224 Va 127

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
FEB 25 1982
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 811845

MANUEL C. QUINTANA,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

VOLUME II
APPENDIX

Benjamin N.A. Kendrick
2007 N. 15th Street
Arlington, Virginia 22201

Domingo L. Ordoveza
Jose R. Recinto, Jr.
ORDOVEZA & RECINTO
2045 N. 15th Street, Suite 203
Arlington, Virginia 22201

Counsel for Appellant

Thomas D. Bagwell
Assistant Attorney General
Supreme Court Building
101 N. Eighth Street
6th Floor
Richmond, Virginia 23219

Counsel for Appellee

APPELLATE PRINTING SERVICES • HERITAGE BUILDING • RICHMOND, VIRGINIA • (804) 643-7789

TABLE OF CONTENTS

APPENDIX PAGES

VOLUME I

1. WARRANT OF ARREST FILED MARCH 21, 1981 ---------- 1

2. INDICTMENT FOR FELONY FILED APRIL 20, 1981 ---------- 3

3. MOTION TO SUPPRESS FILED MAY 21, 1981 ---------- 5

4. PHYSICAL EXAMINATION FOR CRIMINAL CASES AS REQUIRED UNDER VIRGINIA CODE ANN.. §19.2-169(1950), AS AMENDED ---------- 6

5. JURY INSTRUCTIONS

a) Instruction No. 1 - granted ---------- 10
b) Instruction No. 1-A - refused ---------- 11
c) Instruction No. 2 - granted ---------- 12
d) Instruction No. 3 - granted ---------- 13
e) Instruction No. 4 - granted ---------- 14
f) Instruction No. 5 - granted ---------- 15
g) Instruction No. 6 - granted ---------- 16
h) Instruction No. 7 - granted ---------- 17
i) Instruction No. 8 - granted ---------- 18
j) Instruction No. 8-A - refused ---------- 19
k) Instruction No. 9-A - granted ---------- 20
l) Instruction No. 10 - withdrawn ---------- 21
m) Instruction No. 11 - refused ---------- 22
n) Instruction No. A - refused ---------- 23
o) Instruction No. B - refused ---------- 24
p) Instruction No. C - refused ---------- 25
q) Instruction No. D - refused ---------- 26
r) Instruction No. E - granted ---------- 27
s) Instruction No. F - refused ---------- 28
t) Instruction No. G - refused ---------- 29
u) Instruction No. H - refused ---------- 30
v) Instruction No. I - granted ---------- 31
w) Instruction No. J - granted ---------- 32
x) Instruction No. K - withdrawn ---------- 33
y) Instruction No. L - withdrawn ---------- 34
z) Instruction No. M - withdrawn ---------- 35
aa) Instruction No. N - withdrawn ---------- 36
bb) Instruction No. O - granted ---------- 37
cc) Instruction No. P - withdrawn ---------- 38
dd) Instruction No. Q - withdrawn ---------- 39
ee) Instruction No. R - withdrawn ---------- 40
ff) Instruction No. S - withdrawn ---------- 41
gg) Instruction No. T - withdrawn ---------- 42
hh) Instruction No. U - refused ---------- 43
ii) Instruction No. V - withdrawn ---------- 44
jj) Instruction No. W - withdrawn ---------- 45
kk) Instruction No. X - refused ---------- 46
ll) Instruction No. Y - refused ---------- 47
mm) Instruction No. Z - refused ---------- 48

nn) Instruction No. Z(1) granted ---------- 49
oo) Instruction No. Z(2) refused ---------- 50
pp) Instruction No. Z(3) given ---------- 51

6. VERDICTS OF JURY FILED JUNE 9, 1981 ---------- 52

7. ORDER FILED JULY 14, 1981 ---------- 54

8. MOTION TO VACATE FILED JULY 24, 1981 ---------- 56

9. MOTION FOR A NEW TRIAL FILED JULY 24, 1981 ---------- 57

10. MOTION FILED JULY 24, 1981 ---------- 59

11. PROBATION REPORT FILED JULY 27, 1981 ---------- 65

12. ORDER FILED AUGUST 4, 1981 ---------- 78

13. NOTICE OF APPEAL FILED AUGUST 21, 1981 ---------- 80

14. WRITTEN STATEMENT OF FACTS PURSUANT TO RULE 5:9, SUPREME COURT RULES FILED OCTOBER 30, 1981 ---------- 81

15. ASSIGNMENTS OF ERROR FILED DECEMBER 18, 1981 ---------- 83

16. EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE CHARLES S. RUSSELL, JUDGE ON MAY 26, 1981

a) Colloquy ---------- 87
b) Testimony of Edward W. Gabrielson ---------- 123
c) Colloquy ---------- 137

17. EXCERPTS FROM TRANSCRIPT OF TRIAL BEFORE THE HONORABLE CHARLES S. RUSSELL, JDUGE ON JUNE 1, 1981

a) Motions, Colloquy, etc. ---------- 147

18. EXCERPTS FROM TRANSCRIPT OF TRIAL BEFORE THE HONORABLE CHARLES S. RUSSELL, JUDGE ON JUNE 2, 1981

a) Testimony of Marche Rothlisberger ---------- 220
b) Testimony of Phillip Beuchert ---------- 230
c) Testimony of Norman E. Tyler ---------- 238
d) Testimony of Dr. James C. Beyer ---------- 262

19. EXCERPTS FROM TRANSCRIPT OF TRIAL BEFORE THE HONORABLE CHARLES S. RUSSELL, JUDGE ON JUNE 3, 1981

a) Testimony of Mark Nell ---------- 297
b) Testimony of Robert Carrig ---------- 298
c) Testimony of Norman E. Taylor ---------- 310
d) Testimony of Nelson Echemendia ---------- 348
e) Testimony of Humberto Rodrigues ---------- 401
f) Colloquy ---------- 414

VOLUME II

20. EXCERPTS FROM TRANSCRIPT OF TRIAL BEFORE THE HONORABLE CHARLES S. RUSSELL, JUDGE ON JUNE 4, 1981

a) Testimony of George Murphy ---------- 417
b) Colloquy ---------- 421
c) Testimony of Caunabot Suarez Del Sol ---------- 425
d) Testimony of Dennis Reed ---------- 470
e) Colloquy ---------- 476
f) Testimony of John Shifflet ---------- 477
g) Testimony of David E. Pauly ---------- 478
h) Testimony of Deputy Curry ---------- 482
i) Testimony of Deborah Goad ---------- 483
j) Testimony of Barbara Goad ---------- 487
k) Testimony of Edward Timberman ---------- 489
l) Testimony of Maria Elena Capaisci ---------- 490
m) Testimony of Seollah Sharrari ---------- 492
n) Colloquy ---------- 493
o) Testimony of Deane Dabbs ---------- 494
p) Testimony of Morris Samuel Clark ---------- 527

21. EXCERPTS FROM TRANSCRIPT OF TRIAL BEFORE THE HONORABLE CHARLES S. RUSSELL, JUDGE ON JUNE 5, 1981

a) Testimony of Edward W. Gabrielson ---------- 531
b) Testimony of Paul Douglas ---------- 581
c) Colloquy ---------- 588
d) Testimony of Robert E. Fudella ---------- 605
e) Colloquy ---------- 615
f) Testimony of James Sheehy ---------- 622
g) Testimony of Theodore Shell ---------- 656

22. EXCERPTS FROM TRANSCRIPT OF TRIAL BEFORE THE HONORABLE CHARLES S. RUSSELL, JUDGE ON JUNE 6, 1981

a) Testimony of Kevin M. Tomez ---------- 658
b) Testimony of Dr. Hormuz Guard ---------- 677
c) Testimony of Barbara Escariz ---------- 743
d) Colloquy ---------- 748
e) Voir Dire Examination of Marche Rothlisberger --------- 758

23. EXCERPTS FROM TRANSCRIPT OF TRIAL BEFORE THE HONORABLE CHARLES S. RUSSELL, JUDGE ON JUNE 8, 1981

a) Colloquy ---------- 764
b) Voir Dire Examination of Raphael DeLeon ---------- 778
c) Colloquy ---------- 799
d) Testimony of Orlando Dominguez ---------- 811-A
e) Colloquy ---------- 823
f) Testimony of Umberto Amilio ---------- 825

24. EXCERPTS FROM TRANSCRIPT OF TRIAL BEFORE THE HONORABLE CHARLES S. RUSSELL, JUDGE ON JUNE 9, 1981

a) Colloquy ---------- 833

b) Testimony of James C. Beyer, M.D. ---------- 843
c) Colloquy ---------- 844
d) Testimony of Carmen Salgado ---------- 846
e) Colloquy, Closing Arguments, etc. ---------- 862
f) Jury Verdict ---------- 875

25. EXCERPTS FROM TRANSCRIPT OF TRIAL BEFORE THE HONORABLE CHARLES S. RUSSELL, JUDGE ON JUNE 10, 1981

a) Colloquy ---------- 878
b) Testimony of Pedro Castro ---------- 879
c) Testimony of Caunabot Suarez Del Sol ---------- 888
d) Colloquy ---------- 897
e) Testimony of Ofelina Moya ---------- 899
f) Colloquy, Sentencing, etc. ---------- 904

26. EXCERPTS FROM TRANSCRIPT OF TRIAL BEFORE THE HONORABLE CHARLES S. RUSSELL, JUDGE ON AUGUST 3, 1981

a) Colloquy ---------- 915
b) Testimony of Marie Donohue ---------- 954
c) Testimony of Susan E. Green ---------- 959
d) Colloquy ---------- 960

PRINTERS NOTE:

Transcript of trial is continued from Volume I.

Q Do you see him here today?

A Yes, seated at the table in front of me with the headphones on (indicating).

MR. MELSON: Your Honor, let the record reflect the Deputy has identified the defendant.

THE COURT: Yes, sir.

BY MR. MELSON:

Q When did you have contact with Mr. Quintana?

A I had contact with Mr. Quintana at the Adult Detention Center. He was being discharged from the Detention Center and he approached me and asked me for money to use the public telephone in the lobby to make a telephone call.

Q Did he indicate how much money he had?

A He showed me and he had fifteen cents.

Q Did you lend him any money?

A Yes, I lent him sufficient change to complete his telephone call in the Detention Center.

Q Did you have any conversation with him about how he was to get where he was going?

A Several minutes later I left the Detention Center, I did have such a conversation with him. It came about when I asked him if he had completed his telephone call. He stated that he had and that the people he had contacted were going to

DEO REPORTING
(703) 751-0013

work and were going to have to work until 2:00 o'clock the following morning and he stated that his intention was to walk to the Patrick Henry Apartments. He wasn't exactly sure where they were and he wanted to get to Route 50.

Q What did you do when he told you that?

A I advised him that it was probably too far to walk to the Patrick Henry Apartments from where he was. At that time I asked him if I called a taxi for him on the telephone if he had sufficient money at home to pay for the taxi and he answered that he had none.

Q Did you take him any place?

A At that point I decided to take him first in front of the magistrate to explain that I was going to be taking him to a bus stop in Camp Washington along Route 50 in Fairfax City and there put him on a bus. I explained that the man spoke no English and that he had been released from the Detention Center and that he would be on a bus bound for Patrick Henry Apartments.

Q Did you in fact take him to the bus stop?

A Yes, I did, and placed him on a Fairfax City owned bus. However, the bus driver of that particular bus advised me that he would not be going any further than Fairfax Circle and told me that he would motion Mr. Quintana to the proper

bus stop so he could change buses and go on to his destination. But the bus driver at that time asked me I could possibly write out a note for the second bus driver so he could understand the man's destination since the first bus driver could not wait.

Q Did you write a note for him?

A Yes, I did.

Q Let me show you Commonwealth's Exhibit No. 62-A and ask if you can identify that note?

(Handing to the witness.)

A Yes, that's the note I wrote for him. It is in my handwriting and I signed in and it is from my notebook.

Q Whom did you give that note to?

A I gave that note to Mr. Quintana and explained to him that he would have to change buses at Fairfax Circle and that the first bus driver would show him where to stand and to give that note to the second bus driver.

Q How were you able to converse if he didn't speak English?

A I conversed with Mr. Quintana in Spanish.

Q Who paid for the bus fare?

A I gave Mr. Quintana a dollar out of my pocket for the bus fare and asked the driver if that was sufficient and he

said it would be.

Q Do you recall what he was wearing on that day?

A He was wearing a brown three-piece suit.

Q Before I ask you that, is that what he was wearing when he came out of jail?

A Yes, sir.

Q Let me show you what's been marked as Commonwealth's Exhibit No. 87-A, B and C and ask what you can tell us about this suit?

MR. KENDRICK: Your Honor, don't you think that's a little general?

MR. MELSON: He's been objecting because I have been leading. Now, I'm too general.

THE COURT: Objection overruled.

MR. KENDRICK: There's a right way to do it and there is a right way to do that, so I suggest you do that.

MR. MELSON: The Court has overruled your objection.

THE WITNESS: That appears to be the suit -- or seems to be the suit he was wearing. It is the same color suit.

MR. MELSON: I have no other questions at this time, Your Honor.

* * *

DEO REPORTING
(703) 751-0013

(Whereupon, a short recess was taken.)

MR. KENDRICK: Your Honor, may I make a statement? I want to address it to the Court and I have a motion.

Ever since this trial began, I have tried to conduct myself as a gentleman and officer of the court and do what I possibly can and everything I can along those lines, but at the same time, to do everything I can to help defend my client. I am outraged at what has just happened. A police officer at the direction of the prosecution has removed a critical piece of evidence from this courtroom that has been admitted into evidence and has taken it outside and displayed it and talked to a witness before they have testified. It is a critical witness. It is a critical piece of evidence. In particular, I'm talking about the suit and the custody that's the suit's been in after the murder was a man by the name of "Suarez." He finally came here today. Before he comes into this court to testify, that suit was removed out of this courtroom and taken outside by the police and prosecutor and they were discussing his testimony about that piece of evidence with that witness. Your Honor, I cannot tolerate that. I think it is objectionable and demands a mistrial.

MR. MELSON: Well, Your Honor, I think Mr. Kendrick's

reaction is very much an over reaction. The Commonwealth is entitled to prepare its witnesses and to talk to them and if they see something on the suit that they can identify, we are entitled to have him point it out to us. It was taken out to the side of the courtroom, right over there (indicating) and not any further than four or five feet from the courtroom door to show it to the witness so he wouldn't have to come into where the defense attorney was. There was nothing improper about showing something to a witness who is going to testify prior to their testimony. It would be a dereliction of one's duty to do that without talking to him prior to that.

MR. KENDRICK: You don't take that evidence outside this court. That is improper. If he wants to talk to him about it, you can put him in this courtroom and let him say everything here and find out what he has to say. There is no way in the world I can do that. It is a critical piece of evidence. That is outrageous.

THE COURT: I can't really understand the objection. The prosecution, just like the defense, has a perfect right to talk to their witnesses. The witnesses were put under a rule and told not to discuss their testimony with anybody except counsel, but counsel were specifically excluded from that rule and it to be presumed that both sides will talk to their

DEO REPORTING
(703) 751-0013

witnesses before they put them on their stand. I know of no inhibition against showing an exhibit to a witness in preparing him to testify to refresh his recollection or find out what his answer would be when confronted with an exhibit at trial.

MR. KENDRICK: Outside of the courtroom, Your Honor?

THE COURT: The only inpropriety would be removing it from the room, but it is removed from the room every day.

MR. KENDRICK: But not shown to the witnesses.

THE COURT: Well, I don't know why not. Every-day exhibits are in the hands of the clerk and taken down to the office and it seems to me that if a prosecutor or defense attorney wants to show a witness something that he has only to take it in the morning. The exhibits are open to the press. They come and finger the exhibits. There is nothing secret about them and they are not locked up so nobody can see them. They are part of the trial. It is a public trial and spectators can see them. I don't see any inpropriety in that as long as the evidence is not tampered with and the witnesses not told what to say. The price to pay for doing that, a witness can be cross-examined and asked about the conditions and what he was shown and if it can be shown that the witness was guided and suggestive things were said to him, that attacks

his credibility.

MR. KENDRICK: Very well. I respect the Court's opinion. I intend to do that. I also assume that those rulings on the viewing of evidence apply to me also and that I can remove evidence and take them out of the courtroom and talk to my witnesses before they testify?

THE COURT: You may indeed show the witnesses the exhibits in private. You don't have to do it within the Commonwealth's presence and let him see and hear you. Obviously, you are an officer of the court. I don't want you to take the exhibit away from here, though you can take the witness into the Clerk's Office and talk to him in the presence of the exhibit if you wish to.

MR. KENDRICK: I respect the Court's ruling.

THE COURT: All right. Are you ready to proceed?

MR. MELSON: Yes, sir. Our first witness will be Mr. Suarez.

THE COURT: Will he need an interpreter?

MR. MELSON: Yes, sir. I think we will need the headphones.

THE COURT: All right. Will the interpreters test the witness on the stand in Spanish?

All right, bring the jury in, please.

DEO REPORTING
(703) 751-0013

(Whereupon, the jury returned to the jury box.)

THE COURT: Mr. Melson, was this witness sworn at the beginning of the trial?

MR. MELSON: I believe he was, Your Honor, along with the next witness.

THE COURT: Would the interpreter ask the witness if he took the oath at the beginning of the trial?

THE INTERPRETER: Yes, Your Honor.

Yes, sir.

THE COURT: All right. If the jury would put on the headphones and we will listen to the English channel here. Would the interpreters test out the channel and be sure that all the jury is hearing you on the English channel.

MR. MELSON: May I proceed, Your Honor?

THE COURT: Yes.

Whereupon,

CAUNABOT SUAREZ DEL SOL,

was called as a witness by and on behalf of the Commonwealth of Virginia, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELSON:

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

A My name is Caunabot Suarez del sol.

Q Would you spell your first name, please?

A C-a-u-n-a-b-o-t.

Q Thank you, Mr. Suarez.

Where do you work?

A I work at the Marriott Hotel.

Q And how long have you worked there?

A Since I arrived in this state about six months ago.

Q Mr. Suarez, where did you live on March 19, 1981?

A At the time I lived at Patrick Henry Drive at Route 50 and Route 7, Apartment 102.

Q Do you remember now the number on the apartment -- the street address?

A 3044.

Q Thank you.

Who did you live there with, Mr. Suarez?

A First I stayed at that location, because the house belonged to the church.

Q My question is: Mr. Suarez, who did you live with? Who was living with you in that apartment?

A With my children. I lived there with my children.

Q How many children do you have?

A With three children, three male children.

DEO REPORTING
(703) 751-0013

Q What are their names?

A There is, of course, Fernando, and Jose and Luis (sic).

Q Were they all working at that time also?

A Yes, they were, and they still are.

Q How many bedrooms do you have in that apartment?

A Just one large bedroom.

Q Who slept in the bedroom?

A The three children slept in the bedroom and I slept in the sofa in the living room.

Q Mr. Suarez, who paid for the rent of that apartment in March?

A I did, myself and my children.

Q Do you know who Manuel Quintana is?

A Yes. I met him the day that he was in the house when I arrived.

Q Is he in the courtroom today?

A Yes.

Q Could you tell us which one of the gentlemen, which individual at the table is the defendant, Mr. Quintana?

A (Indicating.) The second person.

MR. MELSON: Your Honor, I think the record could reflect that the witness has identified the defendant.

THE COURT: The record will so reflect.

BY MR. MELSON:

Q Okay, Mr. Suarez, where did you first meet Mr. Quintana?

A Well, in my apartment. When I arrived from work, I found him there watching television.

Q Do you know approximately when this was?

A About 11:00 or 11:30, approximately.

Q And do you remember what day or date it was?

A No, I do not recall the date.

Q Who did you come home with?

A My children. I did so every day after work.

Q Did you know that Quintana was going to be there when you arrived at home?

A No, I had no idea.

Q What was Quintana doing when you came home?

A He was sitting there watching television and waiting for the -- waiting for us to arrive.

Q Did you have a conversation with Mr. Quintana?

A Yes, of course, I talked to him with respect to the house and about the property that was in there.

Q Would you tell us what you two talked about?

A First, we talked about the situation and that he had

been jailed and that he had been freed because proof had been proven against him -- and this was the reason for which I received him, because he was a countryman of mine and apparently an injustice had been committed as far as I knew and this was the reason.

Q Is that what he told you?

A Yes.

Q Did he just come from jail that night?

A Yes -- yes, sir.

Q Did he tell you whether or not he had any place to stay or had any money?

A No, we did not talk about anything concerning money or anything about that sort.

Q Do you know how he got into your apartment?

A Well, Mr. Quintana lived there before I did because the church had provided him with that apartment. Therefore, he had a key to the apartment.

MR. ORDOVEZA: Your Honor, it is a question of translation. Your Honor, I would like that the prior question be repeated to this and answered again.

BY MR. MELSON:

Q Do you know how he got into your apartment?

A He had a key, because the church had provided him

with a key to the apartment because he had lived in the apartment prior to it.

Q What did you do with the key that Quintana had?

A Well, he immediately turned the key over to me and I put it in my keyholder.

Q Do you remember what Quintana was wearing that night?

A Yes, he wore a beige suit -- a three-piece suit that had a small spot and I think the spot was on the front pocket.

Q Mr. Suarez, let me show you Commonwealth's Exhibit No. 87-A, B, and C and ask you if you recognize what I have just shown you?

(Displaying to the witness.)

THE INTERPRETER: The witness asks if he can examine the object.

MR. MELSON: Yes, he may.

(Handing to the witness.)

MR. MELSON: Your Honor, if the record could reflect that he is pointing to the --

BY MR. MELSON:

Q Mr. Suarez, would you point to that again?

A (Pointing.)

MR. MELSON: If the record could reflect that he is

DEO REPORTING
(703) 751-0013

pointing to a spot on the left breast pocket of the suit coat.

THE COURT: It will so reflect.

THE INTERPRETER: I was just explaining to the witness what the Commonwealth Attorney was saying, because he had not understood. Apparently, his earphone is not working too well. So, I repeated what the Commonwealth Attorney had said.

THE COURT: All right.

BY MR. MELSON:

Q Is that the suit that Quintana was wearing?

A Yes, I know that he was wearing this suit. I don't know about any others.

Q Now, Mr. Suarez, did you just see that suit prior to coming into the courtroom this morning?

A Today?

Q Yes.

A Yes, I did.

Q Were you able to identify the suit then?

A Yes, of course. Yes, because I saw the spot -- this spot (indicating). There is no doubt.

Q On the night that Mr. Quintana came to your apartment from the jail, where did he sleep?

A He slept in -- on the rug in the area of the living

room where I usually sleep. He put his stuff down there and laid down to sleep.

Q Did you see him the next morning?

A Yes. We slept and then we all left the following morning. We left together.

Q Do you remember what he was wearing?

A This (indicating), the same suit.

Q Did you discuss with Mr. Quintana anything about him coming back to your apartment?

A Well, I told him that he would have to come back because of all of his property was there at my apartment and he couldn't carry them along with him. There was a lot of stuff.

Q Where did you see him go that morning when you went to work?

A Well, he went to the bus stop. We went on in our car to different places to work.

Q Did you see him drive away from a car?

A No, sir. He was just standing there at the bus stop, so it would have been difficult for anything else to happen.

Q Did you see Mr. Quintana anymore on that date?

A No, I did not.

Q Did you see him the next day, Friday?

MR. KENDRICK: Your Honor, has it been established that this was a Thursday?

THE COURT: I think not. I don't think the witness said what day this occurred.

BY MR. MELSON:

Q Did you see him the next day?

A The first time that he was in our house was on the 18th and the second time was on the 20th. There was -- he was not in my house on the 19th.

Q The first time was on the 18th?

A The 18th, correct.

Q And he stayed overnight at your apartment; is that --

MR. KENDRICK: (Interposing) Your Honor, the witness has just testified on the first day that he saw him that he did not know what day that was.

THE COURT: You can cross-examine him.

BY MR. MELSON:

Q Did he stay in your apartment on the night of the 18th?

A Yes, he did. Yes, he slept there.

Q When was the next time the defendant came to your

house -- to your apartment?

A On the 20th in the evening.

Q Could you tell us what happened when he came to your house on the evening of the 20th?

A Well, he arrived at my apartment. He knocked and came in. He seemed to be a bit nervous, but after he came in he sat down and began to talk and we spent a few hours talking.

A JUROR: He seemed to be -- what did he say?

BY MR. MELSON:

Q Repeat your answer about how Mr. Quintana seemed.

A Well, Mr. Quintana was somewhat nervous, but according to my view, he was -- he experienced a sort of trauma due to the fact that he had been jailed for some time and also I believe it is my opinion that Mr. Quintana is nervous -- has a nervous problem of some sort. So, I began to talk to him and I began to talk to -- a friend of mine called, Omar, who belongs to the church council.

Q Now, Mr. Suarez, did he spend the night?

A In my house.

Q Do you know whether or not on the night of the 20th when he came back to your house if he had an automobile?

A Yes, that's correct.

DEO REPORTING
(703) 751-0013

Q Do you know Detective Gabrielson?

A Yes, I do. I met him because of this particular case, but I do not know any detectives or policemen.

Q Did you give Detective Gabrielson anything from out of your apartment?

A Yes. My son gave him this (indicating) and the billfold with some papers that -- by the way, I didn't know that these objects were there.

Q Okay.

Who gave Detective Gabrielson the wallet?

A I did.

Q Where did you find the wallet?

A Well, we found it in the same place where the suit was. I don't know how to say it in this country, but it is a place where clothing is stored.

Q Did you have to use anything to get to it?

A Yes, I did. I had to get on a chair. I had to climb up on one of those chairs, because it was very high up.

MR. MELSON: Thank you, Mr. Suarez. Would you answer the questions of Mr. Kendrick, the defense attorney, please?

Your Honor, I do have one other question.

MR. KENDRICK: Can you ask it from there?

MR. MELSON: No, I will ask it from here.

MR. ORDOVEZA: Mr. Suarez, --

THE COURT: (Interposing) Wait just a moment.

BY MR. MELSON:

Q Mr. Suarez, let me ask you just one question. On the morning that you all left for work, the morning after the night he came from jail, do you recall approximately what time you left for work?

A Yes, it is always between 6:30 and 7:00 every day.

MR. MELSON: Thank you.

CROSS-EXAMINATION

BY MR. ORDOVEZA:

Q Mr. Suarez, I'm sure you are a man who is interested in letting the truth come out.

MR. MELSON: Your Honor, we will stipulate to that.

MR. ORDOVEZA: Very well.

BY MR. ORDOVEZA:

Q You testified on the evening of March 18th that you saw Manuel Quintana in your apartment; is that correct?

MR. ORDOVEZA: I would like to hear the Spanish translation on this, Your Honor.

THE COURT: You can switch back and forth.

THE WITNESS: Yes, sir.

BY MR. ORDOVEZA:

Q Did you talk --

THE INTERPRETER: (Interposing) I'm sorry. Could you please repeat that question?

BY MR. ORDOVEZA:

Q Did you talk to him when you arrived at the apartment?

A Yes, of course. We were talking for hours.

Q And I understand from you that he was seated watching the television; is that right?

A Yes. He was just sitting there quietly. He was okay.

Q Where did you come into your place?

THE INTERPRETER: I'm sorry. Would you repeat the question, please?

BY MR. ORDOVEZA:

Q Did you go directly to the living room where he was sitting?

A Yes, because the door was right in front of the television set.

Q Now, did you get to talk with Mr. Quintana that evening, the evening of the 18th of March?

A Yes, I did.

Q He told you that he lived in the apartment previously; is that correct?

A Yes. Yes, and I knew that he had lived in that same apartment and I also knew that -- or I thought that he had a key, but I wasn't positive. There were several keys and I only had some of them.

Q You did mention that he had some personal possessions and other thing belonging to him there; is that right?

A Yes. He said so, but I knew he had because I was the one keeping it for him.

Q Okay.

Now, did you get to talk about the problems of Cuban refugees that evening?

A Yes, the usual discussion about the problems of coming to a new country and the internal situation of Marxism that is doing so much harm to many countries throughout the world.

Q I ask you, did he tell you about the time that he was incarcerated in Fairfax County for several days?

A Yes, in jail in Cuba --

Q (Interposing) No, in Fairfax County.

A No. He didn't say anything about the time he was in

DEO REPORTING
(703) 751-0013

jail. He talked me about the injustice against him, because he wondered why he should have been in jail for such a long time without having been -- having anything proved against him and therefore it was only logical that I should receive him in my house and so on.

Q So, in fact, he told you there was an injustice committed upon him; is that correct?

MR. MELSON: Your Honor, I think he has already answered the question.

THE COURT: Yes, he did answer it.

BY MR. ORDOVEZA:

Q Now, did you notice anything in the house --

Well, let me rephrase myself. Were you aware that there were any items which were not in the house when you last left it?

A Would you please repeat the question?

Q For example, did you find a lunch pail in the house?

A No, I did not. No, I have a kind of --

Q (Interposing) Let me ask you one question, Mr. Suarez --

THE INTERPRETER: (Interposing) The witness said: He did have kind of a so-called lunch pail or a small case, but that belonged to him and not to the accused.

BY MR. ORDOVEZA:

Q It was your lunch pail; is that correct?

A Yes.

Q Can you describe this item, please?

A Just a kind of a case -- an ordinary case that I keep in my house just like any other.

Q It was a suitcase; is that correct?

A It was a small kind of a case about this size (indicating).

Q (Indicating) It was an attache case?

A Yes, more or less an attache case.

Q Is the object that you found in the house -- did you find that object anywhere in the house?

(Displaying to the witness.)

A No, sir.

Q Let me ask you one by one and have them identified.

MR. ORDOVEZA: We would like to have this exhibit identified.

THE COURT: Let the record show the witness is referring to Commonwealth's Exhibit 45.

BY MR. ORDOVEZA:

Q Let me bring you to the evening of March 20th, 1981, Mr. Suarez. That was a Friday, was it not?

DEO REPORTING
(703) 751-0013

A I don't recall exactly, but it should have been.

Q You testified that Manuel Quintana returned to your apartment?

A Yes, sir.

Q Did he tell you where he came from?

A Well, he didn't say, but I asked him. I asked him where he had been and he said that he had stayed at the place of a friend that had to go to Miami, because the house was still available.

Q Where were you seated that evening?

A Well, I didn't sit down. I laid down on the sofa in front of the television set.

Q Approximately what time did Manuel Quintana arrive at your apartment?

A It was probably about 11:00 or 11:30.

Q Did he go into the living room of the house?

A Yes, he went into the living room and sat down.

Q And did you sit down with him that evening?

A No, I wasn't sitting on the sofa. I was sort of lying down on the sofa area.

Q And you were right next to Manuel Quintana that evening?

A Yes, we were pretty close.

Q How far were you from him then?

A About two or three yards away.

MR. ORDOVEZA: Could I please have a clarification of that translation?

THE INTERPRETER: A clarification as to what the witness said?

BY MR. ORDOVEZA:

Q Let me ask you again. I will withdraw that request.

How far in terms of distance? Could you measure it with your two hands, Mr. Suarez?

A Approximately from here to there (indicating). Here to there (indicating).

Q So, you were this close to Manuel Quintana; is that correct (indicating)?

THE COURT: I don't think that is what he said. He was pointing over here in the direction of the box and the bench.

MR. KENDRICK: Tell me where to go?

BY MR. ORDOVEZA:

Q I will have Mr. Kendrick stand in front of you and I will ask you, "Is that the distance? Is that the distance?

(Mr. Kendrick, counsel for the defendant, is demonstrating the distance.)

DEO REPORTING
(703) 751-0013

A Yes, we were together. We ate together and everything.

MR. MELSON: How far are you saying it is?

MR. KENDRICK: No more than three feet -- or are you on the metric system?

BY MR. ORDOVEZA:

Q And you got to talk to Manuel again -- I mean you got to talk to Manuel that evening; is that correct?

A Yes. We were just talking regularly -- normally.

Q He was acting rather normally at the time -- just normally; is that correct?

A Well, when he arrived, he was somewhat nervous, but afterwards we began to talk and he calmed down.

Q While you were talking that evening, Mr. Suarez, did anyone telephone you? That is, did anyone call you by telephone on Friday, March 20th?

A Yes.

Please let me know if I can speak and explain the situation.

Q Yes, I will help you and I will ask you the questions and you just tell the jury the truth.

Who was that who telephoned you that evening?

A Mr. Omar Gonzalez belongs to the church council.

Q What did he tell you by telephone that evening?

A This is where we spoke about the matter that I just discussed. I was talking to him and Mr. Quintana wanted to have some coffee and so while I was talking with the telephone and holding the telephone to my ear --

MR. ORDOVEZA: (Interposing) One moment, Mr. Suarez. I didn't hear any English translation.

THE COURT: Check the headset.

A JUROR: I didn't hear the last two questions.

THE COURT: All right, we will go back.

Mr. Ordoveza, can you go back to the two questions or have the reporter read them if necessary?

MR. ORDOVEZA: What?

THE COURT: You will have to go back two questions. A juror missed the last two questions and answers.

BY MR. ORDOVEZA:

Q Mr. Suarez, on the evening of March 20th, that is a Friday, did anyone call you by telephone at your apartment?

A Yes, Mr. Omar Gonzalez called me.

Q And can you tell the Court and jury what Omar Gonzales told you?

A Well, we first talked about work and about the apartment, just normal matters. But, then Mr. Quintana wished

DEO REPORTING
(703) 751-0013

to have some coffee and so did I, because it was close to 1:00 o'clock in the morning and while I had the phone to my ear I asked my son to prepare some coffee for Mr. Quintana and myself. At that time Omar said --

Q (Interposing) One moment. Did Omar know whether Manuel Quintana was in your apartment then?

A He did not know, but he heard when I said -- when I asked my son to prepare coffee for my son and myself, at that time he learned Mr. Quintana was there.

MR. MELSON: Prior to the rest of the testimony of this witness, may we have a proffer of the rest of the testimony of this witness?

MR. KENDRICK: No.

THE COURT: All right. Let's approach the bench.

(Whereupon, the following bench conference was held out of the hearing of the jury.)

THE COURT: Now, the Commonwealth asked for a proffer as to what you are going to show with this conversation with Omar.

MR. ORDOVEZA: Well, Your Honor, this goes to the --

MR. MELSON: (Interposing) Talk down a little bit and into your microphone.

MR. KENDRICK: This goes into the question -- this

goes to the question of the reactions of the defendant right on the evening of March 19th -- I mean --

Does Omar tell this witness about the murder? Just tell him that's what it's about. Omar tells this guy about the murder.

MR. ORDOVEZA: That's all there is. Omar notifying Mr. Suarez about the murder. That's it.

MR. KENDRICK: Big deal.

MR. MELSON: I got my proffer, Your Honor. Thank you.

THE COURT: You are making no hearsay objection or anything?

MR. MELSON: No, sir.

MR. ORDOVEZA: That's all.

(Whereupon, the bench conference was concluded, and the proceedings continued within the hearing of the jury.)

BY MR. ORDOVEZA:

Q Mr. Quintana, -- Suarez. Excuse me. Let's go back to the conversation between you and Omar. You had just said that Omar -- you are talking to Omar and he was about to tell you -- he was surprised that he knew Quintana was in your apartment; is that correct?

DEO REPORTING
(703) 751-0013

A Yes, of course. Omar said to me, "Is Quintana in your apartment?" I answered, "Yes, he was." And he said, "They are looking for him, because they suspect him of something."

Q What else did Omar tell you, if anything?

A Well, he said that a lady named Irma had said that there had been a killing and --

Q (Interposing) I'm sorry. I'm going to ask the witness to repeat that, because I didn't hear.

THE COURT: All right.

MR. MELSON: Your Honor, before he repeats that, may we caution him about something that was brought up earlier in the trial?

MR. KENDRICK: Caution who, the witness or the lawyer?

MR. MELSON: Both.

MR. KENDRICK: You caution the witness and I'll caution the lawyer.

(Mr. Melson conferred with the witness and Mr. Kendrick and Mr. Ordoveza conferred off the record.)

MR. MELSON: Thank you, Your Honor.

BY MR. ORDOVEZA:

Q When all this conversation was taking place, where was Manuel Quintana?

A He got up and he was close to me. I believe he was in the kitchen helping out and so forth.

Q Did he overhear what you said? Did he overhear what you were talking about?

A I don't believe he did, because I waited until he was unable to hear, because he was not close to listen to that and of course he couldn't hear what Omar was saying to me.

Q Did you eventually tell him what Omar told you?

A No, I did not. The conversation did not end there. I could continue to explain the situation, if you wish?

Q Let me ask you -- let put it another way, Mr. Suarez. In the course of the evening you did tell Mr. Quintana what Mr. -- what Omar told you about the death of Ophelia Quintero' is that correct?

A Yes, that's correct.

Q You also told him that the police were looking for him on suspicion of the death of Ophelia Quintero; is that not correct?

A I'm sorry. My hearing is not too good. Could you repeat the question?

Q You also told Manuel Quintana that the police were looking for him on suspicion of murder of Ophelia Quintero; is that not correct?

A Yes, that is correct.

Q What was his reaction to this?

A Well, he said that --

Q (Interposing) Excuse me. Please, speak very slowly. Please, speak very slowly, Mr. Suarez.

A (Continuing) -- He said to me that the police could not be looking for him for this reason, because he had not committed any crime and he was going to present himself to the police or ask me to present him to the police.

Q He did say that he was innocent of this crime; is that correct?

MR. MELSON: Your Honor, I think that's counsel's interpretation.

THE WITNESS: He said that he was going to go to the police to present himself to the police.

BY MR. ORDOVEZA:

Q So, I gather from you that Manuel Quintina was surprised by this?

MR. MELSON: Your Honor, that's a conclusion that --

THE COURT: (Interposing) Objection overruled.

THE INTERPRETER: The witness answered in the affirmative.

BY MR. ORDOVEZA:

Q Now, in the course of that conversation, is it not a fact that Manuel Quintana had told you about the injustice that they had done to him?

THE COURT: Mr. Ordoveza, I think it would be better if you listened on the English channel and then you couldn't cut off the interpreter when he gives the English translation. Your timing would be better if you listened to the English instead of the Spanish.

BY MR. ORDOVEZA:

Q I will ask the question again, Mr. Suarez: In the course of your conversation with Mr. Quintana, did he not tell you about the many injustices that had been committed to him?

A Yes, sir.

Q Did he not tell you in the course of that evening, Mr. Quintana -- I mean, Mr. Suarez -- about the fact that they put him in jail for charges which were eventually dismissed? Is that correct?

A Yes, that is correct and he was freed. He was set free. So, if he had committed a crime and had been set free one had to assume that he was innocent, otherwise he would not

CEO REPORTING
(703) 751-0013

have been turned loose.

Q Is it not also true that on that occasion Manuel Quintana broke down and cried?

A Well, Mr. Quintana began to cry because of the situation that he explained to me regarding his family in Cuba.

Q So, what did you tell him after that -- let me rephrase the question. Let me rephrase the question. Did you not suggest to him that he should turn himself over to the police if he really was innocent?

A Yes, I did.

Q What was his response to this?

A The same thing I said before. Please, let me finish explaining, because I cannot explain the full contents of the situation. I wanted to tell you what he said to me.

Q I will ask you further questions to clarify the matter.

MR. MELSON: Your Honor, I think he is entitled to explain his answer.

THE WITNESS: Yes, that is what I have asked for, to be able to explain my answer.

Mr. Quintana told me that he had committed no crime. I told him later on that the police is looking for you for

having killed a woman. If you committed the crime, tell me and if you have a good car -- and if you committed this crime, then you are going to be penalized by the law.

BY MR. ORDOVEZA:

Q And what did he answer?

A I wanted to find out if it was true or not that he had committed this crime.

Q What did he tell you after you told him this?

A That he was not leaving this day and that he had no reason to leave and he asked me to take him to the police. That is what he said to me. I'm giving you the exact words that he said to me.

Q Going now to the morning of March 21st, what time did you wake up that morning?

A No, I was unable to sleep that whole night.

Q Why is that?

A First of all, I was unable to sleep because we were talking until about 5:00 or 5:30 a.m.

Q Do you know if Quintana slept at your house?

MR. MELSON: Your Honor, he has not finished his answer.

MR. ORDOVEZA: I think he had finished it.

MR. MELSON: He said, "First of all."

DEO REPORTING
(703) 751-0013

THE WITNESS: No, that is correct. I was unable to complete the answer.

THE COURT: You may complete the answer.

THE INTERPRETER: The witness is a bit confused and asks that the question be repeated.

MR. ORDOVEZA: May I be allowed to continue my questions, Your Honor?

THE COURT: Repeat the same question then so he can complete his answer.

BY MR. ORDOVEZA:

Q All right.

My question, Mr. Suarez, is: Did Manuel Quintana sleep in your apartment?

MR. MELSON: That wasn't the question.

MR. KENDRICK: Just have the reporter read it back.

THE COURT: All right. The reporter may read it back.

MR. MELSON: We are talking about the question he was attempting to answer.

MR. KENDRICK: Just have her read it back. That is the easiest way to do it and then we won't question the question.

(Question read.)

THE WITNESS: No, I didn't wake up, because I was sleeping -- I didn't sleep that night. I was unable to sleep. I just drank a lot of coffee and talked.

BY MR. ORDOVEZA:

Q Why is that that you were unable to sleep that night?

A Well, we were talking until very late and I was just unable to sleep, because if -- Manuel went to bed about 5:00 or 5:30 and went to bed in the bed that belonged to my children and we felt sorry for him because of his situation -- his difficult situation.

Q Now, what time did Manuel Quintana wake up that morning? Do you know?

A Well, Manuel Quintana woke up at the same time that my children did, because we were all going to work and he said the children were getting up and he woke at that time. I had to take my children to work because I wasn't going to work that day.

Q What did Manuel Quintana tell you, if anything?

A He was going to present an application to Seven-Eleven in order to begin working there.

Q In other words, that morning of March 20th, Manuel Quintana had intentions of filing an application for

employment with Seven-Eleven? Is that what you are telling us?

A Yes, at the Seven-Eleven that was nearby. He was going on foot.

Q Let me ask -- I'm sorry?

A I helped him to fill in the application to work at Seven-Eleven. I don't know a lot of English, but I know how to read English, so I know how to more or less, what to put on in each case.

Q Now, you mentioned something about bringing your children to work that morning?

A Yes.

Q Were you able to take any of your sons -- I'm sorry.

You mentioned something about bringing your children to work on the morning of April 21. Were you able to do that?

A Yes, I did.

Q All right. I will rephrase the question, Mr. Suarez.

A Yes?

Q Is it not a fact -- did you bring your children to work that morning?

A No. No, because I wasn't -- I had a problem with my foot and so I wasn't able to do it and he said he would do it

and he said he would do it for me.

Q So, this was on the morning of March 21, which was a Saturday; is that right?

A Yes, that is correct.

Q Did he in fact, bring any of your children to work that morning?

A Yes, he took Fernando, my eldest son, to work because the other two began working later -- at about 6:30 or 7:00. He begins working at 7:30.

Q What time did he return after taking Fernando, your son, to work?

A Twenty or twenty-five minutes later.

Q What happened after he arrived at the apartment having brought Fernando to work that morning?

A Well, he just arrived and sat down. He went to bed again or something like that -- something like that. He may have gone to bed and gone to sleep again. He fell asleep, I think.

Q And did he eventually wake up?

A Well, I went out to do some shopping to buy some groceries and I told him that I would be back shortly and I left at 9:00 and he was asleep -- just regularly asleep.

Q When you returned to the apartment after going out,

was he still in the apartment then?

A Well, when I returned, I found him at the entrance to the parking lot. He was being led away and by the police.

Q About what time was this?

A I don't want to make a mistake, but I think it would have been 11:00 o'clock --.

Q (Interposing) It was some time --

A (Continuing) -- I don't know the exact time.

Q It was some time in the morning of Saturday, March 21?

A Yes, it was --

Q (Interposing) At the --

A (Continuing) -- More or less, I estimate.

THE COURT: Mr. Ordoveza, are you listening to the English translation?

MR. ORDOVEZA: Yes, Your Honor.

THE COURT: You cut in before the translator finishes the answer.

MR. ORDOVEZA: I apologize. I will restrain myself.

THE COURT: I think the problem is you are understanding the answer.

MR. ORDOVEZA: I am sorry, Your Honor. I want to be sure that the Spanish is properly translated.

May I continue, Your Honor?

THE COURT: Yes.

BY MR. ORDOVEZA:

Q I understand from you that you returned to your apartment --

MR. ORDOVEZA: There is no transmission.

BY MR. ORDOVEZA:

Q (Continuing) -- did you arrive?

A Yes, that's correct.

Q And when you arrived at the parking lot, what did you notice?

A The police cars were there. There were two or three police cars and there was quite a commotion.

Q Did you see Manuel Quintana then?

A Yes, when I went into the entrance of the parking lot. When I went into the parking lot, I saw that they were leading him away. He was being arrested by the detectives.

Q Where was Manuel Quintana?

A He was asleep in my apartment. He was asleep when the police knocked on the door. My son opened the door and --

MR. MELSON: (Interposing) Your Honor, I will object to what -- he obviously wasn't there at the time the police came if he was out shopping.

DEO REPORTING
(703) 751-0013

MR. ORDOVEZA: I think the witness misunderstood the question, Your Honor.

THE COURT: Please rephrase the question.

BY MR. ORDOVEZA:

Q I will rephrase the question. You mentioned that you arrived at your apartment at around 11:00 a.m.?

A Yes.

Q That you parked your car?

A No. No. No. No. I did not park my car. When I was going into the parking lot, I ran into the police cars and the commotion and Mr. Quintana was being arrested and the detective stopped and Quintana at that time said, "I'm being led away. I'm being arrested." And I told him, "Don't worry. You will receive justice in this country," and that's all I said.

Q Did you notice the car of Manuel Quintana?

A Yes. It was right there in front of me, right next to the entrance (indicating).

Q I want you to be careful and answer this question and think about it hard. Did you see whether the doors or any door of Manuel Quintana was open?

A At that time all of the -- all of the windows were rolled down. But, the person who could answer that question

would be my son who was there at the time.

MR. KENDRICK: May I have the Court's indulgence, Your Honor?

BY MR. ORDOVEZA:

Q And did you notice whether the doors of the car were open?

A I didn't touch the car because the police did not allow us to approach the car and I just went directly into my house and I waited there because the detective told me to go on to my house -- my apartment.

Q I'm not asking you whether you -- whether you opened the door of the car. What I'm asking you is whether you saw the car of the door open?

A No, it was not open. No, the doors -- the doors were apparently closed.

Mr. Quintana did not use the key to the car, so I think the doors were not locked. However, the doors were closed.

My son can clear this up.

Q In other words, when your son rode with Quintana that morning, the car was unlocked?

MR. MELSON: Your Honor, does he know this of his own --

THE COURT: (Interposing) I wonder how he can know that, Mr. Ordoveza. This would have to be hearsay.

BY MR. ORDOVEZA:

Q Did Quintana tell you anything while he was in the police car?

A Yes, he did when he was leaving.

Q Did he profess his innocence?

MR. MELSON: Your Honor, he's gone over that already.

THE COURT: Not at that time I don't think.

MR. ORDOVEZA: Was the question answered?

MR. KENDRICK: Yes.

THE COURT REPORTER: I didn't hear the English translation.

THE COURT: He said, "Yes."

MR. KENDRICK: Your Honor, may we have a brief recess, please?

THE COURT: All right. Let the jury retire. Take just about five minutes, because I want to break for lunch at 12:30.

(Whereupon, the jury was temporarily excused.)

(Whereupon, a short recess was taken.)

THE COURT: Mr. Ordoveza, do you have more

cross-examination?

MR. ORDOVEZA: Yes, Your Honor. Just a few questions.

THE COURT: All right. Bring the jury back in.

(Whereupon, the jury returned to the jury box.)

MR. ORDOVEZA: May we proceed, Your Honor.

THE COURT: Yes.

BY MR. ORDOVEZA:

Q Mr. Suarez, you mentioned that you were sitting about two or three feet away from Mr. Quintana?

A Right.

Q On the evening of March 20th?

A Correct.

Q Did you notice what he was wearing then?

A He had the suit on and then he changed clothes later that evening.

Q I would like you to examine the suit carefully, parts of which were -- the trouser and which parts of which were cut up for obtaining blood sample specimens. Did you notice whether there were blood stains on that suit?

A I didn't look for that. I didn't see any such stain. However, I did notice the stain -- the ink stain in the upper part.

If one says that -- if a person comes into the house and it is alleged he has killed someone, one would have obviously looked for any signs of blood or anything like that.

MR. ORDOVEZA: With the Court's indulgence?

That's all from that witness, Your Honor. I would like him subject to recall later, Your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. MELSON:

Q Mr. Suarez, on the night of Friday, when Mr. Quintana returned to your apartment, you indicated that he was acting nervous?

A Yes, he was. He was somewhat nervous -- he was nervous, no question about it.

MR. MELSON: I'm sorry, Your Honor. I didn't hear that answer, if there was an answer.

THE COURT: He said, "He was nervous. No question about it."

BY MR. MELSON:

Q Tell us what Mr. Quintana was doing?

A On the night of the 20th?

Q Yes.

A We talked about his family and about his situation.

MR. KENDRICK: I don't think he got the question.

BY MR. MELSON:

Q Let me ask you the question again, Mr. Suarez: What did you see him doing when he came in the apartment? How did he act?

A Well, when I arrived, he was sitting down watching television.

We were talking about the last night, the night of the 20th, right?

Q Yes, Friday night?

MR. KENDRICK: The question was: What was he wearing?

MR. MELSON: No.

BY MR. MELSON:

Q The question was: What was he doing?

A You are asking me how he acted and I'm saying that he was very nervous at first, but afterwards he calmed down.

Q Why did you say he was nervous? What was he doing that made you believe he was nervous?

A First of all, the way in which he came. He knocked on the door very hard and he seemed considerably nervous when he came in. He knocked on the door (demonstrating), and he quickly -- he was restless. He wasn't very -- he wasn't -- he

didn't appear to be very relaxed.

Q Did he do anything to the walls that you remember?

A No.

Q Did he have anything with him like a light of some sort?

A Yes, he had a large flashlight. As a matter of fact, I was a bit taken aback when I saw him -- when I opened the door and saw him with a flashlight, because it was dark and that also the car was out there.

Q How do you know the car was out there?

A Because he said he came -- he was planning to leave right away. We began to talk and I told him just to turn the engine off because this would damage the battery of the car.

Q Mr. Suarez, do you know what the flashlight looked like?

A Well, it seemed to me -- I'm not sure. I'm going to try to say the truth, but if I'm not sure, I don't want to say that I'm sure. But it seemed to me it was a red and white flashlight and practically new. If it wasn't new, it was practically new. It had a large ring at one end.

Now, would you tell us everything that Omar Gonzalez told you over the phone in the conversation on Friday night?

A Yes, I have. Yes, regarding my conversation with

him, yes. I already explained my conversation with him over the telephone and that I mentioned the name of Mr. Quintana and he asked me to try to convince him to stay in the house for some time because the Fairfax Police was coming and he waited eight hours for them, but they did not arrive. And then I also had the hope that he would be arrested, because if he was innocent, therefore there was nothing to fear and I was afraid if he went on the street, he might be shot at or something of that sort.

Q Did Mr. Gonzalez tell you why the Fairfax Police were coming?

A Yes. Mr. Gonzalez -- I'm repeating myself, but Mr. Gonzalez told me when I said that Mr. Quintana was there and my son was going to make some coffee for him, Mr. Gonzalez was amazed and said to me that he was going to call the Fairfax Police so that they would come and arrest him.

Q Okay.

Am I correct in recalling --

MR. ORDOVEZA: (Interposing) A point of clarification, Your HOnor. Mr. Melson's reference to Mr. Gonzalez -- I think the jury members have got to be aware of the fact that Omar and Gonzalez are the same person.

THE COURT: All right.

BY MR. MELSON:

Q So, you indicated that you did not sleep on Friday night?

A No, I spent a sleepless night. I was sitting there without being able to sleep.

Q Why were you unable to sleep, other than that you had been up to 5:00 o'clock?

A Well, one of the reasons is as follows; one of the reasons was just a proportion of circumstances, despite the fact that I'm still confused as to the facts and regarding the circumstances that I had heard from Quintana and from Gonzalez. So, I still -- I did not believe that a person I knew -- I would assume that anyone who had committed a crime would wish to flee. So, I'm very confused. Perhaps it is my lack of knowledge, but I'm very confused.

Q Why were you concerned?

A Well, I was concerned basically because of the scandalous situation that would occur in my apartment with the arrival of the police. Even if it is something of a minor nature, there are always a lot of police. In our country, for example, we were always afraid when the police came, because they came in large numbers and it was really a traumatic situation.

Q Did you go with Quintana when he took your son to work?

A No, I did not. No, I stayed in bed.

Q Where was Quintana's car when you drove into the parking lot when the police were there?

A Where was it? It was near the entrance on a side of the parking lot. It was near the entrance to my apartment.

Q When you parked your automobile, did you go into your apartment?

A Yes, because there was a detective there -- this detective was present here and wanted to -- told me that he wanted to do some checking and he asked me to stay and I didn't want to remain close to the scene because there were about forty policemen there.

Q About how many police?

A A great many. I don't know, because some of them were dressed in civilian clothes, so it was hard for me to determine.

Q Did you say "forty policemen"?

MR. ORDOVEZA: Your Honor, I think there was a mistranslation there.

MR. MELSON: I'm not sure I need his interpretation.

MR. KENDRICK: I'm not sure we need Mr. Melson

DEO REPORTING
(703) 751-0013

cross-examining his -- or impeaching his own witness either.

THE COURT: Ask for a qualification from the translator.

BY MR. MELSON:

Q Did you say "forty" police officers?

A Well, I'm going to say that those were -- those that were in uniform -- the ones that I saw were -- I saw at least seven or eight policemen in uniform. There were three patrol cars -- three cars -- three police cars. There were a lot of people that I recognized in the process of this trial.

And I want you to know that this is affecting my economic situation, but I have seen many of these policemen.

Q Then did you go up to Quintana's car before going into the apartment?

A No, because the car is over here (indicating) and I went in another direction -- this direction (indicating). So, I did not go by Mr. Quintana's car and the witnesses -- the policemen can be witnesses to that, because they were present at the time.

MR. MELSON: No further questions.

THE COURT: All right. Would you tell the witness that he is excused and free to go home? He is to remain on call because the defense may wish to call him later.

* * *

Whereupon,

DENNIS REED,

was called as a witness by and on behalf of the Commonwealth of Virginia, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELSON:

Q Sir, would you state your name for the Court, please?

A Yes, Dennis Reed.

Q By whom are you employed?

A Dennis Reed, Incorporated.

Q What type of business is that?

A Automotive dealership.

Q Where is that located?

THE COURT: Wait just a moment.

Would you speak right into that microphone, please? See if it is on. Thank you. Go ahead.

Would you repeat the question?

BY MR. MELSON:

Q Could you repeat your answer to my question as to where you are employed and where it is located?

A Yes, Dennis Reed, Incorporated, at 5850 Leesburg

DEO REPORTING
(703) 751-0013

Pike, Bailey's Crossroads.

Q Are you the owner of that business?

A Yes.

Q Directing your attention to March 19th, 1981, were you working on that day?

A Yes.

Q What time did you usually take lunch?

A No particular time, but normally anywhere from 12:00 o'clock up till 1:30 or so, depending upon the schedule.

Q Did you have occasion to sell an automobile that day?

A Yes.

Q Was it sold to anybody who is in the courtroom today?

A Yes.

Q Would you point that person out, please?

A Yes, in the blue shirt with the earphones on (indicating the defendant).

Q Do you recall what type of car it was?

A It was a Plymouth Fury, 1969, I believe.

Q Let me show you what is marked as Commonwealth's Exhibit No. 93 and in particular, 93-A, which is part of that exhibit and ask you if you recognize what that document is?

(Handing to the witness.)

A Yes, it is a copy of my original bill of sale and the temporary ownership and license certificate.

Q Did the car have temporary tags on it?

A No, I issued thirty day temporary tags on the automobile.

Q Let me show you Commonwealth's Exhibit No. 40 and ask you whether or not you recognize that automobile?

(Handing to the witness.)

A That's the car.

Q Is that the car you sold to Mr. Quintana?

A Yes.

Q At approximately -- let me ask you what date that was on.

A That was on March 19th, 1981.

Q Do you recall the approximate time?

A It was roughly at twenty after 2:00 or 2:30. I believe he left the office around 3:00 o'clock, 3:15.

Q When you came back -- did you run into this individual when you came back from lunch?

A Yes. I was late getting back that particular day and he was in the parking lot with my secretary's boy friend.

Q What is his name?

DEO REPORTING
(703) 751-0013

A His name is John.

MR. KENDRICK: I'm sorry. I didn't hear the name.

THE WITNESS: John.

MR. KENDRICK: Thank you.

BY MR. MELSON:

Q Did you take any automobile in trade for the one you sold the defendant?

A No, I did not.

Q What were the terms of the sale?

A Cash.

Q How much was the sale for?

A $350.00.

Q Do you recall the type of bills he paid you in?

A Yes, he paid me in twenty dollar bills. He paid me $360.00 in twenty dollar bills and I gave him back a ten dollar bill.

Q All right.

Do you recall whether or not he had anything with him?

A There was a package of some kind in this particular car. Whether it belonged to him or not, I don't know. It was not mine.

Q When you put the car in the parking lot, did you take

the items that were in it out?

A Yes.

Q Was Mr. Quintana alone?

A Yes.

MR. MELSON: Thank you. I have no other questions at this time, Your Honor.

CROSS-EXAMINATION

BY MR. KENDRICK:

Q Mr. Reed, was Mr. Quintana there when you arrived?

A Yes.

Q Are you certain of the time?

A I can't specify the exact time. It was shortly after 2:00 o'clock.

Q Within five or ten minutes?

A I would say it was between -- between ten after 2:00 and possibly twenty-five after 2:00. In that time frame.

Q Usually you return around 2:00 o'clock?

A Yes.

Q Is that because your secretary leaves around 2:00?

A Yes.

Q Do you recall what kind of clothes he had on?

A No, I don't.

Q You don't recall anything about the clothes?

A Well, I recall there was nothing outstanding. I believe he had casual clothes on.

Q Did he have on a three-piece suit?

A No.

Q He did not?

A No.

Q Now, what is this package that you are talking about?

A I don't know exactly what it was. I remember there was something laying on the front seat of the -- of this Plymouth and it could have been a paper bag.

Q A box?

A Possibly.

Q A bucket?

A Not a bucket.

Q A can?

A No.

Q It was either a box or a bag, is that what you are saying? Or are you not sure which?

A No.

Q Could you see inside?

A No.

Q Do you know if there was anything in it?

A No.

MR. KENDRICK: That's all I have, Your Honor.

MR. MELSON: No other questions, Your Honor.

THE COURT: You are excused, Mr. Reed. Thank you.

(Witness excused.)

MR. MELSON: I would like to move that exhibit into evidence. I believe there is a stipulation with respect to that.

MR. KENDRICK: The contract, right?

MR. MELSON: Yes, the exhibit itself.

(Handing to counsel.)

MR. KENDRICK: Your Honor, these items -- Mr. Melson and I had agreed to stipulate that they were taken out of the automobile.

At which time? The date of the search?

MR. MELSON: When Officer Tyler searched the car on Saturday. They came out of the glove compartment of the automobile.

The one, there was no stipulation to, we would move into evidence through Mr. Tyler.

MR. KENDRICK: These were taken at the same time the other items were taken out?

MR. MELSON: Yes. As I said, if we move the other

* * *

Q Do you recall what he was wearing that day?

A Yes, sir.

Q Could you tell us?

A He was wearing dark clothing and a hat.

Q What kind of a hat?

A A small hat with the crease in the center. It wasn't a large hat -- nothing like a baseball cap. A dress kind of cap.

Q I show you Commonwealth's Exhibit No. 42 and ask you whether this was the style of hat the individual was wearing?

A Yes, sir.

MR. MELSON: I have no other questions.

CROSS-EXAMINATION

BY MR. KENDRICK:

Q Are you saying that's the hat he was wearing?

THE COURT: That isn't what he was asked.

BY MR. KENDRICK:

Q That's right; that's not what you are saying, is it?

A It was a hat that style.

Q But are you saying this was the hat that the man was wearing?

THE COURT: Well, Mr. Kendrick, that's not a fair question. He never said that. That wasn't asked of him.

* * *

A Yes, sir.

Q Does that produce anything for the customer?

A Yes, it produces a detailed list of the items and what store and what customer account was and what time there in the store.

Q Do your items in your store have a price tag affixed to them?

A Yes, sir.

Q Describe this price tag for us.

A Okay. Some would be square and would have the store name on it, the price and six digit IBM numbers. We also have another type bought through a pricing gun which is a thin sticket and only gives the name of the store and the price.

Q What type of price tag is on the sundry items?

A Either one. It depends if there was price changes -- or a tag, whichever makes more sense.

Q Sir, let me show you what has been marked as Commonwealth's Exhibit No. 71 for identification and ask if you can identify what this item is?

(Handing to the witness.)

A One of the receipts from our cash registers.

THE COURT REPORTER: Excuse me. Could you speak up a little bit?

DEO REPORTING
(703) 751-0013

THE WITNESS: Okay.

BY MR. MELSON:

Q How can you tell it is one of your receipts?

A Okay. On the bottom it will say Store 210. Well, it will have the number "210."

Q Does it have the name of the store also?

A Yeah.

Q What are the numbers that run down below the title "People's Drug Store"?

A Okay. All these numbers that run down are items purchased on the receipt, all rung up on sundry, which can be anything like a sandal item or anything like that. You have the time, 7:18. You have the date, the cash register number, the customer account and the store number.

Q What date appears on that receipt?

A 3-19-81.

Q What time appears on that receipt?

A 7:18 p.m.

Q Now, among your sundry items, do you have things such as chains and locks?

A Yes, sir.

Q Do you sell lunch buckets?

A Yes, sir.

Q Did you bring any lunch buckets with you?

A Yes, sir. It is in the witness room.

Q Will you get it for us, please?

A Sure.

(Whereupon, the witness leaves the stand to get the lunch buckets.)

Q What is that you have in front of you?

A Okay. This is one of three different types of lunch pails we do carry.

Q Let me show you Commonwealth's --

MR. KENDRICK: (Interposing) I think it is 45.

BY MR. MELSON:

Q (Continuing) -- Exhibit 45. Does that appear to be the same type of lunch pail?

A Yes, it does.

Q Okay. What price do you have on the lunch pail now?

A Right now it is priced at 9.99.

Q Now, have you had a price increase?

A Yes, sir.

Q What was the price of that item on March 19th?

A Okay. This sticker peels off and it would be 9.39.

Q Let me show you the exhibit in front of you, which is Commonwealth's Exhibit No. 71 and ask you if there was an

item purchased on that day for 9.39?

A Yes, sir. It is the fourth item down.

Q Can you tell by what means the payment was paid?

A Okay. It was paid for cash. The total receipt was 81.85.

Q 81.85?

A Yes, sir, and the customer presented $85.00 in cash and he got change back for $3.15.

MR. MELSON: Thank you very much, Mr. Pauly.

CROSS-EXAMINATION

BY MR. KENDRICK:

Q Mr. Pauly, were you present when this transaction took place?

A I was in the store at the time. I was working twelve hours that day.

Q Do you know who made that purchase?

A No, sir, I do not.

Q How many employees did you have on that day?

A I had five employees on duty, but only two of them running registers.

Q Do you think they would know who made this purchase?

A It was two months ago. There is a good possibility they wouldn't remember.

* * *

the defendant as the person who placed his fingerprints on this fingerprint card, which I would like to have marked as a Commonwealth's Exhibit. That is the purpose of this witness. If he is willing to stipulate to that, I will not have to call this witness.

MR. KENDRICK: Your Honor, I will stipulate that these are my client's fingerprints.

CROSS-EXAMINATION

BY MR. KENDRICK:

Q Did you also type in the information on the back, Deputy?

A That, I'm not sure of, sir.

Q What?

A I'm not sure. I don't recall.

Q In the areas that's marked "Reply Desired," what does that mean? Have you asked the F.B.I. for information? Is that what that is for?

A I would assume so. It is just the standard form typing on the back, assuming I typed. I don't recall.

MR. KENDRICK: That's all I have, Your Honor.

THE COURT: All right. You are excused. The exhibit, 94, is received in evidence pursuant to stipulation.

* * *

DEO REPORTING
(703) 751-0013

official of some sort. They are signed by the official and also signed by the person whose prints are being taken, so you know whose prints these belong to. They are taken under ideal circumstances.

Q Let me show you what has been marked as Commonwealth's Exhibit No. 94 and ask you whether or not you've had contact with this item on a previous occasion?

(Handing to the witness.)

A Yes, I saw this in my office on March 23rd of this year.

Q Let me also show you Commonwealth's Exhibit No. 25 and ask you whether you've had previous contact with this exhibit?

(Handing to the witness.)

A Yes, I did.

Q All right.

And what is the exhibit that you have in your hand now?

A Exhibit 25. This is a latent fingerprint card.

Q Does it indicate on the back from where the latent print was recovered?

A Okay. This latent print was recovered from a Polaroid camera.

Q Now, did you have occasion to compare the latent fingerprints that you have in your hand with the known prints of Mr. Quintana?

A Yes, I did.

Q And by what means did you compare the two?

A I compared and identified finger No. 3, which is the right middle finger, on the fingerprint card bearing the name Manuel Quintana with the third lift on the back of this card (indicating).

Q Now, when you made that identification, did you put any marks on the card to indicate that you had made an identification?

A Yes, I did.

Q What color was that marking in?

A It is in red.

Q Would you show the jury where that marking is?

A (Displaying to the jury.) Written in red by No. 3.

(Counsel displaying to the jury.)

Q Miss Davis, on the basis of your training and experience and upon the examination you conducted between that latent fingerprint and the known fingerprint of the defendant, did you arrive at a conclusion?

A Yes, I did.

* * *

DEO REPORTING
(703) 751-0013

BY MR. MELSON:

Q Does that conclude your demonstration with respect to the prints?

A Yes.

(Whereupon, the witness resumed the stand.)

BY MR. MELSON:

Q Let me show you Commonwealth's Exhibit No. 3 and ask you whether you've come in contact with this exhibit on a prior occasion?

(Handing to the witness.)

A Yes, I have.

Q Did you have occasion to compare Commonwealth's Exhibit No. 3 along with Commonwealth's Exhibit No. 93?

A It has got 94 on here.

Q 94?

A Yes.

Q Is that the fingerprint of Mr. Quintana?

A Yes, it is.

Q Did you compare those two?

A Yes, I did.

Q Did you arrive at a conclusion with respect to the identity of the individuals who placed those prints on that paper?

A Yes, I did.

Q What was your opinion?

A I found that fingerprint No. 2 on the fingerprint card bearing the name Manuel Quintana and the first left print on the back of this latent card were both made by Finger No. 2 of the same person.

Q What do you mean by Finger No. 2?

A That's the right index finger.

Q And when it says Person No. 2, are you referring to Manuel Quintana?

A Yes, I am.

Q Did you also make a notation in red next to the finger you are referring to --

A (Interposing) Yes, I did.

Q (Continuing) -- indicating an identification?

A Yes.

Q Did you complete an exhibit with respect to that identification and would you explain it to the jury and what formed the basis of your conclusions?

A Yes, I have it right here (indicating).

Q Fine.

Would you show that to the jury, please?

(Witness showing to the jury.)

* * *

DEO REPORTING
(703) 751-0013

Q And while he was there, did somebody come and inquire about an automobile?

A Yes, sir.

Q Did you sell a car to him?

A No.

Q Did you leave him with somebody else as he was inquiring about the car?

A Yes.

Q Who was that?

A Dennis Reed.

Q Do you recall what this person was wearing?

A Yes.

Q What?

A I believe it was a light shirt and dark slacks, probably jeans, I think. They were dark green and a hat -- a dark green hat. I believe it was suede with a crease in the top -- not suede, but felt.

Q Was it like a baseball cap with a brim in the middle or another type of brim?

A Had a brim all the way around and part of sat up and was pointed.

Q Did Mr. Shifflet describe that hat to you?

A No.

* * *

Q Could it have been shorter?

A Yes.

Q One or two minutes?

A Yes.

Q Less than a minute?

A No.

Q This is the only time that you have seen him?

A Yes, sir.

Q On that one occasion?

A Yes, sir.

Q When was it?

A This was in March.

Q You haven't seen him since then?

A No, sir.

Q And you saw him for possibly less than a minute?

A No. No, I'm sure it was more than a minute.

Q But less than five?

A Uh huh.

Q Could it have been less than a minute?

A No.

MR. MELSON: Your Honor, he has already gone over it.

THE COURT: It is a little repetitious.

MR. KENDRICK: That's all.

* * *

A Okay. On the top of it it will just say "Thank you," and then it will have a cash register number, a store number, and then the purchase and at the bottom of it it will have a receipt number.

Q Let me show you what's been marked as Commonwealth's Exhibit No. 76 and ask you if you can identify that?

(Handing to the witness.)

A Yes, sir, that would be received from our store. It has the date and then the store register, the store number, purchases, and on the bottom of the receipt the number and the total.

Q What is the store number?

A Store 1 -- excuse me. Store 139.

Q Does it indicate what date the transaction occurred?

A 3-20-81.

Q How much was the transaction for?

A 42.41 was the total amount of the purchase.

Q Can you tell how much was given to the cashier?

A Yes, $45.00.

Q Do you know whether or not it was cash?

A Yes, sir. A check would have to be made out for the exact amount and a charge would also be charged up for the same amount. On the bottom of this it has $2.59 returned.

* * *

A Yes, I do.

Q Could you point to him for us?

A It is that young man over there (indicating the defendant).

Q Are you pointing to this one (indicating)?

A Yes.

Q When did you first meet him?

A In the month of December.

Q Do you recall where?

A In Boston.

Q Are you referring to the subway?

A On the bus going towards Virginia.

Q Did you see him again after that time?

A Yes. When I was leaving my job about 4:00 o'clock, I saw him coming by a car. I saw him for the second time and the last time on that occasion.

Q Have you and he talked on the telephone?

A Yes, I have. Yes, twice.

Q Directing your attention to March 20th, 1981, did you receive a phone call from Mr. Quintana?

A Yes, I did.

Q Do you recall about what time?

A Yes, at about 4:00 p.m.

DEO REPORTING
(703) 751-0013

Q Would you tell us what he told you?

A He said that he had some money and a car and he wanted me to go out with him and I told him that I couldn't because I was studying.

Q Did he tell you where he wanted to go?

A No, he did not.

Q Did he tell you at all whether or not he was going to leave the country?

A No.

Q What did he tell you? Did he tell you he was going to leave the state?

A No, he didn't say where. He just said he wanted to leave with me.

MR. MELSON: Thank you. That's all I have.

CROSS-EXAMINATION

BY MR. ORDOVEZA:

Q Maria Capaisci, is that your name?

A Yes, that is correct.

Q Maria, you testified that Manuel Quintana called you only two times; is that right?

A Yes.

Q Could you tell us when those two occasions were?

A He called me on the 20th of March on a Friday and

* * *

Q By whom are you employed?

A Merrifield Exxon.

Q Where is that located?

A Lee Highway and Glebe Road.

Q Sir, let me show you what's been marked as an exhibit in our case, No. 62, and ask if you can identify this?

(Handing to the witness.)

A Yes.

Q What is that?

A That's a bill for the Dodge Plymouth, '69, which I put an alternator in.

Q What day did you do that?

A That's on March 20th, 1981.

Q 3-20-81?

A Yes.

Q Do you have the customer's name on that receipt?

A Yes. That's what he marked it (indicating), but I couldn't read it. He signed it.

Q How much did you charge for doing that work?

A What it says on the bill, $71.00 for the alternator and 16.50 total labor for putting in the alternator and for charging the battery, plus 2.84 tax.

Q All right.

* * *

MR. KENDRICK: Have him sworn, Your Honor.

MR. MELSON: I apologize for not having this done.

(The item previously referred to was marked as Commonwealth's Exhibit No. 95 for identification.)

MR. MELSON: I would submit Commonwealth's Exhibit 95 as a self-authenticating certificate from Fairfax County indicating that the defendant paid $43.00 in cash for a speeding ticket he received in Fairfax County on an earlier date.

THE COURT: No. 95 is received in evidence.

(The item previously marked for identification as Commonwealth's Exhibit No. 95 was received in evidence.)

MR. MELSON: Our next witness will be Deane Dabbs.

* * *

I held at the Blood Bank was Technical and Teaching Supervisor.

Q Have you testified in a Court of Record in this state as an expert forensic scientist on previous occasions?

A Yes, sir, I have.

Q Have you done so in this particular court?

A Yes, I have.

Q I'm directing your attention to Commonwealth's Exhibit No. 37, which is your Item 3. Did you have occasion to come in contact with that on a previous occasion?

A Yes, sir, I did.

Q And what is that item that you have in your hand?

A This was a sample of blood from the victim.

Q What was the purpose of you receiving that vial of blood?

A It was submitted for typing purposes for comparison with any other evidence which might be submitted to me from the Arlington County Police Department.

Q And did you, in fact, type it?

A Yes, sir, I did.

Q What do you mean by that?

A Routinely when I receive samples from the Medical Examiner's Office, they are typed in A, B, O, RH Systems.

DEO REPORTING
(703) 751-0013

These are the systems you are probably most familiar with. In addition, depending upon the nature of the particular case and the other items of evidence which are in the case, we have the capability of being able to type blood in systems other than A, B, O, RH Systems.

Q Were you able to type the group of the blood obtained in the vial?

A Yes, sir, I was.

Q Let me then show you Commonwealth's Exhibit No. 32 which is your Item No. 10 and ask you whether you've had previous contact with this item?

(Handing to the witness.)

A The item is familiar to me; however, I don't see my identifying mark on the hammer.

Q Did you examine such a hammer however?

A Yes, sir, I did.

Q When you examined it, did you find -- what did you examine it for?

A I examined the hammer for evidence of blood, hairs and fibers.

Q Did you find any of either?

A Yes, I did.

Q Any of the three?

A Yes, I did.

Q Did you type any blood?

A Yes, I did.

Q When you found blood, what did you do?

A First of all, I identified the stains as blood. Then I determined that the blood was of human origin. Then I typed the blood.

Q How did the blood that you found on the hammer compare with the blood of the victim?

A It was consistent with the victim's blood in all the systems in which I was able to type it.

Q The item that you received as Item No. 10, from whom did you receive that?

A I received it from Detective Gabrielson of the Arlington County Police Department.

Q Can you recall what date that was?

A March the 27th, 1981.

Q What did you do with it after you completed your comparison of the hammer?

A Repackage the evidence for return the the police department.

Q And did you in fact return it?

A Yes, I did.

DEO REPORTING
(703) 751-0013

Q To whom did you return it?

A It was returned to Detective Gabrielson of the Arlington County Police Department.

Q Do you recall what date?

A On March the 27th, 1981.

Q Is that the same day that you received it?

A Yes, sir, that's correct.

Q Now, did you find any hairs or fibers on the hammer?

A I found no fibers, but I did recover several hairs.

Q And what did you do with the hairs that you recovered?

A The hairs were mounted on glass slides for further examination and comparison purposes.

Q Do you have those slides with you today?

A Yes, sir, I do.

Q Could you identify for us those slides that contain the hairs that you removed from the hammer in front of you?

I'm sorry. Are those all the slides from the work that you did in this case?

A Yes, they are.

MR. MELSON: Your Honor, may I have this marked as a Commonwealth's Exhibit?

(The item previously referred to was marked as Commonwealth's Exhibit No. 97 for identification.)

THE WITNESS: Those are the slides and these are the remainders of the hairs that were used.

BY MR. MELSON:

Q Once you removed the hairs from the hammer and mounted them on the slide, what did you do with them?

A I turned them over to Mr. SamSam Clark, who does hair and fiber comparisons for our laboratory on a part time basis.

Q Is it the same laboratory for which you work?

A Yes, that's correct.

Q Let me show you Commonwealth's Exhibit No. 87-A, B, and C --

Before you answer that, let me get back to these exhibits now that we have them. Commonwealth's Exhibit No. 97, could you identify that for the record and to the jury?

A Commonwealth's Exhibit No. 97 consists of the slides of hairs which I mounted for comparison purposes and the other hairs which were recovered from items in the case.

Q And when you are referring to hairs you took off the

DEO REPORTING
(703) 751-0013

hammer and found and gave to Mr. Clark, are they included in that exhibit?

A Yes, sir, they are.

Q All right.

Let me show you the exhibit that you have in front of you and the one I previously referred to; have you had previous contact with that?

A This exhibit?

Q Yes, m'am, Exhibit 87-A, B, and C?

A Correct. Yes, I can recognize all the items.

Q And did you receive that in relation to this case also?

A Yes, sir, I did.

Q For what purpose did you receive it?

A I received it for examination -- for examination of evidence of blood, hairs or fibers.

Q Did you make such an examination?

A Yes, sir, I did.

Q Did you have occasion to determine whether or not there was any blood on these exhibits that you have in front of you?

A Yes, sir, I did.

Q And were you able to determine whether or not that

was human or animal blood?

A Yes, sir, I was.

Q Which was it?

A It was human blood.

Q Were you able to determine whetheror not it -- how it compared with the blood of the victim?

A It was consistent with the victim's blood.

Q Now, could you show to the jury where on the suit you found the blood about which you are talking? If you would like to come down to the jury rail and I will aid you.

(Whereupon, the witness leaves the stand and demonstrates to the jury.)

THE WITNESS: I think maybe it would help if you would all gather a little bit closer. This is rather difficult to see. I identified blood --

THE COURT: (Interposing) Just a moment. Are you picking that up?

THE WITNESS: (Continuing) -- I identified blood on the right sleeve. These were identified as blood splatters (indicating).

THE COURT: They are still not picking it up.

All right. Now let's test that.

THE WITNESS: (Continuing) -- I identified blood on

DEO REPORTING
(703) 751-0013

the right sleeve (indicating).

MR. KENDRICK: Wait just a minute. I will make this easier for you.

THE WITNESS: (Continuing) -- Okay. I identified blood on the right sleeve of the jacket and I think if you all look at it closely, you will be able to see. This is a splatter pattern (indicating) --

A JUROR: (Interposing) I can't get any closer.

THE WITNESS: (Continuing) -- See the blood splatters on the sleeves (indicating)? These tiny dark dots are really pinpoint size.

Can I pass the jacket among the jurors?

The splatters are tiny pinpoint type stains within this red circle.

BY MR. MELSON:

Q Who put the dark circle on there?

A I put it on there for identification purposes. I also identified blood on the lower front portion of both legs of the pants. These were also identified as splatters and I tried to encircle as many of them as I could (indicating). These black circles were my markings and the holes that you see inside the circles is where I took the stains for typing purposes. I think if you look closely you can see inside the

circles where there is still blood (indicating). They are little tiny pinpoint spots of blood. I think maybe if you pass this around --

A JUROR: (Interposing) May I ask her a question?

MR. MELSON: I think you have to ask the Judge first.

(Whereupon, the jurors are passing around the exhibit.)

THE COURT: Try it out on me first.

THE JUROR: I would like to know of their intensity. Were they light or dark as we see them now?

THE WITNESS: They were as you see them now, except for the spots I removed for typing purposes. They are very, very faint.

BY MR. MELSON:

Q Miss Dabbs, would you take your seat back in the witness box?

(Whereupon, the witness resumed the stand.)

Other than on the right sleeve of the jacket, did you find any other evidence of blood on the jacket?

A No, sir, I did not.

Q Other than on the front pants leg of the pants, did you find any other blood?

DEO REPORTING
(703) 751-0013

A Only on the lower front portion of the pants leg.

Q Not on the back portion?

A No, sir.

Q Did you find any up on the waist portion where the legs come together?

A No, sir, only on the bottom portion.

Q Now, how can you describe the pattern of blood that you see on those items of clothing?

A The blood appears as splatters.

Q Would you tell us what a splatter is?

A A splatter is the impact of blood on a surface. For instance, if you cut your finger and you swing your finger, then the unnatural force of your swinging to get off the blood on the end of the finger -- that natural force causes the blood to splatter on the surface nearby whether it be your clothing, wall or whatever the surface may be.

Q Do you have any other examples of splatters?

A Another example of splatter would be if you dropped a milk carton on the floor. We have all dropped milk cartons or a glass of milk. The action of the milk hitting the floor causes the milk to splatter and if it -- well, if you are standing there, the dropping of it will most likely make the milk splatter on your legs, pants or on the floor. Another

example would be a tomato. I guess as children we have also had experience with tomatoes and with some sort of object to smash a tomato. This cause the splattering of the seeds and pulp on whatever happens to be nearby.

Q What types of patterns are there?

A There is what we call a drop. Now, a drop forms only from gravity. In other words, there is no unnatural pressure being applied to the drop. For instance, if you cut your finger and hold your finger over a towel, the drop will, by gravity, fall from your finger. You are not swinging your finger. The drop is just dripping from your finger and only gravity is acting upon that drop and the drop will form upon the surface in which your finger is being held over.

There is also terminology that we apply that is called a "smear" and a smear results from an action of wiping. For instance, if you cut your finger and take your hand or wipe your hand on your pants or your dress, then the blood will smear. It will usually be a relatively thin film of blood, but of course, this would depend upon how much bloos was involved.

Q Did you find any evidence of droppings or smears on the articles that you examined?

A No, I did not.

DEO REPORTING
(703) 751-0013

Q Let me show you Commonwealth's Exhibit No. 44, which is your No. 16, and ask you whether you've had occasion to examine this item?

(Handing to the witness.)

A Yes, I did examine the items.

Q And what was the result of the examination for hairs and fibers?

A I found hairs on the slacks, but I found no fibers of any value.

Q What did you do with the hairs that you found?

A The hairs were mounted on glass slides for comparison purposes.

Q Are they included in Exhibit No. 97?

A Yes, sir, they are.

Q Did you also give those to Mr. Clark?

A Yes, sir, I did.

Q Let me show you Commonwealth's Exhibit No. 43 and ask you whether you've had occasion to examine this object?

(Handing to the witness.)

A Yes, I did.

Q What was the result of the hair and fiber examination on Exhibit No. 43?

A Hairs were recovered from the shirt, but no fibers

of value were found.

Q What did you do with those hairs?

A They were mounted on a glass slide for comparison purposes.

Q Were they also included within Exhibit No. 97?

A Yes, sir, they are.

Q Let me show you Commonwealth's Exhibit No. 66, your Item 20, and ask you whether or not you've had occasion to examine that exhibit?

(Handing to the witness.)

A Yes, I did examine the exhibit.

Q What was the result of your hair and fiber examination of the item?

A I found no fibers of value, but I did recover many hairs from the shirt.

Q What did you do with those hairs?

A They were mounted on glass slides for comparison purposes.

Q Did they also go in Exhibit No. 97 and to Mr. Clark?

A Yes, sir, they did.

Q Let me show you then, Miss Dabbs, Commonwealth's Exhibit No. 39 which was sent from Dr. Beyer's autopsy room and ask you whether you can identify that?

DEO REPORTING
(703) 751-0013

(Handing to the witness.)

A Yes, sir, I can.

Q Did you conduct any examination -- would you tell us what the exhibit is?

A This sample contained a known head hair sample from the victim and it also contained hairs recovered from various parts of the victim's body.

Q Did you examine those hairs yourself?

A Yes, sir, I examined them and then mounted them on slides for comparison.

Q Did you compare them or did Mr. Clark?

A No, Mr. Clark compared them.

Q Are the hairs that you found or mounted in Exhibit No. 97?

A Yes, sir, they are.

Q Let me show you Commonwealth's Exhibit No. 96, which is your Exhibit No. 4 -- rather, your Item No. 4, and ask you whether or not you had contact with that on a previous occasion?

(Handing to the witness.)

A Yes, sir, I have had contact with it.

Q All right.

And what is the exhibit?

A The Exhibit No. 96 are the hair samples from the defendant, Manuel Quintana.

Q Did you receive those?

A Yes, sir, I did.

Q What did you do with those?

A I mounted the hair on glass slides for comparison purposes.

Q Are they also included in Exhibit No. 97?

A Yes, sir, they are.

Q And did you give them to Mr. Clark?

A Yes, sir.

Q Is Mr. Clark here today?

A Yes, sir, he is.

MR. MELSON: Thank you. No further questions.

THE COURT: We will recess at this time for fifteen minutes.

(Whereupon, the jury was temporarily excused.)

(Whereupon, a short recess was taken.)

THE COURT: All right. Would you call the jury in, please?

(Whereupon, the jury returned to the jury box.)

DEO REPORTING
(703) 751-0013

CROSS-EXAMINATION

BY MR. KENDRICK:

Q Miss Dabbs, have you got -- is it Miss, Ms. or Mrs.?

A Ms.

Q Ms.?

A Yes, sir.

Q Have you got a copy of all the certificates of analysis that you sent the Commonwealth?

A Yes.

Q So, if I refer you to dates in '81, you will know what we are talking about?

A Yes, sir.

Q If you would be so kind to look at your copy of April 22nd, 1981, certificates of analysis, in particular, Item 8, a man's brown wallet.

MR. KENDRICK: Mr. Melson, do you have that wallet or can you tell me what exhibit that is?

BY MR. KENDRICK:

Q While we are waiting for that, did you do an analysis on that wallet?

A Yes, I did.

Q What analysis did you perform?

A I examined the wallet for evidence of blood, hairs

or fibers.

Q And what do you mean by "fibers"?

A They would be such things as -- fibers are stands that are wound together to form a thread. The threads are used in making garments.

Q Were you submitted samples of carpets from the victim's apartment? I'm just trying to determine if that was a fiber that you are trying to match up.

A No, I did not receive samples of carpet.

Q All right.

I don't believe you found any samples of fibers anywhere, did you?

A No fibers of any value, no, sir.

Q On any of your reports?

A That's correct.

Q Now, with respect to the wallet, you determined what?

A That there was no evidence of blood. There were no hairs and there were no fibers on the wallet.

Q Okay.

Now, with respect to Item 12 of the same report of April 22, 1981, Item 12 is what?

A It was a -- identified to me as a -- it was a swab

DEO REPORTING
(703) 751-0013

containing apparent blood collected from the stairway.

Q Do you know what stairway they are talking about?

A No, sir, I don't.

Q You just know from a stairway?

A Yes, sir.

Q Did that in fact turn out to be blood?

A Yes, sir, it was blood.

Q Was it human blood?

A It was insufficient in amount to be able to determine origin or typing.

Q But you knew it was blood?

A Yes, sir, I was able to identify it as blood.

Q How about Item 13, possible blood from Apartment Five door; is that what your certificate shows?

A Yes, sir, it does.

Q What was the result of that?

A I was able to determine what the swab did contain blood.

Q Item 16 -- Item 16 was clothing taken from Manuel Quintana's vehicle; is that correct?

A Yes, sir, that's correct.

Q There were four items: white gloves, a hat, a black shirt, slacks and a handkerchief?

A Yes, sir, that's correct.

Q What are your results of the analysis, if any, that you performed on those items?

A No evidence of blood on any of the items of clothing. I recovered hairs from the black shirt and from the slacks and I found no hairs on the gloves or hat and no fibers of any value were found on any of the items.

Q Those slacks -- are these the slacks that you were talking about earlier? Are these the same ones?

(Handing to the witness.)

A Yes, sir, these are the slacks.

Q All right.

Where exactly was the hair found?

A I did not make note of where the hairs were recovered. The reason that I -- this is common practice when I recovered hairs from items, because in the packaging of the items and the handling of the items, it is impossible to tell where I actually recovered the hair is where the hairs were originally placed.

Q Then, you don't know whether the hair was on the inside or the inside of the pants?

A No, sir, I don't know.

Q And the hair could have been on the outside?

A It is possible, yes.

Q That would be consistent with the hair being on the seat and the pants being laid on that seat would pick up that hair?

A It could, yes, sir.

Q By the way, do you know whose hair it was?

A Pardon me?

Q Do you know whose hair it was on the pants?

A I did not perform the hair comparison. Mr. Clark did the hair comparison.

Q But he doesn't know where it came from when you turned it over to him?

A I recovered the hair and mounted it on a slide for him to do his comparisons.

Q And you are not -- let me make sure I am certain I understand what you are saying. You do not know where that hair came from off of those pants?

A That's correct, yes, sir.

Q How about the hat, shirt, white gloves, do you indicate what analysis was done on that?

A I believe I already stated I found hair on the black shirt and I found no hairs on the gloves and no hairs on the hat.

Q Would the same thing that you said about the pair of pants apply equally to the black shirt?

A With regard to what?

Q Can you tell me where you found the hair?

A No, sir, I cannot.

Q Now, Item 17 is a three-piece suit, vest, slacks and jacket; is that correct?

A Yes, sir, that's correct.

Q And you did find blood on that suit that was consistent with the victim's blood; is that correct?

A Yes, sir, that's correct.

Q If I may, I want you to look at this board for a moment. Have you got an indication of what the victim's blood type is?

A Yes, sir, I do.

Q All right.

It is my understanding that this is the victim's blood type (indicating).

MR. KENDRICK: Your Honor, can you see?

THE COURT: Not quite. Move it back a little bit. That's fine.

BY MR. KENDRICK:

Q It is my understanding that the victim's blood is

DEO REPORTING
(703) 751-0013

large B?

A That's correct.

Q Large C, large D, small c, small e; large E, small s, large D, 1. Am I correct so far?

A Yes, sir.

Q Large P, large G, large M, 2-1; is that correct?

A That's correct.

Q Am I saying this right?

A Yes, sir.

Q All right.

Large E, large A, large P and a large B; is that correct?

A That's correct.

Q A large A, large D, large A, 1; large H, small p, 2; is that correct?

A That's correct, yes.

Q All right.

Did you also receive a known sample of the defendant's blood?

A Yes, sir, I did.

Q Do you have that in front of you?

A Yes, sir, I do.

Q Can we go over this?

A Certainly.

Q Is his blood large A --

THE COURT: (Interposing) Why don't you just say as written on the board?

BY MR. KENDRICK:

Q As written on the board, is that it? He's going to have it checked. Is that it?

A Yes, it is.

Q All right.

The tan suit contained large E, small S, large D, 1?

A That's correct.

Q Large P, large G, large M, 2-1; large E, large A, large P, large P; large A, large D, large A, 1; is that correct?

A Yes, that's correct.

Q All right. I'm familiar with the ABO System and RH System of typing. Can you explain these other letters? This is the type; is that correct?

A The Type A of the defendant and the Type B of the victim represent their blood types in the ABO System. You are probably most familiar with the ABO System and in the ABO System individuals are either classified blood Type A, B, O or blood Type AB. In the RH System, we are dealing with five

DEO REPORTING
(703) 751-0013

different what they call "antigens." They are chemical configurations present on the blood cell which imparts its physical characteristics. It is generally an inherited characteristic. There are five main antigens: Big C, big D, big E, small c and small e antigens. You are probably familiar with the terminology of RH Positive and Negative. RH Positive refers only to the fact that you possess, if you possess RH Positive, the big D antigen. If you are RH Negative, you do not possess the big D antigen. Everyone -- or the majority of the population by far possesses a combination of a five major antigens. You will either be RH Positive or Negative, depending on the big D. But, in addition to the big D, part of the RH System is the presence of other antigens and in this case, the defendant possesses the big C antigen, the bid D antigen, small c antigen and small e antigen. The same would also apply to the victim.

In addition to these system, we have a capability of typing blood in other systems and the other systems -- the systems that we are dealing with in this case are the S re D System, the PGM System, the EAP System, the ADA System. These are what we call enzyme systems and in each of these systems we are able to type blood just as we are able to determine in the ABO System either type A, B, O or type AB.

In the S re D System you can either be Type 1, Type 2-1 or Type 2. The same thing to the PGM System: Type 1, Type 2-1 or Type 2. In the EAP System instead of using 1 or 2's, letters are used. So, in this particular type the defendant and the victim were Type B in this system. This is totally different. This is the EAP System Type B. In the ADA System, again, you can either be Type 1, 2-1 or 2. The other is the Serum Protein System and in this system the majority of the population falls within the type, Type 1, Type 2-1 or 2-2.

Each of these systems, the ABO System or RH System and all the enzyme systems and Serum Protein System are totally independent of one or the other. Because you are Type A, B, or O System has nothing to do with the other systems. Each system is independent of one or the other. I think that pretty well explains it.

Q I'm impressed. Let me ask you this: This system here (indicating) on the tan suit, is that found in the victim's blood?

A Yes, sir, it is.

Q Is it also found in the defendant's blood?

A Yes, sir, it is.

Q This system here (indicating), PGM2-1, is that found in the victim's blood?

DEO REPORTING
(703) 751-0013

A Yes, sir, it is.

Q Is it also found in the defendant's blood?

A Yes, sir, it is.

Q This system here (indicating), EAP-B, is that also found in the victim's blood?

A It is.

Q Is it found in the defendant's blood?

A It is.

Q Finally, this system here (indicating), ADA1, is that found in the Defendant's blood?

A Yes, it is.

Q And the victim's?

A Yes, sir, it is.

Q So, when you say it is consistent with the victim's blood, it is just as consistent with the defendant's blood; is that correct?

A Yes, that's correct.

Q Do you have any figures showing how prevalent these systems are in the blood in the population of this country?

A The combination of the four systems I was able to type the blood in on this suit is found in approximately nine out of one hundred individuals.

Q On the suit?

A That particular combination, yes, sir.

Q Does that break down insofar as caucasians or Hispanics?

A The blood types in these particular systems are relatively independent of racial or origin and also of sex.

Q So, nine out of one hundred people in this country have these systems in their blood?

A That's correct, yes, sir.

THE COURT: Would have that combination of systems?

THE WITNESS: Combination of systems, yes.

THE COURT: I take it that on the suit you were able to get an ABO rating for that blood; is that right?

THE WITNESS: That's correct, yes.

THE COURT: And also the HP -- whatever that's called -- that didn't show up either?

THE WITNESS: It was due to the limited amount of blood that was present on the suit. I was only able to do those systems that required the least amount of stain material for examination and in order to do types in the ABO/RH Systems and Hyperglobin System, it takes more for each of those examinations alone than it does for the total number of Enzyme Systems that I was able to determine.

THE COURT: So, you are saying it is harder to

DEO REPORTING
(703) 751-0013

determine the ABO Type than the Enzyme -- no, you are saying that it takes more blood?

THE WITNESS: It takes more blood to determine.

BY MR. KENDRICK:

Q Did you try to determine the type first?

A I did determine the type in the Enzyme Systems.

Q Well, how about the ABO System? Did you try to determine that first?

A In the ABO System there was not enough blood to attempt to determine blood.

Q There was not enough blood to begin or because you used it on other tests?

A No, there was not enough blood to begin with.

Q All right. Thank you.

Now, referring again to April 22nd, 1981, certificate of analysis, Item 18, did you conduct a similar experiment on Mr. Quintana's boots and if so, what was the result?

A I'm sorry. I don't understand what you mean by "similar experiments."

Q Did you try to find blood or hair on the boots?

A I did examine the boots for evidence of blood, hairs or fibers.

Q What did you find?

A No evidence of blood, hairs or fibers on the boots.

Q Now, you also were submitted, were you not, scrapings from the defendant's fingernails? I refer you to Item 19.

A Yes, sir, I was submitted that.

Q Did you return any tests on that and if so, what was the result?

A Yes, sir, I did examine the fingernail scrapings from the defendant for evidence of blood, hairs, fibers and found no evidence of any of those.

Q With respect to the brown shirt that was recovered from the defendant's vehicle, Item 20, did you find any hair on that?

A Yes, sir, I did.

Q Did you find any blood?

A No, sir, no blood was found.

Q No blood?

A No blood.

Q Now, there were cloths that were turned over to you that were found near the body of the victim. Did you analyze those cloths for blood and hair and if so, what was the result?

A The cloths were examined for hair and hairs were recovered from the cloths and I found no fibers of value.

Q I will have to ask Mr. Clark the result of that comparison on those?

A Of the comparisons, yes, sir.

Q Did you find blood?

A Blood examinations were not requested at the time. Detective Gabrielson delivered the evidence to me. We discussed the -- these particular cloths that were found near the body and because of the position in which they were found, near the pool of blood at the head of the victim, and because they had so much blood on them, we determined that blood examinations would not be of any value to this particular case.

Q Because there was so much blood?

A Yes, sir, that's correct.

Q Well, do you know whose blood it was? Do you have any idea?

A The blood was not examined.

Q All right.

Did you mount for analysis the pubic hair taken from the brown suit?

A I believe that I did mount a pubic hair, but I don't --

Q (Interposing) I might have to wait for Mr. Clark?

A I didn't distinguish in my notes exactly what types of hair were recovered from the items. However, when I mounted the hairs I did, I believe, to the best of my knowledge, make notes for Mr. Clark with regard to the types of hair that were being mounted.

Q And you turned those notes over to him?

A Yes, I did.

Q Is there any difference, to your knowledge, between a head hair, hand hair, leg hair and pubic hair?

A Most definitely, yes.

Q What are they? Are there any unique characteristics?

A I believe that because Mr. Clark did the comparisons in the case that he would be best qualified to answer your questions with regard to hair examinations that were conducted in the case.

Q All right.

But, there is a difference?

A Yes, sir, there are differences.

Q Did you take any measurements on the size of the splatter pattern on the pants?

A No, sir, I did not.

DEO REPORTING
(703) 751-0013

Q Did you take any measurements on the size of the splatter pattern on the sleeve of the jacket?

A No, sir, I did not.

MR. KENDRICK: That's all I have. Thank you very much.

THE COURT: Any redirect, Mr. Melson?

MR. MELSON: No, sir.

I'm --

THE COURT: (Interposing) All right, you are excused.

MR. MELSON: I'm sorry, Your Honor. I did have one.

MR. KENDRICK: I have one other question.

BY MR. KENDRICK:

Q One other question. Did you receive a blood analysis on Orlando Dominguez?

A A blood sample from him?

Q Yes, m'am.

A No, sir, I did not.

Q You didn't even receive one?

A No, sir, I did not.

REDIRECT EXAMINATION

BY MR. MELSON:

Q With respect to Item No. 12 left on the stairway,

can you tell us whether that was animal or human?

A No, sir. There was only enough blood for me to determine in fact that the stain on the swab was blood and it was not sufficient to determine its origin.

Q Respect to 13, the blood from the door?

A I was only able to determine the stain on the swab was blood. In that case, also, there was insufficient amount of blood in order to determine origin.

Q Could you tell whether the blood from the door and the stairway were from the same source?

A No, sir, I could only tell each of the swabs were blood.

Q Can you tell us whether or not they were consistent with the victim's blood?

A No, sir, I could not.

Q Could you tell how old they were?

A No, sir, I could not.

MR. MELSON: That's all I have. Thank you.

(Witness excused subject to recall.)

THE COURT: Next witness?

MR. MELSON: Mr. Clark.

* * *

Q Have you had any teaching experience in this field?

A Yes, over the years I have trained examiners in this specialty from state and local laboratories around the country. I have trained the F.B.I. examiners -- most of them. I was an Adjunct Assistant Professor of Forensic Science at George Washington University for about five years.

MR. MELSON: Your Honor, at this time I would like to move Mr. Clark in as an expert in the examination and comparison of hairs and fibers.

MR. KENDRICK: No objection.

THE COURT: All right, sir. He is qualified.

BY MR. MELSON:

Q Mr. Clark, do you know a Deane Dabbs?

A Yes.

Q Does she work for the same laboratory that you work for?

A Yes.

Q Did you have occasion to receive from her some hairs to compare in relation to the case in which you are testifying today?

A Yes.

Q Let me show you Item No. 97 -- it is Commonwealth's Exhibit No. 97, and ask you if you can identify the items in

* * *

A Yes, I did.

Q What was your conclusion?

A The hairs removed from the hammer consisted of five portions of head hairs ranging in length from three eighths of an inch to about one and one fourth inches. One of these hairs was white. The other four were dark brown and black. One or both ends of each hair was broken. That is, all five hairs or portions of hair were broken and some just at one end and some at both ends and further, these hairs -- or the portions of the hairs from the hammer exhibited the same microscopic characteristics as the known head hairs of the deceased.

Q Do you have any opinion as to what type -- or how hairs can become broken as you found them in this case?

A Yes. Based on experience in previous cases, broken hairs like this are frequently found on weapons such as a hammer or a wrench or any blunt instrument.

Q In other words, is the hair broken by force?

A Yes.

Q Did you also have occasion to examine and compare the head hair from the defendant in this case -- that is your Item No. 4 -- along with the head hair found on a black shirt, which is your Item No. 16?

DEO REPORTING
(703) 751-0013

A Yes, I did.

Q What was the result of your comparison?

A There was one human head hair recovered from the shirt. This head hair exhibited the same microscopic characteristics as the head hair sample from the defendant.

Q Were all the categories that you explained to the jury found in both the known and unknown head hair?

A Yes.

Q That is from both the head hairs of the defendant and the head hair -- rather the head hair from the shirt?

A Yes.

Q All the characteristics were there?

A Yes.

Q Was there any inconsistencies?

A No.

Q Did you also compare the head hair -- or rather the hair from the defendant, which is Item No. 4, with the hair found on the brown shirt, which is Item No. 20?

A Yes, I did.

Q Did you arrive at a conclusion as a result of that examination?

A Yes. There were numerous human head hairs recovered from that shirt. There were -- among those, several of the

hairs exhibited the same microscopic characteristics of the hairs of the defendant, but the remainder of the hairs were dissimilar to the hairs of the defendant and in my opinion, did not originate from him and they were also dissimilar to any other known samples submitted in this particular case.

Q The hair that you compared the defendant's and testified to as being consistent in microscopic characteristics, were they consistent in all microscopic characteristics that you mentioned to this jury?

A Yes.

Q Were there any inconsistencies?

A No.

Q Did you also have a sample of head hair from Orlando Dominguez?

A Yes.

Q I believe that is your Item No. 23?

A Yes.

Q Is that Item No. 23?

A Yes. This is the hair sample of Dominguez.

Q Did you compare that hair sample with all the hair on the slides that you were given by Deane Dabbs?

A Yes. -- well, excuse me. I compared the hairs -- the known hairs of Dominguez with the hairs on the brown shirt,

* * *

DEO REPORTING
(703) 751-0013

* * *

A I was the investigator in the case -- the investigator in charge of the investigation.

Q Let me show you Commonwealth's Exhibit No. 32 and ask you if you can identify what this object is?

(Handing to the witness.)

A I can identify this hammer.

Q What hammer is it?

A This is a hammer that was recovered by Officer Pete Tyler.

Q Did you have occasion to take that to the Northern Virginia Laboratory?

A I took it to the chemist, Deane Dabbs, at the Northern Virginia Laboratory, yes.

Q Did she conduct any tests with regard to that?

A Yes, she removed blood and hair from this hammer.

Q What occurred after she had concluded her test?

A I took the hammer from her and the container it was in back to the Police Department in Arlington.

Q And was it subsequently taken to the F.B.I. Laboratory?

A Yes, I took it then to the F.B.I. Laboratory.

Q How do you know that's the hammer that you are speaking of?

A The word "Nelson: is written on the hammer, which I took a picture of the night it was recovered. There is a knick on the face of the hammer and I remember the knick distinctly on the face of the hammer.

MR. KENDRICK: You say there is a "knick"?

THE WITNESS: Yes, sir.

BY MR. MELSON:

Q As a part of your investigation, what responsibilities did you have?

A Numerous. I was one of the first investigators on the scene. My responsibility was to insure that the property was protected from contamination of any sort, to examine the body, to examine the witnesses, to delegate manpower to witnesses and tasks to be assigned and to work closely with the P-2's. That's the evidence technicians in this case. The reason for that -- the reason I was put in charge of that was because I was at the focal point of information coming into me and information to be disseminated to people who needed to know, that would be evidence technicians and people in the case. That was at the crime scene. My responsibility also is to insure the defendant and deliver the defendant to the court system and have the evidence delivered to proper analyzation people.

DEO REPORTING
(703) 751-0013

Q All right.

Did you have occasion with respect to the victim's apartment to oversee the processing department in analysis of evidence?

A Yes, I was in charge of the general overseeing of that.

Q How did you decide what to fingerprint and what not to and where to send what piece of evidence?

A First of all, in this case I have the ability to hold on to the apartment. That means that the custody of that apartment was going to remain mine. So, because of the fatigue and everything, the items that were very apparently touched by the subject were processed immediately, that being within the first few hours after the body was removed and pictures taken of the body. The several items we ascertained had been moved -- or what the son said they were -- those items were processed immediately. After fatigue had set in and other things had to be checked, I had the apartment door secured by the agents to be returned the next day for further processing. Whatever you said -- what did I do in the processing of this or guidance of this processing of this incident? I sent P-2 Tyler and Beuchert three and four times to either, one, go over it or obtain further evidence from it.

One of the things I did at the very end of this evidence collection was to have a ninhydren test. They actually had to be painted with ninhydren just in case the defendant had touched any walls in the apartment.

Q When did you make a decision as to what to send to each laboratory?

A After the smoke had been cleared. After two or three days I knew exactly what I had in custody and what I did not have in custody. The vehicle had been searched and after I had conferred with the agents who collected the evidence and my superior, Sergeant Hall at that time, and the Commonwealth's Attorneys Office.

Q How many laboratories did you use?

A I used two laboratories; the Northern Virginia Forensic Science Laboratory out in Merrifield for a part of the examination and then I used facilities at the F.B.I. Headquarters right across the bridge.

Q Why did you use the F.B.I.?

A The F.B.I. offered -- after I had requested it, they offered the laser fingerprint materials from their laboratories. From the information I have received, that is the most progressive field in fingerprint identification so I decided to use the laser equipment at the F.B.I.

DEO REPORTING
(703) 751-0013

Q What did you send to the F.B.I.?

A Numerous items both from the suspect's vehicle and from the victim's apartment. Numerous.

Q Let me give you this to help you with the list of items that you sent. Would you tell us what in fact you sent to the laboratory?

(Handing to the witness.)

A Yes, I can.

Q What are those items?

A I sent $200.00 in U.S. currency.

THE COURT: All right. Excuse me. The translator has requested that you give a slight pause after a question before the answer so he can catch up. Just a second or two.

BY MR. MELSON:

Q What was the first item?

A I sent $200.00 in U.S. currency in twenty dollar denominations.

Q Where did that twelve hundred dollars come from?

A A bank in Fairfax County.

Q How did you get to the bank in Fairfax County.

A Detective Sherchek was detailed to the bank, because it was the bank that Dennis Reed, the car dealer, had used to deposit the twenty dollar bills which he received

from Mr. Quintana. We had corresponded with the bank manager and we received the twelve hundred dollars in twenty dollar bills from him at that point, whose located is located at Bailey's Crossroads.

Q Were you hoping that the twenties that the defendant used were in that twelve hundred dollars?

A Hoping wasn't the word. I was checking to see if it was.

Q All right. Fine.

What else did you send to the F.B.I.?

A I sent eleven magazines. They were generally of a pornographic nature.

Q Are any of those magazines the magazines that came out of the automobile?

A Three of them were.

Q Out of the automobile?

A Yes, sir.

Q How about out of the apartment?

A There were eight from the apartment sent. The eight magazines from the apartment were sent.

Q What else did you send?

A I sent a claw hammer -- this claw hammer (indicating).

DEO REPORTING
(703) 751-0013

Q What else?

A Three gift packages that were of the aluminum foil wrapping type -- gift-wrapped Christmas packages.

Q Were those found in the bedroom?

A Yes, they were.

Q What else was sent out there?

A I sent a camera case that the camera had -- prior to the son leaving the apartment it had been in the camera case.

Q Is that the camera case hanging on the back of the door that is exhibited in Exhibit 22? Can you see the photograph?

A 22?

Q Yes, sir.

A I took that camera case photograph in Exhibit 22 to the laser equipment.

Q Was anything else sent out to the laboratory?

A Yes.

Q What was that?

A Yes, a telephone -- red telephone, a wooden box that was next to the telephone, numerous assorted papers including part of the gift wrapping that had torn from one of the gift wrapped packages.

Q And anything else?

A The known fingerprints of several people, including the son, the defendant, Mr. Quintana, Mr. Dominguez, and they already had Olphelia Quintero's.

Q Do you know what the results of those examinations were?

A Stated on here and after conversing with Mr. Fudella, I do.

MR. KENDRICK: Mr. Fudella is with the F.B.I.?

THE WITNESS: Yes, sir.

BY MR. MELSON:

Q Did you find any of Ophelia Quintero's prints?

A No, sir.

Q Any Dominguez prints?

A No, sir.

Q Did you find any of Mr. Quintana's prints?

A No, sir.

Q Did you find any of Nelson Echemendia's?

A Yes, sir.

Q How many?

A I understand four.

Q Let me show you Commonwealth's Exhibit No. 11 and ask you what this object is?

DEO REPORTING
(703) 751-0013

I'm sorry, it is Defendant's Exhibit No. 11.

(Handing to the witness.)

A This appears to be a pillow case that I directed Officer Nell to collect the night of the 19th.

Q Was that sent to the laboratory?

A No.

Q Why didn't you send that to the laboratory?

A My judgment was that it was of no value in this case.

Q Why is that?

A Because of the look of the stain the night of the 19th.

Q Explain to us what you mean by that.

A The stain that you see on it now is exactly the same way I saw it the night of the 19th. In my opinion on the night of the 19th and since then, it has been --

MR. KENDRICK: (Interposing) I am not sure he is qualified to give an opinion.

THE COURT: Objection overruled.

THE WITNESS: (Continuing) -- My opinion is that is not a fresh stain. That is an old stain and possibly had been washed three or four times.

BY MR. MELSON:

Q Did you have occasion to examine the blood that was found on the outside of the door of Apartment Number Five?

A Yes, sir.

Q Explain to us how much blood there was out there.

A In dimensions it would have been no bigger than one eighth of an inch by one eighth of an inch. It was very tiny. The face of this tag (indicating), which is about a half an inch by a half an inch, it would be a quarter of that.

Q What tag are you referring to?

A The tag attached to this blue box on this thing -- Telex (indicating). It would probably be one quarter of that size, the blood located on the door. It would --

Q (Interposing) Let me show you Commonwealth's Exhibit No. 101 and ask you what it is a photograph of?

(Handing to the witness.)

A Yes, sir.

Q What is it?

A That is the body as I saw it upon entering Apartment Number Two. This is Mrs. Quintana -- Quintero.

Q Is there anything on the floor other than the deceased?

A A mass amount of blood. There is at least two

DEO REPORTING
(703) 751-0013

towels that you can see both coated in blood.

Q Is that a fair and accurate representation of the scene which it depicts?

A When I first arrived, yes, it is.

MR. MELSON: I would like to move that into evidence at this time.

MR. KENDRICK: No objection.

THE COURT: 101 is admitted.

(The photograph previously marked for identification as Commonwealth's Exhibit No. 101 was received in evidence.)

BY MR. MELSON:

Q Would you show the -- do you have it back there, Detective?

A Yes, sir.

Q Would you show the jury the two towels that you were referring to? You can step down from the jury rail if they need to see it closer.

A There are two towels I'm referring to in this picture, Commonwealth's Exhibit No. 101 (indicating). They both appear to be wet, one with stripes, and one without stripes. One appears to be on the right side still touching

the blood and some of the blood from what it appeared that night had been draining into the towel located on her right hip as she is laying down -- the towel -- I'm referring to the towel at the left shoulder as she is laying down (indicating).

(Displaying to the jury.)

Q Did you have those towels sent to the laboratory for purposes of comparison of the types of blood that were found on the towels?

A To the best of my recollection, I did not, but I'd like to check my notes on that. My notes are in the back.

MR. MELSON: Your Honor, may he get his notes?

THE COURT: Yes.

(Whereupon, the witness leaves the stand to get his notes.)

(Whereupon, the witness resumes the stand.)

THE WITNESS: Would you check Property No. 71277?

(Whereupon, Mr. Melson shows a document to Mr. Kendrick and hands it to the witness.)

THE WITNESS: The problem I have is I sent three towels and this picture only displays two. The third one you cannot see in this picture. That was under her breast area. I sent three towels, two of which are photographed here, to

the laboratory for analysis which would potentially be a suspect.

BY MR. MELSON:

Q Why didn't you have them examined for blood?

A They were drenched in blood and they were -- at least you can see that one was laying in blood and the other was laying -- was completely covered in blood. At that time I did not feel that it was important to have it done.

Q Was the third one under the body?

A Under the chest area, as I remember, on the body. It was in this area (indicating) between the breast area.

Q Now, as you examined the crime scene, did you find any evidence that the body had been moved from one room to another or from place to place in that room?

A All the evidence indicated she had not been moved once she hit the floor. She did move one arm in her blood and that is still visible in this picture (indicating). Her right elbow went away from her body and I could see that in the blood puddle at the crime center. You could see where the blood had been moved by the arm.

Q Did you see any signs of a struggle?

A No, sir.

Q Let me show you -- or direct your attention to

March 23rd, 1981, and ask you from whom you received Commonwealth's Exhibit No. 87-A, B, and C?

A Yes, sir.

Q From whom did you receive that?

A I received these on March 23rd at 14:50 hours from Fernando Suarez.

Q Is he the son of -- I'm not sure -- Caunabot, C-a-u-n-a-b-o-t?

A That is how I spell his first name. Mr. Suarez, yes.

Q Let me show you first this exhibit and ask you if you received this first item? It is Commonwealth's Exhibit 100.

(Handing to the witness.)

A I can recognize these items. I can recognize them, because on April 1st at 19:00 hours I used this envelope to package this wallet. This wallet I received from Mr. Suarez, again.

Q Is this the elder Suarez?

A Yes, sir.

Q All right.

And can you tell us what is in that envelope -- rather, what is that wallet?

DEO REPORTING
(703) 751-0013

A It is a black wallet containing numerous personal papers, including a driver's license belonging to Manuel Quintana. It has his picture on it. There is a Social Security card and number for Mr. Manuel Quintana.

Q Did it have any -- I'm sorry. Go ahead.

A It also has a note with Quintana's name on top of it. There is a receipt to Manuel Quintana from Fairfax General District Court for a total of $23.00 in cash and assorted other things that have the name Manuel Quintana on them. The green card says Identification Card for Food Stamp Program and it has United States currency.

Q Do you recall how much currency?

A I believe it was $162.00.

Q Would you tell us the denominations?

A One, two, three, four, five, six, seven twenty dollar bills, two ten dollar bills and some one dollar bills.

Q How many twenty dollar bills?

A Several; one, two, three, four, five, six, seven.

MR. MELSON: Thank you. No other questions.

Your Honor, I would like to move the wallet and its contents, Exhibit No. 100, into evidence.

THE COURT: All the contents included?

MR. MELSON: Yes, sir.

THE COURT: Is there an objection to that?

MR. KENDRICK: The defendant's wallet? No objection, Your Honor.

THE COURT: It will be received, Exhibit 100.

(The item previously marked for identification as Commonwealth's Exhibit No. 100 was received in evidence.)

CROSS-EXAMINATION

BY MR. KENDRICK:

Q How long did you say you were on the force?

A How long? About thirteen years.

Q How much of that time was in homicide?

A More than four and a half. I went in in '66 and '67.

Q Anything before that?

A Yes, sir.

Q What?

A I spent four and a half years in narcotics working black narcotics.

Q During the thirteen years or so, had you had any expertise in latent fingerprints?

A I went to P-2 School, which was the school that trained the agents as collectors. Yes, sir, that was in '70

DEO REPORTING
(703) 751-0013

or '71.

Q But nothing special other than that?

A No, other than what I have gathered through the narcotics investigations and homicide investigations.

Q That just basically tells you what to look for and to be careful; is that right?

A Yes, sir.

Q Keep your eye out for everything?

A Exactly.

Q Does the same thing apply to blood stains?

A Yes, sir.

Q Who was the first officer on the scene?

A I don't know who, because I wasn't there first.

Q Who was there when you got there?

A Rothilsberger, Don Kerr, John Wise, and Detective Carrig.

Q What time did you get there?

A Within five or six minutes after 15:35 or thirty-five minutes after 3:00.

Q 3:35?

A Yes, sir.

Q When did the call come in?

A Pardon me?

Q When did the call come in? Do you recall?

A 3:01.

Q 3:01?

A Yes, sir.

Q So, in roughly thirty-four minutes, you were there?

A Yes, sir.

Q Upon your arrival, were other officers there?

A Yes, sir.

Q Were they waiting for you or doing anything?

A They were waiting for me. In waiting for me, that meant they had contained the crime scene.

Q I understand, but you didn't observe them moving anything or touching anything?

A As soon as I walked in the door, I was briefed.

Q By whom?

A Detective Carrig.

Q And what did Detective Carrig tell you?

MR. MELSON: I'm not sure he ought to be going into everything that the officer told him, unless he used it for something to rely on. Otherwise, it is hearsay. He can ask Detective Carrig on the stand.

THE COURT: Are you making a hearsay objection?

MR. MELSON: Yes, sir.

THE COURT: Objection sustained.

Now, I don't want to make that overall. Some of it is admissible to show the fact for the utterance to indicate what he did next.

MR. KENDRICK: That's what I'm trying to do.

THE COURT: All Detective Carrig's suspicions are inadmissible, I believe, but you could certainly elicit from him what Detective Carrig said which then governed his actions.

MR. KENDRICK: That's what I'm trying to find out.

BY MR. KENDRICK:

Q All right. You heard what the Judge said?

A Yes, sir.

Q Along those lines, what did he tell you?

A He told me we should examine the body to make sure what kind of injuries she had sustained. I agreed with him and that's when I and Detective Carrig did examine the wound on her head.

Q In the process of doing that, did you move the body?

A No, sir.

Q Did you touch the body?

A No, sir.

Q Did you see anybody move the body or touch the body?

A Later, but not at that point. Neither me nor Detective Carrig moved the body or touched the body.

Q You said you did or did not move the body?

A At this point, within fifteen to twenty minutes after I arrived on the scene, nobody had moved that body.

Q To your knowledge?

A That I saw. I touched the body.

Q Where did you touch the body?

A The back of the forearm -- as you can see in that picture -- the back of the bicep and in the middle of the back. I was looking for heat.

Q What did you find?

A She was cool to the touch.

Q Cool to the touch, not cold?

A I could tell there was a difference in her temperature and mine. I felt her skin to be cool to the touch.

Q But not cold?

A No.

Q In your examination of the body along the lines that Detective Carrig suggested, the examination of the wounds, what did you do? How did you make that determination or

observation without touching the body?

A How did I make the observation?

Q Yeah. Did you just look or --

A (Interposing) I bent down over the right side of her head and I could see brain material. I knew there was an open space and that I could at least observe brain material.

Now, that was above her right ear. I also observed the very back of her head, which is approximately four to five to six inches from around the head. Here, you could see brain material (indicating). Here you could see large cuts or lacerations (indicating) and where you could also see the bone skeleton. Okay?

Q All right.

What did you do after that?

A Converse with Detective Carrig and knew then we had a homicide.

Q And during that thirteen years that you have been a police officer in the last four or so that you have been working in homicide, have you worked really closely with the F.B.I.?

A Yes, sir.

Q Have you always found them to be cooperative?

A Yes, sir.

Q Willing to help you any way they could?

A Yes, sir.

Q Have they ever refused to cooperate with you in any way?

A Yes, sir.

Q They have?

A Yes, sir.

Q How?

A They won't give us informants. They won't give us money and --

Q They won't give me any money either.

A (Continuing) -- and since we have the Northern Virginia Laboratories, whenever an item is taken to the Northern Virginia Laboratories, I have been turned down by the F.B.I. to reexamine it in the past.

Q You understand why, don't you?

A Yes, I do.

Q Why?

A They do not want to have double testimony in court or to be used for double testimony.

Q And they are also afraid that somebody else's mistake might be saddled on them; isn't that true?

A I have no idea on that.

DEO REPORTING
(703) 751-0013

Q With respect to the analysis of evidence --

A (Interposing) Yes, sir?

Q (Continuing) -- other than what you have just alluded to, have you ever been refused help from the F.B.I. if you went there first?

A In reference to analyzation?

Q Yes, blood, hairs, fingerprints, things like that?

A Not that I can recall.

Q They certainly haven't imposed any limitation on the number of things they would help you with, have they?

A The number of items?

Q Yes.

A No, sir.

Q As a matter of fact, they encourage you to bring everything, isn't that what they say, instead of going to the Northern Virginia Lab, bring them over here?

A I have not heard them say that, no, sir.

Q In so many words, isn't that what they are saying to you?

A No, that's not exactly what they are saying to me.

Q All right.

They've never refused to help you analyze those things, have they, --

A (Interposing) No, sir.

Q (Continuing) -- based on the amount of evidence that you give them?

A Not if they are going to be the original laboratory, sir.

Q With the understanding that you just will go to them first?

A Right.

Q Why not take everything over there? It is no imposition on you, other than the physical labor of carrying it, is it? You would mark it one, two, three, four, however many items it would take and say take it to the F.B.I. and say check it out?

A In any particular case?

Q In this particular case?

A There would be a problem with that.

Q What problem?

A Dr. Beyer had already sent the blood samples to --

Q (Interposing) With the exception of what you are talking about, you could send a lot of the items that were not analyzed yet?

A Yes, sir.

Q Is there any reason why you wouldn't take them to

the F.B.I. and say how about checking this out for me?

A No, sir, no reason.

Q You impose that limitation?

A Yes, I do.

Q Now, the magazines, which one of those magazines did you send to the F.B.I.? Did you send the ones that came from the car or the ones that were underneath the mattress or the three magazines that came from Quintana's car to the F.B.I.?

A I sent eight magazines that had come from the mattress in the deceased's apartment.

Q A total of eleven, a little bit of each? Did you send all the magazines over there?

A Every magazine I knew we had.

Q Okay.

Did you request any specific tests or did you ask them to check it out and give them your best shot?

A No, sir. I requested the laser equipment to be used on this evidence.

Q Did you ask them to use anything else? Did you come up with two tests?

A Whatever I asked for, they said they would do all three types of examinations to lift fingerprints.

Q The expert that you had work with in that regard was Fudella?

A Fudella.

Q Fudella, and to your knowledge there were no fingerprints or blood stains found on those items?

A That's not my information.

Q Did you find some fingerprints on them?

A The items I sent to the F.B.I.?

Q The magazines?

A Several fingerprints were found on the magazines.

Q None of them were the defendant's?

A None of them were classified as the defendant's.

Q None of them were classified by the F.B.I. as his fingerprints; is that right?

A That's right.

Q Now, look at -- can you see Commonwealth's Exhibit No. 31 from there?

A No, sir.

Q All right.

Can you see it now?

A Yes. 31 is a picture of the table with the skirt of the table up and the hammer laying propped up against the leg. Yes, I can.

DEO REPORTING
(703) 751-0013

Q Does it show anything else?

A It shows a picture frame laying on the floor behind it and two by fours showing the skirt or cover underneath the table and leg.

Q Was that picture analyzed?

A I'm sorry?

Q Was that picture analyzed?

A No.

Q It wasn't?

A No.

Q That didn't look like a position you keep a picture in, did it?

A No, I wouldn't keep my picture there.

Q It wasn't analyzed for fingerprints and it wasn't analyzed for blood or anything, was it?

A No, sir, it wasn't.

Q Now, let's talk a minute about these blood stains.

A Which ones?

Q On the hallway, staircase and the door. You found them, didn't you?

A Not the stairway.

Q Not the stairway?

A No, I didn't know there were blood stains or

splatters on the stairway.

Q Who found them?

A Pardon?

Q Who found them?

A I don't know who found them. My technician lifted them, Pete Tyler.

Q Which ones did you find?

A I observed the one on the door.

Q Which door?

A Number Five of --

Q (Interposing) Of Orlando's apartment?

A Yes, sir.

Q All right.

What else?

A The pillow case seized from inside Apartment Five.

Q All right.

We know we have got blood stains on the staircase and on Orlando's -- or leading to the apartment; is that correct?

A Yes.

Q Did you find blood stains anywhere else going to Orlando's apartment?

A Yes, sir.

DEO REPORTING
(703) 751-0013

Q And you found the one on the door?

A Yes, sir.

Q And you say that was a little teeny blood stain, maybe one eighth by one eighth?

A That's right.

Q That's bigger than some of the blood stains on that suit, isn't it?

A No, I don't believe so.

Q You don't think so.

How about looking at the right sleeve of this suit coat? How big are those stains?

(Handing to the witness.)

A The marks I see on the suit are pin head. I would estimate them to be one thirty second of one sixteenth.

Q That's maybe a half or a third smaller than an eighth, isn't it?

A These are the ones on the suit.

Q I understand. Yes, sir.

If those blood stains on the door turned out to be blood to tie someone in conclusively to this murder case, you'd sure take credit for that find, wouldn't you?

A That's why I lifted --

MR. MELSON: (Interposing) Your Honor, that's

argumentative.

BY MR. KENDRICK:

Q That's why you lifted them?

A Yes, sir.

Q You would call that a good piece of police work, wouldn't you?

A Yes, I would.

Q I would too.

A Thank you.

Q Commonwealth's Exhibit 101, which is a photograph, I believe --

May I have the Court's indulgence?

I will show you what has been marked as an exhibit and introduced into evidence as Commonwealth's Exhibit No. 101. That is showing the victim laying face down in the kitchen: is that correct?

(Handing to the witness.)

A Yes, it does.

Q Can you tell me how far away the victim's head is from the radiator?

A In this picture, no, I can't.

Q All right --

A (Interposing) If you want to count blocks, I guess

DEO REPORTING
(703) 751-0013

we can count them backwards. I don't remember if they were twelve inch blocks or --

Q (Interposing) Do you mean the tile?

A Yeah.

Q What size are they?

A I don't remember.

Q Using that photograph and also your observations, give me your best estimate of how far her head appears to be from the radiator?

A Her head, from the radiator, was eighteen to twenty-four inches.

Q Eighteen to twenty-four inches?

A Yes, sir.

Q And from the bottom of the icebox, can you give me the same measurements and can you give me --

A (Interposing) Thirty-six to forty-eight inches.

Q Thirty-six to forty-eight?

A Uh huh.

Q Did you touch that radiator?

A I do not remember touching it. I do not believe I did.

Q Do you know if it was working or not?

A I don't know if the radiator was working or not.

Q The icebox?

A Yes, sir.

Q Do you remember anything about the icebox?

A No, sir.

Q Do you know if there was a fan blowing in the bottom of the icebox?

Let me ask you if you are familiar with the self-defrosting iceboxes. They usually have a fan blowing and then that makes that mechanism work?

A Yes, sir.

Q Do you recall any of this in this icebox?

A I do not remember such a noise. I was not looking for such a noise.

Q You weren't looking --

A (Interposing) I wasn't listening.

Q You weren't listening?

A Right.

Q You didn't feel any air coming out from the icebox?

A With my hand, no, I didn't.

Q With anything?

A We began examining the body with Dr. Sheehy at 6:00. We had opened the window because of the odor and heat and the three of us being in this kitchen for the examination.

DEO REPORTING
(703) 751-0013

Q All right. Okay.

Now, when did you open that window?

A Some time around 6:00 -- between 5:30 and 6:00.

Q What kind of window was it? How big was it?

A Casement. How big?

Q Yes, sir.

A Forty-eight inches tall and thirty-six wide, generally.

Q All right.

And you say it was getting very hot in there?

A It was getting uncomfortable between the smell and the heat.

Q And that's why you opened the window?

A Yes, sir. Well, because there were three of us there and this was at 6:00 o'clock that we opened the window.

Q It hadn't been opened until then?

A No, sir.

Q By anyone else ob your team?

A I watched Detective Carrig open it.

Q For the first time?

A I did see somebody do it.

Q That was for the first time. Are you aware if it is a roll open or a slide up and down window?

A It was not a slide up and down window.

Q Do you recall if it was rolled open?

A No, I do not recall. I do not think it was a slide up and down wooden window.

Q Did it cause a lot of air to circulate in there?

A Not a lot, no, sir.

Q Did it get more comfortable?

A Yes, it did.

Q Did the smell go away?

A No, it did not.

Q But the heat did?

A Yes, sir.

Q It got a little easier to work?

A Yes, sir.

Q When was that picture taken, do you know?

A Fifteen until 4:00.

Q Was that before or after the window was opened?

A Before.

Q That picture was taken while it was still hot; is that correct? The window wasn't opened until the doctor got there? This picture was taken when this was closed?

A Of the scene of that room, yes.

Q How about the temperature in the whole apartment?

DEO REPORTING
(703) 751-0013

A Generally, it was the same in that room as in the entire apartment.

Q How was the heat regulated?

A A radiator. I imagine they had on and off regulators.

Q Did you turn any of them on or off?

A No, I did not.

Q Did you notice if anybody else turned them on or off?

A No, I did not.

Q Was there more than one radiator in the kitchen?

A No.

Q Just one?

A Uh huh.

Q That's the only source of heat that you were aware of causing it to be uncomfortable?

A There was a radiator in the kitchen and heat from the dining room to the other parts of the house.

Q I understand. Could we conclude from your observations that the radiator was probably working?

A No, you cannot. I don't know if it was working.

Q Do you think the heat in the apartment caused it to be hot in the kitchen?

A I have no idea.

Q All right.

You are not saying one way or the other?

A Right.

Q Were all the photographs of the body taken at approximately the same time?

A Approximately the same time, within a half hour. The reason I'm trying to think is I do not remember having the technician take any picture after she was rolled.

Q After she was rolled?

A Yes, rolled over to examine her. That's why I'm thinking. I do not believe I had them take pictures after she was rolled over. I know all the other pictures were taken before any I.D. tag work was done.

Q You don't have any pictures taken from the other side, do you, on the kitchen floor?

A I do not know of any, no, or I cannot remember any.

Q I think you indicated that there were three towels found; one underneath, and didn't you find it necessary to check out the one underneath, because it obviously was covered with blood?

A That's not my testimony.

Q Tell me what you said. I'm not trying to trick you.

Basically just tell me what you did and why you did it?

A The reason I was confused was because these particular cloths -- I remember sending three cloths. Here you can see two. The other one is under the body. These are three towels and one you cannot see, plus two. They were in blood. They were in the blood or that is the explanation of why the victim's blood was on them. That was the decision why not to analyze the blood on the towels.

Q Say that again? Obviously, you didn't analyze the blood on all of the towels, or did you?

A I did not request analyzation of any blood on any of those three towels.

Q And that's because there was so much of it? Is that what you are saying?

A No, sir. It is evidence where the blood is. It is right in the blood.

Q Is it evidence that all that blood is the same blood? Look at that blood and tell me if it is evidence that that blood is only one kind of blood?

A From a person's blood?

Q Yes.

A My observations, yes, it was all coming from her head and all in a stream.

Q How about this one here (indicating)?

A Yes, sir.

Q Is it evidence from your observation and training that that blood and that blood are the same? Are you making that conclusion at the crime scene that there is no need to analyze them because obviously it is the same blood?

A What's your question?

Q Can you look at that blood at the scene and say that there was no reason to analyze those towels because it was obviously the same blood?

A I did not make the decision at the scene, but I made the conclusion whenever I drafted the lab letters. My opinion is that the one towel had been in blood and hasn't been moved. The reason I made that remark is that the blood is coming on the floor to the towel. There is one laying in blood and the other buried under the body in blood.

Q You ruled out, did you not, the possibility that someone else could have been hurt or injured and therefore there was no need for the blood to be analyzed on that towel?

A There were several observations I made to get to that conclusion?

Q Did you make that one?

A That's one.

Q Were there others?

A There was no other blood in that apartment that we can find and we diligently searched for blood in that apartment.

Q Would that be because it was wiped off and left on a towel?

A Not in my opinion.

Q Again, this is all your opinion?

A Yes, sir.

Q Would it be difficult to pick up that rag and take it to the F.B.I. and say check that out?

A The Northern Virginia Police Laboratory --

Q (Interposing) Would that have been difficult to do?

A No, sir.

Q How about the one underneath -- either of those covered with blood. Would it have been difficult to have put that in an envelope and say check this one out?

A No, it would have been no burden at all. I did take them to the Northern Virginia Laboratory.

Q All of these items?

THE COURT: He testified he had them analyzed for hairs.

BY MR. KENDRICK:

Q But not for blood?

A That's right.

Q Commonwealth's Exhibit 100, that is Mr. Quintana's wallet. Is that what you are saying?

A It is a wallet that contains the personal property of Mr. Quintana.

Q And you say there was seven twenty dollar bills in there?

A Yes, there is.

Q You sent the whole bunch to the F.B.I. to have them analyzed, did you not?

A Yes, I did.

Q To have them analyzed for his fingerprints (indicating)?

A Everybody's fingerprints.

Q Did you send those seven?

A No, sir.

Q You knew they were in his wallet?

A Yes.

Q And they have never been sent?

A No, sir.

Q Anything in there been sent?

A No, sir.

Q Did you find anything in that wallet that belonged to Nelson?

A Not that I know of.

Q How about the victim?

A Not that I know of.

Q Did you check?

A I looked through all the papers and I did not figure out any way that any of that property in that wallet belonged to either Nelson or Ophelia Quintero, the victim.

Q You had an opportunity to talk to Orlando, didn't you?

A Orlando Dominguez?

Q Yes, sir.

A Yes, sir, through an interpreter and with the best I could do with his ability to speak English.

Q I understand.

When did this take place?

A I guess I first met Orlando at 5:30 just for a casual hello.

Q A casual hello, did you say?

A Yes, sir.

Q All right.

A I again talked to him somewhere around 6:30 or 7:30 area time frame. This was all the night of the killing.

Q On the 19th?

A Yes, sir.

Q Did you notice anything unusual on his pants or fingers or cuticles?

A I made an observation.

Q What was that observation?

A One of his cuticles -- when I refer to the cuticles I refer to a strip of skin between the nail and the skin -- there was a reddish material which I thought to be blood. This was even smaller than the quarter or eight by eight, quite small.

Q Smaller than this (indicating)?

A We are getting in that size range, yes.

Q But you suspected it to be blood; is that correct?

A Yes, sir.

Q Is this another example of your training and experience that you are relying on?

A Yes, sir.

Q Did anybody see that?

A Yes, sir.

Q Who?

A Detective Carrig.

Q Anyone else?

A I don't know.

Q How about Detective Adams?

A I don't know if he saw it.

Q How about Kevin Tomez?

A Yes, I believe he was there whenever he was interpreting. As I was talking to Orlando, I was trying to watch his features, his address and his demeanor and everything and at one point I observed his finger and Kevin was there and whether I refer to trying to lift that, I don't know.

Q You were investigating this murder? This is still not part of a casual hello?

A No, this is during the interview stage.

Q You are investigating the murder at this point?

A Oh, yes.

Q Did you attempt to get that scraping or any scraping off his cuticles?

A Yes, I did. He fought us and did not want us to do what we were going to do with his finger.

Q How many of you were there?

A My recall is bad, because I was trying to hold him

still, but there were no more than five. I know Kenny Adams was there, the technician that was going to elicit the scrapings; Kevin Tomez was there, because he was trying to interpret to the gentleman. I was there.

Q He didn't have anybody helping him, did he?

A Mr. Orlando Dominguez helps himself.

Q Yeah, you didn't choose up teams or anything?

A No.

Q It was all of you against him?

A We weren't "against him."

Q You mean you didn't see anybody pummel him?

A No.

Q All right.

Did you get it?

A No, sir.

Q He resisted all of you?

A He resisted to a point where I chose that it was not available to us.

Q Well, nobody pulled out any persuasion sticks, did they?

A I don't know what you mean.

Q Anybody pull out any blackjacks and convince him to come around to your way of thinking?

A There was no blackjacks there that day.

Q Nobody pulled any out of their pockets?

A No, sir.

Q Nothing but just restraint?

A No, sir.

Q But you weren't successful?

A No, sir.

Q Because he resisted and what did he do, anything else? Did he stick his finger in his mouth or anything?

A He was handcuffed behind his back for the safety of the item we were looking for.

Q And you still couldn't get it?

A His size printing.

Q His size?

A Yes, sir.

Q Could he fit into that suit, maybe?

A I don't know.

Q Anything ever happen from that? Did you ever get any scrapings from him that were turned over for analysis?

A No.

Q He lives in the apartment, does he not, where you found the little tiny blood spot on the door?

A He occupied the apartment at that time.

Q And the little tiny blood spot was going up to that apartment and it was also found in that same area?

A I --

Q (Interposing) Oh, you didn't find that.

MR. KENDRICK: The Court's indulgence, Your Honor.

BY MR. KENDRICK:

Q During your investigation of that apartment building, there was a canvas going on on regular routine police work, was it not, on the 19th and the subsequent day?

A Yes, sir.

Q Do you recall seeing Orlando leave his apartment any time during the day in the late afternoon?

A Whenever he came to the station, that's where I said hello to him and introduced myself as Detective Gabrielson.

Q So, you weren't the officer who saw him carrying a bag with no shirt on and going outside?

MR. MELSON: There is no evidence anybody saw him leave without his shirt on.

BY MR. KENDRICK:

Q Let me ask you this: Did you see him leave his Apartment Number Five with no shirt on and go outside and come back with an empty bag?

A No.

DEO REPORTING
(703) 751-0013

Q Do you know if any other police officer did?

A I do not know that from my personal knowledge.

Q From your personal knowledge?

A I didn't see that and I didn't talk to anybody who had seen him carrying the bag.

Q Now, there came a time several days -- two or three days after the murder in which Detective Carrig obtained keys from Mr. Quintana. Do you recall that?

A The 20th.

Q The 20th? The 21st?

A It was the 21st he obtained the keys.

Q All right.

And you have indicated in the past, have you not, that that was done voluntarily? In other words, the defendant gave those keys voluntarily to Detective Carrig; is that correct?

A From what I found out, how thekeys were observed by Detective Carrig that it was completely voluntary.

Q All right.

Did you talk to Orlando either before, during or after this attempt to remove what you suspected was blood from his hand about where he had been?

A Pardon me?

Q Where he had been on that day, on the 19th?

A Are you talking about Orlando's alibi?

Q Yes, sir.

A Yes, I do.

Q Did you check his alibi out?

A Yes, I did.

Q What was the result?

A The results are he had a good alibi for where he was that day.

Q He had a good alibi?

A That's right.

Q Did you zero in on the time of his alibi?

A Yes, sir.

Q Was that important?

A About the time?

Q Yes, sir.

A Yes, because he was -- his whole day was important to us and who he was with.

Q Would it not also be important as to when the person was killed in relation to his alibi? Wouldn't it be a critical factor?

A Yes, as long as you know the time of death is a generalization and the observation that I made was a

generalization about the time of death.

Q The observation you made was a generalization as to the time of death?

A Yes, sir.

Q You were generalizing around 2:00 o'clock, were you?

A No, sir.

Q You were not?

A 2:00 o'clock was the bottom line.

Q Are you saying you don't know exactly when the person died?

A No, sir, I do not.

Q How in the world can you rule out anybody's alibi?

A That's right. That's why I said that as long as I take into consideration the generalization of the time of death.

Q Do you know where Orlando is now?

MR. MELSON: Your Honor, I'm not sure what the relevance of that is, where he is now.

THE COURT: Objection overruled.

THE WITNESS: From my own personal knowledge, I do not. I have information where he is.

BY MR. KENDRICK:

Q Where?

A He is in Washington, D.C. being held with other refugees from Cuba.

Q Being held?

A Yes, sir.

Q Where is he being held?

A At the facility at St. Elizabeth's Hospital.

MR. KENDRICK: No further questions.

THE COURT: Let's take a short recess for about ten minutes.

(Whereupon, the jury was temporarily excused.)

(Whereupon, a short recess was taken.)

THE COURT: Ready for the jury?

MR. MELSON: Yes, sir.

THE COURT: Would you call the jury, please?

(Whereupon, the jury returned to the jury box.)

THE COURT: All right.

Mr. Melson?

REDIRECT EXAMINATION

BY MR. MELSON:

Q Detective Gabrielson, on the magazines that you sent over there --

* * *

Whereupon,

PAUL DOUGLAS,

was called as a witness by and on behalf of the Commonwealth of Virginia, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TRODDEN:

Q Sir, would you please state your name for the jury?

A I'm Paul Douglas.

Q And Mr. Douglas, where are you employed?

A Out in Prince William County at Whittier Intermediate Schools.

Q Mr. Douglas, I would like you to think back to March 20th of this year and ask you if you were working at your school on that morning?

A Yes, I was.

Q I would like to focus your attention about 9:30 and ask you where you were at that time?

A I was in my office at that time.

Q Now, did there come a time that you were requested to come to the front counter of the school?

A Yes. My head secretary, Mrs. Edwards, who runs the front office came back and asked me to come up front there

because there might be a problem.

Q Now, what did you observe as you came to the front counter?

A I observed Manuel Quintana at the front counter. Mrs. Edwards said he was trying to --

MR. KENDRICK: (Interposing) Objection.

BY MR. TRODDEN:

Q Without telling exactly what.

A He was standing at the front counter when I came in.

Q The individual referred to, Manuel Quintana, is he present in the courtroom today?

A Yes, he is.

Q Would you identify him?

A Right here in the center of this table (indicating).

Q Which of the gentlemen here?

A The middle one.

MR. TRODDEN: Your Honor, may the record please reflect that the witness has identified the defendant?

THE COURT: Yes, sir.

MR. Douglas, can you repeat the time of this occurrence?

THE WITNESS: About 9:30, because it was the beginning of our second period.

DEO REPORTING
(703) 751-0013

THE COURT: What day?

THE WITNESS: March 20th, Friday morning.

THE COURT: Thank you.

BY MR. TRODDEN:

Q Now, did you have the opportunity to see Mr. Quintana's demeanor at this time?

A Yes, he was at one end of the counter.

Q What did you observe?

A I observed while he was standing there -- we had a couple of notes there on the counter and again he -- he seemed to be wanting something. So, I was called in.

Q Did you have an opportunity to see what he was wearing?

A Yes, he had a hat on his head. He was dressed in black otherwise, black shirt, black pants.

Q This hat that he was wearing, can you describe it?

A It was brown, a brimmed hat, sort of turned down in front. It was kind of a light brown color.

Q Mr. Douglas, I would like to show you what has been marked as Commonwealth's Exhibit No. 42 and ask if you can identify this hat?

(Handing to the witness.)

A Yeah, that's the hat he was wearing. It was sort

of brown suede material like this at the time.

Q Now, did you have an opportunity to see these notes which were on the table?

A Yeah. They were -- you know, there were some notes on the table and this is where the attention was really directed when I came on the scene.

Q I'd like to show you what has been marked as Commonwealth's Exhibit 62-B and ask if you can identify these items?

(Handing to the witness.)

A It does look to me like the notes that I was directed to -- they were in Spanish. They were about this size (indicating).

Q Now, what did you do after seeing these notes?

A Well, the first thing we had to really -- since the notes were in Spanish and obviously Quintana didn't speak English, so we sent for one of our teachers who was teaching in our English as a second language program who speaks fluent Spanish. So, actually Miss Edwards had already sent for her to get her involved in what was transpiring.

Q Did this translator come upon the scene?

A Yes.

Q Through that translator, did you participate in a

DEO REPORTING
(703) 751-0013

discussion with the defendant?

A Yes. It ended up being a discussion really between the three of us where I was directing questions through Mrs. Moskows, our translator, to Mr. Quintana to find out why he was there.

Q What did he say to you?

A Just as it was, he was trying to check two of our students out of school.

Q As a result of that, what did you do?

A In the first place, we have a firm policy that we do not release anyone except to parents. It quickly became apparent that he was not a parent of one of these two girls. So, the gist of the question was why that situation was.

Q What if anything did he respond?

A He responded one of the girls -- Ismari's mother, was in the hospital and was in serious condition. He was a friend of the family. He wanted to help out. He wanted to console the girls and therefore he wanted to check them out. I was not clear whether he wanted to take them to the hospital or what. He wanted to check them out because of this problem -- because of him wanting to help in the situation.

Q Now, when he told you that, what did you do?

A Again, this is very irregular, so we continued questioning him a bit to try and firm this thing up. You know, why he was here and whether the mother had sent him. How long had he known the girls and what relationship was there? We did not like what we were hearing. I decided I guess a couple minutes into this that I was definitely not going to release the girls to Mr. Quintana. I asked him for identification at this point.

Q What did he say?

A He did give his name as Manuel Quintana. I asked him if he had a driver's license and he said, "No, it was in the car. He did not have it with him. He wrote down the numbers for me -- the Social Security number -- and sort of tossed it out and said, I said, "No, I really need to see your driver's license."

Q Then what happened?

A He said it was in the car.

Q Then what happened?

A He went to the car.

Q Did you go to the car?

A Yes, he led Mrs. Moskows and myself to the side of the school.

Q I would like to show you what has been marked as

Commonwealth's Exhibit No. 40 and ask if you can identify what is taken in that photograph?

A Yeah. I did not -- the car was light blue and it was, I felt, a late '60 model. I did not get a make off of it, but I did write down the exact tag number, which matches here. It was Virginia temporary 265566.

MR. TRODDEN: Thank you, sir. Would you please answer counsel's questions?

With the Court's indulgence for a moment, I have one further question.

BY MR. TRODDEN:

Q One further question: Do you recall the name of the girls which the defendant requested to take?

A Yes, the key girl whose mother was supposedly in the hospital is Ismari Garcia Moya. The other girl is Milagros Garcia -- I'm sorry -- Milagros Gonzalez.

MR. TRODDEN: Okay. Thank you.

CROSS-EXAMINATION

BY MR. KENDRICK:

Q Mr. Quintana told you his name. What was that?

A Manuel Quintana.

Q Manuel Quintana?

A Right.

* * *

this point.

MR. MELSON: Independent of whether or not it has been admitted on a previous occasion with his knowledge or without his knowledge, it is relevant because it is a note that we have connected to him that was found in the property in which the stolen property was also found and it corroborates not only the principal's story, but the fact that he had an intimate relationship with this particular lunch pail that had all the stolen property in it.

THE COURT: The objection is overruled.

Would you bring the jury in, please?

(Whereupon, the jury returned to the jury box.)

THE COURT: The interpretor tells me that I made a notation that it was two notes. In fact, what he's got is one note on two slips of paper.

MR. MELSON: Yes, sir, I will give the exhibit to the jury.

Your Honor, I would like to present to the jury an exhibit that has already been introduced into evidence. It is Item 62-B constituting two notes that were found in the lunch pail in the defendant's automobile and I would ask the translator to translate the contents of that note to the jury and I think we will need our headphones for that.

DEO REPORTING
(703) 751-0013

THE COURT: Members of the jury, if you will put your headphones on the English channel, the translator has transcribed that and will read it to you the translation of it.

MR. MELSON: Your Honor, that item is the same note Mr. Douglas, the principal from the Intermediate School has identified.

THE TRANSLATOR: Very well. Do the members of the jury hear me?

THE COURT: Not quite ready yet.

All right, would you test that now?

THE INTERPRETER: Can you hear me now? Can you hear me, one, two, three?

THE COURT: They all can hear you. All right. Thank you. Go ahead.

THE TRANSLATOR: The note reads as follows: "Milagros Gonzalez," this is the person to whom it is addressed. The date is "March 20th, 1981." The text is as follows: "The daughter of Sarah Gonzalez -- " This phrase refers to the fact that Milagros is the daughter of Sarah Gonzalez. Continuing with the text: "Her mother is in the hospital in serious condition and asking for her daughter to come and see her. She wants to see her. Please don't say anything to

Milagros' teacher that her mother is in serious condition in Fairfax County Hospital. Her mother wishes to see her and she's crying and says she wants very badly to see her. Do not say anything to Milagros until she sees her so that she won't cry. Okay?"

That's the end of the note.

THE COURT: Thank you.

MR. MELSON: Your Honor, the Commonwealth's next witness will be Deane Dabbs.

Whereupon,

DEANE DABBS,

resumed the stand, and having been previously duly sworn, was further examined and testified as follows:

DIRECT EXAMINATION (Resumed)

BY MR. MELSON:

Q M'am, would you state your name for the jury, again, please?

A Deane Dabbs.

Q Are you the same Deane Dabbs as testified on a previous occasion in this case?

A Yes, sir, I am.

Q Miss Dabbs, can you tell the jury why you are able to partially type the blood from Commonwealth's Exhibit No.

* * *

what might have been been done if I had been there.

MR. KENDRICK: Precisely.

Thank you very much.

MR. MELSON: I have no questions, Your Honor.

Thank you.

THE COURT: Thank you, Miss Dabbs. You are excused.

(Witness excused.)

MR. MELSON: Your Honor, if all the Commonwealth's exhibits are in evidence at this time then the Commonwealth would rest.

THE COURT: The Commonwealth has rested. Let the jury retire to the jury room.

(Whereupon, the jury was temporarily excused.)

MR. KENDRICK: May it please the Court, there are only charges that remain against Mr. Quintana, since the larceny charge was nol prossed by the Commonwealth, I'm talking about robbery and capital murder. I would like to address my remarks first to the charge of robbery, Indictment 17451. There is, as Your Honor knows quite well, no definition of robbery in the statutes. They do not attempt to define it in any way, so we are necessarily required to look to the common law as to the definition of that crime and in that common law it was defined as the felonious and forceful

taking of money or goods of value from the person of another or in his presence against the owner's will by violence or by putting him in fear and there was of course a taking -- the taking must have been with the intent to steal. Now, as I said, the statutes here in this state do not undertake to constitute the element of the crime and therefore to constitute those elements of robbery and to find out what they are we must necessarily again look to the essential elements as it existed at common law. In regard to that, in robbery there must first be the act of violence and it only need be slight and there must be such demonstrations as to put the person who was in robbery in fear. The demonstrations of fear must be of a physical nature with the single exception that if one parts with his goods through the fear of a threat and the charge is sodomy, then that is taken and also robbery. There must be a second, a larceny, and the third element there must be the taking from the person. The meaning of which expression is not that it must necessarily be from the actual person himself, but it is sufficient if it is taken from the personal protection and presence of the person who was so robbed. The intent to take and deprice another of his property is also an essential element of the crime of robbery. The act must be done with specific criminal intent existing at

DEO REPORTING
(703) 751-0013

the time of the commission of the act.

Virginia cases are very clear: Before the crime of robbery is completed, it must appear that the property was taken into possession by the robber. Secondly, that the taking was with felonious intent and, third, that the property was taken from the person or in the presence of the actual or constructive owner. That it was taken against the will of the owner and, finally, it was taken by the owner through violence or putting him in fear. Now, the manner of taking is in the alternative. It may be either through violence or through intimidation. Both do not have to exist, but one must exist. Allegations of both force and intimidation are unnecessary, since the allegation of either are sufficient. Actual fear: Actual fear is necessary to constitute intimidation. I refer the Court to Walton versus the Commonwealth, 165 Va, 549, which is an attempted robbery case. By analogy it will apply here. We look at the evidence at this point and when we apply the standard as to whether or not there is sufficient evidence in this case to go to the jury and we look at the evidence at its most favorable light to the Commonwealth and I submit to the Court that they could not at this point if the trial ended and if we chose to go no further in the case, the case could only result with the charge of

robbery being an acquittal because of the absence of the two element's that I'll refer to. In the following case the Supreme Court said, "A person cannot be found guilty of an attempt to commit robbery by means of putting his victim in bodily fear if the Commonwealth fails to show beyond a reasonable doubt that the victim of the attempt was actually put in -- was not actually put in fear by the conduct of the accused." Now, there is no evidence at all -- none whatsoever in this case -- to suggest that the property, first of all, was taken from the person, but more importantly, there is absolutely no evidence to suggest even remotely to suggest that it was taken by putting the victim in fear. There is absolutely none and there is no way you can reach that conclusion no matter how you look at the evidence. All of the evidence was in the bedroom. There is no blood in the bedroom. All of the blood and all of the violence that happened in this case happrned in the kitchen. All the evidence was removed from the bedroom. This suggests only one thing happened: There was a murder and then the property was stolen. In other words, the person was killed and then the goods were taken. There is a murder and a larceny, but there is no robbery. There is no fear and there is absolutely no evidence that it was taken against the will of the victim.

DEO REPORTING
(703) 751-0013

If we look at the evidence it would suggest that there was no fear and no intimidation, we would find some very interesting points. Again, if we look at it in the most favorable way we can to the Commonwealth, we find that the killer, as they have portrayed the evidence and brought it forward, was probably first of all a friend or someone that was known to the victim. We know that. There is no suggestion of a struggle or fight or anything of that nature. We know from the evidence of the way the body was found and of the evidence of the forensic pathologist who did the autopsy that all of the wounds were in the rear or on the back of the victim. There were no wounds on the front of the victim. At this point, there is no evidence to siggest that the victim was face to face with her attacker and resisted the attack or that there was any struggle of any kind. There is none whatsoever.

The expert further testified that the first blow probably was sufficient to drop the victim. He went further to testify that any one of the blows to the head would be sufficient to kill her. Obviously, if that's the case, then the first blow not only -- that dropped her, could have in fact killed her. The other blows were just repeated blows by a distorted mind, but the first one did its damage. We know

that they all came from the rear. We know from the evidence in the kitchen that she was probably fixing coffee for a friend. There was a chair in there that normally isn't in there. The chair was probably for another part of the apartment and the chair is not used to stand on to get things from the cupboard, because the son said she was tall enough to reach everything. We have a situation, obviously, where this woman is fixing coffee or something in the kitchen with her back to the killer when she is attacked with a hammer. We can assume the attack was without warning and that it was immediate. It was swift and it was over. Whoever did that, going to the apartment with the intent to murder someone, is not the same thing as going to the apartment with the intent to rob someone. That person can go there with all kinds of intent and kill someone and then feel something and that does not amount to robbery. It amounts to robbery and larceny, but it does not amount to robbery. There is no evidence to suggest or to support that it is a robbery involved in this case. There is no way if the person is murdered that the necessary elements which must exist of fear, coupled with the taking, can possibly exist. It defies logic and it is impossible. If a person is not put in fear simultaneous with the taking, then by law there can be no robbery and that's

what we have here. That is the only conclusion. That is the only reasonable conclusion no matter how you look at the Commonwealth's evidence. Giving them every benefit of the doubt, that's the only conclusion that you can reach, that the person was murdered and then there was a taking of things of value in the apartment. There is no way that you can turn that into the necessary element of fear that must be coupled with the elements that are necessary in robbery. For example, pulling out a gun and saying, "Your money or your life," obviously, that would be a fear and the type of fear that's necessary must come with the parting of the money or goods of value from the person or in their presence and none of that exists in this case and there is no evidence that would suggest that. It is totally void of anything like that. Absolutely. It all suggests only one thing: The person was murdered and then there was an afterthought of taking things of value.

Now, those two necessary elements must exist, Your Honor, and they must exist at this time for this case to go to the jury. If we choose to rest our case, then the question would be beyong a reasonable doubt, but the question at this point is absent of those two elements of fear and the taking against the will and whether the charge of robbery can

go to the jury and obviously it can't, because there is no way that the evidence will support that. We know one other thing: none of the property was taken from the victim herself. Now, that does not necessarily mean that the crime of robbery cannot be made by the Commonwealth, because obviously the property was in the victim's vicinity or under her personal control. But, the important thing to look to and remember is that the element of fear must exist at common law and there is nothing to suggest that fear and there is no evidence to support it in looking at the evidence in the light most favorable to the Commonwealth.

Secondly, there is no taking against the will. There is everything to suggest just the opposite. The taking was done after the murder, which was immediate. I submit to the Court that the charge of robbery must -- must be dismissed at this stage and should not go to the jury. There is no evidence to support it, because the two elements are in fact lacking. They ar crucial and they are necessary and absolute elements to the crime of robbery.

Secondly, if that is that case -- and it must be the case since there is no evidence to support it -- then the charge of capital murder must also fall, because that cannot exist under what they have chosen as their charge of capital

DEO REPORTING
(703) 751-0013

murder. The basis of capital murder charge necessarily includes the charge of robbery. If the robbery does not exist, then capital murder does not exist and were I to rest my case now, the only question that could be presented to the jury would be whether or not there is murder, but not capital murder and not robbery.

Thank you, Your Honor.

MR. TRODDEN: Your Honor, initially I thought I was going to find myself in agreement with Mr. Kendrick in his definition of robbery. I believe he started out correctly. The Durum Case at 214 VA, 166, does in fact cite the elements of robbery as stated initially by Mr. Kendrick. Durum states that robbery at common law is defined as the taking with the intent to steal of personal property from another person or in his presence against his will by violence or intimidation. The phrase, "Of personal property of another from his person or in his presence" has been broadly construed to include the taking of property from the custody of or in the constructive possession of another. Durum does in fact decide the following case, which counsel has referred to. Thus in referring to the language in Durum, it is clear that intimidation is not an element of the offense. It is an alternative. It may be violence or intimidation and there is

ample evidence of violence in this case. Counsel makes the argument that the larceny or the taking must be from the person. As Durum has stated, that is broadly construed; that the person need not be awake and in fact, there is substantial case law to the effect that the person need not be alive, as was stated in the case of People versus Jordan and I will note that there is no case law on point in Virginia on this.

The Jorden Case is found at 135 N.E. 739. I think the court in that case cites it clearly. The fact that the defendant had been reduced to a state of physical nonresistance -- the victim, I mean, before his own money was taken, does not relieve the crime of the quality of constituting robbery. The case goes on to state that if as a result of a quarrel, a fight occurs in which one of the parties is overcome and the other then without having formed the intent before the fight, takes the property of the vanquished one, the offense committed is robbery.

The Commonwealth would submit that in this case the taking was by violence. The victim certainly was extremely battered. The property was in her constructive possession in her apartment with her and the Commonwealth has established all of the elements for robbery and in addition, all of the elements for capital murder under 31-D.

DEO REPORTING
(703) 751-0013

THE COURT: As counsel collectively points out, robbery is a common law crime in Virginia and has never been defined by statute. The common law definition of it is, "The taking of property from a person against his will be violence or intimidation." The last two elements stated in the disjunctive. If the violence resorted to is the means by which the will of the custodian is overcome so that the taking may be accomplished, that is robbery. It makes no difference whether that violence is slight or great. If the violence is sufficient merely to rest the goods from the hands of the owners as in a typical purse snatching situation, that can be a robbery. In other words, the violence can be so great as to cause death, but that doesn't keep it from being a robbery. The violence must be in concomitant with the robbery or it must precede it so as to facilitate the taking, but it makes no difference whether it is concomitant or precedes it. The only time violence is not a part of robbery and it's not an element of robbery is where the evidence shows that the violence was resorted to after the robbery was completed in order to retain possession of the goods already taken, but that may be just to ward off pursuit. But, in this situation where the taking is accomplished by some violence against the person, that violence is whether it causes death or not an element of

the robbery.

MR. KENDRICK: I'm not --.

THE COURT: (Interposing) Now, if indeed the two offenses grow out of the same act, then the violence is resorted to for the purpose of the subject doing the custodian of the property so that the property may be taken and that violence causes the death of the custodian and then under the present statutory definitions both robbery and capital murder exist. It seems to me that the jury may certainly find from the evidence that that is exactly the situation in this case, that the circumstantial evidence would easily admit of the inference that the deceased, who was putting up no resistance and had presumably not yet been robbed and was in -- in a very peaceful posture, presumably in the kitchen getting coffee to serve to her assailant who was very likely a guest, was suddenly and without warning struck, a fatal blow from behind from the assailant. This was probably fatal and it certainly was followed by other blows which combined would produce a fatal result. This violence which caused the death also facilitated the taking of the property and allowed the property to be taken without resistance and in those circumstances as I interpret the law of Virginia, both robbery and capital murder would exist. So, the motion to strike is

DEO REPORTING
(703) 751-0013

denied.

MR. KENDRICK: I respect the Court's opinion, Your Honor, but I'm not sure I made myself clear with respect to -- there is no question in looking at the pictures that you can tell it is a violent act. There is no issue over violence, but the issue is whether there is fear.

THE COURT: I don't think there need be any. I think violence or intimidation are stated in common law definition as disjunctive, either one or the other.

MR. KENDRICK: That's correct.

THE COURT: So, robbery can exist with violence without fear or fear without violence.

MR. KENDRICK: That is correct and Your Honor, I agree at this point that one must have violence with intimidation or violence with fear, but there must be intimidation or fear, coupled with the violence. The disjunctive goes to the intimidation or the fear. In other words, there must be a parting by violence, but there must be a nexus between the violence and the intimidation or the fear. It is intimidation or fear coupled with the violence that makes the crime of robbery. I don't believe that if a person is sound asleep, for example, and is murdered, that you have robbery, because there is no fear. There is no intimidation.

You have a murder and larceny, but you have no robbery and it is that very necessary element that I'm directing my argument to and I understand what the Court is saying and I agree that it is in the disjunctive, but I think you must have one act of violence -- and there is no question about that -- but it must be coupled with two things. One of these two things, not both, as I agree. One of them, though, it must be violence with intimidation or in the disjunctive, violence with fear that results in the person giving up their goods or things of value. There has to be some connection of that sort and that's what is totally lacking and cannot be supported from the evidence.

THE COURT: In my view there must be either violence or intimidation.

MR. KENDRICK: Very well, Your Honor.

THE COURT: Either one is sufficient.

MR. KENDRICK: I understand.

THE COURT: All right. Is the defense ready to proceed?

MR. KENDRICK: Yes, Your Honor. I don't know if it is necessary or not, but for the record, I respectfully note my exception.

THE COURT: Yes, defense's exception is noted.

DEO REPORTING
(703) 751-0013

Would you call the jury, please?

(Whereupon, the jury returned to the jury box.)

THE COURT: Members of the jury, the defense will now proceed to present the defense case.

MR. KENDRICK: Robert Fudella, please.

Whereupon,

ROBERT E. FUDELLA,

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KENDRICK:

Q Mr. Fudella, we have a system set up here that's going to require you to get as close to the microphone as you can.

For the record, state your name and spell it, please.

A Robert E. Fudella, F-u-d-e-l-l-a.

Q Where are you employed?

A Federal Bureau of Investigation.

Q In what capacity?

A Fingerprint Specialist.

Q How long have you been employed?

A Approximately twenty years.

Q Have you also been employed by the Bureau?

A Yes, I was.

Q Have you testified as an expert in this regard?

A Yes, I have.

Q In this state?

A Yes.

Q In other states?

A In other states, yes.

Q On numerous occasions?

A Yes.

Q Were you sent -- did you receive evidence in the Quintana Case by the Arlington County Police Department for analysis?

A Yes, I did.

Q What did you receive and when did you receive it?

A I received sixty twenty dollar bills, eleven magazines, a claw hammer, three gift-wrapped packages, one brown camera case, telephone bills, numerous papers, telephone and wooden box, a piece of ripped paper and numerous assorted paper items and I received that on March 31.

Q What tests did you conduct on those items?

A I examined him by them by the laser process

initially and then I used -- on the paper items I used a ninhydren spray and on the telephone and on the wooden box I used powders. On the camera case I used powders.

Q Can you explain this laser process that you have alluded to?

A The laser illuminesses fingerprints on specimens. Not always in every case, but in cases such as a camera case or surfaces that are hard to get prints off of, if there are prints visible, they will illuminess these prints. It takes a special type of goggles to see the prints.

Q Do you put something on the items and put the goggles on? How does that work?

A No. We use a fifteen watt laser. It is set up in a room by itself and the specimen is placed under the laser light and the examiner has to have special goggles to see this, because the light is very enhanced.

Q Do you use that process on magazines?

A Yes, I did.

Q And approximately how many pages were involved in these magazines and whether or not you did that on each and every page?

A There were numerous pages. I wouldn't have any idea how many pages, but I did do it on all of the pages.

Q Did you laser process each one of the pages?

A Yes, I did.

Q Did you have Mr. Quintana's fingerprints to compare with any you found?

A Yes, I did him.

Q Did you find his fingerprints on any of those items?

A No, I did not.

Q Did you do that same process to the twenty dollar bills?

A Yes, I did.

Q Did you find his fingerprints on any of those?

A No, I did not.

Q The three gift packages?

A His prints were not on those either.

Q Did you use the same process?

A I used the laser on them, but they were already powdered before I received them.

Q They were?

A Yes.

Q Would that in any way affect what you might have seen?

A It possibly could, but not necessarily.

Q What could it possibly have done?

A Well, the powder could have adhered to the fingerprints making a blob -- a real fresh print and could have obliterated it.

Q How long will a print last once put on an object?

A It depends on the object.

Q Take those boxes, for example?

A On a paper item, I'd say it would last years.

Q All right.

How about smooth surface items, like hard plastic or wood?

A Under ideal conditions, they could possibly last years, but I would say no longer than six months at the most.

Q All right.

Did you examine the hammer and if so, what process did you use?

A The hammer was examined by a laser and I used gray fingerprint powder on it.

Q Did you find Mr. Quintana's fingerprints on there, sir?

A No, I did not.

Q Now, does the fingerprint, assuming that it is -- well, I'll ask you, does the surface -- does the size of the surface have anything to do with the fingerprint or whether or

DEO REPORTING
(703) 751-0013

not you can get it?

A No, it does not.

Q So, it can be large surfaces and small surfaces?

A That is correct.

Q Large objects and small objects?

A Correct.

Q It would apply to glass, also?

A Yes.

Q Crystal?

A Yes.

Q Paper?

A Yes.

Q Wood?

A Yes.

Q Plastic?

A Yes.

Q Fiberglass?

A Yes.

Q Is there anything that we can't get a print off of?

A Not that I know of.

MR. KENDRICK: Your witness.

CROSS-EXAMINATION

BY MR. MELSON:

Q Good afternoon, Mr. Fudella. Does a person leave a print every time you touch something?

A Not every individual, no.

Q On these items that you have examined, did you find any prints from Ophelia Quintero?

A No, I did not.

Q Did you find any prints on the hammer at all?

A No prints were found on the hammer at all.

Q None whatsoever?

A None at all.

Q How about the three gift packages?

A No prints at all.

Q Now, someone must have touched those packages in order to wrap them, don't you assume that?

A Yes.

Q What type of processing did you use on the packages?

A All I used was a laser, because they were already powdered prior to my receiving them.

Q But you found no prints?

A No, I did not.

Q How about the camera case? Did you find any prints

on that?

A No, there were none.

Q The wooden box, did you find any prints on that whatsoever?

A There was one portion on the box, but it was not identifiable.

Q Now, you found some prints on the telephone, didn't you?

A Yes, I did.

Q Who brought you those prints? I mean, who belonged to those prints?

A Four of the fingerprints that were present on the telephone belonged to a Nelson and the last name is E-c-h-e-m-e-n-d-i-a.

Q Echemendia?

A Yes.

Q Were there any prints on that telephone you could not identify?

A There were three other prints on the telephone that I did not identify.

THE COURT: Was it because you didn't have any known prints that they agreed with or was it because they were of insufficient quality to make a comparison?

THE WITNESS: One of the prints was a side of a finger and I did not have a side area of a finger from the four individuals that I compared and two of them were just not their fingerprints.

BY MR. MELSON:

Q Now, during your years at the F.B.I., have you had experience actually in the field of processing?

A Yes, I have.

Q Isn't it true that sometimes you may have difficulty in raising a print with powder?

A Yes.

Q So, when you say you can get a print on glass, it depends on the circumstances, doesn't it?

A That's true. It depends on the circumstances in every case whether you are going to get a print or not.

Q So, when you categorically say -- I'm sorry, I didn't mean that.

When you said on direct examination that you can get a print off plastic, glass, fiberglass and other things that you mentioned, it depends on the circumstances and type of object it is that you are trying to print; isn't that correct?

A That's correct and also the person that touches them. If a person is not a secretor, they won't make a print.

Q When you are an agent in the field and did the processing yourself, were there some things you did not print because you knew you could not get a print off them?

A No, I processed everything.

Q Everything? In what type of situation?

A That I thought could have been handled by the individual that committed the crime.

Q Would you process those things in which you have no indication that the person would have touched them?

A No, not necessarily. I probably would not have processed them at all.

Q And whether or not you would obtain any type of prints whatsoever off the things that you would process would depend on the type of object you were processing and how it is made; isn't that correct?

A I don't understand your question.

Q Well, if there were some objects that don't have a smooth surface --

A (Interposing) Right?

Q (Continuing) -- you would not probably get a print off that; isn't that true?

A Not necessarily. A smooth surface is usually more conducive to latent prints. However, a rough surface could

also have them. I have developed prints on wood and wood is not very smooth.

Q You did not get any fingerprints off of this hammer; is that right?

A No, I did not.

Q And that's a piece of wood?

A Right.

Q So, the point is every time you are printing something, you are not necessarily going to get off any type of latent prints, are you?

A That's correct.

Q Now, were you at this particular crime scene?

A No, I was not.

Q So, you are unaware of the circumstances surrounding this particular investigation or crime scene search?

A That's correct.

MR. MELSON: Thank you. No other questions.

REDIRECT EXAMINATION

BY MR. KENDRICK:

Q You indicated that a person may not leave prints if he is not a secretor. Is it possible for a person to leave prints one day and not the next?

A Yes.

Q It is?

A Yes.

Q So, you don't always secrete some days and some days you don't?

A If somebody's handles -- a lot of paper items at one time, then when you touch something afterwards, your hands are going to be drier than somebody that doesn't handle them. So, therefore, after they handle a lot of pieces of paper, and then they touch something, you probably wouldn't leave a print.

Q How long does it take before the oil secretions build up so that you could?

A It would vary with the persons.

Q Minutes, hours?

A I would say probably hours.

Q Okay.

Now, have you -- you, of course, have had no opportunity at all to raise prints on the objects that weren't submitted to you, did you?

MR. MELSON: I think he is leading the witness. It is his witness.

BY MR. KENDRICK:

Q Can you get prints off an object that isn't given to

you?

A No, I cannot.

MR. KENDRICK: Nothing further.

MR. MELSON: I have no other questions.

THE COURT: Thank you, sir. You are excused.

(Witness excused.)

MR. KENDRICK: Dr. Sheehy.

Your Honor, my client has requested to be excused to go to the bathroom for a minute.

THE COURT: All right. Fifteen minute recess.

(Whereupon, the jury was temporarily excused.)

(Whereupon, a short recess was taken.)

MR. KENDRICK: We are ready, Your Honor. Thank you.

THE COURT: Call the doctor, please.

MR. TRODDEN: Your Honor, prior to bringing the jury in, I believe the Commonwealth is going to have an in limine motion to bar the admission of this report as being hearsay.

THE COURT: Swear the doctor.

(Whereupon, Dr. James Sheehy was sworn as a witness.)

MR. KENDRICK: Your Honor, I believe we touched on this problem the other day very briefly. Obviously, I want

this report in because it is -- the code says it can come in; and secondly, there is a medical examiner that first went to the scene; and thirdly, it states that the time of death is at 2:00 o'clock. There is a notation in this man's handwriting on the back which refers to statements that were made to him at the scene by a police officer or someone that stated that the victim was last seen alive at 1:00 o'clock. Again, my position would be, if the objection is hearsay, that it is not offered for the truth, but for the fact that it was said to this gentleman. That is part of his case history that he takes and uses among other things and he uses it to reach the conclusion that he reached at the time of death and that the time of death was 2:00 o'clock.

MR. TRODDEN: The Commonwealth suggests that that is not offered for the truth of the matter and that that should be excised from the report. He may ask that question as to whether he did base his evaluation on it, but I believe placing it in the report gives you the problem of hearsay and adding a certain official tone to it.

THE COURT: May I see that part that you object to?

MR. TRODDEN: Yes, Your Honor.

MR. KENDRICK: I'll show Your Honor a copy. I believe Your Honor remembers the code section that I referred

DEO REPORTING
(703) 751-0013

to that says the report can come in. I believe it is 188. I will check it in a second.

(Handing to the Court.)

THE COURT: The text written under "Narrative Summary of Circumstances Surrounding Death," the first paragraph is obviously hearsay. "The decedent lived with her forty-six year old son. He left earlier in the day. She was known to be alive around 1:00 p.m. At 2:30 p.m. some neighbors noted that her apartment door was opened. They looked in and found her lying face down in a pool of blood." That could be nothing but hearsay and I think that should be excised from the report of the doctor.

The second paragraph, though, would appear to me to relate entirely to his examination. What the examination revealed, the left vertex and the skull and so forth, that would seem to me direct observations on his part and not any hearsay and that should not be excised. The first paragraph, although deleted from the report as hearsay, may become relevant to the examination of the doctor as a part of the information given to him not for its truth, but just to show the fact of its utterance as one of the foundations upon which he reached a conclusion. But I think it ought to come out of the report as given to the jury as an official report,

otherwise it sounds as if the doctor made an investigation of those facts and personally knew all those facts.

MR. KENDRICK: I know. I wouldn't suggest that, Your Honor. But, it seems to me a matter that the Commonwealth can go into in his turn to examine the witness. My understanding is that this is a regular course of business. It is routine and that's the way this gentleman reaches a lot of conclusions. He has to talk -- the body is not going to talk to him and he has to talk to people there at the scene and it is routine.

THE COURT: In my view, this is anything but routine.

MR. KENDRICK: Routine for us.

THE COURT: I don't think that is the kind of thing that goes in under the business records as etcetera.

MR. KENDRICK: May I refer the Court to the code section on this matter?

THE COURT: Yes, sir.

MR. KENDRICK: 19.2-188, "Reports and Records Received as Evidence: Reports of Investigations Made by Chief Medical Examiner or his Assistant or by Medical Examiners and the Reports of Autopsies Made Under the Authority of Title 32 of this Code Shall be Received in

DEO REPORTING
(703) 751-0013

evidence of any court or other proceeding and copies of the reports, photographs, laboratory findings and the records of Office of the Chief Medical Examiner or any Medical Examiner when duly attested to by the Chief Medical Examiner or one of his Associate Medical Examiners or a Medical Examiner whose office of the same are and shall be received as evidence in court or other proceedings for any purpose for which the original could be received without proof of the original person whose name is signed thereto." It is clear that all of these records can come in and if this man takes notes as part of a history in making conclusions about the time of death or anything, it's part of an official report and should come in also.

THE COURT: They can be received only for the purpose -- they may be received for anything that the witness could testify to himself if he were present. In fact, the whole purpose of that is to avoid just what you are doing today, calling Dr. Sheehy as a witness and you can get out of that report exactly what you can get out of Dr. Sheehy in the flesh. Mainly, you may get that part of his testimony which is admissible and meets the rules of evidence and is not hearsay.

MR. KENDRICK: Very well, Your Honor.

* * *

Q How are you employed?

A I practice medicine in Arlington County and I have since 1948.

Q Do you have any specialty?

A I do family practice and I am certified by the American Board of Family Practice.

Q Are you in any way connected with the Medical Examiner?

A Yes. I've been the Medical Examiner in Arlington since 1966.

Q Where did you go to medical school?

A Georgetown University.

Q How long have you been working in the capacity of Medical Examiner?

A Twenty-five years.

Q In that capacity, did you have occasion to respond to 748 South Florida Street on March 19th?

A Yes, I did.

Q What was the nature of that?

A I was called by the police to view the scene of a death in an apartment of -- I've forgotten the address now -- 748 South Florida Street.

Q What time did you get that call?

DEO REPORTING
(703) 751-0013

A I got the call at 6:00 o'clock and arrived approximately fifteen minutes later.

Q What did you do when you arrived?

A I informed the police that I was there and was taken back to the kitchen where the body was pointed out to me and received some preliminary information as to what time the police had been notified and how long they had been there and whether they had moved the body and they had not. Then I began to make the examination of the body.

Q Who did you talk to on the Police Department?

A I don't recall the names. There were a number of policemen there. I'd say six or seven.

Q Was there anyone there that you talked to other than from the Police Department?

A No.

Q Just the Police Department?

A Yes, sir.

Q Now, what facts did they tell you upon which you later used in your report and the conclusions that you reached?

A The facts that -- or the statements that I gleaned were that the decedent had been found about 2:30 when some neighbors coming down from upstairs had seen the apartment

door open and they had come in and found the body laying on the floor. I was also told that around 1:00 o'clock someone had been by and seen that the apartment door was closed and that the impression that I had is that whatever happened had happened between that period, between 1:00 p.m. and 2:30.

Q By "whatever happened," you mean the murder?

A Yes.

Q It was between 1:00 and 2:30?

A That's correct.

Q This information was relayed to you by members of the Police Department?

A Yes, correct.

Q Now, did you file a report?

A Yes, I did.

Q I'm waiting for a copy of that, but do you know whether or not Dr. Beyer signed that report?

A No.

Q If I show it to you and it has his signature, are you in a position to recognize his signature?

A I think so.

MR. KENDRICK: Your Honor, I just will have to wait for that report.

THE COURT: All right. It will be here in just a

DEO REPORTING
(703) 751-0013

minute.

BY MR. KENDRICK:

Q While we are waiting, I will ask you tell me the steps that you went through and exactly what you did in your examination?

A Yeah, the first thing is to get an overall look at the body and ascertain the position the body is in and to note if you see any weapon close to the body that might be disturbed in your further examination of it. One then tries to examine the body without moving it. So, the first thing to check is to see the degree of stiffness that one finds and the degree of rigor mortis that has set in and then one examines the area that seems to be the site where the trauma occurred, whether it be a bullet or blunt instrument wound, stab wound or whatever and thereby examining the area that appears to have been injured. The Medical Examiner will then turn the body to see the remaining part of the anatomy. Turning the body, one looks to see if the body has cooled after death and when one turns the body over, one expects to see kind of a bluish purple lividity, because of the blood settling in the blood vessels and skin and this is what I did in this case.

Q While we have got a break, I want to show you --

MR. KENDRICK: Can you mark this, Mr. Clerk?

THE CLERK: Defendant's Exhibit No. 12.

(The document previously referred to was marked as Defendant's Exhibit No. 12 for identification.)

BY MR. KENDRICK:

Q Dr. Sheehy, I will show you what has been marked as Defendant's Exhibit 12 and ask if you can identify the doctor's signature?

A Yes, that appears to be a true copy of the report that I filed with the Chief Medical Examiner.

Q There is a signature at the bottom that appears to be Dr. Beyer's?

A Yes.

Q Can you recognize that as the signature?

A Yes.

MR. KENDRICK: Your Honor, I would move this document into evidence as with the other ten exhibits.

THE COURT: Proceed.

MR. KENDRICK: I mean the other eleven. I am sorry.

THE COURT: Let's not deal with all the others now. That may be received. What is that, No. 12?

MR. KENDRICK: Yes, sir, Your Honor. Would you like to see it at this point?

MR. TRODDEN: No objection, Your Honor.

(The document previously marked for identification as Defendant's Exhibit No. 12 was received in evidence.)

BY MR. KENDRICK:

Q Dr. Sheehy, you stated the time of death at 2:00 o'clock.

A Yes, sir.

Q That is precise. Can you tell me how you reached that?

A In setting the time of death, one takes into account the physical findings that one makes coupled with the circumstantial evidence relating to what has happened in the vicinity, when the person was last seen, newspapers, mail unopened, things like that. The time of death is usually more dependent on solid evidence than one can get than on the physical findings alone. The physical findings set the framework and the time in which the death could have occurred. So, one may say that when you examine a person who has a degree of stiffness that a person may have died within a

period of say four hours to twelve hours and then the period that you pick from that really depends upon what investigators are able to tell you about when the person was seen and talking to people at their office and so forth.

Q All right.

Did the investigator tell you when this person was last seen again alive?

A My recollection was that the -- that I was told that the open door was closed at 1:00 o'clock and that it was found open at 2:30. I don't recall anyone saying that she had been seen specifically.

Q You say you do not?

A That's correct.

MR. KENDRICK: Your Honor, may we approach the bench, please?

THE COURT: Yes.

(Whereupon, the following bench conference was held out of the hearing of the jury.)

MR. KENDRICK: This creates an obvious problem.

THE COURT: You may refresh his recollection from that note now.

MR. KENDRICK: All right, thank you.

THE COURT: All right.

DEO REPORTING
(703) 751-0013

(Whereupon, the bench conference was concluded, and the proceedings continued within the hearing of the jury.)

BY MR. KENDRICK:

Q Dr. Sheehy, I want to show you a document and ask you to compare that document to Defense Exhibit No. 12 and I will ask you if it is the same document, with the exception of the area whited out?

MR. TRODDEN: Your Honor, I believe he can ask him to refresh his recollection, but not for a comparison.

THE COURT: Just ask him to refresh his recollection.

MR. KENDRICK: Shall I have this one marked?

THE COURT: Yes, mark it as 12-A.

MR. KENDRICK: May I have this marked as Defendant's 12-A?

(The document previously referred to was marked as Defendant's Exhibit No. 12-A for identification.)

BY MR. KENDRICK:

Q Doctor, I show you what has been marked as Defendant's Exhibit No. 12-A and ask you to read the notations on the back. Is that your writing?

A Yes, it is.

Q Would you please read your writing?

MR. TRODDEN: Objection, Your Honor.

THE COURT: Just let him refresh his recollection.

THE WITNESS: Yes, I recall it.

BY MR. KENDRICK:

Q Now, did the police tell you anything about the last time of death?

THE COURT: No, that isn't what you want to ask. Start that question again.

BY MR. KENDRICK:

Q All right.

Have you received any information concerning this individual's last known time that she was seen alive?

A Yes.

Q What did you receive?

A I received some information that something was different at 1:00 o'clock than was different at 2:30.

Q What was different?

A That the apartment door was open at 2:30 and had been closed at 1:00 o'clock.

Q All right.

I will ask you to read it again?

DEO REPORTING
(703) 751-0013

A I recall it well.

Q Well, did you write this: "She was last known to be alive about 1:00 p.m."?

A Yes.

Q You did write that?

A Yes.

Q Where did you get that information?

A I took that as a conclusion of the police that she had been alive then.

Q So, the police gave it to you?

A Yes.

Q That she was last seen alive at 1:00 p.m.?

A That she was last seen alive at 1:00 p.m.

Q She was known to be alive at 1:00 p.m.?

A That was a conclusion I drew from the information I received at the scene.

MR. KENDRICK: All right, Your Honor, I would offer Exhibit 12-A.

THE COURT: The information that you have seen, was it expressed to you in terms of the door or can you recall if somebody had seen her alive at 1:00 o'clock?

THE WITNESS: Well, my recollection is, as one's memory goes back and goes over this, is that the actual

statement related to the door being closed and then being open. The impression that I got was the decedent was alive at 1:00 o'clock and was found dead.

THE COURT: Members of the jury, this is like some other evidence you have heard that has been admitted for some other purpose. However, whoever it was who said that to the doctor isn't here to be examined at this point. We don't know who said that. Therefore, it is not admitted for the truth of whatever was said. It is admitted only to show that such a statement was in fact made to him and that he took it into account in reaching his conclusion. It is one of the ingredients that went into his opinion, but we don't have anyone here to vouch for the truth of it and so don't accept it as anyone's sworn testimony.

MR. KENDRICK: Your Honor, I would offer 12-A at this time.

THE COURT: Is there an objection?

MR. TRODDEN: Yes, Your Honor, there is.

THE COURT: Objection sustained.

BY MR. KENDRICK:

Q Doctor, did you look at the blood in the kitchen on the kitchen floor?

A Yes.

DEO REPORTING
(703) 751-0013

Q What can you tell me from looking at the blood?

A I think very little.

Q Was it wet?

A I think it had -- I don't recall specifically. It was wet enough to stain the decedent's body when we found it. It was wet enough to stain the towels that we used in handling the body and in cleaning my hands, but there is nothing that I would expect to see so specifically from the examination of the blood that I really would have noticed anything more than that.

Q Would you tell me if it was completely dry?

A Yes.

Q Was it?

A No.

Q Was it dry in the center?

A I don't recall.

Q Do you know if it was dry on the edges?

A I don't recall.

Q Did you take any notes?

A Not about that, no.

Q All right.

Do you know where the body was laying in relation to the window?

A The window, according to that (indicating), and my recollection, was on the left side of the --

Q (Interposing) Can you see that? Would you like me to turn it?

A No, I can see it. She was lying inside the kitchen door, not very far from the living room. My recollection is that her head was turned away from the kitchen window and her feet were towards the kitchen window.

Q All right.

Her feet were towards the kitchen window?

A That's my recollection.

Q And her head was turned away?

A Yes.

Q Is that location with respect to the window -- is that important?

A Not in my opinion.

Q It's not? It would not have any effect on the process by which that blood dried or was in the process of drying?

A My experience on the information that I have had on blood stains and the behavior of blood afterwards is such that I really would not attach very much importance to the things that you brought up.

DEO REPORTING
(703) 751-0013

Q You would not?

A No.

Q Would you attach any importance to the fact that the body was near a radiator?

A I don't recall there being a radiator either.

Q You don't recall a radiator in there?

A No.

Q Do you recall the window in there?

A I think I do, yes. I think I remember a source of light.

Q Do you recall whether the window was opened or closed?

A No.

Q Do you recall whether or not there came a time when the window, if there was a window, was opened?

A I do not recall whether the window was closed or open.

Q Do you know how hot it was in there?

A Not unbearably hot, no.

Q Can you estimate how hot it was?

A It was -- the temperature was such that I was not made uncomfortable in the examination in turning the body over and moving it.

Q You were not. Okay.

Do you recall what kind of clothing was on the body?

A I recall that she was fully clothed. I recall having to pull down, I think, a blouse, to make a better examination of the back part of the shoulder, where there were a number of disk-like indentations that I felt were consistent with blows from a hammer. That's my principle recollection.

Q Did you notice what the materials were made out of?

A No.

Q Did you notice --

A (Interposing) I wouldn't know if I looked at them.

Q I'm sorry you wouldn't.

Do you know what wool is or cotton? Do you know the difference between wool and cotton?

A I don't look at clothing with a practiced eye.

Q You don't?

A With the practice eye of determining whether it's rayon or cotton.

Q When you are looking at the body, what do you look for that's important? You don't walk in, do you, and go, well, it's a dead body, when you are there?

A I'm there to examine the deceased to see if there are any medical findings which may be of value to the State or

DEO REPORTING
(703) 751-0013

to the family in the investigation of a suicide, violent or unusual death.

Q And wouldn't the length of time that the body had been there -- might that not be significant?

A Yes, it is.

Q Can you not tell how long the body has been there depending on the cooling process that it goes through?

MR. MELSON: Your Honor, at this point I think counsel can ask these questions without leading and he can ask them quite directly. I think the factual recitation is helpful, but the leading nature certainly is not.

THE COURT: Objection sustained.

BY MR. KENDRICK:

Q What can you determine from the cooling process of the body?

A When life ceases, the body is no longer able to generate heat. That is the reason we are considered warm-blooded animals and that is that our metabolic processes are such that we can maintain a temperature of say ninety-eight degrees at a time when the outside temperature may be sixty degrees. As soon as death ensues, we no longer produce heat and over a period of time our temperature will begin to be reduced towards the temperature of the environment. The rate

at which this happens, unfortunately, is so variable that it is not particularly helpful in determining a time of death, except within a very wide range of hours.

Q It is so variable?

A Yes.

Q Do you have any equipment with you -- any medical equipment or devices that you could use in determining that?

A The temperature?

Q Yes.

A No.

Q Do you know what this is?

(Handing to the witness.)

A A yellow cigar?

Q A yellow cigar, is that what you think that is? Do you think it's a yellow cigar? You may open up the yellow cigar and look inside.

A This is a thermometer that has a range apparently from minus twenty degres Fahrenheit to one hundred.

Q It is an alcohol thermometer; isn't it?

A (No response.)

Q You don't know what that is?

MR. TRODDEN: He has answered the question.

MR. KENDRICK: I didn't hear him.

THE COURT: You are not in a position to cross-examine. It is your witness.

MR. KENDRICK: It must be my tone. I don't mean to.

THE WITNESS: I did not carry a thermometer.

BY MR. KENDRICK:

Q You didn't have one with you; is that correct?

A That's correct.

Q How about a syringe, did you have a syringe?

A No.

Q Would you have need for a syringe?

A No.

Q Is it possible to remove potassium from the eyeball with a syringe and determine the process -- or the time in which a person may have died?

A I doubt that.

Q You doubt that?

A Yes.

Q You doubt that?

A Uh huh.

Q Have you ever heard of the process of vitreous humor, sir?

A Yes.

Q What is that process?

A A number of analyses are made of the vitreous humor, which is an area in the eye and in the lens. A number of chemical determinations are made on their blood sugar. The person may be a diabetic. You may find readings of blood sugar more accurate than you would in the blood, because you didn't get the bacterial decomposition as rapidly as you do in the vitreous.

THE WITNESS: Shall I repeat it?

THE COURT: No.

BY MR. KENDRICK:

Q Can you also measure the amount of potassium buildup in the eye that way?

A I would think so.

Q So, would that not be a valuable way of determining how long a person would be dead?

A I doubt it.

Q You doubt that?

A Yes.

Q You didn't do it, though, did you?

A No.

Q Now, did you check for rigidity?

A Yes.

Q What pattern did you follow?

DEO REPORTING
(703) 751-0013

A One checks to see if -- rigidity normally begins at the top of the body and works downward to the lower part and one checks to see whether the neck is stiff, the arms, and then finally the lower extremities. In her case, all of the parts that I mentioned were stiff.

Q Is rigidity important to establish the time of death?

A Within the framework of all the physical findings, yes.

Q Did you use that in establishing your time of death at 2:00 o'clock?

A I used that as a factor in making my decision.

Q Can you tell me the process? Exactly what did you do in this particular case with respect to rigidity?

A Well, I mentioned that I determined that rigidity was generalized.

Now, is what you're interested in and what you are think of is my thought processes at that point?

Q I would like to know exactly what you did and how you used it in reaching the conclusion, among other things, that this person died at 2:00 o'clock?

A Rigidity begins after death. The body is normally somewhat alkaline. It begins to become somewhat acidic and

the effect on the muscle fibers is such that the muscles begin to contract. As I said, there is a pattern that usually follows starting with the head and the neck and working down. The difficulty with this is that while we may generalize about -- talking about how long it takes for rigidity to begin and how long it lasts before it begins to break up is that it varies tremendously from person to person. It varies sometimes with the circumstances of the death. It will come on more rapidly if the person was engaged in some fianl exertion, say defending themselves before death. So, one has a framework then and saying that in order to get total rigidity would take a minimum of -- I would be very surprised if it were under two or three hours. It would usually be about four hours and then it may be as long as ten or twelve hours before some people have developed complete rigidity. So, we have a framework. We can this in saying that this person would have been dead somewhere between say four and ten or twelve hours. Rigidity is perhaps more helpful sometimes in situations when it begins to break up, so that for instance we are to see a corpse where we could move the jaw and move the neck, but could not move the lower extremities, we would -- feel a little more confident that perhaps twenty-four hours or so had lapsed since the death.

DEO REPORTING
(703) 751-0013

Also, after twenty-four hours, you would get other findings. But, in that period of the first eight, ten, twelve hours, I think all you can say is that you can certainly find things which are pointing to that general direction, but the thought processes that you have pinpointed when you have established the point of death really comes from the investigation of the individuals who tell you when this person was seen and such things as that.

The purpose of the Medical Examiner being there, referred to as what are you doing there, is simply for the investigator and to give him this framework and to see if what we see here is consistent with what you are telling me or is it very inconsistent with it and you better give it another shot or look in another direction.

Q Was that consistent with what you have been told?

A Yes.

Q Now, rigidity will vary, will it not, not only with exertion as you have testified to and physical activity, but also room temperature; is that correct?

A Yes.

Q So, that if a body was near say, for example, a radiator that was working, that could affect rigidity; is that correct?

A Yes.

Q Would it be -- could I say -- what can you determine with respect to rigidity and the effect of heat?

A It could come on more rapidly.

Q It would become quicker; is that right?

A Yes.

Q So, the more heat, the quicker the rigidity?

A All other factors being equal.

Q I understand. Yes, sir. But, that is an important factor?

A (Witness shaking his head.)

Q The same would be true with the lack of heat or the opposite would be true with lack of heat?

A Unless it is so cold that the body would actually freeze and then one has distinguishing rigor mortis from the individual freezing. But within the range of the temperature being cooler, but not enough to freeze, then what you are saying is correct.

Q So, if a body is near a radiator and that was affecting the rigidity and the window was open, then that could have a counter effect, meaning a change in the temperature; is that correct?

A Yes, sir.

Q I believe you said you didn't notice whether or not the window was open or closed?

A That is correct.

Q And you didn't notice whether the radiator was working?

A I did not see a radiator in that room.

Q All right, sir.

Did you determine what the room temperature was?

A No.

Q Did anyone tell you what the room temperature was?

A No.

Q The hotter the room, the quicker the rigidity?

A Yes.

Q Could you determine whether or not there was any hot or warm air blowing on the body?

A As I said, I could not -- I did not feel any evidence of excessive temperature in working with the body.

Q How about lividity, what is that?

A Livisity is the pooling of blood -- the settling of blood by force of gravity to the lowest portion of the body depending upon how the body is laying or sitting. Lividity tends to indicate in the position that the body had been in and in this case, lividity was on the front part of the body

and then because of the fact that she was laying face down for a period of time and this is what we would expect.

Q How do you check the lividity?

A By observation and looking at the difference between the color of the skin on the different parts of the body, the front versus the back.

Q Can you tell anything from touch?

A Touch would be more the evaluation in the body temperature than the pooling.

Q Can you tell if it was fixed or unfixed?

A No.

Q Can you tell me the difference between fixed or unfixed?

A Fixed lividity comes about in a situation where an individual had been in a position for such a long period of time that when they were turned back on their back that the blood would not again drain in the opposute direction by force of gravity. So, if someone dies -- for example, if everyone agreed someone died in a position laying face down, for instance, and in a short period of time thereafter somebody was turned over on their back that after a period of time the lividity would shift from the front to the back. When that no longer happens, someone would say lividity is fixed.

Q So, the movement of the body would affect lividity?

A If it is not fixed.

Q Did you ask the police if they had moved the body?

A Yes.

Q What did they say?

A No.

Q Does it matter whether the body limbs are moved in your checking for lividity?

A I think the rate of cooling was going to be in the torso or trunk of the individual, but I was told that the body had not been moved in any way.

Q By that, do you mean just slipping it back and forth and over?

A Any movement.

Q You were told the body had not been moved in any way?

A No. You asked me if I had been -- I said I was told that the body had not been moved.

Q Who told you that?

A The police. The police in response to my question.

Q Lividity is pretty valuable, is it not, especially coupled with low temperature?

A No, I don't agree.

Q You wouldn't say that?

A No.

Q You use all of these factors, rigidity, lividity --

A (Interposing) The temperature.

Q (Continuing) -- temperature and all of these factors in concluding that -- plus your conversations with the police and your observations of the body color and blood?

A No.

Q The drying process of the blood?

A No.

Q You didn't use that. Did you use anything else in reaching your conclusion that she had died at 2:00 o'clock?

A No, not that comes to my mind.

Q Did you do anything unusual in this homicide case insofar as the process that you went through or was it rather routine?

A The routine is for the Medical Examiner to make on the scene, observations that I mentioned and then contact the Chief Medical Examiner, Dr. James Beyer, and inform him of what I have found and request -- with the full realization that he will do it -- a postmortem examination and a more careful examination exactly to find the extent of the wounds and any other changes in the body that may not be readily

DEO REPORTING
(703) 751-0013

dedectable by external examination alone.

Q Was this homicide treated any different than any other homicide?

A That I have been involved in?

Q Yes, sir?

A No.

MR. KENDRICK: Your witness.

CROSS-EXAMINATION

BY MR. TRODDEN:

Q Dr. Sheehy, the myths of Dr. Quincy aside, isn't it a fact that the time of death is not a scientific matter completely?

A I think in the context of Dr. Quincy, no. As I said, we can offer some information which may be helpful in determining the time of death. The problem where every living or biological process is the fact that people vary so much in the way the tissues react that no matter what measurement one goes by, whether it is temperature, chemical contents, rigidity, if one does this work long enough, one sees so many exceptions to the general rules that I would be very reluctant to ever say based on the physical examination alone when someone died.

Q So, then in determining this concept, the point and

time of death, one has to rely on things other than scientific evidence or things which are apparent to the Medical Examiner?

A Yes.

Q I believe you stated earlier that circumstantial items would be helpful?

A Yes.

Q Now, if you were to take both circumstantial items and things which are visible to the trained eye, as yourself, what percentage could you use to ascribe the time of death to circumstantial factors and what percentage would you ascribe to those things which are visible to the trained eye, such as rigor or lividity or temperature?

A I would say that in -- first of all, one would hope that when you are faced with a situation like this that the two are somewhat agreeable. But the -- I would say that seventy-five percent or probably more to the weight of anything is the circumstantial factors that one can find as opposed to the physical. One would hope that they agreed so that if, for instance, one sees an individual who has the physical characteristic of complete rigor and pooling and a cool temperature and was told, oh, that somebody saw him fifteen minutes ago, you know, one could say to the

DEO REPORTING
(703) 751-0013

investigators that this just isn't in our range at all. But if one says these changes could have occurred within three hours or four hours and it probably would extend to ten or twelve hours that then the time picked in that interval would really depend upon what the investigators found.

Q I assume you've had many occasions where the initial circumstances as initially told to you have changed; is that correct?

A Well, the initial reports are preliminary reports; that is correct.

Q Not in terms of your observations? For instance, dealing with time if you see newspapers stacked out front of the door you would assume nobody had been home; is that right?

A Yes.

Q The person could have been drunk and not care to read the papers?

A Yes, sir.

Q So, the circumstances can later change.

A Yes, sir.

Q In your situation as you arrived here on South Florida Street, you weren't told that she was seen alive at 1:00 o'clock, were you?

A I'm having trouble recollecting it, but as I -- I think so often when one is involved in something like this you are subconscious keeps working and my recollection was that I was told that the door was closed at 1:00 o'clock and was seen open at 2:30.

Q From that information, you made the conclusion that she was still alive?

A Yes.

Q It could also be consistent with the fact that the murderer could have still been in the apartment?

MR. KENDRICK: Objection.

THE WITNESS: Well, the officer --

THE COURT: (Interposing) That's argumentative. I don't know how he can answer it. It certainly doesn't come within his medical expertise.

MR. KENDRICK: Quincy might be able to.

BY MR. TRODDEN:

Q Dr. Sheehy, when you examined this lady on that night at 6:00 o'clock or 6:15, what degree rigor was there when you examined her?

A It was complete.

Q How long in the normal course -- I realize "normal" is flexible -- but how long in the normal course does rigor

DEO REPORTING
(703) 751-0013

become complete?

A Anywhere from three to four hours up to about eight or ten -- I mean ten to twelve, I would say.

Q So insofar as the degree of rigor goes, it would be consistent with the lady being dead at 10:00 o'clock in the morning as well at 2:00 o'clock in the afternoon?

A Yes.

Q Now, as far as the lividity goes in this case, was it consistent with the fact that she could have been dead earlier than 2:00 o'clock?

A Yes.

Q As far as temperature goes, is it consistent that she could have been dead earlier than 2:00 o'clock?

A Yes.

Q So, in other words, the framework -- the parameters you said are certainly limited so that the police should look into it?

A Yes.

Q What would be the limit based on the physical things that you saw this day that you would say this lady could have been murdered in?

THE COURT: At this point, disregard the circumstantial and look only at the physical.

MR. TRODDEN: Yes, Your Honor.

THE WITNESS: The physical finding certainly would be consistent with the death from as early as 8:00 to 10:00 o'clock in the morning until some time before 2:30.

MR. TRODDEN: Thank you, Doctor.

REDIRECT EXAMINATION

BY MR. KENDRICK:

Q Doctor, is it not possible that to take this alcohol thermometer and place it in the rectum or the liver and watch it --

MR. TRODDEN: (Interposing) Your Honor, I would say that is beyond the scope of cross-examination.

THE COURT: The objection is overruled.

BY MR. KENDRICK:

Q Would it be possible to take this thermometer and place it in the rectum of a body or the liver and watch it for one hour and determine the cooling rate of that body?

A Yes, sir.

Q Couldn't you then determine how long that body had been there from that fact?

A No.

Q You could not?

A No.

DEO REPORTING
(703) 751-0013

Q You could not?

A Could not.

Q Thank you, Doctor.

What would it tell you then if you watched it for an hour and you saw the way the body was cooling while laying there on the floor? What could you derive from that?

A That the body was continuing to seek an equilibrium from the ambient temperature.

Q That's correct. Simple mathematics would tell you how long it had been laying there, wouldn't it?

A No.

MR. KENDRICK: Okay, Doctor. That's all.

MR. TRODDEN: No further questions.

THE COURT: You are excused, Dr. Sheehy.

(Witness excused.)

THE COURT: Who is next, Mr. Kendrick:

MR. KENDRICK: Mr. Woolwine, Your Honor.

* * *

Whereupon,

THEODORE SHELL,

was called as a witness by and on behalf of the defendant, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KENDRICK:

Q Mr. Shell, how are you today?

A Just fine, sir.

Q Would you state your name for the record, please?

A Theodore Shell.

Q Are you employed?

A I'm the manager of the Columbia Heights Apartments.

Q Does that include the apartment located at 749 South Florida Street?

A It does.

Q Does that include Apartment Five in that building?

A It does.

Q Is that the apartment where Orlando was living in?

A That's correct.

Q Do you know whether or not the occupants had received an eviction notice on about March 19th, 1981 of this year?

DEO REPORTING
(703) 751-0013

A Not an eviction notice. I had given Mr. Dominguez thirty days notice to vacate.

Q Why?

A Because he was doing his own maintenance work within the apartment and he had messed up the electrical wiring system.

Q He had messed up the wiring system?

A Right. He was taking a fixture down in the dining room area and took all the base plugs out without any knowledge of electricity at all.

MR. KENDRICK: Your witness.

MR. MELSON: No questions, Your Honor.

THE COURT: You are excused, Mr. Shell.

(Witness excused.)

THE COURT: Do you want to take a recess at this point?

MR. KENDRICK: Thank you, Your Honor.

(Whereupon, the jury was temporarily excused.)

(Whereupon, a short recess was taken.)

MR. KENDRICK: Your Honor, before the jury comes in, we are running out of witnesses. We might be able to end relatively soon today and I can definitely finish up tomorrow morning or through half the day on Monday. My forensic

* * *

* * *

MR. KENDRICK: Correct, and not the site of the lunch pail.

THE COURT: I will straighten that out.

(Whereupon, the bench conference was concluded, and the proceedings continued within the hearing of the jury.)

THE COURT: Members of the jury, yesterday when the translator read to you an English translation of the little two-page note that was shown to you as evidence, I erroneously identified it as a note that was found in the lunch pail and that's wrong. It was found in the People's Drug Store bag, which was also in the car, but not the lunch pail.

MR. KENDRICK: Thank you, Your Honor.

Whereupon,

KEVIN M. TOMEZ,

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KENDRICK:

Q Officer, state your name for the record.

A Kevin Martin Tomez.

Q Where are you employed?

DEO REPORTING
(703) 751-0013

A Arlington County Police Department.

Q In what capacity?

A My permanent assignment is the Tactical Squad. I've been assigned Robbery-Homicide for this investigation here.

Q How long have you been employed as a police officer?

A A little over four years.

Q Four years?

A Yes, sir.

Q I want to direct your attention to March 19th of this year, the day of the homicide, and ask you if you had occasion to come into contact with Orlando?

A Dominguez?

Q Yes, sir.

A Yes, sir, I did.

Q When I refer to "Orlando," that's who I am referring to, all right?

A Yes, sir.

Q Was this part of the homicide investigation?

A Yes, sir, it was.

Q What time of day did this take place?

A My first contact with him?

Q Yes, sir.

A In the late afternoon of the 19th of March.

Q Approximately how late?

A Somewhere in the vicinity of 5:00, 5:30.

Q Okay.

And the purpose of that interview was what?

A I was called upstairs from the victim's apartment to Apartment Number Five to assist Detective Frank Richards and Detective Horgus with Orlando. They were doing a canvas of the area and to the best of my knowledge, they had come across him and he was being uncooperative at that time and they asked me to come upstairs because my Spanish is better than Detective Richards and I had previous contact with Orlando earlier.

Q Is this where the scuffle took place?

A No, sir.

Q What time did the scuffle take place?

A It was later on in the evening on the 19th at the third floor of the police station.

Q Approximately what time? Do you recall?

A I'd just be guessing, but somewhere around 9:00 -- 8:00 or 9:00 o'clock.

Q All right.

It is that time frame that I want to talk to you about. Did you take the statement at that time?

DEO REPORTING
(703) 751-0013

A I interviewed him, yes, sir.

Q Did he account for his whereabouts on the 19th, the day of the murder?

A For the most part, yes, sir.

Q All right. We will get back to "for the most part" in a minute, but what did he tell you he was doing on the 19th?

A He gave me the rundown on the entire day.

Q Okay. That's what I want.

Do you remember what he told you?

A Yes, vaguely.

Q Would you be so kind as to tell the judge and the jury what he told you?

A Mr. Dominguez said he had left his apartment, which is located at the same address as the victim's apartment, except it is Apartment Number Five. He shared this apartment with another individual by the name of Umberto Amilio. Somewhere in the vicinity of 11:00 or 12:00 o'clock they went to an individual's apartment who lives on Greenbrier Street, the next street over.

Q Whose apartment is that? Do you recall?

A No, sir, not right offhand. If I could refer to my notes --

Q (Interposing) Feel free to.

A (Continuing) -- Well, I don't have them with me. I didn't realize I was going to be called as a witness.

Another Cuban refugee lived down the street. They went there together, Umberto and Mr. Dominguez. They passed pleasantries there and Orlando asked one of the individuals if they were interested in purchasing some records that he had. He indicated that they said they would. They went back to Orlando's apartment, the three of them.

Q This is on South Florida Street?

A Yes, sir.

They did the transaction for $15.00. One of the Cubans left with the records and Amilio and Dominguez walked to Amilio's apartment at 901 South Fredrick Street. They ate breakfast and passed some time there when Orlando left alone. He was just about to the door, when he turned around and took Amilio's nephew with him. He went to purchase some cigarettes at the 500 block of Columbia Pike and he purchased cigarettes and candy for the little nephew. They came back to the apartment, at which time he's hazy on what time it is. He left for a period of approximately twenty minutes and came back to the apartment and Amilio and he walked to the Northern Virginia Campus in Alexandria.

Q Just a minute. He left alone for about twenty minutes? What time was that?

A He was estimating it by a soap opera on t.v. and he said it was somewhere in the vicinity of between 1:30 and 2:30. He's not exactly sure.

Q Then he goes back to where, Umberto's house?

A When the two of them left together.

Q Where did he say they went after that?

A The campus of the Northern Virginia Community College.

THE COURT: The translator didn't get the time you said Orlando had left.

THE WITNESS: Approximately 1:30 to 2:30 in the afternoon.

THE COURT: All right.

THE WITNESS: They walked to Northern Virginia Campus Community College and were checking on some courses they offer there for non-English speaking people. The office was closed. He estimates the time at approximately 3:00 o'clock, because the office had closed at 3:00 o'clock and it had just closed. They turned around and walked back to 901 South Fredrick, where Orlando spent five minutes in the apartment with Amilio and then he left and walked back up to

his apartment on South Florida Street.

Q Did he indicate the time that that took place?

A He's guessing somewhere around the area of 4:00 o'clock.

Q All right.

Now, did he say to you that he was with Umberto the entire day?

A At first he did, yes, sir.

Q At first that was his statement?

A Yes, sir.

Q And he changed that?

A Yes, sir.

Q And you found out that he was separated from Umberto for about twenty minutes?

A Yes, sir.

Q All right.

Now, how many times did you ask him if he was with Umberto all day long?

A At least three times.

Q And he maintained that initially; is that correct?

A Yes, sir, he did.

Q Did you determine whether this was consistent with other witnesses' statements?

A Yes, sir, I did.

Q What was your finding?

A It was not consistent.

Q What's "1069"?

A It's a police code for an individual that's mentally unstable.

Q Did this individual go "1069"?

A Did he go "1069"?

Q Yeah, did this individual go "1069" or to put it another way, is this accurate, the suspect went "1069"?

A On the occasion when we tried to get fingernail scrapings from him, in my opinion, that's what he did.

Q 1069?

A Yes, sir.

Q Tell me what you observed. What brought that on and what did you observe and what the results were?

A At that time of evening we had brought Mr. Dominguez in voluntary. He came into the station with us. During questioning, we found various things that he had told us to be inaccurate. That's the only word I can use. During the course of these conversations -- I'm not exactly sure who noticed it, Detective Gabrielson or one of the other detectives in the room -- there was noticed a little smudge

on the cuticle of his fingernail.

Q This is the same smudge Detective Gabrielson thought was blood?

A Yes, sir.

Q You heard that testimony, didn't you?

A Yes, sir.

Q All right.

A And Detective Gabrielson and I believe Detective Carrig was in the room decided at this point in the investigation that we would want to get a sample of that cuticle. At this time Mr. Dominguez was very nervous. I was trying to calm him down and explain to him. He was concerned about the police and the United States being the same as they were in Cuba and we were exchanging pleasantries and Kenny Adams came to collect the cuticle sample and he was just looking at him when he was taking the tools out and we tried to get a sample off his fingernail. He didn't resist at first until he saw what they were doing. I don't know why he did it.

Q Explain what you saw him do.

A He went "1069." I don't know if it was to prevent us from getting the sample or he was scared.

Q "1069" is "1069," isn't it?

DEO REPORTING
(703) 751-0013

A Yes, sir.

Q Did he attempt to kick you?

A Yes, sir.

Q And hit you?

A Yes, sir.

Q I hope he wasn't successful?

A No, sir.

Q You didn't get that sample, did you?

A No, sir.

Q Was he taken to the booking area?

A Yes, sir, he was.

Q Did he put up any resistance or did any struggle occur there or in your presence? Did you attempt to get any fingerprints from him?

A I didn't personally, no.

Q Did you observe anyone?

A The Deputy Sheriff did.

Q Did he resist that?

A He didn't resist. He just refused.

Q How long did the struggle go on?

A It seemed like an hour, but I guess it was two or three minutes.

Q Now, did he ever indicate to you that he was never

during that day on the 19th, on Greenbrier Street?

A Yes, sir.

Q He did say he was not there?

A Yes, sir.

Q Where is Greenbrier Street? Is that in Arlington County?

A Yes, sir.

Q Where is it with relation to 748 South Florida Street?

A It would be just west of it, parallel to Florida Street running towards Columbia Pike.

I want to rephrase that; when I asked him if he had ever been on Greenbrier Street, he said he had not been on Greenbrier Street at that time I said he was there.

Q Are you sure he didn't say he denied being on Greenbrier Street any time on that day and that if anybody says they saw him there, they are "full of shit"? Is that what he said?

A Yes, sir.

I'm referring to -- he admitted going down to a gentleman's apartment to sell some records. That is located on the corner of Greenbrier Street, but he's referring to in that particular quote to the time that I accused him of being

on Greenbrier Street. He said he was not there.

Q His response was what?

A He said he was not on Greenbrier Street at that time.

Q Now, did you attempt to walk -- where is the location of Umberto's apartment?

A It is the building right on the corner, which would be the southeast corner of Columbia Pike and Fredrick Street, 901 South Fredrick.

Q Okay.

Did you attempt to pace off the distance by time between 901 South Fredrick Street and 748 South Florida Street?

A Yes, I did.

Q You did that?

A Yes, sir.

Q How long did it take you and what pace were you walking at?

A At a normal pace. Again, I don't have my exact notes. I believe it was five minutes and some seconds to go one direction and six minutes and some seconds to go another direction.

Q Was this at a normal walking pace?

A Yes, sir.

Q Did you take themost direct route?

A Yes, sir, I did.

MR. KENDRICK: Thank you. Your witness.

CROSS-EXAMINATION

BY MR. MELSON:

Q Officer Tomez, when you were talking to Orlando, did he deny being apart from Umberto during that day, where were you?

THE COURT: I don't think you have your mike on.

BY MR. MELSON:

Q Officer Tomez, when you were talking to Orlando and he denied being apart from Umberto during that day, where did that take place?

A That was on the third floor of the police station.

Q And was that during the time that preceded the attempt to take the samples from the cuticles?

A Yes, sir.

Q How old is this individual? Do you know?

A Say, early twenties.

Q Approximately how before he went "1069" was this?

A I personally don't wear a watch there. There was a clock in the interview room. I was in there quite some time with him. I would estimate forty-five minutes to an hour.

DEO REPORTING
(703) 751-0013

Q It was all on the same evening?

A Yes, sir, it was.

Q And Orlando was nervous and upset about being with the police in the interview room, wasn't he?

A I had contact with him a week earlier, at which time he had some personal problems and when I talked to him what was most of the gist of our conversation when we went on discussing our homocide, per say, he would ramble on about other problems. Yes, sir.

Q He told you he thought the police in the United States were like the police in Cuba?

A He didn't say they were, but he was afraid they were.

Q What did he say they were like in Cuba?

A He didn't elaborate on it.

Q You got the distinct impression that he didn't like the police in Cuba?

A Yes, sir.

Q And he was afraid of them?

A Yes, sir.

Q Isn't it a fact that Orlando was pretty nervous and upset during the whole time you were trying to talk to him about his whereabouts on that day, also?

A Extremely, yes, sir.

Q When did you get the information from him that he had, in fact, been separated from Umberto on two short occasions?

A I believe I got that from Mr. Amilio.

Q And Mr. Amilio indicated that he was separated once when he took Amilio's nephew to the Seven-Eleven?

A Yes, sir.

Q Is there a Seven-Eleven near South Fredrick Street?

A Yes, sir, right across the street, kiddy-corner.

Q And he told you he bought some candy and cigarettes?

A Yes, sir.

Q And he came back to Amilio's with this nephew and the fruits of his purchases?

A Yes, sir.

Q So, the only time Umberto indicates that they were separated was during the short period of time estimated between 1:30 and 2:30?

A No, the -- he didn't indicate.

Q How about the second time?

A The second time was somewhere in that area.

Q But no more than twenty minutes?

A He indicated twenty minutes or less. He indicated

twenty minutes, because he was watching a soap opera on t.v.

Q Twenty minutes or less?

A Yes, sir.

Q When he came back from whenever he had gone for that twenty minutes, they were together for the next hour or so at least, because they had got down to the Northern Virginia Campus at 3:00 o'clock?

A Yes, sir.

Q Then I understand Orlando came back to Umberto's place and stayed for a couple of minutes and then went back to his place on South Florida Street?

A Yes, sir.

Q When you indicated that Kenny Adams came into the room to take samples and took out tools, what are you referring to?

A He has a plastic bag. He had a brown envelope and some type of cuticle tool. I'm not familiar with it. It has a loop on one end and is a little metal tool.

Q About this long (indicating)?

A Approximately, yes, sir.

Q When he saw that, he got extremely nervous and upset, didn't he?

A At first he didn't. He didn't realize what was

going on and we eventually had to restrain him.

Q He had been in this country for a short period of time, hadn't he?

A Yes, sir.

Q He was a Cuban refugee?

A Yes, sir.

Q Now, he said he went to inquire about the records. That was on the corner of Greenbrier and what?

A I'm not too sure of the exact address. I would say -- I'd have to refer to my notes. I interviewed everyone in the apartment, but I don't know the exact address. It is located in the same building as the management office of that apartment complex, if that's of any assistance.

Q All right.

Is that the building that has the sign out front that says, "Office," sir?

A Yes, sir. I would estimate about Greenbrier Street and Eighth Street or Seventh Street, somewhere in that area.

Q Now, during your part of this investigation, you didn't find any of the victim's stolen property on Orlando, did you?

A No, sir, I did not.

MR. MELSON: Could we have one second, Your Honor?

That's all I have, Your Honor.

THE COURT: All right, sir. Thank you.

REDIRECT EXAMINATION

BY MR. KENDRICK:

Q Mr. Tomez, just one other question, you indicated there were several things about his statement that were inaccurate. Is there anything other than the Greenbrier -- the times and points, the fact he said he was with Umberto all day long -- were there any other inaccuracies that you found?

A I wouldn't say inaccuracies. He was off on some of the times by an hour or so. On some of the times, for example, I asked him how long it took him to walk a certain distance and he would say fifteen minutes when in fact it took ten or fifteen minutes.

Q Anything else?

A Nothing of value.

Q How many things concerning time was he off on?

A Mr. Dominguez?

Q Yes, Orlando.

A One on the walk to the Northern Virginia Community College.

Q He was off by an hour on that one?

A He wasn't off about the time it took to walk there.

He was off by what time it was. He said he didn't have a watch. He said he was guessing, as I'm doing now. But I don't believe it was an hour. It might have been a half hour.

Q Do you recall specifically? When you say by an hour or so, do you recall what you were talking about and exactly what he was trying to refer to?

A An example would be that he told me that he got up at approximately 10:00 o'clock. Amilio told me they got up at 11:00, that type of thing.

Q So, his time references didn't jibe?

A On some occasions, yes, sir.

Q And we know for a fact that he says he was with Umberto all day long and that was not accurate?

A Yes, sir, it was not.

Q He said he was with him the entire day and he was not?

A At first he did say that.

MR. KENDRICK: Thank you very much.

MR. MELSON: Kevin, wait a second.

Your Honor, we will save our questions for rebuttal.

THE COURT: All right. Remain available for rebuttal.

* * *

(Whereupon, the jury returned to the jury box.)

Whereupon,

DR. HORMUZ GUARD,

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RECINTO:

Q Doctor, for the record, state your full name, please.

A My name is Hormuz Guard, G-u-a-r-d.

Q What is your occupation?

A I'm a Medical Examiner appointed by the State of Maryland with my office in the City of Baltimore.

Q You are with the Medical Examiner's Office in Baltimore?

A Yes, sir.

Q That is the oldest Medical Examiner's Office in the country, isn't it?

A Yes. Baltimore's Office was started in 1939 and it is the oldest statewide system in the United States.

Q What is a medical examiner? Would you explain to the jury what you do?

A A Medical Examiner is a physician trained to be a doctor first and then he is trained in the specialty of pathology, which means he has to understand all kinds of diseases and as to how a person can suffer from certain types of diseases and then die from them. A pathologist especially studies injuries and tries to understand what types of injuries can be inflicted on humans that result in death and that becomes a specialty of what we call "forensic pathology." All that kind of training takes a minimum of sixteen years after passing high school and the appointment of Medical Examiner by the State is with the specific purpose of investigating into all kinds of deaths which are sudden unnatural and suspicious and an ordinary physician cannot sign a death certificate, because death has to be investigated and the Medical Examiner has to come to the conclusion whether the death resulted from natural causes, accidental, homicidal or suicidal, and get into the details and the whole and understand the whole problem.

Q What particular training did you receive for this purpose?

A As I said, I am a Doctor of Medicine to start with. I have a specialty degree of Doctorate in Pathology and I did two years of research with Harvard University in Boston. I

DEO REPORTING
(703) 751-0013

spent one year of research at Dartmouth, New Hampshire and four years of pathology in Rockville, Illinois. Then I decided to try forensic pathology and I came to Baltimore, the most prestigious office and I liked it so much I stayed there for the last seven years.

Q Do you also teach in the university?

A I'm Assistant Professor in the University of Maryland and I teach at John Hopkins University.

Q Have you written any papers or articles?

A I have written papers, yes.

Q Would you give us some examples?

A Well, I did research on the contraceptive pill, the birth control pill, which is the cause of so much trouble in the world today. But it has done good as well as it has done harm. I was at the original time when Dr. Pinkers in Boston formulated the pill. After that I have done many other things.

Q How long have you been in the practice of pathology, Doctor?

A I have been in the practice for thirty-three years and I hope I don't look that old.

Q How long have you been in forensic science?

A I have been in forensic science as an entirely

restricted practice for the last ten years.

Q Have you testified in court?

A Several times.

MR. RECINTO: At this point, I would like to move that Dr. Guard be admitted as an expert witness.

MR. TRODDEN: No objection, Your Honor.

THE COURT: He is qualified. Go ahead.

BY MR. RECINTO:

Q Why is a Medical Examiner called to the scene of a homicide?

A Well, as I said, a Medical Examiner is the one who has studied all kinds of injuries. He knows how a person can be afflicted with a particular kind of injury, how he would die, how soon he would die, what kind of bleeding would occur, what would be his chances of survival and if he died, the police and subsequent investigation would many times require him to determine as to what time that person died.

Q I will give you a hypothetical: You are called by the police and you arrive at the scene and you find an old woman lying face down in a pool of blood with several lacerations in the head and skull fractures. Tell us what you would do in such a situation.

MR. TRODDEN: I would object to the form of the

DEO REPORTING
(703) 751-0013

question. If he uses the hypothetical form to request an opinion answer, I don't believe all the material elements of the hypothetical have been proffered.

THE COURT: It doesn't sound as though you are asking for an opinion, but what procedures he would follow in order to reach one.

THE WITNESS: If I do receive a call from the police department to visit a scene and, you know, that the police always need help if it is late in the night, I would ask him, "Why do you want me?" They would say, "Doctor, we need you because the scene is important and there are several things that you can tell us." I say, "All right, I will come." Then I go to the scene. The first thing I would notice is if the scene has been adequately guarded and no one has moved anything. The victim has not been moved. Then I would look around the room and see how big the room is. I would look at the temperature of the room to determine if the room is very hot or very cold or if there are any windows with cold winds going into the room, because all of those things would ultimately mean something with the body temperature of the victim lying on the ground. Then I would proceed to determine if there are any blood splatters around the body and to see if the blood is indeed dried up. Is it drying or fresh? I would

put my hand into a pool of blood and see if I can feel if it is warm. If it is warm very recently, then I would go about touching the body to see if the body is warm to touch. Generally, as all of us know, we touch the body with the outer side of our hand, not the inside of the hand. The inside of the hand has thicker skin, so we try to feel the temperature. Now, if the temperature is felt and is a little cooler than normal temperature, it is just presumed that you feel the body is cool. That is not an accurate way of doing anything. If a Medical Examiner is especially called to the scene, he should come with his paraphernalia in a bag which has all sorts of instruments.

Q What sort?

A One of the instruments used when called to determine body temperature should be a thermometer and a thermometer of not the kind the doctor uses. Doctor's thermometers are not sensitive. Not a mercury thermometer, but an alcohol thermometer. A thermometer made of alcohol may be used. I believe you have got the right kind there (indicating). I don't know how you got it.

(Handing to the witness.)

Q What kind are you holding in your hand?

A Yes, this is the kind we generally like to use.

Q Would you tell the jury what it is used for?

A Yes. This is probably the right kind that you would use. We use a similar kind. They are not exactly the same. This is a thermometer which gives you a wide range of temperatures varying from minus twenty degrees Fahrenheit to 120 degrees Fahrenheit, which probably would be the extreme degree in the winter and on a very hot day. A clinical theremometer would not give you that range. So, you should specifically have a thermometer like this (indicating) and put it in the rectum of the victim, because that is the deeper part of the body, and insert it three or four inches and let it remain four or five minutes and read the temperature while it is still inside the body and record it accurately. By recording it accurately, you come to know as to what is the temperature of the body and how much heat has been lost. Now, the loss of heat would depend on where the body is lying in the room. If the room is excessively hot, as some people in winter keep their houses hot, the body would lose temperature slowly. If the body is lying near a window with the cold wind blowing on it, it will lose more. At the same time, if the body is lying close to a radiator radiating heat, in that case the body may be quite warm and it may even start decomposing. We have seen cases where two people died in the same room.

One person is lying near the radiator and the other person is not near the radiator. The person near the radiator is almost decomposed and the other has not. All you do is get the body temperature and the ambient temperature. So, we should determine all those things and then if it is determined that it is really critical -- which the police department ought to be able to tell the Medical Examiner.

In this case, we haven't apprehended anybody. We don't really have a suspect and we feel that the body temperature is going to be very crucial. In this case the Medical Examiner should forego his one night of sleep and spend more time near the body. He should leave the thermometer inside the body, not the rectum, but into the liver and make a small cut on the side, as I am showing on my body (indicating), and insert the thermometer into the liver and watch the thermometer for at least one to two hours. The thermometer will show how the temperature is falling within the two-hour period noting the gradation of the fall, you can plot a graph and from the graph you can go back and say, "Well, this room with the air conditioner running or the heater was very hot and the body is losing maybe only 1.5 degrees per hour and in my experience, the body has lost three degrees per hour and so, going backwards, calculating, I would

say that this person was dead more or less precisely by a particular time and calculation.

Q You mean there is a formula that you can use?

A Yes, the formula would depend upon the temperature of the room and the conditions surrounding it. So, the meticulous work of the Medical Examiner is all the evidence as to what he does at the scene and if all that has not been done, then determining the time of death would be really difficult and may not be accurate.

Q Doctor, what is the normal temperature of the human body?

A Well, 98.6 is considered normal.

Q So, given the normal temperature of the human body and if you find from your thermometer what the actual temperature of the victim was at the time of the examination, is there a formula that you can use to arrive at the number of hours?

A All right. I can give you a general formula. Like I say, most people maintain a room temperature of about seventy degrees in the room. Then if a person is found in a room which is seventy degrees and if his body temperature is ninety degrees, then ninety-eight minus ninety degrees would be a difference of eight degrees. If you divide the eight

degrees by about the average figure of 1.5 degrees per hour loss of temperature, that would give you a certain figure. It would give you a figure of less than seven. So, then you would surmise that the person could have died maybe about six or seven hours ago. It depends upon the temperature.

Q Doctor, if the temperature has not been taken at the time of the scene and there has been testimony that the body was cool to the touch, would you say the temperature is four or five degrees lower than normal?

A No, that also has got many problems involved. How to touch it. It can be anything. A person who is dying is in a shock, and, you know, if you people have ever seen a person in shock, a person in shock perspires and the body temperature is cool on the surface pretty rapidly and if you can feel the body temperature is cool by merely touching the body, it could be an average a degree of four or five degrees lower than the body temperature. But the coolness is a crude way of testing a temperature.

Q How would you usually do this, Doctor?

A This is there in my bag all the time (indicating).

Q What other factors would you consider in trying to determine the time of death?

A As I said, the most important is body temperature.

DEO REPORTING
(703) 751-0013

If you have not done that, then you have your reasons for not doing it. Either you are negligent or you do not know about it or you are not adequately trained, but I'm not going to say anymore, but you did not do what was done. That's the end of it.

But then what you do is look at the stiffening of a body. When a person dies the muscles of the body have a chemical change. The chemical change in the muscles makes the body muscles stiff and the stiffening will come up in a certain amount of time and that is always dependent upon many factors. One of the factors is the room temperature. One of the factors could be the person was already suffering from a fever or some kind of disease which increased the body temperature. The other factor would be if the person had been engaged in some kind of severe exertion like football playing and the body would become stiff within a matter of minutes, a half hour or so, because his movements have got a certain kind of chemistry which makes the muscles stiff. Now, the same thing will happen to a victim if a victim is involved in a struggle with a person which involves a lot of activity to musculature, that means muscles going into rigidity quite soon. Ordinarily, if a person is normal and has no activity whatsoever and the room temperature is seventy degrees, then

one would say rigidity starts in about two or three hours and may be completed in maybe about eight to ten hours. That's considering normal conditions. But, as I said, the Medical Examiner's duty is to evaluate all the conditions surrounding the scene and to come to a conclusion from only the rigidity would give you a variation of so many hours that it is not an accurate way.

Q Doctor, let me give you another hypothetical: If you arrived at the scene at around 6:00 o'clock and the outside temperature is forty degrees and the victim is dressed only in a shirt, a blouse and skirt, and the victim is lying close to a radiator and her head is also close to an icebox and there is only one window closed and the room temperature is between seventy to seventy-five, how would you assess the approximate time of death based on these factors?

MR. TRODDEN: Your Honor, I object. I do not believe all the factors of the hypothetical in evidence. Most particularly, I don't believe there is any evidence concerning the radiator proposed in the hypothetical and the only testimony concerning the radiator was that it was off.

THE COURT: I don't remember any testimony about whether the radiator was on or off. I do recall the radiator was there, according to one witness, and it was comfortably

DEO REPORTING
(703) 751-0013

warm. But I think the hypothetical is okay. Objection overruled.

BY MR. RECINTO:

Q Go on, Doctor.

A I would like to know how close the body was to the radiator. Do you have any scene pictures?

THE COURT: I don't think you can put that into it, because the evidence is devoid, as far as I can recall, the testimony, about whether the radiator was actually heating or not.

BY MR. RECINTO:

Q Well, with it being seventy-five degrees in the apartment and the temperature outside being forty degrees --

MR. TRODDEN: (Interposing) Your Honor, I think there is no need for assumptions. Officer Beuchert earlier on in the trial testified, according to our notes, that the radiator was not in fact on. He had touched it and according to him, it was not on.

THE WITNESS: What kind of a radiator, hot air or a steam radiator? A steam radiator never goes completely cold.

THE COURT: You say there is a witness who testified he touched it and it wasn't hot?

MR. TRODDEN: Yes, Your Honor, he felt no heat

coming from there.

THE COURT: I don't think you can put it into your hypothetical as a fact there proved. The ambient temperature of the room is all we have in this case.

BY MR. RECINTO:

Q Okay.

Based on -- without considering the radiator then, but considering the fact that a policeman had to open the door because he was feeling uncomfortably warm --

MR. TRODDEN: (Interposing) Your Honor, I don't believe that is the exact testimony either. I believe the opening of the --

MR. KENDRICK: (Interposing) Wait. It was a window.

MR. TRODDEN: (Continuing) -- window was open not only because it was warm, but also because it was malodorous.

BY MR. RECINTO:

Q That the temperature had been considered that the room is between seventy and seventy-five degrees and let's assume for the moment that the victim had some physical exertion --

MR. TRODDEN: (Interposing) Your Honor, I object to that assumption. That is not in evidence.

DEO REPORTING
(703) 751-0013

THE COURT: Objection sustained.

MR. RECINTO: I withdraw that, Your Honor.

BY MR. RECINTO:

Q I show you Commonwealth's Exhibit No. --

MR.KENDRICK: (Interposing) What is Dr. Beyer's autopsy report?

MR. MELSON: Mr. Clerk, what is the autopsy report exhibit number?

THE CLERK: No. 36.

MR. KENDRICK: No. 36. Have you got the actual exhibit over there?

(Handing to the witness.)

BY MR. RECINTO:

Q I'm directing your attention to a page showing the back and front portion of the body. What do you notice on the left hand of the victim?

A This is a diagram with handwritten explanations of the pathologist doing the external examination which shows that he has made several notations of different kinds of injuries on the back of the neck, on the upper back, on the mid part of the back and the outer aspects of the left hand as well and there are some injuries to the head, as well as some injuries to the front aspects of the right knee.

Do you have any photographs taken at the scene?

MR. RECINTO: Yes.

MR. KENDRICK: Your Honor, I'm showing the witness Commonwealth's Exhibit No. 101, Commonwealth's Exhibit No. 10, Commonwealth's Exhibit No. 34, Commonwealth's Exhibit No. 35, Commonwealth's Exhibit No. 102, Commonwealth's Exhibit No. 5.

(Handing to the witness.)

MR. KENDRICK: If you would refer on the back, Doctor, when you are talking about a photograph, it would be helpful.

THE COURT: Have you completed your hypothetical?

MR. RECINTO: Not yet, Your Honor. I'm trying to establish something from this doctor.

THE WITNESS: This photograph clearly shows different kinds of injuries in different locations, which would have definite implications.

BY MR. RECINTO:

Q What are these implications?

MR. TRODDEN: Your Honor, I would object as to the doctor testifying as to an implication on a photograph. If he's prepared to offer expert opinion on only seeing a photograph, I would like to hear that. Any implication which he is deriving I think is totally inadmissible. It is seeking,

first, not even opinion, but implication.

THE COURT: It seems to me this matter has become unduly complicated. If you want him to venture some opinion now based on the photographs, you better withdraw the hypothetical question. Why don't you do this: Start your hypothetical later after you have done it?

MR. RECINTO: We will do that, Your Honor.

BY MR. RECINTO:

Q Based on the viewing of these photographs, do you have any medical opinion as to whether or not the victim had exerted herself in a struggle or there was any exertion before death?

A Yes. I believe we entered in this discussion because I requested the photographs to see if this victim had in fact entered into any process which would have caused such an amount of exertion. The injuries that I see here -- the lethal injuries here are obviously on the head with profuse bleeding. There are multiple injuries with several injuries with crescentic outline on the right upper back, below the neck, on the back and in the mid portion of the back, which have all definite patterns. They are patterns which would be consistent and produced by an object with a circular outline. Now, the fact that these patters have been produced in other

areas which are not lethal, as well as the injuries on the hand, indicate that the victim was able to put up a fight or else she would not sustain injuries in nonlethal areas. If the injuries were lethal on the head, the subject would be down on the floor quickly and would not be able to put up resistance and putting up resistance is severe exertion.

THE COURT: Doctor, how can you conclude the victim put up resistance?

THE WITNESS: The blows to the back is something which is not going to kill anybody -- not with this implement. These are not lethal blows. Then there are blows to the back of the neck which is also not lethal. There are injuries to the hands -- to the hand, and here (indicating), which indicates that the person had been trying to protect herself in some way or the other. The hand is a mechanism somebody would protect themselves with or turn around if someone is trying to hit us and you would get them on the back. They are defense maneuvers. What can you do? You do what you can.

THE COURT: Doctor, how can you tell whether those blows in nonlethal areas were received in the course of the struggle or resistance or whether they were administered after all resistance had ceased or perhaps after the victim was dead and additional and unnecessary blows were placed upon the body?

DEO REPORTING
(703) 751-0013

THE WITNESS: That's very well put, Your Honor. I've seen many cases where a person who was to inflict lethal injuries to a person would go ahead and inflict the blows which were likely to kill a person. I wouldn't inflict blows by a person -- there is no fun to it. A person is committing it and he wants to finish it and leave the scene of the crime as fast as he can.

MR. TRODDEN: Your Honor, with respect to the Court, I believe the conclusion of the doctor as to the mental state of criminal is not relevant.

THE WITNESS: I'm not implicating the mental state.

THE COURT: I want you to finish your answer.

THE WITNESS: Yes, Your Honor.

In our work we are the only medical people involved. We see the types of injuries that we see. We see how injuries are inflicted and why they are inflicted and what purpose they are inflicted and how people may inflict those injuries and we have seen that people do not inflict injuries which do not do anything to their victim unless there is a purpose. There is no purpose in hitting a person on the back.

THE COURT: Then your answer to my question as to how you can tell whether those blows were unnecessary blows on a helpless body or whether they were inflicted while the

victim was trying to resist is based upon your analysis of the mental state of the criminal and based upon your experience of how criminals usually behave. Is that how it is?

THE WITNESS: No. I'm not here to judge. However, the person who inflicted the thing -- I'm only saying that the evidence shows that the person has seen the weapon being threatened at herself and has received one or two blows and now has realized that he or she is going to be struck with one or more blows. When you are confronted with something like that, you will protect yourself. You would put your hands in front of you and turn around and protect your head and protect your vital organs and then these injuries are the injuries sustained while you are trying to protect yourself. In a sitation of this kind, there is a tremendous heartbeat and tremendous excitement and all the muscles are tensed and that is exertion.

THE COURT: I don't understand how you can conclude that the victim was alive when the unlethal blows landed upon her.

THE WITNESS: Your Honor, the bleeding in these wounds.

THE COURT: Doesn't that proceed for some time after death?

DEO REPORTING
(703) 751-0013

THE WITNESS: After the heart stops, not active bleeding.

Some of the wounds in the back of the neck are antimortem wounds.

THE COURT: There is nothing defensive about the blows in the back of the neck, is there?

THE WITNESS: I know nothing defensive about that, but the person might have bent down -- the head may have been bent down to try to escape the blow aimed at the head and if the person was behind them, the blow would go to the back.

THE COURT: Where are the defensive wounds that you are talking about?

THE WITNESS: I would consider the wounds on the upper back the kind where the person tried to duck his head and the blow goes down to the upper part of the back. That's also clearly seen, because the lower part of the injury is the curvature and according to my experience, if the instrument used was a hammer, it indeed means a person was bending down.

THE COURT: How can you say that that was a voluntary bending down and not falling down?

THE WITNESS: If one is falling down, there is an acceleration by gravity at thirty-nine feet per second. I think four blows by thirty-nine feet per second --

THE COURT: (Interposing) Do you think the blow on the back is a defensive wound?

THE WITNESS: I think these wounds are inflicted on a person that has become aware and has bent the head down.

BY MR. RECINTO:

Q Go ahead. Are they also consistent with the person trying to cover the back of the head?

A That is possible.

Q And the wound in the back of the hand?

A That is a classical type of injury.

Q What effect in this case would exertion have on the rigidity of the victim?

A That brings an important factor in the rigidity. When you are exerting a lot your muscles become rigid by lactic acid. If the lactic acid has created by exertion, the rigidity will come sooner.

Q Let's go back to the hypothetical that I'm giving to you: That you found the victim dressed only in a shirt sleeves and skirt and the outside temperature being only forty to fifty degrees and the victim had physical exertion and the room temperature being seventy or seventy-five and one window is closed, what would be your medical opinion as far as the time of death?

DEO REPORTING
(703) 751-0013

MR. TRODDEN: Your Honor, I object to the hypothetical because contained in the hypothetical is an opinion upon which an opinion will be based. That is that there was defensive actions on behalf of the victim. That is an opinion of this witness of which there is no eyewitness to the crime and thus we are seeking an opinion which is in part conditioned upon the opinion of this evidence.

MR. RECINTO: Your Honor, medical opinion is evidence in the case. This is further testified to medical opinion which is evidence in this case in the same way Dr. Beyer can testify before this court. These are experts. We can work with them.

THE COURT: Dr. Beyer saw the body as did Dr. Sheehy. This gentleman has only seen the photographs. He did, however, conclude from that that he thought there was some evidence that this victim would have been through some exertion. It seems to me he is competent to state that opinion stating it from the basis of the facts from which he drew it, those being the photographs of the injuries. The jury will have to weigh whether that opinion is based upon any evidence and what weight is to be put to it. I think that is competently stated and so I think he should answer.

BY MR. RECINTO:

Q If you examine the body at 6:00 o'clock, what would be the time of death in your opinion?

A If I came to the scene at 6:00 o'clock and if I did not record the temperature, I would be considerably handicapped. All I would go by would be the rigidity. Looking at the clothing that the victim was wearing, it was fairly light clothing. According to what you say, the room was quite warm; otherwise, she would be wearing some definitely --

MR. TRODDEN: (Interposing) I object to the conclusions as to the temperature of the room. I believe there has been some testimony of that, but in the hypothetical -- this man had never been in the apartment to make conclusions as to temperature or what suited the victim in terms of her attire. This is totally objectionable testimony from this witness.

THE COURT: The objection is overruled. He is rendering an opinion based upon the evidence said to him in the hypothetical and photographs he saw. He's competent to draw conclusions from that as a Medical Examiner would draw it.

THE WITNESS: Your Honor, what I'm doing is thinking

DEO REPORTING
(703) 751-0013

aloud as to what I would be doing when I arrived at the scene. I am not drawing any conclusions. I'm saying as to what I would and how I would come to a conclusion. The process arriving at a conclusion.

So, as you say, the clothing was light on the person and the outside temperature was forty degrees which is meaningless to the inside temperature because the window is closed. The woman is lying on the floor. It would be an important thing for me to know what kind of a refrigerator was being used, an automatically defrosting refrigerator or an ordinary refrigerator; do you have that information?

BY MR. RECINTO:

Q No.

A Did the Medical Examiner try to find it out?

Q No, he didn't.

A An automatically defrosting freezer will blow hot air and would have been a condition of the body and affected the rigidity considerably. Taking everything into consideration, I think I would be significantly handicapped. The opinion cannot be very definite, but if the body was, as you said before, was just cool to the touch maybe about five degrees less than the body temperature, which is just perceptively cool, in which case assuming that that was what

the Medical Examiner felt, five degrees below body temperature, would then by calculation from the standard formula, standard body temperature less 1.5 degrees per hour would come to be about five degrees divided by 1.5 -- it would come to be about four hours.

Q Four hours before 6:00 o'clock?

A That can be as close as one can get with the lack of all the information that I need or anybody should need.

Q Thank you, Doctor. Is there any other means of determining the time of death other than rigor?

A There is such a thing as the fluid we call "vitreous humor" in the eye. It is the fluid in the eye and it is very delicate fluid which has certain contents of potassium. After a person died if it is important that a Medical Examiner should take that fluid out with a syringe and make a chemical determination of the amount of potassium in the fluid.

Q Would you do that at the scene of the crime?

A No, you collect that material. If you go with the idea to determine -- a Medical Examiner is not called to the scene to pronounce death. He knows that the death has occurred. He knows that. He is not going to see -- to look at blood and gore. He is going there for a purpose and that

DEO REPORTING
(703) 751-0013

is to determine the time of death. Now, the Medical Examiner should have taken the vitreous humor and submitted it to a chemical analysis. Potassium increases after death in a consistent manner up to about a hundred hours. From a graph we could establish a more accurate and reasonable time of death, but that was not done.

Q No, it wasn't. Is there any other method or determination for determining the time of death that you know of?

A Well, another important thing would be to look at the stomach contents.

Q Okay. If I give you the hypothetical again that the stomach content has a small amount of digested food, what significance can you procure from this?

A Protein, white of egg, vegetable? There are so many kinds of foods.

Q The autopsy did not reveal that. We only have the small information that there was a small amount of digested food.

A It is wrong to say the autopsy did not reveal that. The autopsy reveals everything. It reveals everything. Autopsy in Latin, auto means self and opsy means to see. The physician must see for himself what he's going to announce.

The autopsy reveals everything. It is the physician who does not see it.

All right. Now, if the stomach contents are accurately analyzed as to what it was, pieces of potato, egg, whatnot, the type of digestion and the amount of digestion and the quantity, I could tell you how long the stomach contents was in the stomach and if by chance you knew what time the person took the last meal, then the time of death would be closely approximately. But do you know anything about the last meal about this person?

Q No, I don't.

A And neither do you know what the stomach contents were?

Q No.

A So, it is an investigation which is inadequate.

Q Okay. Let's go to the blood splatters. Would you explain to the jury the significance of blood splattering as far as your profession is concerned?

MR. KENDRICK: What do you want to see, the suit or the pictures?

MR. RECINTO: Let's start with the picture.

BY MR. RECINTO:

Q While we are doing that, tell the jury how a

splatter arrives and what happens?

MR. KENDRICK: Your Honor, for the record, I'm showing the witness Commonwealth's Exhibit No. 13, 15, and 14.

(Handing to the witness.)

THE WITNESS: I have pictures here of evidence, No. 13, 14 and 15 which shows splatters on the wall. One is "to the radiator," which shows really large drops of blood. They are so large that in fact the blood after being spilled on the wall, has by gravity settled down. Therefore, I would say they're considerably large droplets of blood. There are smaller drops of the blood in another area and also just about the radiator in the other area (indicating).

BY MR. RECINTO:

Q Doctor, what are the factors that go into the size of these drops?

MR. MELSON: I didn't hear the question.

BY MR. RECINTO:

Q What factors go into the size of the splatters?

MR. MELSON: The size?

MR. RECINTO: Yes.

MR. MELSON: Thank you.

THE WITNESS: Well, blood, as you know, is thicker

than water as the old saying goes and splatters means blood in a definite manner. In fact, I have a manual here published by the United States Department of Justice Law Enforcement Assistance Administration which is a manual which is entirely on the study of blood splatters.

Now, blood splatters are not just to be looked at as just splatters of blood. You have to look at the size of those splatters and how the blood has splattered in different directions. You should look at the source of the origin of the blood and from where it flies out. You should try to find out at what amount of energy the implement was struck on the pool of blood to cause those splatters. A high velocity strikes an object containing blood, the blood splatters will be as a very tiny droplet form. If the force is medium, like hitting with an ax or a hammer or something with a manual hitting, then it is called medium force. Then blood splattering patterns are droplets of an average of one eighth of an inch depending again upon the distance, but irrespective of the distance, the droplets will fly and make spots wherever they touch the particular area. But the droplet size is larger than the higher velocity strike. Since these are quite large, it is apparent to me they were striking an object with medium force.

DEO REPORTING
(703) 751-0013

Q You are saying that the splatters are consistent with medium velocity force?

A Medium velocity force.

Q I show you a suit entered into evidence as --

MR. TRODDEN: (Interposing) Your Honor, at this time the Commonwealth will object to further comments concerning these splatters unless there is a qualification of this witness as a blood splatter analyst. He has been qualified as a forensic pathologist.

MR. KENDRICK: Would you like to voir dire him?

MR. TRODDEN: I think you have to proffer his qualifications.

THE COURT: You may proceed to do that.

BY MR. RECINTO:

Q Have you had any experience in dealing with blood splatters?

A We deal with them all the time. I --

MR. TRODDEN: (Interposing) Your Honor, I would like the witness to answer only the questions propounded to him rather than giving a dissertation to on all the questions.

BY MR. RECINTO:

Q These blood splatters, is that part of forensic medicine?

A Yes, sir.

Q Have you had training in blood splatters?

A Yes, sir.

Q How many cases have you had in the past that dealt with blood splatters?

A Numerous.

MR. RECINTO: At this point, Your Honor, I think the forensic expert is clearly capable of being an expert on this.

MR. TRODDEN: Voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. TRODDEN:

Q Where did you receive your training?

A From day-to-day work.

Q So, you have no formal training from a professor in blood splatter analysis?

A What do you mean by "formal training"? Do you want me to hit somebody with a hammer --

Q (Interposing) Please answer my question.

A Repeat your question.

Q Do you have any formal training in blood splatter pattern analysis?

What is your idea of "formal training"?

DEO REPORTING
(703) 751-0013

A By learning at the foot of another.

There is no college of blood splatter analysis in the United States of America.

A Are you saying there are no experts in blood splatter analysis in the United States?

A Nobody has been especially qualified by saying "blood splatter analysis expert."

Q Are you familiar with people who have published in the field?

A There is a publication, yes.

Q Are you familiar with other publications on that?

A I have seen many.

Q How many?

A I would not be able to enumerate.

Q Tell us how many you've read.

A Well, I've read -- I don't have an account of each and every thing I read.

Q Is it a fact that you can't remember?

A I don't remember the references.

Q I see. So, your whole experience with blood splatter pattern analysis is what you have seen with your naked eye?

A That's the best one you can have. Let me tell you

that.

MR. TRODDEN: Your Honor, I object to qualifying this man as an expert in blood splatter pattern analysis.

THE COURT: Objection sustained.

MR. RECINTO: Would you indulge us, Your Honor?

MR. KENDRICK: May we have a brief recess, Your Honor?

THE COURT: Well, how much time do you want?

MR. KENDRICK: I would like to confer with my counsel for about five minutes -- ten minutes.

THE COURT: I hate to give you that long while he's on the stand. Go ahead and confer. We'll just stand here.

MR. KENDRICK: Thank you.

(Whereupon, defense counsel conferred at this point.)

DIRECT EXAMINATION (Resumed)

BY MR. RECINTO:

Q In your work as a medical examiner, have you seen blood splatters?

A Yes, sir.

Q You have also a book that you mentioned that discusses the blood splatters?

A In great detail.

THE COURT: What are you doing, Mr. Recinto?

MR. RECINTO: I'm just going to let him read an authority on blood splatter, Your Honor.

MR. TRODDEN: Your Honor, over the Commonwealth's objection.

THE COURT: The objection was sustained. It would appear that his acquaintance with blood splatter analysis is based upon looking at lots of blood splatters and reading books and it would appear to me that any vice man would have that much experience. I would not allow the testimony from the Commonwealth witness on that subject and it does appear to be a specialized field. The objection is sustained.

BY MR. RECINTO:

Q Doctor, have you conducted any experiments on blood splatters other than your reading?

A In one of my cases, yes.

Q Are you prepared to do some experiements or demonstrations on what you have done?

A If I can show you how tiny drop splatters can be placed on a piece of --

MR. TRODDEN: (Interposing) Your Honor, I object. He is not qualified as an expert. These are various that the finders of fact can use from their experience contained

therein. This witness is not an expert. This is a matter exclusively in the province of the jury.

MR. RECINTO: It matters. He has conducted experiments on and the Doctor has been a pathologist for thirty years. Blood is about thirty or sixty percent of pathology. He has been a forensic pathologist for years dealing in homicide. Blood has to be a part of that crime. He has that experience and he can talk to the jury on the very critical point of blood splattering.

THE COURT: Well, he did not state what seemed to me to be a sufficient foundation to allow him to express an expert opinion on that subject or would go beyond anyone else looking at a lot of splatters.

Now, are you seeking to lay a new foundation or what?

MR. RECINTO: Yes.

THE COURT: Do you wish to produce something further that you did not before -- that you didn't state before?

MR. RECINTO: Yes, Your Honor.

THE COURT: This has to do with experiments with drops of blood and asking him to carry on experiments here in the courtroom or what?

MR. RECINTO: Yes, to show how tiny blood droplets

DEO REPORTING
(703) 751-0013

of blood can be placed on a piece of clothing.

THE COURT: How tiny drops of blood can be placed on a piece of clothing?

MR. RECINTO: Yes, Your Honor.

THE COURT: Does this require expert testimony? Isn't this something that the jury can do for themselves?

MR. RECINTO: Well, it has been shown that this has been done, Your Honor.

THE COURT: Well, who would doubt that tiny drops can be dropped on to clothing? I don't know if you need any expertise in that.

MR. RECINTO: Well, Your Honor --

THE COURT: (Interposing) Perhaps I should see you at the bench. Yes, I'm not sure where you are going with this.

(Whereupon, the following bench conference was held out of the hearing of the jury.)

MR. RECINTO: Okay. Your Honor, the basis of all that is that the size of the droplets on the wall is consistent with the medium velocity impact and we have established that. Now, he has accomplished medical studies and read in books that tiny droplets cannot be produced by medium velocity impact and are only produced by high velocity

impact. He can testify on that. Within the distance of the legs and the pants to the victim being shorter and the wall to the victim being longer, the important conclusion is that the droplets on the wall should be smaller and this did not happen. We need testimony on that. We need testimony that the splatters on the pants could not have come at the time of the scene and it is impossible to put it at any time, as I said. That's the basis of our --

THE COURT: (Interposing) What I was coming to is what probative value does that have in this case and you say that his testimony would be to the effect that the droplets on the pants could not have been produced at this scene?

MR. RECINTO: At that time of medium impact.

THE COURT: What if it is a high velocity impact?

MR. RECINTO: He already testified that it is not an impact force of a hammer action. It is a medium velocity impact act. This is like a bullet, a high velocity impact. Those produce tiny droplets.

MR. KENDRICK: The probative value is very high, Your Honor. It is very high especially in the light of the fact that there is nothing conclusive to show that the blood on the suit is the blood on the victim. This man is as much of an expert in this country as anybody is going to get.

DEO REPORTING
(703) 751-0013

MR. TRODDEN: This falls right within the province of the jury.

MR. KENDRICK: It goes to our argument and to the weight.

MR. TRODDEN: It is within the province of the jury. The key question is whether this man is an expert and whether he may proffer an opinion if --

MR. KENDRICK: (Interposing) Why don't you --

MR. TRODDEN: (Continuing) -- Counsel, could you be kind enough to let me --

MR. RECINTO: (Interposing) It is a very critical piece of evidence.

MR. TRODDEN: There has been no foundation that this man has done anything other than naked eye observing of blood. There has been no testimony of formal training or that he has conducted experiments using measuring experiments with infra red or high velocity, medium velocity, or anything. There has been no testimony concerning what caused the blood to splatter and we are refusing to concur he is an expert in that field. We do concur he is an expert in forensic pathology. As the Court has heard from another expert witness, a blood splatter analyst has to be highly trained. There are few experts in the United States. Certainly the foundation laid by this

individual is not sufficient.

MR. KENDRICK: That is a matter for the jury, Your Honor, on how much weight is to be given the testimony of either expert. To deny the jury this -- he has even prepared experiments in this very thing that this man has said are important. It is critical for this jury to have it.

THE COURT: What do you propose to show in the way of a foundation?

MR. KENDRICK: He has conducted experiments and he is the pathologist -- it is within an area which he must necessarily know. He teaches it. He teaches the experts.

MR. RECINTO: He did research in Harvard.

MR. KENDRICK: Your Honor, this is a man you would call to teach the experts.

MR. TRODDEN: This is representation by counsel.

MR. KENDRICK: You check his credentials and you will know I'm right.

THE COURT: It seems to me that I should let him go ahead and testify and let the objections go to the weight.

MR. KENDRICK: Yes, sirree, Your Honor.

THE COURT: His qualifications are no greater than any police officer on blood splatters. Anybody can look at a scene and see the blood spots and read that so and so

DEO REPORTING
(703) 751-0013

combinations mean such and such. Any police officer is probably just as competent to draw these conclusions. That does go to the weight. He has made some study and knows about it more than a layman, but I will let him go ahead and testify.

This is off the record.

(Whereupon, a discussion was held off the record.)

MR. TRODDEN: Your Honor, I have one point prior to this. I would object to the introduction through this witness of the text which is before him. The words of the text is something that I cannot cross-examine.

MR. KENDRICK: Why don't we mark it as an exhibit and introduce that and let them read it themselves? You don't want anybody else to read it?

MR. TRODDEN: It is the witness that is testifying and not a book. I would object to the introduction of the book into evidence whether it be vicariously through the doctor or through direct evidence.

MR. KENDRICK: You can't stop him from referring to it. It is one of the thing that he has read.

THE COURT: I've got to do a little research on that point. I don't want him to quote it. He may refer to it.

You may have it marked for identification. If he says it is his authority and he relies on it, I will then rule on whether the book itself can come in as an exhibit. Have it marked for identification, but don't put it in evidence and don't have him read from it.

MR. KENDRICK: He has requested that should it come to that, he would like to have a copy substituted because it is the only one he's got.

THE COURT: Okay.

(The item previously referred to was marked as Defendant's Exhibit No. 13 for identification.)

(Whereupon, the bench conference was concluded, and the proceedings continued within the hearing of the jury.)

BY MR. RECINTO:

Q Going back now, you have already testified that the blood splatter you saw in Exhibit No. 15 of the Commonwealth is consistent with the medium velocity impact?

A Yes. The type of pattern that I see appears to be an impact on a pool of blood which is not of very high velocity, but of medium velocity.

DEO REPORTING
(703) 751-0013

THE COURT: Excuse me. What you are referring to now, Exhibit 15, what's that?

MR. RECINTO: The photograph of the wall.

THE COURT: All right.

MR. KENDRICK: Have you got those photographs, Doctor?

THE WITNESS: Yes, they are here.

MR. KENDRICK: All right.

BY MR. RECINTO:

Q Doctor, would you now examine the suit pants and tell us the size of those and look at the jacket?

(Displaying to the jury, then handing to the witness.)

A This is a beige colored jacket of which I'm looking at the right sleeve now which shows very tiny brownish dried up spots which at first appearance one could not say that they are blood. They would need to be chemically examined.

Q It has been chemically determined that that is human blood.

A Very small droplets of blood, less than about a millimeter in diameter.

Q What can you conclude from the size of this as to the source of this pattern?

A Apparently, the pattern is not consistent with large droplets that one would expect if an implement was being pushed into a pool of blood with medium velocity.

Q What type velocity would produce such droplets?

A High velocity like a bullet going through an organ of blood, tiny droplets.

Q What would produce larger?

A Large pools of blood is when an object is struck and that would produce the largest groups of blood.

Q What type of instrument would this be?

A Anything large, a hammer, a baseball bat, anything.

Q Doctor, would the distance of the object on which the splatter landed and the source be a factor on the size?

A Yes, to a certain extent it would be.

Q You are now saying, therefore, that the blood splatters on the suit are not consistent with the blood coming out from a blow by a blunt instrument?

A I don't think they are quite consistent, taken into consideration the other evidence put in front of me like the splatters on the wall.

Q Do you have any reference that you can tell us what you can base the normal size of a blood splatter produced by medium velocity?

A I couldn't give you a reference as such. I have seen them all over a number of years.

Q What about the book in front of you, Doctor?

A That book shows experiments conducted by the people who have written a book.

MR. RECINTO: I think I would like that page marked Exhibit 13.

THE COURT: It is marked for identification, but it is not admitted into evidence at this time.

MR. TRODDEN: We would like to see it.

MR. KENDRICK: I will let you see it.

BY MR. RECINTO:

Q Would you also look at the pants of that suit, Doctor? Would you examine the droplets?

A I'm looking at a pair of pants belonging to the same suit on which there are multiple markings and circling some small brownish looking areas, some of which have been cut out for chemical analysis, apparently, and they are also the same small size, only about one millimeter in diameter.

Q Would that size be inconsistent with medium velocity impact?

A I would think so. From what I see in the scene pictures and the large droplets of blood on the wall, it is

inconceivable that there is no such pattern on the clothing at all.

Q Doctor, can you produce blood splatters artificially?

A Why not? You can.

Q How?

A Now, you want me to show you how it can be done? I can show it to you.

MR. TRODDEN: Your Honor, I believe he can just testify as to how. It would certainly be sufficient.

BY MR. RECINTO:

Q Would you proceed?

MR. TRODDEN: Your Honor, there are a number of objections I would like to make at this time. One is the similarity of the type of material. Two is the similarity of the type of instruments. Three is the similarity of the substance and four is the similarity of the person striking the blow and the location of that individual before this experiment may be done.

THE COURT: Well, I haven't heard what the doctor proposes to do yet, so I will reserve judgment.

BY MR. RECINTO:

Q Tell the jury what you are proposing to do.

DEO REPORTING
(703) 751-0013

A Yes. Well, as a matter of fact, I'm a bit of an artist myself. Foresic pathologists have to know everything. We deal with all walks of life. If you are a little bit of everything, then you are a good forensic pathologist. All you have to do is take a little bit of ink, put it on a tooth brush --

MR. TRODDEN: (Interposing) Your Honor, I object.

THE COURT: Tell us what you propose to do.

THE WITNESS: I'm just trying to tell you how to produce some splatter droplets on something.

THE COURT: Tell us what you propose to do.

THE WITNESS: Yes, all you do is apply the ink and that's all you have to do. It will produce what you want, but it will not produce big blobs of blood. I mean it will not produce blood like splatters, it will produce tiny droplets.

MR. KENDRICK: Why don't you try it?

MR. TRODDEN: I would object. What is being used is not in fact blood and we are not talking about anything else in evidence. This is pre conjecture.

THE COURT: How does it relate?

MR. RECINTO: Similarity of the pattern on the suit.

THE COURT: Someone there flinging a tooth brush

with ink?

MR. RECINTO: No, we can show it is inconsistent with the type of blow.

THE COURT: He testified to that.

MR. KENDRICK: Your Honor, it is consistent with our theory of the case.

THE COURT: If you have introduced evidence that someone was flinging blood with a tooth brush, otherwise, it is not.

MR. KENDRICK: It is consistent with someone being framed.

THE COURT: You testified to the conclusion that the marks on the clothing are not consistent with whatever put the blood on the wall.

MR. RECINTO: Very well, Your Honor.

That's all, Your Honor.

THE COURT: Take a five minute recess.

(Whereupon, the jury was temporarily excused.)

(Whereupon, a brief recess was taken.)

THE COURT: Would you bring the doctor back? Call the jury in.

(Whereupon, the jury returned to the jury box.)

DEO REPORTING
(703) 751-0013

CROSS-EXAMINATION

BY MR. TRODDEN:

Q Doctor, you are from Maryland, aren't you?

A Yes, sir.

Q How long have you been practicing forensic pathology in Maryland?

A Six and a half years.

Q You are familiar with the authorities in the State of Maryland?

A What do you mean by "authorities"?

Q The leading like in your field.

A Besides me, I think there are several others.

Q Doctor, aside from the one text that you brought, did you bring any other text today with you?

A I have one textbook with me, yes.

Q What is that textbook?

A It is the book written by my office, by the Chief Medical Examiner.

Q What's the name of that?

A Medical Legal Investigation of Death.

Q Who is the author of that book?

A Dr. Russell Fisher and Dr. Spits.

Q Dr. Fisher is your boss?

A In a way.

Q Now, Doctor, you didn't see the remains of this lady, did you?

A No, obviously not.

Q Doctor, you didn't see the scene where she was murdered, did you?

A No.

Q As a matter of fact, Doctor, you didn't even talk to Dr. Beyer, the pathologist, did you?

A No.

Q As a matter of fact, you didn't even talk to Dr. Sheehy, the doctor who visited the scene.

A No.

Q As a matter of fact, most of your opinions today are based upon your observations of the photographs and the documents which you just read today? Right?

A Yes.

Q Now, Doctor, you are not going to tell the ladies and gentlemen on this jury just when this poor woman was murdered, are you?

A I'm not here to tell anybody anything, but to explain medical principles of medical legal investigations.

Q So, in other words, you can't tell them when she was

DEO REPORTING
(703) 751-0013

murdered?

A I can tell them --

Q (Interposing) Please answer my question, can you tell them when she was murdered?

A From the data collected from the Medical Examiner, no, sir.

Q So, you can't tell the ladies and gentlemen when she was killed. As a matter of fact, you are here to castigate the medical examiner for doing a poor job; isn't that right?

A No. There is no pressure from me, sir.

Q Since you can't tell the ladies and gentlemen of the jury when she died --

A (Interposing) I don't castigate anybody.

Q I see.

Doctor, you characterized the wounds on the victim's hands as defensive wounds?

A Yes, sir, it is one of those kinds of wounds which a person suffers when a person is trying to defend himself or herself.

Q It could also be the kind of a wound inflicted by someone who struck her if he struck her unmercifully and by a person who didn't care where the blows landed?

A Possible.

Q Doctor, you said the wounds on the back of the neck were antimortem wounds?

A Yes, sir.

Q How did you base that conclusion?

A Yes, sir.

Q You didn't see that, did you?

A Well, there are good color photographs that are very formidable in showing the injuries very clearly.

Q Look at that photograph and tell me whether or not the skin is torn or not?

A No, there's a sizeable contusion with a lot of hemorrhage underneath the skin, which is typical of an antimortem wound.

Q Could it also be typical of a blow struck just after she was rendered unconscious?

A That's possible.

Q Doctor, you are not suggesting to the ladies and gentlemen of the jury that the blows to the back she received were as a result of her backing into this injury, are you?

A I don't understand what you mean by "back into injury."

Q Well, you characterize the numerous blows on her

DEO REPORTING
(703) 751-0013

back as possible defense wounds?

A It seems that you did not understand me clearly or you did not listen to me carefully.

Q Doctor, why don't you clarify it for me?

A Yes, I will.

MR. KENDRICK: It is difficult for the witness to answer if the answer is always being interrupted by another question, with all due respect, Mr. Trodden.

BY MR. TRODDEN:

Q Please, Doctor.

A I hope you will give me some time in the patience of this court to explain to you.

Q I will, Doctor. Answer the question.

A It is not as easy as a yes or no, believe me.

THE COURT: What is your question?

BY MR. TRODDEN:

Q My question was: You described the wound on the back of the victim as being a defensive wound. I would like you to explain that to me.

A Now, take for example somebody hitting me in the back of my head. What I would do is duck my head. I would bend down in order that the blows would not come down into my head. I would rather have them on my back -- on my lower back

somewhere and not my head. My head is like an egg. It will crack like a shell. Now, that's called a defensive type action on the part of a person who is protecting herself. Is that clear enough?

Q Certainly, Doctor. However, if the very first wounds cracked her skull and rendered her unconscious, these were not defensive wounds, were they?

A Which was a defensive wound? Can you tell me that?

Q I don't know. If the first wounds rendered her unconscious, would they still be defensive wounds?

A There are many types of wounds and people have lived.

THE COURT: That didn't answer the question, Doctor. Assuming that she was knocked unconscious by the first blow, then what?

THE WITNESS: Then she would have given up the fight to the person.

MR. TRODDEN: I see.

A JUROR: Your Honor, may I see the picture that he is referring to?

THE COURT: Which one, sir?

THE JUROR: The one which he has referred to.

THE COURT: The wounds on the back?

DEO REPORTING
(703) 751-0013

(Handing to the juror.)

BY MR. TRODDEN:

Q Doctor, in terms of these splatters which you observed in the photograph, where the splatters were seen on the far wall, you say they are consistent with a medium velocity blow, something like from a hammer; is that correct?

A Yes.

Q Now, Doctor, isn't it true that the first blow to a head is not going to bleed as badly as the thirteenth blow to the head?

A Certainly.

Q And isn't it quite possible that the first blow is not going to produce as much blood?

A If the person is living, the bleeding will continue for two blows or thirteen blows.

Q But the first blow is not going to emit as much splatter as the 13th?

A No, the first blow will merely split the skin and not produce a splatter. The first blow won't produce a splatter; it will be the subsequent blows.

Q I see.

Doctor, I presume since you brought the textbook, the Medical Legal Examiner, you are familiar with it?

A To a certain extent.

Q I presume you are familiar with the statement contained on Page 15? By the way, this chapter is entitled Medical Legal Investigation of Death, time of death, and changes after death is written by your boss, I believe, Dr. Fisher?

A Yes.

Q I believe Dr. Beyer was one of the contributors to this book also?

A Could be.

Q You don't know?

A I don't have to know every contributor.

Q You have the book.

A That doesn't mean I know by heart all of the contributors.

Q Let me ask you a statement written by your boss and see if you agree with it found on Page 15 that says, "A mechanism of determining the time of death rigidity is of relatively little usefulness."

Do you consider that a fair characterization in view of the factors listed earlier?

A Yes, sir. That's what I told you before.

Q Doctor, you talked about the body cooling as one of

the ways and I believe you testified that the body -- if it was five degrees cooler at 6:00 o'clock, you would estimate the time of death at four hours earlier; isn't that right?

A Well, going by the rule of thumb formula, 1.5 degrees per hour, 1.5 dividing four to five degrees would give you that figure.

Q Are you familiar with the study which Dr. Fisher, your boss, stated on Page 18 of the book in which he said, "In a carefully controlled research study, a series of bodies subjected to an environment of between fifty-nine and sixty degrees Fahrenheit and the rectal temperature taken over a period of hours and demonstrated that the body of ninety-three degrees was reached as early as two hours before the death in some cases, but in other cases as late as six hours after death. The body temperature of seventy-nine degrees Fahrenheit simile within the span of nine hours after death. Thirty-two degrees Fahrenheit, eighteen to thirty hours after the death." Are you familiar with that study?

A Yes.

Q Doctor, in reference to the vitreous humor and the levels of potassium, I believe Dr. Fisher -- tell me if you are familiar with this statement, this is on Page 35: "For these reasons, many forensic pathologists have abandoned this

procedure for determining the potassium interval." Are you familiar with that statement?

A Yes.

THE COURT: What is that connected to, Mr. Trodden?

MR. TRODDEN: Excuse me, Your Honor.

BY MR. TRODDEN:

Q Let me read the whole thing: "The recognition that the vitreous potassium level goes up with the increasing size of the -- it is followed by some postmortem interval. It was initially believed that the method could be used with the confidence of plus or minus five hours and that the standard error did not increase as the death level increased. However, studies have shown that the individual variation is greater being in the nature of plus or minus ten hours the first day after death. Further, the standard error continues to increase with longer postmortem intervals and elevated environmental temperature highly distorted the rate of rise in vitreous potassium. For these reasons some pathologists have abandoned the procedure for postmortem." Are you aware of that?

A Yes, I'm aware of that statement.

MR. TRODDEN: No further questions.

REDIRECT EXAMINATION

BY MR. RECINTO:

Q Doctor, I appreciate you hurt your back and appreciate your coming over.

A That is what is known as a "back breaker." I broke my back yesterday; otherwise, I would have been disqualified -- you know.

Q What do you think an expert is?

A An expert is --

MR. TRODDEN: (Interposing) Your Honor, I believe that is beyond the scope of cross-examination.

THE COURT: Objection sustained.

THE WITNESS: An expert is --

THE COURT: (Interposing) The objection has been sustained.

BY MR. RECINTO:

Q Doctor, when you made your expert and relative conclusion, you were looking at the pictures and reports that the Commonwealth had identified as their exhibits, weren't you?

A Yes, I did.

Q Is the basis of those pictures and the wounds that you saw what made you come to your conclusion?

A I tried to make conclusions, yes.

Q Doctor, if the first blow kills a person, how would that affect the amount of blood that will flow?

A If the person is dead and the heart stopped beating, then the blood will not flow freely. However, the blood will flow from a scalp wound, because scalp wounds bleed profusely but not as profusely as if the heart has stopped with the first blow. But one blow may not necessarily kill a person.

Q From the pictures of the blood pool you saw in that -- from the amount of blood you saw in the pictures of the blood pool, how would you say the first blow killed the woman?

A I could not come to any such conclusion.

Q Doctor, when you gave us your conclusion on the time of death --

MR. TRODDEN: (Interposing) Your Honor, I believe -- if I may object, I don't believe the Doctor did give us a conclusion as to the time of death.

MR. RECINTO: He did say four hours after 6:00 o'clock, which places it at 2:00 o'clock.

THE COURT: He did say that.

MR. TRODDEN: Oh, that was the hypothetical. He

DEO REPORTING
(703) 751-0013

couldn't tell the jury whether he decided --

THE COURT: (Interposing) He said it was based on the hypothetical which was based on the facts recited.

MR. KENDRICK: I think it was four hours before 6:00 o'clock is what he said, Your Honor. And that would place it at 2:00 o'clock.

BY MR. RECINTO:

Q Did you base that conclusion on general terms or was it based on the specific hypothetical data that was given to you?

MR. TRODDEN: I believe the question is for the jury to determine, not for this witness to answer.

THE COURT: Well, what you're doing is restating the question. You put a hypothetical question to him in which you put in facts in evidence in the case. He added an additional fact. The additional fact he added was that the victim was in a state of extreme tension through having struggled with her assailant at the time of death and I let him do that over objection because he deduced that she had been struggling because he said she showed signs of defensive wounds and he said that would cause rigor mortis to set in earlier.

Am I right, Doctor?

THE WITNESS: Yes, Your Honor.

THE COURT: And adding that to the hypothetical facts that you stated he arrived at his 2:00 o'clock conclusion.

MR. RECINTO: Yes, Your Honor.

THE COURT: That's already been testified to.

MR. RECINTO: I wanted to make it clear to the jury that his statement of rigor mortis is of no consequence or not accurate and was based on a conclusion where there are no specific data available and that generally --

MR. TRODDEN: (Interposing) I object to counsel testifying.

THE COURT: I don't understand what you are doing, but it seems to me he has already given an answer to your question.

BY MR. RECINTO:

Q When you mentioned that the extraction of vitreous humor was one of the factors which could be considered, were you suggesting that that should have been done or was it only because the only factors are no longer available, such as body temperature?

A No, my purpose is to explain everything and that in determining the time of death that that is a different

procedure. There is no Dr. Quincy around which could tell you this person died at 5:15 or 17; that's only on television. What we do is take all the factors available, study them critically, make astute observations and then come to a reasonable time of death determination. That's about all we do. In this particular case, there are absolutely no datas except for rigidity. How much can you tell merely from rigidity?

MR. RECINTO: Thank you.

MR. TRODDEN: No recross-examination, Your Honor.

THE COURT: You are excused, Doctor.

A JUROR: I have two questions I would like to ask: One question I want to ask the Doctor is if there is any significance to smell and, two, is brain matter splatters like blood at all?

THE COURT: He wants to know if there is any significance to smell and he wants to know if brain matter splatters are like blood.

Do counsel have any problem with that?

MR. KENDRICK: No, I welcome all questions.

THE COURT: All right. Good.

THE WITNESS: When you are asking about smell, there are, of course, two factors involved. Whether the person did

not take a bath for twenty-five days is one and whether the person is decomposing. Now, decomposing can start very quickly even before twenty-four hours if the room is very hot and the smell of decomposition is something we know, because we deal with those things and that could be really an unbearable smell.

Does that answer your question?

A JUROR: Does it get worse or is there some time continuum to it?

THE WITNESS: Oh, yes, it gets worse. God forbid you ever see a decomposed body. When I come home after working with a decomposed body, my wife drives me out of the house to take a shower. It's that bad.

As to the second question of the splattering of the brain: If the bone has broken into the skull and the instrument pluges in the brain, the brain also will splatter. The way the brain matter is, that's really up in where -- that's really violent.

THE JUROR: Thank you, Doctor.

REDIRECT EXAMINATION (Resumed)

BY MR. RECINTO:

Q Just one question, Doctor. What is the effect of heat, in other words, to the decomposition and/or odor?

DEO REPORTING
(703) 751-0013

A It accelerates the decomposition very quickly. In fact, this textbook which was propounded by the worthy counselor shows that figure in which two people died in the same house and one person was lying close to the radiator and another was away from it and the body close to the radiator is completely decomposed. The other one is intact and if that picture is available, I think the members of the jury will appreciate it.

THE JUROR: I have one question with regard to heat. Especially with today's energy crisis and as it is in some apartment complexes especially in moderate income groups, after the people leave the room in the morning, they turn the heat down and do not put it back on to an upper level until approximately 4:00 or 5:00 o'clock in the afternoon when people return from work. Was this matter taken into consideration by any of the authorities in this complex -- in this case? Would that not have some bearing on the body?

THE COURT: I reckon it would have bearings. I doubt this witness could answer it. He wasn't there and probably hasn't interviewed anyone at that apartment.

THE JUROR: But the question in my mind is: Can he tell us when he says four hours -- well, he says 2:00 o'clock -- perhaps at 2:00 o'clock the temperature range in that

apartment complex was this and if they had radiators, it was probably central heating. Buckingham has central heating. I do not know about the complex where the deceased lived. If this had central heating, their thermostat might be turned downward in the middle of the day when the decomposition or the things you tell us would be in effect and the heat would not be turned up until later in the day. This question is in my mind. I don't know if it would apply here or not, but it is going around in my mind, sir.

THE WITNESS: I compliment you. You could be a good forensic pathologist. An investigation must proceed in this kind of manner, but it was not done here.

THE JUROR: I don't know, but from your deduction and from your perhaps setting the time at 2:00 o'clock, I would ask you would it take longer than four hours, say, for example, if the apartment was cooler in the middle of the day?

THE WITNESS: It would.

THE JUROR: In other words, it might not be at 2:00 o'clock? If it was cooler, it might be longer than four hours then?

THE WITNESS: It could be. That's very troubling in this case. It was an inadequate investigation.

THE COURT: Anything further?

MR. TRODDEN: No, Your Honor.

THE COURT: Thank you, Doctor.

THE WITNESS: Excuse me. I would like to have the book which I have given to you.

(Handing to the witness.)

MR. KENDRICK: If I messed that up by putting it on there, I'm sorry.

THE WITNESS: Well, it will show that I was in Virginia.

MR. KENDRICK: Thank you, Doctor.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Who is next, Mr. Kendrick?

MR. ORDOVEZA: Call Barbara Escariz.

Whereupon,

BARBARA ESCARIZ,

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ORDOVEZA:

Q Please state your name for the record.

A Barbara Escariz.

Q Where do you live?

A 811 South Greenbrier Street, Apartment Five, Arlington, Virginia.

Q Do you know the victim, Ophelia Quintero?

A Yes.

Q Do you have any idea as to her height?

MR. MELSON: I'm sorry, Your Honor, what was the question?

BY MR. ORDOVEZA:

Q How tall is she?

A I don't remember.

Q Is she quite health from your recollection?

A Yes -- well, she took pills that the doctor sent her.

Q But she was not a frail woman?

A No.

Q Do you know Orlando Rodriguez?

A Yes.

Q On March 19th, 1981, between 2:00 and 2:30 p.m., did there ever come a time when you saw him?

A Yes.

MR. MELSON: Who are you referring to?

MR. ORDOVEZA: Orlando Dominguez. May I correct

DEO REPORTING
(703) 751-0013

the record?

THE WITNESS: Yes.

MR. MELSON: Your Honor, I think she better answer the question whether she knows Orlando Dominguez or Orlando Rodriguez.

THE WITNESS: Yes.

BY MR. ORDOVEZA:

Q Where were you when you saw him?

A On Greenbrier Street.

Q How far was this from the place where Ophelia Quintero lived?

A The address?

Q The distance.

A Very close, but I cannot tell you.

MR. ORDOVEZA: No further questions.

CROSS-EXAMINATION

BY MR. MELSON:

Q Miss Escariz, you live on Greenbrier Street, don't you?

A Yes.

Q You live right near the office of the manager of the complex, don't you?

A Yes.

Q And that's where you saw Orlando; isn't that right?

A Yes.

Q Now, was it Orlando Dominguez or Rodriguez that you saw?

A Orlando Dominguez.

Q Now, you were one of the first people to find Ophelia Quintero, weren't you?

A Yes.

Q And that was at 2:30, wasn't it?

A Yes.

Q And is that the time that you saw Orlando over at the manager's office?

A No.

Q I thought you said you saw him over there at 2:30?

A No.

MR. MELSON: Could we have counsel's question and the answer read back to us as to the time that she said?

MR. KENDRICK: Your Honor, I don't think that's necessary.

MR. MELSON: Well, I don't recall the answer.

MR. KENDRICK: Well, ask her the question again.

MR. MELSON: I want to see what she said on direct examination.

THE COURT: All right. Let the Court Reporter read it.

THE COURT REPORTER: "Question: On March 19th, 1981, between 2:00 and 2:30 p.m., did there ever come a time when you saw him?

Answer: Yes."

THE WITNESS: Between 2:00 and -- no, it wasn't at that time. No.

MR. MELSON: I have no other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. ORDOVEZA:

Q Miss Escariz, what time did you see Orlando Dominguez on March 19th, 1981?

A 1:15.

Q Are you now saying that you are changing your statement previously that you saw him between 2:00 and 2:30?

A No.

Q Was he alone while you saw him?

MR. MELSON: Your Honor, that is outside the scope of cross-examination.

THE COURT: That's okay.

THE WITNESS: Yes.

THE COURT: You may have a brief recross-examination

if you wish on that one point.

MR. MELSON: I have no other questions, Your Honor.

THE COURT: The witness is excused. Thank you.

(Witness excused.)

MR. KENDRICK: Your Honor, I have a statement that was supplied to me by the Commonwealth Attorney's Office. I learned this morning --

MR. MELSON: (Interposing) Your Honor, if he is going to talk about matters extraneous to this proceeding this morning, perhaps we ought to approach the bench.

MR. KENDRICK: I have got a witness to call and if they will tell me his name, I'll be glad to call him.

MR. MELSON: Are you referring to the statement you showed me at the desk?

MR. KENDRICK: Who made that statement?

MR. MELSON: Didn't Rothlisberger tell you?

MR. KENDRICK: What? Who made that statement?

MR. MELSON: Ask me some place other than in front of the jury.

MR. KENDRICK: Okay. Come over here for a moment.

THE COURT: All right, gentlemen. That's enough.

MR. MELSON: He is playing games.

THE COURT: That's enough.

DEO REPORTING
(703) 751-0013

MR. KENDRICK: I apolozie, Your Honor.

THE COURT: Do you have a witness that you want to call?

MR. KENDRICK: Your Honor, I would like to know the whereabouts of a man by the name of -- I think it is "Deleon."

THE COURT: May I see you at the bench, please?

(Whereupon, the following bench conference was held out of the hearing of the jury.)

THE COURT: Now, in the first place, I don't want you gentlemen getting into any shouting contests between yourselves in the presence of the jury or otherwise. So far, you have done very well to avoid it. What is the problem here?

MR. KENDRICK: Your Honor, if you'll read that statement, the problem is obvious.

(Handing to the Court.)

THE COURT: I don't know what I'm reading.

MR. KENDRICK: I don't either. I only know that the statement was turned over as a result of my motions for discovery and I found out this morning I had to go out and talk to the policeman, I think Officer Rothlisberger, about the statement, and he said that the man who made the

statement is Deleon and I don't know where the man is or anything about him. I know if I put the detectives up there they are going to scream hearsay.

THE COURT: You wish to find this individual whose name has been blacked out here and call him as a witness?

MR. KENDRICK: Unless -- if they are going to object to the officer who reduced the statement, I am. If they have no objection about that, then I don't mind. But if I call this officer who I believe is Officer Rothlisberger and try to find out about this statement, which I want to offer as the truth of what was said and the truth asserted therein by this guy, then I think I need a guy there. That would verify exactly what I'm saying, that Orlando killed this person.

MR. MELSON: Would you be quiet?

MR. KENDRICK: Don't tell me to be quiet.

THE COURT: Who is Umberto?

MR. KENDRICK: Umberto? I don't know. There are lots of Umberto's, but here's a man who obviously goes out and does something with money and other items that fall under my theory of the case, Your Honor.

THE COURT: This is a statement that the Commonwealth has provided to defense?

DEO REPORTING
(703) 751-0013

MR. KENDRICK: Yes.

THE COURT: In response to what?

MR. KENDRICK: Exculpatory evidence.

MR. MELSON: To his motion for discovery and exculpatory evidence.

THE COURT: Is this something you thought was exculpatory?

MR. MELSON: We provided -- any statements made by Orlando Dominguez we gave to him.

THE COURT: All right. Then what you wish to prove are the statements made by Orlando that would tend to incriminate Orlando and tend to show that he was the perpetrator of the crime?

MR. KENDRICK: Yes, Your Honor.

THE COURT: The statement, I take it, is a statement of a policeman's note made by a policeman?

MR. KENDRICK: Yes, Your Honor.

THE COURT: This Umberto would seem to be a policeman's source?

MR. KENDRICK: The source is scratched out.

THE COURT: Well, I don't know if that's conceded to be a source or not.

MR. KENDRICK: See, it appears that the source

overheard Orlando call Umberto so that Umberto wasn't overheard, but Orlando was. The source told what he overheard Orlando saying to the policeman and it is very exculpatory. The date is absent, too.

THE COURT: What is your reaction?

MR. MELSON: Your Honor, when we gave this to defense counsel a number of weeks ago and I forget whether it was Mr. Ordoveza or Mr. Recinto and they looked at it and said, "That's Mr. Deleon," and it was known to one of the other individuals.

MR. KENDRICK: That's not accurate.

MR. ORDOVEZA: We read by Deleon.

MR. MELSON: They knew that very first day.

THE COURT: Well, are you in a position to provide them with either Orlando, Umberto or Deleon or any of these people?

MR. MELSON: I know where Orlando is. He's had access to Orlando. I don't know where Deleon is.

MR. KENDRICK: How can you say he knows who he is?

MR. MELSON: The officer told him if he wants to call Raphael DeLeon, he can. The officer told me he expects -- I expect him to tell me where he is right now. I don't know.

DEO REPORTING
(703) 751-0013

MR. KENDRICK: That's part of the problem. You keep scratching it out two months before a trial and when I get in trial and it is almost over and I want to find out who it is --

THE COURT: (Interposing) You were told by Officer Rothlisberger who it was?

MR. KENDRICK: Thirty minutes ago.

THE COURT: If you had the statement for several months, why didn't you inquire prior to that?

MR. KENDRICK: I found out who wrote the statement by asking every police officer I could and I kept on and on and on until I found Rothlisberger and he said it might be mine. He said let me check with the prosecution. He comes back and he said, "Yes, that's mine," and I said, "Do you know who this is." He said, "DeLeon." He said, "I don't know where he is." I said, "Do you know when the statement was taken." He said, "Around the 22nd." I found all this out in the hall a half hour ago and I've been trying to find it out for a month. They won't tell me. They scratched it out and don't want me to know.

MR. MELSON: We scratched it out because the Court ruled we were not required to divulge sources of information --

MR. KENDRICK: (Interposing) Look how critical this statement is.

MR. MELSON: If he wants me to look for him, I'll look for him in our jail. I will find out if he is in our jail.

MR. KENDRICK: I want to call Rothlisberger.

MR. MELSON: He has been here the whole trial.

MR. KENDRICK: I know that.

THE COURT: Let the jury retire, I suppose, and you can try to find out from Rothlisberger.

MR. KENDRICK: I would like to get this in the record, if you do know, I'm not going to finish today.

(Whereupon, the bench conference was concluded, and the proceedings continued within the hearing of the jury.)

THE COURT: Let the jury retire to the jury room.

(Whereupon, the jury was temporarily excused.)

MR. KENDRICK: Your Honor, that's critical. It is critical. It is absolutely critical. Here is a man who I'm saying committed the murder and he calls up someone and says, "Bring me the watch and some money." The guy said, "I can't bring you the money, because somebody else left with it." Now, it is interesting that the guy -- he says, "Take care of

DEO REPORTING
(703) 751-0013

other things." Now, here's a man who is seen leaving the apartment. I have reason to believe he was leaving his apartment in the afternoon with a bag full of stuff from the building in which the woman was murdered. It is very conceivable to me and arguable to me that Orlando and Umberto are in cahoots. How can Orlando have possibly planted the stuff because he was in jail? This shows who could have done it. He calls up Umberto and says, "Take care of the money and take care of the other things and guess who else they arrested today." We find out also in this statement that Orlando does not like my man. If that doesn't fit into my theory, then I'll eat my hat.

THE COURT: Who did you say Umberto was?

MR. KENDRICK: I'm not sure. All I know is "Umberto."

THE COURT: Has his name not come out of the evidence?

MR. KENDRICK: There's more than one Umberto. That's the problem. There is more than one Umberto. There is the Umberto who owned the suit and another Umberto and I don't think it is the same one.

MR. TRODDEN: Could I speak, Your Honor?

This report was provided. The gentleman did know

Mr. DeLeon was the source. They mentioned it to me.

MR. KENDRICK: I'll take issue with that, Dick. I wasn't there. I don't know who that was --

MR. TRODDEN: (Interposing) It was one of your colleagues. It was provided to him a substantial period of time before this. What I feel is really detrimental is the implication before the jury that the Commonwealth has been withholding exculpatory evidence and I say we should admonish them that we have not.

MR. KENDRICK: I think you have been withholding it and I want it to go on the record with that. I think you have been withholding information.

THE COURT: All right. When was this turned over?

MR. MELSON: Let me get my notes.

MR. KENDRICK: Your Honor, you know what I suspect is happening?

THE COURT: Wait just a minute. Give him that opportunity to answer my question.

MR. MELSON: March 19th.

MR. TRODDEN: March 19th.

THE COURT: The crime was committed on that day.

MR. MELSON: It must have been May 19th.

MR. KENDRICK: That statement, no way. I was told

DEO REPORTING
(703) 751-0013

by Rothlisberger in the hallway that he thought it was done on March 22nd.

THE COURT: I'm asking when it was provided to the defense.

MR. MELSON: It is the 19th of this May, because the next one I have is the 20th of May.

THE COURT: Do you have any information as to who Juan Carlos is supposed to be?

MR. MELSON: We know who Juan Carlos is. He is Orlando's roommate who left a number of weeks before this incident occurred.

MR. KENDRICK: How do you know that?

MR. MELSON: That's what the investigation disclosed down at Miami at the time.

THE COURT: Well, I think you have a right to call Rothlisberger and find out the basis for all of this and put him on the stand now in the absence of the jury and I'll take the time to go through this now. Is he here?

MR. MELSON: Yes, sir.

MR. KENDRICK: Yes, sir. Thank you, Your Honor.

THE COURT: Call Officer Rothlisberger right here in the courtroom.

THE WITNESS: Your Honor, do I have to be resworn?

I was excused.

THE COURT: No.

Whereupon,

MARCHE ROTHLISBERGER,

was called as a witness by and on behalf of the defendant, and, having been previously duly sworn, was examined and testified as follows:

VOIR DIRE EXAMINATION

BY MR. KENDRICK:

Q Detective Rothlisberger, state your name for the record, please?

A Marche Rothlisberger.

Q Do you have a document in front of you?

A Yes, I do.

Q Can you identify that document?

A It is part of a document that I typed on the 22nd of March, I believe.

Q What does that document -- what is the document about?

A It was about an interview that I had with Raphael DeLeon.

Q On March 22nd?

A I believe so. I believe it was March 22nd.

Q Who was Raphael DeLeon?

A He was a prisoner in the Arlington County Jail at that time.

Q Is this the first time that you showed this to me?

A Yes, sir. I hadn't remembered I had took this until you mentioned it outside.

Q When did I first mention this to you?

A A half hour or so ago.

Q Did I have to also ask you if you were the author of this statement?

A Yes, the author's name is deleted from the copy.

Q Are there other items deleted too?

A Yes, sir.

Q Did you delete them?

A No, sir.

Q Do you know who did?

A No, sir. I have no personal knowledge, no, sir.

Q What is that document all about?

A It referred to a period of time when Orlando Dominguez was in the same jail cell with Raphael DeLeon and the conversation between each other.

Q That documents states, I think, that DeLeon overheard a conversation between Orlando and Umberto; is that

DEO REPORTING
(703) 751-0013

correct?

A Yes, sir.

Q Do you know whether or not that was over a telephone or was it between the two people in person -- that he overheard that?

A To the best of my recollection, it was over the telephone.

Q Over the telephone?

A Yes, sir.

THE COURT: This statement is what DeLeon told you about his hearing one side of the conversation?

THE WITNESS: Yes, sir. He's hearing Orlando and Umberto.

THE COURT: Orlando Dominguez. Did you ever find out who Umberto was or do you know?

THE WITNESS: At that time, I would not know and wouldn't know Umberto if I saw him.

THE COURT: Do you know what last name goes with that first name?

THE WITNESS: No, I don't believe it is in the report anywhere.

THE COURT: Then that doesn't mean anything to you or that it is any person that you know or know of?

THE WITNESS: No, sir. I never interviewed Umberto or saw him personally -- that I'm aware of.

THE COURT: Do you know the whereabouts of DeLeon at this time?

THE WITNESS: To my knowledge he is still incarcerated in our jail.

THE COURT: Does he speak English?

THE WITNESS: Yes, sir. I talked to him. I got this from him.

THE COURT: Go ahead, Mr. Kendrick.

MR. KENDRICK: Thank you.

BY MR. KENDRICK:

Q Can you tell me how he overheard both sides of the conversation on the telephone?

A No, I can't, counsel.

Q Do you know if he overheard both sides of the conversation?

A He indicated that he did by the amount of conversation he related to me. I don't see how you can hear -- he must have construed the other half.

Q You don't know how he did that, though?

A No, sir.

Q Are you aware of any eavesdropping devices in the

jail that would do it?

A No, sir.

Q All right.

He indicates in your statement -- in your statement you indicated that he said that -- what does the statement say? Read the statement only with respect to the conversation between Orlando and Umberto?

A "Orlando called Umberto." The word is crossed out here (indicating). "Hearing the conversation, Orlando told Umberto to send him the wrist watch and one hundred fifty dollars, to keep the rest of the money and take care of whatever business needed to be taken care of. This conversation took place Friday evening between 21:00 and 22:00 hours on 3-20-81. Umberto warned Orlando that the Hispanic male in the cell with him and to be careful of what he said. Umberto told Orlando that Juan Carlos had skipped town with the money the day of the homicide. Juan Carlos had allegedly been paid, but did not have any money. Umberto wanted to tell Orlando that Manuel Quintana had been picked up by the police. Orlando asked what for and Umberto implied murder. Orlando stated at least now they have the right guy. Orlando told -- " word deleted -- "That he had met Manuel. Orlando did not like Manuel. Manuel acted as though he were

superior to Orlando."

MR. KENDRICK: Thank you, Your Honor. I think the jury should be made aware of that.

THE COURT: It would seem to me that would be the rankest kind of hearsay as it stands and the Commonwealth turned this over to the defense pursuant to an order to disclose an exculpatory information. The name of the informant was deleted because the Court ruled in order to protect any person who gave the police evidence from possible reprisals that those named would be kept confidential and they did not have to give the name of the informant. This would be, however, an exculpatory matter which they have to disclose and they evidently did disclose it. Now, the problem that the defense has in getting this information into admission seems to me to be easily remedied by their ability now to go and interview DeLeon, particularly if he is here in Arlington Jail, and I will give you permission to do that.

We will recess the case until Monday, at which time you will have found the source of this.

MR. KENDRICK: For the record, I would like to apologize in front of my client and to my opposition. I do apologize to both of you.

THE COURT: All right.

* * *

* * *

instructions C and D and you say that you want those given along with Three or maybe in lieu of Three?

MR. KENDRICK: Yes, Your Honor, especially D. I think D is absolutely critical and I think C is critial also. The Commonwealth's instruction on circumstantial evidence can come in, but I think the cautionary instruction which is Defendant's C is obviously appropriate in the case and also D, which excludes every reasonable hypothesis except guilt. That's always been given and both of which of these are the standard instructions and I would ask that they be given along with the Commonwealth's circumstantial evidence instruction.

MR. TRODDEN: Your Honor, I would object to Number C. First, I would object to the greater care and caution portion, indicating that circumstantial evidence stands on a different footing than any other form of evidence, which I don't believe was supported by law.

MR. KENDRICK: It is taken right out of Doubles and not altered in any way.

MR. TRODDEN: I also have an objection to the language contained in Instruction C which refers to that somewhat confusing phrase, "moral conviction of guilt for the defendant beyond a reasonable doubt," which I believe as new

DEO REPORTING
(703) 751-0013

language and new implications and new dimensions to the standard of reasonable doubt which the jury already would have been instructed on.

MR. KENDRICK: Your Honor, not unless Doubles is new.

THE COURT: As you may know, I have this Number Three -- well, I have a homemade version I have used for some years to avoid giving the language contained in Doubles. Two pro Commonwealth and two pro defense and then out came the Model Jury Instructions with their instruction Number Two which attempted the same thing as I had attempted and it is a fine instruction, except that it includes language from what is in the defendant's C, which I don't like for the reason Mr. Trodden mentioned. It is the only thing I have against the one from the Model Jury Instructions. When the Commonwealth relies on circumstantial evidence, you should consider such evidence with great care and caution and I object to that for the reason Mr. Trodden expressed. They should view all the evidence with great care and caution and all the evidence is the same once it gets in. As a matter of fact, strong argument can be made that circumstantial evidence is more reliable than direct evidence because it doesn't reflect human frailty. Direct can be outweighed by perjury.

DEO REPORTING
(703) 751-0013

Whatever story they tell, they tell, but if you take that out of the Model Jury Instructions, it is a fair and two-sided statement that gives what both sides in a criminal case should emphasize to the jury. It seems to me that perhaps the easiest way to rectify this dilemma -- and I think the defendant is entitled to have this -- is to add to the end of Instruction Number Three the final sentence from Model Jury Instruction Number Two, which is "the evidence as a whole must exclude every reasonable theory of innocence." If that's in there, it seems to me that the field is completely covered, because Instruction Three does end as it now is written with the sentence "all necessary facts and circumstances proved must be consistent with the guilt of the defendant and inconsistent with his innocence before he may be convicted." I will grant it and add to it "the evidence as a whole must exclude every reasonable theory of innocence."

MR. KENDRICK: Your Honor, if you would be so kind as to give me the finished product again, please.

THE COURT: Number Three as drafted with the addition of that final sentence, "the evidence as a whole must exclude every reasonable theory of innocence."

MR. KENDRICK: And then that would, I presume, eliminate my D instruction?

DEO REPORTING
(703) 751-0013

THE COURT: I will refuse C and D.

MR. KENDRICK: Very well, Your Honor.

THE COURT: E is proof of witnesses prior convictions.

MR. KENDRICK: There is evidence to support that one, Your Honor.

MR. TRODDEN: There is a fellow convicted of unauthorized use. I have language, "Prior conviction of a felony or crime of moral turpitude or one which involves the character of a witness or credibility." Perhaps it could be that one, moral turpitude, that is the one which involves the character of a witness or credibility. I don't know whether that's --

THE COURT: (Interposing) Probably after the word "turpitude" the word "or" should come out. Moral turpitude, one that involves the character of the witness.

MR. KENDRICK: Very well, Your Honor.

THE COURT: All right. E is granted.

F and G are refused as they are already covered.

MR. KENDRICK: That would necessarily include H, too, Your Honor, because I have broken reasonable doubt down to two separate instructions. So, it would be F, G and H, I presume; is that correct?

* * *

MR. KENDRICK: Yes.

THE COURT: All right. We will consider it then.

O, motive, any objection to that?

MR. TRODDEN: No objection, Your Honor.

THE COURT: That is granted.

U, any objection to that?

MR. TRODDEN: I have an objection with U because I think what U does is reiterate what is in the finding instruction. It is the finding instruction under capital murder which requires us to prove this beyond a reasonable doubt as one of the elements which we must prove and to reiterate it, I believe, puts those instructions out of kilter and gives undue stress to something we must say over and over again when the finding instruction is quite clear.

MR. KENDRICK: This is a corpus delecti instruction, Your Honor.

MR. TRODDEN: Which is the elements instruction.

THE COURT: U is refused.

X is violence or threats must have been made -- it shouldn't be threats. We will delete "threats" and just leave "violence." "If you have a reasonable doubt that the same was made prior to or contemporaneously with the alleged taking of the property of Mrs. Quintero and her son or if you

* * *

AFTERNOON SESSION (1:45 p.m.)

(Whereupon, the following bench conference was held out of the hearing of the jury.)

THE COURT: May I see counsel at the bench?

MR. KENDRICK: While we were at the bench yesterday, you will recall there was some testimony from Detective Rothlisberger about a man in jail who overheard, according to Rothlisberger, a conversation between -- as the detective said, Orlando and Umberto and we know the contents of that conversation. It is on the record. I left the court and I instructed my associate to go to the jail. Approximately a half an hour passed before he got to the jail. When he arrived he said he wanted to speak to the individual who was involved, Mr. DeLeon. He was advised by the Sheriff's Office that he had been removed by the police and was not available to talk. If this is incorrect, you tell me. He was told to come back. He came back approximately an hour later. He did get a chance to talk to the man. He found out that the prosecutors, both Mr. Melson and Mr. Trodden, and a police officer had in fact, been to see him. He sat down to talk to them. At that point he found out that the man was changing his version of what Detective Rothlisberger said he did. I intend to call the man and go into that, but in the light of

what I think may have happened or suspect may have happened and even if it didn't, giving my fellow lawyers every benefit of the doubt, I want to call this man and cross-examine him as an adverse witness. If he indicates something different than what Detective Rothlisberger says he said, I want to be able to cross-examine him and have the latitude to question him along the lines of cross-examination and if he shows a prior inconsistent statement, I want to go back in and bring out Detective Rothlisberger and show what the detective first learned two days after the murder.

MR. MELSON: Your Honor, I don't know what legal basis he has for attempting to cross-examine his own witness. Every party has had a right to talk to the witness in this case. Just because Mr. Kendrick talks to him, doesn't allow me to cross-examine the witness if I call him. This individual gave a story contrary to what he told Rothlisberger two days after what he told Rothlisberger way back in March. We went to talk to him because we knew he was a prospective witness. Nothing improper was done to get him to change his statement as to what was said to Rothlisberger and what he subsequently found out and what his story is now as to what was said on the telephone.

THE COURT: You are saying he gave you an

DEO REPORTING
(703) 751-0013

inconsistent statement after he made the first statement? Who did he give that to?

MR. MELSON: Detective Gabrielson.

THE COURT: I think the whole thing ought to come out. We ought to let the jury have it all.

MR. KENDRICK: I do too, but I want to go on the record now as to why it was not given the additional statement.

THE COURT: Because that would not have been exculpatory and they gave you the one that was exculpatory.

MR. KENDRICK: You are saying nothing in the second statement was exculpatory? He told basically the same thing, but just changed the name to Olga. I think we ought to let it all hang out.

MR. MELSON: Okay, Your Honor, if that's the truth, I assume we can have defense counsel's statement given to the witness when he went to interview them with respect to the testimony, if they testify.

MR. KENDRICK: I have no objection to that, but what it is going to necessitate -- and I ask counsel to weigh it heavily -- before he does that it is going to necessitate me putting a co-counsel of mine on the stand and that necessarily means he must withdraw from the case right then and there.

THE COURT: That sort of thing -- it only becomes material if it is contended that a witness's testimony has been influenced by something that an attorney has said.

MR. KENDRICK: That is what he is suggesting, isn't it?

THE COURT: If a witness tells a story that he is uninfluenced by anything whatsoever that counsel says, there is no point in it because it would not be impeaching him. If someone contends that a witness's testimony is influenced by what an attorney has said to him, his testimony is coerced in some way and then it seems to me such coercion ought to be shown so that the jury can properly weigh what the witness is now saying in court. But if the witness is free of any such thing, I don't think that should be put in.

MR. KENDRICK: I agree. Now, if what Mr. Melson suggests is true, then obviously the man would not be changing his testimony along the lines he is suggesting that he has changed it, because if, as he is saying that my co-counsel got up there and said -- if he got up there and testified this way, then he would say exactly what he said the first time and not change his testimony along the lines the prosecutor is saying. I want him to weigh that, because it necessarily means I will have to call my co-counsel as a witness and to do

that, he will have to withdraw from the case.

THE COURT: We will cross that bridge when we come to it.

MR. KENDRICK: Now, you are saying that he told Detective Gabrielson two days after he made this statement -- that he told him something else?

MR. MELSON: I'm not sure if it was two or three days, but it was very soon after that.

MR. KENDRICK: Do you know if Gabrielson reduced that to writing?

MR. MELSON: I don't know.

MR. KENDRICK: You didn't check?

MR. MELSON: I haven't asked him.

Your Honor, have we argued the point of whether what DeLeon is going to testify to is hearsay or not?

THE COURT: No, we have not. I have given it some thought and if DeLeon were to testify to the conversation with Orlando and Umberto or either -- if DeLeon testifies that he heard or overheard or participated in a conversation with one of these other two men in which the speaker, whoever was speaking to DeLeon, admits wrongdoing, then that would seem to me to be a declaration against penal interest and an exception to the hearsay rule and admissible for the truth of whatever

is said, be that absent the declarant. If he is testifying to a statement made by one of these men which involves wrongdoing by the other, not the speaker, then that guarantee of trustworthiness is missing and it would be hearsay. It would be in fact double hearsay.

MR. MELSON: In this particular case, DeLeon would be testifying to something along the lines that Orlando told a person on the other end of the phone to get one hundred and fifty bucks. Keep the rest. Take care of everything. If that's not offered for the truth of it --

THE COURT: (Interposing) Wait a minute. DeLeon is supposed to be in this telephone conversation?

MR. MELSON: No, he overhears Orlando and the third party.

THE COURT: He was in the same room with Orlando and overheard what?

MR. MELSON: Say something to the effect, "Get the money, bring me one hundred and fifty dollars, you can have the rest. Take care of everything else. Get the watch. Something along those lines."

If that's not offered for the truth of it, then there is no relevant or probative value to it. It is not an admission against interest.

DEO REPORTING
(703) 751-0013

THE COURT: Is it not guilty knowledge and participation after the fact on Orlando's part?

MR. KENDRICK: He's the guy that I say committed the murder and framed my man. It is evidence on the button.

THE COURT: It shows guilty knowledge and participation after the fact by Orlando. It is sort of a dangerous situation.

MR. MELSON: The danger of the situation can be put as to the reliability of DeLeon. He didn't know what the other person was saying. He didn't know the essence of the conversation. What Mr. Kendrick would be doing is inferring that's what he was talking about. You can't do that. That's not an admission. It is a statement to do something.

THE COURT: DeLeon says that he doesn't now know what money was being discussed?

MR. MELSON: It could have been any money. In fact, we know what money it was. It wasn't this money. All he is doing is raising an inference.

MR. KENDRICK: I disagree with that.

MR. MELSON: There is no indicia of reliability and this particular piece of hearsay. He only heard half of the conversation.

MR. KENDRICK: Rothlisberger's statement doesn't

indicate that.

MR. MELSON: The evidence will be absolutely clear from DeLeon who was in the cell with Orlando that he could only have heard one end of it. So, if the guy on the other end of the phone said, "Orlando, did you take the money to get some candy yesterday," and he said, "Yes, I did it," and when he hears the "Yes, I did," he is going to infer that he's admitted to a crime. We don't know that. It is unreliable and it is not a clear admission against penal interest. You can't establish it was without having the other person there to pick up the other half of the conversation.

THE COURT: You say you can show what money was being discussed?

MR. MELSON: We have the person on the other end of the phone.

MR. KENDRICK: Your Honor, in that conversation -- sure, I bet they do have another person. In that conversation in a ddition to these little elements to support my theory of a frame-up totally is also Orlando saying they got the right man in the same conversation referring to my guy.

THE COURT: I think we better let the jury hear it all.

MR. KENDRICK: Yes, indeedee.

DEO REPORTING
(703) 751-0013

THE COURT: It seems to me it does in its context, carry a connotation of consciousness of wrongdoing which I think the jury ought to weigh.

MR. KENDRICK: I agree, Your Honor. I think it is crucial.

MR. MELSON: Well, I'm sure he thinks it is crucial. It still does not carry with it any indicia of reliability and it cannot be an admission against penal interest when you are only supposing that. He only heard half of the conversation.

THE COURT: I'm referring to the context.

MR. KENDRICK: That's correct.

THE COURT: The context as I read the statement that Officer Rothlinberger has was in connection with this murder and was going on in the same conversation and discussing the arrest of Quintana.

MR. MELSON: That is impossible, because the conversation took place on the night of the 20th.

THE COURT: Well, let's hear it in the absence of the jury. I want to find out what the context really is.

MR. KENDRICK: Your Honor, no, no, no. Now, just wait a minute. Rothlisberger said he did this on the 22nd and my guy was arrested on the 21st.

MR. MELSON: That's when he wrote the statement and

* * *

Whereupon,

RAPHAEL DE LEON,

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn, was examined and testified as follows:

MR. TRODDEN: Your Honor, is this a voir dire of the witness?

THE COURT: Yes.

MR. TRODDEN: Would you please wait for Mr. Melson?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. KENDRICK:

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

A (Inaudible.)

THE COURT REPORTER: Excuse me?

MR. KENDRICK: Nobody can hear you.

THE WITNESS: Raphael DeLeon, D-e-L-e-o-n.

BY MR. KENDRICK:

Q Where do you reside?

A What do you mean by "reside," sir?

Q Where are you living now?

A In Arlington.

PRINTERS NOTE:

This page intentionally left blank.

Q Are you in jail?

A Yes, I am.

Q Were you in jail on March 19th?

A Yes, I was.

Q On the 20th?

A Yes, I was.

Q March 21st?

A Yes, I was.

Q And the 22nd?

A Yes, I was.

Q Have you been in Arlington County Jail since that time to the present time?

A No, I went back to Fairfax Jail. I'm a Fairfax prisoner.

Q When did you go back to Fairfax?

A On the 22nd.

Q The 22nd of what?

A March.

Q March. Do you recall what time you went back?

A Between the hours of 2:00 o'clock and 4:00.

Q In the afternoon?

A Yes, sir.

Q And you obviously were returned to Arlington. When

* * *

Q They did. All right.

Who talked to you during that period of time?

A The arresting officer -- the arresting detective who arrested Quintana or who was on the investigation.

Q Was that Detective Gabrielson?

A I think so.

Q You think so?

A Yeah. I didn't bother to ask him his name.

Q All right.

Did he show you any kind of identification?

A Yes, he did.

Q Would you recognize him if you saw him?

A Yes.

Q When did he talk to you during this period of May -- March 22nd to May 20th?

A He talked to me on March the 19th, March the 20th, and he talked to me yesterday also.

Q All right. March the 19th and March 20th and yesterday; is that correct?

A Yes.

Q Now, did you also have an opportunity or an occasion on March 22nd to talk to Detective Rothlisberger?

A I think so.

Q You think so?

A I mean I can't remember the names. I can't remember the detective's names.

Q Well, do you recall talking to some other detective other than Detective Gabrielson?

A Yes, I do.

Q You do. You do recall when you talked to that other detective? I'm not talking about Gabrielson, but the other detective; do you recall when you talked to him?

A March 22nd, I think it was.

Q March 22nd?

A (Witness shaking his head.)

Q Is that the first and only time you talked to that detective?

A Yes, it was.

Q Did you tell Detective Rothlisberger, the one you talked to on March 22nd, that you had already talked to Detective Gabrielson on the 19th and 20th?

A Yes, I did.

Q You did. Now, do you recall what you talked to Detective Gabrielson about on the 19th?

A Yes, I do.

Q Tell His Honor what you talked to Detective Gabrielson

DEO REPORTING
(703) 751-0013

about?

A What he wanted to know is what happened and stuff. Did I know anything about the case and stuff. He asked me was I talking to Quintana -- or Orlando, and I told him, yeah, I was talking to him.

THE COURT: Talking to whom?

THE WITNESS: Orlando. First he asked me about Orlando. I said, "Yes, I was talking to Orlando." Were you talking about the case and stuff, you know. So, he asked me everything that happened. I told him that he had called up -- had made a phone call to Umberto's house. After he called Umberto --

THE COURT: (Interposing) Where were you?

THE WITNESS: I was in the receiving cell.

THE COURT: You were in the cell, but you could hear the conversation because the phone was near enough?

THE WITNESS: Inside the cell.

THE COURT: And you heard who talking, Orlando?

THE WITNESS: Yeah, Orlando -- he called Umberto. Umberto wasn't home, so he was talking to Olga, his sister. He told her he wanted the camera, boots, wristband, I thought it was the wrist watch, but he said, "Wristband," and his one hundred fifty dollars and told her to keep the rest of the

money. He said he was supposed to pay her fifteen or ten dollars or give her something like that for doing a favor for him. Then I was talking to him about that. Then they asked me, "Did he say anything else about the murder?" He said, "No." All he was doing is crying a lot claiming he wasn't guilty of anything and wanting to go back where his father was located and stay up there with him. So, he asked me, "Did I know Manuel Quintana," so I said, "Yes, I knew Manuel Quintana." So, he asked me if I knew Quanito Quintana --

THE COURT: (Interposing) Quanito Quintana?

THE WITNESS: The same man, Manuel Quintana. I said, "Yeah, I know Manuel Quintana." Where did I meet him? I met him at the receiving cell downstairs, because I was down there for three days -- two days, to be exact. He asked me, "Did I talk to him," and I said, "Yeah, I talked to him too and what did I talk about and I said talking to him in relation to the murder case and he asked me what was my interest in it."

MR. KENDRICK: I'm going to object to any testimony he may say about the defendant.

MR. MELSON: I think it all should come out.

MR. KENDRICK: Not about the defendant, Your Honor.

DEO REPORTING
(703) 751-0013

I'm only concerned about the conversation that he overheard about Orlando and where that goes, but not about the defendant.

MR. MELSON: I'm concerned with what he said about the defendant.

MR. KENDRICK: I'm sure he is, but he has a Fifth Amendment Right here involved and that's more important.

THE COURT: I don't know what that refers to, but I will hear the whole thing. The jury isn't here. It may be related as far as I know.

THE WITNESS: He asked me, "Did I speak to Manuel Quintana --" he asked me to speak to Manuel Quintana and I said, "Yes," He asked me what about and I said about the murder case. I was mainly interested because they told me that the murder was on Florida Street and my mother happens to live on Florida Street and I was kind of scared and thought it might involve my parents and it was said it was a lady who got killed. So, I kept asking him stuff about it. He had told me he was in Fairfax Jail. I think it was that case or something like that. He came out of Fairfax Jail and he said he had no money to buy a car and no money to buy cigarettes, but then he said he came out to Fairfax Jail and bought a car. When I asked him where he got the money from he

told me I sold another car and -- but then he kept talking about the car. I was asking him where he got the money and he wouldn't answer me. I just let it go. We kept up our conversation and he told me he was majoring in medicine while he was in Cuba. He said he almost finished his schooling in Cuba and had six more months to go in Cuba. The reason he didn't finish his education in Cuba was because he got in a car and one of his little daughters -- when he got in the car with one of the daughters, he put the car in reverse and his second daughter ran up to the car and he ran his daughter over with the car and his wife claimed he did it purposely. He got out of the car and was kind of frustrated. So he just ran and got a hammer and started hammering his car down and started having flashbacks about that happening to his daughter. So he was kind of feeling crazy and stuff.

THE COURT: All right. Go ahead, Mr. Kendrick.

BY MR. KENDRICK:

Q Now, you indicated that on the 19th that you talked to Detective Gabrielson. Is this what you told Detective Gabrielson?

A Excuse me? I don't know if it is Gabrielson. I don't know their names. I can't remember their names.

MR. KENDRICK: Your Honor, can I have

* * *

had just testified to on the 22nd about the conversation that you overheard Orlando or that you talked to anyone about?

A No.

Q On the 22nd than when you talked to Detective Gabrielson and Detective Rothlisberger, you told them the same thing that you told them on the 19th and 20th; is that correct?

A Yes.

MR. KENDRICK: I think the foundation has been laid to show prior inconsistent statement and I point the Court to the one Detective Rothlisberger got from him on the 22nd and reduced it to writing immediately.

THE COURT: I don't know if it is a prior inconsistent statement. I will allow the Commonwealth to cross-examine now if they wish.

MR. KENDRICK: Let me go further now.

THE COURT: All right. Let me ask you a question, Mr. DeLeon. Did Orlando ever at any time indicate to you what camera, what wristband, and what money he was talking about?

THE WITNESS: No, sir.

THE COURT: You never found out where all of this was supposed to have come from?

THE WITNESS: I know -- I found out about the money.

I think it was from his job. He had quit his job. He still had his check and he hadn't gotten it cashed yet or something.

THE COURT: Where did you learn about that?

THE WITNESS: Inside the receiving cell.

THE COURT: From whom?

THE WITNESS: From Orlando.

THE COURT: He didn't mention anything about the camera or the wristband?

THE WITNESS: No, sir.

THE COURT: You say, "wristband," not "wrist watch"?

THE WITNESS: I thought it was "wrist watch" at first and then I looked it up in the dictionary and it means wristband.

THE COURT: You looked it up in Spanish?

THE WITNESS: Yes.

THE COURT: You speak Spanish?

THE WITNESS: Yes.

THE COURT: Your conversation was in Spanish with Orlando and his conversation was in Spanish?

THE WITNESS: Yes, it was.

THE COURT: How did you learn who was at the other end of the phone?

THE WITNESS: He told me Umberto wasn't home, so he

talked to Olga.

THE COURT: Do you know these people?

THE WITNESS: No, sir.

THE COURT: He said he learned this from Orlando. He doesn't know whom Olga or Umberto are.

MR. KENDRICK: May I continue, Your Honor?

THE COURT: Yes, sir.

BY MR. KENDRICK:

Q On March 20th, did you tell Detective Rothlisberger the following, that Orlando called Umberto and that you overheard the conversation?

A Yes, I did.

Q Did you tell him further that Orlando told Umberto to send him the wrist watch and one hundred fifty dollars?

A It wasn't Umberto. It was Olga.

Q Okay. Did you tell Detective Rothlisberger on the 20th initially that Orlando told Umberto to send him the wrist watch and one hundred fifty dollars?

A Yes, I did.

Q Did you also say that you heard him say to keep the rest of the money and take care of whatever business needed to be taken care of?

A No, it wasn't business. He just said take whatever

rest is left.

Q You did not tell Detective Rothlisberger that on the 20th?

A No, I did not.

Q Are you sure?

A I can't be sure, but I'm pretty sure about it.

Q Did you also tell Detective Rothlisberger that this conversation took place Friday evening between 21:00 hours and 22:00 hundred hours on the 3rd of March, 1981?

A No. It wasn't the 3rd of March.

Q I mean the 20th of March. I'm sorry.

A Yes, I did.

Q Did you also tell him that Umberto warned Orlando that the police would probably try to put a Hispanic male in the cell with him and to be careful what is said?

A No, he said --

Q (Interposing) No. Did you tell Detective Rothlisberger that on the 20th?

A No, I did not.

Q You did not tell Detective Rothlisberger that Umberto told Orlando that Juan Carlos had skipped town with the money on the day of the homicide?

A Yes, I did.

DEO REPORTING
(703) 751-0013

Q Did you also tell him in that same conversation that Umberto wanted to tell him that Quintana had been picked up by the police?

A No, I did not.

Q You did not tell Detective Rothlisberger that?

A I'm certain.

Q Did you tell Detective Rothlisberger he said what for and Umberto said, "murder"?

A I'm positive I didn't say it.

Q You didn't say that?

A No.

Q Did you say that Orlando stated, "At least they have got the right guy"?

A Yes, I did.

Q You did say that?

A No, I did not say that Orlando said that.

Q I'm talking about what you said Orlando said and I'm referring to what you told Detective Rothlisberger. Did you tell Detective Rothlisberger that Orlando said that?

A Yes, I did.

Q You did and that's what you told Detective Rothlisberger?

A Yes, I did.

Q Okay.

Did you also --

MR. KENDRICK: It is going to be hard for me to ask this, Your Honor, since the Commonwealth has erased something and there is a gap there, but it is in the same paragraph.

BY MR. KENDRICK:

Q Did Orlando say that he had met Manuel through Nelson?

A Yes, he did.

Q Did you tell Detective Rothlisberger that?

A Yes, I did.

Q Did you also tell Detective Rothlisberger that Orlando said that Orlando did not like Manuel and did not like Manuel because Manuel acted as if he were superior to Orlando?

A Yes, I did, but it wasn't "superior."

Q You didn't say that?

A He didn't care for him too much. He didn't really know him.

Q But you did not say "superior"?

A No, I did not.

MR. KENDRICK: Your witness.

DEO REPORTING
(703) 751-0013

VOIR DIRE EXAMINATION

BY MR. MELSON:

Q Mr. DeLeon, do you recall when you came to Arlington?

A Yes, March 20th.

Q March 20th. Were you put in the receiving cell with Orlando on the 20th?

A Yes, I was.

Q When was the telephone conversation, on the 19th or on the 20th?

A On the 20th.

Q That was in the receiving cell in the jail?

A Yes, it was.

Q There was only you and Orlando in the cell at the time?

A It was.

Q And Orlando had a telephone?

A Excuse me, it wasn't on the 20th. It was on the 19th.

Q The 19th?

A Yes, sir.

Q Why did you say it was on the 19th rather than on the 20th?

A It was the first day I got there.

Q All right.

Now, only the two of you were in the cell at that time?

A Yes, there was.

Q And was the telephone that he was talking on a regular telephone?

A Yes, it was.

Q And the receiver and the thing you talked into was on the same telephone?

A Yes, it was.

Q You couldn't hear what the other person was saying, could you?

A No, I could only hear what he was saying.

Q So, you only heard half the conversation.

Now, you told Detective Rothlisberger what you had heard on the 22nd?

A Yes, I did.

Q Do you recall whether after the 22nd you talked to Detective Gabrielson again?

A Yesterday was the only day I talked to Gabrielson again.

Q Do you recall telling Detective Gabrielson about the

* * *

A Yes, it was.

Q The money he received for working?

A Yes, it was.

Q And that he had quit his job?

A Yes.

Q Was all this that you told Rothlisberger and Gabrielson over the same telephone conversation?

A Yes, it was.

Q That was on the night of the 20th -- rather, the 19th?

A On the 19th.

Q And there is no way that you could have overheard the other end of the conversation?

A No way.

Q Now, you said that Orlando told you that, "At least they got the right guy"?

A Yes, he did.

Q Were you talking about Quintana or was that at a later time?

A It was around -- I can't remember, but they was booking him at the time and they had another detective come up and he said, "Do you know that guy," and -- yeah, that's Juanito.

* * *

MR. MELSON: It is not exactly the same now. I will redo my motion. The dangersof allowing that type of statement in are absolutely exhibited by this person's testimony.

THE COURT: I will let you argue it. Are you through examining the witness?

MR. KENDRICK: No, Your Honor.

THE COURT: Mr. Kendrick, just keep it to the statement itself. His motivation has nothing to do with it.

MR. KENDRICK: Very well, Your Honor.

BY MR. KENDRICK:

Q Going back only about the misstatement, now are you saying that Olga told Orlando that Juan Carlos skipped town with the money the day of the homicide?

A No, he already knew.

Q Did you tell Detective Rothlisberger that?

A No, I did not.

Q Did you tell Detective Rothlisberger that Umberto told Orlando that?

A Orlando knew that Juan Carlos had left. He told me Juan Carlos was in Columbia Road in Washington, D.C.

Q Please listen to my question. Did you tell Detective Rothlisberger that Umberto told Orlando that Juan Carlos had skipped town with the rest of the money?

A No, I did not.

Q Did Orlando tell you that?

A Yes, he did.

Q Orlando told you Umberto had skipped town?

A No, he told me Juan Carlos had skipped town.

THE COURT: Again, when you say, "The rest of the money," did Orlando tell you where that money came from?

THE WITNESS: He said from his job working at Lums.

THE COURT: And that is where Orlando claimed the money came from, from Orlando's job?

THE WITNESS: I think so.

MR. KENDRICK: You think so?

THE WITNESS: Yes, I think so.

THE COURT: In any of your conversation with Orlando, did he ever indicate any guilt on his part? Did he ever indicate he was involved in any criminal activity?

THE WITNESS: No.

THE COURT: He never told you about crimes he had been involved in?

THE WITNESS: No. He was more like the crying type. All he did was cry.

THE COURT: Repeat the statement for the interpreter, please.

THE WITNESS: More like the crying type. All he did was cry.

BY MR. KENDRICK:

Q Did Orlando tell you that he did not like Manuel Quintana?

A Yes, he did.

Q Did he express to you that he was glad the police had picked him up?

A No, he didn't.

Q He didn't say, "Good, they got the right guy"?

A He was glad on his behalf.

MR. KENDRICK: One other question, Your Honor.

BY MR. KENDRICK:

Q How long did you talk to Detective -- who was with Detective Gabrielson yesterday?

A The District Attorney.

Q Which one?

A Both of them.

Q And Detective Gabrielson?

A (Witness shaking his head.)

Q Were you removed from the jail to talk to them?

A Removed from the jail facilities on the fourth floor.

Q Where did they take you to talk to you?

A I don't know, upstairs or downstairs.

Q Did they take you somewhere to talk to you?

A Yes, they did.

Q Were you promised anything?

A No.

Q Not even an extra dessert?

A Nothing.

THE COURT: Take the witness back for a moment. We may send back for him, so keep him available here, if you will.

THE BAILIFF: All right.

THE COURT: Mr. Kendrick, I take it that your position is that at least part of this which is quoting Orlando should go to the jury just as he has testified to it here and -- or do you not say that?

MR. KENDRICK: I think everything with respect to Orlando should go to the jury. Everything. If this man now says it was Olga -- if Orlando says it was Olga and not Umberto, fine. That should go to the jury. Also the fact that Detective Rothlisberger talked to the man on the 20th and reduced that conversation and that this man said Orlando said and it was reduced to writing. That should also go to

the jury. I think the jury should be aware of both conversations.

THE COURT: Now, what exception to the hearsay rule would make this admissible?

MR. KENDRICK: Well, Your Honor, it clearly implicates Orlando in the murder. It clearly implicates Orlando in the murder. It clearly supports my theory that my client was framed. No matter what you say, Orlando talked to Umberto or Orlando talked to Olga, it is a declaration against his penal interest and I think it should come in.

THE COURT: I can't see how I could possibly admit things allegedly said by Olga or Umberto, but Umberto didn't say anything, because that would be double hearsay. It seems to me the best that can be done is take the statement of this witness quoting Orlando as an absent declarant on the theory that what Orlando was saying was a declaration against his penal interest and therefore has a guarantee of trustworthiness that allows that to survive the hearsay objection. But in order to do that, it seems to me it has got to be shown that it was against his penal interest or he thought it was when he said it, so as to guarantee trustworthiness. The question I asked him indicated that Orlando never admitted any wrongdoing. In fact, he gave an

innocent explanation of it and therefore I have a little trouble findingout what penal interest is affected.

MR. KENDRICK: It seems to me like we should argue it to the jury. In all fairness, it should come out. This man is now saying Orlando said, "wristband" as opposed to "wrist watch." He said Orlando told me that. All of this stuff is coming from Orlando and right on all four corners with my theory, Your Honor. If Orlando said to that witness, "I just had a conversation and told that person --" and it doesn't matter who he was talking to -- but I told that person to bring me the "wrist watch/watchband" and one hundred fifty dollars and keep the rest of the money and take care of whatever business needs to be taken care of --

THE COURT: (Interposing) There is nothing in the whole context that links it to this case.

MR. KENDRICK: But the conversation, Your Honor, is about -- the whole conversation is tied in with Quintana.

THE COURT: How so?

MR. KENDRICK: Because he talks about Quintana being arrested and the fact that he didn't like Quintana.

THE COURT: He goes on later to explain the context. I understand from the witness's testimony that he was in the receiving cell and heard Orlando pick up the phone and make a

phone call. He thought he was calling Umberto. Later he explains he didn't get him, but got Olga. However that may be, what he hears from that is Orlando giving some directions as to what is to be done with some assets. Then Orlando later explains that this has to do with his pay from his job at Lums. Nowhere in it does he indicate any consciousness of guilt or wrongdoing or any connection with this alleged murder.

MR. KENDRICK: Then you have to accept the man's word that he got no promise and no threats and was no way intimidated by the police and the prosecutors coming to him. That may well be and I hope that is in fact the truth. On the 20th he is recorded in telling somebody something different.

THE COURT: It is still what he told the police officer. It still doesn't put it in the context of this murder.

MR. KENDRICK: It does, Your Honor. It does put it in the context of the murder. I can argue -- it is clear to me, Your Honor, from the evidence and my theory of the case that the man has been framed by this man and he's got somebody else doing his work for him. That can be argued if I stand up as I intend to and present the jury with my theory

DEO REPORTING
(703) 751-0013

in summation that this man was framed and it could have very well been Orlando that did it and the police officer has this information. It is obviously exculpatory. That's why the Court forced him to give it to me. That's why they crossed the name out. It is exculpatory, Your Honor. It shows exactly what we are saying. The man has asked for some money and to take care of the rest of the business. If I stand up there in front of the jury and said Orlando framed him and they are going to turn around and say, "How could that be?" This is how Orlando could do it, by getting someone else to do it. The only difference this shows today that he is showing Umberto and Olga and basically saying the same thing. "Bring me the watch. Bring me the camera." These are things in evidence -- part of the stuff that may have been stolen and involved in the crime. The money certainly was. "Bring me the one hundred fifty dollars and keep the rest of the money. Take care of the rest of the business." Your Honor, it is clear that it fits. It is my theory, Your Honor, and it supports my theory and I should be able to present that to the jury. If he says, oh, no, they are talking about Lums and his pay, fine, let that come in too, but this supports my theory. It even goes further to say that the man said, I don't like Manuel Quintana, which is an additional reason for framing

him.

Your Honor, it is clear that if this man didn't do it and obviously he couldn't because he was in jail, he had to have someone else do it and that's what this shows and now he is coming into court four months after the murder and he has been interviewed by two prosecutors and the only difference he is making -- the only thing he is changing now is that it wasn't Umberto and that it was Olga that he was talking to. It was Umberto's sister. Well, Your Honor, Umberto was Orlando's alibi that didn't check out.

Now, Your Honor, it is so clear that what I am saying could and probably did happen that justice demands that this come to the jury. You can't keep that out, Your Honor. It is clear that this man had somebody else plant or had somebody else doing something about the murder that he had committed. In the same statement, he talks about his dislike for this man (indicating), which is indicative of a frameup. It supports my theory right to the tee, Your Honor. It is exculpatory. They are forced to give this to me and that is the reason I have it, because Your Honor said give him exculpatory evidence and it is exculpatory. It is not an innocent little statement about somebody not picking up their pay at Lumbs. It is exculpatory because this person had some

DEO REPORTING
(703) 751-0013

involvement in the murder and it shows the person who murdered the lady and what they did with the evidence and it fits my theory to a tee. It is my theory that someone other than my client murdered this lady and I don't see how it can be kept from the jury, Your Honor. If he wants to come in today and say, "Oh, Orlando told me --" and that's what he's got to say at this point -- "Orlando told me all of this, but it wasn't Umberto. It was Olga that he was talking to." I don't care if it was the man in the moon. It was exculpatory and it still supports my theory and it must come in, because it shows culpability on Orlando's part. The man was in jail arrested for the murder. He checks with his people on the outside. The ball is rolling. Things are set up. We got the right man. That's what I read into it. He can argue anything he wants to, but that's exculpatory, Your Honor; that the man comes to court today and said, I didn't tell Detective Rothlisberger when I talked to him that it was Olga. I told him this. We know this is what he told Rothlisberger, because he testified under oath that he took this down on the 20th and he reduced it on the 20th. This is what he heard and he was certain that DeLeon had said this.

Now, DeLeon comes into court after being talked to by both sides four months after the murder and now he says, "I

told him way back then it was Olga." If that's the case, why didn't I get an exculpatory statement saying it was Olga? It is still exculpatory and I didn't get that one.

THE COURT: Mr. Melson?

MR. MELSON: Your Honor, first of all, the Court did not force us to turn anything over. We signed an agreed order to turn over exculpatory evidence prior to coming into court with reference to the motions for discovery and inspection and disclosure of exculpatory evidence.

Secondly, the statements by DeLeon have no reliability whatsoever, because he only heard half of the conversation. He doesn't know what the other half said. It is unfair to the declarant to infer from his statements what we want to infer without knowing what the conversation is actually about. There is no way in the world that DeLeon could have understood what the conversation was about.

THE COURT: I agree that the context in which the conversation took place is what would have to distinguish it as a declaration against penal interest, if in fact, it was, because apparently half the conversation was overheard and was devoid of any reference to murder. At least until he gets on to, maybe, another subject. What we are interested in here would have to be wired up to this case by the surrounding

DEO REPORTING
(703) 751-0013

circumstances, if at all. Isn't it a surrounding circumstance and part of the context that this conversation took place at the time when Orlando was sitting in a holding cell charged with this murder himself?

MR. MELSON: That is a circumstance. Anything he says any time while he is in custody could be construed if you bent whatever he says far enough to be against penal interest. The witness testified that is was about -- wasn't about the money from the murder. In addition, Your Honor --

THE COURT: (Interposing) That is a jury question. The penal interest or the threshold question is something that the Court must determine.

MR. MELSON: It is a legal question. It is a question of evidence and he had to prove by the preponderance of the evidence. In addition, too, if you look atFriend on Evidence requirements for admission against interest, the very first requirements is that the declarant be unavailable. Orlando Dominguez is on his way over here right now. Before we recess, I told -- we told him where he was and he said he didn't want him. In addition, the other participant of that conversation is here today and you have both sides of the conversation and to allow Mr. DeLeon -- it is to make an inference as to what was said. It is so unreliable it

shouldn't be considered by the Court. There is no reliability in it. He only heard half of the conversation.

THE COURT: Do you have friends there?

MR. MELSON: Yes, sir.

THE COURT: I didn't mean to cut you off.

MR. MELSON: I'm not sure I can say anything, Your Honor.

THE COURT: Professor Friend says there are three requirements for this exception to the hearsay rule. One, the declarant must be unavailable. Two, the declarant must have been against -- the statement must have been against the declarant's interest at the time the declaration was made and, third, the declarant must have been aware at the time that the statement was made that it was against his interest to make it. In Virginia declaration against penal interest is admissible, whereas in most states, it is not. In my view, the surrounding circumstances under these circumstances fall short of showing that the defendant -- that the declarant had any knowledge that he was making a statement against his penal interest. On the contrary, he gave an innocent explanation of it, however, if that's true or not, it doesn't make any difference. The statement must carry in itself either a showing that the person who made it knew that it was against

his interest when he made it or the surrounding circumstances which make it obvious that he knew it. Of course, the typical situation where somebody else confesses a crime. This doesn't seem to me to carry that and once you open the door to this kind of thing, you wind up trying an entire case like this on the basis of hearsay. Who was lying? What his motives were. What was said to whom. And you have none of them present to be cross-examined. I'm relieved to hear Orlando Dominguez is available and both sides can make their own independent consideration of whether to put him on the stand and let the jury listen to him, but I will let that up to you.

This particular quotation from him, absent the declarant, doesn't seem to be accorded the trustworthiness to get through the hearsay objection. So, the objection to the statement is sustained and the testimony of the detectives to whom DeLeon told all this is double hearsay. The testimony of DeLeon himself would be admissible as an exception to the hearsay rule if the statements attributed to Orlando were shown by this evidence to be declarations against penal interest, but I cannot say that they are.

MR. KENDRICK: May I say one thing? We have seen and we have evidence in this case that Orlando is something -- is something less than on an even keel. As a matter of fact,

he is over in St. Elizabeth's. That is what they tell me. We know at the time that he was acting strange. There is evidence before the Court that the man was off his rocker and to hold this type of standard to whether or not he knew what he was saying --

THE COURT: (Interposing) I would think you would have to apply even a stricter standard to the quotation of somebody whose mental ability is in question before asking the jury to take that truth. If indeed he is that kind of person, the jury ought to have a chance to look at him in the eye.

MR. KENDRICK: Crazy people kill people too.

THE COURT: I have a little trouble giving full weight to what they say when you can't look at them while saying it.

MR. KENDRICK: Your Honor, I would offer it for the fact that it was said. I want to get into these statements and prior inconsistencies when they were said and the fact that this man said at a different time -- I want to show that it was said and that this man said them. Let them come in with the loony and say he didn't mean it at the time. I'm offering it for the fact that it was said, Your Honor.

THE COURT: Well, that has no probative value in the

DEO REPORTING
(703) 751-0013

case. What the defense wants to do is to establish this as an admission of guilt by some other person.

MR. KENDRICK: It is clear to me that that is what it is, Your Honor.

THE COURT: The defense thinks the exculpatory truth of it is -- what is the true issue?

MR. KENDRICK: Your Honor, it is marked out. It was withheld from me until ten days before trial and it is exculpatory. I think it is a mischarge of justice, Your Honor.

THE COURT: Objection sustained.

MR. KENDRICK: May I have a recess?

THE COURT: If you want to call Orlando Dominguez, you may call and I will give you a chance to interview him. Is there anything else to be heard before the jury comes in?

MR. KENDRICK: I don't know.

THE COURT: The next step apparently before the jury comes in is to take a recess and decide where you want to go from here.

All right.

(Whereupon, a short recess was taken.)

THE COURT: Ready to resume?

MR. MELSON: Judge, we both talked to Orlando and

* * *

delay. We had a number of motions to hear and other matters that took some time and the upshot of that is that Orlando Dominguez, whom you have heard referred to in the testimony, has been brought here. He is now present on the witness stand and will testify and you will need your earphones, so if you will put those on, we will test them out.

All right. The witness has been sworn.

MR. KENDRICK: Your Honor, this is the first time the jury has been out. Is it necessary to call the roll at this point?

THE COURT: No.

DIRECT EXAMINATION

BY MR. KENDRICK:

Q Would you state your name, please?

A My name is Orlando Dominguez.

Q Where are you living now?

A At St. Elizabeth's Hospital.

Q Do you know why you are there?

A Yes.

Q Why?

A For fire on my clothes.

THE COURT: You better tell the witness to speak Spanish. He is using a combination or a mixture of Spanish

DEO REPORTING
(703) 751-0013

and English, so we are having trouble with the translation.

THE WITNESS: Okay. You got it.

BY MR. KENDRICK:

Q Do you know why you are in the hospital?

A No.

Q What did you say, you set yourself on fire?

A A uniform.

Q Is that why you are over there?

THE WITNESS: Hi, Manuel.

BY MR. KENDRICK:

Q Is that why you are over there?

THE WITNESS: Excuse me. Maybe -- I speak English. You got it.

BY MR. KENDRICK:

Q Do you recall making a telephone call from jail on March the 20th?

A No.

Q Do you recall talking to Umberto from jail?

A Yes.

Q Do you recall what the telephone call was?

A No.

Q Did you talk to Umberto more than once from the jail?

A No.

Q Do you recall talking to him once from the jail?

A More than once, yes. I-94 --

MR. KENDRICK: I would like to hear the witness.

THE INTERPRETER: I'm trying to determine what he said. "I-94," I didn't understand.

THE COURT: Speak Spanish to the interpreter.

THE WITNESS: Okay. All right.

BY MR. KENDRICK:

Q Do you know Raphael DeLeon?

A No.

Q Do you remember talking to Olga?

A Olga, yes.

Q Did you talk to Olga the same day you talked to Umberto?

A No.

Q Did you talk to Olga before you talked to Umberto?

A Excuse me. What are you talking about? My problem or the problem with Juanito? What's your name? Me no understand.

THE INTERPRETER: He wants to find out what you are talking about, his problem or some other problem, Juanito's problem.

THE WITNESS: Yeah.

BY MR. KENDRICK:

Q Let's talk for a minute and forget about problems.

A It's okay. All right. It's okay.

MR. KENDRICK: Oh, my God.

BY MR. KENDRICK:

Q Do you recall talking to Umberto on the 20th of March and asking him to bring you a wrist watch and one hundred fifty dollars?

A Yes.

Q Did you say that?

A Yes.

Q Did you ask him to keep the rest of the money?

A Yes.

Q Did you ask him to take care of whatever business needed to be taken care of?

A Yes. Yes.

Q Do you know if this conversation took place on a Friday?

A At approximately 4:30, yes. To go for my apartment --

My lawyer's Spanish --

THE INTERPRETER: I'm trying to get him to repeat it

in Spanish.

He is saying that he went to his apartment at 4:00 or 4:30.

BY MR. KENDRICK:

Q To your apartment?

A Yes.

Q And did you live at 748 South Florida Street?

A 748 South Florida Street, Number Five, Arlington, Virginia, 22240.

Q Is that the same building Ophelia Quintero lived in?

A Yes.

Q Did she live downstairs?

A Yes, downstairs.

Q Did you visit her often?

A Sometimes.

Q Now, going back to this phone call that you made to Umberto, did you tell -- did Umberto tell you what happened on the phone?

A No, I didn't tell him because this was a problem with Roger Smith and myself and Tom.

Q Who is Roger Smith?

A A friend.

Q Does he have your money now?

A Yeah -- I don't know. I don't know.

Q Do you know where Roger Smith is?

A His apartment -- your apartment.

THE INTERPRETER: He says, "Your apartment." He means his apartment.

BY MR. KENDRICK:

Q Do you know the address?

A No.

Q Do you know what county he lives in?

A Excuse me? Yeah, in Arlington, Virginia -- in Virginia.

I understand you have a problem. Espanol, okay, you got it.

I went -- yes, I went to --

I understand a little English. It is confusion now. Spanish, okay.

So, he lives where the Big Boy Restaurant is. There are two Cuban refugees working at the Big Boy Restaurant where a --

He is funny. I know, because I understand English, man. You sit down there. Me sit down there. Me not necessary -- not necessary.

THE COURT: No, use the other microphone. Talk

into that black one there.

THE WITNESS: What are you saying, Spanish?

THE COURT: Yes.

THE WITNESS: Okay.

THE COURT: Go ahead.

BY MR. KENDRICK:

Q Do you know Manuel Quintana?

A Yes, I know him through Quanito.

Q Did you meet him through Nelson?

A Nelson, no. No, I met him at the church, the first day that he arrived.

Q Did you tell Umberto on March 20th -- or the 19th that you did not like Manuel Quintana?

A No, I could not have liked him.

Q Did you tell him that, that you did not like him because he acted superior to you?

A No, no, no. I am not talking about nothing.

Q On the 19th of March, the day Mrs. Quintero was murdered, were you alone at any time during the day?

A No. No. The day that they killed Mrs. Quintero I was with Umberto.

Q All day long?

A Yes, the entire day.

DEO REPORTING
(703) 751-0013

Q You never left him?

A No, I never was separated from him.

Q Did you tell Umberto -- or did Umberto tell you that Juan Carlos had skipped town with the money?

A No.

Q He didn't say that to you?

A No.

Q Who is Juan Carlos?

A My roommate -- our roommate in D.C.

Q Is he a homosexual?

A You got it. I don't know.

Q Did you tell me downstairs he was?

A I don't know.

Q Did he leave without paying the rent?

A I don't know. The apartment was listed in my name, so I had to pay for it. I was responsible for it and I paid for everything and when I needed something, then I was the one responsible. The problem with Carlos and Quintero and Nelson are very much their own problems and there are problems of theirs and not problems of mine. Yes.

Q Do you remember where you spent the night on March 18th, the day before Mrs. Quintero was murdered?

A In my house -- in my apartment.

Q Do you remember what time you got up?

A 11:00 o'clock.

Q Was Umberto with you?

A Yes, sir.

Q All day long?

A Yeah.

Q Do you remember where you went when you got up?

A Excuse me?

Q Where did you go when you got up? Do you remember, on the 19th?

A We got up and we went to Barrera's house.

Q What for?

A To sell my phonograph records.

Q Where does he live?

A I don't know where he lives. It is in the apartment across the street from --

THE INTERPRETER: I didn't get the last word he said. "Across the street from Manny," I think he said.

BY MR. KENDRICK:

Q How long did you stay at Jose Barrera's house -- or Bario's house?

A Just a few minutes.

Q What did you do when you left the house?

A What did I do? I went back to my apartment.

THE WITNESS: Hey, how are you doing, man? Old friend.

BY MR. KENDRICK:

Q How long did it take you to get back to your apartment?

A Maybe thirty minutes.

Q Was Umberto with you?

A Yes, sir.

Q Do you recall what time you got back?

A No.

Q What did you do when you got back?

A I picked up the records. I showed them -- I showed them to --

Excuse me. Not necessary.

I went back to --

Q What did you do when you got back to your apartment?

A When I went back to my apartment, as I said -- I've answered that and repeated again and again the same thing as I have always said and the same thing I've always said. I picked up my records, put them out. I put them back. I showed them to Luiz and after Luiz took them with him.

Oh, my God. I'm sorry.

Q Who is Luiz?

A Luiz -- who is Tomasara?

Q Who is the Luiz you are talking about?

A Excuse me. Luiz, I think, is a Cuban refugee. I don't know his last name. He works in the, oh, El Palacio Restaurant.

Q Did there come a time when you went back to Umberto's house?

A Excuse me?

Q Did you ever go to Umberto's house on the 19th of March?

A Yes.

Q What time?

A Maybe about 12:00 o'clock.

Q Are you guessing at the times?

A No, I'm recalling. I'm remembering.

Q How long -- where does Umberto live?

A Frederick Street on Columbia Pike, Apartment Two, 901.

Q How far is that from your apartment?

A Well, we go down --

THE WITNESS: Hey --

THE COURT: Don't talk to other people in the

courtroom. Just answer the question.

THE WITNESS: Okay. Water, please?

(Handing to the witness.)

THE COURT: Do you have anymore questions?

MR. KENDRICK: Yes, Your Honor. I was waiting for the witness to get his water.

THE WITNESS: Thank you, sir.

THE COURT: Sit down.

Go ahead, Mr. Kendrick.

BY MR. KENDRICK:

Q How far is your house from Umberto's house?

A Going down through Magnolia Gardens one block, two blocks -- about five blocks.

Q Five blocks?

A Yeah. Yes, five blocks.

Q Did you ever -- did you stay with Umberto the rest of the afternoon?

A Yes.

Q Did you ever leave your house alone? Did you ever leave Umberto's house alone? I'm sorry.

A Yes.

Q Did you?

THE INTERPRETER: Yes. He says he did.

BY MR. KENDRICK:

Q I thought you said you were with Umberto all day long?

A No.

Q Are you now saying you weren't with Umberto all day long?

A No.

Q Did you ever leave Umberto's apartment by yourself?

A Yes, by myself.

Q When, on March 19th?

A Yes, around 3:00 in the afternoon. Around 3:00 in the afternoon.

Q Is that the only time that you were alone?

A 4:30 -- 4:30, and we went to the college, yeah.

Q Well, you weren't alone when you went to the college, were you? You were with someone, weren't you?

A Yes, I was with Umberto. We took the -- we got a duplicate of my Social Security and we got my Social Security number and then we get -- and then I took my billfold and I put it away, but I did -- I wasn't wearing a jacket.

Q Is that the only time that you were by yourself?

A Excuse me? Yes, that's it. I was alone. I have always been alone.

DEO REPORTING
(703) 751-0013

Q Did you go to the Seven-Eleven that day alone?

A No, I went to the Seven Eleven with Jessie.

Q Do you remember what you bought?

A Yes, three packs of Marlboro cigarettes and something else -- sort of a syrup to make juice. It is a powder or syrup to make juice, little tablets.

Q Did you go back to your apartment alone after you left Umberto's?

A Yes, alone.

Q Do you recall what time you got there?

A Maybe 5:30. Maybe 5:00 o'clock.

Q Once you went to your apartment, did you ever leave your apartment again that evening?

A Excuse me?

Q Once you went to your apartment, did you ever leave your apartment that evening?

A Yes.

Q When?

A When the people -- the investigators picked me up and they said come over to Arlington Police.

Q Other than that, did you leave your apartment?

A No.

Q You never left it?

A No.

Q Are you sure?

A Certain. I am sure.

Q What was this one hundred fifty dollars that you asked Umberto to get?

A From my work -- from my work at the Pizza Hut.

Q What Pizza Hut?

A Kent Street, the road to Alexandria, Kenny Street --

THE INTERPRETER: Kenny Street, I think. I think he is saying Kenny Street.

BY MR. KENDRICK:

Q What was the wrist watch you were talking about when you told Umberto to get the one hundred fifty dollars?

A I was referring to my wrist watch.

Q Did you have that on the day that you went to Umberto's house and to the Seven-Eleven and when you sold the records?

A Yeah.

Q It worked?

A Yes.

Q Can you tell time?

A I can't tell the time without my watch.

Q Did you have your watch on that day on the 19th?

A Yes, I had it with me.

Q All day?

A Yes.

Q So, the watch was with you all day like Umberto was with you; is that right?

A Yes.

Q Why did you tell him to keep the rest of the money?

A Why? Because he was my friend.

Q What's the rest of the money that you were talking about?

A Fifteen dollars.

Q Fifteen dollars?

A Yes. That's what my records cost.

Q What are you talking about when you said, "Take care of whatever business needed to be taken care of"?

A To what business? To none. To what business was I referring to? To none.

THE INTERPRETER: That's his exact answer, sir.

THE WITNESS: I'm tired. Excuse me.

BY MR. KENDRICK:

Q Did you ever write a note, a threatening note to Nelson?

A No, not threatening.

Q No?

A No, not threatening. Something with a paper similar to that --

THE INTERPRETER: That is what he says, but I don't know what he is pointing to.

THE WITNESS: (Continuing) -- I told him that whenever he wanted to clear something up man to man with me that I would be very glad to clear it up with him. What you didn't find out downstairs you are finding out now.

(Witness is singing.)

BY MR. KENDRICK:

Q Did you like Nelson?

A Did I like Nelson? No, bullshit, no good.

Q Why was Nelson "no good"?

A Because Nelson is a homosexual. Nelson is gay.

Q You don't like homosexuals?

A No. I like woman.

Q Did Nelson ever hurt you?

A No. No, sir.

Q Did Nelson ever threaten you?

A No. No. No. No. He is weak and I am strong.

Q And you asked Roger Smith to buy you some film for a camera too, didn't you?

A No, for Roger Smith's camera.

Q What kind of film did you ask him to buy?

A Polaroid.

Q Did you have a camera?

A No.

Q Do you like cameras?

A Sometimes.

Q What kind of a camera do you like best?

A Polaroid.

MR. KENDRICK: Thank you, Your Honor.

Your witness.

CROSS-EXAMINATION

BY MR. MELSON:

Q Can you hear me, Orlando?

A Yeah.

Q Orlando, on the day that Ophelia Quintero was killed, did Umberto stay with you?

A Yes.

Q Did he stay with you the night before?

A Yes.

Q Were you packing that day to go some place?

A Yes.

Q Did he help you pack?

* * *

A Yes.

Q Was the money you said that Umberto was to keep the fifteen dollars you gave him from the sale of the records?

A He gave me five. He gave me back five dollars.

Q And he kept ten dollars?

A Yes.

Q Did you ask Umberto to take care of the things that were in your apartment?

A Yes.

Q Besides the watch, did you have any watchbands?

A My black watch. My black watch.

Q Did you also have some watchband, pulsars?

A Yes, I had three.

Q Did you wand Umberto to get your property and keep it for you?

A Yes. Yes.

Q Orlando, --

A (Interposing) Yes?

Q (Continuing) -- did you take any property from Ophelia Quintero?

A No, I did not.

Q Did you kill Ophelia Quintero?

A No.

* * *

A No, it would be impossible to say. You could take shortcuts through school yards and schools.

Q More than twenty minutes?

A In my estimation it would.

MR. KENDRICK: More than that?

THE WITNESS: In my estimation.

MR. KENDRICK: I just didn't hear you.

THE COURT: Is that all, gentlemen?

MR. MELSON: That's all, Your Honor.

THE COURT: Thank you.

(Witness excused.)

MR. KENDRICK: Your Honor, could I have Defendant's Exhibit No. 7 read to the jury, please? It is in Spanish.

THE COURT: Yes. Would you take that back to the translator and ask him to read it to the jurors on the English channel?

MR. KENDRICK: Your Honor, for the record, this part of Exhibit 7 has been identified as the note that Orlando wrote Nelson.

THE INTERPRETER: I will translate this note:

"Dated 3-9-81. Nelson, when you wish to talk with me forgetting about what you are as a man, I am ready to speak to you and those who represent

you personally and without covering up each other in any way, because I'm -- I have become tired of all of you. Otherwise, I wish to uncover -- I am going to uncover all of you and in the process, uncover or reveal myself. Establish the date as you may wish, otherwise, I am going to take the initiative to speak to you tomorrow. Hint in English: the one who knocked on the door last night was me." Then he has a Pizza Hut written here and a telephone number, "820-4661" and a signature, "Mr. Dominguez."

THE COURT: Give me the date of that again?

THE INTERPRETER: The date at the top of the page is March -- 3-9-81.

THE COURT: 3/9?

THE INTERPRETER: 3-9-81.

THE COURT: Thank you.

THE INTERPRETER: You are welcome, Your Honor.

MR. KENDRICK: With the Court's indulgence.

We rest, Your Honor.

THE COURT: Does the Commonwealth have rebuttal evidence?

MR. MELSON: We will, Your Honor. Our first rebuttal witness had an exam to take at 5:00 o'clock, I think.

* * *

DEO REPORTING
(703) 751-0013

A No.

Q Do you know his father, Caunabot Suarez?

A No.

Q Do you know where Patrick Henry Drive is?

A No.

Q Directing your attention to -- let me rephrase that again. Did you know or did you know Ophelia Quintero?

A Yes, I knew her by sight.

Q Did you know Nelson Echemendia?

A Yes, I also knew him by sight.

Q Now, do you recall the day that Ophelia Quintero was killed?

A Yes. Do I remember the day? Yes.

Q The night before that day, will you tell us where you spent the night?

A In Orlando Dominguez's apartment.

Q Where did he live? Do you recall?

A Up above the lady's apartment.

Q Was there anybody else there besides you and Orlando?

A No.

Q Did you ever see Juan Carlos there that day or night?

A No.

Q Do you remember about what time you got up?

A I -- what time did I get up?

Q Yes.

A At around 10:00 a.m.

Q Do you recall what time Orlando got up?

A At approximately 9:00.

Q What did you do in -- did you help Orlando with anything in his apartment?

A Yes, I was helping him to organize his personal effects.

Q Why was he organizing his personal effects?

A Because he was going to turn over the apartment. He was going to turn over the apartment -- vacate the apartment.

Q Was there a time on that morning that you and Orlando went some place?

A Did we go some -- yes, we went to several places, yes.

Q Do you know a person by the name of Jose Barrera?

A Yes.

Q Did you go there with Orlando?

A Not really to his house. We went to some other

people's house where he was.

Q Why did you go to that -- the other person's house to see Jose?

A To deliver to the building manager a fuse for the light.

Q The manager for the apartment complex?

A Yes. I don't know if he is the manager or the man in charge or the --

Q (Interposing) Was that on Greenbrier Street?

A I don't know the address.

Q Did you and Orlando come back and go to his apartment, Orlando's apartment?

A Yes.

Q Did anyone come back with you?

A Jose Barrera.

Q Do you know a Luiz?

A Luiz -- Luiz, no, I don't remember who Luiz might be.

Q What happened when you got back to the apartment?

A Orlando gave -- turned over the records and he paid him fifteen dollars for the records.

Q Are you saying Orlando got fifteen dollars for the records?

A Yes, fifteen dollars.

Q What did Orlando do with the fifteen dollars?

A He kept five and gave me ten to keep for him.

Q After Orlando sold his records, what did you and Orlando do?

A We went to my apartment.

Q Did you drive or did you walk?

A No, we walked.

Q Did Orlando have a car?

A No.

Q When you got to your apartment, who was there?

A My sister and the boy.

Q What did you do when you got to the apartment?

A Breakfast.

Q Did Orlando go any place after you had breakfast?

A Yes.

Q Let me back up just a minute, Umberto. Do you recall what time you got to your apartment from Orlando's?

A Slightly after -- around noon. Shortly after 12:00 noon.

Q Where did you say that Orlando went after you had breakfast?

A He went to the Seven-Eleven.

Q Did he take anybody with him?

A My nephew.

Q Is that Jessie?

A Yes.

Q Did Orlando go out again once he came back?

A Yes.

Q Do you know where he went?

A No, I don't know. He told me he was going to a friend's house to claim some money that was owed him, somebody by the name of Roger Smith.

Q About what time was that, do you recall?

A That was at around 1:30, more or less.

Q About how long was he gone?

A Approximately some twenty minutes.

Q Did he come back to your house?

A Yes.

Q Did he seem any different from when he left?

A No.

Q Did he have a lot of money with him?

A No, he didn't have any money.

Q Did he have any jewelry with him?

A No.

Q Did you see any blood on him?

A No.

Q After he came back from looking for Roger Smith, did you and he go some place?

A Yes, we went to Northern Virginia Community College.

Q Why did you go there?

A Because I was going to register.

Q Were you with Orlando when you went?

A Yes, I was.

Q About what time did you go to Nova?

A At around 2:00 p.m.

Q And you were with him all the way to Nova and all the way back?

A Yes. Yes, both going and coming.

Q When you came back -- or left Nova, where did you go?

A Home. I went to my apartment.

Q What did you do when you got back to your apartment?

A Well, we spent a few moments there and then my sister needed to buy some shampoo, so we went to buy it for her.

Q Where did you go to buy the shampoo?

A To People's.

Q Who gave you the money for the shampoo?

A Olga.

Q Where did you go after you purchased the shampoo?

A To the apartment -- back to the apartment -- back to my apartment.

Q What did you and Orlando do when you got back to your apartment?

A Well, I -- I began to put the shampoo on my sister's head and Orlando went back to his apartment.

Q Do you recall when Orlando went back to his apartment?

A After 4:30.

Q Umberto, do you know how to drive an automobile?

A No.

Q Do you recall going to Orlando's apartment after he was in custody with the police?

A No.

Q Did you go get any of his property from his apartment?

A No.

Q Did your sister?

A No.

Q Did Orlando have a watch?

A Yes.

Q Did you ever see what kind it was or could you

describe it for us?

A It was a plastic Star Wars brand wrist watch.

Q Did he have, in addition to his watch, any wristbands?

A Yes.

Q Do you know where they are now?

A I guess it is in his property -- among his property.

Q Did you ever put anything in Manuel Quintana's automobile?

A No, I don't know him.

Q Did you put any blood on Manuel Quintana's suit?

A No. I don't know him. How could I do that? I don't know him.

Q Did you put Manuel Quintana's fingerprints on in Nelson's apartment?

A I have never been in that apartment.

Q Did you give Manuel Quintana six or seven hundred dollars?

A No. No.

Q Did you give Manuel Quintana a hat to wear?

A No. I don't know him.

MR. MELSON: Thank you. I have no other questions.

* * *

P R O C E E D I N G S

(Whereupon, an interpreter, Teresa Pabon, was duly sworn.)

THE COURT: All right. Is counsel ready?

MR. KENDRICK: Your Honor, before we bring in the jury, it is my understanding from talking to Mr. Melson this morning that he has two more witnesses to call in rebuttal. Dr. Beyer, who he is going to call, and also a woman by the name of Carmen. He is going to call Dr. Beyer first. I have a motion in limine with respect to Carmen and I don't know whether you want to take a break or deal with it now, but I look to the Court for guidance.

THE COURT: How long will Dr. Beyer be on the stand?

MR. MELSON: Your Honor, I have four questions for Dr. Beyer.

THE COURT: Since this is going to be brief, we will take the motion in limine now.

MR. KENDRICK: It is my understanding, but I want to hear it from the Commonwealth, with respect to Carmen, what she is going to testify to and the purpose, Your Honor.

MR. MELSON: Your Honor, if the Court please, Carmen is a Deputy Clerk in Fairfax in the General District Court. On March 19th this defendant went out to the Clerk's Office

and arrived out there about 1:10 and he was looking for his attorney out there and talked to a Deputy Clerk whose name, as I said, was Carmen and while talking to her, he said that he had been at an apartment where a friend of his, an old lady, was found with gashes in her head and he also tells a little bit more about that and what he said as a result of finding her and so forth. The evidence is being put on in rebuttal of the defendant's two witnesses who established the time of death at 2:00 o'clock in the afternoon. Mr. Kendrick has tried to set up 2:00 o'clock as the time of death and then argue that the defendant was at Reed's Auto Wholesalers at ten minutes to 2:00, so he could not have committed the crime. The fact that we have evidence that he was with the body prior to 1:10 in the afternoon rebuts the inference that the time of death was 2:00 in the afternoon. That is fifty minutes or so later. I mean his whole -- half of his defense has been the time of death and certainly as Dr. Sheehy said, when you put seventy-five percent of the weight on the circumstances surrounding the death and only twenty-five percent on the medical aspects of it, the fact that a person saw the individual with the gashes in the head an hour before the time of death certainly rebuts his argument that it was at 2:00 o'clock.

DEO REPORTING
(703) 751-0013

MR. KENDRICK: Your Honor, I want the record clear at this point as to whether or not the sole purpose then is to rebut the medical evidence of the time of death being established at 2:00 o'clock. Is that the sole purpose?

MR. MELSON: That's the reason for her testimony. I think it certainly can be argued from that testimony a number of different things, including the time of death.

MR. KENDRICK: Well, I want to know, Your Honor, what the purpose of the witness is. That is the basis of my motion in limine. I want to know the purpose of the testimony.

THE COURT: I don't think he has to tell you what his trial strategy is. What is the motion?

MR. KENDRICK: I don't believe the testimony should be allowed. I don't think it is proper. I have rested my case and I don't believe it is proper for several reasons. First of all, time of death has not been established. The witnesses all say that it might be 2:00 o'clock, but that's the best that they can say. The doctors -- if it is Dr. Sheehy he is talking about, he says you can't be certain about the time of death. Now, I'm going to argue the best I can from 2:00 o'clock, but it has not been established 2:00 o'clock is the time of death. Now, if that's the case, it

isn't proper. It isn't proper impeachment and I want to go into that.

In addition, it is improper rebuttal and I want to go into that. I think from what I can determine I find no authority in Virginia or West Virginia that allows impeachment of an expert's opinion and we don't have that here. There is no opinion that 2:00 o'clock is the time of death. There is some suggestion of that, but it is not established that 2:00 o'clock is the time of death. This business about Dennis Reed is not something that I brought up on direct, but on cross-examination, and I can't argue that. But there is no established fact that Dennis Reed is the car dealer. There is no established fact that 2:00 o'clock is the time of death. There is no established fact, much less an opinion. How can you come in and use impeachment to impeach a witness that hasn't established that? Even if it is established and is not, it seems like to me you don't come in with a lay person who impeaches the final opinion of an expert. That's an improper impeachment. They may show some of the basis on which the premise of the opinions were established and go to that, but to attack and to impeach a witness who has not given an opinion -- at best a guarded guess -- that the time of death was 2:00 o'clock and this is

DEO REPORTING
(703) 751-0013

what they brought out -- to impeach him with a statement of this nature, I think, is highly improper. I think it amounts to -- it amounts to a semi confession that they could have brought out in their case in chief if they thought -- and they certainly had the opinion and they knew that I was going to call the doctor just because I wanted it all to come out. I wanted to know what he did when he got there. They could have called this witness in their case in chief and to do it now -- especially now when it is improper impeachment seems like to me is incredibly inflammatory and any probative value at all is highly outweighed by the inflammatory nature of that, especially right before the jury goes out to deliberate.

There is no testimony from this witness according to what the Commonwealth has said to this accord that this is the same person. The purpose, as they stated, is to rebut or impeach the time of death established by the medical experts beginning at 2:00 o'clock. That has not been established and therefore, it is improper impeachment. There is nothing to it. There is absolutely nothing to the impeachment.

Now, we look at Friends Treatises on rebuttal and what is proper rebuttal. Friends says there is no question that it exists, but he does limit it to three areas. First, I say it is improper impeachment because there is nothing to

impeach; and secondly, Friends says you cannot rebut by introducing matter -- material which is merely cumulative. Secondly, you cannot offer evidence that is not responsive to points raised by the defendant; and third, you cannot attempt to remedy in rebuttal the gaps that you have left out in your case in chief and that's what they are trying to do. Now, they are coming in with this and they are saying it is to rebut, to impeach, but we know the real reason they are doing this. They are going to suggest that the defendant had made some type of a confession. I don't believe that's the proper way to do it. Not after they have rested and not in rebuttal.

THE COURT: It seems to me that the question is not one of impeachment. That is the device by which the credibility of a witness is destroyed or lessened by exacting admissions from that witness which either show prior inconsistent statements by him or a conviction of a crime. The question really is is this proper rebuttal and there the Commonwealth is precluded from introducing it unless it goes to refute factual evidence introduced during the defense's case. However, if it does go to refute a fact which was presented in the defense case, the fact that it carries with it many other facts which do not refute the defense's case is immaterial. It is admissible for all purposes and can be

DEO REPORTING
(703) 751-0013

argued for all purposes. It is not evidence introduced only for a limited purpose. The test then is does the Commonwealth have something here which goes to refute a fact presented by the defense? Well, the defense has relied rather heavily on the time of death asserting that it was as late as 2:00 o'clock, because the defendant's presence is established a little prior to 2:00 out in Fairfax County and this reinforces the defendant's alibi very strongly. The Commonwealth, as it seems, wants to show the time of death is earlier if they can, because that tends to leave the defendant without an alibi and it seems to me that with the evidence of Dr. Guard in the case and the admissions obtained by the Commonwealth in calling Dr. Sheehy -- excuse me -- the defense in calling Dr. Sheehy, the Commonwealth has a right to present this additional testimony that there was a consciousness of guilt in the defendant's mind at an earlier time which would indicate that he knew the death and that the death had occurred earlier. It seemed to me that this is one of those situations where the Commonwealth has a way of getting in in, because it is responsive to something in the defense's case and they have a right to use it for other purposes.

I will deny the motion. It seems to me to be

probative and that they are entitled to it anyway.

MR. KENDRICK: Am I not entitled by the nature of the evidence to so rebut? My counsel interviewed this witness numerous times and there was no indication of any such story. Now, I have rested.

THE COURT: That's a case for cross-examination.

MR. KENDRICK: It may very well be, but can't I then after cross-examination put into surrebuttal and bring out the interviews that were conducted with this woman? Suppose she says I never talked to you or anybody on your side?

THE COURT: You might well be able to impeach her by prior inconsistent statements. I don't think that is surrebuttal.

MR. KENDRICK: Your Honor, I'm going to have to call my co-counsel. I'm going to have to call him.

THE COURT: I understand. We will see how she responds.

MR. KENDRICK: I also have a witness -- a lawyer out there who can corroborate some of the facts as to the reason why my guy was out there. I think I am entitled to go into that -- all of that then, Your Honor.

THE COURT: I don't think that. If this witness

DEO REPORTING
(703) 751-0013

withheld the story from you and you interviewed her, to lessen her credibility you have a right to proceed that one way or the other way, to approach that by asking her about interviews with counsel.

MR. KENDRICK: I want the record to reflect that I have never at any time received notice from the Commonwealth of this statement.

MR. TRODDEN: The Court's indulgence for one minute.

THE COURT: Mr. Kendrick, in regard to that last point you made, I was thinking about their not having disclosed that statement to you. Unless it was taped, I don't think it would fit 3-A-14. It is a statement made to a witness and not written or recorded. As you know, I have found myself overruled by the Supreme Court. I used to always require those things stored in the minds of the witnesses to be produced. They made it rather abundantly clear in the opinion a little while ago that that is not to be done and statements by the defendant do not have to be disclosed. I don't think from what I have heard that it is the kind of statement to obligate them to turn it over to you.

MR. KENDRICK: Your Honor, I have reason to believe that the statement was in writing.

THE COURT: Well, we will find out from the witnesses.

MR. KENDRICK: Yes, sir.

THE COURT: Call the jury, please. You better call the roll this morning.

MR. MELSON: Your Honor, she did make a written statement about a week ago, but that doesn't have any bearing on whether we want to give it to him. Number one, it is not exculpatory and it is not a statement made by a law enforcement witness. It is a statement made to a witness.

MR. KENDRICK: It is my understanding that it was made to a police officer. I think it was made to Papageorge, wasn't it?

MR. MELSON: That's the defendant's statement to a police officer.

MR. KENDRICK: Well, we will find out.

(Whereupon, the jury returned to the jury box.)

(Whereupon, roll was taken of the jury and all were present.)

THE COURT: Who is your first witness?

MR. TRODDEN: Dr. Beyer, Your Honor.

DEO REPORTING
(703) 751-0013

Whereupon,

JAMES C. BEYER, M.D.,

was recalled as a rebuttal witness by and on behalf of the Commonwealth of Virginia, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TRODDEN:

Q Doctor, are you the same Dr. Beyer who has previously testified in this trial?

A Yes, sir.

Q Doctor, would you please describe to the jury what a defensive wound is?

A That term is normally used for the wounds which are received by a victim as they attempt to ward off injuries that are being inflicted on them by an assailant. Therefore, they are normally present on the upper extremities, either the arm, forearm, or hands. If the victim happens to be on their back, then you may have defensive wounds on the lower extremities.

Q Did you find any evidence of defensive wounds on the body of Ophelia Quintero?

A No.

Q Doctor, did you today bring photographs taken before the autopsy and prior to your internal examination?

* * *

straight from the apartment in Arlington and you said you commented on how fast he had gotten there. How do you know how fast he had gotten there? He must have given you a time that he left.

THE WITNESS: I think I might have asked him this. I don't remember exactly.

THE COURT: But you do remember commenting that he had made a fast trip from Arlington to Fairfax Court House?

THE WITNESS: Yes, I do and I think I asked him why he was so upset and that's how it came out that she had been at the bottom of the stairs and she was hurt.

BY MR. KENDRICK:

Q She was hurt?

A Yes.

MR. KENDRICK: Your Honor, I don't think this is a proper rebuttal witness. I think her testimony is so vague. It is so prejudicial and inflammatory that that far outweighs any possible probative value -- any possible probative value. No specific name was mentioned. No time was mentioned and she's guessing and it is clear that she is guessing. The more you ask her the more she guesses. I think it is this. I think it is that. She said she didn't even know if he was telling her a story or not.

DEO REPORTING
(703) 751-0013

THE COURT: I think it is relevant, probative and properly rebuts one contested issue in the case and I will allow it to be heard by the jury.

Would you call the jury?

(Whereupon, the jury returned to the jury box.)

(Whereupon, the defendant is speaking in Spanish.)

THE COURT: Mr. Ordoveza, what is all this about?

MR. KENDRICK: Your Honor --

THE COURT: (Interposing) Let the jury retire.

(Whereupon, the jury was temporarily excused.)

THE COURT: You can go back to the witness room for a moment.

(Whereupon, the witness was temporarily excused.)

MR. KENDRICK: Your Honor, may I try to --

THE COURT: (Interposing) We will take a short recess.

(Whereupon, a short recess was taken.)

THE COURT: Call the jury, please.

MR. KENDRICK: Your Honor, I must approach the bench. Don't call the jury in, please.

(Whereupon, a bench conference was held off the record.)

* * *

Q Directing your attention to March 19th, 1981, did he come to your Clerk's Office and talk to you?

A Yes, he did.

Q All right.

Would you tell us what happened when he came to talk to you, what he said and what you said?

MR. KENDRICK: Your Honor, I would ask that it be by question and answer.

THE COURT: All right, sir.

BY MR. MELSON:

Q When he came to the court house and to your office, what did he say to you to begin with?

A He asked me help him to find his attorney.

Q What did you do when he asked you to help him find his attorney?

A I asked him if his attorney was court-appointed or private.

Q What did he say?

A He said it was private. I told him we didn't keep track of private attorneys and he had to find him on his own.

THE COURT: Miss Salgado, your voice is very low. Keep your voice up, please.

DEO REPORTING
(703) 751-0013

BY MR. MELSON:

Q After you told him that you did not keep track of retained attorneys or non-court-appointed attorneys, what did he do?

A He just kept on looking at me and then I said that if he was court-appointed and because I'm pretty sure he said he was in court the day before and it was the same attorney -- that's when I asked him if it was private or court. He wasn't sure. I said if it was private, we don't keep track of them. If it was court-appointed, I sent him to different departments, criminal liaison and ROR.

Q Do you remember him returning from those departments to where you worked?

A Yes, because nobody had anything to say to him and didn't know what he wanted.

Q What did he say to you when he returned?

A "Can you help me to find out who my attorney is?" I said, "Do you have any papers, anything that would show who your attorney was?" He had a little white piece of paper with a phone number on it.

Q Did you inquire of him whether or not he had a problem?

A Pardon?

Q Did you ask him whether or not he had a problem you could help him with?

A Yes, I did. I asked him what the nature of the problem was and he said that I could help.

Q What did he say?

A That's when he started telling me his story.

Q Tell us what he told you.

A I asked him something like, "What happened? Why do you need an attorney right away? What's the problem?" Those are normal questions that I asked anybody coming up there.

THE COURT: Were you speaking Spanish?

THE WITNESS: The whole time the conversation was taking place in Spanish.

A JUROR: What day was this? I've lost track.

THE WITNESS: The 19th.

BY MR. MELSON:

Q What day of the week was that?

A Thursday.

Q Okay. And what did he tell you then?

A That's when he said he found a friend of his injured at the bottom of the stairs.

Q Did he indicate whether it was male or female?

A He said, "senora." "Senora," in Spanish is older

lady.

Q Did he tell you whether he saw how she was -- did he tell you whether he saw anything which indicated injury to her?

A Yeah, gashes -- gashes.

Q Where on her did he say?

A On the upper part of her body, her head.

Q Did you ask him any questions about whether or not he stayed and helped or called the police or any of those things?

A Yes, I did ask him those questions.

Q What did he say?

A He said no, that he was scared and that he ran.

Q Did he say why he was scared?

A Because he had a problem the day before in court and didn't want to have anything to do with the law.

Q Did there come a time that you looked --

Let me ask this first. Do you have a clock in your Clerk's Office?

A Yes, we do.

Q During your conversation with him, did you look at the clock?

A Yes, I did.

Q What part of the conversation caused you to look at the clock?

A It was when I said something like, "You sure made pretty good time coming up here." Then I looked at the clock and I also looked at the clock when I wrote -- okay. I called that phone number that he gave me on that little piece of paper and there was no answer.

THE COURT: This is a lawyer's phone?

THE WITNESS: Yes, sir.

THE COURT: What he told you was his lawyer's phone number?

THE WITNESS: Yes, it was and also I wrote his name down, the date and the time on a piece of paper so that I could remember his problem in case he would ever need me.

BY MR. MELSON:

Q What was the time?

A It was 1:20.

Q Approximately how long before that did you see him come to the court house or was he in your Clerk's Office?

A It was ten or fifteen minutes from that time -- earlier from 1:20.

Q How long after that did he leave?

A Within five to ten minutes.

DEO REPORTING
(703) 751-0013

Q Did he ask you -- why did you write down his name and date and time on a piece of paper?

A Because he asked me to remember him.

Q Did he say why he wanted you to remember?

A Well, within our previous conversation before -- it led up to that and I advised him to go to a Spanish-speaking committee to get some help and not to run and not to leave town. If he was innocent, then I would help him.

Q Did you tell him what would happen if he ran?

A That he would get caught sooner or later.

Q Do you remember what he was wearing?

A Dark blue pants and a light green shirt.

Q Did you notice anything about the shirt?

A Yes, I did. There were like two drops of blood on his shirt.

MR. KENDRICK: Your Honor --

BY MR. MELSON:

Q (Interposing) After --

MR. KENDRICK: (Continuing) -- Pardon me. Just a minute. I hate to interrupt this testimony, because it is very intriguing. Is this really rebuttal? It seems to me like the rule book went flying out the window.

THE COURT: Objection overruled.

* * *

Q Did you tell him anything about blood?

A No.

Q Did he ask you if there was anything else you could tell him?

A Yes.

Q You didn't remember the blood then?

A No.

Q This was March -- when was this, three weeks ago?

A Uh huh.

Q Okay.

Did you tell him about this story that he told you about seeing somebody fall down the steps and gashes in their head?

A No.

Q Had you forgotten about it at that point or was it no longer weird to you?

A Excuse me. I don't go around remembering every Tom, Dick and Harry at the court house, because I hear a lot of stories up there.

Q Okay. Is this one of them, one of the Tom, Dick or Harry's that you didn't remember then?

A It is possible. It was -- lately at the court house there has been a lot of crime in the area.

DEO REPORTING
(703) 751-0013

Q But you had forgotten?

A Not specifically, no. I didn't remember his incident specifically until it started coming back to me, you know, flashbacks.

Q Flashbacks? That happens when you do drugs. Do didn't do any of that, did you?

A No, I don't do drugs.

Q What makes it flash back, the horrifying incident in and of itself?

A Every time I talked about it, I remembered more and more and the more I talked about it with co-workers, the more I remembered.

Q How long did you talk that day with Mr. Recinto?

A Not very long.

Q Not very long on that day?

A And I was pretty busy.

Q I see.

The next day that he came and talked to you -- he came again, didn't he?

A Yes. He showed me a picture and said he was representing a client and that he was in trouble and he said something like he needed me to place him at the court house at a certain time because of a crime that was committed and I was

the one or only star witness who knew he was up at the court house.

Q Between 1:00 and 2:00?

A Right.

Q And he showed you a picture of Mr. Quintana?

A Yes, he did.

Q Did he bring back any flashbacks of this weird incident?

A All it did was make me remember that he told me a story and I couldn't remember right then and there. Whatever the story was, it scared me.

Q But you couldn't remember? The flashback, was it a big flashback?

A I was very puzzled, very confused.

Q All right.

That was about three weeks ago?

A Uh huh.

Q Now, has anybody else talked to you since you had that fuzzy flashback and today?

A Pardon?

Q Has anybody talked to you since you had the sort of fuzzy flashback about the weird story between the second time and you and Mr. Recinto and today? In particular, let me ask

you very specifically, has anybody from the Sheriff's Department come out and talked to you?

A Yes, they have.

Q When did that happen?

A It was about a week after Mr. Recinto called -- came up to the court house.

Q About a week ago?

A No, about two weeks ago.

Q Two weeks ago?

A Two and a half weeks.

Q Was it anymore than two weeks?

A A little bit more, in the beginning of the week.

Q Was it right after Mr. Recinto talked to you a second time?

A It is possible. Okay?

Q Okay. Now, who was this person? Do you know?

A A lady from Arlington Court House. Yes, Arlington.

Q Was it the Sheriff's Department?

A Yes.

Q Did she have on a brown uniform, like Mr. Wilkerson here?

A No, she's sitting over there (indicating).

Q Oh, this lady, the lady that's been helping us out

all the time (indicating)?

THE COURT: I don't believe she knows her.

BY MR. KENDRICK:

Q Are you referring to Rachel, this lady right here (indicating)?

A Yes, I am.

Q Did she tell you she was from the Sheriff's Department?

A She told the girls at the counter she was.

Q All right.

Did you talk to her?

A All she asked me was about a ticket.

Q That's all she --

A (Interposing) She talked to one of the other girls at the counter and then she took us aside and she talked to the other girl and the other girl said something like, "She took the money for the ticket that the guy paid." I said to her that he came up to the court house to talk to me.

Q You said that to her?

A Yes.

Q Now, let me stop you just a minute, if I may. Were you starting to get a flashback now?

A All I told her was --

Q (Interposing) Were you starting to get a flashback?

A I had already gotten the flashback.

Q Before she got there?

A Yes.

Q Tell me what brought the flashback on this time.

A When she was talking to the lady at the counter, the lady at the counter told her to go to another department.

Q Don't tell me what somebody else said.

A This has something to do with that.

Q We will get to these people. If you can tell me just what you said?

A One of the girls turned around and said, "Isn't that the guy you were talking to for a long time?" I said, "That's the guy that told me about the lady."

Q Is this the flashback coming?

A Yeah.

Q Okay.

Tell me about the flashback now. Was it a funny flashback?

A Well, you are trying to be funny.

Q I'm not trying to be funny with you.

A Well, it sounded like you were trying to be funny.

Q I'm not trying to be funny.

A Okay.

Q Tell me about the flashback.

A When I looked at her, I said, "That's the guy that told me about the lady falling and being hurt." Then she goes, "There was a murder," and I remembered.

Q When she said there was a murder?

A She heard about there being a murder or something and that's when it hit me.

Q Bam, the flashback is in full force then; is that correct?

A Yeah. The blood stains -- I told my supervisor about it and I said, "I'm scared."

Q Now, did you call the police at that point?

A No, I didn't.

Q How about on the 19th when you got this horrifying story, did you have any concern for the lady?

A Yes, I probably did.

Q Did you call the ambulance?

A No, I was sure someone would have.

Q Oh, you are. Why are you sure someone would have done that?

A Because at the time the guy told me the story and

everything I figured somebody would have found her, because I think he told me -- no. He told me that somebody will probably find her. That's why he ran and didn't worry about it.

MR. KENDRICK: May I have the Court's indulgence, please?

BY MR. KENDRICK:

Q Now, did that lady ever come to your house?

A Yes, she did.

Q Was she with anyone?

A Yes, she was.

Q Is that person sitting over there at the table (indicating)?

A Uh huh.

Q Who?

A All three of them.

Q All three of them? When did they come to your house?

A Pardon?

Q When did they come to your house?

A Last week.

Q When you saw Rachel two and a half weeks ago, did you tell her about the flashback?

A No, I didn't.

Q You didn't tell her then?

A No.

Q So, this horrifying flashback that you got two and a half weeks ago was when she came out to the court house and you didn't tell her at that point?

A No, I withheld evidence, I guess.

Q You withheld evidence?

A Yes, because those attorneys told me that I was going to be subpoenaed for them.

Q So, you withheld evidence?

A I told them I had been talking to the guy at the time that I was talking to them, but since I thought I was going to be their witness, I didn't say anything because I didn't know what I was supposed to say or who to.

Q They didn't tell you not to talk to anybody, did they?

A No.

Q They didn't tell you to withhold evidence, did they?

A No, but they kind of beat around the bush a little bit.

Q They beat around the bush a little bit? What did these three tell you when they came out to your house? Wait a

minute. Before you answer that, let me back up a minute. Did they come out because you called them?

A No, I didn't call them.

Q Okay.

When Rachel was at the court house two and a half weeks ago and you had the flashback, did it stay with you the whole time from then until now?

A No, I kept remembering more and more things about the whole thing.

Q Well, if I wait around, are you going to remember some more? Is that possible?

MR. MELSON: Your Honor, that's argumentative.

MR. KENDRICK: It's a question.

THE COURT: Objection overruled.

THE WITNESS: I think I have remembered all there is to remember.

BY MR. KENDRICK:

Q Are you sure?

A Yes, I'm sure.

Q Well, have you ever had these flashbacks before on other things?

A Yes.

Q Do you have them a lot?

* * *

you retire to the jury room?

(Whereupon, the jury was temporarily excused.)

THE COURT: Mr. Kendrick, do you still want to put on surrebuttal?

MR. KENDRICK: Absolutely, Your Honor.

THE COURT: Let me hear what that will consist of.

MR. KENDRICK: It is going to be my co-counsel, who will have to withdraw from the case. He is going to show exactly what he asked her and how much detail she went into on every occasion that he had the opportunity to talk with this witness. The fact that he asked specific questions and got nothing in return and no indication whatsoever of this weird flashback.

In addition, I would like to call Mr. Quintana's attorney, who is present, Bruce Gair, who will say that he told Mr. Quintana on the 18th when he left the court because the charges were dropped against him, to come and see me tomorrow and that was the reason he came to the court house. There is no independent -- the witness has testified that he was there looking for an attorney because of some trouble he was in and what he had seen that morning. It is new evidence. It is entirely -- the first time it has been before this court and I have the attorney here who can contradict that

completely, Your Honor.

THE COURT: All he can do is say on the previous day he gave him an instruction to return, but that wouldn't go to what the defendant said to the witness.

MR. KENDRICK: No, but this witness has testified that the defendant said that the reason he was out here today on the 19th is because of what happened to me this morning.

THE COURT: It is not inconsistent. What it is is it provides an added reason, but he did come out there with a phone number saying, "I'm looking for the lawyer who represented me yesterday." So, that is consistent with what your witness would say.

MR. KENDRICK: I want that corroborated.

THE COURT: I'm sustaining the objection to your surrebuttal. To retain that for the record, you can do that by telling the reporter what this evidence would consist of.

MR. KENDRICK: My co-counsel can?

THE COURT: Yes.

MR. KENDRICK: Could I have my co-counsel read it into the record, Your Honor?

THE COURT: Yes. He can represent what it would be in order to preserve it for the record.

MR. KENDRICK: Yes, sir. Thank you.

* * *

gloves and Nelson's most valuable document, the Immigration Form, the I-94 Form, and the form that gives Nelson the right to be. It was torn up and found among the papers that were in this man's automobile.

Ladies and gentlemen, this man, Mr. Quintana (indicating), has the motive to do the killing and the robbery. He needed the money. He had the opportunity. They were friends. He could gain entrance. He didn't have anything else to do that morning and he had the means. He knew where the hammer was. He knew she would be alone. He knew Nelson would be at work and after that he also had the property and the money, because, boy, did he spend the money over the next few days. It was all in cash and a lot of it was in twenty dollar bills. Ladies and gentlemen, when you look at this case and you look at the evidence in this case, it is completely uncontradicted. There is absolutely no doubt in the world that the man who committed the crime is Mr. Quintana, right there (indicating). He did it with this hammer (indicating) and he did it to Ophelia Quintero without a bit of mercy. Ladies and gentlemen, I ask you to return a verdict on the capital murder charge of guilty.

Thank you.

THE COURT: Mr. Kendrick?

* * *

DEO REPORTING
(703) 751-0013

He indicates that the evidence against Orlando is sufficient because he called Umberto and said, "Umberto, give me one hundred and fifty dollars." What one hundred and fifty dollars? That was money from the Pizza Hut that he gave to Roger Smith. "Keep the rest of the money." Remember Orlando had given him the ten dollars from the sale of the records and kept five himself. He had his own Star Wars watch. It was not a very good watch, but one of the few possessions he had and again, a watch. There is, again, no evidence that Orlando had done anything.

On the suit we have blood consistent with the defendant's and consistent with the victim's. If it is the defendant's blood, where is the evidence that the defendant was ever bleeding between the time that he left Fairfax County Jail to the time the suit was recovered --

MR. KENDRICK: (Interposing) Your Honor, I don't think it is appropriate to in any way suggest that he should testify or explain something.

THE COURT: He didn't say it had to come by testimony from him.

MR. KENDRICK: All right.

MR. MELSON: (Continuing) -- But there is no evidence of that. There is not even any evidence of any

* * *

somebody else set up this man.

The question isn't whether more evidence could have been obtained from this man. The question is is the evidence we have sufficient. Is there any other explanation based upon the evidence that you heard, not upon conjecture and not upon the result of you going outside of the evidence and thinking up doubts, but you have got to base it on the evidence and the evidence indicates that when he was released from jail he had no money and no place to live and no job. And within two days after that man (indicating) was released from the Fairfax County Jail he went out --

THE DEFENDANT: (Interposing) Hey. Hey, hey --

MR. MELSON: (Continuing) -- And he bought $700.00 worth of property. He had no place to get that.

THE COURT: Just a moment. Would you please translate for the defendant? Can you hear me? Is this microphone on? Would you please tell the defendant if he makes any further noise that he will be removed from the courtroom and the case will proceed without him? This is the last warning I will give him. I do not want anymore disturbances from him during the trial.

Go ahead.

MR. MELSON: Thank you.

DEO REPORTING
(703) 751-0013

The defendant Permiso. Excuse me.

THE COURT: Tell him to be silent. He may not speak now.

(Whereupon, the defendant is speaking in Spanish.)

THE COURT: Remove the defendant from the courtroom.

(Whereupon, the defendant was removed from the courtroom.)

THE COURT: All right, I will ask the Court Reporter as soon as the trial concludes to read back all that goes on from this point to the interpreter so that the interpreter may interpret for the defendant and tell the defendant what was said.

All right?

MR. MELSON: Ladies and gentlemen, I don't think much more needs to be said. The evidence is clear. The evidence is unrebutted. The defense's case amounts to mere speculation and conjecture and that's all.

THE COURT: Do you have your microphone on?

MR. MELSON: Yes, sir.

THE COURT: Can the interpreters hear?

MR. KENDRICK: I don't think there is any reason

for it now, Your Honor.

THE COURT: No, there is no point in using it. The defendant is out of the courtroom and he doesn't have his earphones on. You may relax. I will ask you to interpret what is on the Court Reporter's notes from this point on to him.

MR. MELSON: Your duty is a heavy one, but it is made easier because of the weight of the evidence in this case, which I submit to you is overwhelming. There has been no explanation by the defendant's case and the evidence he has presented that explained the evidence against him. The evidence points to the defendant. It points to the defendant alone and I ask for you to go back there and consider this evidence and do your duty as members of this community and find the defendant guilty of capital murder.

Thank you.

THE COURT: Members of the jury, are there any members of the twelve regular jury panel who are now unable for any reason to commence their deliberations?

(No response.)

THE COURT: All right. If that is the case, Mr. Viets and Mr. Ferguson, the two alternate jurors will be excused. I thank you gentlemen very much for bearing with us

* * *

THE COURT: Let the record show that at a prior -- on two prior occasions when the defendant made a disturbance in the courtroom it was explained to him that he would be unable to interrupt the proceedings and that if he persisted in doing so, he would be removed from the courtroom and the trial would proceed without him. He has made such interruptions four or five times during the course of this trial, the most recent being today some time shortly before the luncheon recess, and on that last occasion the Court requested that his counsel advise him of this problem. They promptly did and also the defendant was in the presence of an interpreter, who is a friend of counsel's and who assisted counsel in communicating with him and that warning was transmitted to him through her. At this time, I will ask the interpreter -- when the courtroom is cleaned up of the evidence and an opportunity is presented -- I will ask the interpreters to interpret to the defendant the very short bit of rebuttal and my final remarks to the jury before they retire, which are on the record and which took place after he left the courtroom.

MR. KENDRICK: Your Honor, I would like to respectfully have the record reflect that I object to his removal from the courtroom.

THE COURT: Yes, sir.

So, we will recess for deliberations.

(Whereupon, at 4:10 o'clock p.m., the court recessed for deliberations.)

(Whereupon, the Court Reporter and the interpreter saw the defendant and the record of what happened after he was removed from the courtroom was read to him at this time.)

(6:50 p.m.)

MR. MELSON: Your Honor, perhaps we could recognize our witness and he could go back to work.

MR. KENDRICK: Who is this?

MR. MELSON: One of our witnesses.

(Whereupon, a witness, Pedro Castro, was duly sworn.)

THE COURT: Sir, you are recognized as a witness in the case and you are excused until 10:00 o'clock tomorrow morning. Please return to this courtroom at 10:00 o'clock tomorrow morning. You are free to go now. Do not discuss what your testimony will be with anyone except the lawyers in the case. You may talk to them if you wish.

MR. KENDRICK: I'm one of the lawyers. What's your name?

* * *

DEO REPORTING
(703) 751-0013

lesser included offense instructions. It seems to me the only evidence before the Court when we were discussing the instruction was that whoever committed the murder also robbed the victim.

MR. MELSON: Then the answer to the question is: Yes, they are to assume that we all agreed that the person who committed the robbery committed the murder.

MR. KENDRICK: May I have the Court's indulgence?

My position is the same, Your Honor. "Rolling the bones" means "rolling the bones," and that's what we did. It is all or nothing.

THE COURT: There is one more question. This question says:

Concerning the door to Apartment Two on Florida Avenue; -- I guess that means South Florida Street --

There are questions concerning the testimony concerning at what time the door was observed open and when it was observed closed. Our recollection is that two witnesses addressed this point: Dr. Sheehy and the lady who we think discovered the body.

May we hear the transcript on this point?

My recollection is Dr. Sheehy had only one double or triple hearsay statement that came from some policeman and

* * *

MR. KENDRICK: No.

THE COURT: She just said she found the victim?

MR. KENDRICK: That's right.

THE COURT: Then we have no direct testimony from anybody on this on the door and when it was seen closed or open. All right. I can answer that fairly certain.

MR. KENDRICK: The question was whether they could hear or read the transcript?

THE COURT: Yes, but their recollection is foggy as to the witnesses who testified that they observed the door open and when they observed it open and closed.

MR. KENDRICK: Well, we can answer the one about the transcript pretty easily, Your Honor.

THE COURT: Yes.

Call the jury in and put them in the box, please.

MR. MELSON: What are you going to say to them?

THE COURT: You all seem to be agreed and I'm agreed that --

MR. KENDRICK: (Interposing) "Roll the bones."

THE COURT: (Continuing) -- We are all agreed that there is no evidence to support a lesser included offense and the Commonwealth, as you said in your argument, I think, does not feel entitled to two punishments for the same act and

DEO REPORTING
(703) 751-0013

therefore does not seek any punishment for robbery.

(Whereupon, the jury returned to the jury box.)

THE COURT: Ladies and gentlemen, I have your two questions. One of them -- the first says: "Regarding your instructions to us eliminating the second indictment r.e. robbery plus the elimination of the lesser included offenses:

Are we to assume this means that both sides have agreed that the murderer did the robbery - whoever that was - and it is not possible to consider a separate murder and a robbery?

The answer to that is: Yes. As to the robbery, the Commonwealth takes the position that they are not entitled to seek a separate punishment for the robbery, since it is an integral part of this crime of capital murder and, therefore, a single criminal transaction deserves only a single punishment. They are not entitled to two punishments for it. So, the robbery charge is not the subject of a separate verdict or separate punishment.

As to the lesser included offenses, both sides agree and I agree that there is no evidence to support lesser included offenses. That would get you into detailed consideration of lesser degrees of malice, premeditation, hot and cold blood and so on and none of that appears to be

covered by the evidence in this case. So, you are left with the alternatives of guilty or not guilty as to the capital murder charge and that is all.

A JUROR: Let me make sure I understand exactly. There was a question as to whether there could be a killing and somebody else did the robbery. If that is in fact what we conclude, it is not capital murder; is that what you are saying?

THE COURT: Well, I think it is the view of both sides that there is no evidence to support that theory and that would be speculation and outside the evidence.

The second question: Concerning the door to Apartment Two on Florida Avenue; -- South Florida Street --

A JUROR: (Interposing) Excuse me. I'm sorry.

THE COURT: (Continuing) -- There are questions concerning the testimony concerning at what time the door was observed open and when it was observed closed. Our recollection is that two witnesses addressed this point: Dr. Sheehy and the lady who we think discovered the body.

May we hear the transcript on this point?

I have discussed this with counsel and reviewed my own notes and again, we find ourselves in agreement that no witness testified as to any direct knowledge as to when the

door was seen open and when the door was seen closed. Dr. Sheehy had somewhat -- I suppose what could best be called double hearsay in which he recalled a policeman and told him that other people had told them that the door handle had been seen open and closed at certain times and he couldn't vouch for the authenticity of that and the witnesses who allegedly have said that have never been produced. No witness testified to it in this trial. The closest that we have is the testimony of Barbara Escariz, who testified that she found the victim at about 2:30, but she did not say anything about the door as far as we can recall and so the transcript wouldn't help us on that. All right?

(Whereupon, the jury return to their deliberations at 9:07 o'clock p.m.)

(9:40 p.m.)

(Whereupon, the jury returned to the jury box.)

THE CLERK: Mr. Foreman, does the jury have its verdict?

THE FOREMAN: Yes, sir.

(Handing to the Judge.)

THE CLERK: C-17450, we the jury, find the defendant guilty of capital murder as charged in the indictment herein. 9 June 81. George Gowans, Foreman.

THE COURT: Would you poll the jury, please?

THE CLERK: Anna O'Neill, is this your verdict?

JUROR O'NEILL: Yes.

THE CLERK: Hal Wynne, is this your verdict?

JUROR WYNNE: Yes.

THE CLERK: Robert Ellicott, is this your verdict?

JUROR ELLICOTT: Yes.

THE CLERK: Marie Wright, is this your verdict?

JUROR WRIGHT: Yes.

THE CLERK: Elaine Germas, is this your verdict?

JUROR GERMAS: Yes.

THE CLERK: George Gowans, is this your verdict?

JUROR GOWANS: Yes.

THE CLERK: Dorthea Sheehan, is this your verdict?

JUROR SHEEHAN: Yes.

THE CLERK: Larry Teter, is this your verdict?

JUROR TETER: Yes.

THE CLERK: John Roche, is this your verdict?

JUROR ROCHE: Yes.

THE CLERK: Mary Kuschwa, is this your verdict?

JUROR KUSCHWA: Yes.

THE CLERK: Robert Chew, is this your verdict?

JUROR CHEW: Yes.

DEO REPORTING
(703) 751-0013

THE CLERK: Robert Davis, is this your verdict?

JUROR DAVIS: Yes.

THE COURT: The verdict is received and, members of the jury, in view of our late hour, we will not proceed into the sentencing phase of the case tonight, but we will recess and let you go home and have you come back at 10:00 o'clock tomorrow morning, at which time both sides will have the opportunity to present evidence to you on the subject of punishment. There has been publicity concerning the case and, again, I urge you to avoid the slightest contact with any of that. Don't let anybody tell you indirectly what that was all about. Avoid any interviews or any discussions of the case with each other or anyone else until you are back together. When you return in the morning, go right into this jury room and as soon as the witnesses are ready to be heard, we will bring you back out and continue that phase of it, which I understand will not be at any great length. You are excused for the evening with the same instructions in effect. Thank you. The verdict is received.

(Whereupon, the jury was temporarily excused.)

THE COURT: Gentlemen, I want you to have your witnesses ready for tomorrow morning. Have them so we are not held up and waiting for them to arrive.

* * *

* * *

that the Commonwealth is restricted to criminal convictions. Indeed, the Commonwealth may show prior history in that broader sense and apparently the Supreme Court so viewed the statutory scheme before the 1980 amendment, but there wouldn't seem to be much question about it now.

MR. KENDRICK: Well, can I ask for direction from the Court as to whether or not the Court means that it is going to allow the Commonwealth to come in with witnesses that may have heard something that he did in Cuba?

THE COURT: Well, the Code on that says, "Evidence which may be admissible is subject to the rules of evidence governing admissibility and may include --" So, it seems to me the rules of evidence do apply and of course, they have the burden of proof on it.

MR. KENDRICK: If it is hearsay, then it can't come in?

THE COURT: That would be my view.

What do you say? Do you think the hearsay rule is waived in any respect here?

MR. MELSON: No, I don't, Your Honor, but I don't believe that what I'm going to have the jury listen to today is hearsay. It doesn't come from a third party. It comes from the defendant.

* * *

DEO REPORTING
(703) 751-0013

MR. MELSON: That's right.

Whereupon,

PEDRO CASTRO,

was called as a witness by and on behalf of the Commonwealth of Virginia, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELSON:

Q Would you tell the jury your name, please?

A Pedro Castro.

Q Pedro, was there a time earlier this year that you were in the Arlington County Jail?

A Yes.

Q Why were you in jail?

THE INTERPRETER: I'm sorry. I didn't get his answer.

BY MR. MELSON:

Q Repeat that, please.

A For theft -- burglary.

Q And you were convicted of burglary and grand larceny; is that right?

A Yes.

Q You've also been convicted in New York for burglary?

A Yes.

Q Do you know the defendant, Manuel Quintana?

A Yes, I met him upstairs in the jail house.

Q Did you ever talk to Quintana while you were in jail?

A Yes.

Q Did he ever tell you about things that he did in Cuba?

A Yes.

Q Would you tell us what he told you about what he had done in Cuba?

A Yes, that he killed a man.

Q Did he say how he killed a man?

A He cut his throat.

Q Did he say where he met this man?

A In jail in Cuba.

Q Did he say why he was in jail at the time he met the man?

A For carrying off a girl.

Q What do you mean by "carrying off a girl"? What did he do to the girl?

A Yes, he raped her. He raped her.

Q Did Quintana go to prison as a result of killing

the man?

A Yes.

Q Did Quintana tell you whether or not he was to be punished for that?

A Yes.

Q How was he to be punished for that?

A They were going to shoot him standing up at the firing wall and shoot him.

Q Why wasn't that done?

A He was pardoned.

Q Did he tell you about a time that he went to a school in -- a junior high school in Virginia?

A Yes.

Q Did he tell you what he was going to do?

A He was going to carry off a girl again and he said that the girl's mother was sick and that they were going to call the police.

MR. MELSON: Mr. Interpreter, we have a juror that can't hear.

THE INTERPRETER: You will have to talk to the technician, sir. I have no control over that.

THE COURT: All right, Mr. Interpreter. It is working fine now.

BY MR. MELSON:

Q Now, Mr. Castro, we have to repeat the question because not everyone heard your answer. Would you tell the jury what Mr. Quintana told you he was going to do when he went to the school?

A He told me that he went to the school to get a girl and he told the teacher that the mother -- that the girl's mother was ill and the teacher said that he would have to leave or else they would call the police.

Q Did he tell you anything else about what he was planning to do in Virginia?

A He spoke to me about a house.

Q What did he say about the house?

A He said he had a house to keep people there that he picked up.

Q Did he tell you anything about another individual? Did he describe an individual to you?

A Yes, an attorney.

Q How about another individual who had some children?

A Yes, a gentleman who has four children where he was living.

Q Where who was living?

A Quintana.

Q Are you sure about the number four?

A Well, that's what he told me.

Q How many -- what else did he tell you about this family?

A He called the police.

Q Did he say what he was going to do to him?

A That he was going to grab him when he was released.

Q When Mr. Quintana was telling you about killing the man in Cuba, did he seem to be sorry for what he did?

A No.

Q Explain how he felt.

THE COURT: Well, you will have to rephrase that.

MR. MELSON: I'm sorry.

BY MR. MELSON:

Q Not how he felt, but how he acted?

A Just like any normal person.

Q Is the Quintana that told you all this, is he in the courtroom today?

A Yes, sir.

Q Would you point him out to us so we know who he is?

A (Indicating.)

Q What is he wearing?

A He has got a blue shirt, brown shoes and brown

trousers.

MR. MELSON: Your Honor, if the record could reflect that the witness has identified Mr. Quintana.

THE COURT: The record will so reflect.

MR. MELSON: Thank you. Could I have one second, Your Honor?

Mr. Quintana, answer Mr. Kendrick's questions, please.

MR. KENDRICK: You mean Mr. Castro?

MR. MELSON: Whatever.

CROSS-EXAMINATION

BY MR. KENDRICK:

Q Mr. Castro, how much time did you spend in jail?

A I spent one year. I spent four months in Arlington -- four months in Arlington Jail and eight months in New York.

Q You spent that actually in jail?

A Yes.

Q That's all?

A Yes. They brought me from New York to Arlington, Virginia and then when I was in Arlington, I was sentenced. I was recognized for time served and I was put on probation.

Q You have got a general idea of what it is like in prison in jail?

A Oh, yes.

Q You got a good idea what it is like in jail, don't you?

A Oh, yes, sir. Absolutely, yes.

Q Do you know other people who have been in jail?

A Oh, yes, I know a lot of people who have been in jail.

Q How about people who have been in prison?

A Oh, yes.

Q A lot of those people, huh?

A Oh, yes.

Q Now, isn't it pretty common for people in jail and in prison to brag about murders and things they have done?

A Please repeat the question.

Q Isn't it pretty common for people in prison to brag about things they say they have done?

THE INTERPRETER: Just a minute. I'm not getting this very well. Just a minute. I'm sorry. I'm having to explain what "brag" means to him.

BY MR. KENDRICK:

Q Macho? Macho?

A Oh, yes, sir, they feel very macho.

Q Really, and they believe macho image is very

important?

A Yes, that's what they believe. That's what they believe.

Q The macho image is very important in Cuba?

A That's what they believe.

Q Whether it is true or not, the image is important, isn't it?

A That's what they believe.

Q The more people that believe, the less people that mess with them, isn't that true?

A Well, yes, of course. Of course, if he did commit the crimes, he should pay for them.

Q No question about that, but you didn't see any of these crimes committed, did you?

A No. No. No.

Q Have you ever seen any piece of paper from the government that says he was convicted of a crime?

A The only thing I know is what he told me. I saw nothing. I know only what he told me and he became a friend of mine and I was not in agreement, because this is a lady who could have been my grandmother.

Q But you only know what he told you; is that right?

A Yes.

Q He didn't tell you this one day out there on some street corner, did he?

A No. I don't know him from the outside.

Q He was in jail?

A Yes.

Q Did you ever mess with him in jail?

A No.

Q Did anybody mess with him in jail?

A Well, he had problems, yes.

Q Did anybody actually fight with him or try to fight with him in jail?

A Yes, they fought with him.

Q Did people try to rape him in jail?

A Well, no, but no one spoke to him.

Q There were certainly people in there capable of that, weren't there?

A Oh, yes, there are people in there who would do anything.

MR. KENDRICK: No further questions.

MR. MELSON: No other questions, Your Honor.

THE COURT: All right.

MR. MELSON: May Mr. Castro be excused? He is here out of work and needs to go back to work.

THE COURT: The witness is excused.

(Witness excused.)

MR. MELSON: Mr. Suarez.

THE COURT: Let the record show that this witness has already been sworn.

Whereupon,

CAUNABOT SUAREZ DEL SOL,

was called as a witness by and on behalf of the Commonwealth of Virginia, and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MELSON:

Q Mr. Suarez, would you repeat your name for the record and the jury, please?

A Caunabot Suarez Del Sol.

Q Mr. Suarez, let me take you back for a moment to the first night that you met Mr. Quintana.

THE INTERPRETER: He just wants me to repeat it because my voice was too low. I will repeat it. He thinks he is going deaf, because he can hardly hear me.

THE COURT: All right.

BY MR. MELSON:

Q Let me repeat it. Mr. Suarez, I want to ask you

DEO REPORTING
(703) 751-0013

some questions about the first night you met Mr. Quintana in your apartment.

A Yes, sir?

Q Did he talk to you about the things he had done in Cuba?

A Well, yes, he spoke of some things he had done in Cuba.

Q Did he ever tell you he was in prison?

A Yes, he told me that he had several problems in Cuba because he was somewhat precocious as a child and he was a very quiet child. He was having problems. For example, the police were always after him and hassling him. He had had several problems in Cuba with reference to the fact he was a very spirited youth he said, sort of bragging about what he said he had done. He'd killed, things that young men sometimes talk about.

Q Did he tell you anything -- did he tell you what he did other than kill?

MR. ORDOVEZA: I don't think there was any reference to him having killed anybody in Cuba in the course of this translation, Your Honor. There was no translation to that effect.

MR. MELSON: Excuse me. I thought he concluded

that. I'll ask him specifically.

THE COURT: Clear it up by a direct question.

THE WITNESS: Please repeat your question, sir.

BY MR. MELSON:

Q Mr. Suarez, did Mr. Quintana tell you that he had killed somebody in Cuba?

A Yes, he told me the first night on the 18th -- on the 18th that he had found it necessary to kill somebody, because this gentleman had made his life impossible for him. But he was afraid this person was seeking to kill him and I thought it was pure "bragadacio." Under the new system in the country children are always putting on airs -- "bragadacio." My kids are the same way.

MR. MELSON: Did he tell you anything that was done?

MR. ORDOVEZA: I want it to reflect clearly in the record the remarks about "bragadacio" with Cubans, Your Honor.

THE COURT: What, are you making a speech?

THE INTERPRETER: We should have him speak into the microphone, Your Honor.

THE COURT: Are you complaining that the translation isn't accurate?

MR. ORDOVEZA: We want it to reflect it in the

DEO REPORTING
(703) 751-0013

record properly.

THE COURT: Well, it seems to be properly reflected. Go ahead.

BY MR. MELSON:

Q Did he tell you he was in prison?

A Yes, he told me that he had been jailed many times and that that was the problems that he had, because aside from this fact in Cuba that anybody can be in prison at any time for anything and he had problems with the police and had been in jail for several times and he had many, many problems with the police.

Q Did he tell you how he got out of prison?

A Well, no. As to how he got out of jail, no. The only thing he told me is that he had come over here and many people from the jails were being sent over here.

Q Did he tell you he had come from jail to America?

A Yes, he hadn't come. He had been brought.

Q Did he say he was brought here from jail?

A Yes, because in Cuba you put them on a bus. They took him to the Port of Mariel and put him on a boat and shipped them up here. That's what they did to thousands.

MR. MELSON: Thank you. No other questions.

CROSS-EXAMINATION

BY MR. KENDRICK:

Q Mr. Suarez, a lot of people came to this country and they didn't come from jails?

A Yes, many did not come directly from jail.

Q You didn't come from a jail, did you?

A No, sir.

Q Your family wasn't in jail?

A No, none of them.

Q We really don't know who was in jail and who wasn't in jail, other than by what they say; isn't that right?

A Yes, of course.

Q Why do you suppose the young people in your country tried to create this macho bragadacio image?

A Well, this is the product of the system of life in the youth of our country. They are completely lost by Marxism.

Q Did you find it -- did you find that most of the time there is no truth to it at all and that it's just bragging?

MR. MELSON: Well, that's his opinion and all he knows is what the defendant has told him.

THE COURT: Objection overruled.

DEO REPORTING
(703) 751-0013

THE WITNESS: Simply bragging. It is simply a matter of bragging. It is as common as to chat with anyone and to say good morning to someone.

BY MR. KENDRICK:

Q This includes murder? This includes bragging about murders, killings?

A Well, there are specific cases where, yes. They -- the bragging reaching the level of being very macho and then they keep bragging to one another and each one is trying to show that he's more of a macho than the other guy and they pull knives and things like that. This is the heritage left to us by Mr. Castro.

Q Does it include bragging about rapes?

A Well, there is that part to be found, if you want, that are improperly taught, because there are some children. As a father I've tried to teach them well, but they don't do these things.

Q But they brag about all kinds of ugly vicious crimes then, do they not?

A Crimes and so on, that type of bragging. Well, that's another environment, a different environment. It is the same environment that you feel in the country. It is divided by classes. You have a number of classes where the

children have not had a father and have not had a mother and they raise them out in the street and they are street-rise children and they have had no parental guidance with their mothers and others have had parental guidance and they are not as bad.

Q If I told you that Mr. Quintana was bragging about what he was going to do to you or kill you, would you believe it?

A Well, I don't believe Mr. Quintana would say that to me, because in the first place, there is no reason for it. I -- from the first what I tried to do was counsel him so he would follow the good pattern and always that he would honor the behavior of the kids who have been here many years acting honestly. There are many, many Cubans here who have been here many years; not all of whom come here are bad and we've been here for many, many years, twenty years and so on and we have got a name for ourselves and I was trying to counsel him not to besmirch that image.

Q I agree with you, Mr. Suarez. I think you are a noble person and I'm glad you are in my country.

REDIRECT EXAMINATION

BY MR. MELSON:

Q Mr. Suarez, when the defendant was telling you

about the things he had done in Cuba, were you bragging to him about the crimes you had committed?

A Well, no. No, I have nothing to brag about. Up to now I haven't done any of those things. At least the problems that I have had with the police were problems of political idiology because I was against the system and it was not precisely with the police. It was with the State Security Police which have nothing to do with the Criminal Police.

Q So, at that time, you were not bragging to Quintana?

A No. Mr. Quintana, I don't think doesn't know that I was a political prisoner in Cuba for a long time. I don't think he knows that. I never told him.

Q Mr. Suarez, on Friday night when Mr. Quintana was staying there over until Saturday morning, you were trying to keep him there until the police came?

A Yes, sir. Yes, sir, because from the statements he had made for me he was not guilty. I honestly did not believe he was guilty. At least that's the way I see the truth.

Q The question is: You were keeping him there until the police came?

A Yes, sir. Yes, sir.

MR. MELSON: Thank you. That's all I have.

RECROSS-EXAMINATION

BY MR. KENDRICK:

Q Mr. Suarez, how old are you?

A Must that be said here? Forth-three. Three months ago I was forty-three.

Q Do you know how old he is (indicating)?

A Twenty-seven, I think. Twenty-six or twenty-seven.

Q Do you consider him a youth?

A Yes, yes, he is a young man.

Q And on the night that you were keeping him for the police he in fact told you, did he not, that he wanted you to go with him to the police?

A Yes, sir.

MR. KENDRICK: Thank you.

THE COURT: Thank you, Mr. Suarez. You are excused.

(Witness excused.

MR. MELSON: Milagros Gonzales.

* * *

DEO REPORTING
(703) 751-0013

A Robert Carrig.

Q Are you the same Officer Carrig that testified in this case earlier?

A Yes, sir.

Q Did you have occasion to attend the autopsy of Ophelia Quintero?

MR. KENDRICK: Your Honor, approach the bench, please?

THE COURT: Yes.

(Whereupon, the following bench conference was held out of the hearing of the jury.)

MR. KENDRICK: I gather that Mr. Melson is going to attempt to get in pictures of the autopsy of this witness; is that correct?

MR. MELSON: That's correct.

MR. KENDRICK: The pictures --

MR. MELSON: (Interposing) No, I'm sorry. They are not of the autopsy. They are pictures taken on the morgue prior to the autopsy to show the extent of her injuries, not after anything had been done to her.

MR. KENDRICK: Your Honor, I think this is repetition. I think it is things the jury has seen and been shown in the other photographs and those are just more of the

same thing and at this point I think they are just highly prejudicial. It is the same photograph of the same stuff with the same head and more andmore of the same cumulative inflammatory and highly prejudicial --

MR. MELSON: (Interposing) Your Honor, our burden now is to prove beyond a reasonable doubt that the battery was an aggrevated battery and I think because of that and because it is not a determination of guilt of innocence, that we have much greater latitude than we would at the trial of the case on the merits of guilt or innocence, because we have this specific burden and it goes to a specific question. I think any evidence which bears on that is probative and relevant and therefore admissible.

THE COURT: Do these show anything that aren't shown by the other pictures? I suppose I should see them.

(Handing to the Judge.)

THE COURT: They are extremely inflammatory.

MR. KENDRICK: It is the same one. It is the same pictures blown up. They took these and blew them up.

THE COURT: I don't think they did. Some of them there, I don't think they have another photograph. It would seem to me that what you ought to do is to go through them and pick out the ones that are different views than you may

* * *

DEO REPORTING
(703) 751-0013

witnesses available at this time.

MR. KENDRICK: May I have the Court's indulgence, please?

THE COURT: Yes, sir.

MR. KENDRICK: Call Miss Moya.

Whereupon,

OFELINA MOYA,

was called as a witness by and on behalf of the defendant, and, after having been first duly sworn in Spanish and in English, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KENDRICK:

Q Miss Moya, would you state your full name, please?

A Me?

Q Would you tell us what your name is?

A Ofelina Moya.

Q Can you tell us where you live?

A In Lohman's Plaza.

Q Do you know Mr. Quintana?

A Yes.

Q How long have you known him?

A I met him at the refugee camp.

Q Where?

A In the -- imprecadia in the refugee camp.

Q How long have you known him since you have been in Virginia?

A I met him while we were refugees ten minutes before we left on October 14th and he left in November. So, it -- since I left.

Q Do you have any children?

A Yes, five.

Q Are they with you?

A Three are here and two in Cuba.

Q Which three are here?

A Mary, Daniel and Armando.

Q How old are they?

A Fifteen years old, Armando is nine and Daniel is eighteen.

Q Where does the fifteen year old go to school?

A I don't know the name of her school.

Q Does she go to the same school as the Gonzales girl goes to?

A Yes.

Q Was she going to that school in March of this year?

A Yes.

Q That's the only school she's been to since she has

been here in Virginia?

A Yes.

Q Now, since you have known Mr. Quintana, has he been to your house?

A Yes, he came often. He came every day two or three times a day sometimes.

Q Did he eat dinner there?

A Yes.

Q Did he try to help you around the house?

A Yes, he used to take me to pick up things, because we didn't have a car.

Q Did he take your whole family places?

A Yes, every place.

Q Did you consider him your friend?

A Yes, I did, because whenever he came to my house he was always well behaved and we never had any problems.

Q Was he ever disrespectful to you in any way?

A Never. Never.

Q Did he ever harm you in any way?

A Never.

Q Did he ever harm your daughter in any way?

A No, he was never discourteous to her.

Q Was he always kind and friendly to you?

A Yes.

Q And to your daughter?

A Yes, with her also -- with all of us.

Q Now, you've been sick, haven't you?

A No.

Q Did Mr. Quintana ever go and get medicine for you?

A Yes, once he brought me a medicine and he took care of me and I was coughing very hard and he brought me medicine and he would take care of me.

Q Would you say that he's done more to help you since you've been here than your own son?

A Yes, he was very good to me. I have no complaints about him.

Q Has he ever bragged about crimes or anything in front of you?

A Never.

Q Has he been out on errands with your daughter alone?

A No, no, we would all go out together.

Q And did you do this a lot?

A To go out, you mean? Yes, because we didn't have a car and since he came to my house so often and we had to run errands and he would take us.

Q Do you remember a little girl by the name of

"Maria"?

A Maria, did you say?

Q Maria Elena?

A Yes, I know her.

Q Did she used to come to your house?

A No, she never came to my house. They used to speak on the phone and things, but she never came to my house.

Q Who used to speak on the phone?

MR. MELSON: Your Honor, may we approach the bench?

THE WITNESS: He would come to my house and call her on the phone.

THE COURT: Counsel wants to approach the bench.

(Whereupon, the following bench conference was held out of the hearing of the jury.)

MR. MELSON: Your Honor, I think the defendant is allowed to put in evidence those facts that are mitigating or those of good character, but I don't think he's allowed to put in things which reflected on the case on its merits of his guilt or innocence and I feel that's what he's trying to do now with Maria Elena.

THE COURT: Refresh my recollection as to who she was.

MR. KENDRICK: She was supposed to run away with --

* * *

AFTERNOON SESSION (1:30 p.m.)

THE COURT: Have you both had a chance to look at Instructions 8 and 9-A as redrafted and the verdict form?

MR. MELSON: Yes, sir. The Commonwealth has looked at them and has no objections to them.

MR. KENDRICK: Yes.

THE COURT: Are you satisfied?

MR. KENDRICK: Yes, Your Honor.

Your Honor, there is another one, though, isn't there?

THE COURT: Yes, where is the life imprisonment form? Did I take that from you?

THE CLERK: Yes, you did.

THE COURT: There is indeed another one.

MR. KENDRICK: I'll have no objection to that, Your Honor.

THE COURT: Let them take a look at it.

(Handing to counsel.)

THE COURT: Ready for the jury, gentlemen?

MR. MELSON: Your Honor, I think we still have the issue of the photographs, Commonwealth's Exhibit 103 for you?

THE COURT: All right.

MR. MELSON: I have reviewed them and have taken

DEO REPORTING
(703) 751-0013

all of them out except two photographs. The two remaining photographs, Exhibit No. 1 on the left side of the victim's head and the other -- if I could review the second one, I believe that is also -- that is a closer illustration of the right side, which shows the result of the other blows much more clearly than does Commonwealth's Exhibit No. 34.

THE COURT: May I see that?

MR. KENDRICK: Your Honor, I think the right side is adequately shown and any further attempt to show anything more on that is just repetitious and highly inflammatory and I will object to it.

THE COURT: What does this show that isn't shown in the larger one?

MR. MELSON: It shows more clearly these two wounds (indicating).

THE COURT: All right. The Commonwealth has withdrawn that one, leaving one of the three as only a photograph of the left side of the head.

MR. KENDRICK: Your Honor, I'm not agreeing with the left side either. I don't think that does anything other than inflame the jury also. I would object to that.

THE COURT: All right. Your objection is overruled. 103 is admitted. It consists now only of the

picture of the left side of the face.

(The photograph previously marked for identification as Commonwealth's Exhibit No. 103 was received in evidence.)

THE COURT: Call the jury, please.

(Whereupon, the jury returned to the jury box.)

THE COURT: Members of the jury, I shall now read you the instructions which will be given you to cover the single determination which the jury must now make, which is what penalty shall be imposed. There are but two instructions and they will as before be given to you in writing to take with you into the jury room. The Commonwealth will have the right to open and close argument on this point as heretofore because the Commonwealth again has the burden of proof beyond a reasonable doubt. After that, we will ask you to retire and deliberate on your verdict as to the penalty, which again must be unanimous.

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 two

* * *

DEO REPORTING
(703) 751-0013

please retire?

(Whereupon, the jury retired to consider their verdict.)

THE COURT: I would like to put something on the record. I'm not sure I did mention this yesterday, at the conclusion of the proceedings in the guilt phase of the trial. Yesterday the defendant was removed from the courtroom because of disruptive behavior and there were some proceedings that took place in his absence and at the Court's instruction the Court Reporter thereafter read to the defendant outside of the courtroom all of the proceedings that had taken place in his absence through one of the interpreters here who has been interpreting the proceedings and also in the presence of his attorney.

The Court is in recess.

(Whereupon, a recess was taken.)

THE COURT: Gentlemen, I have a question from the jury that reads as follows: "Because we have found the defendant guilty beyond a reasonable doubt, can or should we now assume that his guilt is absolutely certain in considering a penalty?"

Then there is a sentence which appears to be crossed out, but I'll read it to you anyway. It is part of a

question: "Further is the evidence we are to consider today just that directed to the two alternatives or may we consider all the evidence presented in the case?"

Finally, they say we are split six to six and we are grasping for guidance.

My inclination would be to give them the following answer: As to the first should they consider that his guilt is absolutely certain in considering the penalty: No, they should consider his guilt beyond a reasonable doubt because that's the standard of proof at trial and only they know what further consideration may exist in their minds and that is the standard that applies and that's the standard that still applies. If they do wish to know whether to consider all of the evidence in the case or merely that presented today, the answer is they should consider all of the evidence presented in the case. The final statement does not require a response.

MR. KENDRICK: I'll accept that response, Your Honor.

MR. MELSON: Your Honor, the Commonwealth has no objection to those responses.

THE COURT: All right. Would you call the jury in the box, please?

MR. KENDRICK: Your Honor, let's not bring them in

DEO REPORTING
(703) 751-0013

for one second.

THE COURT: Hold the jury a moment.

MR. KENDRICK: Your Honor, this question indicates to me that there is a problem with their verdict. I'm not certain what to do with that problem, but I question whether their deliberations accurately reflect what they want to do. I'm not so sure that I shouldn't ask for a mistrial at this point, because obviously with that type of a question they are not convinced and they are not unanimous in the decision that they reach.

THE COURT: No, they say "We have found the defendant guilty beyond a reasonable doubt," but now they want to know if guilt is absolutely certain and if they should consider more than proof beyond a reasonable doubt in the case. In other words, if they passed over to some threshold where a higher standard of proof has to be met. I think the answer to that is clearly: No, it hasn't been. The case is in the posture it has always been.

MR. KENDRICK: I'm not sure they have passed through the threshold they were first in. The question is indicative of a problem.

THE COURT: I think it indicates some jurors who say I was willing to find the defendant guilty beyond a

reasonable doubt, but I'm unwilling to impose the death penalty if there is the slightest shadow of a doubt and that I'm unwilling to impose the death penalty unless I'm absolutely certain. Must I assume that we now take the proof of guilt as an absolute certainty? My answer would be: No, they can't take proof of guilt as an absolute certainty.

MR. MELSON: Well, perhaps we ought to tell them that as far as the law is concerned the defendant now is guilty and there is no question about that.

THE COURT: No, I think I will stand on the response that I first formulated.

MR. KENDRICK: That's correct, because then they can't go back and consider the evidence then.

MR. MELSON: They can consider the evidence for the purposes of sentencing.

THE COURT: In considering the crime, they can consider the evidence.

MR. KENDRICK: Not with --

THE COURT: (Interposing) I don't think they are reviewing the finding of guilty. I think the question was asked for the reason I just indicated. I'm speculating and that would seem to me to be the reason for it and that was a perfectly legitimate inquiry.

DEO REPORTING
(703) 751-0013

All right, call them in.

(Whereupon, the jury returned to the jury box.)

THE COURT: Members of the jury, your foreman has given me this question: "Because we have found the defendant guilty beyond a reasonable doubt, can or should we now assume that his guilt is absolutely certain in considering a penalty?"

The answer is: No, he was only required to be proved guilty beyond a reasonable doubt and each of you individually know what degree of conviction exists in your own mind, but he was not required to be proved guilty to an absolute certainty and beyond all shadow of a doubt and all possible doubt and you should not assume that that has changed; it is as it was when you found him guilty and no more. The degree of certainty that exists in your own mind may -- is simply that. It is within your own mind. No door is closed on the case. It is still. He was required to have been proved guilty only beyond a reasonable doubt.

There is a second question that you may have withdrawn, but in the event that you hadn't intended to withdraw it, I will proceed to answer it. The question reads this way: Further is the evidence we are to consider today just that directed to the two alternatives or may we consider

all the evidence presented in the case?"

The answer is: You may consider all the evidence in the case.

Your final paragraph is simply a comment to me, but not a question and to that no response.

Have I answered your questions, members of the jury?

THE FOREMAN: The reason we asked the second question and asked it is because we really didn't know what we were talking about and we were trying to reconcile.

THE COURT: Just take this microphone down.

THE FOREMAN: I think you have answered it, Your Honor, but even as we are walking out the door, there was a lot of discussion here. I want to make sure everyone understands we have gotten the answer we are looking for. We read the instructions and did what we thought we were supposed to do regarding the two alternatives. We came to the conclusions on one of those and we understood the instruction that says, "You may fix punishment --" so, it is a binary decision, but not required. But the only guidance we could find -- excuse me. You said, "If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt that either of the two alternatives --" so, fine, there is no

DEO REPORTING
(703) 751-0013

puntuation here. Then you say "you may fix punishment --" etcetera -- "or if you believe from all the information that the -- evidence that the death penalty is not justified --" It is "all the evidence" in that phrase or clause there. Does that stuff mean that all that we have heard today or all of it?

THE COURT: All of it. You may consider all of the evidence in the case for this purpose.

THE FOREMAN: I'm not sure we understood our first part. To be exactly sure, we draw a doubt line and understand what reasonable doubt means and put a line there and we understand to the right of that line are twelve dots, some just barely over the line and some are way over the line. Now that we have done that and that's behind us, can we assume that all the doubts are at the end of the line when we consider all of these instructions and I understand now that we cannot do that.

THE COURT: It is for each juror to determine that for him or herself as to the degree of certainty that may exist in his or her mind. You cannot assume that a point of absolute certainty was reached simply because there was a guilty finding.

MR. MELSON: Your Honor, before we go back in, may

* * *

THE CLERK: Mr. Foreman, does the jury have its verdict?

THE FOREMAN: We do.

(Handing to the Judge.)

(Handing to the Clerk.)

THE CLERK: C-17450, we the jury, on the issues joined having found the defendant guilty of willful, deliberate, premeditated killing of Ophelia Quintero in the commission of a robbery while armed with a deadly weapon and that after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing, serious threat to society for his conduct in committing the offenses outrageously or wantonly, vile, horrible or inhumane in that it involves deprivity of mind or aggrevated battery to the victim in having considered the evidence in mitigation of the offense, unanimously fix his punishment at death. 10 June 81. George Gowans, Foreman.

THE COURT: Would you poll the jury, please?

THE CLERK: Anna O'Neill, is this your verdict?

JUROR O'NEILL: Yes.

THE CLERK: Hal Wynne, is this your verdict?

JUROR WYNNE: Yes.

* * *

DEO REPORTING
(703) 751-0013

* * *

MR. KENDRICK: Yes, Your Honor. If it may please the Court, most of these motions, with the exception possibly of one or two of them, were made during the trial at various times, either prior to the trial, at the halfway point on a motion to strike, or at the conclusion. All of them, with the exception of one or two were in fact ruled upon by the Court, and I am assuming that the ruling that the Court made at that time would be the same that the Court would make today in that regard; therefore, I have not intended -- do not intend to go into detail on all of those motions, unless the Court so desires. For example, on the motion to suppress, I'm assuming that the Court's ruling today would be the same as it was on that motion and so forth, all the way through.

I am making all the motions again, because I think it is the totality of all of the motions at this stage of the game that amount to the denial of a fair trial for my client. But, again, unless the Court wishes otherwise, I'm not going to go into detail on most of these motions. That's certainly true with respect to number one, denial of Mr. Quintana's motion to suppress. It is certainly true with respect to number two, the denying of the motion to strike at the conclusion of the Commonwealth's case. It is also true with respect to number three, improper rebuttal evidence that was

entered by the Commonwealth Attorney.

You will recall, there was at one point during the trial a witness, a very key witness in this trial, Carmen, was introduced to rebut ostensibly the medical time of death, and while she may have done that, the effect of her testimony may have been that there was an incredible amount of baggage that was attached to her testimony that I say, at this time, was clearly prejudicial to my client. The record will show the detail of that testimony.

The same is true with number four. Once Carmen was allowed to testify, Mr. Quintana was not permitted to introduce surrebuttal testimony to the effect that we had a witness here who was an attorney who represented Mr. Quintana and who would have testified; and that evidence was read into the record by my co-counsel. The effect of Carmen's testimony was that she saw Mr. Quintana in the courthouse, that he was excited, that he indicated that he was in trouble and wanting a lawyer, creating the impression that he wanted a lawyer because of what he thought he was in trouble for; and the jury had been led to believe, and rightly so on that testimony, that it had something to do with the murder, when in fact he was looking for his attorney that had represented him on a prior charge and was there at the courthouse at that

DEO REPORTING
(703) 751-0013

attorney's request. This could have misled the jury, and we submit should have been straightened out at that particular time to eliminate that erroneous impression that they may have had.

Again, number five, Your Honor, I don't believe needs to be aired at this time in any more detail than it was at the time it happened. This is the removing of the evidence from the Court. I think the Court dealt with it at the time, and am assuming the ruling will be the same at this time. It was the suit of clothes that was removed from the courtroom and shown to a witness who was going to come into the courtroom during the trial and identify that critical key piece of evidence. We maintained at the time, and still do now, that it is improper and the Commonwealth should not have done that and that our motion for a mistrial should have been granted at that time.

Number six, also, Your Honor, the weight of the evidence is such that a new trial should in fact be granted.

Number seven, I don't believe needs elaboration at this time, other than what was said at that time, Your Honor. Mr. Quintana was removed from the courtroom. He is entitled to be present during every stage of the proceeding. I don't believe -- the record will be the accurate account, but I

don't believe his removal was for anything longer than a matter of five or ten minutes at the most, but he was in fact removed and that was in the presence of the jury.

Number eight, Your Honor, I have requested that various parts of the trial be transcribed. That has not been done at this point. I will have to trust Your Honor's recollection on exactly what the answer to the jury question was. I have the exact question, but I don't remember the exact answer; and that is why I wanted to have it transcribed, and it is not here. So, I will either have to request that the matter be continued until we get that, or I will rely on the Court's judgment, or both, whichever the Court deems the best way to handle it.

Number nine is a motion for a new trial. The only evidence I have at this point to support that, and we are still in the process of investigating it, is that on Feburary 4th, not February 3rd, as stated in the motion, but on February 4th, 1981, Mr. Quintana was in fact involved in an automobile accident in the State of Maryland. He has indicated that he was wearing the suit that was an issue at trial, and we know from the State's expert witness that the analysis of the blood -- the stains of blood on that suit are consistent with his blood. If, in fact, that can be

DEO REPORTING
(703) 751-0013

corroborated, it is evidence that would have a very material bearing on the outcome of this case. We suggest that more time be allotted to let us investigate that further than we have been able to determine at this date, because it is in fact a crucial piece of evidence that would in fact justify a new trial.

Number ten, Your Honor, this morning I have talked to Mr. Trodden, and I made this motion at the time without knowing the particulars of the motion. I was under the impression that Carmen testified that there was in fact blood on Mr. Quintana's shirt that he was wearing on the day that she saw him in Fairfax and on the day of the murder. My position was this should have been -- the scientific test should have been disclosed, if in fact it existed. I have talked to the Commonwealth this morning, and they advise me there is in fact no such shirt or test that they are aware of. I don't believe at this point there is a basis for the motion, number ten, failure on the part of the Commonwealth to disclose exculpatory evidence, and therefore withdraw that motion.

If I may come back to eleven? I think the record will speak for number twelve equally as well, Your Honor. Our position is, the medical expert's report in its entirety,

including the notes, should have been introduced into evidence and were, in fact, not introduced, and as a result, that was prejudicial, and we should be granted a new trial, also.

Number thirteen, I am going to leave for the moment, Your Honor, to my co-counsel to come back to.

I would like to address my arguments at this time to number eleven. I've always taken the position that it is probably, at the very least, supremely bad taste to read the law to the Court; because of the situation on the interpretation this morning, I would ask the Court's permission to bear with me in that regard. Number eleven, Your Honor, states that the unavailability of lesser included offense instructions and the apparent mandatory nature of the death penalty both interject relevant considerations into the fact-finding process, thereby diverting the jury's attention from the central issue of whether or not the State has satisfied its burden of proving beyond a reasonable doubt that the defendant was guilty of a capital offense.

In this regard, I invite the Court's attention and study to a very significant case that has been brought to my attention, Beck vs. Alabama, in the United States Supreme Court, cited at 447 US 625. I will be reading from 48 -- Law

DEO REPORTING
(703) 751-0013

Weekly 4801. In that regard, I would submit this to the Court's consideration: Under Alabama law, felony murder is a lesser included offense of the capital crime of robbery and intentional killing. Under the Alabama death penalty statute, the trial judge is prohibited from giving the jury the option of convicting the defendant of lesser included offense; instead, the jury must either convict the defendant of the capital crime, in which case it must impose the death penalty, or acquit him. If the defendant is convicted, the trial judge must hold a hearing to consider aggravating and mitigating circumstances and may then refuse to impose the death sentence and instead, sentence the defendant to life imprisonment. The petitioner, Mr. Beck, in that case was convicted of a robbery/intentional killing, and the jury accordingly imposed the death sentence, which the Alabama trial Court refused to overturn. At petitioner's trial, his own testimony established his participation in the robbery, but he denied killing or any intent to kill the victim. Because of the statutory prohibition, the trial Court did not instruct the jury as to the lesser included offense of felony murder. The Alabama Court upheld the conviction and death sentence, rejecting the victim's constitutional attack on the statutory prohibition on a lesser included instructions.

The U. S. Supreme Court held as follows: "The death sentence may not constitutionally be imposed after a jury verdict of guilty of a capital offense where the jury was not permitted to consider a verdict of guilty of a lesser included offense. Providing the jury with the third option of convicting on a lesser included offense, insures that the jury will accord the defendant the full benefit of the reasonable doubt standard. The procedural safeguard is especially important in cases such as this one, for when the evidence establishes that the defendant is guilty of a serious violent offense, but leaves some doubt as to elements which justify conviction of a capital offense, the failure to give the jury a third option inevitably enhances the risk of unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake. Alabama's argument that in the context of an apparently mandatory death sentence in statute, the preclusion of lesser included offense instructions heightens rather than diminishes the reliability of guilt, and the determination must be rejected. The availability of lesser included offense instructions and the apparent mandatory nature of the death penalty both interject irrelevant considerations in the fact finding process, diverting the jury's attention from the central issue of

DEO REPORTING
(703) 751-0013

whether the State has satisfied its burden beyond a reasonable doubt and that the defendant is guilty of the crime.

Thus, on the one hand, the unavailability of the third option may encourage the jury to convict for impermissable reasons, if it is believed that the defendant is guilty of a serious crime and should be punished. On the other hand, the apparent mandatory nature of the death penalty may even encourage the jury to acquit for an equally impermissable reason, that for whatever his crime the defendant does not deserve death. While in any particular case these two extraneous factors may favor the defendant or the prosecution or may cancel each other out, in every case they introduce a level of uncertainty and unreliability into the fact finding process that cannot be tolerated in a capital case.

The jury's option of refusing to return any verdict at all, thus causing a mistrial, is not an adequate substitute for proper instructions on lesser included offenses. Nor does the fact that the trial judge have the ultimate sentencing power compensate for the risk the jury may return an improper verdict because of the unavailability of a third option. If the jury finds the defendant guilty only of a lesser included offense, the judge would not have the opportunity to impose

the death sentence. Mcreover, the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Under these circumstances, it cannot be presumed that a post-trial hearing will always correct whatever mistakes occurred in the performance of the jury's fact finding function."

What this case says, Your Honor, is that Alabama has a statute that eliminates lesser included offenses. What happened in this case was the very same thing. We reached the same result by agreement. The defense and the prosecution and the Court reached the same agreement Alabama reaches by statute. The U. S. Supreme Court says that in every case that cannot be tolerated, if you are talking about death being what is at stake.

I submit to the Court that's exactly what we have here, and that, in and of itself, not considering all the other arguments we have, that that in and of itself is a basis alone for awarding a new trial and it should be done. We know for a fact that the jury's fact finding attention was in fact diverted because of a question that they asked, that is a part of the record. They wanted to know whether or not one person could be found guilty of the robbery and another could have committed the murder. The answer will remain. We will

DEO REPORTING
(703) 751-0013

wait to see what the transcript says, but we know that the very thing the Court spoke of in the Beck case did in fact happen in this case and should not and must not be tolerated in a capital case.

I think my co-counsel have matters they want to address.

MR. RECINTO: Your Honor, although the Court, prosecution, and defense counsel agreed on that tactical move to the extent that there is an appreciable amount of evidence to show that there is somebody else who may have been guilty of the crime, there is an additional duty on the Court to make sue-e sponta the instruction, apart from what we have.

I'm calling the Court's attention to the case of Ball vs. Commonwealth at 221 Va. 762. In that case, and I quote, "The Attorney General, while arguing that there was no appreciable evidence to support felony murder instruction, considered that if there was such evidence, perhaps the trial Court sue-e sponta should have given an instruction relevant thereto." In this case the Supreme Court reversed the conviction because the evidence only supported the fact that the killing occurred in an attempted robbery rather than a consummated robbery and the fact that the Court denied the motion for instructions on the lesser included offense. The

Court said that there was error, and in the same breath, we are making that argument here, Your Honor; that despite the agreement of counsel, this Court should have made it's own motion, because of the totality of the evidence that we have presented and because of the presence of Orlando in that case. The only remedy -- corrective remedy that we have now would be a new trial.

THE COURT: Now, I take it, gentlemen, that this argument addresses itself to point number eleven in the motion for a judgment of acquittal or, in the alternative, a new trial?

MR. KENDRICK: That's correct, Your Honor.

THE COURT: You filed an additional motion having to do with the death penalty statutes. Now, do you wish to argue that point?

MR. RECINTO: Yes, Your Honor.

By the way, Your Honor, I'm now taking up also number thirteen, the motion for a new trial.

THE COURT: You are going to withdraw that?

MR. RECINTO: No, I will argue that.

THE COURT: Go ahead.

MR. RECINTO: We submit that Your Honor, in admitting the testimony of Pedro Castro during the penalty stage of this trial, erred for two reasons.

DEO REPORTING
(703) 751-0013

First, recognizing that the testimony of Pedro Castro concerning the defendant's prior record is heresay, the Court, at the insistence of the Commonwealth, admitted the same, under exception to the heresay rule, in that it was allegedly an admission against penal interest. Now, this rule is sometimes stated this way: "A statement which was at the time of its making so far contrary to the declarant's pecuniary -- or interest and so far tended to subject him to civil or criminal liability that a reasonable man in his position would have not made a statement, unless he believed it to be true."

Now, what are the elements of this rule? First, it involves only statements by the accused prior to trial and at the time of trial that are incriminating to himself. A California decision said it must expose the speaker to criminal prosecution. Second, the out of Court declarant must be shown to have known at the time he made his declaration that the making of it was contrary to his best interests. This is the essence of his reliability.

In 1913 in Donelly vs. the United States case, the United States Supreme Court held that declaration against penal interest was not admissable as heresay. However, in 1973 in Chambers vs. Mississippi at 410 US 284, the Supreme

DEO REPORTING
(703) 751-0013

Court broke with the Donelly case and placed trustworthyness of declarations against penal interest on a par with pecuniary and property interests. Of the Court's ruling in Chambers, first of all, the defendant's admission --

THE COURT REPORTER: Could you go a little bit slower, please?

MR. RECINTO: The following facts justify the Court's ruling in Chambers: First, all of the defendant's admissions were made to close friends; second, each admission was corroborated by other evidence; and third, the admission obviously was against his interests, since he had absolutely nothing to gain. In that case, he admitted having done the murder.

Let's examine the alleged statements of Mr. Quintana to Pedro Castro. Was Pedro Castro a close friend of the defendant? Was any admission corroborated by any other evidence? Was the statement against Quintana's interests? All the answers are, no. As a matter of fact, the statement was made for his best interests in order for him to survive in jail.

Let's now test the testimony in light of the rule itself. First, the statement must expose the speaker to criminal prosecution. Obviously, admitting that he murdered

DEO REPORTING
(703) 751-0013

somebody in Cuba would not expose him to any prosecution here, particularly when he allegedly had admitted having been sentenced already. Second, it must be shown at the time he made the statement that it was contrary to his interests, and we have already shown that it was for his interests to make that statement. Therefore, under the heresay ruling itself, the testimony of Mr. Castro should have not been admitted.

However, the more serious ground in this Court's admission of obvious prejudicial testimony that should not have been allowed at the penalty stage is based on the 1977 Virginia Statute itself. Your Honor, the law says that the probability of future crimes must be shown by evidence of prior history of the defendant. This provision has not been interpreted by the Virginia Supreme Court as yet, however, it has given us an indication on what may constitute evidence on prior history of the defendant, and, apparently, the Court would demand that this criminal record be obtained from a Court of Record.

In the case of Stamper vs. the Commonwealth -- I beg your indulgence, Your Honor, -- I quote -- At this stage the supervisor of the records of the Virginia Department of Corrections was narrating the prior record of the defendant --

DEO REPORTING
(703) 751-0013

"When Mr. Wright testified that Stamper had been convicted within the penal system of certain offenses, including stealing from the kitchen and committing homosexual acts, Stamper's counsel objected, moving that the evidence be stricken, and, after ascertaining from Mr. Wright that his conviction had not been obtained in a Court of Record, moved for a mistrial. The trial Court properly sustained the objection when imposed and directed the jury to disregard any evidence about Stamper's stealing and homosexual activity in the penal system. The motion for a mistrial was denied, but the trial Court again admonished the jury to disregard any evidence as to Stamper's conduct in the penitentiary system."

Obviously, then, if the testimony from a supervisor of records of a correctional institution about the defendant's penal interests was inadmissible, how much more so would be statements of a felon about the murder in Cuba of which we have no record.

Since the Supreme Court has not had a chance to tell us what kind of criminal record would be acceptable in criminal cases, perhaps we should go back to general principles of law. Professor Wigmore, W-i-g-m-o-r-e, said, and I quote: "We have already remarked that no person is

DEO REPORTING
(703) 751-0013

deemed infamous in law and that he had been legally found guilty of an infamous crime, but the mere verdict of the jury is not sufficient for this purpose. It is under the judge, and that only, which is received as legal and conclusive evidence of guilt for the purposes of rendering him incompetent to testify."

Now, if Wigmore demands that much proof for the purpose of the competency of witnesses, should we demand less for the purposes of imposing the death penalty? Should we not be interested whether this murder conviction was rendered in a competent court in Cuba and whether due process was observed? Were the rights of the defendant protected?

Let's look at the provision of the Virginia habitual offender statute, section 46.1-387.1. There the law requires the commission of the Department of Motor Vehicles to certify the transcript or abstract of the conviction records of the habitual offender.

Let's look at the law of enhancement, and that is generally accepted that the statute authorizes enhancement of punishment that firm convictions contemplates valid conviction. In a Texas case, Burgett vs. Texas, at 389 US 109, it was held that prior conviction could not be considered and that the prior criminal statute -- It was void because it was

obtained in violation of fundamental constitutional rights of the defendant. Therefore, to accept Pedro Castro's testimony is to say that the criminal trial in Cuba must be afforded the same weight and consideration as our Court's.

In summary, therefore, the testimony of Pedro Castro was erroneously admitted, either on the ground of the heresay rule or under the provision of the Virginia death penalty law and under the implications of the Stamper case because of the highly prejudicial testimony, and the only corrective action is for the Court to grant a new trial.

THE COURT: All right, if counsel have completed the arguments they wish to make in support of the thirteen grounds for a new trial or judgment of acquittal contained in the original motion -- I just want to know whether it is time to pass the ball to the prosecution to respond or whether you gentlemen have anything further to say about this.

MR. KENDRICK: With the exception of number eight, Your Honor; I will trust the Court's judgment on that. I don't know how you want to proceed on that one.

THE COURT: You say you have the questions; what are they? I suppose there is a file here, but --

MR. KENDRICK: I have the question of the jury. May I have the Court's indulgence?

DEO REPORTING
(703) 751-0013

THE COURT: I think I have them. I found them in the file. I have three here; one of them says, -- and obviously this was during the deliberation in the guilty phase of the trial -- "Regarding your instructions to us eliminating the second indictment, i.e., robbery plus the elimination of lesser included offenses, are we to assume this means that both sides have agreed that the murderer did the robbery, whoever that was, and it is not possible to consider a separate murder and robbery?"

MR. KENDRICK: That's the one. I don't remember what the answer was, but that's the very quesion, Your Honor, that I'm referring to. It also was tied in with what I'm suggesting in the Alabama case. I know at some point they were concerned about the other matters other than the standard of proof beyond a reasonable doubt that is imposed upon the state. That question alone --

THE COURT: (Interposing) Do you have the Law Week there that contains the Alabama case?

MR. KENDRICK: Yes, sir.

(Handing to the Court.)

THE COURT: All right, Mr. Kendrick, thank you.

Mr. Melson, do you wish to respond?

MR. MELSON: Yes, sir, Your Honor.

With respect to his motion which lists thirteen reasons for why he was allegedly deprived of a fair trial, I will not say anything with respect to items one through seven and number twelve, but I will merely rest upon the arguments made at trial and the Court's ruling on the motions of the defendant. With respect to arguments eighteen and eleven, Mr. Trodden will address the Court with respect to those. With respect to number thirteen concerning whether or not the Court erred in admitting the testimony of Pedro Castro, I will only say that I believe the Court was correct when it was admitted on the ground of statements made against penal interests as the Court ruled at the time of the trial, but it would also be admissible --

THE INTERPRETER: (Interposing) Please speak louder.

MR. MELSON: (Continuing) It would also be admissible on the ground that it is an admission of a party to the case, which he certainly is in this particular instance. Section 19.2-264.4, which is the statute which provides for the sentencing function of the jury, and it says that the Court may admit into evidence with respect to sentencing any evidence which the Court deems relevant to sentencing. Certainly, the defendant's admissions that he killed somebody

DEO REPORTING
(703) 751-0013

else in Cuba and that he took a girl away in Cuba were relevant to the jury in determining his history and background and in which the statute says the Court may allow evidence to be proffered on those two points as long as it is admissible according to the rules of evidence, which I believe these admissions by the defendant certainly were.

With respect to the case that counsel for the defendant cites, that is Stamper vs. the Commonwealth, I note to the Court that on page 277 of that decision the Court said, "If evidence as to acts committed by Stamper in prison was inadmissible, which we do not decide here, the trial Court's prompt corrective action was sufficient to eliminate any prejudicial effect."

THE COURT: Well, wasn't Stamper decided under a predecessor of the present statute which restricted the jury to criminal convictions rather than history? Wasn't there a 1979 amendment that changed "record of convictions" to "history?"

MR. MELSON: Yes, sir, I believe there was.

THE COURT: At least what there was, as I recall under the former statute, -- I had a case under it one time and noted an internal conflict. At one point I believe the statute did say that matters of the defendant's history and

background could be introduced, but perhaps it was in the jury's verdict form that required that the jury say that they had considered only his record of criminal convictions, if any, and that was cleared up by an amendment, I think, in 1979 which made it "history and background." I suspect, though, that the Stamper case might have been decided under the earlier form of the statute.

MR. MELSON: I believe it was a 1980 amendment, and this case was decided in August, 1979, but I believe you are correct in that. Even in the light of that, they did not decide in that case whether the evidence of the acts in prison would be relevant or not. They came down, regardless of what the statute was, and there was no decision on that point.

Other than that, Your Honor, we have nothing more to argue with respect to those other points, except for Mr. Trodden with respect to points eight, nine, and eleven.

MR. TRODDEN: Your Honor, I believe issue number eight in the defendant's motion is intimately related with motion number eleven, and thus, I will address eight and eleven together.

Prior to reaching those, I would like to comment upon motion number nine, the discovery of new evidence, and

DEO REPORTING
(703) 751-0013

the Commonwealth would rely, Your Honor, on the case of Lewis vs. the Commonwealth at 209 Va. 602, which deals with the issue of after-discovered evidence as grounds for a new trial, and because of the language contained in that case, it is directly on point. I would like to quote that. It says, "Motions for a new trial on the ground of after-discovered evidence are not looked upon with favor in view of the temptation involved." There it cites a number of cases. The Court goes on to state in Reaber vs. Duncan, 206 Va. 657, "The well settled general principles are stated to be motions for a new trial based on this ground are addressed to the sound discretion of the trial judge and are awarded with great reluctance and with special care and caution. The evidence must first appear to have been discovered since the trial period. Second, be such that in the exercise of reasonable diligence on the part of the applicant it could not have been secured at the former trial. Three, not be merely cumulative, corroborative, or collateral and four, be material in its objects and such as on another trial ought to produce opposite results on its merits."

Your Honor, I believe the assumption of after-discovered evidence before the Court today is such that it does not meet the second criteria: "Be such in the

exercise of reasonable diligence on the part of the applicant that it could not have been secured at the former trial." Certainly, the defendant knew at the time of this trial that he was involved in a motor vehicle accident, thus that knowledge was within his grasp. Furthermore, during the course of the trial, the Commonwealth became aware of this accident and sent an investigator to find information out about the accident, and the information concerning the accident was related to counsel for the defendant. Thus, during the course of the trial itself, the evidence of that accident was known, not only to the defendant, but to his counsel, and thus is truly not after-discovered evidence.

In reference to motion number eleven and number eight, counsel for the defendant relies rather heavily upon the Beck case -- Beck vs. Alabama, which is an anomaly in the eyes of the law in that the Beck case dealt with an Alabama statute which prohibited lesser included offenses on a capital murder charge. The Court in Beck vs. Alabama, basing its analysis on the due process approach, stated that Alabama could not constitutionally prohibit a lesser included offense. That clearly is not the case before this Court. Virginia does not prohibit such offers of lesser included offenses, and in Beck vs. Alabama, the question which the Court granted sur on

DEO REPORTING
(703) 751-0013

was the question of whether a finding of guilt based upon the capital instruction may be sustained where the statute prohibits lesser included offenses; and, secondly, where there was evidence to support lesser included instructions. The facts in the Beck case were that the defendant testified that he participated in the robbery, but that his accomplice struck the fatal blow.

In the case tried by the jury in which we are here on today, there was no evidence that there were any other participants in this crime. As a matter of fact, the whole thrust of the defense was that the defendant was set up and, thus, at the time of the instructions, there was no evidence to support lesser included instructions. At the time of the jury's question, if my memory serves me correctly, when they asked about the lack of lesser included instructions, counsel for the Commonwealth and for the defendant and the Court reached the position that it had at the time of arguing instructions, that there was no evidence to support it, and the Court's admonition to the jury was that it was not to go beyond the evidence or to speculate. Thus, the Beck case, which deals with the statutory prohibition, is in opposite to the case before the Court and does not invalidate the judgment of the conviction.

Your Honor, one other point I would like to mention is that the Commonwealth is prepared to offer testimony if the Court desires it that the investigator who did the investigation of the motor vehicle accident of Feburary 4th did relay that information to both counsel for the Commonwealth and the defendant during the trial.

MR. KENDRICK: In that regard, if I may, I would like the record to reflect that there was no indication of any injury to Mr. Quintana at that point. In fact, that matter came to my attention in light of the Commonwealth having a basket full of bits of paper and receipts showing expenditures of money, and the issue was whether or not we were in any way going to use that to show that Mr. Quintana may have had money or may have not had money. There was no indication whatsoever that there was any injury to our client.

One other thing I think is important, Your Honor; we have to constantly keep reminding ourselves we are not dealing with an individual whom we can assume understands everything that we are saying or is being open with us because of the language problem that we have obviously experienced during this entire trial.

THE COURT: Did you wish to make any further

DEO REPORTING
(703) 751-0013

rebuttal to the Commonwealth's argument?

MR. KENDRICK: May I have the Court's indulgence?

THE COURT: Yes.

MR. KENDRICK: Thank you, Your Honor. Your Honor, that's all we have with respect to one through thirteen. My co-counsel has a motion on the constitutionality of the statute, and he would like to address the Court on it at this time if he may.

THE COURT: All right, sir.

MR. RECINTO: I will attach an order on the other points, Your Honor, on this motion, but I will briefly touch on three and three A. The 1977 Virginia statute was obviously patterned after the Georgia statute upheld in the United States Supreme Court in Gregg vs. Georgia. This does not mean that the Virginia statute will likewise pass constitutional muster particularly when some of the good features in the Georgia statute did not find its way into the Virginia law. An example of the Virginia statute of the provision in the Georgia statute, Your Honor, is this: "The judge or a jury shall hear additional evidence in extenuation, mitigation, aggravation, or punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere as to the defendant or the

absence of any prior conviction and pleas." This is the key point: "provided, however, that only such evidence and aggravation as the State has made known prior to the defendant -- prior to his trial -- shall be admissible." That is not in the Virginia statute.

The other statute in Georgia, section 27-2534.1, states that, "If the verdict is death, the jury or the judge must specify the aggravating factors as found." This particular provision is also not found in the statute. It's importance is obvious where the sentencing authority is required to specify the factors he has relied upon in reaching its decision.

The further safeguard is the meaningful appellate review that is available to assure that the death sentences are not imposed capriciously or in a freakish manner, as the Court found in this case. These force the jury to consider the consequences of the crime and the criminal before it pronounces sentence. It focuses the jury's attention on the characteristics of the person who committed the crime. In a nutshell, Georgia law requires as a prerequisite to the disposition of the death penalty the specific jury findings, the circumstances of the crime, or the character of the defendant. In this way, the jury's discretion is channeled.

DEO REPORTING
(703) 751-0013

There is compatible provision in the Virginia statute under the presentencing system. The jury is given a verdict form with some ultimate language in Pennsylvania. Even these may be indicative that the jury must make a selection according to its findings. In this case, however, the jury made no such specific finding. The foreman merely signed and dated the verdict form, and the defendant herein has no way of finding out what the jury based its verdict on.

The third statute in Georgia which was approved by the Supreme Court is this, section 27-2537 E and F: "If the Court affirms a death sentence, it is required to include in its decision reference to similar cases that it has taken into consideration. The law also requires that the Georgia State Supreme Court retain and preserve the records of all felony cases in which death was imposed. This is undertaken in order to assure that the death sentence was not imposed under the influence of passion, prejudice, or other arbitrary factors." Look how meticulously the Georgia law covers this area. If you assist in deciding whether to sustain the death penalty, the Georgia Supreme Court is supplied in every case with a report from the trial judge in the form of a standard questionnaire containing questions designed to disclose

whether any other factors have played a role.

One interesting question is this: "Whether the evidence quotes all doubts with respect to the defendant's guilt." This question is asked of a judge after a jury verdict of guilty. Again, it is an additional safeguard.

Now, in order that information regarding similar cases may be before the Court, the post of assistant to the Supreme Court was created. His job is to accumulate records of all cases in which the sentence of death was imposed. The Court is required to include in its position the reference to these particular cases, which it took into consideration. Again, the Virginia law does not have such safeguards against the disproportionality of the death sentencing. The 1977 statute requires the Supreme Court to consider and determine whether the sentence of death is excessive or disproportionate. I think it has not the mechanism for doing so. The present statute has no mechanism by which the reviewing court can determine whether in fact the death penalty was being delivered free from discrimination or in an arbitrary fashion. There is no mechanism to determine the jury's verdict, state-wide. We submit that the lack of safeguards in the 1977 Virginia statute makes it subject to the same infirmities found by the Supreme Court in Furman vs.

DEO REPORTING
(703) 751-0013

Georgia case and therefore is unconstitutional on its face.

The same argument can be made on the eighth amendment issue. It has been argued that perceptions of standards of desensitization with respect to the criminal have supported the criminal statute. There is some language in the Gregg case that says this is not conclusive. The eighth amendment demands more than punishment be acceptable to society, since it also has experience upon the exercise of power. In the Gregg case, the Court's inquiry as to excessiveness has two aspects. First, punishment must not involve necessary infliction of pain, and second, punishment must not be grossly out of proportion to the severity of the crime. This is the second aspect that the Virginia statute in framing that has not provided for the mechanism to assure that the penalty of death should not be out of proportion to the severity of the crime, as was done specifically by the Georgia statute, which was affirmed by the United States Supreme Court.

I would submit that the rest of the arguments are self-explanatory in this motion, Your Honor.

MR. MELSON: Your Honor, I will respond only by saying that the constitutional issues raised in this defendant's motion here has been discussed on a number of

occasions by the Virginia Supreme Court at Smith vs. the Commonwealth, 219 Va. 455, and Martin vs. the Commonwealth at 221 Va. 436, and James Briley vs. the Commonwealth, which is only cited at 221 VRR 568, decided on November 26, 1980, and Turner vs. the Commonwealth, decided on the same date, and I would ask the Court to deny the defendant's motion on the constitutionality of the statute.

THE COURT: Let's take a ten-minute recess, gentlemen.

(Whereupon, a brief recess was taken.)

THE COURT: With respect to the defendant's motion for a judgment of acquittal or a new trial, now, additional arguments were presented in support of the motions one through six, and as to those, the Court adheres to the rulings made at the trial or in the earlier proceedings in the case. As to number seven, that does deserve some comment. The defendant was removed from the courtroom during the last few minutes of the rebuttal argument of the Commonwealth. It was the third, fourth, or fifth instance during the trial when the defendant had evidenced some disruptive behavior. In this particular phase, after having been repeatedly admonished not to do this and told he would be removed, and after he did it again, the defendant interrupted

DEO REPORTING
(703) 751-0013

in the final arguments of counsel by rising in his place and taking off his translator's earphone and proceeding to harangue the Court or the jury in Spanish. Rather than further interrupt the proceedings, the Court ordered him removed, and the Commonwealth's argument was completed, and only a few minutes of it remained. At that point, the Court requested the translator and the court reporter to go to the lock-up area where the defendant was and promptly read to him through translation the proceedings that he had missed, which consisted only of the last part of the Commonwealth's final rebuttal argument on the question of guilt. That procedure was resorted to only after prior warnings had failed, and certainly seemed to the Court to be the least disruptive method of allowing the trial to proceed unimpeded.

Dealing with number nine, the motion for a new trial on newly discovered evidence, the defendant now says that his automobile accident occurred on February 4th, 1981. This trial began on June the 1st and it ended on June the 10th. It could hardly be after the discovery. The defendant certainly knew of it. He had Spanish speaking attorneys to assist him in preparation for this trial and was in a position to communicate to them at all times. During the trial, the significance of the blood on the clothing was certainly

communicated to him, because all of the proceedings were at great expense, translated simultaneously for his benefit so that he heard the evidence as rapidly and as promptly as all the English speaking people in the courtroom. If there were anything to tell his lawyers about the significance of the blood on the clothing, he would have been able to communicate it when the Commonwealth sought to introduce that clothing. It hardly seems to me that it can be said that this evidence was not available to the defense by the exercise of diligence. If the defendant failed to communicate any facts to his attorneys, that is not the fault of the attorneys, nor it is the fault of the Commonwealth.

Turning to matters contained in paragraph eight and eleven of the motion, it appears to me that Beck vs. Alabama dealt with a statute which the Supreme Court itself said was evidently unique in the country. The Court observed that Mississippi had had a similar statute, but the Supreme Court of Mississippi ruled it unconstitutional, leaving only the Alabama statute to find its way to the Supreme Court of the United States. That statute not only forbids the judge to instruct the jury as to any lesser included offenses, but it does not -- and this is essential it seems to me -- it does not give the jury the option of life imprisonment. The vice

DEO REPORTING
(703) 751-0013

of this statutory scheme was that it put the jury in the position, at least insofar as the jury could know it, of choosing between the death penalty and not guilty, and that, it seemed to the Supreme Court, confronted them with alternatives which were bound to produce extraneous considerations. True, those considerations might also work to the defendant's advantage, but still, they would be extraneous to the evidence in the trial. In Virginia, not only is there no prohibition against lesser included offense instructions, but quite the contrary, until recent years, it was the practice in homicide cases to instruct the jury as to lesser included offenses whether the evidence warranted them or not. But, the jury is not forced to choose between what appears to be a death penalty conviction and an acquittal, and even if the jury finds the defendant guilty of capital murder, it has the option of imposing life imprisonment, if it thinks that punishment is warranted under the evidence. In no case is the jury compelled to give a death penalty in Virginia.

Turning to lesser included offenses, the Virginia Supreme Court has in more recent years ruled that it is not necessary to instruct the jury as to any lesser included offenses, if the evidence does not support them. In this

case, it might have been arguable that lesser included offenses could have been presented, but the defense, in what seemed to me to be a sound tactical decision in view of the posture of the case at the time it decided that it was in the defense's best interests not to go that route but, indeed, to put the jury to the stark choice between capital murder and not guilty, realizing well the jury could impose life imprisonment if they found the defendant guilty of capital murder. It seemed to me than and now to be an intelligent decision for the defense to make in view of what they knew about the case. But aside from that, it does not seem to me that lesser included offenses were warranted under this evidence, even if they had been requested. Whoever committed this murder committed capital murder. There was no defense here that the defendant acted under the heat of passion in committing this killing, nor that he acted in self-defense, nor that he had any diminished responsibility. Rather, the defense was that the crime was committed by another person and not by the defendant at all. In fact, an effort was made to portray that other person as a stealthy, deliberate killer who intended to lay down a false trail, falsely implicating and framing this defendant. The defense was, in effect, an alibi defense; it was not to show it was a lesser kind of a

DEO REPORTING
(703) 751-0013

murder, quite the contrary. So, it seems to me that under the facts of this case, the lesser included offense instructions should not have been given in any event.

Turning to the attack on constitutionality that has been made upon the Virginia statutory scheme, it is true, as Mr. Recinto argues, that most of the grounds stated in that motion speak for themselves. I will, however, observe that section 17-110.1, which prescribes the proceedings in the Supreme Court on the review of a death sentence or upon the review of a capital conviction, does require, as does the Georgia statute that the Supreme Court may accumulate statute statistics concerning death penalties imposed as they develop and may use those as standards in determining whether the death penalty is warranted under the facts in each case or whether or not it may be disproportionate under the facts of the particular case, based upon their experience in all of the other cases that have come before them. Apart from that, it appears that the constitutionality of the statute has been ruled upon in many cases in Virginia and that sur rarely has been denied by the Supreme Court of the United States in several appeals from convictions which have been rendered under it.

Accordingly, the motions for new trial and for a

judgment of acquittal and for reversal of the conviction on the grounds that the statute is constitutional are denied.

Are counsel ready to proceed with the sentencing phase?

MR. KENDRICK: Your Honor, number thirteen; does the Court's ruling that all motions are being denied -- does that include number thirteen? You didn't specifically address yourself to that.

MR. MELSON: Nor was number twelve specifically mentioned, Your Honor.

THE COURT: I'm sorry; I should have included those in the discussion of motions one through six, because they, too, deal with the rulings at the time of trial, and the Court adheres to that ruling.

MR. KENDRICK: That's the assumption that was made. Then we are ready to proceed.

MR. MELSON: The Commonwealth is ready, Your Honor.

THE COURT: Ask the defendant to please stand.

(The defendant stands.)

THE COURT: Ask the defendant to please state his name and his age.

THE DEFENDANT: Manuel Quintana, 28 years of age.

THE COURT: Mr. Quintana, have you read the report

* * *

DEO REPORTING
(703) 751-0013

THE COURT: All right, sir.

MR. ORDOVEZA: No other comments.

THE COURT: Does the Commonwealth have any comments on the report?

MR. MELSON: Yes, sir, we have two corrections on page one, Your Honor, where it says under jail adjustment that two pieces of metal were found, they were in fact two knives that will be exhibited to the Court during the evidentiary part of sentencing.

THE COURT: All right.

MR. MELSON: On page two, paragraph and number five, where it indicated he retained $102 in his wallet, I believe that should be $182.

The only other comment I have with respect to the report is that there are some areas here, such as family history, where the only indication the Probation Officer had as to his history and activity in other places down in Northern Virginia have been by the defendant alone and without corroboration from independent sources.

THE COURT: I have made notes of the various objections and corrections which counsel have brought to my attention. I've not undertaken to correct all of the typographical errors. I think it reads very clearly,

* * *

Whereupon,

MARIE DONOHUE

was called as a witness by counsel for the defendant, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ORDOVEZA:

Q Ms. Donohue, in the course of your interview of the defendant, who was the other person translating?

A Mrs. Bastillo.

Q Is she in the Court now?

A I don't think so.

Q Do you have any idea this interview did last?

A We interviewed Mr. Quintana on two occasions. I think it was probably a total of about three and a half hours.

Q Did you find him most cooperative in the course of this interview?

A Yes.

Q Do you feel that he withheld anything from you?

A That's difficult to say, seeing how I really didn't understand him.

Q But, you didn't find him evasive when you questioned him in regard to the various matters you wanted to elicit from

DEO REPORTING
(703) 751-0013

him; is that right?

A That's correct.

Q And neither did you find him insincere in his manner of dealing with you and talking with you --

MR. MELSON: (Interposing) Your Honor, perhaps he ought to ask her how she found him, rather than suggesting how she found him.

THE COURT: Objection overruled.

BY MR. ORDOVEZA:

Q The question again was: He was quite sincere in his responses to your questions?

A He appeared to be.

Q Was he forthright in his responses, would you say?

A Yes.

Q Now, you said on page ten of the presentence report, you stated that Mr. Quintana became very emotional on several occasions while being interviewed. On what occasions did he exhibit such emotion while you were interviewing him?

A Most of all when we talked about his family and if they were aware of his difficulties and that he was in jail.

Q He spoke about the injustices perpetrated on him; is that right?

A Yes, he did.

Q And you also stated on page ten of this report that he appeared to be very ashamed of what has happened. In what context did you formulate that impression in your mind?

A Basically, because he didn't want his family to know.

Q Now, was that about whether he did it or didn't do it or was involved in the case or what?

A Just the fact that he was in jail.

Q Not because he did do this vile act? In other words, he did not admit to you, under any circumstances, he had committed the murder for which he is being accused?

A No, he didn't.

Q Now, in regard to your comments that they -- they felt he could be suicidal, and that is on page five of the presentence report, would you state the basis for this statement?

A When I came over to the jail to find out more information about why he was in administrative segregation, I spoke with the classification person. I'm sorry to say, I don't remember who it was. In discussing it, I asked if they felt he was suicidal and they said, yes, they did.

Q Who are they?

A Whoever I talked to on the phone.

Q They didn't indicate any further particulars as to

DEO REPORTING
(703) 751-0013

why they felt he was suicidal?

A No, he didn't discuss what they found in his cell.

Q I see. So, you could not at this time formulate the reason why they felt he was suicidal then; right?

A No.

Q Now, there was no -- There was a reference here in regard to an escape note that he is alleged to have written. Do you know any further particulars about this note?

A Unfortunately, I got that same information from -- from that same person.

Q No note was ever produced to you; is that correct?

A No.

Q Regarding your comment on page ten of the presentence report, you mentioned in the third to the last paragraph, that Mr. Quintana appeared to be a very distraught individual who is most concerned due to his unfamiliarity with the proceedings in the Court and his inability to communicate fully with his attorney, and he has not received a fair trial. Is that basically your feeling or opinion of the matter?

A I think I got this opinion from -- through the interpreter. He stated that Mr. Quintana had a lot of comments to make.

Q Further on your statement is: "This is most tragic

in view of the profound severity of the charge and its penalty." That is a comment on your part, is it not?

A Yes, it is.

Q Let me quote further what you stated: "While Mr. Quintana's guilt has been proven by the Commonwealth and the penalty set by the jury, the severity of the sentence is of concern to this officer." You do manifest from the bottom of your heart real concern about this verdict; is that correct?

A Yes, I do.

Q You feel that the death penalty in this case might be over extreme under the circumstances?

MR. MELSON: I'm not sure that is relevant for her to testify to. She didn't sit through the trial. I don't think that warrants -- in the presentence report whether she is concerned about the penalty.

THE COURT: Objection sustained.

MR. ORDOVEZA: I have no further questions of Ms. Donohue at this juncture.

I want to make one further comment on the presentence report on page twelve, Your Honor.

THE COURT: Just a minute. Let me see if there is cross-examination.

* * *

the other I found under a drawer that had been propped up in his room.

Q Do you have any other contents in that box?

A Those are just blank envelopes (indicating). These are, I would assume, something he's done in translation (indicating). He had an English-Spanish translation dictionary in his individual room. This was something I believe he's translated from his Spanish to English, because it's very broken, and the other is all Spanish.

Q Do you have the pair of those in there?

(Witness is removing them from the box.)

A Yeah, those were obviously taken or made from the brace from the bottom of these two -- braces in the bottom of these two shoes. (Indicating.)

Q What else do you have in the box, if anything?

A This is jail uniforms that have been tied. I would say there is about 35 feet.

Q Where did you find this?

A That was wound up in the corner next to the toilet. It was out in plain sight.

Q Is this the way it was when you found it? (Indicating.)

A Yes.

* * *

AFTERNOON SESSION (2:10 p.m.)

THE COURT: Mr. Kendrick?

MR. KENDRICK: Thank you, Your Honor.

Your Honor, it has been a very long and a very, very difficult trial, and in many ways I am glad that it is apparently almost over. In many ways I am glad that it may not be over. If nothing else, because of the fact that there is a human life involved.

I think if you look at three areas that I think are critical in this whole trial, and that's the area of evidence surrounding Mr. Quintana, the area of evidence surrounding Orlando, and the area of evidence surrounding Carmen, who was a very critical key witness throughout this trial; all of the evidence surrounding Mr. Quintana is circumstantial. There was certainly evidence there. There was certainly evidence there, so far as the jury was concerned, to warrant a conviction, but there was an incredible amount of evidence around Orlando, and evidence that I cannot imagine anyone putting aside or overlooking. There was the blood stains, his behavior, his alibis, the things that he attempted to do and that he said to another individual and with regard to the items that could have been taken out of the house that the victim was in. In my judgment there is only one way -- one

DEO REPORTING
(703) 751-0013

possible way that those three areas can be reconciled, and I believe everything is reconcilable at some point at some tiem. I think the only way we can reconcile these three areas, the evidence that was found in the car that was owned by Mr. Quintana, all the evidence that certainly appeared to point to Orlando as the killer, plus the statement that Carmen gave that was attributed to Mr. Quintana the day of the murder and that is that if the man who had the opportunity in the morning was in fact Orlando and he did in fact commit the murder, just being a matter of minutes away from the victim upstairs. He did, in fact, commit that murder in the morning, which is squarable with the evidence, no matter which medical experts you listen to. It apparently looks as if the woman was killed in the early morning hours; that's consistent. It is also consistent with other evidence that pointed to Orlando as the killer, the blow on the wall, his actions, his 1096, the state the detective described that he went into when they tried to remove the blood from his fingers.

Then you have to square the evidence that was found in Mr. Quintana's car. There is only one way I can do that and that's if Mr. Quintana came along after the murder and saw what he saw and decided to take advantage of the

situation by removing articles from that apartment. That's the only way you can square those two things with the third item, and that's Carmen's testimony who said he appeared out there and saw a woman who had been beaten and appeared the way she described him to appear. I know of no other way to square those three with what apparently is irreconcilable positions, other than by saying that Orlando committed the murder and Mr. Quintana stole things from the apartment and subsequently talked to a woman out in Fairfax about what he saw.

I think that the jury was faced with a situation where ten years ago they would not -- not in this country -- have imposed a death penalty, but they are faced with a situation they really didn't know what to do with or how to control. They believe that life does not mean life. That may, in fact, be an area in the law that we have to deal with as members of the law -- and members of society to do whatever we have to do to make that position reconcilable again. I do not believe that anybody that's had anything to do with this case will ever have a peaceful moment's sleep, if in a year, a month, two weeks, five years, down the road we find out that, in fact, Orlando did commit that murder. For that reason, Your Honor, because of that possibility, I

DEO REPORTING
(703) 751-0013

respectfully ask this Court to grant this man the right to life.

My co-counsel has something he would like to say.

MR. RECINTO: Your Honor, death is a punishment which is unique in its very irrevocability. The basic concern of the decision entered on those defendants who are being sentenced to death is that it be capriciously and arbitrarily. Under the procedures the Court in the Furman case -- the sentencing authority was not directed to give direction to the nature or the circumference of the crime committed or the character and the record of the offender. The underlying basis in Gregg vs. Georgia and Uturek vs. Texas as upholding the death penalty was the parole safeguards built into that statute to make sure defendants in capital cases are not condemned in an arbitrary manner. In response to the 1967 ruling, the Virginia legislature enacted in 1977 the death penalty which we have before us. In order to fulfill the Supreme Court directive, Virginia in section 17-110.1 provides that the Court shall consider and determine two things, the second of which provides whether the sentence of death is excessive or is proportionate to the penalty imposed in similar cases. Considering both the crime and the defendant, I invite this Court to do just that.

Your Honor, you are about to pass on the jury's recommendation in imposing the extreme penalty of death upon Mr. Quintana. The finality of the death penalty makes punishment qualitatively different from other sentencing procedures this Court may have made in the past. In doing so, your duty is not merely to approve or reject the jury's recommendation under the "clearly erroneous standard, because it is a capital punishment you are meting out. You have the additional duty to make your own independent judgment, both as to the culpability of the defendant as to a capital murder, and the appropriateness of the punishment of death for this particular defendant before you." What the Supreme Court of Virginia would be reviewing would be your decision to impose the capital punishment, not the jury recommendation. Therefore, at this stage it behooves this Court to determine whether the sentence of death recommended by the jury is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In this particular crime and with this particular defendant, let's first look at the crime itself. In and of itself, murder in the commission of a robbery is made a capital offense in Virginia, but let's look at some of the

DEO REPORTING
(703) 751-0013

cases wherein the Virginia Supreme Court has affirmed the death penalty. The first case is the Smith vs. the Commonwealth. Here, the defendant was convicted November 2, 1977. The charge was capital murder following rape. The defendant signed a statement admitting that he encountered the victim walking alone at the beach and displayed a knife and ordered her to disrobe and engaged in sexual intercourse with her. This is part of his testimony: He feared that she could send him back to prison so he started choking her with both hands until she went limp. Then he dragged her out to the water a couple of feet and held her head under the water until she stopped moving and then stabbed her in the back several times." What is the significance of this case? First, the defendant admitted to the crime without remorse and he admitted it in writing. Second, the motive for the killing was to eliminate testimony against him. Third, the manner of the killing was by drowning and stabbing. In another case, Stamper vs. the Commonwealth, this involved three capital murders during the commission of armed robbery. The significance here is that there are three victims, and the manner of killing was with a weapon. The victims were shot at close range.

In Clark vs. the Commonwealth, the charge was

murder for hire. Here, again, a defendant confessed that he found -- that he was paid for -- to execute the murder and that he even prevented a friend from abandoning the crime. He also robbed the victim's body and celebrated the murder with his friends. The victim was found with five gunshot wounds in the head and chest.

In another case, Justus vs. the Commonwealth, the charge was murder during the commission of a rape. The significance here is that the victim was pregnant and there was testimony that she was near term in her pregnancy.

In the case of Waye vs. the Commonwealth, this was a charge for murder after rape. The victim was 61 years old, and the defendant confessed to this crime and I quote: "I did it just like they do it on television, wiped the knife and everything." He continued: "Man, wait until my friends hear about this." The victim's body was found mutilated in the bathtub. This additional aggravating circumstance here is also that the Commonwealth showed that he poured a bottle of Clorox on the body in the tub, and the body showed 42 stab wounds.

In another case, Mason vs. the Commonwealth, here the defendant admitted and pleaded guilty to murder during an after-rape. The significance here is that the victim was

DEO REPORTING
(703) 751-0013

burned alive. She was tortured, her nails driven into her wrists. Her body was defiled and objects shown to be thrusted in her anus.

Another case was Coppola vs. the Commonwealth, and it was another commission of a murder after rape of a fifteen-year-old girl. Hours after raping and murdering the girl, the defendant murdered the mother and came back and admitted the killing to silence her.

Still looking at the crimes, notice that in most of the cases where the death penalty has been upheld, the evidence against the defendant was overwhelming in that there was either a confession, testimony of a co-defendant or other witnesses, with the exception of the Stamper case where the substantial evidence was so airtight there was no room for doubt. In contrast to those cases, the crime in which Mr. Quintana was convicted was quote: "a simple killing in the commission of a robbery, aggravated only by the number of blows received by the victim." But, note, however, the victim was a woman not raped or molested. She was not subjected to any torture and no firearm was used. The only weapon was a hammer, which by its nature is not a lethal weapon. A hammer is an instrument that becomes lethal only by repetition. No evidence was shown of any violence to

others, as far as Mr. Quintana was concerned. On the contrary, the only acts of violence attributed to him was suicide attempts and not to hurt others.

In homicide cases, oftentimes the weapon or means of killing gives a clue to the criminal's premeditation or lack of it; for example, procuring a firearm or the use of firearms. All these take preparation and premeditation. However, when the killing is accomplished by weapon not carried with the assailant, nor is it a normally dangerous weapon, there is some doubt as to the degree of premeditation attributed to the killing. The quality and quantity of evidence educed at the trial, again in contrast to the cases again that we have shown that there was the defendant's testimony of this case was built on pure circumstantial evidence.

Your Honor, my presentation of evidence at this point is not an effort to rehash the trial. I will be doing so because of the mandate of the law that the sentencing authority has before it, all the authorities it needs to make a comparison of similar cases. There are many pieces of evidence introduced in evidence, the probative value of which are subject to serious question. The testimony of Carmen comes to mind. Carmen, the clerk in Fairfax County Court,

DEO REPORTING
(703) 751-0013

testified she remembered -- that she testified that she was scared because of what the defendant told her. She also testified that the defendant was wearing a blood stained shirt and that she was positive about the blood stain. Now, if that was true, then who was wearing the blood splattered suit that was introduced at the trial. If Carmen's testimony was true, then there would be two blood stained pair of clothes. However, if there was only one blood stained suit, as the police and the Commonwealth Attorney believe, then could Carmen's testimony -- it must be a lie or a mistake. Whatever it is, should we put a man to death because they had on this type of evidence?

Let's compare the defendants in those cases that have come before the Supreme Court. Clark was shown to have been convicted for conspiracy to distribute drugs. There was also testimony of the police investigator that the defendant was not sorry at all. He was only sorry he was caught. This was the case of murder for hire. In the case of Waye vs. the Commonwealth, the murder following rape of an old woman found in the bathtub, the Probation Officer made this statement in his report. This is a rather unusual observation for a Probation Officer to make, and I would like to read it in Court. The Probation Officer wrote: "This is one of those

times when a person should not take a positive position. In my investigation I have not found an extenuating circumstance that would cause me to disagree with the finding of the jury in this case. Therefore, my conscience compels me to endure the jury's verdict and the jury's sentence." We do not have such a recommendation from our Probation Officer; on the contrary, the Probation Officer is bothered by the severity of the penalty that might be given to this defendant.

Going ahead, we have the Mason case, murder and rape. Here, the Court made a finding that because of the defendant's prior history, which was the problem that the defendant would commit similar acts of violence. The defendant was shown serving a sentence for arson and grand larceny, and three weeks after parole he broke and entered a house armed with a deadly weapon and murdered an elderly occupant and set fire to the house. It was also shown that on the day following the murder for which he was charged with the capital offense, that the defendant again broke and entered killing and committing arson and then he went to another home and armed himself and maimed one girl and sodomized and abducted the young sister later and raped the sister, and when she tried to escape, he attempted to kill her. The Court made these specific findings of the defendant's prior record and history:

DEO REPORTING
(703) 751-0013

"Because section 19.2-262.4C provides that the penalty of death shall not be imposed unless the Government shall prove byond a reasonable doubt that there is a probability, based upon evidence of the prior history of the defendant or of the circumferences surrounding the commission of the offenses of which he is accused, that he would commit criminal acts of violence that would constitute a continuing serious threat to society." In this case we have a presentence report that contains no statement at all of any prior record of the defendant and no history of criminal activity. The Probation Officer plain admits that we do not know the defendant's background. We do not know the circumferences of the defendant. There is only one testimony in his background, and that came from a convicted felon. The Probation Officer, in her report, has already stated the defendant's guilt has been proven by the Commonwealth and the sentence by the jury --the severity of this sentence is of concern to the officer.

Your Honor, if after listening to all of these, you feel that you have seen the bottom of the barrel as far as the defendant is concerned, you can impose the supreme penalty. However, if your information about the defendant's criminal background is incomplete, as the Probation Officer testified to, then we submit, Your Honor, the death penalty cannot be

imposed in this case without violating 19.2-262.4 and the decision of the Supreme Court in jury cases. Legal technicalities aside, it is our position that in this particular case the imposition of the death penalty is inconscionable.

THE COURT: Mr. Melson?

MR. MELSON: Your Honor, if it pleases the Court, it seems that if there is any case in which a jury verdict ought to be affirmed, it is in this very case. I think this type of case is one in which the jury should pass on, not only the guilt or innocence of the defendant, but also the sentence to be imposed by the Court, because this is a very serious case. The sentencing consequences are irrevocable, and it seems only fair that the burden of making the decisions that had to be made in this case be put upon the shoulders of the twelve men and women of this community, rather than upon the judge himself, especially under our system where the members of this jury are the representatives of the community. This is a controversial area, when we deal with the death penalty, and it is one in which the jury as the representatives ought to set the community standards. They sat through nine or ten days of trial listening to a wealth of evidence put on by the Commonwealth and almost the same

* * *

systems, only because it is the Commonwealth and its word is believed. If we take the scales -- a pair of scales, and we put more weight on one side than the other, the loaded side will drop lower obviously. No, Your Honor, there is a human injustice at stake and a human being at stake, just as the future of many human beings that depend upon my life. I ask for justice, impartiality, and legality. I reject lies and confabulations and much less injustices.

If the Latins hate each other here, and mainly human refugees due to the representations created by human people, send me back to Cuba or to another state or country. I will go away with a sense of rectitude and with my head held high, because I'm innocent. I expect justice, Your Honor.

Thank you very much. That's all for the moment.

THE COURT: The jury in this case was under the responsibility of determining the guilt or innocence of the defendant from the evidence which was largely circumstantial. However, the adversary system worked extremely well. Both sides were represented by able and experienced counsel. The case was vigorously contested. The defendant had three attorneys, all of whom are quite capable, and two of whom spoke his language. The case was tried with simultaneous translation throughout. The defense had a full and fair

opportunity to provide all of its defenses and to raise legal questions, many of which were heard and determined before the trial. The jury found the defendant guilty of capital murder beyond a reasonable doubt. In my own judgment, the evidence of the Commonwealth was overwhelming and the jury could have reached no other verdict.

When it came to a determination of the penalty in this case, the jury was assisted with a bifurcated trial which enabled them to hear some background information in addition to what they heard during the trial. The defendant may actually be better off in that no record of his from Cuba was available, and basically what they heard about his background was what emerged from his own lips. There was sufficient evidence before the jury to justify their conclusions that there was a probability that if he were to continue to live in the community that he would commit criminal acts of violence, constituting a serious threat to society. There can be no question that the circumstances attending the death of the deceased were outrageously and inhumanly conducted involving depravity of mind and aggravated battery to the victim. The people of Virginia, through their elected representatives, have decided that certain types of criminal conduct are so severe and outrageous that they must be

DEO REPORTING
(703) 751-0013

deterred by the ultimate penalty. This is one of those cases. It is competent for the people of Virginia to have decided to impose this penalty for that kind of conduct. This case shows the defendant fit into the category that was meant when that statute was drawn up; accordingly, the Court finds the verdict of the jury to be right and proper and enters judgment upon it, and it is the judgment of the Court, Mr. Quintana, that you suffer death in the manner provided by law. The execution of the sentence is suspended until the Supreme Court of Virginia has acted upon the appeal in this case, which is mandatory. But the defendant will be transported to the penitentiary to await the action of the Supreme Court.

It is ordered that a transcript of these proceedings now be prepared and filed in the record subject to the rules of Court for correction of any errors that may appear in them.

The defendant in the presentence report asked for access to a priest in order that he may receive baptism, and the Sheriff may be directed to make that opportunity available to him if he still wishes to do that.

Fees will be provided to counsel for their services in this case, if counsel will notify the Court of their time,

* * *

DEO REPORTING
(703) 751-0013