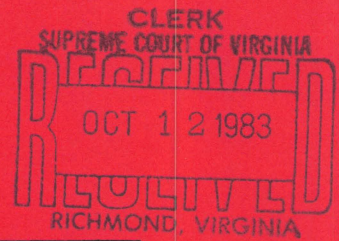


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IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 830176

WILLIAM HENRY HEWITT, SR.,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

APPENDIX

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ASSIGNMENTS OF ERROR

1. The trial court's refusal to permit counsel for Petitioner to participate in voir dire violated the rights conferred upon Petitioner by Va. Code Ann. §8.01-358, and violated Petitioner's rights to trial by jury and to the effective assistance of counsel, rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

2. The trial court's refusal to ask certain questions on voir dire violated Petitioner's rights to trial by jury and to the effective assistance of counsel, rights guaranteed by Sixth and Fourteenth Amendments to the United States Constitution.

3. Virginia's unitary jury sentencing scheme violates Petitioner's rights to trial by jury and to due process of law, rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

4. The trial court's ruling that Petitioner could not present at trial evidence tending to mitigate his sentence violated Petitioner's rights to trial by jury and to due process of law, rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, §§8 and 11 of the Constitution of Virginia.

5. The trial court's refusal to permit defense counsel to argue to the jury using the phrase "beyond all reasonable doubt" denied Petitioner the effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

6. The trial court's refusal to permit meaningful discovery concerning the informant, Robert Talley, violated Petitioner's rights to the effective assistance of counsel and to due process of law, both guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

7. The trial court's refusal to permit defense counsel to ask the informant, Robert Talley, about any promises that may have been made to him by federal authorities was error under the rules of evidence applicable in the courts of Virginia, and also violated Petitioner's right to due process of law under the Fourteenth Amendment to the United States Constitution.

8. The trial court's one-sided conduct of the trial constituted judicial misconduct, and violated Petitioner's right to a trial by jury and to due process of law, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

9. The trial court erred in permitting the Commonwealth to introduce evidence seized from Petitioner's vehicle on January 17, 1983, in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

1 jury can be selected from that group we don't
2 have to get to the other thing that I already
3 have in mind exactly how I'll handle that,
4 too. So, we'll now start on what additional
5 questions the Court will ask, not counsel.
6 Over and above what use to be in the statute,
7 which is now in the rules , 3A-20, A: 1 - 7.
8 Are you listening or not? Did you hear what
9 the Court said?

10 MR. LOWE: Yes, sir.

11 THE COURT: I hope you did.

12 MR. LOWE: Yes, sir, I was listening very carefully.

13 THE COURT: I appreciate the fact that you weren't paying
14 attention to me.

15 MR. LOWE: No, sir, I was paying adequate, absolute
16 attention to you.

17 THE COURT: Talking to your co-counsel wasn't any more
18 listening to the Court than anything in the
19 world. All right, Mr. Reid, I'll hear from
20 you.

21 MR. REID: Judge, I think the defendant is limited
22 under 801-358, to voir dire examination be it
23 by the Court or by counsel, to questions
24 involving four specific areas: One, whether
25 he's related to either party. That's a

1 relatively simple question. I don't think
2 you need to ask anymore than that. Two,
3 whether he has any interest in the cause.
4 This is not the kind of situation where a
5 stockholders or businesses are involved, so
6 questions in that area would be very limited.
7 Three, whether the juror has expressed
8 himself or formed any opinion in the case.
9 And again, that's a, just asking that
10 question will pretty well handle that.
11 Last, the only one that has any generality
12 to it is sensible of any bias or prejudice
13 therein, which is the only one that there
14 could be any argument I think made about
15 whether more detailed questions would be
16 appropriate examining that area. The statute
17 of limits questions pursue those four areas,
18 rather than a general "what did you have for
19 breakfast" type inquiry. Many of the
20 questions propounded by defense counsel to
21 be asked are irrelevant to any one of those
22 four questions. Many of them, like one of
23 your detailed questions I question, get into
24 whether or not you will follow the law.
25 They're all sworn to follow the law and it's

1 the presumption of the law that jurors will
2 in fact follow the instructions of law as
3 given by the Court. And to ask them in
4 voir dire whether they'll follow those laws
5 and whether they understand this and understand
6 that, is duplicative and contrary to that
7 presumption, after the showing that they
8 would in fact on an individual basis not
9 follow the Court's instructions. That's my
10 general objection. There are two Virginia
11 cases, or a number of Virginia cases, two
12 more on the point, that being Bassette vs
13 Commonwealth, the capital murder case tried
14 in this very courtroom. The Supreme Court
15 of Virginia decided that case on December 7,
16 1981. I also have the, this version, Judge,
17 I don't have a citation for the Court. The
18 other case being Turner vs Commonwealth, one
19 Mr. Lowe is familiar with in 221 Va. 513.
20 In both of those cases, in the Bassette case
21 the defendant tendered a number of voir dire
22 questions, some of which were asked by the
23 Court, and Judge Wallace did not allow others
24 to be asked, the Supreme Court found no
25 violation of the Court's discretion in that

1 regard. In Turner vs Commonwealth there were
2 five questions that the Court refused to ask,
3 two of them relating to, one of them
4 relating to a black-white issue, the others
5 relating to death penalty, other four.
6 Those were not asked and the Court found no
7 abusive discretion in that regard. I would
8 note that the ones in/ ^{Turner} which are listed
9 have nothing to do with the four areas of
10 inquiry.

11 THE COURT:

Say what?

12 MR. REID:

13 The questions in Turner that were denied,
14 also as the questions in this case, have
15 nothing to do with the four areas of inquiry
16 to which the defendant is limited. Or
17 anybody is limited. The defendant or the
18 Commonwealth. That's my overriding, basic
19 objection, Judge, is a number of cases holding
20 the same thing, going back to 202 Virginia.
21 I don't know how the Court wants to hand this
22 if you want to go through all 57 questions
23 on an individual basis and say which will be
24 permitted and which not, or what.

25 THE COURT:

All right, do you have anything you wish to
say on this, Mr. Lowe?

1 MR. LOWE: Yes, sir. Let me state first that I believe
2 the Constitution of the United States,
3 Sixth Amendment particularly, Fourteenth
4 Amendment due process, right to counsel,
5 effectiveness of counsel and due process and
6 other provisions of the Constitution of the
7 United States as well as the Constitution
8 of Virginia, as well as the Statutes of
9 Virginia, give me an absolute right to have
10 some opportunity to ask the juror appropriate
11 relevant questions. Your Honor has ruled
12 that I will not be permitted to. I except
13 to your ruling. With regard to the
14 relevance of the questions that I have
15 propounded, in other words, to determine
16 whether even you'll ask them, I will say that
17 I believe that the law of Virginia is clear
18 not only on the ones that you mentioned in
19 the statute, but that I am also permitted to
20 ask about jurors as to whether they can give
21 a fair and impartial trial to the Commonwealth
22 and the accused, based solely on the law and
23 the evidence. Basically, whether they can
24 follow their juror's oaths, whether they can
25 follow your instructions, whether they're

1 willing and able to do that, and so forth.
2 I point out that the Supreme Court of the
3 U. S. in at least - excuse me, the Supreme
4 Court of Va. in at least one case reversed
5 the case where there was no - where there
6 is refusal to exclude for cause a venire
7 that believes that an accused must prove his
8 innocence is an abusive discretion and a
9 denial of the defendant's right to an
10 impartial jury. Martin vs Commonwealth,
11 221 Va. 436, a 1980 case. Now, there's an
12 example where the Supreme Court has upheld
13 my position, which is that we're not limited
14 merely to those things that are contained in
15 the statute, because there the Supreme Court
16 said, and one or several of my questions in
17 the voir dire I proposed, go to the question
18 of whether they would require the defendant
19 to put on evidence or whether they would
20 believe that he was guilty if he didn't,
21 and related questions. And there the
22 Supreme Court of Va. said that the refusal
23 to exclude for cause a juryman who believed
24 that he must prove his innocence is an
25 abusive discretion of the Court and a denial

1 of the defendant's right to an impartial
2 jury. I believe that case stands for the
3 proposition that I can ask questions that
4 are designed to determine whether a juror
5 would be a fair and impartial juror, even if
6 it doesn't fit under the category and the
7 statute. For those reasons I believe that
8 all of the questions I have propounded are
9 appropriate under the Virginia law as well
10 as Federal and State Constitutional law, and
11 I would urge Your Honor, if you are going to
12 do all the questioning at least to ask those.
13 Let me just add one further point. One of
14 the problems on Judge conducted voir dire
15 and denying the lawyers the opportunity, is
16 that many times the answer to a question will
17 require a follow-up question. Now I'm a
18 trial lawyer, I'm not a mechanic and
19 obviously one of the skills that a trial
20 lawyer has is the ability to stand his feet
21 and make judgments about follow-up questions
22 and to see avenues which are appropriate
23 under the law and to take them. And while
24 the trial judge may have the same skills,
25 certainly, you are a trial judge, rather

1 you were a trial lawyer before you became a
2 trial judge. You are not the advocate for
3 the defendant and I believe that he is
4 entitled to have his advocate try to do that
5 as best he can. For those reasons, Your
6 Honor, I ask that you approve the jury
7 voir dire and allow me to ask questions.

8 THE COURT:

Do you have anything else you want to say?

9 MR. REID:

10 Judge, the more I understand your proposition
11 where a question was asked and the jury was
12 found not to stand impartial in the cause
13 and thereafter the failure of the Court to
14 strike him was an abusive discretion. That
15 is not the proposition before the Court.
16 The question before the Court now is what
17 questions are going to be allowed. And in
18 Turner vs. Commonwealth, a case which Mr. Lowe
19 handled before the Supreme Court, this
20 language was used in terms of constitutional-
21 ity. And I quote in Turner vs. Commonwealth,
22 212 Va. at 523. Unless the refusal to ask
23 a question amounts to a denial of due process
24 or otherwise, it impinges upon the right to
25 a fair and impartial jury. The present
 wording of Code 801-358, Rule 38-20A impowers

1 the Court to use its discretion in Turner
2 whether to ask questions proposed by either
3 the Commonwealth or the defendant. Basically,
4 Judge, he's got a right to a fair and
5 impartial jury as does the Commonwealth, but
6 not the right under statute or constitution
7 to carte blanche examination of the jurors by
8 the Court or by counsel.

9 MR. LOWE: I have nothing else, Your Honor.

10 THE COURT: Well, of course, I don't think there's much
11 more to say when you take up Turner against
12 Martin, and it's mandatated under 801-358,
13 there's waiving of the section of code here,
14 1-3-58, Rule 3A:20A, how the trial court
15 uses its discretion in determining whether
16 to ask questions proposed by you, the
17 Commonwealth or the attorney. And of course,
18 we're interested in a fair trial both from
19 the standpoint of the defendant and also
20 from the standpoint of people of the
21 Commonwealth. The Supreme Court in Turner,
22 which incidentally was decided by the
23 Supreme Court of Virginia and certiorie
24 denied by the Supreme Court of the United
25 States, is that Rule 3A:20A, which clearly

1 makes counsel participate in the voir dire
2 upon the trial court's approval, resolve any
3 ambiguity present in the statutory language of
4 the section. And 801- excuse me 3A:20A,
5 after 1 thru 7 says thereafter the Court or
6 counsel with permission of the Court may
7 examine on oath any perspective juror or may
8 ask any question relevant to his qualifica-
9 tions as an impartial juror. And I found
10 that it's desirable for the Court to ask the
11 questions, and therefore we will now go over
12 the questions that have been propounded, and
13 if either counsel wish to add anything other
14 than what they've already said I would like
15 a very brief statement with regard to this,
16 and we will therefore start with the ques-
17 tions, and obviously the defendant desires
18 it, Commonwealth Attorney positioned -

19 MR. REID: All right, question No. 1?

20 THE COURT: Wait just one minute now. Yeah. All right.

21 MR. REID: Judge, I think question 1 thru 5 are related
22 to prior service on either grand or petite
23 juries. I don't know whether that - first
24 of all, that information is available to the
25 defendant. In terms of what jury these

1 people may have served on during this term,
2 to ask that question would be duplicative
3 of the information which sits in the Clerk's
4 Office, number one. Number two, I don't
5 see where it's relevant to any bias or
6 prejudice in the case, whether they have
7 served or haven't served, or whether they
8 voted to acquit or for guilty in a criminal
9 case, doesn't have anything to do with this
10 case. It's just two-fold, you ask questions
11 1 thru 3. Question 4, to be able to serve
12 on a grand jury is utterly without anything
13 to do with this case. And I think, getting
14 into No. 5, anything happened in a criminal
15 case you heard prevents you being fair and
16 impartial in this case, I think that is
17 going to be covered by the general question
18 the Court asked. "Is there any reason any
19 of you have that would prevent you from
20 being a fair and impartial juror in this
21 particular case?" And we go through them
22 from now until dooms day specific instances
23 in their life that may require them, make
24 them less than impartial, and I could pick
25 out one particular thing, i.e. "service on

1 a prior criminal case," and allow that
2 question to be asked, and why is that any
3 more important or less important than any-
4 thing else. It simply does not need to be
5 asked to learn about bias or prejudice of
6 the case. And that's Commonwealth's
7 response to 1 thru 5. You want to rule on
8 these, Judge?

9 THE COURT: Yes, as we go along.

10 MR. REID: As we go along? Thank you, Your Honor.

11 MR. LOWE: Let me respond briefly, two things, Judge.
12 The first applies to all these questions.
13 And that is, with the problem I've already
14 identified to the Court about the limited
15 amount of time to investigate the jurors,
16 some information I need to get from the
17 jurors in the courtroom, simply because of
18 the need of time. For example, the nine
19 jurors that were added yesterday, there's no
20 way I'd have enough time to go to the records
21 and search how many juries they were on, and
22 everything else. A simple question can
23 answer that, and so I think it must be viewed
24 in context. Secondly, if what Mr. Reid has
25 taken to his logical conclusion, then the

1 only voir dire would be the Judge would get
2 the juries in and say one question. "Is
3 there any reason you know of why you can't
4 be a fair and impartial jury?" And unless
5 somebody said, or raised their hand, there
6 would be no further questions necessary.
7 Well, obviously, these jurors don't necessar-
8 ily know the types of things and you may
9 have to jog their recollection, or ask a
10 question that makes them think about it, and
11 that's the purpose of voir dire, or at least
12 one of the purposes. Finally, as to all of
13 these questions, this is not only aimed at
14 finding challenges for cause. I'm allowed
15 to make four peremptory challenges and I
16 have to try to find some information upon
17 which to make an intelligent peremptory
18 strike. It may not be one of the reasons
19 that is for cause. It may be something
20 else, and I'm entitled, I believe, to ask
21 reasonable questions in order to determine
22 some of the things that I may want to
23 consider in making peremptory strikes.
24 Otherwise it's meaningless for me to have
25 peremptory strikes. Might as well let the

1 Court draw them by lot. And for those
2 reasons I think that these are proper
3 questions and I would ask Your Honor to
4 ask them.

5 MR. REID:

6 Judge, if I could just briefly respond to
7 a general allegation made by Mr. Lowe, he
8 said he needed this information to make
9 peremptory strikes. Such is not the purpose
10 of voir dire in Virginia. California it is.
11 Connecticut perhaps. Davis vs Sykes, in
12 202 Va. at 952, stated that the purpose for
13 the voir dire examination to ascertain
14 whether any juror has an interest in the
15 case or any bias or prejudice in relation
16 to it, and that he in fact stands indifferent
17 in the cause. Questions beyond the scope
18 (unintel.) than the sound discretion of the
19 trial court, such discretion is not abused
20 by refusing to ask whether jurors know
21 persons expected to testify merely to aid
22 litigates in making the peremptory challenges
23 allowed by Code Section 8-200. That is the
24 law in Virginia, and that is the system,
25 and we're not here to educate the counsel on
peremptory strikes.

* * *

1 connected with law enforcement agencies.

2 I don't mind asking, 14 I think is repeti-
3 tive, but. All right, 15?

4 MR. REID: Judge, the Court is going to also read out
5 names of defense witnesses at that point.

6 THE COURT: Yes, sir.

7 MR. REID: Judge, on 15, the Commonwealth has no
8 objection to that. On 16,

9 THE COURT: 15, of course is already covered by the
10 standard statute,

11 MR. REID: Yes, sir. 16, Judge, I'll just leave that
12 to the Court's discretion, I'm not sure how
13 relevant that question is. 17 and 18 would
14 be covered by the Court. Standard stuff.

15 THE COURT: 17 is already covered by standard so will
16 not be asked.

17 MR. REID: Judge, 19 and 20 basically asks the jury
18 whether they can follow the law as propounded
19 by the Court on presumption of innocence.
20 The Court will ask the jurors questions
21 about whether they can follow the law or
22 have any problem with following the law
23 in this matter. Plus it's laid out in
24 1920 as duplicative of the instructions,
25 as they are sworn, and to uphold. I don't

1 see where those would be particularly helpful
2 in this matter. I object to those being
3 asked. And No. 21,

4 THE COURT: Are you grouping these?

5 MR. REID: 19 and 20 I would group, Judge. They
6 basically ask whether you can abide by the
7 principal law of presumption of innocence.
8 And whether you require him to put on any
9 evidence in his behalf.

10 THE COURT: What is your position on that?

11 MR. REID: I object to 19 and 20. I think they's be
12 duplicative and they get into areas the
13 Court will cover by asking whether or not
14 they knew anything about the case that would
15 enable them, or prevent them from following
16 the law. I don't think we need to get into
17 specifics of reasonable doubt, presumption
18 of innocence, elements of possession,
19 elements of intent. No more reason to get
20 into those that are a presumption of innocence.
21 And no. 21 I think is a typographical error.
22 The way it reads now, it asks them if he
23 doesn't testify for - if the defendant
24 doesn't testify will you assume for that
25 reason the Commonwealth hasn't proved it's

1 case. I think that word Mr. Lowe meant
2 to ask was if he chooses not to testify or
3 produce evidence, will you assume for that
4 reason the prosecution has proved its case?
5 MR. LOWE: That is correct. Would you amend it that
6 way, Your Honor? Please. Take out that
7 word "not". That's just a typo.
8 THE COURT: Where are you talking about? 21?
9 MR. REID: 21. There's two nots. One in the first
10 line of 21, and one in the third line. The
11 one in the third line should be deleted,
12 the one that says that the prosecution has
13 not proved.
14 MR. LOWE: That's correct, Your Honor, that correction
15 should be made by Your Honor.
16 MR. REID: That is duplicative of 19 and 20, Judge, and
17 is not necessary in this case. Now, Judge,
18 I'll stop at this point and let Mr. Lowe
19 respond.
20 MR. LOWE: Well, I'm not quite through on 15. I
21 gather that 15 would normally be covered in
22 some way by the Court's general instructions.
23 Again, as I pointed out, I've covered
24 everything here, including those that I
25 expect the Court normally would read, or ask.

1 16 I think is very important, because they
2 may have some sensitivities. For example,
3 if their daughter got in trouble with
4 marijuana they may be just absolutely
5 determined, whether they think somebody's
6 guilty or not, that they're going to
7 convict and sentence people to prison just
8 as a sign to society. That would be
9 important to know as to their immediate
10 families, particularly.

11 THE COURT: I'm going to grant 15 and 16, and not going
12 to grant 17. That's covered by prior
13 instructions.

14 MR. LOWE: Well, I understand that, Your Honor, that's
15 what I pointed out before.

16 MR. REID: 18 is covered by prior instructions.

17 THE COURT: 18 is covered by prior instructions.

18 MR. LOWE: That's fine. On 19, 20, and 21, Judge, I
19 point out that I have talked with jurors
20 and I think it's well known there've been
21 interviews in newspapers of jurors who've
22 said, "I don't care, if he doesn't take
23 the stand and testify, to me that proves
24 he's guilty and I'm going to vote guilty."

25 THE COURT: What stage are you talking to jurors?

1 MR. LOWE: Pardon, sir?

2 THE COURT: At what stage have you talked to jurors?

3 MR. LOWE: Oh, jurors, long after their term on court
4 has been over. I've talked to jurors and
5 I've talked to other people who have talked
6 to jurors. I've talked to reports, for
7 example.

8 THE COURT: I thought there was a state bar association
9 ruling that said no lawyer could talk to
10 any juror whatsoever about the basis on
11 which he reached a jury decision.

12 MR. LOWE: I'm not aware of that. I have a -

13 THE COURT: You're not aware of that?

14 MR. LOWE: I have a written opinion, legal ethics
15 opinion, from the Virginia State Bar
16 Legal Ethics Committee which says that it's
17 appropriate to do so but that it should not
18 be done during the term when the juror is
19 still sitting.

20 THE COURT: Maybe I didn't know about the qualification,
21 or maybe I remember the old opinion, before
22 they got more liberal.

23 MR. LOWE: Yes, sir.

24 THE COURT: Like advertising and doing all the things
25 they're doing today that are tearing down

1 the old system.

2 MR. LOWE: Judge, the point is, I think it's reasonable

3 for the Court to ask whether the juror -

4 reasonable for me, but if you're not going

5 to let me ask questions at least for you to

6 ask - whether they will be able to abide by

7 those instructions in order to determine

8 whether they really are fair and impartial

9 jurors. And that's why I think it's

10 important. Now, I pointed out earlier the,

11 it was the Martin case, I think, that the

12 Supreme Court of Virginia specifically said

13 that the failure to strike a juror who had

14 said that he would believe that the accused

15 must prove his innocence was a violation of

16 law. I don't know how the Supreme Court

17 can be any more explicit than that, and

18 that's basically what I've asked in

19 question 21. And it also goes to question

20 20, and it also goes to question 19. It's

21 a correct statement of the law. It may be

22 for example, when I was going to ask the

23 questions that I might have asked one juror

24 question 19, a different juror 20, and a

25 different one 21 to get a different

1 perspective on it. But I think they're
2 questions that are correct, and I would
3 ask Your Honor to ask them of the jury panel.

4 THE COURT: Well, of course, the basic questions, basic
5 instructions, are always given to every
6 juror and in every criminal case, misdemeanor
7 or felony. And so, there's nothing, they
8 all would be duplicating. And I'm going
9 to use 19, 20, and 21 in a general way that
10 they will follow the law as given to them
11 on presumption of innocence and burden of
12 proof. And that's going to cover it, and
13 that's all I'm going to give.

14 MR. LOWE: All right, then I'll put those down as
15 "refused," Judge.

16 THE COURT: Well, they're not refused, so you are
17 precisely in the wrong they're refused, but
18 I mean the general import of the presumption
19 of innocence and burden of proof will be
20 informed beforehand as well as to be in the
21 precise instruction when the jury is selected
22 when they go to them.

23 MR. LOWE: Perhaps I misunderstood you, Judge. I
24 understand that you're not going to ask
25 those three questions as I have written them.

1 Do I understand you're going to ask them
2 generally whether they could afford the
3 presumption of innocence, and so forth,
4 in the voir dire?

5 THE COURT: So they could what?

6 MR. LOWE: Are you going to ask them in a general way
7 in the voir dire whether they believe that
8 they could follow your instructions about
9 burden of proof and presumption of innocence.
10 I thought you meant you were just going to
11 give those instructions at the end of the,
12 case.

13 THE COURT: That is not what I said. I said that
14 although they are covered in every criminal
15 case, misdemeanor or felony, that I'll give
16 them in a very general way at this time,
17 you follow the law applicable to this case,
18 as given to you by the Court, relative to
19 all things, including the presumption of
20 innocence and the Commonwealth has the
21 burden of proof. That's all I'm going to
22 cover.

23 MR. LOWE: All right, Your Honor, I accept your ruling
24 but I understand what you said. Thank you.

25 THE COURT: Sheriff, what I'm going to do, in view of

1 the longness of this situation, (unintel.)
2 scheduled in advance, we should bring the
3 jury in. See, we've had chief justices
4 come up before the General Judicial
5 Conference every year and say things like
6 this. "Start your case on time. Schedule
7 all motions beforehand. Don't let the
8 jury just sit around. Bring the jury in
9 and tell them. Do something." So, because
10 you have all these motions, and you didn't
11 even ask for that, and I asked you all to
12 come in at 9:30 (unintel.) We'd had jurors
13 sitting around wondering what in the world
14 are they doing. And I don't know anything
15 more derogatory, generally, than to have
16 them delayed. I don't know anything more
17 inconsiderate than having them sit around.
18 Sheriff, you can go tell the jury at this
19 time they're excused for lunch. Be back
20 about 1:00 o'clock, or just tell them not
21 to be later than 1:15. Also, at this time
22 the Court will take a short recess and then
23 we'll continue with this. Sheriff, one
24 other thought that I have, I don't know what
25 witnesses are here and what witnesses aren't,

1 but during this recess it will be permissible
2 for counsel to tell the witnesses that are
3 here that they may also go to luncheon
4 recess, but also that they shall not in any
5 way bein anywhere near the, any of the
6 jurors or talk with anyone at all.

7 (Court Recess)

8 All right, after another recess we've come
9 back to the courtroom. The Court notes again,
10 as it has before today, the two Ass't.
11 Comm. Attorneys, Mr. Reid and Mr. Parcell,
12 and two Defense Counsels, Mr. Lowe and
13 Mr. Drescher, along with the defendant, who
14 has been here throughout the whole matter.
15 All right, I believe we-

16 MR. REID: What number are we up to, Your Honor?

17 THE COURT: We're -

18 MR. LOWE: 22 is the next one, isn't it, Judge?

19 THE COURT: Yes, but I think 19, 21, and 22, is so
20 closely related that, plus the fact that
21 instruction always covered all that will
22 definitely cover that.

23 MR. REID: Judge, I would include 23 and 24 that
24 basically talk about reasonable doubt what
25 that means and burden of proof beyond a

1 reasonable doubt beyond the Commonwealth.
2 I would include those in one of, the
3 argument I've made in 19 thru 22. Moving
4 on, if the Court please,

5 THE COURT: Well, let's cover those 23, 24.

6 MR. LOWE: Well, the same thing that I've said before,
7 Judge, there are correct statements of law
8 and there are proper questions to be asked
9 to determine whether in fact they are able
10 to accept the basic building block instruc-
11 tions that you will give them at the end of
12 the trial and I would ask that you ask them
13 that, I can't say anything more than that.

14 THE COURT: All right, in the first place, I think the
15 questions are highly confusing and not in
16 accord with the law, which covers that high
17 probabilities and things of that sort. And
18 we're talking about beyond any reasonable
19 doubt and that is not in the standard that
20 was ever given in the Courts of Virginia.
21 And therefore, they're both confusing in
22 the manner they're done, and they're no
23 more than dupliaction of 19 thru 21 as to
24 which I will give general instructions in
25 there about the innocence, preseumption, and

1 following the instructions of the Court,
2 generally, following the law, and the
3 reasonable doubt.

4 MR. LOWE: Your Honor, just so that the record is clear,
5 in case the word "any" in number 23 would
6 cause independent problem I would offer an
7 amended version that would use the word
8 "beyond" a reasonable doubt, if that would
9 make a difference. I sense that it would
10 not make a difference to you, but I would
11 at least offer that.

12 THE COURT: It's not going to make any difference to
13 me and my position on the thing.

14 MR. LOWE: Thank you.

15 MR. REID: Judge, No. 25 postulates some speculative
16 reasons why a defendant may not testify.
17 It is a comment on the defendant's potential
18 failure to testify and suggests valid
19 reasons that, or allegedly valid reasons,
20 why he may not testify. One reason which
21 is not listed there is the fact that he may
22 have prior convictions which would be
23 brought out by the Commonwealth. If that
24 question could be either amended to put
25 that in, that may be acceptable to the

1 Commonwealth. If the defense counsel does
2 not wish to make that amendment to make the,
3 to port with the facts of this case, the
4 Commonwealth objects, since because it's
5 a comment on the failure to testify and
6 that's violative of the Fifth Amendment.
7 And second of all, it basically asks,
8 "Would you be willing to abide by the
9 principles of law," and the Court is going
10 to cover in a general way all the principles
11 of law of this case and get promises from
12 the jury that they will abide by all the
13 Court's instructions, to go through point
14 by point as I've made, as I've pointed
15 out as duplicative.

16 THE COURT:

All right.

17 MR. REID:

18 On 26, Your Honor, this is a two-part
19 question. The first part talks about the
20 grand jury and it's my understanding and
21 recollection that this Court generally,
22 upon request, puts on an instruction that
23 indictment by a grand jury is not proof of
24 a crime, and cannot be considered as
25 evidence in the case. And that comment
in the
certainly if not given/ instructions can be

1 made by the Court. I think that could be
2 handled in a general sort of way. The
3 presumption of innocence, the second part,
4 I made my same arguments that I did in the
5 other presumption of innocence, questions
6 namely 19 through 21.

7 MR. LOWE:

8 Again, I feel on 25, Judge, that it's
9 important to explore whether they may be
10 able to follow the instruction, whether they
11 would not nearly assume that it was feelings
12 of guilt that caused the defendant not to
13 testify. That's why it says "such as."
14 It doesn't attempt to list an exhaustive list
15 of all the possible reasons. And it has
16 been given in a number of courts in which
17 I've practiced by the Judge's, a preliminary
18 instruction of the jury at the opening of
19 the trial, it has been allowed frequently
20 in cases I've personally been involved in.
21 On voir dire by counsel. I would also ask,
22 and this for some reason was not put in here,
23 I just realized. That the Court also
24 instruct that the fact that the defendant
25 is the defendant, but if he testifies, that
that by itself does not make him incredible.

1 When Mr. Hewitt takes the witness stand, that
2 they do not deny his credibility merely
3 because he's the defendant. And I would
4 ask that that be inserted as an additional
5 one at the appropriate place that you
6 determine. But I think that that is a
7 proper statement of the law and it is proper
8 for me to ask, if you do not allow me to
9 ask it, certainly it is appropriate that
10 the Court ask it in my stead. No. 26, I
11 think is a correct statement of the law.
12 Whether you instruct him at the end of the
13 case or not I think it's appropriate to find
14 out whether they would be able to follow
15 that before they serve as jurors, and it is
16 a correct statement of law. And again I
17 think it's an appropriate question. I call
18 your attention, Your Honor, to the preamble
19 of my questions, and I'm not saying I'm
20 going to ask every jury every question.
21 Some jurors I might ask one or two of these
22 and others different ones. But some I
23 might ask the whole panel. And I think that
24 they are appropriate questions and they do
25 follow the law.

1 THE COURT:

2 All right, I don't look on it as, as far as
3 25 is concerned, the greater part of that
4 will be deleted, but the fourth line down
5 I will simply tell them, even though it's
6 going to be covered later, maybe duplicitous
7 that, well it is duplicitous, however the
8 law says the defendant doesn't even have to
9 testify in his own behalf and the jury may
10 not draw any emphasis from it. If you're
11 going to go into the reasons as to why the
12 defendant doesn't testify it would only be
13 fair to the people of the Commonwealth to
14 put in, "and due to prior record," but
15 that may not be, we all know that can't be
16 done, so of course you can't have it one-
17 sided as this particular portion, the first
18 part of sentence is 25 years. I can't
19 imagine a Judge giving that instruction.
20 Now, the 26th is not only, you're going to
21 get an instruction on that later, the
22 standard instructions are always asked for
23 by attorneys here, that the fact of
24 indictments are not any proof at all. In
25 fact, and it doesn't have to offer any
evidence. Those two. Of course, again, we

1 have another erroneous statement in the
2 question that, page 26, beyond all reasonable
3 doubt. I don't know why that was injected
4 into it. I'm not giving 26, and the reason
5 given, we'll give the usual instructions,
6 as already indicated. Next, 27?

7 MR. REID:

8 Judge, 27 is again asking if they can abide
9 by the reasonable doubt instructions,
10 duplicative of what the Court's going to
11 ask him, for the reasons I've been given
12 since question No. 19. No. 28, I don't feel
13 it particularly relevant. There are
14 feelings in the case, the question is can
15 they, you know, try this man fairly. We
16 can go through how many people believe they
17 get convicted for a bunch of reasons beyond
18 technical legal rules. Or get off because
19 of technical legal rules. Actually, the
20 questions 29 and 30 are relatively broad
21 and I think will be covered by the Court.
22 And if the general instructions, general
23 questions the Court asks about assessing
24 the credibility of each witness and asks
25 on an individual basis and not because of
status, the Court generally asks questions

1 of that nature, take the witnesses as they
2 come, and that would handle No. 29. The
3 other end of it is that I think if 29 and
4 30 would be asked, that Commonwealth might
5 be asked if you'd be more likely to believe
6 a defendant than a police officer and you'd
7 get into whether you're going to believe
8 the defendant and get involved in promises
9 made by the jurors, "we'll believe this
10 guy more than that guy," and etc. I think
11 you just open a can of worms if that
12 specific question is allowed. Judge, going
13 into 31, 32,

14 THE COURT: Wait a minute. Let's hold 31 for awhile.
15 All right, Mr. Lowe.

16 MR. LOWE: Question 27 brings in the question of
17 unanimity of a jury verdict, and I think
18 again, as I've said on all these others,
19 that it's a proper question for me to ask
20 jurors specifically.

21 THE COURT: I will ask 27.

22 MR. LOWE: You say you will?

23 THE COURT: Yes, I will, the first part of it.

24 MR. LOWE: Thank you. 28? I think that reflects
25 bias and prejudice against defendants

1 generally and specifically against lawyers
2 that may make objections during trial as to
3 a bias against the defendant. When they
4 have that occasion we certainly have that
5 issue to deal with, and I think it's an
6 appropriate one. 29 and 30 I think is
7 absolutely a question of bias. Of all the
8 questions in here that clearly points to
9 bias by the Commonwealth. If they would
10 believe a police officer more than another
11 person, other things being equal, that
12 shows a bias, and that's an entirely proper
13 question under the statute, under the rule,
14 under all the constitutional cases on it.
15 And the same is No. 30. If any of these
16 jurors believe that a police officer would
17 never lie under oath, and I know people who
18 believe that, polyannas, I mean, I don't
19 believe that many police officers ever lie
20 under oath, but I know that some do, just
21 as some lawyers and some doctors and
22 probably some judges do. We've got lawyers
23 and judges and doctors indicted all the time
24 and some of them are convicted. If there
25 are people on this jury who think a police

1 officer would never lie they ought not to
2 be sitting on a jury. And that's the purpose
3 of that question. And I think it's an
4 appropriate one. So I'd ask that those be
5 asked.

6 THE COURT: All right, 28, 29, and 30 are all denied.
7 and not be asked. The Court, even before
8 it starts, gives the jury preliminary
9 instructions and talks about credibility
10 and likewise always gives the standard
11 instruction on credibility. I find no
12 basis at all for objecting to those at the
13 situation at this stage. 31?

14 MR. REID: Judge, Mr. Parcell has called my attention.
15 Back up to 27, the last three words of the
16 first sentence say, "All reasonable doubt."

17 THE COURT: I know. That's another misstatement by
18 counsel for the plaintiff.- or for the
19 defendant. I am not going to ask the
20 second sentence at all. I'm going to say,
21 "Members of the jury, the criminal case,
22 you understand that the defendant may not
23 be convicted unless the jury votes unanimously.
24 I'm not talking about convinced. IN other
25 words, vote unanimously that he's guilty

1 in a general way by the Court's general
2 questions.

3 THE COURT: Yes, you have objection to that. I think
4 first of all, the thing is wild, misleading,
5 uses words that nobody would understand, of
6 an average juror, and consequently is
7 covered. In any event. And by the standard
8 instructions that we've always had.
9 Standard question we already have in there
10 covered by 3A:20. Next?

11 MR. REID: Judge, 35 and 36 talks about whether the
12 fact that the case involves marijuana would
13 influence you one way or the other. The
14 Court is allowed question No. 16, which
15 deals with you or any member of your
16 family, close friend, or neighbor that have
17 ever been involved with the use of marijuana.
18 I think that that question when asked,
19 together with the fact that the jury will
20 know the charge before the Court, when we
21 begin, when we actually are doing voir dire,
22 because the defendant will have been
23 arraigned at that point, it's duplicative,
24 Judge, to draw their attention to the
25 marijuana. To question No. 16 will, the

1 Court's general question then about the
2 case, I think that the jury's going to be
3 fair and honest and above board about this,
4 as they are required to be by statute. They
5 will say that, you know, 40 lb. of marijuana
6 makes me want to go out and buy the stuff.
7 and/or want to send a man to prison for
8 the rest of his life, one way or the other,
9 whichever way they feel. So, 35 and 36 are
10 basically duplicative and unnecessary.

11 THE COURT: All right.

12 MR. LOWE: But, Your Honor, I think it's important,
13 the fact that there's a large amount of
14 marijuana, there may be people not
15 withstanding they never had any involvement
16 with family or friends, but because of news
17 coverage and their own feelings, would be
18 so biased and prejudiced against the
19 defendant merely being charged with that
20 that it would make a difference. And that's
21 why those questions are designed to show
22 bias or prejudice, which are allowed under
23 the statute and I would ask you to ask them.

24 THE COURT: Well, I will not ask them. I do not think
25 they come under bias or prejudice. I think

1 that 35 is trying to get into the emotions,
2 and any person on any jury probably has some
3 emotions, and we get into 36 we get into
4 something that's totally speculative, and
5 I find no basis for giving 35 and 36 pursuant
6 to the decisions and the standard questions.
7 All right.

8 MR. REID: No. 35, and 40, are questions about
9 unanimity of opinion, unanimity of verdict,
10 and they are I think not proper questions,
11 for the same reasons as I have assigned to
12 questions 31, 32, and 33, which the Court
13 has already ruled on, which relates to the
14 same subject.

15 MR. LOWE: I think that that goes to question whether
16 they can be a fair and impartial juror and
17 impartial means that they will vote their
18 conscience and not what the majority wants
19 or what somebody else on the jury wants, and
20 these questions are aimed at finding that
21 out. Also, if for some reason in their
22 neighborhood or their family or the place
23 they work, acquitting a person who is
24 charged with marijuana would cause an
25 embarrassment, they obviously have a bias

1 42, it's already covered several times
2 before and it's covered several times in
3 the future instructions. They're both
4 preliminary to the jury and likewise in
5 the final instructions. Next?

6 MR. REID: Judge, No. 43 thru 48, the - 32, the
7 information is already provided. I think
8 Mr. Lowe may want to even withdraw that
9 question, I don't know. 43, what is your
10 occupation? He knows that.

11 THE COURT: It's already furnished in the list.

12 MR. REID: You want to withdraw that?

13 MR. LOWE: I'll be over that when you finish.

14 MR. REID: And 45, where do you reside? He already
15 has that information. 44, the educational
16 background. It doesn't have anything to do
17 with bias or prejudice. It's got a whole
18 lot to do with maybe what he wants to do
19 on peremptories, which doesn't have anything
20 to do with voir dire. Marital status,
21 children, age of the children, No. 46.
22 Again, it's irrelevant to the four factors
23 listed in 8.01-358. Your religious
24 preference and your political affiliation
25 are irrelevant to those four factors, in

1 addition to which they pretty well may
2 impinge on some privacy interest which may
3 be greater than the interest of the defendant
4 in learning that, for whatever use he may
5 put it. So I think those are irrelevant
6 and/or the information is already provided.

7 MR. LOWE:

8 Your Honor, in 43, I know I have a list that
9 whenever it was made up, and I presume it
10 was made up sometime back in June or July,
11 listing occupations. In a highly mobile
12 society lots of people change jobs, change
13 companies frequently. We don't know, for
14 example, whether one of these housewives
15 may have now become employed. One of them
16 might have become a police officer, or a
17 probation officer, or all kinds of things
18 that would have out there - and what I want
19 to do is update what they are listed here as
20 occupation, to find out if they still are
21 occupied. There was a trial in Charlottesville
22 where a person was listed as a student,
23 turned out that he was a law student and
24 by the time the trial came up the person
25 was a lawyer sitting on there. That's
certainly relevant to know. Educational

1 background the same way. These are
2 relevant as to biases and prejudices and
3 to enable me intelligently to make
4 peremptory strikes as well. Where they
5 reside, some of these residences may have
6 changed, and that's important for me to
7 know. Again, I assume that this list is
8 something like two to three months old,
9 since it's for the July term. Marital
10 status and number of children and ages of
11 children I think is a relevant factor for
12 me to know, particularly when we're dealing
13 with drugs, so that I can make intelligent
14 peremptories and because it may with a
15 follow-up question, it may very well
16 indicate a bias or prejudice in a case like
17 this. Religion and political party, there
18 are demographic studies that show certain
19 propensities of people of certain religions
20 and political persuasions and conservative
21 vs liberal, that would enable me to make
22 intelligent peremptory decisions. In
23 addition, it may uncover a prejudice or a
24 bias of some sort. And so I would say that
25 these are all important questions for me to

1 be able to get answered. Let me just say
2 briefly on occupation and residence, it may
3 be that the jurors would be asked if any of
4 them have changed since the master jury
5 list information was submitted. That might
6 deal with that, but at least I want it
7 updated.

8 THE COURT:

9 All right, 43 and 45 are already covered by
10 the jury list. And the very fact that the
11 jury secretary has turned all the information
12 to the deputy sheriff to make the calls, and
13 that they have been able to call them, they
14 have been able to come in, there's been no
15 change, there's no merit to support it.
16 43 and 45, the are previously covered.
17 44 is not relevant in the basic questions
18 that are in concept of what is intended by
19 the rules and statute. Marital status is
20 not needed in these cases. Might if we've
21 got a rape or something like that. I don't
22 see any basis for religion and political
23 party to be coming into it, because the
24 jury commissioners are instructed that they
25 can't exclude anyone based on political
affiliation or religion or race and that

1 sort of thing. So I will not allow anyone
2 of the 43 thru 48. Next?

3 MR. REID: Judge, on 49 and 50, I can't say that these
4 are completely irrelevant factors, since I
5 have heard them being asked before, and
6 I haven't heard a juror not be able to sit
7 because of these physical reasons. I think
8 these can more appropriately be handled
9 by the Court in a gentle sort of way,
10 indicating the case may go on. The way it
11 looks right now it may be trying this case
12 on Monday, and asking if that would be a
13 disadvantageous, if that would interfere
14 with vacation or work plans. I think the
15 Court can handle both of these in a gentle
16 sort of way. No. 51, Civic Organizations.
17 That has nothing to do with anything, it's
18 sort of like party, religious affiliation,
19 might help peremptories, but it is irrelevant
20 to the four factors. Nos.-

21 THE COURT: One minute. We'll stop there.

22 MR. REID: Okay, fine, thank you, Your Honor.

23 MR. LOWE: Well, Judge, I can hardly see anybody
24 objecting to 49 and 50. I had certainly
25 expected the Court to ask something like

1 would be. If there is a conviction to
2 argue how much punishment is appropriate
3 and what the weight of punishment is from a
4 given term in jail, if somebody in there
5 has been in a jail or prison it will alter
6 what I use as argument, it may also have a
7 bias, might be a bias in favor of the
8 Commonwealth, might be a bias against the
9 Commonwealth, but I would like to know and
10 I think the follow-up questions may show
11 one of the statutory biases as well. On
12 55 and on 56 I had in mind asking those
13 with appropriate follow-up questions. If
14 the Court is not going to allow me to ask
15 questions, then I would withdraw those two
16 simply because that, the follow-up questions
17 were being laid as a predicate, depending
18 on whether there was an answer affirmatively.
19 I point out also in 55 that the word
20 commensurate is misspelled, which is a
21 typographical error. Note for the record.
22 And on 57 I'll just address that. Again,
23 that is one on which a follow-up question
24 would have been appropriate and I think
25 that correctly states the law and would go

1 to bias or prejudice. Bias or prejudice
2 doesn't merely just mean guilt or innocence,
3 because we have what I've objected to that's
4 unitary jury sentencing procedure where
5 we must address both at the same time,
6 guilt or innocence, and if there is guilty
7 what the sentence should be. And I think
8 that is an appropriate question under that.
9 I withdraw 55 and 56, Your Honor.

10 THE COURT:

Well, 55 the Court considers not only
11 confusing but also unnecessary, this is
12 52 I'm talking about, and talking about no
13 compromised verdict. And consequently,
14 very confusing and therefore, it's better
15 covered by 53. And so, accordingly, 52 is
16 rejected. Also, while it gets partly into
17 the Allen Charge it won't be needed and
18 this Court would always give in case the
19 jury came in and said we're having problems.
20 53 I will give in a sense that the Court
21 wants you to understand that the appropriate
22 sentence is not the average but must be a
23 sentence in which all 12 jurors unanimously
24 agree. Appropriate under the facts and law
25 of the case. 54, there's no basis for that.

1 Have you ever been inside of a jail, and so
2 forth? And like Mr. Reid said, if you're
3 going into that part from the defendant's
4 standpoint, of course you've also got to
5 go into the point that, what about going
6 into a hospital and seeing somebody who
7 has been affected by drugs or something of
8 that sort.

9 MR. LOWE:

I would agree to that, Your Honor, if you
10 would want to make that amendment. I would
11 join the Commonwealth in asking it to be
12 amended to asking about those hospitals.

13 MR. REID:

I object to the whole question.

14 THE COURT:

54 is denied, it will not be asked. 55 and
15 56 are withdrawn, and would have been
16 rejected anyway. Withdrawn. Now, do you
17 Mr. Reid, address thru 55 but not thru 56
18 and 57, do you have any comments you want to
19 make for the record before we -

20 MR. LOWE:

Before Mr. Reid speaks, Your Honor, let me
21 reinsert 56. I do want to withdraw 55, but
22 I think 56 is correct and I'd let Mr. Reid
23 speak to it. I would not withdraw 56.

24 MR. REID:

Judge, 56 is about the same thing as 55.
25 No one's going to disagree with that. And

1 I just got a little bit confused. Mr. Lowe
2 was to submit voir dire questions, and this
3 is obviously a question that he intended
4 there and was going to agree, and according
5 to him is a follow-up question which is not
6 before the Court, which would - I don't
7 know where they're going to come from, off
8 the top of his head or if he's used them
9 before or knows what he would ask, after
10 everyone agrees that you're suppose to get
11 a fair and impartial trial. But as it
12 stands right now, it's worthless for the
13 same reasons that 55 are, Judge, everyone's
14 going to agree to it. And if Mr. Lowe has
15 a reason for a follow-up question, then it
16 should be stated what those questions are,
17 so we can discuss those intelligently.
18 57, Your Honor, the jury should not be -
19 sentencing has never been much discussed
20 among juries, for the simple reason I guess,
21 I can get into probation so quickly. And
22 what actually happens to people who go to
23 jail, parole. And that's obviously a very
24 big no no to discuss among the jury.
25 THE COURT: The Supreme Court hasn't even allowed the

1 jury to ask how much credit they get for
2 good time or when they're out on parole,
3 or what happens after the sentencing, it's
4 not permitted at all. I'm not going to
5 allow 57. It's totally unsupported. On
6 since 56, the only way I would allow that means
7 every person accused of crime should have
8 a fair trial before a fair and impartial
9 jury, that would be amended if - and the
10 only way I would give it would be amended -
11 the Court advises the jury that either the
12 defendant or every person accused of crime,
13 "and the people of the Commonwealth" would
14 be added to that, should have a fair trial,
15 or a fair and impartial trial. This case
16 is not purely for this defendant. This
17 trial is also, involves the people of the
18 Commonwealth, in order that we may have a
19 lawful society, and if you want that
20 question, Mr. Lowe, 56, that's the way it
21 will be amended.

22 MR. LOWE:

Your Honor, I'd submitted 56 in that form
and I would ask you to give it in that form.

24 THE COURT:

Well, I'm not going to give it in that form.
And it's rejected as is. And if you want

1 it in the form that the defendant, or the
2 person accused of the crime, and the people
3 of the Commonwealth should have a fair trial
4 before a fair and impartial jury, that's the
5 way it's going to be given.

6 MR. LOWE: All right. I except to your ruling, Your
7 Honor.

8 THE COURT: You're not acceptable to the amendment
9 then, is that what you're saying?

10 MR. LOWE: I submitted 56 as is, Your Honor, not with
11 the amendment, and I understand you refuse
12 to give it, and I've excepted to that.

13 THE COURT: Exactly right, I refuse to give it in that
14 form, which forms the jury that every person
15 that is accused of crime and the people of
16 the Commonwealth should have a fair trial
17 before a fair and impartial jury.

18 MR. LOWE: Judge, that covers all 57. There is the
19 additional one I identified earlier that I
20 would want to have asked. Since you're
21 going to ask all the question I would want
22 you to ask, and that is concerning - I
23 assume we're not going to start with Betty
24 Ellen, so just addressing other panelists
25 to find out whether they have talked with

1 other jury panel members or anyone else and
2 have heard reported to them comments which
3 you made on July 29th, and if so to follow
4 up to see if it had any impact on their
5 ability to sit as a fair and impartial juror.
6 THE COURT: All right. So, now I'll be recessed for
7 lunch. Hopefully we'll come back in the
8 next 45 minutes and get started on the jury
9 trial, under these motions we have set up
10 beforehand, and we will start off by having
11 the jury in, the ones that I told you,
12 Sheriff, eliminating the seven on the right
13 side, eliminating Board, Burgess, and Ellen
14 at this stage of the 31 present, we'll
15 eliminate ten and bring in 21 jurors, leaving
16 others in the jury waiting room.

17 MR. LOWE: Judge, excuse me, maybe I misunderstood you.
18 Did you make a ruling at my request, for
19 voir dire by you about whether any of the
20 jurors had heard about your comments to the
21 Thornton jury on July 29? Maybe you ruled
22 and I just didn't hear you.

23 THE COURT: Any comment, Mr. Reid?

24 MR. REID: Judge, I thought the Court earlier ruled
25 that you would not ask any questions like

1 that, that you indicated that you were
2 going to hold off Ms. Ellen, or whatever her
3 name is, on the (unintel.) jury and not
4 include her name among those to be drawn to
5 fill the 20 slots. I understood the Court
6 had told the clerk that.

7 MR. LOWE: Maybe I'm not making myself clear. Other
8 jurors who did not sit on the Thornton trial
9 may have talked with jurors who did sit on
10 the Thornton trial during later panels and
11 may have heard what Judge Hening said, and
12 I just want to find out and if so whether
13 they were influenced by it, that's all.

14 MR. REID: I thought the Court ruled that you would
15 not ask that question of whether jury panel
16 members -

17 THE COURT: I'm not going to ask that question to the
18 rest of the jury panel. In other words,
19 the only possible suggestion was that they
20 had any situation involving the thoughts on
21 how many jurors should decide it, some/^{thing}they
22 could take up with the General Assembly and
23 decide whether they ought to have 9 out of
24 12 or 8 out of 12 or a majority of it, or
25 whether it should still continue as a

1 unanimous thing. I've ruled on that. I'm
2 not going into it any further, that ends it.

3 MR. LOWE: That's fine. I just didn't understand
4 your ruling. Thank you.

5 THE COURT: We'll recess for lunch.

6 (Luncheon Recess)

7 All right, we've returned from the luncheon
8 recess and note the same presences as
9 heretofore. Ass't Comm. Attorney, Duncan
10 Reid and Buddy Parcell. Defense Counsel
11 are Lowe and Drescher, and the defendant.
12 All right, sir, is there anything else
13 preliminary before the Court?

14 MR. LOWE: Just one matter, Your Honor. As to all
15 those questions that you either decline to
16 ask or modified in a different form, I would
17 just like to be sure the record reflects
18 that I except to all those rulings, at least
19 in part on the Fifth, Sixth, and Fourteenth
20 Amendment of the Constitution of the United
21 States, the Constitution of Virginia, and
22 the Statutes of Virginia. I'd like to also
23 put on the record, Your Honor, I don't think
24 I said this, that one of the important
25 reasons why counsel needs to conduct

1 voir dire is because counsel can select
2 particular jurors to ask specific questions,
3 whereas the Court asks them of the entire
4 panel. I also would like to have Court
5 leave to file as an appellate exhibit a
6 document from Dr. Frederick, the witness I
7 had on as an expert earlier, simply giving
8 expert testimony regarding the reasons that
9 I gave as to each of those sentences, or
10 questions that you would not ask. I
11 realize you do not want to go into that now
12 and I'm not proposing to do so, I would just
13 simply like to have your leave to file
14 something at a later time with the Court
15 to be a part of the appellate record. Is
16 that agreeable, sir?

17 THE COURT:

17 I have no idea what you're talking about.
18 You're asking me to have something to be
19 filed that is not in anyway identified, or
20 do I know the substance of it? It is a
21 very unusual request. I've never heard
22 anything like that ever made before, unless
23 it's been cleared with opposing counsel.

24 MR. LOWE:

24 Well, Your Honor, what I would propose to
25 do is to put Dr. Frederick on to give expert

1 testimony about why each of the questions
2 you have declined to ask are important,
3 and relevant. I do not sense that you want
4 me to do that and take the time right now.

5 THE COURT: Exactly correct.

6 MR. LOWE: And I simply propose for him to do that in
7 writing and let me file it with the Court
8 as an appeal exhibit in the event there's
9 a conviction, that's all.

10 THE COURT: All right, you can do it by virtue of a
11 deposition, at which the Commonwealth
12 Attorney will be present so that they can
13 cross examine.

14 MR. LOWE: Perfectly all right.

15 MR. PARCELL: Judge, for the record there's been no
16 qualification of this man as an expert or
17 anything before this Court, to my knowledge.

18 MR. LOWE: Your Honor, I assume, since you allowed
19 and there was no objection to opinion
20 questions, expert opinion questions, that
21 he was accepted as an expert. The rule in
22 Virginia normally is unless there's an
23 objection, opinion questions can only be
24 asked of experts; if there is any question
25 I would ask that you accept him as an expert

1 on jury psychology, litigation psychology v.
2 jury selection, which is what his qualifica-
3 tions clearly showed him to be. Would you
4 make such a ruling, sir?

5 THE COURT: Well, he put in I believe what is known as
6 Def. Exh. 3 with his background. That came
7 in as to what his background is.

8 MR. LOWE: Yes, sir.

9 THE COURT: Now, it's just like any other witness, so
10 far as the Court's concerned, whether he's
11 a so-called expert, which has often been
12 defined "anyone five miles from home," or
13 whether he's any other type lay witness.
14 It's a question insofar as credibility
15 would be accepted by the Court.

16 MR. LOWE: That's right.

17 THE COURT: Just like in a case before the Supreme Court
18 of Virginia where two or three of the great
19 psychiatrists testified about how crazy the
20 defendant was. Commonwealth Attorney didn't
21 put on anyone. Traced the events of the
22 murder, and the jury heard it all, and
23 resolved the matter by convicting the
24 defendant, completely rejecting the
25 psychiatrist's alleged expert opinion, and

1 We've returned from a recess. It's 3:15.
2 The Court notes for the record the presence
3 of the Ass't. Comm. Attorney, Mr. Reid and
4 Mr. Parcell. Def. Counsel is Mr. Lowe and
5 Mr. Drescher, and likewise the defendant in
6 person. Well, we didn't follow the
7 admonition of Edward Bennett Williams, the
8 famous lawyer from Northern Virginia, when
9 he talked to the Bar Association about a
10 year ago, Sept. 1981, when he said lawyers
11 blame the big city courts for the crime
12 rise by asking to reduce the amount of
13 time allowed the lawyers to select juries.
14 Williams said he has never taken more than
15 half a day and never lost a case because of
16 jury selection. 3:15. Is there anything
17 else before we have opening statements?
18 MR. REID: Judge, there's one thing Mr. Lowe brought
19 to my attention. He intends to put the
20 defendant's wife on to testify to the fact
21 that she is the defendant's wife, that
22 they've been married for I think 28 years
23 and they have some children, I don't know
24 what number they have. And that would be
25 all the testimony, I understand, he intends

1 to put on through her. The argument
2 Mr. Lowe intends to advance to sustain that
3 testimony would be that it's relevant on
4 the sentencing aspect of the case if the
5 jury were to reach that part of it. The
6 Commonwealth would object to her testimony
7 simply because it's irrelevant. The testi-
8 mony during the trial of the matter is
9 limited to the guilt or innocence. Character
10 evidence is able to be put in because that
11 goes to guilt or innocence. Evidence of a
12 particular defendant or particular persons'
13 family background, whether they've been
14 married or not, whether they had children
15 would be relevant if that witness were to
16 testify to things other than simply that.
17 For this witness to get on and say, "I'm
18 married to that man, the defendant and we
19 have a marriage with children," is
20 absolutely irrelevant to any issue of the
21 case. Bibliographical information is
22 relevant only to allow the jury sort of a
23 matrix within which to gauge their testi-
24 mony and evaluate the person, knowing a
25 little bit about the person as

1 a guide to evaluate their testimony. The
2 Commonwealth feels it's irrelevant and should
3 not be allowed. In any event, Mr. Lowe
4 mentioned that he would make note of it
5 during his opening, and that's why I'm
6 bringing it up at this point, for the
7 Court's consideration.

8 MR. LOWE:

9 Well, Your Honor, I'm not talking about
10 putting on character evidence, first of all.
11 Merely getting some of the circumstances of
12 the defendant, the fact that he is married,
13 the fact that he has five children, and
14 nothing more is relevant to the jury's
15 sentencing consideration, but it's not
16 character matter. We're not putting the
17 defendant's character in issue. We're
18 giving the jury some understanding of
19 Mr. Hewitt's status, that's all. Now, as
20 Your Honor knows, I've already object to
21 the unitary jury sentencing. And that's
22 one of the reasons is that I must address
23 issues regarding sentencing in this trial,
24 with this jury, before they go out to
25 deliberate, because that's the law. They
don't come back in. So, I'm put to the

1 requirement of having to do some of that.
2 As I explained before, I have some limits
3 because if I put the defendant's character
4 in issue it goes to guilt or innocence, not
5 merely to mitigation for sentencing if they
6 find him guilty. But certainly, that's not
7 character, that's merely his status that
8 he's married and he has five children. If
9 Commonwealth and the Court would permit me
10 to I would just have it stipulated and state
11 it, we don't have to put her on for that
12 purpose. But normally, the Court and the
13 Commonwealth don't agree to that and I
14 would need to put her on just to give that
15 much testimony and nothing further. And I
16 certainly think that's appropriate. And
17 would ask that I be permitted to do that.
18 I think the Court should know that in good
19 faith I told the Commonwealth I was going
20 to do that, because I didn't want to be in
21 the middle of my opening statements and have
22 the Commonwealth or the Court feel that I
23 was making some improper statement after
24 Mr. Reid indicated to me he thought it was
25 improper. I therefore felt that it was

1 important for you to rule in advance,
2 because I certainly don't want to do any-
3 thing that the Court feels is improper.
4 But I do think that's proper. I think I
5 should be permitted to do it.

6 THE COURT:

7 All right, at this time I'll preserve the
8 ruling except for one point. It will not
9 be mentioned in opening statements, in
10 accord with several other rulings I've made
11 that questions you're bringing up in
12 advance of the questions actually being
13 presented on evidence or admissibility of
14 the evidence. And this is another one on
15 which there will be no mention about in
16 the opening statements. As of the time
17 it does become an issue, by that time
18 counsel can have briefed it and gotten the
19 applicable law on the case.

20 MR. LOWE:

21 Could I just have a moment, Your Honor?
22 Your Honor, the defendant has indicated
23 since this is the only matter, and I vouch
24 that that would be the only question asked
25 of his wife, and it is not something about
which sequestration would normally be
permitted or required, whether the Court

1 will allow his wife, who is a wife of 28
2 years, to remain in the courtroom, she wants
3 to be in here, she has expressed apparently
4 to the defendant great distress that she
5 would not be permitted in the courtroom. I
6 make that request as a discretionary request,
7 I would hope the Commonwealth would concur
8 in it, because Mr. Hewitt is disturbed,
9 particular if it may be that you will not
10 later let her give that testimony, that she
11 would be excluded.

12 THE COURT:

Well, you made the motion to separate the
13 witnesses and I granted it, as to both the
14 Commonwealth witnesses and to your own
15 witness.

16 MR. LOWE:

Well, you're not going to make a ruling that
17 we can use her testimony at a later time,
18 is that my understanding?

19 THE COURT:

I'm not going to make a ruling at this time,
20 no, she's going to be excluded on your
21 motion.

22 MR. LOWE:

May I have just one moment?

23 THE COURT:

All right.

24 MR. LOWE:

Your Honor, in light of your ruling and the
25 fact that you will not rule that she would

1 be permitted to give that testimony,
2 Mr. Hewitt says that he rather just forget
3 that and let her in the courtroom, so I will
4 withdraw her as a witness and just allow her
5 to be in the courtroom. That's the only
6 thing we can do.

7 THE COURT: All right.

8 MR. LOWE: That's the only matter I have. I do have
9 one matter before opening, Judge. You told
10 the jurors that they can ask questions.
11 I'm unaware of anything in Virginia law that
12 by statute or rule permits that. There have
13 been a couple of cases where I don't think
14 it was objected to and there was some
15 allusion and the Supreme Court reports to
16 the fact that it took place. But I think
17 over objection it should not be permitted
18 and there are two particular reasons why.
19 First of all, a juror may blurt out a
20 question, not being trained lawyers, that
21 might be totally prejudicial, for example,
22 might say, "I have a question," and ask
23 one of the police officers, "Does
24 Mr. Hewitt have a criminal record?" and
25 that would blow this whole trial, be a

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(Jury out)

MR. LOWE: Your Honor please, you will remember from the two-day hearing that we had, that it went hot and heavy about identifying the informant in this case, about identifying Robert Talley, about finding out where Robert Talley was, and about the fact that we had been trying to get the police to tell us where we could find him in order to get subpoena power over him for hearings, in order to get an interview with him, and in order to get discovery. In the Court file in this case is an omnibus discovery motion which we filed asking, among other things, for this information about Mr. Talley. If Your Honor wants to take a moment to find that in the file I'll wait, or hold off until I make any further comments on that, because you may want to be looking at it. That's the thick discovery motion.

THE COURT: I think I saw it for two whole days already, didn't I?

MR. LOWE: Yes, sir. Well, then I'll just won't refer to it if you don't want to pull it out. In paragraph 10 of that, we make a motion

1 for an order requiring the Commonwealth
2 Attorney to disclose that there was an
3 informant. And in their response, para. 10,
4 they stated, "An informant existed in
5 this case but the Commonwealth will not
6 divulge any information about that person.
7 That informant was Robert Talley. That
8 was acknowledged twice from the witness
9 stand. They declined to give us any
10 information. Under Roviaro it is clear and
11 we made an argument about this, that if an
12 informant is a witness to the crime itself,
13 that we are entitled to get discovery to
14 find him, to have subpoena power of him, to
15 produce him as a witness, and the Government
16 declined at all times to acknowledge that
17 he was - the Commonwealth Attorney did -
18 to acknowledge that he was the informant
19 and to give us discovery. Par. 11 of our
20 Motion for Discovery moved for an order
21 requiring the Commonwealth to discover all
22 information about him, his residence, his
23 present location, in order to enable us to
24 secure service of a subpoena upon him for
25 appearance and testimony in this Court.

1 Went on to allege that he could give
2 testimony favorable to the defendant and
3 that we believed that he might even be
4 under a witness protection program, the
5 Commonwealth's response to that is, the
6 Commonwealth will not divulge any informa-
7 tion about anyone named Robert Talley.
8 Now, that simply violates all of the
9 discovery motions. It's one thing if
10 they have an unidentified informant and
11 they keep him as an unidentified informant
12 and they don't call him as a witness and
13 they don't impede our ability to investi-
14 gate and have a fair trial, but that's not
15 the case here. Your Honor, back as far as
16 the preliminary hearing in this matter in
17 the General District Court of the County
18 of Henrico, I filed a Motion for Disclosure,
19 and I hand you at this time, I've given a
20 copy to the Commonwealth, a copy of that
21 motion for disclosure, which further made
22 a motion stating that he was a material
23 witness, that is Robert Talley was, and
24 I'll give you a moment to just review that
25 motion very briefly.

1 THE COURT: What are you talking about, the one in
2 General District Court?
3 MR. LOWE: Yes. Just to show that we have been making
4 this request in all the Courts of Henrico
5 County since April 1982, and have met
6 unanimously with a refusal by the Common-
7 wealth to produce him or give him to us for
8 subpoena power or to tell us how we can
9 contact him. Now, today, having given
10 no disclosure on him, no discovery on him,
11 except they did provide some documents
12 about what they keep talking about "a man
13 named Robert Talley," without acknowledging
14 he was an informant, from Central State
15 Hospital and some other documents and so
16 forth, but now they come in and they want
17 to reduce him as a witness. Under the
18 case of Giglio vs United States, which we
19 cite in the Omnibus Discovery Motion, the
20 Supreme Court of the United States, the
21 Giglio material regarding Talley was never
22 disclosed. That is, the question of what
23 compensation for what consideration or
24 what plea bargains, or what other promises
25 the Commonwealth has given to Robert Talley,

1 that must be disclosed long before trial.
2 We made a discovery motion. And in the
3 discovery response from the Commonwealth,
4 although they have no right to refuse to
5 give us that information until the week
6 before trial, they said that, under para. 2
7 of the motion requesting that information,
8 Paragraph 2-C, it says, "This information
9 will be supplied in the weeks prior to
10 trial, once potential witnesses have
11 become witnesses who will in fact testify."
12 Up to this very minute we have not been
13 provided that information. That's in
14 violation of the Commonwealth's own response
15 to the discovery motion and it's in violation
16 of federal and state law. The rules of
17 discovery and fair play. If there had been
18 consideration given we would not only need
19 to know that, but have enough opportunity
20 and time to discover, to investigate it,
21 and to develop it. The Commonwealth has at
22 all times, as far as I'm aware, said they
23 did not know his whereabouts and yet he was
24 in court today. Now we have finally
25 subpoenaed him. We caught him in the halls

1 today, in the Commonwealth Attorney's
2 Office, with a subpoena, so that at least
3 he's not going to slip out of our clutches
4 again without our having an opportunity
5 to hold him here, but that doesn't do us
6 any good for a trial today. Commonwealth
7 Attorney, and he is one of the Commonwealth's
8 Attorneys, it's not just the Henrico
9 Attorney, they are the Commonwealth Attorney,
10 Edward Carpenter in Goochland had at one
11 point agreed to produce Mr. Talley, then
12 violated that agreement after we had given
13 up detriment in Goochland County. We've
14 made motions to dismiss for coprosecutorial
15 misconduct in Goochland on that ground. He
16 has refused, similarly, to produce
17 Mr. Talley, and now all of a sudden he's the
18 first witness called by the Commonwealth.
19 And I say to you, Your Honor, that that
20 violates the discovery process, it violates
21 the rules of court, it violates Constitu-
22 tional mandates as expounded by Supreme
23 Court in Giglio and other cases, and it
24 certainly violates every notion of fair
25 play. I also filed a written request with

1 Robert Talley to have an interview with him.
2 I did that at one-thirty this afternoon,
3 because frankly that's the first chance
4 that we've really had to do it, and that's
5 when we served the subpoena on him. I
6 have not had a chance to confront him face
7 to face to see whether he would give me an
8 interview. He's been in, I don't know if
9 it's police custody, but certainly he's
10 been surrounded by police officers the
11 whole time, and taken as a whole I think
12 that this Court ought to bar Mr. Talley
13 from being called as a witness for all
14 these reasons, particularly the failure to
15 disclose as I have commented on. I think
16 this is an improper thing to have them do
17 now and I think the only remedy, certainly
18 we've got a jury selected now, you can't
19 continue the trial now, is to bar them
20 from calling him. I point out further,
21 because this is going to come up, and I
22 might as well put it all together and you
23 can hear all this at once from Mr. Reid.
24 I made an objection before about testimony
25 of informants and hearsay and what was said

1 down in Chesapeake or wherever that was,
2 because the crime if any took place here in
3 Henrico. The possession, if it took place,
4 was in the vehicle when it was in Henrico
5 County. And I would object to any of this
6 other information, including the gun
7 information and so forth, coming in through
8 this witness. For all those reasons he
9 ought not to be allowed to testify at this
10 point.

11 THE COURT: All right, Mr. Reid?

12 MR. REID: Judge, in the first place, the motion to
13 dismiss filed in Goochland was also filed
14 with
15 in this county/ Judge Spinella of this
16 district. Out of hand. Second place,
17 Mr. Lowe says one of the reasons he wanted
18 to learn Mr. Talley's whereabouts is to
19 obtain subpoena power. Well, prior to the
20 first witness being called in this case he
21 in fact did obtain subpoena power. Third
22 place, the Court has already heard arguments
23 back on April 4 and 5, two days worth of
24 arguments, one of their arguments the
25 issues raised in Roviera about the dis-
closure of the informatn. This Court

specifically ruled that Robert Talley, or whoever the informant was was Robert Talley, was a privileged informant as most informants are, and that the Commonwealth was well within its bounds in answering in the manner it did the motions for disclosure of his identity and anything else about the informant in the case. Mr. Lowe now says that we didn't disclose any deals to him. Well, we'd been meeting with Mr. Lowe, well, over the phone or in person for a long time. Last week we probably had at least two or maybe three meetings and several conversations over the phone. Mr. Lowe, I've asked him on at least two occasions, once on Tuesday night and once yesterday, was there anything else he needed to try the case. He said no. And he also indicated, "I hope you all aren't foolish enough to use Robert Talley." He never asked if you do please give me his record or whatever they have. I have furnished the defense counsel a record of one Robert Francis Talley. I have furnished the defense counsel presentence reports of

1 Robert Francis Talley. And also furnished
2 the defense counsel by subpoena duces tecum
3 at the Commonwealth's expense and request
4 the records of Robert Talley at Eastern
5 State Hospital of January 1980. In addi-
6 tion to which I've talked to Mr. Drescher
7 who now sits as co-counsel, and been -
8 I'd ask, "What else do you want, Mr. Drescher,
9 I've given you all I've got, what else do
10 you want? What other kinds of misconduct
11 is it that you made elusions to?" And he
12 said, "Well, I've got what I want on
13 Talley." All this, and then they come in
14 now and say, "We're surprised." Well,
15 if they're surprised, Judge, I'm a little
16 bit surprised myself that they would be so
17 taken aback. It's true I did not disclose
18 to Mr. Lowe nor to Mr. Drescher the deal
19 that was made that the elicitation began
20 Mr. Talley's cooperation. I simply forgot.
21 There's no reason for me not to disclose
22 that deal, and that deal will be disclosed,
23 I can disclose it now or I can disclose it
24 when he testifies. I intended to have him
25 testify about it, and one of the first

1 areas that he would be testifying about would
2 be that. And when I made request of the
3 defense counsel, "What else do you want?"
4 when I supply all this information about a
5 witness who - why should I supply it if
6 he's not going to be a witness. They
7 wanted it all, they got it all, and I in
8 good faith, you know, I would have given it
9 to them if they had asked for it if I'd
10 remembered it. I didn't review these
11 motions before we came in here, and I'll
12 give it to them right now. They will -
13 there is two people involved in that deal
14 being made and both persons are here. Both
15 persons have been summonsed. Both persons
16 raised their hands and took an oath today.
17 So, everybody involved in that deal is
18 here. No investigation needs to be made.
19 outside of that transaction. Now, I would
20 point out, Judge, I believe it was one of
21 the Briley cases in the City of Richmond,
22 a question arose as to Duncan Meekins,
23 in which they disclosed certain evidence
24 and a similar defense motion was made. The
25 Court resolved that issue. I can't recall

1 which Judge, there've been so many of those
2 in the City. But the Court resolved that
3 issue by simply allowing the defense
4 attorney to view the materials in questions.
5 And then they proceeded with the trial.
6 And I certainly don't have any objection
7 to telling Mr. Lowe and Mr. Drescher the
8 arrangements under which this man has come
9 to be an informant. So, I would also point
10 out the terms of this letter, allegedly de-
11 livered to Mr. Talley. Mr. Talley at no
12 time ever indicated any desire, or willing-
13 ness, to speak to Mr. Lowe or to Mr. Drescher.
14 So, you know, that may be a vain effort on
15 their parts to so earnestly hope that he
16 would discuss the case with them.

17 MR. LOWE:

17 Well, if there's anything that's strange
18 credulity it is the fact that with all the
19 conversations that we've had about
20 Mr. Talley, and I point out they've always
21 been relating to his records and convic-
22 tions and his hospitalizations. There's
23 never been any discussion about where we've
24 had all the information we needed about
25 the Giglio material, to have Mr. Reid say

1 he just forgot really is, with as much
2 contact as we've had, is very hard for me
3 to believe. If he did forget, then the
4 Commonwealth has delivered itself up to an
5 error which it must now have corrected by
6 barring the witness on the witness stand.
7 There are lots of things that lawyers
8 forget that bar witnesses. You forget to
9 get the witness itself sometimes. You
10 can't say now, "Well, we'll tell them what
11 it is now," because we don't have the time
12 to check with witnesses down in the
13 Chesapeake area, to investigate this.
14 Mr. Reid says well only two people were
15 involved. We don't know that. I don't
16 accept that. Even if I accept that he says
17 that in good faith, he may not be properly
18 advised. I don't have an opportunity to
19 investigate now. We're sitting here at
20 five minutes or ten minutes to four. These
21 officers come in here. Robert Talley comes
22 in here. I have no opportunity to investi-
23 gate it. It's a denial of Sixth Amendment
24 Right to effective assistance of counsel.
25 It's a violation of the Omnibus Discovery

1 Motion response under the rules of court
2 in the various cases. It does no good to
3 say, "Well, I forgot." My answer is,
4 "Well, if you forgot, then you don't get to
5 use Mr. Talley." Your Honor, the -
6 THE COURT: Well, suppose you forgot to bring it up
7 again and he assumed that you didn't want
8 anymore information than what he'd already
9 gave you, you forgot, too, didn't you?
10 MR. LOWE: No, sir, because Mr. Reid - contrary to
11 other things, where he said, "If counsel
12 wants to ask for something," or the clerk
13 says, "Well, it's available," Mr. Reid
14 told us and told the Court that it would
15 be supplied to defense counsel the week
16 before trial. I just had to assume that
17 there was no information. As a matter of
18 fact, I seem to remember at one point
19 somebody telling me nobody offered Talley
20 a deal. The fact that we were not supplied
21 that information, I certainly took as a
22 negative response under the Omnibus Discovery
23 Motion Response, because that's exactly what
24 he said he would do. If there was any
25 information he would give it during the

1
2 THE COURT:

week before trial. Now we just -
All right, I'd rather not - I've heard
enough. You repeat yourself so often, I
don't need to hear it five times. What
we're going to do at this time is adjourn
the jury over tomorrow and you all are
going to do whatever is necessary in
connection with letting him interview
Talley, or whatever it is you think he's
covered. What isn't accounted for you will
put back tomorrow at 9:00 o'clock before the
jury comes back at 9:15. And if you have
any other statements to make or if you have
any other authorities you want to cite, or
anything that may have been overlooked at
this time or any particular letters or
exchange of information? We'll take it
up at that time. I've never had a case in
which there have been so many motions, so
long, so repetitive, and so forth, as there
have been in this case. And it's worn out
everybody, not only me, but also the jury,
and they've sat around and sat around and
sat around and (unintel.) I'm not going to
let the jury be exposed to that kind of

1 treatment any longer. They're going to be
2 let go home. I'm not going to hear this
3 thing any further this afternoon. I've
4 already had two days of this when you had
5 this Motion to Suppress. Therefore, I'm
6 going to adjourn the jury over until
7 tomorrow at 9:15. I'm going over til
8 9:00 o'clock, at which time you all will be
9 back and which time if you haven't got this
10 thing resolved about Talley, then I want
11 you to be in a position to summarize the
12 thing tomorrow morning at 9:00 o'clock.
13 Bring the jury in, sheriff.

14 MR. LOWE: Your Honor, do I understand you are
15 directing that we be allowed to have an
16 interview with Mr. Talley?

17 THE COURT: I don't know any reason why you can't.

18 MR. LOWE: Thank you, Judge.

19 (Jury in)

20 THE COURT: Members of the jury, I wish again to thank
21 you for your patience, and we're going to
22 have to call on you again further. Other
23 matters came up as they did all morning
24 that leads me to believe that the only
25 fair way to treat you all in this matter

1 is to allow you to be adjourned over until
2 tomorrow morning at 9:15. And consequently,
3 I want to impress upon you again that I
4 do not want anyone discussing the case
5 with you. I don't want any contact made
6 with you by anyone about it. And as I
7 said earlier, I do not know what, if
8 anything, will be in the paper, on the
9 radio or on TV, but I want you to totally
10 disregard it and not read anything about
11 it and not listen to it and not watch it.
12 I'll have to ask you that question first
13 thing in the morning. So at this time I'm
14 turning you all over until 9:15 in the
15 morning. Have a good evening.

16 (Jury adjourned for the day)

17 MR. LOWE:

18 Judge, for uniformity, did you want counsel
19 to stand when the jury comes in and leave,
20 or stay seated. I think we all ought to
21 do it one way or the other, and I'm up to
22 whatever you'd like to do.

23 THE COURT:

24 Well, we are not reopening and we are back
25 in the courtroom, and I don't think it's
that material one way or the other. What's
next? Anything?

1 MR. DRESCHER: There's nothing of any great significance,
2 if Your Honor please, but I want to go on
3 record, because I've been listening to
4 several of the comments made by the
5 Commonwealth's Attorney, that have been
6 misstatements of certain discussions we
7 have had. I agree with the Court whole-
8 heartedly that repetition is not in order
9 here. I have no intention of rebutting
10 every single statement that Mr. Reid made,
11 but I want you to know that they are
12 inaccurate. And if the Court is inclined
13 to inquire of me further in that regard
14 I will be more than happy to respond.

15 THE COURT: All right, I believe the matter is in the
16 light that I, in this case, before I ad-
17 journed the jury over to tomorrow. I want
18 the Commonwealth Attorney in this case to
19 see that the interview of Talley is
20 admitted if he's going to be used as a
21 witness, and then that can be arranged this
22 afternoon, or this evening, or at the
23 earliest possible moment, preferable after
24 we adjourn, and then tomorrow morning we
25 will come back in this case at 9:00 o'clock

1 and if there's anything further counsel
2 wishes to say at that time you may do so.
3 And if you have any more authorities or
4 anything at that time you may likewise
5 be ready to cite them at that time.
6 All right, sheriff, the Court is adjourned
7 over until 9:00 o'clock in the morning.
8 The jury is not to return until 9:15.

9 (Court adjourned)

10 MR. PARCELL:

11 Judge, the Court has instructed us, the
12 Commonwealth Attorneys to grant an interview
13 between a Mr. Robert Talley and Mr. Lowe.
14 I was present when the handwritten note
15 requesting an interview with Mr. Talley was
16 presented by one of our deputy sheriffs
17 from Mr. Lowe to Mr. Talley, and Mr. Talley
18 at that time said he did not wish to talk
19 to Mr. Lowe or Mr. Drescher. He's making
20 that same position throughout this trial
21 since it first began. I know the Court
22 said they could interview him, but I'm
23 getting the impression from Mr. Lowe that
24 the Court's telling Mr. Talley that he has
25 to talk with Mr. Lowe and Mr. Drescher
whether he wants to or not. I want to get

1 it on the record exactly what the Court
2 wishes, because I'm not going to force
3 Mr. Talley, nor is Mr. Reid. That's his
4 decision as to whether or not he wants to
5 talk with Mr. Lowe or Mr. Drescher.

6 THE COURT: Is there anything else?

7 MR. PARCELL: No, sir.

8 MR. LOWE: I'd like just to say, Your Honor, I under-
9 stand that you're giving us a remedy to the
10 fact of surprise by saying that if they
11 want to put him on the witness stand he
12 has to talk to us, other wise he can't go
13 on the witness stand, and I think that's
14 a fair position.

15 THE COURT: Well, I think you have a right to interview
16 him under the circumstances, and so I'll
17 allow you to interview him and if he
18 refuses, then I'll have to deal with that
19 at another time.

20 MR. LOWE: All right, sir. Thank you, Your Honor.

21 (Court Adjourned for the Day)

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PRINTERS NOTE:

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1 MR. REID: Judge, what transpired last night was the
2 interview between defense counsel and
3 Mr. Talley. It lasted a half an hour,
4 45 minutes or so. In addition to which
5 I told them whatever promises were made to
6 Talley to make him an informant in this
7 case. I have previously supplied all the
8 criminal records the Commonwealth of Va.
9 had, all the stuff about Eastern State,
10 there is no criminal record that I'm aware
11 of with any other witness in the case, and
12 there were no promises made to anybody else
13 to put any testimony in the case. So,
14 with that, the Commonwealth has complied
15 with it's obligation. I will speak to the
16 law concerning this matter. The defendant
17 yesterday had at hand the Giglio case versus
18 United States, at 92, Supreme Court Reporter,
19 763. Giglio is a situation where the
20 prosecution of the U. S. Government in that
21 case had a key government witness and had
22 promised him prior to trial that if he
23 testified that he would not prosecute.
24 That information is withheld from the
25 defense attorney throughout the entire trial.

1 On the posttrial proceeding, based on the,
2 because of the defense attorney's discovery
3 of that evidence the Supreme Court of the
4 United States ruled that it was critical,
5 that it should have been made known to the
6 defense counsel on an exculpatory basis
7 rather than any motions under 3A:14 or
8 anything - well, they don't have 3A:14 in
9 the Federal system, but something similar
10 to 3A:14 - and that the non-disclosure
11 throughout the trial was such as to
12 mandating a new trial in the situation.
13 Here, we have a far different situation.
14 We have a situation where request has been
15 made. Commonwealth has to comply. The
16 defense counsel was aware that the Common-
17 wealth had not fully complied with its
18 request. And they lay in the weeds until
19 the Commonwealth attempted to put on Talley,
20 and then as a tactical decision they stood
21 up and cited Giglio quite glibly and in an
22 effort to prevent the Commonwealth from
23 using Talley. It's a strategical tactical
24 matter. Commonwealth talked with these
25 gentlemen, as I've indicated, before trial,

1 and asked them if there was anything else
2 they wanted or needed, and their need for
3 this information was never communicated
4 until right before trial. The Commonwealth
5 had not looked at it as a response to the
6 motion to suppress until this morning about
7 three minutes ago when I examined
8 Mr. Lowe's copy. My copy is somewhere in
9 my office, I don't know where. The Giglio
10 matter, Judge, is inappropriate as an
11 authority. More on point is the case,
12 James Briley vs. Commonwealth, 221 Va. at
13 563. The Brileys - James Briley was charged
14 with a triple murder in the City of
15 Richmond. There's a key witness named
16 Duncan Meekins, a co-defendant. Defense
17 counsel was not supplied with a statement
18 of the Meekins witness prior to trial.
19 There was a motion made during trial,
20 subsequent to the testimony of Meekins for
21 a mistrial, based on failure of the Common-
22 wealth to supply that information. The
23 Judge ruled, and the Court seemed to
24 commend the Court for ruling like this,
25 that the mistrial was not appropriate, that

1 a continuance or short recess would be
2 granted, about a three-hour recess. The
3 statements were made available. Defense
4 counsel had them. They were able to recall
5 and recross examine Mr. Meekins on the
6 contents of the statement. The Court held
7 that cured the air. In this situation,
8 Judge, defense counsel have the entirety
9 of the Commonwealth's promises to the
10 informer. They have had the unusual
11 experience of being able to interview the
12 informer. This Court has ruled that under
13 Roviero they're not entitled to
14 know the informant's role, his name, his
15 address, or certainly there's no mandate
16 for the Court to rule that a witness has
17 to talk to defense counsel. This Court
18 has ruled that, and the witness did in
19 fact talk although he of course didn't
20 have to. So they are way ahead of the game.
21 I will further note for the record that in
22 the discussions between counsel it became
23 evident that defense counsel on their own
24 knew quite a bit about Mr. Talley. I don't
25 know what all they know, I think it may be

1 obvious when Talley testifies. But
2 they're not completely in the dark and
3 are not depending a hundred per cent on the
4 Commonwealth to, and they're apt to
5 discredit Mr. Talley as a witness. As a
6 last matter, Your Honor, the Supreme Court
7 of Virginia has decided that we're to
8 prohibition, this is I think an unreported
9 decision, dated October 24, 1980. This is
10 the Epperly case, Your Honor. The one that
11 where they couldn't find the body. And the
12 Virginia Tech Football player was convicted
13 of the murder of the person but they never
14 found the corpus delecti. During the
15 prosecution of that case the court entered
16 an order, as I understand it,

17 THE COURT:

You're referring of course to the trial
18 court?

19 MR. REID:

The trial Court, yes sir, Judge, that would
20 be the County of Pulaski. The Honorable
21 R. William Arthur, Judge of the Circuit
22 Court of the County of Pulaski. The trial
23 Court in that matter required witnesses to
24 talk to defense counsel. The Commonwealth
25 moved for a writ of prohibition, urging the

1 Supreme Court that the Circuit Court Judge
2 had no authority to require any witness to
3 talk to defense counsel. And reading into
4 the record what the Supreme Court ordered
5 and sustaining the writ of prohibition,
6 they ordered that essentially the Judge be
7 prohibiting him or anyone on his behalf
8 on enforcing that part of an order entered
9 by him on October 1, 1980, in the case of
10 Commonwealth of Virginia versus Stephen
11 Madison Epperly, by which part he has
12 ordered "that any Commonwealth witness in
13 this prosecution cooperate with the defense
14 attorneys in their efforts to interview,
15 provided however, that the defense attorney
16 refrain from asking any question about and
17 that any interviewed witness refrain from
18 stating any statement made by third parties
19 to any agent of the Commonwealth or any other
20 internal report, memorandum, or document
21 made by agents in connection with the
22 prosecution of the case." So that I under-
23 stand that order, the Judge had ordered them
24 to cooperate, except they weren't able to
25 talk about anything involving work product.

1 Now I have, Judge, a copy of defense
2 counsel's brief, a copy of the brief of -
3 excuse me, Your Honor. What I have in front
4 of me is a copy only of the memorandum and
5 a writ of prohibition.

6 THE COURT: Summarize what you just said again, because
7 I don't believe - I don't recall when the
8 matter came up back sometime ago that you
9 cited either Briley, or you cited the
10 Epperly case where the Supreme Court issued
11 a prohibition.

12 MR. REID: Judge, I don't understand what the Court is
13 asking me.

14 THE COURT: Resummarize what you say was the holding by
15 the Supreme Court in it.

16 MR. REID: In Briley or in the Epperly case, Judge?

17 THE COURT: The latter.

18 MR. REID: The latter, okay. Well, the order of the
19 Circuit Court was that "Any Commonwealth
20 witness in this prosecution cooperate with
21 the defense attorneys in their efforts to
22 interview." The rule of prohibition was
23 sought; in that case the argument of the
24 Commonwealth was as follows: The Judge of
25 a Circuit Court has no authority, statutory,

1 inherent, or by virtue of rule support, to
2 compel potential witnesses in a criminal
3 proceeding to be interviewed by defense
4 counsel in advance of trial, particularly
5 when the witness sought to be interviewed
6 is a trooper with the Virginia State Police
7 who conducted the investigation and has
8 knowledge of all the Commonwealth's witnesses,
9 all the Commonwealth's evidence. The order
10 of the Circuit Court compelled all Common-
11 wealth's witnesses, not merely the investi-
12 gating State Trooper. The argument of the
13 Commonwealth obviously is bolstered when the
14 investigating officer is involved, rather
15 than just ordinary witness. But the bottom
16 line is that the Supreme Court said that
17 an order requiring Commonwealth witness to
18 cooperate with prosecutions in an effort to
19 interview or if they had to make themselves
20 to interview, is beyond the power of the
21 Court. The basis of my point is this:
22 Yesterday the Commonwealth, at the Court's
23 direction, provided Mr. Talley to the
24 defense counsel. That was - there was no
25 objection raised by the Commonwealth

1 yesterday that we didn't have to do what we
2 did. Neither nothing in Virginia law,
3 nothing in Riviera, nothing in Giglio,
4 nothing in anything that defense counsel is
5 going to be able to cite requires that that
6 man actually speak to anybody. But that^{was} in
7 fact done, so in this case, any prejudice
8 that could have resulted by these gentlemen
9 being taken by surprise by failure to comply
10 with the exact requirements of the disclosure
11 laws is completely vitiated and made
12 harmless by the fact that they've talked to,
13 they've gotten much more out of Talley than
14 they could have otherwise. In fact, their
15 conversation with Talley yesterday was what
16 is his understanding of the deal, by which
17 he was going to become an informant. They
18 were only required to get that from the
19 Commonwealth. They got it not only from the
20 Commonwealth, but as well from the man who
21 made the deal, Mr. Talley. So, it's
22 unfortunate the Commonwealth has failed to
23 provide this, it was an oversight, but
24 nevertheless it was an oversight that has
25 now been fully cured.

1 THE COURT: All right, thank you, Mr. Reid.

2 MR. LOWE: Your Honor, what Mr. Reid has just done is

3 engage in a five minute criticism of Your

4 Honor's decision yesterday, which I think

5 is unwarranted and is improper. But even

6 if it were not unwarranted and improper it

7 would certainly be a little bit late, because

8 the decision was made and the interview was

9 had last night, and I don't understand what

10 his purpose is in reading you cases that say

11 that he thinks you made a wrong decision

12 yesterday, and certainly I think you made a

13 right decision and it's already been done.

14 The point he misses is that we did talk with

15 Mr. Talley for a while last night. But

16 Mr. Talley refused to answer the pertinent

17 questions. The pertinent questions, and

18 I'm going down the questions that we listed

19 in our discovery motion, which is paragraph

20 2-C, that we ask that we be told any and all

21 consideration, or promises of consideration

22 given to or on behalf of any potential

23 witness or expected or hoped for by any

24 witness, by consideration the defendant

25 refers to absolutely anything, whether

1 bargained for or not, which arguably could
2 be of value or use to such a potential
3 witness or to persons of concern to such a
4 witness, including but not limited to
5 formal or informal, direct or indirect,
6 leniency, favorable treatment, recommenda-
7 tions or other assistance with respect to
8 any pending or potential criminal parole,
9 probation, pardon, clemency, civil, tax
10 court, court of claims, administrator or
11 other dispute with the Commonwealth, with
12 any other sovereign, of course that would
13 include the Federal Government, with local
14 government, or with any authority or with
15 any other parties.

16 THE COURT: Is all that one question?

17 MR. LOWE: Sir?

18 THE COURT: Was all that one question of a laymen?

19 MR. LOWE: No, it was a lawyer, Your Honor. Mr. Reid.
20 Mr. Talley refused to tell us the crucial
21 information. Specifically said, "I don't
22 have to tell you that, I'm not going to."
23 For example, had he been paid for this work,
24 as a paid informant, and if so, of course,
25 whether it was expenses or compensation or

1 what, but we asked whether he'd been paid,
2 he refused to answer whether he'd been paid
3 anything. Commonwealth has not made
4 disclosure. At that time when I asked him,
5 the Commonwealth did not voluntarily make
6 disclosure to us of what the answer to that
7 question would be. Had he ever stolen money
8 to pay for drugs or other crimes? He
9 refused to answer that. Had he -

10 THE COURT:

What was the second question?

11 MR. LOWE:

12 Had he stolen money to pay for drugs in
13 other crimes. In other words, if he had
14 been committing crimes during this period
15 of time and the police had just been laying
16 off of him and just not bothering him or
17 not arresting him, that obviously would be
18 a form of compensation or consideration.
19 He wouldn't answer any questions about
20 whether he'd done it to begin with.
21 Questions about where he was working or,
22 not where physically, but what he was doing
23 to support himself. Leading in again to
24 the question of whether he was being paid,
25 how he was being compensated, what consideration he was being given. Had he been given

1 any other form of compensation for his
2 cooperation, he refused to answer. Had he
3 been given any compensation by the Federal
4 authorities. He had testified before a
5 grand jury. He refused to say whether he
6 had been given immunity, whether he'd been
7 biven any deals by them, whether they'd
8 offered him any refraining from prosecution
9 if he were to cooperate in this case.
10 There's a joint state and federal task
11 force that's been operating in the area
12 that this took place. He refused to
13 answer that. When we pressed him on that
14 regarding Chesapeake and he has a five year
15 suspended sentence for which he had a
16 revocation hearing set in February or
17 somewhere around February of '82, that case
18 was continued generally, we understand. He
19 refused to answer any questions about whether
20 he had been, what he'd been promised, with
21 regard to that revocation, and made a
22 quiptic comment, he said that the entire
23 Chesapeake Commonwealth Attorneys' Offices
24 is entirely eliminated from that case, but
25 he can't and won't tell us why. Very

1 mysterious that nobody down there could
2 tell us what the status of that case was.
3 I might add, Your Honor, this is even
4 further complicated and mysterious by the
5 fact that we went to the Circuit Court of
6 Chesapeake to get extracts of the orders
7 regarding that case, and while there was
8 a conviction order, for some reason the
9 file contains no order, or did not when
10 we went down there, contain no order on
11 sentencing as to what disposition was made
12 and so forth. There apparently is no
13 sentencing date set. We don't even know
14 whether the case has been dropped or not.
15 Mr. Talley would not answer that. That's a
16 serious type of consideration which we want
17 to be able to explore and investigate
18 before trial. That's the purpose of the
19 Giglio type information that we be provided
20 that so we can do an adequate investigation.
21 Now, Mr. Reid cites Briley. I don't know
22 what the statement was in Briley. Mr. Reid
23 put this case under my nose just as I
24 walked in this morning, and Your Honor came
25 into the courtroom. But whatever may be

1 said for cases where the problem can be
2 cured by giving you a three hour recess, as
3 apparently the Court felt in that case, we
4 cannot investigate in Chesapeake, if Your
5 Honor gives us three hours today. We could
6 not investigate in Chesapeake if you gave
7 us a continuance until Monday, because by
8 the time we could get to Chesapeake it would
9 be just about the end of the business day
10 on a Friday, and nothing but the weekend in
11 between.

12 THE COURT:

I thought you'd already made a statement
13 that you'd already checked all the records
14 down there.

15 MR. LOWE:

Yes, sir. and couldn't find any records,
16 but now he tells us that the Commonwealth
17 Attorney's Office is somehow involved and
18 has eliminated, whatever that meant, or
19 can't tell us anything because of some
20 mysterious thing. We can't contact the
21 federal authorities to find out from them
22 what compensation or consideration they
23 have offered him. Have they given him
24 immunity from a lot of federal drug charges,
25 conspiracy charges, tax evading charges?

1 We don't know and Mr. Talley wouldn't tell
2 us, and the Commonwealth hasn't disclosed
3 it. Indeed, you know, we just don't know
4 that.

5 THE COURT: Well, when was it you say that you looked
6 into this situation in Chesapeake?

7 MR. LOWE: Mr. Drescher actually did the groundwork
8 on that, Your Honor. Would you like for
9 him to respond? He can tell you the
10 specifics.

11 THE COURT: I just want to know the approximate date
12 of it.

13 MR. LOWE: We have done some investigation a number of
14 months ago and as recently as this week, I
15 believe, or the last week we checked the
16 file again to find out what the disposition
17 order was and no disposition order could be
18 found, Mr. Drescher advises me, and we have
19 certified copies of the other orders.
20 But we had no time to check with the federal
21 authorities to see what they've given him,
22 that might be very important.

23 THE COURT: You say you've covered everything in
24 Chesapeake. You've gotten all the orders
25 and looked at the file. And presumably

1 looked at the order book.

2 MR. LOWE: And there was no order on sentencing. And
3 Mr. Talley and the Commonwealth have not
4 disclosed, and Mr. Talley has refused to
5 tell us exactly what compensation he's
6 been given, what consideration he's being
7 given on that Chesapeake charge, which is
8 still hanging over his head. There's no
9 order of revocation, Judge. There was a
10 five year suspended sentence and they had
11 a show-cause or something equivalent of a
12 show-cause, based on some criminal activities
13 that took place I believe in 1979 or '80,
14 I've got the list of those.

15 THE COURT: Well, how in the world could Talley control
16 that. In other words, it's up to the
17 Commonwealth Attorney and the Judge, someone,
18 you say you've checked the records, you
19 found all the records in Chesapeake
20 relating to a conviction and a suspended
21 sentence and apparently there might be or
22 has been something in connection with a
23 show-cause possibility, but that it never
24 has been set and never has been decided and
25 there's nothing relating to the revocation.

1 I mean, how can Talley be responsible for
2 that, for goodness sake? That's the duty
3 of the Commonwealth Attorney and the
4 Court system.

5 MR. LOWE:

6 Judge, the initial court date on revocation
7 hearing for that five year sentence to be
8 revoked for criminal misconduct that
9 followed it, was originally set according
10 to the records for May 4, 1981. The
11 records don't disclose exactly what took
12 place to get it continued, but Mr. Talley
13 indicated that, yesterday, that that
14 revocation hearing had been rescheduled
15 sometime in early 1982, perhaps around
16 February. We asked had it been continued,
17 what's the status of it now? He refused to
18 say. So that there is a pending revocation
19 hearing, or at least there was at one time,
20 maybe it's been dismissed now, we don't
21 know, we can't find an order regarding it,
22 Mr. Talley won't tell us, the Commonwealth
23 has not told us. That's very important.
24 If this man has been told, "If you do a
25 good job on Billy Hewitt we'll forget that
five years," that's very important for this

1 jury to know, in terms of his credibility.
2 And that's what we've been trying to find
3 out and we have not been able to find out.
4 THE COURT: I understood you to represent to the Court
5 a few minutes ago that for a number of
6 months that you all have checked the
7 Chesapeake records on Talley and that in
8 the last few days they've also been checked.
9 You still find no hearing on the show-
10 cause order, is that correct or not?
11 MR. LOWE: No disposition on the revocation, whether
12 they revoked it or whether they just
13 refuse to revoke it and remanded him to
14 his probation, or just what they did, there
15 is no order that we could find, that's
16 correct.
17 THE COURT: No indication of any hearing.
18 MR. LOWE: Yes, sir, the records that we have indicate
19 that there was originally a hearing on
20 May 4, 1981. Mr. Talley said it was
21 continued to early 1982. That it was
22 continued generally at that point. What the
23 status of it from then he refused to talk
24 about.
25 THE COURT: Well, it's a matter of record, and that was

1 what we depend upon and I wouldn't require
2 Talley to respond to that at all. Period.
3 In other words, that's a matter of public
4 record, you all have looked at it and it's
5 been continued and there's been no order in
6 connection with it, there's been no situation,
7 it's entirely up to defense counsel. I
8 don't see how any defendant could control -
9 not defense counsel - it's entirely up to
10 the Commonwealth Attorney and the Court, I
11 don't see how any defense counsel can
12 control that. In other words, I'm not
13 going to consider anything in relation to
14 the fact that Talley hasn't responded to
15 some sort of proceeding in Chesapeake, which
16 you all have all checked the records and
17 found out there's been no disposition made.
18 I think it's immaterial. Next?

19 MR. LOWE:

19 Your Honor, I mentioned that I don't think
20 you've addressed the question that we had
21 not been told and Talley refused to tell us
22 whether he's been paid as an informant,
23 whether they were paying living expenses,
24 whether they were giving a salary, anything
25 of that line. Are you saying that we're

1 not entitled to that either?

2 THE COURT: I have not made any such pronouncement as
3 that. Don't put words in the mouth of the
4 Court that are not correct, sir, and has
5 made no statement at all about it. You
6 understand that?

7 MR. LOWE: Yes, sir.

8 THE COURT: You'd better.

9 MR. LOWE: I was -

10 THE COURT: You're saying the Court made some statement
11 about it. You be accurate when you quote
12 the Court, or any other witness.

13 MR. LOWE: Judge, I didn't say you had said it, I
14 said were you saying that? I'm trying to
15 find out if you have ruled on that phase
16 of what I've raised, because if not I would
17 ask if you have a ruling on that regarding
18 ^{he} what/was paid, since they wouldn't tell us
19 and Mr. Talley wouldn't tell us.

20 THE COURT: I have not made any ruling on it yet
21 because you haven't finished and I haven't
22 had the response. And it's standard
23 procedure in any court to let each side do
24 it and let the originating side have a
25 response to it. I'm sure that's standard

1 everywhere.

2 MR. LOWE: All right, sir. Let me just finish up on
3 these things then.

4 (Tape suspended)

5 The matters that I pointed out to the
6 Court have not been disclosed and I would
7 let Mr. Reid respond to those.

8 THE COURT: All right, Mr. Reid, I have them written
9 down, he's question number one was salary
10 paid, I don't know what his question is,
11 state, federal, or what. No. 2, had he
12 ever stolen money to pay for other crimes.
13 3, what he did to support himself or any
14 other compensation from the state government
15 or federal government. So do 4 and 5, and
16 the last one 6 related to this Chesapeake
17 thing and I've already ruled on the first
18 part of it.

19 MR. REID: Judge, in terms of being paid, he didn't
20 answer that question yesterday. There's
21 been no evidence he was paid by the local
22 jurisdiction of Chesapeake or the State
23 Police in connection with this investigation.
24 I mean, I'm disclosing that if he was paid,
25 that would be a promise of consideration

1 for his cooperation.

2 THE COURT: All right, as to question 1, your response
3 is what?

4 MR. REID: He was not paid by the Chesapeake people.
5 He did disclose to defense counsel yesterday
6 that the Chesapeake people rented a car for
7 him on one occasion and then the defendant
8 actually I think saw him in that car. He
9 went down to the defendant's home in Manteo,
10 North Carolina with that car, and he and
11 the defendant and a co-defendant drove back
12 and had to do something about dropping off
13 that car. That testimony was revealed to
14 defense counsel yesterday in the interview.
15 And the second question that the Court
16 raised was about whether he's ever stolen
17 money to support himself, or whatever that
18 was. That had nothing to do, Judge, with
19 consideration given Talley for his coopera-
20 tion if any in this case. What defense
21 counsel is looking at in that situation is
22 perhaps misconduct that goes back a long
23 time ago, which doesn't have anything to
24 do with consideration for his cooperation.
25 They asked how he supported himself. There

1 will be no evidence he supported himself
2 from any of the Commonwealth people during
3 this investigation. The evidence will show
4 that the defendant -

5 THE COURT: Wait one minute, that's No. 3. What he
6 did to support himself?

7 MR. RIED: Yes, sir.

8 THE COURT: Your answer's what?

9 MR. REID: He didn't get any money from the Common-
10 wealth. Commonwealth didn't pay his rent,
11 his board, his room, or anything like that.
12 They did rent the car. And that was
13 disclosed. But that's the only thing I'm
14 aware of. There was evidence revealed to
15 defense counsel yesterday that the defendant
16 himself paid \$300 of Talley's expenses,
17 back in December and January. Hewitt, the
18 defendant, paid Talley \$300 expense money,
19 back in December and January. \$300 total
20 during that period of time. I think it was
21 in three payments of \$100.

22 THE COURT: That date was what?

23 MR. REID: Sometime in December and January, Judge.
24 Mr. Talley may have the exact dates. I
25 think he supplied a date or approximate

1 time yesterday for at least one of the
2 payments. Plus, he also told defense
3 counsel yesterday that Hewitt bought him a
4 car. Some kind of Pontiac with gray primer
5 on it.

6 THE COURT: He was, or he did?

7 MR. REID: He did in fact buy a car, purchased a car
8 for him. But that's something to do with
9 support, but it doesn't have anything to
10 do with coming from the Commonwealth.

11 THE COURT: All right.

12 MR. REID: The other thing the Court raised was
13 something about the federal Government.

14 THE COURT: The 4th and 5th, as I recall the questions
15 by Mr. Lowe was, "Was there any other
16 compensation from the state government or
17 the federal government?"

18 MR. REID: Judge, there's no other compensation from
19 the state or the federal government that
20 I'm aware of involving this case. This is
21 a local investigation. Chesapeake and
22 the State Police were working on it. He
23 was basically, the evidence is going to
24 show, the informant was working under
25 Lt. Don Zeigler of the Chesapeake Police

1 Department and no one paid him, no state
2 or federal agency has paid him anything for
3 his cooperation in this investigation.
4 Defense counsel also made the statement
5 that they were never told at yesterday's
6 interview what consideration there was about
7 the revocation hearing that is currently
8 pending. He testified, he told them rather,
9 that the consideration was basically
10 perhaps a recommendation of leniency if I
11 cooperated. He made that statement to them.
12 That is the grand sum total of everything
13 I know to be the consideration regarding
14 this revocation, show-cause. So they
15 have that information. In addition, they
16 indicated they didn't know what happened
17 on the case, whether it was, disposition had
18 been made or simply had been put by the
19 board because of his cooperation today.
20 That's incorrect. They were told yesterday
21 and may be reflecting in their notes, I
22 don't know, I didn't write it down. But he
23 said that the case is being, "Generally
24 continued." I recall that, because
25 "generally continued" is not normally how

1 it's said, people normally say "Continued
2 generally," and orders reflect "continued
3 generally." That is what he told them had
4 been the disposition of it, and that is in
5 fact the current disposition and status of
6 that thing, it's still hanging. So there
7 is no revocation order that they could
8 have ever been able to find, because none
9 has been entered, to my knowledge. I have
10 not checked the Court files down there, but
11 they have, and the best I can figure from
12 everything I have learned it's continued
13 generally. Judge, I would also like to put
14 in as Comm. Exh. No. 1, this writ of
15 Prohibition, the Order entered by the
16 Supreme Court of Virginia October 24, 1980,
17 in a case Commonwealth of Virginia, Petition-
18 er on a Writ of Prohibition. The Record
19 no. in the Supreme Court is 80-16-92. I
20 have the petitioner's petition, a memorandum
21 supporting thereto, and a copy of the order.
22 I would ask the Court for leave to enter
23 this as Comm. Exh. No. 1. I'd also like,
24 Judge, if I could, to withdraw and make a
25 copy and submit a copy. This was supplied

1 to me by another Commonwealth Attorney's
2 Office and I'd like to return the original
3 he gave to me back to him.

4 THE COURT: All right, suppose we have a photocopy made,
5 two or three photocopies made. We'll need
6 three photocopies, one for defense counsel,
7 one for Comm. Attorney, and one for the
8 Court. Is there anything else you have to
9 say at this time?

10 MR. REID: Judge, there's only one other thing.
11 Mr. Drescher and Mr. Lowe brought up
12 something of my criticism of the Court,
13 I wasn't intending to criticize the Court.
14 Just to point out that they had gotten far
15 more than they're entitled to, legally,
16 in this matter, and for them to complain
17 of surprise or ill preparation of violation
18 of their rights strikes me as being a
19 little bit absurd in light of the fact they
20 have gotten more than they're required to.
21 have in the situation.

22 THE COURT: All right, what you'll do, Sheriff, at this
23 time, is you go ahead and get the three
24 copies of that. All right, and then as
25 soon as I have that copy I will read that,

1 and so therefore we are taking a recess.

2 (Recess)

3 The Court has considered the arguments of
4 counsel and the position of counsel for the
5 defendant and the position of the Common-
6 wealth Attorney, and also a little concerned
7 about the prior position it may have taken,
8 although it was not maybe clarified enough
9 by an order. And I suggested that counsel,
10 they wanted an order after the hearing on
11 multitudus motions back there that they
12 should have had such an order. All the
13 record is clear on such things. And now
14 that the Commonwealth Attorney has brought
15 to the Court's attention, which I don't
16 recall having previously been brought to
17 the Court's attention, the little copy of
18 the certified copy of the Order of Allen
19 Lucy, Clerk of the Supreme Court of Virginia,
20 relative to the decision October 24, 1980,
21 and Commonwealth of Virginia, Petitioner,
22 Record No. 801-692, which I'm making a part
23 of the record, is Court's Exhibit 1 from a
24 Petitioner, a Writ of Prohibition, against my
25 friend, Bill Arthur, out there in Pulaski

1 Circuit Court, and ruled that this prior
2 order should definitely have deleted from
3 it if any Commonwealth witness in this
4 prosecution cooperated with defense
5 attorneys in their efforts to interview
6 about however defense attorney refrained
7 from asking any questions about and any
8 interviewed witness refrained from stating
9 any statement made by third parties to the
10 agent or Commonwealth or other internal
11 report, memorandum, or document made by
12 agents in connection with the prosecution.
13 The Order of the Supreme Court and the
14 brief on behalf of the Commonwealth of Va.,
15 memorandum of law in support of the
16 Petition for the Writ of Prohibition,
17 seeking that because the trial court without
18 authority compels a potential witness in a
19 criminal proceeding to be interviewed by
20 defense attorneys before the actual trial.
21 And, in raising a question of whether the
22 trial court had any authority to order a
23 potential witness in a criminal case to
24 cooperate with the defendant. And
25 particularly one state trooper in that case.

1 And they go ahead with an argument and the
2 memorandum, and go through and leave the
3 distinguished and overrule Old Bobo against
4 Commonwealth, which is 187 Va. 776, and
5 indicate very clearly in the memorandum,
6 which obviously the Supreme Court adopted
7 indirectly that the criminal defendant's
8 right to discovery is nonexplanatory evidence
9 held by the Commonwealth is now controlled
10 by Rule 3A:14. To that extent the rule in
11 any case is interpreted in the same or
12 inconsistent as Bobo, is implicitly
13 overruled. Rule 3A:14 limits discovery,
14 documentary, entangled evidence, enumerated
15 and so forth, and the position of the state
16 was to (unintel.) to be interviewed by
17 defense attorney as being in direct conflict
18 with restrictions imposed by Rule 3A:14.
19 And consequently, quoting further, he is in
20 no general constitutional right to discover
21 in a criminal case and it's only to every-
22 thing controlled by 3A:14. It went on to
23 discuss the situation and a number of other
24 jurisdictions, holding similarly, Maine,
25 Georgia, Texas, Louisiana, Illinois, even

1 the eastern district of California, which
2 surprises you. Then my friend, Judge
3 "Beef" Hoffman, now retired, 602 Fed. 2nd
4 1176, and it's the (unintelligible)
5 access to a perspective witness, although
6 in the end a witness may refuse to be
7 interviewed. Consequently, the summation
8 of the position taken by the state that
9 defense has given, or shouldn't be given
10 the unwarranted right to conduct a fishing
11 expedition in the Commonwealth's file.
12 Also, Belfield, it's Commonwealth 215-303.
13 Now, with respect to all of that, the
14 other case, Briley against Commonwealth,
15 221-563, primarily at page 573 thru 575,
16 must be thru 576, speaking on behalf of
17 an unanimous Supreme Court, Mr. Justice
18 Albertis Harrison, one of the finest
19 Virginia gentlemen all the way from
20 representative of the General Assembly to
21 Senator, to Attorney General, to Governor,
22 to Justice, sums up for the Supreme Court
23 unanimous opinion action by Judge Wilkinson,
24 in allowing something to be read, and
25 indicated. (unintel.) prior statement to

1 be read, took a recess and allowed it to be
2 read, for some question and business file
3 as to whether or not counsel had or had not
4 really asked for this and they didn't ask
5 for it by written motion as was done here
6 but, even on all motions, and we do not
7 construe the statements by Meekins to the
8 police as exculpatory, and of course,
9 that's the only thing that really could be
10 (unintel.). Further due process rule of
11 fairness is the evidence must be exculpatory
12 favorable to the accused. Statements
13 involved Meekins' likewise involvement in it,
14 as an accomplice in the Briley murders.
15 One or two of the cases were tried out here,
16 but I didn't sit on them. And they're
17 convinced in their opinion, according to
18 Mr. Justice Harrison, that even in the
19 early disclosure contents of tapes and
20 transcripts, we've given a little if any
21 aid and cross examining Meekins, and the
22 trial Judge had the alternative of declaring
23 a mistrial or taking curative action, and
24 Judge Wilkinson, the Judge he's talking
25 about, adopted what we believe was the

1 correct course, why the Court, Commonwealth
2 makes tapes and transcripts available, and
3 rather than declare a mistrial, and stated
4 only very extraordinary and striking
5 circumstances would a mistrial be declared,
6 and that that's left entirely to the
7 presiding Judge. Accordingly, I believe
8 that Briley in this case has been covered, / and
9 if the Writ of Prohibition had come to my
10 attention earlier I would have made limita-
11 tions on what could or could not be obtained
12 about Talley, and whether he had a right to
13 interview him, and if he had a right to
14 interview him he cannot compel him in any
15 way to answer if he doesn't want to answer
16 and doesn't want to be interviewed. And
17 that is basically what the Commonwealth
18 Attorney said, but the Commonwealth Attorney
19 has also said, "We've given them every
20 other document, and so forth, they need
21 about his background. And so, consequently,
22 the Court overrules each of the positions
23 of the defense counsel again, that, even
24 though they talked to him last night he
25 wouldn't answer questions. The Court will

1 not require any witness for the Commonwealth
2 to answer any questions if he doesn't want
3 to answer them, and he did refuse, according
4 to the statement made by Attorney Lowe,
5 saying, "I don't have to tell you that and
6 I don't want to answer it," so that's
7 correct of the law. And what he was paid
8 and had he gotten into stolen money and
9 some other cases, and what he did to
10 support himself, what other compensations
11 and so forth. the state government had, none
12 of those are proper questions. When we come
13 to cross examination of this witness. And
14 it would be proper examination to cross
15 examination if he was paid, if he testified
16 on cross examination that attorney for the
17 defendant had asked if he had any (unintel.)
18 consideration for the Chesapeake law enforce-
19 ment people on which he, Commonwealth Attorney
20 said that they did rent a car for him. No
21 money was ever given to him, crimes, that
22 he'd got the, never got any money from the
23 State except the car, except three \$100
24 payments by Hewitt in January or February,
25 and he had apparently bought the car for

1 Talley, and all of that, and I think would
2 be admissible. No compensation from the
3 State or Federal Government in the case,
4 and therefore, nothing of that sort will be
5 appropriate in the way of cross examination.
6 And so, on that basis that is the way
7 we'll henceforth proceed.

8 MR. LOWE: May I ask a question, Your Honor?

9 THE COURT: Yes, sir.

10 MR. LOWE: I want to be sure that I understand what
11 you've just said so that I do not inadvert-
12 ently do something that you don't want me
13 to do on cross examination. Do I understand
14 that I will not be permitted to ask
15 Mr. Talley what consideration or compensation
16 he received from, for example the Federal
17 Government or any agents of the Federal
18 Government in exchange for his cooperating
19 in this case?

20 THE COURT: No, I did not say that. In other words,
21 as I understand the representations of the
22 Commonwealth Attorney, he said that there
23 had been no money or any considerations of
24 anything from the Federal State Government
25 other than the fact that the Chesapeake

1 law enforcement people, the branch of the
2 Federal Government, that they some way
3 provided a car for Talley, I don't know the
4 detail of it, or did they rent a car for
5 him, or some way provide a car for him, and
6 I think that that is appropriate, and I
7 think that can be asked.

8 MR. LOWE:

But other than about the car you're saying
9 that it would be inappropriate for me to
10 ask about any other compensation or
11 consideration given by the State or Federal
12 Government, because the Commonwealth has
13 represented that there was none, is that
14 correct?

15 THE COURT:

In connection with this case, it's what they
16 represented, you can ask the question, and
17 what kind of timing everything to this case,
18 and only that, as I've just indicated.

19 MR. LOWE:

Well, I understand what you just said, but
20 I'm not sure as whether you mean specifically,
21 limited to the car or specifically limited
22 only to questions about what he was given
23 of any kind for this case, and I'm not
24 clear which way, and I want to be sure I
25 follow your instructions.

1 THE COURT: Well, as I say, we, what has been represented
2 to me, you're talking about a moot matter,
3 but I think you can ask the question as to
4 whether or not he received any type consider-
5 ations of any kind from the Federal Govern-
6 ment or the State Government or the
7 Chesapeake law enforcement people.

8 MR. LOWE: All right. I thought you were telling me
9 not to, and that's why I want to be sure.
10 Thank you, Judge.

11 THE COURT: Mr. Reid, what is the problem. I notice one
12 the secretaries just brought you -

13 MR. REID: Judge, she's just given me some information
14 about numerous witness we have out there.
15 There's apparently been a misunderstanding
16 and one of them just left. I didn't intend
17 that to happen.

18 THE COURT: Do you need to check on that or not?

19 MR. REID: Since the jury is not here, could the Court
20 give me a few moments? I would appreciate
21 it.

22 THE COURT: The point is the jury is here and of course
23 been waiting around for about a day and a
24 half already.

25 MR. REID: We can go forward then, Judge. If I can

1 any of you violated that admonition, please
2 let me know by holding up your hand.

3 All right, complete negative response from
4 the jurors, no violation of the Court's
5 admonition. All right. Next witness?

6 MR. REID: Robert Francis Talley.

7 THE COURT: You were sworn yesterday, were you not?

8 WITNESS: Yes, sir.

9 THE COURT: Have a seat, please. Turn your chair, face
10 the jury and talk to the people farthest
11 away from you, loud enough so we can all
12 hear you.

13 DIRECT EXAMINATION: Robert F. Talley by Mr. Reid

14 Q Mr. Talley, I'm going to ask you to direct your response
15 to the ladies and gentlemen of the jury, please. State
16 your full name.

17 A Robert Francis Talley.

18 Q Your age, Mr. Talley?

19 A 31.

20 THE COURT: What was the age?

21 A 31, sir.

22 Q What's your date of birth, Mr. Talley?

23 A 8/30/51.

24 Q Are you married?

25 A Divorced.

1 Q Do you have children?

2 A Two.

3 Q How old are the two children?

4 A One's 11 and one's 6.

5 Q With whom do they live?

6 A They have been living with me for four months. Basically
7 they live with their mother.

8 Q And where do you reside, sir, what part of the State of
9 Virginia do you reside in?

10 A Virginia Beach.

11 Q Are you employed?

12 A Yes, I am.

13 Q In what area of endeavor?

14 A Virginia Beach.

15 Q And what type of work is it that you work in?

16 A Home improvement.

17 Q Approximately how long have you had that employment?

18 A About three months.

19 Q You're a salesman for a home improvement company?

20 A Yes, I am.

21 Q Now, Mr. Talley, going back to the year of 1981,
22 specifically July thru December, where were you living
23 at that time, where were you staying? Last year.

24 A Last year? July thru December? July thru December in
25 1981 I was in Virginia Beach Correctional Center.

1 Q In jail?

2 A Yes, sir.

3 Q What were you down there for?

4 A Threatening phone calls. Threats. Grand larceny.

5 Q When did you enter the Virginia Beach jail on those
6 charges?

7 A Originally, I believe it was December 16th, I left the
8 Virginia Beach Correctional Center around January 12th
9 and I came back May 3rd of 1981 -

10 Q We're talking about December of 1980, you began your
11 stay in Virginia Beach?

12 A Yes, sir.

13 Q And you stayed there through the next month, January of
14 '81?

15 A Yes, sir.

16 Q All right. And you came back to Virginia Beach jail in
17 May of '81?

18 A May 3rd, sir.

19 Q And when did you finish up your time down in Virginia
20 Beach?

21 A December 2nd.

22 Q Now, where did you go in January of '81 when you left the
23 correction center? You were there for a month in
24 December of '80 to January of '81, where did you go then?

25 A To the Eastern State Hospital, for observation.

1 Q And why did you go there? What was the purpose of

2 A going there?

3 A Drug and alcohol abuse.

4 Q Did you make that request to go there?

5 A I'd worked it out with the attorney, my attorney,

6 Dick Bridges, and the Commonwealth Attorney's Office. .

7 Q And what was your real purpose in going to Eastern State?

8 A The real purpose?

9 Q Yes, sir.

10 A To have a way to leave - I had talked to several inmates
11 and they said the easiest way to get out of the situation
12 that I was in was to go to Eastern State, which I did,
13 and I left there and went to the State of Texas for
14 a while.

15 Q And what happened in there? What caused you to return
16 from Texas to Virginia?

17 A I couldn't stay on the run any longer.

18 Q And did you make arrangements to come back to Virginia?

19 A I had called my attorney, Dick Bridges, and asked him to
20 make arrangements with the Commonwealth Attorney's Office
21 in Virginia Beach, and it's my understanding he had wrote
22 a letter requesting a bond for me, which was eventually
23 turned down. I returned May 2nd, the night of May 2nd,
24 I believe it was, and was picked up by the authorities
25 before I could turn myself in.

1 Q And you stayed in jail for seven months from that point
2 until December 2, 1981.

3 A Yes, sir, I did.

4 Q Now. That wasn't the first time you had been in touch
5 with the law in regard to felonies or misdemeanors
6 involving moral turpitude, was it?

7 A No, sir.

8 Q Have you been previously convicted, Mr. Talley, of a
9 felony?

10 A Yes, sir.

11 Q How many felonies have you been convicted of?

12 A Two, sir.

13 Q And what are the names of those felonies?

14 A Distribution of marijuana and grand larceny.

15 Q And have you been convicted of a misdemeanor involving
16 moral turpitude, such as lying, cheating, or stealing?

17 A Yes, sir.

18 Q And how many such misdemeanors are there?

19 A Three, sir.

20 Q And what are the names of those misdemeanors?

21 A Two, false information to police officers. One, petit
22 larceny.

23 Q Now, did you have occasion to know a person by the name
24 of Don Zeigler?

25 A Yes, sir, I did.

1 Q And tell the jury who Don Zeigler is?

2 A He a lieutenant of the special investigations for the
3 City of Chesapeake, Virginia.

4 Q Is he in the vice area now?

5 A Vice and narcotics.

6 Q And did you have occasion, sir, to contact him while you
7 were in Virginia Beach Jail?

8 A Yes, sir. Around July I contacted Mr. Zeigler.

9 Q And what prompted you to do so?

10 A I did not want to spend anymore time in jail. And I
11 felt like I could help him with some situations that
12 I had understood through inmate talk that they wanted
13 certain people, drug dealers.

14 Q By "wanted" what do you mean?

15 A Would like to arrest them.

16 Q Okay. Now. You say you didn't want to spend anymore
17 time in jail.

18 A Yes, sir.

19 Q You were at that point in July serving a jail sentence,
20 is that correct?

21 A Yes, sir.

22 Q As a result of - you did in fact contact Mr. Zeigler?

23 A Yes, sir.

24 Q As a result of your contacting Mr. Zeigler, was the
25 jail sentence that you were then in there presently

1 And then at a later date I went to work for him when he
2 worked at the Backdoor, he was a leasee of the Backdoor
3 Lounge.

4 Q What is the Backdoor Lounge?

5 A It's a - it was a bar around the beach, at Virginia Beach.
6 I was doorman, bartender -

7 Q And what position did Mr. Hewitt occupy?

8 A He was the leasee, or the owner.

9 Q Did you work for him?

10 A Yes, sir.

11 Q When was that? Approximately?

12 A I believe it was '76.

13 Q Now the other two names you gave, Chuck Williams and -
Terry Williams?

14 A Terry Williams and Chip Simpson.

15 Q Do you know them
pretty much the same way that you know Mr. Hewitt?

16 A Very much so, sir.

17 Q Who first mentioned to you the name William Hewitt, the
18 defendant's name? Did Mr. Zeigler mention it or did you
19 first mention it?

20 A No, I'm the one that brought it up to him. I made the
21 contact and had Mr. Zeigler come over there. I'm the
22 one that presented the, my feeling that I could take him.

23 Q Why was it that you picked Mr. Zeigler from all those
24 90 names as being one of the people that you could cause
25 to have arrested?

1 A I didn't basically pick him first. His partner, which is
2 Sgt. John Cherry, who I've known for many years -

3 Q Whose partner?

4 A Lt. Zeigler's partner. I've known him for many years,
5 I've trusted wholeheartedly, and Zeigler was his partner,
6 so they both came over there together, and that's when I
7 discussed it with them.

8 Q My question was, Mr. Talley, why was it that you chose
9 Hewitt as a potential person that you could have cause
10 to have arrested?

11 MR. LOWE: Your Honor, that's not relevant as to why
12 he did choose him. He said he gave the
13 name to Lt. Zeigler. Whatever the reason
14 may be is not important in this case.

15 MR. REID: To me it goes for motivation of the man and
16 why the defendant was picked up.

17 THE COURT: All right, I find no basis for the objec-
18 tion. Move on, will you, please?

19 Q Thank you. Mr. Talley, why was it that you chose
20 Mr. Hewitt from among those 90 names?

21 A As a target? I knew what he was involved in. I knew it
22 was a big operation. I felt like it would benefit me in
23 the longrun. Obviously, I didn't want to spend anymore
24 time in jail. I hope I answered your question correctly.

25 Q You consider yourself friends with Mr. Hewitt at that

1 time?

2 A Pardon me?

3 Q Did you consider yourself a friend of Mr. Hewitt at that
4 time?

5 A Yes, sir.

6 Q Okay. Now, what arrangements did you have with
7 Mr. Zeigler concerning the conditions under which you
8 would begin your quest to do something for the
9 Chesapeake Police?

10 A What arrangements?

11 Q Yes, sir, did you all come to any understanding of what
12 would occur?

13 A Yes, sir, he would, upon my cooperation, honest
14 cooperation all the way through this trial, the getting
15 onto the situation, actually having Mr. Hewitt arrested,
16 he said he would recommend - he hasn't promised me
17 anything - he said he would recommend leniency on my
18 probation revocation.

19 Q Have you come before the Court yet for your, to be
20 sentenced, or to have a decision made on your probation
21 revocation?

22 A No, sir.

23 Q And what is the status of that case? When is it suppose
24 to come up?

25 A It's generally continued, sir.

1 Q And what does "generally continued" mean to your
2 understanding?

3 A Indefinite, sir.

4 Q There's no date set, just when the time comes to be
5 brought forward to the Court?

6 A Yes, sir.

7 Q When was the last time you were in Court on that?

8 A Let's see - 1981 - I was released December 2nd. Prior
9 to December 2, 1981, that date's foggy to me.

10 Q Okay. Have you ever been promised exactly what
11 recommendation the Commonwealth is going to make in this
12 instance on your probation violation?

13 A No, sir.

14 Q When was it you got out of the jail? Virginia Beach Jail?

15 A December 2nd.

16 Q You made your arrangements with Mr. Zeigler and came to
17 this understanding approximately when?

18 A Prior to December 2nd, while I was in the Virginia Beach
19 Correctional Center.

20 Q Do you know if it was -

21 A The dates are - there were several meetings, I can't give
22 you a specific date.

23 Q All right. Did he make any effort to get you out of
24 jail, that you're aware of?

25 A Yes, sir, he did.

1 Q Was he successful in that?

2 A No, sir. He had contacted the Commonwealth Attorney's
3 Office in Virginia Beach. They made an agreement with
4 Lt. Zeigler for me to plead guilty on several misdemeanors
5 and postpone the grand larceny that was awaiting me,
6 providing I plead guilty they would let me out right
7 then to work with the Chesapeake police. I made this
8 agreement. When I went to court they double-banked me
9 is basically what they did. They did not - they said
10 they did not make the agreement with Lt. Zeigler or the
11 Chesapeake Court, and I'd already plead guilty, so they
12 gave me the time.

13 Q When did you begin actually working with Chesapeake
14 Police Department.

15 A December 11th, sir.

16 Q Okay. And describe, if you would, how you went about
17 your work.

18 A I was to work with an undercover lady, Linda Joyce.

19 Q Who was Linda Joyce?

20 A She was working for the Chesapeake Narcotics Division.

21 Q And by "undercover" what do you mean, Mr. Talley?

22 A She's plainclothes. She was never in uniform, she
23 changed her name, I believe it was changed to Gail
24 Joyce. Had a different driver's license, had her own
25 Volkswagen. Basically the same thing, undercover work.

1 right, cross examination.

2 CROSS EXAMINATION: Mr. Talley by Mr. Lowe

3 Q Mr. Talley, you indicated that you began working with
4 Linda Joyce I believe in December of 1981, pretending to
5 be her boyfriend, and you sometime shortly thereafter
6 began to make contact with Billy Hewitt. I believe you
7 indicated December 11th may have been the earliest time
8 which you had some contact with Billy Hewitt and you did
9 not talk about any marijuan on that occasion. During
10 the ensuing months, up until the time that, January 17th,
11 when Mr. Hewitt was arrested, did you ever keep a
12 journal or a notebook or notes of any of the occurrences
13 that were taking place or any of the conversations that
14 you had with Mr. Hewitt?

15 A No, sir, I did not. I made contact everytime that I had
16 any conversation with Mr. Hewitt or any other drug
17 dealers during that course of time, with the authorities.

18 Q Well, now, did anybody else make a record of those things
19 that you told them which you have had a chance to review
20 since that time?

21 A No, sir, I don't review police paperwork.

22 Q So that today at September 24, 1982 you are testifying
23 from your recollection about conversations that took
24 place back in December of 1981 and January 1982.

25 A Sir, I believe you said September 24, 1982? I

1 misunderstood you.

2 Q Yes, today is September 24, 1982.

3 A I'm just -

4 Q So as we sit here today on September 24, 1982 you are
5 testifying purely from your memory as to conversations
6 and dates and events and colors of cars and everything
7 else, back in Dec. of 1981 and Jan. of 1982?

8 A Yes, sir.

9 Q Now, I gather that other than the possibility of Gary
10 Turman, whom you mentioned a couple of times, all these
11 conversations you had with Mr. Hewitt were not witnessed
12 by anybody other than yourself and Mr. Hewitt, is that
13 correct?

14 A The first night I met Mr. Hewitt, Linda Joyce was with me.
15 Again, there was no drug talk that night. It was just
16 partying and drinking. She was there at that particular
17 time. Now, December 23 I went to Mr. Hewitt's party
18 down at his seafood restaurant. I was with Gary Turman.
19 No law enforcement officer was with me. No one heard
20 any talk. There was no talk of drug transactions then.
21 Repeat the question again so I can refresh my mind, if
22 you will, please.

23 Q As I understand your testimony, with the possible
24 exception of Gary Turman, there were never any witnesses
25 to these discussions of marijuaan and other related

1 conversations you've testified about on any of these
2 occasions.

3 A You're right, sir.

4 Q Now on any of the occasions when you had these conversa-
5 tions relating to drugs and some of the other things
6 you've talked about here this morning, were you wired
7 by the police, that is, did you have any transmitters
8 on your body that would permit anybody to overhear you
9 anywhere and corroborate what was being said?

10 A Yes, sir. I was wired. To the best of my memory on
11 one occasion.

12 Q With William Hewitt?

13 A Yes, I was wired on that occasion. Gary Turman was with
14 me. He knew nothing of the wire, obviously.

15 Q And what was the occasion?

16 A The trip to Moyock to the plumbing parts distributors.
17 The time that we discussed me getting 150 lb. from
18 Mr. Hewitt I was wired then.

19 Q And who wired you?

20 A Who wired me? Was the Chesapeake authorities.
21 Chesapeake Police.

22 Q And was there somebody monitoring or following you, or
23 in conjunction with you on that trip?

24 A Yes, there was somebody following me. I don't know which
25 officer was doing the listening in. I don't know.

1 Q Was that wire conversation recorded, do you know?

2 A Yes, sir.

3 Q Do you know the name of the officer who recorded it?

4 A No, sir.

5 Q Do you know whether the recording still exists?

6 A I have not heard nor seen any recorded conversations.

7 Q That was not my question, Mr. Talley. Do you understand
8 the question?

9 A Repeat it, sir.

10 Q Do you know whether that tape still exists? Or the
11 recording still exists?

12 A No, sir. I don't know anything about it.

13 Q Did you carry a recorder, a tape recorder, or did you
14 surreptitiously tape record any conversations other than
15 the one that you just described where you were wired, on
16 any of the times that you talked with Mr. Hewitt?

17 A No, sir.

18 Q Now, during this period of time, from the time you got
19 out of jail, December 2, until today in court, you told
20 us a little bit about the last three months I think, that
21 you were working as a home improvement salesman, if I
22 understood correct. Am I accurate about that recollection?
23

24 A That is correct, sir.

25 Q Now, if we back up, that would be to somewhere in the

1 middle of June, that's when you began that work?

2 A Yes, sir.

3 Q Now between December 2 and the middle of June how were
4 you employed, if in any way?

5 A December 2 is the day I got out of jail. I was not
6 employed until I went to work as a salesman. I tried
7 to open a moving company business, legitly. I formed a
8 corporation, got a business license, and acquired some
9 loans, personal loans from a restaurant owner that I
10 knew at the beach, loaned me some money. Several other
11 financiers. I put the business together and tried very
12 hard to put it together so it worked profitable for me,
13 which it fell through. And then I went to work as a
14 salesman.

15 Q You say you had business loans made to you by somebody?

16 A Yes, sir.

17 Q Who was that person?

18 A Ricky Dunnington was one of them. He owns the Raper
19 Restaurant up the street at Virginia Beach. Ricky and
20 Bobby are both brothers. There was another. Bank of
21 Virginia Beach loaned me some money. And Sarah Valonie,
22 a young girl I knew, loaned me some money.

23 Q Your Honor, I'm not familiar with the recording system
24 here. I notice that the microphone seems to be somewhat
25 to the rear of Mr. Talley, is that going to cause any

1 problems on the machine picking it up with him facing
2 the jury?

3 THE COURT: This machine is one of the most modern
4 that they've put in. It's the most modern
5 developed, and this Court has had them long
6 before anybody else did in the whole area,
7 and I was in charge of the committee, that
8 the executive secretary of the Supreme Court
9 asked to see that all other courts were
10 informed of the recording devices that we
11 had, from the very time we started first,
12 even down at the old building at 22nd and
13 Main, and I can assure you that our record-
14 ing system will pick up everything you say
15 and everything the witness will say.

16 MR. LOWE: Thank you, Judge.

17 Q From the period of December 2 until mid-June, were you
18 given any money by any member of any law enforcement
19 agency or government body for any purpose?

20 A Yes, sir.

21 Q Tell the jury what you received and for what purpose.

22 A I was given expense money. Gas expenses during the
23 investigation for my automobile, whatever automobile I
24 was driving, I needed gas to continue the investigation.
25 The nights that I spent with undercover police officer

1 Linda Joyce, she had money and she spent whatever we
2 needed for expenses. At a later date, after January 17,
3 if the date is correct, is January 19, I had a ticket
4 purchased from the State and Chesapeake Police, a one-
5 way ticket to a state away from here.

6 Q Now, on this expense money were you paid in cash or
7 by check?

8 A Paid in cash.

9 Q By whom?

10 A Lt. Zeigler.

11 Q And how much money on how many different occasions were
12 you paid?

13 A Several different occasions. Not large amounts, just
14 \$20 I think one time, \$25, if my memory is correct. It
15 didn't really, you know, mean that much to me so -

16 Q All told, how much was the total amount, approximately,
17 that you received from Lt. Zeigler for expense money?

18 A I do not recall, sir.

19 Q Was it on the order or magnitude of \$100 or a \$1,000,
20 can you give us a rough idea?

21 A I'd say less than that, sir. Less than \$100.

22 Q Less than \$100 total.

23 A Yes, sir.

24 Q And you received no other funds from any law enforcement
25 agency or government subdivision in any way?

1 A Only when the State Police or Chesapeake Police purchased
2 that ticket. And I believe the ticket cost \$300 and
3 some dollars one way, if my memory serves me correctly.

4 Q And where were you living during this period, December 2
5 thru the mid-June time when you began to have employment?

6 A I stayed at Sarah Vallanti's house. A young girl I
7 had met shortly after I was released from Virginia Beach
8 Correctional Center. I stayed there until just before
9 January 17. I'd moved myself over to a marina, where I
10 was getting information there was drugs being brought in.
11 I moved myself over there, with the permission of one
12 John Power, Jr and one John Power, Sr., who had keys to
13 the place. I moved over there hoping to pick up more
14 information. I stayed there for a couple of nights.
15 From there I moved into Billy Hewitt's room at Worrell
16 Brothers, and stayed there for a couple of nights, two
17 or three nights, I don't remember exactly how many days.

18 Q And what about from there on into mid-June, where did you
19 stay?

20 MR. REID: Please the Court, the question is a fair one,
21 but I prefer the witness, if the Court please,
22 not reveal his return address, for reasons
23 that I'd be happy to state for the record.

24 THE COURT: I don't believe he's been asked his current
25 address and I find no relevancy of it at

1 this time.

2 A I would love to tell you where I was at, but it's family
3 and it's out of state. If I'm required by the Court to
4 order it I will tell it.

5 THE COURT: Just a minute there, you just wait for the
6 question by the defense attorney.

7 Q Let me be more specific. I was not asking for a street
8 address or a family name. Were you staying in a motel,
9 or in a residence, in an apartment house, or where were
10 you staying during the period from Mid-January to
11 Mid-June?

12 A I left the state and lived in a house.

13 Q Were you gone from the State from Jan. 19 until Mid-June?

14 A No, I returned I believe late in March.

15 Q All right, from late March until mid-June where did you
16 stay?

17 A I stayed at a residence on Rosemont Road. Againk if I'm
18 ordered to give that address I will.

19 Q I'm not asking for the address. Rosemont Road where?
20 Virginia Beach?

21 A It was in a house. It was in a house. Yes, Virginia
22 Beach.

23 Q And were you paying any expenses or rent there?

24 A Not at the beginning, but as I was able to get money I
25 paid some rent.

1 Q And where did you get the money with which you paid rent?

2 A The bank loans that I received, the personal loans that
3 I was operating that business with, gave me the oppor-
4 tunity to pay rent, gas, buy a van for the company,
5 whatever, I had it.

6 Q And you've told us all the people's names who gave you
7 any loans during that period of time, or any gifts of
8 money?

9 A There was two other people who, small amounts, people
10 that I stayed with on Rosemont Road.

11 Q What amounts are we talking about?

12 MR. REID: Your Honor, I fail to see the relevance.

13 Q Well, if it's a small amount I'm not goint to pursue it.

14 MR. REID: Well, he said it was, so therefore we
15 shouldn't pursue it.

16 Q Well, I mean if he's talking about \$20, \$40 I'm not
17 going to pursue it. Is that what we're talking about,
18 Mr. Talley?

19 A Yes, sir.

20 Q All right. Did you own an automobile during the period
21 December 2 til mid-June?

22 A Yes.

23 Q And was that an automobile that you owned prior to that
24 time?

25 A NO. No, sir.

1 Q How did you get the ownership of the automobile?

2 A Again, as I said before, I had the money from the loans.

3 I purchased a '74 white Ford Van to use for packing
4 equipment and equipment for (unintel.) the company.

5 Q And that was licensed in your name?

6 A Yes, sir.

7 Q Any other vehicles during that period that you owned?

8 A Shortly thereafter I traded, I sold it and bought a
9 '74 Monte Carol.

10 Q All right, now what was the total amount of all these
11 loans you're talking about? Round numbers? That you
12 made during that period of time?

13 MR. REID: Judge, I don't see what this has got any
14 particular relevance, if the Court please.

15 MR. LOWE: It has to do with the whole question of how
16 he was living during this period of time and
17 the credibility of his saying he wasn't get-
18 ting paid from anybody and I think I'm
19 entitled to explore it on cross examination.

20 THE COURT: Well, a loan is one thing and a payment is
21 another, depending on the source of them.

22 MR. LOWE: Well that's what I'm trying to find out,
23 Judge. And also the availability of funds
24 with which he could be living on.

25 THE COURT: All right, I think some of it's admissible.

1 Or you may renew the objection. I think
2 we're getting into details -

3 Q What's the order of magnitude of the total amount of
4 loans you received during that period?

5 A Now, I was also giving the people I was living with on
6 Rosemont Road - another gentleman and I tried to create
7 this business together - we acquired \$3,000, a ninety
8 day note for this, the Bank of Virginia Beach, with the
9 help of a c-signer, we together got the \$2,000 personal
10 note from Ricky and Bobby Dunnington at the Rader
11 Restaurant at the Beach, and I received \$1500 from
12 Sarah Vallanti. That is the magnitude of the loan,
13 for the loans.

14 Q Did you tell - included in that was the Bank of Virginia
15 Beach?

16 A Bank of Virginia Beach, sir. Sarah Vallanti, Ricky and
17 Bobby Dunnington.

18 Q All right. Now -

19 A That was quite a little - a lot of money and it lasted
20 me for awhile.

21 Q And I gather that your testimony is you were not given
22 any money other than expenses in exchange for working
23 this case and working against Billy Hewitt.

24 A Again, I received expense money and one-way ticket to
25 the State of -

1 Q All right now, during the time period from your return
2 in mid-March of 1982, from this other state, you returned
3 to Virginia and the Tidewater area, I believe you said?

4 A Yes, sir.

5 Q From that point until today, have you had any contact
6 with law enforcement officers in the State of Virginia,
7 such as Lt. Zeigler, and so forth.

8 A I have not been in contact with Lt. Zeigler. I have
9 been in contact with authorities.

10 Q And who, specifically, state police or Chesapeake Police
11 Department have you been in touch with?

12 MR. REID: Judge, I fail to see the relevancy, we're
13 getting into things that occurred far beyond
14 the bounds of January 17th and he has had
15 contact with authorities. I fail to see the
16 relevance of the questions.

17 THE COURT: Sustained.

18 Q When was the first time you met Ass't. Comm. Attorney
19 Parcell and Dep. Comm. Attorney Reid in conjunction with
20 this case?

21 A Dates I do not remember. I should have logged them, but
22 I don't - I met him at the Williamsburg Police Precinct
23 prior to this date.

24 Q Approximately when was this? The first time.

25 A Approximately? July.

1 Q All right.

2 A And then we say August another meeting. And then the
3 night before I came down here, which was - today is
4 Friday - okay, Wednesday night, 6:00 o'clock I met with
5 them again.

6 Q Now during any of those meetings with - were there both
7 prosecutors or just one of them?

8 A Both prosecutors were there.

9 Q Did either one of them tell you that we had asked the
10 Court to assist us in locating you for the purpose of
11 subpoenaing you for various hearings and for the purpose
12 of obtaining an interview?

13 MR. REID: Objection.

14 THE COURT: Sustained.

15 MR. LOWE: You're not going to hear my reasons, Judge?

16 THE COURT: No, sir. We've been over all that. And I
17 don't like your attitude and the way you're
18 tossing your head around when I've ruled.
19 It's disrespectful and the Court's in charge
20 and the Court rules, and that ends it.

21 MR. LOWE: Judge, I did not mean to indicate disrespect,
22 Your Honor, I was expecting -

23 THE COURT: Well that's what it is. And I don't want it
24 again.

25 MR. LOWE: I was not intending it and I will not do it

1 again.

2 Q Did Mr. Reid or Mr. Parcell on any of those occasions
3 ask you how they could get in touch with you, where you
4 were living, how you could be contacted?

5 MR. REID: Objection.

6 THE COURT: I find no basis for going through all this,
7 but that particular question I think is so
8 insignificant I don't think it has any real
9 bearing on this case one way or the other.
10 So I'll sustain again. Getting in irrelevant
11 and immaterial matters that are not pertinent
12 to this case, as I've so ruled.

13 Q Now, Mr. Hewitt, you've indicated in response to questions
14 from Mr. -

15 MR. PARCELL: It's Mr. Talley.

16 Q Excuse me, Mr. Talley. In response to questions from
17 Mr. Parcell that you had several different kinds of
18 convictions and then you talked about others in context
19 of other questions. Let me ask you this. Your first
20 conviction of a crime of moral turpitude occurred in
21 1971 when you were convicted of petit larceny, isn't that
22 correct?

23 A Yes, sir.

24 Q And that was in Norfolk, Va., wasn't it?

25 A Yes, sir.

1 Q Now, you mentioned that you had been familiar with
2 hashish and had I believe you said used it and sold it
3 and been dealing with it or involved in the culture with
4 it for, I think you said over ten years. Did I recall
5 that correctly?

6 A You did, sir.

7 Q And were you ever arrested and convicted in regard to
8 the use of hashish and marijuana?

9 A Marijuana, sir.

10 Q And when was that?

11 A I was indicted in 1974 and convicted in March 1975.

12 Q And that was marijuaan, possession with intent to
13 distribute, wasn't it?

14 A That was distribution of marijuana.

15 Q Distribution of marijuana, and that was where you got a
16 five year suspended sentence?

17 A That's correct, sir.

18 Q Now you'd been convicted of possession of marijuana before
19 that also, haven't you?

20 MR. REID: Objection. Mr. Lowe knows that's improper.

21 MR. LOWE: It's not improper. It was invited, Your Honor,
22 this witness testified about his hashish and
23 marijuana use and knowledge. I didn't ask that.
24 And it's proper for me to follow up and find
25 out about it now. That opened the door.

1 THE COURT: Repeat the question, please?

2 Q The question is there was another earlier occasion on
3 which you were convicted of possession of marijuana,
4 wasn't there?

5 THE COURT: That's a proper question, I'll (unintel.)

6 A Excuse me, sir, you would like me to answer this? I
7 didn't hear.

8 THE COURT: Yes. Would you answer, please?

9 A Yes, sir. If my memory serves me correctly, I was
10 convicted of simple possession. I don't remember, but
11 I was convicted. I don't even remember the amount of
12 time involved. I believe it was suspended for six months
13 and \$150 fine.

14 Q That was in Chesapeake on January 11, 1974, wasn't it?

15 A Yes, sir.

16 Q And when you - during the year 1974 or 1975 on some
17 occasion you attempted suicide, didn't you?

18 A No, sir.

19 Q You did not.

20 A No, sir.

21 Q And you're saying you did not try to cut your wrist at
22 some time during that year?

23 A Oh, I did.

24 Q You did?

25 A Yes, sir.

1 Q And you're telling the jury that wasn't a suicide attempt?

2 A I know it wasn't, sir.

3 Q Were you depressed at the time?

4 A Yes, sir. It was an attention, there's a difference
5 between suicide and trying to get attention.

6 Q Oh, you were trying to get attention. Whose attention
7 were you trying to get?

8 A The authorities.

9 Q The authorities. For the purpose of doing what?

10 A Just an attention grabber, I don't know how to explain it.

11 Q You mean you wanted self-aggrandizement or to get some
12 purpose, accomplish something?

13 A I don't understand that word, sir.

14 Q Well, were you just trying to make yourself look
15 important or were you trying to accomplish some purpose
16 by getting transferred somewhere or get something that
17 you wanted?

18 A Sir, I told you it was an attention grabber, I don't
19 know how to explain it.

20 Q You don't have any more than that?

21 A No, sir.

22 Q Tried to commit suicide again in 1981, didn't you?

23 A No, sir.

24 Q Let me guess. You tried to attention-grab again in
25 1981 by cutting your wrist.

1 A I did, sir, and I can explain that.

2 Q All right, and was that the occasion when you were at
3 the Eastern State Hospital, or State Mental Hospital in
4 Virginia?

5 A This incident you're talking about, I had occasion to
6 talk to several inmates. I wanted out of the city, or
7 Virginia Beach Jail. Reasons? To get money for defense.
8 Just wanted out. Didn't want anymore time. I figured
9 that was the best way out. Several inmates explained
10 the best place to go to get out would be to Eastern State.
11 Go to Central State they're bound by walls. Eastern
12 State has no walls. I made arrangements with my
13 attorney prior to this with the Commonwealth's Attorney,
14 and they had a Court Order to send me to Central State.
15 I devised a way by getting attention then, not to wait.
16 I figured if I do that, I could get attention then and
17 get out of there, very quickly. When I did this, they
18 transported me to the next open spot, which was Eastern
19 State, and I had knowledge they had open spots there.
20 They took me out like that (snap), sent me to Eastern
21 State, I stayed there for five days, stayed in what they
22 call the closed ward, sent me to the open ward, I had a
23 young lady pick me up on, by the library, I went into
24 Norfolk, got a ticket for out of state flight.

25 Q So, what you say was not a suicide attempt was an

1 attention-grabbing attempt for the purpose of getting
2 transferred to Eastern State Hospital for the purpose of
3 escaping jail.

4 A That is correct, sir.

5 Q Do I assume that in the process of doing that you lied
6 to a number of Virginia officials, hospital officials,
7 jail officials, people like that, to convince them that
8 you were sincere and that you needed to be hospitalized?

9 MR. REID: Objection. I don't see where that's got
10 any relevance, Your Honor.

11 THE COURT: Overruled.

12 A Would you repeat that question again, sir?

13 Q Do I assume correctly that in the process of carrying off
14 that attention-grabbing to get transferred to the State
15 Hospital so you could escape, that you had occasions to
16 lie to various state officials, whether they were jail
17 officials, hospital officials, in order to carry off this
18 plot of yours?

19 A I have to honestly admit I manipulated in any way, shape
20 or form, to carry off this.

21 Q I'm sorry, I couldn't hear that.

22 A All right, I honestly can say that I manipulated, if you
23 will, conned whoever to get to where I was at.

24 Q Did you lie on any one or more occasions to a state
25 official of the state jail, or the local jail, or the

1 state hospital in order to carry out this con.

2 A Sir, I don't remember any particular incident. I do
3 admit the fact that I did manipulate and con people to
4 get where I'm at. I don't remember any particular time,
5 any particular person that I did this with.

6 Q But the question is, sir, did you not - I'm not asking
7 you to quote - but did you as a part of what you call
8 con and manipulate, did you lie to state officials?

9 A I don't recall, sir.

10 Q Do you remember telling a Dr. Eason, who is a psychiatrist,
11 that you were suffering from multiple personalities?

12 A Did I tell him this?

13 Q Yes.

14 A I believe that's what he diagnosed me.

15 Q Did you tell him that you had symptoms of multiple
16 personalities?

17 A I don't recall, sir.

18 THE COURT: Just one minute. The jury will step out,
19 please.

20 (Jury out)

21 Thus far, the witness has answered the
22 questions and admitted he manipulated to try
23 to get out of where he was, at Eastern State
24 Hospital, so he could easily get out of there
25 which he apparently did in five days, and he

1 recalls no particular person he talked to.
2 So if he didn't talk to any particular person
3 in that process, in the jail set-up, I don't
4 know what we're getting to. But the other
5 thing that I wonder is on the basis of a
6 possible impeachment, that we don't get into
7 matters of this kind unless there is basis
8 for impeachment. Consequently, unless there
9 is some agreement between counsel that
10 whatever Dr. Mayo said or didn't say, or
11 may have said or didn't say or whatever he
12 did say, then the Court wants to hear from
13 counsel because I don't think, if you haven't
14 got the basis for impeachment you can get
15 into it, and usually the doctor would have
16 to be available unless there's something
17 that has to do with it.

18 MR. LOWE: Your Honor, if I could just have a moment I
19 will find the doctor's report here.

20 MR. REID: Judge, whatever that doctor's report says
21 you have a situation here where the man has
22 stated he doesn't recall whether he said
23 "multiple personalities," or whatever the
24 question was. He may be limited. I think
25 Mr. Lowe is limited to that. The second

1 thing is Commonwealth told the Court before
2 we started that we had an objection to the
3 use of these records for any purposes of
4 impeachment Mr. Lowe obviously is in the
5 middle of trying to impeach via those records.
6 The Commonwealth feels that these things are
7 not relevant, they occurred at this point and
8 time a year and a half ago, January 1980,
9 that statements he may have made to the
10 doctors are far removed from anything he
11 would have said to a police officer in this
12 case. That the critical issue in this case,
13 possession with intent, doesn't have anything
14 to do with what he would have told the doctor,
15 that there is a certain patient-physician
16 privilege that is applicable in this
17 situation. For all those reasons, Your
18 Honor, the Commonwealth feels that this
19 sojourn, etc., in Eastern State is not and
20 cannot be used by the defense to inquire
21 into in terms of prior inconsistent state-
22 ments and things like that. I would further
23 point out to Mr. Talley, for whatever it's
24 worth, has not seen any of those records.
25 I don't know if he's ever seen them, I sure

1 haven't shown them to him.

2 MR. LOWE: Your Honor, if Mr. Talley lied to people,
3 to state officials in order to put himself
4 in a position to escape jail, that's relevant
5 to his credibility as a witness. It's
6 certainly appropriate to bring it out. We've
7 made known such representations to Mr. Reid
8 or Mr. Parcell that we would not use any of
9 the documents that were produced under the
10 motions for disclosure and discovery for
11 impeachment. I don't know where he got that
12 from, but he didn't get it from Mr. Drescher
13 and he didn't get it from me. We have
14 Dr. Easton, the Physician is at Virginia Beach,
15 we've talked to him, he would be available,
16 we would hope, if it were necessary, I
17 certainly did not expect that Mr. Talley
18 would deny statements that he made to him.
19 It's perfectly relevant if he lied to a
20 public official in official duties, in order
21 to obtain an opportunity to escape jail. And
22 I'm entitled to get that. Mr. Talley is
23 weasel-wording I think, with "con", that word,
24 and "manipulate," that word. He doesn't
25 want to say to the jury, look them in the

1 eye and say, "Yes, I lied." And that's what
2 I think I'm entitled to have him say if it's
3 true.

4 MR. REID: Judge, Mr. Lowe has failed to address the
5 patient-physician privilege, has failed to
6 address any distinction to the extent that
7 exists between a police officer and a doctor.
8 I don't know. I can look through the record,
9 Judge, I don't recall exactly what it is in
10 there he's referring to. Is it a handwritten
11 report or a typewritten report?

12 MR. LOWE: I couldn't put my hand on it right this
13 minute. Your Honor, let me point out two
14 things. First of all, as Your Honor I'm
15 sure, experienced trial judges in civil
16 cases know that doctor-patient privilege
17 in Virginia always yield in any case where
18 the mental state of a person is relevant.
19 That's Virginia law. I don't happen to like
20 it, but I know that's what it is. So there
21 is no doctor-patient privilege that can be
22 interceded here. And in terms of the other
23 points that are raised, police officer
24 credibility, that's for the jury to decide.
25 If he would lie to a state hospital doctor

1 or to a private physician or to a jailer, or
2 to a nurse, or to anybody else, the jury is
3 entitled to wonder whether he would lie to
4 the jury under oath. That's the whole pur-
5 pose of attacking credibility.

6 THE COURT:

All right, let's slow it down and get down to
7 what we're talking about and stop asking the
8 Court to be clairvoyant. The Court has
9 asked, in answer to the Court's question, to
10 what extent you did or did not ever agree
11 on anything that's in this thing that it
12 would be admissible without calling the
13 doctor for impeachment? The second thing
14 is, what does the material relate to? And
15 you've just said, Mr. Lowe, you couldn't
16 find it in there, so I want somebody to find
17 something and let me see what we're getting
18 at instead of having me guess at it. It's
19 the least counsel can do is inform the Court
20 as to what we're talking about and not just
21 have him guess at it, while you all inject
22 furiously and argue the thing and the Court
23 not having any knowledge at all about what
24 you're talking about.

25 MR. LOWE:

Your Honor, I have a document here. I would

1 be happy for the Court to look at it, I
2 would prefer not to discuss it and it's
3 contents in front of the witness, but I
4 would be happy for the sheriff to show the
5 Court Dr. Easton's letter in which he
6 quotes Mr. Talley, and I think it's perfectly
7 proper for me to ask that.

8 MR. REID: May the witness be excused for a moment. I
9 think we need to discuss the contents of
10 this communication between counsel and the
11 Court.

12 THE COURT: All right, sheriff, take him out and just let
13 him wait out there out front, please.

14 (Witness out)

15 MR. REID: Could the Court examine this document, Your
16 Honor?

17 THE COURT: Sheriff, get me the document, please.
18 In the absence of the jury and in the
19 absence of the witness, still subject to the
20 Court's position that unless there's some
21 agreement between counsel that whatever this
22 is and wherever it came from has never really
23 been revealed, and since it also relates
24 back to Dec. 1980, there's no basis to
25 impeach in the customary manner. What is the

1 purpose of this? And the man just said he
2 manipulated to try to get where he was. He
3 got out of jail to get into the Eastern State
4 rather than Central State, and talked to
5 people to try to get out. And no particular
6 person he recalls talking to. And there's
7 no indication of any authenticity of who did
8 this or what, when it was done or whether
9 it was done on Dec. 18, 1980. And basically,
10 it indicates that he was examined at the
11 Virginia Beach Correction Center. And he has
12 simply said he didn't recall who he talked to.
13 And unless you're in a position to impeach
14 by the proper method I don't think you're in
15 a position to ask a lot of questions that
16 get into something that is not appropriate.

17 MR. LOWE: Your Honor, I'll tell Your Honor that the
18 document you have in front of you I don't
19 have a copy of it right now, but of my
20 recollections it starts out that he reports
21 what Mr. Talley told him about his illness
22 at the time. Dr. Easton was interviewed by
23 Mr. Drescher or someone in his behalf, told
24 him that whatever the record reflected was
25 an accurate statement of what Mr. Talley told

1 him. If Mr. Talley now denies that he told
2 that to the doctor we would call the doctor
3 as a witness to impeach Mr. Talley as lying
4 on the witness stand. If Mr. Talley admits
5 that he told the doctor that, that it wasn't
6 true, then Mr. Talley admits to the jury that
7 he lied on that occasion in order to manipu-
8 late government officials. I think either
9 of those two are proper for the jury to
10 consider on his credibility. I don't purport
11 right now to introduce that document or even
12 to show it to the witness. I'm merely using
13 that for myself as a guideline to know the
14 question to ask. If he denies it then we'll
15 contact Dr. Easton.

16 MR. REID: Judge, if I could examine the document before
17 I respond to that? After having seen the
18 document the Commonwealth is possessed of
19 a number of arguments.

20 THE COURT: Well, he just said that he'd examined him on
21 Dec. 18, 1980, apparently to the Virginia
22 Beach Correctional Center. Called a Mental
23 Health Assessment, the way the thing
24 indicates.

25 MR. REID: Yes, sir, I think Mr. Lowe is referring to

1 the first page rather than the second. Is
2 that correct, Mr. Lowe?

3 MR. LOWE: Yes, that's correct.

4 THE COURT: In other words, what it says is it's
5 certified on this date, December 18, 1980.
6 I examined Robert Francis Talley at the
7 Virginia Beach Correctional Center, and in
8 my opinion he complains of severe episodic
9 maniac periods without - I can't really read
10 that word - reactive or socio-depressive
11 alternating periods and recepting personality
12 variations and multiple personality problems,
13 possibly alcohol and inter-drug related
14 or induced. The you've got a bunch of X's
15 and so forth and so on and then we go to
16 another sheet and it's possible the same
17 doctor signed it that, he relates to a mental
18 health assessment. What did you want to
19 say, Mr. Reid?

20 MR. REID: If I could examine it for a moment, please.

21 THE COURT: Yes, sure.

22 MR. REID: Thank you. I appreciate it. If it please
23 the Court, I argue to the Court that the
24 patient-physician privilege did not apply.
25 I referred to Friend and I found it very

1 ad minere on that, but Friend, page 141,
2 under Patient-Physician Privilege, that's
3 Section 66 -

4 THE COURT: To what case are you referring?

5 MR. REID: This is Charles Friend on evidence, to the
6 extent that the Court relies on that.

7 THE COURT: Oh, Friend on evidence.

8 MR. REID: It says basically the privilege does not
9 apply in criminal cases, citing a case in
10 Gibson vs Commonwealth, 216-412. So, to
11 the extent that argument is made by the
12 Commonwealth I'll retract that, Your Honor.
13 After reading this document, Judge, Mr. Lowe
14 has represented to the Court that the
15 doctor hadn't see it but it said, "Whatever
16 he told me is, whatever I said he complains
17 of is what he told me." And the proper
18 question to put to Mr. Talley, which has
19 never been asked is, "Did you in fact on
20 a certain date, Dec. 18, 1980, when being
21 interviewed by Dr. Richard E. Easton at the
22 whatever it was, state the following: that
23 you had 'severe episodic manic period without
24 apparent reactive or associated depressive
25 alternating periods, and 2, perceptible

1 personality variation, multiple personality
2 problems, possibly alcohol-drug related or
3 induced." If he wishes to read that into the
4 record and state whether that was made, that
5 is fine. But it's obvious to me as a layman
6 that these are not words that I normally
7 everyday use when I describe the problems
8 that I see in people: manic periods or
9 apparent reactive or associative depressive
10 alternating periods. This is a psychiatrist
11 talking. I'm sure Mr. Talley has no idea
12 what a manic period is, without a reactive
13 associative depressive alternating periods.
14 It basically means you're up and down.
15 That's what he would have said. If
16 Mr. Lowe is representing, and he has repre-
17 senting that what is on here the doctor will
18 testify he said, and we have a diagnosis put
19 on here by a doctor, and God knows what that,
20 Mr. Talley told him. The only thing we have
21 is, the only arguments available I see, the
22 only thing that's in here in quotes is
23 multiple personality. I don't know if that's
24 something Mr. Talley said, if that's something
25 the doctor's using as a shorthand way to

1 describe a complicated psychiatric problem
2 or not. But basically Mr. Talley hasn't been
3 given the benefit of a properly phrased
4 question. And he also says, it is his
5 opinion. I think this whole thing smacks
6 more of a diagnosis rather than a report
7 what the patient has said.

8 THE COURT: _

All right, anything else?

9 MR. LOWE:

10 Yes. Your Honor, I have never said, nor do
11 I now contend that Robert Talley ever spoke
12 any of the words in this letter. I have not
13 tried to introduce this letter, I have not
14 read it to Mr. Talley. The point is that
15 I'm entitled to ask Mr. Talley if he lied
16 to that doctor. I'm entitled to ask
17 Mr. Talley because that would be impeachable
18 and the jury could consider it. I don't
19 have to introduce the letter, I don't have
20 to have the letter to provide the basis. I
21 can ask him out of the blue did you lie to
22 him. If he says no, then that's the end of
23 it, unless I have some basis for impeaching
24 him on that. But I'm entitled to ask him,
25 because what happened is Mr. Talley has
already said that he conned and manipulated.

1 And that means that he lied by actions or by
2 silence or by conduct. Because that's
3 exactly what he's saying. And I'm entitled
4 to have him say that. And if I have a
5 document here, which would indicate that he
6 was indicating to the doctor that he was
7 sick, and if Mr. Talley admits from the
8 witness stand that he was not feeling sick,
9 then that by itself shows that he was lying,
10 by saying that he was sick when he wasn't.
11 I'm entitled to ask those questions. I
12 don't have to ask the questions the way
13 Mr. Reid wants me to. There are many
14 different ways of asking proper questions.
15 I will ask proper questions in a way that I
16 think that are aimed at bringing out the
17 information that I want. The Court always
18 can object or can overrule my form of the
19 question. That hasn't been done yet, and I
20 propose to ask proper questions.

21 MR. REID:

22 Judge, the reason I'm objecting to the way
23 the question was asked, he didn't ask, "Did
24 you lie to the doctor?" His question had
25 precipitated the course looking into this
was, "Did you tell him that you had

1 multiple personalities?" That was the
2 question he asked. It wasn't "Did you lie,"
3 but, "Did you make a specific statement
4 to the man?" Mr. Lowe's correct, he can say
5 did you lie, but that's not the reason I
6 object. I think he's entitled to ask, "Did
7 you lie to the doctor or create a misimpres-
8 sion to get out of the jail," or a question
9 to that import. "Did you lie?" But if he's
10 going to ask specific questions like, "Did
11 you make the statement that -" and then
12 attempt to quote him, which is the question
13 he did ask, I'm saying he's got to put the
14 whole thing in, he just can't quote out part
15 of that that suits his purposes and go on
16 from there. So, the question he was trying
17 ask -

18 THE COURT: Where are you talking about, page 1?

19 MR. LOWE: Judge, I withdraw the question. And I
20 understand what Mr. Reid is saying. I
21 understand Your Honor's feelings, and I will
22 phrase the questions that will avoid that
23 problem, I can get the same information.

24 THE COURT: All right, but what line are we going to
25 take now, because I don't want to bring the

1 jury back and have them play musical chairs
2 and run right back out again. What line,
3 which way are you headed now?

4 MR. LOWE: Your Honor, I'm going to ask him about whether
5 he lied to the doctor, whether he told the
6 doctor he was sick when he really wasn't.
7 That's pretty simple and straight forward
8 for a layman like Mr. Talley. You agree,
9 Mr. Reid?

10 THE COURT: He's already said he didn't recall talking
11 to any particular customer. The first
12 question has got to be, does he recall
13 talking to doctor so and so on such and
14 such a date.

15 MR. LOWE: I'll ask that, Judge, but I think I'm
16 entitled to probe on cross examination, and
17 I will certainly do it within the limits
18 of what you think are proper.

19 THE COURT: All right, then you can ask him when he
20 remembers talking to him and, or not, and if
21 he says he doesn't recall talking to him,
22 that may end it. If he says he doesn't re-
23 member talking to him then I think the next
24 question would be, did you lie to him about
25 it. So, we'll bring the jury back and

1 handle it on that basis.

2 (jury in)

3 All right the jury returned to the courtroom
4 and, members of the jury, thank you again
5 for your patience. All right, next question.

6 Q Mr. Talley, at the time you were - I don't think this
7 part was clear, let me back up one thing - did you cut
8 your wrist in the jail or when you got to the hospital?

9 A In jail.

10 Q In the jail. When you cut your wrist in the jail did
11 there come a time when you received medical attention
12 from a physician?

13 A Yes, sir.

14 Q And who was the physician, if you remember?

15 A I do not recall, sir.

16 Q All right. Do you recall talking to a physician with
17 regard to your mental state, your health, what was going
18 on about the cutting of the wrist? At some point there
19 right after you cut your wrist?

20 A Yes, sir.

21 Q Do you remember what that was -

22 A I don't remember the conversation, but there was conversa-
23 tion.

24 Q Do you remember him inquiring of what you were feeling,
25 what your health was, sort of exploring with you what

- 1 your thinking was as a result of your cutting your wrist?
- 2 A I remember the situation. Again, I don't remember, recall
- 3 what he said.
- 4 Q All right. You remember in a general way though, you
- 5 talked about why you cut your wrist or what you were
- 6 feeling at the time?
- 7 A Yes, sir. it was the conversation.
- 8 Q Did you feigned illness and did you feign symptoms in that
- 9 conversation in order to get the doctor to send you to
- 10 Eastern State Hospital? By feign I mean fake. Did you
- 11 make up things that weren't really true?
- 12 A Yes, sir.
- 13 Q And in other words you lied to that doctor at least,
- 14 didn't you?
- 15 A Whatever the situation, if you want to call it that.
- 16 Q Well I'm asking you, do you consider it lying to make up
- 17 something that isn't true when you talk to a doctor.
- 18 A Again, I don't recall the situation. I don't remember
- 19 the talk between myself, the doctor; again I used means
- 20 to manipulate and con my way there. I don't remember
- 21 the conversation, therefore I can't say I lied. I don't
- 22 remember.
- 23 Q Mr. Talley, do I misunderstand what you said about two
- 24 or three questions ago? Didn't you admit that you had
- 25 faked and told him symptoms that were not true? Do I

1 remember you correctly, or did you say that?

2 A Yes, sir, I said that.

3 Q And that was a lie when you told him that, wasn't it?

4 A Yes, sir.

5 Q Thank you. Now, Mr. Talley, on these attention
6 grabbers on these two occasions, you used the word
7 "manipulated." Isn't it true that you got what you
8 wanted by manipulating? That is, you got to the Eastern
9 State Hospital so you could escape?

10 A Yes, sir.

11 Q And isn't it also true that on a number of occasions
12 you've done whatever was necessary to get yourself out
13 of jail, that being one of them?

14 A That situation right there, sir, took place and obviously
15 I'm here where I'm at right now.

16 Q Isn't it true that you have a great distaste for jail and
17 confinement?

18 A Yes, sir.

19 Q Isn't it also true that you would do just about anything
20 to avoid jail or confinement?

21 A I didn't really want to return to jail, if that answers
22 your question.

23 Q Thank you. When you were - when you began working with
24 the Chesapeake Police Department, isn't it true that
25 Billy Hewitt was your target as a means of keeping yourself

1 out of jail.

2 A That is correct, sir.

3 Q I believe you and I and Mr. Drescher and Mr. Parcell and
4 Mr. Reid had a short interview last night, didn't we?

5 A Yes, we did, sir.

6 Q At one point during there I believe you told us that
7 something to the effect that Mr. Reid and Mr. Parcell had
8 threatened you with perjury prosecutions if you didn't
9 tell the truth or if you did certain things or something,
10 would you tell me, or tell the jury rather, what
11 Mr. Parcell and Mr. Reid threatened you with if you didn't
12 do right or didn't do wrong.

13 MR. REID: I object to that characterization. There
14 was no threats.

15 THE COURT: All right, let the jury go out again. Going
16 to play musical chairs further. I asked you
17 before I brought the jury back if there was
18 going to be any further questions.that we
19 should take up out of the presence of the
20 jury.

21 (Jury out)

22 All right, next?

23 MR. LOWE: I understood there was an objection, I didn't
24 know what the objection was.

25 MR. REID: Objection to the characterization that there

1 were threats. I think the statement last
2 night had no implications of a threat
3 whatsoever.

4 MR. LOWE: Your Honor, I'll vouch to the Court, Mr.
5 Drescher can verify it, that last night
6 Mr. Talley's own words were, "Mr. Reid and
7 Mr. Parcell threatened me with - " something,
8 and that's why I made quite clear I wasn't
9 sure exactly what the words were after that,
10 but the word threaten was Mr. Talley's word.
11 Now, if he wants to disavow it today and
12 change his testimony, or change from what he
13 said last night he can do that. But last
14 night he told us that Mr. Parcell and Mr. Reid
15 threatened him. That doesn't necessarily
16 mean an improper threat. Lots of prosecutors
17 say, "I'll charge you with perjury if you
18 lie." That's proper. Still a threat.
19 And that's why I use the word. It's
20 Mr. Talley's word, and it's entirely proper.

21 MR. REID: Judge, Mr. Talley's word last night as I
22 recall is "promise."

23 THE COURT: Was what?

24 MR. REID: Was "promise". He promised me that if I
25 lied, certain things would occur. And,

1 THE COURT: All right, there was no record made of this?
2 MR. LOWE: No, sir.
3 MR. REID: No, sir, there was not.
4 THE COURT: Okay. All right then, we get to the point
5 to the impeachment, who's going to impeach
6 this time and how you're going to be impeach-
7 ing a witness and also to be counsel in the
8 case, any one of the four of you? Answer
9 that question.
10 MR. LOWE: Well, Your Honor, it's interesting you asked
11 that question, because last night I asked
12 to tape record that and I told Mr. Talley
13 the whole purpose of wanting to do that with
14 his consent was so that if there was a
15 question today about what was said last
16 night, that we wouldn't be in this position
17 where nobody could prove what was said. I
18 think I'm entitled to ask the question, if
19 Mr. Talley denies it, well then he denies it.
20 THE COURT: What we'll do at this time is ask the
21 question in the absence of the jury and let
22 him answer at this time in the absence of
23 the jury, and then we'll see where we are.
24 Q Mr. Talley, did you tell me last night that Duncan Reid
25 and Buddy Parcell threatened you with perjury or words to,

1 what it was after the "threatened," but did you use the
2 word threatened?

3 A I used the word "promise".

4 Q You're an apt pupil. I withdraw the question, Your Honor,
5 I won't ask it.

6 MR. PARCELL: Judge, I'm going to object to his comments..
7 They're very unnecessary in this case.

8 THE COURT: Absolutely.

9 MR. LOWE: I will withdraw the question.

10 THE COURT: Puts him right in the position where the
11 witness denies what he said, exactly what the
12 Commonwealth Attorney says that was never
13 said, and you insist upon it, then you put
14 yourself in the position of trying to impeach,
15 and you have to become the impeaching witness,
16 and then you are disqualified from being the
17 attorney when you turn witness. So, that's
18 why the whole line is improper, because
19 there's no foundation for it and you gave the
20 wrong impression to the Court. And the other
21 counsel denied it. I'll not have this kind
22 of behavior. Do you understand?

23 MR. LOWE: Your Honor, I'd ask Mr. Drescher to vouch for
24 the record for your understanding that last
25 night the word "threaten" was used, is that

1 correct, Mr. Drescher?

2 THE COURT: I want to know exactly the way it was said,
3 if it was said.

4 MR. LOWE: Mr. Drescher?

5 MR. DRESCHER: Your Honor, please, that's my recollection
6 of exactly what he said. He certainly wouldn't
7 impose the question of that magnitude without
8 being reasonable confident what the answer
9 would be. I think Mr. Lowe's concern is the
10 fact that once the Commonwealth made their
11 representation of what was recalled,
12 Mr. Talley took the Commonwealth's tact.
13 I think that's Mr. Lowe's concern. Now, I
14 tried to tape the conversation, so that we
15 wouldn't have this problem. It was my tape
16 recorder and I asked Mr. Talley, the
17 Commonwealth was present, and they refused.
18 To avoid this very problem that we're here.
19 MR. PARCELL: Judge, we never refused. It was Mr. Talley's
20 request that the conversation not be taped,
21 it was not ours. As a matter of fact, it
22 was Mr. Talley's request that he not even be
23 talking to these two persons.

24 THE COURT: And on my ruling today he didn't have to talk
25 to him, but I didn't rule that way because I

1 didn't have the authorities until this
2 morning that you all gave. And therefore, on
3 the basis of that he wouldn't have had to
4 answer the questions at all anyway, if he
5 hadn't wanted to, and that's what you all
6 are representing now. He didn't want to.

7 MR. PARCELL:

Yes, sir, Judge. And since we're into it,
8 there came a point and time in the conversa-
9 tion after Mr. Talley requested the conver-
10 sation not to be taped that he was called a
11 liar by Mr. Drescher. Mr. Talley said,
12 "If that's what you're going to ask me I
13 have nothing else to say." He came back in
14 on his own and smoothed things out and had
15 further conversation with Mr. Lowe and
16 Mr. Drescher. Also, Mr. Talley did not
17 have to make these statements. We requested
18 him to talk to these two gentlemen. He did.
19 And that's where you are. I think (unintel.)
20 where all of it was, was some indication by
21 Mr. Drescher and he thought Mr. Talley was
22 lying, and Mr. Talley said, "Do you think
23 I'm lying?" and Mr. Drescher says, "Well,"
24 something to the effect, "maybe I do, maybe
25 I don't," and Mr. Talley said, "Well, if

1 that's the case, then there's nothing else
2 to talk about."

3 MR. DRESCHER: That's a little more accurate, Your Honor.
4 What Mr. Talley said is, "Don't you believe
5 me?" and I told him "Probably not," and he
6 got up and walked out. Isn't that a little
7 more accurate, Mr. Parcell?

8 MR. PARCELL: Well, that's -

9 MR. DRESCHER: The word "liar" was never used.

10 MR. PARCELL: Yes, it was, Mr. Drescher. It certainly was.

11 THE COURT: All right.

12 MR. LOWE: I'll withdraw the question, Your Honor, to
13 eliminate the controversy when the jury comes
14 back.

15 THE COURT: I think that's the only thing to do, and we'll
16 take a short recess again.

17 (Court Recess)

18 We've returned from recess and the Court notes
19 the same presences as heretofore. The Ass't
20 Comm. Attorneys, the Def. Counsel, the
21 Defendant, and the witness, Talley. All right.

22 MR. LOWE: Your Honor, in the interest of expediting
23 matters and not have the jury have to go out
24 again after a few more questions, there is
25 another matter which I identified to Mr. Reid

1 in the hall so that he would know, and if
2 there were any objection to it we could take
3 it up in advance. I do this in trying to
4 avoid a flack.

5 THE COURT: Which carries my support.

6 MR. LOWE: One of the things Mr. Talley would not talk
7 to us about last night was any kind of
8 consideration he received in the federal
9 area; immunity, which of course as you all
10 know is when a federal court give him
11 immunity, it's also immunity from state
12 prosecution. Any other things of that
13 nature. Now there may be nothing there, but
14 in the absence of information on it I would
15 explore that to determine whether he had any
16 consideration that he was given, if he was
17 given immunity, what it meant in terms of his
18 willingness to do work and perhaps affecting
19 his credibility. I told Mr. Reid I wanted to
20 raise that, because first, Your Honor, it
21 mentioned some bit earlier that it had to
22 relate to this case, and of course I would
23 want to relate it to this case. But I think
24 Mr. Reid had an objection that goes farther
25 than that and I wanted to give him an

1 opportunity to raise it with Your Honor before
2 the jury was present.

3 THE COURT: All right, thank you.

4 MR. LOWE: Could we have Mr. Talley perhaps step out,
5 Judge?

6 THE COURT: All right, Mr. Talley will step out.

7 (Witness out)

8 MR. REID: Judge, all counsel are aware that there is an
9 ongoing federal grand jury investigation that
10 is apparently a state and federal adventure
11 in the Norfolk and Tidewater area. Now,
12 apparently Mr. Talley has in some degree
13 provided the, that grand jury with information
14 and there purportedly is a agreement or some
15 sort of terms under which he provided that
16 information, but Mr. Lowe wants to get into
17 this point. The problem the Commonwealth has
18 is that No. 1, it's absolutely irrelevant to
19 what we have here. The testimony given by
20 Mr. Talley about the parameters of the
21 understanding between myself and Zeigler is
22 the time consideration which motivated his
23 activities on Jan. 17. To allow an agreement
24 between this man and a person of sovereignty
25 is really not a party to the present action

1 to be introduced into evidence. It's
2 inappropriate. Whatever that deal is, and
3 I know what the deal is and I know what the
4 deal was, doesn't have anything to do with
5 and did not bear upon his activities of
6 Jan. 17. So for that reason it's simply
7 irrelevant. The Court is going to have a
8 difficult time ruling on this one way or
9 the other without having before it the
10 agreement. I have, Your Honor, a copy of
11 the letter written by a U. S. Attorney,
12 delineating the boundaries of that agreement.
13 And the agreement, of course, would come
14 to the United States Attorney's Office. I
15 have talked personally with the officer of
16 that letter and he has, what he told me on the
17 phone conforms exactly with what the letter
18 says. I would ask the Court to review this
19 letter without it being displayed to the
20 defense counsel, for the reason that the
21 Court is going to rule on the relevance of
22 the agreement and the Court is ultimately
23 going to make the determination. And I
24 think this something the Commonwealth ought
25 to be able to be entitled to keep secret

1 from defense counsel. Mr. Drescher works
2 down in the Virginia Beach area. Mr. Lowe,
3 of course, represents a client today from
4 that area. Whatever the grand jury does
5 they, neither one of them may end up
6 representing people from that area. And I
7 think it would be inappropriate and
8 immaterial at this point for a state prose-
9 cution to reveal the boundaries of a federal
10 immunity grant if there was one. So, I
11 think this Court can rule on the relevance
12 of it to this case without a lot of argument
13 from counsel. And on that basis I would like
14 to tender to the Court. I can relate to the
15 Court that I did a precedent for this in
16 this jurisdiction. Judge Byrne, on one
17 occasion, took one of our local vice officers
18 when an informer privilege was raised,
19 interrogated that vice officer encamera, and
20 it came out without revealing anything that
21 the detective had told him, sustained the
22 Commonwealth's motion that the informant
23 privilege be protected. So, basically the
24 same way, Judge, if we ended up hacking it
25 out between you and me and Mr. Lowe and

1 Mr. Drescher what the thing is, we're
2 revealing something that should not be
3 revealed.

4 MR. LOWE: If I might respond briefly, Your Honor.

5 THE COURT: Yes, sir.

6 MR. LOWE: All right. That's why I said I'm use to
7 writing. Your Honor, whatever document
8 Mr. Reid has, whatever he has been told,
9 whatever is contained in that document,
10 may very well be a part of the mosaic
11 factors which influence Robert Talley one
12 way or the other, for whatever it has to do
13 with his credibility, and that is for the
14 jury to decide. There is no way for
15 Mr. Reid to say that that is the only con-
16 sideration which Mr. Talley has been told
17 verbally. It may be. I'm sure Mr. Reid in
18 good faith believes that's all that is
19 involved. But Mr. Talley is the only one
20 that knows that. In addition, Mr. Talley
21 may perceive things that will benefit him
22 from what has been going on with federal or
23 the state authorities in a different than
24 what the federal authorities intend or think,
25 and it's what is in his mind is important.

1 Now the Brady line of questions. The Brady
2 line of cases, rather, speak of information
3 which tend to exculpate or tend to mitigate
4 for the defendant, or tend to be favorable
5 to the defense, and is a matter for the jury
6 to decide how much weight to give it. Now,
7 I can at least ask Mr. Talley, I'm not asking
8 that this letter be introduced, vie like
9 that, but I can certainly ask Mr. Talley
10 what assurances he has been given by the
11 federal or other people. I don't propose
12 to ask him who he has testified about and
13 things like that, that would be improper.
14 But I can ask him what assurances he's been
15 given, what promises, what compensation,
16 have they interceded or said they would
17 intercede in his behalf with state proceed-
18 ings if it's appropriate, if he needs help.
19 Just exactly what it is that he has been
20 promised or what he expects or hopes for,
21 affects his credibility. And I say that
22 that would be appropriate and I should be
23 permitted to ask it.

24 MR. REID:

The point of the thing, and I'll make it
25 very brief, it's just occurred to Mr. Parcell

1 and me, we've got a secrecy problem here,
2 with the grand jury. If a man was actually
3 cooperating with the prosecutions, and based
4 on that, promises were made to him, then
5 that's one thing. Though he has a grand
6 jury, obviously the federal grand jury is
7 secret. The contents of the testimony
8 cannot be revealed, that obviously is not
9 the point today. But even, I think Judge,
10 the terms under which the witnesses become
11 available to the grand jury is a matter of
12 secrecy. And I'm not sure that this
13 sovereignty has the authority to require,
14 to violate that secrecy provision any more,
15 quite frankly, Judge, than the federal has
16 the right to come in and inquire as to what
17 a witness testified before the grand jury.
18 There is no allegation raised that, at this
19 juncture, that the witness is cooperating
20 beyond the grand jury. So, I think we're
21 limited to the grand jury aspect of this
22 situation.

23 MR. LOWE: May I just respond to that, since he raised
24 it affresh, Your Honor?

25 THE COURT: All right, sir.

1 MR. LOWE: We're not trying to ask what he told the
2 grand jury, although I will add parenthet-
3 ically that the law is very clear that a
4 witness can tell anybody in the world what
5 he said in the grand jury, because that's
6 not secret for him to say. But even if it
7 were, we're not asking that. What we're
8 asking is was he given immunity? That's not
9 a matter of his testimony. Was he given
10 some kind of promise that he would receive
11 certain benefits if he would go in and
12 testify truthfully or in exchange for his
13 testimony, and that's not secret. That's
14 not under the grand jury secrecy act. It's
15 entirely proper for us to find out.

16 THE COURT: All right, I will take a look at the
17 document and take another recess and go
18 back to the office, and I'll return and
19 announce what I'm going to do, and if I
20 find it desirable I may mark this particular
21 exhibit Court's Exhibit B, or whatever it be,
22 and have it closed at this time.

23 (Court Recess)

24 We've come back to the courtroom once again
25 after a brief recess, and the Court has been

1 over the material furnished by the Common-
2 wealth Attorney, basically a letter from the
3 Assistant United States District Attorney,
4 from the Eastern District of Virginia,
5 U. S. Attorney's Office, Department of
6 Justice, (unintel.) letter to Mr. Duncan
7 Reid, Dep. Comm. Attorney. And included
8 thereto is a letter from the same Ass't.
9 Comm. Attorney, that eminent lawyer,
10 Richard G. Bridges, Esquire, Virginia Beach,
11 Va., and consequently, relating to his
12 client, Talley, and accordingly based on
13 this information, the defendant's endeavor
14 to get into the question that he intends to
15 ask is absolutely overruled and denied.
16 In other words, it's no(unintel.) that
17 would be permissible under this, nothing
18 that would have any bearing on the witness
19 in the Fourth Federal Grand Jury. Statement
20 in general. That's specifics. It's says,
21 "No promise whatsoever that they made
22 regarding holding any kind of a charge,
23 federal, state, or otherwise, and haven't
24 done anything about that. Accordingly, the
25 whole thing is out and the line of

1 questioning will henceforth cease. The
2 Court will see that this is filed as
3 Court's Exhibit 2. A photocopy of it is
4 entered, as Assistant Comm. Attorney will
5 recollect, that the Dep. Clerk, with my
6 knowledge, and which of that photocopy of
7 this will be established as Court's Exhibit
8 No. 2, confidential, not to be opened,
9 remained sealed, and opened only by this
10 Court or the Supreme Court of Virginia.
11 But I find nothing that justifies the
12 pursuing of this line of questioning.

13 MR. LOWE: Your Honor, I will abide by your ruling.
14 It's my understand that it is this broad,
15 that I may not ask any questions about any
16 consideration that Mr. Talley may have
17 received from federal authorities at all,
18 am I correct?

19 THE COURT: Absolutely.

20 MR. LOWE: That's what I, I just wanted to be sure,
21 because I understood that to be your ruling.
22 I would like to vouch for the record, and
23 I think Mr. Reid is knowledgeable on this
24 and can, we can, you can accept my proffer
25 because I believe he knows that Mr. Hewitt,

1 Mr. William Hewitt, the defendant here, is
2 a subject of investigation by the federal
3 authorities in the Norfolk area that we're
4 talking about. Is that correct, Mr. Reid?

5 THE COURT: What are we talking about?

6 MR. LOWE: That Mr. William Hewitt is a subject of
7 investigation of these federal narcotics
8 people of the grand jury, and so forth-

9 MR. REID: Judge, I'm not able -

10 THE COURT: Well, what's the bearing would that have on
11 this situation?

12 MR. LOWE: Because I want to show that the area in
13 which I wanted to explore about possible
14 consideration given to Mr. Talley is not
15 just a wild goose chase, that there is good
16 reason to believe that he may have given
17 cooperation regarding Mr. Hewitt and
18 received cooperation, or consideration from
19 federal authorities. And I vouch to Your
20 Honor that Assistant U. S. Attorney Tommy
21 Miller, who is the Ass't. U. S. Attorney
22 coordinating the Grand Juries in the Norfolk
23 area regarding this has personally told me
24 that Mr. William Hewitt is a subject and a
25 target of the grand jury down there. I

1 believe he's also told Mr. Reid that. Am
2 I correct?

3 MR. REID: Judge, I don't want to vouch to the record
4 without conferring with Mr. Miller. I can
5 tell you, I'll contact Mr. Miller between
6 now and - looks like this case is going to
7 go over til Monday.

8 MR. LOWE: Can we verify it then on Monday?

9 THE COURT: Liable to go over til next Thursday or
10 Friday at the rate we're going.

11 MR. REID: Yes, sir. I can look into it perhaps and
12 vouch the record by stipulation between now
13 and then.

14 MR. LOWE: Thank you. That's all I would have then.
15 I'm ready to go forward.

16 THE COURT: I'm not even sure of what you all are talking
17 about is pertinent or relevant at all, or
18 should be of this record. But I'll let you
19 all pursue that later. In the meantime,
20 Madam Clerk, I'll give this to you exclusive
21 control. Nobody will see it, except me or
22 you. That will be my Court's exhibit No. 2.
23 I think there's still another aspect of it,
24 that counsel hasn't even touched on, which
25 strikes me as maybe pertinent. You know,

1 they are two entirely different court
2 systems, as everybody knows. The federal
3 system and the state system. And the one
4 system is set up by the Congress and one
5 is set up by the legislature of the Common-
6 wealth of Virginia. And I have - you all
7 have the testimony - and I have feelings
8 that's pretty hard to tie together, bring
9 the two of them together. And the other
10 thing is, and I have some feelings that you
11 all haven't discussed either along the line,
12 that the common good of the benefit of the
13 people of the United States as well as the
14 Commonwealth of Virginia, have certain
15 rights that may in effect overcome or^{by}/ much
16 superior to whatever they're trying to get
17 at, as to what may be going on over there.
18 What possible agreement there is with the
19 federal government. But it's all these
20 particular Court's confidential Exhibit
21 No. 2. I find no basis for the defendant
22 to go into any further questioning on the
23 line that he was endeavoring to follow
24 about this sort of immunity, getting from
25 the federal government. All right, anything

1 else?

2 MR. LOWE: NO, sir.

3 MR. REID: No, sir.

4 THE COURT: All right, bring the jury back, sheriff.

5 (Jury in)

6 All 12 jurors back in the courtroom. All of
7 them necessary participants in the courtroom.
8 Members of the jury, let me again thank you
9 for your patience. All right, continue
10 with your examination.

11 Q Mr. Talley, I believe when we broke off we were talking
12 about a meeting last night with four attorneys. Let me
13 rephrase my question. At some point did you say that
14 Duncan Reid and Buddy Parcell, the two Ass't. Commonwealth
15 Attorneys in this case, had promised that they would
16 prosecute you for perjury if you did not cooperate fully
17 and tell the truth?

18 A That is correct, sir.

19 Q Now, in fact, didn't you also tell me that your deal with
20 Lt. Zeigler was that upon your Honor's cooperation and
21 having Hewitt arrested, meaning Billy Hewitt, that he would
22 recommend leniency for you?

23 A The agreement was a recommendation for leniency upon
24 completion of the arrest and my cooperation, thoroughly
25 and completely through this whole thing.

1 Q Upon the completion of the arrest of William Hewitt?

2 A My - again, recommend leniency for not only the arrest,
3 but a complete thorough Court procedure, as right now,
4 and on the near future, all honesty.

5 Q I think you misunderstood my question. You merely
6 said arrest. And I was just trying to be sure we're
7 speaking of the arrest of William Hewitt, the defendant.

8 A That is correct, sir.

9 Q Okay. And that promise was made to you sometime prior to
10 December 2 when you got out of jail?

11 A Yes, it was.

12 Q And I believe you told me that you told Lt. Zeigler
13 something to the effect of that you said you could "take"
14 Hewitt. Am I correct?

15 A You're correct, sir.

16 Q Now, you said that Lt. Zeigler never promised exactly
17 what he would recommend. And I gather by that he didn't
18 specify that he would give you a certain amount of
19 suspended time or recommend that, or that you would get
20 a certain sentence, is that correct?

21 THE COURT: That Lt. Zeigler would give suspended time?
22 What authority does any police officer have
23 to give suspended time? It's still up to
24 the Courts. I think the question has got
25 to be re-worded.

1 MR. LOWE: I'll re-word it, Your Honor.

2 Q I believe what you meant was Lt. Zeigler told you that
3 he would not recommend a specific sentence and you would
4 not be promised by the Commonwealth a specific sentence
5 or a specific disposition, isn't that correct?

6 A Again, all he said was he would recommend leniency.

7 Q Now, you have been what's sometimes called street-wise
8 or jail-wise for about ten years. I think you said you'd
9 been selling and dealing in hashish and other activities
10 you describe here, and you certainly have a pretty good
11 idea, don't you, about the types of things that can be
12 done in exchange for cooperation?

13 A Yes, sir.

14 Q And where there may not have been an express articulated
15 promise in so many words from Lt. Zeigler, there is no
16 question that you were hoping that you might do well
17 enough that they would consider not revoking any of the
18 five years hanging over you, isn't that fair to say?

19 A Obviously, I'm hoping that there is no additional time.
20 Again, he would recommend leniency.

21 Q And you understood that the more good you did the better
22 effect you had, the more you would catch Billy Hewitt,
23 the more people you would catch, or whatever it might be,
24 the more successful you were, the more help you could
25 expect from the authorities, isn't that correct?

1 A I believe it speaks for itself. The more cooperation I
2 give, honest cooperation on my part, I'm hoping that
3 they'll have leniency.

4 Q And equally obvious would you agree, is the fact that if
5 you arranged the arrest of some very big important drug
6 dealers that that would be more helpful and more
7 appreciated by the Commonwealth than just arresting a
8 couple of little street people or users or things like
9 that, isn't that obvious?

10 A That is correct, sir.

11 Q Now, you indicated a couple of other offenses that I,
12 if you explained, I missed. At one point you said
13 that in Virginia Beach you pleaded guilty on several -
14 or the deal was you would plead guilty on several
15 misdemeanors, they would hold off on the grand larceny
16 case, but then they double-crossed you in court. I
17 believe you meant the Commonwealth Attorney, is that
18 accurate?

19 A That is correct, sir.

20 Q What were those misdemeanors for?

21 A Threats. Assaults. A combination of misdemeanors.

22 Q Were they threats by telephone or in person?

23 A Threats by phone.

24 Q All right. You also indicated that in 1981 you were
25 jailed for misdemeanors. Were those the misdemeanors

1 or were there other misdemeanors?

2 A I was jailed for several misdemeanors, threatening phone
3 calls, simple assault; while I was incarcerated there
4 they brought back on me - again I had what they called
5 a deferred sentencing on two previous misdemeanors and
6 one grand larceny.

7 Q What were those misdemeanors for?

8 A One was grand larceny, the other was false information
9 to police officers.

10 Q All right. Now, you indicated from July to December 1981
11 you were in the Virginia Beach Jail for threatening phone
12 calls and grand larceny. Are those the ones we're
13 talking about? Were those the two same 1981 jailing?

14 A Now. Again, threatening phone calls. Two, false inform-
15 ation to police officers. One grand larceny. And a
16 grand larceny that was eventually nol prossessed. I was
17 in jail during 1981 for that.

18 Q All right. Were there assaults in there also at that
19 time? You mentioned them.

20 A Yes, sir, there were two assaults.

21 Q Assaulting a man or a woman?

22 A I threw a drink in a girl's face. I was charged with
23 assault.

24 Q And the threatening calls, were they to women?

25 A To my girlfriend.

1 Q Now on April 22, 1980 you were convicted of auto theft
2 for that automobile of Debbie Laux, is that correct?

3 A That's incorrect, it's Debbie Laux (pronounced Lux).

4 Q Or Laux. I'm pronouncing it wrong. It's L-a-u-x, is
5 that right?

6 A That's right, sir, my girlfriend's sister.

7 Q And sentence was withheld at that time and there was just
8 no sentence imposed.

9 A That is correct, sir.

10 MR. REID: All right. What is that date, Mr. Lowe?

11 MR. LOWE: I believe it's 4/22/80. I have a question
12 mark by it. That's one of the records
13 I have. It wasn't clear whether that was
14 the offense date or the court date.

15 A Let me clear this. I don't remember the date.

16 Q Right, but there was only one time when you were convicted
17 of auto theft and the sentence was withheld.

18 A I was not convicted then. My sentence was deferred. I
19 was not convicted of anything.

20 Q You were not convicted of anything?

21 A Not the first time. When that sentence was deferred
22 there was no conviction. Later on I broke the year. They
23 had like a year probation on me. That I should seek
24 psychiatric help. Obviously, I broke that, and so at a
25 later date they convicted me on it.

1 Q But ultimately you had a felony conviction for auto theft
2 on that occasion.

3 A That is correct, sir.

4 Q You mentioned phoning false information to a police officer.
5 One or two charges?

6 A Two charges, sir.

7 Q And that was - was that Officer Boswell?

8 A It was either Boswell or Stalling. I believe it was both,
9 they work as partners. If I'm correct.

10 Q All right. And now you had two of those in October 1979.
11 Are those the two you're speaking of?

12 A The dates are foggy, but I'm sure it's the same two.
13 I haven't been charged with anything else.

14 Q Well, let me perhaps put it this way. Were those in the
15 fall of 1979? Is that approximately three years ago, the
16 two you're talking about?

17 A Yes, sir.

18 Q You received a \$500 fine and 12 months in jail on each one.

19 A Deferred sentencing.

20 Q Deferred sentencing?

21 A That was deferred also, if my memory serves me correctly.
22 And later I was convicted of it.

23 Q So then, on September 15, 1981, when you were convicted
24 or sentenced to 6 months suspended sentence for false
25 information to a police officer by phone, you're saying

1 that's the same two from back then?

2 A That is correct, sir.

3 Q And the sentence on the auto theft on Sept. 15, 1981, when
4 you received a two-year suspended sentence, given credit
5 for time served in jail, that was for the Laux automobile?

6 A That is correct, sir.

7 Q And you had also 6 months in jail on Sept. 15, 1981 for
8 eight threats by phone, didn't you?

9 A That is correct, sir.

10 Q And consecutive to that you had 6 months in jail for two
11 assaults and one destroyed property, didn't you?

12 A That is correct, sir. That might be incorrect. I don't
13 know if destroying private property was ever convicted.
14 The others yes.

15 Q All right. Your Honor, may the sheriff mark an item for
16 identification, in order that I can show it to counsel
17 and prepare to show it to the witness? This is an order.

18 THE COURT: Receive it, sheriff. I don't understand
19 the reason for this so I guess we'll have to
20 send the jury out again.

21 (Jury out)

22 May I ask the purpose of offering this?

23 MR. LOWE: Yes, I have a number of the versions in
24 front of me, but I don't think I have the
25 one there to quote from, but I believe it

1 shows that he was in fact convicted and
2 sentenced on the assault. He said he
3 couldn't remember whether he was or not.

4 MR. REID: It's grand larceny.

5 MR. LOWE: May I have the sheriff hand me that, Your
6 Honor, I may have handed him the wrong one.
7 but I intended to show him the one that had
8 the -

9 MR. REID: But he did testify a moment ago that he was
10 in jail on the assault. You don't go to
11 jail unless you've been convicted and
12 sentenced.

13 MR. LOWE: Well, he also had threatening phone calls,
14 and he was saying he acknowledged that but
15 he couldn't remember whether he was
16 sentenced on the assault or not. May I just
17 have a moment? I had handed the Court
18 the wrong order. This is, they were
19 together and this is the one.

20 THE COURT: Again, I ask the question, what's the
21 purpose of this?

22 MR. LOWE: The witness says he couldn't remember
23 whether he'd been convicted of the assaults
24 or not, and this would be to refresh his
25 recollection by showing him the certified

1 copy of the Court Order which convicts him
2 of the assault.

3 THE COURT:

4 Well, that isn't the way the impeachment is
5 based. You've got to ask him some specific
6 question to get it. There's only one sort
7 of general question, and that was 1981 you
8 said he was, he admitted he was jailed for
9 several misdemeanors and brought back on
10 two charges, grand larceny and false
11 information to the police in July to
12 November 1981 there were two assaults where
13 while drinking and went on to say where
14 these other convictions were, and I don't
15 have in my notes any specific question as
16 to whether or not he did or did not, he
17 was asked whether he did or - was or was
18 not convicted of assault or whether he did
19 or did not have any jail time on it.
20 Accordingly, until such time as the question
21 is asked specifically as to the specific
22 date and time, and there's no basis under
23 the Virginia law to put the record in.
24 So, accordingly, you'll have to ask the
25 question first and only if he denies being
convicted on the date that you're going to

1 refer to, September 15, 1981, if he denies
2 it (unintel.) Standard procedure for
3 impeachment on denial of a particular
4 conviction.

5 MR. LOWE: Judge, I wasn't really impeaching, I was
6 just trying to help his recollection, but
7 I'll do that, that's easy enough.

8 THE COURT: Well, the whole point is you don't put
9 something in unless you go about it the
10 right way. That's the other way to look at
11 things, so you're wrong, again, on what
12 you're offering. Handle it the right way.
13 All right, bring the jury back, please.

14 (Jury in)

15 Q Mr. Talley on September 15, 1981 were you convicted of
16 two counts of assault, one count of destroying private
17 property and sentenced to 6 months in jail in Chesapeake
18 County, or Chesapeake City, excuse me, Virginia Beach
19 Circuit Court?

20 A I was convicted of ^{two} assaults. I don't recall that I was
21 convicted of destroying private property.

22 Q Would it refresh your recollection if you saw a certified
23 copy of the order of the Court for that occasion?

24 A If you have a copy of it I'll definitely agree to it.

25 MR. LOWE: Your Honor, may the sheriff mark a copy for

1 the purpose of having this witness, see if
2 it would reflect his recollection?

3 THE COURT: Yes, indeed.

4 A This is correct, sir.

5 Q All right. Does that refresh your recollection?

6 A Yes, it does sir.

7 MR. LOWE: Your Honor, I see no need to put that into
8 evidence unless the Commonwealth or the
9 Court wishes it to be.

10 MR. REID: We don't.

11 Q Now, Mr. Talley, it's not it's entirely clear to me the
12 status of your revocation hearing. I believe you told
13 Mr. Reid on his direct examination that the five year
14 sentence from distributing marijuana, which was hanging
15 over your head, that there had been a motion for revoca-
16 tion and that it's continued generally. Is that accurate
17 so far as it goes?

18 A That is accurate, sir.

19 Q Do you have a court date that you have been told will be
20 set, or a specific date when it is anticipated by you that
21 you will be going back to court on that revocation.

22 A Been generally continued. I have no date that I know of
23 that has been set. I haven't been notified of anything
24 as of yet.

25 Q And as far as you're aware are you simply working in

1 in cooperation with the police as long as they want you
2 to, or until they're ready to go back to court? Or what
3 is the status of that?

4 A Upon completion of this investigation, full cooperation,
5 honesty, then I will be summonsed back to court. What
6 date I do not know.

7 Q Well, then, of all those 90 names that you had, including
8 the three that you specifically mentioned to Lt. Zeigler,
9 the whole revocation hangs on Billy Hewitt at this point,
10 is that correct?

11 A And previous individuals that I was involved with. I had
12 mentioned earlier Terry Williams, Marshall Hewitt, Chip
13 Simpson. They are based on those two.

14 Q All right. But right now the only one that's still
15 left is Billy Hewitt, is that correct?

16 A That is correct, sir. Involving this particular case.

17 Q Mr. Talley, have you personally used marijuana?

18 A Yes, sir.

19 Q Have you personally used hashish?

20 A Yes, sir.

21 Q Have you personally used quaaludes?

22 A Yes, sir.

23 Q And is that a, you understand to be a, uh, Methaqualone,
24 a trade name for Methaqualone, a control substance under
25 the law of Virginia?

1 A If that's what the forensics people say it is, I don't
2 know, Quaaludes. I've taken Quaaludes.

3 Q Have you personally taken Cocaine?

4 A I personally have taken cocaine.

5 Q Have you distributed, shared, sold, these drugs as well?

6 A Yes, sir.

7 Q Have you personally taken LSD, Lysergic Acid Diathlemide,
8 also called Acid?

9 A Yes, sir.

10 Q Have you sold it?

11 A Yes, sir.

12 Q Have you personally taken PCP, Phencyclidine, also known
13 as Crystal in some places or Angel Dust?

14 A When I acquired the substance I was told it was PCP;
15 whether it was or not I do not know.

16 Q When you took it you thought it was PCP?

17 A That is correct, sir.

18 Q Have you personally taken Heroin?

19 A One time, sir.

20 Q On some of these occasions did you ingest these things
21 through snorting? Such as cocaine?

22 A Yes, sir.

23 Q On some of these occasions did you take these by pills
24 or other ways through the mouth?

25 A Yes, sir.

1 Q And some of these did you take these by injecting them
2 into your body, such as heroin and perhaps cocaine?

3 A Not heroin, sir, cocain.

4 Q Cocaine. How do you take the heroin, snuffing?

5 A I snort it, sir.

6 Q Do you expect to be prosecuted for any of these crimes
7 of possession or sale of illegal drugs under Virginia law?

8 A No, I don't expect it.

9 MR. REID: Judge, if it please the Court, that's not
10 a fair question. Mr. Lowe knows full well
11 the burden of the Commonwealth to prove a
12 drug case and knows the corpus delecti
13 necessary. He knows that, if it please the
14 Court, I think that's an unfair question to
15 place in the jury's mind the possibility of
16 prosecution.

17 THE COURT: I'll sustain the objection. Can't be aware
18 of any charge against him on those.
19 Something else, but -

20 MR. LOWE: I have no further questions.

21 THE COURT: All right, redirect.

22 CONTINUED
DIRECT EXAMINATION: Robert Talley by Mr. Reid

23 Q Now the money you got from Mr. Zeigler was reimbursement
24 money for money you'd actually spent, is that correct?

25 A Rephrase that again.

1 Q The money you got for expenses for gas and what have you,
2 that was for money you'd actually spent, is that correct?
3 Or were intending to spend on the investigation?

4 MR. LOWE: Your Honor. I don't mind Mr. Reid leading
5 through preliminaries, but that's pretty
6 bad leading question for his witness. Could
7 we have that in an interrogatory form, please?

8 Q Was the money for expenses that you'd already spent, or
9 was it for something that you were going to go out and
10 just have a good time?

11 A The money that Lt. Zeigler gave me, again was for gas
12 that I needed for the automobile, to motivate around to
13 complete this investigation. Again, any other expenses
14 I had there was an officer with me and she paid for it.
15 it was

16 Q Sir, /on January 19, that you got a ticket out of state,
17 is that correct? One-way airline ticket?

18 A Yes, sir.

19 Q This is after the arrest of the defendant?

20 A That is correct, sir.

21 Q The reason you left the jurisdiction was what?

22 MR. LOWE: Objection, Your Honor, there's no relevance
23 whatsoever. It's not been contested. It
24 wasn't gone into on cross examination.

25 THE COURT: Overruled.

Q The reason you got the ticket and left at that time was

1 what?

2 A I had feared there would be retaliation.

3 Q Now, you went to stay with, I think you said it was with
4 people you are related to?

5 A That is correct, sir.

6 Q The car that Mr. Hewitt bought, what type of vehicle was
7 that?

8 A If my memory serves me correctly, it was a '73 gray
9 primer Pontiac.

10 Q What did you do with the car?

11 A I eventually sold it.

12 Q Do you recall when you sold it or to whom?

13 A No, I don't recall the name.

14 Q Who was it purchased from?

15 A Richard Backus.

16 Q You testified that was on January 16?

17 A Yes. The night before the actual arrest.

18 THE COURT: Who purchased it?

19 A Billy Hewitt purchased it for me.

20 Q That's the defendant?

21 A That's correct, sir.

22 Q Now, do you know a person, on January 17, did you know a
23 person by the name of Gerald Hester?

24 A No, sir.

25 Q I'd ask you to take a look at two documents. One is a

1 card, a purported business card, and the other a sheet of
2 yellow paper from a legal pad, with numbers on it.

3 Q Okay, have you ever seen those before?

4 A I've never seen these before, no, sir.

5 Q Do you know Gerald Hester, the person whose name is
6 written on the business card?

7 A No, sir, I do not.

8 Q Is any of the handwriting on the yellow pad yours?

9 MR. LOWE: Your Honor, this is absolutely incorrect
10 redirect examination. Nothing was gone
11 into about any of this on cross examination
12 in any way.

13 THE COURT: The Court has a right to allow appropriate
14 examination, either in direct or redirect
15 is not limited to the position that you've
16 tried require the Court to listen to,
17 restrict it to. Objection's overruled.

18 MR. REID: Your Honor, if the Court please, I move the
19 Court to introduce these as Commonwealth's
20 Exhibits 1 and 2, respectively, for identifi-
21 cation at this point.

22 MR. LOWE: Introduced or to be identified?

23 MR. REID: Introduced for identification. Just mark
24 "for identification." It's not 1 or 2.
25 I don't know what numbers we're up to, Your
Honor.

1 THE COURT: Y ou're asking for them to be Commonwealth's
2 Exhibits?
3 MR. REID: For identification only, at this point.
4 THE COURT: All right.
5 MR. REID: It will subsequently be linked up with other
6 witnesses.
7 THE COURT: Just hand them to the Clerk and we'll not
8 give them an exhibit number at this time.
9 Q Do you know Officer Foster, L. C., or Buzzy Foster at the
10 State Police?
11 A Buzzy Foster. There's several of them I know now.
12 There's eight or ten of them. I know a -
13 Q He's with the Richmond area officers of state police.
14 Not the Chesapeake area. If that helps you.
15 A I might have met him but I don't recall the name.
16 Q Were you ever in any state police cars that evening of
17 the 17th, or after you left down there from Chesapeake?
18 A Did I what?
19 Q Did you ever actually sit in a car, in the other car, that
20 Pontiac you described to us?
21 A Was I in the Pontiac?
22 Q No, were you in the State Police vehicle? From the point
23 you left Chesapeake until you drove back to Chesapeake,
24 did you ever sit in a state police vehicle?
25 A No. No. No, sir.

1 Q Now, you testified that you'd manipulated people in jail
2 to get out of jail, is that correct?

3 A That is correct.

4 Q Did you manipulate putting any hash in Mr. Hewitt's truck
5 on the evening of January 17?

6 A Not at all, sir.

7 Q Were you in his truck on the evening of January 17?

8 A No, sir.

9 Q Did you have in your possession at anytime a suitcase?
10 A green suitcase filled with 40 lb., or close to 40 lb.
11 of hash?

12 A No, sir.

13 Q Now, there has been some testimony that Mr. Parcell or
14 myself told you what would occur, I made some promises
15 to you, is that correct?

16 A Would you repeat that again, sir?

17 Q There is some testimony that you, that was elicited on
18 cross examination that Mr. Parcell or myself made some
19 promises to you, is that correct?

20 A Yes, sir.

21 Q And you testified that you must, promised that you must
22 tell the truth today, is that correct?

23 A That is correct, sir.

24 Q It was also part of the promise that if you failed to
25 tell the truth you'd be prosecuted for perjury?

1 A That is correct, sir.

2 Q And that if you did in fact lie on the witness stand and
3 the Commonwealth found out about it, this case against
4 Mr. Hewitt would be immediately dropped?

5 A That is correct, sir.

6 Q And also that if you lied on the witness stand I personally
7 would go down to Virginia Beach and tell the Judge at the
8 revocation hearing that you in fact had lied on the witness
9 stand?

10 MR. LOWE: Your Honor, I must object to his leading
11 form. I've never heard such leading. If he
12 wants to ask what he was told, that's one
13 thing. But this is his witness. He's on
14 direct examination, he's not on cross exam-
15 ination.

16 THE COURT: All right, we will speed up. I don't think
17 you need to go any further.

18 Q Now, you first contacted Mr. Zeigler around July of '82?

19 A That is correct, sir.

20 Q And you had several discussion with him, is that correct?

21 A That is correct.

22 Q And the understanding that you've reached with him
23 concerning the ground rules for your cooperation, they
24 were reached prior to your exiting your jail, is that
25 correct?

1 A That is correct, sir.

2 Q Now, you had how many persons, you said it was three
3 names that you were looking at when you got out?

4 A There was three major targets.

5 Q And what separated those three persons from the other
6 90 names or other 87 names on your list?

7 MR. LOWE: Your Honor, this is irrelevant. There was
8 no challenge as to what the distinction was.
9 It has nothing to do with this case, whether
10 he distinguishes on alphabetical or on
11 whatever reason he had, is an improper
12 question. It's prejudicial and has nothing
13 to do with this case.

14 MR. REID: Please the Court, it was brought out
15 directly by Mr. Lowe.

16 THE COURT: I think we've - I think it's sufficient as
17 it is. As it's stated about who the
18 targets were, what his cooperation agreement
19 was, as it relates to this -

20 Q Now, you used drugs for what period of time? Drugs that
21 Mr. Lowe mentioned. All those five or six drugs. You've
22 used those over what period of time?

23 A I'd say a good 10 or 12 years.

24 Q Now, do you use drugs anymore?

25 A No, sir, I do not.

1 Q Okay, and do you drink anymore?

2 A Yes, sir, moderately.

3 Q And previous to your getting out of jail would you describe
4 your drinking habits? Back in the time when the abuse
5 and the telephone, the assault charges rose,

6 A I drank no less than a fifth, sometimes two fifths a day,
7 and used narcotics very heavily.

8 Q Now, the grand larceny that you were charged with and
9 convicted of back in 1981, what did that charge involve?

10 A Read the question again?

11 Q I'll withdraw it, never mind, that's not going to matter
12 to the jury that much. Mr. Lowe asked you if you under-
13 stood that it would help you if you were able to arrest
14 big dealers, then that would be more important than
15 arresting small dealers, is that correct?

16 A That's correct, sir.

17 Q And you understood, from what Mr. Lowe asked you, that it
18 was important to arrest big dealers, is that correct?

19 A Yes, sir, that's correct, sir.

20 Q Now, if you had not used the drugs you used, if you had
21 not dealt the drugs you in fact sold, do you think you
22 would have been able to do what you in fact have done?

23 A I don't think it would have been impossible.

24 Q Would you have been able to secure Mr. Hewitt's confidence
25 had he not known of your use of drugs and your prior

1 sales of drugs?

2 MR. LOWE: Objection, Your Honor, that's a conclusion
3 about Mr. Hewitt's thought processes. It
4 must be rankest speculation by this witness,
5 as to whether he could or couldn't.

6 THE COURT: Yeah, that's dwelling on, it's a bit
7 argumentative and dwelling on the express
8 opinion of what - it's argumentative and
9 it can be handled on that basis.

10 Q Do you know, Mr. Talley, whether or not Mr. Hewitt knew
11 that you used drugs?

12 A Oh, it's quite obvious to most of the community where I
13 live, what I did for a living and my use of drugs.

14 Q How about your sale of drugs?

15 MR. LOWE: Objection, Your Honor, I'd like to ask that
16 the witness' last answer be stricken, as
17 it was non-responsive. He answered what
18 the community thought, he didn't answer
19 what Mr. Hewitt knew. That was the question.

20 Q Do you know whether or not Mr. Hewitt knew?

21 THE COURT: Just a minute. We're not asking the
22 community. I thought the question had already
23 been asked and been answered about whether
24 the defendant knew he used drugs.

25 Q That's all I have, Judge.

1 THE COURT: Anything else?

2 MR. LOWE: May I just have one moment to confer with
3 Mr. Drescher?

4 (Tape Suspended)

5 In light of your previous rulings, Your Honor,
6 I would have no further questions.

7 THE COURT: All right, now at this time I want you to
8 look at that jury, please. Insofar as
9 anything that may relate to revocation of
10 your obvious sentence down there, that's
11 been referred to. You testified that no
12 date has been given you. Your Attorney was
13 Mr. Bridges from Virginia Beach?

14 WITNESS: Yes, it is, sir.

15 THE COURT: And whether you employed him or whether the
16 Court assigned him with state expense, he
17 would communicate with you about this if he
18 would need for you to come back, would he not?

19 WITNESS: Yes, sir.

20 THE COURT: All right now, let me ask you this. You
21 indicated that you've gone through this
22 period of ten years before this, then you
23 said ten to twelve years that you personally
24 used a number of drugs, and you said you no
25 longer used drugs. When did you stop using

1 drugs?

2 WITNESS: Prior to - well, obviously when I was
3 arrested and put in jail this last time,
4 May 3 thru December 2 I was incarcerated.

5 THE COURT: We're talking about May 3, 1981 until when?

6 WITNESS: To the release of December 2, and then
7 after that I used marijuana during the
8 investigation.

9 THE COURT: Well, then, it's still not clear to me,
10 when did you last use drugs?

11 WITNESS: Let's see, the investigation stopped
12 Jan. 17, that's somewhere around that
13 particular time. I don't remember the exact
14 time that I quit, that I smoked it. I
15 smoked it during the investigation. To
16 secure, again, a good feeling with the
17 drug dealers.

18 THE COURT: This is after release from jail when you
19 associated with drug people?

20 WITNESS: That is correct, sir. During the investiga-
21 tion.

22 THE COURT: All right, now, I want you to look at that
23 jury, right down the line, start with this
24 lady here and go on down and look at the
25 gentleman in the back and come on back this

1 way, I want you to look at everyone of them.
2 Is what you're telling this jury today the
3 truth, the whole truth, and nothing but the
4 truth, or are you holding anything back and
5 telling a lie?

6 WITNESS: I'm not telling a lie, everything is the
7 truth.

8 THE COURT: All right, the witness can step down. We
9 will now take another recess. This witness,
10 if counsel are willing, may be excused.
11 What does the counsel desire of the witness,
12 being excused?

13 MR. LOWE: I would like him to remain to be maintained
14 on hand, Your Honor.

15 MR. REID: Very well.

16 MR. LOWE: For Monday, as well, if we go over to Monday
17 as it appears we will.

18 THE COURT: No question of it going over to Monday.
19 There are five or six more witnesses coming
20 up. I will take a recess at this time,
21 inasmuch as Commonwealth Attorney has
22 contact of this man and where he is, and
23 whatever. And under the circumstances make
24 such arrangements as you know where he's
25 going to be and have him remain until we

* * *

JOHN C. LOWE
FIDELITY & SECURITY
ANNEX 100, COBBS
FIDELITY & SECURITY

TO: ~~CLERK OF COURT~~
The Honorable Edmund Hening
Henrico Circuit Court

DATE: September 20, 1982

RE: Commonwealth v. Hewitt

FILE/CASE NO. _____

Dear Clerk of Court:

Please file the enclosed:

- ☐ Motion for Judgment/Bill of Complaint
- ☐ Demurrer/Plea/Motion to Strike
- ☐ Answer/Grounds of Defense/Cross-bill/Counterclaim
- ☐ Interrogatories/Answers to Interrogatories
- ☐ Affidavit/Depositions/Exhibits
- ☐ Motion/Notice
- ☐ Order/Decree
- ☐ Praecipe
- ☒ Other: Jury Instructions and voir dire questions

Please:

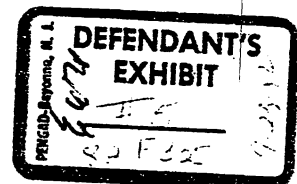
- ☒ Note: Court has set for hearing at 10:00 a.m. 9/23/82
- ☐ Prepare for service of process and deliver to sheriff.
- ☐ Present to court for entry.
- ☐ Return one copy marked "filed" with case number.
- ☐ Return _____ certified copies.
- ☐ Return envelope enclosed.
- ☐ Check (s) enclosed.

This transmittal letter need not be filed.

Very truly yours,


John C. Lowe

CC: Duncan Reid Esq.



WILLIAM H. HEWITT -- JURY VOIR DIRE

The following list of questions includes some questions which will probably be asked by the court, and will not be asked again by counsel if that occurs. Additionally, it is not anticipated that every juror will be asked all questions. Many of these questions will be asked to the panel as a whole, with follow-up questioning only in the event of a positive response. It may not be that counsel will not ask all of the questions listed, depending on the responses to early questions or questions by the court or Commonwealth. Obviously counsel does not know whether issues will arise during voir dire which require questions that are not listed on this sheet, as follow-up questions or suggested questions. Counsel has tried in good faith to cover all subjects which he reasonably anticipates might be covered in voir dire, but cannot preclude the possibility that other issues will arise which need exploration in order to assure a fair and impartial jury.

1. Have any of you ever served on a jury previous to this case? X

2. If so, on how many juries have you served? X

3. If so, on how many criminal case juries have you served? X

4. Have any of you ever served on a grand jury? X

5. Did anything happen in any of the criminal cases you heard in previous jury duty which would prevent you from serving as a fair and impartial juror in this case?

Yes

6. Have any of you or a ^{close} relative or a close friend ever been the victim of a crime? If so, where and when and what type of crime?

Yes

7. Have any of you ever testified in court about a crime or criminal case? If so, where and when and what type of crime?

X

8. Have any of you ever appeared as a witness before a grand jury? If so, where and when and in what kind of matter?

X

9. Have any of you or any member of your family worked ~~as a volunteer or employee of~~ ^{with} a law enforcement agency, a prosecutor's office ^{or a court?} ~~or a court?~~ If so, when, where and in what capacity?

Yes but limited

10. Do any of you have neighbors, or close friends, employed by a law enforcement agency, prosecutor's office, jail, prison or court? If so, where and in what capacity?

X

11. Did any of you ever serve in the Armed Forces? If so, did you ever sit in a court martial, or as a military policeman?

X

12. Do any of you know personally or have you ever had any business or social dealings with either of the Commonwealth's Attorneys, Mr. Parcell or Mr. Reid?

or other atty

13. Do any of you know the Defendant personally, by hearsay or by reputation?

Yes by reputation

14. Do any of you know personally, by hearsay or by reputation any of the following witnesses for the prosecution?
(Read names of all prosecution witnesses.)

15. Is there anything about the nature of the charges in the indictment that would prevent any of you from considering this case fairly and impartially?

16. Have any of you, a member of your family, a neighbor or a close friend ever been involved with the use of marijuana or drugs? If so, please state when, where and in what way?

17. Have any of you heard or read anything about this case before you came here for jury duty?

18. Have any of you heard or read anything about this case, or have you discussed it with anyone at any time?

19. The law says that the Defendant who has been charged with a crime is presumed to be innocent; that a Defendant does not need to prove his innocence, and that the Commonwealth has the burden of proving the Defendant guilty. Would any of you be unwilling or unable to abide by that principle of law in this case?

20. Would any of you expect or require the Defendant to prove his innocence or to introduce evidence in his own behalf before you would be willing to consider voting "not guilty" on the charges?

21. If the Defendant chooses not to produce evidence in this case will you assume for that reason alone that the prosecution has ~~not~~ proven the guilt of the Defendant beyond any reasonable doubt?

22. The law requires you to vote for acquittal of Mr. Hewitt unless you are satisfied that the Commonwealth has proven every element of the charge beyond a reasonable doubt. Would any of you be unwilling or unable to abide by that principle of law in this case?

23. If you believe from the evidence that the Commonwealth had proven that there was a high probability that the Defendant was guilty, but had not quite proven beyond ^{to} any reasonable doubt that he was guilty, would you vote "not guilty" or "guilty"?

24. Do you understand that a finding of "not guilty" does not mean that you have found that the evidence proves that the Defendant is innocent, but that merely that the Commonwealth has failed to carry its burden of proving beyond reasonable doubt that the Defendant was guilty?

25. There may be many reasons why a Defendant does not testify, other than feelings of guilt, such as lack of education, fear of public speaking, speech defects, or advice of counsel, and the law says that a Defendant need not testify in his own behalf and the jury may not draw any inferences from his not testifying. Would any of you be unwilling or unable to abide by that principle of law in this case?

26. Do any of you believe that the mere fact that the Defendant has been indicted and is present in this court room makes it probable that he is guilty of the charge? If the Defendant decides not to put on any evidence, but to rely on the presumption of innocence which the law accords him, would you still be willing and able to vote "not guilty"?

if you believed the Commonwealth had not proven the guilt of the Defendant beyond all reasonable doubt? X

27. A Defendant in a criminal case may not be convicted unless the jury is ^{instructed} ~~unanimously convinced~~ that he is guilty beyond all reasonable doubt. Would any of you be unwilling or unable to abide by that principle of law in this case? X

28. How many of you feel that many persons who have committed crimes get off because of technical legal rules? X

29. How many of you would be more likely to believe a police officer than a person who is not a police officer, other factors being equal? X

30. How many of you believe that a police officer would never lie under oath in a criminal case? X

31. If you decide that the Commonwealth has not proven the guilt of the Defendant beyond all reasonable doubt, and therefore decide that you should vote "not guilty", and some, most or all of the other jurors decide that they believe that the Commonwealth has met its burden of proof in this regard, and that they will vote "guilty", would you be willing and able to stand firm on your vote of "not guilty" until and unless you actually change your mind and decide that you believe that the Commonwealth has proven the guilt of the Defendant beyond any reasonable doubt? X

32. There are three possible verdicts by the jury: "guilty", "not guilty", and "unable to reach a unanimous verdict" (hung jury). Is there any reason why you would be unwilling or unable to return any one of those three verdicts, X

depending on the evidence, the law given to you by the court, and the votes of the members of the jury on which you would be serving? 4

33. In the event that the jury you are sitting on was unable to reach a unanimous verdict, and reported that fact to the court, would you feel that you had succeeded or failed in following your jurors oath in light of the inability of your jury to reach a unanimous verdict?

34. Is there anything about the nature of this case that bothers any of you in any way that would affect your desire or ability to serve as a juror? If so, please explain.

35. How many of you would be able to be objective and unemotional in deciding this case even though 40 pounds of alleged marijuana is involved?

36. Does the knowledge that alleged marijuana is involved in this case make any of you feel differently at this time about the Defendant than you would if some other offense were involved instead?

37. Do any of you know of any reason why you could not sit as an impartial juror? Course

38. Is there anything else any of you want to tell the court that will help the court to discover whether you have any stereotypes or prejudgment in your mind that will affect your decision as a juror?

39. If you are chosen as a juror, how many of you will stand by your opinion based on the evidence that comes into the trial, even if you find that all or most of the other jurors disagree with you and express disapproval of

you for holding your opinion?

40. Would it be embarrassing to any of you or a member of your family, either in your neighborhood or at the place you work, if you sat on a jury in this case, and the jury acquitted Mr. Hewitt?

41. How many of you believe the Commonwealth's Attorney might prosecute an innocent man for a crime of this nature because he didn't realize that the man was innocent?

42. How many of you sincerely believe that right now William Hewitt is presumed innocent of the charge against him?

43. What is your occupation?

44. What is your educational background?

45. Where do you reside?

46. What is your marital status? Any children?

Ages of children?

47. What is your religion?

48. Are you affiliated with any particular political party, and if so, which party?

49. Do any of you have any hearing or sight problems which would affect your ability to see and hear the evidence in this case?

50. Do any of you have any difficulty in sitting for a long time because of some medical problem which the court should be aware of?

51. What civic organizations (Rotary, Lions, etc.) do you belong to?

52. If there comes a time where the jury decides unanimously that the Defendant is guilty of some offense

under the instructions of the court, you will need to consider sentencing under the instructions of the court. This could involve a sentence of up to 30 years in prison. If you believe that a sentence of 5 years is appropriate under the evidence, and another juror or jurors or all of the other jurors believe that some other sentence is appropriate, will you hold firm to your belief and refuse to compromise on the amount of sentence, until and unless you change your opinion as to what sentence is appropriate under the facts of the case? X

The Court informed the jury...
53. Do you understand that an appropriate sentence in the event of the conviction is not the average of the sentences suggested by all 12 jurors, but must be a sentence which all 12 jurors unanimously agree is appropriate under the facts of the case? ✓

54. Have any of you ever been inside of a jail or prison, for example as a visitor, as a member of an educational or government tour, as a consultant, as a nurse, or for any other purpose? X

55. How many of you would agree that persons who break the law should have a speedy and fair trial, and if guilty should receive punishment commensurate with their crime? X

The Court informed the jury...
56. How many of you would agree that every person who is accused of a crime should have a fair trial before a fair and impartial jury? X

57. How many of you would agree that the rehabilitation of a person convicted of a crime is an important factor to X

be weighed by a jury in determining a suitable sentence to
be imposed?