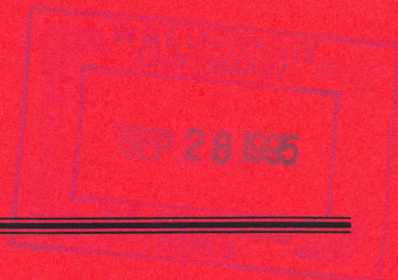


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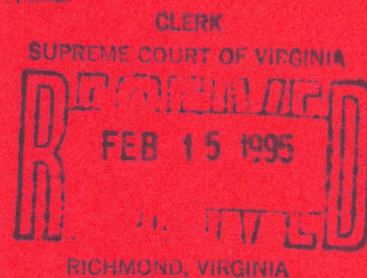


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IN THE  
**Supreme Court of Virginia**

RECORD NO. 942189  
CONS. W/ 942192



**ANDRE L. GRAHAM,**

*Appellant,*

**V.**

**COMMONWEALTH OF VIRGINIA,**

*Appellee.*

JOINT APPENDIX  
Volume II

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Virginia:

In the Circuit Court of the City of Richmond, Manchester Courthouse

the 4th day of October, 19 94.

Commonwealth of Virginia, plaintiff,)

against

Andre L. Graham a/k/a

Andre Grant a/k/a

Lorenzo Cross a/k/a

Lewis A. Rivas,

defendant,)

Indictment for

a Felony -

Case NO. 94-641-F

94-642-F

94-644-F

94-645-F

Andre L. Graham, who stands indicted for eight (8)

felonies, to-wit:

(Case No. 94-641-F) Count 1 - feloniously and unlawfully kill and murder one Sheryl L. Stack in a willful, deliberate and premeditated manner during the commission of a robbery of Edward Martin and while armed with a deadly weapon, and Count 2 - unlawfully and feloniously use or display in a threatening manner a firearm while, during and in the commission of the capital murder of Sheryl L. Stack;

(Case No. 94-642-F) Count 1 - feloniously and unlawfully attempt to rob one Sheryl L. Stack of United States currency, and Count 2 - unlawfully and feloniously use and display in a threatening manner a firearm while, during and in the commission of the attempted robbery of Sheryl L. Stack;

(Case No. 94-644-F) Count 1 - feloniously, unlawfully and maliciously cause bodily injury to Edward Martin with the intent to maim, disfigure, disable or kill the said Edward Martin, and Count 2 - unlawfully and feloniously use or display in a threatening manner a firearm while maliciously causing bodily injury to Edward Martin; and

(Case No. 94-645-F) Count 1 - feloniously and unlawfully rob one Edward Martin of United States currency, and Count 2 - unlawfully and feloniously use or display in a threatening manner a firearm while, during and in the commission of the robbery of Edward Martin;

this day was led to the bar in the custody of the Sheriff of the City of Richmond, and also appeared Jeffrey L. Everhart and Robert P. Geary, his Attorneys at law, and Learned D. Barry, an Assistant Attorney for the Commonwealth.

Thereupon, the defendant, being arraigned, after consultation with counsel, pleaded not guilty to said charges, and



having demanded trial by jury, a jury of twelve qualified persons and one alternate were selected from a panel of twenty-three, and were duly sworn the truth of and upon the premises to speak.

Whereupon, the Court and jury proceeded to hear the evidence in these cases, and at the conclusion of the introduction of the Commonwealth's evidence, counsel for the defendant moved the Court to strike the Commonwealth's evidence, which motion the Court overruled, to which ruling of the Court counsel for the defendant objected.

Thereupon, the jury, having fully heard the evidence on behalf of the Commonwealth, was adjourned until October 5, 1994, at 8:30 a.m., and the defendant was remanded to the custody of the Sheriff of the City of Richmond.

Enter this Order,

 Judge



1 V I R G I N I A:

2 IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

3 Manchester Division

4  
5  
6  
7 \* \* \* \* \*

8 COMMONWEALTH OF VIRGINIA

9 -VS-

10 ANDRE L. GRAHAM

11 \* \* \* \* \*

\*  
\*  
\* FILE NOS. 94-641F  
\* THROUGH 94-648F  
\*

12  
13  
14  
15 Transcript of the Second Day of Trial in the  
16 above-styled matter, when heard on October 5, 1994, before  
17 the Honorable James B. Wilkinson, Judge and jury.

18  
19  
20 APPEARANCES:

21 LEARNED D. BARRY, ESQ., Deputy Commonwealth's Attorney for  
the City of Richmond;

22 ROBERT P. GEARY, ESQ., 2025 E. Main Street, Richmond,  
23 Virginia 23223, and JEFFREY L. EVERHART, ESQ., 201 N.  
Boulevard, Richmond, Virginia counsel for the defendant;

24 The defendant, Andre L. Graham, present in person.  
25

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1 THE CLERK: The case of Commonwealth  
2 of Virginia against Andre L. Graham. Counsel  
3 ready to proceed?

4 MR. GEARY: Judge, we have a couple  
5 of matters that I would like to take up.

6 THE CLERK: Is the Commonwealth  
7 ready?

8 THE COURT: What matters do you want  
9 to take up?

10 MR. GEARY: As I recollect yesterday  
11 we finished with the Commonwealth's case. We  
12 made a motion. It was denied. I would ask you  
13 to voir dire the defendant about his right to  
14 testify or not testify.

15 THE COURT: I don't think that's a  
16 matter for the Court. It's a matter for  
17 counsel. I don't represent him. If you  
18 advised him what his rights are I think it's  
19 time he makes the choice, not the Court. He  
20 has been advised of the right not to testify  
21 and the right to testify. Do you understand  
22 that?

23 THE DEFENDANT: Yes.

24 THE COURT: All right. I don't think  
25 it's my place to go any further than that. If

1 he has been advised, he makes the choice.

2 What's your next matter?

3 MR. GEARY: Second, I would like the  
4 Court after the conclusion of the testimony  
5 this morning to give each side at least 15  
6 minutes to prepare, half an hour if I could, to  
7 prepare the closing argument.

8 THE COURT: Well, I will give you  
9 time to prepare for the argument.

10 MR. GEARY: That's all we basically  
11 need.

12 THE COURT: Gentlemen, y'all were  
13 telling me yesterday you're not going to have  
14 your witnesses in mitigation until tomorrow but  
15 I am not going to make the Commonwealth put on  
16 half of its testimony and y'all put on yours.  
17 They will all be put on together, if it's  
18 necessary to put it on that far. Mr. Barry, do  
19 you understand that?

20 MR. BARRY: Yes, sir, I do.

21 THE COURT: I want to conclude this  
22 case as rapidly as possible but without being  
23 too expeditious, no prejudice to either side.  
24 Right now we are moving right along with the  
25 case. I would like to move on with the case.



1 It's a strain on everybody. And, we will do  
2 that. We will probably conclude the case today  
3 on the guilt or innocence probability. If you  
4 can't have your witnesses until tomorrow  
5 morning then I will let the Commonwealth wait  
6 until tomorrow morning to put on the case in  
7 aggravation. I don't think it would be fair to  
8 divide it up.

9 MR. BARRY: I am fully prepared to,  
10 if they do, if they do come back with capital  
11 murder, I think it would be excellent to put on  
12 all my mitigation or aggravation at one time.

13 THE COURT: No questions? All right.

14 MR. EVERHART: That's fine, Judge, if  
15 I could have one, could I ask Mr. Barry one  
16 thing?

17 THE COURT: There should be 13  
18 persons instead of 12. You count them.

19 JURY IN

20 THE COURT: Counsel at the bar waive  
21 the poll of the jury? Is there any question  
22 you want the Court to ask?

23 MR. BARRY: No.

24 MR. GEARY: Judge, I would ask the  
25 Court to discuss with the jury the admonition

1                   you gave last night.

2                   THE COURT: All right, ladies and  
3 gentlemen of the jury, did all of you follow  
4 the admonition of the Court? Have any of you  
5 read anything, talked about this case, looked  
6 at anything, or heard anything about this case  
7 since last evening when you were dismissed?  
8 All of them have answered in the affirmative  
9 they have not heard, read or seen anything  
10 about the case.

11                  MR. GEARY: Thank you, Judge.

12                  THE COURT: You may proceed.

13                  MR. GEARY: Your Honor, we would call  
14 Detective Steve Dalton.

15  
16                  STEVE A. DALTON, a witness called on  
17 behalf of the Defendant, having first been sworn,  
18 testified as follows:

19                  DIRECT EXAMINATION

20                  BY MR. GEARY:

21                  Q            Good morning, Mr. Dalton.

22                  A            Good morning.

23                  Q            Mr. Dalton, you testified in this  
24 case yesterday, did you not?

25                  A            Yes, sir, I did.



1 Q And, the Richmond Police Department  
2 in major crime cases do they assign a detective to it, a  
3 lead detective?

4 A Yes, sir, that's correct.

5 Q Are you the lead detective in this  
6 case?

7 A Yes, sir.

8 Q The Steak and Ale case?

9 A Yes, sir.

10 Q Can you tell the jury when it was or  
11 did you, were you the person who served warrants on Andre  
12 Graham?

13 A Yes, sir, I was.

14 Q Can you tell the jury when those  
15 warrants were served on him?

16 A Just a second. June the 24th, 1994.

17 Q And, where were those warrants served  
18 on him?

19 A At police headquarters, 501 N. 9th  
20 Street.

21 Q Across the river?

22 A Yes, sir.

23 Q Did you and Mr. Graham have -- did  
24 you interview Mr. Graham after you served the warrants on  
25 him?

1                   A           Yes, sir, I did.  
2                   Q           Did you ask him questions about this  
3 case?

4                   A           Yes, sir, I did.

5                   Q           Did he answer the questions you asked  
6 him?

7                   A           Yes, sir.

8                   Q           Did you, between June 24th and this  
9 week, ever show him a picture of someone named Poochie?

10                  A           No, sir, I haven't.

11                  Q           Are you aware that he was shown a  
12 picture of someone named Poochie prior to this week?

13                  A           I am not familiar with it.

14                               MR. GEARY: That's all I have, Judge.

15                               MR. BARRY: No questions.

16                               THE COURT: All right, detective, you  
17 may step down.

18                               MR. EVERHART: I call Detective  
19 Showalter, please, Your Honor

20                               THE COURT: Detective Showalter.

21                               MR. EVERHART: I'm sorry?

22                               THE COURT: I just said Detective  
23 Showalter. He is still under oath.

24                               MR. EVERHART: Can I ask Mr. Barry  
25 something, Judge?

1 THE COURT: Yes.

2  
3 W. F. SHOWALTER, a witness called on  
4 behalf of the Defendant, having previously been sworn,  
5 testified as follows:

6 DIRECT EXAMINATION

7 BY MR. EVERHART:

8 Q Good morning, sir.

9 A Good morning.

10 Q Please tell the ladies and gentlemen  
11 of the jury your name.

12 A Detective W. F. Showalter,  
13 Chesterfield Police Department, Crimes Against Persons  
14 Unit.

15 Q You were employed by the Chesterfield  
16 County Police Department back in December of last year?

17 A Correct, sir.

18 Q And, late November also?

19 A Correct, sir.

20 Q Yesterday you testified about a  
21 phonecall that you received from a Sheriff McGregor; do  
22 you recall testifying about that?

23 A I did not receive the call. I was  
24 notified there had been a call made.

25 Q My mistake. Do you recall testifying



1 about that yesterday?

2 A Correct, sir.

3 Q Do your notes reflect or do you  
4 recall what the date of that call was?

5 A It would be December 3rd, sir.

6 Q Do you recall what day of the week  
7 that was?

8 A If I'm not mistaken I believe it was  
9 a Friday morning.

10 Q Do you recall what time, do you  
11 recall what time you were advised of the call from Sheriff  
12 McGregor?

13 A In the neighborhood between 7:00 and  
14 7:30.

15 Q What did you do in response to that  
16 call?

17 A Responded to the apartment of the  
18 residence of Priscilla Booker, in Midlothian Village.

19 Q Is it safe to say that you responded  
20 there in a rather speedy fashion?

21 A Exceptionally speedy.

22 Q Sorry?

23 A Exceptionally speedy.

24 Q Do you recall what time you arrived  
25 at the residence of Priscilla Booker on the morning of

1 December 3rd, 1993?

2 A Approximately 7:30, quarter of 8:00.

3 Q Did it take you long to get there?

4 A Not at all.

5 Q And, as I recall from your testimony  
6 yesterday when you got there Ms. Booker was there?

7 A Along with other subjects.

8 Q Along with Ms. Green, her mother,  
9 somebody else perhaps?

10 A Several other people.

11 Q Several other people. During the  
12 course of your investigation there you recovered the  
13 firearm which is part and parcel of this case, correct?

14 A Correct, sir.

15 Q When you showed the firearm or asked  
16 Ms. Booker about it, am I correct that she had a statement  
17 about that gun, about whether she had seen it before or  
18 not seen it before?

19 A Yes, sir, she had seen it before.

20 Q Well, didn't she say at that time I  
21 had never seen that gun until I stripped the sheets?

22 A Well, her statement was, sir, that  
23 she had seen the gun since approximately September in his  
24 possession. As she put it, he lived with it, he took  
25 baths with it, it never left him. She told him to get the

1 weapon out because her children were there in the home.  
2 She thought the weapon had been gotten rid of, that is why  
3 she thought it was no longer there.

4 Q Detective --

5 MR. GEARY: Judge, can I approach  
6 with Mr. Barry a second?

7 THE COURT: Do what?

8 MR. GEARY: Can I approach Mr. Barry?

9 THE COURT: Not about this case.

10 NOTE: At this point a side bar  
11 conference is held, out of the presence of the  
12 Court Reporter.

13 BY MR. EVERHART: (Continuing)

14 Q Detective Showalter, if I understand,  
15 I heard your response a moment ago, maybe I didn't do a  
16 very good job of phrasing the question. Do you recall  
17 Priscilla Booker ever saying to you and I quote, I have  
18 never seen that gun until I stripped the sheets, unquote?

19 A Yes. And, then she clarified the  
20 answer.

21 Q So, she, do you recall when she made  
22 that statement?

23 A When we first arrived there.

24 Q When you first arrived there, after  
25 the gun was recovered?



1                   A           When we arrived asking for the  
2 package or the bag.

3                   Q           As I recall your testimony from  
4 yesterday, you said when you arrived you said do you know  
5 what we are here for, or words to that affect. Is that an  
6 accurate recollection of what you said yesterday?

7                   A           Correct, sir.

8                   Q           Because at that point you really  
9 didn't know what you were there for?

10                  A           We had an idea.

11                  Q           You had an idea but you weren't  
12 certain, correct, sir?

13                  A           Correct.

14                  Q           So, she said, or she responded  
15 affirmatively?

16                  A           Correct.

17                  Q           And, she took you to a linen closet?

18                  A           No, sir.

19                  Q           Her mother did?

20                  A           Priscilla Booker took us to her  
21 bedroom.

22                  Q           To her bedroom?

23                  A           Where she stated she had found the  
24 object.

25                  Q           In the mattress?

W. F. Showalter - Direct

1 A Correct.

2 Q Or she didn't say, and it was then as  
3 I recall your testimony yesterday her mother said I will  
4 get it for you or something like that and started to get  
5 it out of the closet and you said no, wait, I will do  
6 that?

7 A Correct, sir.

8 Q My recollection is correct on that?

9 A Correct, sir.

10 Q And, in that sequence of events when  
11 did Priscilla Booker tell you I have never seen that gun  
12 until I stripped the sheets?

13 A Initially when we went to that  
14 bedroom.

15 Q So, when she led you to the bedroom  
16 she basically, to paraphrase, I found the gun in the  
17 mattress, I have never seen it before until I stripped the  
18 sheets?

19 A Then about ten seconds later is when  
20 she clarified.

21 Q And, then she went on to what you  
22 just said and as to what she may have testified to  
23 yesterday?

24 A I do not know what she testified to  
25 yesterday.

1 Q I know you don't. I know you don't.  
2 Back up. She told you what you just said a few moments  
3 ago, she expounded upon that answer?

4 A Correct.

5 Q You're certain that was approximately  
6 7:30 on Friday morning, December 3rd, 1993, correct?

7 A Correct, sir.

8 Q You're certain that you going to that  
9 address was in response to a phonecall that you were  
10 advised of from Sheriff McGregor?

11 A I was advised by my personnel.

12 Q Right.

13 A Sgt. Scruggs said a call has been  
14 received from the jail. As to what deputy I do not know  
15 his name or did not at that time.

16 Q Did you see Deputy Sheriff McGregor  
17 here yesterday?

18 A Correct, sir.

19 Q To the best of your knowledge is that  
20 the gentleman that made that phonecall that led you to go  
21 to Priscilla Booker's?

22 A Correct, sir.

23 MR. EVERHART: That's all I have.

24 Thank you, Your Honor.

25 THE COURT: All right, Mr. Barry.



CROSS EXAMINATION

BY MR. BARRY:

Q So, for the record, she initially said she hadn't seen the gun before, and then after how long a pause did she finally complete it?

A I would say approximately ten seconds. Her statement was I had never seen the gun before. I looked at her kind of questioning like, at which time she said I told him to get rid of it, that's why I thought it was gone, that is why I said I hadn't seen it because I thought it had been taken out of here.

Q Then she related to you the whole history of him and the gun?

A Correct, sir.

MR. BARRY: Thank you, sir.

THE COURT: All right. Thank you, sir. You may step down.

MR. GEARY: We rest, Your Honor.

THE COURT: You rest. Any rebuttal?

MR. BARRY: No.

THE COURT: All right, ladies and gentlemen of the jury, I will ask you to retire a few minutes. I will get the instructions. Then I will instruct you as to the law and summation of attorneys, then you will go for

1 your deliberations. Sheriff, would you take  
2 charge of the jury.

3 JURY OUT

4 MR. GEARY: Judge, I have a motion to  
5 strike the capital murder charge. Under  
6 Virginia law the Commonwealth at this point has  
7 to show much more than a prima facie case.  
8 It's almost beyond a reasonable doubt that the  
9 defendant is death eligible under the capital  
10 murder statute. In Virginia the Virginia cases  
11 are very clear the Commonwealth has to prove  
12 beyond a reasonable doubt the fact that the  
13 defendant is the triggerman. In this case the  
14 evidence is that when the shooting took place,  
15 it looks like it was approximately between 3:30  
16 and 4:00 on the morning of October the 8th. My  
17 recollection of Mr. Martin's testimony is I  
18 believe it came out a little bit in reverse, is  
19 that he was shooting, when he was shot was  
20 prior to the time the car was moved. And  
21 that's what Mr. Barry's questioning, he was  
22 faced different when the police got there than  
23 he was at the time he was shot. He testified,  
24 he made identification of the defendant with  
25 the gun. He said he was told to close his

1 eyes. I do not believe there is any evidence  
2 in the case to demonstrate to the Court or to  
3 the jury as to when the time elapsed from the  
4 statement close your eyes until the shooting  
5 took place. I think his testimony was in  
6 response to Mr. Barry that he really didn't  
7 remember the actual being shot, that when he  
8 woke up the car was moving, he moved out of the  
9 way to get out of the way of the car. Under  
10 Virginia law there's got to be proof beyond a  
11 reasonable doubt that the defendant charged is  
12 the triggerman. I don't think the  
13 Commonwealth's evidence, giving it every  
14 benefit it's entitled to on a motion to strike,  
15 rises to the level the jury can say with  
16 certainty beyond a reasonable doubt that he, in  
17 fact, was the triggerman.

18 MR. BARRY: Judge, it's very clear I  
19 can rely on either direct evidence or  
20 circumstantial evidence. In this particular  
21 case for the record I would state that Edward  
22 Martin went through a litany of who had the  
23 gun, when he had the gun, Graham, the gun,  
24 Graham, the gun. We would stop along his  
25 testimony and each time we would ask who had



1 the gun, who had it, Graham. Where did he have  
2 it? In his hand. And, then through the  
3 robbery and then through the conversation and  
4 then through laying on the ground. So, I think  
5 for the purpose of this case going before the  
6 jury on the issue of capital murder the  
7 Commonwealth has a very strong circumstantial  
8 case that Mr. Graham is the triggerman.

9 THE COURT: The Court will overrule  
10 your motion. Y'all have agreed on these  
11 instructions? Do you have any additional ones?

12 MR. GEARY: Judge, Mr. Barry was kind  
13 enough to provide me last week with the  
14 Commonwealth's instructions. We met a couple  
15 of times and we made changes that we suggested  
16 were incorporated in the final instructions  
17 that we have you. The instructions I talked  
18 about yesterday that I offered to the Court are  
19 the circumstantial evidence instruction, which  
20 comes from the model book, which is volume one,  
21 page 23, which is given at most every jury  
22 trial we have.

23 MR. BARRY: I have no objection to  
24 that. This is the standard model jury  
25 instruction on circumstantial evidence.

1 MR. GEARY: Judge, secondly I would  
2 offer to the Court an instruction which has no  
3 citation, but I would rely on two cases. The  
4 first is a fairly old Virginia Supreme Court  
5 Braxton v. Commonwealth, 209 Va., 1969, page  
6 750. The more recent cases are Commonwealth v.  
7 Curtis, which was cited by the Court of Appeals  
8 in 1990, 11 Va. Appeals 28. And, the last case  
9 is Doen v. Commonwealth, 15 Va. App., 1987.  
10 The instruction deals with the cautions that a  
11 jury should look at eyewitness identification  
12 when it is made in the courtroom. I think the  
13 one I have given can be better. I think the  
14 language from the Court of Appeals in Doen  
15 gives a better definition than I have in the  
16 instructions. The Doen case involved a two  
17 part question of whether an in-court  
18 identification was admissible. That's where  
19 most of these cases arise from, rather jury  
20 instructions. The Court of Appeals in Doen,  
21 and cited in cases like Curtis and Miller v.  
22 Commonwealth, talks about the two part test  
23 that is necessary. And they said that there  
24 are five factors which are involved in  
25 liability of challenge identification, and

1 this in-court identification, we have an in-  
2 court identification. And those factors are  
3 the opportunity of the witness to observe the  
4 person at the time of the crime, the witness,  
5 eyewitness degree of attention, the accuracy,  
6 if any, to the eyewitness prior description of  
7 the person, the level of certainty demonstrated  
8 by the witness' testimony, the length of time  
9 between the crime and the confrontation. And  
10 in our case it was almost a year. I think that  
11 the jury is entitled to know about the vagaries  
12 of eyewitness identification. This is a direct  
13 evidence case involving, as far as the  
14 identification by Mr. Martin, it's as Mr. Barry  
15 suggested, it's a circumstantial case in other  
16 respects in terms of who pulled the trigger and  
17 whether or not the circumstantial evidence from  
18 people like Ms. Booker, et cetera, corroborate  
19 the identification. I think that --

20 THE COURT: Doesn't the  
21 circumstantial evidence corroborate Mr. Martin?

22 MR. GEARY: That will be a subject of  
23 argument, Judge. What I am suggesting in terms  
24 of identification is that according to the  
25 Virginia Supreme Court and Court of Appeals, we



1 are entitled to the instruction based upon the  
2 evidence in the case. And, I think obviously -  
3 -

4 THE COURT: Well, I am not going to  
5 grant this instruction. They have already been  
6 instructed once. This instruction is basically  
7 reasonable doubt, credibility of witnesses, it  
8 has been proved and reapproved by the Supreme  
9 Court of Virginia and the Court of Appeals and  
10 the Supreme Court of the United States.

11 MR. GEARY: Judge, is there anything  
12 in particular, any instruction that the Court  
13 finds it shouldn't give, because I would like  
14 to be able to change it to conform -- I think  
15 we're entitled to an opinion or, excuse me, an  
16 instruction to the jury about the cautions they  
17 must view eyewitness identification.

18 THE COURT: You can argue that. No  
19 question about it.

20 MR. GEARY: Judge, I know I can argue  
21 it. I have been arguing that for 22 years.

22 THE COURT: I know.

23 MR. GEARY: Sometimes with, sometimes  
24 without success.

25 THE COURT: I think this comes out of



1 the Fourth Circuit. Now, the Supreme Court has  
2 rejected this theory. There's a case right on  
3 point.

4 MR. GEARY: No eyewitness  
5 identification instruction that we can offer?

6 THE COURT: No. I think it's all  
7 covered under reasonable doubt. I really see  
8 nothing wrong with your instruction other than  
9 Virginia law, this one on the facts they have  
10 used that instruction throughout the world. I  
11 think the subject matter has been covered. You  
12 certainly may argue that. Put that in the  
13 file, Madam Clerk, refused.

14 MR. GEARY: Judge, Mr. Everhart said  
15 we still have to note our exception.

16 THE COURT: Yes, I fully understand.  
17 I don't understand those technicalities. I  
18 look for the ends of justice. That's what  
19 counts. All right, gentlemen you may tell me  
20 how long you wish to argue. I will tell you  
21 how long you can argue.

22 MR. BARRY: I anticipate 20 minutes  
23 and 10 minutes.

24 THE COURT: Half an hour?

25 MR. GEARY: I would like half an

1 hour, Judge.

2 THE COURT: I don't think that is  
3 unreasonable in this case.

4 MR. GEARY: Can we have about 15  
5 minutes to prepare?

6 THE COURT: All right. You may have  
7 15 minutes to prepare. Sheriff, the Court will  
8 be in recess for 15 minutes.

9 NOTE: Recess.

10 THE COURT: All right. Return the  
11 jury.

12 JURY IN

13 THE COURT: Counsel at the bar waive  
14 the poll of the jury?

15 MR. BARRY: Yes, sir.

16 MR. EVERHART: Yes, sir.

17 THE COURT: All right, ladies and  
18 gentlemen of the jury, the Court will now  
19 instruct you as to the law in this case. The  
20 first order of business you should take up upon  
21 retiring is the election of a foreperson who  
22 will reside over your deliberations and sign  
23 whatever verdict you reach. The Court further  
24 instructs you that your verdict must be  
25 unanimous. This particular phase you will only

1 make certain findings of guilt or innocence  
2 after which, depending on your verdict, there  
3 might be a second phase. Again, I caution you  
4 your verdict must be unanimous. Whatever  
5 verdict you reach your foreperson will sign it  
6 as the verdict of each and every one of you.  
7 Can y'all hear me all right? Can you hear me,  
8 sir?

9 JURY MEMBER: Yes, sir.

10 THE COURT: The defendant is presumed  
11 to be innocent. You should not assume the  
12 defendant is guilty because he has been  
13 indicted and is on trial. This presumption of  
14 innocence remains with the defendant throughout  
15 the trial and is enough to require you to find  
16 the defendant not guilty unless and until the  
17 Commonwealth proves each and every element of  
18 the offense beyond a reasonable doubt. This  
19 does not require proof beyond all possible  
20 doubt, nor is the Commonwealth required to  
21 disprove every conceivable circumstance of  
22 innocence. However, suspicion or probability  
23 of guilt is not enough for a conviction. There  
24 is no burden on the defendant to produce any  
25 evidence. A reasonable doubt is a doubt based

1 on your sound judgment after a full and  
2 impartial consideration of all the evidence in  
3 the case.

4 You are the judges of the facts, the  
5 credibility of the witnesses, and the weight of  
6 the evidence. You may consider the appearance  
7 and manner of the witnesses on the stand, their  
8 intelligence, their opportunity for knowing the  
9 truth and for having observed the things about  
10 which they testified, their interest in the  
11 outcome of the case, their bias, and if any has  
12 been shown, their prior inconsistent  
13 statements. While you have no right to  
14 arbitrarily disregard believable testimony of  
15 any witness, you do have a right to discard or  
16 accept in whole or in part the testimony of any  
17 witness when you consider it in connection with  
18 the other evidence in the case. You are  
19 entitled to use your common sense in judging  
20 any testimony. From these things and all the  
21 other circumstances of the case, you may  
22 determine which witnesses are more believable  
23 and weigh their testimony accordingly.

24 A principal in the first degree is  
25 the person who actually commits the crime. A



1 principal in the second degree is a person who  
2 is present, aiding and abetting, by helping in  
3 some way in the commission of the crime.

4 Presence or consent alone is not sufficient to  
5 constitute aiding and abetting. It must be  
6 shown that the defendant intended his words,  
7 gestures, signals or actions to in some way  
8 encourage, advise, or urge, or in some way help  
9 the person committing the crime to commit it.  
10 A principal in the second degree is as liable  
11 for the same punishment as the person who  
12 actually committed the crime. The Commonwealth  
13 must prove beyond a reasonable doubt that the  
14 defendant is a principal in the second degree.

15 Willful, deliberate, and premeditated  
16 means the adoption of a specific intent to  
17 kill. The intent to kill must come into  
18 existence at some time before the killing, but  
19 need not exist for any particular length of  
20 time.

21 The defendant is charged with the  
22 crime of capital murder. The Commonwealth must  
23 prove beyond a reasonable doubt each of the  
24 following elements of that crime: that the  
25 defendant killed Sheryl L. Stack; and that the

1 killing was willful, deliberate and  
2 premeditated; and, that the killing occurred  
3 while, either during the commission of robbery  
4 of Edward Martin while the defendant was armed  
5 with a deadly weapon. If you find from the  
6 evidence that the Commonwealth has proved  
7 beyond a reasonable doubt each of the above  
8 elements of the offense as charged, then you  
9 shall find the defendant guilty. As a lesser  
10 included offense, if you find from the evidence  
11 that the Commonwealth has proved beyond a  
12 reasonable doubt the first and the second  
13 elements of the offense as charged but do not  
14 find beyond a reasonable doubt that the killing  
15 occurred during the commission of robbery of  
16 Edward Martin while the defendant was armed  
17 with a deadly weapon, then you should find the  
18 defendant guilty of first degree murder. If  
19 you find that the Commonwealth has failed to  
20 prove beyond a reasonable doubt any one or more  
21 of the elements of the offense, then you shall  
22 find the defendant not guilty.

23 The defendant is charged with the  
24 crime of using or displaying in a threatening  
25 manner a firearm while committing the capital

1 murder of Sheryl L. Stack. The Commonwealth  
2 must prove beyond a reasonable doubt each of  
3 the following elements of that crime: that the  
4 defendant used a firearm; and that the use was  
5 while committing the capital murder of Sheryl  
6 L. Stack. If you find from the evidence that  
7 the Commonwealth has proved beyond a reasonable  
8 doubt each of the above elements of the offense  
9 as charged, then you shall find the defendant  
10 guilty. If you find the Commonwealth has  
11 failed to prove beyond a reasonable doubt  
12 either element of the offense, then you shall  
13 find the defendant not guilty.

14 The defendant is charged with the  
15 crime of robbery. The Commonwealth must prove  
16 beyond a reasonable doubt each of the following  
17 elements of that crime: that the defendant  
18 intended to steal; and that United States  
19 currency and personal property was taken; and  
20 that the taking was from Edward Martin or in  
21 his presence; and that the taking was against  
22 the will of the owner or possessor; and that  
23 the taking was accomplished by the threat or  
24 presenting of a firearm. If you find from the  
25 evidence that the Commonwealth has proved



1           beyond a reasonable doubt each of the above  
2           elements of the offense as charged, then you  
3           shall find the defendant guilty of robbery. If  
4           you find that the Commonwealth has failed to  
5           prove beyond a reasonable doubt any one or more  
6           of the elements of the offense, then you shall  
7           find the defendant not guilty.

8           The defendant is charged with the use  
9           of a firearm while committing the robbery of  
10          Edward Martin. The Commonwealth must prove the  
11          following two elements of that crime: that the  
12          defendant used a firearm; and that the use was  
13          while committing the robbery of Edward Martin.  
14          If you find from the evidence that the  
15          Commonwealth has proved beyond a reasonable  
16          doubt each of the above elements of the offense  
17          as charged, then you shall find the defendant  
18          guilty. If you find that the Commonwealth has  
19          failed to prove beyond a reasonable doubt  
20          either element of the offense, then you shall  
21          find the defendant not guilty.

22          The defendant is charged with the  
23          crime of aggravated malicious wounding of  
24          Edward Martin. The Commonwealth must prove  
25          beyond a reasonable doubt each of the following



1 elements of that crime: that the defendant  
2 wounded Edward Martin; and that such wounding  
3 was with intent to maim, disfigure, disable or  
4 kill Edward Martin; that the act was done with  
5 malice; and that as a result of the act Edward  
6 Martin is severely injured and is caused to  
7 suffer permanent and significant physical  
8 impairment. If you find from the evidence the  
9 Commonwealth has proved beyond a reasonable  
10 doubt each of the above elements of the offense  
11 as charged, then you shall find the defendant  
12 guilty of aggravated malicious wounding. If  
13 you find that the Commonwealth has failed to  
14 prove beyond a reasonable doubt any one or more  
15 of the elements of the offense, then you shall  
16 find the defendant not guilty. Excuse me just  
17 a moment. It should be that the act was done  
18 with malice. The word with has been left out.  
19 I just put that in, gentlemen, the word with  
20 malice.

21 The defendant is charged with the  
22 crime of using or displaying in a threatening  
23 manner a firearm while committing the  
24 aggravated malicious wounding of Edward Martin.  
25 The Commonwealth must prove the following two

1 elements of that crime: that the defendant  
2 used a firearm, and that the use was while  
3 committing the aggravated malicious wounding of  
4 Edward Martin. If you find from the evidence  
5 that the Commonwealth has proved beyond a  
6 reasonable doubt each of the above elements of  
7 the offense as charged, then you shall find the  
8 defendant guilty. If you find that the  
9 Commonwealth has failed to prove beyond a  
10 reasonable doubt either element of the offense,  
11 then you shall find the defendant not guilty.

12 The defendant is charged with the  
13 crime of attempted robbery Sheryl L. Stack.  
14 The Commonwealth must prove beyond a reasonable  
15 doubt each of the following elements of that  
16 crime: that the defendant intended to commit  
17 robbery; and that the defendant did a direct  
18 act toward the commission of the robbery which  
19 amounted to the beginning of the actual  
20 commission of the robbery. If you find that  
21 the Commonwealth has proved beyond a reasonable  
22 doubt each of the above elements of the offense  
23 as charged, then you shall find the defendant  
24 guilty of attempted robbery. If you find that  
25 the Commonwealth has failed to prove beyond a

1 reasonable doubt either of the elements of the  
2 offense, then you shall find the defendant not  
3 guilty.

4 Then we come down to another charge  
5 of use of a firearm while committing the  
6 attempted robbery of Sheryl L. Stack. The  
7 Commonwealth must prove that he used a firearm  
8 and that it was used while committing the  
9 attempted robbery of Sheryl L. Stack. If you  
10 find from the evidence that the Commonwealth  
11 has proved beyond a reasonable doubt each of  
12 the above elements of the offense as charged,  
13 then you shall find the defendant guilty. If  
14 you find that the Commonwealth has failed to  
15 prove beyond a reasonable doubt either element  
16 of the offense, then you shall find the  
17 defendant not guilty.

18 It is not necessary that each element  
19 of the offense be proved by direct evidence,  
20 for an element may be also proved by  
21 circumstantial evidence. You may convict the  
22 defendant on circumstantial evidence alone, or  
23 on circumstantial evidence combined with other  
24 evidence, if you believe from all the evidence  
25 that the defendant is guilty beyond a



1 reasonable doubt. When the Commonwealth relies  
2 upon circumstantial evidence, the circumstances  
3 proved must be consistent with guilt and  
4 inconsistent with innocence. It is not  
5 sufficient that the circumstances proved create  
6 a suspicion of guilt, however strong, or even a  
7 probability of guilt. The evidence as a whole  
8 must exclude every reasonable theory of  
9 innocence.

10 Ladies and gentlemen, I will caution  
11 you as to one instruction. That's the one on  
12 capital murder, that the defendant killed  
13 Sheryl L. Stack, in other words, he was the one  
14 that pulled the trigger.

15 All right, ladies and gentlemen of  
16 the jury, that concludes all the evidence in  
17 the case, that's the law in the case. I don't  
18 know if you have any questions, which I am  
19 privileged to answer under the law, but if you  
20 do I will entertain it at this time. You will  
21 have all the exhibits with you in the jury room  
22 and also these photocopies of these  
23 instructions. Seeing no questions from the  
24 jury, Mr. Barry, you may summarize the  
25 Commonwealth's case.



1 MR. BARRY: Many people feel this  
2 part of the trial is sometimes very emotional  
3 because this part of the trial is an evaluation  
4 of the law and the evidence. Because when you  
5 came in here most of you have never sat on a  
6 jury trial before. Most of you have never had  
7 to deal with these laws before. Most of this  
8 stuff should be, if you're decent citizens, a  
9 complete strange thing. So, what I am going to  
10 spend the next 20 minutes doing is explaining  
11 to you the law and how the facts coexist with  
12 the law. The one thing that most people don't  
13 realize is the law is really nothing more than  
14 the jury instructions the Judge just read you.  
15 The law you can take right back there on the  
16 table. You can lay it out on the table and  
17 then each and everyone of you can take the time  
18 because, there is no time restraints. You can  
19 take time to understand what the law is. And,  
20 what we do in addition to giving you a copy of  
21 the law, is we even give you little forms to  
22 deal with the law. And the Judge will also  
23 give you, he didn't tell you at the time, but  
24 he will also give you literally fill out the  
25 blank forms on what to do in this case. So,

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1           you put the law in one corner, you put the  
2           forms in the other corner, and then all 12 of  
3           you get to commencing talking about the  
4           evidence. And that's how jury deliberations  
5           work. Understand the law, understand the  
6           crimes and then put the facts to the law. It's  
7           a mathematical situation. You devise in your  
8           mind what is my standard, my standard is beyond  
9           a reasonable doubt. What does that mean?  
10          Well, it means a moral certainty. But, it  
11          doesn't really mean beyond all possible  
12          conceivable proof. A reasonable doubt, a gut  
13          feeling that did he do it or didn't he do it?  
14          That's the best way to if you feel it. If you  
15          feel it in your stomach he did it, that's  
16          beyond a reasonable doubt.

17               MR. GEARY: Judge, I am going to  
18               object at this point. I think that is quite  
19               not the law, gut feeling.

20               THE COURT: Well, it's argument.  
21               Maybe it is. He says it is beyond a reasonable  
22               doubt.

23               MR. BARRY: You will know when it  
24               happens. You will know. Now, let's take it a  
25               little step further. Let's go through the

1 language one by one. Let's start with the easy  
2 ones first. We are dealing with humans. But,  
3 the law is simple. Let's start with robbery.  
4 We have an attempted robbery and we have a  
5 robbery. Now, what is a robbery? If I take a  
6 gun and take this woman's purse I have robbed  
7 her. If I take a gun, tell her to give me her  
8 wallet, but I don't actually get the wallet, I  
9 shall we say ransack her purse, tear through  
10 her car, ask for her money while you have a gun  
11 on her. That is an attempted robbery. I  
12 wanted to do it. We just don't really know if  
13 we got anything or not. Now he is charged with  
14 the attempted robbery of Sheryl Stack. That is  
15 nothing more than one small point for you to  
16 remember. Edward Martin said that the  
17 defendant got them both out of the car, walked  
18 them around, and at gunpoint said give me your  
19 wallet and your money. Now, when Edward gave  
20 up his wallet and Graham had the gun on him,  
21 that's robbery. And, then again while Sheryl  
22 at the point of a gun had her car ransacked and  
23 her purse opened and her contents strewn about  
24 the ground, that is attempt robbery. No one  
25 really knows what he got from Sheryl because



1 she can't tell us because she is dead. But, we  
2 know that he tore through her purse and her car  
3 and wanted her money. Real simple. Now, what  
4 goes with those two charges? The Judge kept  
5 reading over and over again use of a firearm,  
6 use of firearm. What does that mean? That's  
7 real straight forward. If you commit a crime  
8 and you use a gun then it's a separate crime in  
9 this state to use the gun. When Edward Martin  
10 was robbed a gun was used. First offense  
11 robbery. Second offense, use of a firearm.  
12 When Sheryl Stack was attempted to be robbed,  
13 first offense attempted robbery, second offense  
14 use of a firearm. We have just covered four  
15 offenses under the law here in Virginia. It  
16 took us six minutes. You just got a primer in  
17 robbery, attempted robbery and use of firearms.  
18 Aggravated permanent malicious wounding is a  
19 little bit different. It's a very bad wounding  
20 of a human being that causes a permanent  
21 disability. Now, you don't have to be a rocket  
22 scientist to figure out that Edward Martin is  
23 permanently disabled. There is no issue. No  
24 issue. He can't see, bad arm, limps and has a  
25 horrible time talking. And, it's not getting



1 any better. That's aggravated malicious  
2 wounding. And, when a gun is used in the  
3 aggravated malicious wounding then you have a  
4 second crime. So, what have we done, folks?  
5 We are now up to seven minutes and we have now  
6 gone through six crimes here in the  
7 Commonwealth of Virginia, three use of  
8 firearms, three bad crimes. The one case, and  
9 I pray the good Lord that you fully understand  
10 this, the one case that you've really got to do  
11 your homework on is the capital murder charge.  
12 You have got to understand. Capital murder in  
13 this state, and in this situation, is not only  
14 I rob someone but during the course of the  
15 robbery I, I, kill someone and I am the  
16 triggerman. Then that is capital murder. And,  
17 it has to be during a robbery. Okay. Now, we  
18 know Edward Martin was robbed. We know he gave  
19 up his wallet and we know that the car was  
20 taken. We know that the tapes were taken. All  
21 those things are the subject of the robbery.  
22 Now, we've got a robbery. Sheryl Stack, she is  
23 gone. She is dead. She is the subject of the  
24 murder. So, so far, you know we've got a  
25 robbery, we've got a murder, now we have to

1 decide who the triggerman is. Now, I am going  
2 to talk to you about the facts of this case  
3 because each and every one of you understand  
4 that there are eight charges: murder, capital  
5 murder, robbery, attempted robbery, and  
6 aggravated malicious wounding. Four charges.  
7 Two human beings. And, then, of course, all  
8 the gun charges. Let's talk about who pulled  
9 the trigger because the truth of the matter is  
10 that's why you're here today. You've got three  
11 charges and I am not even going to talk about  
12 the third but the first two you either find him  
13 guilty of first degree murder as being there  
14 participating in the murder or you find him  
15 guilty of capital murder because he's the  
16 triggerman. Edward Martin and Sheryl Stack are  
17 what I would consider every parents nightmare.  
18 They were good kids. They were working their  
19 way through school. They were doing nothing  
20 wrong. They got off from work. They went to  
21 get something to eat. They came back and for  
22 Gods sake they were kissing each other, and the  
23 defendant came up on Martin's side of the car,  
24 and he was sitting in her car, with the gun.  
25 And Graham with the gun asked him to come and

1 get out of the car. And both of them did  
2 exactly what Graham told them to do while he  
3 had the gun. And, he walked them around to the  
4 other side of Edward's car and while he talked  
5 to them he had the gun. And, he repeated I  
6 want your wallets and your money. And, they  
7 gave their wallets and their money to Sheppard.  
8 Now, Sheppard is another man. He is not on  
9 trial. Don't be confused by that situation.  
10 He is not here. He's not your responsibility  
11 today. Now, who's got the gun? Graham's got  
12 the gun. Who is getting the money? Sheppard  
13 is getting the money. Does Sheppard have a  
14 gun? No. What does Edward tell you next? He  
15 says Sheppard or the other man because he  
16 didn't know who he was at the time, got in my  
17 car and started getting into all my tapes. The  
18 car was loaded with tapes. Loaded. So, you've  
19 got Sheppard with no gun in the car stealing  
20 the tapes. Where is Graham? Graham's got the  
21 gun. What does Graham tell these two kids? If  
22 you cooperate and go over there and lay down we  
23 won't hurt you. So, they walk in between the  
24 cars. They lay down. Sheryl is down on her  
25 stomach. He is on his back. And, the last

1 words he hears we won't hurt you. And, then he  
2 is shot. Edward, who was the last person you  
3 saw before you closed your eyes with the gun?  
4 Graham. He shot. You've got Graham with the  
5 gun and you've got Sheppard in his car. Who's  
6 the triggerman? Now, that's a good point. I  
7 don't think any of you are the slightest bit  
8 concerned. You know who shot Edward Martin.  
9 It is Graham. Now, what did James Jones tell  
10 you who was there that night not more than a  
11 hundred yards from this? He heard two loud  
12 noises two or three seconds apart. Two or  
13 three seconds apart. You have just killed or  
14 shot, rather, Edward Martin. You have just  
15 taken your gun and shot him in the face. Now,  
16 for you to find this man not guilty of capital  
17 murder, you are going to have to say to  
18 yourself, Graham, who has had this gun since  
19 September, Graham who slept with this gun,  
20 Graham who kept this gun in his pants, Graham  
21 who took his damn gun into the shower with him,  
22 is going to then say excuse me, Mr. Sheppard,  
23 within the next two or three seconds, would you  
24 mind taking this gun and shooting Sheryl Stack?  
25 To find him not guilty of capital murder,



1 that's what you're going to have to believe.  
2 You're going to have to believe an absolute  
3 insane defense, that it was the other guy that  
4 shot Sheryl Stack. If you understand the  
5 basics now of the law then I feel I have  
6 accomplished my task. Because the whole point  
7 is is he the triggerman or is he not the  
8 triggerman. And, you have to go through not a  
9 whole lot of mental gymnastics, and you do that  
10 because we have brought you so much evidence  
11 not only from Edward Martin that God has chose  
12 to smile upon and allow to live and talk and  
13 breath again. But, he has also allowed us to  
14 bring forward Priscilla Booker, who was his  
15 girlfriend, who was instructed by him to get  
16 rid of it. Now, did Sheppard call her and say  
17 get rid of it? No. Why? Because God damn it,  
18 he is the triggerman. He knows, my gun, my  
19 gun, it's still here, they haven't found it,  
20 get rid of it or I am a goner. Well, the  
21 police missed it the first time and then  
22 Showalter gets right back there and he gets it.  
23 And he knows it. And, we take it to the lab  
24 and that gun matches up to both of those  
25 bullets that when through both of those kids.

1 And the prints on all the stolen stuff is  
2 Graham. For you to not find him guilty of  
3 capital murder you would have to ignore the  
4 testimony of the firearm's expert, the  
5 fingerprint expert, Edward Martin, and  
6 everybody who testified. Because that's what  
7 you are dealing with, what evidence you have  
8 before you. This is a mathematical thing that  
9 you do because you live in the City of Richmond  
10 and you have to go through this formula. You  
11 understand robbery. You understand attempted  
12 robbery. You understand malicious wounding,  
13 and now please understand capital murder. If  
14 he is not the triggerman you have to find him  
15 guilty of first degree murder. But, if he is  
16 the triggerman, and he killed that absolutely  
17 helpless woman, then you have to convict him of  
18 capital murder.

19 THE COURT: All right, Mr. Geary,  
20 whoever.

21 MR. GEARY: If it please the Court.  
22 I probably disagree with about 14 and a half  
23 minutes of what Mr. Barry just told you. We  
24 are not here as Mr. Barry says simply to say is  
25 this guy sitting over here the triggerman. We

1 are not here for that. We are here to decide  
2 whether or not the Commonwealth has proven  
3 guilty beyond a reasonable doubt of the crimes,  
4 all of the crimes. When you came in here  
5 yesterday either a Deputy Sheriff or the jury  
6 officer brought you in here, you came in here  
7 one by one, and we spent from 9:00 yesterday to  
8 about 12:00, quarter to 1:00, picking 13  
9 people. And when you got out today one of you  
10 will be declared an alternate, so 12 people  
11 will go out there to decide the case. And, I  
12 believe each of you were asked by myself or Mr.  
13 Everhart or Mr. Barry some questions. And when  
14 the Deputy Court Clerk gave the oath yesterday  
15 you put your hand up and said I swear I am  
16 taking this oath. And, some of the language  
17 that she read to you as she told you fairly and  
18 justly try the case. She told you some other  
19 things, those things are things that aren't in  
20 this case. By taking the oath as a juror you  
21 say to the Court, to Judge Wilkinson, you say  
22 to Mr. Barry, you say to the world at large, I  
23 am going to decide this case based on the law  
24 and evidence, no more, no less. I am going to  
25 decide this case based on what happened here.



1 I am not going to decide this case based on  
2 sympathy. Is there a lot of sympathy in this  
3 case? No question about that. No one cannot  
4 feel sympathetic for Edward Martin. But,  
5 that's not what you are here for. You are here  
6 to decide whether or not the Commonwealth of  
7 Virginia has proven him guilty not based on  
8 sympathy. Not based on revenge that somebody  
9 got to pay the price for this. Does he have to  
10 pay the price? Have they proven beyond a  
11 reasonable doubt? He jumps, oh, don't worry  
12 about that question, Mr. Barry said. I suggest  
13 that's something for you to think about before  
14 you even get to that part of the case. You  
15 will have, as Mr. Barry told you, you will have  
16 all the jury instructions back there. As I  
17 tell you now and he told you just a few minutes  
18 ago, read these, read these carefully. There  
19 are 13 jury instructions. You're going to have  
20 all the exhibits from the trial. I want you to  
21 take a look at those. As he told you there is  
22 no time constraint when you get back there.  
23 You take as long as you like. No rush. No  
24 rush whatsoever. Whether it's a misdemeanor  
25 appeal jury or capital murder case, jurors take

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1           their time. You decide the case. You decide  
2           someone's future. Instruction number one, as  
3           the Judge told you, is the presumption of  
4           innocence which I believe most of you were  
5           asked about when you came in yesterday morning.  
6           Andre Graham, as he sits there, is presumed to  
7           be innocent. He can't be convicted unless you  
8           feel the words Mr. Barry used the very first  
9           minute, to a moral certainty, a moral  
10          certainty, proof beyond a reasonable doubt that  
11          he is guilty of these charges. You've got to  
12          have that. If you don't have it it is your  
13          duty under the law and the oath you took to say  
14          not guilty. You're saying not guilty in this  
15          courtroom. You don't have to worry about  
16          family, friends, or anybody else. Twelve  
17          people make that decision. And the oath that  
18          you took said I will make that decision  
19          regardless of what happens later when people  
20          talk to me, I sat on a capital murder case in  
21          Manchester and I voted because I heard the  
22          evidence, I heard the law, and this is the vote  
23          that I made because that's what I was convinced  
24          of. You have to be convinced, as Mr. Barry  
25          told you, of a moral certainty of whether or

1 not Andre Graham is guilty of any one of these  
2 eight charges. The second instruction talks  
3 about the credibility of the witnesses. Read  
4 it over. Think back to the witnesses in this  
5 case. Number three talks about the principal  
6 in the first and second degree and you read and  
7 I think you will understand that. A lot of  
8 these other instructions deal with the elements  
9 of the crime. Mr. Barry went through with you  
10 what most of these elements are. Capital  
11 murder, that's probably the longest instruction  
12 in here. The robbery, you have to have the  
13 robbery of someone. In this case the  
14 Commonwealth alleges Edward Martin was robbed  
15 and Sheryl Stack was killed in a first degree  
16 manner, et cetera, et cetera. As he told you,  
17 in order to convict of capital murder in  
18 Virginia under the law you must find that the  
19 person beyond a reasonable doubt pulled the  
20 trigger. The last instruction in here talks to  
21 you about circumstantial evidence. And, I  
22 would ask you to read this as carefully as you  
23 read all the others. When the Commonwealth  
24 relies on circumstantial evidence, the  
25 circumstantial evidence in this case is

1 everything except Edward Martin's testimony.  
2 His testimony is what we call direct evidence.  
3 Everybody else, including the person that Mr.  
4 Barry slightly mentioned at the end, Priscilla  
5 Booker, is a circumstantial witness. When the  
6 Commonwealth relies upon circumstantial  
7 evidence the circumstances proven must be  
8 consistent with guilt and inconsistent with  
9 innocence. It is not sufficient the  
10 circumstances proved create a suspicion of  
11 guilt, however strong, or even a probability of  
12 guilt. If that's what we have proven, the  
13 verdict is not guilty. I would like to go  
14 through with you what some of the witnesses say  
15 here. I would like to start with Mr. Martin  
16 first. Edward Martin. He told you that on  
17 October the 8th, I think he said, maybe 2:30,  
18 3:00. I would skip the first officer on the  
19 scene's testimony because he got the time down  
20 because he got the radio call. The fellow at  
21 the Red Roof Inn, Mr. Jones, called the police  
22 on 911. Officer Giles, I believe his name was,  
23 he responded when I asked what time did you get  
24 the call? 3:59 a.m. What time did you get  
25 there? He said within 30 seconds or a minute,



1 he was there at 4:00. So, we have the setting  
2 there and Mr. Martin has told you that they  
3 went out, he and Sheryl Stack went out and went  
4 across the river and ate and came back to the  
5 Steak and Ale parking lot. If you look at  
6 Commonwealth's exhibit number one, which he  
7 stood up here yesterday and showed you, it is  
8 circled. Again you look at it in the jury  
9 room. It's circled as to where the car was  
10 parked. Again this is the off ramp of  
11 Chippenham. This is Midlothian here. The Red  
12 Roof Inn is where Mr. Jones worked. The cars  
13 are over here where this tree is. If you look  
14 at Commonwealth's exhibit 2-A and 2-B they were  
15 taken by Detective Searles, one on the morning  
16 of October the 8th, he said earlier morning,  
17 6:00, 7:00, 8:00, it was light. You can see  
18 where the Volvo, you can see the Red Roof Inn,  
19 you can see a couple of police cars back there  
20 and if you look on the large picture the  
21 aerial, these lines here show parking spaces  
22 here. You can get some idea of distance from  
23 looking at these three pictures of how far it  
24 is from various places. As you recall I asked  
25 Mr. Ayes, the manager at Steak and Ale, about



1 the lights. In 2-A and 2-B you can see the  
2 pictures and I think I asked him, I described  
3 them as being eight to ten feet high like  
4 storage lights. You can see one of them way  
5 over here, way down on here. You can't see  
6 them very well if at all in the aerial. Again,  
7 here is the Red Roof Inn. Exhibit 2-B shows  
8 that pole over there. You will recall that Mr.  
9 Ayers from the Steak and Ale told you that  
10 sometime after October 8, 1993, they placed  
11 spotlights on the building to shine into the  
12 parking lot. The only light there at the time  
13 was this spotlight over in this area facing  
14 over here. There are the lights. I don't know  
15 if you can see them on here. You can't because  
16 they weren't here, obviously. This was taken  
17 October the 8th, 1993. There are no spotlights  
18 in the parking space. I think that's important  
19 for two reasons. The first is that the  
20 Commonwealth made no attempt whatsoever to tell  
21 you, to prove to you that the lighting was  
22 good. We know from Officer Giles that the  
23 shooting took place between probably maybe 3:40  
24 a.m. to 3:45, 47, 50 in the morning. Dark out,  
25 very dark out. What's the lighting? It was

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1 never brought out to you by the Commonwealth  
2 because I suggest to you that when you look at  
3 these photographs and you listen to Mr. Jones'  
4 testimony from Red Roof and Mr. Ayers from  
5 Steak and Ale, the lighting was not good.  
6 After this happened both places installed  
7 additional lights. Mr. Jones testified that  
8 the Red Roof Inn over here put up four poles to  
9 shine their lights, excuse me, into their lot  
10 25 to 30 feet in the air to shine down. He  
11 also testified across the street over here is  
12 the K-Mart which had the high 25 to 30 foot  
13 lights, poles with two lights on it. It is  
14 well lit. I suggest to you that you can find  
15 in this case that that parking lot behind the  
16 Steak and Ale was not a well lit place. What  
17 does that give you? That goes to the question  
18 of whether or not Edward Martin is mistaken in  
19 the identification he has made in this case.  
20 He testified to you about what happened on  
21 October the 8th. When Mr. Barry argued to you  
22 he argued to you as if you already found Andre  
23 Graham guilty. He referred to Graham did this,  
24 Graham did that. That's for you to decide, not  
25 for the Commonwealth to decide. The

1 identification that Mr. Martin made in Court  
2 yesterday, he said that's the guy, that's the  
3 guy with the gun. You heard the testimony that  
4 he gave in terms of time. There was no  
5 evidence as to how long this robbery/shooting  
6 took place. It appears that it could have  
7 happened in 35, 40 seconds, a minute, minute  
8 and a half, two minutes. According to  
9 Detective Dalton approximately six months to  
10 six and a half months later Detective Dalton  
11 and as Assistant Commonwealth's Attorney named  
12 Parcell go to the Martin residence and they go  
13 to the Martin residence with among other things  
14 what are called photospreads. The Commonwealth  
15 offered this one into evidence. It didn't have  
16 or didn't offer into evidence the other one.  
17 Detective Dalton told you on May 22nd, 1994,  
18 again some six and a half months after it took  
19 place and after Mr. Martin had been through the  
20 hospital and back at home, that he and Mr.  
21 Parcell are over there, that in this  
22 conversation that lasted he said about 45  
23 minutes there was a conversation, I think he  
24 said five minutes, and again if I am  
25 recollecting wrong it's your recollection that

1 counts, not mine. That he showed Edward Martin  
2 a photospread. And when he started talking  
3 direct examination he talked about the  
4 photospread in which this person was selected  
5 by Edward Martin. It was only upon cross  
6 examination that it comes out. Wait a minute.  
7 There was another photospread shown. There  
8 was? Did he look at another photospread?  
9 Detective Dalton, yes, he did. Were there six  
10 different people than the people in this  
11 photospread? Yes. And, what happened? And,  
12 then remember when Mr. Martin testified he used  
13 the words, the name Sheppard, and we asked him  
14 where did he get that. And I asked Detective  
15 Dalton did he tell him that name Sheppard.  
16 Detective Dalton said that he picked out  
17 someone other than Sheppard in the other  
18 photospread. Detective Dalton told you that a  
19 guy named Sheppard was in the second spread and  
20 that Mr. Martin picked out someone other than  
21 the person named Sheppard. Does that tell you  
22 something about his ability to make the  
23 identification? Does it tell you, well, was  
24 the lighting good enough in the back of the  
25 Steak and Ale? Why didn't the prosecutor come



1 in here and have these police officers testify  
2 to how well lit that parking lot was. Nobody  
3 was asked by the prosecution. Nobody was  
4 brought in by the prosecution. It's something  
5 to think about. I am not suggesting to you in  
6 any way, shape or form that Edward Martin came  
7 in here and did not or lied to you or didn't  
8 tell the truth. I am not suggesting that to  
9 you at all. In identification cases people can  
10 make mistakes. In this case in particular you  
11 have something that happened 4:00, 3:30 in the  
12 morning dark, quick, shooting, robbery, bam,  
13 gone. And then the witness, the question is  
14 does the witness have the ability six and a  
15 half months later to make an identification?  
16 No height, no weight. Did you hear any  
17 detective or police officer say we got a  
18 description prior to 5-22 that would match  
19 Andre Graham? No. You look at this little  
20 picture here. That's the guy. Come to Court,  
21 Graham. That's the guy. Sheppard other guy.  
22 I suggest to you again that Mr. Barry wants you  
23 to jump to the triggerman because he's got  
24 problems in this case. He's got substantial  
25 problems in regard to eyewitness

1 identification, and that eyewitness  
2 identification is not bolstered by the evidence  
3 from the other witnesses, particularly  
4 Priscilla Booker. If you would take a look at  
5 the clock. You all have a clock in here that  
6 says it's about 10:15 in here and we are coming  
7 on to quarter of right now. If we start right  
8 now, Mr. Jones, as the way I recollect what he  
9 said and in regard to the two noises he heard,  
10 he said two to three to ten seconds in between  
11 the noise. You can look at the clock while I  
12 am talking in terms of two to three to ten  
13 seconds, if that's in fact what happened. I  
14 believe that's what he said, two to three to  
15 ten seconds between shot one and shot two.  
16 They weren't boom, boom, as the prosecutor  
17 would lead you to believe they were. That's  
18 something else you have to think about. Mr.  
19 Jones has been over there, I think he testified  
20 four or five years at the Red Roof Inn. He is  
21 out there on a smoke break with a lady that  
22 works there, very late in the morning. He  
23 works midnight shift. He has nothing to be  
24 concerned about. He is out there. The cars,  
25 he tells you about the cars that he sees pull

1 in. He described that car, which is Mr.  
2 Martin's car, as a red or orange or maroon car.  
3 When Mr. Barry asked him about it again Mr.  
4 Barry used the word red car. Okay. But the  
5 witness without being, without having a color  
6 chosen for him said the car that I saw and  
7 again he's over here, sees the car come in,  
8 this Volvo and the red car, or orange car,  
9 maroon car come through here. That's how he  
10 identified it. He tells you that the people  
11 are out there for some period of time. He goes  
12 back in. He hears noises, talks to the lady.  
13 They think it's got something to do with  
14 breaking, maybe a break-in to the cars out  
15 there. And he comes out and they go over and  
16 they see what they can do and they come back  
17 and make the call. And, I think that you saw  
18 him, he's a totally disinterested witness in  
19 this case. He has nothing to gain to testify  
20 for either side. I think some of the things he  
21 told you again give you pause. That he  
22 identified the car as red, as orange or maroon.  
23 Think about that in relation to Ms. Booker.  
24 Okay. Because Ms. Booker is what we call a,  
25 some lawyers called a burn witness. She is in



1 here to burn the defendant. She is going to do  
2 her best to do it whether it is the truth or  
3 not. Ms. Booker is shown this picture by Mr.  
4 Barry. He walks over here and holds the  
5 picture up and says is that the car you saw?  
6 She says, yes, that's the car I saw. Now think  
7 about that. How many cars have all of us seen  
8 in our lifetime? Here is a car, you really  
9 can't even see the license plate. And, she  
10 just says that's the car, that's the car.  
11 Think about what Mr. Jones said. He had a good  
12 view of that car and he is not even sure of the  
13 color of the car. When Ms. Jones, Ann Jones,  
14 the person that we stipulated was an expert  
15 witness, if you remember when she was up here  
16 yesterday, I was standing over there and Mr.  
17 Everhart was standing here, and Mr. Barry was  
18 standing here, and Ms. Jones was being asked to  
19 make identification of things. Unlike Ms.  
20 Booker that jumps at anything that is put in  
21 front of her by the prosecutor, Ann Jones goes  
22 through these exhibits. You remember she opens  
23 them up to make sure that what she is  
24 identifying is, in fact, what she had seen  
25 previously. She sees the writing on here. She



1           says, yes Mr. Barry, yes ladies and gentlemen,  
2           this is what I saw before. That's what an  
3           expert witness does. That's what a good  
4           witness does. Priscilla Booker is shown this  
5           gun and says, oh, yeah, that's the gun. How  
6           does she know that? Anything that Mr. Barry  
7           puts in front of her she can identify because  
8           she is here to burn the defendant. And, you  
9           heard her testimony about the phonecall. Was  
10          she contradicted by Deputy McGregor in terms of  
11          the time, and the contents of that phonecall  
12          when Mr. Barry said were you speaking in code?  
13          Yeah. We were speaking in code about it, the  
14          metal. Do you recall what Deputy McGregor  
15          said? I have to look at my notes. I will tell  
16          you as far as I recollect. Deputy McGregor  
17          said that he was in the room with Mr. Graham  
18          about 7:25 in the morning on December 3rd and  
19          that Graham said go to the closet, get the bag  
20          and the contents and get rid of it. Is that  
21          what Priscilla Booker told you? Absolutely  
22          not. Priscilla is a witness you cannot put any  
23          trust in, none whatsoever, certainly not to a  
24          moral certainty. She is up here, she is a  
25          prosecution witness, she is going to tell the

1 story that's going to benefit her and burn  
2 Andre Graham. You heard Ms. Booker tell you  
3 about this conversation that she claims, which  
4 is unsupported by any other witness in this  
5 case, that on the morning of October the 8th,  
6 1993, at some, watching some news show on  
7 television, whether it is, who knows, 6:00  
8 news, 8:00 news, noon news, that a shooting  
9 report came over the air from the Steak and Ale  
10 and that she said a friend of hers had gotten  
11 shot so she was real concerned about it. And  
12 he said to her well why are you always  
13 concerned about other people. And later in the  
14 conversation he said I know who did it but it  
15 wasn't me. I know who did it but it wasn't me.  
16 That's what she claims that he said to her. In  
17 regard to the gun, she has told you two  
18 different stories that don't stand up in terms  
19 of what Detective Showalter has told you. She  
20 tells you that he had the gun which she can  
21 readily identify. She can identify anything a  
22 prosecutor shows her. She said he had that gun  
23 from September, October, August of 1993, never  
24 left that gun out of his sight she said. Mr.  
25 Barry said, yeah, he never left that gun out of

1 his sight, he slept with it, went to the shower  
2 with it. Well, where was the gun if he kept it  
3 all the time? He didn't have it when he was  
4 arrested. Obviously, he didn't have it when he  
5 was arrested. Priscilla Booker is not telling  
6 you the truth. It is another embellishment to  
7 nail Andre Graham. Her story is disputed by  
8 the Commonwealth's own evidence, that he called  
9 in the presence of Deputy McGregor about what  
10 they claim was a gun. So, obviously he didn't  
11 have the gun all the time. Priscilla Booker  
12 says well that's the gun, he had it for three  
13 months, never parted company with that gun.  
14 That's not true. That's a lie. I suggest to  
15 you ladies and gentlemen that you not -- I  
16 can't get up here again to argue. Since Mr.  
17 Barry has the burden of proof he can talk last,  
18 but I can't. But, please when you go back  
19 there don't do what he is trying to get you to  
20 do which is assume guilt and then go onto  
21 something else. You 12 people have sworn under  
22 oath you're going to give the defendant and the  
23 Commonwealth a fair trial in this case. There  
24 is more here than meets the eye. I suggest to  
25 you that maybe Edward Martin is mistaken. You



1 know he was mistaken in regard to the other  
2 photospread and that was only because we asked  
3 on cross examination that that ever came out.  
4 The Commonwealth didn't bother to bring in the  
5 other photospread. He didn't bother to bring  
6 in whether or not Poochie was in the other  
7 photospread. He didn't bother to bring out  
8 whether or not Poochie was the person who was  
9 identified by Edward Martin when Detective  
10 Dalton showed him the picture. Thank you.

11 THE COURT: All right, Mr. Barry.  
12 You may have your rebuttal.

13 MR. BARRY: I don't as a general rule  
14 take notes. I try to remember based on what he  
15 says and I know you have to do the same thing.  
16 But I couldn't help but take down a couple  
17 things. I can't hardly see anymore. But, the  
18 first thing he says for you to be concerned  
19 about the bad lighting. All right. James  
20 Jones who was a hundred yards away saw a blond  
21 girl and a dark haired male get out of a car  
22 and he described the car and identified the  
23 car. Now, if the lighting is so bad that James  
24 Jones a hundred yards away can see what's going  
25 on is the defense counsel trying to get you to



1 believe that if I spend five minutes robbing  
2 this lady that she is not going to remember  
3 what I look like? Is he trying to say that the  
4 lighting is so, so bad that this lady and I are  
5 six feet apart for almost five minutes and she  
6 can't identify me? You know, we must be  
7 looking at different photographs or maybe he is  
8 talking about a different case. Because every  
9 picture I see there is lights. I just picked  
10 up one picture. There is a light there. It is  
11 not 50 feet away. There is light here. It is  
12 not 50 feet away. There is no issue of  
13 lighting. All these pictures have lights in  
14 them. I mean, no, I didn't bring out that  
15 there is a full moon that night. I mean, it's  
16 ludicrous. There are certain things that you  
17 have to assume that humans have enough  
18 intelligence to understand. If you have  
19 lighting in the parking lot it's not a major  
20 issue, unless the defense counsel chooses to  
21 make it an issue. If I am five feet away from  
22 this woman for five minutes I really don't  
23 think lighting is an issue unless defense  
24 counsel wants to make you think it's an issue.  
25 It is not an issue. He spent, Edward Martin

1 spent, and he's got one eye which works real  
2 good, five minutes he said throughout this  
3 entire thing before he was shot doing nothing  
4 more than staring at Andre Graham and that damn  
5 gun. And, if he had trouble picking out the  
6 other man I can understand why. The other man  
7 didn't have the gun. The other man wasn't in  
8 his face. The other man didn't shoot him.  
9 And, that covers the second point. He says  
10 somehow Edward has made a terrible mistake,  
11 somehow Edward is just lucky I guess that it  
12 was a picture of Andre Graham. That was just  
13 somehow some luck. And, isn't it a coincidence  
14 that the man he picked out not only has his  
15 fingerprints all over the stolen tapes, and  
16 isn't it a coincidence that the man he picked  
17 out has owned this gun for four months, the gun  
18 that killed Sheryl Stack. And, isn't it a  
19 coincidence that the man Edward Martin picked  
20 out just happened to be driving Edward Martin's  
21 stolen car that night. And, isn't it a  
22 coincidence that Edward Martin picked out just  
23 the man who not only owned that gun but told  
24 his girlfriend to get rid of it? And, that's a  
25 bad identification? So, you have, there is an

1 instruction in there somewhere that says you  
2 can't leave your common sense at home. And,  
3 the defense counsel can say, well, there is  
4 little lighting problem here and perhaps maybe  
5 sort of there is an ID problem here, but if you  
6 look at the case in total, not with blinders on  
7 like the defense counsel is having you do, but  
8 you look at the entire picture, you have a  
9 picture where a surviving witness without any  
10 difficulty identifies the man who shot him, not  
11 only from a photospread but here today in  
12 Court. And, all he is concerned with, his only  
13 responsibility in this Court yesterday was to  
14 tell as honestly and truthfully what he  
15 remembered happening. And, do you not think  
16 that young man for one second if he didn't know  
17 who shot him would tell you that? He knows he  
18 shot him. He told you the truth. There is no  
19 mistake. There is no misidentification. He  
20 has five minutes to look at the man that had  
21 the gun on him and he knows who shot him. And,  
22 it's not fair when the defense comes in and  
23 says no, just look at this one little thing  
24 right here folks. You know, the defense  
25 counsel didn't say one thing about the



1 fingerprints on the tapes. You know, he didn't  
2 say one thing about the fact that the gun was  
3 completely hidden at the direction of the  
4 defendant. And then he says, what did he call  
5 Priscilla? A burn victim. She is out to burn  
6 you. Do you think Priscilla Booker was happy  
7 yesterday? Did she appear to you to be really  
8 excited to be here? The person that was trying  
9 to burn the defendant yesterday? What was she  
10 going to do? She was going to hide the gun for  
11 him. Remember what she said. She said I went  
12 back, I found the gun that was hidden in the  
13 mattress, I was going to take it out to the  
14 country and get rid of it. She was trying to  
15 help the defendant. And, somehow from going  
16 from hiding the murder weapon for her  
17 boyfriend, today in Court she has become the  
18 burn, I am going to burn you. I mean that is  
19 totally an irrational asinine remark by the  
20 defense counsel. It has no logic. She didn't  
21 want to be here. She testified to what she had  
22 to testify to and then she was out of here.  
23 She didn't want to be here, believe me. Now,  
24 you've got to go back -- he brings up, his  
25 defense is there was bad lighting and this is a



1 bad I.D. and Priscilla should not be believed.  
2 But, you just can't get around the fact, you  
3 just can't get around the fact that it was him  
4 who called Priscilla and it was her who was  
5 trying to hide the murder weapon at his  
6 request. And his prints are all over the  
7 stolen CD's. And, he is driving the stolen  
8 car. I mean, I can just go on forever. I am  
9 telling you the only thing that you folks have  
10 to go back there and work on is is he or is he  
11 not the triggerman? And, I reiterate to you  
12 over and over again, defense counsel is not  
13 going to touch that. He is going to talk to  
14 you about light bulbs. He is not going to talk  
15 to about the ultimate issue. And, the ultimate  
16 issue is who is the triggerman? Please go  
17 through your mind, go through whatever Edward  
18 told you, go through what James Jones told you.  
19 Go through the normal human experience, if I  
20 have the gun from beginning to end am I going  
21 to hand it to somebody else at the last second  
22 to commit the murder? No. I am going to shoot  
23 Edward and then I am going to shoot her and  
24 then I am going to take my stolen car and my  
25 stolen tapes and I am going to go on home. And

1 that's the truth. And that's what happened.  
2 And it's a horrible thing to have to deal with  
3 but the truth of the matter is Andre Graham is  
4 the triggerman. It didn't change and it will  
5 never change. It will always be the same.  
6 Andre Graham killed Sheryl Stack. He is guilty  
7 of capital murder. Thank you.

8 THE COURT: All right, ladies and  
9 gentlemen of the jury, the Court has the forms  
10 of your instructions, the one on capital  
11 murder, first degree murder, and not guilty.  
12 The rest of them you will hear are self-  
13 explanatory and you will sign the proper form,  
14 the foreman will sign as the verdict of each  
15 and every one of you. You may now retire to  
16 consider your verdict. When you reach it let  
17 the Sheriff know. Sheriff, take charge of the  
18 jury.

19 Ms. Hinton, you're excused. You were  
20 the alternate. We do appreciate your services.

21 All right, Sheriff.

22 JURY OUT

23 NOTE: At this point the jury retires  
24 to deliberate.

25 MR. GEARY: Do you want the

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1 identification -- did you mark the  
2 identification jury instruction refused?

3 THE COURT: Yes.

4 MR. GEARY: Can I read it to the  
5 Court Reporter?

6 THE COURT: It's in the record. I  
7 refused it, marked it and signed it. All  
8 right. The Court will be in recess.

9 NOTE: Recess.

10 THE COURT: All right. Return the  
11 jury.

12 JURY IN

13 THE COURT: All right. Counsel at  
14 the bar waive the poll of the jury?

15 MR. EVERHART: Yes.

16 THE COURT: All right. Do you have a  
17 question, ladies and gentlemen of the jury?

18 MR. NAOROS: Yes, Your Honor, we do.

19 THE COURT: All right.

20 MR. NAOROS: Basically, it boils down  
21 to two questions. One is with regard to jury  
22 instruction number five, under the third  
23 element the sentence reads that the killing  
24 occurred either during the commission of the  
25 robbery of Edward Martin while the defendant

1 was armed with a deadly weapon. We don't know  
2 what the "or" is or if there is supposed to be  
3 and/or.

4 THE COURT: Let me see the  
5 instruction. It should be "and."

6 MR. BARRY: The "either" should not  
7 be here.

8 THE COURT: The "either" should not  
9 be there.

10 MR. GEARY: Judge, can I see that?

11 THE COURT: Yes. Well, I think,  
12 ladies and gentlemen of the jury, I am going to  
13 let you go back. I am going to withdraw the  
14 instruction and redraw the instruction all  
15 together. So, do you have another question?

16 MR. NAOROZ: Yes, Your Honor. We had  
17 several questions that involved facts that we  
18 heard in the case and the question really boils  
19 down to are we entitled to a record of the  
20 testimony at this point?

21 THE COURT: No, sir.

22 MR. NAOROZ: So, the facts we have to  
23 recall ourselves?

24 THE COURT: You recall the facts  
25 yourself. What I will do with this instruction



1 I am going to withdraw it. It doesn't make  
2 sense. All right, ladies and gentlemen of the  
3 jury, you may retire. I will send you a  
4 corrected instruction.

5 MR. NAOROZ: Thank you, Your Honor.

6 NOTE: At this point the jury retires  
7 for their deliberations.

8 JURY OUT

9 THE COURT: Really, the only word is  
10 knocked out the "either."

11 MR. BARRY: That's correct.

12 MR. EVERHART: Yes, sir.

13 THE COURT: That it occurred during  
14 the commission of the robbery of Edward Martin  
15 while the defendant was armed with a deadly  
16 weapon. All right. I am going to have this  
17 instruction redrawn with the word "either"  
18 knocked out of it. It should really be that  
19 the killing occurred during or subsequent to  
20 the commission of the robbery of Edward Martin  
21 while the defendant was armed with a deadly  
22 weapon. I think the statute puts it, it says  
23 in the commission of the robbery. All of that  
24 is one in the same. I am just going to knock  
25 out the word "either" and have the instruction

1 remade and redrawn to reflect that.

2 MR. GEARY: That's fine, Judge.

3 THE COURT: All right, have Mrs.  
4 Adams type that please. As a cautionary I will  
5 bring the defendant back into the courtroom  
6 when I deliver the corrected instruction to the  
7 jury so you will be present at all stages of  
8 the trial. He does not have to be present  
9 during the drawing of the instruction. So,  
10 y'all stay very available. It probably should  
11 not take over five minutes.

12 NOTE: Recess.

13 THE COURT: All right, gentlemen, I  
14 am marking the instruction number five. I am  
15 going to re-read it to the jury. Then I will  
16 let them go back and deliberate. Sheriff,  
17 bring in the jury.

18 JURY IN

19 THE COURT: Let the record show that  
20 everyone is present. All right, counsel at the  
21 bar waive the poll of the jury?

22 MR. EVERHART: Yes.

23 MR. BARRY: Yes, sir.

24 THE COURT: All right, ladies and  
25 gentlemen of the jury, I don't question your

1 ability to read but I think under the law I am  
2 under a duty to read the instruction. So, I am  
3 going to read the instruction. The defendant  
4 is charged with the crime of capital murder.  
5 The Commonwealth must prove beyond a reasonable  
6 doubt each of the following elements of that  
7 crime: that the defendant killed Sheryl L.  
8 Stack; and that the killing was willful,  
9 deliberate and premeditated; and that the  
10 killing occurred during the commission of  
11 robbery of Edward Martin while the defendant  
12 was armed with a deadly weapon. If you find  
13 from the evidence that the Commonwealth has  
14 proved beyond a reasonable doubt each of the  
15 above elements of the offense as charged, then  
16 you shall find the defendant guilty. As a  
17 lesser included offense, if you find from the  
18 evidence that the Commonwealth has proved  
19 beyond a reasonable doubt the first and the  
20 second elements of the offense as charged but  
21 do not find beyond a reasonable doubt that the  
22 killing occurred during the commission of  
23 robbery of Edward Martin while the defendant  
24 was armed with a deadly weapon, then you shall  
25 find the defendant guilty of first degree

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

5 Since it has come up, gentlemen, do  
6 you wish to argue the case further?

7 MR. BARRY: No, sir.

8 MR. GEARY: No, Your Honor.

9 THE COURT: All right, Sheriff, give  
10 this to the foreman of the jury. All right,  
11 ladies and gentlemen of the jury, the Court  
12 appreciates your bringing that to the Court's  
13 attention. You may retire and continue your  
14 deliberations.

15 NOTE: At this point the jury retires  
16 to continue their deliberations.

17 JURY OUT

18 THE COURT: All right, the jury has  
19 retired. I don't know what the jury may  
20 decide. If they come back with a conviction of  
21 capital murder in aggravation there is a lot of  
22 evidence that would be admissible under the  
23 capital murder statute or that is not  
24 admissible under the other things. So I have  
25 been thinking about that. I think I will



1 proceed with the aggravation and mitigation on  
2 the other offenses and then save the capital  
3 murder until tomorrow. What do y'all suggest?  
4 I'm open to suggestions.

5 MR. BARRY: Well, the only thing,  
6 Judge, that we have, is just obviously all his  
7 prior convictions and anything else is victim  
8 impact on any potential murder conviction. So,  
9 other than handing them a copy that has been  
10 agreed upon as his convictions, read it, which  
11 is either 10 or 12 convictions, that's all we  
12 have as to the other matters.

13 THE COURT: That's right. On the  
14 capital murder you would be able to introduce  
15 other evidence.

16 MR. BARRY: That's right. Capital  
17 murder I am going to have four victim impact  
18 witnesses if that happens to be the verdict.  
19 If it is not the verdict then I am just handing  
20 them this copy of all his convictions.

21 THE COURT: All right. We will see  
22 what they find.

23 MR. GEARY: Judge, do I understand  
24 are you saying that the second phase would be  
25 this afternoon with those as to the

1 Commonwealth's evidence; is that correct, Mr.  
2 Barry?

3 MR. BARRY: Why don't we see what  
4 they have done.

5 THE COURT: We will see what they  
6 have done. All right, return the jury.

7 JURY IN

8 THE COURT: Counsel at the bar waive  
9 the poll of the jury?

10 MR. BARRY: Yes, sir.

11 MR. EVERHART: Yes, sir.

12 THE COURT: All right, ladies and  
13 gentlemen of the jury, have you reached a  
14 verdict?

15 MR. NAOROZ: Yes, we have, Your  
16 Honor.

17 THE COURT: Give it to the Sheriff,  
18 please, sir. All right, will the accused  
19 please rise.

20 THE CLERK: We, the jury, find the  
21 defendant guilty of the capital murder of  
22 Sheryl L. Stack, as contained in the  
23 indictment.

24 We, the jury, find the defendant  
25 guilty of using or displaying in a threatening

1 manner a firearm while committing the capital  
2 murder of Sheryl L. Stack, as contained in the  
3 indictment.

4 We, the jury, find the defendant  
5 guilty of robbery of Edward Martin, as  
6 contained in the indictment.

7 We, the jury, find the defendant  
8 guilty of using or displaying in a threatening  
9 manner a firearm while committing the robbery  
10 of Edward Martin, as contained in the  
11 indictment.

12 We, the jury, find the defendant  
13 guilty of aggravated malicious wounding of  
14 Edward Martin, as contained in the indictment.

15 We, the jury, find the defendant  
16 guilty of using or displaying in a threatening  
17 manner a firearm while committing the  
18 aggravated malicious wounding of Edward Martin,  
19 as contained in the indictment.

20 We, the jury, find the defendant  
21 guilty of attempted robbery of Sheryl L. Stack,  
22 as contained in the indictment.

23 We, the jury, find the defendant  
24 guilty of using or displaying in a threatening  
25 manner a firearm while committing the attempted

1 robbery of Sheryl L. Stack, as contained in the  
2 indictment. Peter Naoroz, foreperson.

3 THE COURT: All right, you may have  
4 your seat. All right, ladies and gentlemen of  
5 the jury, are these the verdicts of each and  
6 every one of you? Does anyone wish the jury  
7 polled?

8 MR. BARRY: No, sir.

9 MR. GEARY: No, Your Honor, not at  
10 this time.

11 THE COURT: All right. Ladies and  
12 gentlemen of the jury, I am going to ask you to  
13 go back to the jury room for a moment. We have  
14 some procedural matters to take up. I hope to  
15 have you back in the courtroom very shortly,  
16 because it will be a two phase trial. So,  
17 would you go with the Sheriff, please.

18 JURY OUT

19 THE COURT: Gentlemen, we now have  
20 some ground that is new in this Commonwealth  
21 relative to procedure. Certain evidence that  
22 is admissible on the other crimes is very  
23 limited to convictions and certified  
24 convictions which I understand y'all have been  
25 given.



1 MR. EVERHART: Yes, sir.

2 THE COURT: On the other, on the  
3 capital murder punishment, there is other  
4 evidence that the Commonwealth might present  
5 which is more broader than the limitations put  
6 on by the statute under the bifurcated trial.  
7 The question now is which way shall we proceed  
8 first, with the capital murder or the other?  
9 It seems in fairness that the capital murder  
10 being the more severe crime that we allow the  
11 Commonwealth to proceed on that first, after  
12 which we will put the other evidence in,  
13 although then they will know the evidence that  
14 is not in. So I look to counsel to see what  
15 their advice is or what their desires are. Mr.  
16 Barry?

17 MR. BARRY: Well, we talked about  
18 this, Judge, quite frankly all counsels  
19 involved and we were going to simply come back  
20 tomorrow morning, as you had suggested, and  
21 start. I will put first the record in, then my  
22 victim impact statement witnesses, then they  
23 would put on mitigation witnesses, and the jury  
24 could decide everything at one time.

25 THE COURT: What we really have is a

1 problem here is the fact in your victim impact  
2 statements for capital murder.

3 MR. BARRY: We are aware of that.

4 THE COURT: It is not allowable under  
5 the section of the bifurcated trial.

6 MR. BARRY: Well, if the Court  
7 basically is suggesting that we do a  
8 trifurcated trial where we now give them a copy  
9 of the record and anything that the defense  
10 desires and let them deliberate further as to  
11 the punishment on the other crimes. That's up  
12 to the defense. I anticipated that we would do  
13 everything all at one time. I can't speak for  
14 the defense but I thought that's where we were  
15 at this point. I really have no objection at  
16 all.

17 THE COURT: Well, I think that was  
18 correct but then under 19.2-295.1 they do not  
19 make a provision for other crimes being tried  
20 with the capital. All right, Mr. Everhart.

21 MR. EVERHART: Your Honor, I think we  
22 are all caught a little offguard because as you  
23 say, it's a new, it's a new experience. I  
24 would, I think that the Court's reading is  
25 correct and I on behalf of Mr. Graham we cannot

1 waive the distinction. In other words, I think  
2 we would be committing an egregious error if we  
3 allow the Commonwealth's victim impact evidence  
4 and other evidence to come in, evidence which  
5 is admissible on the capital aspect to come in  
6 prior to fixing the punishment on the non-  
7 capital offenses or the other felony  
8 convictions. So, I would suggest that the  
9 Court and ask the Court to consider that we  
10 proceed on the, everything but the capital  
11 murder case and the Court allow us to return  
12 tomorrow on the capital case.

13 THE COURT: Well, I am of the opinion  
14 the punishment ought to be heard all at one  
15 time, really, it shouldn't be done piecemeal.  
16 And, I know that, I don't think the witnesses  
17 are ready for this afternoon, the trial having  
18 been moved more rapidly than anticipated. I  
19 think I am going to adjourn the jury over until  
20 tomorrow morning at 9:00, then we will go into  
21 the penalty phase. We will have to take up the  
22 other crimes and where you will limit the  
23 proper statute to those, then we will take up  
24 those plus the aggravation and mitigation of  
25 capital aspect of it.

1 MR. EVERHART: Judge, just for  
2 clarification am I correct that what we will do  
3 is we will return, the Commonwealth will put on  
4 their evidence. We will put on any evidence we  
5 have as to the non-capital offenses.

6 THE COURT: That is correct.

7 MR. EVERHART: Then the jury will  
8 retire and we will wait for them to fix the  
9 punishment on those charges.

10 THE COURT: That is correct.

11 MR. EVERHART: Once they do that then  
12 we will go, the Commonwealth will be able to  
13 put on any additional evidence, then we will be  
14 able to put on whatever evidence we deem proper  
15 at that stage; is that correct?

16 THE COURT: That is correct.

17 MR. EVERHART: Thank you.

18 THE COURT: That's the procedure that  
19 I really know.

20 MR. BARRY: I don't have a problem  
21 with the procedure. Why don't we go on this  
22 afternoon. It's only 1:00. And at least get  
23 through the non-capital offenses.

24 THE COURT: That would be fine with  
25 me.



1 MR. BARRY: That's my suggestion.  
2 That's not complicated. The complicated  
3 portion is the capital murder portion. We can  
4 handle this. I mean, I hand them one piece of  
5 paper and it's pretty much over with.

6 THE COURT: Well, I think if you, I  
7 think that's the best way. The more we can  
8 accomplish today the less we have to worry  
9 about tomorrow. And I understand from counsel,  
10 I don't know, that the capital murder  
11 aggravation and mitigation might be quite  
12 lengthy.

13 MR. BARRY: That's correct.

14 THE COURT: Maybe two hours for you  
15 and two to four hours for them. So, that's  
16 going to be a good portion of the morning.

17 MR. BARRY: I suggest that we bring  
18 the jury back in, that you instruct them as to  
19 that we are going to do next, I put on my  
20 evidence, they put on whatever evidence they  
21 want, they deliberate, then we break until  
22 tomorrow for any issue of capital murder. I  
23 have all the sentencing instructions right now  
24 for everything and I believe the Court has my  
25 copy of everything.

1 THE COURT: Well, we are going to  
2 have to change these because you have one on  
3 capital murder. We're not going to use that.

4 MR. BARRY: There is actually three  
5 of them for capital murder. I have the  
6 firearm, capital murder, robbery, firearm,  
7 attempted robbery, firearm, malicious wounding,  
8 firearm, and the findings on each one.

9 THE COURT: Well, it will be shy of  
10 two so it's really only six charges at this  
11 time.

12 MR. BARRY: That's correct. Well,  
13 now we are following the letter of the law, it  
14 wouldn't be six charges, it would be seven  
15 charges because the only thing that we are not  
16 using is the capital murder.

17 THE COURT: I was going to let the  
18 whole thing for the capital murder.

19 MR. BARRY: All right.

20 THE COURT: The whole thing for  
21 capital murder which would be firearm and the  
22 capital murder. And you have drawn the  
23 instructions on use of a firearm is three  
24 years, all of the rest of them are five years.  
25 And, I am going to leave them at five years

1 because they have convicted him on one of them.

2 MR. BARRY: Right.

3 THE COURT: That would be three.

4 MR. BARRY: No, Judge, you have to  
5 leave the five because he's got prior  
6 convictions in Chesterfield. That's the reason  
7 everything is five.

8 THE COURT: You have more information  
9 than I do. All right. So, I will do that. I  
10 will find the robbery of Edward Martin. The  
11 use of firearm of Edward Martin. And, that's  
12 five years. Then I am going to have one on the  
13 aggravated malicious wounding of Edward Martin  
14 with the penalties, then I have the form for  
15 that. So, that's four. Then use in a  
16 threatening manner. Then I have one, the  
17 felony attempt robbery of Sheryl Stack. Then I  
18 have a finding instruction on that, and then I  
19 have five years for that. So, that will be  
20 those so that will come up there. Now, I will  
21 save the one on capital murder and the use of a  
22 firearm in capital murder for tomorrow.

23 MR. EVERHART: Judge, could we have  
24 the opportunity just to review the ones that we  
25 are going to present?

1 THE COURT: You certainly may.

2 MR. EVERHART: Judge, we have  
3 reviewed the sentencing instructions and the  
4 only correction that we would ask the Court to  
5 make relates to the instruction on the finding  
6 on the aggravated malicious wounding. The  
7 instruction that we have reads upon  
8 consideration of all the evidence you have  
9 heard you shall fix his punishment at one,  
10 imprisonment for life, or, two, confinement in  
11 the Department of Corrections for not less than  
12 20 years and a fine of not more than  
13 \$100,000.00. And, the finding, the actual  
14 verdict instruction reflects that it says  
15 hereby which fix his punishment at confinement  
16 in the Department of Corrections for blank  
17 years and a fine of blank dollars. When you  
18 refer to the punishment for a conviction of a  
19 Class II felony which this is, 18.2-10,  
20 subsection, paragraph (b) says for Class II  
21 felonies imprisonment for life or for any term  
22 not less than 20 years and subject to  
23 subsection (g) you fine or not more than  
24 \$100,000.00. When you refer to subsection (g)  
25 it says except as specifically authorized in



1 subsection (e) or (f) or in Class I felonies  
2 for which a sentence of death is imposed the  
3 Court shall impose either a sentence of  
4 imprisonment together with a fine or  
5 imprisonment only. So, I think it's kind of  
6 akin to the 12 months in jail and a fine of  
7 \$2,500.00, either or both we have in certain  
8 cases. In other words, the way the instruction  
9 reads it gives the impression you have to do  
10 both. The statute actually says it's --

11 THE COURT: I haven't got the  
12 instructions in front of me.

13 MR. EVERHART: I'm sorry, Judge.  
14 According to the order you had them in that  
15 would have been instructions four and five is  
16 the order you had them in.

17 THE COURT: Well, I will just put in  
18 and/or a fine of \$100,000.00.

19 MR. EVERHART: Judge, it's actually,  
20 actually, Judge, it's not an and/or.

21 THE COURT: That's what I thought you  
22 said.

23 MR. EVERHART: I think I did say that  
24 and if I did I was wrong. If I can just read  
25 you again the last part or subsection (g). It

1 says the court shall impose either a sentence  
2 of imprisonment together with a fine or  
3 imprisonment only. I think if you put and/or in  
4 there you gave me the impression they can just  
5 give a fine, not imprisonment.

6 THE COURT: That will probably be  
7 true. What I'm going to do, I don't think the  
8 fine is material. Do you, Mr. Barry?

9 MR. BARRY: No, sir. I do not.

10 THE COURT: I will just scratch that  
11 out. Confinement in the Department of  
12 Corrections for not less than 20 years.  
13 Gentlemen, on the instruction on robbery of  
14 Edward Martin do hereby fix his punishment at  
15 confinement in the Department of Corrections  
16 for blank. I struck out the word "years"  
17 because they can give him life on that. Well,  
18 then, we have on attempt robbery the same  
19 thing, for not less than two years or more than  
20 ten years and a fine of not more than  
21 \$10,000.00. It's not a mandatory fine.

22 MR. BARRY: No.

23 THE COURT: You want to knock out the  
24 fine?

25 MR. BARRY: That will be fine, Judge.

1 These are all coming out of model jury  
2 instructions but obviously they have some  
3 problems on these fines.

4 THE COURT: Well, the statute is not  
5 clear.

6 MR. EVERHART: The problem is they  
7 all refer to subsection (g).

8 THE COURT: You gentlemen might want  
9 to look at this. I scratched years out. I  
10 don't believe you can make it out. I might be  
11 wrong. Gentlemen, I don't know if you have any  
12 argument.

13 MR. EVERHART: If so I will be very  
14 brief.

15 NOTE: At this point a side bar  
16 conference is held, out of the presence of the  
17 Court Reporter.

18 THE COURT: All right. You may  
19 return the jury, Sheriff.

20 JURY IN

21 THE COURT: Counsel at the bar waive  
22 the poll of the jury?

23 MR. BARRY: Yes, sir.

24 MR. EVERHART: Yes, sir. Thank you.

25 THE COURT: What we are really doing

1 now, this is going to be a three part trial.  
2 You have found guilt or innocence. Now you  
3 will hear evidence in aggravation and  
4 mitigation on all of the offenses except the  
5 capital murder. The reason for that is the  
6 fact because of the way the law is drawn.  
7 Tomorrow morning you will hear evidence on the  
8 capital murder in aggravation and mitigation.  
9 So, that is what we are trying to do. The  
10 reason we have to do that is some of the  
11 witnesses I understand are coming great  
12 distances and they were summonsed for Thursday.  
13 So, what right now you will just hear evidence  
14 in aggravation and mitigation on all of the  
15 crimes except the capital murder. The firearm  
16 charges are fixed by statute. You don't have  
17 to worry about that, all you have to do is sign  
18 them because that is statutory. The rest of it  
19 you will deliberate and unanimously agree on  
20 the penalty. I hope I have made myself clear.  
21 All right, Mr. Barry, if you have anything on  
22 aggravation?

23 MR. BARRY: Yes, I do, Judge. I have  
24 a summary of Andre Graham's, the defendant  
25 present today in Court, convictions. And I



1 would like to be allowed to read them to the  
2 jury and then give them a summarized copy of  
3 the convictions.

4 THE COURT: All right.

5 MR. BARRY: November of 1991 he was  
6 convicted of unauthorized use of an automobile  
7 in Richmond General District Court. In  
8 November of 1991 he was convicted of assuming  
9 the name of another in the Richmond General  
10 District Court. In November of 1991 he was  
11 convicted of a concealed weapon in the Richmond  
12 General District Court. In November of 1991 he  
13 was convicted of trespass on posted property in  
14 Richmond General District Court. January of  
15 1992 he was convicted of failure to appear in  
16 court in the Richmond Circuit Court. In  
17 January of 1992 he was convicted of possession  
18 of cocaine in the Richmond Circuit Court. In  
19 January of 1992 he was convicted of possession  
20 of cocaine while in possession of a firearm.  
21 In August of 1994 he was convicted of capital  
22 murder in Chesterfield County Circuit Court.  
23 In August of 1994 he was convicted of use of a  
24 firearm in the commission of capital murder in  
25 the Chesterfield Circuit Court. In August of

1 1994 he was convicted of robbery in the  
2 Chesterfield Circuit Court. In August of 1994  
3 he was convicted of use of a firearm in the  
4 commission of robbery in the Chesterfield  
5 Circuit Court. In August of 1994 he was  
6 convicted of capital murder in the Chesterfield  
7 Circuit Court. In August of 1994 he was  
8 convicted of robbery in the Chesterfield  
9 Circuit Court. In August of 1994 he was  
10 convicted of use of a firearm in the commission  
11 of robbery in the Chesterfield Circuit Court.  
12 Commonwealth's exhibit.

13 THE COURT: We have one marked in the  
14 evidence.

15 NOTE: Received and so marked by the  
16 Clerk as Commonwealth's Exhibit Number 15.

17 MR. BARRY: Thank you. You're  
18 allowed to take this back with you.

19 THE COURT: Is that your case on  
20 aggravation?

21 MR. BARRY: Yes, it is, Judge.

22 THE COURT: All right. Any  
23 mitigation evidence?

24 MR. EVERHART: No. Thank you.

25 THE COURT: None for the defendant.

1 All right, ladies and gentlemen of the jury, I  
2 will now read you as to the law. You have found  
3 the defendant guilty of the felony aggravated  
4 malicious wounding of Edward Martin and have  
5 heard evidence relative to the punishment.  
6 Upon consideration of all the evidence you have  
7 heard you shall fix his punishment at  
8 imprisonment for life, or confinement in the  
9 Department of Corrections for not less than 20  
10 years. Then we have your finding instruction,  
11 we, the jury, find the defendant guilty of the  
12 aggravated malicious wounding of Edward Martin,  
13 do hereby fix his punishment at confinement in  
14 the Department of Corrections for whatever you  
15 agree upon. Your foreperson will sign that.  
16 Then we have the one on use of a firearm which  
17 is automatic five years which your foreperson  
18 will sign that. Then we have, you have found  
19 the defendant guilty of the felony of robbery  
20 of Edward Martin and have heard evidence  
21 relative to the punishment. Upon consideration  
22 of all the evidence you have heard, you shall  
23 fix his punishment at imprisonment for life, or  
24 confinement in the Department of Corrections  
25 for not less than five years. Then that is

1 your finding instruction on what you agree  
2 upon. Then you will have one also on the use  
3 of a firearm. That's already filled in. Then  
4 you have this, you have found the defendant  
5 guilty of the felony of attempted robbery of  
6 Sheryl L. Stack and have heard evidence  
7 relevant to the punishment. Upon consideration  
8 of all the evidence you have heard, you shall  
9 fix his punishment at confinement in the  
10 Department of Corrections for not less than two  
11 or more than ten years. Then you have a  
12 finding instruction where you fill in the  
13 blank. Then you have the one on use of a  
14 firearm and you just have to sign that because  
15 that's automatic by the statute.

16 Now, gentlemen, you may summarize  
17 your case. I will allow you to summarize.

18 MR. BARRY: It's just going to be  
19 very brief, Judge. Actually, I just want to  
20 leave you with one thought because what we are  
21 really dealing with now is now is how we're  
22 going to punish this man for what he did to  
23 Edward Martin. You obviously have the  
24 attempted robbery of Sheryl Stack, but that  
25 speaks for itself. And, I can do this in no



1 other way than to tell you that there sits a  
2 very brave, very courageous young man who has  
3 somehow has battled back against unbelievable  
4 odds that he can even talk. And, he in his own  
5 small way has done an amazing job just  
6 testifying on the stand in any sort of  
7 intelligent manner that you can understand. I  
8 leave you with this thought. The last thing  
9 Graham said to him before he did what he did  
10 was if you cooperate I won't hurt you. Lay  
11 down on the ground and close your eyes. I  
12 just, you know, the things that he did to this  
13 kid is just unbelievable. And, to tell him to  
14 lay down and close your eyes and then just to  
15 shoot him in the face, that's just the most  
16 horrible thing I can conceive of. That's 20 to  
17 life. That shouldn't even be an issue. The  
18 robbery speaks for itself. That's five to  
19 life. And, what he did to that young lady, for  
20 her few belongings, that's two to ten. That  
21 speaks for itself. Just remember when you set  
22 the punishment, the punishment has to be  
23 commensurate to what he did. Lay down, I won't  
24 hurt you.

25 THE COURT: All right, Mr. Everhart.

1 MR. EVERHART: Judge, we will submit  
2 the cases to the jury at this time. Thank you.

3 THE COURT: All right, ladies and  
4 gentlemen of the jury, you may go back and when  
5 you reach your verdict let the Sheriff know.

6 JURY OUT

7 NOTE: At this point the jury retires  
8 for their deliberations.

9 THE COURT: All right, Sheriff,  
10 return the jury.

11 JURY IN

12 THE COURT: Counsel at the bar waive  
13 the poll of the jury?

14 MR. EVERHART: Yes, Your Honor.

15 MR. BARRY: Yes, sir.

16 THE COURT: All right, ladies and  
17 gentlemen of the jury, have you reached your  
18 verdicts?

19 MR. NAOROZ: Yes, we have, Your  
20 Honor.

21 THE COURT: Would you give them to  
22 the Sheriff, please, sir.

23 THE CLERK: We, the jury, find the  
24 defendant guilty of aggravated malicious  
25 wounding of Edward Martin, do hereby fix his

1 punishment at confinement in the Department of  
2 Corrections for life.

3 We, the jury, find the defendant  
4 guilty of robbery of Edward Martin, do hereby  
5 fix his punishment at confinement in the  
6 Department of Corrections for 25 years.

7 We, the jury, find the defendant  
8 guilty of attempted robbery of Sheryl L. Stack,  
9 do hereby fix his punishment at confinement in  
10 the Department of Corrections for ten years.

11 We, the jury, fix the defendant's  
12 punishment at confinement in the Department of  
13 Corrections for a period of five years.

14 We, the jury, fix the punishment of  
15 the defendant at confinement in the Department  
16 of Corrections for five years.

17 We, the jury, fix the defendant's  
18 punishment at confinement in the Department of  
19 Corrections for a period of five years.

20 THE COURT: They are the only three  
21 firearms, gentlemen. She didn't read the whole  
22 thing. It is five years.

23 THE CLERK: That's Peter Naoroz,  
24 foreperson.

25 THE COURT: All right. You may have

1 your seat. All right, ladies and gentlemen of  
2 the jury, is that the verdict of each and every  
3 one of you? Does anyone wish the jury polled?

4 MR. BARRY: No, sir.

5 MR. GEARY: No, Your Honor.

6 THE COURT: All right, ladies and  
7 gentlemen of the jury, I am going to ask you to  
8 come back at 9:00 in the morning and we will  
9 finish up the other phase of the case. We will  
10 move as expeditiously as possible without  
11 rushing anyone. Depending on your  
12 deliberations we hope tomorrow we will finish  
13 the case. I thank you for your patience. I  
14 thank you for your service. I trust you will  
15 have a nice evening. You may be excused. You  
16 may go either way you desire. You may be  
17 excused.

18 MR. GEARY: Judge, the admonition.

19 THE COURT: Oh, excuse me. Let me  
20 remind you about the admonition. Don't read  
21 anything about the case. Don't listen to  
22 anything about the case, and don't even talk to  
23 anyone about the case. You just tell your  
24 husband, wife, sister, brother, mother or  
25 father you will tell them tomorrow and keep



1           them in suspense when you're doing. And, I  
2           thank you. You may be excused.

3           JURY DISMISSED

4           THE COURT: All right, gentlemen,  
5           their verdicts are now, or these judgments,  
6           these verdicts are now judgments or will be  
7           shortly just as soon as I enter them.

8           MR. EVERHART: Judge, I think that  
9           before you do we need to make a motion to set  
10          aside the verdicts as being contrary to the law  
11          and the evidence. I would ask the Court to  
12          incorporate, to allow us to incorporate the  
13          arguments previously made on the two motions to  
14          strike. And, incorporate the arguments that  
15          Mr. Geary made during his closing arguments to  
16          the jury.

17          THE COURT: All right. The Court  
18          will overrule those motions. In fact, I might  
19          add at this time the Court is in full  
20          accordance with the verdict of the jury and  
21          fully feels they were based on the law and the  
22          evidence in this case.

23          All right. Will the accused please  
24          rise. Do you have anything further you wish to  
25          say?

1 THE DEFENDANT: (Shakes head no).

2 THE COURT: All right. In accordance  
3 with the verdict of the jury the Court will now  
4 find you guilty of aggravated malicious  
5 wounding of Edward Martin and do hereby fix  
6 your punishment at confinement in the  
7 Department of Corrections for the balance of  
8 your natural life. In accordance with the  
9 verdict of the jury the Court will now find you  
10 guilty of robbery of Edward Martin and do  
11 hereby fix your punishment at confinement in  
12 the Department of Corrections for 25 years. In  
13 accordance with the verdict of the jury the  
14 Court will find you guilty of attempted robbery  
15 of Sheryl L. Stack and fix your punishment at  
16 confinement in the Department of Corrections  
17 for ten years. In accordance with the verdict  
18 of the jury, the Court will find you guilty of  
19 using or displaying in a threatening manner a  
20 firearm while committing the attempt robbery of  
21 Sheryl L. Stack. And, according to the  
22 evidence the Court will sentence you to serve  
23 five years in the Department of Corrections.  
24 In accordance with the verdict of the jury the  
25 Court will find you guilty of the felony using

1 or displaying in a threatening manner a firearm  
2 while committing the robbery of Edward Martin.  
3 Based upon the evidence, the Court will  
4 sentence you, in accordance with the jury  
5 verdict the Court will sentence you to serve  
6 five years in the Department of Corrections.  
7 In accordance with the verdict of the jury the  
8 Court will find you guilty of using of a  
9 firearm while committing the aggravated  
10 malicious wounding of Edward Martin. And,  
11 according to the evidence and the jury verdict  
12 the Court will sentence you to serve five years  
13 in the Department of Corrections on these  
14 charges.

15 Gentlemen, you will advise your  
16 client of his appellate rights. In the  
17 meantime he will be committed to the custody of  
18 the City to be returned tomorrow morning at  
19 9:00 when the case will be complete.

20 Gentlemen, I want each and every one  
21 of you to be ready to go forward at 9:00.  
22  
23  
24  
25

CERTIFICATE OF COURT REPORTER

I, Theresa S. Griffith, hereby certify that I was the court reporter in the Circuit Court of the City of Richmond, Manchester Division, on October 5, 1994, at the second day of the trial herein.

I further certify that the foregoing transcript is true and accurate, to the best of my ability.

Given under my hand this 2nd day of December, 1994.

  
Theresa S. Griffith - Court Reporter

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THERESA S. GRIFFITH  
COURT REPORTER  
(804) 755-7377



Virginia:

In the Circuit Court of the City of Richmond, Manchester Courthouse

the 5th day of October, 19 94.

Commonwealth of Virginia, plaintiff,)

against

Andre L. Graham a/k/a

Andre Grant a/k/a

Lorenzo Cross a/k/a

Lewis A. Rivas,

(D.O.B. 3/4/70)

(Date of Offenses: 10/8/93)

defendant,)

Order -

Case No. 94-641-F

94-642-F

94-644-F

94-645-F

This day the defendant was again led to the bar in the custody of the Sheriff of the City of Richmond, and also appeared Jeffrey L. Everhart and Robert P. Geary, his Attorneys at law, and Learned D. Barry, an Assistant Attorney for the Commonwealth, and came again the jury in keeping with its adjournment on yesterday.

Whereupon, the Court and jury proceeded to hear the evidence on behalf of the defendant, and at the conclusion of the introduction of all the evidence, counsel for the defendant renewed his motion to strike the Commonwealth's evidence, which motion the Court overruled, to which ruling of the Court counsel for the defendant objected.

Thereupon, the jury, having fully heard the evidence, instructions of the Court, and argument of counsel as to the defendant's guilt or innocence, retired to its room to consult of a verdict (the alternate juror having been discharged from any further consideration of these cases) and after some time returned into Court with the following verdicts, to-wit:

(Case No. 94-641-F) Count 1 - "We, the jury, find the defendant guilty of capital murder of Sheryl L. Stack, as contained in the indictment." /s/ Peter M. Naoroz, Foreman, and Count 2 - "We, the

jury, find the defendant guilty of using or displaying in a threatening manner a firearm while committing the capital murder of Sheryl L. Stack, as contained in the indictment." /s/ Peter M. Naoroz, Foreman;

(Case No. 94-642-F) Count 1 - "We, the jury, find the defendant guilty of attempted robbery of Sheryl L. Stack, as contained in the indictment." /s/ Peter M. Naoroz, Foreman, and Count 2 - "We, the jury, find the defendant guilty of using or displaying in a threatening manner a firearm while committing the attempted robbery of Sheryl L. Stack, as contained in the indictment." /s/ Peter M. Naoroz, Foreman;

(Case No. 94-644-F) Count 1 - "We, the jury, find the defendant guilty of aggravated malicious wounding of Edward Martin, as contained in the indictment." /s/ Peter M. Naoroz, Foreman, and Count 2 - "We, the jury, find the defendant guilty of using or displaying in a threatening manner a firearm while committing the aggravated malicious wounding of Edward Martin, as contained in the indictment." /s/ Peter M. Naoroz, Foreman; and

(Case No. 94-645-F) Count 1 - "We, the jury, find the defendant guilty of robbery of Edward Martin, as contained in the indictment." /s/ Peter M. Naoroz, Foreman, and Count 2 - "We, the jury, find the defendant guilty of using or displaying in a threatening manner a firearm while committing the robbery of Edward Martin, as contained in the indictment." /s/ Peter M. Naoroz, Foreman.

Thereupon, the jury, having heard further evidence, instructions of the Court, and argument of counsel as to the defendant's punishment in Case No. 94-642-F, 94-644-F & 94-645-F, retired again to its room to consult of a verdict and after some time returned into Court with the following verdicts, to-wit:

(Case No. 94-644-F) Count 1 - "We, the jury, find the defendant guilty of aggravated malicious wounding of Edward Martin, do hereby fix his punishment at confinement in the Department of Corrections for Life." /s/ Peter M. Naoroz, Foreman, and Count 2 - "We, the jury, fix the defendant's punishment at confinement in the Department of Corrections for five (5) years." /s/ Peter M. Naoroz, Foreman (on the conviction of using or displaying in a threatening manner a firearm while committing the aggravated malicious wounding of Edward Martin);

(Case No. 94-645-F) Count 1 - "We, the jury, find the defendant guilty of robbery of Edward Martin, do hereby fix his punishment at confinement in the Department of Corrections for 25 years." /s/ Peter M. Naoroz, Foreman, and Count 2 - "We, the jury, fix the defendant's punishment at confinement in the Department of Corrections for five (5) years." /s/ Peter M. Naoroz, Foreman (on the conviction of using or displaying in a threatening manner a firearm while committing the robbery of Edward Martin); and

(Case No. 94-642-F) Count 1 - "We, the jury, find the defendant



guilty of attempted robbery of Sheryl L. Stack, do hereby fix his punishment at confinement in the Department of Corrections for 10 years." /s/ Peter M. Naoroz, Foreman, and Count 2 - "We, the jury, fix the defendant's punishment at confinement in the Department of Corrections for five (5) years." /s/ Peter M. Naoroz, Foreman (on the conviction of using or displaying in a threatening manner a firearm while committing the attempted robbery of Sheryl L. Stack)

Whereupon, counsel for the defendant moved the Court to set aside the verdicts as being contrary to the law and the evidence, which motion the Court overruled.

Thereupon, the jury was adjourned until October 6, 1994, at 9:00 a.m., for further disposition as to Case No. 94-641-F.

Whereupon, after allocution of the defendant, it is Ordered by the Court, in accordance with the jury verdicts that the defendant be confined as follows:

(Case No. 94-644-F) Count 1 - Life in the Department of Corrections on the conviction of aggravated malicious wounding of Edward Martin, and Count 2 - five (5) years in the Department of Corrections on the conviction of using a firearm while committing the aggravated malicious wounding of Edward Martin;

(Case No. 94-645-F) Count 1 - twenty-five (25) years in the Department of Corrections on the conviction of robbery of Edward Martin, and Count 2 - five (5) years in the Department of Corrections on the conviction of using a firearm while committing the robbery of Edward Martin; and

(Case No. 94-642-F) Count 1 - ten (10) years in the Department of Corrections on the conviction of attempted robbery of Sheryl L. Stack, and Count 2 - five (5) years in the Department of Corrections on the conviction of using a firearm while committing the attempted robbery of Sheryl L. Stack.

Thereupon, the defendant was remanded to the custody of the Sheriff of the City of Richmond.

Enter this Order,

 Judge

In deciding what the facts are, you must consider all the evidence. In doing this, you must decide which testimony to believe and which testimony not to believe. You may disbelieve all or any part of any witness's testimony. In making that decision, you may take into account a number of factors including the following:

1. Was the witness able to see, or hear, or know the things about which the witness testified?
2. How well was the witness able to recall and describe those things?
3. What was the witness's manner while testifying?
4. Did the witness have any interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in the case?
5. How reasonable was the witness's testimony considered in light of all the evidence in the case?
6. Was the witness's testimony contradicted by what that witness has said or done at another time, or by the testimony of other witnesses, or by other evidence?

In deciding whether or not to believe a witness, keep in mind that people sometimes forget things. You need to consider therefore whether a contradiction is an innocent lapse of memory or an intentional falsehood, and that may depend on whether it has do with an important fact or with only a small detail.

These are some of the facts you may consider in deciding whether to believe testimony.

The weight of the evidence presented by each side does not necessarily depend on the number or witnesses testifying on one side or the other. You must consider all the evidence in the case, and you may decide that the testimony of a smaller number of witnesses on one side has greater weight than that of a larger number on the other.

All of these are matters for you to consider in finding the facts.



INSTRUCTION NO. 1

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

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

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

A handwritten signature in dark ink, appearing to be "L. J. [unclear]" or similar, written in a cursive style.

INSTRUCTION NO. 2

You are the judges of the facts, the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any has been shown, their prior inconsistent statements. While you have no right to arbitrarily disregard believable testimony of any witness, you do have a right to discard or accept in whole or in part the testimony of any witness when you consider it in connection with the other evidence in the case. You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

*Given  
JRW*

INSTRUCTION NO. 3

A principal in the first degree is the person who actually commits the crime. A principal in the second degree is a person who is present, aiding and abetting, by helping in some way in the commission of the crime. Presence or consent alone is not sufficient to constitute aiding and abetting. It must be shown that the defendant intended his words, gestures, signals or actions to in some way encourage, advise, or urge, or in some way help the person committing the crime to commit it.

A principal in the second degree is liable for the same punishment as the person who actually committed the crime. The Commonwealth must prove beyond a reasonable doubt that the defendant is a principal in the second degree.

*Hein*  
*BBW*

INSTRUCTION NO. 4

Willful, deliberate, and premeditated means the adoption of a specific intent to kill. The intent to kill must come into existence at some time before the killing, but need not exist for any particular length of time.

*Guin*  
*BBW*



INSTRUCTION NO. 5

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

- (1) That the defendant killed Sheryl L. Stack; and
- (2) That the killing was willful, deliberate and premeditated; and
- (3) That the killing occurred during the commission of robbery of Edward Martin while the defendant was armed with a deadly weapon.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty.

As a lesser included offense, if you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first and the second elements of the offense as charged but do not find beyond a reasonable doubt that the killing occurred during the commission of robbery of Edward Martin while the defendant was armed with a deadly weapon, then you find the defendant guilty of first degree murder.

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

INSTRUCTION NO 6

The defendant is charged with the crime of using or displaying in a threatening manner a firearm while committing the capital murder of Sheryl L. Stack. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant used a firearm; and
- (2) That the use was while committing the capital murder of Sheryl L. Stack.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty.

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

*Quin*  
*offa*

INSTRUCTION NO. 7

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

- (1) That the defendant intended to steal; and
- (2) That United States currency and personal property was taken; and
- (3) That the taking was from Edward Martin or in his presence; and
- (4) That the taking was against the will of the owner or possessor; and
- (5) That the taking was accomplished by the threat or presenting of a firearm.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty of robbery.

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

A handwritten signature in cursive script, appearing to read "Lucas" over "J. B.", is located in the lower right quadrant of the page.

INSTRUCTION NO. 8

The defendant is charged with the crime of using or displaying in a threatening manner a firearm while committing the robbery of Edward Martin. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant used a firearm; and
- (2) That the use was while committing the robbery of Edward Martin.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty.

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

A handwritten signature in dark ink, appearing to be "L. Martin" or similar, written in a cursive style.



INSTRUCTION NO. 9

The defendant is charged with the crime of aggravated malicious wounding of Edward Martin. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- 1) That the defendant wounded Edward Martin; and
- 2) That such wounding was with intent to maim, disfigure, disable or kill Edward Martin; and
- 3) That the act was done <sup>with</sup> malice; and
- 4) That as a result of the act Edward Martin is severely injured and is caused to suffer permanent and significant physical impairment.

If you find from the evidence the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty of aggravated malicious wounding.

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

A handwritten signature, possibly reading "L. J. [unclear]", is written in dark ink.

INSTRUCTION NO 10

The defendant is charged with the crime of using or displaying in a threatening manner a firearm while committing the aggravated malicious wounding of Edward Martin. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant used a firearm; and
- (2) That the use was while committing the aggravated malicious wounding of Edward Martin.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty.

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

A handwritten signature in dark ink, appearing to be 'L. J. Brown' or similar, written in a cursive style.

INSTRUCTION NO. 11

The defendant is charged with the crime of attempted robbery of Sheryl L. Stack. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant intended to commit robbery; and
- (2) That the defendant did a direct act toward the commission of the robbery which amounted to the beginning of the actual commission of the robbery.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty of attempted robbery.

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

*Lucin*  
*[Signature]*

INSTRUCTION NO 12

The defendant is charged with the crime of using or displaying in a threatening manner a firearm while committing the attempted robbery of Sheryl L. Stack. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant used a firearm; and
- (2) That the use was while committing the attempted robbery of Sheryl L. Stack.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty.

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

A handwritten signature in cursive script, appearing to read "L. J. Smith" or similar, with a large flourish at the end.



INSTRUCTION NO. 13

It is not necessary that each element of the offense be proved by direct evidence, for an element may also be proved by circumstantial evidence. You may convict the defendant on circumstantial evidence alone, or on circumstantial evidence combined with other evidence, if you believe from all the evidence that the defendant is guilty beyond a reasonable doubt.

When the Commonwealth relies upon circumstantial evidence, the circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt.

The evidence as a whole must exclude every reasonable theory of innocence.

*Lucian*  
*JBW*

INSTRUCTION NO. 5

The Court further instructs the jury that the following forms of verdicts will be used in this case:

1. GUILTY

We, the jury, find the defendant guilty of capital murder of Sheryl L. Stack, as contained in the indictment.

*[Signature]*  
Foreman

2. GUILTY

We, the jury, find the defendant guilty of the lesser included offense of first degree murder of Sheryl L. Stack, as contained in the indictment.

\_\_\_\_\_  
Foreman

3. NOT GUILTY

We, the jury, find the defendant not guilty.

\_\_\_\_\_  
Foreman

INSTRUCTION NO. 6

The Court further instructs the jury that the following forms of verdicts will be used in this case:

1. GUILTY

We, the jury, find the defendant guilty of using or displaying in a threatening manner a firearm while committing the capital murder of Sheryl L. Stack, as contained in the indictment.

  
Foreman

2. NOT GUILTY

We, the jury, find the defendant not guilty.

\_\_\_\_\_  
Foreman

INSTRUCTION NO. 7

The Court further instructs the jury that the following forms of verdicts will be used in this case:

1. GUILTY

We, the jury, find the defendant guilty of robbery of Edward Martin, as contained in the indictment.

John M. Howard.  
Foreman

2. NOT GUILTY

We, the jury, find the defendant not guilty.

\_\_\_\_\_  
Foreman



INSTRUCTION NO. B

The Court further instructs the jury that the following forms of verdicts will be used in this case:

1. GUILTY

We, the jury, find the defendant guilty of using or displaying in a threatening manner a firearm while committing the robbery of Edward Martin, as contained in the indictment.

  
Foreman

2. NOT GUILTY

We, the jury, find the defendant not guilty.

\_\_\_\_\_  
Foreman

INSTRUCTION NO. 9

The Court further instructs the jury that the following forms of verdicts will be used in this case:

1. GUILTY

We, the jury, find the defendant guilty of aggravated malicious wounding of Edward Martin, as contained in the indictment.

*John M. [Signature]*  
Foreman

2. NOT GUILTY

We, the jury, find the defendant not guilty.

\_\_\_\_\_  
Foreman

INSTRUCTION NO. 10

The Court further instructs the jury that the following forms of verdicts will be used in this case:

1. GUILTY

We, the jury, find the defendant guilty of using or displaying in a threatening manner a firearm while committing the aggravated malicious wounding of Edward Martin, as contained in the indictment.

  
Foreman

2. NOT GUILTY

We, the jury, find the defendant not guilty.

\_\_\_\_\_  
Foreman

INSTRUCTION NO. 11

The Court further instructs the jury that the following forms of verdicts will be used in this case:

1. GUILTY

We, the jury, find the defendant guilty of attempted robbery of Sheryl L. Stack, as contained in the indictment.

  
\_\_\_\_\_  
Foreman

2. NOT GUILTY

We, the jury, find the defendant not guilty.

\_\_\_\_\_  
Foreman



INSTRUCTION NO. 12

The Court further instructs the jury that the following forms of verdicts will be used in this case:

1. GUILTY

We, the jury, find the defendant guilty of using or displaying in a threatening manner a firearm while committing the attempted robbery of Sheryl L. Stack, as contained in the indictment.

  
Foreman

2. NOT GUILTY

We, the jury, find the defendant not guilty.

\_\_\_\_\_  
Foreman

INSTRUCTION NO. \_\_\_\_\_

You have found the defendant guilty of the felony of aggravated malicious wounding of Edward Martin and have heard evidence relevant to the punishment.

Upon consideration of all the evidence you have heard, you shall fix his punishment at:

- 1) Imprisonment for life; or
- 2) Confinement in the Department of Corrections for not less than twenty (20) years and a fine of not more than \$100,000.00.

*Handwritten signature*

INSTRUCTION NO. \_\_\_\_\_

You have found the defendant guilty of the felony of robbery of Edward Martin and have heard evidence relevant to the punishment.

Upon consideration of all the evidence you have heard, you shall fix his punishment at:

- 1) Imprisonment for life; or
- 2) Confinement in the Department of Corrections for not less than five (5).

A handwritten signature in cursive script, appearing to read "H. J. Paul", is written in the center of the page.

INSTRUCTION NO. \_\_\_\_\_

You have found the defendant guilty of the felony of attempted robbery of Sheryl L. Stack and have heard evidence relevant to the punishment.

Upon consideration of all the evidence you have heard, you shall fix his punishment at:

- 1) Confinement in the Department of Corrections for not less than two (2) years nor more than ten (10) years; or
- 2) Confinement in the Department of Corrections for not less than two (2) years nor more than ten (10) years and a fine of not more than \$100,000.00.

A handwritten signature in cursive script, appearing to read "L. W. Smith" or similar, located in the lower right quadrant of the page.



INSTRUCTION NO. \_\_\_\_\_

The Court further instructs the jury that the following forms of verdicts will be used in this case:

We, the jury, find the defendant guilty of aggravated malicious wounding of Edward Martin, do hereby fix his punishment at confinement in the Department of Corrections for Life.

John H. Martin  
Foreman

INSTRUCTION NO. \_\_\_\_\_

You have found the defendant guilty of the felony of using or displaying in a threatening manner a firearm while committing the aggravated malicious wounding of Edward Martin and have heard evidence relevant to the punishment.

Upon consideration of all the evidence you have heard, you shall fix his punishment at confinement in the Department of Corrections for five (5) years.

We, the jury, fix the defendant's punishment at confinement in the Department of Corrections for five (5) years.

  
\_\_\_\_\_  
Foreman

INSTRUCTION NO. \_\_\_\_\_

The Court further instructs the jury that the following forms of verdicts will be used in this case:

We, the jury, find the defendant guilty of robbery of Edward Martin, do hereby fix his punishment at confinement in the Department of Corrections for 25 years ~~\_\_\_\_\_~~.

Wm H. Hootz.  
Foreman

INSTRUCTION NO. \_\_\_\_\_

You have found the defendant guilty of the felony of using or displaying in a threatening manner a firearm while committing the robbery of Edward Martin and have heard evidence relevant to the punishment.

Upon consideration of all the evidence you have heard, you shall fix his punishment at confinement in the Department of Corrections for five (5) years.

We, the jury, fix the defendant's punishment at confinement in the Department of Corrections for five (5) years.

  
Foreman



INSTRUCTION NO. \_\_\_\_\_

The Court further instructs the jury that the following forms of verdicts will be used in this case:

We, the jury, find the defendant guilty of attempted robbery of Sheryl L. Stack, do hereby fix his punishment at confinement in the Department of Corrections for 10 years.

  
Foreman

INSTRUCTION NO. \_\_\_\_\_

You have found the defendant guilty of the felony of using or displaying in a threatening manner a firearm while committing the attempted robbery of Sheryl L. Stack and have heard evidence relevant to the punishment.

Upon consideration of all the evidence you have heard, you shall fix his punishment at confinement in the Department of Corrections for five (5) years.

We, the jury, fix the defendant's punishment at confinement in the Department of Corrections for five (5) years.

  
\_\_\_\_\_  
Foreman

V I R G I N I A:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

Manchester Division

\* \* \* \* \*

COMMONWEALTH OF VIRGINIA

-vs-

ANDRE L. GRAHAM

\* \* \* \* \*

FILE NOS. 94-641F  
THROUGH 94-648F

Transcript of the Third day of Trial in the  
above-styled matter, when heard on October 6, 1994, before  
the Honorable James B. Wilkinson, Judge and jury.

APPEARANCES:

LEARNED D. BARRY, ESQ., Deputy Commonwealth's Attorney for  
the City of Richmond;

ROBERT P. GEARY, ESQ., 2025 E. Main Street, Richmond,  
Virginia 23223, and JEFFREY L. EVERHART, ESQ., 201 N.  
Boulevard, Richmond, Virginia 23220, counsel for the  
defendant;

The defendant, Andre L. Graham, present in person.

## I N D E X

WITNESSES:	DIRECT:	CROSS:	REDIRECT:
W. F. Showalter	510		
Sherry Oliver	523	525	527
Leigh D. Hagan, M.D.	527	540	
Jacqueline Graham	544		

EXHIBITS:	PAGE:
For the Commonwealth:	
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19 - Photo	514
For the Defense:	
1 - Curriculum Vitae	530



1 THE CLERK: The case of Commonwealth  
2 of Virginia against Andre Graham. Is the  
3 Commonwealth ready, Mr. Barry?

4 MR. BARRY: Yes, ma'am.

5 THE CLERK: Is the defendant ready,  
6 Mr. Geary, Mr. Everhart?

7 MR. GEARY: Yes, sir.

8 MR. EVERHART: Yes, ma'am.

9 THE COURT: All right. Is there  
10 anything that needs to be brought up before the  
11 jury returns?

12 MR. GEARY: Yes, sir, Judge. Mr.  
13 Everhart and I have checked and Mr. Barry.  
14 There are no witnesses in the courtroom other  
15 than the persons allowed to stay by statute.  
16 Is that correct?

17 MR. BARRY: Yes, sir, that's correct.

18 MR. GEARY: Judge, I would like to  
19 use the podium, if I may. There is a motion I  
20 would like to make.

21 THE COURT: Do what?

22 MR. GEARY: I would like to have the  
23 podium so I can put these books up there.

24 THE COURT: All right.

25 MR. GEARY: Judge, we are here on the

1 second phase of, or third phase, what was the  
2 second phase before July 1st of 1994, in regard  
3 to the capital murder case. We are in what's  
4 called the penalty phase. Under 19.2-264.4C,  
5 the statute says the penalty of death shall not  
6 be imposed unless the Commonwealth shall prove  
7 beyond a reasonable doubt that there is a  
8 probability based upon evidence of the prior  
9 history of the defendant or of the  
10 circumstances surrounding the commission of the  
11 offense of which he is accused that he would  
12 commit criminal acts of violence that would  
13 constitute a continuing serious threat to  
14 society, or that his conduct in committing the  
15 offense was outrageously or wantonly vile,  
16 horrible or inhuman, in that it involved  
17 torture, depravity of mind or aggravated  
18 battery to the victim. As the Court knows,  
19 Your Honor, there are two factors, the generic  
20 future dangerousness and the generic vileness  
21 which has three sub-parts which are torture,  
22 aggravated battery, or outrageous or depravity  
23 of mind. The first motion that I wish to  
24 address, Judge, deals with the two statutory  
25 aggravators. The fact that now under Virginia

1 law under 19.264.5 Code of Virginia it deals  
2 with post-sentence reports. If the jury in a  
3 capital murder case in Virginia returns a  
4 verdict of death then by statute there is a  
5 post-sentence report which is to be submitted  
6 to the Court. We come back and the Judge then  
7 hears any evidence that may be offered and any  
8 arguments that may be offered and at that time  
9 pursuant to that statute it says, and I quote,  
10 "that the post-sentence reports shall in all  
11 cases contain a victim impact statement. Such  
12 statement shall contain the same information  
13 and be prepared in the same manner as victim  
14 impact statements prepared pursuant to 19.2-  
15 299.1." And, it goes on talking about what the  
16 Court's authority is then. I understand from  
17 the Commonwealth, Judge, with the discovery  
18 that has been done in this case both the trial  
19 phase discovery, and this phase of discovery,  
20 the meetings with Mr. Barry and Mr. Everhart  
21 and I have had together that a significant  
22 portion of the evidence to be offered by the  
23 Commonwealth in the penalty phase the  
24 Commonwealth versus Graham today is victim,  
25 what is called "victim impact." That evidence

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1 includes a family member of the deceased.  
2 According to what Mr. Barry has told me that  
3 evidence would include the testimony of what I  
4 think he referred to or I referred to community  
5 people who knew the victim, Ms. Stack, in one  
6 way or another, knew her or were associated  
7 with her. It is our position that under  
8 Virginia law that under the statute that's not  
9 allowed. The statute talks in terms of two.

10 THE COURT: What statute are you  
11 talking about?

12 MR. GEARY: Two statutes. The  
13 statute I read to you first, Your Honor, is  
14 19.2-264.4C, that's the death penalty statute,  
15 two statutory aggravators.

16 THE COURT: 19.2 --

17 MR. GEARY: 264.4C.

18 THE COURT: All right.

19 MR. GEARY: Judge, in that statute  
20 the Virginia Supreme Court said the burden in  
21 this phase of the case is upon the Commonwealth  
22 to prove initially in a prima facie way that  
23 one or both of the statutory aggravators  
24 existed. And the statutory aggravators are  
25 again future dangerousness and/or the



1 aggravated battery violence. In order for the  
2 Commonwealth to do that, Judge, they cannot put  
3 on any evidence that is not cited in one of  
4 those aggravators. The evidence of family  
5 members, the evidence of community members does  
6 not go to each of the aggravators. It is  
7 therefore barred by Virginia law, not by the  
8 Constitution of the United States, not by any  
9 Supreme Court decision of the United States,  
10 not by any decision of the Virginia Supreme  
11 Court, but by the General Assembly when they  
12 enacted this law. The law says the  
13 Commonwealth is bound to two aggravators. That  
14 is clear, Judge, when you look at 19.2-264.5,  
15 because in that section it says that the Judge  
16 when he hears the case after the jury has  
17 returned a verdict of guilt in a death penalty  
18 the Judge then they gets the victim impact  
19 through what we normally call a presentence  
20 report in most cases but in a death penalty  
21 case it is called a post-sentence report.  
22 Clearly the statutory scheme in Virginia for  
23 the General Assembly is that a victim impact  
24 statement does not come to the jury. They do  
25 not hear anything about it because it is

1 prohibited by statute. The Supreme Court, the  
2 U. S. Supreme Court --

3 THE COURT: Excuse me. This is not -  
4 - get me 4A of the Code. They forgot to put  
5 the new supplements in.

6 MR. GEARY: Judge, the United States  
7 Supreme Court has talked about victim impact  
8 twice in the past few years and both times the  
9 Supreme Court of the United States was talking,  
10 telling the state legislatures that they were  
11 not prohibited or were prohibited from doing  
12 something. In Booth v. Maryland, 198, they said  
13 that the Eighth Amendment prohibited a jury  
14 from knowing victim impact evidence. They  
15 reversed themselves four years later in Payne  
16 v. Tennessee and I have the Lawyer's Edition  
17 case on that, Judge. It's 115 Lawyer's  
18 Edition, 720. If the Court wishes to read it I  
19 have it right here. The Supreme Court said in  
20 Payne that a state may, consistent with the  
21 Eighth Amendment, allow victim impact  
22 testimony. It didn't say it had to. It simply  
23 said it was not prohibited from doing that.  
24 Our law, our statutory law does not allow  
25 victim impact. And the motion to eliminate

1 this Court is to prohibit the Commonwealth from  
2 offering any evidence which would be victim  
3 impact which would not go to one of the two  
4 aggravators in this case which is future  
5 dangerousness and vileness.

6 MR. BARRY: Judge, I think I can save  
7 us all a lot of time. I have an incredibly  
8 innocent victim literally an angel on earth and  
9 I am, and I was fully prepared to use victim  
10 impact evidence. I could have brought in half  
11 of the town of South Hill, quite frankly, but  
12 there is a problem. And the truth of the  
13 matter is that I am not prepared to push the  
14 envelope in this case, even though God knows I  
15 want to, because the United States Supreme  
16 Court has said why not, why can't you use the  
17 character of the victim, why can't you let us  
18 know what a wonderful person she was? But, Mr.  
19 Geary is right. Virginia law specifically says  
20 no victim impact at all until it comes to you  
21 at the post-sentence report. So, I'm conceding  
22 this point. I will not use victim impact  
23 evidence.

24 MR. GEARY: Judge, I take it from  
25 what Mr. Barry says that also you can't argue,

1           you cannot argue the character of the victim?

2           MR. BARRY: I will not.

3           THE COURT: It doesn't say anything -  
4           - you're not talking about character?

5           MR. BARRY: Well, the Supreme Court  
6           even nails us on this. They specifically say  
7           that victim impact is defined as character of  
8           the victim and the impact it had on its family.

9           THE COURT: Well, the impact on the  
10          family is one thing. What case is that? Let  
11          me see it.

12          MR. BARRY: All right.

13          THE COURT: And, I'll get a photostat  
14          copy of it.

15          MR. BARRY: It's Payne v. Tennessee.  
16          And, it's in the memo I provided the Court.  
17          Payne held that the victim impact evidence,  
18          i.e., evidence of the victim's character and  
19          impact of the victim's death on his family and  
20          others. It's the word straight from Payne.

21          THE COURT: Well, if you're not going  
22          to present it today.

23          MR. BARRY: We are going to have to  
24          get the law changed. This is a good case, a  
25          good example of why the law has to be changed.

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1 But, I am conceding. Thank you, Judge.

2 THE COURT: All right.

3 MR. GEARY: Thank you, Judge. The  
4 second motion to be raised concerns the first  
5 aggravator or predicator that was in the  
6 statute which is part C. It talks about  
7 vileness, and again this is something that Mr.  
8 Barry and I have discussed. I've looked at the  
9 cases and I've shown him some of the cases I  
10 will talk about. In Virginia since 19 -- I  
11 guess the Peterson case was the first one, Your  
12 Honor. There have been a series of four cases  
13 that deal with vileness in gunshot cases:  
14 Peterson, Boggs, Thomas, and the last one was  
15 Stockton. That was the case, if you remember,  
16 Judge, the fellow was retried. He got the  
17 death penalty, he was retried and got the death  
18 penalty the second time. The latest Stockton  
19 case is the fourth case to deal with whether or  
20 not the issues always have been if there are  
21 multiple gunshot wounds, whether or not that is  
22 sufficient to establish vileness. And in the  
23 very first case, Judge, Peterson v.  
24 Commonwealth, in that case the Virginia Supreme  
25 Court, that's 225 Va., 289, in that case the

1 Court did not consider the issue because they  
2 said that counsel had waived the trial. But  
3 they talked about it. And, this is what the  
4 Supreme Court of Virginia said in Peterson v.  
5 Commonwealth. "A death sentence based upon  
6 vileness is not supportive by the evidence  
7 where the victim died almost instantaneously  
8 from a single gunshot wound." Citing the U. S.  
9 Supreme Court case of Godfrey v. Georgia, a  
10 1980 case, they go on to say the lawyer didn't  
11 ask for the instruction or objected and did not  
12 discuss the ramifications of it. The second  
13 case, Judge, 229 Va., 469, Watkins v.  
14 Commonwealth, in that case one of the issues  
15 raised on appeal to the Virginia Supreme Court  
16 in the death penalty case was the vileness  
17 issue. On page 489 the court talked about and  
18 cited 19.2-264.2C, defined what aggravated  
19 battery meant, "which qualitatively and  
20 quantitatively is more culpable than the  
21 minimum necessary to accomplish an act of  
22 murder." That court then cited cases we're  
23 familiar with, Smith, Edmonds, Turner. And, it  
24 went on to say in that case "the evidence  
25 established Watkins fired four shots at Barker,

1 inflicting one facial and two chest wounds."  
2 It talked about other things that happened,  
3 which is a store robbery. The court said there  
4 an aggravated, and I quote on page 489, "an  
5 aggravated battery is not proven where the  
6 evidence shows that the victim died almost  
7 instantaneously from a single gunshot wound."  
8 Then they again quote themselves from Peterson  
9 again and the U. S. Supreme Court case of  
10 Godfrey v. Georgia. They go on to say,  
11 "however, proof of infliction of multiple  
12 wounds may meet the test for an aggravated  
13 battery." Then they quote their previous case  
14 of Boggs v. Commonwealth. In the third case in  
15 Thomas v. Commonwealth, which was decided in  
16 1992, 244 Va., page number one, that defendant  
17 was given death penalty and raised the vileness  
18 issue. The Court on page 24 talked about  
19 standard again and say this in terms of  
20 aggravated battery to mean battery which again,  
21 qualitatively and quantitatively more culpable  
22 than the minimum necessary to accomplish the  
23 act of murder, while a single gunshot wound  
24 causing instantaneous death, instantaneous  
25 death does not constitute an aggravated



1 battery, citing Peterson, where there is  
2 multiple gunshot wounds may constitute  
3 aggravated battery. Where there is an  
4 appreciable lapse of time between the first  
5 shot and the last and where death does not  
6 result instantaneously from the first. In  
7 Stockton, which is the last case, Judge, in  
8 that case they upheld the death penalty because  
9 in addition to the shooting in the Stockton  
10 case there was ample evidence of body severing,  
11 of parts being severed after the shooting took  
12 place. So, clearly the aggravation and  
13 vileness was present.

14 This case presents a single shot,  
15 Judge, and the testimony from Dr. Daniel, the  
16 Medical Examiner, in regards to Ms. Stack, was  
17 that she lost consciousness very quickly after  
18 being shot. She was comatose at MCV. Dr.  
19 Broaddus, the neurosurgeon that testified, said  
20 that when he treated Ms. Stack she was I quote,  
21 "deeply comatose." He operated and that it was  
22 very clear within 12 hours I think he said that  
23 things were bad. Based on that evidence,  
24 Judge, it's the defendant's position in regard  
25 to the vileness predicator that the



1 Commonwealth should not be allowed to go  
2 forward. In regard to the three sub-parts,  
3 there is no torture evidence in this case. In  
4 regard to aggravated battery, there is  
5 absolutely no evidence of aggravated battery  
6 given the definition that the Virginia Supreme  
7 Court has given to that section. And, there is  
8 no evidence --

9 THE COURT: Doesn't that come in  
10 after I hear the evidence?

11 MR. GEARY: Excuse me?

12 THE COURT: Doesn't this come in  
13 after I hear the evidence and I rule on these  
14 points, the instructions?

15 MR. GEARY: Judge, I think you have  
16 heard the evidence.

17 THE COURT: Well, I have heard the  
18 evidence. But, I don't know what may be coming  
19 up.

20 MR. GEARY: Judge, I am --

21 THE COURT: I am not hearing this  
22 case like you and Commonwealth. I am hearing  
23 it for the first time.

24 MR. GEARY: As far as I know the  
25 evidence the Court heard from the witnesses in

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1 the first phase of the case, what Mr. Martin  
2 and the doctors said, that is the  
3 Commonwealth's evidence with regard to  
4 vileness. I don't think, and Mr. Barry can  
5 correct me if I am wrong, again, Judge, we have  
6 done a lot of discovery and we talked an awful  
7 lot. There is no additional evidence in regard  
8 to vileness.

9 THE COURT: Well, that may be correct  
10 and I will be glad to rule on the point.  
11 That's fine.

12 MR. GEARY: I think constitutionally  
13 that Mr. Graham is entitled if the case goes  
14 forward, if there in fact is no further  
15 evidence, that the Court can rule now so the  
16 Commonwealth cannot seek to put on evidence and  
17 cannot argue in opening statement that there is  
18 vileness in this case. And, if that's what  
19 they have, and I represent to the Court that is  
20 what my understanding --

21 THE COURT: What if this young lady  
22 suffered for 12 hours in agony and they bring  
23 on some evidence of that, you mean they can't  
24 bring that in?

25 MR. GEARY: Judge, as I understand

1 it, these four cases I talked about, they all  
2 talk about --

3 THE COURT: I am very familiar with  
4 one gunshot. The Supreme Court of the United  
5 States, the Supreme Court of Virginia has held  
6 that battery is not aggravated, they have to  
7 use more force. I am bound by that. I intend  
8 to follow that, but I don't know the evidence  
9 at this point. I did hear the doctor say she  
10 was comatose, that she lived some while after  
11 that but I don't know what evidence they have.  
12 If I was as prepared as you and Commonwealth's  
13 Attorney I wouldn't have any problem. But,  
14 you're asking me to limit something that I  
15 don't know about. I doubt that Mr. Barry can  
16 go, maybe he can't go into further than that.

17 MR. GEARY: Judge, I think if that's  
18 the case I think the Commonwealth has a duty to  
19 tell us, to tell the Court and to tell the  
20 defense, that we don't have any additional  
21 vileness.

22 THE COURT: Well, I will rule on it  
23 at that time.

24 MR. GEARY: Those are the only two  
25 motions I have.

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1 THE COURT: All right. Well, the  
2 Commonwealth's Attorney concedes he is not  
3 going to include victim impact.

4 MR. GEARY: That's what I understand  
5 we said, Judge.

6 THE COURT: All right. The one, if  
7 there is any further evidence than the one  
8 single gunshot wound.

9 MR. BARRY: Judge, I can tell the  
10 Court now we have no secrets in this courtroom  
11 anymore. I am going to put on evidence  
12 obviously of future dangerousness. I am going  
13 to in some detail go through the killing in  
14 Chesterfield County that he has already been  
15 convicted of. The Court has heard all my  
16 evidence as to vileness. I will tell the Court  
17 that it is clear that there is no aggravated  
18 battery. But, I still have depravity of mind  
19 left. You're well aware of the facts in this  
20 case as far as that they were laid, they were  
21 laid on the ground face down in the dirt, they  
22 were told nothing was going to happen to them.  
23 The young Edward Martin was shot and that  
24 Sheryl Stack while laying face down in a  
25 helpless position had at least two or three



1 seconds of absolute sheer terror before she  
2 herself was shot. And, if the defense is  
3 telling me that's not vile, that I can't argue  
4 that to the jury, that that's not an issue of  
5 fact for the jury to determine. You have heard  
6 all of the facts, that psychological torture  
7 if there ever was. So, I am telling the Court  
8 now you have heard all the vileness that I  
9 think you need to hear, now it is time for the  
10 jury to decide whether or not that, in effect,  
11 was sufficiently vile.

12 THE COURT: All right.

13 MR. GEARY: Judge, I will accept that  
14 if that's what the Commonwealth is going to  
15 concede, but I would suggest at the proper time  
16 what the factual basis he says he has does not  
17 meet the standard from the Virginia Supreme  
18 Court.

19 THE COURT: Well, there is some  
20 evidence in this case, as I recall, that the  
21 young man and young lady were holding hands  
22 trying to communicate. There would be some  
23 indication to me there was some suffering and  
24 the young lady did live a bit of time after  
25 that. I don't know about the Supreme Courts

1 but I live down here with the people and that  
2 was a mighty touching part of this case. Those  
3 two young people grasping each other's hands,  
4 struggling for life. I will rule on that point  
5 at the proper time.

6 MR. GEARY: Thank you, Judge.

7 THE COURT: But, certainly that is a  
8 point of suffering and so forth. All right,  
9 Mr. Barry, if you're ready and Mr. Geary, if  
10 you're ready, I will call the jury in. We will  
11 proceed.

12 MR. GEARY: Yes, sir.

13 THE COURT: All right. Return the  
14 jury.

15 JURY IN

16 THE COURT: Good morning, ladies and  
17 gentlemen of the jury. Counsel at the bar  
18 waive the poll of the jury?

19 MR. BARRY: Yes, sir.

20 MR. GEARY: Defense waives.

21 THE COURT: All right, ladies and  
22 gentlemen of the jury, I will assume that you  
23 did not violate the admonition of the Court and  
24 listen or read anything about this case, didn't  
25 discuss it with anyone. All right. Is that

1 sufficient, gentlemen? Do you wish more  
2 inquiry?

3 MR. GEARY: Judge, I looked at all of  
4 them and they all indicated they did not. I  
5 will accept that. That's fine.

6 THE COURT: All right, Mr. Barry, you  
7 may call your first witness. Excuse me. Let  
8 me explain, we are now going into the aspects  
9 of the capital murder which you convicted the  
10 defendant. This will be evidence in  
11 aggravation and evidence in mitigation which  
12 are different rules in this than it was in the  
13 other. But, that's the reason we have to do it  
14 in this part. I know it is highly legal but  
15 I'm trying to explain it to you the best I can  
16 in the short time that I have. So, this  
17 evidence will be limited to aggravation and  
18 mitigation as far as the capital murder is  
19 concerned to assist you in fixing the  
20 punishment in that crime. Mr. Barry, your  
21 first witness?

22 MR. BARRY: Detective Showalter.

23 THE CLERK: You want them resworn?

24 THE COURT: No, they are still under  
25 oath.

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1 MR. BARRY: Judge, while he is  
2 getting ready I am, for the purpose of this  
3 phase of the hearing, reintroducing  
4 Commonwealth's exhibit number 15, factors in  
5 aggravation, his convictions.

6 THE COURT: All right. Exhibit  
7 number 15 will be a part of this.

8  
9 W. F. SHOWALTER, a witness recalled  
10 on behalf of the Commonwealth, having been previously  
11 sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. BARRY:

14 Q Good morning, sir. Would you  
15 introduce yourself again to these ladies and gentlemen.

16 A Detective W. F. Showalter,  
17 Chesterfield Police Department, Crimes Against Persons  
18 Unit.

19 Q Sir, how long have you been employed  
20 as a Chesterfield County detective?

21 A Twenty-four years, sir.

22 Q Sir, these ladies and gentlemen have  
23 already received information of previous convictions of  
24 the defendant in Chesterfield County. Are you aware of  
25 those convictions?



1 A Yes, sir, I am.

2 Q In fact, you actually participated in  
3 the trial; is that correct?

4 A I was the lead investigator of that  
5 case.

6 Q Would you be kind enough, if you  
7 would, to give us the background on this particular case,  
8 starting with the date that you were actually called to a  
9 location in Chesterfield County.

10 A On November 30th, 1993, 9:30 a.m., in  
11 the morning I was called to respond to 706 Scottingham  
12 Terrace, which is in the County of Chesterfield, where at  
13 the scene we found the bodies of a male and female in that  
14 residence.

15 Q The bodies were identified as who,  
16 sir?

17 A Richard and Rebecca Rosenbluth.

18 Q Would you be kind enough to put your  
19 file down, come out of the box, and I am going to show you  
20 some photographs, and I would ask that you identify them  
21 for the ladies and gentlemen of the jury.

22 NOTE: Received and so marked by the  
23 Clerk as Commonwealth's Exhibit Number 16.

24 BY MR. BARRY: (Continuing)

25 Q Commonwealth's exhibit 16, would you

1 be kind enough to hold that up, starting with this  
2 gentleman and moving from their left to your right?

3 A The gentleman at the top is Richard  
4 Rosenbluth. The young lady at the bottom is Rebecca  
5 Rosenbluth.

6 Q Is that a picture at the time of  
7 their wedding?

8 A Correct.

9 Q Commonwealth's exhibit number 16, I  
10 want you to identify that for the ladies and gentlemen of  
11 the jury and tell them exactly what that purports to be a  
12 picture of?

13 A This is the two that I found at the  
14 residence at 706 Scottingham Terrace.

15 Q Now, specifically as to Rebecca  
16 Rosenbluth --

17 MR. BARRY: That will be  
18 Commonwealth's exhibit number 17.

19 NOTE: Received and so marked by the  
20 Clerk as Commonwealth's Exhibit Number 17.

21 BY MR. BARRY: (Continuing)

22 Q -- I want you to tell these folks  
23 just exactly what that purports to be a picture of?

24 A This is a picture of Rebecca with  
25 four bullet wounds to the head. Correction, three to the

1 head, one to the neck.

2 Q And, that's exactly how you found her  
3 on the day that you entered the apartment; is that  
4 correct, sir?

5 A Yes, sir.

6 NOTE: Received and so marked by the  
7 Clerk as Commonwealth's Exhibit Number 18.

8 Q Let me hold the picture just for a  
9 second, if I may.

10 MR. BARRY: Let the record reflect I  
11 am showing the witness Commonwealth's exhibit  
12 number 11.

13 BY MR. BARRY: (Continuing)

14 Q Have you seen this weapon before,  
15 sir?

16 A Yes, sir, I have.

17 Q What correlation does this weapon  
18 have to this picture?

19 A These two bullet wounds just at the  
20 ear level were delivered, by ballistic comparison, by that  
21 weapon.

22 Q And, finally, sir, if you would be  
23 kind enough to identify that.

24 MR. BARRY: Madam Clerk, what number  
25 are we on?

1 THE CLERK: I am on 19.

2 NOTE: Received and so marked by the  
3 Clerk as Commonwealth's Exhibit Number 19.

4 BY MR. BARRY: (Continuing)

5 Q Commonwealth's exhibit number 19.

6 A This would be a picture of Richard  
7 Rosenbluth, bullet wound through the left eye. The second  
8 shot was when he was shot fired up the nostrils into the  
9 head.

10 Q All right. That's fine. You can  
11 return to your seat. For the murder of Rebecca Rosenbluth  
12 and the robbery of all those people, both Richard and  
13 Rebecca, and use of a gun in the killing and robbery, the  
14 defendant was convicted of that in Chesterfield County?

15 A Correct sir.

16 MR. BARRY: Answer defense counsel's  
17 questions.

18 MR. GEARY: No questions, Judge.

19 THE COURT: All right. Thank you.  
20 You may be excused.

21 MR. BARRY: Thank you, sir. Those  
22 are the matters in aggravation that I wish to  
23 present to the jury this morning.

24 THE COURT: You're saying you rested?

25 MR. BARRY: Yes, I did.



1 THE COURT: All right. Commonwealth  
2 rests.

3 MR. GEARY: I would like to make a  
4 motion.

5 THE COURT: What is that? All right,  
6 ladies and gentlemen of the jury, please  
7 retire. Sheriff, take charge of the jury.

8 JURY OUT

9 THE COURT: All right. The jury has  
10 retired.

11 MR. GEARY: Judge, the motion at the  
12 conclusion of the Commonwealth's case in chief  
13 and the penalty phase in regard to the  
14 aggravating evidence that has been put on by  
15 Detective Showalter and any aggravated evidence  
16 in the first part of the case, I believe that  
17 Detective Showalter's testimony can only go to  
18 one element in the statute, and that is the  
19 issue is future dangerousness. That's the only  
20 thing it goes to because vileness is limited to  
21 the crime that we tried. Vileness does not go  
22 to another case. At this point, Judge, I would  
23 move to strike the Commonwealth's evidence in  
24 regard to vileness on any predicate whether it  
25 is torture, depravity of mind, or aggravated

1 battery. I do move to strike on the issue of  
2 future damages. I think in terms of what I  
3 argued before Judge, now we are in a different  
4 stage in terms of prima facie case after the  
5 Commonwealth rests in chief the penalty phase.  
6 The cases are clear, Judge. I don't think that  
7 there is an arguable case here  
8 constitutionality to say that there was  
9 torture, aggravated battery, depravity of mind,  
10 and based on the facts the Court has heard.  
11 When you look at the other cases, when you look  
12 at cases this Court is very familiar with over  
13 the years, vileness, those are the kinds of  
14 cases that get the treatment from the Supreme  
15 Court in terms of aggravated battery, in terms  
16 of torture, in terms of the depravity of mind.  
17 You and I can throw case names out to each  
18 other in the Richmond area in the past ten  
19 years and we would know the case we are talking  
20 about. The Supreme Court in DeLong v.  
21 Commonwealth, Bassett in Henrico, Stanford in  
22 Henrico, Fitzgerald in Chesterfield. Those are  
23 the cases where there is ample evidence of  
24 depravity of mind. In this case, despite what  
25 the Commonwealth would argue to you, Judge, no

1 case in Virginia, and the Supreme Court now is  
2 probably up to about 70 or 80 published  
3 opinions in death penalty cases, that talks  
4 about a single gunshot to someone.

5 THE COURT: How about DeLong? How  
6 many gunshots?

7 MR. GEARY: DeLong did not get  
8 convicted on vileness. He got convicted on  
9 future dangerousness. He shot a police officer  
10 and decided to end his life sometime last year.  
11 In this case, Judge, when the instruction from  
12 the Supreme Court talks about something that's  
13 qualitatively, quantitatively more than  
14 necessary to commit a murder. That's what they  
15 are talking about. They are talking about a  
16 murder, the predicate offense is a robbery.  
17 Under Virginia law that's how we get to the  
18 capital murder. You have these categories of  
19 offenses. Robbery is one of them. We have  
20 robbery. If you get to the robbery then you  
21 get to a first degree murder during the  
22 commission of the robbery and that becomes  
23 capital murder. And to get to this phase,  
24 Judge, you have to have something factually  
25 that can be demonstrated to have the

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1 heinousness that the State talks about, both  
2 the State Supreme Court and the General  
3 Assembly when they passed these laws. These  
4 laws were meant for those kind of cases,  
5 DeLong, Bassett, Stanford, Fitzgerald, Vincent  
6 Martin, which the Court remembers, the killing  
7 of the police officer. We don't have that,  
8 Judge. The argument that Mr. Barry wants to  
9 make in terms of what was done, given the  
10 jury's decision yesterday finding beyond a  
11 reasonable doubt that these are the facts in  
12 the case. Those facts do not support a  
13 vileness predicate. They simply don't. You  
14 close your eyes, you're shot. There is  
15 nothing, there is no vileness in this case,  
16 absolutely none.

17 THE COURT: What?

18 MR. GEARY: There's no vileness.

19 THE COURT: No vileness?

20 MR. GEARY: In terms of the  
21 definition. I am not talking about our common  
22 definition. I am talking about the definition  
23 in terms of 264-.2 in terms of what the  
24 Virginia Supreme Court has said what the  
25 Commonwealth must prove beyond a reasonable



1 doubt. They have got to have it in order to go  
2 forward. They don't have it. I suggest to  
3 you, that the Virginia Supreme Court would say  
4 if they were reviewing this thing now, you  
5 don't have vileness. We concede at this point  
6 that they have established for purposes of  
7 going forward that there is a future  
8 dangerousness. And at this point I would move  
9 again to strike the Commonwealth's evidence on  
10 vileness.

11 THE COURT: Mr. Barry?

12 MR. BARRY: The same argument, Judge,  
13 a one shot killing, if you shoot someone that's  
14 standing in front of you and they drop and die,  
15 there's no pain, there's no suffering. In this  
16 case they set them up. They walked them  
17 through a robbery. They led them to believe  
18 that if they cooperated everything they would  
19 be fine. They laid them down face first in the  
20 dirt. They shot one and allowed for two or  
21 three seconds before they killed the other, and  
22 then left them after attempting to run over  
23 them in the car. Don't forget that. And, then  
24 no pain, no suffering? They held each other's  
25 hands. They were trying to communicate with

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1 each other. I mean, that is psychological  
2 torture, that is depravity of mind. It is not  
3 aggravated battery, I concede, but I should be  
4 able to argue to the jury the other two points.

5 THE COURT: I will overrule your  
6 motion at this time. Gentlemen, I really have  
7 some question that the death was not  
8 instantaneous. They did try to run over him  
9 with an automobile.

10 MR. GEARY: Judge, if I may, if I  
11 may.

12 THE COURT: There is some suffering.  
13 There is some fear. I have never been in this  
14 situation, thank God, but it must have been  
15 right discouraging, I mean frustrating. And I  
16 can't help but to feel that there's suffering  
17 there.

18 MR. GEARY: Judge, you have, with all  
19 due respect, Judge, you have suffering in  
20 every, in virtually every murder.

21 THE COURT: The death was not  
22 instantaneous.

23 MR. GEARY: The Supreme Court in  
24 Virginia does not say that. It talks about not  
25 being instantaneous but whether there is a

1 second shot. You look at the cases where there  
2 is some, like in Stockton, the facts in  
3 Stockton, where the defendant either before or  
4 after the shooting chopped off the victim's  
5 hands. That's what the Supreme Court said.  
6 That's vileness.

7 THE COURT: Wasn't there evidence  
8 that he tried to run over the young man?

9 MR. GEARY: Judge, I don't know that  
10 that's the evidence. The evidence is --

11 THE COURT: That's what he said. It  
12 is uncontradicted.

13 MR. GEARY: In the red car, that they  
14 left the scene in the red car.

15 THE COURT: As he moved over so they  
16 wouldn't run over him.

17 MR. GEARY: Judge, I think Mr. Barry  
18 would concede to the Court, I would hope that  
19 he would, is that the car was backing up,  
20 getting out of the parking lot. You know, if  
21 the killer is going to run over Mr. Martin and  
22 Ms. Stack they would pull back out and they  
23 would do it. But, that was a flight. That's  
24 exactly what happened, a flight. And my  
25 suggestion to the Court is that the facts --

1 THE COURT: I think at this point  
2 they are entitled to all reasonable inferences.  
3 I am going to overrule that motion.

4 MR. GEARY: Thank you, Judge.

5 THE COURT: I am not saying I will  
6 not give the instruction. All right. Do you  
7 have some evidence?

8 MR. EVERHART: Judge, if we can have  
9 just a couple of minutes to check to see.  
10 There were two witnesses that hadn't arrived.

11 THE COURT: Are y'all ready?

12 MR. EVERHART: Yes, sir.

13 THE COURT: All right, Sheriff,  
14 return the jury please.

15 JURY IN

16 THE COURT: Counsel at the bar waive  
17 the poll of the jury?

18 MR. BARRY: Yes, sir.

19 MR. GEARY: Defense waives.

20 THE COURT: Call your first witness.

21 MR. EVERHART: Judge, our first  
22 witness will be Sherry Oliver.



1                    SHERRY OLIVER, a witness called on  
2        behalf of the Defendant, having first been sworn,  
3        testified as follows:

4                    DIRECT EXAMINATION

5        BY MR. EVERHART:

6                    Q            Good morning, ma'am. Please tell the  
7        ladies and gentlemen of the jury your name.

8                    A            Sherry Oliver.

9                    Q            How old are you, Ms. Oliver?

10                  A            Twenty-two.

11                  Q            Where do you live?

12                  A            Midlothian Village.

13                  Q            Do you have any children?

14                  A            Two.

15                  Q            How old are they?

16                  A            Two and eleven months.

17                  Q            The gentleman to my left here, Andre  
18        Graham, do you know him?

19                  A            Yes, I do.

20                  Q            How long have you known Mr. Graham?

21                  A            About two years.

22                  Q            How did you come to meet Mr. Graham?

23                  A            Through a girlfriend of mine.

24                  Q            Did you ever, were you romantically  
25        involved with Mr. Graham?

1 A No.

2 Q Just friends, then?

3 A Uh-huh.

4 Q Did you ever socialize with Mr.

5 Graham?

6 A Yeah.

7 Q He got together with you and other  
8 friends?

9 A Uh-huh.

10 Q Did he ever visit your home?

11 A Once or twice.

12 Q Were your children or one of your  
13 children present when Andre visited?

14 A Yes.

15 Q Did he have any interaction with your  
16 children?

17 A Yeah.

18 Q Can you tell the ladies and gentlemen  
19 of the jury how he got along with your children or how he  
20 treated you and your children?

21 A He was real nice. He was polite. He  
22 never showed an attitude or anything.

23 Q Did you ever see Mr. Graham get angry  
24 at you or your children?

25 A No.

1 Q Have you kept in contact with Mr.  
2 Graham recently by telephone?

3 A Yeah.

4 Q And, what, if anything, has he asked  
5 about your children?

6 A He asked how they're doing, you know,  
7 stuff like that.

8 MR. EVERHART: Thank you, ma'am.

9 Answer any questions Mr. Barry may have.  
10

11 CROSS EXAMINATION

12 BY MR. BARRY:

13 Q How do you support yourself?

14 A I am on ADC.

15 Q You also sell cocaine, don't you?

16 A No, I don't.

17 Q Are you sure?

18 A I am positive.

19 Q Never sold cocaine?

20 A I am positive.

21 Q Have you ever had cocaine in the home  
22 with those children?

23 A No, I haven't.

24 Q You're under oath. I am asking you  
25 again --

1 MR. GEARY: Judge, I object to this  
2 unless Mr. Barry has got some evidence. This  
3 is very inflammatory.

4 THE COURT: Well, he might --

5 MR. GEARY: The suggestion that he is  
6 making, unless he has evidence to back it up,  
7 he couldn't --

8 THE COURT: He can ask her the  
9 question. He is on cross-examination.

10 BY MR. BARRY: (Continuing)

11 Q So, you simply live by ADC?

12 A Yeah.

13 Q Are these his children?

14 A No.

15 Q All right. And, you're testifying  
16 because he calls and ask about the children?

17 A Well --

18 Q That's it? He just calls and ask  
19 about the children and you're testifying here?

20 A No.

21 MR. BARRY: All right. Thank you,  
22 ma'am.



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1 REDIRECT EXAMINATION

2 BY MR. EVERHART:

3 Q Ms. Oliver, you're testifying because  
4 you're a friend of his, correct?

5 A Right.

6 MR. EVERHART: That's all I have.

7 THE COURT: All right. You may step  
8 down.

9 MR. EVERHART: Judge, could I ask the  
10 Sheriff to call for first Anita Martin. I  
11 don't believe she is present. I ask she be  
12 called.

13 DEPUTY SHERIFF TOYER: She is not  
14 here.

15 MR. EVERHART: Sheriff, if you would  
16 please call for Dr. Hagan.

17  
18 LEIGH D. HAGAN, M.D., a witness  
19 called on behalf of the Defendant, having first been  
20 sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. EVERHART:

23 Q Good morning, sir. Please introduce  
24 yourself to the Court and ladies and gentlemen of the  
25 jury.

1                   A           My name is Dr. Leigh D. Hagan. I am  
2 a forensic psychologist.

3                   Q           Where do you reside and where do you  
4 work, Dr. Hagan?

5                   A           I practice forensic psychology with  
6 my office in Chesterfield, across from the courthouse  
7 there.

8                   Q           How old are you now?

9                   A           Forty-one.

10                  Q           You mentioned that you practice  
11 forensic psychology; is that your occupation?

12                  A           It is.

13                  Q           Could you explain to the ladies and  
14 gentlemen of the jury and to the Court what a forensic  
15 psychologist does?

16                  A           Within psychology there are several  
17 specialty areas. Some psychologists teach in  
18 universities, some do research in the laboratory. That's  
19 not what I do. I am a forensic psychologist, which means  
20 that I work with people and far and away most of the  
21 people that I see in my practice are folks who have had  
22 some problem that's gotten them involved in the court or  
23 regulatory agency. So, my specialty within psychology has  
24 to do with law and human behavior.

25                  Q           Could you share with the ladies and

1 gentlemen of the jury your educational background, please  
2 and any, any -- share with them your education.

3 A I have a bachelor's degree from the  
4 University of Virginia and then a master's degree from  
5 there as well. After that I went to the University of  
6 Missouri-Columbia, where I finished the doctoral program  
7 in psychology. After that internship.

8 Q Do you have a copy of your curriculum  
9 vitae with you?

10 A Yes, I do.

11 Q Do you have an extra copy?

12 MR. EVERHART: Mr. Barry do you not  
13 have a copy?

14 MR. BARRY: I have a copy of it. I  
15 don't have any questions.

16 BY MR. EVERHART: (Continuing)

17 Q Judge, I would like to ask, Dr. Hagan  
18 you have handed the Sheriff a multi-paged document. Could  
19 you identify that for the Court and for the ladies and  
20 gentlemen of the jury.

21 A That is my vitae. Vitae is a  
22 summary of my training and my experience.

23 MR. EVERHART: Judge, I would ask  
24 that be introduced into evidence as defense  
25 exhibit number one, please sir.

1 THE COURT: All right.

2 NOTE: Received and so marked by the  
3 Clerk as Defendant's Exhibit Number 1.

4 BY MR. EVERHART: (Continuing)

5 Q Dr. Hagan, I note you're a Ph.D.  
6 Could you tell the ladies and gentlemen of the jury what a  
7 Ph.D. is?

8 A It stands for doctor of philosophy.  
9 And, I can't tell you why that's the degree we get or why  
10 they call it that. But it represents beyond the master's  
11 degree, two or three years in the classroom, about a year  
12 working on dissertation, and a year in supervised  
13 residency or internship.

14 Q Do you have any education past that  
15 point?

16 A I do. One of the things we have to  
17 be careful of in our field is to make sure you don't rest  
18 on your laurels, and just assume that what you learned ten  
19 years ago was still good today. So, I've kept up with  
20 continuing ed and I recently finished a two year process  
21 of becoming a diplomat in forensic psychology. Now, the  
22 word diplomat I can't tell you where comes from, but what  
23 it means is that it represents the highest level of  
24 training and expertise in forensic psychology. It's a two  
25 year process. And, in the State of Virginia I think they



1 are by my last count there are three of us in full-time  
2 practice who have earned this designation.

3 Q Have you appeared in either this  
4 court or other circuit courts in the area, Henrico,  
5 Chesterfield, City of Richmond north of the James, have  
6 you testified in any courts in the Commonwealth of  
7 Virginia?

8 A Yes, I have.

9 Q And, have you qualified as an expert  
10 in forensic, in clinical psychology in those courts?

11 A Yes, in every court where my  
12 credentials have been presented.

13 MR. EVERHART: Judge, I would offer

14 Dr. Hagan --

15 MR. BARRY: So stipulated.

16 MR. EVERHART: Fine. I would offer

17 Dr. Hagan as an expert in forensic psychology.

18 THE COURT: All right.

19 MR. EVERHART: Thank you, Your Honor.

20 BY MR. EVERHART: (Continuing)

21 Q Dr. Hagan, obviously you're here  
22 because of this young man to my left, Andre Graham. You  
23 know him?

24 A Yes, I have had the opportunity to  
25 talk with him.

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1 Q How did you come to meet Mr. Graham?

2 A I was appointed by Judge Wilkinson to  
3 serve as, to assist the defense in mitigation, so Judge  
4 Wilkinson appointed me in this case.

5 THE COURT: Well, excuse me. I want  
6 to correct that. I didn't appoint him to  
7 assist --

8 MR. EVERHART: Well, you asked him to  
9 assist.

10 THE COURT: -- in mitigation. I  
11 appointed him as an expert to examine the  
12 defendant.

13 MR. EVERHART: Yes, sir.

14 THE COURT: There is a major  
15 difference.

16 THE WITNESS: My apologies.

17 MR. EVERHART: Yes, sir.

18 THE COURT: That's all right.

19 BY MR. EVERHART: (Continuing)

20 Q Dr. Hagan, can you share with the  
21 ladies and gentlemen of the jury what evaluation, what  
22 research, if you will, you have done regarding Andre  
23 Graham?

24 A A number of things. And in  
25 evaluating an individual it is important to rely on as

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1 many different kinds of information as you can get ahold  
2 of. So, I spent some time talking with Andre. I spoke  
3 with his mother and I spoke with the mother of his child.  
4 Through my computer I accessed Richmond Times Dispatch and  
5 New York newspapers. I was interested in any timing in  
6 which Andre or any of his aliases appeared in the paper  
7 because I was interested in his history, in his character,  
8 and what the general public knew of him.

9 Q Did you review any court records?

10 A I did. I reviewed all of the  
11 information that was available in his Richmond case  
12 recently, and I also went over to Chesterfield and  
13 reviewed the entirety of that file as well.

14 Q That is the case which the ladies and  
15 gentlemen of the jury have heard about involving the  
16 murder of Mr. and Mrs. Rosenbluth, correct?

17 A That's correct.

18 Q Have you spoken with Mr. Graham  
19 personally?

20 A I have.

21 Q Can you share with the ladies and  
22 gentlemen of the jury some of Mr. Graham's social history?

23 A What I am about to tell you comes to  
24 me principally through Mr. Graham and also my independent  
25 conversations with the mother of his child, Shantra

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1 Mashore and his mother, Jacqueline Graham. I don't know  
2 if you will have the opportunity to hear from them today  
3 or not. So, I spoke with people who have an interest in  
4 this case. I did not have the opportunity to look at old  
5 school records to confirm that information, but I can tell  
6 you this, that of the sources that I just named they  
7 didn't contradict themselves, even though they were  
8 interviewed independently.

9 Q Tell the ladies and gentlemen of the  
10 jury what, if anything, you learned?

11 A Well, I learned that he was born in  
12 1970 and was raised in New York. At age four his father  
13 abandoned the family. They lost their home due to non-  
14 payment and moved into an eight unit, four story apartment  
15 building in New York that had a first floor unit. There  
16 is a brother and a sister. He had some of the life  
17 interest of other kids. There were pets, cat, dog,  
18 salamander. I think he had a special interest in pigeons  
19 and on another day perhaps he can tell you what he knows  
20 about that. I thought it was interesting how much he knew  
21 about pigeons. They had a chicken at one time. He and  
22 his brother shared a room. He had considerable  
23 difficulties with school. He had to repeat the second  
24 grade.

25 Q Did you do any evaluations of his IQ?



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1 A I did.

2 Q What is his IQ according to the  
3 testing?

4 A He earned an overall intelligence  
5 score of 84, which places him mid-way in the lower average  
6 range. Now, what that means is that he outscored about 16  
7 percent of other people in this age group. It tells us  
8 that this is not a matter of mental retardation.

9 Q There is no evidence in the case of  
10 any organic brain damage or anything like that; is that  
11 correct?

12 A Well, to assess organic brain damage  
13 often times require much more specialized evaluation than  
14 I did. It's called a neuro-psychological evaluation.

15 Q Dr. Hagan, the answer to my question  
16 is either yes, sir, or no, sir, if you would, please.  
17 Now, as Mr. Graham progressed in age, at some point in his  
18 life he had a romantic relationship. Did he share that  
19 with you?

20 A Yes.

21 Q Who was that with?

22 A Shantra Mashore.

23 Q What else did you learn from your  
24 conversations with Mr. Graham and/or from your  
25 conversations with family and friends that you believe

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1 would be appropriate for the ladies and gentlemen of the  
2 jury to be aware of about Mr. Graham?

3 A Based on what I am told, and also  
4 from the testing I did, in all likelihood he had a  
5 learning disability. In fact, he was placed in special ed  
6 classes as a student. His major problem was not going to  
7 school. He went, and after several school failures, he  
8 went to job corp where he spent six months and his  
9 training was in electronics repair. After he turned 18 he  
10 moved to the Richmond area and struck up a relationship  
11 with Shantra Mashore. They were introduced by a high  
12 school friend of hers.

13 Q You have done research, have you not,  
14 as to what will be referred to today as future  
15 dangerousness; is that correct?

16 A I have done some reading in that  
17 area, yes.

18 Q Can you share with the ladies and  
19 gentlemen of the jury the sources you have reviewed to  
20 assist you in that regard?

21 A There are some important sources.  
22 These come from the forensic psychology literature written  
23 either by forensic psychologists for attorneys. And of  
24 special interest for the problem before us today is  
25 research on the question of those people who were given

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1 the death penalty and then later because of some Supreme  
2 Court decision, particularly in 1972, and those people  
3 were, their death penalty was set aside and they were  
4 still in the prison, what did they do?

5 Q How many people -- are we talking  
6 about a study of sorts?

7 A We are talking about a study that  
8 covered 29 states and the District of Columbia.

9 Q How many people did that study  
10 encompass?

11 A Five hundred and fifty-eight death  
12 row persons.

13 Q So, as I understand what you're  
14 saying these 500 and some odd people are people who had  
15 death sentences and in 1972 those were commuted to life  
16 imprisonment; is that correct?

17 A That's correct.

18 Q And, what does that study show as far  
19 as future dangerousness?

20 A Well, of those 558 for our interest  
21 today what we really need to focus on is 453 murders. The  
22 others were rapists or robbers. But, our attention today  
23 is on the issue of murder. Of those 453 people, their in  
24 prison behavior was monitored very closely to see if they  
25 had any major institutional violations, that is, did they



1 break any important rules, still locked up on their life  
2 sentence. And, we have the benefit of 15 years of close  
3 monitoring of that behavior.

4 Q What does the study reveal? What is  
5 the end result?

6 A The end result is that of those 453  
7 people who juries had determined would be an ongoing  
8 threat to society if they weren't put to death, of those  
9 99.1 percent of those people over a course of 15 years did  
10 not commit any other homicide in prison.

11 Q Now, just so the ladies and gentlemen  
12 of the jury understand, those people were incarcerated,  
13 they were not back on the street?

14 A Absolutely.

15 Q They had death, it was changed to  
16 life because of the Supreme Court decision back in '72,  
17 correct?

18 A Not only that but when those life  
19 sentences were commuted, five of those people were able to  
20 --

21 Q Well, Dr. Hagan, just -- I don't mean  
22 to interrupt you. I know where you're going because we  
23 talked about that. I don't think we can go into that.

24 MR. EVERHART: May I have one moment,  
25 please?



Leigh D. Hagan, M.D. - Direct

1 BY MR. EVERHART: (Continuing)

2 Q Dr. Hagan, you have mentioned the  
3 results of the study that what it shows about people in  
4 prison on life sentences. Based on your evaluation of  
5 Andre Graham have you come to a conclusion about what  
6 risks Mr. Graham would pose, in other words, as to future  
7 dangerousness of Mr. Graham, were he to receive a life  
8 sentence?

9 A It's my opinion within a reasonable  
10 degree of psychological certainty, that is, as certain as  
11 I can be, knowing what I know, that Mr. Graham does not,  
12 will not pose any greater threat, ongoing threat to  
13 society than any other murderer given a life sentence.

14 Q And, those similarly situated people,  
15 so to speak, are the people whom that study covered or at  
16 least four hundred and some odd people, correct?

17 A For the most part but not exactly.

18 Q Explain that.

19 A What makes Andre's case different  
20 from some of those people studied is he has life sentence  
21 in Chesterfield, he has life sentence in Richmond, and  
22 additional years on top of that. So, he will be so deep  
23 into the system. That's one thing that makes him  
24 different from those other people.

25 Q You understand today the jury has two

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Leigh D. Hagan, M.D. - Cross

1 choices, life or death, correct?

2 A Yes, sir.

3 Q And, your opinion obviously deals  
4 with if they give him life, the danger that he would pose  
5 if they gave him a life sentence, correct?

6 A Ongoing threat to society, yes.

7 MR. EVERHART: That's all the  
8 questions I have. Answer any questions Mr.  
9 Barry may have, please.

10  
11 CROSS EXAMINATION

12 BY MR. BARRY:

13 Q He is not insane?

14 A Not insane.

15 Q And, not retarded?

16 A Not retarded.

17 Q And, what you're saying is he is no  
18 more a threat than any other murderers we've got locked up  
19 in the penitentiary?

20 A Who have a life sentence.

21 Q Who have a life sentence. Now, can  
22 you give me a percentage, I mean give me some percentage  
23 of the population. What percentage are we talking about?

24 A Of the incarcerated population with  
25 life sentences?

Leigh D. Hagan, M.D. - Cross

1                   Q           Right. It must be some percentage of  
2 those people that do do things wrong and don't do things  
3 wrong?

4                   A           Okay. I can address it from what I  
5 learned in the study?

6                   Q           Right.

7                   A           What we learned from those 453 people  
8 is that 99.1 percent of those people who were given the  
9 death penalty and then the Supreme Court said wait a  
10 minute, we are not going to carry that out, you have a  
11 life sentence for now. Those people did not go into the  
12 general prison population and kill anyone. So, that means  
13 that .9 percent did?

14                  Q           So, if you've got a hundred  
15 penitentiary guards, only one of them is going to get  
16 killed?

17                  A           In this --

18                               MR. EVERHART: Judge, I object to  
19 that. That's not the correct, that's not a  
20 correct statistic extrapolation from what he  
21 said. It doesn't relate to how many prison  
22 guards there are. You can have a million  
23 prison guards, plus we don't know who the  
24 victim might be. It's an improper question.

25                               THE COURT: Well, I think the

1 Commonwealth's Attorney has a right to ask that  
2 question, how these people are housed in  
3 prison, are they isolated, are they general  
4 population?

5 MR. EVERHART: I agree with that,  
6 Judge. I am just saying his hypothesis is not,  
7 or the question he posed does not derive itself  
8 from the statistics that Dr. Hagan gave him in  
9 response to his previous question.

10 THE COURT: I will overrule that. I  
11 think he has a right to cross examine.

12 MR. EVERHART: Yes, sir. Thank you.

13 BY MR. BARRY: (Continuing)

14 Q It's the same things with inmates.  
15 If a hundred inmates are housed with these individuals,  
16 one of them is going to get killed, maybe the other 99 are  
17 maimed?

18 A No. No. It was 99.1. So, we are  
19 talking about a decimal point and not a whole number.

20 Q All right. So, we're going only to  
21 kill .9 percent of the guards?

22 A In the study I believe there was one  
23 guard killed. But, the other homicides committed were  
24 against other prisoners.

25 Q If I am not mistaken, and I am



Leigh D. Hagan, M.D. - Cross

1 certainly not a scholar, the study that you're dealing  
2 with is a study where you don't have individuals with  
3 prior acts of violence?

4 A Not so. Some did. Some didn't.  
5 They were all given the death penalty for murder. I am  
6 not talking about the rapists and robbers.

7 Q All right. I understand. But, what  
8 you are talking about is some of these people that were  
9 convicted and given the death penalty, this was their  
10 first killing, and some of the people it was their second  
11 or third killing?

12 A Yes, that's exactly right.

13 MR. BARRY: Thank you. All right.  
14 Thank you, sir.

15 THE COURT: All right. Any further  
16 questions?

17 MR. EVERHART: No, Your Honor. Thank  
18 you very much.

19 THE COURT: All right, sir, you may  
20 be excused.

21 MR. EVERHART: Judge, I would ask  
22 Jacqueline Graham be called, please.

23 THE COURT: Jacqueline Graham.  
24  
25

Jacqueline Graham - Direct

1                    JACQUELINE GRAHAM, a witness called  
2 on behalf of the Defendant, having first been sworn,  
3 testified as follows:

## 4                    DIRECT EXAMINATION

5                    BY MR. EVERHART:

6                    Q                    Good morning, ma'am. Please tell  
7 Judge Wilkinson and the ladies and gentlemen of the jury  
8 your name.

9                    A                    My name is Jacqueline Graham.

10                  Q                    And, where do you live, Ms. Graham.?

11                  A                    I live in Brooklyn.

12                  Q                    What is your relationship to the  
13 young man to my left, Andre Graham?

14                  A                    He is my son.

15                  Q                    How old is your son?

16                  A                    Twenty-four.

17                  Q                    What was his date of birth?

18                  A                    March 4, '70, 1970.

19                  Q                    How long have you lived in New York?

20                  A                    All my life.

21                  Q                    Do you recall where you were living  
22 when Andre was born?

23                  A                    Yes.

24                  Q                    Would you tell the ladies and  
25 gentlemen of the jury.

Jacqueline Graham - Direct

1                   A           I was living in Brooklyn, Brooklyn,  
2 New York.

3                   Q           Andre's father, how long was he with  
4 your family?

5                   A           For about 18 years.

6                   Q           How long after Andre -- did he remain  
7 with Andre throughout Andre's life?

8                   A           No, he didn't.

9                   Q           Tell the ladies and gentlemen of the  
10 jury what occurred with that.

11                  A           He left, he left home when Andre was  
12 four.

13                  Q           How many other children do you have,  
14 Ms. Graham?

15                  A           I have three other children.

16                  Q           Are they older or younger than Andre?

17                  A           Two older and one younger.

18                  Q           The two older are they brothers,  
19 sisters or one of each?

20                  A           One, one sister that's older and a  
21 brother that's older.

22                  Q           And, a younger?

23                  A           The younger one is 16.

24                  Q           Is that a brother?

25                  A           He is a brother.

Jacqueline Graham - Direct

1 Q Were they all, do they all live in  
2 either Richmond or New York?

3 A Yes.

4 Q Can you share with the ladies and  
5 gentlemen of the jury some of the things that Andre was  
6 interested in when he was a younger man?

7 A He was in like different things for  
8 children, like Boy Scouts or different clubs or whatever  
9 for school, athletic things.

10 Q How did he interact with his brothers  
11 and sisters?

12 A As normal children do. They  
13 sometimes got into little squabbles or whatever, but they  
14 always made up. They made up themselves, as a matter of  
15 fact.

16 Q Are you a grandmother?

17 A Yes, I am.

18 Q What is your grandchild's name?

19 A I have four grandchildren, one by  
20 Andre. His name is Courtney, her name is Courtney.

21 Q How old is Courtney?

22 A She is four years old.

23 Q Is Andre's, are any of Andre's  
24 grandparents living?

25 A Yes, his two grandmothers.



Jacqueline Graham - D

1 Q Where do they reside?

2 A Both of them live in Jamaica Queens  
3 in Brooklyn, I mean New York.

4 Q In New York?

5 A Yes.

6 Q I am sorry. Where did you say you  
7 live again?

8 A I live in Brooklyn, New York.

9 Q And, you came down here when?

10 A This morning, 2:30 a.m.

11 Q Do you understand that Andre has been  
12 convicted of some horrible crimes?

13 A Yes.

14 Q When Andre was in your home was he  
15 ever violent towards you?

16 A Never. He always been respectful to  
17 me, always, any adult I have known him, you know, he were  
18 in contact with he was very respectful, never had any  
19 problems like that.

20 Q Is there anything else about your son  
21 that you feel would be important for the ladies and  
22 gentlemen to know?

23 A Yes, I do. I mean, I don't think  
24 that my child was as guilty of what he has been convicted  
25 of. Because, I've never had any problems with him being

1 violent.

2 Q I understand that, but you understand  
3 that decision has been made. Is there anything you would  
4 like to bring to the attention of the jury other than  
5 that?

6 A That he's never been a violent  
7 person, that's why I don't understand. I don't understand  
8 how, you know, this could have occurred, because he's  
9 never been violent in his life, ever.

10 Q At least not in your presence,  
11 correct?

12 A Since I have known him all his life.  
13 I have been involved in his life throughout his life.

14 MR. EVERHART: I understand. Answer  
15 any questions Mr. Barry may have.

16 MR. BARRY: No, ma'am. I have no  
17 questions.

18 THE COURT: All right. You may step  
19 down. Thank you.

20 MR. EVERHART: Thank you. Judge, I  
21 would ask the Sheriff to call for Shantra  
22 Mashore.

23 THE COURT: No response.

24 MR. EVERHART: Judge, could I ask the  
25 Sheriff to try one more time to call Anita

1 Martin? Judge, if both Ms. Martin and Ms.  
2 Mashore are absent that would be the conclusion  
3 of the defendant's case.

4 THE COURT: All right. Do you have  
5 any rebuttal?

6 MR. BARRY: No, sir.

7 THE COURT: All right. I will ask  
8 you to retire. We will go over the  
9 instructions and then we will have you back.  
10 Sheriff, take charge of the jury.

11 JURY OUT

12 THE COURT: All right.

13 MR. GEARY: Judge, I would renew the  
14 motion to strike on the vileness predicate that  
15 we talked about initially before we started the  
16 motion to strike after the Commonwealth's case  
17 in chief. We have rested. I think it's clear  
18 under Virginia law there is insufficient  
19 evidence to go to the jury on vileness. I  
20 mean, Mr. Barry conceded he does not have  
21 aggravated battery. I think this case is very  
22 clear we did not have torture. I think the  
23 case is also clear that we do not have  
24 depravity of mind. I do not make a motion to  
25 strike in the regards to the issue of future

1 dangerousness. Clearly that is a question for  
2 the jury to determine.

3 THE COURT: How about depravity of  
4 mind? You got to take that as one act. It's  
5 two people. He shoots one in the mouth, shoots  
6 the other in the back of the head. It appears  
7 to me it would fall in that category.

8 MR. GEARY: Well, Judge, I would  
9 suggest to the Court respectfully these cases  
10 that when you're talking when you have a double  
11 shooting like with the underlying crime being  
12 robbery, which makes it death penalty predicate  
13 you --

14 THE COURT: If the young man had died  
15 it would come under another set of --

16 MR. GEARY: Well, you could have had,  
17 you could have had, but you didn't. What you  
18 have, Judge, are cases that you tried as a  
19 Judge for I think 23 years, and --

20 THE COURT: Twenty-five.

21 MR. GEARY: Twenty-five. Excuse me.  
22 And, prosecuted for a number of years as a  
23 prosecutors. You have a robbery. You have a  
24 shooting. You have a robbery here and you have  
25 a shooting, two shootings. And the reason for



1 the shooting usually is to leave no witnesses.  
2 That's usually the shooting, as far as my  
3 experience and I think that yours also, that's  
4 usually the reason. You have one shot of each  
5 robbery victim, or in the case of Ms. Stack an  
6 attempt robbery victim. If you didn't have the  
7 robbery you don't have capital murder, clearly.  
8 If you have a robbery and you have one  
9 shooting, and one shooting, do you have any of  
10 those adjectives that are in the vileness  
11 predicate? I suggest you don't. This is a  
12 case where you don't have this.

13 THE COURT: Well, on this, to me,  
14 what do you have to say, Mr. Barry?

15 MR. BARRY: Well, Judge, we've gone  
16 through it now three times, nothing has  
17 changed. You have a sick individual who tells  
18 someone don't go anywhere, cooperate,  
19 everything will be fine. That in itself is  
20 depravity of mind because you know what that  
21 does, that takes away your natural instinct to  
22 flee because you think, all right, if I do what  
23 I am told I won't be hurt. Then they cooperate  
24 with you fully through the whole thing. He's  
25 setting them up, he is playing with them. That

1 is a sick mind. That is a depraved individual.  
2 He knew from the very get-go he was going to  
3 run these people down, he was going to kill  
4 them. And, for us to say it is not vile, that  
5 it doesn't show some depravity of mind, that's  
6 ridiculous. There is not a court in the world  
7 that's going to say, well, it's just one shot,  
8 let's just close our eyes to everything else  
9 that happened that night. That's not the  
10 situation here.

11 THE COURT: Well, I am going to give  
12 the instruction. But, I will amend it.

13 MR. GEARY: Judge, can I say one more  
14 thing?

15 THE COURT: Yes.

16 MR. GEARY: We are talking about  
17 statutory language. Mr. Barry knows we are not  
18 talking about the common use of the language.  
19 These are words the General Assembly has put  
20 into the statute. The Virginia Supreme Court  
21 has looked at this time and time again since  
22 1978 and they say that certain facts have got  
23 to be there to have these things. Now, whether  
24 in the province of the prosecutor arguing the  
25 case to 12 people and using the term vileness,

1 that is fine. But when the cases say or when  
2 you have facts like this, his characterization  
3 that someone is sick, that may be true, it may  
4 not be true. But we know the robbery/shooting  
5 takes place to make sure there was nobody to  
6 make the identification. When you at these  
7 cases, Peterson, Stockton, Briley, when you  
8 look at those cases, Judge, these robbery and  
9 murder cases.

10 THE COURT: Get me the cites on  
11 those. I want to look at those because to me  
12 this statute is written in the disjuncture. It  
13 can be that the offense was outrageous or  
14 wantonly vile, horrible, or inhuman.

15 MR. GEARY: That's correct.

16 THE COURT: And that it involved  
17 torture, depravity of mind or aggravated  
18 battery. I don't think there is any evidence  
19 of aggravated battery.

20 MR. BARRY: I concur.

21 MR. GEARY: Can I give you those  
22 citations for those?

23 THE COURT: Yes.

24 MR. GEARY: Thomas v. Commonwealth,  
25 244 Va., page 1, 1992. The originally one, the

1 first one the Dikta case, Peterson v.  
2 Commonwealth, 225 Va., 289, at 296. The third  
3 one Watkins v. Commonwealth, 229 Va., 469, at  
4 page 489.

5 THE COURT: 469?

6 MR. GEARY: Yes. That's where it  
7 starts and the key language with regard to  
8 vileness is 489. And, the final one, Judge, is  
9 Stockton v. Commonwealth. I have the  
10 citations, Judge, I don't have the --

11 THE COURT: We can get it.

12 MR. GEARY: Stockton, the second  
13 Stockton, Judge. His first case went on  
14 appeal, then he was retried and got the death  
15 penalty the second time.

16 THE COURT: All right, Sheriff, take  
17 charge of the defendant, please. The Court  
18 will require everyone to remain seated.

19 NOTE: Recess.

20 THE COURT: Mr. Geary, I believe you  
21 had something you want to put in the record?

22 MR. GEARY: Judge, I'm sorry, I  
23 didn't hear you. I didn't hear you.

24 THE COURT: I believe you had some  
25 instructions, some exceptions you want to put



1 in the record.

2 MR. GEARY: Judge, we have concluded  
3 a conversation with regard to the jury  
4 instructions, Mr. Barry and myself and Mr.  
5 Everhart. I will offer two instructions. And,  
6 the Court has indicated what it's ruling will  
7 be. The instructions are based on Virginia  
8 Code Section 53.1-151. One instruction is  
9 based on Section B.1, which appeared on page 99  
10 of the 1994 annotated Code section, volume  
11 number 7A. The instruction to be offered is  
12 this. "If you sentence the defendant to life  
13 in prison, then he will not be eligible for  
14 parole." Based on the evidence Mr. Barry has  
15 adduced and the summary of convictions that has  
16 been introduced to the jury, there have been  
17 prior convictions which come under and are  
18 capsulated under B-1 of that statute. The  
19 statute says any person convicted of three  
20 separate felony offenses of one, murder; two,  
21 rape; three, robbery. Either presenting the  
22 firearms or a deadly weapon or any combination  
23 of offenses specified in those three  
24 subdivisions, when such offenses were not part  
25 of the common act, transaction, or scheme,

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1 shall not be eligible for parole. As I  
2 understand the summary conviction sheet that  
3 Mr. Barry introduced there are three  
4 convictions involving the Chesterfield case,  
5 the conviction yesterday involving the robbery  
6 case, and the conviction involving the murder.  
7 Which now makes five offenses which fall into  
8 the B-1 category. I do not think at this point  
9 the Court can tell with regard to how to  
10 determine whether or not there is a common  
11 scheme or plan. The Court of Appeals has ruled  
12 in Garrett v. Commonwealth, 14 Va., 154, that  
13 the parole board and Department of Corrections  
14 makes the decision on that common scheme or  
15 plan. We that do this, Judge, know that common  
16 scheme or plan must mean something. It means  
17 something in a robbery case, et cetera, when  
18 the Commonwealth tries in the prosecution of  
19 the case to be able to get in other crimes  
20 evidence to establish a fact such as identity.  
21 And I would assume that without knowing the  
22 Court of Appeals would say that the Department  
23 of Corrections must use that standard and what  
24 those words mean, although I don't know that.  
25 I would suggest to the Court that the criteria

1 of the statute have been met without war at  
2 this point. The evidence that has been  
3 established to this point, to this case, not  
4 the evidence on the other case, what we have  
5 here, establishes that at this stage that Mr.  
6 Graham would come under the B-1 provisions of  
7 Section 53.1-151, and I would offer that  
8 instruction that if he is sentenced to life by  
9 the jury, life in prison by the jury, he would  
10 not be eligible for parole. And, that would be  
11 both, the argument on that, Judge, would be  
12 both based on that statute under Virginia law  
13 and also based on the recent U. S. Supreme  
14 Court decision in Simmons v. South Carolina,  
15 which says in sentencing under a capital state  
16 scheme the trial court must indicate to the  
17 jury if asked by the defense if under that  
18 state law that person is not eligible for  
19 parole that the jury must know that. So, there  
20 is, in fact, truth in sentencing, that the jury  
21 knows there is either the death penalty or if  
22 they give a sentence of life it is without  
23 parole. That's the first one. The second one,  
24 Judge, perhaps I will let Mr. Barry address  
25 that, then you decide.

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1 MR. BARRY: Well, Judge, the Supreme  
2 Court case dealt with a specific statute in  
3 South Carolina that said if you were convicted  
4 of capital murder you got life without parole  
5 period. In this particular situation we are  
6 not even at that juncture. At best we have one  
7 event, two events. We are still waiting for  
8 the third event. So, he has not yet triggered  
9 the Virginia statute that says three strikes  
10 and you're out. For that reason I think that's  
11 an inappropriate instruction.

12 THE COURT: All right. The Court is  
13 of the view under that statute as you said, Mr.  
14 Barry, I won't interpret the parole board or  
15 the Department of Corrections, but my  
16 understanding of that statute is there must be  
17 three separate offenses. I only have two  
18 offenses before me, one of which took place in  
19 Chesterfield County. And, the other one took  
20 place at the Steak and Ale, which the statute  
21 wouldn't apply because they are not separate.  
22 I refuse the instruction. If you give it to me  
23 I will so mark it. I will mark it "A" refused.

24 MR. GEARY: Judge, the second motion  
25 on the instruction would be based on the same



1 statute, 53.1-151. That statute provides  
2 generally for at the present time under the law  
3 as enacted effective July 1, 1994, as to parole  
4 eligibility. It is my understanding of how I  
5 interpret Mr. Graham's criminal conviction  
6 record that for the Department of Corrections  
7 purposes at the present time he will be what's  
8 considered a second offender, that has been in  
9 once before. And that understanding is based  
10 upon the document that Mr. Barry gave to me as  
11 far as the discovery in this case. The  
12 documents indicate that there was a conviction  
13 for a trespass in which the General District  
14 Court of the City of Richmond imposed a 12  
15 month sentence. At the same time there was a  
16 felony conviction in a different court of  
17 possession, also in Richmond, of possession of  
18 cocaine, which netted a term of years suspended  
19 by the Department of Corrections and a six  
20 month jail sentence. Those two sentences  
21 combined, as I understand what the Department  
22 of Corrections says, and what the parole board  
23 says, and I believe what the Court is saying,  
24 is that at the time once you get past that 12  
25 months, once you hit 12 months in one day, in

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1 his case it was 18 months, you become for  
2 parole purposes a first offender and if you  
3 come back into the system you come back as a  
4 second offender. If that's the case, and under  
5 53.1-151, he would be eligible for parole if he  
6 received a life sentence in this case at the  
7 end of 30 years. The instruction I offered to  
8 the Court is this. It says, "if you sentence  
9 the defendant to life in prison, then he will  
10 not be eligible for parole for thirty years."  
11 Parenthetically, Judge, if you were not prior  
12 convicted, not a prior DOC --

13 THE COURT: Suppose the legislature  
14 in the year 2,000 changes the whole thing and  
15 said after you serve a fourth of your time  
16 you're eligible for parole?

17 MR. GEARY: Judge, unlike one of the  
18 delegates from Richmond, and unlike the Lt.  
19 Governor, I do not believe that you can affect,  
20 the General Assembly can affect inmate patrol.  
21 They can affect --

22 THE COURT: They can make it more  
23 lenient.

24 MR. GEARY: They cannot make it  
25 worse.

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1 THE COURT: They can make it more  
2 lenient.

3 MR. GEARY: The proposal today that  
4 the Governor wishes to enact, when it is  
5 enacted I understand, would be ineffective for  
6 those in the system at that time.

7 THE COURT: As of January the 1st,  
8 but that's under the Governor's Plan of  
9 Fairness under the law.

10 MR. GEARY: The question the Court  
11 asked is there a possibility that the General  
12 Assembly and the Governors in future years can  
13 change parole then so it would benefit people  
14 today, and the answer is yes.

15 THE COURT: Yes.

16 MR. GEARY: I would offer the  
17 instruction.

18 THE COURT: I will refuse the  
19 instruction. Bring it here I will mark it "B,"  
20 refuse it.

21 MR. GEARY: Judge, I also, I also, if  
22 the cases -- if the Court -- if also if he were  
23 going into it the first time the instruction we  
24 would ask for would be 25 years eligibility.  
25 That's what I understand would be for that. I

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1 think that would cover it. But I would  
2 indicate to the Court I am not waiving the  
3 right to submit a second one which would say he  
4 would be eligible in 25 years.

5 THE COURT: I would refuse that, too  
6 because we never know what's going to be in the  
7 future. The Court takes the view of that that  
8 we can't foretell the future. We have to go on  
9 what the law is today. The Court has  
10 deliberated and though, read the cases, and  
11 come to the conclusion it is going to give the  
12 instruction on wanton vileness, horrible or  
13 inhuman in that it involved torture or  
14 depravity of mind, under the theory I think the  
15 Court has the right, the jury has the right to  
16 take the whole crime scene into consideration  
17 in considering their verdict as to what  
18 punishment they would inflict. As I understand  
19 the evidence, that there were two young people  
20 out there on the Steak and Ale lot. They were  
21 talking. And they came up and they were  
22 accosted by the defendant and his cohorts.  
23 They were ordered to get out of the car. They  
24 were ordered to give them their property, which  
25 they did. They were ordered to lay down. And



1 both of them were shot through the head, which  
2 to me is an execution type murder when you tell  
3 people to lie down and you shoot them in the  
4 head. Everything is common sense and  
5 everything in my life tells me that's  
6 execution, which I think shows the depravity of  
7 mind. And, therefore, I feel that the jury  
8 would have a right to consider that. They have  
9 a right to consider all of the evidence before  
10 this case, even the Chesterfield cases.  
11 Therefore, the Court will grant that and note  
12 your exception, Mr. Geary and Mr. Everhart.

13 MR. EVERHART: Thank you, Your Honor.

14 THE COURT: All right, if y'all are  
15 ready I will call the jury back.

16 MR. GEARY: Can I have one second to  
17 talk to Mr. Barry?

18 THE COURT: All right, gentlemen, see  
19 if we can't move along.

20 MR. EVERHART: Thank you, Your Honor.

21 THE COURT: Thank you. Return the  
22 jury.

23 JURY IN

24 THE COURT: Counsel at the bar waive  
25 the poll of the jury?

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1 MR. BARRY: Yes, sir.

2 MR. EVERHART: Yes, Your Honor.

3 Thank you.

4 THE COURT: Ladies and gentlemen of  
5 the jury, I apologize for the delay but this is  
6 quite a complicated case and it took counsel  
7 and the Court to come a little while to come to  
8 agreement on the instructions. I apologize for  
9 that. Some things cannot be helped. I will  
10 now instruct you as to the law in the penalty  
11 phase of this case. I caution you that your  
12 verdict still must be unanimous. Whatever  
13 verdict you reach your foreperson will sign  
14 that as the verdict of each and every one of  
15 you.

16 And, then I instruct you have  
17 convicted the defendant of an offense which may  
18 be punished by death. You must decide whether  
19 the defendant shall be sentenced to death or to  
20 life imprisonment. Before the penalty can be  
21 fixed at death, the Commonwealth must prove  
22 beyond a reasonable doubt at least one of the  
23 following two alternatives: (1) that after  
24 consideration of his history and background,  
25 there is a probability that he would commit

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1 criminal acts of violence that would constitute  
2 a continuing serious threat to society, or, (2)  
3 that his conduct in committing the offense was  
4 outrageously or wantonly vile, horrible or  
5 inhuman, in that it involved torture or  
6 depravity of mind. If you find from the  
7 evidence that the Commonwealth has proved  
8 beyond a reasonable doubt either of the two  
9 alternatives, then you may fix the punishment  
10 of the defendant at death, or if you believe  
11 from all the evidence that the death penalty is  
12 not justified, then you shall fix the  
13 punishment of the defendant at life  
14 imprisonment. If the Commonwealth has failed  
15 to prove beyond a reasonable doubt either  
16 alternative, then you shall fix the punishment  
17 of the defendant at life imprisonment.

18 To find the aggravating factor  
19 regarding vileness, you must find that the  
20 defendant's conduct in committing the offense  
21 for which he stands charged was outrageously or  
22 wantonly vile, horrible or inhuman in that it  
23 involved torture or depravity of mind. Thus,  
24 before the death penalty can be imposed on the  
25 basis of this clause, you must find that the

1 defendant's conduct established torture or  
2 depravity of mind. You may find vileness only  
3 if you find beyond a reasonable doubt that the  
4 defendant exhibited either torture or depravity  
5 of mind. To establish depravity of mind, you  
6 must find beyond a reasonable doubt that the  
7 defendant, in committing the murder, exhibited  
8 a degree of moral turpitude and psychical  
9 debasement surpassing that inherent in the  
10 definition of ordinary malice or premeditation  
11 required for proof of murder.

12 If you find that the Commonwealth has  
13 proved beyond a reasonable doubt either or both  
14 of the previously mentioned alternatives, which  
15 are called future dangerousness and vileness,  
16 you may still decide not to impose the penalty  
17 of death. You may not impose the death penalty  
18 unless you find one of these alternatives have  
19 been proved beyond a reasonable doubt. But you  
20 are not compelled to impose the death penalty  
21 even if you find one or both of these proven  
22 beyond a reasonable doubt.

23 In order for you to return a decision  
24 to impose the death penalty, your decision must  
25 be unanimous. If your verdict is not



1 unanimous. If your decision is not unanimous,  
2 then the sentence will be life in prison.

3 Now, I want you to listen to this  
4 instruction, like all of them, very carefully.  
5 This is called alternative jury verdicts. And,  
6 I instruct you to cross out any paragraph, word  
7 or phrase which you do not find beyond a  
8 reasonable doubt. And, the paragraph reads,  
9 we, the jury, on the issue joined, having found  
10 the defendant guilty of capital murder and  
11 having unanimously found after consideration of  
12 his history and background that there is a  
13 probability that he would commit criminal acts  
14 of violence that would constitute a continuing  
15 serious threat to society, and having  
16 unanimously found that his conduct in  
17 committing the offense is outrageously or  
18 wantonly vile, horrible or inhuman in that it  
19 involved torture, depravity of mind, either  
20 one, and having considered the evidence in  
21 mitigation of the offense, unanimously fix his  
22 punishment at death. What I said there, ladies  
23 and gentlemen of the jury, if you come to one  
24 of these conclusions you will strike out any  
25 that you do not, you can strike out a

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1 paragraph, you can strike out a phrase, or you  
2 can strike out a word; do you understand that?

3 All right. Then we have you form of  
4 the verdicts. We, the jury, on the issue  
5 joined, having found the defendant guilty of  
6 capital murder and having unanimously found  
7 after consideration of his history and  
8 background that there is a probability that he  
9 would commit criminal acts of violence that  
10 would constitute a continuing serious threat to  
11 society, and having considered the evidence in  
12 mitigation of the offense, unanimously fix his  
13 punishment at death. And, your foreperson will  
14 sign that. Or, we, the jury, on the issue  
15 joined, having found the defendant guilty of  
16 capital murder and having unanimously found  
17 that his conduct in committing the offense is  
18 outrageously or wantonly vile, horrible or  
19 inhuman in that it involved torture or  
20 depravity of mind, and having considered the  
21 evidence in mitigation of the offense,  
22 unanimously fix his punishment at death. Or,  
23 we, the jury, on the issue joined, having found  
24 the defendant guilty of capital murder and  
25 having considered all of the evidence in

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1           aggravation and mitigation of such offense, fix  
2           his punishment at imprisonment for life.

3                   And, lastly, ladies and gentlemen,  
4           the firearm charges. You just have to sign  
5           that because the penalty is fixed and you've  
6           already found him guilty.

7                   Ladies and gentlemen of the jury, on  
8           the third phase I should say of this case that  
9           is law involved. You have heard the facts.  
10          And so now the attorneys will get an  
11          opportunity to summarize their case before it  
12          goes to you for your consideration. Mr. Barry,  
13          you may start with your summation.

14                   MR. BARRY: Let me share with you  
15          some of the same thoughts that I shared with  
16          you yesterday. Yesterday you came in here.  
17          You really were not sure why you were here,  
18          what you were dealing with. Most of you had  
19          never sat on a jury before. You went through  
20          the process of learning the law, learning the  
21          facts, making a decision, coming to a unanimous  
22          verdict. Today's situation is identically the  
23          same. You take those jury instructions back to  
24          the same room that you were in yesterday, you  
25          lay those jury instructions on the exact same

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1 table that you did yesterday, and one by one  
2 each of you try to understand what you're  
3 dealing with. Now, the law is different.  
4 Yesterday you were dealing strictly with guilt  
5 of innocence. Today you are dealing with  
6 either life or death. That's the only decision  
7 that you have before you, life or death. And,  
8 the Judge has given you what the law is here in  
9 Virginia. You have sworn an oath to follow  
10 that law as closely and as clearly as humanly  
11 possible. The law is not complicated. The law  
12 in this State is if you are determined by a  
13 jury to be a future danger to society based on  
14 your acts of vileness you can receive the death  
15 penalty. Of if the act that you committed was  
16 so vile, so disgusting, so depraved that it  
17 would just absolutely shock human conscience  
18 then you may again give someone the death  
19 penalty.

20 MR. GEARY: Judge, I have to object.  
21 The language he just used is not in the  
22 instructions. He is saying to the jury this is  
23 the law but he is not correct. The law is what  
24 you told them.

25 THE COURT: Well, he will correct it.



1 Go on, Mr. Barry.

2 MR. BARRY: Thank you. I am just  
3 paraphrasing exactly what it is. Now, I'm  
4 going to use these two terms over and over and  
5 over, future dangerousness or vileness. You're  
6 either a danger to society or the act that you  
7 committed was so vile. The law says one of  
8 those, just one of those is sufficient to put a  
9 person to death. Two of them will also put  
10 someone to death. And, then, of course, you  
11 have the option of giving him life  
12 imprisonment. This is really brutal. This is  
13 really straight forward. Was the act that he  
14 committed so vile that he warrants the death  
15 penalty, or is he such a danger to the  
16 community based on what he has done that he  
17 must be put to death. Now, vileness, vileness  
18 is nothing more than you dissecting that  
19 horrible crime that you watched and listened to  
20 yesterday. Vileness is torture and depravity  
21 of mind. Vileness is leading two young adults  
22 out of a car at gunpoint, taking from them  
23 their valuables, telling them to lay down in  
24 the dirt and not to worry that they would not  
25 be harmed. And, then very coldly and very

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1           calculatedly shooting one in the face and  
2           shooting one in the back of the head. It's an  
3           execution. And then having to actually somehow  
4           roll your body out of the way of the car back  
5           coming back over you. You have to say to  
6           yourself, my God, is that torture, is that  
7           depravity of mind, is that not just so sick, so  
8           evil, so bad that this man really does not  
9           warrant my sympathy for a life sentence. And,  
10          as painful as it is to the family, I want you  
11          to think about one thing. I want you to think  
12          about what Sheryl Stack was thinking as she  
13          laid there on the ground and she heard the  
14          first gun go off and she saw her boyfriend's  
15          head explode. I want you to think about what  
16          was going through her head before she got  
17          killed. And, if that is not vile then there is  
18          nothing vile in this world. Can you imagine  
19          what she was going through? Can you imagine  
20          what was going through her head? She had done  
21          everything that they told her to do. She had  
22          laid down. She had cooperated. She hadn't  
23          fought. She hadn't run. She was laying face  
24          down. She couldn't even see anything. And,  
25          he shoots her in the back of the head. That's

1 the Commonwealth's definition of vile.

2 All right. Future dangerousness.  
3 These are horrible pictures. These are  
4 horrible, horrible pictures. I mean, those  
5 folks were human beings at one time. They were  
6 human beings. Families. Loved ones. Lived.  
7 Cried. Went to work. And they ended up in  
8 their home like this. And, the actual murder  
9 that he was convicted of was killing this woman  
10 and he shot her in the back of the head. I  
11 mean, what we are dealing with here is future  
12 dangerousness. He has been convicted of  
13 capital murder once. Capital murder twice.  
14 Capital murder three times. Robbery. Robbery.  
15 Robbery. Use of firearm. Use of firearm. Use  
16 of firearm. Use of firearm. Use of firearm.  
17 And then, of course, you know, then the  
18 destroying of Edward Martin's face and brain.  
19 Now, you reach a point in most human civilized  
20 societies where you think, Jesus, is he a  
21 danger to the community? Do we want to  
22 actually give him the opportunity to continue  
23 on in society? He's already killed one child  
24 and she is 24, she was a child. And, then he  
25 has killed another woman in Chesterfield County

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1 by shooting her in the back of the head. What  
2 a gutless man. Not only does he kill women, he  
3 shoots them in the back of the head. So, as  
4 much emotion that can be fed into any sort of  
5 case, at the same time you have to say to  
6 yourself, gees, I don't know, this is two dead  
7 folks, a maimed young man, another dead man, he  
8 robs people, he carries guns around with him, he  
9 carries them into the shower with him. Gees.  
10 Do I really want to risk society? Well, the  
11 defense's answer to that is no, it's okay,  
12 because he's really no different than any other  
13 murderer and if you put him in the penitentiary  
14 he will probably only kill one out of a  
15 hundred, so we can go ahead and take that  
16 chance, because that's really not that big of a  
17 deal anyway, unless unfortunately you're the  
18 one that he can potentially kill by statistics.  
19 So, I guess my frustration in dealing with you  
20 folks is that the law says you not me, not  
21 them, not them. You 12 all have to agree. If  
22 just one of you say I am going to give him that  
23 second chance, or that third chance, or that  
24 fourth chance, whatever you conceive it to be,  
25 then he gets life. I am talking to all 12 of

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1 you. He has forfeited his right to remain in a  
2 civilized society. He has killed two women.  
3 He has taken this monstrosity called a gun and  
4 absolutely reeked havoc in our world. And it  
5 is our world, the City of Richmond is our  
6 world. And you have to say to yourself, you  
7 have to look into your heart and say how many  
8 more chances am I going to give this man before  
9 I can say enough, enough? He has committed the  
10 ultimate crime, and the law says he must suffer  
11 the ultimate punishment.

12 THE COURT: All right, Mr. Geary.

13 MR. EVERHART: Thirty-eight years ago  
14 this past August my mother brought me into this  
15 world. My dad was in the Army. As a result of  
16 that my family moved literally around the  
17 world. When I was 18 years old I lived in 12  
18 places. I had attended three different high  
19 schools. I had lived in the Orient. I had  
20 lived in Europe. I feel that I was blessed  
21 because I was exposed to a multitude of things  
22 many people are not. I was fortunate enough  
23 that my family could afford to send me to  
24 college. They could afford to send me to law  
25 school. They could afford to help me when I

1 got out of law school and was bearing making a  
2 living. And, I made a choice to practice  
3 criminal law, to defend people charged with  
4 crimes, to defend people like Andre Graham. I  
5 go to continuing legal education classes to  
6 learn how to do my job, my craft better. I go  
7 to classes, if you will, that teach me out to  
8 represent appropriately, adequately, as I am  
9 supposed to, people charged with just this  
10 crime as Andre Graham, now no longer charged  
11 but convicted. But, I tell you in all candor,  
12 even having done capital cases before, nothing  
13 prepares you for this. Nothing prepares you  
14 for standing up before 12 ladies and gentlemen  
15 of the jury and, in essence, pleading for the  
16 life of someone, in this case Andre Graham.  
17 Mr. Barry makes a very eloquent, disarming in  
18 its simplicity, appealing argument for death.  
19 Put Andre Graham to death, he deserves it. One  
20 of the reasons, one of the things they can't  
21 prepare you for is about every argument you  
22 make if you're the defense counsel is a double  
23 edged sword. It can help you but when it comes  
24 back it cuts you. I mean, realistically what  
25 do you say when someone stands up before you as

1 Mr. Barry just did, these are horrible crimes,  
2 the Rosenbluths, Sheryl Stack is dead because  
3 of what this man did. That's a horrible crime.  
4 What do you say? What can we really argue  
5 about? Mr. Barry gives you what he says are  
6 the facts of the case. I run the risk if I  
7 contest what he says are the facts do come  
8 across as some kind of an ogre animal or some  
9 cold heartless person? I guess I do. I guess  
10 I do. But I have to run that risk because I  
11 have to represent, I don't have to, I am  
12 representing Andre Graham. And, I don't want  
13 you to send him to the electric chair. That's  
14 no surprise. Several of you I had the  
15 opportunity to pose questions to and get  
16 answers from on voir dire. I told you then  
17 that if we got to this point that's what I was  
18 going to be asking you to do, don't kill him,  
19 don't execute him, don't send him to the  
20 electric chair. I offer with due apologies and  
21 well deserved to the families of Mr. Martin and  
22 Ms. Stack, the evidence that you heard does not  
23 what Mr. Barry just told you. Edward Martin  
24 testified, if you recall he sat in the witness  
25 stand and in response to Mr. Barry's questions

1 he did tell you the man with the gun told us to  
2 lie down, to close our eyes and we wouldn't be  
3 hurt and he identified that man as Andre  
4 Graham. And I have every reason to believe  
5 that's the reason you convicted him of capital  
6 murder. The next thing that Edward Martin said  
7 was, Mr. Barry said what happened next. Mr.  
8 Martin said the car was backing up, I rolled  
9 over to get out of its way and that's what he  
10 said. We don't know who got shot first and who  
11 got shot second. And, when I say it cuts both  
12 ways, I mean, what a horrible thing to have to  
13 stand here and argue about. I mean, the bottom  
14 line in this case is Sheryl Stack is dead. I  
15 can't change it. You can't change it. Mr.  
16 Barry can't change it. No one can change it.  
17 I suspect that if we took a poll of people in  
18 the courtroom just about everyone in it would  
19 do anything humanly possible they could to  
20 bring back Sheryl Stack. If we had a way of a  
21 verdict would bring her back, I've got to tell  
22 you I would vote that way, too. I would ask  
23 you to vote that way. And, it all sounds so  
24 simplistic. I hear myself making these  
25 arguments and I've got to tell you I am not

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1 comfortable with it. But the bottom line is  
2 the evidence did not come to you the way Mr.  
3 Barry tells you it did. You have to rely on  
4 your recollection but how can you, how can you  
5 forget when Edward Martin sat here and  
6 testified? I think you're going to carry it  
7 with you the rest of your life. I am. And, I  
8 do this every day, not capital cases, but I do  
9 crimes every day, just like Mr. Barry does.  
10 It's a sad commentary that pictures like this,  
11 cases like this are more prevalent than we want  
12 to believe. Mr. Martin testified, to the best  
13 of my recollection, the way I told you. You  
14 rely on your recollection. As I say though,  
15 the bottom line is Sheryl Stack was killed  
16 during the commission of a robbery. Mr. Graham  
17 stands before you guilty of that charge. You  
18 have the decision to make. You started out in  
19 this trial during the voir dire when we asked  
20 you questions the Court, Judge Wilkinson, Mr.  
21 Barry and I all asked you questions and you  
22 gave us answers. You swore an oath to well and  
23 truly try this case and true deliverance make,  
24 and Mrs. Tapscott administered that oath  
25 Tuesday. It seemed like a year ago. In

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1 essence, we were wrong. We said it was going  
2 to be a bifurcated trial, two parts. Well,  
3 you got extra, we got extra, whatever. It's a  
4 trifurcated trial, three parts. Yesterday,  
5 yesterday you found Mr. Graham guilty of  
6 several charges, aggravated malicious wounding,  
7 robbery, attempted robbery, and three use of  
8 firearms. And, you gave him life plus 50 years  
9 for those crimes. Today we come to the next  
10 level, the third trial within a trial, if you  
11 will. As the Judge instructed you and as Mr.  
12 Geary -- pardon me, as Mr. Barry had said a few  
13 moments ago, there are two predicates, two  
14 bases, if you will, that our law and the  
15 Commonwealth of Virginia allow for imposition  
16 of the death penalty. First future  
17 dangerousness, which Mr. Barry mentioned. The  
18 Commonwealth wants, the Commonwealth must  
19 convince each and every one of you individually  
20 and collectively and unanimously as a jury that  
21 Andre Graham constitutes a future danger to  
22 society. He has to prove that to you beyond a  
23 reasonable doubt. Beyond a reasonable doubt.  
24 We all know that's the cornerstone of our  
25 judicial system. That's where you are. Dr.

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1 Hagan's testimony, which Mr. Barry mentioned  
2 yeah, I wish he could stand up or sit down and  
3 tell you without exception Andre Graham will  
4 never, you give him life in the penitentiary he  
5 won't be a threat to anybody. He can't do  
6 that. If he did he wouldn't have any  
7 credibility at all because, quite frankly, who  
8 is going to believe that? Can you guarantee  
9 through life incarceration Andre Graham might  
10 not hurt somebody in the jail, in the  
11 penitentiary? No, you can't. Can you  
12 guarantee that somebody who gets a couple years  
13 in the penitentiary for breaking into  
14 somebody's house won't hurt anybody? No, you  
15 can't. The fact that he is convicted of murder  
16 in this case, that's why that study he  
17 mentioned is important. Statistics can be made  
18 to say anything you want. Forget the  
19 statistics even though they -- you heard what  
20 Mr. Barry said about statistics. It is hard to  
21 argue that. Yes, there is a chance that  
22 something else could happen. I don't know.  
23 Has the Commonwealth proven to you, however,  
24 beyond a reasonable doubt, that if you give him  
25 life incarceration he still poses a future

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1 threat to society. I suggest to you the  
2 Commonwealth has not done that. Mr. Graham has  
3 been punished by either another jury or another  
4 judge besides Judge Wilkinson I mean, for these  
5 crimes. They heard that case. Mr. Barry wants  
6 you to say because he did this murder, these  
7 murders, I apologize, and this murder today he,  
8 therefore, must be dangerous in the future. I  
9 think he said if you think he deserves another  
10 chance or a third chance, or a fourth chance,  
11 whatever it may be, you, and I think he meant  
12 any one of you individually, can cause a life  
13 sentence by wanting a life sentence. All 12 of  
14 you have to agree on death. I suggest to you  
15 that the Commonwealth has not proved beyond a  
16 reasonable doubt that Andre Graham constitutes  
17 a future danger to society. Because you hold  
18 in your hand the ability to lock him up for  
19 life. You see what he has been convicted of in  
20 Chesterfield. I think two of these charges  
21 look awfully familiar because of what we are  
22 talking right now, capital murder. Capital  
23 murder. Vileness. Another one of those double  
24 edged swords I talked about a few minutes ago.  
25 Purely literal sense, is this crime vile?

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1 Without question. Human life is valued above  
2 any other thing. I would suggest that you that  
3 to take any life through violence is a vile  
4 act. When you look in Webster's Dictionary and  
5 look up vileness, which I haven't done, but I -  
6 - how do you say if I go down the street and  
7 shoot somebody it is not vile. If Lee Harvey  
8 Oswald sits up in the bank building in Dallas,  
9 Texas, and kills President Kennedy is that not  
10 vile? Sure it is. To cause somebody's death,  
11 that is vile. But we are not talking, we are  
12 talking a more legal sense, a term of art if  
13 you will. Mr. Barry is going to stand up and  
14 throw that in my face in a few minutes and say  
15 Mr. Everhart is talking about a term of art, we  
16 are talking about a dead girl laying in the  
17 parking lot of the Steak and Ale. Like I said,  
18 it's a double edge sword. I don't know how  
19 else to put it. Does Mr. Barry suggest to you  
20 that this crime would have been somehow less  
21 vile if Andre Graham and whoever the other  
22 person was with him had ordered Mr. Martin,  
23 Edward Martin and Sheryl Stack out of the car,  
24 pistol whipped them, told them we are going to  
25 take your money then we are going to kill you.

1 I mean, my goodness, how horrible does that  
2 sound? It sounds awfully horrible to me. I  
3 was, I noted with irony what Mr. Barry said,  
4 his choice of words. And, it is ironic. He  
5 said this was an execution. Would it have been  
6 better if the young lady had been shot in the  
7 stomach and had to suffer and bleed literally  
8 to death from that, what I think you could all  
9 agree would be a more painful wound? I base  
10 that strictly on what the neurosurgeon said.  
11 He said it was a massive injury to the brain,  
12 she would have been almost instantaneously  
13 rendered comatose. She never regained  
14 consciousness. The bottom line I mean I know,  
15 I know what you're thinking, Everhart, you're a  
16 nut, the woman is dead. And, you're right.  
17 She is. And, I am sorry, you know, I am sorry  
18 for that. I am sorry for these people's loss.  
19 I am sorry Andre Graham did it. You have made  
20 the decision he did it. I am sorry that he did  
21 it. It's hard for me to stand up here and  
22 imagine how could it have been better, how  
23 could it have been worse? I suggest to you  
24 when you read the instructions you talk about  
25 vileness or depravity of mind. I think torture

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1 is in there. I suggest to you that this does  
2 not fall within those perimeters. As painful  
3 as that may be, as distasteful, as sickening as  
4 that may be, I suggest to you it doesn't fall  
5 within those perimeters. And, all that is of  
6 no consolation. The young lady is dead. If  
7 you find either of the two predicate offenses  
8 then the General Assembly of the Commonwealth  
9 of Virginia says you may then impose a penalty  
10 of death. Judge Wilkinson read you the  
11 instruction. In instruction number three and I  
12 quote, "if you find the Commonwealth has proven  
13 beyond a reasonable doubt either or both of the  
14 previously mentioned alternatives which are  
15 called future dangerous and vileness you may  
16 still decide not to impose the penalty of  
17 death. You may not impose the death penalty  
18 unless you find one of these alternatives have  
19 been proved beyond a reasonable doubt, but you  
20 are not compelled to impose the death penalty  
21 even if you find one or both of these proven  
22 beyond a reasonable doubt. What does that  
23 mean? Cut it down to a couple of words. It  
24 means if you disagree with me on vileness and  
25 you disagree with me on future dangerousness,

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1 the question then becomes do you want to  
2 execute Andre Graham? You will not literally  
3 execute Andre Graham. You will not literally  
4 pull the switch by any means. Mr. Barry will  
5 stand up in a moment and he might well argue  
6 that Andre Graham has cast his die. He has  
7 made his bed. He has got to lie in it. And,  
8 all of those arguments have merit. Mr. Barry  
9 and I disagree on whether this case should be  
10 decided on vileness or future dangerousness. I  
11 suggest to you the Commonwealth has not proven  
12 either beyond a reasonable doubt. Mr. Barry  
13 says I have proven both. He will say in a  
14 moment he has proven both. But, the ultimate  
15 decision -- that is not really correct. If you  
16 say it is then you have to make the ultimate  
17 decision, whether to impose the death penalty  
18 in this case. I think that's a personal  
19 decision for each and every one of you. I ask  
20 you not to. I am an advocate for Andre Graham,  
21 despite choices, despite vileness, despite what  
22 are agreeably horrible, totally unnecessary  
23 crimes. I ask you to spare his life. I ask  
24 you to not visit his death upon his family.  
25 And that sounds rather hypocritical, I know,

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THERESA S. GRIFFITH  
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1 because we know the Stack family has been  
2 visited with death. I suggest to you life  
3 imprisonment will serve two purposes. It will  
4 serve to protect society, the society that Mr.  
5 Barry mentioned to you a few moments ago, the  
6 world we live in so to speak, and I suggest to  
7 you it will also punish Andre Graham.  
8 Certainly we can disagree and argue forever  
9 whether it punishes him enough, whether we  
10 harken to the old eye for an eye. I don't  
11 know. You 12 ladies and gentlemen of the jury  
12 have to make that decision, but I ask you that  
13 even if you do believe that the Commonwealth  
14 has proven either one or both of the predicates  
15 bases beyond a reasonable doubt I ask you not  
16 to sentence Andre Graham to death. Thank you.

17 THE COURT: All right, Mr. Barry, do  
18 you have any rebuttal?

19 MR. BARRY: Just a couple. Defense  
20 counsel's job is to do exactly what they're  
21 supposed to do. They are advocates for their  
22 client. But they are not an advocates for  
23 society. They only represent one interest. I  
24 represent the Commonwealth. I represent the  
25 people of the City of Richmond I am not Mr.

1 Barry. I am the Commonwealth. And, I am  
2 suggesting to you as the Commonwealth's  
3 representative that you cannot take another  
4 chance with a human being at his disposal.  
5 Now, admittedly there aren't many women for him  
6 to kill in the penitentiary. And, that  
7 probably will cut his style a little bit  
8 because that's usually all he does. And he  
9 might have a little difficulty getting a .45  
10 handgun, laying women down in the penitentiary  
11 and shooting them. But do you really want to  
12 take the chance? Does society really not think  
13 we have given every opportunity? Do you really  
14 think that there is any reason for us not to  
15 say to Mr. Graham, Mr. Graham you're not  
16 insane, you're not retarded, you look like you  
17 had a normal existence coming up, and for some  
18 reason Mr. Graham, you decided to start killing  
19 women. I mean, what's wrong with telling him  
20 that? Why, why do we have to spare him? He  
21 didn't spare anybody. He kills women. So, I  
22 don't understand the difference. Defense  
23 counsel says, well, let's give him a break,  
24 let's just give him a little, a life sentence.  
25 Why? Why do we have to spare a woman killer?

1           Why do we have to spare a gutless man that  
2           shoots people in the back of the head? What did  
3           he say and what did he show us to give us one  
4           conceivable reason to keep this man alive? I  
5           mean, you know, eventually you've said got to  
6           say enough, damnation, enough, we have had  
7           enough. You killed one woman, you killed  
8           another woman, you rob people, you maim people,  
9           and we're supposed to have sympathy for you?  
10          We're supposed to say gees we are sorry, you  
11          must have had a bad day, we're going to give  
12          you life? You know, every defense counsel that  
13          does his job comes in and says spare him, spare  
14          him. He didn't mean it. Give him another  
15          chance. Why? What did he say? He didn't give  
16          us any reason to spare him. Then he tap dances  
17          around it's not vile. You know, on October the  
18          7th we had a human being. On October 8th this  
19          is all we had left. I am going to leave you  
20          with one last thought. On the night Sheryl was  
21          killed and that Edward was killed, they reached  
22          out for each other. The Lord took one and let  
23          the other one stay. Yesterday Edward reached  
24          out to you and took, you took his hand, and you  
25          gave him some justice. Today Sheryl is

1 reaching out and she wants some justice, too.

2 THE COURT: All right. Ladies and  
3 gentlemen of the jury, the Court has ordered  
4 your lunch. So you may retire and start your  
5 deliberations and the Sheriff will bring your  
6 lunch in to you. You may retire.

7 JURY OUT

8 NOTE: At this point the jury retires  
9 for their deliberations.

10 MR. GEARY: Can I take a look at the  
11 instructions?

12 THE COURT: Do what?

13 MR. GEARY: Can I take a look at the  
14 instructions?

15 THE COURT: Yes, you may. All right,  
16 Sheriff, you may return the defendant.

17 NOTE: Recess.

18 THE COURT: All right. Return the  
19 jury, Sheriff.

20 JURY IN

21 THE COURT: All right. Counsel at  
22 the bar waive the poll of the jury?

23 MR. BARRY: Yes, sir.

24 MR. GEARY: Defense waives.

25 THE COURT: All right, ladies and



1 gentlemen of the jury, have you reached your  
2 verdict?

3 MR. NAOROS: Yes, we have, Your  
4 Honor.

5 THE COURT: Give it to the Sheriff,  
6 please, sir. All right, the verdict of the  
7 jury is having unanimously found -- stand up  
8 please, sir. Having unanimously found that his  
9 conduct in committing the offense is  
10 outrageously or wantonly vile, horrible or  
11 inhuman in that it involved depravity of mind,  
12 and having considered the evidence in  
13 mitigation of the offense, you unanimously fix  
14 his punishment at death. You may have your  
15 seat. Now, ladies and gentlemen of the jury, I  
16 am going to ask you to go back. We had a jury  
17 form for the verdict, if that's your verdict  
18 would you please correct this one in the form,  
19 this one right here, this last one here,  
20 please. Y'all may go back into your jury room  
21 to do it.

22 MR. NAOROS: Your Honor, I didn't  
23 understand your instruction.

24 THE COURT: Well, that is really the  
25 jury form that you must sign. You signed this

1 one. It's all right. You all you have to do  
2 is sign that.

3 MR. NAOROS: May I speak to the  
4 Court?

5 THE COURT: Yes, sir.

6 MR. NAOROS: We decided on both of  
7 the alternatives, Your Honor.

8 THE COURT: Oh, you did. I am sorry.  
9 I misread that. All right. This will be all  
10 right. Gentlemen, excuse me. Y'all come back  
11 here please. I see that on, we, the jury on  
12 the issues joined, having found the defendant  
13 guilty of capital murder and having unanimously  
14 found after consideration of his history and  
15 background that there is a probability that he  
16 would commit criminal acts of violence that  
17 would constitute a continuing serious threat to  
18 society. And, you're exactly right, sir. I am  
19 sorry. And, having unanimously found that his  
20 conduct in committing the offense is  
21 outrageously or wantonly vile, horrible or  
22 inhuman in that it involved depravity of mind,  
23 and having considered the evidence in the  
24 mitigation of the offense, unanimously fix his  
25 punishment at death. All right, you may have

1 your seat. I think that's perfectly all right,  
2 ladies and gentlemen of the jury. Anyone wish  
3 the jury polled?

4 MR. GEARY: Judge, I would like to  
5 see the verdict form.

6 THE COURT: Yes, sir, you may see it.

7 MR. GEARY: We ask for a poll.

8 THE COURT: While you're looking at  
9 that, Mr. Geary, would the accused please rise?  
10 Having found the defendant guilty of the felony  
11 of using or displaying in a threatening manner  
12 a firearm while committing the capital murder  
13 of Sheryl L. Stack and having heard the  
14 evidence relative to the punishment. Upon  
15 consideration of all the evidence you have  
16 heard you shall fix his punishment at  
17 confinement in the Department of Corrections  
18 for five years. We, the jury, fix the  
19 defendant's punishment at confinement in the  
20 Department of Corrections for five years. All  
21 right. Any questions about the verdict of the  
22 jury?

23 MR. GEARY: Judge, I wish a poll of  
24 the jury.

25 THE COURT: All right. Let me first

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1 find out. Is there any question about the  
2 verdict of the jury?

3 MR. GEARY: I read the verdict form.

4 THE COURT: All right, ladies and  
5 gentlemen of the jury, if that is your verdict  
6 when your name is called, don't stand up or  
7 anything, just answer yes. If it is not your  
8 verdict answer no. Poll the jury?

9 THE CLERK: Peter Naoroz?

10 MR. NAOROZ: Yes.

11 THE CLERK: Betty Heath?

12 MS. HEATH: Yes.

13 THE CLERK: Carter Bryant?

14 MR. BRYANT: Yes.

15 THE CLERK: Mary Alexander?

16 MS. ALEXANDER: Yes.

17 THE CLERK: Jeffrey Stein?

18 MR. STEIN: Yes.

19 THE CLERK: Rutha Robinson?

20 MS. ROBINSON: Yes.

21 THE CLERK: Bernice Clack?

22 MS. CLACK: Yes.

23 THE CLERK: Harold Lighty, Sr.?

24 MR. LIGHTY: Yes.

25 THE CLERK: Twanna Venable?

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THERESA S. GRIFFITH  
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1 MS. VENABLE: Yes.

2 THE CLERK: Sadie McKinney?

3 MS. MCKINNEY: Yes.

4 THE CLERK: Amanda Horsley?

5 MS. HORSLEY: Yes.

6 THE CLERK: Carroll Boyd?

7 MS. BOYD: Yes.

8 THE COURT: All right. All of them  
9 have answered in the affirmative. Anything  
10 else further before I discharge the jury?

11 MR. BARRY: No, sir.

12 MR. GEARY: No, Your Honor.

13 THE COURT: All right. Ladies and  
14 gentlemen of the jury, the Court wishes to  
15 express its thanks for your service. I know it  
16 has been a trying three days for you, as has  
17 for everyone. But I express the Court's thanks  
18 for your service. If it would help some of you  
19 much, the procedure now is the Court will get a  
20 post-sentence report. The ultimate decision  
21 relies with the Court. I don't know. I will  
22 be make that returnable about six weeks and at  
23 that time the Court will fix the appropriate  
24 sentence. I thought I might tell you that so  
25 you will know what will happen. I thank you

1 for your service, you may be excused. Go  
2 either way you so desire.

3 JURY DISMISSED

4 THE COURT: All right, gentlemen,  
5 before the Court goes any further I will order  
6 the post-sentence and entertain any motions  
7 that you have at this time.

8 MR. GEARY: Judge, the motion would  
9 be to set aside the verdict.

10 THE COURT: The Court will overrule  
11 that motion.

12 MR. GEARY: Judge, the post-sentence  
13 report 19.2-264.5, I would tell the Court that  
14 we have a presentence report from Chesterfield  
15 County which was prepared on Mr. Graham in July  
16 so we would be able to sent that to Mr. White  
17 at the probation office.

18 THE COURT: All right. You may send  
19 that to Mr. White. But, I will order what we  
20 call a post-sentence report and let's see,  
21 today is October 6. How about November 17th,  
22 gentlemen?

23 MR. GEARY: What time?

24 THE COURT: 9:00.

25 MR. GEARY: That's fine.

1 THE COURT: Is that agreeable with  
2 everyone?

3 MR. BARRY: Yes, sir.


4 THE COURT: All right. The post-  
5 sentence report will be returnable on November  
6 the 17th. The defendant will be committed to  
7 the custody of the Sheriff of the City, which  
8 you may remove him at this time, Sheriff.  
9 Before you leave, Sheriff, I just want to say  
10 one thing. I wish to commend counsel both for  
11 the Commonwealth and the accused for the trial  
12 of this case. You have made it very simple for  
13 the Court. The Court appreciates that. And, I  
14 commend all of you gentlemen. You may commit  
15 the defendant to the custody of the Sheriff to  
16 be dealt with according to law.  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE OF COURT REPORTER

I, Theresa S. Griffith, hereby certify that I was the court reporter in the Circuit Court of the City of Richmond, Manchester Division, on October 6, 1994, at the time of the third day of the trial herein.

I further certify that the foregoing transcript is true and accurate, to the best of my ability.

Given under my hand this 2nd day of December, 1994.

  
Theresa S. Griffith - Court Reporter

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THERESA S. GRIFFITH  
COURT REPORTER  
(804) 755-7377



Virginia:

In the Circuit Court of the City of Richmond, Manchester Courthouse

the 6th day of October, 19 94.

Commonwealth of Virginia, plaintiff,)

against

Order -

Case No. 94-641-F

Andre L. Graham a/k/a

Andre Grant a/k/a

Lorenzo Cross a/k/a

Lewis A. Rivas,

defendant,)

(D.O.B. 3/4/70)

(Date of Offenses: 10/8/93)

This day the defendant was again led to the bar in the custody of the Sheriff of the City of Richmond, and also appeared Jeffrey L. Everhart and Robert P. Geary, his Attorneys at law, and Learned D. Barry, an Assistant Attorney for the Commonwealth, and came again the jury in keeping with its adjournment on yesterday.

Thereupon, the jury, having found the defendant guilty of capital murder of Sheryl L. Stack and using a firearm in the commission of the capital murder of Sheryl L. Stack, in Case No. 94-641-F, proceeded to hear the evidence as to the defendant's punishment, and at the conclusion of the Commonwealth's evidence, counsel for the defendant moved the Court to strike the Commonwealth's evidence, which motion the Court overruled, to which ruling of the Court counsel for the defendant objected, and at the conclusion of all the evidence, counsel for the defendant renewed his motion to strike the Commonwealth's evidence, which motion the Court overruled, to which ruling of the Court counsel for the defendant objected.

Whereupon, the jury, having fully heard the evidence, instructions of the Court, and argument of counsel, as to the

defendant's punishment in Case No. 94-641-F, retired again to its room to consult of a verdict and after some time returned into Court with the following verdicts, to-wit:

(Case No. 94-641-F) Count 1 - "We, the jury, on the issue joined, having found the defendant guilty of capital murder and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (~~barbaric~~) (depravity of mind); and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death." /s/ Peter M. Naoroz, Foreman, and

Count 2 - "We, the jury, fix the defendant's punishment at confinement in the Department of Corrections for five (5) years." /s/ Peter M. Naoroz, Foreman (on the conviction of using or displaying in a threatening manner a firearm while committing the capital murder of Sheryl L. Stack).

Thereupon, counsel for the defendant moved the Court to set aside the verdicts as being contrary to the law and the evidence, which motion the Court overruled.

Whereupon, it is Ordered by the Court pursuant to Section 19.2-264.5 of the Code of Virginia, that sentencing be delayed pending a post-sentence report by the Probation and Parole Department for this District, returnable to this Court on November 17, 1994, at 9:00 a.m., and the defendant was remanded to the

custody of the Sheriff of the City of Richmond.

Enter this Order,

 Judge

INSTRUCTION NO. A

If you sentence defendant to life in prison, then he will not be eligible for parole.

*Referred  
JBC*



INSTRUCTION NO. 13

If you sentence defendant to life in prison, then he will not be eligible for parole for thirty years.

*Referred  
JWB*

INSTRUCTION NO. 1

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

(1) That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

(2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture or depravity of mind.

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

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

*Sum*  
*(B-4)*

INSTRUCTION NO. 2

To find the aggravating factor regarding vileness, you must find that the defendant's conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind. Thus, before the death penalty can be imposed on the basis of this clause, you must find that the defendant's conduct established torture or depravity of mind. You may find vileness only if you find beyond a reasonable doubt that the defendant exhibited either torture or depravity of mind.

To establish depravity of mind, you must find beyond a reasonable doubt that the defendant, in committing the murder, exhibited a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary malice or premeditation required for proof of murder.

*Kevin  
(JRS)*

INSTRUCTION NO. 3

If you find that the Commonwealth has proven beyond a reasonable doubt either or both of the previously mentioned alternatives, which are called future dangerousness and vileness, you may still decide not to impose the penalty of death. You may not impose the death penalty unless you find one of these alternatives have been proven beyond a reasonable doubt but you are not compelled to impose the death penalty even if you find one or both of these proven beyond a reasonable doubt.

*Kevin  
J. W.*



INSTRUCTION NO. 4

In order for you to return a decision to impose the death penalty, your decision must be unanimous. If your decision is not unanimous, then the sentence will be life in prison.

*Heure  
y 800*

INSTRUCTION NO. 5

COMMONWEALTH

v.

Case No. 94-641-F THRU 94-648-F

ANDRE L. GRAHAM

ALTERNATIVE JURY VERDICTS

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

We, the jury, on the issue joined, having found  
the defendant guilty of capital murder and having  
unanimously found after consideration of his history and  
background that there is a probability that he would commit  
criminal acts of violence that would constitute a continuing  
serious threat to society,

and

having unanimously found that his conduct in committing the  
offense is outrageously or wantonly vile, horrible or  
inhuman in that it involved ~~extreme~~ [depravity of mind];  
and having considered the evidence in mitigation of the  
offense, unanimously fix his punishment at death.

  
Foreman

OR

We, the jury, on the issue joined, having found the defendant guilty of capital murder and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

---

Foreman

OR

We, the jury, on the issue joined, having found the defendant guilty of capital murder and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved [torture] [depravity of mind]; and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

---

Foreman

OR

We, the jury, on the issue joined, having found the defendant guilty of capital murder and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

---

Foreman

INSTRUCTION NO. \_\_\_\_\_

You have found the defendant guilty of the felony of using or displaying in a threatening manner a firearm while committing the capital murder of Sheryl L. Stack and have heard evidence relevant to the punishment.

Upon consideration of all the evidence you have heard, you shall fix his punishment at confinement in the Department of Corrections for five (5) years.

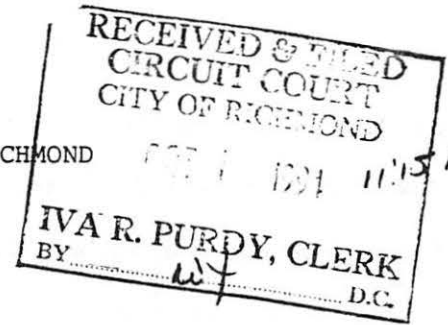
We, the jury, fix the defendant's punishment at confinement in the Department of Corrections, for five (5) years.

  
Foreman



V I R G I N I A :

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND  
MANCHESTER DIVISION



COMMONWEALTH OF VIRGINIA,

v.

ANDREA GRAHAM,

Defendant.

**DEFENDANT'S MOTION TO SET ASIDE THE VERDICTS ON  
THE GROUND THAT THE PROSECUTION FAILED TO COMPLY  
WITH THE BRADY VERSUS MARYLAND MOTION THAT WAS MADE**

Comes now defendant, by counsel, and says in this his Motion to Set  
Aside the Verdicts the following:

1. On October 5, 1994, defendant was sentenced by a jury in this Court on six non-capital felony convictions.
2. On October 6, 1994, defendant was sentenced on capital murder and a gun charge by the jury and sentencing in that matter will be on November 17, 1994.
3. On or about July 26, 1994, defendant filed a written Motion for Discovery, Inspection and "Exculpatory Evidence" brought pursuant to the United States Supreme Court decision in Brady v. Maryland, otherwise known as a Brady Motion.
4. Thereafter, discovery in the matter consisted of meetings between the Commonwealth and counsel for defendant. A number of meetings and phone calls were held and the Commonwealth gave defendant through counsel the information requested in these Motions.
5. Within approximately 10 to 12 days before trial the Commonwealth showed to defense counsel a photo spread. The photo spread consisted of

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TESTED IVA R. PURDY, CLERK  
By [signature] D.C.

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pictures of six persons. The Commonwealth indicated to defense counsel that Edward Martin picked out picture number five as the person who had the gun on him in the Steak and Ale parking lot on October 8, 1993. That person pictured was the defendant.

6. Nothing further was said by the Commonwealth about any photographic show-up.

7. The defense was told that the photo spread was shown by Detective Dalton to Edward Martin on May 22, 1994.

8. At trial the defendant called Detective Dalton as his witness. It was then disclosed for the first time that Edward Martin had seen two photo spreads. The other photo spread did not contain the picture of the defendant. It did contain the picture of the co-defendant, Mark Shepard. Detective Dalton testified and the defense learned for the first time that Edward Martin had picked out someone other than Mark Shepard in the second photo spread.

9. Such evidence was clearly and directly exculpatory to this defendant as it placed in doubt the reliability of Mr. Martin's out-of-court identification and his subsequent in-court identification of the defendant.

10. Such material should have been disclosed to the defense well before trial. Such evidence was only found out when the defense put Detective Dalton on the witness stand.

11. Defendant was prejudiced by the Commonwealth's failure to disclose this material. Such failure to disclose this material, it will be shown upon an evidentiary hearing, created a reasonable probability that the result of the trial would have been different.

WHEREFORE, defendant moves this Court for an Order granting an evidentiary hearing on this matter and thereafter setting aside the eight convictions against defendant.

ANDREA GRAHAM

BY


  
COUNSEL

Jeffrey L. Everhart  
VSBN 22328  
201 North Boulevard  
Richmond, VA 23220

Robert P. Geary, VSBN 9165  
21 Center/Suite 202  
2025 East Main Street  
Richmond, VA 23223

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing was hand delivered to Learned Barry, Assistant Commonwealth's Attorney for the City of Richmond, Manchester Courthouse, 10th and Hull Streets, Richmond, Virginia 23224 on this the 14th day of October, 1994.

  
Robert P. Geary

V I R G I N I A :

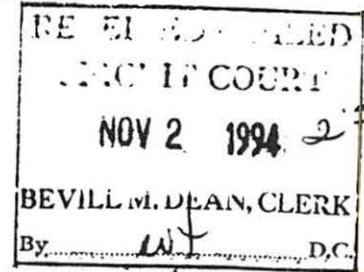
IN THE CIRCUIT COURT OF THE CITY OF RICHMOND  
MANCHESTER DIVISION

COMMONWEALTH OF VIRGINIA,

v.

ANDREA GRAHAM,

Defendant.



**DEFENDANT'S MEMORANDUM IN SUPPORT OF HIS  
MOTION TO SET ASIDE THE VERDICTS ON  
THE GROUND THAT THE PROSECUTION FAILED TO COMPLY  
WITH THE BRADY VERSUS MARYLAND MOTION THAT WAS MADE**

The factual allegations of the motion, prior to the evidentiary hearing set for November 4, 1994, are as follows:

1. On October 5, 1994, defendant was sentenced by a jury in this Court on six non-capital felony convictions.
2. On October 6, 1994, defendant was sentenced on capital murder and a gun charge by the jury and sentencing in that matter will be on November 17, 1994.
3. On or about July 26, 1994, defendant filed a written Motion for Discovery, Inspection and "Exculpatory Evidence" brought pursuant to the United States Supreme Court decision in Brady v. Maryland, otherwise known as a Brady Motion.
4. Thereafter, discovery in the matter consisted of meetings between the Commonwealth and counsel for defendant. A number of meetings and phone calls were held and the Commonwealth gave defendant through counsel the information requested in these Motions.
5. Within approximately 10 to 12 days before trial the Commonwealth showed to defense counsel a photo spread. The photo spread consisted of pictures of six persons. The Commonwealth indicated to defense counsel that Edward Martin picked out picture number five as the person who had the gun on him in the Steak and Ale parking lot on October 8, 1993. That person pictured was the defendant.
6. Nothing further was said by the Commonwealth about any photographic show-up.
7. The defense was told that the photo spread was shown by Detective Dalton to Edward Martin on May 22, 1994.

FILED  
TEST: BEVILL M. DEAN, Clerk  
D.C.  
Rabert Rapradt



8. At trial the defendant called Detective Dalton as his witness. It was then disclosed for the first time that Edward Martin had seen two photo spreads. The other photo spread did not contain the picture of the defendant. It did contain the picture of the co-defendant, Mark Shepard. Detective Dalton testified and the defense learned for the first time that Edward Martin had picked out someone other than Mark Shepard in the second photo spread.
9. Such evidence was clearly and directly exculpatory to this defendant as it placed in doubt the reliability of Mr. Martin's out-of-court identification and his subsequent in-court identification of the defendant.
10. Such material should have been disclosed to the defense well before trial. Such evidence was only found out when the defense put Detective Dalton on the witness stand.
11. Defendant was prejudiced by the Commonwealth's failure to disclose this material. Such failure to disclose this material, it will be shown upon an evidentiary hearing, created a reasonable probability that the result of the trial would have been different.

Pursuant to the Virginia Constitution, Article I, Section 8, the legislature and the Supreme Court have enacted statutes and rules governing discovery in criminal cases. Section 19.2-260 of the Code of Virginia and Rule 3:11 of the Rules of the Supreme Court of Virginia.

In regard to evidence which may be or is exculpatory, the constitutional implications are both under the Virginia Constitution cited above and the Fourteenth Amendment to the United States Constitution. Virginia Rules, both statutory and court made, strongly suggest exculpatory evidence is a form of discovery which must be tendered by the Commonwealth both under the Constitution and by statute and rule. Fitzgerald v. Bass, 6 Va. App. 38 (1988).

Allegations that the prosecution has withheld exculpatory evidence generally fall into one of three categories. Dozier v. Commonwealth, 219 Va. 1113 (1979).

The first category is that where the evidence is obviously of such important value to the defense that elementary fairness requires that it be disclosed even without a specific request.

In a situation such as that the prosecution's failure to voluntarily inform the defense of the potential evidence constitutes reversible constitutional error if the omitted evidence would have created a reasonable doubt that did not otherwise exist. Dozier, supra.

The second situation is where the defendant has made an express request for specific evidence which is either material to guilt or punishment. Robinson v. Commonwealth, 220 Va. 673 (1980)

Irrespective of whether or not the prosecutor acts in good faith or not, the material must be turned over if considered exculpatory. The last situation is where the prosecutor knowingly uses perjured testimony. In such a case the conviction will be set aside if there is reasonable likelihood that the false testimony could have effected the judgment of the trier of the fact. Walker v. Commonwealth, 4 Va. App. 286 (1987)

The Brady portion of the defendant's Motion for Discovery and Inspection and for Exculpatory Evidence set forth the following:

Comes now defendant, by counsel, and moves this Court to enter an Order, pursuant to Rule 3A:11 of the Rules of the Supreme Court of Virginia and pursuant to the Constitution of the United States and the Constitution of the Commonwealth of Virginia, to grant to defendant all discovery called for under Rule 3A:11 of the Rules of the Supreme Court of Virginia; and further moves the Court for an Order for the Commonwealth to disclose to defendant any and all exculpatory material discoverable under Brady v. Maryland; and inspect and copy or photograph any relevant written or recorded statements, any confessions made by the defendant or copies thereof and the substance of any oral statements or confessions made by the defendant to any law enforcement officer and any criminal record of the defendant; and the criminal conviction record of all persons who will testify or who may testify against defendant; and the sum and substance of any and all plea negotiations and/or plea bargains or agreements by the Commonwealth with any persons, who may testify against this defendant.

There followed in the Motion eleven specific requests of the prosecutor pursuant to Gigglio v. United States and Napue v. Illinois, none of which are applicable to the present situation.

The factual situation in which defendant found himself was that, based upon what the prosecution had disclosed, he could not file in good faith a Motion to Suppress any in-court identification to be made by Edward Martin as there was no basis in law or in fact for such a Motion.

However, as events turned out at trial, there was in fact a sound legal and factual basis for such a Motion had the prosecutor disclosed that Edward Martin had seen a different and other photographic show up. Detective Dalton's testimony was that he picked out someone and that someone was not the suspect that the Commonwealth had, Mark Shephard, defendant's co-defendant.

Armed with that knowledge, the defendant would have moved to suppress the in-court identification and an evidentiary would have been held.

Given the delicate condition of Edward Martin, defendant by counsel was unable to probe his identification procedures because of the jury being present and the implications of the defense counsel attacking implicitly or explicitly a virtually crippled person.

That could have been done substantially without a jury being present on a Motion to Suppress. As the Commonwealth argued in the guilt or innocence phase of the jury, its case rose or fell on Edward Martin's identification in the matter.

In one of the more recent death penalty cases the Virginia Supreme Court has addressed the general area of alleged failure to comply with Brady v. Maryland. In Ramdass v. Commonwealth, 246 Va. 413, 420 (1993) the Supreme Court analyzed the claimed failure of the Commonwealth to turn over polygraph



results. As it noted, it has previously found that evidence impeaching the credibility of a Commonwealth's witness is exculpatory evidence. Ramdass, 246 Va. at 420, citing Robinson v. Commonwealth, 231 Va. 142, 150 (1986).

For the present defendant to establish that his rights under Brady v. Maryland, have been violated by the Commonwealth, the record adduced at trial must indicate that the undisclosed evidence was in fact exculpatory material either to guilt or punishment. Lowe v. Commonwealth, 218 Va. 670, 679 (1977).

Obviously, the fact that Edward Martin, the Commonwealth's critical witness, had misidentified or picked out the wrong person in the other photo spread went to his credibility as a witness and was in fact or could have been exculpatory if the jury had understood the implications of it and if counsel had been able to develop this in a pretrial Motion to Suppress Evidentiary hearing.

Whether or not good faith is involved here in this Brady type Motion is irrelevant. Williams v. Commonwealth, 16 Va. App. 928, 932 (1993).

The standard of materiality to guilt or punishment has, in other circumstances, been said to be that had the evidence been disclosed to the defense the result of the proceeding would have been different. Davis v. Commonwealth, 230 Va. 201 (1985) and Williams, supra, 16 Va. App. at 933.

In the present situation a Motion to Suppress which could have laid bare the entire foundation for the identification. It was critical to the defense in this case to impeach Edward Martin's ability to make the identification. Defendant would have been able to do that with an evidentiary hearing with no jury present.

Upon all the facts of this case the Commonwealth was under a clear duty to disclose through the discovery and Brady v. Maryland process, that Edward Martin had viewed two photo spreads. In the photo spread not involving the



defendant he had not picked out the co-defendant, but had picked out someone different. If that had been known prior to trial, as it should have, a well-developed record in regard to what happened in the photographic identification process along with the other evidence adduced at trial about the bad lighting situation could have seriously put in doubt Edward Martin's ability to be able to say who the defendants were and who shot him.

The Virginia Supreme Court most recently discussed a claim of prosecution failure to disclose exculpatory evidence in Bowman v. Commonwealth, \_\_\_\_ Va. \_\_\_\_, 445 S.E.2d 110 (610 1994).

The police department undercover officer had made an identification of the defendant based on a photographic spread. The officer said he had seen the defendant in person twelve times before the arrest. At the time of the drug sales the defendant was 6'2 and weighed 194 pounds. A report the police officer filed said that the person he bought the drugs from was 5'8 and 150 pounds.

After trial the defendant filed a Motion to Dismiss based on the prosecution's failure to disclose that description of the defendant made by the police officer in his report.

The defendant also moved after trial to be allowed to inspect the report to see if there was any other exculpatory evidence in it. The trial court disallowed the motions that after reviewing it in camera. The Supreme Court noted the long line of cases from Brady v. Maryland in regard to exculpatory evidence. It noted that Bowman, as the instant defendant, had filed a pretrial motion for discovery and for exculpatory evidence under Brady. The Supreme Court said in Bowman that:

"Despite this request, the Commonwealth did not provide Bowman with Young's report, presumably because the prosecution determined that the report did not contain material exculpatory evidence." Bowman, supra, 445 S.2d at 111.

The Supreme Court said exculpatory evidence is material if there is a reasonable probability the outcome of the proceeding would have been different had the evidence been disclosed to the defendant and that a "reasonable probability is one which is sufficient to undermine confidence in the outcome of the proceedings. Robinson v. Commonwealth, 231 Va. 142, 151 (1986).

The Supreme Court noted that a reviewing court has a difficult time looking at evidence which did not come to a fact trier and determining that the result would be different. The Court said it should look at the totality of the circumstances with the awareness of that difficulty in reconstructing post trial proceedings the course the defense at trial would have taken had the defense not been misled by the prosecutor's incomplete response to the Brady request. United States v. Bagley, 473 U.S. 667 at 683 (1985).

The Court on this issue said it could not conclude that the failure to disclose the information earlier prevented Bowman from effectively using the information for the purpose of challenging Young's credibility. Bowman, supra, 445 SE.2d at 111.

In the instant case it is clear that with the victim Edward Martin in the condition that he was, it was extremely difficult for the defendant to challenge his credibility in front of the jury given the sympathy that would arisen for the victim and against the defendant. This is most particularly true in a death penalty case.

If the evidence had been given by the Commonwealth, then a full exploratory motion to Suppress Evidentiary hearing could have been held at which the detective, the former assistant commonwealth's attorney, the parents and the victim himself could have testified in regard to the identification that was made.

The Commonwealth's failure to do this should result in the motion being granted.

For these reasons and for the reasons to be developed at the evidentiary hearing in this matter, this Court should set aside all the convictions including the capital murder/death penalty conviction of defendant.

ANDREA GRAHAM

BY

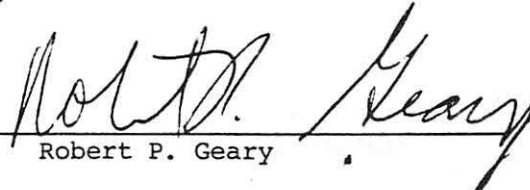
  
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CERTIFICATE

I hereby certify that a true and exact copy of the foregoing was hand delivered to Learned Barry, Assistant Commonwealth's Attorney for the City of Richmond, Manchester Courthouse, 10th and Hull Streets, Richmond, Virginia 23224 on this the 2nd day of November, 1994.

  
Robert P. Geary

V I R G I N I A:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

Manchester Division

\* \* \* \* \*

COMMONWEALTH OF VIRGINIA

-vs-

ANDRE L. GRAHAM

\* \* \* \* \*

FILE NOS. 94-641F  
THROUGH 94-648F

Transcript of Sentencing in the above-styled  
matter, when heard on November 17, 1994, before the  
Honorable James B. Wilkinson.

APPEARANCES:

LEARNED D. BARRY, ESQ., Deputy Commonwealth's Attorney for  
the City of Richmond;

ROBERT P. GEARY, ESQ., 2025 E. Main Street, Richmond,  
Virginia 23223, and JEFFREY L. EVERHART, ESQ., 201 N.  
Boulevard, Richmond, Virginia 23220, counsel for the  
defendant;

The defendant, Andre L. Graham, present in person.

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COURT REPORTER  
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## I N D E X

WITNESSES:	DIRECT:	CROSS:
W. F. Showalter	603	
William H. Parcell, III	607	
Steve A. Dalton	610	619

## EXHIBITS:

For the Defense:

1 - Photospread	617
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1 THE CLERK: Case of Commonwealth of  
2 Virginia against Andre L. Graham. Is the  
3 Commonwealth ready, Mr. Barry?

4 MR. BARRY: Yes, ma'am.

5 THE CLERK: Is the defendant ready,  
6 Mr. Geary, Mr. Everhart?

7 MR. GEARY: Yes.

8 MR. EVERHART: Yes, ma'am.

9 THE COURT: All right. I think we  
10 have some motions, gentlemen, to take up?

11 MR. GEARY: Judge, before I call the  
12 first witness Mr. Barry and I entered factual  
13 stipulations with regard to the motion that was  
14 filed, claiming an alleged Brady v. Maryland  
15 violation. The stipulations are as following:  
16 We are stipulating to paragraph five of the  
17 motion, which also appears in paragraph five of  
18 the Memorandum. That stipulation is as  
19 follows: "within approximately 10 to 12 days  
20 before trial the Commonwealth showed to defense  
21 counsel a photospread. The photospread  
22 consisted of pictures of six persons. The  
23 Commonwealth indicated to defense counsel that  
24 Edward Martin picked out picture number five as  
25 the person who had the gun on him in the Steak

1 and Ale parking lot on October the 8th, 1993.  
2 That person pictured was the defendant." We  
3 are stipulating paragraph number six. It says  
4 as follows: "Nothing further was said by the  
5 Commonwealth about any photographic show-up."  
6 We stipulated further, Your Honor, that the  
7 Commonwealth told defense counsel prior to  
8 trial Edward Martin was not able to identify  
9 the second person. We are stipulating  
10 paragraph seven of the motion, "the defense was  
11 told that the photospread that was shown by  
12 Detective Dalton to Edward Martin that took  
13 place on May 22, 1994. And, the final  
14 stipulation, Your Honor, is in regard to the  
15 appearance of Edward Martin when he testified  
16 in this case on October 4, 1994. The testimony  
17 is about his physical condition at the time.  
18 He had been shot in the eye, had replaced an  
19 eye, that he talked haltingly, that one arm was  
20 paralyzed and he moved with a noticeable limp.  
21 Those were the stipulations Mr. Barry and I  
22 have agreed on.

23 MR. BARRY: That's correct.

24 MR. GEARY: My first witness will be  
25 Investigator Showalter, Your Honor.

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THE COURT: All right.

W. F. SHOWALTER, a witness called on  
behalf of the Defendant, having first been sworn,  
testified as follows:

DIRECT EXAMINATION

BY MR. GEARY:

Q Detective Showalter, would you state  
for the Court your full name, please.

A Detective W. F. Showalter.

Q And, your employment, please?

A Chesterfield County Police  
Department, Crimes Against Persons Unit.

Q Approximately how long have you been  
a police officer in Chesterfield, Mr. Showalter?

A Twenty-five years, sir.

Q And, did you testify in this matter  
on October the 4th, 1994?

A Yes, sir, I did.

Q In regard to an investigation  
concerning the deaths of the Rosenbluths in Chesterfield  
County, were you the investigator in that case?

A Yes, sir.

Q And, was Mr. Graham charged with  
those offenses?



1 A Yes, he was.

2 Q And, you testified in this Court on  
3 October the 4th that a deputy sheriff in Chesterfield  
4 reported to you a conversation he had overheard after Mr.  
5 Graham was arrested?

6 A Correct, sir.

7 Q And, as a result of that information  
8 would you tell the Court what you did and where you went?

9 A From that information which would  
10 have been December the 3rd, 1993, we went to the residence  
11 of a Priscilla Booker in Midlothian Village Apartments,  
12 and retrieved a weapon from a residence there. Was that  
13 weapon that you retrieved the weapon that was introduced  
14 in the case here?

15 A Correct, sir.

16 Q The murder of the Rosenbluth's, do  
17 you recall what date that took place?

18 A We responded to that residence on  
19 November 30th, 1993.

20 Q And, the trial of Mr. Graham in that  
21 case took place when?

22 A In the month of May, sir.

23 Q May of this year?

24 A Correct, sir.

25 Q And, a co-defendant in that case was

1 named Mark Sheppard; is that correct?

2 A Correct, sir.

3 Q And, Mr. Sheppard was tried in what  
4 month of this year?

5 A That would be the month of September,  
6 sir.

7 Q And, Mr. Sheppard received the death  
8 penalty in that case?

9 A Correct, sir.

10 Q In regard to the gun that you  
11 retrieved at the residence of Priscilla Booker on or about  
12 December 3, 1993, did you have occasion after that time to  
13 discuss that gun with Detective Dalton of the Richmond  
14 Bureau of Police?

15 A Correct, sir.

16 Q And, would you tell the Court what  
17 the purpose of your having the discussion with Detective  
18 Dalton about that gun was?

19 A The caliber of the weapon that was  
20 recovered from the Booker residence appeared to be the  
21 same caliber that was used in the Steak and Ale and the  
22 LaQuinta incidents in the city.

23 Q And, that was a .45, correct?

24 A Correct, sir.

25 Q Detective Dalton was the officer,

1 lead investigator in regard to the LaQuinta shooting and  
2 the Steak and Ale murder case; is that correct?

3 A The Steak and Ale was his. I believe  
4 Detective Mullins from the city was in LaQuinta.

5 Q And, as a result of getting the .45  
6 caliber weapon in early December of last year was that  
7 taken to Ms. Jones at the forensic laboratory?

8 A It was taken to the state lab and she  
9 was the examiner that was designated to do the  
10 examination.

11 Q Did you receive information at some  
12 point that that weapon was a weapon that was used in the  
13 Rosenbluth murder case?

14 A We received oral confirmation and  
15 later we received written confirmation.

16 Q Can you tell the Court at  
17 approximately what point in time Ms. Jones told you orally  
18 that the gun had been used in the Rosenbluth case?

19 A I would say approximately in the  
20 neighborhood of a week and a half, two weeks after the  
21 arrest of the subjects.

22 Q That would have been somewhere around  
23 December 15, 20, something like that?

24 A Somewhere around the middle of  
25 December I would estimate, sir.

William H. Parcell, III - Direct

1 Q Did you receive any information from  
2 Ms. Jones that time or fairly soon thereafter that that  
3 .45 also was a shooting weapon involved in the Steak and  
4 Ale and LaQuinta, too?

5 A At the same time she was able to  
6 orally give us a confirmation that it appeared to be the  
7 same weapon, all of them.

8 Q And, at the time Mr. Graham was  
9 arrested and brought to the Chesterfield jail was he under  
10 arrest for the Rosenbluth murders?

11 A Yes, sir, he was.

12 MR. GEARY: Can I have a minute,  
13 Judge? No further questions, Your Honor.

14 MR. BARRY: Thank you, sir. I  
15 appreciate it.

16 MR. GEARY: I call William Parcell.

17  
18 WILLIAM H. PARCELL, III, a witness  
19 called on behalf of the Defendant, having first been  
20 sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. GEARY:

23 Q Would you state your full name,  
24 please.

25 A William H. Parcell, III.



1 Q As of May of this year would you  
2 state your employment?

3 A I was Assistant Commonwealth's  
4 Attorney for the City of Richmond.

5 Q And, approximately how long did you  
6 work for the Commonwealth Attorney's Office in Richmond?

7 A Five years.

8 Q Were you assigned to the Steak and  
9 Ale murder cases some time prior to May 22nd of this year?

10 A I was.

11 Q Who made that assignment?

12 A I did.

13 Q Did you talk to Edward Martin's  
14 mother and father anytime prior to May 22nd of this year?

15 A I did.

16 Q Were you present, did you go to the  
17 house of the Martins with Detective Dalton at any time  
18 before May 22nd?

19 A I did.

20 Q And, how many times did you visit the  
21 Martin household?

22 A Once.

23 Q What was the purpose of that visit?

24 A It was for Detective Dalton and I to  
25 meet Edward. We had been in contact with his parents

William H. Parcell, III - Direct

1 since he was going through his recovery period, and the  
2 sole purpose of our visit was to let him know who we were  
3 and we could met him on his turf for lack of better term  
4 to make him feel comfortable with us because we knew we  
5 had to spend a lot of time with him as we prepared for the  
6 Graham trial.

7 Q Do you have any idea when that  
8 meeting took place or that visit took place?

9 A It was in early May of 1994.

10 Q At that time as far as you recollect  
11 were there any photographs shown to Mr. Martin?

12 A There were not.

13 Q At that time as far as your  
14 recollection, were there any photographs shown to Mr.  
15 Martin?

16 A There were not.

17 Q Were you present on any occasion when  
18 photographs were shown to Mr. Martin?

19 A I was not.

20 MR. GEARY: That's all I have, Judge.

21 MR. BARRY: I have no questions.

22 Thank you, sir.

23 THE COURT: Thank you, Mr. Parcell.

24 MR. GEARY: I call Detective Dalton.

25 THE COURT: Who?

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MR. GEARY: Detective Dalton.

STEVE A. DALTON, a witness called on  
behalf of the Defendant, having first been sworn,  
testified as follows:

DIRECT EXAMINATION

BY MR. GEARY:

Q Mr. Dalton, tell the Court your name.

A Steve A. Dalton.

Q And, your employment?

A Richmond Police Department, Detective  
Division, Homicide Unit.

Q Approximately how long have you been  
a city police officer?

A Twenty-four years.

Q And how long a detective?

A About 20 years.

Q And how long with homicide?

A Off and on about five years total.

Q In regard to the Steak and Ale case  
that we are here about, were you assigned that case within  
the Richmond Police?

A Yes, sir, I was.

Q And, you were considered the lead  
detective, lead investigator?

1 A Yes, sir.

2 Q You had been in the courtroom and you  
3 heard Investigator Showalter testify this morning?

4 A Yes, sir.

5 Q Did you receive some time in December  
6 information from Ann Jones, forensic lab, in regards to a  
7 .45 that had been confiscated by the Chesterfield Police?

8 A Yes, sir, I did.

9 Q Did Ms. Jones indicate to you  
10 anything about that gun in regard to the LaQuinta cases  
11 and Steak and Ale cases?

12 A She stated it was the same gun that  
13 was used in the Chesterfield murder case, the Steak and  
14 Ale murder case and the LaQuinta shooting.

15 Q Prior to May of this year had you  
16 visited Edward Martin and his family at their home?

17 A Not at their home.

18 Q Had you met them somewhere other than  
19 that?

20 A Yes, sir.

21 Q Where was that?

22 A At least three or four times at MCV  
23 Hospital.

24 Q That was where Edward was a patient?

25 A Yes.



1 Q And, you were called to testify in  
2 this trial on October the 5th of this year; is that  
3 correct?

4 A That's correct.

5 Q Did you at some time in May go to the  
6 Martin residence and show photographs to Edward Martin?

7 A Yes, I did.

8 Q Do you recall what date that was?

9 A May 22nd.

10 Q How were you able to recall this  
11 particular date?

12 A I had Edward Martin sign a copy of  
13 the photospread that was shown, date it and initial it.

14 Q To your recollection was anyone with  
15 you when you went to the Martin home?

16 A I testified that Mr. Parcell was with  
17 me.

18 Q Is that still your recollection?

19 A I thought he was but in discussions  
20 with him since he has said that he was not with me.

21 Q Do you recall if there was anybody  
22 else that might have been with you besides Mr. Parcell,  
23 any other police officer or prosecutor?

24 A No, sir.

25 Q I believe you testified that at the

Steve A. Dalton - Direct

1 home that Edward's mother and father were t the home along  
2 with Edward?

3 A Yes, sir.

4 Q Was that the first time you had seen  
5 him since he had gotten out of MCV?

6 A That would be the second time.

7 Q Could you describe to the Court what  
8 Edward Martin's physical condition was on May 22nd, 1994?

9 A He was in the recovery stage. He was  
10 very alert. He had physical impairments but was mentally  
11 alert and astute to what we were talking about.

12 Q And, the physical impairment would  
13 you describe what those were if you remember.

14 A He had problems with his arm. He had  
15 problems walking. And, he had lost one eye.

16 Q How about speech problems?

17 A Speech was slurred but  
18 understandable.

19 Q Was it slow? Did he have any problem  
20 getting words out?

21 A Some, he had to think on each word.  
22 He thought through each word before he spoke it.

23 Q On that occasion how many  
24 photospreads did you show him?

25 A Two.

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Steve A. Dalton - Direct

1 Q Can you explain to the Court the  
2 photospread used by the Bureau of Police, how those or how  
3 do you set those up, how many photographs were spread?

4 THE COURT: I thought we went over  
5 this at trial. He showed him two. He picked  
6 out this defendant as the one that shot him and  
7 he showed him another one and he couldn't pick  
8 him out. He didn't pick the other one out.

9 MR. GEARY: I would like to expand on  
10 what he testified to at the trial because that  
11 was in front of the jury.

12 THE COURT: I believe, I think he is  
13 bound by that.

14 BY MR. GEARY: (Continuing)

15 Q The photospread, if I may lead you,  
16 consisted of six photographs; is that correct?

17 A That's correct.

18 Q And, manilla folder?

19 A Yes, sir.

20 Q And, you have holes cut out and the  
21 pictures are attached inside the manilla folder?

22 A Yes, sir.

23 Q So, the person viewing the  
24 photospread cannot see a name?

25 A No, sir

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Steve A. Dalton - Direct

1 Q They don't see anything below the  
2 chin, right?

3 THE COURT: Isn't there one in the  
4 evidence?

5 THE CLERK: Sir?

6 THE COURT: Isn't there one in the  
7 evidence?

8 THE CLERK: I can go back and pull  
9 it.

10 MR. BARRY: It is, Judge.

11 THE CLERK: Would you like for me to  
12 go back and get it?

13 THE COURT: I think it speaks for  
14 itself.

15 BY MR. GEARY: (Continuing)

16 Q Do you recall, was Andre Graham's  
17 picture in the first photospread that you showed Mr.  
18 Martin?

19 A Yes, sir.

20 Q Was there anyone else in the room  
21 when you showed him the photospread?

22 A Definitely, his parents were there.

23 Q And, your testimony at trial is that  
24 he picked out I think you said number five, which was  
25 Andre Graham ; is that correct?

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(804) 755-7377



Steve A. Dalton - Direct

1 A That's correct.

2 Q You then showed him a second  
3 photospread?

4 A That's correct.

5 Q In that second photospread you told  
6 us that Mark Sheppard was in that photospread?

7 A That's correct.

8 Q Does that photospread still exist?

9 A Yes, sir, it does.

10 Q Where is that?

11 A Right here.

12 Q May I see that?

13 MR. GEARY: Judge, for the record I  
14 have been shown the original of a photospread.  
15 I would ask the copy be introduced as the  
16 defendant exhibit on this motion. I think  
17 Detective Dalton has a copy with him.

18 THE COURT: All right.

19 THE WITNESS: The copy would have a  
20 date and initials of Mr. Martin.

21 BY MR. GEARY: (Continuing)

22 Q And, the initials are by what person?

23 A By number four.

24 Q Do you know who that is?

25 A I have no idea.

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Steve A. Dalton - Direct

1 Q Other than Mr. Sheppard in that  
2 photospread do you know the identity of the other five  
3 persons?

4 A No, sir, I don't.

5 Q What number is Mark Sheppard?

6 A Number three.

7 Q And, tell the Court what happened in  
8 regards to this photospread. Tell us what Mr. Martin did  
9 and what he said to you.

10 A He --

11 MR. GEARY: I move to introduce that  
12 with the deputy.

13 NOTE: Received and so marked by the  
14 Clerk as Defendant's Exhibit Number 1.

15 A He didn't say anything until I showed  
16 him the first photospread. I didn't indicate to him that  
17 he had picked out the primary suspect or anything. I did  
18 not indicate to him at all. I showed him the second  
19 photospread, asked several times questions, did he  
20 recognize anyone in the photospread. At that time he  
21 looked at it very cautiously and then he pointed to number  
22 four. And I had him sign the copy that I just turned into  
23 the Court. I had him initial that and date it and there  
24 was no other response. I didn't tell him that he had  
25 picked out the wrong person or the other correct person.

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Steve A. Dalton - Direct

1 Q As a result of what happened on May  
2 22nd, did you then inform whatever prosecutor was handling  
3 the case of what you had learned on May 22nd?

4 A Yes, sir, I did.

5 Q Do you recall who that person was at  
6 you spoke with?

7 A At that time Mr. Parcell was the  
8 prosecutor on the case.

9 Q Can you tell, as best you remember  
10 Detective Dalton, can you tell the Court today what you  
11 told Mr. Parcell on May 22nd?

12 A Word for word no, but I can tell you  
13 I was very excited that he had picked out the primary  
14 suspect and I immediately contacted Mr. Parcell since he  
15 was with him. I am sure out of the excitement I contacted  
16 him as soon as I could.

17 Q What was your recollection talking to  
18 him about the second photospread?

19 A I told him I felt like he picked out,  
20 he had picked out the wrong person but that was because I  
21 did too good of a photospread and the person was too  
22 similar to Mark Sheppard all the way down the line.

23 Q Is there such a thing in the police  
24 world as too good of a photospread; is that right?

25 A Yes, sir.

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Steve A. Dalton - Cross

1 MR. GEARY: That's all the questions  
2 I have, Judge.  
3

4 CROSS EXAMINATION

5 BY MR. BARRY:

6 Q Based on the fact Mr. Martin was able  
7 to identify Mr. Sheppard, the decision was made not to  
8 charge anyone else in the case; is that correct?

9 A That's correct.

10 MR. BARRY: Thank you.

11 THE COURT: All right. Thank you.  
12 No further questions?

13 MR. GEARY: No, sir. Judge, those  
14 are all the evidence, all the witnesses we are  
15 calling on the motion.

16 THE COURT: All right.

17 MR. BARRY: We are ready to argue,  
18 Judge.

19 MR. GEARY: Judge, I have submitted  
20 some time prior to when we were supposed to  
21 have had this hearing on November 4th,  
22 memorandum. The chief case in Virginia now is  
23 Bowman v. Commonwealth, which was decided by  
24 the Virginia Supreme Court in June, which  
25 overturned the Virginia Court of Appeals'



1 decision which had affirmed the conviction. In  
2 Bowman there was a question of identification.  
3 There was a Brady motion filed. In that case an  
4 undercover police officer had made a drug buy.  
5 At trial he testified that he had seen Bowman I  
6 think he said 10 to 12 times prior to making  
7 the buy, and Bowman apparently was 6'2", 220  
8 pounds. And then they found out after  
9 conviction that the police officer in his  
10 report had indicated the person that he had  
11 purchased the drugs from was 5'8" and 150  
12 pounds. The Virginia Supreme Court unanimously  
13 overturned the conviction, overturned the  
14 decision of the Court of Appeals. The  
15 standard, as set out in Bowman, Judge, as it is  
16 in many other Virginia Supreme Court cases. In  
17 this case, Judge, the chief difficulty that we  
18 have in examination of Mr. Martin in this case  
19 in front of the jury in a death penalty case  
20 was the fact he was extremely sympathetic  
21 witness. There had been some debate between  
22 Mr. Everhart and myself as whether we should  
23 even attempt to cross examine him because of  
24 that factor. I believe the Commonwealth had a  
25 duty, absolute duty, to disclose at some time

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1 reasonably prior to trial that the fact Mr.  
2 Martin had picked out someone in the second  
3 photospread who was not the person the  
4 Commonwealth considered, had charged in the  
5 offense. That would have given us the factual  
6 basis to file a motion to suppress the  
7 identification. As I indicate in the memoranda  
8 and I believe in the motion, as lawyers we  
9 can't file motions for discovery when we have  
10 a, when we want to find out something unless we  
11 have the factual basis for the motion. In this  
12 case there was absolutely no factual basis for  
13 defense counsel to file a motion to suppress  
14 the identification based on the information  
15 which had been supplied by the Commonwealth.  
16 There was no indication of any  
17 misidentification until by happenstance  
18 Detective Dalton was called, was a witness by  
19 the defense, we found out for the first time  
20 there had been a second photographic spread and  
21 a misidentification. In this case I don't know  
22 if the Commonwealth will concede but I would  
23 suggest very strongly their argument to the  
24 jury in the first case was basically without  
25 the identification testimony of Edward Martin.

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1 they would not have been available to secure a  
2 conviction. Therefore we are talking about the  
3 testimony of a critical witness, a witness who  
4 we were not reasonably able to cross examine at  
5 trial because of the problems that he had and  
6 the sympathy that would have been gendered for  
7 him and against my client in terms of that  
8 cross examination. I set out in memorandum the  
9 fact if we had had the ability to have a motion  
10 hearing without the jury to go into all these  
11 factors, I believe we would have met the burden  
12 that's imposed upon the defense in cases such  
13 as Bowman to say that you have to show at the  
14 instruction of the evidence in terms of  
15 changing your strategy or going would have been  
16 different, which may have produced a different  
17 result. This was an identification case. The  
18 gun was certainly a strong circumstance, the  
19 manner in which it was found without Edward  
20 Martin's convincing testimony, Your Honor, I  
21 don't believe the Commonwealth would have  
22 secured the conviction. I don't know if the  
23 Commonwealth is willing to concede that but I  
24 believe that's the way it will look on appeal

25 MR. BARRY: Judge, this is a non-



1 issue. We have to start with the fact that the  
2 motion to set aside the verdict is incorrect as  
3 far as to paragraph eight. Both defense  
4 attorneys were aware at the time and I am  
5 pretty sure they will concede this now that Mr.  
6 Martin had not been able to pick out Sheppard  
7 in the photospread. What we are litigating  
8 here was the fact they were not told that he  
9 picked out someone else. And, that message or  
10 that information had been given to Mr. Parcell.  
11 This is a non-issue. To this day we do not  
12 know and we will not attempt to prosecute the  
13 alleged second man because we don't know who he  
14 is. For all we know number four might have  
15 been the second man. He keeps saying we had to  
16 do Sheppard, we had to do Sheppard, we had to  
17 give him information about Sheppard. The truth  
18 of the matter is Sheppard is a non-factor. No  
19 one has ever been charged as a second man in  
20 this case. To this day we do not know or we do  
21 not have sufficient evidence to go forward on  
22 who the second man is. The issue that he is  
23 bringing before you is that because he was not  
24 told that it was not Sheppard that was picked  
25 out, therefore, it would have been different

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1 results at trial. Both attorneys were well  
2 aware of the fact he was unable to pick out  
3 Sheppard. Both attorneys were well aware of  
4 the fact that because he wasn't able to pick  
5 out Sheppard we were not going to prosecute  
6 Sheppard. We don't have anybody to prosecute,  
7 unfortunately, for being involved in this case  
8 on that night. The cases that he has cited to  
9 you are significant cases in that the police  
10 described a man six foot and someone else says  
11 he is five foot. That is substantial. In this  
12 case there is no issue. He picked out Andre  
13 Graham. He was unable to pick out the led  
14 suspect, Mark Sheppard. Because he was able to  
15 do that we did not go forward. There is no  
16 issue as far as Mark Sheppard is concerned. No  
17 one has ever been charged. No one will be  
18 charged, because we don't know who he was. So,  
19 for them to say because we didn't tell them  
20 that there was another man picked out there is  
21 going to be a different result at trial is  
22 ludicrous. There is no issue.

23 MR. GEARY: Judge, it seems to me  
24 that Mr. Barry can't stand up and argue the  
25 case without saying what I told him is

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1           ludicrous. In fact, they never told us about a  
2           second photospread. He said Mr. Martin can't  
3           identify the second shooter, which makes sense.  
4           We were never told about a second photospread  
5           until Detective Dalton testified. What he just  
6           argued factually is not what we just  
7           stipulated. We were never told about it. And  
8           I think we if we were told about it and found  
9           out that in addition to finding for the first  
10          time there was a second photospread in addition  
11          that the misidentification took place. Now,  
12          it's sort of disingenuous for Mr. Barry to  
13          argue that Mark Sheppard was not involved in  
14          this case. Since Mark Sheppard got the  
15          electric chair in the Rosenbluth case and the  
16          Commonwealth in that case used the Steak and  
17          Ale case in the sentencing phase of the case to  
18          assist itself in getting a death penalty. They  
19          paraded witnesses in against Sheppard in  
20          Chesterfield to show that he was present at the  
21          Steak and Ale shooting case. So for the  
22          Commonwealth in Richmond to say that Sheppard  
23          was not a suspect and was not the man flies in  
24          the face of what the Commonwealth in  
25          Chesterfield did. And I think Mr. Barry would

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1 have to agree that these two prosecutors in the  
2 case since December have been working glove in  
3 hand, Mr. VonSchuch in Chesterfield and Mr.  
4 Barry here in Richmond. And for him to argue  
5 here today that Sheppard wasn't the second  
6 shooter is ludicrous. It's more ludicrous than  
7 anything I have ever said. The fact that  
8 Detective Dalton said he picked out the wrong  
9 guy, because they knew they had evidence that  
10 Sheppard was, in fact, the second person.

11 THE COURT: All right. The Court is  
12 of the opinion there was no Brady material to  
13 give. I watched the young man testify like the  
14 jury did. He was very positive in his  
15 identification. My recollection of the  
16 testimony he said he really didn't see the  
17 other man. I think one time had him in the car  
18 at the time him and the young lady were shot.  
19 His attention was to the man with the gun who  
20 happened to be, by the evidence, Mr. Graham.  
21 The Court has no problem at all with the case  
22 on that point. And, I will overrule your  
23 motion, Mr. Geary. In the first place I don't  
24 think even on a motion to suppress, it is  
25 whether or not his recollection at the time of

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1 the offense or whether it is some way the  
2 pictures assisted him. I don't think if you  
3 pass for 400 yards every week and on the 11th  
4 week you pass for 100 yards, you're a bad  
5 passer. I watched this young man testify very  
6 closely. He was exact. He had difficulty a  
7 little bit in speaking but he was convinced  
8 beyond all doubt that Mr. Graham shot him. Of  
9 course, he did not see the shot, he only saw  
10 the gun and he heard the shot. All right.  
11 What other motions do we have, gentlemen?

12 MR. GEARY: That was the only motion  
13 we have, Judge.

14 THE COURT: All right. Any argument?

15 MR. BARRY: We are prepared to go  
16 forward now with the presentence report. If I  
17 may be heard on that I would like to read  
18 something into the record.

19 THE COURT: Let the record reflect  
20 they are not retained, they are court  
21 appointed. It says here retained.

22 MR. EVERHART: Yes, sir, it does,  
23 Your Honor.

24 MR. BARRY: Judge, we have a  
25 procedure in this state that obviously is three

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1 years out of date, because in 1991 the Supreme  
2 Court of the United States in Payne v.  
3 Tennessee said that victim impact evidence was  
4 totally appropriate to be brought forward to  
5 the attention of a jury. Now, our state, for  
6 some reason, some absurd reason, says that you  
7 can't do that in capital murder cases. You can  
8 do it in other case but you cannot do it in a  
9 capital murder case. So, a jury in this state  
10 is left to flounder with what they can be given  
11 and what they can't be given. Then after the  
12 effect of the jury if we are lucky enough to  
13 convince them of a capital murder death verdict  
14 then we are then somewhat belatedly allowed to  
15 bring that information to the Court's  
16 attention. And, I find it most unusual that a  
17 prosecutor cannot tell the citizens of the  
18 community the impact it has had on the family.  
19 Let me read this to you. Because at least now  
20 I am given an opportunity to present that  
21 evidence. I am going to read this to you  
22 because I want it in the record. This is from  
23 Mrs. Stack. Our daughter died from the gunshot  
24 wound to her head two and a half days after she  
25 was shot. She had two operations. Although

1 comatose, she spent this entire time groaning  
2 and gasping for breath. We were at her bedside  
3 the whole time. We were allowed to stay in the  
4 intensive care unit because there was no hope.  
5 Although the doctors said that she couldn't  
6 understand pain, we watched her writhe and  
7 heard her groans, so this was no comfort to us  
8 at all. All we could do was hold her hand and  
9 see that she was given painkillers and watch  
10 her slowly die. I will never forget any of  
11 this. She suffered. Our lives are  
12 overshadowed by the loss of our daughter. We  
13 were a close knit family. Our eleven year old  
14 son is afraid something will happen to one of  
15 us now. It is hard to concentrate or  
16 accomplish anything. Words just can't express  
17 the pain. Sheryl was my best friend as well as  
18 my daughter. I will miss her forever. And, it  
19 is signed by her mother, Marilyn Stack. Now, I  
20 think that sort of evidence would have some  
21 impact on a jury as well as it has some impact  
22 on the Court. I also had, had I been given the  
23 opportunity, a number of young kids who this  
24 young lady had worked with on her own time for  
25 years down in her community. Kids, I would say

1 they were poor kids, I think they're called  
2 disadvantaged nowadays. But they were  
3 struggling in school. And, this young lady on  
4 her own time while she herself was working her  
5 way through school, would take her days and go  
6 down to 7th and 8th grade and spend hours with  
7 each of these children helping them get better  
8 in math. You probably saw the two young ladies  
9 here in court. I made the decision I could not  
10 put them on, even though I desperately wanted  
11 to. I could have had 20 more children just  
12 like that.

13 MR. GEARY: Your Honor, I am going to  
14 object. if Mr. Barry wants to testify, fine.  
15 He's supposed to be doing the victim impact  
16 here in writing. Let him go from there, not  
17 testify. He did enough of that during the  
18 trial.

19 MR. BARRY: I am arguing, Judge. I  
20 think that's appropriate.

21 MR. GEARY: You're arguing facts not  
22 in evidence.

23 THE COURT: You're arguing facts not  
24 in the record, Mr. Barry.

25 MR. BARRY: Once again I feel like my



1 hands are being tied because I can't bring  
2 before the Court victim impact information.  
3 But, this case is in a good posture right now.  
4 I will leave it at that.

5 There is no reason to set aside this  
6 death verdict. Period. Had that jury heard  
7 from the mother of this young woman what I just  
8 read to you they wouldn't have been out the two  
9 hours that they were out, because this is just  
10 heart rendering. I had to prove two things in  
11 this case. I had to prove vileness and/or I  
12 had to prove future dangerousness. After the  
13 Chesterfield convictions were obtained by the  
14 Chesterfield police and Mr. VonSchuch, future  
15 dangerous was assured. And, the vileness of  
16 this, when you really stop and think what  
17 Edward Martin testified to, couple that with  
18 the impact that its had on his family, I don't  
19 think there is any issue that the vileness has  
20 been also proven by the Commonwealth. I  
21 respectfully request the case be carried  
22 forward to the Supreme Court of Virginia with  
23 your sentencing today, the same sentence that  
24 the jury gave him six weeks ago.

25 THE COURT: All right, Mr. Everhart,

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1 Mr. Geary?

2 MR. EVERHART: Thank you, Your Honor.  
3 May it please the Court, Your Honor, we have  
4 had the opportunity to review the presentence  
5 report. I have reviewed it with Mr. Graham.  
6 Your Honor has pointed out a few moments ago  
7 the only correction that we would have brought  
8 to the attention of the Court, that being the  
9 counsel was actually appointed, not retained.  
10 The presentence report is prepared to allow the  
11 Court some insight a overview, if you will, of  
12 Andre Graham's life to this point. When you  
13 look at it you see a young man who had problems  
14 at home from an early age. I think the Court  
15 will recall some of the problems that his  
16 mother mentioned when she testified before the  
17 jury. And Mr. Graham does have a criminal  
18 past. Until the events which bring us here  
19 today, combined with the Rosenbluth matters,  
20 which Mr. Barry just mentioned, arguably  
21 assured the Commonwealth of a finding of future  
22 dangerousness in Chesterfield. I would suggest  
23 to the Court that the record is not one of  
24 violence which make it difficult to see how we  
25 get to where we are today, quite frankly. I

1 don't know. I hear Mr. Barry's comments. I  
2 hear his apparent frustration that we can't  
3 bring certain things to the attention of this  
4 Court and couldn't bring certain things to the  
5 attention of the jury. Quite frankly, I don't  
6 know how from a prosecutor's standpoint you get  
7 a much stronger more sympathetic case than the  
8 one that came before this Court several months  
9 ago. I don't know if the jury had heard from  
10 Mrs. Stack, whether it had been out less time,  
11 more time, I have no way of knowing that. The  
12 bottom line is the jury deliberated, they came  
13 back and they found under both prongs, future  
14 dangerousness and vileness, that Mr. Graham  
15 should be sentenced to death. This Court has  
16 the ultimate decision. The easy thing to do is  
17 to rubber stamp I guess the choice, the  
18 decision of the jury. Certainly Mr. Graham has  
19 been convicted of heinous crimes in  
20 Chesterfield County. This crime was a horrible  
21 crime. He has been convicted of it. And, the  
22 easy thing to do for Your Honor is to say the  
23 jury heard the evidence, the jury made the  
24 determination, I will not tamper with that. I  
25 would suggest to Your Honor though that it

1 would be appropriate for Your Honor to do the  
2 more difficult thing. The more difficult  
3 thing, obviously, would be to sentence Andre  
4 Graham to life imprisonment. The Court has by  
5 way of the presentence report the sentences  
6 which were imposed in Chesterfield County. You  
7 can see that according to page 10-A he has two  
8 life sentences from those convictions. On page  
9 10-B there is a previous life conviction from  
10 these events. When you review the presentence  
11 you see that Mr. Graham has once before been  
12 into the Department of Corrections. My  
13 understanding of the way probation and parole  
14 works is if you're a second time felon and you  
15 have two or more life sentences you will never  
16 be eligible for parole. We can argue forever  
17 whether being locked up for life is more --  
18 pardon me, whether being locked up for life is  
19 harsher punishment than the death penalty or  
20 whether the death penalty is harsher punishment  
21 than being locked up for life. Quite frankly,  
22 and I told the jury this, if killing Andre  
23 Graham brings back Sheryl Stack then I in all  
24 candor think the decision is a relatively easy  
25 one for the Court. Unfortunately, tragically,



1 that is not the case. Noting you do, nothing I  
2 do, nothing anyone ever does can bring back  
3 Sheryl Stack and remedy the damage that has  
4 been done to her family. I would suggest to  
5 Your Honor that to incarcerate Andre Graham for  
6 life is ample punishment. He will serve out  
7 his natural life behind bars. Despite what  
8 sometimes is the public perception that prison  
9 is not a painful place to be, my experience in  
10 visiting various correctional centers around  
11 the Commonwealth is I am always thankful when  
12 they close the gate behind me when I am going  
13 in, I know that some time the next hour or two  
14 or three the gate is going to close behind me  
15 as I go out. I think it would be overwhelming  
16 to think you're going to enter that gate, close  
17 it behind you and you're never going to walk  
18 out. I think that this Court can insure the  
19 safety of the people of the Commonwealth of  
20 Virginia by imposing the life sentence knowing  
21 he will not be eligible for parole. I think  
22 the Court can punish Andre Graham by giving him  
23 life imprisonment. The Court is aware of the  
24 impact that this crime has had. The Court is  
25 aware of Mr. Graham's past record. I grant you



1 that because of his past record is certainly  
2 not sympathetic because the facts of this crime  
3 are certainly not sympathetic. He has a family  
4 as well. And, I would suggest to the Court  
5 that to send him to the electric chair does not  
6 complete the circle. It represents tragedy on  
7 another family. We can talk about he chose the  
8 path, he's got to pay the price so his family  
9 pays the price, and all those are good  
10 arguments. They are logical arguments and I  
11 don't have quite frankly a good logical counter  
12 to them. I just ask you to take the road more  
13 difficult, the road less traveled, which is set  
14 aside the life or death penalty imposed by the  
15 jury or recommended by the jury and sentence  
16 Andre Graham to life. You know how the system  
17 works Judge. The jury was not aware, just as I  
18 could not argue that to the jury, Mr. Barry  
19 said he couldn't argue certain things to the  
20 jury, I couldn't argue that to the jury. I  
21 couldn't say to the jury he already has these  
22 lives, he is second time felon, he will never  
23 get out. But, I can argue to Your Honor and  
24 you know the system, Judge.

25 THE COURT: I don't think that's the

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1 law.

2 MR. EVERHART: I believe it is. If  
3 the Court doesn't then that's --

4 THE COURT: All right. The parole  
5 board will interpret that issue, not you.

6 MR. EVERHART: That's correct.

7 THE COURT: We can always change the  
8 law two years after, a year down the road they  
9 can put everybody on parole. I doubt if they  
10 will but they can. Excuse me. I didn't mean  
11 to interrupt.

12 MR. EVERHART: That's all right. I  
13 understand the Court comments. I would just  
14 suggest to the Court that I guess anything is  
15 possible. I would ask the Court to consider  
16 your experience over the years. My experience,  
17 as limited as it is would be that based on this  
18 these crimes he is not going to get out on  
19 parole. Anything is possible as you say. I  
20 merely suggest to the Court and ask the Court  
21 to strongly consider that he can be amply  
22 punished without sentencing him to the electric  
23 chair, which is obviously the ultimate  
24 punishment. So I ask you to consider my  
25 comments and I ask you to sentence Andre Graham

1 to life imprisonment. Thank you.

2 THE COURT: Mr. Barry, do you have  
3 anything?

4 MR. BARRY: No.

5 THE COURT: I would like to say you  
6 determined the easy thing to do is to send him  
7 to the electric chair. I hope I never live so  
8 long that it would be easy to send someone to  
9 death. It's a painful thing for the Court to  
10 have to do. I certainly take no joy in it.  
11 And, the time that I start taking joy in doing  
12 that I guess it's time to retire.

13 MR. EVERHART: Judge, excuse me --

14 THE COURT: I don't feel it is easy.

15 MR. EVERHART: I don't want to  
16 interrupt the Court. I apologize. Just Mr.  
17 Graham would like to address the Court.

18 THE COURT: Oh, excuse me.

19 MR. EVERHART: I didn't know if you  
20 were going to reach the ultimate.

21 THE COURT: All right. I was going  
22 to get there.

23 MR. EVERHART: I thought you were  
24 laying the background for your decision.

25 THE COURT: I will ask him before I

1 pronounce sentence, if he has anything further  
2 to say. I do not feel that is an easy thing to  
3 do. None of us can bring back this young  
4 child, as was termed in the trial as an angel.  
5 But I do in reading the impact statement and I  
6 think Mr. Barry probably termed it correct, she  
7 was an angel in our midst. But, I look at the  
8 overall picture in the case. Two young people  
9 dating like young people do, going out and the  
10 life was snuffed out like a cigarette. She  
11 lived longer. And the young man reached over  
12 to grabbed her by the hand trying to comfort  
13 her. Gentlemen, the Court has written a  
14 memorandum of law about the single shot. But I  
15 can't help but believe that probably she knew  
16 that she was ready to cross the river to go to  
17 the green valley of eternity. She must have  
18 suffered some psychological difficulty and pain  
19 at that time. She lived a certain few days  
20 after this vicious attack. She must have  
21 thought about it at that time. No case is  
22 easy. Capital murder cases are particularly  
23 difficult. They are the kind of cases that  
24 live with the Court for a long time. I can  
25 probably tell you every capital murder case I



1 have tried. And, one thing that sits out in  
2 my mind very distinctly the punishment people  
3 must go through before the death comes to the  
4 point that even some beg for death. You know  
5 when I look at this case and this presentence  
6 report we talk so much about parole. This man  
7 has six suspended sentences. To me it shows a  
8 failure in the system. After time and time  
9 again we give suspended sentences. I have come  
10 to the point that we must all be responsible  
11 for our actions. And, maybe forgiveness comes  
12 from a different court, which I have no control  
13 over. But, certainly six suspended sentences,  
14 perhaps if we imposed some we could avoid this.  
15 Perhaps the defendant would have learned his  
16 lesson, we would not be here for this occasion  
17 this morning. And I will take it all into  
18 consideration before making my decision. I  
19 will hear from the defendant if he has  
20 something to say. Do you have something to  
21 say? You may say it.

22 THE DEFENDANT: When I first got  
23 indicted on this charges I spoke to Steve  
24 Dalton about, you know, the charges, you know,  
25 I was telling him what happened. I told him,

1           you know, I guess he was listening to me. But  
2           I was telling him exactly what happened. But,  
3           he never bring that up to you in court. That  
4           night that Ms. Stack got killed it was three  
5           people there. I was me, Avery Wright, and Mark  
6           Sheppard. After I told Steve Dalton what  
7           happened he told Mark Sheppard's lawyer what  
8           happened. All right. Mark Sheppard put a  
9           rumor around the jail that I'm a snitch, I'm a  
10          this and that. I'm not a snitch. I am just  
11          telling the truth exactly what happened.  
12          Nobody was there. Nobody actually knew exactly  
13          what happened. I know what happened. You  
14          understand what I am saying? And, me and  
15          Avery Wright, we seen exactly what happened and  
16          after that happened it was like, yo, something  
17          is wrong with him. And, I remember it clear as  
18          day. I ain't know what Avery Wright was until  
19          he wrote me a letter a few weeks after the  
20          trial, you know, after the jury found me  
21          guilty, and I gave the letters to, you know,  
22          showed the letters to my lawyer, and I was  
23          telling him, you know, and he was telling me,  
24          you know, if you need me, if I need him, you  
25          know, to get my lawyers to come and get in

1 touch with him. But, I never got a chance to  
2 get all my witnesses together. Mark Sheppard  
3 threatened my baby's mother, threatened the  
4 witnesses that he know he did it, you know,  
5 because the day that happened I told my baby's  
6 mother did you see that on the news? She said  
7 yeah. I said Mark did it. And, he did it, you  
8 know. It's not that I'm a snitch. I'm trying  
9 to fight for my life for something I didn't do.  
10 People say they seen, you know, certain things.  
11 I don't see how that man identified me as being  
12 the killer because, I mean, I never even got  
13 out of the car. I was driving Priscilla  
14 Booker's car. While I was in the passenger  
15 seat Avery Wright was driving. How can he  
16 identify me?

17 THE COURT: Why did you take his  
18 tapes?

19 THE DEFENDANT: I didn't take the  
20 tapes.

21 THE COURT: You didn't?

22 THE DEFENDANT: No. What happened --

23 THE COURT: Your fingerprints were on  
24 40 of them.

25 THE DEFENDANT: I will tell you

1 exactly how it happened. Okay. I didn't get  
2 the tapes until Mark Sheppard came to me and I  
3 gave him, I'm going to tell you what I gave  
4 him. I gave him some coke and I gave him some  
5 money and he said somebody was selling them to  
6 me. That's when Priscilla Booker said she seen  
7 the tapes

8 THE COURT: Why was your gun in your  
9 girlfriend's apartment?

10 THE DEFENDANT: I didn't get the .45  
11 gun until like a day before I got arrested. I  
12 never shot that people.

13 THE COURT: Why did Mr. Martin  
14 identify you as the one there with him?

15 THE DEFENDANT: I don't know. I  
16 didn't, I didn't shoot that man.

17 THE COURT: Well, I think your  
18 argument is completely contrary to the evidence  
19 in this case.

20 THE DEFENDANT: But it's true. It  
21 was three of us there. Avery Wright, he was  
22 there. He was with me but he is in the system  
23 now. He had just locked up for trespassing at  
24 Jefferson Village Apartments. I bailed him out  
25 of jail. And, that's when, I mean, I don't, I



1           ain't even know Mark Sheppard.

2           THE COURT: I believe you didn't  
3           testify, did you, as I recall?

4           THE DEFENDANT: Well, Avery Wright  
5           know he did it. But he never got a chance  
6           because he was in the system. He was in the  
7           penitentiary.

8           THE COURT: Well, we could have  
9           gotten him here with no difficulty at all.

10          THE DEFENDANT: I didn't know where  
11          he was at the time. He knew. He knew. He  
12          knew exactly what happened. It was three  
13          people there that night. I never, I didn't, I  
14          didn't kill no people. I really didn't kill no  
15          people. Mark, I don't know what's wrong with  
16          him. He knows, if he's was a so called friend,  
17          I guess he would have come forward.

18          THE COURT: What were you doing out  
19          that time of night robbing people anyway?

20          THE DEFENDANT: I wasn't robbing  
21          nobody.

22          THE COURT: What were you doing?

23          THE DEFENDANT: I'm going to tell  
24          you, sir. I was coming from Park Lee Gardens.

25          THE COURT: Do what?

1 THE DEFENDANT: I was coming from  
2 Park Lee Gardens with Priscilla Booker's car.  
3 Because I was just, me, Avery Wright and Mark  
4 Sheppard were coming from Park Lee Gardens off  
5 that highway and Avery Wright -- Mark Sheppard  
6 said drop him off right here. He said, well,  
7 wait a minute. That's when we heard shots and  
8 we drove. I never got in no car. I never seen  
9 Mr. Martin's car. That's what I don't  
10 understand that people say they seen me in the  
11 car. The only car I was in was my car, or I  
12 was driving Priscilla Booker's car. I never --

13 THE COURT: I guess your situation is  
14 like so many, everybody in the world is wrong  
15 but me.

16 THE DEFENDANT: But, I didn't kill no  
17 people. And, they, people, I got witnesses  
18 that know that for a fact. But I just didn't  
19 know, you know, where he was at at the specific  
20 time. The reason I didn't testify, I mean, I  
21 don't know. I just -- I don't know. I was  
22 just -- I am just so scared. I don't want to  
23 die for something I didn't do. I could see if  
24 I did it, but I never even shot nobody in my  
25 life, you know. I, I, I, I'm all mixed up with

1 something I never even, you know, I didn't get  
2 felony charges until I came in Virginia. That  
3 was my big mistake.

4 THE COURT: You were convicted in  
5 Chesterfield for being present at the time --

6 THE DEFENDANT: But, how can I --

7 THE COURT: -- two people were --

8 THE DEFENDANT: Yeah, I was --

9 THE COURT: -- viciously murdered.

10 THE DEFENDANT: Right. I was, you  
11 know-- how can I be there, I mean --

12 THE COURT: Well, why were you there?

13 THE DEFENDANT: I wasn't there.

14 THE COURT: Oh, you weren't there.  
15 Again that jury was wrong?

16 THE DEFENDANT: No, but they just had  
17 me there because I was selling drugs to the  
18 Rosenbluth's, and I was there.

19 THE COURT: What were you doing  
20 selling drugs?

21 THE DEFENDANT: Excuse me?

22 THE COURT: If you're so pure and  
23 white what were you doing selling drugs?

24 THE DEFENDANT: I wasn't, I'm not  
25 saying I am pure, but that's just --

1 THE COURT: I might add, Mr. Graham,  
2 a lot of cases, as many cases that I have  
3 heard, the against you has been the strongest  
4 as any.

5 THE DEFENDANT: I don't see how he  
6 can identify me if I wasn't even at, you know  
7 what I'm saying, the Steak and Ale parking lot.

8 THE COURT: But, he did. He appeared  
9 to me to be telling the gospel truth.

10 THE DEFENDANT: It wasn't me, though.

11 THE COURT: Well, the jury decided  
12 otherwise. I think there is ample evidence  
13 that supports it.

14 THE DEFENDANT: You're about to  
15 sentence me to death for something I didn't do,  
16 though.

17 THE COURT: Well, in any event, the  
18 jury recommended that.

19 THE DEFENDANT: I know but --

20 THE COURT: Anything further you wish  
21 to say?

22 THE DEFENDANT: The people running  
23 around the jail saying, I ain't no snitch.  
24 It's just that, you know, I had to tell the  
25 truth, you know. The detective didn't take



1 that into consideration. He knows when I  
2 talked with him I told him exactly what  
3 happened, you know, I was telling him exactly  
4 what happened, you know. He ain't never said  
5 nothing about that. You know, I told him  
6 exactly what, you know, that things that Mark  
7 Sheppard told me even in the LaQuinta case. I  
8 told him exactly the things had happened. I  
9 wasn't trying to, you know, what I am saying,  
10 being a snitch, you know. I was just trying to  
11 tell the truth because I didn't do it.

12 THE COURT: All right. Anything  
13 further?

14 THE DEFENDANT: No, sir.

15 THE COURT: All right. On the issue  
16 joined, having found the defendant guilty of  
17 capital murder and having unanimously found  
18 that after consideration of his history and  
19 background that there is a probability that he  
20 would commit criminal acts of violence that  
21 would constitute a continuing serious threat to  
22 society, and having unanimously found that his  
23 conduct in committing the offense is  
24 outrageously or wantonly vile, horrible or  
25 inhuman in that it involved depravity of mind,

1 and having considered the evidence in  
2 mitigation of the offense, unanimously find or  
3 unanimously fix, excuse me, unanimously fix his  
4 punishment at death. The Court will affirm the  
5 verdict of the jury.

6 All right. The Court will not set an  
7 execution date, as he has an automatic appeal  
8 to the Supreme Court of Virginia for review of  
9 the case. As soon as the Supreme Court acts on  
10 it the Court will fix an execution date. In  
11 the meantime you will be committed to the  
12 custody of the Sheriff. I might suggest that  
13 the Sheriff contact the Department of  
14 Corrections for confinement there.

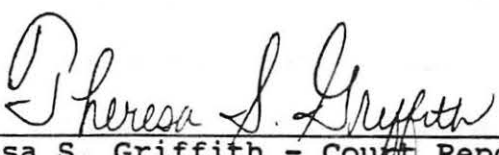
15 Wait just a minute. The Court also  
16 in accordance with the verdict of the jury will  
17 find him guilty of use of a firearm in the  
18 commission of murder and you're committed to  
19 the Department of Corrections for five years.  
20  
21  
22  
23  
24  
25

CERTIFICATE OF COURT REPORTER

I, Theresa S. Griffith, hereby certify that I was the court reporter in the Circuit Court of the City of Richmond, Manchester Division, on November 17, 1994, at the time of the Sentencing herein.

I further certify that the foregoing transcript is true and accurate, to the best of my ability.

Given under my hand this 2nd day of December, 1994.

  
Theresa S. Griffith - Court Reporter

730

THERESA S. GRIFFITH  
COURT REPORTER  
(804) 755-7377

Virginia:

In the Circuit Court of the City of Richmond, Manchester Courthouse

the 17th day of November, 19 94.

Commonwealth of Virginia,	plaintiff,)	Order -
against		Case NO. 94-641-F
		94-642-F
		94-644-F
		94-645-F
Andre L. Graham a/k/a		
Andre Grant a/k/a		
Lorenzo Cross a/k/a		
Lewis A. Rivas,	defendant,)	
(D.O.B. 3/4/70)		
(Date of Offenses: 10/8/93)		

This day the defendant was led to the bar in the custody of the Sheriff of the City of Richmond, and also appeared Jeffrey L. Everhart and Robert P. Geary, his Attorneys at law, and Learned D. Barry, an Assistant Attorney for the Commonwealth, and Suzanne J. Tarr, Probation and Parole Officer.

Whereupon, these cases (Case No. 94-641-F, 94-642-F, 94-644-F & 94-645-F) came on to be heard upon the defendant's motion to set aside the jury's verdicts of October 5, 1994 and October 6, 1994, and the Court proceeded to hear the evidence on the defendant's motion, and having heard the evidence and argument of counsel, doth overrule the defendant's motion.

The defendant having been on October 6, 1994, found guilty by a jury as follows:

(Case No. 94-641-F) Count 1 - guilty of feloniously and unlawfully killing and murdering one Sheryl L. Stack in a willful, deliberate and premeditated manner during the commission of a robbery of Edward Martin and while armed with a deadly weapon, as charged in the Indictment; and .

Count 2 - guilty of unlawfully and feloniously using or displaying



in a threatening manner a firearm while, during and in the commission of the capital murder of Sheryl L. Stack, as charged in the Indictment;

and this case having been referred to the Probation and Parole Department for a post-sentence investigation and report, and said report having been filed in open Court, and the defendant advised as to the contents thereof, and having waived his privilege of cross-examining the reporting officer thereon, and arguments of counsel having been heard, the Court doth now, in accordance with the jury verdicts, ascertain the defendant's punishment at death on the conviction of capital murder of Sheryl L. Stack; and five (5) years in the Department of Corrections on the conviction of using a firearm in the commission of the capital murder of Sheryl L. Stack.

Whereupon, after allocution of the defendant, it is the judgment of this Court that the said Andre L. Graham be confined in the Department of Corrections for a period of five (5) years on the conviction of using a firearm in the commission of the capital murder of Sheryl L. Stack; and that he be sentenced to death by electrocution on the conviction of capital murder of Sheryl L. Stack.

Whereupon, it is further Ordered that Robert P. Geary and Jeffrey L. Everhart, Attorneys at law, be appointed to represent the defendant in the above cases for review of the Supreme Court of Virginia and in perfecting his appeals, and that a transcript of the record in these cases be made a part of the record and filed with the Clerk of this Court according to law.

It is further Ordered that the Commonwealth do recover of the defendant her costs incident to these proceedings, and that the defendant be remanded to the custody of the Sheriff of the City of Richmond for transfer to the Department of Corrections.

Enter this Order,

*James W. Williams* Judge

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HEALTH  
OFFICE OF THE CHIEF MEDICAL EXAMINER  
CENTRAL DISTRICT  
9 NORTH 14TH STREET  
RICHMOND, VIRGINIA 23219  
PHONE: (804) 786-3174



AUTOPSY NO. 488-93  
DATE/DAY 10/11/93  
TIME 6:45 AM - 8:45 AM

REPORT OF AUTOPSY

DECEDENT Sheryl Stack  
First Middle Last

Autopsy Authorized by: Dr. Miguez, M.E. for Richmond

Body identified by: <u>Davis Service Tags, MCV Tag</u> <u>"Ms. XX"</u>	Persons Present at Autopsy: <u>E. Joyner</u> <u>Detective Blaylock</u> <u>W. Davis</u>
---	---

Rigor: <u>Complete</u> <u>x</u> <u>jaw</u> <u>neck</u> <u>arms</u> <u>legs</u> <u>passed</u>
Livor: color <u>purple</u> distribution: <u>posterior, blanching</u>
Age <u>20</u> Race <u>white</u> Sex <u>female</u> Length <u>67"</u> Weight <u>139 lbs</u> Eyes <u>green</u> Pupils: <u>R</u> <u>L</u>
Hair <u>light brown</u> Mustache <u>no</u> Beard <u>no</u> Circumcised <u>no</u> Body Heat <u>refrigerated</u>

Clothing, Personal Effects, External Wounds, scars, tattoos, other identifying features:

CLOTHING: body received unclothed with the following marks of therapy - dressings about head, right subclavian IV catheter "10-8, 9 PM", Foley catheter, bandage over tracheostomy incision, small 1/8" scratch below umbilicus (? healing peritoneal lavage incision site), stapled serpinous craniotomy incision left parietal area.

PERSONAL EFFECTS: None.

EXTERNAL WOUNDS: Bilateral periorbital ecchymoses (not over bony prominences), healing abrasion over bridge of nose and forehead, numerous small healing abrasions up to 1/2" over lower chest and abdomen, healing superficial linear abrasions right thigh, bruising/linear abrasions left upper arm.

IDENTIFYING FEATURES: appendix present.

HISTORY: Shot during apparent robbery outside of Steak-N-Ale Restaurant; companion also shot (Midlothian turnpike, Richmond).

PATHOLOGICAL DIAGNOSES:

Perforating gunshot wound to left back of head. Entrance (Identified by internal beveling at inferior posterior margin of craniotomy defect underlying sutured skin incision left parieto-occipital area) approximately 2 1/2" from top of head, and 1/2" left of anterior midline, skin wound no longer identifiable. Exit above left eyebrow, 2 1/2" from top of head, and 1" left of anterior midline; 1 x 3/4" healing sutured cruciate incision present with surrounding healing abrasion. Bullet path massive hemorrhage and destruction through left cerebral hemisphere, extensive fractures over both orbital plates, left greater than right, with 3/4" residual area of external beveling beneath exit wound at left orbital ridge. Projectiles none recovered. Direction of fire back to front, slightly left to right.

Status post left craniotomy with 6 x 3 1/2" surgical defect in left temporal parietal occipital skull incorporating margins of entrance and exits.

Postmortem toxicology: Non-contributory

Cause of Death: Gunshot wound of head.

THIS IS A COPY OF THE  
FINAL AUTOPSY REPORT

Provisional Report 10/11/93

Final Report 12/8/93

The facts stated herein are true and correct to the best of my knowledge and belief.

10/12/93

Date Signed

OCME Richmond

Place of Autopsy

Jack Daniel, M.D.  
Signature of Pathologist  
9 N. 14th St.  
Richmond, VA 23219



# GROSS DESCRIPTION

GENERAL: Well developed well nourished, young adult white female with prominent bilateral periorbital ecchymoses, hair shaved on front left top and left side of head associated with stapled left parietal occipital craniotomy incision.

SKIN: Abrasions and other injuries as described.

PLEURA: Dry.

PERITONEUM: Unremarkable.

PERICARDIUM: Intact and unremarkable.

HEART: 330gms normal coronary anatomy, no significant atherosclerosis, valves and myocardium unremarkable.

AORTA: No significant atherosclerosis, unremarkable.

NECK ORGANS: Atraumatic apart from surgical tracheostomy incision. Thyroid is unremarkable.

LUNGS: Right 930gms, left 650gms, frothy fluid present in airways, cut surfaces unremarkable except for congestion.

LYMPH NODES: Unremarkable.

LIVER: 1500gms, unremarkable.

GALLBLADDER: Distended with amber bile, no stones.

SPLEEN: 240gms, congested, otherwise unremarkable.

PANCREAS & ADRENALS: Unremarkable.

GI TRACT: Mouth shows bruising of internal surfaces of left upper and lower lips. Esophagus unremarkable, stomach contains a small amount of dark fluid, no recognizable food stuffs, mucosa is unremarkable, small and large bowel are unremarkable, appendix is present, anus is unremarkable.

KIDNEYS: Right 150gms, left 160gms, unremarkable.

BLADDER: Contains a small amount of residual urine, mucosal hemorrhages associated with foley catheterization.

GENITALIA: External genitalia atraumatic, uterus, tubes and ovaries present and unremarkable, no evidence of pregnancy.

BRAIN & MENINGES: Brain weight 1480gms, massive hemorrhage and destruction of entire lateral portion of left cerebral hemisphere from parietal occipital area to left frontal lobe associated with bullet path. Cerebellum and brain stem are atraumatic.

SKULL: Craniotomy defect as described, inferior posterior most aspect displaying 1/2" area of internal beveling with dark discoloration on beveled edge from which fractures radiate in several directions (entrance wound); a 3/4" irregular defect displaying external beveling is present at the left orbital ridge aspect of the craniotomy defect anteriorly; the remainder of the margins of the defect display either a rounded effect or an apparent sawed edge. Galea and dura from around the defect with internal beveling in the left parieto-occipital area are submitted for microscopics.

RIBS & VERTEBRA: Unremarkable.

PELVIS: Unremarkable.

EXTREMITIES: Unremarkable except as noted.

X-RAY: No bullets or apparent bullet fragments.

MICROSCOPICS: Entrance dura, entrance galea, brain, ovary, uterus, lung

(10/19/93) Uterus: no evidence of pregnancy; no other abnormality. Ovary: unremarkable. Lung: patchy acute pneumonia. Entrance dura and galea: hemorrhage, organizing clot, gelfoam material present (slide #4), bone fragments, black particulate material present.

OTHER LAB PROCEDURES: TOX ☒ PHOTO ☒ DENTAL ☐ FINGERPRINTS ☐ MICRO ☐ X-RAY ☒  
 SER (GROUP ☐ PERK ☐ ) GSR ☐ FIREARMS ☐ ACCELERANTS ☐ BACTERIOLOGY ☐ VIROLOGY ☐ HEPATITIS B ☐ HTLV III ☐  
 OTHER ☐

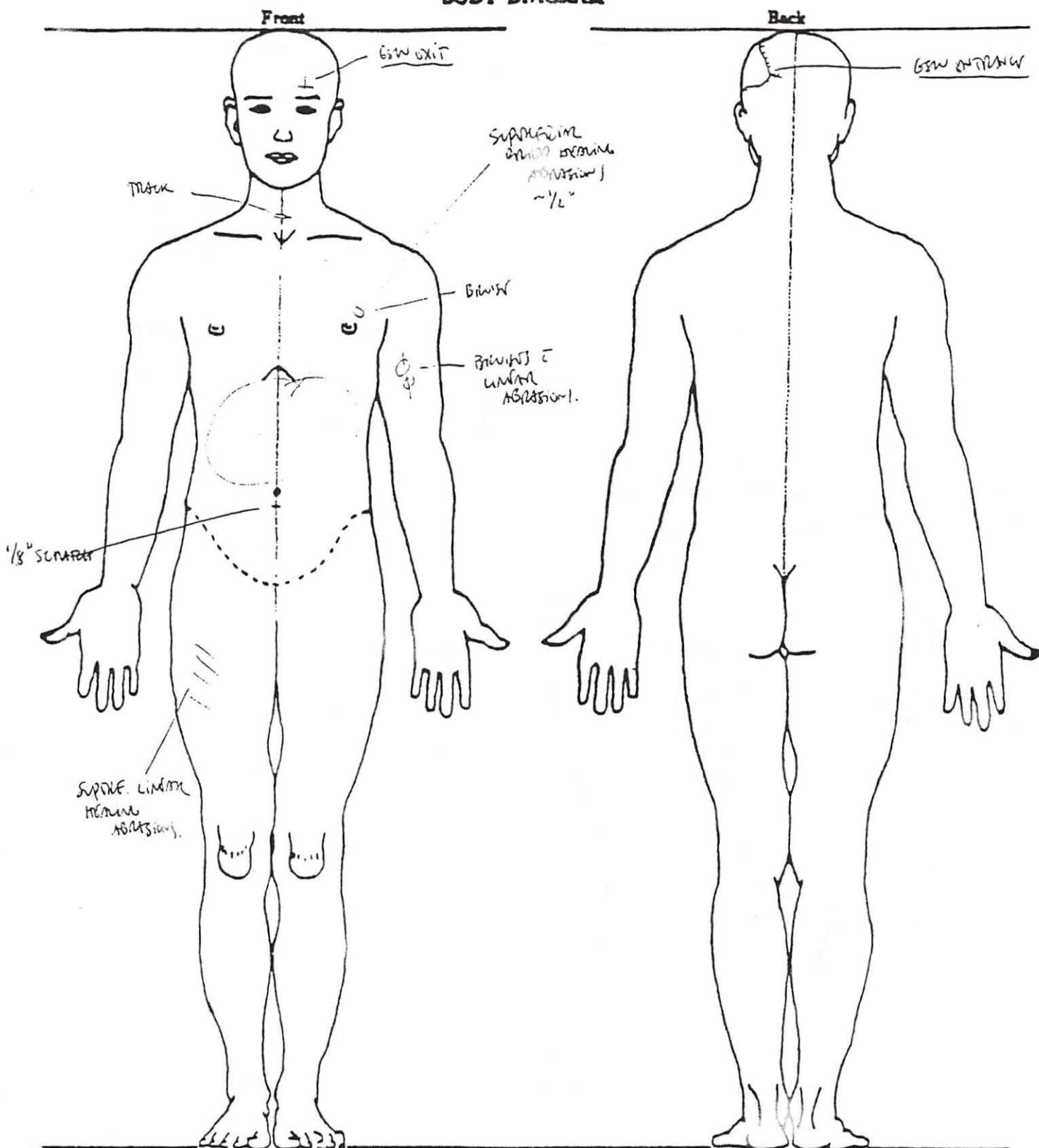
## DISPOSITION OF EVIDENCE:

TYPE (Clothing, Bullets, etc.)	NAME OF RECIPIENT	ADDRESS	OFFICIAL TITLE	DATE
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Autopsy blood, urine, bile, brain, liver, vitreous, to toxicology.

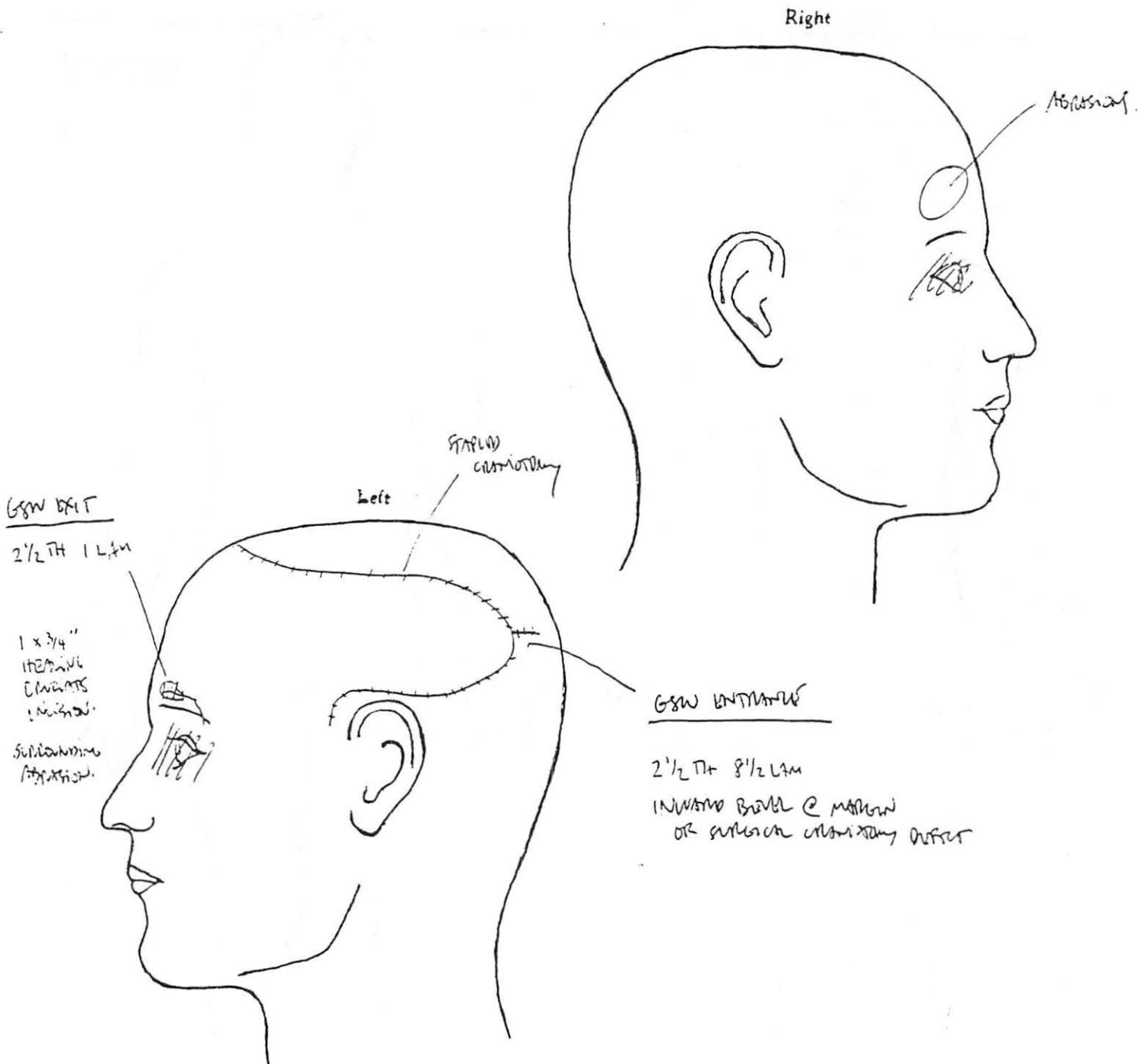


## BODY DIAGRAM



Decedent's  
Height 67" inches  
139 #

Name 488.93 SHARLE STARK  
Examined  
By DANOL Date 10.11.93



Decedent's Name 488-93 CHARLY STONE

Examined

By DANIEL Date 10-11-43



Commonwealth of Virginia  
Department of General Services  
**DIVISION OF FORENSIC SCIENCE**

ORIGINAL

2  
12/8

**CERTIFICATE OF ANALYSIS**

November 30, 1993

Central Laboratory  
P.O. Box 999  
Richmond, VA. 23208

Tel.No: (804)786-4706  
Fax: (804)371-8328  
TDD/Voice: (804)786-6152



To: JACK DANIEL, MD  
OFFICE OF THE CHIEF MEDICAL EXAMINER  
9 NORTH FOURTEENTH STREET  
RICHMOND, VA 23219

FS Lab #: CL93-10335

Your Case # 488-93

Victim(s):  
STACK, Sheryl

Suspect(s):  
- - -

Evidence Submitted by: Jack Daniel, M.D.

Date: 10/14/93

Two (2) vials of blood, one (1) vial each of urine,  
vitreous and bile; one (1) container each of liver,  
gastric contents and brain

**RESULTS:**

Blood: No ethanol, methanol, isopropanol or acetone  
detected.  
Cocaine - none detected.  
Benzoyllecgonine - none detected.  
Morphine - 0.51 mg/L.  
Codeine - 0.03 mg/L.  
No other alkali-extractable drugs detected  
(synthetic narcotics, antihistamines, anti-  
depressants, tranquilizers).

**ATTEST:**

I certify that I performed the above analysis or examination as an employee of the Division of Forensic  
Science and that the above is an accurate record of the results of that analysis or examination.

J. C. Valentour, Ph.D.  
Chief Toxicologist

JCV:ph

738

Chief Medical Examiner

120539

## PHOTO SPREAD

### WITNESS: PLEASE READ THESE INSTRUCTIONS CAREFULLY

Positions of persons in this photo spread are numbered left to right, beginning with Number One (1) on your left.

1. If previously you have seen one or more of the persons in this photo spread, write your initials in the "INITIALS" space(s) beside the photo(s) of the person(s) you have seen.

## OFFENSE / INCIDENT No.

2. In "NOTES" space, tell briefly how/where/when you saw or met person(s) you identified.

3. If you never have seen any person in this line-up, write your initials in the "NONE OF THE ABOVE" space.

4. Sign your name in the "VIEWED BY" space, and fill in the time and date spaces.

5. Then hand this photo spread to the officer in charge.



#1 PERSON

DATE \_\_\_\_\_

INITIALS \_\_\_\_\_

NOTES \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



#2 PERSON

DATE \_\_\_\_\_

INITIALS \_\_\_\_\_

NOTES \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



#3 PERSON

DATE \_\_\_\_\_

INITIALS \_\_\_\_\_

NOTES \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

739



#4 PERSON

DATE \_\_\_\_\_

INITIALS \_\_\_\_\_

NOTES \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



#5 PERSON

DATE \_\_\_\_\_

INITIALS \_\_\_\_\_

NOTES \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



#6 PERSON

DATE \_\_\_\_\_

INITIALS \_\_\_\_\_

NOTES \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

NONE OF THE ABOVE \_\_\_\_\_

AGENCY \_\_\_\_\_

OFFICER \_\_\_\_\_

TIME PHOTO SPREAD SHOWN \_\_\_\_\_

DATE PHOTO SPREAD SHOWN \_\_\_\_\_

OFFICER \_\_\_\_\_

Sig. of Witness to this Viewing \_\_\_\_\_

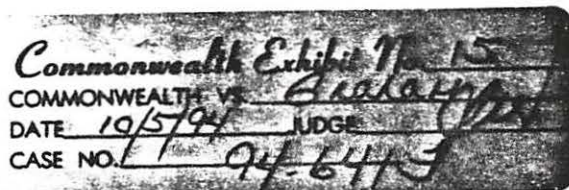
VIEWED BY \_\_\_\_\_

*Officer [Signature]*  
COMMONWEALTH VS. *[Signature]*  
DATE *10/11/09*  
CASE NO. *01-111-3*



SUMMARY OF CONVICTIONS - ANDRE GRAHAM

<u>DATE</u>	<u>OFFENSE</u>	<u>JURISDICTION</u>
11-20-91	unauthorized use of auto	Richmond Gen Dist
11-20-91	assume the name of another	Richmond Gen Dist
11-20-91	concealed weapon	Richmond Gen Dist
11-20-91	trespass on posted property	Richmond Gen Dist
1-17-92	failure to appear in court	Richmond Circuit
1-17-92	possess cocaine	Richmond Circuit
1-17-92	possess cocaine w/firearm	Richmond Circuit
8-25-94	capital murder	Chesterfield Cir.
8-25-94	use of firearm in commission of capital murder	Chesterfield Cir.
8-25-94	robbery	Chesterfield Cir.
8-25-94	use of firearm in commission of robbery	Chesterfield Cir.
8-25-94	capital murder	Chesterfield Cir.
8-25-94	robbery	Chesterfield Cir.
8-25-94	use of firearm in commission of robbery	Chesterfield Cir.



DEFENDENT'S EXHIBIT NO. 1  
COMMONWEALTH VS. Andre Giam  
DATE 10/17/94 JUDGE JBS  
CASE NO. 94-6413

## PHOTO SPREAD

### WITNESS: PLEASE READ THESE INSTRUCTIONS CAREFULLY

Positions of persons in this photo spread are numbered left to right, beginning with Number One (1) on your left.

1. If previously you have seen one or more of the persons in this photo spread, write your initials in the "INITIALS" space(s) beside the photo(s) of the person(s) you have seen.

### OFFENSE / IN

2. In "NOTES" space, tell briefly how/where/when you saw or met person(s) you identified.
3. If you never have seen any person in this line-up, write your initials in the "NONE OF THE ABOVE" space.
4. Sign your name in the "VIEWED BY" space, and fill in the time and date spaces.
5. Then hand this photo spread to the officer in charge.



#1 PERSON

DATE \_\_\_\_\_

INITIALS \_\_\_\_\_

NOTES \_\_\_\_\_



#2 PERSON

DATE \_\_\_\_\_

INITIALS \_\_\_\_\_

NOTES \_\_\_\_\_



#3 PERSON

DATE \_\_\_\_\_

INITIALS \_\_\_\_\_

NOTES \_\_\_\_\_

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#4 PERSON

DATE 5/22/94

INITIALS EM

NOTES \_\_\_\_\_



#5 PERSON

DATE \_\_\_\_\_

INITIALS \_\_\_\_\_

NOTES \_\_\_\_\_



#6 PERSON

DATE \_\_\_\_\_

INITIALS \_\_\_\_\_

NOTES \_\_\_\_\_

NONE OF THE ABOVE \_\_\_\_\_

AGENCY \_\_\_\_\_

TIME PHOTO SPREAD SHOWN \_\_\_\_\_

VIEWED BY \_\_\_\_\_

OFFICER \_\_\_\_\_

DATE PHOTO SPREAD SHOWN \_\_\_\_\_

DATE OF OFFENSE \_\_\_\_\_

OFFICER \_\_\_\_\_

Sig. of Witness to this Viewing \_\_\_\_\_

DATE \_\_\_\_\_

### ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO PROHIBIT THE IMPOSITION OF THE DEATH PENALTY.
  - A. FAILURE TO GUIDE THE JURY'S DISCRETION IN ITS CONSIDERATION OF THE "VILENESS" AND "FUTURE DANGEROUSNESS" AGGRAVATING FACTORS AS REQUIRED UNDER FURMAN V. GEORGIA, GODFREY V. GEORGIA AND MAYNARD V. CARTWRIGHT.
  - B. SECTIONS 19.2-264.2 THROUGH 19.2-264.5 OF THE CODE OF VIRGINIA ALLOW THE JURY TO USE THE EVIDENCE OF PRIOR CONVICTIONS TO IMPOSE THE SENTENCE OF DEATH, VIOLATING DEFENDANT'S PROTECTION AGAINST DOUBLE JEOPARDY.
  - C. THE DEATH PENALTY, PER SE, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER CURRENT STANDARDS OF DECENCY. SEE TROP V. DULLES, 356 U.S. 86, 101 (1958).
  - D. FAILURE TO GIVE THE JURY ADEQUATE INSTRUCTIONS ON MITIGATION, USE OF MODEL JURY INSTRUCTIONS, AND JURY VERDICT FORMS INHIBITS THE JURY FROM GIVING INDEPENDENT WEIGHT TO ASPECTS OF THE DEFENDANT'S CHARACTER AND RECORD AND TO CIRCUMSTANCES OF THE OFFENSE PROFFERED IN MITIGATION, IN VIOLATION OF LOCKETT V. OHIO AND MILLS V. MARYLAND.
2. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO STRIKE ON THE GROUND THAT THE COMMONWEALTH FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS THE TRIGGERMAN.
3. THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT'S OFFERED INSTRUCTION IN REGARD TO EYEWITNESS IDENTIFICATION.
4. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SET ASIDE THE VERDICTS ON THE GROUND THAT THE COMMONWEALTH HAD FAILED TO COMPLY WITH THE BRADY V. MARYLAND STANDARD AND THE BRADY V. MARYLAND MOTION FILED BY APPELLANT.