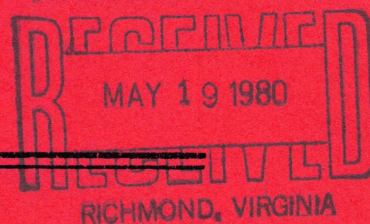


221 VA 513

CLERK
SUPREME COURT OF VIRGINIA



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO., 800375

WILLIE LLOYD TURNER,

.....Appellant

v.

COMMONWEALTH OF VIRGINIA,

.....Appellee

VOLUME I
JOINT APPENDIX

John C. Lowe
LOWE & GORDON
409 Park Street
Charlottesville, Va. 22903

Counsel for Appellant

Robert H. Anderson, III
Assistant Attorney General
830 E. Main Street
Richmond, Virginia 23219

Counsel for Appellee

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COMMONWEALTH OF VIRGINIA

COUNTY OF SOUTHAMPTON, to-wit:

IN THE CIRCUIT COURT OF SAID COUNTY:

April 16, 1979

The Grand Jurors of the Commonwealth of Virginia in and for the body of the County of Southampton, and now attending the Circuit Court for the said County, upon their oaths present: That on or about the 12th day of July, 1978, in the City of Franklin, Southampton County, Virginia, Willie Lloyd Turner did unlawfully, feloniously, wilfully, deliberately and with premeditation kill W. Jack Smith, Jr. while in the commission of a robbery while armed with a deadly weapon

Va. Code § 18.2-31 (d)

against the peace and dignity of the Commonwealth of Virginia.

THIS INDICTMENT found at the April Term, 1979, of the Circuit Court of Southampton County, on the evidence of Alan D. Bain

witnesses sworn and sent to the Jury by the Court.

STATE OF VIRGINIA

City of Franklin

} to-wit:

To the Sergeant or any Police Officer of said city to execute:

Whereas, Officer Alan D. Bain, Jr. of the said City,
has this day made complaint and information on oath before me, Elizabeth R.

Saunders, Clerk of the GENERAL DISTRICT COURT of the said
City, that Willie L. Turner in the said City did on the 12th. day of
July, 19 78, unlawfully, feloniously, willfully, deliberately and
premeditatedly, kill W. Jack Smith, Jr. in the commission of robbery while armed
with a deadly weapon, in violation of Sec. 18.2-31(d) of the Code of Virginia.

~~in violation of City Ordinance~~ against the peace and dignity of the Com-
monwealth of Virginia.

These Are, Therefore, To command you, in the name of the Commonwealth, to
apprehend and bring before the GENERAL DISTRICT COURT of the said City, the
body of the said Willie L. Turner to answer the said complaint
and to be further dealt with according to law. And you are also directed to
summon _____

_____, as witnesses.

Given under my hand and seal this 12th day of July, 19 78.

Elizabeth R. Saunders, Clerk of the GENERAL DISTRICT COURT (Seal)

The following witnesses are recognized to appear before the Circuit Court of
Southampton County on the _____ day of _____, 19____, under
penalty of \$ _____

STATE OF VIRGINIA—CITY OF FRANKLIN, to-wit:

I, _____ a _____ of the _____ Court _____ and _____ for the City aforesaid, in the State of Virginia, do certify that _____ and _____ as his suret _____, have this day acknowledged themselves indebted to the Commonwealth of Virginia in the sum of _____ Dollars (\$ _____) to be made and levied of their respective goods and chattels, lands, and tenements to the use of the Commonwealth to be rendered, yet upon this condition: That the said _____, shall appear before the _____ Court of _____ on the _____ day of _____ 19 _____

19 _____, at _____ M., at _____, Virginia, and at any time or times to which the proceedings may be continued or further heard, and before any court thereafter having or holding any proceedings in connection with the charge in this warrant, to answer for the offense with which he is charged, and shall not depart thence without the leave of said court, the said obligation to remain in full force and effect until the charge is finally disposed of or until it is declared void by order of a competent court; and upon further condition that the said _____ shall keep the peace and be of good behavior for a period of _____ days from the date hereof. Nonappearance shall be deemed to constitute a waiver of trial by jury.

Given under my hand this _____ day of _____ 19 _____

JUDGE
CLERK
DEPUTY CLERK

Fine - - - \$ _____
Costs - - - \$ 28.00
Total - - - \$ 28.00

_____, Judge
GENERAL DISTRICT COURT

NO BOND

original

Docket No. A 78-323

CITY OF FRANKLIN Warrant of Arrest

V. { Willie L. Turner
Age 32 Color Black
524 Bank St., Franklin, Va.
Address
Executed 7-12, 1978
By A. D. BAIN

Date 3/26, 1979
Upon the examination of the within charge, I find the accused _____

for other crimes
7/6/78 Received by right to come before court
to court for one of independent
general trial 7/31/78 to go to court
from prison report to court
set 11/13/78 trial

Thompson L. Woodward Jr. Pd
W. R. Savage, III, Pd

GRAND JURY

Date: March 26 1979 Upon an examination of the within charge, I find that the accused should be committed for trial on suspicion of a felony having been committed by him, and hereby certify the within case to the _____ 1979
Grand Jury of the Circuit Court of Southampton County, Virginia, to be further dealt with according to law.
J. B. K. King, Jr. Judge
General District Court

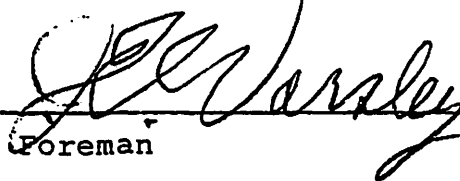
APPEAL

Date: _____ 19____, Upon an examination of the within charge, I find the accused guilty and fine him \$ _____ and \$ _____ costs and sentence him to serve _____ days in jail _____

The defendant having prayed for an appeal, and proper bond having been posted, the appeal is granted, execution of sentence is suspended and the case is hereby certified to the _____ 19____ term of the Circuit Court of Southampton County, Virginia, to be further dealt with according to law.

_____, Judge
General District Court
C. and P. Justice, C. J. F. \$ 10.00
Arrest, *trial fee* \$ 10.00
Fine, - - - \$ _____
Jail, - - - \$ _____
Bail, - - - \$ _____
Summoning Witnesses, - \$ _____
Ch. fee - \$ 2.00
Total. - - - \$ 22.00

We, the jury, in the case of Capital Murder, find the
accused guilty as charged in the Indictment.


Foreman

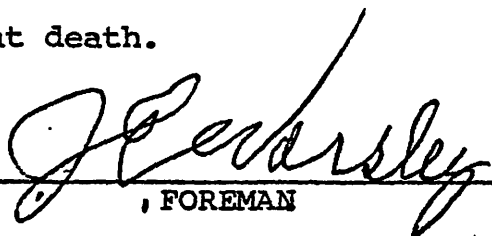
Cross out any paragraph, word or phrase
which you do not find beyond a reasonable doubt.)

We, the Jury, on the issue joined, having found the
defendant guilty of Capital Murder of W. Jack Smith, Jr., as
charged in the Indictment, and having found that,
after consideration of his past criminal record that there is
a probability that he would commit criminal acts of violence
that would constitute a continuing serious threat to society,

and/or

his conduct in committing the offense is outrageously or wantonly
vile, horrible or inhuman in that it involved torture, depravity
of mind; aggravated battery to the victim beyond the minimum
necessary to accomplish the act of murder,

and having considered the evidence in mitigation of the offense,
unanimously fix his punishment at death.



, FOREMAN

VIRGINIA: In the Circuit Court of Northampton County, the 6th day of February, 1980

Commonwealth

vs. #86-79

D.O.B. 12/9/45

Willie Lloyd Turner

This day came again the Attorney for the Commonwealth, and Willie Lloyd Turner, who stands convicted for a felony, to-wit: Capital Murder, was led to the bar in the custody of the jailer of this Court and came also Thomas L. Woodward, Jr., and W. Richard Savage, III, his attorneys heretofore appointed by the Court.

Whereupon, the attorneys for the defendant re-newed their motion to set aside the verdict of the jury on the grounds stated to the record, which motion was overruled and exception noted.

And the Probation Officer of this Court, to whom this case had been previously referred for investigation, appeared in open court with a written report, which report he had presented to the Court, and a copy thereof was delivered to counsel for the defendant at least five (5) days prior thereto.

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

Whereupon, the Court taking into consideration all of the evidence in the case, the report of the Probation Officer, the

additional facts as were presented by the defendant, and the arguments of counsel, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and the defendant having made his statement in response thereto, the Court doth confirm the verdict of the jury finding the defendant guilty of Capital Murder, as charged in the Indictment, and it is accordingly the judgment of the Court that the defendant is guilty of Capital Murder and hereby sentences the defendant to death as by the jury ascertained.

It is therefore ORDERED that the defendant be remanded to jail and from there to be taken to the penitentiary of the Commonwealth of Virginia and there, on the 6th day of August, 1980, to be put to death in the manner prescribed by law, unless this sentence is stayed or modified according to law.

The Court then informed the defendant that the judgment of this Court would be reviewed on the record by the Supreme Court of Virginia. The Court further informed the defendant of his right to appeal to the Supreme Court of Virginia for which purposes the Court doth appoint Thomas L. Woodward, Jr., and W. Richard Savage, III, to represent him and to protect his rights, both on review and on appeal.

It is further ORDERED that the transcript be made a part of the record in this case, and that the record of these proceedings, including the transcript of the evidence and incidents of trial, be transmitted to the Supreme Court of Virginia for review within ten (10) days after receiving the said transcript.

The Court Reporter is directed to prepare and deliver to the attorneys for the defendant a copy of the transcript to be delivered by them to the defendant, at no cost to the defendant.

The Court certifies that at all times during the trial of this case the defendant was personally present and his attorneys were likewise personally present and capably represented the defendant for which services they are allowed attorneys' fees of \$400.00 each.

It is ADJUDGED that the Commonwealth of Virginia do recover against the defendant its costs by it about its prosecution in this behalf expended in the amount of \$

And the defendant is remanded to jail to await transfer to the penitentiary.

Enter this 19th day of February, 1980.

A Copy
Teste:

Clerk

D.C.

Judge

By:

COMMONWEALTH OF VIRGINIA

COUNTY OF SOUTHAMPTON, to-wit:

IN THE CIRCUIT COURT OF SAID COUNTY:

April 16, 1979

The Grand Jurors of the Commonwealth of Virginia in and for the body of the County of Southampton, and now attending the Circuit Court for the said County, upon their oaths present: That on or about the 12th day of July, 1978, in the City of Franklin, Southampton County, Virginia, Willie Lloyd Turner did unlawfully and feloniously use a firearm, to-wit: a pistol in the commission of the murder of W. Jack Smith, Jr.

Va. Code § 18.2-53.1

against the peace and dignity of the Commonwealth of Virginia.

THIS INDICTMENT found at the April Term, 19 79, of the
Circuit Court of Southampton County, on the evidence of Alan D. Bain

witnesses sworn and sent to the Jury by the Court.

STATE OF VIRGINIA

City of Franklin

} to-wit:

To the Sergeant or any Police Officer of said city to execute:

Whereas, Police Officer Alan D. Bain, Jr. of the said City,
 has this day made complaint and information on oath before me, Elizabeth R.
Saunders, Clerk of the GENERAL DISTRICT COURT of the said
 City, that Willie L. Turner in the said City did on the 12th. day of
July, 19 78, unlawfully and feloniously did use (sawed off shotgun) in the
 perpetration of a crime of violence in violation of Sec. 18.2-300 A of the Code of
 Virginia.

in violation of City Ordinance and against the peace and dignity of the Com-
 monwealth of Virginia.

These Are, Therefore, To command you, in the name of the Commonwealth, to
 apprehend and bring before the GENERAL DISTRICT COURT of the said City, the
 body of the said Willie L. Turner to answer the said complaint
 and to be further dealt with according to law. And you are also directed to
 summon _____

_____, as witnesses.

Given under my hand and seal this 12th day of July, 19 78.Elizabeth R. Saunders, _____ of the GENERAL DISTRICT COURT (Seal)

The following witnesses are recognized to appear before the Circuit Court of
 Southampton County on the _____ day of _____, 19____, under
 penalty of \$ _____

GENERAL DISTRICT COURT

VIRGINIA:

IN THE CIRCUIT COURT OF SOUTHAMPTON COUNTY.

COMMONWEALTH OF VIRGINIA -----Plaintiff

v.

WILLIE LLOYD TURNER -----Defendant

PROPOSED QUESTIONS ON VOIR DIRE
ON BEHALF OF THE DEFENDANT

(1) Do you know anything about the facts of this case and the charges against Willie Lloyd Turner?

(2) Have you read, seen or heard any news articles of the facts of this case or the charges against the defendant?

(3) Have you heard anyone discuss this case in any way?

(4) Have you formed any opinions as to the guilt or innocence of the defendant, Willie Lloyd Turner?

(5) Have you formed any opinion as to what punishment Willie Lloyd Turner should receive if guilty?

(6) Are you related by blood or marriage to any person who is employed as a policeman or any other law enforcement officer?

(7) Have you or any members of your family been a victim of any crime of any sort? If so, what kind?

(8) (If the answer to the foregoing question is Yes, then ask the following:) Will the fact that you have been related to such a crime affect your ability to reach a fair and impartial verdict based on the evidence in this case?

(9) The defendant in this case, Willie Lloyd Turner, has been convicted of felonies on prior occasions and has previously served time in the penitentiary. Will those facts affect your judgment as to the guilt or innocence of the defendant or in determining the grade of the offense?

(10) The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

(11). Do you feel that if a person is to be given the death penalty for the unlawful killing of another person, such penalty should be given only if such killing is of the most severe and aggravated nature?

(12) Do you feel that every person convicted of the unlawful killing of another person should receive the death penalty?

(13). Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty?

(14) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if there is a probability that the person would commit criminal acts of violence that would constitute a continuing threat to society?

(15). Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder?



William R. Savage, III

William R. Savage, III
Glasscock, Gardy and Savage
Fourth Floor National Bank Building
Suffolk, Virginia

Thomas L. Woodward, Jr.
Attorney at Law
153 E. Washington Street
Suffolk, Virginia 23434

We, the jury, on the charge of Use of a Firearm in the commission of a felony, find the accused guilty as charged in the Indictment and fix his punishment at 1 year confinement in the Virginia State Penitentiary.


Foreman

VIRGINIA: In the Circuit Court of Northampton County, the 6th day of February, (30 (

Commonwealth

vs. #84-79

D.O.B. 12/9/45

Willie Lloyd Turner

This day came again the Attorney for the Commonwealth, and Willie Lloyd Turner, who stands convicted for a felony, to-wit: Use of a Firearm in the Commission of Murder, was led to the bar in the custody of the jailer of this Court and came also Thomas L. Woodward, Jr., and W. Richard Savage, III, his attorneys heretofore appointed by the Court.

Whereupon, the attorneys for the defendant re-newed their motion to set aside the verdict of the jury on the grounds stated to the record, which motion was overruled and exception noted.

And the Probation Officer of this Court, to whom this case had been previously referred for investigation, appeared in open Court with a written report, which report he had presented to the Court, and a copy thereof was delivered to counsel for the defendant at least five (5) days prior thereto.

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

Whereupon, the Court taking into consideration all of the evidence in the case, the report of the Probation Officer, the

additional facts as were presented by the defendant, and the arguments of counsel, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and the defendant having made his statement in response thereto, the Court doth confirm the verdict of the jury finding the defendant guilty of Use of a Firearm in the Commission of Murder, as charged in the Indictment, and it is accordingly the judgment of the Court that the defendant is guilty of Use of a Firearm in the Commission of Murder and is hereby sentenced to confinement in the penitentiary of the Commonwealth of Virginia for the term of one (1) year, and that the Commonwealth of Virginia do recover against the said defendant its costs by it about its prosecution in this behalf expended in the amount of \$

And it is further ORDERED that as soon as possible after the entry of this order the defendant be removed and safely conveyed according to law from the jail of this Court to the said penitentiary, therein to be kept, confined and treated in the manner provided by law.

The Court informed the defendant of his right to appeal to the Supreme Court of Virginia for which purpose the Court doth appoint Thomas L. Woodward, Jr., and W. Richard Savage, III, to protect his rights on appeal.

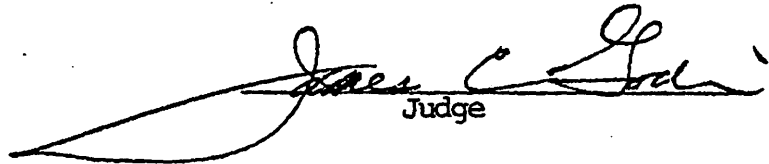
It is further ORDERED that the transcript of the evidence and incidents of trial be made a part of the record in this case.

The Court Reporter is directed to prepare and deliver to the attorneys for the defendant a copy of the transcript to be delivered by them to the defendant, at no cost to the defendant.

The Court certifies that at all times during the trial of this case the defendant was personally present and his attorneys were likewise personally present and capably represented the defendant for which services they are allowed attorneys' fees of \$200.00 each.

And the defendant is remanded to jail to await transfer to the penitentiary.

Enter this 19th day of February, 1980.


Judge

COMMONWEALTH OF VIRGINIA

COUNTY OF SOUTHAMPTON, to-wit:

IN THE CIRCUIT COURT OF SAID COUNTY:

April 16, 1979

The Grand Jurors of the Commonwealth of Virginia in and for the body of the County of Southampton, and now attending the Circuit Court for the said County, upon their oaths present: That on or about the 12th day of July, 1978, in the City of Franklin, Southampton County, Virginia, Willie Lloyd Turner did possess a "sawed-off" shotgun in the perpetration of a robbery of Alan D. Bain

Va. Code § 18.2-300 (A)

against the peace and dignity of the Commonwealth of Virginia.

THIS INDICTMENT found at the April Term, 1979, of the
Circuit Court of Southampton County, on the evidence of Alan D. Bain

witnesses sworn and sent to the Jury by the Court.

STATE OF VIRGINIA—CITY OF FRANKLIN, to-wit:

I, _____ a _____ of the _____ Court
for the City aforesaid, in the State of Virginia, do certify that _____ and
_____ as his suret _____, have this day acknowledged themselves indebted
to the Commonwealth of Virginia in the sum of _____ Dollars (\$ _____)
to be made and levied of their respective goods and chattels, lands, and tenements to the use of the Commonwealth to
be rendered, yet upon this condition: That the said _____ shall appear before the

Court of _____, on the _____ day of _____
19____, at _____, Virginia, and at any time or times to which the proceedings
may be continued or further heard, and before any court thereafter having or holding any proceedings in connection
with the charge in this warrant, to answer for the offense with which he is charged, and shall not depart thence with-
out the leave of said court, the said obligation to remain in full force and effect until the charge is finally disposed
of or until it is declared void by order of a competent court; and upon further condition that the said _____
shall keep the peace and be of good behavior for a period of _____
days from the date hereof. Nonappearance shall be deemed to constitute a waiver of trial by jury.

Given under my hand, this _____ day of _____, 19____

JUDGE
CLERK
DEPUTY CLERK

Grand Jury

NO BOND

ORIGINAL

Docket No. A 78-324

CITY OF FRANKLIN Warrant of Arrest

V.

Willie L. Turner

Age 32 Color Black

Address 524 Bank St., Franklin, Va.

Executed 7-12, 1978

By A. D. BAIN

Date 3/26, 1979

Upon the examination of the within
charge, I find the accused _____

for atty only
7/17/78 Released. Request to release
for defendant to court get me
if defendant - please write 7/18/78
to get me of own choice or report
to court.

11/13/78

Thomas J. Woodland, Jr. & P.
P. R. Savage, III, & P.

Fine	-	-	-	\$	—
Costs	-	-	-	\$	22.00
Total	-	-	-	\$	22.00

_____, Judge
GENERAL DISTRICT COURT

GRAND JURY

Date: March 21 1979 Upon an
examination of the within charge, I find that
the accused should be committed for trial on
suspicion of a felony having been committed
by him, and hereby certify the within case to
the April 1979
Grand Jury of the Circuit Court of South-
ampton County, Virginia, to be further dealt
with according to law.

J. B. King, Judge
General District Court

APPEAL

Date: _____ 19____, Upon an
examination of the within charge, I find the
accused guilty and fine him \$ _____
and \$ _____ costs and sentence him to
serve _____ days in jail _____

The defendant having prayed for an appeal,
and proper bond having been posted, the ap-
peal is granted, execution of sentence is sus-
pended and the case is hereby certified to the

_____ 19____ term
of the Circuit Court of Southampton County,
Virginia, to be further dealt with according
to law.

_____, Judge
General District Court

C. and P. Justice	C. I. F.	\$	10.00
Arrest	trial. per	\$	10.00
Fine,	-	\$	—
Jail,	-	\$	—
Bail,	-	\$	—
Summoning Witnesses,	-	\$	—
<i>Clerk per</i>	-	\$	2.00
Total.	-	\$	22.00

VIRGINIA:

IN THE CIRCUIT COURT OF SOUTHAMPTON COUNTY.

COMMONWEALTH OF VIRGINIA -----Plaintiff

v.

WILLIE LLOYD TURNER -----Defendant

PROPOSED QUESTIONS ON VOIR DIRE
ON BEHALF OF THE DEFENDANT

(1) Do you know anything about the facts of this case and the charges against Willie Lloyd Turner?

(2) Have you read, seen or heard any news articles of the facts of this case or the charges against the defendant?

(3) Have you heard anyone discuss this case in any way?

(4) Have you formed any opinions as to the guilt or innocence of the defendant, Willie Lloyd Turner?

(5) Have you formed any opinion as to what punishment Willie Lloyd Turner should receive if guilty?

(6) Are you related by blood or marriage to any person who is employed as a policeman or any other law enforcement officer?

(7) Have you or any members of your family been a victim of any crime of any sort? If so, what kind?

(8) (If the answer to the foregoing question is Yes, then ask the following:) Will the fact that you have been related to such a crime affect your ability to reach a fair and impartial verdict based on the evidence in this case?

(9) The defendant in this case, Willie Lloyd Turner, has been convicted of felonies on prior occasions and has previously served time in the penitentiary. Will those facts affect your judgment as to the guilt or innocence of the defendant or in determining the grade of the offense?

(10) The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

(11) Do you feel that if a person is to be given the death penalty for the unlawful killing of another person, such penalty should be given only if such killing is of the most severe and aggravated nature?

(12) Do you feel that every person convicted of the unlawful killing of another person should receive the death penalty?

(13) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty?

(14) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if there is a probability that the person would commit criminal acts of violence that would constitute a continuing threat to society?

(15) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder?



William R. Savage, III

William R. Savage, III
Glasscock, Gardy and Savage
Fourth Floor National Bank Building
Suffolk, Virginia

Thomas L. Woodward, Jr.
Attorney at Law
153 E. Washington Street
Suffolk, Virginia 23434

We, the jury, on the charge of Possession of a Sawed-off
Shot Gun in the commission of a felony as charged in the Indict-
ment, find the accused guilty and fix his punishment at _____

Guilty

J. J. C. C. C.
Foreman

Life imprisonment

VIRGINIA: In the Circuit Court of Northampton County, the 6th day of February, 1980

Commonwealth

vs. #85-79

D.O.B. 12/9/45

Willie Lloyd Turner

This day came again the Attorney for the Commonwealth, and Willie Lloyd Turner, who stands convicted for a felony, to-wit: Possession of a Sawed-off Shot Gun in the Commission of Robbery, , was led to the bar in the custody of the jailer of this Court and came also Thomas L. Woodward, Jr., and W. Richard Savage, III, his attorneys heretofore appointed by the Court.

Whereupon, the attorneys for the defendant re-newed their motion to set aside the verdict of the jury on the grounds stated to the record, which motion was overruled and exception noted.

And the Probation Officer of this Court, to whom this case had been previously referred for investigation, appeared in open Court with a written report, which report he had presented to the Court, and a copy thereof was delivered to counsel for the defendant at least five (5) days prior thereto.

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

Whereupon, the Court taking into consideration all of the evidence in the case, the report of the Probation Officer, the additional facts as were presented by the defendant, and the

arguments of counsel, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and the defendant having made his statement in response thereto, the Court doth confirm the verdict of the jury finding the defendant guilty of Possession of a Sawed-off Shot Gun in the Commission of Robbery, as charged in the Indictment, and it is accordingly the judgment of the Court that the defendant is guilty of Possession of a Sawed-off Shot Gun in the Commission of Robbery and is hereby sentenced to imprisonment in the penitentiary for life, and that the Commonwealth of Virginia do recover against the said defenant its costs by it about its prosecution in this behalf expended in the amount of \$

And it is further ORDERED that as soon as possible after the entry of this order the defendant be removed and safely conveyed according to law from the jail of this Court to the said penitentiary, therein to be kept, confined and treated in the manner provided by law.

The Court informed the defendant of his right to appeal to the Supreme Court of Virginia for which purpose the Court doth appoint Thomas L. Woodward, Jr., and W. Richard Savage, III, to protect his rights on appeal.

It is further ORDERED that the transcript of the evidence and incidents of trial be made a part of the record in this case.

The Court Reporter is directed to prepare and deliver to the attorneys for the defendant a copy of the transcript to be delivered by them to the defendant, at no cost to the defendant.

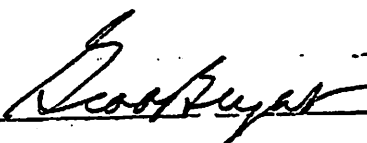
The Court certifies that at all times during the trial of

this case the defendant was personally present and his attorneys were likewise personally present and capably represented the defendant for which services they are allowed attorney's fees of \$400.00 each.

And the defendant is remanded to jail to await transfer to the penitentiary.

Enter this 19th day of February 1980.


Judge

A Copy
Tests:  Clerk
By: _____ D.C.

Instr #1

~~#1~~ *revised to*

INSTRUCTION 1

The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

Inst. #1A
REPUSSD

INSTRUCTION 1-A

The burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged against the defendant. It is not sufficient that the jury may believe his guilt probable, or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction, but the evidence must prove his guilt beyond a reasonable doubt. The jury shall not speculate or go outside of the evidence to consider what they think might have taken place, but you are to confine your consideration to the evidence introduced by the Commonwealth and unless you believe, upon a consideration of all the evidence before you, that guilt of the defendant has been proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him, then you shall find the defendant not guilty.

Doubles § 100.14

*Instr. 1-B
Revised*

INSTRUCTION 1-B

The defendant is presumed to be innocent of the offense with which he is charged and this presumption of innocence goes with him through the entire case and applies at every stage thereof and is sufficient to require you to find the defendant not guilty unless and until the Commonwealth upon whom the burden rests, proves his guilt beyond a reasonable doubt, and the Court further tells you that it is not sufficient that facts and circumstances proved be consistent with the guilt of the defendant, but they must be inconsistent with every reasonable hypothesis consistent with the innocence of the defendant.

Inst. 1C
Revised

INSTRUCTION 1-C

The Commonwealth must prove from the evidence beyond a reasonable doubt every material fact and if the jury have a reasonable doubt as to the grade of the offense, then they must resolve the doubt in favor of the defendant and find him guilty of the lower grade; if you have reasonable doubt as to whether the defendant is guilty of capital murder or murder in the first degree, you shall find him guilty of murder in the first degree.

ur 1-D
Remains

INSTRUCTION 1-D

An attempt is an intended, apparant, unfinished crime. It consists of an intent to commit the crime and the doing of some direct act toward its consummation without actually committing the crime itself.

Inst. 1 E
Revised

INSTRUCTION 1-E

The Court instructs the jury that to attempt to commit a crime has as its elements the intention of the defendant to commit the crime and a direct act by the defendant toward the commission of the crime, which act amounts to the beginning of the actual commission of the crime, but without completing the crime which the defendant has attempted to commit.

1-F
Revised

INSTRUCTION 1-F

The Court instructs the jury that if you believe from the evidence that the defendant was committing the crime of attempted robbery and the victim was shot and if you further believe from the evidence that the Commonwealth has proven beyond a reasonable doubt that the defendant intended to commit robbery and that he did a direct act toward the commission of the robbery which amounts to the beginning of the actual commission of the robbery, then you shall find the defendant guilty of murder in the first degree and affix his punishment at a term of imprisonment of not less than twenty (20) years to life in the penitentiary.

Inst. 4

~~Inst. 4~~

INSTRUCTION 4

The defendant is charged with the crime of unlawfully using a pistol in the commission of the murder of W. Jack Smith, Jr.. The Commonwealth must prove beyond a reasonable doubt each of the following elements:

- (1) That the defendant killed W. Jack Smith, Jr.; and
- (2) That the killing was unlawful; and
- (3) That the killing was done with a pistol.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at a term of imprisonment for one (1) year.

Instr. 8

~~11~~ 8 objected

INSTRUCTION 8

The defendant is charged with the crime of possessing a "sawed-off" shotgun in the commission of a crime of violence. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed a "sawed-off" shotgun in the commission of the crime of robbery of Alan Bain.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty and fix his punishment at a term of imprisonment for life or for any term of not less than twenty (20) years.

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

Instr. 10

~~10~~

INSTRUCTION 10

The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant killed W. Jack Smith, Jr.; and
- (2) That the killing was willful, deliberate and premeditated; and
- (3) That the killing occurred during the commission of *of W. Jack Smith, Jr.* robbery, while the defendant was armed with a deadly weapon

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

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

Iwsr. 12

~~12~~ 12

INSTRUCTION 12

You must not consider any matter that was rejected or stricken by the Court. It is not evidence and should be disregarded.

Instr. 13A
Revised

13 A Revised

INSTRUCTION 13-A

In another instruction of the Court, you were instructed that in order for the defendant to be found guilty of capital murder, the Commonwealth must prove beyond a reasonable doubt, among other things, that the murder occurred during the commission of robbery.

The Commonwealth must, therefore, prove beyond a reasonable doubt each of the following elements of robbery:

- (1) That the defendant intended to steal;
- (2) That money and jewelry were taken;
- (3) That the taking was from the owner or in his presence;
- (4) That the taking was against the will of the owner; and
- (5) That the taking was accomplished by violence and bodily harm.

The word "take" as used in this instruction means to lay hold of or seize and the Commonwealth must prove beyond a reasonable doubt that defendant did actually seize or lay hold of the money and jewelry.

If you find that the Commonwealth has failed to prove any one or more of the elements of the offense of robbery beyond reasonable doubt, then you shall find the defendant not guilty of capital murder.

Inst. 13 B
Response

13b *refuse*

INSTRUCTION 13-B

In another instruction of the Court, you heard that in a capital murder case one of the things that must be proven by the Commonwealth is that the murder occurred during the commission of robbery.

Therefore, if the murder occurred during an attempted robbery, you shall not find the defendant guilty of capital murder.

INST. 1
2ND SPACE

1

INSTRUCTION 1

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following alternatives:

- (1) That, after consideration of his past criminal record, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
- (2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

INSTR. 2
240 STAGU

2

INSTRUCTION 2

The Court instructs the Jury that when determining the punishment to be imposed for a conviction of capital murder, you shall consider/ the circumstances surrounding the offense, the history and background of the defendant, Willie Lloyd Turner, and any other facts in mitigation of the offense. Facts in mitigation, if proven by the evidence, may include, but shall not be limited to the following:

- (1) The capital felony was committed while the defendant, Willie Lloyd Turner, was under the influence of extreme mental or emotional disturbance; or
- (2) At the time of the commission of the capital felony, the capacity of the defendant, Willie Lloyd Turner, to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.

Instr. 3
2nd stage

#3

INSTRUCTION 3

Failure of the defendant to testify creates no presumption against him; and in considering the punishment to be imposed, his failure to testify is not a circumstance which the jury is entitled to consider.

Inst. 4
2nd since

4

INSTRUCTION 4

The Court instructs the jury that in this proceeding, as in the former where you determined the guilt of the defendant, the burden is upon the Commonwealth to prove each and every fact required for imposition of the death penalty, as set forth in other instructions of this Court, by evidence so strong, so clear, and so conclusive that there is left in the minds of the jury no reasonable doubt. Where the evidence is susceptible to two interpretations, one consistent with the imposition of the death penalty, and the other with the imposition of life imprisonment, you should not adopt that interpretation which is consistent with imposition of the death penalty.

If, therefore, upon a consideration of all the evidence, there exists in your minds a reasonable doubt as to any fact or conclusion you are required to find before the death penalty may be imposed, you shall recommend a sentence of life imprisonment.

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January 19, 1979

Richard C. Grizzard
Commonwealth's Attorney of Southampton County
Boykins, Virginia 23827.

W. R. Savage, III
Attorney at Law
P. O. Box 1876
Suffolk, Virginia 23434

FOR YOUR INFORMATION

Re: Willie L. Turner

Dear Mr. Grizzard and Mr. Savage:

Psychiatric evaluation on Mr. Turner has been completed. I interviewed him initially on November 27, 1978, again on December 14, 1978, and the final interview was on January 11, 1979. I also interviewed his sister, Esmon Thompson, on December 21, 1978, and psychological testing was performed by Dr. Sacks on December 29, 1978. You should already have transcripts from all the interviews. If not, please let me know and I will send them to you. I have also reviewed statements made by the witnesses as the jewelry store, as well as the FBI report, Dr. Dmitris's report, and X-ray report of November 21, 1978.

I feel that Mr. Turner is competent to stand trial. On January 2, 1979, I expressed to Mr. Grizzard that this was my general opinion, but at that time I was not sure whether any mental condition could interfere with his ability to use good judgement in deciding whether to enter a guilty or an innocent plea. One question I raised at this time was the expression of an innocent plea in spite of what appears to be overwhelming evidence against him, and whether there could be any delusional basis to his position. After evaluating him on January 11, 1979, and also after reviewing the psychological testing, he displayed the ability to use good judgement and there were no signs of him taking any delusional position in regard to his defense. This removed my last question regarding competency, and, as a result, I see Mr. Turner as being competent to stand trial. In regard to his mental condition, he shows sociopathic tendencies in his interviews, by his history, and in his psychological testing. In the first interview he showed some mild depressive tendencies which have subsequently improved. Some of his depression was related to his legal situation. I don't feel that depression is an especially

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significant problem. I don't feel it has any legal bearing on either on his competency or any relationship to deciding the question of sanity on July 12, 1978. The area in his evaluation which raised the greatest question was whether any paranoid and/or schizophrenic process was present. There is nothing to give a definite proof of schizophrenia and/or paranoia although some things in the evaluation raised a few questions in both of these areas.

First to address the question of schizophrenia, he did not display bizarre emotional affect seen in schizophrenia, was able to use abstract reasoning with interpersonal situations, and the psychological testing did not show any schizophrenic tendencies. Things in the evaluation which raised the question of schizophrenia included his history of isolating himself, and a history of auditory hallucinations. One cannot make a diagnosis of schizophrenia from these things alone, although the questions could be raised as to whether a latent schizophrenic process could be present which would show itself at times of stress. The patient was very guarded during the Rorschach portion of the psychological testing. This is a very useful test in evaluating schizophrenia, and someone with paranoid and schizophrenic tendencies might hold back at this point for fear of disclosing things about themselves. If he would more freely have performed the Rorschach portion of the test, and if this would not have shown schizophrenic symptoms, it would have been much more useful in ruling out schizophrenia. It does not appear that there is sufficient evidence from the evaluation to support the presence of even a latent schizophrenic process. Probably a few psychiatrists would diagnose Mr. Turner as having latent schizophrenia, but I feel that the great majority would not. He did not display any gross distortions of reality, and usually even with latent schizophrenia one would tend to see more symptoms by the age of thirty-three.

The next question was in regards to paranoia. Paranoia can be seen with schizophrenia, or it can be separate. His initial interview and the history from the sister gave quite a bit of information which gave some weight towards considering the presence of a paranoid condition. It is clear and very apparent that Mr. Turner is a very suspicious person, but the question in his evaluation was if this goes to the point of paranoia. Things in the interview which gave some weight towards the direction of paranoia included - hearing voices calling his name, feeling that something is plotted against him, a feeling that he is being watched and followed, scared and suspicious feelings, difficulty trusting people, feeling that he can predict the future, a tendency to use denial to block out intolerable thoughts, spells in which he feels "evil," explosive tendencies, his feelings of grandiosity in regards to losing his job at the barber shop, a tendency to see things out of the corner of his eye, nightmares just before going to sleep, a suspicion regarding the medication I prescribed for him,

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the fact that these suspicious tendencies improved after being treated with (Mellaril), his recent behavior of sitting on a sofa holding a gun and kissing and caressing and talking to it, his tendency to show strange behavior when under the influence of alcohol, his tendency to say that he was God and pretend that he was God to people, his feeling that people didn't like him and were jealous of him even though there was evidence to prove that that wasn't so, a feeling that his food in prison was being poisoned, a feeling that he would be dead before he left jail, an excessive preoccupation with control, and a preoccupation regarding homosexual assault. The preoccupation regarding homosexual assault may be related more to conditions in prison rather than paranoid makeup. Psychological testing did not show any paranoid tendencies, but instead showed him to be a very suspicious and calculating person without displaying any delusional quality in suspiciousness. I feel it is possible that Mr. Turner could show some paranoid symptoms at times of stress but these might not be present at other times when he was under a lesser degree of stress. When there is a lesser amount of stress, he may just appear to be highly suspicious, but not paranoid. Even at times of stress when he might display paranoid tendencies, there does not appear to be times when he has ever shown what we call a paranoid psychosis. He has always been aware that the voices were his imagination, and it is not clear that he has ever clung to any delusional systems.

Diagnostically, I see Mr. Turner as having an antisocial personality with a tendency to show paranoid tendencies at times of stress.

On July 12, 1978, there is no history to support that any unusual events happened that day to adversely effect Mr. Turner. It does appear that in the weeks prior to this time he had shown some tendencies towards regression. He did lose his job, was accused of assaulting a baby, was aggressive towards his girlfriend, police were called in because of his violent behavior, and he was upset about financial pressures. This could have layed the groundwork for some degree of regression - possibly the development of some paranoid tendencies, however, there is no evidence to support the presence of any psychotic behavior at this time. From reading the description of his behavior during the robbery, he did not make any statements which sounded psychotic. The policeman entering and announcing that the silent alarm had been set off did not result in any immediate impulsiveness on the part of Mr. Turner. One must consider the question of irresistible impulse in the shooting that he was obviously angry after he realized that the silent alarm had been set. He did not react to this immediately. He methodically continued the robbery, and then committed the murder. I spoke with Dr. Sacks about this point, and there

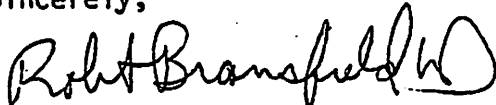
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was no proof to support the presence of an irresistible impulse causing the murder. The question could be raised as to whether or not Mr. Turner became acutely psychotic when he realized the silent alarm had been sounded, but I did not read statements from any of the witnesses which supported presence of an acute psychotic episode nor did Mr. Turner give me any history which would have supported the presence of an acute psychotic episode. It is, therefore, my impression that Mr. Turner may have had some paranoid tendencies on July 12, 1978, as he has been under some stress over the previous few weeks, but I do not feel he was psychotic nor do I feel that he responded to an irresistible impulse at the time of the murder. The paranoid tendencies may have had some impact on his behavior, but I do not feel this was to the degree where he would be unable to tell right from wrong or to maintain contact with reality or to prevent the manifestation of any irresistible impulse. how?

I feel continued treatment with Mellaril would be of benefit to him as it seems to have helped him since the evaluation was initiated. Enclosed are copies of pages from the American Psychiatric Association Diagnostic Manual which described some of the conditions I have made references to.

Sincerely,



Robert C. Bransfield, M.D.

ASSIGNMENTS OF ERROR OF APPELLANT
PURSUANT TO RULE 5:20

1. Pretrial publicity of subject case and another sensational murder required that subject case be continued.
2. The jury should have been sequestered throughout entire trial.
3. The jury should have been sequestered after the first stage of trial and during all portions of the second stage.
4. The voir dire should have been conducted by the attorneys, together with the Court, and each member of the jury panel should have been examined individually, rather than in groups of five.
5. In the alternative, and without waiving the foregoing assignment of error, each member of the jury panel who required further examination should have been examined outside the presence of the other members of the jury panel.
6. The Court's asking the members of the jury panel questions designed to determine whether or not they had an absolute predisposition against the death penalty was error.
7. In the alternative, and without waiving the above assignment of error, the Court should have asked all the questions on voir dire proposed by defendant.
8. The Court should have granted defendant's motion for mistrial based on the statement of juror, Cosby Kellam, on the voir dire.

9. The Court should not have allowed Mrs. Nina Depalo to be seated as a member of the jury panel after discovering that she had been the victim of a kidnapping.
10. The Court should not have struck from the jury panel, Samuel Cypress, who was not absolutely predisposed against the death penalty.
11. The Virginia death penalty statute is facially unconstitutional, and death penalty statutes in general, including that in Virginia, are unconstitutional as applied.
12. The Court erred in allowing the Commonwealth's witness, Judith R. Cosby, to make certain prejudicial and inadmissible statements.
13. The Court erred in admitting into evidence the victim's blood-stained shirt and undershirt. (Exhibit 8)
14. The Court erred in admitting into evidence three photographs of the victim's wounds. (Exhibits 10, 11 and 12)
15. The Court erred in not allowing defendant to question the Commonwealth's witness, Officer Alan D. Bain, Jr., on City of Franklin police procedures.
16. The Court erred in admitting into evidence a photograph of the bullet-hole in the victim's store building. (Exhibit 16)
17. The Court erred in refusing to strike the Commonwealth's evidence as to the capital murder indictment of murder during the commission of robbery and dismiss that charge because the robbery was not proven.

18. The Court erred in granting instruction 1, which is not a proper statement of the law on reasonable doubt.
19. The Court erred in refusing to grant instructions 1A, 1B, 1C, 1D, 1E, 13A, and 13B offered by defendant.
20. The Court committed error in its answer to the jury as to what the term "capital murder" means.
21. The Court erred in refusing to grant defendant's motion for a mistrial after the first stage of the proceedings because of the newspaper publicity related to the trial.
22. The Court erred in refusing to allow Dr. Robert Bransfield to testify that he did not find defendant legally insane or under the influence of an irresistible impulse.
23. The Court erred in refusing to admit Dr. Robert Bransfield's letter report of January 19th, 1979.
24. The Court erred in refusing to instruct the jury as to the presumption against the death penalty.
25. The Court erred in refusing to strike from consideration of the jury the sentence of death on the ground of "atrociousness".
26. The Court erred in refusing to set aside the verdicts of the jury convicting defendant of capital murder, and the use of a firearm in the commission of murder, in that the use of a firearm in the commission of murder is an essential element of the capital murder charged.
27. The Court erred in entering judgment on the jury's verdict

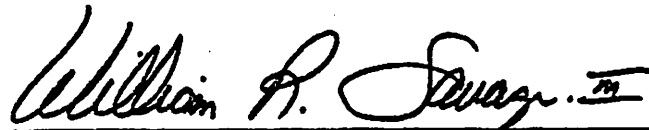
of death because the crime was not "atrocious" and there was no likelihood that defendant would be a threat to society in the future.

28. The sentence of the jury and the Court was imposed under the influence of passion, prejudice and/or the possibility that defendant would harm a jail inmate if allowed to live in jail or a citizen, if released.
29. The sentence of the jury and the Court was excessive.
30. The sentence of the jury and the Court was disproportionate to the penalty imposed in similar cases.

Respectfully submitted,

WILLIE LLOYD TURNER

By



Of Counsel

Thomas L. Woodward, Jr.
153 East Washington Street
Suffolk, Virginia 23434

William R. Savage, III
Glasscock, Gardy and Savage
Fourth Floor National Bank Building
Suffolk, Virginia 23434

Counsel for Appellant

1 (The reporter was sworn.)

2 THE COURT: All right, gentlemen.

3 Mr. Savage.

4 MR. SAVAGE: If Your Honor please, as the
5 Court knows, there was a rather violent and
6 horrible murder in Zuni, the area of Southampton/
7 Isle of Wight County, and that murder was widely
8 covered in the newspaper over here in the edition
9 of the Virginian-Pilot, as well as the verdict in
10 the Jimmy Smith case, which was another Suffolk
11 homicide case, and, for that reason, we ask that
12 this matter be continued until things have had a
13 chance to cool down, and we would submit these
14 allegations in support of that motion.

15 THE COURT: Mr. Grizzard, do you have any
16 comment?

17 MR. GRIZZARD: May it please the Court, if
18 you wait to try a case until such time as there is
19 no crime committed, you would never go to court.
20 I don't think that would have any bearing on the
21 way the jury would feel in this particular case.

22 THE COURT: All right, sir. I'm going to
23 file these in the record. I'm going to overrule
24 your motion and note your exception in the record.

25 MR. SAVAGE: At this point, Judge, we would

1 move that at all stages of this trial after the
2 jury is selected that the panel be sequestered all
3 day during all recesses, during the meal periods
4 and at night, beginning with their selection this
5 morning until this trial is completed. We know
6 that there has been another capital murder case on
7 the Eastern Shore -- the Mason case. We know that
8 has been widely discussed throughout the Shore.
9 We know that the people on the Shore are aware that
10 this case is being tried here today, and we think
11 it would be in the best interest of the defendant
12 if the jury be removed from the general population
13 until they have made their award; that they be
14 removed from the influence of family and friends
15 and people standing around who would offer their
16 opinion. We ask the sequestering of the jury
17 throughout this trial.

18 MR. GRIZZARD: May it please the Court, of
19 course, again, the Commonwealth takes the position
20 that the Court can adequately instruct the jury as
21 to their duties and what they are supposed to do
22 during the trial of a case; to refrain from the
23 reading of newspapers, watching TV or discussing or
24 letting the case be discussed with any member of
25 the jury or in his presence. Now, I think that

1 would be sufficient. If something would come up,
2 then the Court can properly rule on it at the
3 proper time. In some other cases, this issue has
4 been raised during trial. I don't see there is
5 any immediate necessity at this time to order
6 sequestering of the jury.

7 THE COURT: All right, gentlemen. I'm going
8 to overrule your motion at this time and note your
9 exception.

10 MR. SAVAGE: Judge, at this time, there is
11 an additional matter of the photographs. We don't
12 know what photographs he intends to introduce. We
13 have seen one photograph showing the place where
14 the victim was lying supposedly when he was shot.
15 Rather gory photograph. The Commonwealth has not
16 indicated whether or not that photograph will be
17 admitted. If it is, we intend to object to that on
18 the basis of the language that's contained in all
19 of these capital cases. It's contained in the Waye
20 case where that photograph was not really relevant.
21 It's not relevant unless there is some question
22 about premeditation, which is probably not in this
23 case, which there is some question about the
24 atrociousness of the crime, which is really not in
25 this case. All the evidence and all the facts, all

1 the elements of proof needed by the Commonwealth
2 can be established by the witnesses in this murder.
3 Unlike the others, there were four eyewitnesses to
4 the act. There won't be any problem establishing
5 what happened and exactly how it did happen. The
6 photographs showing a bloody scene or a nude body
7 riddled with bullet holes will only serve to
8 inflame the jury and adds nothing to the proof of
9 the Commonwealth. If those photographs are offered,
10 we would ask that they be excluded.

11 There is also the matter of the sketch
12 prepared by an officer of the police force, not to
13 scale, obviously distorted, obviously offering an
14 unrealistic view of the scene of the crime, and we
15 would move that that not-to-scale sketch be
16 excluded also.

17 MR. GRIZZARD: If it please the Court, the
18 Commonwealth would not offer the sketch into
19 evidence. At the time Dr. Presswalla is called upon
20 to testify, the Commonwealth does intend to offer
21 photographs at that time showing the body of
22 Mr. Smith. I have not seen the photographs. I
23 have been unable to get them from Dr. Presswalla.
24 I will not see them until today. I would suggest
25 to the Court that before the Court rules on that

1 particular point that we wait until the photographs
2 are available for the Court's inspection and for
3 inspection by defense counsel and the Commonwealth's
4 Attorney.

5 As to the other photograph, in particular,
6 that Mr. Savage is referring to showing the location
7 of the blood in the building, at this time, I
8 cannot tell the Court whether I intend to offer it
9 or not; but, in order that the Court may properly
10 be aware of it, if I do intend to offer it later on
11 in the trial, I will advise the Court and defense
12 counsel before I do so.

13 THE COURT: All right, sir. We will have to
14 wait until we see the pictures of the Medical
15 Examiner before I rule on it. You can make your
16 motion at that time to exclude them if you so
17 choose.

18 MR. SAVAGE: Our primary concern, Judge, is
19 that we not have to make the motion in the presence
20 of the jury in the event that the motion of the
21 Commonwealth is granted to admit the photograph.
22 It would just serve to draw attention.

23 THE COURT: Mr. Grizzard has agreed to offer
24 it out of the presence of the jury.

25 MR. GRIZZARD: I would advise the Court and

1 defense counsel before I decide.

2 THE COURT: He will do that so you won't
3 have to do it before the jury.

4 All right, gentlemen. What else do you
5 have?

6 MR. WOODWARD: Your Honor, on behalf of the
7 defendant, we would also move to dismiss the
8 indictment against him which alleges what is
9 commonly known as capital murder, in that the death
10 penalty itself is unconstitutional in its
11 application and constitutes cruel and unusual
12 punishment, in violation of Amendments 8 and 14 to
13 the Constitution of the United States; and, further,
14 to the Constitution of the Commonwealth of Virginia.

15 There are two arguments which are raised as
16 far as constitutionality of the death penalty, as
17 such, in Virginia, and one is the facial
18 constitutionality which I have just spoken to. The
19 second is the constitutionality as it is applied.
20 In Virginia, this point has been raised previously
21 before the Supreme Court in Waye v. Commonwealth.
22 The Commonwealth Attorney has unilaterally stated
23 what is the unbridled discretion in determining
24 those persons who will stand trial and face the
25 penalty of death and those persons who will face

1 trial with the penalty of incarceration.

2 I would point out to the Court that you, as
3 the Court, and Mr. Grizzard, as Commonwealth
4 Attorney, within the last several months have tried
5 a case in Southampton County, the same county where
6 this particular offense arose, in which a store
7 clerk was slain with a shotgun in the commission of
8 a robbery. In that particular case, the
9 Commonwealth Attorney chose not to ask for the
10 death penalty. In this case, we understand it is
11 his intention to ask for the death penalty. Of
12 course, that leaves him as the ultimate arbiter of
13 those persons. He will decide who will face the
14 death penalty and those who will not.

15 The death penalty in Virginia also
16 peculiarly almost is unconstitutional. It sets
17 forth the determination of those who will receive
18 the penalty of death, a dangerousness standard.
19 Now, Virginia is one of only three states which has
20 this particular standard. Besides Virginia, only
21 the States of Washington and Texas. The dangerous-
22 ness standard couches in somewhat general language
23 that one who is charged and faces the penalty of
24 death may be so sentenced if the jury decides or if
25 the Court decides without a jury that his continued

1 existence constitutes a continuing threat to
2 society.

3 Obviously, when one is asked to make that
4 determination, it is most difficult for him to do
5 so, for he must do what no man can do and that is
6 predict the future, and we submit to you that it is
7 unconstitutional to have such a vague and arbitrary
8 standard as dangerous as Virginia does have. I'm
9 aware that the Supreme Court has addressed that
10 particular question in Michael Marnell Smith v.
11 Commonwealth, which is reported in 209 Va. 455, and
12 that particular opinion cites the United States
13 Supreme Court case of Jurek v. Texas. That's
14 reported in 428 United States Reports, Page 262,
15 decided in 1976. Our point is that from 1976 until
16 the end of 1979, the application of statutes such
17 as Virginia, Texas and Washington, it has proven
18 that the application of that operates not only on
19 a logical basis but operates, really, on a basis
20 which man does not have; that is, to predict the
21 future, other than what may have occurred in the
22 past.

23 We would further say to the Court that the
24 death penalty or capital murder statute which
25 applies the death penalty as ultimate punishment is

1 unconstitutional in that its application in various
2 states which have adopted United States Supreme
3 Court applied-type statutes that those who are of
4 minority races such as the defendant in this case;
5 those who may suffer from other disabilities by
6 race such as Chicanos, for example, have been
7 disproportionately sentenced to death because of
8 their race; and, further, the race of the victim as
9 studied at Northeastern University in Boston has
10 been shown. We have those in greater detail and we
11 would ask the Court to allow us to submit them
12 subsequently.

13 I would indicate that in addition to the race
14 of the defendant in a particular case, the race of
15 the victim has a great deal to do with whether he
16 receives the death penalty or not. Those studies
17 which have been conducted in a number of states seem
18 to indicate that in cases where the victim, as in
19 this case, is white that a disproportionate number
20 of defendants are sentenced to death; that where
21 the victim is of a minority group, such as a black,
22 then very seldom is the death penalty applied and,
23 in its application, we state to you that the
24 constitutionality of the death penalty is seriously
25 questioned and we submit to you that in its

1 application it is unconstitutionally applied and
2 is violative of the applicable section of the
3 United States Constitution and the Constitution of
4 the Commonwealth of Virginia. Our motion,
5 therefore, is to dismiss the indictment charging
6 capital murder against the defendant in this case.

7 MR. GRIZZARD: Your Honor, without going
8 into a lengthy debate or argument as regards the
9 motion, everything that Mr. Woodward has put before
10 the Court has been ruled on by the Supreme Court of
11 the State of Virginia and has been turned down by
12 that Court. The only thing he brings up new today
13 is some report he indicates from Northwestern and
14 other states indicating, I think his statement was,
15 that the death penalty was inflicted on the basis
16 of race. I think you're taking figures and taking
17 them out of context and that is not evidence as
18 such in this particular matter. It's not for this
19 Court to consider. In Virginia, I think you would
20 have to take it on the cases in Virginia. I have
21 not looked at them to break down who is on Death
22 Row in Virginia and whether the victims are white
23 or black, but I think the statute in Virginia is
24 pretty clear that it doesn't say whether it was a
25 black man or white man who got killed or a black man

1 or white man who was the perpetrator of the crime.
2 The statute states certain prerequisites that have
3 to be met before the death penalty is imposed.
4 That statute is constitutional and has been set so
5 by the state.

6 MR. WOODWARD: The statement that I made
7 regarding the disproportionate application of the
8 death penalty is based on a study which, again, I
9 would state that we would like to submit
10 subsequently. We would like Mr. Grizzard to see it
11 and it was prepared by Northeastern University, not
12 Northwestern.

13 MR. GRIZZARD: Excuse me.

14 MR. WOODWARD: It was prepared there with
15 the idea that the race of the victim indicates
16 disproportionate application of the death penalty,
17 not only in one state, but in a number of states
18 where those studies have been conducted. I do not
19 know of my own knowledge the race of the victims in
20 Virginia who have had defendants sentenced to death.
21 There are, I believe, seven cases since our death
22 penalty statute was revised. My understanding is
23 that all those victims are white and certainly since
24 trials have been conducted since the Virginia
25 statute has been amended, I cannot conceive of no

1 blacks being killed, so our contention is the
2 application is disproportionate because of the
3 race of the victim and, therefore, that denies
4 equal protection and due process to the defendant.
5 That is the assertion of the Northeastern
6 University study and it's our assertion before you.
7 We would certainly be remiss, however, if we did
8 not state to the Court but for that point,
9 Mr. Grizzard....(unintelligible)

10 The other points that we have raised have
11 been either directly ruled upon by our Supreme
12 Court or at least laterally spoken to by that Court.
13 Certainly always favorable for the Commonwealth as
14 he has indicated.

15 THE COURT: Well, gentlemen, of course, our
16 Supreme Court has ruled on this question in
17 practically every case gone up and they have
18 clearly stated that the Virginia statute was
19 constitutional and I so rule at this time and note
20 your exception in the record.

21 MR. WOODWARD: Your Honor, may we preserve
22 the right to submit that study?

23 THE COURT: You can submit any study you
24 desire and I will file it as part of the record.

25 MR. GRIZZARD: Again, like Mr. Savage and

1 Mr. Woodward, before it's submitted in the
2 presence of the jury, I think he should submit it
3 to the Court for argument and discussion outside
4 the presence of the jury.

5 MR. WOODWARD: We don't intend to submit it
6 before the jury.

7 THE COURT: It won't be a matter taken up
8 before the jury. We're talking about matters of
9 law.

10 MR. WOODWARD: Question of law. That's for
11 the Court to decide.

12 THE COURT: All right, gentlemen. What
13 other questions do you have at this time?

14 MR. WOODWARD: Judge, we have a number of
15 questions concerning the voir dire of the jury
16 which is to be conducted subsequently, not only as
17 to the procedure which is to be used, but the
18 questions which are to be propounded. I don't know
19 whether the Court wishes the defendant to be
20 arraigned and then have us make our statements
21 concerning that or whether you would prefer that we
22 do so at this time.

23 THE COURT: You can proceed now if you so
24 choose.

25 MR. WOODWARD: Your Honor, the Court has

1 previously indicated to us in response to our
2 inquiry that it would conduct the voir dire of the
3 jury and the manner in which it would conduct the
4 voir dire is that it would take the jurors five at
5 a time -- potential jurors -- making certain
6 inquiries of them. Mr. Savage would speak, if he
7 may, to the inquiries which we're talking about.
8 My concern at this point is that as we have asked
9 previously that the Court reconsider its previous
10 statement to us and allow counsel to conduct the
11 voir dire with the Court, and I cite to the Court
12 Section 8.01-358 of the Code of Virginia, and that
13 states in part that the Court and counsel for
14 either party may conduct voir dire. Now, it's
15 stated in the conjunctive and not the disjunctive.
16 We certainly don't contend that the Court has no
17 right to conduct vir dire. The Bemeary (phonics)
18 case also says that we should have the right to
19 examine potential jurors. In death penalty cases,
20 you have peculiar questions which are asked. We
21 would concede if it were a question who is kin by
22 blood or marriage to the defendant or questions of
23 that nature, if the answer is readily known to the
24 potential jurors, there is no legitimate reason for
25 counsel to make the examination. In this case,

1 though, we're asking something of people which
2 really probes their soul and that's their feeling
3 as to the death penalty.

4 First of all, whether they have an automatic
5 objection to the death penalty in any case, which
6 is the exclusionary standard; but, in addition to
7 that, we contend we should be allowed to inquire of
8 them whether one believes that the death penalty
9 should be imposed in any case where murder is the
10 crime charged; whether it is in this case, as the
11 indictment alleges, murder in the commission of a
12 robbery or whether any type of murder which, of
13 course, is an unlawful killing. If the Court would
14 consider -- and I'm sure you have previously -- the
15 other cases decided since the amendment of our
16 death penalty statute -- Michael Marnell Smith. In
17 that case, counsel -- both Commonwealth Attorney
18 and defense counsel -- inquired of jurors and in
19 the Supreme Court opinion, we find that Mr. Person
20 and, I believe it was, Mr. Pugh, asked a particular
21 juror those proposed questions which allowed the
22 answers -- which allowed the Court subsequently to
23 make its finding as to whether that juror should be
24 allowed to be seated on a jury.

25 In all the cases, the seven which have been

1 decided since the amendment of the death penalty
2 statute, wherever there is a question of the
3 suitability of a juror or the exclusion of a juror,
4 the Supreme Court in this particular opinion has
5 always indicated, as I assume was the fact, that
6 counsel in addition to the Court inquired of the
7 juror. Now, we contend that the Supreme Court in
8 that statement is giving approval to that as a
9 method to determine whether jurors -- potential
10 jurors really are suited to serve. When you ask
11 someone what his feelings are on the death penalty
12 or whether he has an automatic objection to it,
13 then you're asking an individual directly again
14 what's in his heart, because it's a very serious
15 question and it's not one that people have a ready
16 answer for. When they ask them are they kin by
17 blood or marriage, they say no. It requires no
18 thought. It requires no probing of one's inner
19 feelings whatsoever.

20 Now, the Court intends, as you have indicated
21 to us, to take five at a time and ask those five
22 certain questions and, I submit to the Court, that
23 through experience I'm sure the Court has found
24 that jurors will sit and make no statement
25 whatsoever unless asked directly. I can recall the

1 situation in Suffolk where they asked several, "Do
2 you know the victim in this case?" And, finally,
3 we found out he knew the victim, but he sat there
4 and listened as the Court examined him. I say to
5 the Court that the better course and the one which
6 is indicated in Smith and these other cases where
7 the Supreme Court has talked about the exclusion of
8 jurors, is to take each potential juror individually
9 and to require that juror to respond to questions
10 which are propounded to him. First of all, the
11 questions propounded by the Court and, second of
12 all, the questions which are propounded by counsel
13 for the parties, both the Commonwealth Attorney and
14 Mr. Savage and me. I believe that the Court can
15 relegate us to certain questions which we can ask
16 and, in relegating us to these questions which we
17 might ask, then if a juror indicates reluctance as
18 they have so frequently to some question then
19 neither party is put upon, but, in fact, both
20 parties are assisted by knowing what the feelings
21 of the jurors are since he has had to respond
22 affirmatively or negatively to each question which
23 is asked of him.

24 I anticipate Mr. Grizzard's response. He's
25 going to say 8.01-358 is discretionary; that it

1 allows the Court and allows counsel -- says "may"
2 and once it says may then it's up to the Court to
3 decide. I submit to you that the intent of the
4 Legislature in that particular statute was to leave
5 the discretion of voir dire examination to counsel
6 and if counsel elected to make examination then it
7 has the right to do so, otherwise, Section 8.01-358
8 is meaningless. If the Court can say, "You want to
9 do it? I'm not going to let you do it," then 358
10 has no meaning or so I would submit to you.
11 Mr. Grizzard is going to say Rule 3A:20 of the
12 Rules of the Supreme Court states specifically that
13 the Court is the one that controls the situation,
14 but the rule of the Supreme Court fails when it
15 conflicts with the will of the Legislature as
16 expressed in Section 8.01-358. Our Supreme Court
17 some ten years ago spoke or tried to speak, I
18 assume, to this particular question.

2 In Harmon v. Commonwealth, 209 Va. 574,
19 decided in 1969, counsel in that particular case
20 asked the Court that he be permitted to examine the
21 jurors on their voir dire individually and he
22 indicated to the Court that his purpose was to
23 assist him in making preemptory challenges to
24 potential jurors. The trial judge took the position
25

1 that in accordance with the usual practice, the
2 question should be propounded to the jurors by him
3 -- meaning the Court -- and not by counsel for the
4 defendant. Counsel then stated that he had no
5 objection to the Court's asking the questions, but
6 insisted that they should be submitted to the
7 jurors individually rather than jointly. The trial
8 Court ruled that it would submit the relevant
9 questions to the jurors as a group and not
10 individually. Let me say at this point that we're
11 not going to be like counsel in Harmon. We do not
12 concede the point that we're making here. We're
13 not waiving whatever objection we do have. And the
14 Supreme Court went on stating specifically and in
15 that particular case it was speaking of Code
16 Section 8-199, which is the substantive precursor
17 of 8.01-358. Here's what the Supreme Court said on
18 Page 580. "Counsel, having agreed that the questions
19 on voir dire might be asked by the Court, the issue
20 before us is not whether counsel for the defendant
21 should have been permitted to question the jurors
22 individually, but whether the Court must do so."

23 The second case decided in 1969 is Dean v.
24 Commonwealth, 209 Va., Page 666. In that particular
25 case, the Court again spoke to voir dire

1 examination. In that particular opinion, at Page
2 668, this is what the Supreme Court said. "The
3 Court denied defense counsel's request that he be
4 permitted to examine each prospective juror
5 separately out of the presence of the other
6 prospective jurors. Counsel recognizes that
7 sequestration of prospective jurors usually lies
8 within the Court's discretion. Nevertheless, he
9 argues that because Dean was charged with a capital
10 offense that had caused 'considerable speculation,
11 discussion and comment in the community', the Court
12 abused its discretion by denying the request for
13 sequestration.

14 "Code Section 8-199, which governs the voir
15 dire, does not require sequestration of prospective
16 jurors." The Court goes on to indicate that, "It
17 lies within the discretion of the Court whether the
18 jurors should be sequestered or examined
19 individually." In neither of those two cases has
20 the Supreme Court said counsel for the defendant
21 does not have the right to examine the jurors. In
22 neither case has it indicated that that is within
23 the discretion of the Court.

24 As I read those two opinions, what it has
25 said in one, we don't decide it because counsel has

1 already conceded it's for the Court to do and,
2 therefore, discretionary for the Court, and the
3 other question is whether potential jurors must be
4 examined individually or whether they may be
5 examined as a panel or as part of the panel, and I
6 concede that Dean v. Commonwealth indicates that
7 sequestration is within your prerogative. We are,
8 therefore, asking in the exercise of your discretion
9 that they be examined individually. We are further
10 asking -- again, this is -- as I understand it --
11 has not been decided in either case -- that we be
12 allowed to conduct such voir dire of the potential
13 jurors as we deem to be the death penalty factor in
14 this case. We believe as counsel for the defendant
15 that we are uniquely situated to make that
16 examination, to determine whether there are jurors
17 who have some feeling of imposition of the death
18 penalty, contrary to that which the Legislature has
19 prescribed; and, further, to elicit from them such
20 responses as may assist the Court in removing these
21 jurors for cause; and, further, in assisting the
22 Commonwealth Attorney.

23 It is not a one-way street. It is a two-way
24 street. Mr. Grizzard has the same opportunity that
25 we have. We would, therefore, move that the voir

1 dire examination be conducted in accordance with
2 the request that we have made, to preserve any
3 objection which we do have, and we do not make the
4 concession that was made in the case of Harmon v.
5 Commonwealth.

6 MR. GRIZZARD: Your Honor, Mr. Woodward has
7 made reference to Rule 3A:20, Subsection (a),
8 "After the prospective jurors are sworn on the voir
9 dire, the Court shall question them individually or
10 collectively to determine whether anyone:" is and
11 it lists a series of questions which the Court must
12 ascertain regarding the bias, prejudice, prior
13 knowledge of the case and what-have-you. Then it
14 says, "Therefore, the Court, or counsel, with the
15 permission of the Court, may examine on oath any
16 prospective juror or may ask any question relevant
17 to his qualifications as an impartial juror." I
18 think the wording of Rule 3A:20 states quite clearly
19 that any individual examination of the jurors by
20 counsel is solely within the discretion of the
21 Court. I agree with Mr. Woodward, Harmon and Dean
22 have not gone to this one particular point. No
23 case that I am aware of has been to the Supreme
24 Court as to whether or not that is a right created
25 by statute permitting counsel in any criminal case

1 can ask individual questions on voir dire. It's
2 not been decided. This Court can only go on the
3 statute and on the rules of the statute. Section
4 8.01-358 viewed in conjunction with Rule 3A:20,
5 Subparagraph (a) indicate that it is a matter which
6 is within the sound discretion of the Court, and
7 as with all other matters within the discretion of
8 the Court, it's clear that it would not be reversed
9 unless there is a clear abuse of discretion by the
10 Court.

11 I would think that during the course of the
12 voir dire examination if the Court would overrule
13 it if some question arose then possibly you might
14 go to individual examination. As far as a practice
15 by counsel, it's not required by the statute.

16 MR. WOODWARD: Your Honor, if what
17 Mr. Grizzard says is correct, then the statute is
18 virtually meaningless. Again, we believe, by the
19 word "discretionary", the statement goes to
20 counsel's examination and not to the Court's. He
21 has stated correctly Rule 3A:20. We again state
22 to the Court that if a rule of Court is in
23 conflict with the statute then we submit that the
24 statute must control.

25 THE COURT: Well, gentlemen, I think the

1 voir dire and its method is within the discretion
2 of the Court. I'm going to ask the questions on
3 voir dire. I will place five jurors in the box and
4 question them in panels of five with the exception
5 of the question of the death penalty, which I will
6 ask each individual juror. Now, are there any
7 questions that you want the Court to specifically
8 ask the members of the jury on voir dire?

9 MR. WOODWARD: Your Honor, might we except
10 to the Court's ruling as to the method it will
11 follow?

12 THE COURT: I will overrule your motion and
13 note your exception in the record.

14 MR. WOODWARD: Mr. Savage has the questions
15 which we are asking to be propounded. We would ask
16 that Mr. Grizzard present his first since, of
17 course, he is the moving party.

18 MR. GRIZZARD: Your Honor, I have previously
19 submitted to the Court in the light of the Court's
20 instructions the two questions of the Commonwealth
21 that be asked on voir dire. For the record, I
22 would submit that, Your Honor, as the questions of
23 the Commonwealth.

24 THE COURT: All right, gentlemen.

25 MR. SAVAGE: Judge, in not one case that is

1 tried in the Commonwealth of Virginia or any other
2 state, to my knowledge, whether it be civil or
3 criminal, is any question asked of the jury as to
4 their feelings or their propensity to give or not
5 to give a certain punishment. In the former capital
6 cases, whether it was murder or robbery, no question
7 was asked of the jury whether or not they would or
8 would not give it -- whether they would give life
9 imprisonment; whether they would favor five or ten
10 years or jail sentence or any other options known
11 or unknown to a jury. In the capital murder case,
12 however, we find the Commonwealth posing the
13 question in which he wants to ask the jury whether
14 or not they have any objection to the death penalty.
15 If they answer the question he proposes to find out
16 whether their objection is absolute, the asking of
17 this question itself and the striking of any jurors
18 on the basis of the answer is a denial of this
19 defendant's right to due process, to equal
20 protection of the law compared with other criminal
21 cases, violation of the Fifth, Sixth and Fourteenth
22 Amendment to the federal Constitution and, despite
23 the fact that this matter has been ruled on by our
24 state Supreme Court, we move that this question not
25 be asked.

1 MR. GRIZZARD: Your Honor, again, I think
2 it's a standard question that's been asked. I know
3 it was asked in the death penalty cases that came
4 out of Southampton County and it was asked in one
5 that was not reversed. In Witherspoon v. Illinois,
6 it states that it's a proper area of inquiry
7 because the Commonwealth is entitled to know that
8 someone would absolutely refuse to vote against the
9 death penalty in a proper case and it's been upheld
10 by the Supreme Court of the United States.

11 MR. SAVAGE: By my reading of Witherspoon,
12 it does not say that question can be asked. Our
13 Court has seemed to interpret it that way, but we
14 feel that's not a proper interpretation of that
15 case.

16 THE COURT: All right. I'm going to overrule
17 your objection and note your exception in the
18 record.

19 MR. SAVAGE: Judge, without waiving our
20 objection and without taking inconsistent positions
21 and, specifically, reserving the objection to the
22 question which we would move to be deemed continuing
23 throughout every step of this proceeding in
24 selecting these jurors, we have suggested some
25 proposed questions which you may have a copy of

1 there. Do you have a copy of these questions?

2 THE COURT: Yes, sir. I'm marking this
3 filed and it will be made a part of the record.

4 All right, sir. Go ahead.

5 MR. SAVAGE: The last part of these
6 suggested questions has to do with the death penalty
7 and, as I understand the Court's ruling, the Court
8 is going to ask each member of the jury separately
9 whether or not they have any predisposition against
10 the death penalty and if they say, yes, they do,
11 then you're going to further ask them that they
12 absolutely not return a verdict for the death
13 penalty, regardless and irrespective of what the
14 death penalty involves. If they answer yes to that
15 question, they will not return a sentence of death,
16 then you're going to remove that juror for cause.
17 If that is going to be the case and if the
18 Commonwealth is going to attempt to select a jury
19 which is programmed and predetermined to return the
20 death penalty, then the defendant has the right to
21 remove from the jury for cause any juror which has
22 a predisposition to give the death penalty; and, in
23 fact, will give it in any case of homicide or
24 unlawful killing. We suggest that as the first
25 basis of our question.

1 Furthermore, counsel for defendant needs to
2 know exactly how each juror holds this belief in
3 order to take the strikes that we are allowed and
4 in order to know that the following questions --
5 the last few on the second page there -- address
6 themselves to just how deeply this belief goes.
7 Mr. Woodward suggested it's not possible for us to
8 make the determination or to find out what each
9 juror thinks on this subject without asking more
10 than just a simple, "Will you give it or will you
11 not give it?" Something of the situation presented
12 here has to be suggested to each juror and we feel
13 that these questions are proper and should be asked.
14 We feel that we should be permitted to ask them
15 ourselves. In light of the Court's ruling, we ask
16 that you propound each one of these questions to
17 each juror separately, specifically, as it is asked.
18 These questions have been prepared not at all
19 haphazardly, but after considerable thought in an
20 effort to determine whether or not there is a juror
21 on this panel which is going to give the death
22 penalty, regardless of the evidence.

23 Now, these are proper for a number of
24 reasons. As Your Honor knows, there are only a
25 very few cases in which the death penalty can be

1 given. This, according to Mr. Grizzard, is one of
2 them. We say that it's not; but, for purposes of
3 this argument, let's assume that it is one of them.
4 The general public, I'm sure, and even many lawyers
5 who haven't read the statute, which is relatively
6 new, do not understand that. There are many types
7 of capital homicide or homicide which do not carry
8 the death penalty. We need to know if the jurors
9 have a general understanding or general feeling
10 that any homicide should carry the death penalty.

11 Going one step further, the Commonwealth has
12 to prove a number of things. If the Commonwealth
13 proves murder in the commission of a robbery, that
14 does not in and of itself entitle the Commonwealth
15 to ask for the death penalty. He can ask for it,
16 but, to get it, he must prove the other two
17 elements as set forth in the Code. In other words,
18 it's a very restricted process and under that Code
19 section, if Your Honor please, if the Commonwealth
20 proves the probability that the defendant will
21 commit other acts or even if the Commonwealth proves
22 that there was a horrible, violent, inhuman act,
23 this jury still does not have to give the death
24 penalty. It is still an option. In other words,
25 it's presumed that every step along the way, even up

1 to the end, that the death penalty should not be
2 given and, therefore, if there is any juror that has
3 a predisposition towards it then that juror should
4 be removed and we ask that all of these questions
5 be asked.

6 MR. GRIZZARD: If it please the Court, the
7 list that's prepared, I assume it's the list with
8 the fifteen questions --

9 MR. SAVAGE: Right.

10 MR. GRIZZARD: -- that Mr. Savage and
11 Mr. Woodward have been kind enough to provide us a
12 copy of. The Commonwealth would object starting on
13 the second page with the question Number 10. The
14 general question on bias and what-have-you would,
15 I think, satisfy the requirements of Number 10.
16 Number One, this is not a rational case. There are
17 no rational overtones in the allegations of this
18 case. It's a simple case of whether or not the
19 defendant committed murder in the commission of a
20 robbery. The fact that you have got people of
21 different races -- victim and perpetrator -- is of
22 no consequence and I don't think is a proper
23 question of inquiry for the jury.

24 Questions 14 and 15 deal with really
25 instructions that would be pertinent in the second

1 stage of this bifurcated trial. The voir dire
2 question itself is couched in such a way as to ask
3 the juror on voir dire to make a determination as
4 to what his ultimate disposition of the case might
5 be at the end of the case without hearing any of
6 the evidence, without knowing any of the facts and,
7 I think, on that basis it's much too broad. It's
8 improper and it should not be asked. The
9 Commonwealth takes the same position as regards
10 Question Number 15. It's an attempt at this stage
11 to get a juror to commit himself to vote yes or nay
12 on the ultimate issue without hearing any facts or
13 knowing anything about the case.

14 Questions 11 and 12 and 13 again are asking
15 the jurors to -- in effect are attempting to put
16 the jurors on the defensive. If they answer, for
17 instance, in Number 13, "Do you feel that every
18 person convicted of an unlawful killing should
19 receive the death penalty?", if the juror is
20 selected and says no to that question and when the
21 times comes after the evidence has been presented
22 as to mitigation or extenuating circumstances, that
23 juror would be reminded in argument of his pledge
24 on voir dire and then he would be told that if he
25 said he wouldn't do it, he cannot do it. That's

1 the purpose of that type of question. It's to put
2 the jurors on the defensive. It goes to the
3 ultimate issue in the case and, again, the
4 objection to 11, 12 and 13 is that they are
5 improper. They are going to the ultimate issue
6 and are not eliciting proper information on voir
7 dire. The Commonwealth would object to everything
8 from 10 to 15.

9 THE COURT: How about 9?

10 MR. SAVAGE: Judge, we withdraw 9 on
11 defendant's motion.

12 THE COURT: That's what I was wondering.

13 MR. SAVAGE: No, sir. We proposed these
14 questions several months ago and we want 9 removed.

15 THE COURT: Gentlemen, as far as 10 through
16 15 are concerned, Question 10 has been ruled on by
17 the Supreme Court. I'm not going to ask that.
18 Eleven, 13, 14 and 15, I think they are covered
19 adequately and fully by instructions of the Court.
20 I don't think the jury should consider those at
21 this particular time. I will ask the question in
22 the nature of Number 12 as I also do not want a
23 person on the jury who feels that the death penalty
24 should be given in every case of unlawful killing
25 or homicide. Now, are there any other questions?

1 MR. SAVAGE: Note our exception to the
2 Court's ruling.

3 THE COURT: Yes, sir.

4 MR. WOODWARD: Would you excuse us just one
5 moment?

6 MR. SAVAGE: They more or less are in a
7 series, with each one stated slightly differently
8 than the other one and 12, of course, the second in
9 that series. If you're going to limit yourself to
10 one question, we would ask that instead of the
11 words "unlawful killing" that you use the word
12 "murder". There are many unlawful killings, but
13 we're talking about a murder.

14 THE COURT: All right. I'm going to
15 substitute that word in your question.

16 Now, gentlemen, do you want the defendant
17 arraigned at this time or do you want him arraigned
18 before the jury?

19 MR. WOODWARD: Your Honor, we would ask that
20 the defendant be arraigned now.

21 THE COURT: All right.

22 MR. CRIZZARD: Your Honor, I would ask that
23 such counts as he pleads guilty to that he be
24 rearraigned and plead in front of the jury.

25 THE COURT: Well, the question will be asked,

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be tried by a jury in these cases?

THE ACCUSED: Yes, sir.

THE COURT: Do you want to be tried by a jury?

THE ACCUSED: Yes.

THE COURT: And have you discussed this with your attorneys?

THE ACCUSED: Yes.

THE COURT: Now, are you ready for trial today?

THE ACCUSED: Yes, sir.

THE COURT: Are you satisfied with the services of your attorneys in these cases?

THE ACCUSED: Yes, sir.

THE COURT: Any questions that you would like to have the defendant answer, Mr. Woodward?

MR. WOODWARD: None that I can think of at this time, Your Honor.

THE COURT: Mr. Savage?

MR. SAVAGE: No, sir.

THE COURT: Is there anything further that you would like to say at this time?

THE ACCUSED: No, sir.

THE COURT: All right, sir. Be seated.

Now, gentlemen, the full jury panel will be

1 brought in and he will be, of course, asked the
2 question on arraignment if he has previously pled
3 not guilty to these charges and then we will take
4 the jury panel in groups of five. I will question
5 them on the voir dire. We will then, after we get
6 a panel of twenty, we will put four more people in
7 the box and we will get two alternates. You will
8 get one strike each on the four. Now, I prefer not
9 to have the alternates know that they are
10 alternates. Is that agreeable, gentlemen?

11 MR. GRIZZARD: Commonwealth agrees, Your
12 Honor.

13 MR. WOODWARD: We have no objection to the
14 procedure you intend to follow, preserving again
15 our objections previously made, overruled and
16 excepted as to the manner in which the voir dire is
17 being conducted.

18 THE COURT: That objection is continuing.

19 Let's take a short recess.

20 (The Court recessed at 11:05 a.m. The Court
21 reconvened at 11:15 a.m.)

22 THE CLERK: As I call the names of the
23 jurors, would you please answer to your name. Give
24 me your correct mailing address and the number of
25 miles just one way from your home to the courthouse.

1 Lloyd Turner did unlawfully, feloniously, wilfully,
2 deliberately and with premeditation kill W. Jack
3 Smith, Jr., while in the commission of a robbery
4 while armed with a deadly weapon, and you pled not
5 guilty. Do you wish to be tried by the jury or by
6 the Court?

7 THE ACCUSED: By the jury.

8 THE CLERK: A jury now to be called will
9 pass upon your trial now to be had and if you have
10 a mind to challenge any of them, you must do so as
11 they come to be sworn and you shall be heard.

12 Will the following please come forward:

13 Cosby Kellam, Virginia Merritt, Ora W. Holland,
14 Kathy Ellen Bailey, Bernice L. Mapp.

15 (The jurors were sworn on voir dire.)

16 THE COURT: Would you ladies and gentlemen
17 be seated in the jury box, please.

18 MR. WOODWARD: Your Honor, before you conduct
19 the examination of these potential jurors, may we
20 approach the bench?

21 (A side-bar conference was held by the Court
22 with counsel for both sides out of the hearing of
23 the jurors and the court reporter.)

24 THE SHERIFF: All jurors who are not being
25 examined at this time, will you please wait in the

1 hall.

2 (The remaining jurors were excluded from the
3 courtroom.)

4 THE COURT: I would like for the jurors to
5 identify themselves. When your name is called,
6 raise your hand so you may be identified, please.

7 (The jurors were identified.)

8 THE COURT: Ladies and gentlemen, the case
9 that you will hear today is one of Commonwealth of
10 Virginia versus Willie Lloyd Turner. Willie Lloyd
11 Turner is charged with the use of a firearm in the
12 commission of a felony. He's charged with
13 possession of a sawed-off shotgun in the
14 perpetration of a robbery. He is charged with
15 capital murder. He is charged with killing W. Jack
16 Smith, Jr., while in the commission of a robbery
17 while armed with a deadly weapon.

18 Now, these offenses are alleged to have
19 occurred on the 12th day of July, 1978, in the City
20 of Franklin, Virginia. Willie Lloyd Turner, the
21 defendant, is represented in these cases by
22 Mr. William R. Savage, from Suffolk, Virginia;
23 Mr. Thomas L. Woodward, Jr., from Suffolk, and the
24 Commonwealth of Virginia is represented in this case
25 by Mr. Richard C. Grizzard, Commonwealth's Attorney

1 for the County of Southampton.

2 Now, in the case of possession of a
3 sawed-off shotgun in the perpetration of a robbery,
4 it was the perpetration of a robbery of Alan D.
5 Bain.

6 Now, is there any member of the jury related
7 by blood or marriage to either of the attorneys
8 involved in this case, to the defendant or to the
9 alleged victims, either Alan D. Bain or W. Jack
10 Smith, Jr.?

11 Now, is there any member of the jury who has
12 any knowledge about the facts of this case?

13 Have you read or seen any articles in the
14 newspaper or have you heard through any news media,
15 radio, television, through any source, anything
16 about these cases?

17 Have you heard anyone discuss this case in
18 any way?

19 Now, are you related by blood or marriage to
20 any person who is employed as a police officer or
21 any other law enforcement agency?

22 Have you or any members of your family been
23 a victim of any crime?

24 Now, ladies and gentlemen, one of the charges
25 in this case, the alleged charge of murder of

1 W. Jack Smith, Jr., is a capital case and carries
2 the possibility of the death penalty, if convicted.

3 Now, Mr. Kallam, do you have any religious
4 or conscientious scruples or objections against the
5 imposition of a sentence of death?

6 MR. KELLAM: (Shaking head negatively.)

7 THE COURT: Mrs. Mapp, do you have any
8 religious or conscientious scruples or objections
9 against the imposition of a sentence of death?

10 MRS. MAPP: No, sir.

11 THE COURT: Mrs. Holland, do you have any
12 religious or conscientious scruples or objections
13 against the imposition of a sentence of death?

14 MRS. HOLLAND: No, sir.

15 THE COURT: Mrs. Bailey, do you have any
16 religious or conscientious scruples or objections
17 against the imposition of a sentence of death?

18 MRS. BAILEY: No.

19 THE COURT: Mrs. Merritt, do you have any
20 religious or conscientious scruples or objections
21 against the imposition of a sentence of death?

22 MRS. MERRITT: No.

23 THE COURT: Now, do any of you on this panel
24 -- do any of you feel that every person convicted
25 of murder of another person should receive the

1 death penalty?

2 Mr. Kellam?

3 MR. KELLAM: Speak that again, please.

4 THE COURT: Do you feel that every person
5 convicted of murder of another person should
6 receive the death penalty?

7 MR. KELLAM: In most cases.

8 THE COURT: Sir?

9 MR. KELLAM: In most cases.

10 THE COURT: Mrs. Mapp?

11 MRS. MAPP: I think it depends on the
12 circumstances.

13 THE COURT: All right.

14 Mrs. Holland?

15 MRS. HOLLAND: I do, too.

16 THE COURT: Mrs. Bailey?

17 MRS. BAILEY: Depends on the background.

18 THE COURT: Mrs. Merritt?

19 MRS. MERRITT: No. Not in every case, no.

20 THE COURT: All right.

21 MR. WOODWARD: May we approach the bench
22 again?

23 (A side-bar conference was held by the Court
24 with counsel for both sides out of the hearing of
25 the jurors and the court reporter.)

1 THE COURT: Mr. Kellam, are you of the
2 opinion that in every murder case, regardless of
3 what the facts may be, that the person if he is
4 convicted should receive the death penalty?

5 MR. KELLAM: If he has killed somebody.

6 THE COURT: Sir?

7 MR. KELLAM: If he has killed somebody. One
8 life -- the other fellow's life is as good as his.

9 THE COURT: All right, sir. You may stand
10 aside. Thank you, sir.

11 All right, Sheriff. Would you put the other
12 jurors in the jury room, please.

13 THE SHERIFF: In the jury room, sir?

14 THE COURT: Yes.

15 (Mr. Kellam was excused and the remaining
16 four jurors went into the jury room.)

17 THE COURT: Bring them back just one second,
18 Mr. Sheriff. I have got one more question that I
19 want to ask them.

20 (The four jurors returned to the courtroom.)

21 THE COURT: Be seated, ladies.

22 I want to ask you ladies, do any of you know
23 any reason whatsoever why you cannot render a fair
24 and impartial verdict in these cases, either for the
25 defendant or for the Commonwealth of Virginia? Do

1 any of you know why you cannot render an impartial
2 verdict in this case?

3 THE JURORS: No.

4 THE COURT: Do any of you know any reason
5 whatsoever why you should not sit as a member of
6 the jury in this case?

7 THE JURORS: No.

8 THE COURT: All right, Mr. Sheriff.

9 (The four jurors went into the jury room.)

10 * MR. WOODWARD: Your Honor, we have a motion
11 to make. We would move at this time for a mistrial
12 based upon the examination of Mr. Cosby Kellan, who
13 was a juror who nodded affirmatively when the Court
14 asked him about the imposition of the death penalty,
15 and he then indicated, "In most cases." The Court
16 on its motion inquired of him further. Necessarily,
17 his answer to your inquiry of the biblical standard,
18 although we submit erroneously, of an eye for an eye
19 and teeth for a tooth -- that's essentially what he
20 said -- necessarily prejudices the other four
21 persons who are seated there. This is the very
22 point we made on our motion that there be
23 individual voir dire of the jurors because you're
24 asking people about things which do not lend
25 themselves to easy answers. People cannot respond

1 yes or no to many of them. Mr. Kallam, as was
2 inquired by the Court, gave his explanation. We do
3 think that it is prejudicial as to the other four
4 jurors and, therefore, we would move for a mistrial
5 at this point.

6 THE COURT: I'm going to overrule the motion
7 for a mistrial and note your exception in the
8 record.

9 MR. WOODWARD: Your Honor, we would ask
10 again if the Court would consider examination of
11 all the jurors individually and if you will not
12 examine them individually, at such time as a juror
13 indicates in response to the two questions of real
14 substance that he has some question concerning it,
15 that the other jurors then be removed and the
16 examination of him be singular and that way there
17 will be no persuasion either way by one's statement,
18 whether it be favorable to the Commonwealth or
19 favorable to the defendant.

20 THE COURT: All right, sir. Do you have any
21 objection to Mr. Kallam sitting in the courtroom?

22 MR. WOODWARD: No, sir.

23 THE COURT: Bring the other five jurors in.

24 (The five jurors entered the courtroom.)

25 MR. WOODWARD: Mr. Clerk, would you read

1 their names slowly.

2 THE CLERK: I ask you all to raise your
3 right hand.

4 (The jurors were sworn on voir dire.)

5 THE COURT: Be seated in the jury box,
6 please.

7 THE CLERK: As I call your name, would you
8 just raise your right hand. James Warren Smith,
9 Ellen Chandler, James Smith, Jessie Moodie and
10 J. Ashby Lacato.

11 (The jurors were identified.)

12 THE COURT: Lady and gentlemen, the case
13 that we have here today -- the cases -- are
14 Commonwealth of Virginia versus Willie Lloyd Turner,
15 and the defendant, Willie Lloyd Turner, is
16 represented by Mr. William R. Savage of Suffolk,
17 and Mr. Thomas L. Woodward, Jr., of Suffolk. The
18 Commonwealth of Virginia is represented by
19 Mr. Richard C. Grizzard, Commonwealth's Attorney of
20 Southampton County, and the defendant is charged
21 with use of a firearm in the commission of a felony.
22 He's charged with possession of a sawed-off shotgun
23 in the perpetration of a robbery of Alan D. Bain.
24 He's charged with the capital murder of -- the
25 killing of W. Jack Smith, Jr., while in the

1 commission of a robbery while armed with a deadly
2 weapon.

3 Now, all of these offenses are alleged to
4 have happened on the 12th day of July, 1978, in the
5 City of Franklin, Virginia.

6 Now, are any of you related by blood or
7 marriage to any of the attorneys involved in this
8 case, to the defendant or to Alan D. Bain or W. Jack
9 Smith, Jr.?

10 Are any of you related to any of these
11 people?

12 Do any of you have any knowledge with
13 reference to these cases?

14 Have you heard them discussed?

15 Have you read, seen or heard any news
16 articles of the facts of this case or the charges
17 against the defendant?

18 Have any of you read anything or heard
19 anything or seen anything about these cases?

20 Have you heard anyone discuss this case in
21 any way?

22 Have any of you formed any opinion with
23 regard to the guilt or innocence of the defendant,
24 Willie Lloyd Turner?

25 Have you or any members of your family been

1 a victim of any crime?

2 Are you related by blood or marriage to any
3 person who is employed as a police officer or any
4 other law enforcement officer?

5 Now, one of the charges, the alleged charge
6 of murder of W. Jack Smith, Jr., is a capital case
7 and carries the possibility of the death penalty,
8 if convicted.

9 Mrs. Chandler, do you have any religious or
10 conscientious scruples or objections against the
11 imposition of a death sentence?

12 MRS. CHANDLER: Under some circumstances.

13 THE COURT: Could you in a proper case
14 impose the death penalty?

15 MRS. CHANDLER: I think if I felt that the
16 person --

17 THE COURT: Would you please just answer
18 yes or no, please.

19 MRS. CHANDLER: Yes. I guess I could.

20 THE COURT: Then is your objection to the
21 death penalty absolute?

22 MRS. CHANDLER: No.

23 THE COURT: Do you feel that every person
24 convicted of the murder of another person should
25 receive the death penalty?

1 **MRS. CHANDLER:** Yes.

2 **THE COURT:** Do you feel that regardless of
3 the facts in the case that in each case of murder
4 the defendant should receive the death penalty?

5 **MRS. CHANDLER:** No.

6 **THE COURT:** You do not?

7 **MRS. CHANDLER:** No.

8 **THE COURT:** Now, I will ask Mr. Smith seated
9 next to you, Mrs. Chandler.

10 **Mr. Smith,** do you have any religious or
11 conscientious scruples or objections against the
12 imposition of a sentence of death?

13 **MR. SMITH:** No, sir.

14 **THE COURT:** Do you feel that every person,
15 regardless of the evidence presented in the case,
16 who is convicted of murder of another should receive
17 the death penalty?

18 **MR. SMITH:** Yes, sir.

19 **THE COURT:** Do you feel that in every case,
20 regardless of the facts, that if a person is
21 convicted of murder he should receive the death
22 penalty?

23 **MR. SMITH:** Yes, sir.

24 **THE COURT:** Now, Mr. Smith, do you have any
25 religious or conscientious scruples or objections

1 against the imposition of the death sentence?

2 MR. SMITH: No, sir.

3 THE COURT: Do you feel that in every case,
4 regardless of the evidence, regardless of the facts,
5 if a person is convicted of murder he should
6 receive the death penalty?

7 MR. SMITH: No, sir.

8 THE COURT: Mr. Moodie --

9 MR. MOODIE: Sir?

10 THE COURT: -- do you have any religious or
11 conscientious scruples or objections against the
12 imposition of the death sentence?

13 MR. MOODIE: No, sir.

14 THE COURT: Do you feel that in each and
15 every case, regardless of the facts, where a person
16 is convicted of murder he should receive the death
17 penalty?

18 MR. MOODIE: No, sir.

19 THE COURT: Mr. Lecato -- did I pronounce
20 that correct?

21 MR. LECATO: Yes, sir.

22 THE COURT: Do you have any religious or
23 conscientious scruples or objections against the
24 imposition of death?

25 MR. LECATO: No, sir.

1 THE COURT: Do you feel that in each and
2 every case where a person is convicted of murder he
3 should receive the death penalty?

4 MR. LECATO: No, sir.

5 THE COURT: Now, do any of you know any
6 reason whatsoever why you cannot render a fair and
7 impartial verdict in this case?

8 Do any of you know any reason whatsoever why
9 you should not serve as a member of the jury in
10 this case?

11 MR. GRIZZARD: May counsel approach the
12 bench, Your Honor?

13 THE COURT: Yes.

14 (A side-bar conference was held by the Court
15 with counsel for both sides out of the hearing of
16 the jurors and the court reporter.)

17 THE COURT: All right, Sheriff. Would you
18 take these members of the jury panel.

19 (The jurors went into the jury room.)

20 THE COURT: All right, Mr. Grizzard.

21 MR. GRIZZARD: May it please the Court,
22 Commonwealth would ask that Mrs. Chandler be brought
23 back for further questioning. The answers she gave
24 to the Court's voir dire are equivocal at best and
25 confusing. I think she has not made a clear

1 statement whether she is absolutely against the
2 death penalty or not. That is if she has an
3 absolute objection to the death penalty, of course,
4 the Commonwealth would move to exclude her for
5 cause. In a series of -- her first answer -- I
6 don't have the exact words -- the implication was
7 that she is opposed to the death penalty. Then she
8 came back and said in answer to another question of
9 the Court, "In some circumstances it would be all
10 right." Then in answer to the third question
11 whether or not she could impose the death penalty,
12 she said, "I guess I could." I'm confused as to
13 whether she's opposed to it. I don't think anybody
14 could state with any certainty whether she has an
15 absolute objection to the death penalty.

16 MR. SAVAGE: If Your Honor please, further
17 questioning would only serve, one, to confuse the
18 matter more or attempt to rehabilitate her on
19 behalf of the Commonwealth. The question is really
20 does she have an irrevocable commitment and
21 predisposition against it. It's clear from the
22 answers to her questions her feelings are not
23 irrevocable and she is not predisposed against it.
24 I do not think she should be further examined or
25 removed for cause.

1 MR. GRIZZARD: I'm not asking that she have
2 a predisposition to vote for the death penalty.
3 The cases hold that we're entitled to jurors who do
4 not have absolute objections to the death penalty.
5 I don't think we have elicited enough information
6 from her to make that determination at this point.

7 THE COURT: Gentlemen, I think that the
8 juror has indicated that she did not have an
9 absolute disposition against the death penalty.

10 MR. GRIZZARD: Well, Your Honor, not to
11 prolong the argument, she said she's opposed to it.

12 THE COURT: Would you like for the court
13 reporter to read it back?

14 MR. GRIZZARD: I would. Yes, sir.

15 THE COURT: Would you read back the
16 questions.

17 (The following questions and answers were
18 read back by the court reporter:)

19 "THE COURT: Mrs. Chandler, do you have any
20 religious or conscientious scruples or objections
21 against the imposition of a death sentence?

22 "MRS. CHANDLER: Under some circumstances.

23 "THE COURT: Could you in a proper case
24 impose the death penalty?

25 "MRS. CHANDLER: I think if I felt that the

1 person --

2 "THE COURT: Would you please just answer
3 yes or no, please.

4 "MRS. CHANDLER: Yes. I guess I could.

5 "THE COURT: Then is your objection to the
6 death penalty absolute?

7 "MRS. CHANDLER: No.

8 "THE COURT: Do you feel that every person
9 convicted of the murder of another person should
10 receive the death penalty?

11 "MRS. CHANDLER: Yes.

12 "THE COURT: Do you feel that regardless of
13 the facts in the case that in each case of murder
14 the defendant should receive the death penalty?

15 "MRS. CHANDLER: No.

16 "THE COURT: You do not?

17 "MRS. CHANDLER: No."

18 MR. GRIZZARD: That's just the point, Judge.
19 Her first answer about religious or conscientious
20 objections to the death penalty, she says, "In some
21 circumstances." I think we need to find out what
22 religious or conscientious scruples or objections
23 she would have to the imposition of the death
24 penalty, Number 1. Her answers are confusing and
25 contradictory all the way through. You asked the

1 same question twice, "Do you feel that all persons
2 who are convicted of murder should receive the
3 death penalty?" She says yes and says no the very
4 next time. I don't think we have elicited enough
5 information from that prospective juror for anybody
6 to make a determination as to whether or not she
7 would qualify to sit on a capital murder case. I
8 would ask that she be brought back to be asked
9 further questions.

10 MR. SAVAGE: Judges, the only purpose that
11 could be served to ask her more questions is for her
12 to say unequivocally, yes, she would give the death
13 penalty, and would only make it firmer in her mind
14 that's what is expected of her. There is no
15 question that she understood your question about
16 absolute predisposition and she answered no. It's
17 also obvious she wanted to explain to you she will
18 consider the evidence and will apply it in the
19 proper case and she will not apply it if it's not
20 the proper case. That's the kind of a jury we're
21 looking for.

22 MR. GRIZZARD: I appreciate Mr. Savage's
23 explanation as to what she was going to explain to
24 the Court. I would like to hear what she was going
25 to explain to the Court. The Court would not let

1 her explain the answer and I think this is what we
2 need to find out. I would ask again that she be
3 brought back for further examination.

4 THE COURT: Well, gentlemen, I'm satisfied
5 that the jury has no preconceived ideas about the
6 absolute imposition or not imposing the death
7 penalty. I feel under proper instruction she can
8 render a fair and impartial verdict in the case. I
9 note the Commonwealth's exception.

10 MR. GRIZZARD: Please.

11 THE COURT: James Henry Smith will be excused.

12 (James Henry Smith was excused from the jury
13 panel.)

14 MR. GRIZZARD: May counsel approach the
15 bench, Your Honor?

16 THE COURT: Yes.

17 THE SHERIFF: Deputy Snaw, the next five.
18 Come right on up to the Clerk's desk.

19 (The five jurors entered the courtroom.)

20 THE CLERK: I ask that you all raise your
21 right hand.

22 (The jurors were sworn on voir dire.)

23 THE COURT: Would you ladies and gentlemen
24 have a seat in the jury box, please.

25 THE CLERK: As I call your names, would you

1 raise your right hand. Clarastine Spady, Nora
2 Pearson, Albert T. Christian, Juanita Ruth Ward and
3 Nina Depalo.

4 Thank you.

5 (The jurors were identified.)

6 THE COURT: Ladies and gentlemen, the cases
7 that we will try here today are those of
8 Commonwealth of Virginia versus Willie Lloyd Turner.
9 Willie Lloyd Turner is charged with use of a firearm
10 in the commission of a felony, the murder of W. Jack
11 Smith, Jr. He's charged with possessing a sawed-off
12 shotgun in the perpetration of a robbery of Alan D.
13 Bain. He's charged with the capital murder of
14 W. Jack Smith, Jr., in the Commission of a robbery
15 while armed with a deadly weapon.

16 Now, the defendant, Willie Lloyd Turner, is
17 represented in these cases by Mr. William R. Savage
18 of Suffolk, Virginia; Mr. Thomas L. Woodward, Jr.,
19 of Suffolk, Virginia. The Commonwealth is
20 represented by Mr. Richard C. Grizzard of
21 Southampton County.

22 Now, is there any member of the jury related
23 by blood or marriage to any of the attorneys, to the
24 defendant, Willie Lloyd Turner, to Alan D. Bain or
25 W. Jack Smith, Jr.?

1 Do any of you have any knowledge with
2 reference to these cases?

3 Have you heard anyone discuss any of these
4 cases?

5 Have you read, seen or heard anything
6 through any news media whatsoever? Have you read
7 or heard anything about these cases?

8 Have any of you formed any opinion as to the
9 guilt or innocence of the accused?

10 Are any of you related by blood or marriage
11 to any police officer or anyone employed in law
12 enforcement?

13 Have you or any members of your family been
14 a victim of any crime?

15 (Juror raising hand.)

16 THE COURT: Would you state your name, please.

17 PROSPECTIVE JUROR: Nina Depalo.

18 THE COURT: Would the fact that you have had
19 this particular crime related to you or a member of
20 your family affect your ability to reach a fair and
21 impartial verdict in this case?

22 MRS. DEPALO: I don't believe so.

23 THE COURT: Can you say yes or no?

24 MRS. DEPALO: No, it wouldn't affect me.

25 THE COURT: All right.

1 Now, Mrs. Spady, one of the charges, the
2 alleged charge of murder of W. Jack Smith, Jr., is
3 a capital case and carries the possibility of the
4 death penalty, if convicted.

5 Now, do you have any religious or
6 conscientious scruples or objections against the
7 imposition of the sentence of death?

8 MRS. SPADY: (Long pause.)

9 THE COURT: I didn't hear that. Did you say
10 yes or no?

11 MRS. SPADY: No.

12 MR. GRIZZARD: I didn't hear the answer,
13 Your Honor.

14 THE COURT: No.

15 Now, do you feel that every person convicted
16 of murder, regardless of the facts or circumstances,
17 should receive the death penalty?

18 MRS. SPADY: Do I believe that every person
19 should receive the death penalty?

20 THE COURT: Yes.

21 MRS. SPADY: No, I don't think they should.

22 THE COURT: You don't think so?

23 MRS. SPADY: (Shaking head negatively.)

24 THE COURT: Mr. Christian, do you have any
25 religious or conscientious scruples or objections

1 against the imposition of the sentence of death?

2 MR. CHRISTIAN: No, sir.

3 THE COURT: Now, do you feel that in every
4 case, regardless of the facts and circumstances,
5 where a person is convicted of murder he should be
6 given the death sentence?

7 MR. CHRISTIAN: No, sir, I don't.

8 THE COURT: Mrs. Pearson, do you have any
9 religious or conscientious scruples or objections
10 against the imposition of the death penalty?

11 MRS. PEARSON: No, sir.

12 THE COURT: Do you feel that in every case,
13 regardless of the facts and circumstances, where a
14 person is convicted of murder he should be given
15 the death penalty?

16 MRS. PEARSON: Not every case, sir.

17 THE COURT: Mrs. Ward, do you have any
18 religious or conscientious scruples or objections
19 against the imposition of the death penalty?

20 MRS. WARD: No, sir.

21 THE COURT: Do you feel that in each and
22 every case where a person is convicted of murder he
23 should be given the death penalty?

24 MRS. WARD: Not in every case.

25 THE COURT: Mrs. Depalo, do you have any

1 religious or conscientious scruples or objections
2 against the imposition of the death penalty?

3 MRS. DEPALO: No, sir.

4 THE COURT: Do you feel that in every case
5 of murder, regardless of the facts or circumstances,
6 the death penalty should be imposed?

7 MRS. DEPALO: No, sir.

8 THE COURT: Now, do any of you ladies or
9 gentlemen know of any reason whatsoever why you
10 cannot render a fair and impartial verdict in these
11 cases, either for the defendant or the Commonwealth
12 of Virginia?

13 Do any of you know any reason whatsoever why
14 you should not serve as a member of this jury?

15 Mr. Sheriff.

16 THE SHERIFF: Come and wait out here in the
17 jury room, please.

18 (The jurors went into the jury room.)

19 MR. WOODWARD: Your Honor, of that group of
20 five, Nina Depalo indicated in response to your
21 question, as I understand the question or answer,
22 that a member of her family had been the victim of
23 a crime. We believe that we're entitled to know
24 what crime a member of her family was a victim of.

25 MR. GRIZZARD: If it please the Court, I

1 think they would be entitled to ascertain that on
2 voir dire and would have no objection.

3 Before you bring her back, Sheriff,
4 Clarastine Spady gave the Court an ultimate answer
5 as to whether or not she had a religious or
6 conscientious objection to the death penalty. I
7 think the Court could tell from the way she agonized
8 over that decision that there is some question in
9 her mind and I would ask the Court to bring her back
10 for further examination on that particular point
11 and have her explain her position again. I know she
12 answered in the final, ultimate conclusion as no,
13 but I think the way that she acted and the way she
14 responded to the Court's question is cause for
15 further examination.

16 MR. WOODWARD: Mr. Grizzard wants you and
17 the rest of us to become psychologists. She was
18 the first of the five who was asked the question.
19 The other four have had the opportunity to have
20 heard the questions and made their responses. It
21 is a difficult question and the fact that she
22 thought about it or took some time to respond
23 certainly doesn't indicate that she was unknowing
24 of what your question means or unknowing of her
25 response. I think it is a question that she thought

1 about and gave the unequivocal response to you.

2 MR. GRIZZARD: Judge, again, I think the
3 spoken word is one thing and the picture is
4 something else. They are entitled to a fair jury
5 and so is the Commonwealth. I think clearly from
6 her actions on that witness stand there is serious
7 question whether she could vote for the death
8 penalty in a proper case. I think we're entitled
9 to know what her feelings are.

10 THE COURT: Gentlemen, we are all looking
11 for an impartial jury. Now, the juror has stated
12 and it's a difficult question, there is no two ways
13 around it, and it's more difficult for some people
14 to answer than others, but when they answer the
15 question they know, of course, the Court is not
16 going to go back into it and try to clarify answers
17 or maybe get them to give reasons. I will bring
18 Mrs. Depalo back for her question, but I will not
19 bring Mrs. Spady back. I'm satisfied with her
20 answer.

21 MR. GRIZZARD: Will you note the
22 Commonwealth's exception to that, Your Honor?

23 THE COURT: Bring Mrs. Depalo in.

24 (Mrs. Depalo entered the courtroom.)

25 THE COURT: Mrs. Depalo, I asked you a short

1 while ago whether you or any member of your family
2 had been the victim of a crime. Would you state,
3 please, what that crime was.

4 MRS. DEPALO: I was kidnapped.

5 THE COURT: All right. Thank you.

6 (Mrs. Depalo went into the jury room.)

7 MR. WOODWARD: Your Honor, Mrs. Depalo
8 has indicated that she was kidnapped -- the victim
9 of a crime. She certainly has been the victim of
10 a most serious crime if she has been kidnapped
11 against her will. We submit to you that given the
12 facts as we understand from the Commonwealth
13 Attorney will be presented, one who is the victim
14 of a serious crime, as this kidnapping, certainly
15 has a predisposition to impose some penalty that
16 she may not otherwise impose. I think she's been
17 very forthright in making the statement to you.
18 We believe that is grounds for her being excused
19 from this particular panel.

20 MR. GRIZZARD: Your Honor, I know of no
21 grounds to excuse her for cause. The Court went
22 further in questioning and asked her specifically
23 if that would affect her verdict or thinking in any
24 criminal case and she answered unequivocally that
25 it would not. I think that's the answer to the

1 case.

2 THE COURT: All right. I'm satisfied with
3 that. I will note your exception, Mr. Woodward.

4 THE SHERIFF: The next five, Deputy Snaw.

5 (The five jurors entered the courtroom.)

6 THE CLERK: I ask you to raise your right
7 hand.

8 (The jurors were sworn on voir dire.)

9 THE SHERIFF: Have a seat right here in the
10 jury box, please.

11 THE CLERK: As I call your names, would you
12 please just raise your hand momentarily. Sarah
13 Preston Worrell, Charles R. Roselle, Ellen F.
14 Camden, Norman Parks, Louise R. Taylor.

15 Thank you.

16 (The jurors were identified.)

17 THE COURT: Ladies and gentlemen, the cases
18 that we will try here today are Commonwealth of
19 Virginia versus Willie Lloyd Turner. Willie Lloyd
20 Turner is charged with use of a firearm in the
21 commission of a felony, murder of W. Jack Smith,
22 Jr. He's charged with possessing a sawed-off
23 shotgun in the perpetration of a robbery of Alan D.
24 Bain. He's charged with the capital murder of
25 W. Jack Smith while in the commission of a robbery

1 while armed with a deadly weapon.

2 Now, the defendant, Willie Lloyd Turner, is
3 represented in these cases by Mr. William R. Savage
4 and by Mr. Thomas L. Woodward, Jr. The
5 Commonwealth is represented by Mr. Richard C.
6 Grizzard, Commonwealth's Attorney of Southampton
7 County.

8 Now, is there any member of the jury related
9 by blood or marriage to either of the attorneys, to
10 the defendant, Willie Lloyd Turner, Alan D. Bain,
11 or W. Jack Smith, Jr.?

12 Are any of you related to any of these
13 people?

14 Do any of you have any knowledge with
15 reference to these cases?

16 Have you heard anyone discuss these cases?

17 Have you formed any opinion with regard to
18 the guilt or innocence of the accused, Willie Lloyd
19 Turner?

20 Have any of you read anything -- heard
21 anything or seen anything on any of the news media
22 with reference to these cases?

23 Have any of you read anything in the
24 newspaper, heard anything, seen anything in any news
25 media?

1 Are any of you related by blood or marriage
2 to any person who is a police officer or involved
3 in law enforcement?

4 Have you or any member of your family been
5 the victim of a crime?

6 Now, one of the charges, the alleged charge
7 of murder of W. Jack Smith, Jr., is a capital case
8 -- a capital offense -- and carries the possibility
9 of the death penalty, if convicted.

10 Now, Mr. Roselle, do you have any religious
11 or conscientious scruples or objections against the
12 imposition of the death penalty?

13 MR. ROSELLE: No, I guess not.

14 THE COURT: Would you say yes or no, please?

15 MR. ROSELLE: No.

16 THE COURT: Now, do you feel that in any
17 case, regardless of the facts or circumstances, if
18 a person is convicted of murder that there should
19 be the death penalty?

20 MR. ROSELLE: I don't know, sir.

21 THE COURT: Did you say yes or no?

22 MR. ROSELLE: Well, I said I didn't know.

23 THE COURT: What I'm asking you, sir, do you
24 feel in every case of murder the defendant should
25 get the death penalty regardless of the facts or

1 circumstances in the case?

2 MR. ROSELLE: No, sir.

3 THE COURT: You said no, sir?

4 MR. ROSELLE: Yes, Your Honor.

5 THE COURT: All right. Is it Miss Worrell?

6 MISS WORRELL: Yes.

7 THE COURT: Miss Worrell, do you have any
8 religious or conscientious scruples or objections
9 against the imposition of the death penalty?

10 MISS WORRELL: Yes, I do.

11 THE COURT: Now, is your objection to the
12 death penalty absolute?

13 MISS WORRELL: Yes, it is.

14 THE COURT: Could you in a proper case
15 impose the death penalty?

16 MISS WORRELL: I couldn't.

17 THE COURT: All right. Would you stand
18 aside, please. Thank you.

19 THE SHERIFF: Just have a seat right back
20 here.

21 (Miss Worrell was excused from the jury
22 panel.)

23 THE COURT: Mrs. Taylor, do you have any
24 religious or conscientious scruples or objections
25 against the imposition of the death penalty?

1 MRS. TAYLOR: Yes, I do.

2 THE COURT: Is your objection to the death
3 penalty absolute?

4 MRS. TAYLOR: Well, not on circumstantial
5 evidence I wouldn't convict anyone.

6 THE COURT: Can you say yes or no? I mean
7 is your objection to the death penalty absolute
8 under any circumstances?

9 MRS. TAYLOR: Under any circumstances?

10 THE COURT: Yes, ma'am.

11 MRS. TAYLOR: No, I wouldn't say under any
12 circumstances.

13 THE COURT: All right. Would you answer the
14 next question.

15 Could you in a proper case impose the death
16 penalty?

17 MRS. TAYLOR: I wouldn't want to.

18 THE COURT: All right, Mrs. Camden --

19 MRS. CAMDEN: Yes.

20 THE COURT: Do you have any religious or
21 conscientious scruples or objection against the
22 imposition of the death penalty?

23 MRS. CAMDEN: Yes, sir.

24 THE COURT: Is your objection to the death
25 penalty absolute?

1 MRS. CAMDEN: Yes, sir.

2 THE COURT: Could you in a proper case
3 impose the death penalty?

4 MRS. CAMDEN: No, sir.

5 THE COURT: All right. Mr. Parks, do you
6 have any religious or conscientious scruples or
7 objections against the imposition of the death
8 penalty?

9 MR. PARKS: No, sir.

10 THE COURT: Do you feel that regardless of
11 the facts or circumstances that in every case of
12 murder the death penalty should be imposed?

13 MR. PARKS: Yes, sir.

14 THE COURT: Sir?

15 MR. PARKS: Yes, sir.

16 THE COURT: You think it should be in every
17 case of murder regardless of the circumstances or
18 the facts involved?

19 MR. PARKS: If they prove him guilty. I'm
20 having a hard job of hearing.

21 THE COURT: What I'm trying to ask you, sir,
22 is do you feel that in every case where the accused
23 is charged with murder and is convicted that
24 regardless of the facts or circumstances involved
25 the death penalty should be imposed?

1 MR. PARKS: If he's convicted, yes.

2 THE COURT: All right. Would you ladies and
3 gentlemen step outside a moment, please.

4 (The jurors went into the jury room.)

5 THE COURT: Mr. Grizzard.

6 MR. GRIZZARD: If it please the Court,
7 beginning first with Charles Roselle. The first
8 answer he gave to the Court on the ultimate question
9 of whether or not he had religious or conscientious
10 objection to the death penalty, he was standing
11 there. He said, "I guess not." And you said, "I
12 can't hear you," and he said "No" at that point.
13 If he's guessing now on that, Judge, I think we
14 need to bring him back in here and find out. That's
15 Number 1.

5. 16 As to Mrs. Taylor, she has stated that --
17 she's very equivocal about whether or not she can
18 vote a death penalty under proper circumstances. I
19 think the proper question for her would be to bring
20 her in here and ask her if she had a choice of life
21 of death would she in a proper case vote the death
22 penalty. Her answers are equivocal and the
23 impression that the Commonwealth gets in this
24 matter, there is no possibility of getting a death
25 penalty verdict out of her under the proper facts of

1 the situation. I would ask that she be removed for
2 cause. I would ask that Mrs. Camden be removed,
3 who says her objection is absolute, and I would ask
4 the Court to inquire further of Louise Taylor and
5 Charles Roselle.

6 MR. WOODWARD: Your Honor, in response to
7 that, Charles Roselle again was the first of the
8 five who was inquired of. Unfortunately, the
9 questions that are propounded do not elicit easy
10 answers and, again, as made in our motion on voir
11 dire as how we believe it should be conducted,
12 these are questions that probe people's souls. The
13 other time he had been given the opportunity to
14 answer, his answer was unequivocal and that's the
15 test. Can he make an unequivocal statement to the
16 Court. Now, the Court has excluded Sarah Preston
17 Worrell. Mrs. Camden did indicate -- I may have
18 those two reversed -- both of them did indicate
19 absolute. We, of course, can make no objection to
20 that. In the same case, Norman Edward Parks, Jr.,
21 should be excluded for cause. After the Court
22 explained it to him, again, he said if he's
23 convicted he wants the death penalty. That's the
24 question we asked to be propounded.

25 That leaves Louise R. Taylor. Mrs. Taylor

1 wrestled with the question, obviously, but she did
2 not indicate an automatic predisposition not to
3 give the death penalty in any case and the last
4 inquiry that you made of her again did not elicit
5 that response from her. She indicated that she
6 wouldn't want to, but she didn't say she wouldn't.
7 She just said she wouldn't want to. I'm sure none
8 of the people on the jury wants to, but she has not
9 indicated the automatic disposition against the
10 death penalty, which is the standard enunciated by
11 the United States Supreme Court. We submit Louise
12 R. Taylor is properly seated as a member of the
13 jury panel as is Charles R. Roselle; that Norman
14 Edward Parks, Jr., should be excluded for cause.

15 MR. GRIZZARD: Your Honor, going back, again,
16 I don't know that I'm the only one that heard
17 Charles Roselle say, "I guess not" in his first
18 answer.

19 THE COURT: Then he said no.

20 I want to hear Mrs. Taylor first.

21 MR. SAVAGE: Your Honor, your question on
22 the choice of life or the death penalty, I think
23 the form of it is improper.

24 THE COURT: I'm not going to give her a
25 hypothetical case.

1 MR. SAVAGE: Or a choice-type of thing?

2 MR. GRIZZARD: Your Honor, that is the exact
3 phrasing of the question on voir dire in the
4 Michael Smith case in Williamsburg.

5 THE COURT: What question?

6 MR. GRIZZARD: It's a series of questions
7 leading up to it, Judge. "Question: You could
8 find him guilty; is that correct? Answer: Yes.
9 Question: Now, once you found him guilty, there
10 would be only two punishments. Answer: Yes.
11 Question: One would be life imprisonment and the
12 other would be death. All right." Then the answer
13 is yes. "Question: Now, if the Commonwealth
14 proves its case beyond a reasonable doubt and it
15 was a proper case, could you vote the death penalty
16 for the defendant?" The witness starts to answer.
17 She said, "I" and the question continues. "Question:
18 Or would you have to give him life imprisonment?
19 Answer: I would say life." That's a question
20 approved by the Supreme Court of Appeals of Virginia.

21 MR. WOODWARD: Your Honor, they didn't
22 approve the question. What they said in that was
23 that the Court had elicited the finding which
24 indicated a predisposition and automatic refusal to
25 give the death penalty in any case. I submit the

1 question is improper because then we get into the
2 second stage of the trial, the very thing the Court
3 has pointed out to us previously. You're asking
4 her to decide the case without hearing any
5 evidence. I think the question is -- United
6 States Supreme Court question is to elicit the
7 response. You asked her that question in the
8 series which the court reporter has just read back
9 and she did not indicate an absolute predisposition
10 and that's the standard. That's the only standard,
11 the fact that she doesn't want it. "I wouldn't
12 want to" does not indicate that. It doesn't say
13 that the Commonwealth gets someone just as
14 favorable to them as to the defendant. It says,
15 "We remove the people that" --

16 THE COURT: I'm going to bring her back for
17 one question.

18 MR. GRIZZARD: Your Honor, in response to
19 his argument, this is a set of questions set forth
20 by the Supreme Court in the opinion in the Michael
21 Smith case. I assume if they set it out in their
22 opinion, they approve it. I ask that that question
23 be asked.

24 THE COURT: I'm going to bring her back,
25 gentlemen, and ask her one question.

1 (Mrs. Taylor entered the courtroom.)

2 THE COURT: Mrs. Taylor, I asked you
3 previously could you in a proper case impose the
4 death penalty. Your answer to that is, "I
5 wouldn't want to." What I am asking you is could
6 you in a proper case impose the death penalty?

7 MRS. TAYLOR: If I was sure. That's all I
8 can answer you.

9 THE COURT: Are you saying that if you were
10 sure of the guilt of the defendant in a proper case --

11 MRS. TAYLOR: Uh-huh.

12 THE COURT: -- you could impose the death
13 penalty?

14 MRS. TAYLOR: Uh-huh. If I was sure, but I
15 would have to be sure.

16 THE COURT: All right. Thank you. You can
17 step outside, Mrs. Taylor.

18 (Mrs. Taylor went into the jury room.)

19 THE COURT: All right, gentlemen. I'm going
20 to seat Mr. Roselle and Mrs. Taylor. I will strike
21 for cause Worrell, Camden and Parks.

22 (Mr. Parks, Mrs. Camden and Mrs. Worrell
23 entered the courtroom.)

24 THE COURT: Mr. Parks, Mrs. Camden and Mrs.
25 Worrell, you're excused. Thank you for being here.

1 (Mr. Parks, Mrs. Camden and Mrs. Worrell
2 were excused from the jury panel.)

3 THE SHERIFF: The next five, sir.

4 (The five jurors entered the courtroom.)

5 THE CLERK: I ask you all to raise your
6 right hand.

7 (The jurors were sworn on voir dire.)

8 THE CLERK: As I call your names, would you
9 just raise your right hand just for a moment. Amy
10 Irene Webb, Odessa Doretha Shap Wynder, Wesley B.
11 Bowen, Jr., J. E. Worsley and Willis H. Walker.

12 (The jurors were identified.)

13 THE COURT: All right, ladies and gentlemen.
14 The cases that we will try here today are
15 Commonwealth versus Willie Lloyd Turner. Willie
16 Lloyd Turner is charged with use of a firearm in
17 the commission of a felony. He's charged with
18 possession of a sawed-off shotgun in the
19 perpetration of a robbery of Alan D. Bain. He is
20 charged with the capital murder of W. Jack Smith,
21 Jr., in the commission of a robbery while armed
22 with a deadly weapon.

23 Now, the defendant, Willie Lloyd Turner, is
24 represented by Mr. William R. Savage and Mr. Thomas
25 L. Woodward, Jr., of Suffolk, Virginia. The

1 Commonwealth is represented by Mr. Richard C.
2 Grizzard, Commonwealth's Attorney for Southampton
3 County.

4 Now, is there any member of the jury related
5 by blood or marriage to any of the lawyers, to Alan
6 D. Bain, to W. Jack Smith, Jr., or to the defendant,
7 Willie Lloyd Smith -- Willie Lloyd Turner?

8 Do any of you have any knowledge with
9 reference to this case? Have you heard it
10 discussed?

11 Have you formed any opinion as to the guilt
12 or innocence of the accused?

13 Have you seen, heard or read in the news
14 media anything about these cases?

15 Are any of you related by blood or marriage
16 to any police officer or anyone in law enforcement?

17 Have you or any member of your family been
18 the victim of a crime?

19 MR. BOWEN: What kind of crime?

20 THE COURT: Any crime.

21 MR. BOWEN: I got fined for washing clams on
22 public property which I got arrested for.

23 THE COURT: Have you or any member of your
24 family been the victim of a crime?

25 MR. BOWEN: Yes.

1 THE COURT: Now, Mrs. Webb, one of the
2 charges -- alleged charges of the murder of W. Jack
3 Smith, Jr., is a capital case and carries the
4 possibility of the death penalty, if convicted. Do
5 you have any religious or conscientious scruples
6 or objections against the imposition of the death
7 penalty?

8 MRS. WEBB: Well, I have personal feelings
9 about the thing. I have mixed feelings about it.

10 THE COURT: Could you answer that question
11 yes or no?

12 MRS. WEBB: Well, I must say no then.

13 THE COURT: Yes?

14 MRS. WEBB: No.

15 THE COURT: Do you feel that the death
16 penalty should be imposed in every murder case,
17 regardless of facts or circumstances?

18 MRS. WEBB: Well, no.

19 THE COURT: Mrs. Shep Wynder. Do you have
20 any religious or conscientious scruples or
21 objections against the imposition of the death
22 penalty?

23 MRS. SHEP WYNDER: No.

24 THE COURT: Do you feel that in every case
25 of murder, regardless of facts or circumstances,

1 the death penalty should be imposed?

2 MRS. SHEP WYNDER: No.

3 THE COURT: Mr. Walker --

4 MR. WALKER: Yes.

5 THE COURT: -- do you have any religious or
6 conscientious scruples or objections against the
7 imposition of the death penalty?

8 MR. WALKER: No, sir, I don't.

9 THE COURT: Do you feel that in every case
10 of murder, regardless of facts or circumstances,
11 the death penalty should be imposed?

12 MR. WALKER: No, sir, not every one.

13 THE COURT: Mr. Bowen, do you have any
14 religious or conscientious scruples or objections
15 against the death penalty?

16 MR. BOWEN: No.

17 THE COURT: Do you think the death penalty
18 should be imposed in every murder case, regardless
19 of facts or circumstances?

20 MR. BOWEN: No.

21 THE COURT: Would you state your name, please.

22 PROSPECTIVE JUROR: John Worsley.

23 THE COURT: All right, Mr. Worsley. Do you
24 have any religious or conscientious scruples or
25 objections to the imposition of the death penalty?

1 MR. WORSLEY: No, sir.

2 THE COURT: Do you feel that the death
3 penalty should be imposed in each and every case --
4 each and every murder case, regardless of facts or
5 circumstances?

6 MR. WORSLEY: No, sir.

7 THE COURT: Now, do any of you ladies or
8 gentlemen know any reason whatsoever why you cannot
9 render a fair and impartial verdict in this case
10 either for the defendant or for the Commonwealth of
11 Virginia?

12 Do any of you know any reason why you cannot
13 render a fair and impartial verdict?

14 Do any of you know any reason whatsoever why
15 you should not sit as a member of this jury?

16 All right.

17 (The jurors went into the jury room.)

18 THE COURT: Do you want Mr. Bowen to come
19 back and tell us what crime he was the victim of?

20 MR. WOODWARD: Yes, Your Honor.

21 THE COURT: Will you bring Mr. Bowen back.

22 (Mr. Bowen entered the courtroom.)

23 THE COURT: Mr. Bowen, you indicated that you
24 or some member of your family had been the victim of
25 a crime. What crime was that?

1 MR. BOWEN: Murder. My father.

2 THE COURT: All right, sir. Would you stand
3 aside. Would you step outside.

4 (Mr. Bowen went into the jury room.)

5 MR. WOODWARD: I move that he be excluded
6 for cause. The man whose father has been murdered
7 cannot sit dispassionately, in my opinion.

8 THE SHERIFF: His father wasn't murdered.
9 His father murdered someone.

10 THE COURT: His father murdered someone?

11 MR. WOODWARD: That's an unusual answer to
12 the question you propounded.

13 MR. GRIZZARD: I would go with Mr. Woodward's
14 motion and remove him for cause.

15 MR. WOODWARD: It's not a proper question
16 ever to ask if someone has been convicted of a
17 crime in a person's family. I think Mr. Grizzard
18 having the information can use that in his
19 preemptory challenges, Your Honor. It's not a
20 proper exclusion for cause.

21 MR. GRIZZARD: It might not be a proper
22 question. Certainly his disposition there with that
23 in his background would make him a shaky juror at
24 best, trying somebody for the same thing his father
25 was convicted of. I think that clearly would put

1 the burden unreasonably on the Commonwealth. I
2 move to strike him for cause.

3 THE COURT: Well, Mr. Grizzard, if you have
4 got any authority for that, I will do it.

5 MR. GRIZZARD: I don't know of any, Judge.

6 THE CLERK: That's twenty, Your Honor.

7 THE COURT: Now, we need two more, so let's
8 bring four in.

9 All right, Sheriff. Would you bring the
10 next four in.

11 THE SHERIFF: Just four.

12 (The four jurors entered the courtroom.)

13 (The jurors were sworn on voir dire.)

14 THE CLERK: As I call your names, would you
15 just momentarily raise your right hand. Victor
16 Len Simpson, Charles Lemon, Jr., Linda Barnes
17 Turner and Samuel Cypress.

18 (The jurors were identified.)

19 THE COURT: Ladies and gentlemen, the cases
20 that we will hear today are the cases of
21 Commonwealth versus Willie Lloyd Turner. Willie
22 Lloyd Turner is charged with use of a firearm in
23 the commission of a felony. He's charged with
24 possession of a sawed-off shotgun in the perpetration
25 of the robbery of Alan D. Bain. He's charged with

1 the capital murder of W. Jack Smith, Jr., in the
2 commission of a robbery while armed with a deadly
3 weapon.

4 The defendant, Willie Lloyd Turner, is
5 represented by Mr. William R. Savage and Mr. Thomas
6 L. Woodward, Jr., of Suffolk. The Commonwealth is
7 represented by Mr. Richard C. Grizzard, the
8 Commonwealth's Attorney for Southampton County.

9 Now, is there any member of the jury related
10 by blood or marriage to either of the lawyers
11 involved in this case, to the defendant, to Alan D.
12 Bain, or W. Jack Smith, Jr.?

13 Do any of you have any knowledge with
14 reference to this case?

15 Have you heard it discussed or have you
16 formed any opinion as to the guilt or innocence of
17 the accused in this matter?

18 Have you heard, read or seen in the
19 newspaper, radio, television or what-have-you
20 anything about this case?

21 Are any of you related by blood or marriage
22 to any police officer or law enforcement agent?

23 Have any of you or members of your immediate
24 family been the victims of a crime?

25 Now, one of the charges, the alleged charge

1 of murder of W. Jack Smith, Jr., is a capital case
2 and carries the possibility of the death penalty,
3 if convicted.

4 Now, Mr. Cypress, do you have any religious
5 or conscientious scruples or objections against the
6 imposition of the death penalty?

7 MR. CYPRESS: Well, really, I don't go for
8 the death penalty.

9 THE COURT: Can you say yes or no to that
10 question?

11 MR. CYPRESS: No.

12 THE COURT: Or yes?

13 MR. CYPRESS: Do I have any objection?

14 THE COURT: Yes.

15 MR. CYPRESS: Yes.

16 THE COURT: Is your objection to the death
17 penalty absolute?

18 MR. CYPRESS: Well, I would say yes.

19 THE COURT: Could you in a proper case
20 impose the death penalty?

21 MR. CYPRESS: Didn't hear.

22 THE COURT: Could you in a proper case
23 impose the death penalty?

24 MR. CYPRESS: Well, I can't see where it
25 helps any.

1 THE COURT: All right, Mr. Simpson. Do you
2 have any religious or conscientious scruples or
3 objections against the imposition of the death
4 penalty?

5 MR. SIMPSON: No.

6 THE COURT: Do you feel that the death
7 penalty should be imposed in every murder case,
8 regardless of the facts or circumstances?

9 MR. SIMPSON: No.

10 THE COURT: Mr. Lemon, do you have any
11 religious or conscientious scruples or objections
12 against the imposition of the death penalty?

13 MR. LEMON: No, sir.

14 THE COURT: Do you feel that the death
15 penalty should be imposed in every murder case,
16 regardless of the facts or circumstances?

17 MR. LEMON: No, sir.

18 THE COURT: Mrs. Turner, do you have any
19 religious or conscientious scruples or objections
20 against the imposition of the death penalty?

21 MRS. TURNER: No, sir.

22 THE COURT: Do you feel that the death
23 penalty should be imposed in every murder case,
24 regardless of the facts or circumstances?

25 MRS. TURNER: No.

1 THE COURT: Would you ladies and gentlemen
2 step outside, please.

3 THE SHERIFF: Come in the jury room, please.

4 (The jurors went into the jury room.)

5 MR. GRIZZARD: If it please the Court,
6 Commonwealth moves to strike Samuel Cypress. I
7 think he's indicated clearly he has an absolute
8 objection to the death penalty.

9 MR. WOODWARD: Your Honor, I don't believe
10 he stated it as unequivocally as Mr. Grizzard
11 recites it to the Court. He did state in his
12 concluding answer he can't see where it helps. He
13 has not stated the unequivocal answer to the Court-
14 approved question. That's what is required to
15 remove him for cause. Not only is his
16 predisposition absolute but, in no instance, would
17 he administer it, but his response to your inquiry
18 was not directed to that. He said, "I don't see
19 where it helps." I may have that conclusion that
20 maybe certain instances it could be imposed. I
21 think the question should be put to him directly
22 and a yes-or-no response added to it.

23 THE COURT: All right, gentlemen. I'm going
24 to strike Mr. Cypress for cause. I note your
25 exception, Mr. Woodward.

1 We need one more, Sheriff.

2 (Mr. Nottingham entered the courtroom.)

3 THE CLERK: Mr. Nottingham, come up to the
4 Clerk's desk, please.

5 (Mr. Nottingham was sworn on voir dire.)

6 THE SHERIFF: Have a seat right over here in
7 the jury box, please, sir.

8 THE COURT: Mr. Nottingham, the cases that
9 we will try today are those of Commonwealth versus
10 Willie Lloyd Turner. Willie Lloyd Turner is
11 charged with the use of a firearm in the commission
12 of a felony. He's charged with possessing a sawed-
13 off shotgun in the perpetration of a robbery of
14 Alan D. Bain. He's charged with the capital murder
15 of W. Jack Smith, Jr., in the commission of a
16 robbery while armed with a deadly weapon.

17 Now, the defendant is represented by
18 Mr. William R. Savage and Mr. Thomas L. Woodward,
19 Jr., of Suffolk. The Commonwealth is represented
20 by Mr. Richard C. Grizzard, Commonwealth's Attorney
21 for Southampton County.

22 Do you have any knowledge with reference to
23 this case?

24 MR. NOTTINGHAM: Sir?

25 THE COURT: Do you have any knowledge with

1 reference to this matter?

2 MR. NOTTINGHAM: No, sir.

3 THE COURT: Are you related by blood or
4 marriage to any of the attorneys involved or to any
5 of the parties, the defendant, the victim, Alan D.
6 Bain, or the victim, W. Jack Smith, Jr.?

7 MR. NOTTINGHAM: Not to my knowledge.

8 THE COURT: Have you heard this case discussed?

9 MR. NOTTINGHAM: No, sir.

10 THE COURT: Have you formed any opinion with
11 regard to the guilt or innocence of the accused?

12 MR. NOTTINGHAM: No, sir.

13 THE COURT: Have you read, heard or seen
14 anything on any of the news media about this case?

15 MR. NOTTINGHAM: I don't think so.

16 THE COURT: Are you related by blood or
17 marriage to any police officer or anyone engaged in
18 law enforcement?

19 MR. NOTTINGHAM: Not at the present time.
20 Not to my knowledge.

21 THE COURT: Have you or any member of your
22 immediate family been the victim of a crime?

23 MR. NOTTINGHAM: Not to my knowledge.

24 THE COURT: Now, one of the charges in this
25 case, the alleged charge of murder of W. Jack

1 Smith, Jr., is a capital case and carries the
2 possibility of the death penalty, if convicted.

3 Now, do you have any religious or
4 conscientious scruples or objections against the
5 imposition of the death penalty?

6 MR. NOTTINGHAM: No, sir.

7 THE COURT: Do you feel that the death
8 penalty should be imposed in every murder case,
9 regardless of the facts or circumstances?

10 MR. NOTTINGHAM: In every what?

11 THE COURT: Do you think that the death
12 penalty should be imposed in every murder case,
13 regardless of the facts or circumstances?

14 MR. NOTTINGHAM: I don't really know. I
15 don't think so, but I don't really know.

16 THE COURT: What I'm asking you, sir, is in
17 every case of murder, regardless of what the facts
18 or circumstances may be, do you think the death
19 penalty should be imposed?

20 MR. NOTTINGHAM: No, I do not.

21 THE COURT: All right, sir. Do you know of
22 any reason whatsoever why you cannot render a fair
23 and impartial verdict in this case either for the
24 defendant or the Commonwealth of Virginia?

25 MR. NOTTINGHAM: My only reservation is the

1 fact that I do not hear too well and I might miss
2 some points.

3 THE COURT: Other than that, do you know of
4 any reason why you should not serve as a member of
5 this jury?

6 MR. NOTTINGHAM: No.

7 THE COURT: Do you feel that your hearing is
8 such that it would cause you any real problem in
9 sitting as a member of this jury?

10 MR. NOTTINGHAM: I think it's a problem.
11 I'm sure I'd miss some words here and there.

12 THE COURT: All right, sir. Would you step
13 outside just a moment, please.

14 (Mr. Nottingham went into the jury room.)

15 MR. SAVAGE: Judge, we couldn't help but
16 notice while he was answering the questions that he
17 is the only person here, you're speaking directly
18 to him, all his attention is focused right on you
19 and even then he really couldn't hear everything.

20 MR. GRIZZARD: We're not going to go by the
21 way they look in the box. I raised that objection
22 a couple of times and the Court has overruled it.

23 THE SHERIFF: Do you want another one?

24 THE COURT: Yes. Excuse Mr. Nottingham.

25 (Mr. Nottingham was excused from the jury

1 panel.)

2 (Mrs. Dominick entered the courtroom.)

3 THE SHERIFF: Come right on up front to the
4 Clerk's desk, please, ma'am.

5 (The juror was sworn on voir dire.)

6 THE SHERIFF: Would you have a seat over
7 here in the jury box, please.

8 THE COURT: You are Mrs. Adeline Dominick?

9 MRS. DOMINICK: Yes.

10 THE COURT: Now, Mrs. Dominick, the case
11 that we're going to hear today -- there are three
12 cases of Commonwealth against Willie Lloyd Turner.
13 Willie Lloyd Turner is charged with use of a
14 firearm in the commission of a felony. He's
15 charged with possessing a sawed-off shotgun in the
16 perpetration of a robbery of Alan D. Bain. He's
17 also charged with the capital murder of W. Jack
18 Smith, Jr., in the commission of a robbery while
19 armed with a deadly weapon.

20 Now, the defendant is represented by
21 Mr. William R. Savage and Mr. Thomas L. Woodward,
22 of Suffolk. The Commonwealth is represented by
23 Mr. Richard C. Grizzard, Commonwealth's Attorney
24 for Southampton County.

25 Now, are you related by blood or marriage to

1 any of the parties involved in this case, to the
2 attorneys, to Willie Lloyd Turner, to Alan D. Bain,
3 W. Jack Smith, Jr.?

4 MRS. DOMINICK: No.

5 THE COURT: Now, do you know anything about
6 this case?

7 MRS. DOMINICK: No, I do not.

8 THE COURT: Have you heard it discussed?

9 MRS. DOMINICK: No.

10 THE COURT: Have you heard anyone talk about
11 it at all?

12 MRS. DOMINICK: No, I haven't.

13 THE COURT: Have you read, heard or seen
14 anything about it either in the newspaper or on
15 television or heard anything on the radio?

16 MRS. DOMINICK: No.

17 THE COURT: Are you related by blood or
18 marriage to any police officer or anybody in law
19 enforcement?

20 MRS. DOMINICK: No.

21 THE COURT: Have you or any member of your
22 immediate family been the victim of any crime?

23 MRS. DOMINICK: No.

24 THE COURT: Now, one of the charges, the
25 alleged charge of murder of W. Jack Smith, Jr., is

1 a capital case and carries the possibility of the
2 death penalty, if convicted.

3 Do you have any religious or conscientious
4 scruples or objections against the imposition of
5 the death penalty?

6 MRS. DOMINICK: No.

7 THE COURT: I didn't hear you.

8 MRS. DOMINICK: No.

9 THE COURT: Now, do you feel that in every
10 murder case, regardless of the facts or
11 circumstances, the death penalty should be imposed?

12 MRS. DOMINICK: No, I don't believe in it.

13 THE COURT: Now, do you know of any reason
14 whatsoever why you cannot render a fair and
15 impartial verdict in this case either for the
16 defendant or the Commonwealth of Virginia?

17 MRS. DOMINICK: No.

18 THE COURT: Do you know of any reason
19 whatsoever why you should not serve as a member of
20 this jury?

21 MRS. DOMINICK: No.

22 (Mrs. Dominick went into the jury
23 room.)

24 THE COURT: Mr. Grizzard, do you have any
25 objection to this --

1 MR. GRIZZARD: I think she answered
2 equivocal, but the Court is not going to excuse her.

3 MR. SAVAGE: No, sir.

4 THE COURT: All right, gentlemen, that
5 completes the panel. Now, you will take your four
6 strikes as to the twenty, then you will have one
7 each of the last four.

8 MR. SAVAGE: If Your Honor please, we have
9 been at it for a number of hours. We would like to
10 have a brief recess. I assume the last two on the
11 list are going to be alternates.

12 THE COURT: The last two on the list will be
13 alternates. I will not tell them that, because I
14 think perhaps they should all sit with the
15 understanding that they are full members of this
16 jury and they may well be before the case is over.

17 We will take a brief recess, ladies and
18 gentlemen.

19 (The Court recessed at 1:15 p.m. The Court
20 reconvened at 1:30 p.m.)

21 THE COURT: Mr. Sheriff, will you bring the
22 jury in.

23 MR. WOODWARD: Sheriff, before they come
24 back, there is a motion that we would like to make.

25 Your Honor, at this time, we would renew our

1 motion for a mistrial based upon the manner in
2 which the respective jurors have been examined,
3 certain statements that have been elicited through
4 voir dire by the Court, which we believe would be
5 inherently prejudicial to others seated on the jury
6 panel who heard those statements, and certain
7 inferences might be drawn from certain statements
8 that have been made.

9 We did make a motion for a mistrial
10 previously and in lieu of making a motion at each
11 particular stage, we now renew the motion to the
12 whole process for the reasons stated.

13 THE COURT: All right. I'm going to overrule
14 your motion and note your exception.

15 (The jury panel was recalled to the
16 courtroom.)

17 THE CLERK: As I call your names, would you
18 please raise your hand one more time.

19 (The jury panel was identified.)

20 (The jury was struck.)

21 THE CLERK: Would the following persons
22 please stand aside: Jessie Moodie, J. Ashby Lecato,
23 Clarastine Spady, Nina Depalo, Louise R. Taylor,
24 Odessa Doratha Shap Wynder, Wesley B. Bowen, Jr.,
25 Willis N. Walker, Victor Len Simpson and Adeline

1 Dominick. Please stand aside. You all can come
2 have a seat in the audience.

3 As I call the names of those remaining,
4 would you please answer to your name.

5 (The jurors' names were called.)

6 THE CLERK: I ask you all if you will please
7 stand and raise your right hand.

8 (The jury was sworn.)

9 THE COURT: Mr. Sheriff, will you excuse the
10 other jurors.

11 (The remaining jurors were excused.)

12 THE COURT: Ladies and gentlemen, I regret
13 that we are a little late getting to lunch today.
14 We will try to correct that but, in any event, we
15 will recess at this time and we will recess for one
16 hour. If you will please be back at ten minutes to
17 three.

18 Now, I want to caution you very carefully,
19 please do not discuss this matter with anyone. Do
20 not allow anyone to discuss it with you. Do not
21 remain in the presence of anyone talking about this
22 case. If anyone tries to talk to you about it,
23 report it to me upon your return.

24 Now, when you come back to the courtroom,
25 please report directly to your jury room and we will

1 have somebody here. You're now excused until ten
2 minutes to three.

3 (The Court recessed for lunch at 1:30 p.m.

4 The Court reconvened at 3 o'clock p.m.)

5 MR. WOODWARD: Your Honor, Mr. Grizzard
6 suggested that before the jury returns perhaps we
7 should see if all our witnesses are here or at
8 least scheduled to be here at that point in time so
9 there is no question.

10 MR. GRIZZARD: All right. The Commonwealth
11 will call Mrs. Cosby, Ms. Huffman. Dr. Presswalla
12 is due approximately three thirty. Officer Alan
13 Bain is present, Sergeant Poole, Detective Dixon,
14 Detective Eubanks, and Mr. Hoppe is due in late this
15 afternoon, Judge.

16 THE COURT: All right, sir.

17 MR. GRIZZARD: So we have all the witnesses
18 that are supposed to be here for the Commonwealth at
19 this stage.

20 MR. WOODWARD: Your Honor, the defense
21 witnesses, in accordance with Mr. Savage's letter to
22 Mr. Bryant, the Clerk, asked that a number of
23 witnesses be summoned for tomorrow, Tuesday,
24 December 4, in anticipation that some witnesses
25 perhaps will testify tomorrow and some on Wednesday.

1 JUDITH R. COSBY, called as a witness on behalf of
2 the Commonwealth, having been first duly sworn, was examined
3 and testified as follows:

4
5 DIRECT EXAMINATION

6
7 BY MR. GRIZZARD:

8 Q Mrs. Cosby, would you state your name, your
9 address and your occupation, please.

10 A Judith R. Cosby, RFD, Franklin. I'm employed
11 by USDA in Courtland, Virginia.

12 Q And I want to direct your attention to July
13 12, 1978, and ask you, Mrs. Cosby, if you had occasion that
14 day to be in the vicinity or at Smith Jewelers in the City of
15 Franklin?

16 A Yes, I did.

17 Q At approximately what time, Mrs. Cosby, did
18 you arrive there?

19 A At approximately 11:25 a.m.

20 Q Would you tell the ladies and gentlemen of
21 the jury what occurred when you arrived at Smith Jewelers on
22 July 12, 1978?

23 A Yes. When I arrived at Smith Jewelers at
24 approximately 11:25 a.m. on the morning of July 12, 1978, I
25 entered the store to pick up my husband's watch and I got

1 about halfway in the store, which the room is long and
2 narrow, and I noticed when I got about halfway in that
3 Mrs. Huffman, the clerk, was standing at the back. There was
4 some people at the back also, but she had her hand over her
5 lip like this (demonstrating), and I looked around from that
6 and I saw a man with a sawed-off shotgun that was wrapped in
7 a green towel and I knew from that that there must be a
8 robbery going on and so I just stood where I was. There was
9 no turning back and after I got in, Mr. Smith was stuffing
10 some money from the cash register into some bags, which they
11 were white bags. They were store bags. And Mr. Smith told
12 the gentleman that that was all there was in the cash
13 register.

14 Q Mrs. Cosby, let's go back one minute, now.
15 This man that you saw in the store with the sawed-off shotgun
16 in a towel, had you ever seen that man before that day?

17 A No, sir.

18 Q Can you identify the man that you saw with
19 that sawed-off shotgun?

20 A Yes, sir.

21 Q Could you tell the ladies and gentlemen of
22 the jury whether or not that man is in the courtroom today?

23 A Yes, sir.

24 Q Will you please point him out?

25 A The defendant in the green suit.

1 Q All right. Now, after --

2 MR. GRIZZARD: Sheriff, do you have a knife?

3 THE SHERIFF: Yes, sir.

4 MR. GRIZZARD: Judge, can I go where I can
5 get some water?

6 THE COURT: Yes, sir.

7 Ladies and gentlemen, while we're waiting,
8 we will make every effort to stop at near 5 o'clock
9 as we can. We will try to take a short recess at
10 the end of every hour. If at any time you want to
11 take a break, you let me know and we will stop.
12 It may be necessary to run a few minutes beyond
13 five if we're in the middle of somebody's testimony.

14 Now, tomorrow morning, we would like to
15 start at nine thirty and please be here a few
16 minutes early so we can get started promptly. We
17 will do everything we can to keep you comfortable
18 and move along as rapidly as possible.

19 (Gm shown to defense counsel for
20 examination.)

21
22 BY MR. GRIZZARD:

23 Q Mrs. Cosby, I show you this and ask you if
24 you have ever seen anything like this before?

25 A Yes, sir.

1 Q And where?

2 A In Smith Jewelers that day, July 12, in the
3 hands of the man in the green suit.

4 MR. GRIZZARD: At this time, Your Honor, the
5 Commonwealth would like to have this marked
6 Commonwealth's Exhibit 1 for identification
7 purposes.

8 THE COURT: All right, sir.

9 (Marked by the Clerk as Commonwealth's
10 Exhibit Number 1 for identification.)
11

12 BY MR. GRIZZARD:

13 Q Mrs. Cosby, I show you this green towel and
14 ask you if you have ever seen anything like this or similar
15 to this before?

16 A Yes.

17 Q And will you tell the ladies and gentlemen
18 where.

19 A It was wrapped around the sawed-off shotgun.

20 MR. GRIZZARD: I would like the towel marked
21 Commonwealth's Number 2 for identification purposes,
22 Your Honor.

23 (Marked by the Clerk as Commonwealth's
24 Exhibit Number 2 for identification.)
25

1 BY MR. GRIZZARD:

2 Q All right, Mrs. Cosby, you were stating and
3 I interrupted you at the point that you said Mr. Smith said
4 that was all the money.

5 A Right.

6 Q Will you then tell the ladies and gentlemen
7 of the jury what occurred after Mr. Smith told him that was
8 all the money.

9 A After he was told that that was all the
10 money, he stepped around -- like I say, I was not back at the
11 back with the other people who were there. He stepped around
12 me and motioned for me with the sawed-off shotgun that was
13 wrapped up with the towel. He had it under the -- shotgun
14 here under the towel. He motioned for me to move on to the
15 back and I was trying to move very slowly and very deliberately
16 so as not to cause a commotion.

17 MR. SAVAGE: Your Honor please, she can just
18 tell what she did without stating her state of mind,
19 the facts as they occurred.

20 MR. GRIZZARD: Judge, I think she can tell
21 whether she moved back there or she moved slowly or
22 deliberately.

23 THE COURT: Objection overruled. Go ahead.

24 A (Continuing) I was saying that I was moving
25 slowly and deliberately and it was apparently too slow.

1 MR. SAVAGE: What is apparent to her is not --

2 A (Continuing) The fact is that he kicked me
3 in my seat when I was not moving fast enough.

4

5 BY MR. GRIZZARD:

6 Q You keep saying "he". There were two males
7 in the store. That's the defendant and Mr. Smith. Will you
8 state who "he" is.

9 A The defendant. The man with the sawed-off
10 shotgun.

11 And I moved to the back and then he ushered
12 all of us -- pointed the gun. He had not spoken. I had not
13 heard him speak at that time, but he was pointing with the
14 gun and all of us lined up along the counter on one side at
15 the back of the counter and when we all lined up, he was
16 standing out almost in the center of the store, and a police
17 officer entered the store and said, "Hey, your silent alarm
18 is on. Is something wrong?" And no one said anything and
19 the police officer saw the man in the middle of the floor
20 with the sawed-off shotgun and he immediately -- he stopped
21 and the man motioned with the gun for him to come on in and
22 he came in and motioned for him to take his gun out of -- out
23 of the holster, which he did, and the man motioned for him to
24 lay it on the floor, which he did, and the defendant -- the
25 man with the shotgun picked up the policeman's gun, which was

1 a pistol, and he continued to hold the shotgun in his right
2 hand. He picked up the pistol and looked at it and put it --
3 it was either in his pocket or inside of his pants like this
4 (demonstrating) and continued to maneuver us about with the
5 sawed-off shotgun.

6 And then the defendant asked if the silent --
7 he said, "Is this alarm still on?" And Mr. Smith nodded
8 in the affirmative and so he told him to cut it off and
9 Mr. Smith was to my left and I was -- I was about four feet
10 from the end of the counter. Mr. Smith -- I moved to the end
11 of the counter. Mr. Smith came around, went over and cut the
12 alarm off. It was -- I really couldn't tell you where it was,
13 except it was somewhere in the area of the cash register
14 underneath, because I saw him lean over and turn it off. He
15 asked if it was off and he nodded that it was and the man
16 with the shotgun -- the defendant -- decided he wanted
17 something else --

18 MR. SAVAGE: Your Honor, I object to what he
19 decided. Just tell what he did.

20 THE COURT: Just state what you saw him do.

21 THE WITNESS: Yes, sir.

22 A (Continuing) He told Mr. Smith to get some
23 more bags; that he wanted something else, and Mr. Smith got a
24 couple bags and came back around me and started filling up
25 the bags and, at this time, the telephone rang and it rang

1 once and maybe twice and the police officer said to the
2 defendant, he said, "Hey, this is a business establishment.
3 Someone should answer the telephone. Do you want me to
4 answer it?" And he shook his head no and he pointed to me
5 with the shotgun and motioned for me to answer the telephone
6 and I came out and went around across the room and -- before
7 I got there, I said, "Sir, what should I say?" And he said,
8 "Whatever is necessary." And I answered the phone. I said,
9 "Smith Jewelers" and it was a lady inquiring about her ring
10 and I said, "I'm sorry, Mr. Smith has stepped out. Can I
11 have him call you when he comes back?" And she said, "Yes,"
12 and she gave me two phone numbers where she could be reached
13 and I told her I would have him call her and I hung up the
14 phone and all the while I was talking on the phone, the
15 defendant was standing to my left with the sawed-off shotgun
16 six to eight inches from my ear. It was very close to my ear
17 while I talked to the lady on the telephone; and, when I hung
18 up the telephone, Mr. Smith had been -- had filled up the
19 bags or had put right much merchandise in the bags and the
20 defendant told me to get some more bags; that he wanted some
21 more, and I asked where they were and Mr. Smith told me under
22 the counter, and I reached down and got maybe that many bags.
23 (Indicating) I just grabbed a handful and I walked over and
24 put them on the counter in front of Mr. Smith.

25 The defendant motioned me back around to my

1 position where I was behind the counter and -- and after I --
2 after I got behind the counter, the defendant was still
3 standing over in the little set-off place where the telephone
4 and the cash register was located and he took the pistol out
5 of his pants or his pocket, wherever it was that he had it,
6 and he looked at it and kind of tossed it like that and then
7 he fired it and it fired out toward the back of the store,
8 and the police officer said, "Look," he said, "there is
9 nobody coming in the back. Just forget about it. Nobody is
10 coming in that way." And, at this time, he put the sawed-off
11 shotgun from his right hand into his left hand and took
12 command with the policeman's pistol at this time.

13 He walked back over to the middle of the
14 room in front of Mr. Smith and just looked at Mr. Smith and
15 fired the gun at Mr. Smith and, as I said before, Mr. Smith
16 was standing no more than four or five feet to my left. I
17 saw Mr. Smith fall back and slump across the counter and then
18 he fell and I saw a place on his temple and that's where I
19 assume that he had been shot was right across here (indicating)
20 because it was fresh blood right here and Mr. Smith fell to
21 the floor and the police officer said --

22 Q Mrs. Cosby --

23 A Yes.

24 Q -- when this shot was fired at Mr. Smith,
25 what weapon was used for that firing, shotgun or pistol?

1 A The policeman's pistol, but he still had the
2 shotgun in his left hand.

3 Q All right. Now, who fired that shot?

4 A Beg your pardon?

5 Q Who fired the shot at Mr. Smith?

6 A The defendant.

7 Q All right. What happened after Mr. Smith
8 had fallen behind the counter?

9 A Mr. Smith fell and the police officer said --

10 MR. SAVAGE: I object to what the officer
11 said, Your Honor. It's hearsay.

12 MR. GRIZZARD: May it please the Court, what
13 is going on right in the store is part of the res
14 gestae and is not hearsay to anybody.

15 THE COURT: Well, I think it would be hearsay
16 under these circumstances. Of course, other
17 evidence of what the police officer has said has
18 come in without objection. All right. I will
19 sustain the objection.

20 MR. GRIZZARD: If it please the Court, I
21 don't know whether I ought to argue this in the
22 presence or out of the presence of the jury. I
23 would like to argue the point.

24 THE COURT: All right, sir.

25 Would you ladies and gentlemen step in the

1 jury room, please.

2 (The jury was excluded from the courtroom
3 and the following occurred out of the presence of
4 the jury:)

5 MR. GRIZZARD: May it please the Court,
6 hearsay is a statement made out of the hearing of
7 the defendant. The defendant is standing right
8 there in the Smith Jewelers. He's just fired a
9 shot and is a response to that shot that was fired.
10 The witness is getting ready to relate statements
11 made by the officer at that point.

12 THE COURT: Let's see what the statements
13 are out of the presence of the jury.

14 MR. GRIZZARD: All right, sir.

15
16 BY MR. GRIZZARD:

17 Q Mrs. Cosby, would you relate what was said
18 by Officer Bain at that time.

19 A Well, he said to the effect, he said, "Hey,
20 look, you don't have to shoot anybody else." He said to the
21 effect that, you know, there were back-up units on the way.
22 He just said, "I will take you out of town. I will take you
23 anywhere you want to go. Just don't shoot anybody else."

24 Q These were statements from the police officer
25 to the defendant in the store?

1 A Yes, sir.

2 Q How far apart were they?

3 A I don't understand.

4 Q How far apart were they when the officer was
5 making these statements to the defendant?

6 A They were within four feet, I would say.
7 Four or five feet of one another.

8 MR. GRIZZARD: I submit, Your Honor, the
9 statements made by the officer directed to the
10 defendant in the store at the time of the robbery
11 is not hearsay as regards to the defendant. It's
12 not hearsay as regards to anything. It's part of
13 the res gestae. It's a spontaneous declaration.

14 MR. SAVAGE: The res gestae comes in as a
15 statement of the defendant himself, a statement he
16 made or something he could have denied. That's no
17 exception to the hearsay rule. On the other end,
18 to show you the inaccuracy of hearsay, what she
19 said is not in keeping with what her statement was
20 that she made on record a few days after the
21 incident. The Court made mention that we didn't
22 object to what the police officer said. To be
23 honest, it's hard to object even assuming that we
24 have a right to let in hearsay if we want to or
25 object to other parts of it. We think this

1 statement is very damaging and that's why we
2 object. The officer is here and he can testify to
3 what he said. She doesn't have to give that
4 testimony.

5 MR. GRIZZARD: Judge, I submit -- you're
6 talking about hearsay. That's the objection. It's
7 not hearsay. Hearsay is a statement made out of
8 the presence of the defendant. Res gestae is part
9 of what's going on right then. It's not something
10 that the defendant has to say or do. It can be a
11 spontaneous declaration by anybody.

12 THE COURT: All right, sir. I'm going to
13 let it in, gentlemen. I will note your exception.

14 THE WITNESS: Can I make an exception to
15 one --

16 THE COURT: Just a moment.

17 (The jury was recalled to the courtroom, and
18 the following occurred in the presence of the jury:)

19 THE COURT: All right, Mr. Grizzard.

20
21 BY MR. GRIZZARD:

22 Q Mrs. Cosby, you were testifying that
23 Mr. Smith had been shot and fallen on the floor. You saw the
24 wound, at which time the officer said something. Would you
25 start there and tell us what the officer said.

1 A He said, "Hey, you don't have to shoot
2 anybody." He said, "Don't shoot anybody else. I will take
3 you out of town. I will take you anywhere you want to go.
4 Just don't shoot anybody else."

5 Q All right. What happened then, Mrs. Cosby?

6 A What happened then was that the defendant
7 moved back a little bit. He backed up and he said, "I'm
8 going to kill that nigger for snitching on me" and, as I said
9 before, Mr. Smith was lying on the floor. His head was
10 toward the front door. His feet were facing me, and the
11 defendant fired with the pistol over the counter at
12 Mr. Smith's head and I was still standing, and when I looked
13 down the aisle where I was standing, Mr. Smith was here and
14 Mrs. Huffman and the other young, black male that was in the
15 store at the time who was a customer. I looked and when he
16 fired the shot -- at the time he fired the shot, they were --
17 the young, black man was on his hands and knees crawling out
18 and Mary had already gone out the front, and after the
19 defendant fired the second shot, I began to get a little
20 queasy on my stomach and -- there was no one in the room at
21 the time but the defendant, the police officer, Mr. Smith,
22 who was on the floor, and myself, and I asked the defendant
23 if I could please sit down; that I was getting sick, and he
24 nodded yes, that I could sit, and so I sat down on the floor
25 behind the counter and after I sat down, he walked -- well, I

1 heard Mr. Smith gurgling and the defendant walked and looked
2 over the counter and took the pistol and pointed it right
3 over there at him and fired, and I saw myself the impact of
4 the bullet as it hit his chest and Mr. Smith jumped and I
5 didn't see him move anymore after that, and then I was still
6 -- I never got up while the rest of them went on and I heard
7 the police officer -- the police officer said, "Look, my wife
8 just had a baby" --

9 MR. SAVAGE: Our objection is continuing,
10 Your Honor.

11 THE COURT: Let's don't go into that.

12 A (Continuing) In essence, he was begging for
13 his life and --

14 MR. SAVAGE: Your Honor please, we have a
15 motion we would like to make out of the presence of
16 the jury, please, sir. We have a motion we would
17 like to make, Your Honor.

18 THE COURT: All right, sir. Would you ladies
19 and gentlemen please step out a minute.

20 (The jury was excluded from the courtroom,
21 and the following occurred out of the presence of
22 the jury:)

23 MR. SAVAGE: Your Honor, this is the purpose
24 of our original objection. This is what happens
25 when the witness has the unbridled discretion to say

1 what pops in her mind. We move the Court to grant
2 a mistrial on the basis of her statement as to what
3 the officer was saying and what he was begging for.
4 Nothing could be any more prejudicial or
5 inadmissible than what she was thinking or heard
6 the officer say. We would move for the mistrial.

7 MR. GRIZZARD: If it please the Court, once
8 again, this is what's happening at the scene. The
9 police officer was the man begging for his life.
10 That's what's taking place. You know, it's a fact.
11 It's not hearsay. It's admissible.

12 MR. SAVAGE: Judge, what she's saying, he
13 was begging for his life. That's not even a
14 statement. That's her impression.

15 THE COURT: I agree with that. That's
16 inadmissible and I will so instruct the jury. She
17 cannot say what she thought he was doing. She made
18 a statement, not what the police officer said. She
19 said, "He was in essence begging for his life,"
20 which is not admissible and I shall instruct the
21 jury to disregard it and we will move on from there.
22 I'm going to overrule your motion for a mistrial.

23 MR. SAVAGE: Please note my exception.

24 MR. GRIZZARD: Judge, before they come back,
25 can we then make certain that the witness is

1 instructed to state just exactly what was said, not
2 characterize what the words are then?

3 THE COURT: Let's get the testimony. Let's
4 find out what the testimony is. Go ahead,
5 Mrs. Cosby. Take up where you left off.

6 THE WITNESS: It's very hard to say what
7 happened word for word.

8
9 BY MR. GRIZZARD:

10 Q I understand. Will you tell -- just relate
11 to the Court what was being said at that point.

12 A Officer Bain was begging him not to shoot
13 him. He said, "I will take you anywhere. Hey, man, my wife
14 just had a baby." He said, "Don't shoot me. I will take you
15 anywhere you want to go. I will get you out of town."

16 THE COURT: And then what?

17 THE WITNESS: After that, I don't know. It's
18 an assumption on my part that he became distracted,
19 okay, and Officer Bain took over.

20 MR. SAVAGE: Objection.

21 THE WITNESS: Because I heard a struggle and
22 all of a sudden I looked up and saw the pistol up
23 in the air and no shotgun in sight.

24 THE COURT: Well, I don't want you to state
25 any assumptions. I think we had better -- from

1 this point, we had better stick to exactly what you
2 saw and not go into any further statements because
3 I don't think this lady -- she was excited and I
4 don't think she can accurately state what was said.
5 She can now testify as to what she observed and
6 what she saw from this point on.

7 MR. GRIZZARD: Is the Court ruling that she
8 can't testify as to what the officer said at this
9 point?

10 THE COURT: Yes, sir.

11 MR. SAVAGE: Judge, very quickly, we renew
12 our motion for a mistrial on the grounds that our
13 original objection to hearsay should have been
14 sustained. We think it should have been struck
15 before and it's gone too far to cure.

16 THE COURT: All right, sir. We have got that
17 in the record.

18 MR. GRIZZARD: The Commonwealth excepts to
19 the Court not allowing her to state what was said
20 at the time of the robbery.

21 (The jury was recalled to the courtroom, and
22 the following occurred in the presence of the jury:)

23 THE COURT: Ladies and gentlemen of the jury,
24 I will instruct you, please disregard the last
25 statement made by the witness as to what she thought

1 the police officer was doing.

2 All right, Mr. Grizzard.

3

4 BY MR. GRIZZARD:

5 Q Mrs. Cosby, after the second shot then was
6 fired at Mr. Smith, what is the next thing that you saw?

7 A The second shot or the third shot?

8 Q Where he leaned over the counter and fired
9 the shot. You saw the impact of the bullet in the chest.
10 After that, what was the next thing you saw?

11 A That was the third shot. The next thing
12 that I saw?

13 Q Yes, ma'am.

14 A I was on the floor. I didn't see that much.

15 Q Well, what is the next thing you recall
16 seeing?

17 A The next thing that I recall seeing was the
18 defendant's hand up in the air with the pistol and the -- he
19 and the policeman were struggling for the pistol.

20 Q And then what did you do?

21 A I was still on the floor and they struggled
22 on behind me into the counter back here and they banged up
23 some glass back there in the struggle, and the officer finally
24 got the pistol and took charge and told the man --

25 MR. SAVAGE: Objection.

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THE COURT: All right, sir.

BY MR. GRIZZARD:

Q All right. What did you do?

A I was told to leave the room and I did. I came out from around the counter and left the building.

(Bags shown to defense counsel for examination.)

BY MR. GRIZZARD:

Q Mrs. Cosby, I show you three bags. Have you ever seen bags like these before?

A Yes, sir.

Q And where?

A In Smith Jewelers.

Q Are these the type of bags that you spoke of earlier in the testimony that were being filled?

A Yes, sir.

MR. GRIZZARD: At this time, Your Honor, the Commonwealth would offer these three bags as Commonwealth's Number 3 for identification purposes.

THE COURT: All right, sir.

(Marked by the Clerk as Commonwealth's Exhibit Number 3 for identification.)

(Gm shown to defense counsel for

1 examination.)

2
3 BY MR. GRIZZARD:

4 Q Mrs. Cosby, I hand you a revolver and ask you
5 if you have ever seen that before?

6 A Yes, sir.

7 Q Can you say where?

8 A It was Officer Bain's pistol.

9 MR. GRIZZARD: I would like the revolver
10 marked Commonwealth's Exhibit 4 for identification
11 purposes, Your Honor.

12 (Marked by the Clerk as Commonwealth's
13 Exhibit Number 4 for identification.)

14 THE COURT: All right, sir.

15
16 BY MR. GRIZZARD:

17 Q Mrs. Cosby, do you recall what was being
18 loaded into these bags from the counter?

19 A No, sir, I don't.

20 MR. GRIZZARD: All right. Answer defense
21 counsel.

CROSS-EXAMINATION

BY MR. SAVAGE:

Q Mrs. Cosby, it was after 11 o'clock when you were going through town to go to Smith Jewelers, I think you said, July 12, 1978; is that right?

A After eleven, yes.

Q I take it that as you were going through town, at that point it was just a normal morning. Wasn't anything out of the ordinary before you got inside the store, was there?

A No.

Q There was nothing outside the store to attract your attention, particularly?

A No.

Q One way or the other?

A No.

Q When you entered the store, I think you said even then you didn't notice that anything was any different at first when you first walked through the door, right?

A That's right.

Q You didn't hear any loud talking?

A No, sir.

Q No scuffling around?

A No, sir.

1 Q Mary Huffman, clerk, I think you said, had
2 had her finger up to her lips like this (demonstrating), I
3 suppose?

4 A Yes, sir.

5 Q She was not weeping or crying or upset at
6 that point?

7 A No, sir.

8 Q I think you said that you realized that you
9 walked into a robbery attempt when you saw the man with the
10 gun in the back of the store?

11 A Yes, sir.

12 Q Do you recall what the person had on? What
13 kind of clothes he was wearing?

14 A Do I recall what he had on? He had a shirt
15 and a pair of slacks and he had something on his head to
16 cover up his hair.

17 Q Did he have a hat on?

18 A It looked like some sort of a night bonnet-
19 type thing and then a hat over it, I think.

20 Q You don't recall whether he had on blue
21 jeans or dress pants or what he was wearing, particularly?

22 A No, sir, I don't.

23 Q I think you said it's a small, narrow store
24 where all this happened, isn't it?

25 A It's a long, narrow store; yes, sir.

1 Q In fact, the aisle between the counters is,
2 what, about six feet wide, probably?

3 A Between the counter on the left and the
4 counter on the right?

5 Q Yes, ma'am.

6 A It's wider than that.

7 Q When you got back there and some of these
8 events had taken place, you say that the defendant pulled the
9 pistol out and began to fiddle with it a little bit, correct?

10 A I didn't say he fiddled with it. I said he
11 looked at it and tossed it up one time. Just like, you know,
12 you have something in your hand like this.

13 Q And then the gun fired through the back wall
14 or into the back wall of the store?

15 A He fired it.

16 Q You don't know where the bullet went, which
17 direction?

18 A It went to the back of the store. I don't
19 know if it went out the door or into the wall, but it went to
20 the back of the store.

21 Q Now, this service revolver that you
22 identified, did it make a loud noise when it went off in this
23 store?

24 A Not extremely loud.

25 Q You weren't startled by the pistol firing?

1 A Of course I was startled.

2 Q Did you ever see the person fire the shotgun?

3 A No, sir.

4 Q Did the person ever fire either of the
5 weapons at Officer Bain?

6 A No, sir.

7 Q Never fired any shots at you?

8 A No, sir.

9 Q The person with the guns that you have
10 described, when Officer Bain walked in, was standing to the
11 rear of the store, I think you said, or was he midway in the
12 store?

13 A He was midway in the store.

14 Q Now, after Officer Bain was relieved of his
15 weapon, did the person try to run -- run away at that time?

16 A No, sir.

17 Q After the first shot was fired into the back
18 wall of the store, did the person try to run away then?

19 A No, sir.

20 Q At any time while you were able to see, did
21 you ever see the person actually trying to run for the door?

22 A No, sir.

23 Q Now, there are three bags, I think,
24 Mr. Grizzard has handed you. I thought when you were making
25 your description, you were describing five bags -- your

1 description of the events.

2 A I didn't count the number of bags that I
3 picked up. I don't know how many bags I picked up. I picked
4 up about that many bags. (Indicating) I just reached down
5 there and -- they were in a vertical position and I just
6 grabbed them and laid them on the counter. It could have
7 been three bags. It could have been five. It could have
8 been ten, but it was more than one or two.

9 Q You related on direct examination that
10 Officer Bain volunteered to take the person out of town, I
11 think you said. Said he would carry him out of town.

12 A Yes, sir.

13 Q Did you ever hear the defendant say, "All
14 right. I will go out of town with you"?

15 A No, sir.

16 MR. SAVAGE: Thank you very much, Mrs. Cosby.
17 That's all the questions I have.

18 THE COURT: Is that all, Mr. Grizzard?

19 MR. GRIZZARD: I think that's all right now.

20 THE COURT: Thank you, Mrs. Cosby.

21 Do you need this witness any further?

22 MR. GRIZZARD: I don't think so, Judge.

23 THE COURT: Do you want her to wait outside?

24 MR. GRIZZARD: I don't think she's going to
25 leave before the end of the day.

1 A As I was assisting my customer in Smith
2 Jewelers with a watch band, this guy came in and we gave him
3 ample time to get to the back where we would wait on him and
4 when I noticed -- when I stepped over to see who it was, I
5 noticed this guy walking up with a shotgun and he was pulling
6 the green-velvet towel off it and laid it at an angle between
7 Mr. Smith and I, which Mr. Smith had his back to me and to
8 Turner.

9 Q Mrs. Huffman, did you notice anything about
10 the shotgun?

11 A It was a sawed-off shotgun.

12 Q I show you this gun marked Commonwealth's
13 Exhibit 1 and ask you if you have ever seen this gun before?

14 A Yes, sir.

15 Q And where have you seen it?

16 A That particular date at Smith Jewelers and
17 also at the hearing.

18 Q Is that the gun you're speaking of that the
19 man had?

20 A Yes, sir.

21 Q I show you the green towel marked
22 Commonwealth's Exhibit 2 and ask you if you have ever seen
23 that before?

24 A That's what he was wiping off the gun with
25 as he laid it on the counter.

1 Q This man that you're speaking of that had
2 the gun and came to the back of the store, can you identify
3 that man?

4 A Yes, sir.

5 Q Have you seen him since July 12, 1978?

6 A Yes, sir. I saw him at the hearing.

7 Q Have you seen him today?

8 A Yes, sir.

9 Q Would you point him out, please.

10 A (Witness complied.)

11 Q Who are you pointing to, please?

12 A Turner, over to the left beyond Mr. Woodward.

13 Q All right. Thank you. After the man with
14 the gun came to the back of the store -- at the counter
15 where you were, exactly what happened then?

16 A As I was standing there when Mr. Smith
17 rolled his chair back after he gave the customer ample time
18 to get to the back, Mr. Smith rolled his chair back and said,
19 "What can I do for you?" That's when Turner made a motion
20 with his gun. Never said a word. Mr. Smith asked him that
21 statement --

22 MR. SAVAGE: I object to what Mr. Smith
23 asked or said.

24 THE WITNESS: Pardon me.

25 THE COURT: She wasn't going into any

1 statement. He did something as a result of that
2 statement which is already in evidence.

3 MR. SAVAGE: I must have misunderstood her.
4 I thought she was telling what Mr. Smith said.

5 MR. GRIZZARD: I think what she said, Judge,
6 Mr. Smith asked him what he could do for him and
7 the man motioned with the gun.

8 THE WITNESS: Right.

9 MR. GRIZZARD: My impression was that she
10 was getting ready to say what Mr. Smith was getting
11 ready to say at that point.

12 THE COURT: I thought she was testifying as
13 to what he previously said.

14 MR. SAVAGE: She was getting ready to say
15 something else is the way I understood it.

16 THE COURT: You're objecting to what
17 Mr. Smith said?

18 MR. SAVAGE: Yes, sir.

19 THE COURT: I'm going to let it in and note
20 your exception.

21
22 BY MR. GRIZZARD:

23 Q What did Mr. Smith say?

24 A He asked him what did he want and did he
25 want money and that's when Turner motioned with the gun and

1 Mr. Smith was stuffing money and coins and everything in a
2 jewelry bag and --

3 Q You say he was stuffing money in a jewelry
4 bag. What type of jewelry bag are you speaking?

5 A Jewelry bag we gave customers with Smith
6 Jewelers written on the front of it. It was white and gray.

7 Q And Mr. Smith was stuffing the money in the
8 jewelry bag. Tell the Court and the ladies and gentlemen of
9 the jury what happened then.

10 A Okay. In the meantime, Mr. Smith had
11 released the alarm to the police department and he was still
12 getting all the money and then Mrs. Cosby in a few seconds
13 came in and I motioned to her like this (demonstrating) so
14 she wouldn't get excited or upset about it and then as she
15 came in, Turner told us to get, you know, behind the counter.
16 He motioned for Mr. Smith and the Smith boy also, which was
17 the other customer in there -- motioned to all of us to get
18 behind the counter and he was always motioning with the gun
19 and he kicked Mrs. Cosby in the meantime, which we got behind
20 the counter and we were all lined up.

21 Mr. Smith -- wait. Excuse me. It was
22 Turner and then myself and then Mr. Smith and then Mrs. Cosby
23 and then Bains. We were all -- excuse me. Bains hadn't
24 arrived at that particular time. We were all behind the
25 counter and Mr. Smith was getting jewelry out like Turner had

1 ordered him to, and he was going up towards the front of the
2 store when immediately Bains answered a call and came in and
3 he says that, "Your alarm keeps going off," so that's when we
4 were all still behind the counter and when Bains comes in,
5 Turner motions with the gun to order him to the case where
6 he could -- where he asked for his pistol.

7 Q What did Turner do exactly with the gun?

8 A He had it at Bains' head now as he entered
9 the door.

10 Q And what gun did Turner have at that time?

11 A He had his sawed-off shotgun at the
12 particular time and then as Bains walked to the center of the
13 store is when Bains took his pistol out as he was ordered and
14 laid it on the floor and Turner picked it up.

15 Q Was it a verbal order?

16 A Yeah. He ordered it and he got it. He did
17 as he was told to and then Bains was ordered to the back of
18 the store where he was also lined up with us all in the same
19 line and they were talking about it there and I heard Bains
20 ask him, you know, if there wouldn't be any shooting, he
21 would just have him escorted out of town and that was when he
22 came back there and the telephone rang and Mrs. Cosby
23 answered the phone.

24 Q All right. Just a minute, now. At this
25 point, you indicated that some jewelry was being taken?

1 A Yes. Mr. Smith was getting the rest of it
2 out like he was ordered, but he was also ordered before that
3 particular instance to turn the alarm off that he had
4 released to the police. As he put his position back to the
5 jewelry counter to get the remaining jewelry that he was
6 getting out at the particular time --

7 Q Just a minute, now. Had Mr. Smith started
8 getting jewelry out before Officer Bain came in?

9 A He was getting it out; yes, sir.

10 Q All right. Now, after Officer Bain came in
11 and made the statement about the alarm --

12 A He was getting additional jewelry out.

13 Q Well, who turned the alarm off?

14 A Mr. Smith. He went and turned it off. See,
15 he had gone out behind the counter at the time like Bains had
16 ordered -- I mean Turner had ordered him to to release the
17 alarm after Bains had come in. That's when he knew that the
18 alarm was on.

19 Q What type of jewelry was Mr. Smith getting
20 out at this time?

21 A Okay. He was still getting out diamonds and
22 class rings, plus regular stone rings.

23 Q Diamonds and class rings?

24 A And regular other type stone rings.

25 Q All right. Now, while he was getting out

1 the rings and what-have-you, then what occurred at that time?

2 A That was when Turner -- he was in that
3 little cage like and he had the pistol in one hand and the
4 gun in the other, and the phone rang at that particular
5 instant and Mrs. Cosby answered the telephone and he still
6 had the gun pointed towards her head at that time.

7 Q Which gun did he have pointed toward
8 Mrs. Cosby's head?

9 A Well, he had them both at this angle. They
10 were both in the air.

11 Q After the phone had been answered by
12 Mrs. Cosby, what exactly did Mrs. Cosby do or what did
13 Mr. Turner do next?

14 A Well, she got back in her regular position
15 that she was beforehand and Turner was flipping with the gun
16 in some sort of -- I couldn't really see all the little
17 actions that he was doing.

18 Q Which gun are you speaking of?

19 A The pistol and he shot towards the wall,
20 which was over to his left, but, at the time, you know -- it
21 went off and it happened so quick, it just sounded like a pop.

22 Q Now, where in the store was Turner at the
23 time?

24 A Turner, he was in between the cage like --
25 walkway area.

1 Q And where were you and Mr. Smith and
2 Mrs. Cosby?

3 A As you come in the front door was Smith,
4 the customer, and then myself and then Mr. Smith and then
5 Mrs. Cosby and then Bains -- the officer.

6 Q Now, what exactly happened after this gun
7 that was fired sounded like a pop?

8 A Then Smith stepped out and that was when
9 Bains was still trying to talk to him but, like I say, I
10 couldn't hear all the exact words that were being said and
11 he stepped out and next thing he shot and I heard Mr. Smith
12 yell like a puppy and he fell to the floor and Smith and
13 myself fell also and --

14 Q Now, you say Mr. Smith yelled and then you
15 said Smith fell?

16 A Mr. Smith fell to the floor.

17 Q Right. And then you fell?

18 A And then Smith to my left fell.

19 Q Is that Mr. Smith or Smith customer?

20 A Smith customer.

21 Q All right. Go on and tell exactly what you
22 did then.

23 A And then Smith was to my left and when we
24 fell to the floor, I looked up real quick and I scrambled out
25 the front door with a down position and then Smith came out

1 behind me.

2 Q You say Smith --

3 A The customer.

4 Q The customer, Smith?

5 A Yes.

6 Q So you heard two shots?

7 A Yes.

8 Q Did you hear any more at any time that day
9 other than those two shots?

10 A No, sir.

11 Q Now, these rings that you're speaking of --
12 where were the rings that were being taken? Where were they
13 being put?

14 A They were being stuffed in bags.

15 Q What type of bags?

16 A They were still also the jewelry bags that
17 we only had.

18 Q Mrs. Huffman, I show you three bags,
19 Commonwealth's Exhibit 3 for identification, and ask you
20 have you ever seen bags like these before?

21 A Yes, sir.

22 Q And what type of bags are these?

23 A They are bags that we gave our customers
24 when they purchased merchandise.

25 Q Smith Jeweler bags?

1 A Correct.

2 Q Do you know, Mrs. Huffman, how many rings
3 had been in that jewelry case when Mr. Smith was taking them
4 out?

5 A I don't know the exact quantity.

6 Q After you scrambled out of the store, did
7 you go back in the store that day?

8 A Just -- just to the front door to get my
9 purse.

10 Q Did you ever see a -- any of those rings
11 again?

12 A Only when we inventoried them.

13 Q And who were you with at that time?

14 A I was with Chief O'Brien.

15 Q Where was that and when was that?

16 A That was at Southampton County back on the
17 following Monday.

18 Q Do you remember what day of the week that
19 was?

20 A It was the 17th, if I'm not mistaken.

21 Q Mrs. Huffman, I show you this list with the
22 word "rings" at the top of it. Have you ever seen this
23 before?

24 A Yes, sir.

25 Q Whose handwriting is that?

1 A (No response.)

2 Q You didn't write it out? That's the
3 question.

4 A No, sir.

5 Q Were you present when it was written out?

6 A Yes, sir.

7 Q The figures on the right-hand side, who
8 gave those figures? Speak up, now, these ladies and
9 gentlemen have to hear you.

10 A These are the retail prices of the rings.

11 Q And is this the list that you inventoried
12 on the Monday afterwards, which I believe it was the 17th?

13 A Correct.

14 Q Looking on the last page of this -- one,
15 two, three, four -- Page 5, they list forty-three one-dollar
16 bills; twelve five-dollar bills and some other currency
17 figures. What does that represent?

18 A This was the money that was in the register
19 that was given to him that particular date of the robbery.

20 Q Was that also inventoried at Southampton
21 County Bank?

22 A That, I think, was done at the City Hall
23 when Mrs. Smith received it back.

24 MR. GRIZZARD: I would like this marked
25 Commonwealth's Exhibit Number --

1 THE COURT: 5.

2 MR. GRIZZARD: -- 5.

3 (Marked in evidence by the Clerk as
4 Commonwealth's Exhibit Number 5.)

5
6 BY MR. GRIZZARD:

7 Q After July 17, 1978, Mrs. Huffman, did you
8 ever see that jewelry again, the rings, and what-have-you,
9 again?

10 A Yes, sir. When I signed for it to be
11 accepted back at Smith Jewelers.

12 Q Mrs. Huffman, I show you this typed sheet,
13 drawing your attention to the third page and pointing out the
14 words "Mary F. Huffman". Whose writing is that?

15 A That's mine.

16 Q And the list that's attached thereto, is
17 that a list of the jewelry?

18 A Yes, sir.

19 Q Is this the jewelry that you received back
20 that day?

21 A Yes, sir.

22 Q And what does this purport to be all
23 together? In other words, is this the receipt you gave for
24 it?

25 A That's what I signed for when I accepted it

1 back.

2 MR. GRIZZARD: I would like this marked
3 Commonwealth's Exhibit Number 6.

4 (Marked in evidence by the Clerk as
5 Commonwealth's Exhibit Number 6.)
6

7 BY MR. GRIZZARD:

8 Q The figures on that last sheet, are they the
9 -- what do the two columns of figures represent?

10 A One was the cost and one was the retail.

11 MR. GRIZZARD: All right. Answer
12 Mr. Woodward and Mr. Savage.
13

14 CROSS-EXAMINATION

15
16 BY MR. SAVAGE:

17 Q Mrs. Huffman, this shop was on Second Avenue
18 in Franklin, you said, right?

19 A Yes, sir.

20 Q Second Avenue is a street lined with small
21 businesses such as the one you worked in, I think?

22 A Yes, sir.

23 Q Kind of in the middle of the block?

24 A Yes, sir.

25 Q And over on the right as you're facing the

1 store, is there a business over there or was there in July,
2 '78?

3 A On the right facing the store from the
4 outside?

5 Q Yes, ma'am.

6 A There was a real estate business there.

7 Q Real estate office there?

8 A Yes, sir.

9 Q Over on the left, was there a store over on
10 the left-hand side?

11 A Yes, sir. There is Farmer's Hardware and
12 the furniture store combination.

13 Q And that was, I take it, a little bigger and
14 wider than your store?

15 A Correct.

16 Q The shop where you worked was kind of a long,
17 narrow shop, wasn't it?

18 A Yes, sir.

19 Q With counters on each side -- display
20 counters?

21 A Yes, sir.

22 Q And there was a little office area in the
23 back?

24 A Yes, sir.

25 Q Is that correct?

1 A (Witness nodding head affirmatively.)

2 Q And the door from the front, is that in the
3 middle of the shop as it was situated in the street?

4 A It's in the center of the two windows as you
5 walk in the entrance.

6 Q So you have a window on either side?

7 A Right.

8 Q And the door in the middle?

9 A Right.

10 Q And when you walk in, you walk right into
11 the aisle?

12 A The center aisle.

13 Q With the counters on each side?

14 A Yes, sir.

15 Q And would you say the room between the
16 counters is about six or seven feet in the center aisle there?

17 A Yes, sir.

18 Q Had you worked in the jewelry store very
19 long?

20 A Seven years.

21 Q Seven years?

22 A (Witness nodding head affirmatively.)

23 Q Did you know where the alarm button was?

24 A Yes, sir.

25 Q And you knew that when it was pressed, a bell

1 or something rang down at the police station?

2 A Yes, sir.

3 Q You knew how that worked?

4 A Yes, sir.

5 Q When it was pressed, nothing happened inside
6 the shop, I take it?

7 A No, sir.

8 Q Had the button ever been pushed accidentally
9 before that day?

10 A Not that day; no, sir.

11 Q At any time before that day?

12 A Well, if it had, it would have been a
13 previous year or something.

14 Q You don't remember any incident when the
15 policeman came by there in response to a false alarm?

16 A No, sir.

17 Q Now, when this person with the gun was in
18 the store, were you conscious or do you remember what he was
19 wearing?

20 A I remember he had a little cap on top of his
21 head.

22 Q You don't know anything about his clothes,
23 whether he had on a suit or pants or jeans or what?

24 A I can't recall.

25 Q The front of the store, as you have

1 described it, with the plate-glass windows, I guess a person
2 could walk up then to the window and look into the store?

3 A Right.

4 Q And then go to the door. Was it a glass
5 door?

6 A Yes, sir.

7 Q And then look through the glass and see
8 inside the store, correct?

9 A Yes, sir.

10 Q And you said when Bain came up there he just
11 walked in and said, "The alarm is off"?

12 A Yes, sir.

13 Q When this gun went off, did it startle you?
14 Did it make the kind of noise that shook you?

15 A Yes, sir.

16 Q Do you recall if the person ever said
17 anything at all?

18 A He said very little and then it was a
19 mumbling towards the back that I could not hear exactly what
20 the words were.

21 Q Now, you indicated there was some rings and
22 things. I think they are listed on this list that the
23 Commonwealth has put into evidence, some rings and things
24 there?

25 A Yes, sir.

1 Q And you have given the wholesale price and
2 the retail on the one side?

3 A Yes, sir.

4 Q The top one there, talking about ring set,
5 the figure on the left is \$45 and the figure on the right is
6 two hundred sixty. That means the wholesale is forty-five
7 and you all sell it for \$260; is that right?

8 A Yes, sir.

9 Q These other rings back here in the back --
10 Windsor High School ring -- is that Windsor High School
11 there in Isle of Wight County?

12 A They were sample rings that we had on
13 display.

14 Q Well, you haven't got any price by those.

15 A Right. They were samples that were put
16 there for display purposes, not for selling.

17 Q And the Franklin High School ring and some
18 others, they are all the same thing?

19 A Right.

20 Q Now, while you were in the store, do you
21 recall the person ever trying to run out of the door?

22 A A person running out the door?

23 Q The defendant that you have identified, do
24 you recall him ever trying to flee and get away?

25 A No, sir.

1 Q After Officer Bain came in and he realized
2 the silent alarm had been turned on at police headquarters,
3 did he ever try to run away?

4 A No, sir.

5 Q Now, when you -- the way you described the
6 store. When you left, you went behind the counter?

7 A The one on your left.

8 Q Behind the left-hand counter? Then I take
9 it when you got to the end of the counter, you had to turn --

10 A I had to turn and go out.

11 Q Turn and go out into the middle aisle and
12 then out the front door? I take it the person was standing
13 in the middle aisle when this was going on?

14 A Yes, sir.

15 Q Now, when you ran and got in the middle
16 aisle and dashed out the door, you and this other fellow, were
17 any shots fired at you?

18 A Not that I know of.

19 MR. SAVAGE: Mrs. Huffman, thank you very
20 much. That's all the questions I have.

21
22 REDIRECT EXAMINATION

23
24 BY MR. GRIZZARD:

25 Q Mrs. Huffman, the counter that you were

1 behind as you scrambled down behind, does that go all the way
2 to the front door?

3 A Yes, sir, except for a little break there.

4 Q How much of a break would it be?

5 A I guess it's about the width of this.

6 (Indicating)

7 MR. GRIZZARD: For the record, Judge, would
8 that be two foot?

9 THE COURT: Yes, sir.

10
11 BY MR. GRIZZARD:

12 Q So while you were scrambling, he was behind
13 the counter the whole time?

14 A Yes, sir.

15 Q Now, Mrs. Huffman, the alarm had never been
16 set off, you're stating, accidentally by someone bumping into
17 it. Can you recall any occasions where you might have been
18 advised that your alarm was ringing for some other reason?

19 A The only occasion that I can recall of that
20 is like when there was a closing time -- the front alarm, when
21 you go out the front -- when you turn it on for the nighttime,
22 you know, to lock it up, is the only time I have known it to
23 have gone off.

24 Q Just the one time?

25 A It's occurred once or twice and that's it.

1 MR. GRIZZARD: All right. Thank you,
2 Mrs. Huffman.

3 THE WITNESS: Yes, sir.

4 THE COURT: Would you gentlemen approach
5 the bench a moment, please.

6 MR. GRIZZARD: Your Honor, may I put one
7 more piece of evidence in before we come to the
8 bench?

9 THE COURT: Yes, sir.

10 MR. GRIZZARD: By agreement with defense
11 counsel, Commonwealth would offer into evidence as
12 Commonwealth's Exhibit Number 7 a receipt signed by
13 Mary N. Smith, the wife of Mr. Smith, showing that
14 she did receive back from the police department
15 certain bills and change.

16 THE COURT: All right, sir.

17 Have Mr. Woodward and Mr. Savage seen this?

18 MR. WOODWARD: Your Honor, that exhibit we
19 agreed to be admitted.

20 (Marked in evidence by the Clerk as
21 Commonwealth's Exhibit Number 7.)

22 (A side-bar conference was held by the Court
23 with counsel for both sides out of the hearing of
24 the jury and the court reporter.)

25 THE COURT: Ladies and gentlemen, the next

1 witness is going to be a little bit longer than I
2 want to keep you here this afternoon. It's about
3 ten minutes to five and you have been very patient
4 and it's been a long day for you, I'm sure. I'm
5 going to excuse you now until tomorrow morning at
6 nine thirty. I want to caution you again, please
7 do not discuss this case with anyone. Do not allow
8 anyone to talk about it in your presence. Do not --
9 if it happens to be anything in the newspaper,
10 please do not read it. You must get all of your
11 evidence here in the court and don't read about it.
12 Don't talk about it. Don't look at anything that
13 has anything to do with this case except in this
14 courtroom.

15 All right. You are now excused until
16 tomorrow morning at nine thirty. Thank you very
17 much.

18 (The jury was excused at 4:50 p.m.)

19 THE COURT: All right, Mr. Grizzard.

20 MR. GRIZZARD: May it please the Court, as
21 indicated earlier today in some pretrial motions
22 earlier this morning, it was brought to the Court's
23 attention at that time that the Commonwealth would
24 intend to offer a photograph of Mr. Smith for
25 purposes of identification in showing the wounds.

1 It was decided at that point that when
2 Dr. Presswalla arrived with the photograph, we
3 would look at it and at that point present it to the
4 Court out of the absence of the jury. The
5 Commonwealth has obtained the photograph and shown
6 it to defense counsel and to the Court and it's my
7 understanding defense counsel objects to the
8 admissibility of the photograph.

9 MR. WOODWARD: Your Honor, the photographs,
10 of course, are admitted in order to be probative
11 and help the trier of the fact in making its
12 determination. In photographs of victims of
13 serious crimes, the question always arises whether
14 the photograph is necessary for some probative
15 point. We submit to you that the counterelement
16 to that is whether those particular photographs,
17 which are sought to be introduced into evidence,
18 are prejudicial to the defendant; and, secondly,
19 whether they are inflammatory.

20 In this instance, Mr. Grizzard has
21 photographs, I assume, taken by Dr. Presswalla or
22 someone in his behalf. Dr. Presswalla will be here
23 tomorrow morning to give his testimony
24 scientifically as to the location of the wounds and
25 the remainder of his examination. The photographs

1 which are sought to be introduced cannot possibly
2 produce anything probative beyond his testimony.

3 Now, if Dr. Presswalla were not here or
4 could not be here for some reason then perhaps the
5 argument would be legitimate. Dr. Presswalla is
6 the person who is testifying. It's always produced
7 by Commonwealth attorneys. They say this has got
8 a probative purpose, but it has no other purpose
9 than to inflame the jury and, as a result, to be
10 prejudicial to the defendant. I'm not aware of any
11 way they could possibly assist the Commonwealth and
12 we object to them on the basis of the inflammatory
13 nature and, secondly, the prejudice which
14 necessarily accrues to the defendant by their
15 introduction in evidence.

16 MR. SAVAGE: If Your Honor please, I would
17 like to address this point also.

18 THE COURT: Only one of you gentlemen can
19 argue.

20 MR. SAVAGE: Yes, sir, I understand.

21 MR. WOODWARD: Judge, Mr. Savage pointed out
22 to me -- I'm sure the Court has seen it -- the
23 opinion of Waye v. Commonwealth, which was decided
24 on January 12, 1979. Again, this is an opinion of
25 our Supreme Court in a capital murder case. If

1 you will recall in that case, the victim was
2 brutally beaten, slashed, mutilated. A number of
3 things. And photographs were sought to be
4 introduced. The Court in *Ways* on Page 8 stated,
5 "The admission of the photographs rested within
6 the sound discretion of the trial Court, and in
7 the absence of an abuse of discretion, we will
8 not disturb the Court's action. While the
9 Commonwealth did have other evidence available
10 to establish the elements of the offense, the
11 photographs portrayed more graphically, but not
12 more inflammatorily, than the testimony of any
13 witness the methodical manner in which the
14 killing of the victim was accomplished." Again,
15 in *Ways*, I believe there were 44 slash marks on
16 the victim. She had been brutalized, sodomized.
17 There were so many things that occurred. The
18 Court goes on in the same paragraph and this is
19 a quote, "The photographs were 'relevant and
20 material to establish premeditation and malice and
21 to show the degree of atrociousness of the crime.'"

22 Citing Smith v. Commonwealth, another
23 capital murder case, in 219 Va. 455, and Brown v.
24 Commonwealth, 212 Va., Page 515. In this particular
25 instance, you have direct testimony of witnesses

1 sufficient and adequate enough, I feel certain
2 Mr. Grizzard feels, to establish premeditation and
3 malice. And the question of atrociousness is not
4 really before this particular Court. Now, there
5 are no witnesses in Waye. Photographs had great
6 meaning. In this case, Mr. Grizzard has so far
7 presented two eyewitnesses. He has another which
8 -- whom we understand he intends to present and the
9 Medical Examiner, and to say that a body which has
10 been shot three times you need photographs to show
11 premeditation, malice and it's conjunctive, not
12 disjunctive, to show the degree of atrociousness
13 of the crime simply is not borne out by the facts.

14 The two elements involved: Does the
15 probative value outweigh the inflammatory nature
16 of the photograph? We submit the exception that
17 was granted in Waye because of the nature of that
18 case or in Smith, which it cites no witnesses, no
19 eyewitnesses, and, again, you had a brutal slaying
20 and beating, stabbing, so many things occurred in
21 Smith and in Waye that you don't have anything but
22 to take that photograph which the Court has
23 indicated it will allow into evidence and say, here,
24 to the jury, you look at this, presents to the jury
25 something which has been presented otherwise

1 through evidence of witnesses. We believe it is
2 totally inflammatory and will result in prejudice
3 to the defendant, which we cannot possibly
4 overcome. We ask that you reconsider the ruling
5 which you stated to us informally and not allow
6 any photographs into evidence.

7 THE COURT: All right, Mr. Grizzard.

8 MR. GRIZZARD: May it please the Court, in
9 all the cases cited by Mr. Woodward, the law in
10 this case is like any other case and numerous other
11 cases in the history of the Commonwealth and any
12 reports of the Commonwealth. It is within the
13 discretion of the trial Court to determine the
14 admissibility of photographs and the rule is stated
15 completely that when they are relevant and
16 material to establish premeditation and malice and
17 to show the degree of atrociousness of the crime,
18 they are admissible.

19 In the case of Stamper v. Commonwealth, they
20 allowed an officer's videotape with a sound
21 recording where the officer described the scene.
22 Now, the officer was at the scene. He could have
23 gotten on the witness stand and stated what he saw
24 and what he observed, but the Court in the Stamper
25 case -- and it was approved by the Supreme Court --

1 stated that it needed more than just a
2 description. Now, you can sit up here and talk in
3 the abstract. Yes, he was shot three times. Where
4 was he shot? He was shot here and here and here.
5 This photograph shows exactly where the wounds were.
6 It identifies the person that we're talking about,
7 W. Jack Smith, Jr. We have to have the
8 identification. This photograph gives us the
9 identification. It also shows the wounds. We're
10 not asking for a whole series of photographs. We
11 want one. I think certainly we're entitled to it.
12 We're trying to prove a premeditated murder; a
13 deliberate murder; a malicious murder and the
14 location of the wounds on the body are something
15 that the jury should see in order that they can
16 judge that in regards with the other evidence as to
17 whether or not it is wilful, deliberate,
18 premeditated. I would ask the Court to allow the
19 photograph to come in.

20 MR. WOODWARD: Well, Your Honor, all of us
21 have human bodies. I think if Dr. Presswalla tells
22 us where a wound was, any person of any competence
23 whatsoever will understand what he's talking about.
24 Mr. Grizzard wants the photographs in spite of what
25 he says to inflame the jury. The bloody shirt. It

1 looks gory. That's why he wants it.

2 He refers to the Stamper case. In Stamper
3 there were no witnesses either. In Stamper the
4 offense was over with and Stamper, the defendant,
5 supposedly had killed, I believe, three people.
6 There were no witnesses and in that case, again,
7 different from this case where we have merely a
8 shooting, in that case you have again brutalization
9 of people and that comes under the atrociousness
10 standard. In this instance, this photograph here,
11 as I say, is somewhat gory. It can serve no useful
12 purpose. It doesn't show the wounds. It shows a
13 white shirt or garment from a hospital or the
14 Medical Examiner with a bloodstain on it and shows
15 blood elsewhere. The purpose is inflammatory and
16 we suggest to you it has no probative value
17 whatsoever and that the Waye case and that the
18 Smith case and that the Stamper case are not
19 similar to this case, in that you have eyewitnesses
20 here to testify, two today and one tomorrow.
21 Secondly, you do not have the atrociousness of the
22 crime that you have in those three. It simply does
23 not exist. We say to you that the photograph of
24 what Mr. Grizzard says is his reason, it doesn't
25 show his reason. His purpose is to inflame the

1 jury.

2 THE COURT: Well, gentlemen, I agree with
3 the Waye case. I think the photograph portrays
4 more graphically than the testimony of any witness
5 the methodical manner in which it was done and
6 that's the reason I'm going to let it in. I think
7 it is relevant and material and I'm going to let
8 this one picture in. I'm not going to let a series
9 of pictures in that show every little detail of
10 everything that happened, but I am going to let
11 this picture in and I'm going to note your
12 exception in the record.

13 MR. GRIZZARD: Thank you, Your Honor.

14 THE COURT: Now, is there anything else that
15 we have to take up this evening, gentlemen?

16 MR. GRIZZARD: No.

17 THE COURT: All right. We will start
18 promptly at nine thirty tomorrow morning.

19 (The Court adjourned at 5:15 p.m., December
20 3, 1979.)

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25

1 In the Circuit Court of the County of
2 Northampton, before The Honorable James C. Godwin,
3 Judge, and jury, at 9:30 a.m., December 4, 1979.

4 Appearances same as heretofore noted.

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7 -----oOo-----
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9

10 MR. WOODWARD: Your Honor, before we proceed
11 this morning, there are several matters which we
12 would like to take up with you. I would ask if
13 there are any potential witnesses in the courtroom
14 that they be excluded before we make our motion.

15 THE SHERIFF: Doctor Presswalla.

16 (Doctor Presswalla was excluded from the
17 courtroom.)

18 MR. WOODWARD: Your Honor, at the conclusion
19 of the trial yesterday, the matter of the
20 photograph was presented to the Court by
21 Mr. Grizzard and myself. In response to that and
22 our position to the admission of that photograph,
23 the Court indicated that the photograph would be
24 admitted into evidence. What Mr. Grizzard
25 represented to you was that there were four

1 photographs which he had, three of which the Court
2 has excluded and three of which the Court said it
3 would admit into evidence. The question which I
4 have is based upon my previous trial experience in
5 matters of this type. I cannot conceive that the
6 Medical Examiner does not have photographs other
7 than those which Mr. Grizzard has presented to you.
8 I believe that there are probably available
9 photographs which do not depict in a gory manner
10 that which Mr. Grizzard indicates he wants to show
11 the position of the wounds. There were three
12 wounds, but the photograph which he has is not the
13 standard black and white photograph which the
14 Medical Examiner has produced in previous cases in
15 which I have been involved.

16 We would say further to you that if
17 Mr. Grizzard is concerned about identification and
18 if that is his purpose in introducing any
19 photograph, we will concede that the body or cadaver
20 examined by Doctor Presswalla is the body of William
21 Jack Smith, Jr., the same person who is the victim
22 or the alleged victim of the alleged offense so
23 there is no question of his having to present
24 evidence. The William Jack Smith, Jr., again, as I
25 said before, who was examined by Doctor Presswalla,

1 we will concede is the same person who is named in
2 the indictment as the victim and is the same person
3 who was slain in Smith's Jewelry in Franklin on the
4 date of the offense. Again, we ask that the Court
5 reconsider its previous ruling. We believe that
6 the photograph which Mr. Grizzard has has no
7 probative value; that it is totally inflammatory
8 and he's seeking to introduce it in lieu of other
9 photographs which we believe may be available to
10 him to show what he indicated to the Court
11 yesterday he wanted to show.

12 MR. GRIZZARD: If it please the Court, this
13 is the only photograph, as I understand it, that
14 Doctor Presswalla has showing Mr. Smith. There are
15 other photographs which I presented to the Court
16 yesterday showing the entry and exit wound in the
17 side of the ear. There were other photographs
18 showing the wounds on the body and the Court said
19 that this photograph was the only one that the Court
20 would accept. It shows the point -- not the impact
21 on the body, but it shows the place where the blood
22 is on the shirt that's being examined and shows the
23 wound on the head on Mr. Smith.

24 It's nice for the defense counsel to stand up
25 today and say we will finally stipulate that the man

1 who is dead is Mr. Smith. I submit to this Court,
2 I don't have to conduct my case the way they want
3 it conducted. I'm entitled to put on what
4 happened and I can't help it if this photograph is
5 gory. It's the photograph of Mr. Smith, the
6 decendent in the case --

7 THE COURT: What they are asking, are there
8 additional photographs other than these four?

9 MR. GRIZZARD: The only ones I have -- there
10 were some showing different parts of different
11 wounds. I will get every one Doctor Presswalla has
12 and let the Court look at them.

13 MR. WOODWARD: I would ask that Doctor
14 Presswalla be called as a witness for that purpose
15 only to indicate whether there are any other
16 photographs.

17 THE COURT: All right. Call Doctor
18 Presswalla.

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25

1 FARUK PRESSWALLA, called as a witness on behalf of
2 the Commonwealth, having been first duly sworn, was examined
3 and testified as follows:

4
5 DIRECT EXAMINATION

6
7 BY MR. GRIZZARD:

8 Q Doctor Presswalla, state your name, your
9 address and your occupation, please.

10 A Faruk Presswalla. I'm a physician.

11 Q And are you employed at the office of the
12 Chief Medical Examiner in Norfolk, Virginia, sir?

13 A I am.

14 Q Did you have occasion, Doctor Presswalla, on
15 July 13, 1978, to examine the body of the decedent, W. Jack
16 Smith, Jr.?

17 A Yes, I did.

18 Q How many photographs did you take, sir?

19 A I took a photograph of the body and some
20 photographs of the wounds. About seven or eight.

21 Q Would you let me see all of those photographs,
22 please.

23 (The Court, defense counsel and the
24 Commonwealth's Attorney looking at the photographs.)

25 THE COURT: All right, gentlemen. Do you

1 have any questions?

2 MR. WOODWARD: I do.

3

4

CROSS-EXAMINATION

5

6 BY MR. WOODWARD:

7 Q Doctor Presswalla, did you take these
8 photographs?

9 A I did.

10 Q You took all of the photographs?

11 A Yes, sir.

12 Q Including the other photograph which
13 Mr. Grizzard has?

14 A Yes, sir.

15 Q All right. The small photograph here showing
16 Mr. Smith's body --

17 A Yes, sir.

18 Q -- you took that also?

19 A (Witness nodding head affirmatively.)

20 Q Were there any other photographs taken at the
21 office of the Chief Medical Examiner by you or anyone else in
22 the regular course of business?

23 A I don't recall offhand. There might have
24 been.

25 Q Well, don't you customarily at the Chief

1 Medical Examiner's office take a photograph of the entire
2 cadaver after it's disrobed, after your examination?

3 A No, sir.

4 Q You do not?

5 A No, sir.

6 Q What other photographs might have been taken
7 in addition to those which the Judge has and Mr. Grizzard has
8 here?

9 A The only additional photographs that might
10 have been taken would be duplicate photographs of the wounds
11 on a different kind of film which is to make slides for
12 teaching purposes.

13 Q So in response to my question, your answer
14 is you do not have a photograph of the disrobed cadaver, as
15 such?

16 A We did not take one. The police might have.

17 Q The police might have taken them?

18 A Yes.

19 MR. WOODWARD: That's all I have of Doctor
20 Presswalla.

21
22 BY MR. WOODWARD:

23 Q Excuse me. Doctor Presswalla, in your
24 explanation of the wounds, in this particular case is the
25 photograph necessary for you to explain --

1 MR. GRIZZARD: That's going beyond the
2 proper cross-examination and, again, defense
3 counsel is trying to run the Commonwealth's case.
4 I have a right to put on evidence describing the
5 wounds and also showing Mr. Smith and the place
6 where the blood is on him and the wound in his
7 head. The Court is the one that said I couldn't
8 put in the one showing the wound.

9 THE COURT: I will allow the question out
10 of the presence of the jury.

11
12 BY MR. WOODWARD:

13 Q Doctor Presswalla, do you need a photograph
14 to show or describe each of the wounds involved?

15 A It depends on what issue comes to light. I
16 don't need it ordinarily, but if there are certain questions
17 that you or counsel or the Court bring up, it may require a
18 photograph.

19 Q You have three bullet wounds in this case,
20 do you not?

21 A Yes.

22 Q You can describe the location of each as it
23 appeared on Mr. Smith's body during your examination?

24 A Yes, sir.

25 Q No photograph is needed to do that, is it?

1 A No, sir.

2 MR. WOODWARD: Your Honor, I would ask, if
3 Mr. Grizzard allows me to do so, that this be
4 marked for identification for the purpose of my
5 examination of Doctor Presswalla.

6 THE COURT: Commonwealth's Exhibit Number 8,
7 I believe, isn't it?

8 (Marked by the Clerk as Commonwealth's
9 Exhibit Number 8 for identification.)
10

11 BY MR. WOODWARD:

12 Q Doctor Presswalla, the exhibit which has
13 been marked Commonwealth's Exhibit Number 8, I would ask that
14 you look at that photograph and what wounds are revealed
15 there on Mr. Smith's body?

16 A This photograph is taken for the purpose of
17 identification and it reveals a wound on the head.

18 Q How about any other wounds?

19 A The other wounds are not revealed on the
20 body because they are covered by a garment.

21 Q So the purpose of introducing this photograph
22 would be merely to identify the cadaver which you examined?

23 A The purpose of taking the photograph by me
24 was for that purpose.

25 Q Identification?

1 A Yes, sir.

2 MR. WOODWARD: That's all I have. Thank
3 you, Doctor Presswalla.

4 MR. GRIZZARD: I have no further questions.

5 THE COURT: All right, Doctor. Would you
6 please step outside again, please, sir.

7 (Doctor Presswalla was excluded from the
8 courtroom.)

9 MR. WOODWARD: Your Honor, we don't know
10 what other photographs Mr. Grizzard may have
11 available to him through the police department or
12 whether there are any which might be admissible or
13 not but, again, we indicate to the Court as we have
14 previously and Doctor Presswalla has indicated this
15 photograph was taken by him for identification.
16 There are three wounds and, incidentally, it shows
17 the head wound. It does not show the chest wounds.

18 THE COURT: All right, sir. I will do this,
19 gentlemen: If you don't stipulate that there is no
20 question of identification then I will put the
21 pictures in showing the wounds and not this picture.
22 The Doctor has testified this was for the purpose of
23 identification.

24 MR. GRIZZARD: Judge, I want to state for the
25 record that I object to the implication in

1 Mr. Woodward's statement that he doesn't know what
2 other photographs the Commonwealth might have. I
3 want to state for the record, pursuant to discovery
4 orders, Mr. Woodward has been given everything and
5 Mr. Savage has been given everything the Common-
6 wealth has. Detective Dixon was present at the
7 autopsy. To my knowledge, he did not take any
8 photographs. Every photograph that we took of the
9 scene or anything else has been provided defense
10 counsel.

11 MR. WOODWARD: We accept that presentation.
12 We didn't mean to imply any wrongdoing. We merely
13 were inquiring.

14 MR. GRIZZARD: I understand. I just want
15 the record to reflect that.

16 MR. WOODWARD: We would like to examine the
17 other photographs, Your Honor.

18 MR. GRIZZARD: I think you gave them back to
19 the Doctor.

20 I realize the Court has ruled, but I point
21 out to the Court the case of Stamper v. Commonwealth
22 and, in that case, in Stamper's view, since he
23 stipulated the victims were dead and did not object
24 to the diagram being introduced by the Commonwealth
25 showing where the bodies were, et cetera, and so

1 forth, then the Court still allowed the videotape
2 of the scene and what-have-you to describe the
3 scene adequately to the jury. The photographs are
4 relevant. They are material. They establish
5 premeditation. They establish malice to show the
6 degree of atrociousness and I think it's clearly
7 admissible.

8 MR. WOODWARD: I strongly object to the
9 Court's ruling in allowing that photograph in.

10 THE COURT: I'm going to allow the wounds
11 themselves to be shown by the Doctor and I assume
12 he's going to have to come forward and tell us which
13 are which unless you can point them out.

14 MR. GRIZZARD: That's the entry wound on the
15 head and the exit wound on the head.

16 THE COURT: All right.

17 MR. GRIZZARD: This shows the two wounds on
18 the chest. I think these are entry wounds on the
19 chest, Judge.

20 MR. WOODWARD: They could be duplicates.

21 MR. GRIZZARD: I don't know. I would have to
22 talk to Doctor Presswalla to find out which wounds
23 were which.

24 THE COURT: I imagine they were chest wounds.

25 MR. WOODWARD: Your Honor, we think he's

1 entitled to photographs based on the Court's
2 ruling of the wounds, but we don't think he's
3 entitled to duplicated photographs.

4 THE COURT: I will allow these,
5 Mr. Grizzard, and not allow this one since the
6 Doctor has testified this was merely for purposes
7 of identification and they have stipulated --
8 Mr. Woodward, I understand on the record you have
9 stipulated there is no question of identification.

10 MR. WOODWARD: That is correct, Judge.

11 MR. GRIZZARD: We would like it stipulated
12 in the presence of the jury.

13 MR. WOODWARD: By our objection to the
14 photograph Mr. Grizzard sought to have introduced,
15 we do not waive any objection which we have --

16 THE COURT: I'm going to mark this refused.

17 MR. GRIZZARD: Just one minute. Let's hear
18 what --

19 MR. WOODWARD: Your Honor, we do not waive
20 any objection we have to any photograph being
21 introduced into evidence.

22 THE COURT: I understand that.

23 MR. WOODWARD: Our argument is the same as
24 to any of the photographs; that they are unnecessary;
25 that they are inflammatory; and that they are

1 prejudicial under the authorities which we cited
2 yesterday.

3 THE COURT: I have allowed you to get all
4 that in the record, but I'm going to allow these
5 three and I'm going to mark this Commonwealth's
6 Exhibit Number 8 refused and let the Commonwealth
7 except to that.

8 MR. WOODWARD: We would ask for purposes of
9 the record that the Court recognize the argument
10 which we made yesterday about the introduction of
11 photographs and understand your ruling in
12 overruling our motion.

13 MR. GRIZZARD: Your Honor, I would like one
14 moment with Doctor Presswalla that I'm straight on
15 these three photographs. I'm satisfied what they
16 are, but I want to check with him one minute before
17 the jury comes in.

18 THE COURT: I'm going to mark that refused
19 photograph Commonwealth's 8A so our exhibits that
20 go to the jury will be numerically in order.

21 (Marked by the Clerk as Commonwealth's
22 Exhibit Number 8A refused.)

23 THE COURT: Are you ready, gentlemen?

24 MR. GRIZZARD: I don't know what I did with
25 the rest of the photographs.

1 THE SHERIFF: Your briefcase. You put them
2 in there.

3 MR. GRIZZARD: Yes. We're ready.

4 THE COURT: All right. Bring the jury in,
5 Sheriff.

6 (The jury was recalled to the courtroom, and
7 the following occurred in the presence of the jury:)

8 THE COURT: All right, Mr. Grizzard.

9 MR. GRIZZARD: I think we have a stipulation
10 before we call Doctor Presswalla.

11 MR. WOODWARD: Your Honor, the next witness,
12 as we understand it, whom the Commonwealth intends
13 to call, is Doctor Faruk B. Presswalla of the Chief
14 Medical Examiner's office of the Commonwealth of
15 Virginia. We have agreed with Mr. Grizzard to
16 stipulate that the body of William Jack Smith, Jr.,
17 examined by Doctor Presswalla, which he will now
18 testify, is the same William Jack Smith, Jr., named
19 in the indictment.

20 THE COURT: All right, sir.

21 MR. GRIZZARD: Doctor Presswalla.

22
23
24 -----OO-----
25

1 FARUK PRESSWALLA, recalled as a witness on behalf
2 of the Commonwealth, having been previously sworn, resumed
3 the stand and testified as follows:

4
5 DIRECT EXAMINATION (Rec.)
6

7 BY MR. GRIZZARD:

8 Q Doctor Presswalla, state your name, your
9 address and your occupation, please.

10 A Faruk Presswalla. I'm a physician employed
11 by the Commonwealth as the Deputy Chief Medical Examiner in
12 charge of Tidewater.

13 Q And what are your duties as the Medical
14 Examiner?

15 A I'm authorized by statute to investigate
16 certain deaths within my jurisdiction, and these include
17 sudden, unexpected, unusual and unnatural deaths and deaths
18 in legal custody.

19 MR. GRIZZARD: Do you stipulate that he is
20 an expert in his field or do you want to qualify
21 him?

22 MR. WOODWARD: We will stipulate that Doctor
23 Presswalla has examined in his experience a number
24 of bodies, et cetera, yes.

25 THE COURT: All right, sir.

1 BY MR. GRIZZARD:

2 Q Doctor Presswalla, in your opinion and in
3 your capacity as the Deputy Chief Medical Examiner, did you
4 have occasion, sir, to examine the body of William Jack
5 Smith, Jr.?

6 A I did.

7 Q Will you tell the ladies and gentlemen of the
8 jury when you first saw the body of William Jack Smith.

9 A I examined the body on the 13th of July, '78,
10 in the morning.

11 Q And who was present at that time, Doctor
12 Presswalla?

13 A At that time were present Detective Dixon of
14 the Franklin Police and Mr. Hampton and Mr. Lane, who were my
15 mortuary assistants.

16 Q All right, sir. Would you describe to the
17 ladies and gentlemen of the jury the outward appearance of
18 Mr. Smith.

19 A Mr. Smith was a middle-aged male, measuring
20 six feet, three inches, and weighing 200 pounds, and he was
21 clothed in pants, underclothes, shirt and a necktie and shoes
22 and socks. The shirt had been pulled off and my examination
23 showed that he had sustained two gunshot wounds of the trunk.
24 These were located on the left side about here and here.

25 (Indicating)

1 Q All right, sir. Just one moment.

2 (Mr. Grizzard picking up the blood-stained
3 shirt.)

4 MR. WOODWARD: We're going to object to that.

5 MR. GRIZZARD: Well, start.

6 MR. WOODWARD: Your Honor, we have a motion
7 to make out of the presence of the jury.

8 THE COURT: All right. Would you take the
9 jury out, please.

10 (The jury was excluded from the courtroom,
11 and the following occurred out of the presence of
12 the jury:)

13 MR. WOODWARD: Your Honor, we see that
14 Mr. Grizzard has this morning, contrary to our
15 expectation, has what I assume is the shirt which
16 Mr. Smith was wearing at the time of Doctor
17 Presswalla's examination of him. The shirt has no
18 probative value whatsoever. Mr. Grizzard again, we
19 submit, is seeking to get into evidence that which
20 he cannot get into evidence through the photograph
21 and that is the blood-stained shirt which has no
22 possible probative value in accordance with Doctor
23 Presswalla's expertise, other than to inflame the
24 jury and to result in prejudice to the defendant.
25 Doctor Presswalla clearly can testify without this

1 particular shirt being introduced into evidence.
2 This is not a circumstantial-evidence case. This
3 is a case of direct, eyewitness identification
4 examination, et cetera. Two testified yesterday
5 and one will testify today and Mr. Grizzard has the
6 right to run his case any way he chooses, but he
7 does not have a right to inflame the jury and
8 establish prejudice when it has no probative value
9 whatsoever. Now, he's brandished the shirt
10 already. We would move for a mistrial also on the
11 basis of his presenting the shirt without letting
12 us know he intended to present it.

13 MR. GRIZZARD: Now, now, now --

14 MR. WOODWARD: Wait just a moment.

15 We were not aware that he was going to
16 present the shirt into evidence. We were aware that
17 he had it. Based upon your previous ruling of the
18 photograph, now to present the shirt would be to do
19 the exact same thing the Court has indicated there
20 was no purpose in doing through Doctor Presswalla's
21 testimony and we object to it. We move for the
22 mistrial. We, secondly, move to exclude it.

23 MR. GRIZZARD: Your Honor, I will state for
24 the record as late as Sunday night of this week,
25 Mr. Woodward and Mr. Savage were advised we were

1 intending on putting that shirt into evidence.

2 MR. WOODWARD: We disagree with his
3 statement. We did know he had the shirt, but we
4 were not aware that he intended to introduce it in
5 evidence in this court.

6 MR. GRIZZARD: You weren't listening.

7 THE COURT: Let's get to the admissibility.

8 MR. GRIZZARD: Judge, I appreciate
9 Mr. Woodward's and Mr. Savage's position that they
10 don't want any evidence to come in here to actually
11 show the injury, what happened in this case. We
12 are dealing with a serious offense and, true, we
13 have eyewitness testimony as to the events that took
14 place on July 12, 1978. I did not know that just
15 because you have got eyewitness testimony that you
16 can't put on any evidence of what is there. These
17 are the clothes that the victim was wearing. These
18 are the clothes taken by the Medical Examiner. They
19 show the bullet holes in the shirt and the
20 underclothing. I think they are clearly admissible.

21 MR. WOODWARD: He still hasn't answered the
22 question we propounded. What probative value does
23 it add? What does it tell the jury that it has not
24 been told previously by Commonwealth witnesses and
25 what it will not be told by Doctor Presswalla's

1 testimony now? The Court has allowed photographs
2 to be introduced into evidence to show the
3 location. He's going to testify scientifically as
4 to the location of the wounds; and, the fact that
5 Mr. Grizzard has the shirt, we, again, submit has
6 no probative value. It has one purpose, the same
7 purpose as the photograph had. That is to hold it
8 up there to the jury; show the gore; get them
9 inflamed. That's not the purpose of this trial.
10 The purpose of this trial is for the jury to have
11 such evidence before it that it can understand the
12 Commonwealth's position in this case. He had two
13 eyewitnesses yesterday. They have got another one
14 today and they have got the Medical Examiner to
15 locate each of the wounds; and, in addition, they
16 have got the photographs which we objected to to show
17 each of those wounds. Now, I don't understand what
18 good the shirt does. It's not a question of
19 identification. If it were the victim's shirt --
20 and say we can't identify him and we seized his
21 shirt. Certainly, it's admissible, but it has no
22 purpose here other than an inflammatory purpose
23 before this jury and, again, we submit it has no
24 reason to be here and we object to it.

25 THE COURT: All right, gentlemen. I'm going

1 to overrule your objection and note your exception
2 for the record.

3 Bring the jury back.

4 (The jury was recalled to the courtroom, and
5 the following occurred in the presence of the jury:)

6
7 BY MR. GRIZZARD:

8 Q Doctor Presswalla, you have previously
9 testified that there were two holes in the shirt of
10 Mr. Smith. I show you these garments and ask you if you have
11 ever seen them before, sir?

12 A Yes, sir. I have seen them before.

13 Q And would you tell the ladies and gentlemen
14 of the jury where.

15 A This is the shirt and undershirt that I
16 removed from Mr. Smith's body.

17 MR. GRIZZARD: At this time, Your Honor, the
18 Commonwealth would offer that into evidence as
19 Commonwealth's Exhibit Number 8.

20 (Marked in evidence by the Clerk as
21 Commonwealth's Exhibit Number 8.)

22
23 BY MR. GRIZZARD:

24 Q Now, would you continue, sir. You described
25 the clothing that he was wearing and you saw two bullet holes

1 in the chest and what else did your external examination find,
2 sir?

3 A On the back of Mr. Smith's body, as I
4 turned it over, was an exit wound with a bullet still caught
5 between the exit and the clothing and I recovered this bullet
6 and marked it with my initials S2/P.

7 Q Now, Doctor Presswalla, this bullet that you
8 saw between the clothing, was that between the shirt and the
9 outer shirt?

10 A Yes. I --

11 Q Excuse me. And you say you marked that how,
12 sir?

13 A With the initial S2/P.

14 Q Doctor Presswalla, I hand you this and ask
15 you if you have ever seen that before, sir?

16 A Yes, sir, I have.

17 Q And where, sir?

18 A This is the bullet that I removed from
19 between the outer shirt and the undershirt of Mr. Smith's
20 body.

21 Q And was it in this flattened condition when
22 you found it, sir?

23 A Yes.

24 MR. GRIZZARD: I would like this bullet
25 marked Commonwealth's Exhibit 9.

(Marked in evidence by the Clerk as
Commonwealth's Exhibit Number 9.)

BY MR. GRIZZARD:

Q What did you do with that bullet, Doctor
Presswalla?

A After marking the bullet, I submitted it to
Detective Dixon, who was present there.

Q All right. Go ahead and continue your
external examination.

A Further examination showed that there was a
gunshot wound of the head which was located in this region
and it had traversed in a backward direction through the
scalp and had exited just about here. (Indicating) No
bullet was recovered there. Then I continued with my internal
examination.

Q Doctor Presswalla, I show you these two
photographs, sir, and ask you what they represent?

A Okay. This photograph represents the
entrance wound in the head, located about here and the bottom
photograph represents the exit wound, which is located about
there. (Indicating)

MR. GRIZZARD: For the record, Your Honor,
I would like Commonwealth's Exhibit Number 10 to be
marked "Entrance Wound" and Commonwealth's Exhibit

1 Number 11 to be the "Exit Wound."

2 (Marked in evidence by the Clerk as
3 Commonwealth's Exhibit Numbers 10 and 11.)

4
5 BY MR. GRIZZARD:

6 Q Doctor Presswalla, you testified earlier in
7 your external examination you saw two wounds in the chest and
8 you pointed to your chest where they were. Did you take a
9 photograph of that, sir?

10 A Yes, I did.

11 Q I show you that photograph, sir, and ask you
12 what that depicts?

13 A Yes. That is a photograph depicting
14 Mr. Smith's chest region, showing the two gunshot wounds of
15 entrance.

16 MR. GRIZZARD: We would like this photograph
17 marked Commonwealth's Exhibit Number --

18 THE COURT: 12.

19 MR. GRIZZARD: -- 12.

20 (Marked in evidence by the Clerk as
21 Commonwealth's Exhibit Number 12.)

22
23 BY MR. GRIZZARD:

24 Q After you had located the bullet between the
25 clothing -- the shirt and the shirt in the back and completed

1 your external exam, sir, did you then have occasion to make
2 an internal examination?

3 A I did.

4 Q And what did your internal examination
5 reveal, sir?

6 A On my internal examination, I explore the
7 bullet wounds and trace their tracks. The gunshot wound of
8 the head, which I said had passed through the scalp, had
9 produced, however, some bleeding on the coverings of the
10 brain and bruised the brain surface. The two wounds in the
11 chest, the one which was higher had gone through in a
12 backward direction, had penetrated through the heart and
13 through the feed pipe and through the windpipe and had
14 enlarged itself in the spine where I recovered the bullet and
15 I marked that bullet S1/P.

16 Q All right, sir. Just one moment. Doctor
17 Presswalla, I hand you this object and ask you if you have
18 ever seen that before, sir?

19 A Yes, sir, I have.

20 Q And what mark is on that, sir?

21 A S1/P.

22 Q Is this the bullet that you're speaking of
23 that you took from the back vertebra?

24 A I did, sir.

25 MR. GRIZZARD: Your Honor, I would like that

1 marked Commonwealth's Exhibit Number --

2 THE COURT: 13.

3 MR. GRIZZARD: -- 13.

4 (Marked in evidence by the Clerk as
5 Commonwealth's Exhibit Number 13.)
6

7 BY MR. GRIZZARD:

8 Q What did you do with this bullet, Doctor
9 Presswalla?

10 A This bullet was also handed to Detective
11 Dixon.

12 Q And you have traced the path of this one
13 bullet -- the higher wound. Did you trace the path of the
14 bullet that exited through the back?

15 A Yes, sir.

16 Q Would you describe where that bullet went,
17 sir.

18 A That bullet penetrated the chest and went
19 through the lung and then exited out from the back where I
20 recovered it between the clothing as mentioned before and
21 both the first and the second bullet wounds in the chest had
22 resulted in internal bleeding, both in the chest cavity and
23 in the sacks surrounding the heart.

24 Q From your overall examination of the
25 decedent, Mr. Smith, sir, could you determine the cause of

1 death of Mr. Smith?

2 A Yes, sir, I did.

3 MR. WOODWARD: Your Honor, before he
4 testifies, I believe he has to do so with
5 reasonable medical certainty.

6 THE COURT: All right, sir.

7
8 BY MR. GRIZZARD:

9 Q Can you testify with reasonable medical
10 certainty as to the cause of death, sir?

11 A I can, sir.

12 Q And what was the cause of death?

13 A That Mr. Smith died as a result of internal
14 bleeding from the gunshot wounds to the chest.

15 Q Would either one or the other have been the
16 actual cause of death or was it a combination of the two or --

17 MR. WOODWARD: I object to his leading the
18 witness, Your Honor.

19
20 BY MR. GRIZZARD:

21 Q Well, let's take the top bullet wound, the
22 one that went through the heart. Could you tell in your
23 opinion, Doctor Presswalla, whether that one shot would have
24 been sufficient, with reasonable medical certainty, to kill
25 Jack Smith?

1 A Yes, that wound by itself would have been
2 fatal.

3 Q As to the other shot in the chest, the one
4 -- the lower one that exited -- went through the lung and
5 through the body and exited out into the back, could you tell
6 the ladies and gentlemen of the jury with reasonable medical
7 certainty whether in your opinion that wound would have been
8 sufficient to kill W. Jack Smith, Jr.?

9 A That wound independently could have been
10 fatal.

11 MR. GRIZZARD: All right, sir. Answer
12 Mr. Woodward and Mr. Savage.

13 MR. WOODWARD: We have no questions of
14 Doctor Presswalla, Your Honor.

15 THE COURT: All right. You gentlemen have
16 no further need of Doctor Presswalla?

17 MR. WOODWARD: We have no objection to his
18 being excused, Your Honor.

19 MR. GRIZZARD: Officer Alan Bain.

20
21
22 -----OOO-----
23
24
25

1 ALAN D. BAIN, JR., called as a witness on behalf of
2 the Commonwealth, having been first duly sworn, was examined
3 and testified as follows:

4
5 DIRECT EXAMINATION

6
7 BY MR. GRIZZARD:

8 Q Officer Bain, state your name, your address
9 and your occupation, please, sir.

10 A My full name is Alan D. Bain, Jr. I reside
11 in the City of Franklin. I'm a police officer in the City of
12 Franklin.

13 Q And were you so employed on July 12 of 1978,
14 sir?

15 A Yes, sir.

16 Q Do you know where Smith Jewelers is located,
17 sir?

18 A Yes, sir. At the time, it was located next
19 to Stephenson's Realty.

20 Q And where is that?

21 A On East Second Avenue.

22 Q And is that in the City of Franklin?

23 A Yes, sir.

24 Q I want to direct your attention to July 12
25 and ask you if you were working on that date, sir, of 1978?

1 A Yes, sir, I was working the seven to three
2 shift.

3 Q Did you have occasion on that date to go to
4 Smith Jewelers?

5 A Yes, sir.

6 Q Would you tell the Court what time you went
7 to Smith Jewelers.

8 A I received a call around eleven twenty-one,
9 somewhere around there. The alarm had gone off at Smith
10 Jewelers.

11 Q What did you do in response to that, sir?

12 A When I got to the area, I pulled my unit in
13 between Stephenson's and Smith Jewelers and proceeded to go
14 to the store, and when I entered the door to notify Mr. Smith
15 that the alarm was off, a subject pointed a shotgun right at
16 my face on the right-hand side of me.

17 Q Did you make any statement before this was
18 done?

19 A Yes, sir. I told Mr. Smith at the time his
20 alarm was on.

21 Q You say a subject?

22 A Yes, sir. At the time, I didn't know who the
23 subject was other than just a black male with a shotgun.

24 Q What type of shotgun was it?

25 A It was a sawed-off shotgun. All I saw was

1 the barrel of it.

2 Q Where were you in the store at that time?

3 A I was right at the door -- front entrance.

4 Q Where was the man with the shotgun?

5 A He was right at my right side with the gun
6 pointed right at my head.

7 Q What occurred at that time, sir?

8 A Subject didn't make any statement. He just
9 poked the gun on my side to get me inside the store and then
10 he poked the gun again in my side to get me to go in the store.
11 I got to the center of the store. He took the shotgun again
12 and jabbed it into the side of my hip and jabbed it back
13 again and I questioned him what he wanted me to do with it.
14 Then I asked him did he want me to take the weapon out and he
15 nodded his head, so I laid it on the floor next to him and he
16 jammed the gun back in my side, pointing toward the back of
17 the store, and then I walked to the back toward -- I think
18 it was the check-out counter.

19 Q You went to the check-out counter. You say
20 he nodded his head?

21 A When he pointed to the back, I asked him if
22 he wanted me to go back. He nodded his head. He didn't say
23 anything. He didn't open his mouth or nothing.

24 Q Then you went to the back?

25 A Yes, sir.

1 Q What was done with your pistol?

2 A He had possession of it after I got to the
3 back of the store.

4 Q You didn't know who the subject was that day?
5 Do you know who was holding that sawed-off shotgun?

6 A Yes, sir, the defendant, sitting right there.
7 (Indicating)

8 Q This pistol -- your service revolver --
9 could you tell the ladies and gentlemen of the jury whether
10 or not it was loaded.

11 A Yes, sir, it was fully loaded. Six shots.

12 Q What type of bullets do you use, sir?

13 A I had lead bullets in it. Department-issued.

14 Q All right, sir. You got to the back of the
15 store. Was anybody else at the store at that time?

16 A Yes, sir, there was some people lined up on
17 the right-hand wall running from the back of the building to
18 -- almost to the center of the store.

19 Q And who were these people?

20 A Mrs. Cosby, Mr. Smith, a black subject I
21 didn't know at the time, and Mary, the clerk of the store.

22 Q Would that be Mrs. Huffman?

23 A Yes, sir.

24 Q All right. Did you observe anything going
25 on in the store when you went to the back?

1 A When I got to the back, I glanced around to
2 see the position of the people and the situation in the
3 store at that time; and, as I was standing there, I noticed
4 to my -- which would be my right as I was facing out of the
5 store, there was stuff piled up on the counter.

6 Q What counter is that?

7 A That would be the -- I reckon it was the
8 check-out counter.

9 Q All right. After you had gotten to the back,
10 you noticed the stuff on your right on the check-out counter.
11 What occurred next in the sequence of events, Mr. Bain?

12 A The subject then talked to Mr. Smith and
13 told him to turn off the alarm, at which time Mr. Smith did
14 exactly what he said. He then walked from behind the counter
15 that was at the right side of the store, went through the
16 counter where I was standing at and proceeded to turn off the
17 alarm.

18 Q After Mr. Smith turned off the alarm, what
19 did he do?

20 A The subject was standing there behind
21 Mr. Smith. The phone rang, as I recall, and Mrs. Cosby asked
22 him if he wanted her to answer the phone. If I recall, I
23 believe he told her to be very careful what she said and, at
24 this time, she answered the phone and hung up. He then told
25 Mr. Smith that he wanted the diamonds from the counter that

1 was over on the right-hand side, at which time Mr. Smith
2 went over there to clear out the shelf. He pointed the
3 shotgun at the shelf and told him he wanted the stuff on that
4 shelf.

5 Q All right. Did Mr. Smith then start pulling
6 the --

7 A Yes, sir, and, while he was doing that, the
8 subject was examining my service revolver.

9 Q When he was examining -- how was he examining
10 the revolver?

11 A He was looking at it, studying it, and,
12 during the time he was doing that, he pulled back the hammer
13 on my revolver and it went off over my head.

14 Q Where were you in the store at this time?

15 A I was at the direct back wall of the store.

16 Q And where were the other people in the store?

17 A Mrs. Cosby was to my left in the back
18 corner, Mr. Smith was behind the jewelry counter, and I don't
19 know the exact position of Mary Huffman and the black subject.
20 I don't know exactly where they were at that time, but they
21 were somewhere in between the center and the front.

22 Q All right, sir. After the shot was fired,
23 what -- was anything said or anything done at that time?

24 A After that, he said if he saw or heard any
25 more police officers, he was going to start killing. About

1 that time, I heard a siren go off.

2 Q All right, sir. Now, after you made this
3 statement, was everybody still in their relative positions?

4 A Yes, sir. Just about. I think Mr. Smith
5 was then standing about the center of the store, which would
6 put him in front of his crystal section. He did exactly what
7 he was told to do.

8 Q Do you know whether or not the jewelry
9 counter had been emptied at that time?

10 A I can't recall if it was emptied out. I
11 know he moved all the diamonds, but I don't know if it was
12 all empty or not.

13 Q What was Mr. Smith doing at that time?

14 A When the subject began to move from the
15 back, Mr. Smith was standing up. The subject started out
16 towards the front of the store and about the time he got to
17 the center of the store, he fired a shot right at Mr. Smith
18 and everybody went down at that time. I got up right quick
19 and started talking.

20 Q Just a minute.

21 A Yes, sir.

22 Q You say the subject. Are you speaking of
23 the defendant?

24 A Yes, sir.

25 Q You say he moved toward the front of the

1 store?

2 A Yes, sir.

3 Q How far down the store was Mr. Smith from
4 where he was?

5 A He was in about the center of the store,
6 roughly.

7 Q The jury doesn't know how far the center is.
8 Can you pick out an object in this courtroom to show how far
9 the defendant moved?

10 A I would say where your briefcase is to where
11 I'm sitting. About.

12 MR. GRIZZARD: For the record, Your Honor,
13 twelve feet, fifteen?

14 THE COURT: Twelve, fifteen feet.

15 MR. GRIZZARD: Twelve, fifteen feet.

16

17 BY MR. GRIZZARD:

18 Q Now, as he was walking toward the front of
19 the store, did he have any weapons with him at that time?

20 A Yes, sir. He had the shotgun and he had my
21 revolver.

22 Q Now, which hand was which in?

23 A He had the shotgun in his left hand and my
24 revolver in his right hand.

25 Q And as he got to where Mr. Smith was in the

1 store, you say he fired at Smith. How did he fire at
2 Mr. Smith?

3 A He stopped. I don't remember if he turned
4 or not, but he just pointed right at Mr. Smith and fired.
5 There was no warning. He just pointed and fired. At that
6 time, I started talking to him. I offered to take him out
7 of the store. I offered to carry the stuff and take him
8 anywhere he wanted to go. While I was talking to him, at
9 this time, Mrs. Huffman and the black subject that was with
10 her were making their way up to the front of the store and
11 I saw what they were trying to do, so I kept him talking to
12 me, keeping him looking at me as they made their way out the
13 door, which only left myself and Mr. Smith and Mrs. Cosby in
14 the store.

15 Q Now, at the time that you were talking to
16 him, what was he doing?

17 A When I was talking to him, he was looking
18 right at me, pointing the shotgun directly at me. He kept
19 the shotgun on me at all times, making sure that he had me at
20 a good distance and he just noticed them going out the door.
21 When he turned around, he pointed the gun directly at the
22 black subject going out the door and I continued to talk to
23 him, which drew his attention back to me; and, after they got
24 out the door, he looked directly at me and he told me he
25 wasn't going to hurt me, but, he said, "I'm going to kill this

1 nigger squealer" and at that time he reached over the counter.
2 He fired at Mr. Smith.

3 Q How many times did he fire at Mr. Smith?

4 A I believe it was two shots were fired at
5 that time. I'm not sure. It could have been more.

6 Q Now, do you recall whether they were one
7 right behind the other or whether there was a space between
8 them or what?

9 A It was a rapid fire.

10 Q How wide is that counter, Mr. Bain?

11 A I would say it was this wide. (Indicating)
12 I don't know how wide it is.

13 MR. GRIZZARD: For the record, a foot and a
14 half?

15 MR. WOODWARD: Approximately.

16
17 BY MR. GRIZZARD:

18 Q Now, where was Mr. Smith at the time just
19 before he fired these two shots?

20 A I'm not sure whether he was sitting or laying
21 on the floor. He was down behind the counter.

22 Q Now, how exactly did the defendant reach
23 over the counter?

24 A He reached over the counter looking down and
25 fired just like this (indicating), touching the counter.

1 Q What occurred after these two shots were
2 fired down at Mr. Smith?

3 A The subject then started coming back towards
4 the back of the store where I was standing and Mrs. Cosby was
5 standing and as soon as he got to the corner, something told
6 me to go ahead and grab him. At this time, I grabbed for
7 both weapons and pushed him up against the back of the wall
8 where the shelves were at, and I told her to get to hell out
9 of there. As soon as she reached the front door, I yanked
10 the weapons out of his hands and ordered him to the floor.
11 During that time, I opened the shotgun and ejected a live
12 round on the floor. Either dropped it or the shotgun down.
13 I don't remember which one. Just tried to neutralize the
14 weapon and I stood over him with my weapon on him and I
15 called for help.

16 Q Did anybody come in response to your call?

17 A Yes, sir. I believe Sergeant Poole entered
18 the store and I believe it was Deputy Barnes.

19 Q All right, sir. Officer Bain, after Sergeant
20 Poole or someone else came in, what did you do, sir?

21 A What did I do?

22 Q Yes, sir.

23 A After the subject was handcuffed, I picked up
24 the shotgun and carried it down to headquarters, at which time
25 I turned it over to Sergeant Poole, which, in turn, he turned

1 it over to Detective Eubanks, which the shotgun then was
2 completely unloaded.

3 Q Completely unloaded where?

4 A Inside the -- I remember it was done inside
5 the headquarters.

6 Q Do you recall how many shells were in the
7 gun at headquarters?

8 A Two were left in there. Yeah.

9 Q Now, you testified earlier you had thrown a
10 shell out; is that right?

11 A Yes, sir.

12 Q Do you know what happened to that shell?

13 A I had that shell with me when I went down
14 there.

15 Q How did you get that shell?

16 A If I remember right, I think I picked it up
17 off the floor. I'm not sure.

18 Q What did you do with that shell?

19 A Gave it to -- I remember I gave it to
20 Detective Eubanks. I'm not quite sure.

21 Q Mr. Bain, I show you Commonwealth's Exhibit
22 Number 1 for identification and ask you if you have ever seen
23 this before?

24 A Yes.

25 Q And where?

1 A I saw it inside of Smith Jewelers and I had
2 it in my hand.

3 Q Is this the weapon that was turned over to
4 Eubanks?

5 A Yes, sir.

6 Q I show you Commonwealth's Exhibit Number 4,
7 sir, and ask you if you have ever seen that before, sir?

8 A This is the service revolver I had at the
9 time and these two pieces here I had put on the gun for my
10 use.

11 MR. GRIZZARD: For the record, Your Honor,
12 he's pointing to an enlargement on the trigger and
13 an enlargement on the handgrip.

14
15 BY MR. GRIZZARD:

16 Q Did you take anything out of the store,
17 Officer Bain, other than the shotgun, the one shell and the
18 -- your service revolver?

19 A No, sir.

20 Q Do you know where the --

21 A Wait a minute. Excuse me. I did have
22 something else. I had the -- a towel and, if I remember
23 right, a bag. I don't know if I took it out of the store, but
24 I know I had possession of it.

25 Q I show you this towel marked Commonwealth's

1 Exhibit 2, and ask if you have ever seen that before?

2 A Yes, sir. That's what was wrapped around
3 the shotgun.

4 Q Do you know what was done with the jewelry
5 or what-have-you that Mr. Smith had been putting --

6 A No, sir. When I left, everything was still
7 in the same location that it was during the time I was in
8 the store.

9 Q Do you know how long a time elapsed from
10 the time you had the defendant on the floor until Sergeant
11 Poole arrived?

12 A I couldn't really tell you. It just seemed --

13 MR. WOODWARD: I object to what it seems,
14 if he doesn't know.

15
16 BY MR. GRIZZARD:

17 Q If you don't know --

18 A (No response.)

19 MR. GRIZZARD: All right. Answer
20 Mr. Woodward.

21
22 CROSS-EXAMINATION

23
24 BY MR. WOODWARD:

25 Q Mr. Bain, how long have you been a police

1 officer with the City of Franklin?

2 A This April coming up will make six years.

3 Q And have you been continuously employed as
4 an officer during that period of time?

5 A Yes, sir.

6 Q And you were so employed on the date
7 Mr. Grizzard has asked you about?

8 A Yes, sir.

9 Q Now, you have indicated that you were
10 working the seven to three shift?

11 A Yes, sir.

12 Q And that you were dispatched to Smith
13 Jewelers?

14 A Yes, sir.

15 Q And who dispatched you?

16 A The dispatcher.

17 Q And you went there with the understanding,
18 did you not, Mr. Bain, that there was an alarm that had gone
19 off?

20 A Yes, sir.

21 Q Are you familiar with the operation of the
22 headquarters of the Franklin Police Department?

23 A Yes, sir.

24 Q And Smith Jewelers had an alarm which
25 sounded there, didn't it?

1 A Yes, sir.

2 Q And that was commonly known as a silent
3 alarm?

4 A I wasn't familiar with the alarm. The alarm
5 was down at another place. It wasn't at headquarters.

6 Q When I say "silent alarm", I mean an alarm
7 that does not ring, buzz or sound in Smith Jewelers.

8 A Yes, sir.

9 Q That's correct, isn't it?

10 A Yes, sir.

11 Q And, in addition, Smith Jewelers had an
12 alarm system on its front glass, didn't it?

13 A Yes, sir.

14 Q And that would be a ringing noise? A bell,
15 for example?

16 A I believe so.

17 Q And you went there approximately what time?

18 A It would be sometime between eleven twenty-
19 one and maybe twenty-five.

20 Q Were you alone in your police vehicle?

21 A Yes, sir.

22 Q You have indicated that you pulled beside
23 Smith Jewelers?

24 A Yes, sir.

25 Q I assume you got out of your vehicle?

1 A (Witness nodding head affirmatively.)

2 Q And walked directly in the front door of
3 the jewelry store?

4 A Yes, sir.

5 Q And as you opened the front door, what did
6 you say?

7 A I didn't say anything when I opened the door.
8 When I got into the store is when I notified Mr. Smith his
9 alarm was off.

10 Q What did you say again exactly as you can
11 recall?

12 A I notified him that his alarm was off. Exact
13 words I used, I don't remember.

14 Q And where was Mr. Smith then?

15 A He was behind the counter on the right-hand
16 side of the store.

17 Q So he was approximately how far down the
18 store toward the back?

19 A Almost the middle of the store.

20 Q And when you made the statement to him, you
21 had just stepped inside the door?

22 A Yes, sir.

23 Q Now, in your being an officer with the
24 Franklin Police Department, do you have any training or any
25 manual or whatever that you are supposed to follow when you're

1 dispatched when a silent alarm is sounded?

2 A Yes, sir, but at that time I was the only
3 unit in the city available to answer the call.

4 Q Well, what are you told or what is your
5 understanding as to what you're supposed to do in responding
6 to a silent alarm?

7 MR. GRIZZARD: May it please the Court, I
8 think these questions are not related to the
9 hearing that we're having at this particular point.

10 THE COURT: What is the relevance,
11 Mr. Woodward?

12 MR. WOODWARD: Well, Your Honor, he's
13 examined him carefully on direct examination. We're
14 merely cross-examining as to what he did and whether
15 that was in accordance with what he was supposed to
16 do.

17 THE COURT: Well, what relevance would that
18 have?

19 MR. WOODWARD: Well, if we might make our
20 statement outside the presence of the jury, Your
21 Honor.

22 THE COURT: All right. Ladies and gentlemen,
23 would you step outside and take a short recess.

24 (The jury was excluded from the courtroom,
25 and the following occurred out of the presence of

1 the jury:)

2 MR. WOODWARD: Your Honor, it's one of the
3 circumstances of what occurred, what this man did
4 and what he didn't do.

5 THE COURT: I agree what he did is relevant.
6 What you're going into is rules and regulations of
7 the Franklin Police Department. What is the
8 relevance of that?

9 MR. WOODWARD: We think that's a
10 circumstance to be considered by this jury in
11 determining whether capital murder is the offense
12 committed and, subsequently, the punishment which
13 is to be inflicted on the defendant. It's a
14 surrounding circumstance. This is a man on cross-
15 examination who has told the jury what he did. We
16 think the jury is entitled to know whether he has
17 acted in accordance with what occurred. It
18 certainly is a contributing circumstance, we submit
19 to you, of the totality of what occurred. If that
20 man had done it differently, perhaps it wouldn't
21 have occurred. We think the jury is entitled to
22 consider all the circumstances and what each person
23 did and whether he acted in accordance with what he
24 should have done. One of the offenses which is
25 alleged is that Officer Bain has been robbed by the

1 use of a sawed-off shotgun. This certainly goes to
2 that, what he did and whether he was acting in
3 accordance with his instructions. To limit that,
4 of course, limits the case strictly to what Officer
5 Bain did. Now, he's a police officer. He's told
6 what to do and under what circumstances he is
7 supposed to do it. It's not as if he were a lay
8 person walking in the store. We certainly couldn't
9 ask that person the same question we're propounding
10 to Officer Bain. We subsequently intend to call
11 another witness perhaps toward this same line of
12 questioning and ask him what is the procedure;
13 what's supposed to be done; and did he do it. We
14 think it is probative to the issue before the jury.

15 MR. GRIZZARD: If it please the Court,
16 Franklin Police procedure is not the issue in this
17 case. There is no relevancy whatsoever at this
18 stage of the trial as to the Franklin police
19 officers' procedure. The questions are what the
20 defendant did. Is it wilful, deliberate, and
21 premeditated? What the police officers in Franklin
22 do do not have any probative value as to that issue.

23 THE COURT: I think what you're talking
24 about, Mr. Woodward, may be relevant if we have a
25 second stage of this trial, but I don't think it's

1 relevant on the guilt or innocence stage.

2 Go ahead. I will allow you to say anything
3 else you want to say.

4 MR. WOODWARD: I understand your ruling.

5 THE COURT: I'm going to sustain the
6 objection and note your exception in the record.

7 MR. WOODWARD: Please, Judge.

8 MR. SAVAGE: Before the jury comes back,
9 may we have a recess?

10 THE COURT: We have been at it about an hour.

11 MR. WOODWARD: Your Honor, if we might have
12 a moment just on the same point.

13 THE COURT: All right, sir.

14 MR. WOODWARD: Your Honor, we have a witness
15 who is supposed to come today. In light of the
16 ruling which you have made, we, of course, would
17 like to offer his testimony, but I see no reason
18 for him to appear and make a lengthy trip since you
19 have indicated you will not allow us to introduce
20 evidence of the nature which we sought to elicit
21 through our cross-examination of Mr. Bain.

22 THE COURT: Who is that witness, Mr. Woodward?

23 MR. WOODWARD: That is Chief O'Brien.
24 Franklin Police Department.

25 THE COURT: All right, sir.

1 MR. GRIZZARD: Is he here?

2 MR. WOODWARD: No. The arrangement was he
3 was supposed to be here about 3 o'clock this
4 afternoon and we thought we might need him.

5 MR. GRIZZARD: I don't know. We will need
6 to check that.

7 THE COURT: Let's take a short recess.

8 (The Court recessed at 10:45 a.m. The Court
9 reconvened at 10:48 a.m.)

10 (The jury was recalled to the courtroom, and
11 the following occurred in the presence of the jury:)

12 THE COURT: All right, sir.

13

14 BY MR. WOODWARD:

15 Q Mr. Bain, when you went into Smith Jewelry
16 in Franklin, were you dressed as you are now?

17 A Yes, sir.

18 Q That's in uniform with the Franklin Police
19 Department?

20 A Yes, sir.

21 Q And the weapon which you had was on your
22 right side or your left side?

23 A Same side I'm wearing it now. My right side.

24 Q And you had a pistol in a holster as you do
25 now?

1 A Yes, sir.

2 Q And does that have a snap which goes over
3 the pistol?

4 A Yes, sir.

5 Q Was the pistol in the holster?

6 A Yes, sir.

7 Q Was the snap closed?

8 A Yes, sir.

9 Q You have indicated that after you got inside
10 the store that then the shotgun was pushed against you or
11 pushed near you?

12 A Yes, sir.

13 Q And then you went to the center of the store,
14 approximately? Approximately the center of the store?

15 A Yes, sir.

16 Q You and the defendant both walked there?

17 A Yes, sir.

18 Q And then you removed the pistol there and,
19 I believe you indicated, laid it in the center of the floor?

20 A I laid it right beside me on the floor.

21 Q And where did you go then?

22 A He pointed the gun toward the back of the
23 store. I asked him if that's where he wanted me to go and he
24 nodded and that's where I went.

25 Q And you did go to the back of the store?

1 A Yes, sir.

2 Q When you got to the back of the store, did
3 you then turn around, facing from the back of the store
4 toward the front of the store?

5 A No. I was standing in the alleyway of where
6 the workbench/cashier area was and I was observing that area.

7 Q There is an open area that you can walk from
8 the front to the back of the store then, is there not?

9 A Yes, sir.

10 Q And you were standing in the opening there
11 going on toward the back?

12 A Yes, sir.

13 Q When you got there, did you then see that
14 the defendant had the pistol in his hand?

15 A If I remember rightly, when I saw him coming
16 to the back of the store, the pistol was in his pants pocket.

17 Q Well, where was he when he was examining the
18 pistol?

19 A In the work area.

20 Q In the work area?

21 A Yes, sir.

22 Q And how close was he to you then?

23 A Let's see.

24 Q Approximately.

25 A I wasn't in the work area when he was

1 examining the weapon. At that time, I was over at the left
2 side, back wall at that time.

3 Q In the sequence of events as they occurred
4 when he examined the weapon, you had him in your full view at
5 that time?

6 A Yes, sir.

7 Q Did it not appear to you that he was
8 unfamiliar with the weapon?

9 A He was examining it. I would say yes.

10 Q He was turning it over in his hands,
11 et cetera?

12 A Yes, sir.

13 Q And then the weapon discharged, didn't it?

14 A Yes, sir.

15 Q And when it discharged, he was not pointing
16 the weapon at you?

17 A No, sir.

18 Q Now, at what point did he tell Mr. Smith to
19 cut off the alarm?

20 A It was during the time he was on his way to
21 the back of the store.

22 Q And Mr. Smith went to where the alarm button
23 was?

24 A Yes.

25 Q There were no bells or buzzers or anything

1 ringing in the store that stopped when Mr. Smith touched the
2 button?

3 A No, sir.

4 Q Once Mr. Smith had done that, where did he
5 then go?

6 A Who do you mean by where did he go?

7 Q Meaning Mr. Smith. Once he had cut the
8 alarm off, where did he go then?

9 A After he cut the alarm off, that's when the
10 defendant told him that he wanted the jewelry out of the
11 showcase on the right-hand side of the store.

12 Q Did the defendant actually speak at that
13 time?

14 A As soon as he took possession of my weapon,
15 that's when he started to talk.

16 Q And that was the first that he had spoken?

17 A Yes, sir.

18 Q And where did Mr. Smith go in relation from
19 the front of the store to the rear of the store?

20 A Mr. Smith was on the other -- opposite side
21 of the jewelry counter. He came down toward the back of the
22 counter, around it, to where the work area was and then there
23 somewhere he turned off the alarm. He did what he was
24 exactly told and went back around the jewelry counter and he
25 started clearing the shelf off.

1 Q Started removing jewelry?

2 A Yes, sir.

3 Q The jewelry was being placed in a bag by
4 Mr. Smith, wasn't it?

5 A I believe so; yes, sir.

6 Q And you have indicated that a siren sounded?

7 A I believe I heard one when I was standing
8 there.

9 Q You heard a siren, didn't you, Mr. Bain?

10 A (Witness nodding head affirmatively.)

11 Q And where was the defendant then?

12 A He was still in the work area. Right at the
13 opening area of the work area.

14 Q Before the siren sounded, did it appear to
15 you that he was leaving -- going out?

16 A No, sir.

17 Q It did not. And once the siren had sounded,
18 did he say anything to you?

19 A He made the statement at that time that if
20 he saw any more police or heard any more, he was going to
21 start killing.

22 Q Didn't he say that before the siren sounded?

23 A No, sir.

24 Q After the siren sounded?

25 A Yes, sir.

1 Q And then what did he do?

2 A He then came out -- as he was walking out,
3 he went to almost the center of the store and turned and
4 fired at Mr. Smith.

5 Q Did he actually turn?

6 A I can't remember if he turned all the way
7 around or if he was just coming around when he was making his
8 turn. I don't know if he made a full turn or not.

9 Q So he was then walking away from you?

10 A Yes, sir.

11 Q You were behind him?

12 A No, sir, I was over to his --

13 Q To the side of him?

14 A To his left side.

15 Q You were following him with your eyes?

16 A Yes, sir.

17 Q You were walking along and you say you don't
18 know whether he turned or as the shot was fired he turned and
19 the shot was fired at Mr. Smith?

20 A Yes, sir.

21 Q After the shot was fired at Mr. Smith, did
22 you then get back on your feet and engage him in conversation?

23 A Yes, sir.

24 Q During the conversation that you had with him,
25 I believe you have testified that Mrs. Huffman -- Mary, as you

1 called her -- Mary Huffman and the other customer in the
2 store were then going out the front door?

3 A Yes, sir. They were making their way out.

4 Q I believe you further testified the
5 defendant then turned and pointed the gun at the customer?

6 A Yes, sir.

7 Q He could have shot the customer, couldn't he,
8 Mr. Bain?

9 A Yes, sir.

10 Q And at any time during the occurrence of this
11 event, he could have shot you?

12 A Yes, sir.

13 Q He could have shot Mrs. Cosby, couldn't he?

14 A Yes, sir.

15 Q Now, after he had turned back toward the
16 front of the store where Mrs. Huffman and the other customer
17 were leaving the store, did he then turn back toward you?

18 A During the time he turned to see what was
19 going on on the other side, at all times he had the shotgun
20 on me and then he turned back after they had gone out the
21 door back to me as I talked to him.

22 Q Once he had looked out the front door, you
23 said something to him and he then turned back and looked at
24 you?

25 A Yes, sir.

1 Q When he looked back at you, what statement
2 did he make to you?

3 A He looked directly at me and he said, "I'm
4 not going to hurt you, but I'm going to kill this nigger
5 squealer."

6 Q And then immediately did he lean over the
7 counter as you have described and fire the two shots?

8 A Yes, sir. He leaned over and fired.

9 Q I believe you have indicated that they were
10 in rapid succession?

11 A Yes, sir.

12 Q One behind the other?

13 A Yes, sir.

14 Q Then did he walk back toward you?

15 A He walked towards the back of the store, at
16 which time I was kind of off a little bit to the corner of
17 the counter, and as soon as he got to the back of the counter
18 there, something just told me to go ahead and grab him and I
19 made a jump at him for both weapons and pinned him up against
20 the wall.

21 Q And you then subdued him, did you not?

22 A Yes, sir.

23 Q Now, Mr. Bain, from the time that you first
24 entered the store until the time that he took your pistol, he
25 had the shotgun?

1 A Yes, sir.

2 Q And once he took your pistol or picked it up
3 off the floor, he then had the shotgun in one hand or one arm
4 and the pistol in the other?

5 A Yes, sir.

6 Q And when you subdued him, he still had both
7 weapons in his hand?

8 A Yes, sir.

9 Q Mr. Bain, when you went outside the store
10 after this incident had occurred, there were numerous police
11 officers, were there not?

12 A Are you talking about after I went out?

13 Q Yes, sir.

14 A I don't recall. I didn't look around.

15 Q Well, didn't you see Mr. Poole there?

16 A Yes, sir.

17 Q And other officers there also, if you recall?

18 A The only ones I remember are Jeff and
19 Officer Poole. I was just relieved to see him.

20 Q That's Jeff Barnes of Southampton County
21 Sheriff's office, was it not?

22 A Yes.

23 Q Do you know what brought them to the scene
24 there?

25 A No, sir.

1 Q You did not call them and notify them, did
2 you?

3 A No, sir.

4 Q Now, Mr. Bain, actually, in your subduing
5 the defendant and taking the weapons from him, by your so
6 doing, you prevented the robbery being completed, didn't you?

7 MR. GRIZZARD: I object, Your Honor. That's
8 totally improper.

9 THE COURT: All right, sir. Do you want to
10 be heard on that, gentlemen?

11 MR. WOODWARD: I'm merely asking him whether
12 he stopped it. I know the answer is obvious, Your
13 Honor.

14 THE COURT: Well, I think the answer is
15 obvious that he stopped what was going on.

16 MR. WOODWARD: Yes, sir. That's all I'm
17 asking.

18 THE COURT: All right, sir.

19

20 BY MR. WOODWARD:

21 Q Now, if you will excuse me for just one
22 moment, Mr. Bain.

23 Mr. Bain, at any time during the course of
24 this incident as you have described for us, were you aware of
25 anyone else being involved with the defendant?

1 A No, sir.

2 Q A confederate of any type?

3 A No, sir.

4 Q As far as you know, there was no getaway
5 vehicle at the front of the store?

6 A I didn't have any knowledge of one.

7 Q And no one else to your knowledge was
8 involved with him in any way?

9 A I don't know. I couldn't answer that.

10 Q Just to your knowledge.

11 A I don't know.

12 Q All right. Excuse me.

13 MR. WOODWARD: Mr. Bain, thank you very much.
14

15 REDIRECT EXAMINATION
16

17 BY MR. GRIZZARD:

18 Q Officer Bain, when Mrs. Huffman and Sheldon
19 Smith were going out the door, you indicated in your
20 testimony that the defendant looked at them. Did he turn and
21 look at them or did he just glance his head at them?

22 A It was something similar to like this.
23 Shotgun pointed at me and the pistol pointed at the subject
24 going out the door.

25 MR. GRIZZARD: All right. That's all.

1 Thank you.

2 MR. WOODWARD: Thank you, Mr. Bain. I have
3 no further questions.

4 MR. GRIZZARD: Sergeant Poole.

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10 DICK E. POOLE, called as a witness on behalf of the
11 Commonwealth, having been first duly sworn, was examined and
12 testified as follows:
13

14 DIRECT EXAMINATION

15
16 BY MR. GRIZZARD:

17 Q Sergeant Poole, state your name and your
18 address and your occupation, please, sir.

19 A Sergeant Dick E. Poole. My address is 125
20 Brandon Lane, Franklin, Virginia, and I'm a police officer on
21 the Police Department in the City of Franklin, Virginia.

22 Q Were you so employed, sir, on July 12, 1978?

23 A I was.

24 Q On that date, sir, did you have occasion to
25 go to Smith Jewelers in the City of Franklin?

1 A I did.

2 Q What time did you arrive there, sir?

3 A I think it was probably just about
4 11 o'clock or a few minutes thereafter.

5 Q What did you do when you got to Smith
6 Jewelers?

7 A I parked my police vehicle some 50 to 75
8 feet away from the entrance to Smith Jewelry and I took the
9 shotgun out of the holster in the police car and stayed at
10 the outside on the west -- east side of the building on the
11 front door.

12 Q So while you were outside of the store, did
13 you hear any shots at all, sir?

14 A I heard four shots.

15 Q After the fourth shot that you heard, how
16 long was it before you got into the store?

17 A I would say approximately a minute, minute
18 and a half after the fourth shot.

19 Q When you entered the store, Sergeant Poole,
20 what did you observe at that time?

21 A When I entered the store, Officer Bain was
22 standing over a person with his pistol pointed at him.

23 Q All right. What did you do at that time?

24 A I handcuffed the subject and --

25 Q Did you know the subject?

1 A I did.

2 Q And who was the subject?

3 A Willie Lloyd Turner.

4 Q Is that the defendant in this case?

5 A Yes, sir.

6 Q All right, sir. Sergeant Poole, after you
7 had handcuffed the subject, what did you do next, sir?

8 A I turned him over to the Deputy Sheriff to
9 have him to take him to the police station and then
10 Mrs. Huffman was there and I went out to get her so we could
11 secure the store. I found her and we secured the store, and
12 then I turned her over to Elizabeth Breit, which was -- I saw
13 in the area.

14 Q All right. When you secured the store, did
15 you leave everything in the store the way it was at the time?

16 A Yes. Nobody else was in the store and I
17 locked it without touching anything.

18 Q All right. Was Mr. Smith still in the store
19 when you first got there?

20 A Yes, sir.

21 Q And did you remain there until he was
22 removed?

23 A Sir?

24 Q Did you remain at the store until he was
25 removed?

1 A Yes.

2 Q And was the store secured after he had left?

3 A The store was secured after he had left;
4 yes, sir.

5 Q And everything at that time was the way it
6 was when you entered?

7 A Yes, sir.

8 Q All right, sir. Sergeant Poole, after you
9 had left the store, where did you go, sir?

10 A I went to the police station.

11 Q And who did you see at the police station?

12 A I saw Willie Lloyd Turner. He was at the
13 police station and Officer -- Detective Eubanks was there and
14 Officer Bain.

15 Q Sergeant Poole, I show you this marked
16 Commonwealth's Exhibit Number 1, and ask you if you had
17 occasion on that day to see that shotgun?

18 A Yes.

19 Q Where did you see it?

20 A Officer Bain gave it to me and there were
21 two shells out of the gun and Detective Eubanks and myself --
22 there was a third shell in the gun and Detective Eubanks and
23 myself were in the confines of the lieutenant's office, which
24 is approximately an eight-by-six room. We took the shell out
25 of the gun and I turned it directly over to Detective Eubanks.

1 Q Officer Bain took it from him?

2 A Yes, sir, took it from him.

3 Q I show you this service revolver marked
4 Commonwealth's Exhibit 4 and ask you if you have ever seen
5 that before?

6 A I have seen the gun. I think that's
7 Mr. -- it is Officer Bain's service revolver and that was
8 given from Bain directly to Detective Eubanks.

9 Q In your presence?

10 A In my presence, yes.

11 Q How many shells -- shotgun shells were at
12 the police station?

13 A Three.

14 Q All right, sir. After you had been to the
15 police station and -- with Detective Eubanks and Officer Bain,
16 sir, did you have any duties as regards to the store and the
17 jewelry that was at the store, sir?

18 A Yes, sir. Detective Eubanks and myself and
19 Mr. Grizzard went to the store and --

20 Q Was the store still secured at that time?

21 A The store was still secured at that time.
22 We went to the store and got the jewelry, the rings and stuff,
23 and carried them to the Southampton County Bank.

24 Q Now, where were these items in the store; do
25 you recall?

1 A These were up on the left counter right
2 where the -- right back of the cash register.

3 Q And were they loose or were they in --

4 A They were in bags.

5 Q What type of bags were they in, if you
6 recall?

7 A I can't say.

8 Q All right. What did you do with the items
9 that you took from the store at that time?

10 A We took them to the Southampton County Bank
11 and inventoried them and put them in a safety deposit box.

12 Q Were any photographs taken at that time in
13 your presence?

14 A There were some photographs taken.

15 Q I show you Commonwealth's Exhibit 5,
16 Sergeant Poole, and ask you if you have ever seen that before,
17 sir?

18 A Yes, sir. We inventoried it. Officer
19 Eubanks wrote the list inventory down on this.

20 Q All right, sir. It's got a list of rings on
21 the last page and it shows money. Was that also inventoried?

22 A That was also inventoried and put in the
23 safety deposit box.

24 Q You all were together?

25 A We were together.

1 Q Sergeant Poole, I show you this photograph
2 and ask you if you were present when it was taken and if you
3 know what it represents?

4 A This was taken on the desk of the
5 Southampton County Bank. It's the rings and stuff that were
6 taken in the jewelry store.

7 MR. GRIZZARD: May it please the Court,
8 Commonwealth would offer into evidence a photograph
9 of the rings as Commonwealth's Exhibit Number 14.

10 MR. WOODWARD: Your Honor, we have no
11 objection to that so long as it's stipulated that
12 they are shown there for purposes of photographing
13 of them for identification.

14 MR. GRIZZARD: Judge, I'm putting it in to
15 show -- they are placed on a table to photograph
16 them for identification. These are the ones in the
17 bag that have been carried to the bank.

18 MR. WOODWARD: That's fine.

19 THE COURT: All right.

20 (Marked in evidence by the Clerk as
21 Commonwealth's Exhibit Number 14.)

22
23 BY MR. GRIZZARD:

24 Q From the time you first inventoried them,
25 Mr. Poole, and were present when that photograph was taken,

1 you never had anything else to do with the jewelry or the
2 money?

3 A No, sir.

4 MR. GRIZZARD: All right, sir. Answer
5 Mr. Woodward.
6

7 CROSS-EXAMINATION
8

9 BY MR. WOODWARD:

10 Q Mr. Poole, the call to which you responded
11 at Smith Jewelers there in Franklin was what type of call?

12 A It was a call that the burglar alarm had
13 been sounded. We received a call first that it was Brady's
14 Jewelry Box and then the call was immediately changed to
15 Smith Jewelers.

16 Q You got a call that the alarm was on?

17 A Yes, sir. The burglar alarm was on.

18 Q Didn't you get a call that there was a
19 robbery in progress?

20 A The first call I received was that the
21 burglar alarm was off.

22 Q You didn't respond to that, did you?

23 A Yes, sir.

24 Q You did?

25 A Yes, sir.

1 Q Then the second call was the robbery in
2 progress?

3 A Yes, sir.

4 Q And that was broadcast over the radio system
5 for Franklin and Southampton County, wasn't it?

6 A No, sir, that -- the call came from Officer
7 Bain's police cruiser that was parked in -- not in front of
8 the store, but to the west of the store just a wee bit.

9 Q Somebody made a call over that radio then?

10 A Yes.

11 Q And you responded to that?

12 A I was responding to the original call when I
13 got that one.

14 Q And other officers responded also, did they
15 not?

16 A Yes, sir. Other officers responded, but how
17 they got the call, I do not know.

18 Q They were there with you?

19 A Lieutenant Breit and myself arrived at the
20 same time.

21 Q Jeff Barnes from Southampton County Sheriff's
22 Department arrived also, did he not?

23 A I think it was just a little bit later.

24 Q I believe you have indicated you heard four
25 shots, Mr. Poole?

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A Yes.

MR. WOODWARD: That's all I have. Thank you.

REDIRECT EXAMINATION

BY MR. GRIZZARD:

Q Is the call that you received from Officer Bain's police cruiser -- are you familiar with Officer Bain's voice?

A Yes, sir. It was not Officer Bain.

MR. GRIZZARD: That's all. Thank you.

MR. WOODWARD: I have no further questions.

Thank you, Mr. Poole.

THE COURT: All right.

MR. GRIZZARD: Detective Dixon.

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