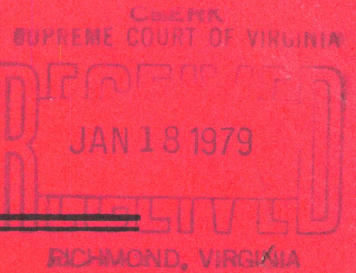


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IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 781233

WILLIAM P. NEWCOMER,

.....Appellant

v.

COMMONWEALTH OF VIRGINIA,

.....Appellee

APPENDIX

Bernard J. Natkin
GANAS & NATKIN
One Court House Square
Lexington, Virginia 24450

Shuler A. Kiser
212 East 21st. Street
Buena Vista, Virginia 24416

COUNSEL FOR APPELLANT

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VIRGINIA
IN THE CIRCUIT COURT OF THE COUNTY OF ROCKBRIDGE

COMMONWEALTH OF VIRGINIA)	INDICTMENT FOR USE OF A FIREARM
)	IN COMMISSION OF MURDER
VS.)	
)	A FELONY
WILLIAM PORTER NEWCOMER)	
D.O.B. 3/29/40)	

This day again came the Attorney for the Commonwealth and William Porter Newcomer, who stands indicted of a felony, to-wit: use of firearm in commission of murder, as charged in the indictment, appeared in Court according to the conditions of his recognizance and came also Bernard J. Natkin and Shuler A. Kizer, Attorneys for the defendant, who were heretofore appointed by the Court and the Jury adjourned from February 21, 1978.

And after having heard the evidence, the instructions of the Court and argument of Counsel, the jurors were sent to the jury room to consider of their verdict. They subsequently returned unto Court without making a finding on the indictment as aforesaid.


JUDGE-DESIGNATE

ENTERED: FEBRUARY 22, 1978

1

VIRGINIA
IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

COMMONWEALTH OF VIRGINIA)	INDICTMENT FOR MURDER
)	A FELONY
VS.)	
)	CASE # 76-288
WILLIAM PORTER NEWCOMER)	
D.O.B. 3/29/40)	

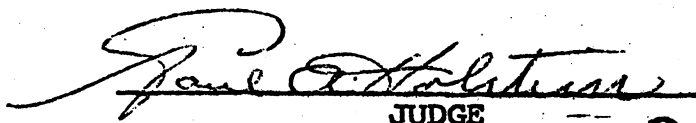
This day again came the Attorney for the Commonwealth and William Porter Newcomer, who stands indicted of a felony, to-wit: Murder, as charged in the indictment, appeared in Court according to the conditions of his recognizance and came also Bernard J. Natkin and Shuler A. Kizer, Attorneys for the defendant, who were heretofore appointed by the Court and the jury adjourned from February 21, 1978.

And after having heard the evidence, the instructions of the Court and argument of Counsel, the jurors were sent to the jury room to consider of their verdict. They subsequently returned their verdict in open Court, in the following words: We the jurors, find the defendant William P. Newcomer guilty of murder in the 2nd degree and we recommend his punishment to be 7 years in prison, Robert C. Huffman, foreman.

Thereupon the defendant, by Counsel, moved the Court to set aside the verdict of the jury on grounds stated to the record.

Whereupon the Court withheld imposition of sentence in the case pending the hearing on the defendant's motion to set aside the verdict of the jury.

And this case stands continued until a later date of this Court and the defendant is released upon a bond in the penal sum of \$25,000.00.


JUDGE

2

ENTERED: FEB. 22, 1978

I Ralph Harrison was at Ham Hensons home last night playing Snake. Around 12 or 1 o'clock ~~Henson~~ a car horn blew and Randy Camden went to the door and seen that it was Vernon Stetson in a car. Vernon Stetson told Randy Camden to come there to his car. When Randy finished talking to Vernon, Randy came into the door and told Ralph (me) that Vernon wanted to talk to ~~me~~ me (Ralph).

I went to the door and Vernon asked me if I had seen Billy Newcomer. I told him no, I have been working 9-11 and I just got here 1/2 hour ago. He (Vernon) said when I see him I am going to take these two hands and break him into. I said Vernon you should forget it and go home to bed and stay out of trouble. Then he ~~he~~ left.

He returned between 1 or 2:30. I was a knock at the door. Billy went over to the window and said it was Vernon. Randy Camden open the door I think. Randy said Billy, Vernon wants to ~~talk~~ talk to you. The door was open

then part the way. Vernon said come
here Billy. Billy said no, you come
in here. About that time Vernon ~~walked~~
walked thru the door into the house.
and he said Billy you lied to me.
Billy said no I did not. At that
moment Vernon pushed his way past
me and Vernon hit Billy several times
in the face and as Billy was trying to get
away from Vernon they both went in to
the floor.

I got to the door and as I got ~~there~~ there
as I turned I seen Billy fall face down into
the door ~~frame~~ ~~faced~~ faced. Vernon stepped over top
of Billy and ~~then~~ Vernon told Billy to be
out of town by Monday. Then as Vernon
was walking off of the porch Billy came
out with the gun, from where he got the
gun I do not know. When I saw the
gun I jumped over the railing and ran.
as I ran I heard ~~Vernon~~ Vernon saying
please Billy. Then I heard the shots.

This is a true statement
from me.

Ralph T. Harrison

7/24/76

8:20 AM

statement of by
Vernon Rapold
police officer.

ORDER

This day came the Commonwealth and the Defendant, by and through their respective attorneys, and the Defendant being present, to argue certain motions to set aside the verdict of the jury heretofore announced in this case, and was argued by counsel.

WHEREUPON the Court, after hearing argument on all the respective motions made, the same being transcribed and made a part of this record and by reference being incorporated herein, is of the opinion that the same be, and they hereby are, overruled.

Accordingly, it is the judgment of this Court that the Defendant, in accordance with the verdict of the jury in this case, be found guilty of murder in the second degree and accordingly he is ADJUDGED, ORDERED and DECREED guilty of murder in the second degree and sentenced to a term of confinement in the penitentiary of Virginia for a term of seven years.

On motion made by defense counsel a stay of execution of thirty (30) days is hereby ORDERED to permit the Defendant to take those procedural steps necessary to perfect his appeal, provided an appeal bond with sufficient surety be entered into in the penal amount of Thirty-five Thousand Dollars (\$35,000.00).

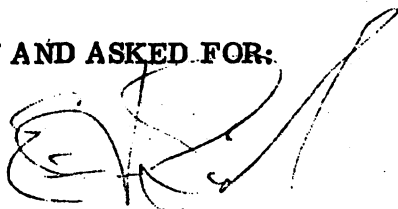
It is further ORDERED that in the event the Defendant properly perfects his appeal the execution of sentence shall be further stayed until such time as the Supreme Court of Appeals acts on the Defendant's Petition and disposes of the said Appeal. The aforesaid appeal bond shall continue in effect until such time as final disposition of the said Appeal is made.

ENTERED: *Paul A. Holstein*

JUDGE

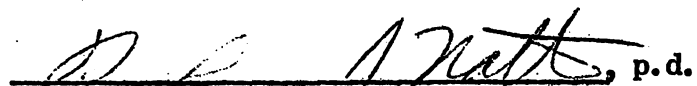
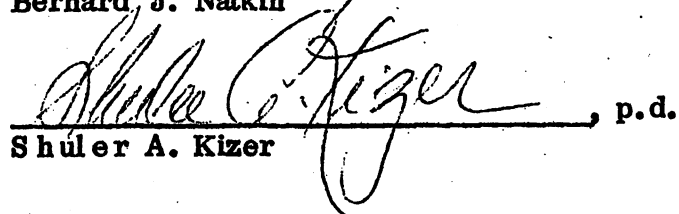
Designate

SEEN AND ASKED FOR:



_____, p.q.
Eric Lee Sisler

SEEN AND OBJECTED TO:


_____, p.d.
Bernard J. Natkin
_____, p.d.
Shuler A. Kizer

ASSIGNMENTS OF ERROR FILED BY APPELLANT

1. The Trial Court Erred in Failing to Grant a New Trial On The Ground That The Commonwealth's Motion for a Change of Venue Had Erroneously Been Granted.
2. The Trial Court Erred In Failing To Grant The Appellant's Motion For A New Trial On The Ground That The Commonwealth Had Suppressed Exculpatory Evidence Favorable To The Defendant.
3. The Trial Court Erred In Failing To Grant A New Trial On The Ground That Commonwealth's Instructions 9, 10 and 11 Were Erroneously Given.
4. The Trial Court Erred In Failing To Grant A New Trial On The Ground That The Jury Was Erroneously Instructed To Disregard A Portion Of The Appellant's Closing Argument.

INSTRUCTION NO. 9

The Court instructs the jury that the law of self-defense is the law of necessity, with regard to the necessity that would justify the slaying of Vernon Staton in self-defense, the Court instructs the jury that William P. Newcomer must not have wrongfully brought on the necessity by his own misconduct at the time of the shooting, for the Defendant is not permitted to justify the killing of Vernon Staton by a pretense of necessity, as the same appeared to him, unless, he, William P. Newcomer, was without fault at the time of the shooting in bringing that necessity upon himself.

Accordingly if William P. Newcomer brought the necessity on by his own misconduct at the time of the shooting he is not entitled to rely upon the legal doctrine of self-defense.

INSTRUCTION NO. 10

The Court instructs the jury that even though you believe that William P. Newcomer through fear believed that it was necessary to shoot as he did in order to save his own life or avoid serious bodily harm, unless you further believe from the evidence that the deceased had made some overt act indicative of imminent danger to the life or the infliction of serious bodily harm to William P. Newcomer, then William P. Newcomer cannot rely upon a plea of self-defense.

INSTRUCTION NO. 11

The Court instructs the jury that self-defense, being a defense of necessity, dictates that one may only use that amount of force which reasonably appeared to him to be necessary to protect himself from death or serious bodily harm. That is to say, if one uses more force than reasonably appeared to him from the circumstances to be necessary then the law of self-defense does not apply.

INSTRUCTION NO. F

When a person reasonably apprehends that another intends to attack him for the purpose of killing him or doing him serious bodily harm, then such person has a right to arm himself for his own necessary self-protection, and in such case, no inference of malice can be drawn from the fact that he prepared for it.

*Given
J. A. H.*

INSTRUCTION NO. 6

The Court instructs the Jury that the law of self defense is the law of necessity or apparent necessity.

Therefore, if you believe from the evidence that the Defendant reasonably believed that he was in imminent danger of being killed or done serious bodily harm by the deceased and that it reasonably appeared to him to be necessary to kill the deceased in order to save himself from death or serious bodily harm and that he was free from fault in bringing about the difficulty between them, then you must find the Defendant not guilty.

Given
P.A.H.

CHAMBERS

1
2
3 MR. KIZER: If it please the Court, some time
4 ago, after the second trial of this matter, resulting in a
5 mis-trial on account of a hung jury, Mr. Natkin and I ad-
6 vised Mr. Newcomer that certain financial arrangements
7 would have to be made before we would proceed into the
8 third trial, if it should occur. A month or six weeks ago
9 he was advised by mail to the same effect and then a couple
10 of weeks ago a second letter was sent that said that he
11 should see us.

12 He did see us one day last week and while we
13 do not say -- we are not in complete agreement as to Mr.
14 Newcomer's understanding of the fee arrangement, we are
15 very positive on the position we take and which we advised
16 him of.

17 No arrangements have been made for meeting the
18 conditions, the failure of which we told him would compel
19 us to ask the Court to permit us to withdraw. We stated
20 in a positive way that when this case was called today we
21 would not answer for him as his attorneys and we therefore,
22 pursuant to your letter, are here to ask that we not be
23 required to answer for him or proceed further with the matter.

24 COURT: It was my understanding, perhaps I
25 should be corrected, it was my understanding from either

1 Mr. Natkin or Mr. Kizer, that Mr. Newcomer had run out of
2 funds, he did not have any more money to pay you gentlemen
3 a fee and that you would probably ask the Court to exercise
4 the Court's authority to appoint court-appointed counsel,
5 and following that I conferred with Judge Moffett, Chief J
6 Judge, under whose direction I am acting during my recall
7 to duty in the 25th Circuit, and he suggested that it would
8 be entirely appropriate if I was satisfied that Mr. New-
9 comer could be classified as a poor person, to allow you
gentlemen the maximum fee provided by the Statute.

10 This case has been tried twice. The first
11 trial was May 16, 17 and 18 and the second trial was Novem-
12 ber 16, 17 and 18 and each time the Court was compelled
13 to declare a mis-trial because the jury was unable to
14 reach a unanimous verdict. The Court has been advised that
15 the cost for the first trial was \$7,394.78 and that the
16 cost for the second trial, exclusive of the court reporter,
17 totaled \$4,180.75. It is to be remembered that such costs
18 are imposed on the Commonwealth.

19 As you gentlemen know, my retirement was effect-
20 ive on December 16 and I accepted temporary recall to serve
21 the 25th Judicial Circuit, which continues until February
22 23. My services are subject to the direction of Judge
23 Moffett, Chief Judge and as I advised the four of you,
24 Mr. Natkin, Mr. Kizer, Mr. Sisler and Mr. Norton, by letter
25

4
1 of January 16, Judge Moffett is of the opinion that this
2 case should be tried prior to the termination of my recall
3 and I have set February 20, 21 and 22 for the trial of
4 this case.

5 It is also to be remembered that because of
6 the disqualification of Mr. Robey, Commonwealth Attorney
7 for the City of Buena Vista, it became necessary for this
8 Court to appoint an attorney to prosecute this case and
9 Mr. Eric L. Sisler, former Commonwealth Attorney of Rock-
10 bridge County, who is considered by this Court to be well
11 qualified to represent the Commonwealth, was appointed to
12 prosecute the case. Mr. Fergus Norton is associated in the
13 prosecution, having been employed by members of the family
14 of the deceased. The defendant has been capably represented
15 by two of the most able trial lawyers, Mr. Shuler Kizer
16 and Mr. Bernard Natkin and I requested all counsel to
17 arrange their schedules so that this case can be tried
18 on February 20, 21 and 22.

19 That was a preliminary statement which I pre-
20 pared yesterday to be read into the record.

21 This poses a novel question, I have never had
22 this problem before. It would appear to me, this case
23 being as serious as it is and you gentlemen being completely
24 aware of the problems and having undertaken to represent
25 this man - and I presume each of you were substantially

1 DEFENDANT: What if it becomes another hung
2 jury?

3 COURT: We will cross that bridge when we come
4 to it. I think there would be motions made later on. That
5 same question was raised by Mr. Page in an editorial about
6 how many times are cases to be tried. Rule 1:111 provides
7 if the Court over-rules a motion to strike the motion may
8 be renewed and if the Court is of the opinion it is error
9 to deny the motion -- I think I am duty bound to order a
10 third trial. I still think under all the circumstances -
11 this case has drawn so much publicity I think it has to
12 be tried a third time and ultimately disposed of.

13
14 COURT ROOM

15
16 MR. NORTON: We would like to call Mr. Robey
17 as a witness on the Motion for a Change of Venue.

18
19 W. T. ROBEY, III
20 being duly sworn, testified as follows:

21
22 ROBEY - DIRECT

23 By Mr. Norton:

24 Q Please state your name.

25 A W. T. Robey, III.

1 Q What is your position in the City of
2 Buena Vista?

3 A I am a practicing attorney and I am
4 also Commonwealth's Attorney and City Attorney.

5 Q How long have you been a resident of
6 Buena Vista?

7 A All my life.

8 Q Are you in daily communication with
9 the people of the City of Buena Vista both as a practicing
10 attorney and as Commonwealth's Attorney?

11 A Yes sir.

12 Q In your position as an attorney,
13 resident and as Commonwealth's Attorney, have you had
14 occasion to have people talk to you with reference to the
15 Newcomer case?

16 A Talk to me, yes, and I hear talk, I
17 think it would probably be as much hearing conversations
18 about it.

19 Q Are matters of an evidentiary nature
20 discussed by people of Buena Vista?

21 A There is a great deal of discussion
22 by a large number of people about the facts of the case
23 and the facts surrounding the case and the individuals
24 involved.

25 Q When you say there is discussion

1 involving the facts surrounding the case, as an attorney,
2 would you be discussing matters irrelevant to the factual
3 issues in the case?

4 A The things you hear people talking
5 about and taking sides - this ought to happen, that ought
6 to happen - you hear people taking into consideration things
7 that would not be appropriate to consider in determining
8 guilt or innocence. There will be individuals who are
9 saying " I don't like the defendant" or, " I don't like the
10 way he rides up and down the street, something ought to be
11 done." You hear them say the victim did so and so or the
12 defendant is doing something he should not be, they don't
13 like the way the defendant is living, they didn't like the
14 way the victim was living prior -- this type consideration
15 and people expressing their views as to what the outcome
16 ought to be, this is taking place generally in the commun-
17 ity.

18 Q From this general conversation, can
19 you perceive a polarization of the people in general?

20 A Unless the Court directs me to, I am
21 not going to try to come to any conclusion on that. I can
22 tell you what occurs. There is a lot of conversation about
23 a lot of facts surrounding the case, much of which would
24 not be relevant to guilt or innocence and it is prevalent
25 within the community and I think that is a well known fact

1 among everybody involved.

2 Q Would you tell us what the size, or
3 population of Buena Vista is?

4 A I think the most recent census was
5 6400 or 6500 but it is pretty much thought that the commun-
6 ity is around 7000 or 7500 at this time.

7
8 ROBEY - CROSS

9 By Mr. Natkin:

10
11 Q Do you remember a conversation with
12 me shortly after the last trial in regard to where this
13 case should be tried?

14 A No I don't - would you refresh my
15 memory?

16 Q Immediately after the trial you met
17 me in the parking lot. Someone had informed you what the
18 vote of the jury was and you said now you were of the opin-
19 ion that the Commonwealth could get a fair and impartial
20 trial.

21 A There was a statement made about a
22 fair trial being had.

23 Q You volunteered to me that you were of
24 the opinion that the Commonwealth could get a fair and im-
25 partial trial in the City of Buena Vista, did you not?

1 A There was a conversation to that effect.

2 Q That was your opinion immediately
3 after the last trial, is that correct?

4 A You will have to take the total con-
5 versation.

6 Q I know of nothing other than you
7 volunteering that information to me unrequested.

8 A There was a conversation or a state-
9 ment made, when it was heard that the jury were eleven to
10 one or twelve to nothing ---

11 Q And if my recollection is correct you
12 said you were now of the opinion---

13 A There was a statement in the context
14 of fairness insofar as the trial was concerned.

15 Q And that the Commonwealth could get
16 a fair and impartial trial, in your opinion?

17 A You have not heard me say anything
18 to the contrary of that.

19 Q Then I will ask - are you of the opin-
20 ion that the Commonwealth can or cannot get a fair and im-
21 partial in the City of Buena Vista?

22 A I think that is for the Judge to rule
23 on, after considering the facts.

24 Q As I have read the cases, that has to
25 come from evidence. Are you satisfied that the jurors of

1 the City of Buena Vista, if instructed to disregard any
2 evidence except what comes from the stand, will not obey their
3 oath?

4 A I think that calls for a conclusion,
5 you have people who will and people who won't and that would
6 depend upon the twelve people selected. I think that is
7 for the Court to rule upon.

8 Q It is my understanding you say you
9 know more about what is going on in this community than
10 others, what people are saying. Do I now understand that
11 you refuse to give an opinion whether or not the Common-
12 wealth could get a fair and impartial trial? Whether the
13 jurors of this City will obey their oath if directed not to
14 consider anything except what comes from the stand?

15
16 MR. NORTON: I think Mr. Natkin is
17 trying to be unfair to Mr. Robey. He
18 is not here to speak as to what the
19 citizens will do once they are given
20 their oath. He is called by us to
21 testify to his personal knowledge as
22 to the type conversations that are
23 being heard in the community. We
24 have not called him here to give a
25 judgment as to what twelve jurors may

1 or may not do and I think for Mr.

2 Natkin to try and force a comment from
3 Mr. Robey is unfair.

4 COURT: I expect Mr. Robey knows what
5 Mr. Natkin is endeavoring to do and
6 will answer appropriately. This case
7 has been tried twice by Buena Vista
8 citizens and on the voir dere everyone
9 was asked the question whether they
10 had knowledge of the case through the
11 news media or other source, and as I
12 recall every one knew something about
13 the case, and yet they could not agree
14 either time.

15
16 Q Mr. Robey, you prefer not to give any
17 opinion as to whether the Commonwealth could or could not
18 get a fair and impartial trial on the third trial of this
19 case in Buena Vista?

20 A I don't refuse. If the Court tells
21 me it wants me to invade - to answer a question which in-
22 vades the province of the Court -- I will do it but I don't
23 think it is appropriate. If they had asked me what is my
24 opinion you would have objected and said that is for the
25 Court to decide and I think it should cut both ways. I

1 have some thoughts about how it could effect both the def-
2 endant and the Commonwealth. The greatest amount of con-
3 versation I hear is in regard to the defendant and the
4 question I raise is that of whether the defendant can get
5 a fair and impartial trial.

6 MR. NATKIN: The Commonwealth made that Motion
7 and I think your answer is in the record and we stop with
8 that.

9
10 ROBEY - ReDIRECT

11 By Mr. Norton:

12
13 Q Apparently there was a conversation
14 had with Mr. Natkin immediately after the trial, is that
15 correct?

16 A I don't know whether it was a con-
17 versation, it was something in passing.

18 Q Was that at a time prior to the print-
19 ing of an editorial in the Buena Vista newspaper?

20 A It was immediately after the jury had
21 gone. The article in the paper was several weeks later.
22 The statement I made to Mr. Natkin at that time was along
23 the lines that the Commonwealth, with a 12 to 0 decision
24 for guilt of some kind of homicide, had received a fair
25 trial.

1 Q That conversation was again prior to
2 the hearing of the general attitude of the people?

3 A That was prior to all the conversation
4 after the second trial and after all of this was published
5 in the newspaper.

6 -----

7
8 COURT: I don't want to put Mr. Robey on the spot
9 but I understood him to say he did not wish to violate the
10 prerogatives of the Court and state his opinion with regard to
11 whether the Commonwealth and the defendant can receive a fair
12 and impartial trial here. It would be most helpful if I
13 could receive the opinion of Mr. Robey and of other people.

14 MR. NORTON: I would have no objection to that.

15 COURT: That is the only way I would know whether
16 both the Commonwealth and the defendant could receive a
17 fair trial.

18 MR. ROBEY: I don't mind being put on a spot,
19 I have been there before. The people ask me questions --
20 you have to rule on it and I can make an observation.

21 In a small community, a case with this amount of
22 publicity, and with the people knowing both the victim and
23 the defendant, their life styles, the things they do and
24 the things they don't do are of such common knowledge and
25 talk that practically every one in the community has total

1 knowledge of the total situation which would not be the
2 subject matter of a trial, and people, being human as they
3 are, it is difficult to know things and then arrive at a
4 decision disregarding the things that you know and have
5 formed opinions about. That is just human nature and does
6 not reflect on the character, ability of judgment, it simply
7 makes them human beings. As much as I would like to say
8 that a person can take things out of their mind and dis-
9 regard things, human nature cannot do it and whether they
10 liked the defendant or not, whether they liked the victim
11 or not, these things cannot be taken out of their minds.
12 If a jury is going to consider those things, then it is a
13 matter of some one else deciding whether both parties can
14 get a fair trial under those circumstances. I think the
15 whole situation cuts both ways -- it can go both ways.

16 COURT: I have jotted down a few observations.
17 Yesterday I made these notes. Should this Court decide to
18 grant the motion for a change of venue, this would not be a
19 reflection on the integrity of the citizen of Buena Vista,
20 but would relieve friends, associates and families of the
21 responsibility of deciding whether the killing of Vernon
22 Staton was justifiable or not. Both the defendant and the
23 deceased were personally known throughout this community.
24 Isn't that just about what you said Mr. Robey?

25 MR. ROBEY: Yes sir.

1 COURT: I don't think it would be an attack on
2 the integrity of the citizens of Buena Vists. They have
3 all heard about this case, discussed the case and they are
4 people who are very conscientious in their beliefs and
5 conclusions and will not surrender their views, even though
6 directed to do it. This is a serious case. We have tried
7 this case twice. I am not pre-judging it right now but we
8 have had hung juries both times and this Court has been
9 compelled to declare a mis-trial. That is what I would
10 like to avoid if possible. Whether the defendant is con-
11 victed or acquitted, I think it must reach an ultimate
12 conclusion. This case has already cost the Commonwealth
13 large sums of money. The Court has been advised that the
14 cost of the first trial was \$7,394.78, and the second trial,
15 exclusive of the court reporter's fee, was \$4,180.75, and
16 a third trial will create more expense but as I see it,
17 this case must reach an ultimate conclusion.

18 -----
19 ROBEY - CROSS

20 By Mr. Natkin:

21
22 Q Mr. Robey, do you remember a tele-
23 phone conversation with Mr. Kizer within the last week in
24 regard to this?

25 A Yes sir.

1 Q Did you advise Mr. Kizer that if the
2 jury considers only the evidence from the stand, the Common-
3 wealth can get a fair and impartial trial, but if they go
4 beyond the evidence, they cannot?

5 A That is the whole gist of what I am
6 saying now.

7 Q If the jury follows the instructions
8 of the Court, they can get a fair and impartial trial?

9 A If the jury is able to disregard
10 those things that it knows that it should not know, if
11 they can be super human beings and be able to say they
12 know something but they don't, then the defendant and the
13 Commonwealth can get a fair trial.

14 Q But your statement was that if they
15 obey the instructions of the Court to only consider the
16 evidence from the stand you are of the opinion we can get
17 a fair and impartial trial?

18 A Are you trying to say what I said or
19 are you asking me a question? Tell me what you say I said.

20 Q You were asked whether you were of
21 the opinion that the Commonwealth could get a fair and
22 impartial trial and your response was to the effect that
23 if the jury considers the evidence from the stand and does
24 not consider things known on the outside, we can get a fair
25 and impartial trial, is that correct?

1 A If the jury was able to consider only
2 the evidence from the stand and was able to disregard what
3 it knew that it should not know, yes.

4 Q And you are familiar that is what the
5 instructions of the Court are?

6 A Yes sir.

7 -----

8
9 MR. NORTON: We would like to introduce into
10 evidence the editorial of Wednesday, November 23, 1977 in
11 the Buena Vista News. We would hope that the Court would
12 take this into evidence, we feel it shows there has been a
13 great degree of polarization in the City. We submit that
14 the editorial has further polarized the various sentiments,
15 the two elements in the City of Buena Vista.

16 Firstly, reading from the second column: "We
17 have never heard of trying one person for the same offense
18 three times".

19 COURT: Have you?

20 MR. NORTON: Oh yes, I have heard of several and
21 I was personally involved in a case that was tried four
22 times and there were hung juries.

23 COURT: What is wrong with that comment?

24 MR. NORTON: If the case were to be re-tried in
25 Buena Vista this would be placing the people on notice of

1 past difficulties and you may have people who would want to
2 see another hung jury, and perhaps resolve the problem in
3 this manner. This case should be taken out of here and
4 referred to another community of impartial individuals.
5 The next to last paragraph of the second column of the
6 editorial states: " To move a third trial, if there is to be
7 one, outside of Buena Vista is to tell all of our people
8 that they are unable to give a fair trial on this or any
9 future trials." That cuts both ways, that cuts into the
10 effectiveness of the prosecution and also the defense. You
11 may get the people who are so polarized that no one would
12 move. The editorial further states: " We resent outside
13 lawyers...". Mr. Sisler is from Lexington and I am from
14 Roanoke and we think that type statement in an editorial
15 indicating the leading newspaper's resentment of us cuts
16 into the effectiveness of a fair and impartial trial.

17 I believe this newspaper reporter is present
18 here today, she summed it up in her court room impressions.
19 "... then the announcement of a hung jury, the ' I told you
20 so' and the discussions. Everyone predicted it. People
21 were going through the corridors, making bets, discussing it,
22 expecting it. Everyone is aware of the polarization of
23 the community and it is for this reason we are seeking a
24 change of venue. We hope to have these included into the
25 record.

1 MR. KIZER: We would like to have an opportunity
2 to view them. Insofar as the editorial referred to by Mr.
3 Norton, I read from the second paragraph.

4 " We know nothing of the innocence or guilt of the
5 accused and do not here to attempt to infer that the defend-
6 ant is either innocent or guilty. We are not concerned
7 with that aspect of the case. Our judicial system will take
8 care of that. We are concerned with the venue of any future
9 trial."

10 The third paragraph states: " Judge Paul A. Hol-
11 stein, in response to the motion noted that he had previous-
12 ly observed in passing upon a similar request, that this was
13 a matter for the people of Buena Vista to handle. He obser-
14 ved that the offense was alleged to have been committed in
15 Buena Vista, by a resident of Buena Vista and that the victim
16 of the homicide was likewise a resident of Buena Vista. He
17 noted the people of Buena Vista were basically fair, intelli-
18 gent and able to solve their own problems. Attorneys for
19 the Commonwealth when arguing their case to the jury last
20 Friday afternoon repeatedly reminded the jury " that the
21 case belonged to Buena Vista.

22 " Before the second trial, those representing the
23 Commonwealth suggested that there could not be found within
24 the city twenty people who were qualified to render a fair,
25 just and proper verdict. More than one hundred people were

1 summoned as possible jurors for the second trial. After
2 careful examination by both Court and lawyers, a panel of
3 twenty qualified jurors was found within the first forty-
4 five names of those who were on the jury list. The others
5 were sent home.

6 " We are sure that each of those persons who were
7 accepted for jury service, were honest and candid with the
8 Court when they advised the Judge that they could and would
9 render a fair and impartial verdict according to the law and
10 evidence.

11 " It seems to us to now suggest that there cannot
12 be found within this city another group of twenty people who
13 would be unable to hear the evidence and render a fair, just
14 and impartial verdict, free from any prejudice for either
15 side is nonsense.

16 " The fact that each of the two previous trials
17 of this case have terminated in a hung jury does not mean
18 that the people of this city cannot and will not make a
19 correct decision if there is another trial.

20 " What we have here are witnesses who testified
21 differently, yet with apparent sincerity and the jury had to
22 apply this testimony to complicated legal directions of the
23 Court. They they were unable to unanimously do. But this
24 does not mean the jury did not act in good faith. We
25 believe they did."

1 "We agree with both the Judge and attorneys, that
2 the people of Buena Vista should solve their own problems,
3 and cases. All of what we have stated suggests there will
4 be a third trial. We do not know the law or the limitations
5 of trials. We have never heard of trying one person for the
6 same offense three times. We have heard of and in fact have
7 read of cases where the defendant has been tried twice and
8 both juries were unable to agree. There must be some rule or
9 law that ends the trial for an alleged offense. If the
10 attorneys ask for a third trial and the Judge said he would
11 make a decision later on the request, we suppose a man can
12 be tried more than twice for the same offense.

13 "There is one other part of this case that needs to
14 be mentioned and that is the cost to the city of state, we
15 are not sure which, etc.

16 "To move a third trial, if there is to be one,
17 outside of Buena Vista is to tell all of our people that
18 they are unable to give a fair trial on this or any future
19 trials. It would be an insult to the honesty of our people."

20 The mere fact there have been two mistrials means
21 that they have been conscientious people who did have a
22 complicated case, the instructions were numerous, and they
23 were unable to reach a verdict in the first case after a
24 very long deliberation which shows their sincerity and honesty
25 and purpose with which the jury approached their function.

1 They had to weigh something in excess of two days of testi-
2 mony and make a judgment in accordance with the law and
3 the instructions of the court. To me, that says that we
4 have in Buena Vista people who will make a conscientious
5 and sincere effort to correctly determine the guilt or
6 innocence of an accused. The fact that they hung would
7 seem to emphasize that some were of one belief and some
8 of the other. There is no reason to believe that at
9 another trial the same result will attain. It may, because
10 we are dealing with a complicated legal situation.

11 The second hung jurors say to me loud and clear
12 that you have and can obtain a fair and impartial jury who
13 will make a bona fide effort to apply the law as the Court
14 gives it to them to the facts and evidence as they hear
15 it from the stand. Mr. Robey says if they do that, the
16 Commonwealth, in his opinion, can receive a fair and impartial
17 trial. It seems to me, certainly based on this editorial
18 and based on Mr. Robey's opinion, based on this Court's
19 observations according to the editorial, that this is a
20 Buena Vista matter to be handled by Buena Vista people and
21 solved by Buena Vista people.

22 We submit that while the cases do hold that the
23 constitutional provision which guarantees to every person
24 charged with a criminal offense the right to be tried where
25 the offense occurred, may vary by Statute, it is a serious

1 matter to remove from that venue a case to another. You are
2 touching upon constitutional questions. I am aware of the
3 decision in the Poindexter case. If these jurors had gone
4 out and in ten or thirty minutes returned and said they
5 were hung it would have been an entirely different situation
6 This situation, in the two trials, suggests nothing except
7 jurors trying to honestly and conscientiously perform the
8 function the Court assigned to them and I submit to you there
9 should be no change.

10 This editorial would seem to me to epitomize the
11 importance of the case remaining here. I have not seen the
12 other documents.

13 MR. SISLER: We would like to have these documents
14 in the record.

15 MR. NORTON: I presume from the eloquent and lengthy
16 statements by Mr. Kizer that they are not going to present
17 any evidence.

18 MR. NATKIN: That is not an assumption you can make.

19 MR. NORTON: Mr. Kizer refers to this as something
20 very complicated. Actually it is very simple.

21 Most importantly, I know this Court has its finger
22 upon the pulse of this situation and I would let it rest
23 with the Court at this time.

24 COURT: According to the laws of this Commonwealth
25 a Circuit Court Judge may, on the motion of the accused or
the Commonwealth for good cause, order the venue for the

1 trial of a criminal case to be changed to some other Circuit
2 Court. The cases hold that the question of change is within
3 the sound judicial discretion of the Trial Judge.

4 I would first like to make an observation in res-
5 pect to the criticism of the editorial from the Buena Vista
6 News. I was not effected in any way -- I don't think the
7 newspaper is the answer to this. I have here in my notes
8 that if this Court decides to change the venue, this will
9 not be a reflection on Mr. Page, his reporter or the Buena
10 Vista News. I feel the publicity given the case was accur-
11 ately and fairly reported. It was not unusual form for an
12 editorial, and coming to the point of visiting attorneys --
13 In chambers I made these observations. This case has been
14 tried twice, on May 16, 17 and 18 and again on November
15 16, 17 and 18 and each time this Court was compelled to
16 declare a mis-trial because the jury was unable to reach
17 a unanimous verdict. This Court has been advised that the
18 costs for the first trial was \$7,394.78 and for the second
19 trial \$4,180.75, exclusive of the court reporter. It is
20 to be remembered that such costs are imposed on the Common-
21 wealth. Mr. Page, on November 23, properly questioned the
22 limit on the number of trials. This is covered by Rule
23 1:111 and 3A:22, subsection A, which provides that if a
24 Court over-rules a motion to strike and there is a hung
25 jury the moving party may renew its motion and if the Court

1 is of the opinion that it erred in denying the motion, the
2 Court may enter judgment in favor of the moving party.

3 In this case, since no motion was made by the
4 defense to strike the evidence, it is my opinion that a
5 third trial must be ordered.

6 As you gentlemen know, my retirement was effective
7 on December 16 and I accepted temporary recall to serve
8 the 25th Judicial Circuit, which continues until February
9 23. My services are subject to the direction of Judge
10 Moffett, Chief Judge, and as I advised the four of you
11 by letter of January 16, Judge Moffett is of the opinion
12 that this case should be tried prior to the termination
13 of my recall and I have set February 20, 21 and 22 for the
14 trial of this case.

15 It is also to be remembered that because of the
16 disqualification of Mr. Robey, Commonwealth Attorney
17 for the City of Buena Vista, it became necessary for this
18 Court to appoint an attorney to prosecute this case and
19 Mr. Mr. Eric L. Sisler, former Commonwealth Attorney of
20 Rockbridge County, who is considered by this Court to be
21 well qualified to represent the Commonwealth, was appointed
22 to prosecute the case. Mr. Fergus Norton is associated in
23 the prosecution, having been employed by members of the
24 family of the deceased. This defendant has been capable
25 represented by two of the most able trial lawyers, Mr.

1 Shuler Kizer and Mr. Bernard Natkin and I requested all counsel
2 to arrange their schedules so that this case can be tried on
3 February 20, 21 and 22. I also mentioned in that letter that
4 when this case is re-tried, the Indictment charging the
5 defendant with the use of a firearm will be tried simul-
6 taneously in accordance with 18.2-53.1.

7 The primary issue now to be determined is the
8 Commonwealth's motion for a change of venue and I have
9 already stated the authority for the Court to do this if
10 the circumstances are such that the Court feels such an
11 Order would be proper.

12 Following the first trial a motion was made for
13 a venire to be called from without Buena Vista, or that the
14 case be tried in another area and at that time I made the
15 observation - Mr. Page is correct when he quotes me - I
16 made the observation that the determination of the guilt
17 or innocence of the defendant should be left to the citizens
18 to Buena Vista at the next trial, both the defendant and
19 the deceased being local residents and the alleged murder
20 having been committed within this community.

21 This case was again tried, with the anticipation of
22 a guilty or a not guilty verdict. It was anticipated there
23 would be a unanimous verdict, but after three days and two
24 nights of trial the jury was again unable to reach a
25 unanimous verdict

1 Judge Moffett and I have discussed this case, all
2 of the problems and finally we discussed the matter of the
3 change of venue and he is of the opinion, and I concur, that
4 the Commonwealth's motion for a change of venue should be
5 granted and the case be tried in the Circuit Court of
6 Rockbridge County with a venire from Rockbridge County.

7 This is not a reflection on the integrity of the
8 citizens of Buena Vista but rather relieves friends,
9 associates and families of the responsibility of deciding
10 whether the killing of Vernon Staton was justifiable or
11 without justification. Both the defendant and the deceased
12 were personally known throughout this community. It is to
13 be remembered that each prospective juror knew about the
14 case through the news media or personal observation or other
15 sources. Everybody knew about the case, this is a small
16 community of 6400 people and everybody heard it discussed.
17 When I questioned the jurors I asked each of them - what
18 do you know about this? Have you formed a fixed opinion
19 as to guilt or innocence of the accused? Some of them
20 answered yes, some no. To those who answered yes I said:
21 " Is your opinion so fixed it cannot be changed by the law
22 and the evidence?" and the majority of them said no.

23 You have these people, all good people, good
24 citizens who hear the evidence and they know something about
25 the case - they may have known the Staton man, known him to

1 be a fighter. The rules of evidence precluded that in the
2 trial but some of them knew he would fight. There were some
3 who knew of Mr. Newcomer's relations with other women.
4 Perhaps not all of this was brought out in the evidence,
5 perhaps it was prohibited, but some of the jurors knew it
6 and they subconsciously knew facts and circumstances that
7 were not adduced by the evidence because by the rules of
8 evidence it was not permitted to be shown. It is bound to
9 have effected somebody or I don't believe twice we would
10 have had a hung jury and I am afraid if it remains in Buena
11 Vista we are going to have another and I want this case
12 disposed of, Judge Moffett wants it disposed of and I know
13 you gentlemen do also. I want a conclusion, whether guilty
14 of innocent.

15 I would like to put this into the record -- if you
16 were to bring in veniremen of Amherst citizens, I think that
17 might be a reflection on the citizens of Buena Vista, or if
18 you bring in a venire from Roanoke or Augusta County. What
19 we are suggesting is to move this into Rockbridge County,
20 an adjoining area, and try it there. I don't think that is
21 saying to Buena Vista ' we challenge your integrity ' , I
22 don't believe so. I feel that and Judge Moffett feels that
23 and I am going to rule that the motion of the Commonwealth
24 for a change of venue should be granted and the case be
25 tried on February 20, 21 and 22 in the Circuit Court of

1 Rockbridge County and the Clerk of this Court will remove
2 all necessary papers to the Clerk's Office of the Circuit
3 Court of Rockbridge County.

4 MR. KIZER: Defendant by counsel respectfully ex-
5 cepts to the ruling of the Court. We were prepared to
6 offer an Affidavit to sustain the position we have taken
7 but ---

8 COURT: I was unaware you wished to present any
9 evidence. I will withdraw my decision and give you an
10 opportunity to present that.

11 MR. KIZER: We would like to note our exception
12 on a further ground. The Court made reference in its ob-
13 servations that this Court is functioning under Judge
14 Moffett and that Judge Moffett had at some unstated time,
15 obviously before today, come to the conclusion that the
16 venue should be changed. So far as I know Judge Moffett
17 has heard no evidence, but this Court stated that Judge
18 Moffett was of the opinion that the venue should be
19 changed.

20 COURT: He did not rule so, but he was of that
21 opinion after we discussed the case.

22 MR. KIZER: I took it that was the basis on which
23 this Court was entering this Order.

24 COURT: You are wrong.

25 MR. KIZER: I gathered from what the Court said

1 that the decision to change the venue was made some time
2 prior to today in discussions between this Court and Judge
3 Moffett.

4 COURT: Judge Moffett does not control this case.
5 I accepted temporary recall to perform services in the
6 25th Judicial Circuit and under the Rules of the Supreme
7 Court there is a Chief Judge who assigns cases or decides
8 what cases should be tried.

9 MR. KIZER: I do not in any way quarrel with that,
10 sir.

11 COURT: I will be glad to have you talk to Judge
12 Moffett.

13 MR. KIZER: No sir, I do not desire to do that. I
14 understood this Court to say that at an unspecified time
15 Judge Moffett indicated, or said he thought it proper to
16 change the venue, and that you, as Presiding Judge and
17 Judge Moffett had discussed this, and that Judge Moffett
18 wanted it tried before Your Honor's designation expires.

19 COURT: Is there anything improper in that?

20 MR. KIZER: No sir, but you also stated that he
21 thought the venue should be changed.

22 COURT: After some discussion, he agreed to that.

23 MR. KIZER: My position is, Your Honor, that it
24 would have been impossible for Judge Moffett to have heard
25 any evidence to have justified a change of venue.

1 COURT: I think what we are both disturbed about is
2 two hung juries, substantial expense to the Commonwealth
3 and that which will be incurred again and if that should res-
4 ult in a hung jury. If defense counsel had moved to strike
5 the evidence then you would have something to hand your
6 hat on. If you want to be critical I will be pleased to
7 offer my comments.

8 MR. KIZER: I am only trying to perform my ---

9 COURT: You are being critical of Judge Moffett
10 and of me. I have a duty that I would like to assign to
11 some one else but I feel it is my responsibility to preside
12 at the third trial. If you gentlemen will move to have my
13 successor in office preside, I will be most happy to relin-
14 quish this responsibility.

15 MR. KIZER: I appreciate the position the Court is
16 in and I have a duty to perform which I am now trying to do
17 to the best of my ability, even though it may involve the
18 action of this Court of Judge Moffett, for both of whom I
19 have the highest respect and regard, but I do think it was
20 error and I believe this Court upon reflection will believe
21 it was error, that Judge Moffett should have made a ruling
22 on the change of venue before the motion was scheduled to
23 be heard and because of that, and further, because the Court
24 seems to put great emphasis upon the cost of the trials, we
25 take exception to the fact that the Court gives great weight

1 to the cost, justice should not have a price tag. I would
2 like now to introduce an Affidavit that would have tended
3 to sustain our position with reference to the fact that both
4 the Commonwealth and the defendant could receive a fair and
5 impartial trial and we would like to note our exception to
6 the Court's ruling for the reasons stated.

7 COURT: I would like to state in the record that I
8 personally consulted with Judge Moffett as Chief Judge.
9 He was fully aware of this case and what had happened. I
10 questioned Judge Moffett and his opinion was that under
11 those circumstances a change of venue would be proper. Not
12 Staunton or Augusta but to move it to Rockbridge County and
13 at that time I asked if I could quote him. If you would
14 like to hear from Judge Moffett ---

15 MR. KIZER: No sir, I don't question what the Court
16 said but it would seem to me to necessarily follow that we
17 have gone through an exercise this morning where the ruling
18 was pre-determined. Judge Moffett -- I do not mean to be
19 disrespectful -- but apparently the two of you came to the
20 conclusion some time prior to this morning that the venue
21 should be changed. I think we have gone through a futile
22 exercise today because the ruling was made at some time in
23 the past and at a time unknown to me and at a time when the
24 Court heard no evidence on whether or not the motion should
25 be granted.

1 COURT: Did you know this motion was going to be
2 argued this morning?

3 MR. KIZER: Yes sir.

4 COURT: You said you did not have an opportunity
5 to put on evidence.

6 MR. KIZER: The Court ruled before ---

7 COURT: I told you I would rescind my decision and
8 give you an opportunity to put on evidence.

9 MR. KIZER: We want to get this Affidavit in.

10 COURT: Mr. Sisler, Mr. Norton, have you read this?

11 MR. NORTON: Your Honor, we have no idea who these
12 people are. There is no opportunity to cross examine them
13 as to how many people they discussed it with. We have no
14 objection to it being admitted for whatever it might indicate
15 to the Court.

16 MR. SISLER: I just looked at it briefly, but I
17 think it was done today and I think there are perhaps ten
18 or twelve names on it, and it looks like three or six of
19 those people are married. I see a Mr. Wheeler on one side
20 and Mrs. Wheeler on the other, it looks like possibly they
21 are husband and wife. It does not recite their age, occu-
22 pation, nothing to indicate anything about them. I suggest
23 that the Affidavit is worthless and lends nothing that the
24 Court could base an opinion on. Certainly the defendant
25 had enough time and I am sure if there were evidence to

1 oppose the motion we would have heard from some witnesses
2 and today we have not seen or heard from anybody.

3 One brief comment about MR. Kizer's comments with
4 respect to this Court considering the motion prior to
5 today. It is ridiculous for any attorney to say you should
6 not consider a pending motion until the very day of the
7 hearing. All motions such as this are considered not only
8 on the day of the motion, but prior thereto. Mr. Kizer
9 would suggest that the Court should think nothing about
10 these things until the actual hearing and I suggest that
11 would be injustice for the Court not to consider the evi-
12 dence in the file, not to think about a motion until they
13 walk into the court room. I don't think Mr. Kizer meant
14 to suggest that.

15 COURT: I have frankly admitted I have discussed
16 this with Judge Moffett not once but several times. This
17 has been a most difficult case and I have discussed it with
18 Judge Moffett. I saw nothing wrong in that. If Mr. Kizer
19 and Mr. Natkin feel I should disqualify myself I would be
20 most happy to do that, and have my successor preside in
21 this case.

22 On this Affidavit, you gentlemen have a right to
23 call these people and determine who they are.

24 MR. NORTON: We have no desire to do so, Your Honor.

25 COURT: I will say very frankly that I did not

1 decide on a change of venue until this morning. There was
2 some very serious question in my mind whether I would grant
3 the motion. I have listened carefully to your arguments and
4 things I thought I should consider and I ruled as I thought
5 proper. This has not all been pre-determined although I
6 knew how Judge Moffett felt. Would you gentlemen like an
7 opportunity to talk to Judge Moffett?

8 MR. KIZER: No sir.

9 COURT: If you are going to make this an assignment
10 of error, I think in fairness to Judge Moffett he is entitled
11 to be heard.

12 MR. KIZER: We are not questioning that, but neither
13 do we waive the right to make it an assignment of error.
14 We have a duty, I am sure the Court understands that, and
15 our present thinging is we respectfully say to you we be-
16 lieve it is error, and serious error.

17 COURT: I understood you to say in your grounds for
18 exception, one was that Judge Moffett ruled and that I was
19 influenced by his decision that there should be a change
20 of venue. Was I wrong in that?

21 MR. KIZER: My interpretation of the Court's remarks
22 was that Judge Moffett wanted a change of venue.

23 COURT: And that I was acting by his direction?

24 MR. KIZER: Yes sir.

25 COURT: No. Mr. Natkin, would you like to be heard?

1 MR. NATKIN: No sir.

2 COURT: I heard you say something to Mr. Kizer.

3 MR. NATKIN: I told him I thought the Court said
4 you concurred in that opinion, I did not want Mr. Kizer
5 to misquote the record.

6 MR. NORTON: I don't believe there are any other
7 matters before the Court, other than for the Court to now
8 make a determination.

9 COURT: Mr. Natkin, Mr. Kizer, do you gentlemen
10 wish to put on any evidence?

11 MR. NATKIN: The Affidavit is our evidence.

12 COURT: Then I will restate my decision that there
13 will be a change of venue in this case.

14 MR. KIZER: We do not wish to waive, by remaining
15 silent, our exception to the Court's ruling and if the
16 Court would consider our objection and exception to the
17 Court's ruling that there would be a change of venue for
18 the reasons I stated a few moments ago reiterated at this
19 time after the Court now rules there will be a change of
20 venue.

21 COURT: The reason I withdrew or rescinded my
22 first ruling was when you reminded me you had not had an
23 opportunity to put on evidence. So I withdrew my ruling to
24 give you that opportunity. I just now inquired whether you
25 had put on all of your evidence and Mr. Natkin said yes,

1 and it was suggested I restate my ruling, which I did.

2 MR. KIZER: I am talking about something technical.
3 We do not wish to waive our objection and exception to the
4 Court's ruling. I stated at some length the defendant's
5 objection to the Court's ruling. I would like for the
6 Court to consider those objections as previously stated
7 as objections to the ruling the Court has just made.

8 COURT: The record will take care of that.

9 MR. KIZER: I just want to make sure the Court
10 will accept those reasons.

11 COURT: I am not sure what position this has put
12 Judge Moffett in. I am not going to put Judge Moffett on
13 the spot without the chance to be heard. Your grounds for
14 exception was that Judge Moffett did something to influence
15 me in that decision?

16 MR. KIZER: Yes sir.

17 COURT: That is not true.

18 MR. KIZER: Basically it was as I gathered from
19 what this Court said, that in the discussion with Judge
20 Moffett, Judge Moffett wanted this done and you concurred.

21 COURT: The setting of the trial dates.

22 MR. KIZER: I thought you said on the change of
23 venue.

24 COURT: I did say he wanted the case tried prior to
25 the termination of my recall to temporary duty.

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MR. KIZER: May the record show our exception.

COURT: This case from the very outset has certainly
had peculiar problems, and they continue.

1 that badly.

2 Yes, there is a homicide, and all a homicide
3 means is that one person took the life of another. But
4 there is justifiable homicide and there is excusable homi-
5 cide and it will be described by His Honor. The law of
6 self defense will be described for you by the Court and it
7 is the sincere contention of the defense in this case that
8 this was a justifiable homicide and that Mr. Newcomer should
9 be found not guilty and it will be your pleasure, your duty,
10 upon hearing all of the evidence and applying that evidence
11 to the law to say, yes, he fired the gun but there are times
12 when a human being has the right to take another life and
13 be found not guilty properly and justifiably by a jury of
14 his peers.

15 Thank you.

16
17
18
19 RANDOLPH CAMDEN

20 a witness called by and on behalf of the Commonwealth, being
21 duly sworn, testified as follows:

22

23 CAMDEN - DIRECT

24 By Mr. Norton

25 Q State your name and address.

1 Q From there, tell us what happened.

2 A There was a knock at the door and
3 Vernon was there, and he asked for Billy to come outside.

4 Q When you say Billy, are you referring
5 to the gentleman seated at my far left?

6 A Yes.

7 Q That's Billy Newcomer?

8 A Yes.

9 Q So Vernon asked that he come outside?

10 A Yes.

11 Q Then what happened?

12 A Billy told him to come in, that he was
13 not coming out, and when he walked in he swung at Billy,
14 and Billy fell on the floor and when he hit the floor he
15 kicked at Billy. Billy ran to the kitchen and we all left.
16 When I went outside Billy was laying at the door, facing it,
17 and Vernon told Ham he was sorry and he told Billy to be out
18 of town by Monday. Then Vernon started to the car --

19 Q When you say Vernon had already apolo-
20 gized to Ham Henson and then started where?

21 A He was going toward the car.

22 Q Towards his car? For Vernon Staton
23 to have left the house of Ham Henson, what did he have to
24 do?

25 A You have to go through a fence.

1 Q Through a gate in the fence?
2 A Yes.
3 Q Had he gotten through the gate?
4 A Not as I recall.
5 Q Then what happened?
6 A Billy went back in the house and came
7 out and started shooting. Vernon was behind the tree and
8 Billy was in front of the tree.
9 Q Had Vernon gotten outside the gate?
10 A Not as I recall.
11 Q Did he ever get beyond the tree?
12 A At that time when the shooting was he
13 was at the tree.
14 Q Is that tree in or outside the fence?
15 A It's inside.
16 Q When the first shot was fired, where
17 was Mr. Newcomer in relationship to the tree?
18 A He was in front of the tree.
19 Q And where was Vernon Staton?
20 A He was beside and behind it. He was
21 trying to dodge the pistol.
22 Q When you say he was trying to dodge,
23 describe what Mr. Staton was trying to do.
24 A He was going back beside the tree,
25 trying to keep from getting hit, I reckon.

1 Q How big is this tree?

2 A About like this (motioning with hands).

3 Q Mr. Newcomer, was he trying to see

4 around the tree, or what was he doing?

5 A He was standing in one spot, shooting.

6 Q What was Vernon Staton doing?

7 A He was staying back at the tree.

8 Q Was the tree between Vernon Staton

9 and Mr. Newcomer?

10 A Yes.

11 Q What happened then?

12 A There was several shots fired.

13 Q How many shots were fired at the tree?

14 A I don't know.

15 Q Was it more than one shot?

16 A Yes.

17 Q Were shots fired some place else?

18 A Yes, he started across the road and --

19 Q Who started across the road?

20 A Vernon did. And then another shot was

21 fired.

22 Q When Vernon started across the street,

23 did he face his vehicle and keep his back to the house?

24 A Yes.

25 Q And his back was to Mr. Newcomer?

1 A Yes.

2 Q Was he shot while he was in that
3 position?

4
5 MR. KIZER: Your Honor, this is direct
6 examination and --

7
8 Q Describe the position of Mr. Newcomer
9 and Vernon Staton while Staton was crossing the street.

10 A Vernon was crossing the street and
11 another shot was fired and then he fell.

12 Q Where did he fall?

13 A In the middle of the road.

14 Q Were there any other shots fired?

15 A Yes.

16 Q Describe how the next shot was fired,
17 the position of Mr. Staton and the position of Mr. Newcomer.

18 A Vernon was laying face up, and Billy
19 walked up to him and shot him.

20 Q Where were you at this time?

21 A At the tree, trying to get Terrance
22 up.

23 Q Not at the same tree?

24 A No.

25 Q How far were you from Mr. Newcomer

1 when the first shot was fired?

2 A I would say 20 to 25 yards.

3

4

CAMDEN - CROSS

5

6 By Mr. Kizer

7

8

Q Where do you live?

9

A Glasgow.

10

Q How did you happen to go to Ham Hen-

11

son's house that night?

12

A I rode up with Terrance Grey.

13

Q For what purpose did you go there?

14

A To play cards.

15

Q Were you in the habit of doing that?

16

A Yes, we played there a lot of times.

17

Q Whose vehicle did you go in?

18

A In Terrance Grey's van.

19

Q You were drinking pretty heavy,

20

weren't you?

21

A Not heavy, I drank a couple.

22

Q Terrance drank so much he got sick

23

and went out in the yard, didn't he?

24

A He was drinking.

25

Q Did you drink every time he did?

1 shows a larger view of the front of
2 the house and the tree Staton was
3 standing behind and Mr. Newcomer was
4 on the other side of the tree in rela-
5 tion to the house. This photograph is
6 not offered for the fact that there was
7 snow on the ground in July, it is not
8 offered for the fact that there were
9 leaves on the trees. It is merely
10 offered in conjunction with Common-
11 wealth's Exhibit 3 to give the jury
12 a complete picture of the front of the
13 house and the tree.
14
15

16 LEWIS E. PLAUGHER

17 a witness called by and on behalf of the Commonwealth, being
18 duly sworn, testified as follows:
19

20 PLAUGHER - DIRECT
21

22 By Mr. Sisler
23

24 Q State your name and address.

25 A Lewis E. Plaughter, Investigator for the

1 Buena Vista Police Department.

2 Q What is your occupation?

3 A Investigator for the Buena Vista Police
4 Department.

5 Q Tell the Court and jury how long you
6 have been with the Buena Vista Police Department.

7 A Seven and a half years.

8 Q Is that as of today?

9 A Probably a little over that now.

10 Q I take it you were employed on July 24,
11 1976 and had been for some time?

12 A Yes.

13 Q What is your chief job?

14 A Primarily I patrol with the rest of
15 the force, plus I work investigations.

16 Q Did you on July 24, 1976 have cause
17 to investigate this homicide?

18 A Yes sir.

19 Q Tell the Court and the jury when you
20 first became aware of this and what you did.

21 A On July 24 around 7:25 a.m.

22 Q Where were you at that time?

23 A I was working.

24 Q You were on duty?

25 A Yes sir, I was on duty, patrolling.

1 Q. Tell us what you did that morning.

2 A. I received a dispatch there had been
3 a shooting in front of the Chittum house at 16th and Chest-
4 nut.

5 Q. Is that close to the Ham Henson house?

6 A. It's next door. I proceeded to ans-
7 wer the call and I turned off 17th Street onto Chestnut
8 Avenue and I noticed a man lying in the street in front of
9 Ham Henson's house and another man standing about half way
10 between Henson's house and Chittum's house, standing by the
11 curb. I pulled down--first I radioed for them to send
12 the First Aid and then I pulled into the curb, and as I
13 pulled in Billy Newcomer walked over to me with a gun,
14 holstered, and handed me the gun and said, "I shot Vernon."

15 Q. Prior to this time did you know Billy
16 Newcomer?

17 A. Yes sir.

18 Q. Did he know you?

19 A. Yes sir.

20 Q. And he walked over to you?

21 A. Yes sir.

22 Q. And handed you a pistol?

23 A. Yes sir.

24 Q. All right, go ahead.

25 A. At this moment I had started to get

1 Q How much time had elapsed at this
2 time?

3 A Twenty-five or 30 minutes between the
4 time I got the call and the time I got to the hospital.

5 Q Tell the jury what happened at Stone-
6 wall Jackson Hospital.

7 A I got to the hospital and I went to
8 the emergency room to see Mr. Newcomer and he was off the
9 emergency room in a small room back of it, and I went in
10 there and he had some type of hospital gown on. His face
11 had been wiped and I talked to him some more about what
12 happened at the scene.

13 Q Tell the jury about that conversation,
14 what he told you.

15 A I asked him what happened and he said
16 he went over to Ham Henson's about 5:30 in the morning to
17 play cards, and that he had been there an hour or so when
18 somebody knocked at the door. He said the door opened and
19 Vernon Staton was there and he told Billy he wanted to see
20 him outside, and Billy said if he wanted to see him to come
21 in, that he was not coming out. Mr. Newcomer said Vernon
22 made a couple of steps in and took a swing and he ducked
23 and slipped on the floor, and Vernon kicked him in the face.
24 He said he got up and they struggled into the kitchen and
25 back through the front room to the hall.

1 He said at that point he fell on the floor, and
2 Staton stepped over him and told him to be out of town by
3 Monday, He said he laid there a minute or so until he re-
4 gained his senses and --

5 Q Did he use those words, "regained his
6 senses"?

7 A Yes sir, he said when he regained his
8 senses he got the pistol off the table and went outside and
9 Staton was almost across the street. He said when Vernon
10 realized he had a gun he turned and started back and started
11 apologizing, but he told him, "This is it".

12 He said he started shooting and Vernon was try-
13 ing to hide behind the tree, but the tree was not big enough.
14 I asked him how many times he shot and he said that he thou-
15 thought it was five or six.

16 Q How long did it take Mr. Newcomer at
17 this time to relate what had happened, approximately?

18 A We talked for about half an hour.

19 Q Did you take notes during this conver-
20 sation?

21 A Yes, I did.

22 Q On what did you take them?

23 A On a yellow legal pad.

24 Q You reduced what he said to writing on
25 that pad?

1 just the two of you?

2 A Just the two of us.

3 Q Please relate to the jury whatever
4 conversation you may have had on the way back from the
5 hospital to Buena Vista.

6 A On the way back Mr. Newcomer asked me
7 if I knew what his bond would be, and I said I had no idea,
8 that the magistrate would set that. I told him I had to
9 process him before he could be bonded and while I was doing
10 that we would find out what the bond would be.

11 Q Did he raise that inquiry about the
12 bond?

13 A Yes sir. I told him, "Billy, I sure
14 wish this had not happened, did you really mean to kill
15 Vernon?" And he said, "That's the reason I shot him."

16 Q During this conversation how would you
17 describe his demeanor?

18 A He was calm, he appeared normal to me.

19 Q Was he able to carry on a rational
20 conversation?

21 A Yes sir.

22 Q Did he make any complaint to you at
23 that time that he did not recall what had happened?

24 A No sir.

25 Q I assume it did not take you very long

1 notes on a yellow pad.

2 A That's right.

3 Q And you took that to the police de-
4 partment with you on the date in question?

5 A Yes sir.

6 Q And using those yellow notes you re-
7 produced them onto this white paper?

8 A Yes.

9 Q I would like to hand you this paper
10 and ask you if you can look at it and identify it?

11 A Yes sir, I wrote this.

12 Q What is that?

13 A This is the statement that was written
14 from my notes on the yellow paper.

15 Q When was it reduced to writing?

16 A July 24.

17 Q The day of the homicide?

18 A Yes sir.

19 Q So these white sheet notes were taken
20 from the yellow pad notes?

21 A Yes sir.

22
23 MR. SISLER: The Commonwealth would
24 offer this in evidence as Exhibit --

25 MR. KIZER: We object to it, Your

1 Honor.

2
3 Q Are these in your own handwriting?

4 A Yes sir.

5
6 MR. SISLER: Then we would offer this
7 as Commonwealth's Exhibit 13.

8 COURT: It will be accepted into evi-
9 dence and identified as Commonwealth's
10 Exhibit 13.

11
12 Q Would you read those notes, please.

13 A "7-24-76, 7:30 a.m. Subject: Vernon
14 Staton. Age: 36. Birth date: 2-19-40. Address: 29th Street
15 Buena Vista, Virignia.

16 William P. Newcomer. Age: 36 Birthdate 3-29-
17 40. Address: 1842 Walnut Avenue, Buena Vista, Virginia.

18 Statement of Facts: On Saturday, July 24, 1976
19 at approximately 7:30 a.m. received a call to check on shoot-
20 ing in front of Jeanette Chittum's house on 16th and Chest-
21 nut Avenue. When we arrived at the scene I saw Vernon Staton
22 laying in the street in front of Ham Henson's house. William
23 Newcomer was standing by the curb with a pistol in his hand.
24 The pistol was in the holster. At this time Mr. Newcomer had
25 seen the police car. He walked over to me and handed me the

1 pistol. I told Mr. Newcomer not to say anything until I
2 had advised him of his rights. At this time I advised Mr.
3 Newcomer of his rights under the Miranda warning. I asked
4 Mr. Newcomer if he wished to say anything. He stated that
5 he had shot Vernon Staton. Mr. Newcomer stated that he had
6 come down to Ham Henson's house around 5:30 or 6:00 a.m. to
7 play some cards. He stated that he had been playing an hour
8 or so, when somebody knocked at the door. When the door was
9 opened he said that he saw Vernon Staton. He stated that
10 Vernon asked him to come outside but he told Vernon if he
11 wanted to talk to him to come in and talk. He said that
12 Vernon stepped in about two steps and took a swing at him
13 and that he ducked and Vernon missed. This led to a fight
14 in the front room. Vernon Staton kicked Mr. Newcomer in the
15 face. This resulted in Mr. Newcomer bleeding from the nose
16 and left side of face swelling. After the fight Staton
17 stepped over Bill Newcomer and told him to be out of town by
18 Monday. Bill stated that he regained his senses after a
19 minute or so. He got up and got the pistol off a table in the
20 front room where they were playing cards. He went back to
21 the front door. By this time Vernon had gotten across the
22 street. Mr. Newcomer stated that when Vernon saw that he
23 had a gun he started to apologize but, "I told him this was
24 it." He said, "I started shooting and Vernon tried to hide
25 behind the tree, but the tree was not big enough.

1 Mr. Staton was hit six times by the bullets."

2

3 Q That is the statement that you reduced
4 to writing from the yellow sheets you made in talking to
5 Mr. Newcomer?

6 A Yes sir.

7 Q There was some question about a sub-
8 sequent that you reduced to the first person?

9 A Yes sir.

10 Q Mr. Robey, I believe you said, the
11 Commonwealth's Attorney, asked you to take your notes and
12 reduce them to the first person writing of the defendant's
13 statement?

14 A Yes sir.

15 Q Did you do that?

16 A Yes sir.

17

18 MR. SISLER: Your Honor, we would
19 offer this statement into evidence
20 as Commonwealth's Exhibit 14.

21 MR. KIZER: We object to this. He
22 has the original.

23 COURT: Objection sustained.

24

25 Q I will ask you to look at this and

1 DAVID W. OXLEY
2 a witness called by and on behalf of the Commonwealth, being
3 duly sworn, testified as follows:

4
5 OXLEY - DIRECT
6

7 By Mr. Sisler

8
9 Q Please state your full name for the
10 record.

11 A David W. Oxley.

12 Q What is your occupation?

13 A I am a forensic pathologist and I
14 am Deputy Chief Medical Examiner for Western Virginia.

15 Q Please give us briefly your education-
16 al background.

17 A I am a 1965 graduate of George Wash-
18 ington University School of Medicine with an A.B. in path-
19 ology, clinical anatomy and forensic science. I am a member
20 of the American Association of Forensic Scientists and the
21 Medical Association of Virginia.

22 Q For how long have you served with the
23 Medical Examiner's office?

24 A Since July of 1972.

25 Q Did you have occasion in July of 1976

1 to perform, as part of your duty, an autopsy on the body of
2 Vernon Staton?

3 A Yes, I did.

4 Q Do you have a copy of your report
5 there?

6 A Yes, I do.

7 Q Please summarize your findings for the
8 jury.

9 A The autopsy was performed on the 24th
10 of July 1976. The body was that of a well developed, well
11 nourished white male, length 71 inches, weight 190 - 195
12 pounds. The body was clothed in a red short sleeved shirt
13 labeled Mohawk. On the right sleeve there was an emblem
14 identifying the wearer as an official umpire of the United
15 States Slow Pitch Softball Team Association. There was a
16 bullet hole in the upper neck band of the garment, posterior-
17 ally. This bullet hole showed no powder residue on the fabric.
18 There was a large, irregular, oblique bullet track in the
19 left lateral collar and neck band portion of the shirt. This
20 hole showed no powder residue. There was a bullet hole in
21 the left mid-chest portion of the garment. This bullet hole
22 showed extensive soot and particulate powder residue. There
23 was a bullet hole in the right upper back portion of the gar-
24 ment. There is no powder residue present around this hole.
25 There was a bullet hole through the bottom of the emblem on

1 the right sleeve, however there was no corresponding wound
2 in the upper right arm. This hole passed obliquely through
3 the sleeve and exited the sleeve on the margin of the emblem,
4 posteriorally. A deformed bullet fragment was found to
5 be entangled in the material of the shirt.

6 The body was also clothed in black whipcord
7 trousers with a black leather belt. Attached to the belt
8 was a black cloth pouch which contained an umpires ball and
9 strike counter and a small yellow whisk broom.

10 The body was also clothed in black stretch socks
11 and black leather ripple soled athletic shoes.

12 The body was examined and there was found to
13 be seven gun shot wounds present on the body, which I have
14 numbered 1 through 7 for purposes of description.

15 Wound No. 1 was located on the lateral aspect
16 of the left cheek. The wound was oblique, oriented forward
17 and toward the right and measured $3/8$ by $1/4$ inch. There
18 was particulate powder stippling over the skin of the left
19 cheek, left upper and lower eyelids, and left chin over an
20 area of about three-fourths inches. The range of fire of
21 this shot was probably between one and two feet. The wound
22 path was slightly downward, forward and toward the right,
23 causing extensive fracturing of the left upper jaw and teeth,
24 and the bullet exited from the mouth, causing contusion of
25 the left upper lip. This bullet was not recovered.

1 WILLIAM E. FERRIS
2 a witness called by and on behalf of the Commonwealth, being
3 duly sworn, testified as follows:
4

5 FERRIS - DIRECT
6

7 By Mr. Norton
8

9 Q State your name and address please

10 A William E. Ferris, 1736 Chestnut
11 Avenue, Buena Vista.

12 Q In addition to your gainful employment
13 are you also a member of the volunteer rescue squad?

14 A Yes sir, I am the training officer
15 with the Buena Vista Rescue Squad.

16 Q On July 24, 1976, did you have occasion
17 to answer a rescue call?

18 A Yes sir.

19 Q What time was that?

20 A Something after 7:00, I am not sure.

21 Q Do you mean in the early morning hours?

22 A Yes sir.

23 Q Pursuant to that call, where did you
24 go?

25 A I left home that morning, I went from

1 my home to the call, I didn't go to the squad building.

2 Q When you went to the call, do you re-
3 call the street number?

4 A It was between 16th and 17th Streets
5 on Chestnut Avenue.

6 Q When you arrived there, please des-
7 cribe what you observed.

8 A I saw a police car sitting there
9 and I think there was another car sitting in front of the
10 home, and I saw Officers Plaughter and Lawhorn and I think
11 -- and there was a person laying in the street.

12 Q Did you examine that person who was
13 lying in the street?

14 A I did not examine him. When I arrived
15 Officer Plaughter met me, and when I started toward this
16 person, I bent over him and Plaughter stated that he didn't
17 believe there was much I could do for that person, or words
18 to that effect, but he said he would like for me to take a
19 look at this other person.

20 Q Then did you go over to this other
21 person?

22 A I stood up and looked around and I
23 believe this person was with Officer Lawhorn at the time,
24 and I started toward this person and they started toward me.

25 Q Is this person in the court room now?

1 A Yes, he is.

2 Q Is that Mr. Newcomer, the defendant?

3 A Yes.

4 Q Did you help wipe some blood off his

5 face?

6 A I did not recognize the person at

7 first, I have to say that.

8 Q Due to the swelling on his eye?

9 A Yes, one side of his face.

10 Q Did you take this person someplace?

11 A Yes, after I recognized him I spoke

12 to him, and he spoke to me, and we went to the police car

13 and I checked his face and his mouth and tried to wipe off

14 some of the blood.

15 Q Had you known the defendant previously?

16 A Yes.

17 Q For how long?

18 A Approximately 15 years.

19 Q Did you know him on a first name

20 basis?

21 A Yes sir.

22 Q Did you call him by his first name?

23 A Yes sir.

24 Q Did he call you by your first name?

25 A Yes sir.

1 Q So he recognized you?
2 A Yes sir.
3 Q Did you transport him to the hospital?
4 A We didn't take Bill in the ambulance
5 at first, I put him in the pick up truck that Captain Slough
6 came in. We put him in the ambulance first but then we took
7 him out and put the other victim in. We called for another
8 vehicle and it did not arrive when I thought it should have
9 so I put him in the vehicle with us and took him to the squad
10 building and then transferred him to a squad vehicle.
11 Q Did you have any conversation with the
12 defendant?
13 A Not at that time.
14 Q Did he make any complaint about phys-
15 ical injuries?
16 A Not at that time.
17 Q Did he discuss the shooting with you?
18 A No.
19 Q Did he have any conversation with you?
20 A Not at that time, he did on the way to
21 the hospital.
22 Q On the way to the hospital, what was
23 said by you to him and by him to you?
24 A I asked Bill -- I still didn't know
25 who it was laying in the street and I asked who was that

1 person and he said it was Vernon Staton and he said: "I hope
2 the son of a bitch is dead."

3 Q When you arrived at the hospital did
4 he ask you to do anything in particular for him?

5 A Yes sir, he was in the emergency room
6 and I think the nurse had looked after Bill, but I was still
7 with him, I was the only one in there with him, and he asked
8 me if I would take a card and call this person. I told Bill
9 I was not the officer in charge but that I would get Captain
10 Slough to take care of it, and I did.

11 Q When you say he gave you a card, do you
12 know from where he took this card?

13 A No, I don't. I wasn't interested in
14 it because it seemed -- he may have done this (reaching into
15 pocket).

16 Q Did you know who it was he wanted you
17 to call?

18 A I believe he said would I call his
19 lawyer.

20

21

FERRIS - CROSS

22

23 By Mr. Kizer

24

25

Q You have known Billy Newcomer how long?

1 A No sir.

2 Q As far as you can report, he was con-
3 scious at all times?

4 A Yes sir.

5
6 RONNIE SLOUGH

7 a witness called by and on behalf of the Commonwealth, being
8 duly sworn, testified as follows:

9
10 SLOUGH - DIRECT

11
12 By Mr. Norton

13
14 Q State your name and address please.

15 A Ronnie Slough, 1225 Forest Avenue,
16 Buena Vista.

17 Q With respect to the Buena Vista Rescue
18 Squad, describe your position and duties.

19 A At the time of this, or now?

20 Q At the time, please.

21 A I was Captain of the Squad, in charge
22 of emergency transactions.

23 Q That was in July of 1976?

24 A Yes.

25 Q On July 24, at any time during that
day, did you respond to a rescue call?

1 A Yes sir.

2 Q Advise us where you went.

3 A I went to 17th and Chestnut.

4 Q When you arrived describe what you
5 observed.

6 A I went up in the truck, I answered
7 the call from my home and Vernon Staton was laying in the
8 road, gasping for breath. At the time the squad had not got
9 there with the equipment. I went to the police car and
10 called on the radio, and told them to hurry. When they got
11 there they put Vernon in the ambulance and off they went to
12 the hospital. Billy Newcomer started to get in the unit and
13 I told him to wait, that I would take him in another vehicle.
14 We put Billy in the truck and took him to the squad building
15 and put him in another ambulance and took him to the hospi-
16 tal.

17 Q During the ride from the scene to the
18 hospital, was there any conversation between Mr. Newcomer
19 and yourself?

20 A As well as I can remember, very little
21 conversation. Eddie Ferris asked the question, who was it,
22 and Billy said, "It was Vernon Staton, and I hope the son of
23 a bitch is dead."

24 Q When you arrived at the emergency room
25 did Mr. Ferris give you something pursuant to a request from

1 truth, didn't you?

2

3

MR. KIZER: Objection, he is asking
4 for a conclusion.

5

6

7

Q Did you accept his statement as the
truth when he said, "I hope the son of a bitch is dead"?

8

A

9

MR. KIZER: Your Honor, that asks
10 clearly for an opinion.

11

12

13

14

15

16

17

COURT: I believe this witness said he
previously had never known him to tell
a lie. That was challenged as con-
trary to the rules of reputation and
I think your objection is well taken,
Mr. Kizer.

18

RALPH HARRISON

19

20

a witness called by and on behalf of the Commonwealth, being
duly sworn, testified as follows:

21

22

HARRISON - DIRECT

23

By Mr. Sisler

24

25

Q

State your full name.

1 A Ralph Harrison.
2 Q Where do you live?
3 A 2175 Spruce Avenue.
4 Q How long have you lived in Buena
5 Vista?
6 A All my life.
7 Q How long have you known Billy New-
8 comer?
9 A About 15 years.
10 Q Prior to July 24, 1976, were you friends
11 with Mr. Newcomer?
12 A Yes sir.
13 Q How long had you been friends at that
14 time?
15 A All the time.
16 Q A number of years?
17 A Yes.
18 Q Did you live close together?
19 A Yes sir.
20 Q Were you present at Ham Henson's on
21 the early morning of July 24, 1976?
22 A Yes sir.
23 Q Tell the jury what time you got there
24 and what was going on and what you did.
25 A I was working the 3:00 to 11:00 shift

1 at James Lee and I got off at 11:00.

2 Q 11:00 at night?

3 A Yes sir, Friday night, and I went
4 to Ham Henson's as soon as I got off and he was sitting on
5 the porch in a chair.

6 Q You are referring to Mr. Henson?

7 A Ham Henson. I sat down and we sat
8 there talking maybe five or ten minutes and he asked did I
9 want to play some Tonk and we went in the house and played
10 a few hands and a car went by -- we had the door open, and
11 it was George Saunders. I got up and went to the door and
12 hollered at him. He turned and came back and came in and
13 started playing cards with us. We played for a while and
14 Randy Camden and Terrance Grey came to the house and we all
15 started playing poker. We played poker for a while, we had
16 closed and locked the door, and a knock came at the door
17 later in the night, or early morning, and it was William
18 Newcomer, and he came in and sat down to my left and started
19 playing cards. I told him I had something I wanted to tell
20 him and he asked me what it was and I said I would tell him
21 later. He asked me again what it was and I told him that Mr.
22 Staton had been there looking for him.

23 Q Do you mean Vernon Staton?

24 A Yes sir. Before Mr. Newcomer came
25 to the house a car horn blowed outside and Randy Camden went

1 to the door and it was Vernon Staton and he went out and
2 talked and then he came in and said that Vernon wanted to
3 talk to me. I went out and stood near the gate and I was
4 talking to him, and he asked if I had saw Billy Newcomer
5 and I said no, I had worked 3:00 to 11:00 and I had not saw
6 him. He said, "I saw him with my wife tonight and I am going
7 to hurt him, I am going to take these two hands when I find
8 him and hurt him". I told him to go home and forget about
9 it and --

10 Q Do you know approximately what time
11 this was?

12 A It was somewhere around 1:30.

13 Q And he told you that he had seen
14 the defendant with his wife that night?

15 A Yes sir. I told him to go home and
16 forget about it and he said no, that he was going to find
17 him. He left and I went back in the house and about five
18 minutes later a car horn blowed again, it sounded like
19 Vernon but it went on by. Later on, Mr. Newcomer came in --

20 Q I think you backed up there. You
21 were all playing cards together?

22 A Yes.

23 Q Then what?

24 A We played cards and after I told him
25 I had something to tell him, I told him Mr. Staton was look--

1 ing for him.

2 Randy Camden made the statement -- he was talk-
3 ing about Vernon and he said --

4 Q You should not repeat what somebody
5 else said.

6

7 COURT: You cannot repeat what some-
8 one else said unless it was in the
9 presence of the defendant.

10

11 A Randy said Vernon was a man that if
12 you bothered him he would hurt you, and Terrance Grey said
13 he didn't carry a .38, but he took and showed us a switch
14 blade knife. Terrance Grey got sick and throwed up in a
15 bag there in the room. He went --

16 Q You are talking about Terrance Grey?

17 A Yes.

18 Q He got drunk --

19 A And he went broke.

20 Q He got drunk and ran out of money.

21 Then what happened?

22 A He went outside. Mr. Newcomer left
23 and he was gone about an hour and then he came back. He sat
24 down on my left, in the same place he had been, and we played
25 cards for a while and then the game broke up. When Mr. Hen-

1 son quit playing, we started playing Tonk and we played for
2 \$5.00 a hand. We played one hand and a knock came at the
3 door, Ham Henson came from the kitchen and Randy got up when
4 he went by and he said, "Billy, Vernon wants to talk to
5 you", and Billy said, "If you want to talk to me, come in",
6 and Vernon said, "No, you come out", and Billy said, "No,
7 I am not coming out". Mr. Staton pushed the door back and
8 came on in the house. I was still at the table. Mr. Newe
9 comer walked around on my right, Mr. Staton pointed his fin-
10 ger at him and said, "You lied to me".

11 Q Vernon Staton said that to William
12 Newcomer?

13 A Yes.

14 Q Then what happened?

15 A He went between me and the table and
16 swung at Mr. Newcomer and he fell on the floor.

17 Q Did he hit him the first time?

18 A No.

19 Q Then what happened?

20 A They were wrestling around there and
21 Mr. Newcomer got thrown into the window and it broke and he
22 run toward the kitchen and Mr. Staton still had hold of him.
23 When they came back toward the window I saw Mr. Staton hit
24 him in the eye. He fell next to the window and Mr. Staton
25 kicked him.

1 Q Where did he kick him?

2 A In the chest. Mr. Newcomer jumped
3 and went to run and pop had been spilled all over the floor,
4 and I think he had shower shoes on and his feet flew out and
5 he landed in the doorway where I was standing.

6 Q He slipped on Coke and fell down?

7 A Yes.

8 Q You saw one blow struck?

9 A Yes.

10 Q And you saw him kicked once?

11 A Yes.

12 Q And the rest of the time you say they
13 were scuffling, holding each other and bouncing around?

14

15 MR. KIZER: This is direct examination
16 and he is putting words in this man's
17 mouth that he has not used, and I ob-
18 ject.

19 COURT: The objection is sustained.

20

21 Q After Mr. Newcomer slipped on the Coke
22 what happened?

23 A His feet flew out and he fell and
24 his face hit right at my feet in the doorway. He had his
25 hands over his head. Vernon stepped over the top of him and

1 told him to be out of town by Monday and he walked off the
2 porch, and Mr. Newcomer got up and went into the living room
3 to a bag that was laying on the night stand. He took a hol-
4 ster out with a gun in it. He took the gun out of the hol-
5 ster and put it in his hands and --

6 Q How did he hold it?

7 A Like this (both hands extended in
8 front of him). And he walked around me and went out the door
9 and I went out behind him and when I got out on the porch Mr.
10 Staton was about middle ways of the road and Mr. Newcomer run
11 off the porch and Mr. Staton looked back and started back
12 toward the curb. They met near the curb at some trees on the
13 right side of the gate. Mr. Staton saw the gun and said,
14 "Put the gun down, Billy, I am sorry". Billy said, "It's too
15 late". Mr. Staton jumped behind the tree, Mr. Newcomer had
16 the gun pointed at him, Mr. Staton was behind the tree moving
17 around like this, and when he came around Mr. Newcomer fired
18 the gun and Mr. Staton fell to his knees and throwed his hands
19 up in the air and started to beg Mr. Newcomer not to shoot
20 any more.

21 Q Was he still behind the tree?

22 A He was opposite the tree.

23 Q Show the jury how his hands were when
24 he had them up, begging Newcomer not to shoot.

25 A Like this (open and up).

1 Q What did Mr. Newcomer do?

2 A He said, "This is it." I took off
3 running and I heard another shot. I was running towards the
4 back of the house and I heard him holler.

5 Q You heard who holler?

6 A Vernon Staton.

7 Q What did he say?

8 A He said, "Oh God, help me, don't shoot
9 any more."

10 Q Did you hear any more shots?

11 A Yes, I jumped down behind the creek
12 when I heard the shots. After all the shots were fired Mr.
13 Camden came around and said, "I think he has done killed him"
14 and I said, "Oh God, no", and he said, "Yes, I think he is
15 dead", he walked over to him and put the gun down to him and
16 pulled the trigger".

17 Q Then what did you do?

18 A I walked back to the house with Cam-
19 den, and Vernon Staton was laying in the road, face up.
20 When I went out the gate I had to walk by Mr. Staton who was
21 laying in the road, face up, and there was lead sticking out
22 his nose.

23 Q What did you do at that point?

24 A I stood there a few minutes and the
25 police pulled up. Pot Chittum came out first, and Mr. New-

1 comer asked him for a drink of water. Pot went to get the
2 water, but Mr. Newcomer went in the house, put the gun in
3 the holster, came back and the police pulled up and it was
4 Plaughter and Lawhorn, and Mr. Newcomer handed the gun to the
5 officer.

6 Q Did you leave at that time, or what
7 did you do?

8 A I left.

9 Q Tell the jury, after you left that
10 morning, when was the next time you saw William Newcomer that
11 day.

12 A I went to my house and stayed a few
13 minutes, and then I went to Mr. Newcomer's house and told
14 his wife what happened. I went back down towards where it
15 happened, I heard the first aid, and I believe they were
16 going through town, and I walked on downtown and they took
17 Mr. Newcomer to Lexington to the hospital and then they brought
18 him back to the court house and I went over there and asked
19 did he want an ice pack for his eye.

20 Q Do you know approximately what time
21 you saw Mr. Newcomer at the court house in Buena Vista?

22 A About somewhere before 12:00.

23 Q And you had a conversation with him?

24 A Yes sir, he was sitting on a bench in
25 the hallway and I asked did he want an ice pack and he said

1 A Yes.

2 Q Did you see him anymore that day?

3 A I think I saw him come out and get
4 in his car that evening.

5 Q You did not talk to him?

6 A No.

7 Q You saw him get back in his car and
8 drive somewhere else?

9 A Yes sir.

10 Q Did you have occasion to talk with
11 Mr. Newcomer the following day?

12 A Yes sir, on Sunday afternoon.

13 Q That would have been the Sunday after
14 the shooting?

15 A Yes sir.

16 Q Tell the jury about that conversation.

17 A He came over to my house and we sat
18 in the swing on the front porch. We were having a general
19 conversation, and it was hot, and my wife came out and asked
20 if we wanted some pop and we said yes. I asked Billy if he
21 knew what he had done, that he had killed Vernon, and he said
22 he did, and I said, "You could have shot one of us", and he
23 said, "No, I looked around and saw everybody but George
24 Saunders before I started shooting".

25

1 A No.

2 Q He didn't say anything to you about
3 it?

4 A I told him I was going to get some ice
5 at the drug store and he didn't say anything about any pre-
6 scription.

7

8 HARRISON - RE-DIRECT

9

10 By Mr. Sisler

11

12 Q Let me ask you several more questions.
13 When Mr. Newcomer fell at your feet, you said he slipped in
14 some Coke and fell, can you estimate how long he stayed in
15 a prone position, how long it was before he got up?

16 A Between five and ten seconds.

17 Q And at that point he got up and went
18 for his gun?

19 A Yes.

20 Q And you described that he got it and
21 was holding it in both hands?

22 A Yes sir.

23 Q How was he holding the gun as he
24 walked through the house?

25 A Like this (in both hands, straight

1 Q In response to Mr. Kizer's question
2 you said at one point in time that Mr. Staton heard Mr. New-
3 comer, or that he turned in the road?

4 A Yes sir.

5 Q And you said Vernon Staton walked
6 back toward him. What, if anything, was he saying?

7
8 MR. NATKIN: Your Honor, we must com-
9 plain about the leading of the witness.

10 MR. SISLER: I am not leading the wit-
11 ness.

12 COURT: I am ruling that you are.
13

14 Q Tell the jury in what manner Mr.
15 Staton walked toward Mr. Newcomer, and what, if anything,
16 he was saying.

17 A When Mr. Newcomer came off the porch
18 Mr. Staton turned and looked over his shoulder, he turned
19 and walked back toward the curb and by the time he got to
20 the tree Mr. Newcomer was out there.

21 Q And what was Mr. Newcomer doing, and
22 what was being said?

23 A He had the gun in his hand and Mr.
24 Staton saw him and said, "Put that gun down".

25 Q What direction was the gun being point-

1 ed?

2 A At his head.

3 Q Whose head?

4 A Mr. Staton's.

5 Q What did Mr. Staton say?

6 A He said he was sorry.

7 Q Then what did he do?

8 A He jumped behind that little tree.

9 Q Is that a photograph of the tree, I
10 hand you Commonwealth's Exhibit 4.

11 A This is the tree, right here.

12 Q And Mr. Staton jumped behind this tree?

13 A Yes.

14 Q What was he doing when the first shot
15 was fired?

16 A Going around the tree.

17 Q Was the tree between the deceased and
18 Mr. Newcomer?

19 A Yes sir.

20
21 HARRISON - RE-CROSS

22
23 By Mr. Kizer

24
25 Q You recall at some time in Mr. Nat-

1 COMMONWEALTH 9 - Given over objection

2 MR. NATKIN: We object to the giving of 9 be-
3 cause it does not include the words " apparent
4 necessity".

5 COMMONWEALTH 10 - Given over objection

6 MR. NATKIN: We make the same objection as to
7 instruction 9.

8 COMMONWEALTH 11 - Given as amended

9 MR. NATKIN: We still believe the law of self-
10 defense is necessity or apparent necessity and
11 we request that the words after necessity be
12 "or apparent necessity".

13 COMMONWEALTH 12 --

14 MR. SISLER: Your Honor, on Instructions 12 and
15 13, you might want to pass them at the present
16 time. We are not tendering any instructions on
17 manslaughter and if the Court decides to instruct
18 on manslaughter then 12 and 13 would have to be
19 amended to reflect the additional charge of
20 manslaughter.

21 COURT: I would like for you to state whether
22 you object to the giving of an instruction on
23 manslaughter.

24 MR. SISLER: We do, Your Honor. The authorities,
25 I submit, make it clear that a manslaughter

1 badly. Two members of the Rescue Squad, they were right
2 there with him and the man was beaten so horribly -- the
3 Commonwealth says why didn't you bring in doctors. Why
4 didn't they? They have behind them the unlimited resources
5 of the Commonwealth of Virginia, they could have subpoenaed
6 the medical records --

7
8 MR. NORTON: Your Honor, that is absolutely
9 false, that is privileged communication between
10 patient and doctor. The Commonwealth did not
11 have the right to do that.

12 COURT: Mr. Natkin, I think the jury should be
13 told that. The relationship between doctor and
14 patient is confidential.

15 MR. NATKIN: We object to the Court's statement.

16
17 --- The condition of Mr. Newcomer is seen by this picture,
18 it was described by him and it was described by the people
19 that saw him and that is the only evidence before you.
20 With that evidence, people who knew him not being able to
21 recognize him, beaten as he described, kicked, under these
22 circumstances and how it appeared to him, he acted as he
23 thought he had to and that is legal justification.

24 He tells you he was dazed, he don't remember
25 everything after that, he was in a state of shock. Who
wouldn't be under that set of circumstances. You are beaten

1 COURT: You are not to make an example
2 of this defendant. If that is the way
3 you interpret what Mr. Sisler is say-
4 ing, I direct you to disregard that.

5
6 MR. SISLER: I do not request that you make an
7 example of this man. I request that you punish him for what
8 he did, bearing in mind he needs to be punished and that others
9 need to be deterred from committing this type assassination
10 on the streets of our County. Thank you.

11
12 COURT: Members of the jury, before this case
13 is handed to you I want to make this observation for the
14 record and my remarks are addressed to you. At the conclusion
15 of the evidence you were instructed on the law and then you
16 heard final arguments by counsel, during which argument counsel
17 for the Commonwealth and for the defendant commented on the
18 failure of the other side to call as witnesses the doctors
19 who treated the defendant following this incident. Mr.
20 Norton objected to Mr. Natkin's comment that the Commonwealth
21 could have called the doctors. I sustained the objection
22 and Mr. Natkin, without further argument, objected to the
23 Court's ruling. This Court now tells you that the doctors,
24 being available to either the Commonwealth or the defendant
25 and neither side having elected to summons them, that fail-

1 ure is not to be considered by this jury in your deliber-
2 ations and you are directed to disregard the comments by
3 counsel regarding such failure. Your duty is to fairly
4 and impartially consider the evidence in this case. You are
5 not to go outside the evidence, but consider only such evi-
6 dence adduced from the stand and the law applicable to this
7 case and from that only you are to find your verdict.

8
9 JURY OUT

10
11 MR. NATKIN: As Your Honor just stated to the
12 jury, during my argument there was an objection made. The
13 Court has stated that the Commonwealth had the right to
14 subpoena the doctor and at that time I was stopped and the
15 Court has now advised the jury on that. For the record,
16 Gibson v. Commonwealth, 216 Va 418, says there exists no
17 privilege in criminal prosecutions in Virginia. I am not
18 unmindful that the Court has so advised the jury that the
19 statement by the Commonwealth and the instruction by the
20 Court was erroneous, but the damage has now been done, it is
21 before the jury and it cannot be corrected by the admonish-
22 ment the Court gives the jury to disregard it and the defendant
23 does therefore respectfully move for a mis-trial.

24 COURT: I don't admit that it was error, I
25 merely took the precautionary action of directing the jury

1 to disregard your comments and Mr. Norton's.

2 MR. NATKIN: Further, I wish to get into the
3 record the objection to the Court's admonishment, telling
4 the jury to disregard my comments to them. My comments
5 were what the law says, that the Commonwealth had the right
6 to call that witness, that they had as much right to call
7 him as we did. By telling the jury to disregard my remark,
8 it has taken the effectiveness away and that cannot be
9 changed.

10 COURT: You had no right to comment on the fail-
11 ure of the Commonwealth to call doctors.

12 MR. NATKIN: We were attempting to argue that
13 the Commonwealth had as much right to call doctors as we
14 did.

15 COURT: Let's see what the jury does.

16 MR. NATKIN: We feel that the Court compounded
17 the error by stating that the law as stated by Mr. Norton
18 was correct, that was done in front of the jury and effected
19 my argument, it was not a correct statement of law and we
20 except to the Court's ruling and we except to the refusal
21 of the Court to grant our motion for a mis-trial.

22 MR. SISLER: If Your Honor please, the motion
23 for a mis-trial comes far too late, it is not timely made
24 and should not be regarded. The case cited by Mr. Natkin
25 is a situation where the defendant was ordered by order of

1 the Court to undergo a psychiatric examination. The case
2 held that statement made at that time by the defendant by
3 virtue of having been so ordered by the Court were admissible.
4 The case did not speak to the doctor-client relationship
5 independent of the Court ordered examination. It is clear
6 from the law in Virginia that a doctor is not able to divulge
7 information unless consented to by the individual being
8 treated. Defendant's motion is too late and is not appli-
9 cable.

10 COURT: Without further comment, I over-rule the
11 defendant's motion.

12
13 JURY IN

14
15 COURT: You will now retire to your jury room
16 to commence your deliberations. Your first duty is to select
17 a foreman. I will remind you that your verdict must be
18 unanimous and when you have reached a unanimous verdict it
19 will be reduced to writing and signed by your foreman. You
20 will take the Instructions of the Court and you may call for
21 such Exhibits as you wish. You may now retire.

22 Jury Out - 2:13 P.M.

23
24 MR. NATKIN: Your Honor, if I may, for the record----

25 COURT: I have already recessed.

1 Mr. Norton and then your conclusion.
2

3 MR. NATKIN: If you please, Your Honor, there is
4 one additional motion that I need to make at this time, sir.
5 The Defendant by counsel most respectfully moves for a new
6 trial upon the grounds of after discovered evidence. It
7 came to our attention only Saturday, this past Saturday, that
8 Ralph Harrison had given a written statement to the Buena
9 Vista Police Department immediately after this incident.
10 Only a few minutes ago were we able to obtain a copy of that
11 statement. We did call Mr. Sisler as soon as -- I guess it
12 was actually yesterday -- call Mr. Sisler, as soon as we got
13 hold of Mr. Sisler -- Mr. Sisler stated he did not have that
14 statement. In the mean time we have run down and found that
15 that statement was in the possession of the Buena Vista Police
16 Department and apparently had not been turned over to either
17 the Commonwealth Attorney or to anyone else.

18 A motion had been filed previously in this case,
19 sir, as the record will show, asking that the Defendant,
20 William P. Newcomer, by counsel, pursuant to Rule 3A-14 of the
21 Rules of the Supreme Court of Virginia be permitted to
22 inspect recorded statements, confessions, following the
23 Statute. And further a motion was made that the Defendant
24 by counsel further moves the Honorable Court to direct the
25 Commonwealth's Attorney to make available to the Defendant

1 any and all information that is known by the Commonwealth's
2 Attorney to be within the possession, custody or control of
3 the Commonwealth, which is or may be favorable to the Defend-
4 ant and beneficial to his defense.

5

6 COURT: When was this filed?

7

8 MR. NATKIN: Prior to the first trial, sir.
9 There was a hearing on it and the Commonwealth at that time
10 stated -- it was filed prior to the first trial -- the Common-
11 wealth stated that, of course, he would make those things
12 available to us even without the motion because as a matter
13 of law we are entitled to those things.

14 Ralph Harrison it developed was the most
15 detrimental witness to the Defendant. The record will show
16 the many things he said describing the position of Staton,
17 of various discussions. Yet, at this stage and only at this
18 stage, when we finally received the statement that Ralph
19 Harrison gave to the police which the police had all this
20 time, and even in the course of the trial, after knowing of
21 Harrison's testimony completely to the contrary, did not
22 come forward with this statement -- and this statement clearly
23 shows that -- and this is after what happened inside -- "I
24 got to the door and as I got there and as I turned I seen
25 Billy fall face down into the door facing. Vernon stepped
over the top of Billy and Vernon told Billy to be out of town

1 by Monday. Then as Vernon was walking off of the porch Billy
2 came out with the gun. From where he got the gat I do not
3 know. When I saw the gun I jumped over the railing and ran.
4 As I ran I heard Vernon saying, 'Please Billy', then I heard
5 the shots." Everything that this man testified to in that
6 case about what he saw is completely refuted by his own signed
7 statement which the police, the Commonwealth of Virginia, the
8 police of Buena Vista, had in their possession and permitted
9 this man to testify to the contrary, never came forward with
10 this statement and only as of this morning did we obtain this
11 statement --

12

13 COURT: How did you obtain that?

14

15 MR. NATKIN: We called Mr. Sisler and asked him
16 if there was such a statement. We had previously -- we first
17 learned about it on Saturday, that one of the people -- Mr.
18 Sisler gave it to us.

19

20 COURT: The only reason I ask that is to find out
21 whether the grounds exist, you know, for the after discovered
22 evidence -- if it was available upon the proper investigation.

23

24 MR. NATKIN: It was turned over to us by Mr.
25 Sisler who physically went over and got it from Mr. Plogger

1 here in the Courtroom today. We had requested it -- I believe
2 Mr. Kizer called Mr. Plogger and asked him yesterday whether
3 such a statement -- he had such a statement and he indicated
4 that there was such a statement in existence but properly
5 we had to go through Mr. Sisler. He was most cooperative in
6 assisting us and having the statement here today.

7 We would like to ask, sir, that this statement
8 be made a part of the record.

9
10 MR. SISLER: Just a minute, Mr. Natkin, I think
11 I ought to have a chance to respond.

12
13 MR. NATKIN: I think I can move at this point,
14 the Judge don't have to rule. I want to move that this
15 statement be made a part of the record, that this is proper
16 after-discovered evidence and further that this was evidence
17 that should have been adduced under the Beatty Rule and under
18 the series of rules and cases that states when the Commonwealth
19 has knowledge -- and we are not accusing Mr. Sisler of having
20 this knowledge, we are accusing the Commonwealth of Virginia,
21 the police department -- of having knowledge of this and not
22 coming forward when it was the entire key crux of this entire
23 case, the testimony of Mr. Harrison.

24 And we were advised by Mr. Sisler that he had all
25 of the other statements of the other witnesses but this one.

1 He did not have this one, the police department withheld it
2 from him, even the acting Commonwealth Attorney didn't have
3 this -- which turns out to be the key statement of the entire
4 case, sir.

5 We submit, sir, that with this statement to
6 properly impeach this witness the results of this case could
7 have been entirely different. It goes to a key matter in
8 the case and we most respectfully move, sir, that the verdict
9 of the Jury be set aside and we be granted a new trial -- or,
10 at least, that the verdict of the Jury be set aside because
11 of the failure of the Commonwealth -- and when I'm talking
12 about the Commonwealth I'm talking about the police department --
13 to come forward with this statement and to permit the man to
14 perjure himself as thoroughly and absolutely on the stand
15 without giving us this opportunity to prove his perjury, sir.

16 Your Honor, we have other grounds and did you
17 want us to cover all of the grounds --

18
19 COURT: Yes.

20
21 MR. NATKIN: Your Honor, we further most respect-
22 fully move that the Court set aside the verdict of the Jury
23 as being contrary to the law and the evidence. We most res-
24 pectfully submit, sir, that certain instructions which were
25 objected to in the trial, being Instructions numbered -- well,
we objected to giving of all of the instructions, we reiterate

1 Commonwealth can only speak one time --

2

3 MR. NATKIN: Yes sir, Mr. Kizer is going to finish
4 my argument. In other words, I have covered this part of it
5 and he is going to cover --

6

7 COURT: The Commonwealth has a right to argue --

8

9 MR. NATKIN: Yes sir, well we haven't completed
10 the initial part of our argument. In other words, I have
11 covered this and he is going to cover this venue question on
12 our opening, sir. He is covering new ground other than what
13 I did.

14

15 MR. KIZER: If Your Honor please, Mr. Sisler, the
16 record will show and I'm sure the Court will recall that this
17 matter was twice tried by a venire in Buena Vista, I believe
18 in May and in November of last year. Both of those trials
19 resulted in a mistrial because of the inability of the Jury
20 to agree upon a unanimous verdict. Subsequent to the November,
21 1977, trial, the Commonwealth made a motion for a change of
22 venue. And that matter came on to be heard by the Court on
23 January 23rd, 1978, in Buena Vista. I take it that I need
24 not argue that the party making the motion has the burden of
25 establishing grounds for the granting of the motion if it is

1 to be granted. Or to say it in another way, sir, the burden
2 rests upon the Commonwealth to establish grounds for a change
3 of venue.

4 Now before I proceed into that area, sir, the
5 Court is well aware of the fact that both the Constitution of
6 the State of Virginia and the Constitution of the United
7 States provides that a person charged with a crime or a
8 criminal offense has certain -- I suppose as stated in the
9 Preamble -- inalienable rights, trial by Jury, a speedy trial,
10 and enumerated among those rights is the right to a trial
11 by a venire composed of the people within the jurisdiction
12 wherein the offense is said to have occurred. I am not un-
13 mindful that there is a -- I believe '61 Virginia case that
14 rules on the Statute that the Legislature has passed which
15 permits the change of venue on the motion of either party.
16 I now, sir, raise a question as to the constitutionality of
17 that Statute as being in conflict not only with the Constit-
18 ution of Virginia but in conflict with the Constitution of
19 the United States and therefore unconstitutional because it
20 strips from the Defendant one of the rights guaranteed him
21 by the Constitution.

22 Now, sir, moving to the hearing of January 23,
23 the Court will recall and I believe the record will substanti-
24 ate, that the only witness who testified at that hearing was
25 Mr. Robey, the Commonwealth's Attorney of Buena Vista who dis-

1 qualified himself because he had been summoned as a witness
2 for the Defendant. There is reference in the record to
3 certain news articles that are said to have been printed and
4 published in the Buena Vista News. However, nowhere do I
5 find, upon searching the transcribed record, that those news
6 items were ever admitted into the evidence. If I am correct,
7 sir, in that statement then it would appear that the motion
8 had to stand or fall upon the testimony of Mr. Robey. And
9 bearing in mind that the burden was on the Commonwealth to
10 prove, even when one concedes --

11
12 COURT: May I interrupt just a minute. In the
13 Order that I entered granting change of venue in the second
14 paragraph I recite in my Order, "The Commonwealth in support
15 of its motion introduced testimony of William T. Robey, III,
16 Commonwealth's Attorney for the City of Buena Vista and
17 introduced as Exhibits newspaper accounts published by the Buena
18 Vista News covering events from the time of the homicide and
19 continuing through both trials. And the Defendant in opposi-
20 tion of the motion introduced a petition signed by eleven
21 persons stating a fair and impartial trial could be had in
22 Buena Vista."

23 The reason I read that into the record is that
24 I understood you to say that as far as you recall those news-
25 paper publications were not offered into evidence. But I

1 believe they were.

2

3 MR. KIZER: Well, the record -- I'm talking about
4 the record of the actual proceedings themselves -- no where
5 do they show -- does that record show, that I was able to
6 discover, that the Court admitted them into evidence. It's
7 just not there.

8 Now, sir, with reference to Mr. Robey's testimony
9 who was called by the Commonwealth to offer evidence to support
10 its motion, I refer the Court respectfully, sir, to page 15 --
11 and this is the transcript of the hearing on January 23rd
12 when that motion was heard -- where Mr. Robey said about a little
13 over half-way down on the page, it appears in the form of a
14 question and it was by Mr. Natkin, "And that the Commonwealth
15 could get a fair and impartial trial, in your opinion?" Mr.
16 Robey's answer is "You have not heard me say anything to the
17 contrary of that". In other words, Mr. Robey is saying that
18 he did not dispute that the Commonwealth could get a fair and
19 impartial trial. But there is more to it, sir, -- on page 18,
20 Mr. Robey -- at the top of the page on 18, in the last state-
21 ment, and I'm quoting him now -- "The greatest amount of con-
22 versation I have heard is in regard to the Defendant, and the
23 question I raise"-- I being Mr. Robey -- "is that of whether
24 the Defendant can get a fair and impartial trial." In other
25 words, the only witness offered by the Commonwealth is saying

1 it's not a question of whether or not the Commonwealth can
2 get a fair and impartial trial, in his opinion, but the ques-
3 tion was whether or not in his opinion the Defendant could get
4 a fair and impartial trial in Buena Vista. And again for the
5 purpose of emphasis, sir, I call to your attention that this
6 was a motion made by the Commonwealth, not by the Defendant.
7 And the sole witness called by the Commonwealth says that in
8 his opinion the question -- at the expense of repetition -- was
9 not whether or not the Commonwealth could get a fair trial
10 but whether or not the Defendant could.

11 Now if you will permit me to move to page 25 --
12 or page 22 -- at the top of the page, "Did you advise Mr.
13 Kizer" -- and this was a question put by Mr. Natkin to Mr.
14 Robey -- "Did you advise Mr. Kizer that if the Jury considers
15 only the evidence from the stand, the Commonwealth can get a
16 fair and impartial trial, but if they go beyond the evidence,
17 they cannot?" Mr. Robey's answer is "That is the whole gist
18 of what I am saying now." Question, "If the jury follows the
19 instructions of the Court, they can get a fair and impartial
20 trial?" Robey, "If the jury is able to disregard those things
21 that it knows that it should not know, if they can be super
22 human beings and able to say they know something but they
23 don't, then the Defendant and the Commonwealth can get a fair
24 trial."

25 Now we move to page 25, mid-way of the page, where

1 the Court is speaking, Your Honor is speaking. I stand
2 corrected, I, myself, am speaking but am quoting from a news
3 article which allegedly quotes Your Honor. There are right
4 many kind of "Chicken Little told me" type things in that.
5 But it shows it as a quote as Your Honor will observe there.
6 "Judge Paul A. Holstein, in response to the motion, noted
7 that he had previously observed in passing upon a similar
8 request, that this was a matter for the people of Buena Vista
9 to handle. He observed that the offense was alleged to have
10 been committed in Buena Vista, by a resident of Buena Vista
11 and the victim of the homicide was likewise a resident of
12 Buena Vista. He noted the people of Buena Vista were basically
13 fair, intelligent and able to solve their own problems." Now
14 Your Honor made that observation into the record.

15
16 COURT: That was when the first motion was made
17 by the Commonwealth to change.

18
19 MR. KIZER: Right, sir.

20
21 COURT: That was prior to the mistrial --

22
23 MR. KIZER: That's correct, sir. But Your Honor
24 was making observations in general about the people of Buena
25 Vista.

1 Now, sir, I next wish to call your attention to
2 the sequence of events that are bound to have occurred in this
3 matter. And I say this most respectfully, sir. Apparently,
4 there were several conferences between Your Honor and Judge
5 Moffett on this subject. One cannot read this record without
6 arriving at the conclusion that Your Honor and Judge Moffett
7 conferred on at least two occasions while this motion was
8 pending as to whether or not the motion should be granted.
9 And this I shall attempt to point out to Your Honor by quoting
10 from the record which is to say if I am correct that Judge
11 Moffett played a material part in determining whether or not
12 the motion should be granted, although Judge Moffett never
13 heard any evidence in this matter, either in the trial itself
14 or on the motion for a change of venue. The Court will note
15 at the top of page 33, and this is the Court stating, "Judge
16 Moffett and I have discussed this case, all of the problems
17 and finally we discussed the matter of the change of venue
18 and he is of the opinion," -- he being Judge Moffett -- "and
19 I concur," -- I being Your Honor -- "That the Commonwealth's
20 motion for a change of venue should be granted and the case
21 tried in the Circuit Court of Rockbridge County with a venire
22 from Rockbridge County."

23 Now I submit to you, sir, there can be but one
24 fair interpretation of Your Honor's remark at that time. And
25 that is that Judge Moffett had made the determination that the

1 venue should be changed and Your Honor concurred in that judg-
2 ment, in that determination. To put a fair interpretation
3 upon that it would not be Your Honor's -- this doesn't say
4 it's Your Honor's decision -- it says it's Judge Moffett's
5 determination, Judge Moffett's judgment, and that Your Honor
6 concurred in Judge Moffett's determination.

7
8 COURT: While you are on that subject, since
9 apparently, not even by implication, but by direct accusation
10 you say that this decision was Judge Moffett's, I feel that
11 my letter of February the 15th, 1978, which I made a part of
12 the record -- the original is in there and I believe you have
13 a copy of that -- I believe that that should be read into the
14 record in fairness to both Judge Moffett and to me.

15
16 MR. KIZER: I do not have a copy --

17
18 COURT: You did receive it though?

19
20 MR. KIZER: I'm sure I did. I do not have a copy
21 of it.

22
23 COURT: Would you have any objection if I read it?

24
25 MR. KIZER: No sir.

1 COURT: Excuse me for interrupting.

2

3 MR. KIZER: Yes sir.

4

5 COURT: This is a letter addressed to Mr. Kizer
6 and Mr. Natkin and Mr. Sisler and Mr. Norton, counsel in this
7 case, dated February 15, 1978.

8 "Gentlemen: I acknowledge the filing of exceptions
9 to my order entered January 23, 1978, granting the Commonwealth's
10 motion for change venue.

11 Argument was heard January 23, 1978, on the motion
12 to change venue. Exceptions were filed by Counsel for the
13 Defendant February 10, 1978, a copy of which was received by
14 the Court February 13.

15 Counsel for the Defendant charge this Court with
16 improperly making a finding unsupported by evidence, and that
17 this Court was influenced by the opinion of Judge Moffett,
18 the Chief Judge of the Twenty-Fifth Circuit.

19 As I stated during the hearing on January 23,
20 following the second mistrial of this case, I did discuss the
21 problems related to this case with Judge Moffett several
22 times. I considered this not only permissable but advisable
23 mindful of Virginia Code Section 17-116.2 (b) which provides:

24 "The Chief Judge of the Circuit shall
25 ensure that the system of justice in

1 his Circuit operates smoothly and efficient-
2 ly. He shall have authority to assign the
3 work of the Circuit as between Judges, and
4 in doing so he may consider the nature and
5 categories of the cases to be assigned."
6

7 It is at the suggestion of the Chief Judge that
8 I preside at the third trial of this case; and that the trial
9 of this case be held February 20, 21 and 22nd. After detail-
10 ed discussions of this case and the problems involved, this
11 Court concurred in the opinion of Judge Moffett that venue
12 should be changed. However, this Court at no time made a
13 finding on the motion until at the conclusion of the hearing
14 on January 23, and this followed the testimony of W. T. Robey,
15 III, offered by the Commonwealth, and the affidavit of eleven
16 persons offered by the Defendant.

17 I invite the attention of Counsel to pages 40 and
18 41 of the transcript of motions heard January 23, where this
19 Court tells you, "I will say very frankly that I did not
20 decide on a change of venue until this morning. There was
21 some very serious question in my mind whether I would grant
22 the motion. I have listened carefully to your arguments and
23 things I thought I should consider and I ruled as I thought
24 proper. This has not all been pre-determined although I knew
25 how Judge Moffett felt."; and pages 42 and 43 where I said,

1 "The reason I withdrew or rescinded my first ruling was when
2 you reminded me you had not had an opportunity to put on
3 evidence. So I withdrew my ruling to give you that opportunity.
4 I just now inquired whether you had put on all of your evid-
5 ence and Mr. Natkin said "Yes" and it was suggested I restate
6 my ruling which I did"; and

7 To Mr. Kizer: "Your grounds for exception
8 was that Judge Moffett did
9 something to influence me in
10 that decision".

11 By Mr. Kizer: "Yes sir".

12 By Court: "That is not so."

13 Finally, Counsel for the Defendant aver "the Court
14 had prejudged this matter prior to hearing any evidence as
15 shown by the transcript wherein he had prepared a written
16 statement, including his finding, prior to hearing evidence
17 in this case. The Court, prior to hearing argument January
18 23, reviewed the law related to change of venue, and prepared
19 notes to which reference was made during the hearing. The
20 "written statement" mentioned by Counsel are such notes.

21 The order entered January 23, 1978, sets forth
22 the grounds supporting the change of venue."

23 That was the content of the letter which I sent
24 to all of the attorneys involved and states correctly my
25 position. Now, go ahead, Mr. Kizer.

1 MR. KIZER: As I was saying, sir, I cannot help
2 but believe that it was error that Judge Moffett and you
3 should have reached a decision on the change of venue, even
4 before the motion for the change was argued. During the
5 argument, on page 38, line 9, this Court stated "I questioned
6 Judge Moffett and his opinion was that under those circum-
7 stances a change of venue would be proper." Then on page 37
8 this Court stated, "I think what we are both disturbed about
9 is two hung juries, substantial expense to the Commonwealth
10 and that which will be incurred again and if that should
11 result in a hung jury." We feel that any reference to the
12 expense of this matter was improper. On page 43, sir, I made
13 the observation in the record that I gathered from what this
14 Court said that in the discussion with Judge Moffett, Judge
15 Moffett wanted this done and you concurred. At that time,
16 at the hearing on January 23, we noted our exception to this
17 for the record.

18
19 MR. NATKIN: On the other point, Your Honor, the
20 matter of the testimony of Ralph Harrison. We would like to
21 read into the record certain portions of his testimony at the
22 trial and also the statement that he gave to Officer Reynolds.
23 We wish to point out to Your Honor the differences in his
24 testimony and his statement. If I may do that please?

25 COURT: Are you saying, Mr. Natkin, that he testified

1 differently from what is contained in the statement?

2

3 MR. NATKIN: If I might read both into the record,
4 sir, I believe ---

5

6 MR. SISLER: The record has been transcribed,
7 Your Honor, and could speak for itself.

8

9 MR. NATKIN: I would like for the record to read
10 this.

11

12 COURT: Very well, go ahead.

13

14 MR. NATKIN: I am reading from Ralph Harrison's
15 testimony at the last trial.

16

17 "A He went outside (here referring to Terrance
18 Grey). Mr. Newcomer left and he was gone about an hour and
19 then he came back. He sat down on my left, in the same place
20 he had been, and we played cards for a while and then the
21 game broke up. When Mr. Henson quit playing, we started play-
22 ing Tonk and we played for \$5 a hand. We played one hand
23 and a knock came at the door, Ham Henson came from the kit-
24 chen and Randy got up when he went by and he said, "Billy,
25 Vernon wants to talk to you", and Billy said, " If you want
to talk to me, come in", and Vernon said, "No, you come out",

1 and Billy said, "No, I am not coming out". Mr. Staton push-
2 ed the door back and came on in the house. I was still at
3 the table. Mr. Newcomer walked around on my right, Mr.
4 Staton pointed his finger at him and said, "You lied to me."

5 Q Vernon Staton said that to William
6 Newcomer?

7 A Yes.

8 Q Then what happened?

9 A He went between me and the table and
10 swung at Mr. Newcomer and he fell on the floor.

11 Q Did he hit him on the first time?

12 A No.

13 Q Then what happened?

14 A They were wrestling around there and
15 Mr. Newcomer got thrown into the window and it broke and he
16 run toward the kitchen and Mr. Staton still had hold of him.
17 When they came back toward the window I saw Mr. Staton hit
18 him in the eye. He fell next to the window and Mr. Staton
19 kicked him.

20 Q Where did he kick him?

21 A In the chest. Mr. Newcomer jumped
22 and went to run and pop had been spilled all over the floor,
23 and I think he had shower shoes on and his feet flew out and
24 he landed in the doorway where I was-standing.

25 Q He slipped on Coke and fell down?

1 A Yes.

2 Q You saw one blow struck?

3 A Yes.

4 Q And you saw him kicked once?

5 A Yes.

6 Q And the rest of the time you say they
7 were scuffling, holding each other and bouncing around?"

8 At that point there was an objection by Mr. Kizer
9 which was sustained by the Court.

10 "Q After Mr. Newcomer slipped on the Coke
11 what happened?

12 A His feet flew out and he fell and
13 his face hit right at my feet in the doorway. He had his
14 hands over his head. Vernon stepped over the top of him and
15 told him to be out of town by Monday and he walked off the
16 porch, and Mr. Newcomer got up and went into the living room
17 to a bag that was laying on the night stand. He took a hol-
18 ster out with a gun in it. He took the gun out of the hol-
19 ster and put it in his hands and ---

20 Q How did he hold it?

21 A Like this (both hands extended in
22 front of him). And he walked around me and went out the door
23 and I went out behind him and when I got out on the porch Mr.
24 Staton was about middle ways of the road and Mr. Newcomer run
25 off the porch and Mr. Staton looked back and started back
toward the curb. They met near the curb at some trees on the

1 right side of the gate. Mr. Staton saw the gun and said,
2 "Put the gun down, Billy, I am sorry". Billy said " It's
3 too late." Mr. Staton jumped behind the tree, Newcomer had
4 the gun pointed at him, Mr. Staton was behind the tree moving
5 around like this, and when he came around Mr. Newcomer fired
6 the gun and Mr. Staton fell to his knees and threwed his hands
7 up in the air and started to beg Mr. Newcomer not to shoot
8 any more.

9 Q Was he still behind the tree?

10 A He was opposite the tree.

11 Q Show the jury how his hands were when
12 he had them up, begging Newcomer not to shoot.

13 A Like this (open and up).

14 Q What did Mr. Newcomer do?

15 A He said, "This is it". I took off
16 running and I heard another shot. I was running towards the
17 back of the house and I heard him holler.

18 Q You heard who holler?

19 A Vernon Staton.

20 Q What did he say?

21 A He said, " Oh God, help me, don't
22 shoot any more."

23

24

25

1 MR. NATKIN: That, Your Honor, is the testimony
2 of Ralph Harrison from the last trial. Now, if it please the
3 Court, I would like to read the statement that Mr. Harrison
4 gave to Officer Reynolds on the afternoon of this incident.

5 "I, Ralph Harrison, was at Ham Henson's home last
6 night playing Tonk. Around 12 or 1 o'clock a car horn blew
7 and Randy Camden went to the door and seen that it was Vernon
8 Staton in a car. Vernon Staton told Randy Camden to come there
9 to his car. When Randy finished talking to Vernon, Randy
10 came into the door and told Ralph (me) that Vernon wanted to
11 talk to me (Ralph). I went to the door and Vernon asked me if
12 I had seen Billy Newcomer. I told him no. I have been work-
13 ing 3-11 and I just got home one-half hour ago. He (Vernon)
14 said when I see him I am going to take these two hands and
15 break him in two. I said Vernon you should forget it and go
16 home to bed and stay out of trouble. Then he left. He re-
17 turned between 7 or 7:30. It was a knock at the door. Billy
18 went over to the window and said it was Vernon. Randy
19 Camden open the door. I think Randy said Billy, Vernon wants
20 to talk to you. The door was open then part the way. Vernon
21 said come here Billy. Billy said no, you come in here. About
22 that time Vernon said Billy you lied to me. Billy said no
23 I did not. At that moment Vernon pushed his way past me and
24 Vernon hit Billy several times in the face and as Billy was
25 trying to get away from Vernon they both went in the floor.

1 I got to the door and as I got there as I turned I seen Billy
2 fall face down into the door facing. Vernon stepped over
3 top of Billy and Vernon told Billy to be out of town by
4 Monday. Then as Vernon was walking off of the porch Billy
5 came out with the gun. Where he got the gun I do not know.
6 When I saw the gun I jumped over the railing and ran. As I
7 ran I heard Vernon saying please Billy, then I heard the
8 shots.

9 This is a true statement of Ralph Harrison,
10 signed Ralph Harrison, 7/24/76 at 8:20 a.m.

11
12 COURT: I am going to permit that, if the
13 Commonwealth has no objection, I am going to admit that in
14 this case and make it a part of the record.

15 Any further comments?

16
17 MR. KIZER: Your Honor, Officer Plogger is present
18 in the Courtroom and we would like to ask leave of the Court
19 to complete this record to permit us to have him state into
20 the record how we got that statement and where the statement
21 had been up to this time, sir.

22
23 COURT: Any objection, gentlemen?

24
25 MR. SISLER: Your Honor, I don't think that there
is any -- I mean I think we can stipulate as far as I know

1 that the statement was with him until this morning. I don't
2 think there is any problem with that.

3
4 MR. NATKIN: And I assume that you will further
5 stipulate that all the other statements except that one was
6 turned over to you as Commonwealth's Attorney?

7
8 MR. SISLER: The thing that I can't really say
9 with any great degree of certainty -- as you recall Mr.
10 Robey was involved in this thing initially and then his files
11 were turned over to me. And, you know, to my personal know-
12 ledge I had not seen the statement. But that's not to say
13 when given to me, I don't know, I just didn't have any know-
14 ledge of it and, you know, as far as I know it was not. I
15 did have some other statements from Randy Camden I think,
16 and one or two other of these gentlemen, that I specifically
17 recall being in my file. They were very brief. I don't
18 recall this one but that's not to say that it wasn't given
19 to me. I did not incidentally turn over any other statements
20 to the Defense because I don't -- as I said earlier the rules
21 simply don't permit it. This was done just out of the inter-
22 est of helping them make their motion this morning.

23
24 COURT: Well, I don't see where any harm could be
25 done by having Officer Plogger testify as to when he obtained

1 this statement.

2

3 MR. SISLER: He didn't obtain it I don't think,
4 Judge.

5

6 MR. NATKIN: Mr. Reynolds -- according to the
7 statement Officer Reynolds took the statement but it was
8 turned over to Plogger as investigating officer. For the
9 record may I state that we did file what is generally known
10 as the Brady Motion with the Court, and by Brady I mean the
11 case of Brady versus Maryland, 373 US 80 10 LED 2nd 215,
12 83 Supreme Court 1194, which I'm sure the Court is fully
13 familiar with the Brady motion that if the Commonwealth has
14 exculpatory or advantageous evidence for the Defendant and
15 does not produce it, then we are entitled -- then the verdict
16 should be set aside.

17

18 COURT: Of course, Mr. Sisler says he had no know-
19 ledge of this statement.

20

21 MR. NATKIN: Yes sir. We are saying, sir, by
22 Commonwealth -- and in this case it was a police officer,
23 not the Commonwealth's Attorney, who had taken a confession
24 of another man and never told the Commonwealth or anyone that
25 he had it. And the Jury convicted one Defendant, Brady, and

1 it developed someone else had confessed to it and the Supreme
2 Court set it aside and said it was the Commonwealth's duty
3 where that is advantageous and of benefit to the Defendant,
4 to come forward with that information.

5
6 COURT: Isn't it true, Mr. Natkin -- if such a
7 statement -- if the Commonwealth in the prosecution of the
8 Defendant would predicate its entire case on the testimony
9 and the knowledge reduced to writing by such a Defendant --
10 wouldn't that create a different situation? You don't contend
11 in this case that that is the only evidence that he is con-
12 victed by?

13
14 MR. NATKIN: No sir, but I say that that was a
15 key evidence and that he was the most damaging witness and
16 the primary witness against the Defendant. And as shown by
17 the Commonwealth in his argument where he relied heavily on
18 this man saying I saw him go over and get the gun out and
19 take it out of the holster. Yet in his statement he says I
20 didn't see any of that. I saw him -- the Defendant with his
21 hands raised and so on -- in his statement he saw none of that,
22 he jumped over the rail and ran. I sincerely say that could
23 have made the difference if we would have been able to impeach
24 that man with this statement and it was their duty to come
25 forward with it.

1 COURT: He does conclude his statement by saying
2 I heard Vernon saying please Billy.

3
4 MR. NATKIN: Yes sir, But read what he says in
5 his -- well, as we read to you in the record.

6
7 COURT: Then I heard the shots.

8
9 MR. NATKIN: Oh, more than that --

10
11 COURT: I heard you read it into the record.

12
13 MR. NATKIN: Yes sir, so the record speaks for
14 itself on that, sir.

15
16 COURT: I don't know what could be gained by
17 putting Officer Plogger on the stand.

18
19 MR. NATKIN: If the Commonwealth will stipulate
20 into the record that this statement was taken by Officer
21 Reynolds, that was either held by the Police Department until
22 yesterday, or if a copy was sent to the Commonwealth the
23 Commonwealth had no knowledge -- does not know of it.

24
25 COURT: Now is Officer Reynolds in the police
department?

1 MR. NATKIN: Yes sir, he is an officer.

2

3 COURT: There should be some explanation why he
4 withheld that statement, if he did.

5 My recollection is that Officer Plogger was the
6 investigating officer in this. And he is the one that obtain-
7 ed a statement from the Defendant. And there was an issue,
8 hotly joined, on this statement that was obtained from the
9 Defendant in that Officer Plogger had misplaced it. But this
10 is the first time I have ever heard that Officer Reynolds
11 was involved.

12

13 MR. NATKIN: That statement is signed by -- it
14 says taken by Officer Reynolds.

15

16 COURT: Yeah, I know, but I say this is the first
17 time I have heard of this statement gotten by Vernon Reynolds,
18 police officer.

19

20 MR. NATKIN: Yes sir.

21

22 COURT: Is that all, gentlemen?

23

24 MR. NATKIN: I assume we have that stipulation
25 in the record, sir?

1 MR. SISLER: Well, if you want to call him you
2 can go ahead and call him.

3 MR. NATKIN: Well, there's no need if you stip-
4 ulate it, fine. If you want me to call him, I'll call him.
5 I want to make sure that the record is complete at this time.
6 I understood you to say you agree to stipulate it, if you do
7 there is no use calling him. If you don't want to stipulate
8 it then I request leave to call him.

9 MR. SISLER: What are we stipulating?

10 MR. NATKIN: That the statement was taken by
11 Officer Reynolds on the date said. That it remained with the
12 Police Department up until the date of May 30th. That we
13 do not know whether a copy of it was given to the Common-
14 wealth's Attorney, but if it was, the Commonwealth's Attorney
15 has no memory or knowledge of it being given to him.

16 COURT: Gentlemen, I think we ought to put Mr.
17 Plogger on just to ask him a few questions.

18

19

20 LOUIS E. PLOGGER
21 being duly sworn, testified as follows:

22

23 PLOGGER - DIRECT

24 By Mr. Kizer:

25

Q What is your name sir?

1 A Louis Edward Plogger.

2 Q Officer Plogger, were you the investi-
3 gating Officer of the Buena Vista Virginia Police Department
4 in the matter of Commonwealth against William Newcomer?

5 A Yes sir, I was.

6 Q Did you, yourself, take one or more
7 statements from people who were said to be witnesses to the
8 incident?

9 A Yes sir, I did.

10 Q From whom did you take statements?

11 A I took one from Randy Camden, Mr.

12 Chittum -- I will have to look through and see ---

13

14 COURT: I don't think we ought to delve
15 into that.

16

17 Q Did you, yourself, take a statement
18 from Ralph Harrison?

19 A No sir, I did not.

20 Q Did you come into possession of a
21 statement said to have been taken from Ralph Harrison by
22 Officer Reynolds of the Buena Vista Police Department on the
23 day of the alleged homicide?

24 A Yes sir I did.

25 Q When did you come into possession of that?

1 A Some time later that afternoon, on the
2 day of the homicide.

3 Q What did you do with the statement?

4 A I put it in my file with the rest of
5 the statements that I had and all the other material I had.

6 Q Did you ever deliver that statement to
7 any person prior to yesterday, or this morning?

8 A Yes sir, I delivered everything I had
9 to Mr. Robey right before the preliminary hearing.

10 Q Does that include the statement of Mr.
11 Harrison that has now been admitted into evidence?

12 A Yes sir, it was everything I had.
13 Everything was kept in one file, Mr. Robey had the complete
14 file.

15 Q When did you do that?

16 A I don't know the date, it was prior to
17 the preliminary -- it was before the preliminary.

18 Q Did you have possession of that state-
19 ment this morning and yesterday?

20 A Yes sir.

21 Q All right, now, you said you delivered
22 it to Mr. Robey some time after the alleged homicide?

23 A Yes sir.

24 Q Now how did it come back into your
25 possession?

1 A I got it back in my file with every-
2 thing.

3 Q Well, when was that?

4 A I don't know what date it was, it was
5 before the preliminary.

6 Q Did you, yourself, deliver any state-
7 ments to Mr. Sisler, the acting Commonwealth's Attorney?

8 A I can't remember delivering any to him.

9 Q According to Mr. Sisler he had certain
10 statements of other witnesses. He is not sure whether or not
11 he had this one. Can you account for that, sir?

12 A No sir, my duty was to the Common-
13 wealth's Attorney then. I delivered everything I had. I
14 thought they had everything they needed. I was never asked
15 for anything else. I thought I performed properly what I
16 was supposed to do.

17 Q Let me take you back. You delivered
18 your entire file to Mr. Robey?

19 A Yes sir.

20 Q Which included this alleged statement
21 of Ralph Harrison?

22 A Yes sir.

23 Q Shortly after the incident under
24 investigation?

25 A Yes sir.

1 Q Now, did you get your entire file back
2 from Mr. Robey?

3 A Yes sir.

4 Q And do you know when that was, about?

5 A It was -- no sir, I know it was a few
6 days after I delivered it to him.

7 Q Was it prior to the preliminary hear-
8 ing?

9 A Yes sir.

10 Q Did you ever discuss the statement of
11 Harrison with Mr. Sisler, the acting Commonwealth's Attorney?

12 A I don't think I did, because Mr.
13 Harrison discussed with Mr. Sisler his statement.

14 Q Sir? I didn't understand -- I didn't
15 catch what --

16 A I said Mr. Sisler talked with Mr.
17 Harrison, I didn't need to talk with him about it.

18 Q Mr. Sisler talked with him when?

19 A He talked with him before the trial
20 some time.

21 Q Before the first trial?

22 A No sir.

23 Q Sir?

24 A Before the preliminary, you mean?

25 Q Yes?

1 A No sir, Mr. Robey was on the preliminary.
2 Q All right, before the first trial in
3 the Circuit Court?
4 A I don't recall. All I know is he talk-
5 ed with him. I can't recall whether it was before the first
6 trial or the second trial, but I know that he did talk with
7 him.
8 Q Was your file returned to you prior to
9 the preliminary hearing?
10 A Yes sir.
11 Q If statements of other witnesses were
12 turned over to Mr. Sisler prior to the trial in the Circuit
13 Court, and at that time you had your file, do you know how
14 that could come about?
15 A Well, when Mr. Robey took my file he
16 said he was going to run off photostatic copies of the
17 statements.
18 Q All right, so Mr. Robey at that time
19 was the Commonwealth's Attorney for the City of Buena Vista?
20 A Yes sir.
21 Q And he was so acting in this case?
22 A Yes sir.
23 Q And he took your file and said that he
24 was going to make photostatic copies of the contents?
25 A Yes sir.

1 Q Which included this statement made by
2 Ralph Harrison to Officer Reynolds?

3 A This statement was in the file, so I
4 will say it was included.

5 Q And then a short time after that, and
6 by short time I mean several days later, your file was
7 returned to you?

8 A Yes sir.

9 Q Was it intact? The same papers in
10 there as you had delivered to Mr. Robey?

11 A Yes sir.

12

13 PLOGGER - COURT

14 By Judge Holstein:

15

16 Q Mr. Plogger, was that file available
17 to Mr. Kizer and Mr. Natkin, your file?

18 A I guess if they wanted it, it was.
19 Anything I had was available if anybody asked. I was oper-
20 ating for Mr. Robey at the time and I didn't make an effort
21 to volunteer information to Mr. Kizer or Mr. Natkin, I was
22 giving my information to Mr. Robey, the Commonwealth's
23 Attorney, and I thought I was going through proper channels.

24 Q Well, did you make any effort to con-
25 ceal, or withhold any information?

1 A No sir, I had no reason to.

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MR. NATKIN: May I, sir, at this point show that I wrote Mr. Robey and requested them by letter dated August 12th, and was refused those statements?

COURT: Well, do you have a reply from Mr. Robey?

MR. NATKIN: I don't have a reply. I would like to put it in the record to show I asked for it.

COURT: Well, you can state that if you want to.

MR. NATKIN: I would like, if I may, have this put into the record.

COURT: I don't think it's proper.

MR. SISLER: Neither do I.

MR. NATKIN: If you please, Your Honor, I would like to request to read into the record this letter, sir, and request that it be made a part of this record in the light of the officer's statement.

COURT: There is no question but that you did make an effort to uncover this evidence --

MR. NATKIN: Yes sir. I have a letter to ---

COURT: Let me say this also, Mr. Natkin. I think this has been mentioned during this argument, that you and Mr. Kizer apparently had interviewed Harrison or you

1 would not have called him as a witness.

2 MR. NATKIN: We had interviewed Harrison, but I
3 am trying to get into this record, sir -- and even if the
4 Court refuses, I would like to have the letter -- like to
5 have it shown that the Court refuses -- that I requested
6 this very information from Mr. Robey and never got it, by
7 letter dated August 12th.

8 COURT: There is no harm in that.

9 MR. NATKIN: I would like to have that in the
10 record, that I could not go direct to him, I have got to go
11 through the Commonwealth's Attorney.

12 COURT: Well, what you are doing -- aren't you
13 prolonging this thing? Shouldn't Mr. Robey be given an
14 opportunity to come forward and say I gave Mr. Natkin all
15 of the available information?

16 MR. NATKIN: That would be just fine, sir.

17 MR. SISLER: Judge, I think on this letter, if
18 you look at it, it's a request to Mr. Robey -- and I assume
19 he got it -- to give Mr. Natkin copies of any statements of
20 any witnesses he intended to call at the preliminary hearing
21 or thereafter. I think it may even have been limited to the
22 preliminary. First of all, in fairness to Mr. Robey, Mr.
23 Ralph Harrison was a defense witness. He was never called
24 by the prosecution in this case until they had elected to
25 call him at the first trial. His testimony at the first

1 trial, which is in the record, was so devastating and so
2 contrary to the defendant's position that he thereafter became
3 a Commonwealth witness. And in this letter to Mr. Robey,
4 even assuming he had an obligation to do that, and of course,
5 he does not have an obligation to give any statements taken
6 from witnesses, that is not under the rules of criminal pro-
7 cedure. But be that as it may, this letter is immaterial
8 because that is witnesses Mr. Robey intended to call at the
9 preliminary, which did not include Ralph Harrison and, in fact,
10 as we have said, the only reason that Ralph Harrison ever
11 appeared as a witness subsequent to the first trial, was the
12 defendant's election to call him at the first trial.

13 MR. NATKIN: If you please, Your Honor, the pur-
14 pose of that letter was to get copies of any statements of
15 any witnesses, and that's what it says -- of all witnesses
16 that the police took statements from.

17 COURT: Can't you just stipulate that you made
18 that request?

19 MR. NATKIN: Yes sir.

20 COURT: All right, let it be stipulated in the
21 record that Mr. Natkin requested of Mr. Robey, who at that
22 time was acting as Commonwealth's Attorney, and who later
23 disqualified himself because he was summoned by the defendant
24 to testify on his behalf? Anything further, gentlemen?

25 MR. NATKIN: No sir. MR. SISLER: No sir.

1 COURT: First, I would like to state for the record
2 that I had but one objective in this case, and that was to
3 see that this defendant received a fair and impartial trial.
4 I was not unmindful of the duty that I also had with regard
5 to the Commonwealth receiving a fair and impartial trial.
6 In all three of these trials I have honestly endeavored to
7 see that the defendant and the Commonwealth each was given
8 a fair and impartial trial. This has been a long case. It
9 has contained many problems, it contains some unpleasanties,
10 and yet I remain, what I believe, to be fair, unbiased and
11 impartial in the case.

12 I am principally concerned with two matters.
13 One is the change of venue which Mr. Kizer has argued most
14 impressively in support -- as one of the grounds for the
15 motion to set aside the verdict. And I am not unmindful,
16 gentlemen, that the change of venue rests in the sound dis-
17 cretion of the Court. And I believed that when I ruled --
18 when I granted the Commonwealth's motion for a change of
19 venue. I think I so observed in --- I entered an Order in
20 this case which I prepared. I didn't request counsel or
21 the late Clerk of Court, to prepare the Order, I prepared
22 it myself because having sat in this case, having presided
23 in the case on two prior trials I felt that all of the prob-
24 lems should be recited, all the issues should be recited
25 in the Order granting the motion for a change of venue. I

1 will read this Order into the record. I have not been able
2 to find it in the original rec ord.

3 "This day came the Commonwealth by Eric Lee
4 Sisler, acting Commonwealth's Attorney, and Fergus Norton,
5 associate acting Commonwealth's Attorney, and also came the
6 defendant William P. Newcomer, and his court appointed attor-
7 neys, Shuler A. Kizer and Bernard J. Natkin, on a motion
8 by the Commonwealth to change venue from the Circuit Court
9 of the City of Buena Vista where this case has been tried
10 twice and has ended each time with a mistrial when the jury
11 was unable to agree upon a verdict.

12 The Commonwealth, in support of its motion,
13 produced the testimony of William T. Robey, III, Commonwealth's
14 Attorney for the City of Buena Vista, and introduced as
15 Exhibits newspaper accounts published in the Buena Vista News
16 convering events from the time of the homicide and continuing
17 through both trials. And the defendant, in opposition to
18 the motion, introduced a petition signed by eleven persons
19 stating that a fair and impartial trial could be obtained
20 in Buena Vista. And the defendant, William P. Newcomer,
21 who stands indicted for the murder of one Vernon Staton, was
22 first tried on May 16, 17 and 18, 1977, which trial ended
23 with a mistrial when the jury was unable to agree upon a
24 verdict.

25 Immediately thereafter, the Commonwealth, pursuant

1 to the provisions of the Code, moved for a change of venire,
2 alleging in support of the motion that it would be virtually
3 impossible to assemble a jury in Buena Vista which could
4 render a fair and impartial verdict in this case. The
5 defendant opposed the motion and the Court denied the motion
6 and set the case for trial.

7 And the second trial of this case was held on
8 November 16, 17 and 18, 1977, and also ended with a mistrial
9 when the jury was again unable to agree upon a verdict.

10 And immediately thereafter, the Commonwealth,
11 pursuant to Code Section 19.2-251, moved for a change of
12 venue, alleging that a fair and impartial trial could not be
13 had in the City of Buena Vista. And the defendant again
14 opposed the motion and the Court took the motion under advise-
15 ment.

16 In the Buena Vista News, a local newspaper pub-
17 lished and circulated within the beyond the City of Buena
18 Vista, was published the accounts of the fatal shooting prior
19 to the trials and published also the accounts of the trials
20 and the testimony of the witnesses. And the population of
21 the City of Buena Vista is approximately 6,400 persons, a
22 majority of whom have knowledge of the case through the news
23 media and exchange discussions. And on the voir dere of the
24 prospective jurors at each trial, the juror when questioned
25 whether he or she knew anything about the case through the

1 news media or having heard it discussed, replied in the
2 affirmative and some admitted they had formed fixed opinions.
3 And there are facts within the common knowledge of many per-
4 sons within the community which are related with the back-
5 ground and behavior of the deceased and of the defendant,
6 some of which would not be admissible evidence when offered
7 in the trial of this case.

8 And because of the significance and the notor-
9 iety of this case and the impact upon the community of what
10 has occurred, a fair trial is not possible.

11 It is therefore, Adjudged, Ordered and Decreed
12 that the Commonwealth's motion to change venue is hereby
13 granted and the venue is changed from this Court to the
14 Circuit Court of Rockbridge County. It is further Ordered
15 that the trial of this case shall be held commencing February
16 20 and if necessary continuing through the 22nd. It is
17 further Ordered that the indictment charging the defendant
18 with the use of a deadly weapon in the commission of a felony
19 shall be tried simultaneously with the murder indictment.

20 It is further Ordered that the Clerk of this
21 Court and the Clerk of the Circuit Court of Rockbridge
22 County, in the removal of this case, shall act in compliance
23 with Code Section 19.2-253."

24 Gentlemen, I don't believe that I abused my
25 discretion in granting the change of venue, so I will not

1 accept that as a grounds for the motion to set aside the
2 verdict.

3 Now it has been argued strongly that the Court
4 erred in making the observation with regard to the defense
5 and the Commonwealth each having the right to call doctors to
6 testify with regard to the defendant's mental condition.
7 The defendant, in support of that ground, relies heavily on
8 the Gibson case which was decided on December 1, 1975,
9 reported in 216 Va. 412. The Gibson case recites, on page
10 414: "There exists no physician-patient privilege in a
11 criminal prosecution in Virginia." But this case goes fur-
12 ther. It says: "During the defendant's trial the Common-
13 wealth called as a witness -- the Commonwealth called Doctor
14 James C. DeMetries, who had examined the defendant at Central
15 State Hospital. Over objection of defense counsel Dr.
16 DeMetries was permitted to testify that the defendant in the
17 course of interviews conducted to determine his mental con-
18 dition had admitted killing his wife and father-in-law.

19 The Gibson case also held this: "The final
20 contention of the defendant is that the Court erred in re-
21 fusing him an instruction on insanity. The question here is
22 whether there was sufficient evidence to support such an
23 instruction."

24 I mention that gentlemen, because the Common-
25 wealth strongly objected to the Court giving -- I believe it

1 was Instruction L for the defendant. That Instruction read:
2 "The Court instructs the jury that legal unconsciousness is
3 a state of mind of a person of sound mind suffering from
4 voluntary or involuntary agency rendering such person unaware
5 of their actions. Unconsciousness as used in this Instruction
6 need not reach the point where the person is unable to move
7 and act. It can exist where the subject acts in fact, but
8 at the time is not conscious or aware of his actions. There-
9 fore if you believe from the evidence that the defendant was
10 in the above defined state of unconsciousness when he fired
11 the fatal shot or shots, then you should find him not guilty."

12 When I gave that instruction, as I recall, the
13 Commonwealth objected strongly to the giving of the instruct-
14 ion. The Gibson case says that where there is no evidence
15 to support the giving of an instruction -- in the Gibson case
16 it was the refusal of the Court to give an instruction on
17 insanity -- and the Court refused in that case and the Court
18 was right. And yet there was evidence in the Gibson case
19 which could properly be interpreted to be evidence in support
20 of the defendant's contention that he was insane at the time
21 of the killing.

22 But in this case here, what we have -- we have
23 no evidence other than the defendant's own statement. But
24 the evidence in this case -- and the jury had the right to
25 accept that -- was overwhelming to refute that this man was

1 not in a state of unconsciousness. But again going back to
2 my observation a few moments ago. I had but one objective in
3 this case, to see that this defendant and the Commonwealth
4 received a fair and impartial trial. And I gave that instruc-
5 tion because the defendant says he only remembered firing
6 the first shot, that's all he remembered. But yet the evi-
7 dence immediately following the shooting just completely
8 refuted that he was unconscious. But the jury had a right
9 to accept that. And I thought seriously about not giving
10 that instruction over the objection of the Commonwealth, but
11 I gave it. I mention that to again support the statement
12 that I have made that I wanted to see that this defendant
13 received a fair and impartial trial.

14 Now, on the law and the evidence in the case, I
15 don't think that I will comment on that because the jury was
16 properly instructed in my considered opinion on the law and
17 I think that the evidence was established which supported the
18 giving of those instructions. I believe the instructions
19 specifically mentioned by Mr. Natkin was that the Court erred
20 in giving all of the instructions, but then you specifically
21 mentioned Instructions 4, 5, 9, 10 and 11 for the Commonwealth.
22 I felt that the law was applicable to the evidence in this
23 case and the jury being the sole judges of the credibility
24 of witnesses and the weight of the evidence to be given to
25 such testimony, I felt that the case was properly submitted

1 to the jury. As a matter of fact, I believe at the conclusion
2 of the Commonwealth's evidence Mr. Kizer made a motion to
3 strike the evidence and I over-ruled that motion. And then
4 I believe again at the conclusion of all the evidence you
5 again repeated your motion and again I over-ruled the motion

6 Gentlemen, this last development on the after
7 acquired or newly discovered evidence in this case -- I don't
8 believe -- it is my opinion that the testimony -- this
9 testimony was the same testimony -- it's not as complete as
10 testified to by Harrison in this case. I don't believe that
11 would have affected the verdict of the jury. That's my
12 opinion and I don't see where it was prejudicial, I don't
13 see where the defendant's rights have been violated.

14 I feel, gentlemen, that Mr. Newcomer has been
15 given a fair and impartial trial. He was capably represented
16 by two of our outstanding trial lawyers, Mr. Natkin and Mr.
17 Kizer.

18 To review just what transpired from the very
19 beginning. I believe that Mr. Natkin and Mr. Kizer had been
20 privately employed by Mr. Newcomer. And they represented him
21 at the first two trials as privately employed attorneys.
22 And then when Mr. Newcomer signed an affidavit that he was
23 indigent, under the Statute I appointed Mr. Kizer and Mr.
24 Natkin since they had been in the case -- I appointed them
25 both to represent the defendant. I felt that no one could be