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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 810480

JOHN MIDDLETON FREEMAN

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

JOINT APPENDIX

Fred G. Wood, Jr.
R. Lecky Stone, Jr.
FRED G. WOOD, JR.
& ASSOCIATES
Suite 2, 100 Court Square
Charlottesville, Virginia 22901

Counsel for Appellant

Robert H. Anderson, III
Assistant Attorney General
900 Fidelity Building
830 East Main Street
Richmond, Virginia 23219

Counsel for Appellee

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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COMMONWEALTH OF VIRGINIA

CITY OF CHARLOTTESVILLE, to-wit:

IN THE CIRCUIT COURT OF SAID CITY, ...NOVEMBER.... TERM, 19.79

The Grand Jurors of the Commonwealth of Virginia in and for the body of the City of Charlottesville and now attending the Circuit Court of said City, upon their oath present that ....John Middleton Freeman...., on or about ..July 15....., 19 .79., in said City, did feloniously produce ~~and~~ or make sexually explicit visual material which has as a subject a person less than eighteen years of age, in violation of Virginia Code §18.2-374.1, B 2

MH 1/10/80 amended 11-13-80

against the peace and dignity of the Commonwealth.

Indictment found on the evidence of R.O. Jones

witnesses sworn in open Court and sent to the Grand Jury to give evidence.

Michael H. Daniel
Attorney for the Commonwealth

A true bill

Allen G. Allen
Foreman

MOTION TO
DISMISS
Case # 79-154

Now comes the defendant herein, by counsel, and moves that the Court dismiss the indictment against him on the following grounds, to-wit:

(1) The indictment in this case charges a violation of Virginia Code §18.2-374.1, B2;

(2) That said cited portion of said Section of the Virginia Code is so vague as to form no adequate standard of certainty by which to ascertain guilt;

(3) That §18.2-374 is not reasonably restricted to the alleged offenses for which it is said to deal;

(4) That §18.2-374 by its terminology purports to make criminal certain acts which are patently not criminal;

That because of the above defects, the cited Virginia Code Section is in violation of the 1st and 14th Amendments to the Constitution of the United States and the Due Process Clause of the Constitution of Virginia and is therefore void.

JOHN MIDDLETON FREEMAN

By: R. Lecky Stone
Counsel

R. LECKY STONE, JR.
Fred G. Wood, Jr. & Associate
Suite 2, 100 Court Square
P.O. Box 97
Charlottesville, VA 22902

CERTIFICATE

I hereby certify that a true copy of the above Motion was mailed on 15th day of September 1980 to Richard H. Barrick, Esquire, Commonwealth's Attorney for the City of Charlottesville, City Hall, Charlottesville, Virginia 22901.

R. Lecky Stone, Jr.

FILED Sept. 15 1980
CARL E. HENNRIGH, CLERK

VIRGINIA:- AT A CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE, ON THE LAW SIDE THEREOF, HELD ON THURSDAY, OCTOBER 16TH, 1980.

Present:- Honorable HERBERT A. PICKFORD, Judge

COMMONWEALTH OF VIRGINIA — Plaintiff

V. — Indictment No. 79-154-1 - Produce and make sexually explicit material

JOHN MIDDLETON FREEMAN — Defendant
Date of Birth: 8/14/19

On this the 16th day of October, 1980, came the Commonwealth of Virginia by her Attorney and the defendant, John Middleton Freeman, appeared in court in obedience to his recognizance; likewise appeared Fred G. Wood, Jr., and R. Lecky Stone, Jr., his attorneys heretofore appointed as such to represent the defendant in the prosecution of this case.

Thereupon, counsel for the defendant moved the Court to strike as evidence, the statment made by defendant to the police and to suppress as evidence the photographs of the minor child in this case.

And the Court, having fully heard the evidence and argument of counsel, doth deny said motions, to which ruling of the Court defendant's exception is noted.

Thereupon, counsel for the defendant moved the Court to dismiss the indictment against the defendant, which motion the Court takes under advisement and orders this case continued until further order.

At each and every stage of this hearing the defendant, John Middleton Freeman, had been personally present and his above named attorneys were likewise personally present and capably represented the defendant.

And the defendant was permitted to depart with same bond in full force and effect until further order of the Court.

****

A Copy Teste:-

S/ HERBERT A. PICKFORD, Judge

L.O.B. 47
P. 426

Paul C. Garnett, Clerk

VIRGINIA:- AT A CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE, ON THE LAW SIDE THEREOF, HELD ON WEDNESDAY, OCTOBER 22ND, 1980.

Present:- Honorable HERBERT A. PICKFORD, Judge

COMMONWEALTH OF VIRGINIA Plaintiff

V. Indictment No. 79-154-1 - Produce and make sexually explicit material

JOHN MIDDLETON FREEMAN Defendant
Date of Birth: 8/14/19

The Court having fully considered of the evidence and argument of counsel, doth deny defendant's motion to dismiss heard October 16, 1980.

Defendant's exception to such ruling is noted.

****

S/ HERBERT A. PICKFORD, Judge

A Copy Teste:-

Paul C. Garrett, Clerk

L.O.B. 47
P. 444

HERBERT A. PICKFORD, JUDGE
CITY COURTHOUSE
315 E. HIGH STREET
CHARLOTTESVILLE, VIRGINIA 22901
804-293-5869

DAVID F. BERRY, JUDGE
MADISON, VIRGINIA
VANCE M. FRY, JUDGE
ORANGE, VIRGINIA
F. WARD HARRADER, JR., JUDGE
LOUISA, VIRGINIA

SIXTEENTH JUDICIAL CIRCUIT

CIRCUIT COURTS OF THE CITY OF CHARLOTTESVILLE AND THE COUNTIES OF ALBEMARLE, CULPEPER, FLUVANNA, GREENE, GOOCHLAND, LOUISA, MADISON AND ORANGE

October 22, 1980

Richard H. Barrick, Esq.
City Hall
Charlottesville, Virginia 22901

R. Lecky Stone, Esq.
P. O. Box 97
Charlottesville, Virginia 22902

Re: Commonwealth v. John Middleton Freeman

Gentlemen:

The two cases cited by the defendant in support of his motion to dismiss, Butler v. Michigan, 352 US 380 (1956) and Goldstein v. Commonwealth, 200 Va. 25 (1958), both turn on the fact that a statute arbitrarily curtailed liberties of adults by providing "a standard of judging obscenity dependent upon the undesirable effect the offensive material may have upon youth," (Goldstein at page 29). Such a standard was held to be unconstitutional in both cases.

The criteria of Virginia Code §18.2-374.1A(1) and (2) closely parallel the New York statute subject of Ginsberg v. State of New York, 390 US 629 (1968) in that sale of the allegedly offensive material is banned if it "(i) predominantly appeals to the prurient, shameful or morbid interests of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors."

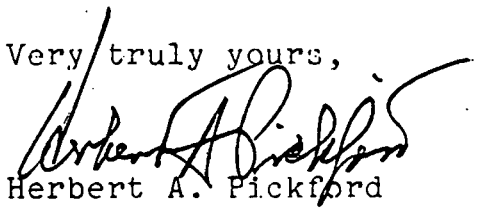
The third criterion as set forth in §18.2-374.1A(3) contains precisely the language approved by the United States Supreme Court in Miller v. California, 93 S. Ct. 2607 (1973) at page 2615. It is noted that §18.2-374.1A(1) and (2) also appear to conform sufficiently with the Miller case's requirement.

The statutes in Butler and Goldstein sought to curb the sale to the general public of materials considered obscene to minors. Ginsberg, involved a statute curtailing sales to minors of materials judged obscene under its criteria. The instant case involves a statute, §18.2-374.1B(2), which prohibits production of materials judged obscene under its criteria, if such materials utilize or have as a subject a minor. The import of this statute is to forbid the use of a minor

in the production of materials judged obscene under its criteria, which is different from barring the sale to the general public of any material judged obscene for minors. The statute in question is held to be neither unconstitutionally vague nor overbroad.

The defendant's motion to dismiss is denied.

Very truly yours,



Herbert A. Pickford

HAP:jr

MOTION IN LIMINE
Case #79-154

Comes now the defendant, John Middleton Freeman, by counsel, and moves the Court to prohibit the Commonwealth from presenting any evidence, except in rebuttal, at the trial of this matter regarding any fondling or other sexual activity between the defendant and any child on the following grounds:

(1) That such evidence would be irrelevant for the issue of guilt or innocence for the offense charged;

(2) That such evidence would be highly inflammatory to a jury and therefore prejudicial to the defendant; and,

(3) That such evidence would place the defendant in the position of having to defend against allegations of other crimes which he is not now prepared to defend.

RESPECTFULLY MOVED

JOHN MIDDLETON FREEMAN

BY: R. Lecky Stone
Counsel

R. LECKY STONE, JR.
Fred G. Wood, Jr. & Associate
Suite 2, 100 Court Square
P.O. Box 97
Charlottesville, VA 22902

CERTIFICATE

I hereby certify that a true copy of the foregoing Motion was delivered to Richard H. Barrick, Esquire, Commonwealth's Attorney for the City of Charlottesville, City Hall, Charlottesville, Virginia this 31st day of October 1980.

R. Lecky Stone
R. Lecky Stone, Jr.

3

The defendant is charged with the crime of producing or making sexually explicit visual material which has as a subject a person less than 18 years of age. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant took a photograph of Jennifer Lee Malcolm, a person under the age of 18;

(2) That the photograph depicits nudity;

(3) That the photograph appeals to the prurient interest of children as determined by the experience of children in the contemporary community;

(4) That the photograph affronts contemporary standards of adults as to what is suitable matter for children; and

(5) That the photograph lacks serious literary, artistic, political and scientific value for children.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense, then you shall find the defendant guilty and fix his punishment at:

(1) A term of imprisonment of not less than one (1) nor more than five (5) years; or

(2) Confinement in jail for not more than 12 months; or

(3) A fine of not more than $1,000.00; or

(4) Confinement in jail for not more than twelve (12) months and a fine of not more than $1,000.00.

If you find the Commonwealth has failed to prove any of the above elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

Evidence of the defendant's statements to Sgt. R. O. Jones which shows, or tends to show, that he may have committed other crimes may not be considered by the jury as evidence that he did the acts for which he is on trial; but may be considered by the jury as bearing on the issue of whether the defendant had intent, motive, plan or design to commit the offense for which he is being tried.

Given
HAP

VIRGINIA:- AT A CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE, ON THE LAW SIDE THEREOF, HELD ON MONDAY, JANUARY 12TH, 1981.

Present:- Honorable HERBERT A. PICKFORD, Judge

COMMONWEALTH OF VIRGINIA Plaintiff

V. Indictment No. 79-154-1 - Make or produce sexually explicit material with subject under 18 years of age

JOHN MIDDLETON FREEMAN Defendant
Date of Birth: 8/14/19

On this the 12th day of January, 1981, came the Commonwealth of Virginia by her Attorney and the defendant, John Middleton Freeman, appeared in court in obedience to his recognizance; likewise appeared Fred G. Wood, Jr., and R. Lecky Stone, Jr., his attorneys heretofore appointed as such to represent the defendant in the prosecution of this case.

Thereupon, Alan C. Rasmussen, Probation Officer of this Court to whom this case had been referred on November 13, 1980 for investigation, appeared in open court with a written report, which report he presented to the Court in open court in the presence of the defendant who was fully advised of the contents of the report and a copy of said report having previously been delivered to counsel for accused.

Thereupon the defendant and his counsel were given the right to cross-examine the Probation Officer as to any matter contained in the said report and to present any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as a part of the record in this case.

Whereupon the Court taking into consideration all of the evidence in the case, the report of the Probation Officer and such additional facts as were presented by the defendant, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him, according to law, and nothing being offered or alleged in delay of judgment, pursuant to the verdict of the jury returned November 13, 1980, the Court sentences the defendant to confinement in the penitentiary for a term of two (2) years.

And the defendant was advised by the Court of his right of appeal to the Supreme Court of Virginia within 30 days from this date and of his right to proceed in forma pauperis and to have the assistance of court appointed counsel.

And the Court doth appoint Fred G. Wood, Jr., and R. Lecky Stone, Jr., competent attorneys at law, to represent the defendant in perfecting an appeal.

And the defendant having orally noted his intention to appeal this case, on motion of counsel for the defendant, the Court doth suspend execution of said 2 year sentence on the condition that the defendant execute an appeal bond in the amount of $5,000.00 cash or $10,000.00 property.

On motion of counsel for the defendant, it is ordered that the transcript of the proceedings in this case is made part of record.

At each and every stage of the trial of this case the defendant, John Middleton Freeman, had been personally present and his above-named attorneys were likewise personally present and capably represented the defendant.

It is ordered that the Commonwealth recover and have judgment against the defendant for its costs in this behalf expended.

And the defendant having executed an appeal bond, execution of the 2 year sentence is suspended until said appeal is perfected, and if perfected, until such time as this case is ruled upon by the Supreme Court.

And the defendant was permitted to depart until further order of the Court under the conditions of said appeal bond.

****

S/ HERBERT A. PICKFORD, Judge

A Copy Teste:-

Paul C. Garrett, Clerk

L.O.B. 47
P. 726

I. ASSIGNMENT OF ERRORS

1 The Circuit Court of the City of Charlottesville erred in ruling that §18.2-374.1 Code of Virginia (1950) as amended, is constitutional and in therefore refusing to grant petitioner's motion to dismiss the indictment.

2 The Circuit Court of the City of Charlottesville erred in refusing to grant petitioner's motion in limine and in thereby permitting irrelevant, inflammatory and prejudicial evidence to be presented at trial.

3 The Circuit Court of the City of Charlottesville erred in permitting the Commonwealth, over objection, to introduce at trial expert testimony to prove that the pictures taken were "obscene for children."

4 The Circuit Court of the City of Charlottesville erred in ruling that the expert witness presented by the Commonwealth was qualified to express an opinion as to the value of the pictures for children.

5 The Circuit Court of the City of Charlottesville erred in refusing to grant petitioner's motion to strike the Commonwealth's evidence.

6 The Circuit Court of the City of Charlottesville erred in refusing to suppress petitioner's confession.

COPY

VIRGINIA

IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA	:	
	:	OCTOBER 16, 1980
v.	:	FILE NO: 79-154
JOHN MIDDLETON FREEMAN	:	
DEFENDANT	:	

MOTION

BEFORE: THE HONORABLE HERBERT A. PICKFORD
Judge of the Circuit Court
Charlottesville, Virginia

APPEARANCES: Richard H. Barrick, Esquire
Commonwealth Attorney
Charlottesville, Virginia
Assisted by:
Charles Blaha, Law Student

Fred G. Wood, Jr., Esquire
100 Court Square
Charlottesville, Virginia

R. Lecky Stone, Jr., Esquire
100 Court Square
Charlottesville, Virginia

Elaine H. Helvin, Court Reporter duly sworn.

ELAINE H. HELVIN
COURT REPORTER
CHARLOTTESVILLE, VIRGINIA
TELEPHONE 296-3870

FILED Mar. 17, 1981
PAUL C. GARRETT, CLERK

I N D E X

COMMONWEALTH'S WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
R. O. Jones	3	11	19	

DEFENDANT'S WITNESSES				
John M. Freeman	23	28		

EXHIBITS

COMMONWEALTH'S EXHIBITS	DESCRIPTION	PAGE
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Number 2:	Statement	11

ELAINE H. HELVIN
COURT REPORTER
CHARLOTTESVILLE, VIRGINIA
TELEPHONE 296-8870

THE COURT: This is the matter of the Commonwealth of Virginia v. John Middleton Freeman. We are here on the Defendant's motion to dismiss, testing the constitutionality of the statute under which the defendant is charged and also on a motion to suppress the confession. Do you want to argue any on this memoranda or shall I subsequently read it? Certainly, I am going to do . . .

MR. WOOD: If it please the Court: we would suggest if Your Honor wants to read it after the arguments today of counsel, Mr. Stone will be arguing that part of the case for the defendant. We would also suggest that it may be best to go ahead and put on the evidence regarding the confession first and then, after concluding that, possibly argue the motion on the constitutionality.

THE COURT: All right.

MR. BARRICK: Your Honor, before we proceed, I would like to introduce to the Court, Mr. Charles Blaha, who is a third year student at the University of Virginia Law School, and who is qualified for third year practice. With the Court's permission, I would like Mr. Blaha to assist me in these motions. I have a certificate from the deputy director of the Virginia State Bar indicating that Mr. Blaha is

ELAINE H. HELVIN
COURT REPORTER
CHARLOTTESVILLE, VIRGINIA
TELEPHONE 296-8870

1 defendant signed and that written form contains a
2 full description of the right to counsel. This form
3 the defendant signed voluntarily and he also
4 indicated on the form that he understood the right
5 and chose not to exercise it and I would indeed just
6 state that under the great preponderance of the
7 evidence, the Commonwealth has met its burden that
8 every statement, both oral and written, that the
9 defendant made, he made it while aware of his rights
10 choosing to waive them and he also made them
11 voluntarily.
12 MR. WOOD: A very brief rebuttal, if I may
13 respond to that, Your Honor? On the Waiver of
14 Rights form, it says, do you understand these rights,
15 waive these rights and so forth. The signature by
16 Mr. Freeman to that and the yes answer is consistent
17 with his testimony and obviously occurred after the
18 policeman would not accept his polite request for a
19 consultation with a lawyer.
20 THE COURT: The Commonwealth has borne its
21 burden and I deny the motion. We move on to the
22 argument on the motion to dismiss.
23 MR. STONE: Your Honor, if I may, it is a
24 rather unusual situation. The defendant is charged
25 with production, possession of what is called

BLAINE H. HELVIN
COURT REPORTER
CHARLOTTESVILLE, VIRGINIA
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1 sexually explicit photographs of a five year old
2 girl and he is charged under § 18.2-374.1, this Code
3 section which, to the best of my knowledge and as
4 far as the Commonwealth can find, it has not been
5 put to any judicial interpretation at this point.
6 However, Your Honor, we claim that this Code
7 section is unconstitutional in the memorandum sub-
8 mitted to the Court citing various cases, we submit
9 that the most in point cases are Butler v. Michigan,
10 352 U.S. 380 (1956) and Goldstein v. Commonwealth,
11 200 Va. 25, 29 (1958) which cites Butler. Both
12 of which have to do with very specific points in
13 this statute. If I may, Your Honor, the statute
14 prohibits the production or the possession or
15 distribution, etc. of sexually explicit visual
16 material involving children which is obscene for
17 children. The definition of obscene for children,
18 quoting the statute is:
19 1. Considered as a whole, it appeals to the
20 prurient interest of children as determined by the
21 experience of children in the contemporary community.
22 2. It affronts contemporary standards of adults as
23 to what is suitable matter for children.
24 3. Considered as a whole, it lacks serious literary,
25 artistic, political and scientific value for children.

1 Now, Your Honor, this language has been taken
2 from statutes which have been proved prohibiting the
3 sale to children of material which is obscene for
4 children. We have no objection to that kind of
5 statute. The problem that we point out in this
6 statute is the same problem that the courts faced
7 in both Butler and Goldstein. It is that this
8 statute does not deal with distribution to children
9 of any material. It deals with possession and pro-
10 duction of pictures involving children which are
11 obscene for children. Butler and Goldstein opinions
12 held that both statutes applying the standard of
13 what was harmful to juveniles, appealing to the
14 prurient interest of juveniles, and both the United
15 States Supreme Court in Butler and the Virginia
16 Supreme Court in Goldstein have said that the prob-
17 lem with that kind of statute is that it limits the
18 adult population to reading only what is fit for
19 children, in seeing and possessing only what is
20 fit for children, and this statute has the same
21 problem.
22 Now, we are not claiming that the legislature
23 and the General Assembly of Virginia could not have
24 set up a statute prohibiting the taking of nude
25 pictures of children. The legislature certainly

1 has wide power of authority with regard to what can
2 be done to children, with children, or by adults to
3 children, but in this case what the General
4 Assembly has attempted to do is to limit the adult
5 population saying that the adults in Virginia can
6 only have and possess pictures of children which
7 are suitable for children. If the statute had
8 simply stopped and said, nobody can take any
9 sexually explicit pictures of children, then we
10 would have a different kind of situation.
11 Our argument here is that the Court should
12 view the Butler and Goldstein opinions and try to
13 figure out what this statute is designed to do.
14 We claim that it is vague, number one, under law
15 in that there is no way that an adult who is in
16 possession of the pictures to determine whether
17 those pictures are obscene for children or contain
18 artistic or scientific value for children. Now,
19 the way the section is set up, the Supreme Court
20 has said time and time again in Butler and Miller
21 and a number of decisions that material which has
22 no scientific or artistic value is not necessarily
23 protected by the First Amendment but is an adult
24 standard and what this statute does, it says if it
25 doesn't have those values for children and it is

1 obscene for children, it is illegal. Now, the
2 issue for the Court is whether this statute is
3 vague and overbroad. We claim because of the
4 definition that has been set up, the statute is
5 overbroad in that it takes away from adults material
6 which is not obscene for adults, which should not
7 be illegal for an adult to obtain or possess.
8 The statute was designed to protect the
9 children who are the subjects of the photographs
10 to have been written in terms of taking the pictures
11 of the children regardless of whether they were
12 obscene to other children. The legislature cer-
13 tainly could have set up a statute saying nobody
14 can take pictures, nude pictures of children period.
15 As in essence an extension to contributing to the
16 delinquency of a minor code section. Certainly,
17 the legislature could have done that, but what they
18 have done is that they have said that you, as an
19 adult, if you intend to take a picture of a child,
20 you must figure out whether that picture is obscene
21 for children.
22 Now, we submit, and the memoranda goes into
23 this to some extent, Your Honor, we submit that
24 there is no way for an adult to figure out what it
25 means. There is no standard set forth in the

ELAINE H. HELVIN
COURT REPORTER
CHARLOTTESVILLE, VIRGINIA
TELEPHONE 296-8870

1 statute as to what age children, what type of
2 children, but it is just the experience of children
3 in the community. Now, we submit, if you take a
4 picture . . . a nude picture of a child, is it
5 going to appeal to the prurient interest of a 16
6 year old male or a 10 year old girl or a 3 year old
7 boy? There is no way that an adult can sit down
8 and figure out whether this picture has any social
9 or artistic value for children or whether it is
10 obscene for children. There is no practical way
11 of solving that problem short of an adult going out
12 and polling the child population of Charlottesville.
13 We estimate that he probably would be immediately
14 arrested when the parents found out. Certainly,
15 if someone was going around showing pictures . . .
16 We can hold adults legally responsible for
17 knowing what the adult standard is, that is clear
18 from all of the obscenity cases that I am sure the
19 Court is familiar with. Certainly you can say you
20 as an adult are bound to have knowledge of what the
21 contemporary adult standards are but when you take
22 an adult and say you have to go figure out what
23 children consider obscene and what adults consider
24 obscene for children and whether or not this
25 material has any socially redeeming value for

ELAINE H. HELVIN
COURT REPORTER
CHARLOTTESVILLE, VIRGINIA
TELEPHONE 296-7870

1 children. We submit, that is vague, Your Honor,
2 and what it does is this statute turns and takes
3 from the adult a certain raw material, it can be all
4 X-rated material, anything that the State says it
5 has determined is suitable for adults and not
6 suitable for children and this statute makes it all
7 illegal by the way it reads.
8 But, certainly no one is going to claim that a
9 nude picture of a child which would possibly be
10 X-rated, if it is suitable for adults and if it is
11 not obscene for adults, it is constitutionally
12 protected. This could certainly limit and could
13 possibly ban the taking of pictures of children in
14 that fashion, but it cannot forbid the possession
15 of those pictures by adults and it is a very narrow
16 point. But, if the Court reads the Butler and
17 Goldstein opinions, I think the Court will find
18 it is clear. That is what the courts are saying,
19 that you cannot take adults and say even though this
20 material is fine for you, since it is obscene for
21 children, there is no evidence of it ever having
22 been distributed to children. But, just because
23 it is obscene for children, you can't possess it.
24 It makes it a felony if you possess it. And the
25 Supreme Court in Butler and the Virginia Supreme

ELAINE H. HELVIN
COURT REPORTER
CHARLOTTESVILLE, VIRGINIA
TELEPHONE 296-8870

1 Court in Goldstein says that you can't do that. If
2 it is constitutionally protected for adults, it is
3 constitutionally protected and just like cigarettes,
4 alcohol and any number of other things, we can
5 limit the sale to children, we can limit the involve-
6 ment of children in many ways in the production of
7 these pictures, but what this statute does is to
8 limit possession.
9 It doesn't say that it is illegal to produce
10 these pictures with intent to distribute them to
11 children. It doesn't say it is illegal to take
12 pictures of children. But, it is illegal to take
13 sexually explicit pictures of children which are
14 obscene for children. There is no way for an adult
15 to figure out what that means as a practical matter
16 or a legal matter and that therefore the statute
17 is vague. But the strength of the claim is what
18 Butler says, that you cannot make the adult popula-
19 tion read, possess only what is fit for children.
20 Now, I submit on the facts of this case, given
21 this statute, if the Court were to construe that
22 statute in such a fashion as to eliminate the
23 possession . . . then the statute would be perfectly
24 fine, right in line with every Commonwealth obscenity
25 statute that would ever come along. That is fine.

ELAINE H. HELVIN
COURT REPORTER
CHARLOTTESVILLE, VIRGINIA
TELEPHONE 296-8870

1 Certainly, the limiting of taking of pictures of
2 children would be fine if it were a standard we
3 were able to understand, but this statute makes no
4 exception for parents or anyone else taking any
5 pictures and if the Court will look at all the
6 statutory background in this statute, sexually
7 explicit means anything showing the breasts, the
8 buttocks . . . Under this statute, Your Honor, the
9 Coppertone ad may well be illegal with a little
10 girl's buttocks shown on a billboard. If it is
11 obscene for children then thats the end of it and
12 we claim that this statute is unconstitutional to
13 limit its activities. It is not designed, it is not
14 written for this. It is to cure the evils which
15 the legislature has attempted to assign, I believe.
16 The legislature certainly doesn't want the distribu-
17 tion of nude pictures of children. That is easy
18 enough to accomplish and they have taken the language
19 of this statute from a similar statute prohibiting
20 distribution to children. In fact, there are other
21 Virginia statutes about distribution to children.
22 This statute was obviously designed to prevent the
23 taking of the pictures.
24 Your Honor, we submit that the best way to
25 resolve this problem would be to give it a

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1 contributing to the delinquency of a minor charge,
2 not giving an adult this kind of standard, saying
3 you can take some pictures, you can't take other
4 pictures. Now, all of the pictures may be consti-
5 tutionally protected but we are going to say, you
6 can't take them if they are obscene for children.
7 And we are not going to apply the Supreme Court's
8 obscenity standard which is having socially redeem-
9 ing values, we are going to apply a lesser standard,
10 socially redeeming values for children and we are
11 not going to apply the Supreme Court's obscenity
12 standards for adults, but we are going to apply the
13 children's standards. And you, as an adult, cannot
14 make, possess, sell or distribute in any fashion
15 even the negatives of a picture of a child which
16 is obscene for children.
17 There is nothing in that statute about whether
18 it would be obscene for a particular child, whether
19 it harms that child in any fashion, or whether
20 that child agreed to see the pictures or know that
21 the pictures were taken. I submit, Your Honor,
22 that in this statute, the way it reads, if I went
23 out in my back yard and took a picture of my
24 neighbor's two year old girl swimming in the
25 swimming pool without any clothes on, it would be

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1 illegal under this statute. If I do it with my
2 own child, it is illegal under this statute. The
3 legislature simply has not limited the statute to
4 the evil which it wants to stop. It wants to stop
5 the making of child pornography and in so doing,
6 they have gone far beyond the pornography standard.
7 They have not got child pornography but they got
8 anything which a child would find prurient and I
9 submit, Your Honor is well aware that a 16 year old
10 male is going to find a great deal of information
11 prurient that may not be prurient at all to an 8
12 year old or to a middle-aged man or an elderly man
13 and under that standard there simply is no way
14 that statute should be applied.
15 We are not claiming that what has been charged
16 here is not an offense. He could be charged under
17 contributing to the delinquency of a minor under
18 these facts. He could be charged with possession
19 of obscene materials, whether these pictures would
20 be obscene under an adult standard is a question
21 but he could be charged with the possession of
22 obscene material with an intent to distribute.
23 There are many other statutes under which this
24 activity, the particular activity, that Mr. Freeman
25 is charged with. Many other statutes under which

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1 he could be charged but the Commonwealth has
2 selected this one and we claim this one simply is
3 not appropriate. If we had a bachelor situation,
4 where we are talking about an X-rated movie, like
5 the Blue Lagoon or whatever, that involved the
6 nudity of children, the State censors have already
7 decided that it is fit for adults but not for
8 children. If it is not fit for children and it
9 does not have some artistic value for children . . .
10 and it is precisely what Butler says you can't do.
11 If it is suitable for adults, the adults can have
12 it and if adults can possess it and it is constitu-
13 tionally protected under possession, then this
14 Court should not find a man guilty of production
15 of constitutionally protected material. We claim
16 that is what this material is under the statute.
17 I ask the Court to read the Butler and Goldstein
18 opinions carefully because we submit that is what
19 the problem with this statute is, that it is over-
20 broad and it attempts to make illegal the production
21 and possession of material which is constitutionally
22 protected for adults. And, in addition, it is vague
23 in that the standard tends to apply for obscenity
24 for children, it simply is undiscoverable for an
25 adult. An adult can try to find out that standard.

He can ask other adults, maybe he can find out what other adults think is suitable. The only way that he can discover is to ask the children. I submit, Your Honor, if a man tried to do that he would be arrested more quickly than the Court could imagine, if he went to one of the schools with naked pictures and said, do you children find this obscene, no one would put up with this. On that basis, Your Honor, we ask the Court to dismiss this charge under this statute and declare that this statute is unconstitutional the way it is written. We certainly have no objection to letting them show what he tried to do, he simply went too far. And in going too far, they caught this activity in a trap, an impermissible trap and we ask that it be dismissed on that basis.

THE COURT: All right.

MR. BLAHA: Your Honor, I feel that the Commonwealth has argued that as put forth in my brief, so I will be very brief here. Insofar as the defendant's vagueness argument, I feel that the Miller case and the Ginsburg case in combination are more than an adequate reply to that. The Ginsburg case establishes beyond a doubt the State power to adjust the definition of obscenity to fit

1 minors and also the fact that it is not vague. It
2 is not an undiscoverable standard as counsel for the
3 defendant has suggested. The Ginsburg court
4 specifically held that such standard was not un-
5 discoverable and was not vague and could very well
6 determine that standard.
7 I would submit that most adults were at one
8 time children and they were able to adequately
9 judge what is or what is not obscene and what is
10 and what is not suitable for children. And, further-
11 more, I would submit that this statute is practic-
12 ally identical in the remainder of its provisions
13 to the suggestion in the Miller opinion and I would
14 just ask the Court to read the Miller and Ginsburg
15 opinions and I feel that those two statutes put
16 together will more than adequately be reflected
17 in the statute that we are talking about today.
18 Now, insofar as counsel's Butler argument is
19 concerned, I feel that there has been a slight
20 misreading of Butler here. Butler was designed,
21 and Goldstein too, and they both dealt with statutes
22 designed to protect juvenile audiences. They were
23 designed to prohibit the sale of obscene material
24 to anyone that was obscene for children in other
25 words, and this is what happened in Butler;

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1 An adult was arrested for selling material to an
2 adult. Now, fundamentally and we feel a crucial
3 distinction in this statute is that in this statute
4 it is designed to protect juvenile participants, not
5 juvenile audiences but juvenile participants. Now,
6 this is a very crucial distinction because it makes
7 the scope of the statute much much narrower. In
8 Butler the defendant was convicted of selling
9 material that did not depict children, this statute
10 has an additional requirement that the material
11 in question must depict children under 18 years and
12 what this does, as I said, it makes the scope of
13 the statute much narrower than either the Butler
14 or the Goldstein statute. It does not, as counsel
15 suggested, prohibit all material that is obscene
16 for minors, it prohibits the sale and distribution
17 of material obscene for children that depicts
18 children. And the Butler court says that the evil
19 of the statute there was that it reduced the adult
20 population in the State reading only what was fit
21 for children.
22 Now, this statute does not have that effect.
23 This statute has the effect of merely prohibiting
24 one type of material obscene for children, namely
25 that of material that depicts minors. It, unlike

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1 the Butler statute, unlike the Goldstein statute,
2 adults are free to sell, produce and distribute
3 material obscene for children that does not depict
4 children. And furthermore, Your Honor, I would
5 call your attention to the extremely stringent
6 standard imposed by this statute. When read in
7 combination with the definitional section, it sets
8 forth some very concrete examples of what is pro-
9 hibited in terms of displays and furthermore, its
10 three-pronged standard goes on to set up, as I said,
11 a very stringent standard and under the statute
12 the material has to fail or meet all three prongs
13 in order to be held obscene for minors. Such a
14 stringent statute is not present in either Butler
15 or Goldstein and contrary to what counsel for the
16 defense may have suggested, this statute does not
17 prohibit simple possession.
18 So, Your Honor, just in brief, I would like
19 to stress this difference between protection of a
20 juvenile audience and the protection of juvenile
21 participants and there is every reason in the world
22 to protect juvenile participants and to prevent any
23 coersion or undue influence or taking advantage,
24 a juvenile can be taken advantage of.
25

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1 There is also the fact that a minor is in-
2 capable of fully appreciating the nature and conse-
3 quence of his or her act. I would submit to the
4 Court that this is an even better reason for adults
5 to be judging the appropriateness of what is
6 depicted in sexually explicit visible material
7 involving minors.
8 Furthermore, as I stated that in the Ginsburg
9 opinion, the State does have independent interest
10 in the well-being of children and that includes
11 the healthy development of children in terms of
12 their attitudes towards sex. And I would think
13 that this statute more than adequately addresses
14 that insofar as counsel's argument concerning not
15 knowing which child to consider as the child whose
16 prurient interests appeal to, I would submit that
17 this argument as well as in the Miller case, as
18 you know, what is an average adult in the community
19 and the Miller opinion answers that. The Miller
20 opinion says that you are not to take the most
21 prudish adult or take the most sophisticated but
22 take an average adult. But, it is not vague under
23 the Miller opinion and all this statute does is to
24 take the Miller opinion and transfer that idea of an
25 average person to an average child and I would

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1 submit that under Miller and under Ginsburg that
2 is not vague at all.
3 Thank you, Your Honor.
4 MR. STONE: What I would like to point out to
5 the Court is that the Ginsburg decision and the
6 Miller decision, while not as correct in that this
7 statute was derived from statutes approved by the
8 courts in those two decisions, however, they are
9 completely opposite decisions. Ginsburg is a case
10 of sale to a minor, pure and simple, and the Supreme
11 Court said a standard of harmful to minors talking
12 about sale to minors, is not vague. Your Honor,
13 we take the position that is perfectly true of any
14 adult who is considering selling something to a
15 minor does so at his own risk and certainly the
16 legislature can say that you had better be super
17 careful if you are going to sell something to a
18 minor. However, Your Honor, this statute that we
19 are dealing with here does not deal with the sale
20 to minors. It deals with production, possession,
21 sales and distribution by adults and now we are
22 taking the standard saying that you are an adult,
23 you are thinking of making this picture or possess-
24 ing this picture, you can't sit there and say, well,
25 it is not obscene for adults. You have got to sit

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1 down and say, possession of this picture by me may
2 be illegal because it is obscene for someone else,
3 regardless of whether I am going to distribute to
4 children. It has nothing to do with distribution
5 to children. What this statute does is that it
6 takes the Ginsburg text of harmful for juveniles
7 in a sale in a juvenile context and says not only
8 can you not sell to juveniles, you can't even
9 possess them.
10 That is what we are complaining about. Now,
11 obviously this distinction to some extent is set
12 up to protect the juvenile participant, but if the
13 Court reads the full statute, you will find out that
14 it is not specifically for that purpose. In fact,
15 the statute specifically states that is the subject
16 in the photographs looks like they are under 18,
17 it is a prima facie proof that they are under 18.
18 The statute has nothing to do with the subject. It
19 is not designed to protect that child. The statute
20 doesn't even care if it is a child, as long as it
21 looks like a child. The statute is designed to
22 prevent the distribution of child pornography, not
23 necessarily the production of it but the distribu-
24 tion of it. That is what they are really going
25 for and we claim, Your Honor, that Butler looks

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1 at this thing and says, if it is all right for
2 adults, why can't adults have it? Just because it
3 is obscene for children, why do you say the adults
4 can't possess it? That is the distinction, Your
5 Honor, we admit that this statute is certainly
6 narrower than the statutes that the court in Butler
7 and Goldstein were considering, certainly the
8 statutes are limited to pictures of children. If
9 it is a nude picture of a child and it is obscene
10 to children which is not spelled out in the
11 definitional section, it simply says, appeals to
12 the prurient interests of children. You see that
13 sounds fine if we are talking about sales, but it
14 simply will not apply when you are saying an adult.
15 You have got to go check out the standard before
16 you can sell any pictures. Now, Mr. Blaha is making
17 the point that this statute does not prohibit
18 possession, simple possession. Simple possession
19 cannot be prohibited, but production can be
20 prohibited? That is what we are saying, Your Honor,
21 that simple possession is constitutionally protected.
22 That the legislature therefore cannot prohibit
23 production, which is what Mr. Freeman is charged
24 with, if possession is protected, so is production.
25 That is what the First Amendment is all about.

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1 You can't turn to the producers of the material and
2 say, you can't produce it even though it may be
3 all right once it is produced and that is the uncon-
4 stitutionality of the statute. Again, we ask the
5 Court to read both our memoranda fully and we think
6 the Court will find that Miller sets up an
7 obscenity standard for adults. Ginsburg sets up an
8 obscenity standard for sale to children and this
9 statute tries to combine the two by saying adults
10 cannot possess that material which they could not
11 sell to children. If the statute simply says that
12 the possession of these materials with intent to
13 distribute to children, that would be fine. But
14 that is not what it says. It says production,
15 possession, sales, distribution, etc. It has
16 nothing to do with distribution to children. The
17 statute is really not concerned with the child
18 subject. It is concerned with dissemination of
19 this kind of material. We simply claim that the
20 legislature has gone overboard and what they should
21 have said was child pornography and if anything
22 is obscene involving children, which is obscene
23 for children is illegal and certainly there is a
24 broad gap between what is obscene for adults and
25 what is obscene for children and we submit that for

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a factual matter that is where these pictures fall, in between, and they have been scooped up in this overbroad net of the statute and we submit it is unconstitutional on that basis which brought this charge, if properly construed and limited the statute would be fine, but it cannot go outside and state illegal constitutional activities. We ask you to dismiss on that basis. Thank you.

THE COURT: All right. I will read your memoranda and advise you of my decisions. They have been very good arguments, memoranda were good. All right, I certify for the record that the defendant has been present throughout this proceeding with his attorneys.

REPORTER'S NOTE: Whereupon, the Court stood adjourned.

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COURT REPORTER
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TELEPHONE 296-8870

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1 VIRGINIA

2 IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

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COMMONWEALTH OF VIRGINIA :

6 : OCTOBER 31, 1980

:

7 v. : FILE NO: 79-154

:

8 JOHN MIDDLETON FREEMAN :

DEFENDANT :

9 ----------

10 MOTION IN LIMINE

11

12 BEFORE: THE HONORABLE HERBERT A. PICKFORD
Judge of the Circuit Court

13 Charlottesville, Virginia

14

15 APPEARANCES: Richard H. Barrick, Esquire
Commonwealth Attorney

16 Charlottesville, Virginia

17 Fred G. Wood, Jr., Esquire
100 Court Square

18 Charlottesville, Virginia

19 R. Lecky Stone, Jr., Esquire
100 Court Square

20 Charlottesville, Virginia

21

22

23

24 Elaine H. Helvin, Court Reporter duly sworn.

25

ELAINE H. HELVIN
COURT REPORTER
CHARLOTTESVILLE, VIRGINIA
TELEPHONE 296-8870

FILED Mar. 17, 1981
PAUL C. GARRETT, CLERK

1 THE COURT: The Commonwealth of Virginia v.
2 John Middleton Freeman. We have a motion In Limine.
3 Do you wish to address that Mr. Wood or Mr. Stone?
4 MR. STONE: Your Honor, I will address it.
5 As Your Honor may recall, this case involves a con-
6 fession. There is a written confession and in
7 addition there were statements made to the two
8 police officers involved. Detective Jones testified
9 at the suppression hearing a matter of just weeks
10 ago and among the statements that were given to
11 the police officers at that time were that these
12 pictures of the little girl were taken and on other
13 occasions there had been fondling or some various
14 other physical sexual contact between the defendant
15 and the little Malcolm girl and another little girl.
16 And, Your Honor, the defendant is charged with
17 manufacture and possession of the pictures and we
18 do not challenge that the pictures were taken by
19 the defendant. We do, however, challenge the
20 reasons for which they were taken and we would ask
21 that any statements or other evidence with regard
22 to the fondling or any other touching or sexual
23 activity between the defendant and these children
24 be excluded on the basis that it would be inflamma-
25 tory to the jury and would put the defendant in the

1 position of possibly being sentenced for that crime
2 as well as for the crime that he is charged with.
3 That is our main contention, Your Honor, that
4 this is not an element of the events here. It is
5 a completely different offense that we are coming
6 across, into the felony of fondling in the statute
7 or one of the . . . with regard to minors and we
8 would ask that any evidence with regard to this
9 fondling or this sexual contact be excluded on that
10 basis because we feel that the jury would certainly
11 be inflammed by it and would give undue weight to
12 it.
13 The defendant is not prepared to defend those
14 charges which are separate events and because we
15 are not in a situation where the taking of the
16 pictures as far as the confession is being challenged.
17 They do not set forth any scheme or plan. There is
18 no relevancy to them whatsoever with regard to
19 this charge. We ask that they be excluded on that
20 basis.
21 MR. BARRICK: Your Honor, before I reply to
22 Mr. Stone, Your Honor may want to be aware of more
23 specifically what is being identified by the
24 defendant as evidence which they want excluded In
25 Limine. I think that Mr. Freeman's statement of

1 September 19, 1979 has been introduced at the pre-
2 trial record and is a part of the record. Now, I
3 don't know whether there is anything in that state-
4 ment which the defendant objects to or not.
5 MR. STONE: Your Honor, if I may, there are
6 indeed portions of this statement which we would
7 prefer to have excluded.
8 MR. BARRICK: Would you mind telling me what
9 you are referring to?
10 MR. STONE: Midway down the first page, I
11 read what they had written after that: They both
12 hugged and kissed me and climbed in my lap and
13 numerous times afterwards they climbed in my lap
14 and loved to excite me. And from there, I don't
15 see any need to have anything from there on all the
16 way through except for that paragraph.
17 MR. BARRICK: Right.
18 MR. STONE: Even in the statement it shows a
19 gap of several months.
20 MR. BARRICK: Now, Your Honor, I believe,
21 also with the file is an exhibit at the first trial
22 which is a copy or perhaps the original of notes
23 made by Sergeant Jones on the same night that he
24 interviewed Mr. Freeman. I guess you have the
25 originals there, Mr. Stone?

1 MR. STONE: Yes.

2 MR. BARRICK: And I am sure the defendant's
3 motion is objected to or is directed to the better
4 portion of these notes?

5 MR. STONE: Yes, Your Honor, and any testimony
6 by those officers with regard to those statements.

7 MR. BARRICK: Are you just referring to those
8 notes inclusively? Your motion is directed to
9 everything in these notes?

10 MR. STONE: Yes, it would be directed to any
11 reference by these police officers even either
12 through their notes or the signed confession or
13 their oral testimony with regard to those particular
14 items.

15 MR. BARRICK: What I propose to do, if the
16 subject of this note is admissible, would be
17 probably to introduce it as a past recollection
18 recorded through Officer Jones. Now, Officer
19 Robertson was also present during this interview
20 and he likewise made some notes. I don't know
21 whether you all have seen them or not? Do you
22 have a copy of them?

23 MR. STONE: Yes, we do.

24 MR. BARRICK: However, Your Honor, he is re-
25 covering from open heart surgery and I don't expect

him to be available as a witness. Even if he were, I think his notes would be essentially a duplication of Officer Jones's notes.

There is one further fact that I am aware of, that is not in Officer Jones's notes, that I am sure that this motion is directed to, and it is my recollection that Officer Jones will testify that after he had interviewed Mr. Freeman and was taking Mr. Freeman to the magistrate's office, Mr. Freeman made the statement to him . . . I am just paraphrasing it, that he was glad that this had all come out into the open or that he had been arrested, I really don't recall because it wouldn't have been too long before he would have been trying to have intercourse with the girls . . . very generally, something like that. I am just drawing from my memory of what Officer Jones told me, something to that effect, very generally, Your Honor.

MR. STONE: Your Honor, our objection would be to any evidence whatsoever with regard to other contacts with these girls. It is not an element of the offense and it certainly would be prejudicial.

MR. BARRICK: Well, what I was trying to do, Mr. Stone, I was trying to give the Judge all of the . . . a summary of all of the testimonial

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TELEPHONE 296-3[illegible]

1 evidence as I understood it which your motion was
2 directed to.
3 Your Honor, our position is that this evidence
4 is relevant. The offense requires the Commonwealth
5 to prove that the sexually explicit visual material
6 considered as a whole lacks serious literary,
7 artistic or scientific value for children. In the
8 defendant's written statement of September 19th,
9 he makes reference to the fact that he is an artist
10 and a writer of children's books and in the notes
11 made by Detective Jones, there is one reference
12 to the fact that his subject, Jennifer, wanted to
13 be a model and it seems to me that through that
14 evidence and through the defendant's statement
15 which he has no objection to, he is portraying or
16 attempting to portray to the jury the relationship
17 of artist and model, or photographer and model.
18 And, therefore, the question of his intent in
19 taking these pictures becomes a relevant issue.
20 Furthermore, although the Commonwealth is not
21 required to prove motive, motive is a relevant
22 factor for the jury's consideration and it seems
23 perfectly clear to me from this evidence which the
24 defendant objects to that his intent with Jennifer
25 was not that of photographer or artist and model,

1 but that he had a sexual interest in this girl and
2 his motives in connection with taking these pictures
3 were prurient, were lascivious, were sexual, and
4 that therefore this evidence does become relevant
5 and, if it is relevant, then it is not prejudicial
6 to the defendant.
7 The third point raised by the defendant that
8 he would have to defend against these charges can
9 be adequately cured by a cautionary instruction
10 which this Court frequently given, that evidence
11 of other crimes is not to be considered by the
12 jury to determine his guilt or innocence of the
13 crime for which he is on trial but may be considered
14 by them in proof of intent or motive of the
15 defendant.
16 MR. STONE: Your Honor, we take the position
17 that this material would only be relevant in the
18 same way that proving a man is a sloppy driver by
19 nature would be relevant with regard to a reckless
20 driving charge. Mr. Barrick's sole purpose here
21 is to show by specific acts in the past that this
22 man had a specific intent when he committed that
23 with which he is charged. We urge the Court to
24 rule that simply is not permissible. Regardless of
25 that, however, Mr. Barrick is claiming this

1 evidence may be relevant for rebuttal purposes
2 should the defendant claim a particular intent.
3 We have stated in the motion, Your Honor, that our
4 objection at this point is only to the presentation
5 of the evidence not with regard to the presentation
6 of that evidence for rebuttal purposes.
7 I believe that the motion states except for
8 the purposes of rebuttal. We agree should the
9 defendant take the stand and argue that he had a
10 specific intent in taking these pictures that Mr.
11 Barrick at that point be able to show another
12 intent by showing the relationship with these
13 children. However, there is no need to go into
14 specific acts in the past of events of another
15 charge and, Your Honor, we simply believe that a
16 precautionary instruction here would not prove
17 worthwhile. Certainly, they could consider it for
18 the purposes of intent but I believe the Court in
19 its discretion would certainly realize that the
20 jury would consider it for far more than that.
21 And in terms of punishment they would punish
22 this individual should they find him guilty . . .
23 far more than for taking the pictures. We feel that
24 is the prejudice to this defendant by introducing
25 evidence of specific acts in the past with regard

1 to these particular children.

2 There is a real danger here that he may not be
3 convicted because of that evidence but he certainly
4 would be sentenced on that evidence and we think a
5 precautionary instruction on that basis would not
6 persuade the jury otherwise. We do feel that for
7 rebuttal purposes, Mr. Barrick is entitled to go
8 into this man's relationship with these children
9 as far as possible sexual urges and that sort of
10 thing. But, specific incidents are what we are
11 concerned about, Your Honor, and we feel that there
12 is no need to unduly inflame the jury, certainly
13 for information and evidence that is not relevant
14 except for rebuttal purposes and even at that point
15 of rebuttal that information would still be
16 extremely prejudicial and not necessarily relevant.
17 We would reserve our objection to it at that stage
18 depending upon the method by which the evidence is
19 presented.

20 THE COURT: Do you take the position then that
21 this in no way has anything to do with motive or
22 general scheme in relationship with these girls?

23 MR. STONE: Your Honor, we take the position
24 that it is not . . . it is months earlier. It is a
25 completely different kind of act. Any fondling or

1 sexual contact with these girls is certainly not
2 the same kind of thing as taking pictures of them
3 and the Court is aware that the pictures were
4 ultimately, according to the Commonwealth, given to
5 the mother of the children and there is no evidence
6 presented or will be presented, I submit, that the
7 pictures were ever given to the children.
8 We submit that is a completely different kind
9 of relationship and Mr. Barrick would like to
10 introduce these previous . . . evidence of these
11 previous sexual contacts for the purposes of
12 proving intent here. However, this is not a
13 situation where we have got a motive or some sort
14 of scheme. It simply does not exist in this situa-
15 tion and if Mr. Barrick introduces that evidence
16 he is not going to be able to prove that there is a
17 scheme, only to prove that there were previous
18 contacts and thereby possibly raise an inference in
19 the minds of the jurors that there is a scheme.
20 Again, that is rebuttal evidence, Your Honor,
21 and we would submit that it certainly should not
22 be introduced except with regard to rebuttal and
23 even then, the specific incidents do show a scheme,
24 completely different kinds of acts.
25

1 where the victim was asked what was the purpose of
2 their going to a certain place and she said something
3 about to get some pot or some cocaine and that was
4 a totally different offense there. I think the
5 Supreme Court said that was not relevant or germane
6 to the rape prosecution. I don't know the subject
7 case here has as much . . .
8 MR. STONE: Your Honor, the position that we
9 take, the man is charged with taking the pictures
10 and that is what makes the difference. Here we
11 are talking about a statute designed to go after
12 people who are producing pornography.
13 THE COURT: Do we have to have the purpose for
14 which the pictures were taken?
15 MR. STONE: It is required in the statute,
16 Your Honor.
17 THE COURT: We are going to deal with, what is
18 it . . . appeals to the prurient interest of
19 juveniles, isn't that the terminology of the statute?
20 MR. BARRICK: It appeals to the prurient
21 interests, Your Honor.
22 THE COURT: Prurient interests?
23 MR. BARRICK: Yes, Your Honor, but the motive,
24 Your Honor, even though it is not a required element
25 of proof is always a relevant issue for the

1 Commonwealth to prove and the Commonwealth is
2 entitled to prove motive and just very bluntly, I
3 think through these statements the Commonwealth will
4 prove that it was not an artistic relationship,
5 just a dirty old man and that was the motive in
6 taking these pictures.
7 THE COURT: You say that motive is irrelevant?
8 MR. STONE: Proof of motive, Your Honor, is
9 not required in the statutory purpose but we take
10 the position with regard to the motive for taking
11 the pictures. That is certainly relevant, Your
12 Honor, the motive and reason that this man took the
13 pictures is certainly relevant. However, we take
14 the position that showing specific acts of sexual
15 conduct in the past is not relevant proof of the
16 reason for doing this at this particular time for
17 taking pictures were the man charged at this
18 particular time for having sexual contact with the
19 children then, we admit that it would be relevant
20 to show some scheme or plan.
21 However, this is a totally different kind of
22 activity and the statute goes after a totally
23 different kind of person. A person who produces
24 and takes pictures, whether for the purpose of
25 distribution or for their own lascivious purposes.

1 It is a totally different kind of activity than
2 fondling. And, we submit, that the problem here is
3 that the jury, we feel, may well sentence the man
4 for the fondling while convicting him of taking the
5 pictures. It is a whole different ball game, Your
6 Honor, and that is what we are worried about. If
7 Mr. Barrick can show motive for taking the pictures,
8 all right, but you can't go back into somebody's
9 past and try to prove that they are a pervert and
10 that is why, because they were a pervert and did
11 perverted things in the past that is why they took
12 these particular pictures. That is the same kind
13 of thing saying . . . as saying this man has got a
14 bad driving record and he is a sloppy driver by
15 nature and therefore, he must have been recklessly
16 driving at this particular incident when he was
17 charged with reckless driving and the Supreme
18 Court has indicated time and time again that cannot
19 be done and that is what we believe that Mr. Barrick
20 is trying to do here. He is not trying to say
21 because of the relationship in the past that is
22 why these pictures were taken. He is saying that
23 this man had this relationship all along and be-
24 cause he has got this perverse relationship with
25 these children. Then, he must have had a bad motive

for taking the pictures. What we are saying is that even if he had this relationship, he may very well have taken the pictures for another purpose, for an entirely different purpose. And all this evidence would be to show perversion and have nothing to do with the motive for taking of the pictures at that particular time and because of that, we feel it is prejudicial and simply not relevant to the issue of intent at the time the pictures were taken.

THE COURT: I'm afraid you can't show the propensity if somebody looks . . . let me just look at that case . . . the case that I am referring to is King v. Commonwealth Case 217 Va. refers to the one that I am more interested in Kirkpatrick v. Commonwealth 211 Va. 269, page 272 wherein this rule is discussed and the court on the line you are talking about, Mr. Stone, says that where a person is indicted for stealing a watch, evidence submitted that he had stolen a coat, that certainly wouldn't be admissible, entirely different charges, no relationship between the two. It says the exception to the general rule, wherein evidence of other offenses is not permissible, evidence of other offenses is admitted shows the conduct and feeling of the accused toward his victim, establishes

1 their prior relations or tends to prove any relevant
2 element of the offense charged, then it is permis-
3 sible in the case where intent or knowledge of the
4 accused involved where evidence is connected with
5 or leads up to the offense for which the accused is
6 on trial. Also, it is permissible where other
7 crimes constitute a part of the general scheme in
8 which the crime charged is a part. Do you perceive
9 the motive is not an element but certainly relevant
10 to the subject charge?
11 MR. STONE: Your Honor, I admit that it is, but
12 we certainly intend to present our own evidence
13 with regard to that.
14 THE COURT: This is permissible under the
15 Kirkpatrick case, the exception noted therein, of
16 course the Court can instruct the jury as Mr. Barrick
17 indicated. So, I deny your motion.
18 MR. STONE: Thank you, Your Honor.
19 THE COURT: I certify for the record that the
20 defendant has been present throughout this proceed-
21 ing and with his attorneys.
22 REPORTER'S NOTE: Whereupon, the Court stood
23 adjourned.
24
25

COPY

VIRGINIA

IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA v. JOHN MIDDLETON FREEMAN DEFENDANT	NOVEMBER 13, 1980 FILE NO: 79-154

BEFORE: THE HONORABLE HERBERT A. PICKFORD
Judge of the Circuit Court
Charlottesville, Virginia

APPEARANCES: Richard H. Barrick, Esquire
Commonwealth Attorney
Charlottesville, Virginia

Fred G. Wood, Jr., Esquire
100 Court Square
Charlottesville, Virginia

R. Lecky Stone, Jr., Esquire
100 Court Square
Charlottesville, Virginia

Elaine H. Helvin, Court Reporter duly sworn.

ELAINE H. HELVIN
COURT REPORTER
CHARLOTTESVILLE, VIRGINIA
TELEPHONE 296-8870

FILED March 12 1981
PAUL C. GARRETT, CLERK

I N D E X

COMMONWEALTH'S WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS	RE-REDIRECT	RE-RECROSS
Susan E.Malcolm	7	16	29	30	32	
Merrill P. Runquist	33	42				
R. O. Jones	44	58				
DEFENDANT'S WITNESSES						
Johm M. Freeman	63	90	105			
Recalled	106	106				
William Buxton	111	127	139	141	143	145
Alicia W. Flynn	146	149				
B. Chamberlain	149					
Angelika Powell	151					
Rosser Eastham	152					
Charles E. Moran	154					
Ira L. Hull	155					
REBUTTAL						
COMMONWEALTH'S WITNESSES						
R. O. Jones	157					

EXHIBITS

COMMONWEALTH'S EXHIBITS	DESCRIPTION	PAGE
Number 1:	Photograph	58
Number 2:	Photograph	58
Number 3:	Photograph	58

ELAINE H. HELVIN
COURT REPORTER
CHARLOTTESVILLE, VIRGINIA
TELEPHONE 296-8870

1 accepted, Mr. Freeman.

2 MR. WOOD: So that there will be no misunder-
3 standing on the record, Your Honor, he was asked if
4 he understood the charge against him, and I submit,
5 Your Honor, that it is our position that no one
6 understands the statute and with that caveat, he
7 answers affirmatively. I didn't want any misunder-
8 standing.

9 THE COURT: All right, Mr. Stone's exception
10 was noted and previously filed. Now, is there any-
11 thing else before we bring the jury back?

12 MR. WOOD: Yes, sir. We have a motion. May it
13 please the Court: We were here previously on a
14 Motion In Limine, and Your Honor has already ruled
15 on it, and we would like to correct something that
16 was said at that point. . . possibly a misunderstanding
17 during the course of argument but it is our position
18 that the statute in question is extremely confusing.

19 It does not require any motive, certainly,
20 not insofar as the particular subsection under which
21 this defendant is charged. I think it is B-2?

22 THE COURT: That is right.

23 MR. WOOD: There is no motive in anyway ascribed
24 or mentioned in the statute and our position would
25 be; therefore, that motive is not relevant, and we

1 would ask the Court assuming that to be the case
2 to rule that evidence of other activities that were
3 previously brought up in the Motion In Limine, and
4 I am sure that Your Honor would recall the other
5 activities involving these children, and be excluded
6 from any consideration today.
7 All the Commonwealth, as I read the statute,
8 and I hope that I am correctly stating it, has to
9 prove is that the defendant produced the pictures
10 or that the pictures are obscene as the statute
11 attempts to define obscenity and that the subject
12 of the pictures was under 18 years of age and they
13 were sexually explicit.
14 I think that I have covered all of the areas.
15 But none of those by direct language or implication
16 involve motive. And on that basis, we would again
17 renew our motion regarding any other evidence of any
18 other activities other than the pictures be excluded.
19 THE COURT: Does the Commonwealth have any
20 comments?
21 MR. BARRICK: Your Honor, I don't know of any
22 statute that requires the Commonwealth to prove
23 motive but yet: nonetheless, motive is always a
24 relevant issue for the jury and; therefore, I think
25 this evidence is admissible in this case, and

1 additionally, it is not only offered to prove motive
2 but offered to prove plan or scheme.
3 THE COURT: All right, I think that we somewhat
4 touched on this at our hearing but my ruling stays
5 the same; the motion is denied. Is there anything
6 else before we call the jury back?
7 MR. WOOD: We would except, Your Honor. And in
8 light of the Court's ruling, the defense will also
9 present evidence today in this area of the case.
10 THE COURT: All right, bring the jury in, please.
11 JURY IN
12 REPORTER'S NOTE: Whereupon, the Court gives
13 the preliminary instructions to the jury. The Court
14 and the jury hear the opening statements of both
15 counsel. The proceedings continue as follows:
16 SUSAN E. MALCOLM, a witness called by and on
17 behalf of the Commonwealth, being first duly sworn
18 was examined and testified as follows:
19 DIRECT EXAMINATION
20 BY MR. BARRICK:
21 Q Your full name, Mrs. Malcolm?
22 A Susan E. Malcolm.
23 Q Would you speak up a little, Mrs. Malcolm?
24 A Yes, Susan E. Malcolm.
25 Q In 1979, where were you living?

1 A I was living in Charlottesville on 15th Street.
2 Q What was your occupation at that time?
3 A I am a hairdresser and I was employed at 22
4 Elliewood Avenue in Charlottesville.
5 Q Was I right, it was the Sir and Her?
6 A Yes, it is.
7 Q Are you originally from Charlottesville?
8 A No, I am not. I am originally from the Washing-
9 ton, D.C. area.
10 Q How long had you lived in Charlottesville?
11 When did you come here?
12 A I came here in 1977.
13 Q And you have a daughter?
14 A Yes, I do . . . she was five.
15 Q Her name is Jennifer Lee Malcolm?
16 A Yes.
17 Q What is Jennifer's birthday?
18 A July 25, 1973.
19 Q Are you still living in Charlottesville, Mrs.
20 Malcolm?
21 A No, I am not. I am in Silver Springs, Maryland.
22 Q Did you come from Silver Springs just for this
23 trial?
24 A Yes, I did.
25 Q Was Jennifer in school in 1978 and 1979?

1 A Yes, she was.

2 Q She would go to what, Venable?

3 A She went to Venable.

4 Q After school was out that year, what arrange-

5 ments, if any, did you have for her care during

6 the day while you worked?

7 A I would pick her up after school, and then, she

8 would come to the shop with me to play.

9 Q After school was out, what did you do with

10 Jennifer?

11 A She came with me to the shop.

12 Q When you came in - in the morning?

13 A Yes.

14 Q Did she stay there all day with you?

15 A She stayed there and played with three other

16 little girls on the street.

17 Q Was there another person at the beauty shop

18 who had a young daughter about the age of

19 Jennifer?

20 A Yes, there was Craige Stone, and she had a

21 daughter, Michel. She is two years older

22 than Jennifer.

23 Q Did she have to make the same arrangements

24 with Michel

25 A Yes, she did.

1 Q She brought her to the shop?
2 A Yes, she did.
3 Q What relationship developed between Jennifer
4 and Michele?
5 A They were best friends.
6 Q Did you place any restrictions on Jennifer as
7 far as where she could go and what she could
8 do?
9 A Oh, yes. They were not allowed to play in front
10 of the shop and only visit their other friends
11 on the street by telling us beforehand where
12 they were going. They always had to be outside
13 in the summer time so that we could look out
14 the door to see them.
15 Q Did you know the defendant in the summer of
16 1979?
17 A I knew Mr. Freeman casually, yes.
18 Q How did you become acquainted with Mr. Freeman,
19 and how did you know him casually?
20 A Well, he lived on the street. I had seen some
21 of his art work on the Lawn during an art show
22 at one time, just brief hellos were exchanged
23 . . . we knew everybody on the street.
24 Q On September 19, 1979, did you have a conver-
25 sation with Mr. Freeman?

1 A Yes, I did.

2 Q Could you tell the ladies and gentlemen of the
3 jury where this occurred and what was the sub-
4 ject matter of the conversation and what then
5 happened?

6 A Well, Mr. Freeman came to see me about a quarter
7 after 4:00 or 4:30, and he told me that he had
8 pictures of Jennifer that he wanted to show me.
9 So, we sat down with another girl that I worked
10 with on a porch swing, and he proceeded to show
11 me two pictures of Jennifer with her clothes on
12 and about another seven without her clothes on.
13 And he told me that he had already shown them
14 to a man in New York, a publisher, and that he
15 was going to trade him rights to publish his
16 book for the pictures. He wanted my approval,
17 and I told him . . .

18 Q Why did he show them to you? Did he say any-
19 thing to you about . . .

20 A Well, he said that he thought that I was liberal
21 enough to appreciate what he had done.

22 Q And he said that he was going to trade the
23 pictures to the publisher for publishing the
24 book?

25 A Yes.

1 Q What was your reaction when you saw these
2 pictures?
3 A I told him that I didn't approve of what he
4 did - at all. He never had my permission to
5 have Jennifer in or near his house and . . .
6 Q Did he tell you where he had shown these
7 pictures?
8 A He told me that he had shown them to a publisher
9 in New York.
10 Q No, ma'am, where he had taken them?
11 A I asked him where and he said--when he showed
12 me the pictures and he said these were taken
13 in his bedroom and he lived at 12 Elliewood
14 Avenue.
15 Q Is that located in the City of Charlottesville?
16 A Yes, it is - it is about two doors up from where
17 I worked.
18 Q Well, after you told him that he had no per-
19 mission to do this, what other conversation,
20 if any, occurred?
21 A I told him that I wanted the pictures and the
22 negatives and that no one else was to see them.
23 And he told me that in his financial state that
24 he couldn't do that but he could sell them to
25 me.

1 Q Did he mention a price?

2 A No, he didn't. I demanded that I have the

3 pictures and he said that he couldn't do it,

4 and he just put them into his briefcase and

5 walked away.

6 Q And what did you do?

7 A I went inside and called the police department.

8 Q And did the police officers respond?

9 A Yes, two or three responded and I talked to

10 Detective Jones and Robertson.

11 Q That same evening?

12 A Yes.

13 MR. BARRICK: Your Honor, these photographs

14 have been marked for identification as the Common-

15 wealth's Exhibits Numbers 1 through 14.

16 THE COURT: All right.

17 BY MR. BARRICK:

18 Q Would you look at each of these photographs,

19 Mrs. Malcolm, and tell the ladies and gentlemen

20 of the jury whether or not you can identify

21 the subject of that photograph, and if so, of

22 whom?

23 A Yes, this is Jennifer.

24 Q That is photograph number 1?

25 A Yes and this is Jennifer.

1 Q Photograph number 2?
2 A Yes, this is Jennifer.
3 Q Photograph number 3?
4 A Yes, this is Jennifer.
5 Q Photograph number 4?
6 A Yes, this is Jennifer.
7 Q Number 5?
8 A Yes, this is Jennifer.
9 Q Number 6?
10 A Yes, this is Jennifer.
11 Q Number 7?
12 A Yes, that is Jennifer.
13 Q Number 8?
14 A Yes, that is Jennifer.
15 Q Number 9?
16 A Yes.
17 Q Number 10?
18 A Yes.
19 Q Number 11?
20 A Yes, Jennifer.
21 Q Number 12?
22 A Yes.
23 Q Number 13?
24 A Yes.
25 Q Those are pictures of your daughter, Jennifer?

1 A Yes.
2 Q This picture has been marked as the Common-
3 wealth's Exhibit Number 14, who is the subject
4 of that one?
5 A It is her girl friend, Michelle.
6 Q Michelle Stone?
7 A Yes.
8 Q Whose mother is the owner of the shop and who
9 worked with you at the beauty shop?
10 A Yes.
11 Q Some of those photographs depict Jennifer
12 posing without any clothes on or with very little
13 clothes on- - prior to seeing those photographs,
14 had you ever known Jennifer to do anything like
15 that before?
16 A No, not at all.
17 Q To the best of your knowledge, had she ever
18 been the subject of any type of photographs
19 or other visual matter of posing in positions
20 or situations of that kind?
21 A No.
22 Q She is with you now in Maryland?
23 A Yes, she is.
24 MR. BARRICK: That is all I have.
25 THE COURT: Any cross?

1 CROSS EXAMINATION

2 BY MR. WOOD:

3 Q Mrs. Malcolm, how old are you?

4 A I am twenty- six.

5 Q How long were you down here in Charlottesville

6 at the beauty shop?

7 A Three years.

8 Q Was your husband living with you?

9 A I am divorced.

10 Q And you were at that time?

11 A Yes.

12 Q Now, you said that you would have Jennifer

13 with you at the beauty salon in the afternoons

14 after she got out of school?

15 A Yes.

16 Q There would be periods, would there not, when

17 she would go out of your vision?

18 A I always knew where she was.

19 Q But she would go away, wouldn't she?

20 A Yes.

21 Q And you wouldn't know where she went, would

22 you?

23 A No, but the majority of times I knew exactly

24 where she was.

25 Q There were several photographs that were shown

1 to you - that Mr. Freeman showed to you that
2 showed your daughter clothed?
3 A Yes.
4 Q And you, of course, had no objection to those
5 photographs, did you?
6 A Yes, because she was in his house and she was
7 not allowed in his house.
8 Q I didn't hear you. . .
9 A They were in his house and she was not allowed
10 in his house.
11 Q You did not allow her in his house?
12 A She was not allowed in anybody's house or any
13 place.
14 Q You are not saying just his house but you are
15 saying that she was not allowed to go into any-
16 one's home?
17 A Yes.
18 Q Aside from that . . . several of the photographs
19 show her with clothes on, and you would have
20 had no objection at all to those pictures of
21 your daughter, would you?
22 A No.
23 Q Do you not think it is possible, of course,
24 being upset at the time that you were confused
25 with what Mr. Freeman was saying to you a little

1 bit when he came over that day?
2 A No, I understood him clearly.
3 Q Isn't it possible . . .
4 MR. BARRICK: That is argumentative, Your Honor.
5 We are not dealing in the realm of possibility.
6 THE COURT: Ask her what he told her. . . you
7 are sort of speculating.
8 MR. WOOD: Well, I am leading into . . .
9 BY MR WOOD:
10 Q Did Mr. Freeman indicate that the pictures that
11 he was going to give to the publisher or what-
12 ever, did he offer the ones that show your
13 daughter with her clothes on?
14 A No, he told me that he wanted the ones without
15 clothes.
16 Q You were very upset at the time, were you not?
17 A Yes.
18 Q Did you ever discuss with or show your daughter
19 the Playboy magazine?
20 A She has seen that as well as other magazines.
21 Q Why would you let a girl of that age . . .
22 MR. BARRICK: I object to that question.
23 MR. WOOD: Mr. Barrick opened the door about
24 prior activities involving the child, and I am
25 trying to go into the background involving the

1 child, also.

2 THE COURT: You can ask what she has seen but

3 as to why she was shown it, I don't think that is . . .

4 BY MR. WOOD:

5 Q Well, on how many occasions was she shown the

6 Playboy magazine?

7 A I don't know . . . kids could see them. They

8 are on the news stands.

9 Q But you have them in your shop?

10 A No.

11 Q How do you know that she saw them?

12 A Well, they see them at the news stands all of

13 the time.

14 Q To your knowledge, your daughter had definitely

15 seen Playboy magazine, had she not?

16 A Yes.

17 Q And she had seen the models in the Playboy

18 magazine of the women in various poses, isn't

19 that correct?

20 A Yes.

21 Q Were several of the poses in the photographs

22 that you have examined similar to those taken

23 in Playboy magazine?

24 A Yes, they were.

25 Q Didn't Mr. Freeman when he came up and spoke

1 to you that day specifically make reference
2 to your daughter's desire to look like a
3 model in Playboy magazine?
4 A No, he did not. He said that he wanted to
5 have her pose as the models in Playboy.
6 Q He did use the words Playboy magazine, didn't
7 he?
8 A Yes.
9 Q Didn't he ask you why you would let your
10 daughter look at Playboy magazine?
11 A No, he did not.
12 MR. WOOD: I didn't hear the answer due to the
13 coughing in the courtroom. I would ask Your Honor
14 to ask the people who are having a lot of trouble
15 coughing if they would be kind enough to take a
16 cough pill or something because I can't hear the
17 answers and I am sure that the jury can't hear.
18 THE COURT: All right, whoever is having the
19 coughing seizure if you will step out and try to
20 arrest it and then come back in? Will you ask
21 the question again?
22 BY MR. WOOD:
23 Q Mr. Freeman didn't say that your daughter
24 had told him that she wanted to pose like
25 the Playboy girls?

1 A No, he was very definite in saying that he had
2 her pose as the big girls did in the magazine.
3 Q How many times would you say that your daughter
4 looked at Playboy magazines?
5 A Probably only a few . . . there are naked women
6 in Glamour and Mademoiselle like I buy.
7 Q What other books such as Playboy have you allowed
8 your daughter to look at?
9 A That would be the only one.
10 Q There was another lady there with you at the
11 time of this conversation?
12 A Yes, Mrs. Molly Williams.
13 Q Mrs. Molly Williams?
14 A Yes.
15 Q Where is she now?
16 A She is still employed at 22 Elliewood.
17 Q Was she present throughout the conversation
18 that you have related to us?
19 A She was present through the majority of it.
20 She was appalled and she got up and left to-
21 wards the end of it.
22 Q Did she hear the parts about the publisher?
23 A Yes, she did.
24 Q And saw the nude pictures?
25 A Yes, she did.

1 Q Isn't it a fact that when the matter of the
2 purchase of the pictures came up all that Mr.
3 Freeman wanted from you was the cost to have
4 them produced?
5 A No, he never mentioned a price or he told me
6 what he would have to charge me for the pictures.
7 Q You don't know what he was asking, the price,
8 do you?
9 A He never mentioned the price, no.
10 Q Did he mention any cost to him to have them
11 developed?
12 A He never mentioned anything to me.
13 Q Now, you had bought or you had seen . . . he
14 had shown you, had he not, pictures of your
15 daughter before this September date?
16 A Yes. He had taken pictures of a lot of the kids
17 on the street outside playing.
18 Q Including Jennifer?
19 A Yes.
20 Q And you had no objection and had made that
21 clear to him as to those pictures?
22 A No.
23 Q As a matter of fact at a prior time before the
24 September date he had brought you sketches of
25 Jennifer?

1 A He had sketched Jennifer and Michele outside
2 and Craige and I purchased them from him be-
3 cause he said that he needed some money.
4 Q And you were pleased with the sketches and you
5 so told him, didn't you?
6 A Yes.
7 Q Didn't you feel that they showed artistic
8 talent?
9 A Yes.
10 Q And you didn't have any objection at all of
11 buying them from him, did you?
12 A No.
13 Q You never had any bad relationships or hostile
14 relationships with Mr. Freeman before that
15 September date, had you?
16 A No.
17 Q Were you not aware that your daughter was very
18 frequently visiting a home, Mr. Freeman's
19 mother where he was living?
20 A The girls used to go up to visit Mrs. Freeman
21 outside of the home - when she was outside.
22 Q How do you know they didn't go inside?
23 MR. BARRICK: He is arguing, Your Honor.
24 THE COURT: I think this is proper, go ahead.
25 BY MR. WOOD:

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COURT REPORTER
CHARLOTTESVILLE, VIRGINIA
TELEPHONE 296-8870

1 Q So, as far as you know they went inside, too,
2 didn't they?
3 A Not that I knew of.
4 Q You wouldn't objected if they had gone into
5 Mr. Freeman's home, would you?
6 A Yes, I would have; they were not allowed to go
7 inside.
8 Q So, it was all right if they went upon the
9 porch but not to go indoors?
10 A They would visit Martha's Cafe next door a lot
11 of times amd they would see her and say hello
12 and visit for a few minutes, then leave.
13 Q What was it that you said about your permission
14 with the pictures?
15 A He thought. . . he told me that he thought I
16 was liberal and I would approve of what he had
17 done - as he was showing me the pictures.
18 Q Are you liberal in your views of what should
19 be displayed in terms of nudity?
20 A Yes, I am.
21 Q That is why you don't particularly concern
22 yourself with that little girl having seen
23 Playboy, isn't that right?
24 A Yes.
25 Q Now, do you recall testifying previously under

1 oath regarding this same occurrence?
2 A Yes.
3 Q Isn't it a fact that on that occasion in your
4 testimony outlining the conversation with Mr.
5 Freeman that you never mentioned showing the
6 pictures to a New York publisher?
7 A Yes, I mean, no.
8 Q Do you deny that I am correct in saying that?
9 Do you just not remember?
10 A I don't understand the question.
11 Q I am sorry. I did not mean to confuse you, but
12 when you testified before that you made . . .
13 MR. BARRICK: Your Honor, excuse me, but I would
14 like to be heard outside the presence of the jury.
15 JURY OUT
16 MR. BARRICK: It occurred to me that Mr. Wood
17 and Mr. Stone did not represent Mr. Freeman in the
18 preliminary hearing stages and unless they have a
19 transcript or an accurate account of what was said,
20 I think it is an improper line of questioning to
21 examine the witness on what is bound to be secondary
22 information.
23 MR. WOOD: May it please the Court: In preparing
24 for the case today, it is true that we weren't there
25 and we didn't want to prejudice our client because

1 we weren't there so we went to the Juvenile Domestic
2 Relation Court and listened to the recording of Mrs.
3 Malcolm's testimony which still exists right across
4 the street and in the process Mr. Stone wrote down-
5 not every word as a transcription would be but he
6 wrote down what we submit is an entirely, complete
7 and accurate rendition of what was said and I re-
8 quested Mr. Stone who was reveiwing the notes as
9 she testified - any questions that I would ask her.
10 I would be glad to submit to the Court our
11 handwritten notes or to Mr. Barrick - our handwritten
12 copy or if Your Honor wishes we can have the tape
13 played . . .
14 MR. BARRICK: I don't question Mr. Wood's
15 integrity, Your Honor, the point that I am really
16 making is that unless you have a certified tran-
17 script of the testimony that you are referring to
18 this is really just shooting in the dark and there
19 is no way to support the challenge that is made by
20 the question, and I think an unnecessary inference
21 then arises therefrom which cannot be proven to the
22 jury.
23 THE COURT: Well, let's see what the question
24 is, and perhaps, the answer may be . . .
25 MR. WOOD: Yes, sir, I think that she may answer.

1 THE COURT: Let's see what the question is.

2 MR. WOOD: Yes, sir, I will ask the question.

3 BY MR. WOOD:

4 Q Mrs. Malcolm, it is not correct that when you

5 testified in the other hearing that you made

6 no mention of showing the pictures to the New

7 York publisher or of Mr. Freeman showing the

8 pictures to the New York publisher?

9 A I don't remember.

10 Q You don't remember?

11 A No.

12 Q Do you recall in the former case having then

13 testified that he said to you that he wanted

14 you to see them before anyone else?

15 A Yes, he did.

16 MR. WOOD: I can ask her that but I wouldn't do

17 it on impeachment but just ask her that question.

18 She doesn't remember on the other.

19 MR. BARRICK: Then, I think that I am allowed to

20 ask Mrs. Malcolm if she did not give the Charlottes-

21 ville police officers a statement on September the

22 19th in which she did say that Mr. Freeman told her

23 that he had shown these pictures to a New York

24 publisher.

25 THE COURT: To show prior consistency?

1 MR. WOOD: I thought that I was going to be ex-
2 cluded in light of her answer from going into the
3 New York publisher?
4 THE COURT: You will be allowed to ask
5 it but he will be permitted to ask question, too,
6 to show prior consistency with her statement.
7 MR. WOOD: All right, her answer is that she
8 doesn't remember.
9 THE COURT: Is there anything else?
10 MR. WOOD: That is all.
11 JURY IN
12 BY MR. WOOD:
13 Q Mrs. Malcolm, is it not correct that when you
14 testified in a previous hearing about this
15 matter you made no mention of Mr. Freeman having
16 said to you anything about showing the pictures
17 to a New York publisher?
18 A I don't remember.
19 Q Again calling your attention back to that
20 previous hearing, is it not true that you
21 testfied in that hearing that you wanted Mr.
22 Freeman - that Mr. Freeman said that he wanted
23 you to see the pictures before anyone else?
24 A Yes, and that he had shown them to his publisher
25 as well.

1 Q I thought that you didn't remember? Are you
2 telling me now what you said in a previous
3 hearing or what you now recall?
4 A No, I remember him telling me that he had shown
5 then to a publisher and he wanted me to see
6 them before anybody else did and I don't re-
7 member at the hearing . . .
8 Q Now, what did you ask him to do with these
9 pictures?
10 A I told him that I wanted the negatives and
11 the prints themselves.
12 Q Didn't you tell him to take them home and to
13 show them to no one?
14 A No, I did not.
15 Q Are you sure of that?
16 A I told him that I wanted those pictures then
17 and now and the negatives.
18 MR. WOOD: That is all.
19 REDIRECT EXAMINATION
20 BY MR. BARRICK:
21 Q Mrs. Malcolm, do you remember giving the police
22 officers a statement on September 19, 1979,
23 the same day that you talked to Mr. Freeman?
24 A Yes, I do.
25 Q Is this the statement?

1 A Yes, it is.
2 Q In that statement, did you make reference to
3 whether or not Mr. Freeman told you that he
4 had shown these to a publisher in New York?
5 A Yes.
6 Q What do you say in that statement about this?
7 A Yes?
8 Q Read it to us, please.
9 A He told me that he had shown the pictures to
10 an author about publishing his book -in re-
11 ference to selling his book in trade for the
12 pictures.
13 Q All right, the writing on the back of Common-
14 wealth's Exhibit Number 1 and on the back of
15 Commonwealth's Exhibit Number 3, is any of that
16 your writing?
17 A No, it is not.
18 Q Do you recognize or can you identify that
19 writing or do you know it is just not yours?
20 A It is not mine.
21 MR. BARRICK: That is all.
22 RECROSS EXAMINATION
23 BY MR. WOOD:
24 Q In this statement that you just made reference
25 to in response to Mr. Barrick's question, it

ELAINE H. HELVIN
COURT REPORTER
CHARLOTTESVILLE, VIRGINIA
TELEPHONE 296-8879

1 is dated the 19th of September?
2 A Yes.
3 Q Do you want to read it? Not out loud but does
4 that reflect as best as you can recall what
5 you did say on that occasion?
6 A Yes.
7 MR. WOOD: We would like this statement which
8 the witness has identified marked and introduced
9 as the Defendant's Exhibit Number 1.
10 THE COURT: All right, so received.
11 REPORTER'S NOTE: Whereupon, said statement
12 received in evidence and marked the Defendant's
13 Exhibit Number 1.
14 BY MR. WOOD:
15 Q Mrs. Malcolm, rather than passing this to the
16 jury, would you be kind enough to read this
17 statement to the jury and into the record?
18 A This afternoon at 4:30, John Middleton Freeman
19 came to visit me at my employer's which is at
20 22 Elliewood Avenue. He showed me pictures
21 of my daughter posing nude at his house. He
22 told me that he had shown the pictures to an
23 author about publishing his book in reference
24 to selling his book and in trade for the
25 pictures. I told Mr. Freeman that I did not

1 approve of what he did or whom he had showed
2 the pictures to and asked him why he had my
3 daughter in his house to begin with and he
4 told me that in his financial position that
5 he could not give me the pictures but he would
6 sell them to me.
7 I told him that at no time did I want the
8 pictures or want to have them shown to anyone
9 else. I told Mr. Freeman that at no time did
10 Jennifer have permission to go into his house
11 and that he knew she was not allowed in the
12 house at all. He said, how old is Jennifer?
13 She is six.
14 MR. WOOD: That is all I have.
15 RE-REDIRECT EXAMINATION
16 BY MR. BARRICK:
17 Q This is the statement, I believe that you
18 dictated into a machine?
19 A Yes, it is.
20 Q At the police department and somebody typed
21 it up and you came back and reviewed it and
22 determined it was accurate?
23 A Yes.
24 MR. BARRICK: Thank you.
25 THE WITNESS STANDS ASIDE

1 MERRILL PHILLIP RUNQUIST, a witness called by
2 and on behalf of the Commonwealth, being first duly
3 sworn, was examined and testified as follows:
4 DIRECT EXAMINATION
5 BY MR. BARRICK:
6 Q What is your full name and occupation, sir?
7 A My name is Merrill Phillip Runquist and I am
8 a clinical child psychologist at the University
9 of Virginia Medical Center.
10 Q What is your age, Dr. Runquist?
11 A I will be thirty-five next week.
12 Q I don't think that you need to concern your-
13 self about speaking into that microphone be-
14 cause I think your voice will carry all right.
15 Would you tell the jury something about your
16 educational background?
17 A I have a Bachelor of Science degree in psy-
18 chology from the University of Wisconsin at
19 Oshkosh, Wisconsin. I have a Ph.D. in clinical
20 psychology from the University of Nebraska at
21 Lincoln. I have served on the faculty of the
22 University of North Carolina School of Medicine
23 and the University of Virginia School of Medicine.
24 Q When did you get your Ph.D. in clinical
25 psychology?

1 A In 1975.
2 Q And are you certified in Nebraska?
3 A I am licensed in Virginia.
4 Q As a clinical psychologist?
5 A That is right.
6 Q How long have you been on the faculty of
7 the University of Virginia?
8 A Since March 1, 1976.
9 Q In addition, you are connected with the
10 Division of Child and Family Psychiatry at
11 the University?
12 A That is correct.
13 Q In that capacity you are seeing and evaluating
14 patients, are you not?
15 A I see children, adolescents, and adults for
16 diagnosis and psychotheraphy as well as super-
17 vised residents in training for seeing children,
18 adolescents and adults.
19 Q What professional organizations, if any, do
20 you belong to, doctor?
21 A I belong to the American Psychological
22 Association. I am president of the Virginia
23 Psychological Association. I belong to the
24 American Association of Psychiatric Services
25 for Children and I am the past president for

1 that organization for the southeastern United
2 States.
3 Q Now, I believe that you have published on
4 occasions?
5 A That is correct.
6 Q Psychology is a science of discipline that
7 deals with a person's behavior?
8 MR. WOOD: Your Honor, I object to counsel.
9 MR. BARRICK: All right.
10 BY MR. BARRICK:
11 Q What is psychology?
12 A Psychology strives to have a scientific under-
13 standing of a person's behavior and develop-
14 ment as well as clinical psychology strives
15 to have a scientific understanding for methods
16 of changing the behavior particularly deviant
17 or abnormal behavior.
18 Q Would the area of psychology embrace the pro-
19 blems of someone with a deviant sex interest
20 or abnormal sex interest?
21 A Yes, it would. Sexual activity or sex interest
22 are certainly behaviors which psychology would
23 have a definite interest, yes.
24 Q Would that apply to persons under the age of
25 18 as well as people over the age of 18?

A Yes, it certainly will, children certainly have sexual feelings and interests.

Q Doctor, are there professional publications which are recognized in your field as being authoritative on the subject of abnormal or deviant behavior or attitudes by children or by somebody under 18?

A Certainly, most standard textbooks in child psychiatry and child psychology deal with the sexual interests of children and they have for many many years throughout this century.

Q Are you acquainted with most of these recognized authorities on that particular subjects?

A The literature is voluminous, I don't think that I could say that I am acquainted with most but I could certainly say that I am acquainted with several, yes.

Q I am going to show you five photographs which have been marked for identification as the Commonwealth's Exhibits Numbers 7, 8, 9, 12 and 13.

MR. STONE: Your Honor, I would like to take up something outside the presence of the jury, please.

JURY OUT

1 MR. STONE: Pardon the interruption, Your Honor,
2 but we were unaware of exactly what Dr. Runquist
3 was going to be qualified for and we have certainly
4 no objection to his qualifications but we are really
5 not sure what he is prepared to testify to but I
6 assume that from being shown the pictures that he
7 is going to be asked his professional opinion if
8 these photographs are obscene for children and we
9 would object to any questions along that line, in
10 that the promulgated statute is that the pictures
11 be obscene as determined by the experience of
12 children in the contemporary community.
13 We submit that no individual is qualified to
14 meet that standard or to give an expert opinion
15 and the only possible way of determining what
16 children consider obscene with regard to these
17 pictures unless this doctor has shown these pictures
18 to individual children and gauged their reaction,
19 and we would submit that any opinion in that regard
20 would be irrelevant.
21 MR. BARRICK: That argument may well be made
22 with respect to the weight to be given to Doctor
23 Runquist's opinion, Your Honor, but it certainly is
24 not a proper argument as whether or not he can ex-
25 press an opinion. His academic background and

1 professional background is certainly such that he
2 has been qualified as an expert who knows more about
3 this subject than Mr. Stone or myself, and he is;
4 therefore, able to express an opinion.
5 MR. STONE: Your Honor, this is opinion testi-
6 mony and we would take the position that the way
7 the law reads on obscenity it is not an opinion
8 as to whether this general category of pictures
9 or these kinds of pictures are obscene for children
10 but it is whether these individual pictures are
11 obscene for children and any opinion by this doctor
12 as to whether these individual pictures are obscene
13 for children is an invasion of the province of
14 the jury.
15 That is one of the elements necessary and in
16 fact it is the only element that is being challenged
17 here by the defendant and to allow an expert to
18 come in and say that in my opinion these particular
19 pictures are obscene for children invades the pro-
20 vince of the jury.
21 We take the position that if he could have
22 testified that these kinds of pictures in other
23 instances I have found that pictures of naked
24 little girls have excited or have been in the
25 prurient interest of 8 year old boys but that is

1 totally irrelevant as to whether these pictures
2 are obscene for children as proscribed by the
3 statute - that is the province of the jury in this
4 case to decide whether or not these pictures are
5 obscene for children as determined by the general
6 standard of children in the community. This man
7 is not qualified to testify to that point.
8 THE COURT: Are you speaking of these pictures
9 or pictures of this type?
10 MR. BARRICK: He is speaking to those pictures,
11 Your Honor.
12 THE COURT: Of course, I think it is recognized
13 that you need some expert testimony in obscenity
14 cases.
15 MR. BARRICK: With respect, of course, to the
16 other element that must be proven that the photo-
17 graphs affront contemporary community standards of
18 adults of what is suitable matter for children that
19 I think is something which the adult jury can pass
20 upon without the need of any expert testimony. I
21 think the Miller case specifically held that the
22 necessity of any expert testimony that they are
23 capable of making that determination but I intend
24 to ask Dr. Runquist questions with respect of
25 whether or not these pictures appeal to the prurient

1 interest of children and also whether they have
2 any scientific, literary, political or artistic
3 value for children.
4 THE COURT: I overrule the objection. You may
5 proceed. Is there anything else before we call the
6 jury back?
7 MR. STONE: If you will note our exception,
8 Your Honor?
9 THE COURT: Certainly. Bring the jury back.
10 JURY IN
11 BY MR. BARRICK:
12 Q Dr. Runquist, you now have had an opportunity
13 to examine those 5 photographs which I pre-
14 viously identified before the jury was excused?
15 A Yes.
16 Q In your opinion, do those photographs appeal
17 to the prurient interests of children as
18 determined by the experience of children in
19 the contemporary community?
20 A It is my opinion and my experience with
21 children in this community it would so appeal
22 to their prurient interests.
23 Q By prurient, you mean . . .
24 A Lustful, abnormally sexually arousing.
25 Q In your opinion, do those photographs lack

1 serious, literary, artistic . . .

2 MR. WOOD: Objection, Your Honor, there has been
3 no foundation laid that he is an expert in what is
4 artistic or whatever else is in there. He has come
5 forth as a psychiatrist, as I recall, I guess that
6 Mr. Barrick is going to meet all of the parts of
7 the statute. He would have to be qualified or he
8 is invading the province of the jury; we submit,
9 and we object on both grounds.

10 THE COURT: Do you contend that he has expertise
11 in this field, Mr. Barrick?

12 MR. BARRICK: Yes, sir.

13 THE COURT: Literary and artistic?

14 MR. BARRICK: Yes, scientific value for children
15 and he . . .

16 THE COURT: For children?

17 MR. BARRICK: Yes, sir.

18 THE COURT: All right, proceed; I overrule the
19 objection.

20 MR. WOOD: We except.

21 BY MR. BARRICK:

22 Q In your opinion, Doctor, do these photographs
23 lack literary, artistic, political and scientific
24 value for children?

25 A They have no such value as far as I would judge,

1 MR. BARRICK: All right, thank you very much.
2 THE COURT: Any cross?
3 CROSS EXAMINATION
4 BY MR. STONE:
5 Q Dr. Runquist, your experience with children,is
6 that through the University Hospital or it it
7 through the Blue Ridge Mental Health branch?
8 A Through the hospital.
9 Q Through the hospital itself?
10 A Yes.
11 Q In that regard how many children did you see
12 in the last two years?
13 A In the last two years, a couple of hundred.
14 Q Now, are these children of varying ages?
15 A Yes.
16 Q You testified in your opinion these pictures
17 appeal to the lustful interests of children?
18 A Yes.
19 Q Do children's lustful or prurient interests
20 vary with age?
21 A I think probably they do and if children get
22 earlier adolescence, then, I think their sexual
23 impulses are closer to the surface and are
24 being awakened and I think that we know from
25 our own experience, too, and I think the sexual

1 interest is heightened as people get older in
2 adolescence, yes.
3 Q With regard to say a 5 year old girl, at what
4 point does the sexual interest begin in a child,
5 do you know?
6 A I think most authorities would conclude that
7 sexual inerests generally start at about age
8 4.
9 Q Then prior to age 4, there is no such thing as
10 sexual or prurient interest for a child?
11 A I would agree with that, yes.
12 Q Do prurient interests based on your experience
13 differ between males and females of the same
14 age?
15 A I would say that they are more often and more
16 easily expressed on the part of the male, yes.
17 Q Of the several hundred children that you have
18 seen over the past few years, for what purpose
19 are those children being brought to you?
20 A For a wide variety of purposes, some with school
21 difficulties, soem with a lot of difficulties
22 in relationships with their parents, some with
23 difficulties because of traumatic incidents that
24 they have been involved with, and some times
25 sexual abuse, sexual attack but those are

1 certainly the minority of the cases though, but
2 depression and many, many various reasons.
3 Q Would any of those reasons that they have been
4 brought to you, would any of those have an
5 effect upon whether or not that particular child
6 had a more easily aroused sexual interest?
7 A Are you saying that the reason that they are
8 brought to me is because they have sexual in-
9 terests that are more easily aroused than other
10 children?
11 Q Yes.
12 A On occasion, children have been brought to me
13 because their sexual interests are more aroused
14 but whether they have been more easily aroused
15 than other children, I don't know but I think
16 it is because they have been exposed to situations
17 that are more arousing.
18 MR. STONE: I have no further questions, thank
19 you.
20 THE WITNESS STANDS ASIDE
21 R.O. JONES, a witness called by and on behalf
22 of the Commonwealth, being first duly sworn, was
23 examined and testified as follows:
24 DIRECT EXAMINATION
25 BY MR. BARRICK:

1 Q You are Sergeant R. O. Jones with the Char-
2 lottesville Police Department?
3 A Yes, sir.
4 Q How long have you been a police officer, Serg-
5 eant Jones?
6 A Approximately 17 years.
7 Q In your present position, you are the immediate
8 supervisor of all of the detectives in the
9 Youth Investigative Division, is that correct?
10 I may not be using the - quite the right words
11 but Youth Investigation?
12 A Yes, sir, that is correct.
13 Q You are the sergeant in charge of the detectives?
14 A Yes, sir.
15 Q Were you aware or did you become aware that Mrs.
16 Malcolm had made a report to the Charlottesville
17 Police Department on September 19, 1979?
18 A Yes, I was.
19 Q Did you go to the Sir and Her beauty shop on
20 Elliewood Avenue after the report had been made
21 by Mrs. Malcolm?
22 A Yes, sir. I first met with the officer who took
23 the report and then, I went to the Sir and Her.
24 Q After you got this basic information from her
25 report, did you swear to an affidavit and obtain

1 a search warrant for Mr. Freeman's home on
2 Elliewood Avenue?
3 A Yes, I did.
4 Q Is that located in the City of Charlottesville?
5 A Yes, it is.
6 Q Who accompanied you in the execution of this
7 search warrant?
8 A Detective Robertson and Detective Hughes.
9 Q About what time did you arrive at Mr. Freeman's
10 home and who was present?
11 A Some time between 9:00 and 9:30 and Mr. Free-
12 man's mother was present.
13 Q Was that on the night of September the 19th of
14 this year?
15 A Yes, it was.
16 Q What was the search directed to?
17 A It was directing us to look for and seize any
18 pictures of Jennifer Malcolm.
19 Q While you were looking for these pictures, did
20 Mr. Freeman arrive at home or did Mr. Freeman
21 come to his house?
22 A Yes, he did.
23 Q Tell us how this occurred and what happened
24 thereafter?
25 A While we were in there searching his bedroom

1 he appeared at the door and came on in.
2 Q Do you know how he got to his house?
3 A Officer Melton was with him, so I assume that
4 he came with him.
5 Q All right, had you advised other police officers
6 that you wanted to see Mr. Freeman?
7 A Yes. I had already advised Officer Melton who
8 works the Corner - the University Corner to be
9 on the look out for him that we had a warrant
10 for him.
11 Q When Offficer Melton brought Mr. Freeman to his
12 home, what transpired?
13 A I served him with the warrant of arrest and I
14 told him that we had executed the search war-
15 rant on his mother and at that time, I advised
16 him of the warnings under Miranda.
17 Q Was this done orally?
18 A It was read from a card.
19 Q Just tell us what happened after that, Sergeant
20 Jones?
21 A After this, he said that he would go ahead and
22 get the pictures and him and Detective Hughes
23 and Robertson left the room and in a couple of
24 minutes, they came back into the room with
25 some pictures.

1 Q And those pictures were subsequently inventoried
2 on the back of the search warrant and turned
3 into the property room at the Charlottesville
4 Police Department?
5 A Yes, sir.
6 MR. BARRICK: I think Mr. Wood and Mr. Stone
7 and I, Your Honor, have agreed that these pictures
8 were seized in connection with the execution of
9 the search warrant and are the pictures which have
10 been marked for identification as the Commonwealth's
11 Exhibits Numbers 1 through 13.
12 MR. WOOD: That is correct and if we could have
13 a minute to look at them?
14 MR. BARRICK: Yes but let me explore one other
15 matter first.
16 BY MR. BARRICK:
17 Q Did you not also seize at the same time 3
18 negatives, I guess that is what you call them,
19 photography negatives?
20 A Yes.
21 Q Are these the photography negatives?
22 A Yes, they are.
23 MR. BARRICK: Your Honor, I would like for
24 these 3 photography negatives marked as a composite
25 Exhibit - as the Commonwealth's Exhibit Number 15.

THE COURT: All right, so marked.

MR. BARRICK: I should have included in my examination of Sergeant Jones, the Commonwealth's Exhibit Number 14 or what has been marked as the Commonwealth's Exhibit Number 14 and which was identified by Mrs. Malcolm as a photograph of Michele Stone.

THE COURT: All right, Number 14.

BY MR. BARRICK:

Q What happened after you acquired these photographs and negatives, Sergeant Jones?

A We went to the police department.

Q At the police department, was Mr. Freeman again advised of his rights under the Miranda Decision?

A Yes, he was.

Q Was this done by a printed form that is customarily used by the Charlottesville Police Department for this purpose?

A Yes, it was.

Q Is this the original of that form?

A Yes, sir, it is.

Q Did Mr. Freeman appear to understand his rights?

A Yes, sir. He stated that he did and wrote down, yes that he understood them.

1 Q Did he waive his rights and agree . . .
2 MR. WOOD: I don't think that is a matter for
3 the jury to consider whether he waived his rights
4 or not.
5 THE COURT: The Court has already made that
6 determination, but you wanted to . . .
7 MR. WOOD: Yes, sir.
8 MR. BARRICK: Yes, sir, the question about the
9 voluntariness . . .
10 MR. WOOD: The voluntariness has already been
11 determined; we are not raising the issue of the
12 voluntariness again.
13 MR. BARRICK: I would like to introduce this
14 Advice of Rights as the Commonwealth's Exhibit
15 Number 16.
16 THE COURT: All right.
17 REPORTER'S NOTE: Whereupon, said Advice of
18 Rights received in evidence and marked the Common-
19 wealth's Exhibit Number 16.
20 BY MR. BARRICK:
21 Q Then, did you - Mr. Freeman give you a state-
22 ment which he wrote in his own hand and signed?
23 A Yes, he did.
24 Q Is that the original of that statement?
25 A Yes, it is.

Q Would you please read it?

MR. WOOD: May it please the Court: We would submit for the record our objection previously made in the Motion In Limine at this point.

THE COURT: A continuing objection?

MR. WOOD: Yes, sir.

THE COURT: I understand - proceed.

BY MR. BARRICK:

Q Would you read the body of the statement to the jury?

A Just the body?

Q Yes, not the part about his education and that sort of thing but what he has written in his own hand.

A As an artist and writer and who is still writing a children's book for a publisher in New York I am not ashamed to briefly relate my dealings with my youngest photographic model, Jennifer Malcolm.

I have known her and her friend, Michele Stone for over a year as neighbors on Elliewood Avenue. Both were particularly interested in my studio and young women's drawings and nude studies of my models during the last six months, and some even earlier. Jennifer and Michelle

1 came to me ten days after Valentine's Day with
2 a handwritten Valentine to Grandpa, whom they
3 said that they loved, and when I heard the door-
4 bell and opened the door, they told me to sit
5 down on the sofa and they read what they had
6 written and after that, they both hugged and
7 kissed me, and climbed into my lap.
8 Numerous times after they would have climbed
9 into my lap and loved to excite me, and I
10 eventually excited them but only when they
11 pressed me to respond affectionately. I told
12 them of my belief in the beauty of love towards
13 other individuals but always warned them that
14 if that show of affectation was to lead to any-
15 thing that would hurt that individual in anyway
16 that it was not a love that Christ taught.
17 They understood and little Jennifer used to
18 say what we are doing isn't hurting us or you,
19 and I would say, right and always remember that
20 real love never hurts anyone if done with God's
21 love in us. This was not a physical expression
22 except visual or when . . .
23 Q You can't read that?
24 A No, I can't make it out . . . through our
25 clothes . .. I think it was approximately in

1 the middle of July, 1979, when the color photo-
2 graphs were taken and then, maybe a week later
3 for the black and white shots. John Middleton
4 Freeman.
5 MR. BARRICK: I would offer that statement,
6 Your Honor, as the Commonwealth's Exhibit Number
7 17.
8 THE COURT: All right, so received.
9 REPORTER'S NOTE: Whereupon, said statement
10 received in evidence and marked the Commonwealth's
11 Exhibit Number 17.
12 BY MR. BARRICK:
13 Q What was Mr. Freeman's attitude during your
14 interview with him, Sergeant Jones?
15 A He was very open and very cooperative.
16 Q Did he talk freely with you?
17 A Yes, sir, he did.
18 Q Did he tell you other things in addition to
19 what he wrote in that statement?
20 A Yes, sir, he did.
21 Q Did he relate other associations that he had
22 with Jennifer Lee Malcolm at or about the same
23 time that those photographs were taken in
24 addition to what he said in his statement?
25 A Yes, sir, he did.

1 Q Now, after your interview with Mr. Freeman,
2 did you record these additional statements
3 which he made?
4 A Yes, sir, I did.
5 Q And when was that record made?
6 A That same night.
7 Q Can you identify this document, please, sir?
8 A Yes, sir, that is my handwriting.
9 Q And what is that document?
10 A It is the notes on the Jennifer Malcolm case
11 on John Freeman.
12 Q Are these the notes that you referred to and
13 that you made that night?
14 A Yes, sir.
15 Q About the matters that Mr. Freeman told you
16 of and his association . . .
17 MR. WOOD: Your Honor, I object to his leading.
18 THE COURT: All right.
19 BY MR. BARRICK:
20 Q This is entirely in your handwriting?
21 A Yes, sir, it is.
22 MR. BARRICK: Your Honor, I would offer this
23 as the Commonwealth's Exhibit Number 18, Detective
24 Jones's past recollections recorded.
25 MR. WOOD: We note again our continuing objection

in this area, Your Honor.

THE COURT: Yes.

REPORTER'S NOTE: Whereupon, said statement received in evidence and marked the Commonwealth's Exhibit Number 18.

BY MR. BARRICK:

Q Would you please read what you recorded in those notes, Sergeant Jones?

A It says: Notes on Jennifer Malcolm case on John Freeman. After advising Mr. John Freeman of his rights under the Miranda Warning at approximately 10:45 P.M. 9-19-79, I asked Mr. Freeman about the pictures of Jennifer Malcolm in the nude, and he stated that he had taken the pictures.

The first ones that he took were in the middle of July in color and the black and white were taken maybe a week later.

He stated that Jennifer had told him that she wanted to be a model and that she went upstairs to his bedroom and that she closed the blinds except the ones that she couldn't reach and he closed them leaving two open so that he could photograph her.

1 Mr. Freeman stated that Jennifer got on the
2 bed and jumped up and down and then, started
3 posing for him with clothes off.
4 Mr. Freeman stated that he didn't touch Jennifer
5 and that back in May, Jennifer and a girl
6 named, Michele Stone wanted to see him in the
7 nude and that he went into a closet and dropped
8 his clothes and jumped out in front of them
9 for a second, and that the two girls pulled
10 their pants down and back up real quick.
11 Mr. Freeman stated that the two girls were
12 always trying to get him excited by rubbing
13 up against him and it did get him excited.
14 Mr. Freeman stated that he often fondled the
15 girls both with clothes on and off and some
16 time back in August, that he masturbated in
17 front of the girls.
18 Mr. Freeman stated that at no time did he ever
19 penetrate the two girls. Mr. Freeman also
20 stated that at different times, the two girls
21 would put their hands on his penis and kiss it.
22 And the last time was just before the University
23 students returned to school.
24 Mr. Freeman stated at one time he kissed both
25 girls on their privates in a vacant building

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now occupied by a pizza house and both girls were standing up with their pants down.

Mr. Freeman stated that they were always doing these things in his room or in a vacant house now a pizza house, or at the end of Elliewood in some vacant garages. Signed : R. O. Jones.

THE COURT: Now, Members of the jury, I will instruct you later but I will also do it right now. This last statement concerning other incidents is told you purely for the purpose of showing motive or purpose which the defendant may have gone about making the pictures. But they are not - those statements are not to be taken by you as being evidence that he committed the offense for which he is now on trial. Keep that in mind. All right, Mr. Barrick, proceed.

MR. BARRICK: Your Honor, I would now offer as Commonwealth's Exhibits, these photographs which have been marked for identification as Exhibits 1 through 14 along with the negatives that have been marked for identification as the Commonwealth's Exhibit Number 15.

THE COURT: All right.

REPORTER'S NOTE: Whereupon, said photographs received in evidence and marked the Commonwealth's

Exhibits Numbers 1 through 14. The said negatives received in evidence and marked the Commonwealth's Exhibit Number 15.

MR. BARRICK: I would like to show them to the jury, please.

THE COURT: All right, you may do so.

[Exhibits circulated among the jury]

MR. BARRICK: I have no further questions.

THE COURT: Any cross?

CROSS EXAMINATION

BY MR. WOOD:

Q Did you describe, Detective Jones, Mr. Freeman as being cooperative and open with you?

A Yes, sir.

Q Much more so, wouldn't you say than most people that you interrogate?

A Yes, sir.

Q As a matter of fact, such that it kind of surprised you, didn't it?

A Yes, it did.

Q It was almost that you had to keep him from talking rather than the other way around, isn't that correct?

A That is correct.

Q Now, Officer Jones, when you all went out to

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TELEPHONE 296-8870

1 the house to get the pictures, he is the one
2 who actually found the pictures, Mr. Freeman?
3 And he gave them to the police, isn't that
4 correct?
5 A That is correct.
6 Q He never made any effort to hide or secrete
7 anything in any form, did he?
8 A No, sir.
9 Q You all hadn't been able to locate them be-
10 fore he came there, is that right?
11 A No, sir, we hadn't located them.
12 Q As soon as he came in - moments later, the
13 pictures were available?
14 A That is correct.
15 Q And he had no objections or made no efforts
16 in anyway not to show them to you?
17 A No, sir.
18 MR. WOOD: That is all, Your Honor.
19 THE WITNESS STANDS ASIDE
20 MR. BARRICK: The Commonwealth rests, Your
21 Honor.
22 THE COURT: The Commonwealth rests.
23 MR. STONE: We have a motion, Your Honor.
24 JURY OUT
25 MR. STONE: Your Honor, at this point, we would

1 move to strike the Commonwealth's evidence on the
2 following bases with no further challenge that
3 sufficient proof has been offered at this stance
4 that the defendant did take ghe pictures and that
5 they were sexually explicit and were of a child
6 under 18 years of age; however, with regard to
7 whether the photographs are obscene for children,
8 we renew our previously voiced objection to the
9 vagueness of the statute, the statutory definition.
10 I point out to the Court the only evidence upon
11 which the jury can conclude that these photographs
12 appeal to the prurient interest of children as
13 determined by the experience of children in the con-
14 temporary community has been the testimony of Dr.
15 Runquist.
16 Dr. Runquist is a practicing clinical child
17 psychologist who has seen a number of children;
18 however, given this standard, Your Honor, Dr. Runquist
19 did admit that in his opinion that children under
20 4 have no prurient interest and that the prurient
21 interest of children vary extensively with age and
22 vary to some extent with regard to sex.
23 Dr. Runquist's opinion was based solely on the
24 children that he had seen in a clinical capacity
25 over the last two years, and with regard to those

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1 who were sexually abnormal, Your Honor.

2 And he testified that he did not know whether

3 those children when they were brought to him were

4 more easily aroused than normal children - that was

5 the extent of his testimony.

6 I specifically asked him and he said that he

7 simply did not know whether these children were more

8 easily aroused than others or whether they had simply

9 been exposed to more arousing situations or just

10 what the circumstances were, and based upon that

11 testimony, Your Honor, it is the defendant's position

12 that Dr. Runquist has not testified as to the general

13 experience of children in the contemporary community.

14 He has testified solely with regard to the

15 children that he has seen and all of whom had been

16 brought to him for some abnormality, or some family

17 problem or something in that regard.

18 We submit that the children who have been taken

19 specifically to the psychiatrist or psychologist at

20 the hospital are not a normal sampling of the children

21 in their own community and based upon that, Your

22 Honor, we take the position that evidence - that

23 opinion of Dr. Runquist is insufficient as a matter

24 of law for the jury to conclude beyond a reasonable

25 doubt that these pictures appeal to the prurient

1 interest of children as required by the statute.
2 There is simply no evidence as to what normal children
3 in a contemporary community would consider prurient
4 expecially, given the additional information that
5 certain children specifically those under 4 have no
6 prurient interest.
7 So, at least with regard to all of the children
8 in the Charlottesville community between the ages
9 of 1 and 4, these pictures do not appeal to their
10 prurient interest by the Commonwealth's own evidence,
11 and we submit that given the vague nature of this
12 statute and the definitions contained therein that
13 it is a criminal statute which should be strictly
14 construed against the Commonwealth in favor of the
15 defendant.
16 And given that definition, it should be con-
17 sidered as broadly as possible in favor of the de-
18 fendant in that Dr. Runquist has supported the
19 position that there is more than a reasonable doubt
20 that these pictures are not obscene for children as
21 defined, and we would move to strike on that basis.
22 THE COURT: All right, Mr. Barrick?
23 MR. BARRICK: I don't care to respond, Your
24 Honor.
25 THECCOURT: I think the evidence is sufficient

to go forward at this time and I overrule your motion. Shall we proceed with the defendant's evidence?

MR. WOOD: We note our exception and need to confer very briefly with Mr. Freeman.

RECESS

JURY IN

MR. WOOD: I call Mr. Freeman.

JOHN MIDDLETON FREEMAN, the Defendant appearing on his own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WOOD:

Q Please state your full name, please?

A John Middleton Freeman.

Q How old are you, Mr. Freeman?

A I am sixty-one years.

Q When were you sixty-one?

A August the 14th.

Q Where are you now residing?

A At 3201 Monument Avenue, Richmond, Virginia.

Q With whom are you living at this time in Richmond?

A I am living with my father's sister, my aunt, Mrs. James Branch Cabell.

1 Q Where were you living before you began living
2 eith Mrs. James Branch Cabell in Richmond?
3 A I was living in the house of my mother at 12
4 Elliewood Avenue.
5 Q Your mother is Mrs. Alicia Flynn?
6 A Yes.
7 Q How long had you been living with your mother
8 beginning . . . going back in time to the summer
9 of 1979? How many years had you been living
10 with her prior to that time?
11 A Prior to that, '71 or something like that.
12 Q Possibly 8 years?
13 A Yes.
14 Q Were you born and raised here in Charlottes-
15 ville?
16 A Yes, I was.
17 Q Briefly what is your educational background?
18 A Two years of college.
19 Q Where did you attend college?
20 A The University of Virginia and also other places,
21 my art education, 5 years of that.
22 Q Where was your art education?
23 A Most of it in New York City, The Art Students
24 League of which I am a life member.
25 Q Are you by profession an artist?

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TELEPHONE 296-3870

1 A I am.
2 Q Are you also a writer?
3 A Yes, I am.
4 Q How long have you been an artist?
5 A Ever since I can remember - 5 years old, I was
6 drawing but I wasn't making any money until I
7 was 12 or 13.
8 Q Do you have any other source of income now other
9 than your artistic and writing work?
10 A Yes, I do. I receive from the Veteran Adminis -
11 tration, a compensation for a disability of 30
12 per cent.
13 Q Do you admit, Mr. Freeman, that you took the
14 pictures of Jennifer that you have seen here
15 in the courtroom this morning?
16 A Yes, I do.
17 Q When were those pictures taken? Let me rephrase
18 that, were all of the pictures taken at the
19 same time?
20 A No, sir, they were not.
21 Q When were the nude black and white pictures
22 taken?
23 A They were taken either in June or July of 1979.
24 Q When were the nude color pictures taken?
25 A They were the last and they were taken in July.

1 Q Of 1979?
2 A Yes, in 1979.
3 Q I hand you several pictures, Commonwealth's
4 Exhibit Number 1 depicting the child with what
5 looks like a Scottie dog, can you recall when
6 that picture was taken?
7 A Well, it was taken in 1978, in the fall or late
8 summer of 1978.
9 Q I hand you, Commonwealth's Exhibit Number 2
10 which is again a picture of a child with a
11 Scottie Dog. . .
12 A The same time - same time.
13 Q I hand you, Commonwealth's Exhibit Number 3
14 which shows Jennifer with a pink jacket and blue
15 trousers, do you recall when that was taken?
16 A I would say that was taken in January of 1979,
17 or pretty close to that.
18 Q Now, I hand you, Commonwealth's Exhibit Numbers
19 4, 5 and 6, all of Jennifer, as you look at
20 them, tell the jury when they were taken?
21 A These were the last pictures that I took of
22 Jennifer and they were in July of 1979.
23 Q Were they taken before or after the nude
24 pictures?
25 A They were taken after the nude pictures.

Q Did you show all of these pictures to Mrs. Malcolm?

A No, I did not.

Q You did not show them all to her?

A No, I just took her certain ones.

Q Can you recall today which ones you did show to her?

A Well, I would have said that I showed all probably of the black and white and I would guess most of the color ones.

Q Did you show her both the nude pictures and the pictures of the children with clothes?

A I am not positive. I could have shown some with clothing on but I don't remember.

Q When and under what circumstances, did you first meet Jennifer Malcolm?

A She and her little playmate Michele were walking down the street and saw me with a camera. I had seen them a number of times at a distance, and they stopped . . . they said, how about taking our pictures . . . I think that was the first time that I got to know them. They were both standing with signs advertising the Her and Sir business of her mother.

Q Was this out on the street in that area?

1 A Yes, right.
2 Q Where was your mother's home where you were
3 living in relationship to the Her and Sir Beauty
4 Salon?
5 A It is across the street but diagonally, oh,
6 a 150 feet, I guess.
7 Q What professional activities were you then
8 engaged in, Mr. Freeman?
9 A Well, I was doing some portrait work and I had
10 commissions to do, repair work on a frame that
11 is generally what I was occupied with and some
12 photography but I didn't get paid too much for
13 that.
14 Q How frequently during this course of time,
15 would you see Jennifer with her friend, Michele?
16 A Well, it would differ . . . sometimes a week
17 would go by and I wouldn't see them and at other
18 times it would be almost every day that I would
19 pass them on the street. We all went to the
20 Corner.
21 Q Now, what type of pictures did you take of
22 these children when you first began to take
23 pictures of them?
24 A Well, just pictures . . . if they happened to
25 be on the front porch, I would take a picture

like that one that I showed you. There was a time when, after I had given the picture to Craige Stone, she was the spokesman mainly for the group. I had given it to her as a Christmas present and she was very pleased and the children were very pleased and came to me, particularly Michele . . . particularly Jennifer, Michele was always in the back but Jennifer came upstairs one day and saw me polishing my shoes and she had her blue jacket on and I said, you sit over there, honey, and I will photograph you . . . you have a terrific color combination. This . . . that picture is one in that group there and that is the one that was liked in New York.

Q My question, if you have forgotten, Mr. Freeman, what type of pictures that you took? But, let me ask you this, did you show any of those pictures to Mrs. Malcolm or Michele's mother?

A Of course.

Q Describe their reactions at that time with these pictures?

A Very pleased with them.

Q Did you give any of these pictures to either of those parents?

1 A Yes.
2 Q Were there ever any drawings made by you of
3 either child?
4 A Later on, yes, there were.
5 Q And what did you do with the drawings?
6 A I sold them. The child said, my mother will
7 buy it.
8 Q To whom did you sell it?
9 A I sold it to Susan Malcolm. She gave $5.00
10 to her daughter to pay me and then her
11 daughter gave it to Michele as a present.
12 Q Describe briefly what it showed?
13 A They were conte' sketches, some similar to
14 some that I have here but they were a little
15 bit larger. I used better paint. I usually
16 get about . . .
17 Q Was there any nudity in any way involved?
18 A Absolutely none, absolutely none.
19 Q Whose idea was it for Jennifer to visit in
20 your home?
21 A They both came to the door and knocked. This
22 was a few days after Valentine's Day . . . they
23 pushed me in the door, grandpa, sit down . . .
24 they had already made their entrance then.
25 I don't know, can you say that I was trying to

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1 keep them out? They came in on their own and
2 they liked being there.
3 Q Did their visits ever cause any problems for
4 you?
5 A Yes, sir, they did.
6 Q State for the jury what problems their visits
7 caused?
8 A Well, I was working on a painting of the Civil
9 War and my palettes are usually pretty wet and
10 covered with paint. Children don't know how
11 to walk around a studio and you have to watch
12 them and I told them to be careful, but they
13 were curious and I got them out the first time
14 as quickly as I could but they came back again
15 as they were still very curious about a studio.
16 And my mother objected to the noise that they
17 made coming in.
18 Q What other things besides the pictures and the
19 drawings did you do at that time with the
20 children?
21 A Well, at that time and that covers a period of
22 two, three or four months, February, March and
23 April. By May some rather unusual things were
24 taking place, to me anyway. They were bringing
25 me drawings and they were standing on the porch

1 and saying things to me.
2 Q What things were they saying and what type of
3 drawings were they bringing?
4 A Well, the first set of drawings that they
5 brought me were ink drawings, similar to the
6 valentine that they had given me but this time
7 they were explicit drawings of themselves and
8 me and them doing certain things.
9 Q What type of things? Were they sexual or not?
10 A They were sexually oriented, yes, and they
11 would write words like grandpa can you help
12 us spell these words . . . and they were, dog,
13 cat, and rat, the usual, and then when they
14 got down to spelling the state, they mis-
15 spelled it . . . in pencil they misspelled it.
16 Q How did they spell Virginia?
17 A Vagina.
18 Q What other words did you notice that they
19 misspelled?
20 A Pencil was spelled penis.
21 Q Did you ever do anything with them outside,
22 at the University?
23 A I used to go out and dance with them and go to
24 the pinball machine with them. They loved to
25 play pinball at Poes' and at the West Virginian.

1 There were lots of these machines and their
2 mother would give them a dollar. I finally had
3 no money. I gave them at first two or three
4 dollars to play these machines, but then we
5 would dance together. They were very good
6 dancers . . . excellent. They taught me how
7 to do disco.
8 Q Mr. Freeman, I am going to refer you now to
9 the nude pictures in evidence of Jennifer and I
10 want you to tell the jury why you took those
11 pictures?
12 A Well, by the time I had found that children
13 at that age knew more than I ever knew at that
14 age, and I was curious to know what were they
15 going to do next, I took the first set of draw-
16 ings, I think that I had six of them, up to
17 show David Ward, who is our minister, and I
18 showed these to him at a party . . . that we had
19 a party at Dr. Buxton's and he said . . .
20 Q Who is Dr. Buxton, is he your psychiatrist?
21 A Dr. Buxton is an old friend of the family and
22 he has been a very helpful psychiatrist in my
23 case when I am depressed . . .
24 Q Well, my question is, why you took the pictures?
25 A Well, we are leading up to it. He said not to

1 worry about it but I was worried because I
2 knew this could lead to some other things.
3 When the children showed this particular sexual
4 interest in me I thought that there ought to be
5 something done and I told my mother to keep
6 her out . . . keep these children out,
7 particularly Jennifer. Now, Jennifer, she had
8 already shown signs of liking me . . . she told
9 me that her mother needed a boy friend. I said,
10 well, I am not that boy friend, your mother
11 is nice to me, but she won't take me. I hadn't
12 asked her to do more than to have a cup of
13 coffee, but Craige Stone, the other girl who
14 had agreed to have coffee, but we never got
15 together . . .
16 Q I understand, but if we may go back, Mr. Freeman?
17 A The reason why I took the pictures?
18 Q Yes?
19 A The girl comes into the house and wants to use
20 the john upstairs. She knows she is forbidden
21 to come in, she goes upstairs and uses the john.
22 She pulls down the shade and she says, grandpa,
23 I am going to be a Playboy girl and you photo-
24 graph me, you have got a camera, you have got
25 film in it. I said, no, get out, and I got her

1 out. The first time I got her out. The second
2 time she came back, I thought that I had better
3 photograph her this time.
4 Q Slow down a little. You say that the first
5 time you got her out, tell the jury what you
6 mean by the first time you got her out?
7 A Well, when she comes in and uses an excuse
8 that she wants to use the bathroom, I said,
9 well, you know where it is, go on up there and
10 use it and come on down and it is . . .
11 grandpa, I can't open the door, I can't open
12 the door. I went up and opened the door for
13 her. Then she . . .
14 Q Excuse me, Mr. Freeman, my question was, what
15 you meant by saying that the first time you
16 got her out?
17 A Well, the first time I got her out, she did
18 her duty and she got out. She was pestering
19 me. But she came back again . . .
20 Q How . . . excuse me, go ahead?
21 A She came back again, twice again, the second
22 time she came back I thought, there is something
23 very strange about this type of behavior and I
24 am going to make a record of it, no matter
25 what, because no one will ever believe me if I

1 tell them, so I did. I recorded it.
2 Q Explain what you mean, made a record, so the
3 jury will understand what you mean by that?
4 A Well, there are other things in photography
5 besides art photography. There is a record of
6 what happens that people cannot see any other
7 way except as a photograph. They can believe
8 a photograph where they won't believe your
9 word or testimony to that effect.
10 Q Who did you intend to confront or show these
11 pictures to?
12 A At first I thought about it and I thought that
13 I didn't have to show them to anybody. The
14 little child wanted me to have me give them to
15 her so that she could show her boy friends but
16 I refused to do it. But, then I thought the
17 only other person who should see these should
18 be her mother.
19 Q Why did you feel that way?
20 A Because the mother ought to know what the child
21 was doing and if she didn't know, she ought to
22 know and if she didn't like it, then that was
23 just too bad. We would have to do something
24 about it because it seemed to me that the
25 children had already gotten some other children,

1 older boys, in trouble and she did not have the
2 best reputation, this particular one, and I
3 knew this from some friends, little girls and
4 boys, so to show up her promiscuity, if that is
5 what it would be called, I would say probably
6 that is the best word . . . a little child
7 doesn't know what promiscuity is . . .
8 Q Did you regard what she was doing as promiscuous?
9 A I would say, yes, but I wouldn't say that the
10 pictures to me were obscene, but what she was
11 doing was promiscuous . . . asking me to go to
12 bed with her . . . how could I do that?
13 Q Did you ever harm or injure either of these
14 children?
15 A Of course not, of course not.
16 Q Did they ever make requests in that regard?
17 A Not to harm them, no, but they did make requests
18 which would have harmed them had I done it, yes.
19 Q How many times?
20 A Oh, any number of times over a period of two
21 months.
22 Q Why didn't you report this to her mother?
23 A Well, her mother was very busy and every time
24 I tried to get over there to talk to them
25 there was some excuse . . . I can't see you . . .

1 I was never able to see them, but finally, I
2 was determined the day before I showed the
3 pictures to talk to Michele's mother, Mrs.
4 Stone, and that is when I decided that I had
5 better do it the next day.
6 Q Who developed those pictures?
7 A Eastman Kodak, Rochester, and possibly another
8 place over here that Mincer deals with, over
9 in the valley, I don't know.
10 Q Did you participate at all in the development?
11 A No, in no way.
12 Q Did you ever intend to profit in any way
13 financially from these pictures?
14 A No, I certainly did not.
15 Q Did you ever intend to gain in any way from
16 these pictures?
17 A Absolutely not.
18 Q Did you ever intend to use any of the nude
19 pictures in any book that you were working on?
20 A Absolutely not.
21 Q You heard Mrs. Malcolm's testimony in which she
22 accused you of saying to her that you were going
23 to trade these pictures of her daughter for
24 publishing rights. Would you please tell the
25 jury what you said to Mrs. Malcolm and what she

1 said to you on that September day?
2 A Yes, sir. I said, Mrs. Malcolm, I have some
3 pictures that I think you should see of your
4 daughter and she didn't know what I was going
5 to show her and I showed them to her and I
6 said, let me ask you a question since these
7 things don't appeal to you, why do you show a
8 girl that age Playboy and Playgirl magazines,
9 she said they are going to see them anyway . . .
10 Q Excuse me?
11 A They are going to see them anyway.
12 Q Why did you actually show the pictures to Mrs.
13 Malcolm?
14 A To show the mother of this little girl how the
15 little girl was promiscuous and doing something
16 that she shouldn't do . . . and to see what she
17 could do about it.
18 Q Did you have or want the permission of Mrs.
19 Malcolm to use certain pictures in a book?
20 A Not in a book, but I did state that the man
21 that I had been talking to first, Don List,
22 might be interested in seeing what this little
23 girl's character was like after she had been
24 seen by him clothed. I thought years from now
25 or maybe next month if she gives me permission

1 if I could get to New York, but that wasn't the
2 important thing . . . the important thing was
3 to show why she would show a child, allow a
4 child to go out and show her Playboy and stir
5 up her . . . to the degree that she would come
6 to me and say, you are a great artist, you
7 are a great photographer . . . make me famous.
8 I am a beautiful thing, make me famous.
9 Q What did Mrs. Malcolm say to you on that
10 occasion?
11 A She told me to hold on to them . . . I said,
12 you know I can't keep on making pictures
13 without getting something back and before I got
14 to the point to say, how about $4.50, or what-
15 ever the fee would have been for the film and
16 negatives . . .
17 Q Do you mean $4.50?
18 A Yes, $4.50 . . . before I could even get that
19 out of my mouth, she said, these . . . don't
20 show these to anyone, take them back and put
21 them away and don't show them to anyone.
22 Q Did she ever ask you to give these to her?
23 A No.
24 Q Are you sure of that?
25 A Well, if she did I never heard it, but if she

1 did ask me, I might have thought here again,
2 people are asking me for things for nothing.
3 I am giving things away and I am going broke
4 doing it. But, I do not remember that she asked
5 me at all and I did remember thinking why does
6 she want them if she thinks they are obscene
7 and she said keep them, I don't want them.
8 I distinctly heard her say, I don't want them.
9 Q Would you have given her all of these pictures
10 if she had given you the $4.50?
11 A Every one . . . what use were they to me?
12 Other than to prove a story, but if she took
13 them that would have admitted that she could do
14 something about the child.
15 Q What did you plan to do with these pictures
16 after you left Mrs. Malcolm's location that
17 day?
18 A I had no plans to do anything with them. I
19 wanted her to tell me what to do . . . she said
20 to lock them up and not show them to anybody,
21 that was good enough for me, so I did it.
22 Q Where did you lock them up?
23 A I took them and put them in a drawer out in
24 the hall.
25 Q Would one opening the drawer readily see them

1 or what?
2 A Well, they were under some other things, but
3 there were a whole lot of other things in the
4 drawer, there were pictures and junk and stuff.
5 Q Before that day, had you ever shown the pictures
6 to anyone else?
7 A I don't have any memory of it. I might have
8 shown it to one person and he thought it was
9 artistic and that is the only person . . .
10 might have been one person but I don't think
11 . . . I don't even recall . . . yes, I do recall,
12 I did show it to one person and then brought it
13 back because I said I don't think I should
14 ever show it to anyone and that is the truth.
15 Q Did you ever try to sell these to anyone?
16 A Never. That is very bad for photographers to
17 do that. No decent photographer does that, I
18 don't. We are asked to do things often but I
19 just don't do them.
20 Q Do you consider these pictures obscene?
21 A I do not.
22 Q What, if anything, could be added to the pic-
23 tures in your opinion to make them obscene?
24 A Oh, you would have to bring in all sorts of
25 things and I certainly wouldn't do that.

1 How can you take the naked body that God gave
2 us and call it obscene unless it is involved in
3 something that is obscene?
4 Q Don't you feel, Mr. Freeman, that you should
5 distinguish between a five year old child and
6 an older person?
7 A Yes, definitely. A five year old child at a
8 beach doing this sort of thing is not thought
9 of as anything, at least I have seen enough
10 of them so I am not impressed by them. But her
11 attitude, I think, was a responsible attitude
12 put on by someone else telling her to do this.
13 How could she do it out of her head unless she
14 was told to do it?
15 Q Did you encourage her in any way to do this?
16 A I certainly didn't, but probably my pictures
17 were enough encouragement. There were drawings
18 but that was enough encouragement, personally,
19 I did not encourage her. They were the ones
20 who gave me the candy and kissed me and things
21 like that . . . they gave me the candy, I
22 didn't give them the candy.
23 Q Do you feel that the taking of these pictures
24 by you was wrong?
25 A I think that I could have used better judgement,

1 but I don't think it was wrong.
2 Q Why don't you think it was wrong?
3 A It was evidence of what our social system today
4 of youth coming into knowledge before time and
5 particularly for Charlottesville and I don't
6 think that Charlottesville is ready for this
7 type of education of four and five year olds
8 in this type of thing. Maybe it is, but it
9 isn't in view of what I have learned about the
10 way things are going, I think this is the
11 evidence that I wanted to show, proof that this
12 goes on. If I am wrong, then I am wrong but
13 at least I had the proof . . . who would take
14 my testimony if I told them? They wouldn't
15 take it without proof and a photograph is proof.
16 Q I am going to hand you some things. First, I
17 am going to show them to Mr. Barrick. Mr.
18 Freeman, I am going to hold this up so that the
19 jury can see it, tell the jury what this is,
20 that I am showing?
21 A This is a photograph of my portrait of Miss
22 Savage who was one of the librarians at the
23 Alderman Library a number of years ago. And
24 this is Colonel Charles Christian Wertenbaker
25 who was . . . it was in 1887, it was a large

1 photograph. I did a painting in color, he was
2 my great-grandfather.
3 Q These portraits that you painted, you had
4 pictures of them?
5 A Pictures of my oil portraits.
6 MR. WOOD: I offer these in evidence.
7 THE COURT: No objection, so received.
8 REPORTER'S NOTE: Whereupon, said pictures were
9 received in evidence and marked the Defendant's
10 Exhibit Number 2.
11 BY MR. WOOD:
12 Q Would you briefly tell the jury who these
13 people are or what this is?
14 A I will start at the bottom here . . . this is
15 a young lady who, in 1967, she worked over at
16 the pharmacy at the Dart Drug or one of the
17 places out on Barracks Road. This is Mr.
18 Keogh [?], the late Mr. Keogh. I did his
19 portrait in 1970.
20 Q Excuse me . . . Mr. Freeman, these are photo-
21 graphs of portraits that you have painted?
22 A These are photographs of the originals that are
23 life size. This is a lady that I did years
24 ago down in Norfolk. She is a relative of a
25 friend of ours. This is some work that I did

1 up in New York thirty-five or forty years ago.
2 It is now in a very fine home in Maryland. This
3 is my uncle, Tom Wertenbaker, a famous histor-
4 ian at Princeton and his wife has it now.
5 MR. WOOD: This would be Defendant's Exhibit
6 Number 3.
7 THE COURT: So received.
8 REPORTER'S NOTE: Whereupon, said photographs
9 were received in evidence and marked the Defendant's
10 Exhibit Number 3.
11 BY MR. WOOD:
12 Q I am going to hand you these sketches as a
13 group and ask you to briefly state, did you do
14 each of these?
15 A Yes, I did.
16 Q When did you do these?
17 A This was done a few months ago, right here.
18 I did a pastel of the same girl. This is
19 another, she works out here at City Hall. This
20 is a child of one of the workers at the Univ-
21 ersity, I forget which, I think she is a cook
22 . . . very good, excellent.
23 Q Was this done at Poe's?
24 A It was done at Poe's, when she worked at Poe's
25

about five months ago and this is a child and I don't know who she was . . . Sarah just came in with her parents.

Q Was that in March of 1979 at the Virginian?

A Right.

Q Were these sketches that you mentioned that you sold to Mrs. Malcolm of her daughter and to the other lady of her daughter, were they similar to these sketches?

A Similar to the brown ones but a little bit larger and done with red chalk.

MR. WOOD: I offer these as Defendant's Exhibit Number 4.

THE COURT: Number 4?

MR. WOOD: Yes, sir.

THE COURT: So received.

REPORTER'S NOTE: Whereupon, said sketches were received in evidence and marked the Defendant's Exhibit Number 4.

BY MR. WOOD:

Q How did you learn that the police were at your home on Elliewood Avenue on the September date that has been mentioned?

A I had left home after eating and I went down to the Mineshaft where I used to sketch quite a

1 bit and I was having a beer. I had already
2 had three or four beers when little Charlie
3 Taylor came in and said, Monk Melton is looking
4 for you.
5 Q Who is Monk?
6 A Monk is the policeman at the Corner at the
7 University. He is well-known and well-liked
8 so I heard that and I beat it out of there real
9 fast, left my beer and I had to hunt for Monk.
10 I went up the usual way but when I got to
11 Elliewood Avenue . . .
12 Q Would this be up towards the University itself?
13 A Yes. I crossed over the back way which is the
14 quickest way knowing that he was probably near
15 mother's house.
16 Q Did you run into him?
17 A I ran into him on the street right on Elliewood.
18 Q What did you say to Monk when you saw him?
19 A I said, what is going on and he said, oh, they
20 want to find some pictures. I said, oh, yes,
21 I know about the pictures but I didn't know it
22 was going to be that way. I didn't know that
23 she had gotten charges out.
24 Q What statements did you give, if anything, to
25 help the police locate the pictures?

A Well, when they asked me for them and I saw that they were turning the room upside down, well, they were very nice but they weren't turning things upside down, but they were beginning to and had gone into things and taken a lot of my stuff apart. I said, if you had gotten me first, I would have taken you right directly to the pictures, which is what I did.

Q Did you have any intent to use any of these nude pictures for any book?

A No, I didn't.

Q Did you intend to barter or use them in exchange?

A Never, never.

Q Did you intend to in any way proffit from them?

A No, in no way.

Q Were you paid for the pictures that you gave to Mrs. Malcolm earlier in 1979?

A I don't recall being paid for any of them, but I could have been paid something. I just don't remember but I never sent her a bill . . . not for that, anyway.

MR. WOOD: Your witness.

CROSS EXAMINATION

BY MR. BARRICK:

1 Q Well, your intention wasn't to use them in a
2 book or to sell them or anything like that,
3 I believe, you said your intention was to show
4 them to Mrs. Malcolm?
5 A Yes.
6 Q And so that she would have proof or she would
7 have some evidence . . .
8 A Some evidence.
9 Q As what her daughter was doing?
10 A Right.
11 Q And that was the only reason that you took them?
12 A The only reason, what more could I have?
13 Q Now, I believe that you were at your mother's
14 home throughout the summer in 1979?
15 A Yes, I was.
16 Q And Mrs. Malcolm was at the Sir and Her Beauty
17 Shop?
18 A Right.
19 Q Throughout the summer of 1979?
20 A Yes.
21 Q And you say these photographs right here are
22 the last ones that you took?
23 A Yes.
24 Q Of Jennifer Lee?
25 A Yes, these were the very last ones. She is

1 clothed and trying to make up. This is a
2 picture of her making up on the front porch.
3 Q These three and these three I assume that they
4 were taken at the same time?
5 A Yes, within an hour of each other.
6 Q Now, according to the back of these photographs
7 they were developed in July of 1979, Mr.
8 Freeman?
9 A That is right.
10 Q If you had these available to you in July of
11 1979 and if your purpose was to show Mrs.
12 Malcolm what her daughter was doing, why did
13 you wait until September the 19th?
14 A I had a very good reason.
15 Q What is that?
16 A Do you know that the children weren't around
17 but they had asked me for these pictures and I
18 had found out that if I was to give them to
19 them, it would be spread all over the place and
20 I would have been arrested just like that? How
21 are you going to explain having pictures of
22 this nature? How would you if you had pictures
23 of this nature, what would you do to them?
24 Dig a hole and bury them? Now, if I had done
25 that, let's consider if I had done that . . .

1 I would have no evidence to tell people about
2 this child and the activities that she and her
3 friends were doing. No one would believe me,
4 my credibility in 1979 was nil . . . at least
5 in that neighborhood as far as saying things.
6 I was supposed to be a writer of fantasy. This
7 is not a fantasy, this is the truth, but who
8 would have believed me if I didn't have this to
9 show to back it up because she did exactly what
10 I thought she wouldn't do. I thought that she
11 would say, it is a cute little kid, all right,
12 but there is no need . . . no need to get
13 excited and I said, well, I am not excited . . .
14 instead, she saw them as obscene pictures of her
15 daughter. Why? She sees her daughter all of the
16 time. What is obscene about her daughter?
17 Only because I took them, but under what condi-
18 tions? The girl comes to me and begs me to
19 take them, isn't that unusual? Usually, it is
20 the other way around, the photographer begs a
21 child to pose. It was a very unusual situation.
22 This is evidence of a very unusual situation.
23 Q I don't know that you really answered my
24 question, but you said that these black and
25 white, which are Commonwealth's Exhibits 10, 11,

12, and 13, they were taken before?

A They were taken before and I put down . . . I had it reversed, these were the first.

Q These black and whites were first?

A Right.

Q And they were taken before and developed? I will ask you this, they were taken for the same reason, to show Mrs. Malcolm?

A A part of the whole thing.

Q Then why didn't you show these pictures to Mrs. Malcolm until September the 19th?

A Mrs. Malcolm . . . do you know what their vacation times are? Many times they were away during that time. Sometimes a whole month, all of July, I think all or part of August, they were there and they weren't there and they went away in September. They came back. I have other things to do and these pictures were not of any importance to me until I could meet and confront her, so when she finally came back I did confront her.

Q Where did you keep those pictures?

A I kept them in a drawer. I had two drawers I kept them . . . in my room at first, then a little later, I kept them in the hall.

1 Q Where are the negatives of those pictures?
2 A I know that the negatives that I turned over to
3 the police are missing or some of them . . .
4 I turned over quite a few negatives that are
5 missing.
6 Q Well, you are not suggesting that you turned
7 over any more negatives to the police officers
8 than these three, are you?
9 A I certainly am. I turned over at least twice
10 as many . . . possibly . . . where are the
11 color negatives that I turned over?
12 Q I don't know, that is what I am asking you?
13 A Well, they were turned over to the police and
14 I am not a police officer. You ask them what
15 happened to them.
16 Q Have you searched your home and room since this?
17 A I have. See, I told them that everything was
18 there. I said, I will search until I find what
19 is missing because I knew there was one or two
20 more negatives that should be there and I
21 finally found them . . . after a long time I
22 finally found them. Mr. Boyle, who was my
23 lawyer for the first time last year, suggested
24 that I not take them to the police, but to keep
25 them elsewhere in the house, so I did that.

1 Then, I got another lawyer and showed them to
2 him and he said keep them, don't give . . . and
3 Monk said don't give them any more, but what
4 happened to the other negatives, that is what
5 I want to know.
6 Q Now, this is Commonwealth's Exhibit Number 1.
7 There is writing on the back . . . Jennifer,
8 age 5 after her birthday. That is in your hand-
9 writing, isn't it?
10 A Right.
11 Q You wrote that on the back of the picture?
12 A Yes, I wrote . . .
13 Q To identify that this picture was taken of
14 Jennifer Lee Malcolm after her 5th birthday?
15 A Yes, I would say it was after . . .
16 Q All right?
17 A A year later when she would turn 6 . . .
18 Q In a different ink, but that is also in your
19 handwriting?
20 A Yes.
21 Q Jennifer Malcolm will be 6?
22 A On July 25th.
23 Q Right . . .
24 A That was written a year later.
25 Q Why did you write that down?

1 A Because these pictures were to be identified
2 when people look at them, they want to identify
3 them.
4 Q But what was the significance of her birthday?
5 A What do you mean?
6 Q What was the significance of her birthday?
7 A She invited me to her birthday.
8 Q Oh, I see.
9 A I just wanted to keep it straight.
10 Q You wanted to have a record of her birthday?
11 A Yes, I was supposed to give her a present and
12 all the rest.
13 Q What did you do when the girls gave you the
14 little valentine kissing candy?
15 A I put them on the top shelf and gave them back
16 to them a week later.
17 Q Did you kiss them?
18 A No, I did not.
19 Q Commonwealth's Exhibit Number 3 has some writing
20 on the back of it?
21 A Yes.
22 Q Isn't that in your hand, sir?
23 A Yes.
24 Q You wrote that?
25 A Yes.

1 Q Would you read that to us?
2 A The Saint Paddy's Day book is dedicated to
3 this young woman . . .
4 Q All right?
5 A Don List gave me that idea.
6 Q Well, what is the Saint Paddy's Day book?
7 A The Saint Paddy's Day book is a book that has
8 been accepted by publishers in New York.
9 Q This is of your authorship?
10 A That is right.
11 Q And this is the book that you sent to New York?
12 A I took to New York. I wouldn't send it.
13 Q All right. It is a children's book?
14 A Adult children's book, that is what I call it.
15 Q This doesn't have any pictures in it, or
16 illustrations?
17 A No, the only ones are in the front. They told
18 me they would have to take out . . . there were
19 photographs . . . they wanted all to be draw-
20 ings . . . mostly drawings are in there. It
21 has in it two photographs or rather it has one
22 photograph of Jennifer and Michele standing
23 advertising Her and Sir. On the other pages
24 it has three children that I had read stories
25 to for years and they are friends of Powell's

1 children . . . beautiful children who are now
2 at about the same age as Michele and Jennifer.
3 They are the only pictures that will come out
4 but they are photographed clothed, of course.
5 Q Now, what is the subject matter of that book?
6 A Fantasies . . . you would have to see it.
7 I have brought it down many times and I do have
8 it here.
9 Q Maybe you can just tell us . . . fantasies of
10 children?
11 A Fantasies . . . I don't know whether you ever
12 had Grimms fairy stories ever read to you,
13 Mr. Barrick, but it is that type of thing . . .
14 like that, with the new way of looking at them
15 with love instead of hate, trying to bring
16 something out of something that isn't quite the
17 usual. But at the same time I have got truthful
18 things in it like I have got an account of the
19 ship and how it nearly hit another ship out of
20 Rio. I put that in and it is a true story, but
21 I said it was a monster ship . . . a monster,
22 children understand what a monster is and I
23 have other accounts, one about my cat and how
24 that cat liked me and I liked it and how I went
25 off to college and the cat died. It is very

1 tragic and that is about the size of it and
2 the drawings that I made of animals . . .
3 hokey pokey animals, you know . . .
4 Q But, some of your own drawings are in it?
5 A It is still with my own drawings.
6 Q Are these a series of stories?
7 A Yes.
8 Q Some of the story fantasies have to do with
9 sexual fantasies?
10 A I wouldn't say so, no.
11 Q Well, it is a question of opinion . . . some
12 have to do with relationships between males
13 and females?
14 A Yes, a frog has a little girl friend, yes
15 there is a sexual connotation between the
16 mermaid and the frog in growing up to be the
17 prince. You can't get away from that.
18 Q And this book, had you delivered this book to
19 the publisher before you had the conversation
20 with Mrs. Malcolm?
21 A They had seen it, two, for two years . . . I
22 mean they had seen it the year before. I had
23 gotten around to talking . . . no, I am wrong
24 about that . . . not a year before. I went up
25 in January of '79 and showed it to Don and

1 Don was not that interested but his lady friends
2 were. These two ladies said we can't pay you
3 for it . . . we will publish it for free but
4 you will get royalties once it gets out.
5 Q And in the book as it will be published are
6 pictures of Jennifer and Michele?
7 A At present, they are in the front . . .
8 dedicated to these children.
9 Q And you have dedicated the book?
10 A I have dedicated the book.
11 Q To Jennifer?
12 A Yes, to Jennifer because Don gave me the idea.
13 He said, she was such a sweet, beautiful little
14 kid that we had to give her some quality of
15 . . . prominence.
16 Q Have you ever felt as close to any other little
17 girl?
18 A Oh, when I was with Emily at the same time.
19 She was a close friend, yes, and there were
20 other girls, you know, throughout my life and . . .
21 Q What else is written on the back of that?
22 A Well, let's see . . . Jennifer and her friend
23 Michele, the book is dedicated to this young
24 woman, Jennifer and her friend Michele, Jennifer
25 has yet to come to the Virginian with me for

1 drinks . . . well, we used to go down there
2 and have cokes and we used to drink cokes and
3 I would say, do you mind if I drink a beer
4 while you drink cokes . . . and then we go
5 downstairs at the West Virginian when it was
6 open and play pinball machines and dance . . .
7 that is what that meant.
8 Q Do you know why you recorded that bit of infor-
9 mation on the back of that picture?
10 A I record things on all of the pictures that I
11 make if I can remember because years from now
12 I won't have any way of knowing exactly what
13 happened.
14 Q Mr. Freeman, it seems to me from looking at
15 these pictures and your testimony, that you did
16 not at first take any nude pictures of Jennifer
17 and Michele?
18 A That is right.
19 Q When you first started to use them as models
20 you were taking pictures of them outside of
21 your house or on your porch in perfectly
22 natural positions for 6, 7, 8 or 9 year old
23 girls?
24 A That is right.
25 Q With their dog and one thing or other?

1 A Right.

2 Q And you would have these developed and then you

3 would show them to them?

4 A Yes.

5 Q It was only as your relationship with this little

6 girl and her trust in you developed that you

7 were able to take nude pictures of her, isn't

8 that true?

9 A No. Oh, I think it encouraged it.

10 Q Well, the last pictures that you took of her

11 were the nude pictures?

12 A They were semi-nude. The first nude pictures

13 were taken a week before.

14 Q But, I mean within the period of a week?

15 A Well, when a little girl begs you to take these

16 things over and over again and you, of course,

17 you probably have this happen to you every day

18 but it doesn't happen to me . . . children do

19 not beg me to take pictures of them in the

20 nude. Little Michele said I wouldn't do what

21 Jennifer is doing. She told me, I wouldn't

22 do that. I said, well, I wouldn't ask you to

23 do anything and neither would Jennifer ask you

24 to do something that is against your will . . .

25 why does Jennifer want to do this?

Q These pictures, Commonwealth's Exhibits 4, 5, and 6 were taken on the same day as Commonwealth's Exhibits 7, 8, and 9, were they not?

A That is correct.

Q Because in these pictures this young girl has on the same top?

A Yes, that is right.

Q And that she displays in two of these taken on your bed?

A Right.

Q The pictures of her clothed outside on the porch were taken first?

A No, they were not. The reason for that is, you see, she is making herself up and after I would not do what she wanted me to do upstairs, she said, I know grandpa what it is, I need makeup. I said, you don't need anything but just get out of the house and let me take a picture of you if you want with the makeup and then leave and that is why they are the last pictures of her. You know a lot of people . .

Q You took these first?

A Of course, I took them first.

Q These pictures?

A Yes, she said, have you got film in your camera.

1 These are showing her making herself up on the
2 front porch.
3 Q After she had posed?
4 A After she had posed, right. Then, as she is on
5 her way home and she is standing there and I
6 photograph her, she said . . .
7 Q Why did you have to take these, Mr. Freeman?
8 A To prove what she was doing.
9 Q There isn't anything wrong with what she is
10 doing in these pictures, is there?
11 A No, but they were taken after, not before,
12 your mind works like the majority of people
13 . . . the ones clothed have to be taken first,
14 then the nude ones, but it is just the other
15 way around. The nude ones were taken first and
16 then the clothed ones to show that she wanted
17 to makeup to appeal to grandpa more, but
18 grandpa wouldn't hear of makeup making her more
19 sexy. She wanted to be sexy to grandpa and I
20 refused her. That is the point that I am trying
21 to get over. Isn't that unusual? It has to be
22 unusual psychologically for a child, even an
23 adult, but certainly for a child.
24 MR. BARRICK: I have no questions.
25 THE COURT: Any redirect?

1 REDIRECT EXAMINATION

2 BY MR. WOOD:

3 Q The pictures of Jennifer and her friend in

4 the fantasy book are pictures of them fully

5 clothed, are they not?

6 A Yes, exactly, fully clothed.

7 MR. WOOD: No further questions.

8 THE COURT: We will break for lunch at this

9 time.

10 REPORTER'S NOTE: Whereupon, the jury being

11 duly cautioned and warned, the Court recessed for

12 the luncheon period at 12:45 p.m. to return at

13 1:45 p.m.

14 JURY IN

15 JURY OUT

16 MR. WOOD: We would like to recall Mr. Freeman

17 and offer the book which has been the subject of

18 testimony in evidence.

19 THE COURT: All right. Anything else before we

20 bring the jury back?

21 MR. WOOD: No, Your Honor.

22 JURY IN

23 JOHN MIDDLETON FREEMAN, a witness recalled by

24 the Defense, having been previously sworn, was

25 examined and testified as follows:

1 DIRECT EXAMINATION

2 BY MR. WOOD:

3 Q Mr. Freeman, in the examination by Mr. Barrick,
4 he has elicited testimony from you regarding a
5 book of fantasy, I think was the word that
6 was used?

7 A That is correct.

8 Q Fantasy tales for children?

9 A Yes.

10 Q I hand you a book titled Irish Tales for Adult
11 Children, and ask you if that is the book that
12 you testified about?

13 A This is the book that I testified about.

14 MR. WOOD: Your Honor, we would like this admit-
15 ted in evidence as Defendant's Exhibit Number 5.

16 THE COURT: All right.

17 REPORTER'S NOTE: Whereupon, said book was
18 received in evidence and marked the Defendant's
19 Exhibit Number 5.

20 MR. WOOD: Your witness.

21 CROSS EXAMINATION:

22 BY MR. BARRICK:

23 Q Mr. Freeman, this is the book that you wrote
24 for children?

25 A For adult children.

1 Q Sir?

2 A For adult children. There are certain children

3 that have slightly adult type minds.

4 Q This was written for adult type children?

5 A Yes. They go up to sometimes . . .

6 Q What ages?

7 A Well, I would say ages 8 to 25.

8 Q And you are the author of everything in here?

9 A Yes.

10 Q And all of the illustrations?

11 A That is right.

12 Q And here is the picture that you referred to

13 as Jennifer and Michele?

14 A That is right.

15 Q They are together holding up . . .

16 A Her and Sir advertisement.

17 Q What kind of advertisement?

18 A An advertisement for the place of work of their

19 mothers, Her and Sir.

20 Q It says see page 151 . . . and then you have a

21 clipping from the Charlottesville Observer,

22 Uncle Bruce and Irma . . . Michelle, would you

23 like to have a new bike? Why did you . . .

24 A Well, they asked me to illustrate one particu-

25 lar . . . see, I was working for the Observer,

1 Kay Peaslee said one day that we would like to
2 bring out the story of saving trees that may
3 be torn down so I spoke to her the next day
4 . . . to Jennifer and Michele and they fitted
5 into the thing. I just drew a picture of them
6 saving the trees.
7 Q So, you are the author of Uncle Bruce and Irma?
8 A That is correct.
9 Q Where it says by Jean de Centreville?
10 A Jean de Centreville, that is my pen name.
11 Q Oh, I see. I notice that in the introduction
12 to the book under errata, you say, warning,
13 errata. It says, all errors in spelling are
14 left for a purpose, that a child may learn
15 from them and if doubtful, see why there is an
16 importance to small things such as one letter
17 here, another there, etc. One does not learn
18 overnight . . . the author. Then you have
19 warning in a black square . . . old adults may
20 not like this book. You underlined old. What
21 do you mean by that?
22 A Well, there are certain people that don't think
23 that you should tell fairy stories any
24 differently than they have been told in the
25 past, that we should keep everything exactly

1 the same, I have got changes.
2 Q What?
3 A I have got changes in some of them.
4 Q Is that why you put old adults may not like
5 this book.
6 A I would say that is a good reason, yes.
7 Q For what reason?
8 A I just said that there are things in this book
9 that might offend adults. They don't like to
10 have old fairy stories changed.
11 Q Yes. I notice that there is an illustration
12 here, if I can find it, on page 53. It shows
13 a face and then what appear to be some mush-
14 rooms. Isn't that a phallic symbol right there?
15 A That is a mushroom. It could be called that,
16 yes.
17 Q It looks very much like a male penis, doesn't
18 it?
19 A If you think so.
20 Q Well, how did you draw it?
21 A As a mushroom.
22 Q All right, sir. If I could have a second to
23 look through this book. Here is a story that
24 you started on page 155 . . . Commentary and
25 Other Fantastic Thoughts and it reads;

1 They had spent all night together, both as one.
2 The silent night watching them and spreading a
3 cool breeze over their forms as they lay to-
4 gether wrapped in an eternal . . . then you
5 blot something out. This is about King Arthur
6 . . . rubbed her eyes and her lover, King
7 Arthur looked up saying, it has turned into a
8 large flower. Do you think that is fit for
9 children?
10 A I think that children learn about love before
11 adults do.
12 Q By love you mean sexual encounters?
13 A Spiritual love is what a child feels first and
14 then later the physical when he grows older.
15 Q What you are talking about in this first para-
16 graph is physical love, male and female spent
17 the night together as one?
18 A Don't you know that children get together and
19 don't have a physical thing.
20 Q Well, I am asking you what you intended by this
21 first paragraph?
22 A I am trying to show that physical love, if it is
23 properly presented with spiritual love is
24 perfectly all right to a child.
25 Q And what you meant by the first paragraph that

1 a male and female spent the night?
2 A That is what I meant.
3 Q That a male and female spent the night together
4 and had intercourse?
5 A If I implied this, I see nothing wrong with it.
6 Q I am just asking you if that is what you meant,
7 wasn't it?
8 A Of course.
9 MR. BARRICK: I have nothing further.
10 MR. WOOD: I have nothing further, Your Honor.
11 THE WITNESS STANDS ASIDE
12 WILLIAM D. BUXTON, a witness called by and on
13 behalf of the Defendant, being first duly sworn, was
14 examined and testified as follows:
15 DIRECT EXAMINATION
16 BY MR. STONE:
17 Q Sir, would you state your name to the jury,
18 please?
19 A My name is William Dimmock Buxton.
20 Q What is your occupation, Dr. Buxton?
21 A I am a psychiatrist.
22 Q Where are you currently employed?
23 A University of Virginia Medical School and
24 Hospital.
25 Q How long have you been employed there?

ent of Susan Malcolm Date September 19, 1979

I'm Detective Robinson, Charlottesville Police Department. On September 19, 1979, I'm investigating a sex offense involving Mrs. Malcolm's daughter. Mrs. Malcolm will give me a verbal statement on this tape recorder.

"Jennifer is six. This afternoon at 4:30, Middleton Freeman came to visit me at my employer's, which is 22 Elliewood. He had shown me pictures of my daughter posing nude in his house. He told me that he had shown the pictures to an author about publishing his book in reference to selling his book in trade for the pictures. I told Mr. Freeman that I did not approve of what he did or whom he had shown the pictures to, and, asked why he had my daughter in his house to begin with. He told me that in his financial position, he could not give me the pictures, but that he would sell them to me and I told him that at that time, I did not want the pictures or want to have them shown to anyone else. I told Mr. Freeman that at no time did Jennifer have permission to go in his house and he knew she was not allowed in the house at all.

How old is Jennifer? Jennifer is six. Thank you very much.

I, Susan Malcolm, 510 15th Street, Apartment 3, Charlottesville, gave this statement voluntarily in regard to Jennifer.

have read this statement and certify by signature that it is true and to the best of my knowledge and belief.

Susan L Malcolm
(Signature)

TO STATEMENT:

DEFENDANT'S EXHIBIT NO. 1

WITNESS TO SIGNATURE:

Sgt R. Jones

W. R. Robinson

written in longhand or to whom dictated and typed _____.

POLICE DEPARTMENT

CHARLOTTESVILLE, VIRGINIA

DATE: 9-19-79

TIME: 10:45 PM

Name: John Middelton Freeman

Sgt R.O. Jones Det W.R. Robinson of the Charlottesville ce Department.

YOUR RIGHTS

re we ask you any questions, you must understand your rights.

. You have the right to remain silent.

. Anything you say can and will be used against you in court.

. You have the right to talk with a lawyer for advice before we ask you any questions and to have your lawyer with you during the questioning if you desire.

. If you do not have a lawyer and cannot afford one, then one will be appointed for you before any questioning if you desire.

. If you decide to answer questions now without a lawyer present, you have the right to stop answering questions at any time or until after you have consulted a lawyer.

WAIVER OF RIGHTS

ou understand each of these rights I have explained to you? Yes

ng these rights in mind, do you wish to talk to us now? Yes

SIGNED: John M. Freeman

TIME: 10:45 p.m.

ESS: W. R. Robinson

ESS: Sgt R.O. Jones

PLAINTIFF'S EXHIBIT NO. 16

PLAINTIFF'S EXHIBIT NO. 17
PENGAD-Bayonne, N. J.
67-1574
11-13-80

Police Department
Charlottesville, Va.

Date: 9-19-79

Time: 11:07 PM

I, John Middelton Freeman, now make the following voluntary statement to Sgt R.O. Jones and Det W.R. Robinson who have identified themselves to me as officers of the Charlottesville Police Department. There have been no threats nor promise of reward to induce me to make this statement in connection with Taking Pictures ~~of Jennifer~~ ~~Malcolm~~ MALCOMB.

Q. What is the extent of your education:

A. 2½ years College; 5 years specialized Art work afterward

Q. Can you read and write:

A. Yes

As an artist and writer who is still writing a childrens book for a publisher in New York, I am not ashamed to briefly relate my dealings with my youngest photographic model - Jennifer Malcolm. I have known her and her friend, Michele Stone for over a year as neighbors on Ellicwood Avenue. Both were particularly interested in my studio and the young women's drawings (nude studies) of my models during the past 6 months + some even earlier. Jennifer & Michele came to me 10 days after Valentine's Day with a handwritten Valentine to "Grampa" who they said they loved. When I heard the door bell and opened the door they told me to sit down on the sofa and read what they had written. After that, both hugged and kissed me and climbed in my lap. Numerous times afterwards they would climb in my lap and loved to excite me. I eventually excited them only when they pressed me to respond affectionately. I told them of my belief in the beauty of love toward other individuals, but always warned them that if that shows

Statement of John M. Freeman

of affection was to lead to anything that would hurt that individual in any way, it was not a love that Christ taught. They understood and little Jennifer used to say - "what we are doing isn't hurting us or you." And I would say, "Right, and always remember that real love never hurts anyone if done with God's love in us." This was not a physical expression except visually, or when touching through our clothes.

I think that it was approx. the middle of July, 1979, when the color shots were taken. Then maybe a week later for the black and white were shot. John M. Freeman

Witness: W. R. Robinson
Witness Sgt R O Jones

Notes on Jeniffer ~~[illegible]~~ Malcolm Cases
on John Freeman

After advising Mr John Freeman his Rights under the Miranda Warning at appry 10:45 P.M. 9-19-79 I asked Mr Freeman about the pictures of Jennifer Malcolm in the nude and he stated the had taken the pictures. The 1st ones he took was in middle of July in Color and the Black + White was taken maybe a week later. He stated that Jennifer had told him that she wanted to be a model and she went upstairs to his Bedroom and she Closed the Blinds except the one's she couldn't reach and he Closed them leaving (2) open so he could photograph her. Mr Freeman stated that Jennifer got on the Bed and Jumped up + Down and then started poising for him with Clothes OFF. Mr Freeman Stated that he didn't touch Jennifer and that back in May Jennifer and a girl named Michele Stone had wanted to see him in the nude and he went in a Closet and dropped his Clothes and jumped out in Front of them for a Second and the two girls pulled their pants Down + Back up real quick. Mr Freeman stated that the two girls were always trying to get him excited by Rubbing up against him and

that it did get him excited. Mr Freeman Stated the he often fondled the girls both with Clothes on + off and sometime Back in Aug. he mastubated in Front of the Girls. Mr Freeman stated that a no time did he ever pentrate the two girls. Mr Freeman also Stated that at different times the two girls would put thar' nds on his pents and Kiss it. Thr' just before the WUA <.'

Mr Freeman stated that one time he Kissed both girls on their privates in a Vacant Building now occuped by a Pizza house and both girls were Standing up. with their pants Down. Mr Freeman Stated that they were always doing these things in his room, Vacant house (now Pizza house) or at the end of Elliewood in some Vacant garges.

R O Jones

PLAINTIFF'S EXHIBIT NO. 18