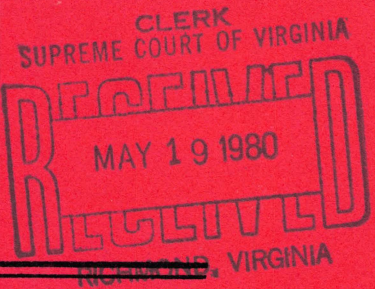


221 VA 513



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO, 800375

WILLIE LLOYD TURNER,

.....Appellant

v.

COMMONWEALTH OF VIRGINIA,

.....Appellee

VOLUME III
JOINT APPENDIX

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

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

Counsel for Appellant

Counsel for Appellee

TABLE OF CONTENTS

APPENDIX
PAGES

VOLUME I

1. INDICTMENT	1
2. WARRANT	2-3
3. JURY VERDICT	4-5
4. ORDER ENTERED FEBRUARY 19, 1980	6-8
5. INDICTMENT	9
6. WARRANT	10
7. PROPOSED QUESTIONS ON VOIR DIRE ON BEHALF OF THE DEFENDANT	11-13
8. JURY VERDICT	14
9. ORDER ENTERED FEBRUARY 19, 1980	15-17
10. INDICTMENT	18
11. WARRANT	19
12. PROPOSED QUESTIONS ON VOIR DIRE ON BEHALF OF THE DEFENDANT	20-22
13. JURY VERDICT	23
14. ORDER ENTERED FEBRUARY 19, 1980	24-26
15. JURY INSTRUCTIONS	27-43
16. LETTER REPORT DATED JANUARY 19, 1979	44-47
17. ASSIGNMENTS OF ERROR	48-51
18. EXCERPTS FROM TRANSCRIPT OF TESTIMONY BEFORE THE HONORABLE JAMES C. GODWIN, JUDGE ON DECEMBER 3, 1979	
a) Proceedings	52-147
b) Testimony of Judith R. Cosby	148-173
c) Testimony of Mary Huffman	174-195
d) Discussion between Court and Counsel	195-204
19. EXCERPTS FROM TRANSCRIPT OF TESTIMONY BEFORE THE HONORABLE JAMES C. GODWIN, JUDGE ON DECEMBER 4, 1979	
a) Proceedings	205-208
b) Testimony of Faruk Presswalla	209-214

VOLUME II

c)	Discussion between Court and Counsel	214-219
d)	Testimony of Faruk Presswalla	220-223
e)	Testimony of A. D. Bain, Jr.	234-267
f)	Testimony of Dick E. Poole	267-276
g)	Testimony of R. K. Eubanks	277-297
h)	Testimony of August O. Hoppe	300-305
i)	Discussion between Court and Counsel	305-327
j)	Jury Instructions	327-335
k)	Jury Verdict	335-336
l)	Discussion between Court and Counsel	336-338

20. EXCERPTS FROM TRANSCRIPT OF TESTIMONY BEFORE THE
HONORABLE JAMES C. GODWIN, JUDGE ON DECEMBER 5,
1979

a)	Proceedings	339-343
b)	Testimony of L. G. Wright	344-350
c)	Testimony of Dick E. Poole	350-351
d)	Discussion between Court and Counsel	351-359
e)	Testimony of William G. O'Brien	359-369
f)	Testimony of Alan Bain	369-380
g)	Testimony of Robert C. Bransfield	381-420
h)	Discussion between Court and Counsel	420-429
i)	Testimony of Gussie Turner	430-456
j)	Testimony of Cora Kelly	456-464
k)	Discussion between Court and Counsel	464-469

21. EXCERPTS FROM TRANSCRIPT OF TESTIMONY BEFORE THE
HONORABLE JAMES C. GODWIN, JUDGE ON DECEMBER 6,
1979

a)	Proceedings	470-475
b)	Jury Instruction	476
c)	Discussion between Court and Counsel	477-484

VOLUME III

22. EXCERPTS FROM TRANSCRIPT OF TESTIMONY BEFORE THE
HONORABLE JAMES C. GODWIN, JUDGE ON FEBRUARY 6,
1979

485-548

23. COMMONWEALTH'S EXHIBITS

a)	Exhibit Number 8 (Shirt and Undershirt) ...	549
b)	Exhibit Numbers 10-12 (Photographs)	549
c)	Exhibit Number 16 (Photograph)	549

24. DEFENDANT'S EXHIBIT 1

550-576

1 MR. GRIZZARD: If it please the Court, the matter
2 before the Court today is Commonwealth versus Willie Lloyd
3 Turner on three cases. There are two matters to come before
4 the Court. One is a series of motions that have been filed
5 by the defendant. If the Court overrules that then there
6 would be a presentence hearing on it.

7 THE COURT: All right, sir.

8 MR. WOODWARD: Your Honor, we have previously moved to
9 set aside the verdict as being contrary to the law and the
10 evidence. We are here today to present our argument on that
11 particular motion. By so doing, if we are remiss in speaking
12 to a particular point that we have made through the course of
13 the trial, it is merely an oversight on our part. We do not
14 waive any motion that we have made in the proceeding or any
15 motion for mistrial or any motion that we may have made.

16 If you recall in our presentation of argument as to
17 unconstitutionality of the death penalty, we spoke to two
18 particular areas, facial unconstitutionality and
19 unconstitutionality as the death penalty generally is applied.
20 In this case, in order that the record would be correct, we
21 would like to present to you the study to which we referred
22 from Northeastern University in Boston concerning the race of
23 the victim in murder going to the application of the death
24 penalty more so than actually the race of the perpetrator of
25 the crime. In this particular study which we refer to, it

1 indicates that where the victim of a crime is white, the
2 likelihood of the death penalty is so much greater as far as
3 its application than in a situation where the same is black
4 or of some other minority group. We did speak to that and we
5 would like to present this particular survey of various
6 states from Northeastern University so that the record will
7 be complete as to that point.

8 MR. GRIZZARD: Your Honor, I don't have a copy of it.
9 I told him as far as presenting it to the Court, I have no
10 objection. I realize the purpose of it. I have no objection
11 to it.

12 MR. WOODWARD: We would ask, Your Honor, that this
13 report which we refer to be marked, I believe it will be,
14 Defendant's Exhibit Number 1. I don't recall any other
15 exhibits that we have presented.

16 (Marked in evidence by the Court as Defendant's Exhibit
17 Number 1.)

18 MR. WOODWARD: Your Honor, again, as far as the record
19 to date being complete, if you will recall at the conclusion
20 of the first stage of this particular trial, the Court with
21 counsel in the back room reviewed various instructions which
22 were presented to the Court by the Commonwealth and also by
23 us on behalf of the defendant. At that time, in addition to
24 the argument which we made, we indicated to the Court that
25 there were certain instructions which we did not have but

1 which the Court indicated it would allow us to submit
2 subsequently. We understood at that time your ruling or
3 rulings that indicated to us that these particular
4 instructions would be refused. We, therefore, would present
5 the series of instructions which I believe you have
6 previously marked them sequentially and, in so doing,
7 indicated that each one of them would be refused. We would
8 like to speak to several of those instructions, Your Honor,
9 if we might. As you will recall, Mr. Grizzard submitted to
10 you the instruction on reasonable doubt and presumption of
11 innocence from Virginia Model Jury Instructions, Criminal
12 Volumes 1 and 2, what I call Matthew, Mark, the first two of
13 the Gospels. I assume Luke and John will follow in civil
14 proceedings; and, all of a sudden, these instructions have
15 the imprimatur of sacredness and the instructions that we have
16 used previously are apparently no longer of any value. Model
17 Jury Instructions Committee was prepared by, I assume, the
18 top criminal lawyers in the state as well as professors from
19 various universities and supposedly now the standard of
20 reasonable doubt will be the standard that's enunciated in
21 that combination instruction, reasonable doubt and presumption
22 of innocence. Mr. Grizzard, of course, gave you that
23 instruction. We objected to it because we felt as if and
24 still feel that the instruction on reasonable doubt peculiarly
25 is that of the defendant to present. It is the defendant's

right to have the case proved beyond a reasonable doubt.

We have presented to you today as Instruction Number 1A, I believe, which you have marked refused, the instruction from Doubles which has always been held to be valid. Now, the instruction from Doubles is a cautionary instruction. It indicates to the jury that not only is the suspicion of guilt more probable than his innocence and tells them to exclude every reasonable hypothesis consistent with his innocence before finding his guilt. It is a very strong instruction. It's always been used, to my knowledge, at least in my circuit, until these two volumes came down from on high, Virginia Model Jury Instructions. If I might look at the instructions which were presented, Your Honor, Instruction Number 1, which you granted. Mr. Grizzard, of course, wanted to get ahead of us and did. Instruction Number 1 states in part, "A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case." I assume a lawyer wrote that. That's an assumption on my part. If we are going to have an instruction on reasonable doubt then Doubles is a much superior instruction. I realize the Supreme Court has been most hesitant about that Doubles instruction which we have used in saying that most of that really constitutes argument; but now it is supplanted by a standard which I think reasonably one could characterize as a barbershop standard.

1 If we were sitting in a barbershop, I would anticipate we
2 would come up with something like that. It is the most
3 asinine, ridiculous statement of reasonable doubt I have ever
4 read. Now, Mr. Grizzard says, well, it came from on high.
5 I want you to grant it. We wanted our instruction on
6 reasonable doubt that has stood the test of time. Instead of
7 this, it's come from somewhere, I assume, with all these
8 wonderful people standing behind it saying this is now
9 reasonable doubt. What we have used previously is no longer
10 any good. I don't accept that, Your Honor, and I say it's
11 up to the defendant to present his instruction on reasonable
12 doubt and we did so and you have refused it.

13 Now, there is also a second instruction, Instruction
14 1B, which you marked refused this morning on presumption of
15 innocence and the presumption-of-innocence instruction which
16 we have submitted to you again is from Doubles. It is a
17 separate instruction. It goes into detail as to what the
18 presumption of innocence is, and the instruction which
19 Mr. Grizzard presented, reasonable doubt and presumption of
20 innocence, you have a very brief statement. Again, I submit
21 to you, that the Doubles instruction is superior. It is
22 consistent with the case law of this state and it has stood
23 the test of time. Again, you have refused that.

24 Now, Your Honor, the next instruction, Instruction 1C,
25 which you have marked refused, goes to where there is a

1 question as between one grade of an offense and another grade
2 of an offense. In this instance, we submitted to you an
3 argument. There will be a subsequent instruction I will
4 speak to concerning robbery versus attempted robbery. Now,
5 the Court, as a matter of law, directed a verdict that it
6 would be robbery. We were not allowed to present our
7 instructions on attempted robbery and the theory that
8 emanates from that is that there was some fact in dispute, we
9 submit to you. You say, no, but there was one -- more than
10 one witness. The two or three witnesses' testimony was not
11 identical. We say the jury was the proper determiner of
12 whether it was robbery or attempted robbery, either of which
13 is underlying capital murder or first-degree murder.

14 Instruction 1C, again, which we submitted to you, indicates if
15 you have a reasonable doubt based upon that other instruction
16 as to whether the defendant is guilty of capital murder or
17 murder in the first degree, you shall find him guilty of
18 murder in the first degree. Again, we submit the jury should
19 have been instructed as to this and the Court usurped the
20 function of the jury in determining robbery or attempted
21 robbery and, therefore, capital murder or first-degree murder.

22 Now, in that same line is Instruction 1D, which I
23 believe you have marked refused this morning, concerning an
24 attempt. An attempt is not defined statutorily in Virginia
25 and we, therefore, go to the common law, and this particular

1 instruction indicates what an attempt is. "An attempt is an
2 intended, apparent, unfinished crime. It consists of an
3 intent to commit the crime and the doing of some direct act
4 toward its consummation without actually committing the
5 crime itself." Our argument is on the same basis that the
6 Court has, in effect, directed a verdict on the underlying
7 premise of robbery. We submit to you the jury should have
8 been the one to decide whether it was robbery or attempted
9 robbery on this particular instruction. This particular
10 instruction is to assist the jury in our particular theory of
11 the attempt.

12 The next instruction which we have submitted to you
13 this morning is 1E, refused, Your Honor, again, speaks to what
14 an attempt is -- an attempt to commit a crime -- and tells the
15 jury that the intent to commit a crime or the attempt to
16 commit a crime consists elementally of the intention of the
17 defendant to commit the crime and is a direct act by the
18 defendant toward the commission of the crime, which act amounts
19 to the beginning of the actual commission of the crime, but
20 without completing the crime which the defendant has attempted
21 to commit. This goes to the same ruling that the Court made.

22 Now, we say to you, Your Honor, we were entitled to
23 have our theory presented to the jury. It is a criminal case.
24 The jury is the trier of fact. They had the right to believe
25 Mr. Bain. They had the right to believe Mrs. Huffman. They

1 had the right to believe Mrs. Cosby and those three persons
2 did not testify identically. Now, I anticipate Mr. Grizzard
3 is going to say, yes, but substantially. We say to you unless
4 it is identical that the jury is the determiner of that and
5 the jury also determines credibility. It may accept part and
6 not part of what someone else said. We again submit to you
7 that you have prevented our presenting to the jury our theory
8 of the case by so refusing the instructions which we presented
9 on attempt -- on attempted robbery.

10 The next instruction, Your Honor, and which you have
11 also refused, indicates to you further attempted robbery, the
12 commission of the crime of attempted robbery and the victim
13 was shot therein, which goes to first-degree murder, and this
14 is the same argument which we presented on our motion to
15 strike. We do not intend to belabor that particular point.
16 Again, Section 18.2-31 and 18.2-32, we presented very
17 extensive argument in trial as to that. We believe that the
18 jury was improperly instructed by the failure to grant this
19 particular instruction as well as the others.

20 Now, Your Honor, they are the instructions which we
21 reserve the right to submit; and, if you had indicated to us
22 then that you would have allowed the jury to be instructed on
23 those points, we would have submitted them to you at that
24 particular time. I believe with the introduction of the
25 Northeastern University report and these instructions, the

1 record is now consistent and it should have been when we
2 concluded the trial.

3 Now, there are a number of points which we have which
4 we raised during the course of the trial. If the Court
5 permits us to do so, I would like to speak to part of them
6 and Mr. Savage would like to speak to part of them. I
7 understand that you wish us to present our entire argument,
8 then Mr. Grizzard will respond to that entire argument.

9 MR. SAVAGE: If Your Honor please, on the very first
10 day of this trial way back December 3, I think it was, we
11 moved the Court to sequester the jury at all points during
12 the trial -- during the entire day of the trial, during the
13 lunch breaks and any recesses during the day and at night
14 after each day of the trial. We knew at that time that the
15 trial was going to take more than one day. We also knew that
16 the trial would be exposed to publicity in the papers being
17 published on the Shore. We knew that there would be a great
18 deal of talk about the trial around, this being a capital-
19 murder case in the jurisdiction -- in a locale which it had a
20 very serious capital-murder case not too long ago. The Court
21 overruled that motion, refusing to sequester the jury at any
22 time either during the trial itself or during the sentencing
23 portion. We renewed our motion to have the jury sequestered
24 after returning the initial verdict and before considering the
25 sentencing portion of the trial. The record already compiled

1 and available to the Court will reflect that there was
2 considerable publicity during the trial. There was an account
3 of a rather grisly murder over across the Bay in Isle of Wight
4 County in which the alleged defendants or alleged perpetrators
5 of that crime had just been caught. There was a report of a
6 murder trial in the City of Suffolk and the sentence given
7 that person, all of which were presented to the Court in
8 support of our motion, not only to sequester, but later on for
9 mistrials as each day progressed.

10 Finally, Judge, if you will recall, there was the
11 article that appeared in the Eastern Shore edition of the
12 Norfolk Virginian-Pilot. That's also in the court record
13 reporting on the testimony in this case and singling out the
14 testimony of one Mrs. Cosby to the exclusion of all others.
15 The newspaper article quoted Mrs. Cosby in the most attractive
16 portions of her testimony; the most inflammatory portions of
17 her testimony without giving any other account of anything
18 else that happened in the trial. It would be unthinkable that
19 the members of this jury were not exposed to that article
20 either having read it personally or having had it discussed
21 with them. Later on in the proceedings, the jury was exposed
22 to the account of the first portion of the trial where the
23 sentence of the defendant was reported in great detail and
24 also the second stage of the sentencing portion which was to
25 come later. We felt that in the beginning that the jury

1 should be sequestered to avoid contact with anything of that
2 nature. Our fears were borne out by the newspaper articles
3 that I just mentioned and we feel that the motion for mistrial
4 should now be granted, should have been granted earlier
5 because of this pretrial publicity and the certainty of the
6 jury being tainted by their contact, not only by people on the
7 Shore, but also by these newspaper articles.

8 MR. WOODWARD: Your Honor, Mr. Savage and I were
9 discussing off the record. Each of us is prepared to speak
10 to various points again. Again, we would appreciate your
11 allowing us to do so; that the points we wish to make today
12 would be in chronological order with the events of the trial.

13 THE COURT: Yes, sir.

14 MR. WOODWARD: The second issue which we wish to raise,
15 Your Honor, is the unconstitutionality of the death penalty.
16 We have spoken to that previously and understand your previous
17 ruling. We disagree with it and at this point we would like
18 to preserve the argument which we made at that time and such
19 motions as we did make.

20 We then go to the question of voir dire; and, very
21 extensively, counsel -- Mr. Grizzard and us on behalf of
22 defendant argued the point of voir dire. The Court made
23 numerous statements as to the manner in which it would conduct
24 voir dire. We presented very detailed argument concerning the
25 right of counsel -- defense counsel -- to conduct voir dire

1 examination of the jurors. We cited to you a code section --
2 Mr. Grizzard cited Rule 3A:20. We cited several cases. We
3 understand your ruling. Our reading of the record, however,
4 indicates that and for us to repeat today what we said at that
5 time would not be productive and would merely be repetitious.
6 We again preserve, as we have stated previously, any and all
7 objections previously made. We would like to speak today,
8 however, to after you had made your ruling that the Court was
9 going to conduct the voir dire examination and that you would
10 examine the jurors without our being able to examine them in
11 conjunction with you; that you would conduct the examination
12 in groups of five and we moved very strenuously at that time,
13 Your Honor, that you conduct individual examination of jurors.
14 The reason we stated then and the reason we state it again
15 now, and we think it's clearly proven by the record, is that
16 when asking about one's disposition towards the death penalty
17 that you are not asking a question which gives an easy answer
18 such as Are you kin by blood or marriage? Those standard
19 questions people are able to respond to, yes or no. It is a
20 question which produces answers which go to the entire
21 spectrum from the eye for an eye, tooth for a tooth simplistic
22 misinterpretation of the Bible to absolute objection.
23 Absolute objection to the imposition of the death penalty
24 under any circumstance.

25 Now, within that realm, you had a number of jurors who

1 were hesitant. Usually, the first in the panel of five and
2 then others responded, and then the Court began this
3 particular process. You took five and then five and then
4 five and then, I believe, you excluded some and would bring
5 one back. What Mr. Savage and I contended to you at that
6 time about having individual examination of the jurors, once
7 you had made the other ruling which we objected and excepted
8 to, was proven by the very first man over there, Mr. Cosby
9 Kellam. He's sitting there with four others. Page 47 of the
10 transcript and pages following, Mr. Kellam said, "The other
11 fellow's life is as good as his." Now, there are four other
12 jurors sitting there. Four sitting there with him. We
13 submit to you that voir dire examination of a juror is not a
14 vote of the community. It is not the place to have the
15 philosophical dialogue among jurors, but here's Mr. Kellam,
16 the very first man, said, "The other fellow's life is as good
17 as his." We moved for the mistrial again and we submit to
18 you, Your Honor, that we can conceive of no legitimate reason
19 for not having individual voir dire of potential jurors except
20 to save time. Now, I submit to you that to save time or to
21 save half a day or a day cannot stand the test of the
22 defendant's rights and the processes of our system as it is
23 understood. You go on in there and, again, it occurs time and
24 time again that somebody makes some statement in the presence
25 of four other potential jurors, some of whom were on the panel.

1 This has to prejudice them. I don't know whether the
2 other four knew Mr. Kellam or not. I don't know whether
3 Mr. Kellam knows them or not, but we submit that the voir
4 dire examination of jurors is not the place to have a
5 discussion among jurors, everyone to listen to a speaker
6 state what his feelings are. The voir dire is to determine
7 those jurors who should be excluded and whether one should
8 be excluded should have no effect whatsoever on the others.
9 It's a very simple matter to put the others elsewhere; to
10 take them one at a time and to conduct your examination of
11 them.

12 We except again to your determination of how you
13 would conduct the voir dire examination. We suggested to
14 you before, during, after and again now that the matter of
15 voir dire examination is totally prejudicial to the
16 defendant and that you should now declare the mistrial which
17 we submit you should have declared previously.

18 In the voir dire examination, one of the jurors was
19 named Nina Depalo and Mrs. Depalo, in response to the Court's
20 question, indicated that she was a victim of kidnapping.
21 Kidnapping is a most serious crime. It is punished most
22 severely. Well, it should be. After she indicated that she
23 had been the victim of a crime -- kidnapping -- we moved to
24 have her excluded. The Court did not allow her to be
25 excluded; would not exclude her. I believe it's Page 68 of

1 the record, Your Honor. Our point now is why was the
2 question asked of them if they weren't going to be excluded?
3 Why ask them a question if the affirmative answer to that
4 does not exclude them? Mrs. Nina Depalo was part of the jury
5 panel. Effectively, defense counsel had to exercise its
6 strikes, which it is entitled to, of members of the panel when
7 otherwise we should not have been required to do so when the
8 victim of a most serious crime sits on the panel and we
9 suggest to you that she should have been excluded. Again, we
10 make the motion that you declare the mistrial and order a new
11 trial.

R2 12 Page 89 of the transcript, again, in the voir dire
13 examination, Samuel Cypress, a potential juror, was inquired
14 of by the Court and, in asking him about the death penalty,
15 his ultimate answer was, "Well, I can't see where it helps
16 any." And, on that basis, you excluded him, and we submit to
17 you that one who indicates he doesn't see where it helps any
18 is not saying that he will not impose the death penalty in an
19 appropriate case, but he was removed and that is the ultimate
20 answer that he gave. "Well" -- this is a quote -- "Well, I
21 can't see where it helps any." We submit he should not have
22 been excluded and that he should have been allowed to remain
23 a member of the jury panel.

24 Now, Your Honor, the voir dire examination, we submit,
25 not only particularly as to those items which we have cited to

1 you but, as a totality, was not done in the proper manner,
2 but we suggested to you when we began and throughout that and
3 following it and suggest to you now clearly indicates that it
4 is not the way voir dire examination should be conducted;
5 that it was highly prejudicial and that the defendant's rights
6 were infringed upon. We suggest that again you declare a
7 mistrial based upon the improper voir dire examination, not
8 only as to method, but as to the actual examination itself,
9 the seating of Mrs. Depalo and the exclusion of Mr. Cypress.

10 Excuse me a moment, Your Honor.

11 MR. SAVAGE: Judge, still on the voir dire. If you
12 will recall, one of the main questions that the Commonwealth
13 wanted to ask of the panel, however they were to be asked, was
14 a question of whether or not they had any conscious objection
15 to the death penalty. Initially, we objected to that
16 question being asked on the ground that this is the only case
17 tried in the Commonwealth of Virginia or any other jurisdiction
18 where a question is asked such as that designed to elicit the
19 response of the jury as to their predisposition towards a
20 certain method of sentencing, and no other case except a
21 capital-murder case can the jury be asked that type of
22 question. In most all cases, as in this case, the jury has
23 certain alternatives. In this case, the alternatives were life
24 imprisonment or the death penalty. In other cases, it is some
25 term of sentencing and those terms are set forth in the

1 instructions. In no case is the jury asked in a certain case
2 do you have a predisposition against giving twenty years or
3 against giving a monetary fine or will you give just five
4 years, but yet in this case the Commonwealth is allowed to
5 ask each juror if they will not give the death penalty and if
6 the answer to that is in the affirmative, then they are struck.
7 We made our objection that such a question was a denial of
8 due process, a denial of equal protection of the laws and
9 infringement of the Fifth, Sixth and Fourteenth Amendments of
10 the United States Constitution. We renew our motion at this
11 time that the mistrial be granted because of the Commonwealth's
12 asking that question.

13 Of course, we anticipate that they will say that this
14 was taken up in the Witherspoon case. We do not agree with
15 the Commonwealth's interpretation of that case. Judge, at
16 that time, while not waiving our objection to that question
17 and, in fact, specifically continuing our objection, we also
18 posed certain questions to be asked of the jury. There were
19 a number of questions that we posed and they are in the
20 record. We submitted them in written form. The questions
21 were set up in a series so that we could determine by the
22 method of asking the questions exactly how strongly each juror
23 felt about the death penalty; whether a juror would give the
24 death penalty in every case of an unlawful killing or whether
25 the juror would merely give the death penalty in a certain

1 type of case, and the last question was couched in the facts
2 as we knew them to be from this case to find out if the juror
3 would absolutely give the death penalty in those cases if
4 those facts were proven, and Mr. Grizzard objected to us
5 asking those questions and the Court sustained that objection.

6 If Your Honor will recall our discussions not only at
7 that point, but also during the instructions, we all agreed,
8 finally, even Mr. Grizzard, that in no event in a capital-
9 murder case in Virginia and under no set of facts or
10 circumstances is the death penalty mandatory. In no event
11 would a jury be required to give the death penalty. The
12 presumption against the death penalty, in fact, stands with
13 the defendant throughout every step and stage of the
14 proceeding; and, therefore, we felt that we were entitled to
15 ask a question of this jury setting up the facts of this case
16 and asking that if those facts were proven would they
17 absolutely give the death penalty regardless of any other
18 factors and if their answer to that had been yes then we
19 would have submitted that we should have had them struck
20 because, as the Court and Mr. Grizzard conceded, under no set
21 of facts or circumstances do they have to give the death
22 penalty. The Court refused to ask the series of questions
23 that we proposed. The Court did ask one question in a
24 modified version and we were glad to get what we got, I
25 suppose, at that stage. We feel like it was error, however,

1 not to ask the questions as we presented them and we renew
2 our motion for the mistrial on that basis.

3 MR. WOODWARD: Judge, moving along to the trial stage
4 of the proceedings and the actual testimony. If you recall,
5 during the direct examination of Mrs. Cosby, one of the
6 eyewitnesses -- alleged eyewitnesses to the offense -- starts
7 on Page 130 of the transcript. Mrs. Cosby was obviously very
8 excited and distressed about being here and what she
9 supposedly saw and was very anxious to testify in favor of the
10 Commonwealth. She was very anxious to give her impression of
11 what was happening at that time; to give to the jury her idea
12 of what people were thinking and what was going through
13 people's minds and what the scenario was rather than just
14 testifying to the facts that she saw or the things that she
15 heard. We started our objections on Page 130. We were
16 overruled. Mr. Grizzard felt that her impressions of what was
17 going on were patently proper and, finally, on Page 133, she
18 described Officer Bain as begging for his life. Well, that
19 was even too much for Mr. Grizzard and the Court. You finally
20 sustained our objections and directed Mrs. Cosby to limit
21 herself to what she saw and heard and not what she thought
22 people were thinking or not what she thought was going on. At
23 that point, however, it was too late. After the jury hearing
24 this most dramatic and damaging testimony, it was impossible
25 for them to erase it from their minds despite the Court's

1 admonition not to take into account what Mrs. Cosby said. We
2 alerted the Commonwealth's Attorney early on that we did not
3 want that type of testimony; that we considered it improper.
4 He continued ahead and finally got the fatal comment, in my
5 opinion, describing Officer Bain begging for his life, which
6 required the Court to grant a mistrial. We made the motion at
7 that time and we renew it now. It is simply not possible for
8 the jury to disregard that type of testimony. She should not
9 have been allowed to give that statement and she wouldn't have
10 then if she had been cut off earlier in her testimony.

11 Your Honor, the next step of the trial which we would
12 like to speak to today concerns the admission of certain
13 photographs. This begins at Page, I believe, 178 of your
14 record. Mr. Grizzard sought to introduce into evidence
15 photographs of the victim's body and the bullet holes, et
16 cetera, and he indicated to you initially that he needed those
17 in order that Mr. Smith could be identified. Now, the wounds
18 to Mr. Smith -- there was a relatively superficial wound to
19 the head. There were two wounds to the general chest area, as
20 I recall, were testified to by Doctor Presswalla, the Medical
21 Examiner. Mr. Grizzard says, "Well, we needed the photographs
22 to identify Mr. Smith. That's the way I'm going to elect to
23 try my case." I said, "Fine. We will stipulate that the body
24 of William Jack Smith, Jr., is the same William Jack Smith,
25 Jr., named in the indictment." He said, "Well, Doctor

1 Presswalla needs these photographs to testify as to where the
2 wounds are." Doctor Presswalla testified he did not; that he
3 could tell you where the wounds were so the two reasons, one
4 came first, the other came second, that the Commonwealth
5 submitted the photographs. Those photographs that were
6 introduced were in part fatal. Mr. Grizzard's theory failed
7 as to that. They were introduced but for one reason, gore,
8 inflammation of the jury, prejudice to the defendant or a ploy
9 of the Commonwealth's Attorney. I'm sure when they have one
10 of the numerous conventions throughout the state, they all sit
11 down and say I had this case. We got so-and-so photograph in.
12 They know they can't do it. We suggest to you that the Court
13 committed error in introducing any photographs that showed the
14 wounds.

15 Now, any murder is heinous. I submit to you that it
16 is, but photographs present no probative value whatsoever.
17 None. When Doctor Faruk Presswalla was here to testify, he,
18 having examined the body, and Doctor Presswalla we called as
19 a witness to that point and he testified he did not need
20 those photographs. A portion of them were admitted. Page 194
21 of the record, Your Honor, and Mrs. Donn has it down
22 correctly. She has it down accurately. "Mr. Grizzard picked
23 up the blood-stained shirt." What purpose does the blood-
24 stained shirt have? I would concede to you if we were here in
25 a circumstantial evidence case, if there was some question as

1 to who the perpetrator of the crime was, what happened to the
2 victim, it might have some value to show the course of events
3 through the admission of such as the blood-stained shirt. In
4 this case, the Commonwealth has, I'm sure, by their standard,
5 the best possible case. They have four eyewitnesses, three of
6 whom they bring before you, yet Mr. Grizzard picks up the
7 blood-stained shirt. What purpose? None. None of probative
8 value except by their twisted theory to inflame the jury.
9 Let's get it all up here. If they had a movie, they would
10 bring it in here. In this situation, we're not talking about
11 circumstantial evidence. You're not talking about inferences
12 from evidence. You're talking about the eyewitness testimony
13 and these two things -- photographs and the blood-stained
14 shirt -- have absolutely no reason to be in this trial. We
15 ask that you exclude them. We ask that you not admit them.
16 You did admit them and there is no basis for having so
17 admitted them. We believe, Your Honor, this prejudiced the
18 defendant; that it was inflammatory and prejudicial to him
19 and should have been excluded. We move for a mistrial. We
20 moved for their exclusion. We renew those motions.

21 We then come in the course of the evidence, Your Honor,
22 to Mr. Bain. We asked Mr. Bain about the police procedure.
23 What was the procedure? Mr. Grizzard objected to the police
24 procedure. I believe it's at Page 222 of the record. He
25 objected to the police procedure; what he had been instructed

1 to do; what was the standard. You can't admit that. That's
2 not admissible at that time, that particular stage, and you
3 did allow us to admit it at the second stage. We suggest to
4 you what he did -- if the Commonwealth is going to get its
5 pictures, if the Commonwealth is going to get its blood-
6 stained shirt, then why can we not ask of Mr. Bain what were
7 you supposed to do? And the Court did not allow us to go into
8 that.

9 Now, this is not a negligence case, Your Honor. It's
10 not some prior event. It's not some nonlegal standard.
11 Mr. Bain's instructions as to what he was supposed to do --
12 and we learned subsequently he didn't have any instructions;
13 he was to, as Chief O'Brien told us, use his judgment --
14 should have been admitted at that particular stage of the
15 proceedings. We should have been allowed to inquire of him
16 and we were not. We submit to you that the restriction which
17 you placed upon us prevented our presentation of the case on
18 cross-examination of the particular witnesses, particularly,
19 Mr. Bain, who we sought to pursue. We suggested to you that
20 you committed error in your ruling and we moved for a
21 mistrial. We ask that you reconsider at this time the motion
22 which we made as to that.

23 Now, Your Honor, we have gone through those points.
24 We wish to speak as to the Commonwealth's case in chief.
25 There were other points which we spoke to. Again, we do not

1 waive such argument as we presented, such objections as we
2 made, such exceptions as we noted, such motions for mistrial
3 as we made and continued to make throughout the proceedings.
4 We merely wanted to bring to your attention those various
5 matters in the presentation of the Commonwealth's case which
6 we ask that you reconsider; that you determine whether, in
7 fact, at this point that perhaps you were in error at that
8 point, and that you reconsider those things that we have
9 presented to you this morning.

10 We then moved to strike the Commonwealth's evidence.
11 We argued to you very extensively concerning robbery versus
12 attempted robbery, capital murder versus first-degree murder.
13 I do not intend at this point to belabor the argument which we
14 made to you. The record is replete with our position and the
15 Commonwealth's position as to that. We feel very strongly
16 that Virginia, which, as I understand it, has more lawyers by
17 percentage in its Legislature than any other state, when they
18 use these words of skill in law, murder, capital murder,
19 robbery and attempted robbery that the Court would rule and
20 say, well, what they really meant was anytime during the
21 commission of a robbery, a portion of which time would have to
22 be the attempted robbery until it goes another step. The
23 Court indicated to us at that time "while armed with a deadly
24 weapon" was pertinent language. Now, Your Honor, we did not
25 make this motion at that time and I suspect perhaps we should

1 have and we would now make it. The Commonwealth elected to
2 proceed here on three separate indictments. I would ask that
3 you exclude for this particular argument that about the
4 shotgun. You have the defendant charged with capital murder.
5 As the Court pointed out to us under its ruling in the capital
6 murder that he was "armed with a deadly weapon". If that is
7 an essential element, "armed with a deadly weapon," then that
8 implies, I would think, that armed with a deadly weapon means
9 he used the deadly weapon in the commission of the murder.
10 Obviously, if someone strangles somebody else and happened to
11 have a pistol in his pocket, I don't think that's what our
12 Legislature intended. While armed with a deadly weapon goes
13 to the use of that weapon in the perpetration of a crime --
14 subsequent murder. Now, if that is correct, Your Honor, I
15 inquire now and indicate to you that one of the two indictments
16 has to fail. Mr. Grizzard then indicts the defendant
17 simultaneously -- I should say indicts the defendant on the
18 use of the firearm in the commission of murder. Now, I ask
19 you, how can you have both? How can you have "used in the
20 commission of murder" and how can you have as a separate
21 offense "armed with a deadly weapon" as an essential element
22 of that offense? The two cannot stand legally. One has to
23 fail. I'm sure Mr. Grizzard thinks if that's got any validity,
24 I want the lesser of the two to fail. I submit to you that he,
25 having proceeded on both, and, we submit, in error, having

1 proceeded on both, that they both must fail; that the Court
2 cannot now take the lesser of the two, the one year versus
3 this man's life and say, well, if that's correct, forget the
4 one year. Now, Mr. Grizzard elected how to prosecute the
5 case. He presented the indictments. Again, I indicate to
6 you that perhaps at the conclusion of the Commonwealth's case,
7 after having heard all its evidence, we should have then moved
8 to strike both indictments, the capital-murder indictment and
9 the other indictment because the two cannot exist together,
10 not based on the facts which were presented to you from the
11 witness stand and through the exhibits. Again, I ask how can
12 "armed with a deadly weapon" stand consistently with that
13 crime of the use of a firearm in the commission of murder?
14 It cannot. We submit to you that both verdicts in those
15 cases, one of which has not been completed, has to fail.
16 Mr. Grizzard, of course, we submit, can go back subsequently
17 and elect to retry the defendant on either capital murder or
18 on the use of a firearm in the commission of murder, but he
19 can't have both. Having elected to proceed on both, they must
20 both now fail.

21 Again, Your Honor, the record is replete, we suggest
22 to you, as to our argument of robbery versus attempted
23 robbery and first-degree murder versus capital murder. We
24 feel very strongly about it. We understand your ruling.
25 We excepted to your ruling on our motion to strike. We

1 renewed our motion to strike at the conclusion of all the
2 evidence and make the motion again. We preserve any motions
3 that we have made as to that throughout the trial. We do
4 understand the ruling which you made.

5 MR. SAVAGE: Your Honor please, I have one or two other
6 very short matters. I apologize for the disjointed nature of
7 this to you and Mr. Grizzard. We made some effort to get
8 together in the chronology of the thing.

9 Back on the photographs, if Your Honor please, you will
10 recall that there were some photographs showing the holes in
11 the wall of the jewelry store that Mr. Grizzard put into
12 evidence over our objection. We objected that there wasn't
13 any evidence to show that there were bullet holes, merely that
14 they were holes in the wall. As I recall the testimony of the
15 investigating police officer and the detective, they both said
16 that that was right. They could not say that they were bullet
17 holes, merely that there were some holes in the wall that they
18 took pictures of. We object to those as not being probative
19 of anything as in the case of the victim's body and the bloody
20 shirt, merely submitted to inflame the jury. Under the
21 authorities we listed at that time, primarily in the Waye case,
22 the bullet-hole pictures should not have been admitted.

23 If the Court will also recall in the cross-examination
24 of Doctor Bransfield, which occurred in the sentencing portion
25 of the trial, Mr. Grizzard got into a great harange with

1 Doctor Bransfield about his letter of January 19, 1979, as
2 being inconsistent with his testimony on the day of trial;
3 and, in fact, he argued to the jury that his testimony was
4 inconsistent with his final evaluation and report. On
5 redirect examination, we attempted to ask Doctor Bransfield
6 some questions which would have rehabilitated him to show
7 that Mr. Grizzard had misunderstood the report of January 19
8 and his testimony on the day of the trial; that they were
9 really not inconsistent. One of the things that we had asked
10 Doctor Bransfield was whether or not he had found Turner to
11 be -- made a finding which would allow the Court to find
12 Turner to be found not guilty by reason of insanity. If you
13 will recall at that point, Mr. Grizzard objected to the
14 question and the Court would not allow us to ask that
15 question. I would at this point ask the Court to put this
16 January 19, 1979, report in the record as an exhibit as
17 background for our motion at this point to show that there is
18 inconsistencies in what Mr. Grizzard stated to the Court.
19 That should have been cleared up. Primarily, on Page 2 or
20 Page 3 of this report, there is -- the last paragraph on that
21 page, Doctor Bransfield states and this is a quote, "However,
22 there is no evidence to support the presence of any psychotic
23 behavior at this time." Later on, he says, "One must consider
24 the question of irresistible impulse," and he rules that out.
25 What Doctor Bransfield was doing in this evaluation and in

1 this report was following all the steps of the order from the
2 lower court. That is, attempt to determine whether or not the
3 defendant was not guilty by reason of insanity, and Doctor
4 Bransfield found that the defendant did not have that defense
5 available to him; that he was not not guilty by reason of
6 insanity and then he went ahead to state his feelings about
7 the defendant at the time the offense was committed, and we
8 will talk about this again later on; but, what he said at that
9 point was -- this is on Page 69 of the transcript, dated
10 December 5, that he was under the influence of some mental
11 disturbance at the time of the offense, and that was all we
12 wanted to show by Doctor Bransfield. We never intended for
13 the jury to think that our defense was or that the defendant
14 was claiming that he was not guilty by reason of insanity, and
15 yet Mr. Grizzard made this big argument to the jury and
16 conducted quite a vigorous cross-examination of Doctor
17 Bransfield showing that, in fact, he had not found him not
18 guilty. In other words, playing his testimony at the trial
19 against this report. They were not inconsistent because the
20 points in the report were not directed to the same evaluation.
21 When Doctor Bransfield got past his opinion that the defendant
22 was not or did not have available to him the insanity defense
23 then he attacked and considered the other points pertinent to
24 the trial. It's apparent from a reading of this report that
25 that is the fact of the matter and I would like for that to be

1 put in the record on behalf of the defendant.

2 MR. GRIZZARD: Your Honor, what we're trying to do is
3 resurrect a dead horse. If he wanted to do it, he should have
4 put it in at the time of trial. I will state to the Court I
5 questioned Doctor Bransfield on what he wrote on that report.
6 If they didn't like the way the questions were recorded, they
7 could have brought it back on redirect because I asked what
8 was in that report. I object to it coming in at this time.
9 It's too late.

10 THE COURT: I think it's too late to introduce any
11 report in evidence at this time.

12 MR. SAVAGE: We attempted to resurrect or bring back
13 Doctor Bransfield on redirect. We did address that point on
14 redirect examination and, as I stated, we were overruled on
15 that one point. What he says down here at the end of his
16 report is that, "The paranoid tendencies may have had some
17 impact on his behavior, but I do not feel this was to the
18 degree where he would be unable to tell right from wrong or
19 to maintain contact with reality or to prevent the
20 manifestation of any irresistible impulse."

21 MR. GRIZZARD: Your Honor, if we're going to read the
22 report in evidence, we might as well put it in evidence. I
23 have objected to the report being introduced.

24 MR. SAVAGE: I don't want to read a four-page report in
25 the record.

1 THE COURT: I won't let you do that.

2 MR. SAVAGE: I don't intend to do that.

3 Judge, if you would mark this refused then.

4 (Discussion off the record.)

5 MR. GRIZZARD: Is this becoming part of the record in
6 the case?

7 THE COURT: No, sir.

8 MR. GRIZZARD: That's what I wanted to find out.

9 THE COURT: Wasn't this presented at one time during
10 the trial?

11 MR. GRIZZARD: No, sir.

12 MR. SAVAGE: I don't think we did; no, sir. We talked
13 about it a lot at that point in the trial.

14 THE COURT: You had a lot of discussions about it.

15 MR. SAVAGE: Yes, sir.

16 THE COURT: Okay.

17 MR. GRIZZARD: That is not part of the record in the
18 trial then, as I understand it? It's refused?

19 THE COURT: It's a refused -- they have offered an
20 exhibit and I have refused it. I have marked it and refused
21 it.

22 MR. SAVAGE: If Your Honor please, in summary, then,
23 and I'm just about through with this point --

24 MR. GRIZZARD: I'm trying to get something straight in
25 my own mind, Judge. I don't know that they can have it even

1 marked and refused at this point in the trial. It's not part
2 of the record in this case and should not be received as
3 evidence in the case.

4 THE COURT: I agree with that and I think you're
5 absolutely right. I don't think it should be even in the
6 file; but, in this particular case, considering the serious
7 nature of it, I'm going to allow it to be placed in the file
8 and I have refused it. I didn't allow it to go to the jury
9 and I'm not considering it at this time either.

10 MR. SAVAGE: Judge, the reason why we objected at that
11 time and asked for an opportunity to examine Doctor Bransfield
12 was to clear up the inconsistency allegedly between his
13 January 19, 1979, report and his testimony on the day of the
14 trial. As I stated, he was in his report trying to determine
15 whether or not the man was acting under the influence of an
16 irresistible impulse or whether he was legally insane. He
17 determined he was not. For purposes of trial, he was not
18 called during the guilt or innocence stage of the proceeding.
19 He was put on the stand only in the second stage of the
20 proceeding to -- the sentencing stage -- where the insanity
21 defense was already passed. We wanted to show at that time
22 that he was under the influence of mental disturbance. That's
23 the language of the Code and that is what Doctor Bransfield
24 testified to that day.

25 For that reason and all the other grounds, we renew our

1 motion for a mistrial.

2 Judge, we do have one point that we made on one of the
3 other charges, that being the shotgun charge. Use of a
4 shotgun. We mentioned at that time that under 18.2-299 of
5 the Code, the shotgun is detailed and the elements of the
6 shotgun offense are set out in some detail in the Code. The
7 Commonwealth failed in its proof, in our opinion, in one of
8 those elements, which was the single-firing mechanism. This
9 is the argument that we made during the trial and we renew
10 that now. We think that the verdict -- it says, ". . . from
11 a smooth or rifled bore by a single function of the firing
12 device . . ." That's in 18.2-299. We submit there is no
13 evidence that the weapon was of that type and the verdict of
14 the jury should be set aside on that ground.

15 Judge, also in the instructions and Mr. Woodward, I
16 think, got through most of these in the first part, but we
17 offered and had typed up for consideration by the Court at
18 the time of trial several instructions. They are 1A, 4A and
19 4B. We renew our objection to the Court's refusal to grant
20 those three instructions in addition to the others that
21 Mr. Woodward already talked about for the reason that I
22 touched on earlier.

23 There is virtually no question -- no argument, no
24 dispute or dissent from the Commonwealth or the bench on any
25 case that's been considered in the Commonwealth since the

1 enactment of this statute that in no event is the death
2 penalty mandatory. Under no set of facts or circumstances is
3 the jury required to give the death penalty. We offered
4 Instruction 1A, which was refused, which primarily was taken
5 from the former instruction, but, at the end, set forth the
6 fact that the jury was not required to administer the death
7 penalty. In fact, the last sentence of that says, "Regardless
8 of what the Commonwealth proves, you may sentence the
9 defendant to life imprisonment." We think that was a correct
10 statement of the law and should have been granted. 4A and 4B
11 have to do with the same general theme; that is, that the
12 death penalty is not mandatory and that there is a presumption
13 against the death penalty which would have followed the
14 defendant throughout the proceedings. Both of those were
15 refused and we submit that the verdict of the jury should be
16 set aside for misdirection of the jury on these three and also
17 the ones that Mr. Woodward mentioned.

18 MR. WOODWARD: Your Honor, we are now prepared to speak
19 to the errors which we contend have been committed in the
20 second stage of the proceeding and the instructions which were
21 given to the jury as to what bases it could use in determining
22 whether the punishment of death could be affixed or
23 recommended, I should say, to the Court. I don't know whether
24 Mr. Grizzard would prefer and, of course, you prefer to speak
25 to those presented so far and segregate the second stage or

1 whether you wish us to proceed with the second stage of
2 argument at this time.

3 THE COURT: What do you prefer?

4 MR. GRIZZARD: Doesn't make any difference to me, Judge.

5 THE COURT: Suppose you go ahead and finish.

6 MR. WOODWARD: Your Honor, the jury having been
7 instructed on the second stage retired there with two
8 standards which were submitted to it consistent with 19.2-264.2.
9 Virginia has two standards. Dangerousness. We indicated to
10 you at that time one of only three states which has -- which
11 have dangerousness as a standard. Mr. Savage will speak to
12 the matter of dangerousness. The other basis or standard is
13 that of what is commonly known as atrociousness. This
14 indicates that his conduct in committing the offense for which
15 he stands charged was outrageously or wantonly vile, horrible
16 or inhuman and that it involved torture, depravity of mind or
17 an aggravated battery to the victim. Now, the language in
18 that particular passage I have just read which is important is
19 torture, depravity of mind or an aggravated battery to the
20 victim. Your Honor, if this crime can stand the test of
21 atrociousness as that section reads, then every -- every
22 murder which involves the use of a firearm is atrocious. I
23 submit to you, it simply is not. What occurred in this event
24 is a simple murder. Now, that's not to belittle murder. We
25 don't intend to belittle murder; but, as murders go, and as

1 the Court knows as a judge of long standing and we know as
2 attorneys, it is a simple murder.

3 Now, what constituted the murder? Doctor Presswalla
4 told us it could have been one of two shots. These were shots
5 that were fired to the general chest area of Mr. Smith, the
6 victim. There was another shot which preceded, but which was
7 not fatal. These two shots Doctor Presswalla said either of
8 them may be fatal. Officer Bain told you that those two shots
9 were fired in rapid succession. I say to you, Your Honor, how
10 can that particular act that was presented to the jury and to
11 you involve torture, depravity of mind or an aggravated
12 battery to the victim?

13 Now, the Commonwealth is going to say, well, he shot
14 twice. So what. That's what I say. So what if he shot
15 twice. That's not the standard. An aggravated battery to
16 the victim, torture, depravity of mind. Mason, here on the
17 Eastern Shore. Is that depravity of mind and torture? Sure,
18 it is. Ways. Torture. Torture. The man in Richmond that
19 shoots three of them up there, slaughters them, and does so
20 much more than is necessary to commit murder and the premise
21 in the argument is that murder is going to be committed. Now,
22 if I come up to you -- let's say I come up to Mr. Murden and
23 shoot him twice in rapid succession. Then what the jury has
24 said is that's atrociousness. Yes, it is atrociousness as
25 murder may be considered generally, but it is not atrociousness

1 as we take the standard of murder legally. Now, if I shot
2 Mr. Murden once and waited thirty minutes and shot him again
3 and kicked him and cut him and sodomized him and did all
4 those things to him then you might have an atrocious
5 situation; but, what I say to you, if this is atrocious --
6 if this is atrocious then two shots constituted atrociousness.
7 Two shots in rapid succession. It cannot stand the test of
8 our cases which have been presented.

9 Now, dangerousness is totally a separate standard.
10 It's dangerousness or atrociousness and atrociousness is the
11 way that it can be found. We don't know what our jury did.
12 The Court indicated that it could find both standards. We
13 say to you that the standard of atrociousness could not be
14 committed to the jury; that it could not go to the jury based
15 on the evidence which we heard. Now, what has Mr. Grizzard
16 presented as to atrociousness? He has presented absolutely
17 no evidence. Where is the witness who says, yes, I have been
18 a police officer for twenty-six years. I have investigated X
19 number of murders and this is an atrocious event or this
20 differs from others I have investigated. What the Court has
21 allowed the jury to do is to sit there and speculate as to
22 whether this is atrocious. I would think Mr. Grizzard is
23 going to tell us this involved torture, depravity of mind.
24 He's going to say it's an aggravated battery to the victim.
25 He's going to tell the Court he used more than the force

1 reasonably necessary to accomplish the act. I say to you,
2 this is not that type of situation. Two shots in rapid
3 succession. If that's atrociousness then every multiple
4 firing in a murder is atrocious. That simply is not so.
5 This section was put in the Code, Your Honor, to prevent the
6 continued existence of those persons who had committed an act
7 which shocked the conscience of the community and that's why
8 this language exists, torture, depravity of mind, an
9 aggravated battery; and, we moved, Your Honor, that you not
10 permit the jury to consider that particular factor and I
11 think we have all agreed all the way through this particular
12 case in various proceedings, it's this man's record. That's
13 where it rises and falls. Dangerousness. Is he dangerous?
14 Mr. Savage will speak to that. We don't concede that's a
15 legitimate standard. Dangerousness is it, not atrociousness.
16 Mr. Grizzard doesn't even argue atrociousness. He doesn't
17 even mention atrociousness. The jury is allowed to sit over
18 there and speculate and say this is atrociousness. I don't
19 think it can withstand the test of the comparison with other
20 cases which have been presented to our Supreme Court under
21 this particular section nor can it withstand the test of the
22 Court's own experience as to what is atrocious; and, I suggest
23 to you, Your Honor, that as to that particular segment that
24 the Court should not have instructed the jury that that was a
25 consideration to be made by it; that the Court should set

1 aside the verdict of the jury which is left in the air as to
2 whether it's alternative or whether it's multiple and that by
3 allowing the jury to consider the standard of atrociousness
4 that you, therefore, have prejudiced the rights of the
5 defendant; that it has to be highly inflammatory to them to
6 be told these various things in an instruction of the Court.
7 Clearly, the evidence does not justify any consideration of
8 atrociousness whatsoever; and, if comparison of cases has any
9 validity, then certainly that particular section should fail,
10 and we ask, again, that you declare the mistrial as to what
11 has transpired as to the standard of atrociousness. The jury
12 was misinstructed; and, having been misinstructed, the only
13 rectification can be to declare a mistrial and order a new
14 trial for the defendant.

15 MR. SAVAGE: Judge, just a second. I want to speak to
16 Mr. Grizzard a minute.

17 Come here, Dick.

18 (The Court recessed at 11:15 a.m. The Court reconvened
19 at 11:25 a.m.)

20 THE COURT: All right, Mr. Savage.

21 MR. SAVAGE: Your Honor please, we are still to that
22 portion where we're making a motion to set aside the verdict
23 of the jury and order a new trial for the defendant. The last
24 point that I have -- I think the defense has -- is that the
25 verdict of the jury should be set aside on the dangerousness

1 portion of the sentencing stage of this trial; that is, after
2 the defendant had been found guilty and the jury came back to
3 determine his sentence and the jury returned a verdict of the
4 maximum punishment against the defendant on both grounds as
5 set forth in the statute. In the first place, we ask the
6 Court to strike that part having to do with the violence of
7 the crime which Mr. Woodward just spoke to. We feel like that
8 should not have been submitted to the jury at all. We felt
9 that the verdict form should have been separated so that they
10 were not stated in the conjunctive or disjunctive; that they
11 were stated separately so that the jury could not or should
12 not return a verdict on both without executing two separate
13 forms. We renew our motion on that point and, inasmuch as the
14 jury found against the defendant on the second aspect of it,
15 that is, the dangerousness aspect, where the statute asked the
16 jury to decide whether or not there is a probability that the
17 defendant will participate in acts of violence and be a threat
18 to society in the future, and we move to set aside the verdict
19 on that point. Judge, the Commonwealth's Attorney was very
20 accurate in his analysis of this jury, very accurate in his
21 analysis of the effect of the jury on the defendant's prior
22 criminal record; and, to that end, he submitted in evidence
23 in that stage of the trial only the prior criminal record of
24 the defendant. He had available to him, as the Court knows,
25 Doctor Dimitris, a skilled and experienced psychiatrist from

1 the Commonwealth of Virginia, stationed in Richmond, I think,
2 who had in his care and custody, the defendant, for a period
3 of weeks, and Doctor Dimitris and his staff examined Turner
4 for a long period of time. Doctor Dimitris could have -- and
5 was prepared to, I'm led to believe -- gotten on the stand and
6 testified from a psychiatric point of view about whether or
7 not the defendant was or could be considered dangerous in the
8 future. The Commonwealth's Attorney elected not to put
9 Dimitris on the stand because he was afraid that he would then
10 be in the middle of a constitutional-law conflict; that
11 testimony would not be admissible; that it would be improper
12 for anybody to make that determination so he did not put it on;
13 and, by so doing, he elected not to put on any evidence about
14 whether or not this person could be dangerous in the future.

15 Judge, that leaves you only with Doctor Bransfield's
16 testimony and Doctor Bransfield said two things, very briefly,
17 and these were uncontradicted, I might add, by any other
18 psychiatric testimony. He said that the defendant was,
19 Number One, under the influence of extreme mental disturbance
20 at the time of the offense. That's one of the mitigating
21 factors directly out of the Code, and he also stated with
22 continued treatment, continued administration of the
23 drug, Mellaril, and the other things that he had prescribed,
24 that Willie Lloyd Turner would not be a threat to society. In
25 fact, in answer to one of Mr. Grizzard's questions, I think he

1 said if he had been treated prior to the murder of this
2 victim that the murder would not have occurred; that the
3 treatments that he received showed a marked improvement in the
4 defendant. For that reason, that particular question should
5 not have been submitted to the jury. Having been submitted
6 and the jury having returned its verdict on that point, the
7 Judge should set aside the verdict of the jury on the question
8 of dangerousness and we make that motion at this time.

9 MR. WOODWARD: Excuse me a moment, Your Honor.

10 Your Honor, there is one other matter before we get to
11 what we call the postsentence report in your consideration.
12 As you will recall, it appears in the record the jury was
13 instructed in the second stage. It retired and came back
14 within a matter of minutes and made inquiry to you as to the
15 definition of life imprisonment. At that time, you told them
16 what they were to do. After you told them and they retired,
17 we moved for a mistrial. We believe that the better course
18 and the accepted course and the mandated course in that
19 particular situation is that you tell the jury only that they
20 have been instructed. You said, well, life imprisonment means
21 what it says, et cetera. I cannot disagree with the fairness
22 with which you tried to tell them, but I do disagree and we
23 submit you committed error when you tried to tell them
24 anything at all; and you merely should have told them that
25 they received instructions and should retire instead of giving

1 any explanations whatsoever. We will speak subsequent to that
2 part in the second stage in consideration by you of the
3 postsentence report.

4 We would again renew such motions for a mistrial as we
5 may have made. We don't want to be remiss in any way in
6 waiving any motion. We know the proclivity of our Supreme
7 Court to scrutinize with the closest eye the actions of
8 counsel, you didn't raise it or you didn't speak to it. You
9 didn't give substantiation as to it. We ask that you
10 consider the record as well as such motions we may have made,
11 objections we may have made, exceptions we may have made and
12 statements we may have made as well as those we have now made
13 before you today.

14 MR. GRIZZARD: If it please the Court, very briefly in
15 response to the points raised by defense counsel, beginning
16 with the instructions. As I read the first objection stated
17 by defense counsel is that the Commonwealth offered an
18 instruction on reasonable doubt and presumption of innocence,
19 and the objection is that the defendant was not allowed to
20 offer his instructions, and the argument being that, as I
21 understand the construction of the argument, is that the
22 Commonwealth was taking over their function as far as
23 instructing the jury. The purpose of jury instructions is
24 just that and that is to inform the jury what the law is in a
25 particular case. It is the duty of the Court to instruct the

1 jury on the law. The instructions are the Court's
2 instructions whether they are offered by the Commonwealth or
3 by the defendant. The instruction that the Court approved is
4 a combination of the two, reasonable doubt and the
5 presumption of innocence instruction that has been historically
6 used out of the Doubles book. It is the recommended
7 instruction in the book of instructions that has been
8 presented through the Legislature and the courts for use by
9 the courts in instructing juries now. The jury was properly
10 instructed as to reasonable doubt and they were properly
11 instructed as to presumption of innocence.

12 Objection is also raised to the Court's refusal to
13 grant the instruction on the grade of an offense. Before any
14 instruction of law can be given to a jury, it must be based
15 on the evidence that is presented or has been presented in a
16 case. In this particular case before the Court today, there
17 had been no evidence whatsoever to support a lesser grade of
18 murder. There had been no evidence presented to the Court to
19 show an attempted robbery as opposed to the commission of a
20 robbery. The lesser-included instruction had to follow on the
21 basis that there was no evidence to show that there was only
22 an attempted robbery.

23 The murder statute itself states on a capital murder --
24 it says murder in the commission of a robbery. Commission of
25 means the beginning of. Once Willie Lloyd Turner walked in

1 there and started the robbery in process, you have a murder
2 -- a robbery that is being committed and that falls under the
3 statute of capital murder. The fact that he did not walk out
4 of the store with the jewelry and the money does not reduce
5 the commission of that robbery down to an attempt, and these
6 instructions were properly refused as instructions to the
7 jury.

8 The defense counsel next argue to the motion of
9 sequestering of the jury. The Court has -- Supreme Court has
10 repeatedly stated that sequestration of a jury is a matter
11 within the discretion of the trial court and in an absence of
12 abuse of the discretion, it will not be overruled. There has
13 been no evidence before the Court that the members of this
14 jury had read or during the course of the trial heard anything
15 improper; that they were tainted by hearing the evidence
16 outside the courtroom or hearing comments or reading anything
17 outside of the courtroom. At every stage of the trial the
18 Court properly instructed the jury not to read, not to listen
19 and not to allow anybody to discuss the case with anybody
20 until they had the case for deliberation. I think clearly
21 under the factual situation here, nothing being raised during
22 the course of the trial, the Court was proper in not
23 sequestering the jury.

24 The voir dire questions. Mr. Woodward raises the point
25 first that the hesitant answers by the jury on the ultimate

1 question of it as to whether or not they could impose a
2 death penalty indicated that there was some problem and
3 reluctance on their part to answer that question in a group.
4 That is the type of question that no person would answer
5 lightly. It's the type of question that anyone that you
6 would want serving on that type of jury would have some
7 thought about before they would give an answer. The mere
8 fact they hesitated in making that answer to the Court shows
9 to the Commonwealth that they were thinking about the
10 ultimate responsibility they would face and not that they
11 were reluctant to state in a public manner as to what their
12 position would be.

13 The language of the voir dire by the Court was a matter
14 within the sound discretion of the Court. The cases leave it
15 up to the Court as to whether you're going to have one member
16 questioned individually or the whole panel questioned as a
17 group. In this particular case, the way we did it was groups
18 of five. It leaves it up to the Court whether the Court is
19 going to handle the voir dire or whether the attorneys are
20 going to handle it. Under Rule 3A:20, as cited by
21 Mr. Woodward, I think the Court did not abuse its discretion
22 and properly ruled and properly handled the voir dire
23 questioning. Three particular people were brought out in
24 the argument as to reasons for errors by the Court in the
25 selection of the jury. The first was that of Mr. Kellam.

1 Mr. Kellam in his answer stated that there was some
2 confusion, but the construction of it was that one person's
3 life was as good as another person's life. He was
4 immediately excluded from the jury. The argument advanced
5 today was that that tainted the other four members of the
6 panel that were in the box with him. I point out to the
7 Court in the record, the Court asked counsel if there was any
8 objection to Mr. Kellam remaining in the courtroom. At that
9 time, they had no objection. I think this speaks for the
10 fact that counsel at that time did not feel he would have any
11 effect on the remaining part of the jurors in the box and I
12 think that the objection they make at this point comes too
13 late. As to Nina Depalo, Mr. Woodward talks on Page 68 of
14 the transcript as to the Court not excluding her because she
15 had stated that she had been the victim of a kidnapping. If
16 you read back into the transcript on Page 62 where she was
17 first questioned as to whether or not she had been the victim
18 of a crime or any member of her family been the victim of a
19 crime, on Page 62, the Court went further where Mrs. Depalo
20 was considered and asked her specifically, starting at Line
21 18, "Would the fact that you have had this particular crime
22 related to you or a member of your family affect your ability
23 to reach a fair and impartial verdict in this case?" Her
24 answer was, "I don't believe so." The Court said, "Can you
25 say yes or no?" She answered, "No, it wouldn't affect me."

1 I think it's quite clear from the statements of Mrs. Depalo on
2 the witness stand that her previous experiences from being the
3 victim of a crime would have no bearing whatsoever on her
4 ability to render a fair and impartial verdict in this
5 particular case. The purpose of voir dire is to find out if
6 there are any underlying factors which might influence a
7 verdict and when a juror answers unequivocally as she did in
8 that particular case, the Court, of course, did not abuse its
9 discretion and let her remain in the box. Mr. Cypress was
10 brought forth as another example of someone who was improperly
11 left on the panel because he raised some objection to the
12 death penalty or had some question about it. I would point out
13 to the Court on Page 87 of the transcript where you deal with
14 Mr. Cypress' answers, particularly to the Court. Excuse me,
15 Your Honor, I had 87 down here, but it's not on Page 87.

16 MR. WOODWARD: Eighty-nine.

17 MR. GRIZZARD: On Page 89 of the transcript, the Court
18 asked Mr. Cypress a series of several questions dealing with
19 whether or not the objection to the death penalty on
20 religious and conscientious grounds was absolute. I point out
21 to the Court on Page -- on that page on Line 18, the Court had
22 just asked the question, "Is your objection to the death
23 penalty absolute? MR. CYPRESS: Well, I would say yes." Then
24 you asked further on that page, "Could you in a proper case
25 impose the death penalty?" His answer, "Well, I can't see

1 where it helps any." At that time, he was excluded for cause.
2 As Mr. Savage pointed out clearly, the Witherspoon case
3 handles this type of situation. A person who states
4 unequivocally -- and it's quite clear from the record he
5 stated unequivocally -- that he was opposed to the death
6 penalty was properly excluded from the jury panel.

7 The question that Mr. Savage presented on voir dire
8 where he stated the facts as they thought they should be and
9 they wanted the Court to ask if these were the facts, would
10 you vote for the death penalty, is clearly an improper
11 question. First off, it assumes facts that are not in
12 evidence. It goes to a predisposition on certain specifics
13 which might not be the way the evidence comes in, and it's
14 clearly not a proper type of question to ask on voir dire.
15 The proper question which the Court presented to every member
16 of the panel is whether or not they had an absolute religious
17 or conscientious objection to the death penalty. That
18 question was presented. That question was delved into with
19 many jurors in some detail and the Court on no occasion
20 abused its discretion in refusing or sitting jurors.

21 During the course of the trial, objection was made to
22 Mrs. Cosby's testimony which was characterized by Mr. Savage
23 today as her interpretations of exactly what was seen at the
24 time of the murder and the robbery. In particular, he brought
25 out one particular aspect of it and that's on Page 133 of the

1 transcript where Mrs. Cosby stated that the officer was
2 begging for his life. At that time an objection was made, if
3 the Court will look on Page 133 of the transcript of December
4 4, I believe it is, Your Honor. Excuse me, it would be
5 December 3. Mrs. Cosby started stating what the police
6 officer said and I quote from Line 7, "The police officer
7 said, 'Look, my wife just had a baby.'" At that time, she
8 was interrupted and then she continued, "In essence, he was
9 begging for his life," On Page 135 of the transcript, she
10 stated, "Officer Bain was begging him not to shoot him." He
11 said, "I will take you anywhere. Hey, man, my wife just had
12 a baby. Don't shoot me. I will take you anywhere you want
13 to go. I will get you out of town." I think her beg is a
14 proper word in the English language to characterize the
15 substance of the statement that she quoted as being Officer
16 Bain's statement to Willie Lloyd Turner at the time of the
17 murder.

18 Objection was made as to the photographs that were
19 placed in evidence, in particular, the fact that they were
20 placed in for identification and also to show the wounds.
21 Mr. Woodward points out one place in the transcript where it
22 says something about the blood-stained shirt and argues to
23 this Court that the whole purpose of it was to inflame and
24 prejudice the jury. It's a tragedy that we have to present
25 this type of evidence to a jury at any time, but you can't

1 forget what the factual situation is. You can't hide
2 evidence from a jury because it's not pleasing to your sight.
3 At that time that the objection was made, I pointed out to
4 the Court the case of Stamper v. Commonwealth, out of
5 Richmond, Virginia, in which the officers went to the scene
6 and actually, even though the defense counsel stipulated that
7 the victims were killed and all this other and they didn't
8 want photographs and all that, the officers went to the scene
9 and videotaped and gave an oral description along with the
10 videotape describing the scene with blood all over it leading
11 from the safe to this other place in the store and trails of
12 blood. That was presented to the jury and that was upheld by
13 the Supreme Court of Appeals of Virginia as proper evidence
14 before the jury in that particular case. Of the two
15 photographs that were presented, one showed Mr. Smith as who
16 he was. It showed the wound on the side of his head. Another
17 one the Court allowed, as I recall it, showed two bullet holes
18 in the chest. The blood-stained shirt, it might be
19 unfortunate for the defendant, but that is what Mr. Smith was
20 wearing and it showed where the bullet holes were in the shirt
21 on the day of the crime. The evidence was clearly admissible
22 for the purpose it was placed before the Court.

23 The objection further by Mr. Woodward is to not allowing
24 Officer Bain to testify as to police procedure on Page 222 of
25 the transcript. I don't know how many cases that have been

1 tried in which the question has been asked, what is your usual
2 procedure in this point, and the defense jumps up and objects
3 to it. Your Honor, we're not interested in the usual
4 procedure for this type of case. We want to know what was
5 done on that particular day and this was the objection of the
6 Commonwealth in this particular case. What is the usual
7 procedure or what is the police procedure was not relevant.
8 At the evidentiary stage of the trial, what we were interested
9 in and what the jury was concerned with at that time was what
10 actually happened. What did happen on July 12 and the Court
11 properly excluded that evidence.

12 Mr. Woodward's next argument goes to the armed with a
13 deadly weapon, the double-jeopardy, I assume, claim that you
14 can't try a man for murder in the commission of a robbery
15 and use of a firearm in the commission of murder and
16 possession of a sawed-off shotgun in committing a crime of
17 violence all at one time. He bases this argument because the
18 capital murder statute states that it is a murder committed
19 in the robbery while armed with a deadly weapon. His
20 argument to the Court is that it has to be -- the crime has
21 to be committed with that weapon; that if you strangle
22 somebody, it would not qualify, I would venture to guess,
23 Your Honor, and I think he's completely wrong on that premise.
24 The robbery might be started with a deadly weapon. That does
25 not necessarily mean that you have to kill that person with

1 that deadly weapon. In this particular case, the robbery was
2 started with a sawed-off shotgun. The murder was committed
3 with a pistol. While armed with a deadly weapon just puts
4 the perpetrator of the crime in a different light as he goes
5 in to commit a robbery that would result in capital murder as
6 opposed to just a straight first-degree murder. If you go
7 into a place to rob it and in the course -- without a deadly
8 weapon and in the course of the robbery you would strangle
9 somebody, clearly under the statute it would be a first-degree
10 murder because you don't have those magic words "while armed
11 with a deadly weapon," but in this particular case he was
12 armed with a deadly weapon, a sawed-off shotgun, when the
13 commission of the robbery started. The murder was committed
14 with a pistol after he had taken that from Officer Bain. The
15 construction of Mr. Woodward's argument has already been
16 delved upon by our Supreme Court. The use of a firearm in
17 the commission of a crime of violence under 18.2-53 has been
18 taken before our Supreme Court on several occasions and on
19 each occasion the Supreme Court has held that you can be
20 convicted of the major crime and also be convicted of the
21 crime of use of the firearm in the commission of a crime of
22 violence. The mere fact that in a capital murder case you
23 have to be armed with a deadly weapon at the time that you
24 are committing the robbery does not negate the other two
25 statutes. The murder was committed with the pistol. At the

1 time the murder was committed with the pistol, the evidence
2 in the case shows that Willie Lloyd Turner was still armed
3 with the sawed-off shotgun. The evidence says he had the
4 sawed-off shotgun in one hand and the pistol in the other.
5 Under the factual situation in the case, the defendant is
6 guilty of three separate and distinct crimes so they do not
7 bar one another from being tried at the same time by the same
8 jury or by subsequent juries. They are all separate
9 offenses. They are not included one with the other.

10 As to the testimony of Doctor Bransfield, the Court
11 has heard many arguments that Doctor Bransfield was misquoted
12 and that he was talking about one -- looking for one
13 particular thing where he was trying to find out whether or
14 not he knew right from wrong and irresistible impulse and so
15 on and so forth. On Page 86 of the transcript -- and this is
16 after Doctor Bransfield has told this jury that the defendant
17 was suffering from a mental deficiency or emotional
18 disturbance and so on and so forth on July 12th -- he was
19 asked on Page 86, Line 12, "Did you write, 'On July 12, 1978,
20 there is no history to support that any unusual events
21 happened that day to adversely affect Mr. Turner'? Answer:
22 Yes." At which time we had several objections raised by
23 defense counsel and so on and so forth that it was taken out
24 of context. Then on Page 87, the full paragraph was placed
25 in context. He was asked again, "Did you then state after

1 having those conclusions or those facts on January 19, 1979,
2 'There is no evidence to support the presence of any
3 psychotic behavior at this time'? Answer: Speaking of July
4 12, 1978? Yes, I did." So the letter or the report of July
5 19th which has been placed into evidence marked refused by
6 the Court shows clearly on those -- just the few quotes taken
7 from the transcript -- show clearly that the questions
8 presented to Doctor Bransfield were not taken out of context.
9 They were his conclusions as to the condition of Willie Lloyd
10 Turner on July 12, 1978; and, at that time, he said there was
11 no psychotic -- no evidence of any psychotic behavior which
12 was contrary to what he told this jury.

13 Going to the twin arguments advanced first by
14 Mr. Woodward and Mr. Savage, first on atrociousness and
15 dangerousness. Mr. Woodward based his entire argument on the
16 testimony of Officer Bain, who stated that the last two shots
17 were fired at Mr. Smith in rapid succession. Mrs. Cosby
18 testified that first he shot Mr. Smith. Mr. Smith fell. She
19 noticed the wound in his head. Shortly after that, the
20 defendant next says, "I'm going to kill that nigger for
21 snitching on me," at which time he leaned over the counter
22 and fired a shot. She further testified, the best I can
23 recall, that she felt sick. She said something to the
24 defendant. He said something to her. At this time, she heard
25 Mr. Smith gurgle, at which time he leaned back over the

1 counter and fired the second shot. How much time elapsed?
2 Enough time for that conversation, for her actions and,
3 what-have-you, for Mr. Smith to be gurgling.

4 Now, the wording of the instruction states, "That his
5 conduct" -- speaking of the defendant's -- "in committing the
6 offense was outrageously or wantonly vile, horrible or
7 inhuman, in that it involved" -- it says, "torture, depravity
8 of mind or aggravated battery . . ." Mr. Woodward is arguing
9 to this Court today that you have got to have torture. You
10 have got to have depravity of mind. You have got to have
11 everything else. The statute says the conduct has to be
12 outrageously or wantonly vile. It has to be horrible or
13 inhuman in that it involved one of these others; and, I
14 submit to the Court, that the jury on the evidence before
15 them -- the testimony of Mrs. Cosby -- could have found that
16 the conduct of Willie Lloyd Turner was outrageous. It was
17 wantonly vile. It was horrible and that it showed a
18 depravity of mind and that it showed an aggravated battery and,
19 after he had shot the man in the head, after he had shot him
20 laying -- while he was laying on the floor, shot him in the
21 chest, after he heard him gurgle, after the conversation took
22 place and some other things heard in the store and he heard
23 that the man was still alive and then he leaned over and shot
24 him again. I submit to this Court that the evidence was there
25 for the jury to state that they could find this alternative in

1 the death penalty instruction. There was evidence for the
2 jury to consider and it was a proper element in the
3 instruction.

4 As to the question on dangerousness, the argument is
5 that the Commonwealth had Doctor Dimitris here to testify as
6 to the defendant's propensity for violence and so on and so
7 forth. Doctor Dimitris was not here for that particular
8 purpose because Doctor Dimitris had read the jury case out of
9 Texas and had brought that to the Commonwealth's attention
10 that that was a question that could not be asked. He was not
11 going to testify as to the ultimate fact as to the
12 dangerousness or propensity for violence in the future. He
13 was here for the question as to whether or not the defendant
14 was laboring under, in his opinion, any severe emotional
15 disturbance or strain on July 12 when the crime was committed.
16 The Commonwealth in the course of the trial felt like it was
17 not necessary for him to testify. When you deal with the
18 element of dangerousness as set forth in the instruction, it
19 says, "That after consideration of his past criminal record
20 there is a probability that he would commit criminal acts of
21 violence that would constitute a continuing serious threat to
22 society," the evidence in this case. The evidence in this
23 particular case that was placed before this jury showed that
24 the defendant after being committed to the state penitentiary
25 had escaped and, while he was at the penitentiary, had maimed

1 two inmates and killed a third before he committed this crime
2 against Jack Smith. The jury could very easily from that past
3 criminal record state that in their opinion and find that
4 there was this probability that the defendant would commit
5 criminal acts of violence in the future that would constitute
6 a serious threat to society.

7 The argument by defense counsel that Doctor
8 Bransfield's testimony stands un rebutted that on the date in
9 question that he was suffering from extreme mental
10 disturbance and so on and so forth, again, I direct the
11 Court's attention to Page 86 and Page 88 of the testimony on
12 December 5th in which Doctor Dimitris' letter of July 19th
13 correctly contradicts everything he said before that jury
14 when he said there was no evidence of any psychotic
15 disturbance on July 12, 1978. I think the Court properly
16 presented the issue of dangerousness to the jury in a proper
17 instruction to the jury and that from the factual situation in
18 the case as presented to the jury, they could find this
19 element of dangerousness.

20 The final argument made by defense counsel deals with
21 the Court's instruction to the jury when they came back on
22 December 6th and asked the Court exactly what a life sentence
23 meant; and, on Page 201 of the transcript of December 6, the
24 foreman came back -- they had been out approximately 18
25 minutes -- and informed the Court that the instructions had

1 been read by the prosecuting attorney and defendant
2 attorneys. They have also been read by the foreman to the
3 jurors in the jury room. Before they start deliberating, they
4 would like to know exactly what the death penalty means. What
5 does life imprisonment entail. And the Court's response to
6 that, "Of course, you must read the instructions. The
7 instructions mean exactly what it says in the instructions.
8 You need not concern yourselves with what may happen
9 hereafter. You must follow the Court's instructions and you
10 have, of course, the two alternatives that are set out in
11 that instruction." That is the standard instruction that has
12 been approved time after time again for the Court to instruct
13 the jury when they come back with a question after they have
14 gone to the jury room. It has been held proper by our Supreme
15 Court any number of times and the Court properly instructed
16 and responded to the question of the jury foreman on the date
17 in question.

18 Willie Lloyd Turner received a fair trial. A complete
19 trial. All of his rights were protected. The jury has come
20 back with verdicts. There are no mistakes, no errors in the
21 record whatsoever, and the Commonwealth would respectfully
22 move the Court to overrule all of the motions made by defense
23 counsel to set aside the verdict and the sentence of the jury.

24 MR. WOODWARD: Your Honor, not to belabor the points.
25 We, of course, have made our statements. We do disagree with

1 certain statements that Mr. Grizzard has stated. The
2 photographs and the blood-stained shirt he wants to say
3 Stamper v. Commonwealth -- Stamper had no eyewitnesses.
4 Stamper relied on circumstantial evidence. In Stamper there
5 was no one to say what occurred at the commission of the
6 offense. Mr. Grizzard in this case has had four eyewitnesses.
7 Three of them he called. Doctor Presswalla, as we stated
8 previously, undercut his theory. He said, "It is a tragedy
9 you have to introduce it." It is a tragedy. It didn't have
10 to be introduced. There is no valid reason for having the
11 photograph and the shirt. Whether he had a shirt on or coat
12 on or bearskin rug on has got nothing to do with Doctor
13 Presswalla's testimony. Doctor Presswalla so stated. We
14 don't waive what we stated previously. We just want to speak
15 to several of these, however.

16 I don't see how Mr. Grizzard is getting around
17 18.2-31 and 18.2-53.1. 18.2-31, Capital Murder. Capital
18 murder is the willful, deliberate and premeditated killing of
19 any person by another for hire; by an inmate in a penal
20 institution; during the commission of or subsequent to rape;
21 law enforcement official; and the one we're talking about here,
22 the willful, deliberate and premeditated killing of any person
23 in the commission of robbery, and if you read that paragraph,
24 you have first-degree murder while armed with a deadly weapon,
25 and the Court stated that's the language that makes it

1 different. Well, if that's the language that makes it
2 different then you have got to have the deadly weapon and
3 then you go from there to 18.2-53.1. The indictment is drawn
4 very strictly. Use of a pistol in the murder of Jack Smith.
5 You cannot have both. Mr. Grizzard, with his prosecutorial
6 zeal, is determined he's going to prosecute both of them. It
7 does constitute double jeopardy. That is the case of Jones v.
8 Commonwealth, 218 Va. 18, decided in 1977, is inapplicable
9 because they are not separate and distinct offenses. You
10 can't have one without the other and they overlap. To the
11 extent they overlap, it constitutes double jeopardy, the fact
12 that one is most severe and the other is minor. It should be
13 declared a mistrial as to both and both verdicts set aside.

14 We do have further statements to make as to
15 appropriateness and as to dangerousness and that sort of
16 thing. It's interesting to me that Mr. Grizzard now wants to
17 impeach Mr. Bain. Mr. Bain, an experienced police officer,
18 goes in and tells you the shots were fired in rapid
19 succession, and they were his words. Not our words. His
20 words. In rapid succession. Mr. Grizzard says, well, let's
21 not believe Mr. Bain. Let's take Mrs. Cosby, who comes in
22 with this romanticized idea of what occurred and how she would
23 right it. Mr. Grizzard says, well, Mrs. Cosby's statement was
24 correct. Mrs. Cosby told just what they thought she was going
25 to tell, though. Mr. Savage objected. The Court said, "Let's

1 not go into that." Well, in effect, he was begging for his
2 life." Mrs. Cosby was going to testify no matter what the
3 Court said. Mr. Grizzard said to you, Your Honor, take
4 Mrs. Cosby and forget Mr. Bain on the atrociousness. You
5 cannot do it and he can rise no higher than his own evidence
6 and that is his evidence, not our evidence. His evidence.
7 His witnesses. And he says, well, if they conflict -- and
8 that tends to prove the point we made to you to start with --
9 that if there is a conflict, it's up to the jury to decide as
10 to attempted robbery. Now, you can't have it both ways; but,
11 yet, he wants it both ways and we say to you, Your Honor, that
12 our motion is well made; that it is substantiated and that for
13 the reasons previously assigned that you should set aside the
14 verdict because of its failure under the law and the evidence
15 as presented and order new trials. That's all we have to say
16 at this point. We do not waive any statements we have
17 previously made. We ask you to consider all we said on our
18 initial motions.

19 THE COURT: Well, gentlemen, I'm not going to take
20 these various objections point by point. They have been ruled
21 on in the record. Practically every point that's been raised
22 had been previously raised and the Court has ruled on them
23 and they are in the record at this point.

24 The jury, I feel, was properly impaneled. I think the
25 voir dire was correct. I think the defendant is entitled to

1 a fair and impartial jury and I think he received one, and
2 he's not entitled to a partial jury. As far as the evidence
3 that was admitted, I think it was admitted properly and the
4 Court has ruled on the various pieces of evidence as they
5 were admitted and as objections were raised during the trial
6 of the case.

7 Now, with reference to the instructions, of course, we
8 took up the instructions. Defense counsel were given the
9 opportunity to go back and redraft the instructions that they
10 asked for that were refused. These instructions, it was
11 understood at the time, would be drafted at a later date, but
12 they were offered and refused but were not in the proper form
13 that you wanted to present them. They are now all in the
14 record.

15 Now, as far as the capital murder case and use of a
16 firearm in the commission of a felony or in the commission of
17 murder, the capital murder recites deadly weapon. The deadly
18 weapon does not have to be a firearm. Now, the Supreme Court
19 has ruled on this question and the Court has held that the
20 defendant can be guilty of both murder and use of a firearm
21 in the commission of murder because the elements may be
22 different.

23 Now, as far as the sentencing stage or the second stage
24 of this trial as to whether or not the jury believed that the
25 defendant committed acts that were depraved or whether he

1 committed acts that included all of the things he
2 enumerated in the statute. That was a jury question. It's
3 true that Mrs. Cosby said one thing and Mr. Bain said another,
4 but that made it a jury question. They were entitled to
5 believe whoever they chose to believe with regard to the time
6 element involved. I think the jury was properly instructed
7 in the first stage of the trial. I think they were properly
8 instructed in the second stage. I think the defendant in this
9 case has received a fair and impartial trial by the jury. I
10 think he's been very fairly and adequately represented. He
11 has received excellent representation by counsel. I'm going
12 to overrule the motions for mistrials, the motions to set
13 aside the verdict and we will now proceed with the sentencing
14 of the defendant.

15 MR. WOODWARD: Please note our exception.

16 THE COURT: I will note your exception.

17 Now, have you gentlemen had an opportunity to go over
18 this presentence report?

19 MR. WOODWARD: Your Honor, I have a copy of the
20 presentence report dated January 25, 1980, prepared by Aaron
21 D. Boone, Probation and Parole Officer of the Court. After
22 receiving the report, I went to Southampton County Jail
23 where the defendant had been incarcerated and read to him
24 verbatim approximately two and a half pages of this report.
25 The report is eight pages in length. At that point, the

COMMONWEALTH'S EXHIBIT 8
(Shirt and Undershirt)

COMMONWEALTH'S EXHIBIT 10
(Photograph)

COMMONWEALTH'S EXHIBIT 11
(Photograph)

COMMONWEALTH'S EXHIBIT 12
(Photograph)

COMMONWEALTH'S EXHIBIT 16
(Photograph)

PRINTERS NOTE:

The above mentioned exhibits can not be reasonably reproduced. A copy of each exhibit may be found filed with the record in the Clerk's office.

Off 1
2/6/80
[Signature]

C. L. H. - [unclear]

NORTHEASTERN UNIVERSITY

360 HUNTINGTON AVENUE
BOSTON, MASSACHUSETTS 02115

CENTER FOR APPLIED SOCIAL RESEARCH

September 6, 1979

Mr. Thomas L. Woodward, Jr.
P.O. Box 98
Suffolk, Virginia 23434

Dear Mr. Woodward:

As per our conversation, enclosed is a copy of our most recent death sentence tabulations.

Thanks for calling - we'll talk with you next week.

Sincerely,

[Signature]

Glenn L. Pierce

GLP/cac

(Not for publication without
Authors' permission)

PRELIMINARY TABULATIONS REFLECTING ARBITRARINESS AND
DISCRIMINATION UNDER POST-FURMAN CAPITAL STATUTES

William J. Bowers

and

Glenn L. Pierce

Center for Applied Social Research
Northeastern University
Boston, Massachusetts 02115

August 1979

Tables Listed in Groups

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM

Table 1 - GEO

Table 1 - FLA

Table 1 - TEX

Table 1 - ALA

Table 1 - OHIO

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM

Table 2 - GEO

Table 2 - FLA

Table 2 - TEX

PROBABILITY OF A DEATH SENTENCE BY RACE AND SEX OF VICTIM

Table 3.1 - GEO

Table 3.2 - GEO

PROBABILITY OF A DEATH SENTENCE BY RACE AND AGE OF VICTIM

Table 4.1 - GEO

Table 4.2 - GEO

PROBABILITY OF A DEATH SENTENCE BY JUDICIAL CIRCUITS GROUPED REGIONALLY

Table 5.1 - GEO

Table 5.1 - FLA

Table 5.2 - FLA

PROBABILITY OF A DEATH SENTENCE BY JUDICIAL CIRCUITS GROUPED REGIONALLY
AND RACE OF VICTIM

Table 6.1 - GEO

Table 6.1 - FLA

Table 6.2 - FLA

ADJUSTMENT PROCEDURES FOR TEMPORAL AND CROSS-SECTIONAL UNDERCOVERAGE OF
HOMICIDE OFFENDER DATA

Appendix A

DATA SOURCES

Appendix B

Table 1 - GEO

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF
OFFENDER AND VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-FURMAN
STATUTE THROUGH 1977

<u>Race of Offender</u>	<u>Estimated Number of Offenders^a</u>	<u>Persons Sentenced to Death</u>	<u>Probability of a Death Sentence</u>
White	1082	41	.038
Black	2716	49	.018
<u>Race of Victim</u>			
White	1265	76	.060
Black	2529	14	.005
<u>Offender/Victim Racial Combinations</u>			
Black Kills White	258	37	.143
White Kills White	1006	39	.039
Black Kills Black	2458	12	.005
White Kills Black	71	2	.028
<u>All Offenders</u>	3798	90	.024

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

^a. The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 1 - FLA

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN FLORIDA FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

<u>Race of Offender</u>	<u>Estimated Number of Offenders^a</u>	<u>Persons Sentenced to Death</u>	<u>Probability of a Death Sentence</u>
White	2265	72	.032
Black	2606	61	.023
<u>Race of Victim</u>			
White	2439	122	.050
Black	2432	11	.005
<u>Offender/Victim Racial Combinations</u>			
Black Kills White	286	48	.168
White Kills White	2146	72	.034
Black Kills Black	2320	11	.005
White Kills Black	111	0	.000
<u>All Offenders</u>	4871	133	.027

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program, Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

- ^a. The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.484 equals the number of homicide victims from January 1973 through December 1977 (sources: 1, 2) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 1 - TEX

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF
OFFENDER AND VICTIM IN TEXAS FROM THE EFFECTIVE DATE OF THE POST-FURMAN
STATUTE THROUGH 1977

<u>Race of Offender</u>	<u>Estimated Number of^a Offenders</u>	<u>Persons Sentenced to Death</u>	<u>Probability of a Death Sentence</u>
White	3771	38	.010
Black	2940	29	.010
<u>Race of Victim</u>			
White	3964	71	.018
Black	2740	2	.001
<u>Offender/Victim Racial Combinations</u>			
Black Kills White	344	27	.078
White Kills White	3616	37	.010
Black Kills Black	2597	2	.007
White Kills Black	143	0	.000
<u>All Offenders</u>	6711	73	.011

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1974 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reporting Bureau, Texas Department of Public Safety, Austin, Texas; (3) Vital Statistics records on willful homicides from January 1974 through December 1977, supplied by the Bureau of Vital Statistics, Texas Department of Health, Austin, Texas; (4) persons sentenced to death from January 1974 through December 1977, supplied by the Office of Court Administration, The Supreme Court of Texas, Austin, Texas.

- ^a. The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 2.473 equals the number of homicide victims from January 1974 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 1 - ALA

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN ALABAMA FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

<u>Race of Offender</u>	<u>Estimated Number of^a Offenders</u>	<u>Persons Sentenced to Death</u>	<u>Probability of a Death Sentence</u>
White	462	35	.076
Black	933	6	.006
<u>Race of Victim</u>			
White	419	19	.045
Black	976	22	.023
<u>Offender/Victim Racial Combinations</u>			
Black Kills White	70	16	.229
White Kills White	392	19	.049
Black Kills Black	906	6	.007
White Kills Black	27	0	.000
<u>All Offenders</u>	1395	41	.030

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data for 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.;

(2) Vital Statistics tabulations on willful homicide for April 1976 through 1978, Division of Vital Statistics, State Department of Public Health, Montgomery, Alabama; (3) persons sentenced to death, supplied by the Southern Poverty Law Center, Montgomery, Alabama.

- ^a. The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976 (source: 1) by a victim-based adjustment factor to correct for under-coverage. The adjustment factor 3.099 equals the number of homicide victims from April 1976 through December 1978 (source: 2) divided by the number of homicide victims in the years 1976 (source: 1). See Appendix A for a further discussion of the adjustment procedure.

Table 4.2 - GEO

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE AND AGE OF VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-FURMAN CAPITAL STATUTE THROUGH 1977

<u>Age and Race of Victim</u>	<u>Number of Victims</u>	<u>Number of Death Sentences</u>	<u>Probability of a Death Sentence</u>
0-20 years			
White	51	16	.313
Black	36	5	.149
21-30 years			
White	83	13	.157
Black	47	3	.021
31-50 years			
White	113	9	.080
Black	65	1	.015
Over 50 years			
White	146	26	.178
Black	47	2	.043

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia;
 (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

Table 1 - OHIO

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN OHIO FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

<u>Race of Offender</u>	<u>Estimated Number of^a Offenders</u>	<u>Persons Sentenced to Death</u>	<u>Probability of a Death Sentence</u>
White	850	45	.053
Black	1343	57	.042
<u>Race of Victim</u>			
White	976	82	.084
Black	1217	20	.016
<u>Offender/Victim Racial Combinations</u>			
Black Kills White	173	37	.214
White Kills White	803	45	.056
Black Kills Black	1170	20	.017
White Kills Black	47	0	.000
<u>All Offenders</u>	2193	102	.047

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1975 to December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Ohio Bureau of Criminal Identification, Columbus, Ohio; (3) Vital Statistics tabulations on willful homicides, supplied by Division of Physical Health, Atlanta, Georgia; (4) persons sentenced to death, supplied by the Adult Parole Authority, Columbus, Ohio.

- ^a. The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 1.871 equals the number of homicide victims from January 1975 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 2 - GEO

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

<u>Race of Offender</u>	<u>Estimated Number of Offenders^a</u>	<u>Persons Sentenced to Death</u>	<u>Probability of a Death Sentence</u>
White	196	37	.189
Black	338	42	.124
<u>Race of Victim</u>			
White	316	69	.218
Black	218	10	.046
<u>Offender/Victim Racial Combinations</u>			
Black Kills White	134	34	.254
White Kills White	183	35	.191
Black Kills Black	205	8	.039
White Kills Black	13	2	.154
<u>All Offenders</u>	534	79	.148

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1973 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

^a. The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 2 - FLA

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN FLORIDA FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

<u>Race of Offender</u>	<u>Estimated Number of Offenders^a</u>	<u>Persons Sentenced to Death</u>	<u>Probability of a Death Sentence</u>
White	307	54	.176
Black	251	50	.199
<u>Race of Victim</u>			
White	432	97	.224
Black	122	7	.057
<u>Offender/Victim Racial Combinations</u>			
Black Kills White	136	41	.301
White Kills White	296	54	.182
Black Kills Black	115	7	.061
White Kills Black	7	0	.000
<u>All Offenders</u>	558	104	.186

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program, Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

- ^a. The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.484 equals the number of homicide victims from January 1973 through December 1977 (sources: 1, 2) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 4.1 - GEO

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE AND AGE OF VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-FURMAN CAPITAL STATUTE THROUGH 1977

<u>Age and Race of Victim</u>	<u>Number of Victims</u>	<u>Number of Death Sentences</u>	<u>Probability of a Death Sentence</u>
0-20 years			
White	179	19	.106
Black	341	6	.018
21-30 years			
White	404	13	.032
Black	844	4	.005
31-50 years			
White	620	11	.018
Black	994	2	.002
Over 50 years			
White	405	30	.074
Black	408	4	.010

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia;
 (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

Table 3.2 - GEO

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE AND SEX OF VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-FURMAN CAPITAL STATUTE THROUGH 1977

<u>Sex and Race of Victim</u>	<u>Number of Felony Homi- cide Victims</u>	<u>Number of Death Sentences</u>	<u>Probability of a Death Sentence</u>
Male			
White	323	44	.136
Black	171	7	.041
Female			
White	74	20	.270
Black	29	4	.138

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia;
(2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

Table 2 - TEX

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN TEXAS FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977

<u>Race of Offender</u>	<u>Estimated Number of Offenders^a</u>	<u>Persons Sentenced to Death</u>	<u>Probability of a Death Sentence</u>
White	411	34	.083
Black	294	27	.092
<u>Race of Victim</u>			
White	551	63	.114
Black	151	2	.013
<u>Offender/Victim Racial Combinations</u>			
Black Kills White	173	25	.144
White Kills White	378	34	.090
Black Kills Black	121	2	.016
White Kills Black	30	0	.000
<u>All Offenders</u>	705	61	.087

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1974 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reporting Bureau, Texas Department of Public Safety, Austin, Texas; (3) Vital Statistics records on willful homicides from January 1974 through December 1977, supplied by the Bureau of Vital Statistics, Texas Department of Health, Austin, Texas; (4) persons sentenced to death from January 1974 through December 1977, supplied by the Office of Court Administration, The Supreme Court of Texas, Austin, Texas.

- a. The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 2.473 equals the number of homicide victims from January 1974 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 3.1 - GEO

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE AND SEX OF VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-FURMAN CAPITAL STATUTE THROUGH 1977

<u>Sex and Race of Victim</u>	<u>Number of Victims</u>	<u>Number of Death Sentences</u>	<u>Probability of a Death Sentence</u>
Male			
White	1230	46	.037
Black	2010	9	.004
Female			
White	379	27	.071
Black	576	7	.012

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

Table 5.1 - GEO

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY JUDICIAL CIRCUITS
GROUPED REGIONALLY IN GEORGIA FROM THE EFFECTIVE DATE OF ITS POST-FURMAN
STATUTES THROUGH 1977

<u>Regional Grouping of Georgia Judicial Circuits ^a.</u>	<u>Number of Victims</u>	<u>Number of Death Sentences</u>	<u>Probability of a Death Sentence</u>
North	289	2	.007
Central	1011	41	.041
Atlanta	1133	7	.006
Southwest	985	21	.021
Southeast	837	19	.023
All Regions	4255	90	.021

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

^a. Regional Groupings include the following Circuits: North (Lookout Mountain, Conasauga, Blue Ridge, Mountain, Northeastern, Rome, Cherokee); Central (Tallapoosa, Cobb, Coweta, Griffin, Clayton, Stone Mountain, Gwinnett, Alcovy, Piedmont, Western, Ocmulgee, Northern, Toombs, Flint); Atlanta (Atlanta); Southwest (Chattahoochee, Macon, Houston, Southwestern, Pataula, Cordege, Tifton, Dougherty, South Georgia, Southern, Alapaha); Southeast (Augusta, Middle, Dublin, Ogeechee, Oconee, Atlantic, Eastern, Waycross, Brunswick).

Table 5.1 - FLA

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY JUDICIAL CIRCUITS
GROUPED REGIONALLY IN FLORIDA FROM THE EFFECTIVE DATE OF ITS POST-FURMAN
STATUTES THROUGH 1977

<u>Regional Grouping of Florida Judicial Circuits a.</u>	<u>Number of Victims</u>	<u>Number of Death Sentences</u>	<u>Probability of a Death Sentence</u>
Panhandle	415	19	.046
North	980	31	.032
Central	1524	51	.033
South	1916	34	.018
All Regions	4835	135	.028

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

- ^a. Regional Groupings include the following Circuits: Panhandle (1, 2, 3, and 14); North (4, 5, 7, and 8); Central (6, 9, 10, 12, 13, 18, and 19); South (11, 15, 16 and 17).

Table 5.2 - FLA

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY JUDICIAL CIRCUITS GROUPED REGIONALLY IN FLORIDA FROM THE EFFECTIVE DATE OF ITS POST-FURMAN STATUTES THROUGH 1977

<u>Regional Grouping of Florida Judicial Circuits^a</u>	<u>Number of Victims</u>	<u>Number of Death Sentences</u>	<u>Probability of a Death Sentence</u>
Panhandle	31	18	.581
North	141	20	.142
Central	172	39	.227
South	269	29	.108
All Regions	613	106	.173

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

^a Regional Groupings include the following Circuits: Panhandle (1, 2, 3, and 14); North (4, 5, 7, and 8); Central (6, 9, 10, 12, 13, 18, and 19); South (11, 15, 16, and 17).

Table 6.1 - GEO

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF VICTIM
AND JUDICIAL CIRCUITS GROUPED REGIONALLY IN GEORGIA FROM THE EFFECTIVE
DATE OF ITS POST-FURMAN STATUTE THROUGH 1977

<u>Regional Grouping of Georgia Judicial Circuits a.</u>	<u>Number Of Victims</u>	<u>Number of Death Sentences</u>	<u>Probability of a Death Sentence</u>
North			
White	227	2	.009
Black	72	0	.000
Central			
White	482	33	.068
Black	529	8	.015
Atlanta			
White	300	5	.017
Black	833	2	.002
Southwest			
White	336	19	.057
Black	649	2	.003
Southeast			
White	292	17	.058
Black	546	2	.004

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

a. Regional Groupings include the following Circuits: North (Lookout Mountain, Conasauga, Blue Ridge, Mountain, Northeastern, Rome, Cherokee); Central (Tallapoosa, Cobb, Coweta, Griffin, Clayton, Stone Mountain, Gwinnett, Alcovy, Piedmont, Western, Ocmulgee, Northern, Toombs, Flint); Atlanta (Atlanta); Southwest (Chattahoochee, Macon, Houston, Southwestern, Pataula, Cordege, Tifton, Dougherty, South Georgia, Souther, Alapaha); Southeast (Augusta, Middle, Dublin, Ogeechee, Oconee, Atlantic, Eastern, Waycross, Brunswick).

Table 6.1 - FLA

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF VICTIM
AND JUDICIAL CIRCUITS GROUPED REGIONALLY IN FLORIDA FROM THE EFFECTIVE
DATE OF ITS POST-FURMAN STATUTE THROUGH 1977

<u>Regional Grouping of Florida Judicial Circuits ^a.</u>	<u>Number of Victims</u>	<u>Number of Death Sentences</u>	<u>Probability of a Death Sentence</u>
Panhandle			
White	189	18	.095
Black	226	1	.004
North			
White	445	27	.061
Black	532	3	.006
Central			
White	842	48	.057
Black	677	3	.004
South			
White	972	29	.030
Black	936	4	.004

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

^a. Regional Groupings include the following Circuits: Panhandle (1, 2, 3, and 14); North (4, 5, 7, and 8); Central (6, 9, 10, 12, 13, 18, and 19); South (11, 15, 16 and 17).

Table 6.2 - FLA

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF VICTIM
AND JUDICIAL CIRCUITS GROUPED REGIONALLY IN FLORIDA FROM THE EFFECTIVE
DATE OF ITS POST-FURMAN STATUTE THROUGH 1977

<u>Regional Grouping of Florida Judicial Circuits ^a.</u>	<u>Number Of Victims</u>	<u>Number of Death Sentences</u>	<u>Probability of a Death Sentence</u>
Panhandle			
White	24	17	.708
Black	7	1	.143
North			
White	102	18	.176
Black	38	1	.026
Central			
White	138	37	.268
Black	34	2	.059
South			
White	191	25	.131
Black	76	3	.039

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

^a. Regional Groupings include the following Circuits: Panhandle (1, 2, 3, and 14); North (4, 5, 7, and 8); Central (6, 9, 10, 12, 13, 18, and 19); South (11, 15, 16, and 17).

Appendix A

ADJUSTMENT PROCEDURES FOR TEMPORAL AND CROSS-SECTIONAL UNDERCOVERAGE OF HOMICIDE OFFENDER DATA

For 1976 the Supplementary Homicide Reports compiled by local police agencies and filed with the Uniform Crime Reporting Section of the FBI were revised to include information on offenders as well as victims of criminal homicide in those cases where offenders or suspected offenders were arrested or known to the police. Since 1976, offender characteristics have been reported for roughly 85 percent of all homicide incidents or victims.

In most states, these Supplementary Homicide Reports are not compiled or filed with the FBI by all local jurisdictions, thus producing cross-sectional undercoverage of homicides.

Since these reports may not be filed by all local jurisdictions within a given state (cross-sectional undercoverage) and since the information on offenders is not reported prior to 1976 (temporal undercoverage) for all states, this data source will underestimate the number of homicide offenders since the effective date of post-Furman capital statutes in most states. To obtain adequate estimates of the numbers of homicide offenders arrested or known to the police during the effective periods of post-Furman capital statutes in the states under analysis, we must adjust for temporal and cross-sectional undercoverage.

Our adjustment for undercoverage of homicide offenders is based on full coverage homicide victim statistics. The Vital Statistics Program of the National Center for Health Statistics provides a virtually complete accounting

of the victims of willful homicide in all states. Willful homicides as classified or defined by the Vital Statistics Program correspond quite closely to the UCR definition or classification of criminal homicides. (Where coverage is complete for both data sources, the reported number of victims of homicide or homicide victims is very nearly the same, 95% on the average.)

Our victim-based adjustment factor is then the number of homicide victims in a state for the period to be studied divided by the number of homicide victims in that state for the period over which offender characteristics are available. Where the number of victims for the period of analysis is drawn from the Vital Statistics records or reports and the number of victims during the period for which offender data are available come the Supplementary Homicide Reports. The adjustment employed corrects for both temporal and cross-sectional undercoverage when the effective date of the post-Furman statute was earlier than 1976 and not all police agencies in the state consistently filed Supplementary Homicide Reports. Where a state has a post-1976 capital statute (as in Alabama) the adjustment is strictly for cross-sectional undercoverage; and where all police agencies in a state file Supplementary Homicide Reports (as in Florida) the adjustment is strictly for temporal undercoverage. In the latter case, homicide victim figures from the Supplementary Homicide Reports provide full coverage of homicide victims and are used in place of Vital Statistics figures to correct for temporal undercoverage.

It should be noted that this adjustment procedure assumes comparable arrest or suspect rates and offender/victim ratios for the time periods and geographical areas where offender data are missing or not available.

Appendix B

DATA SOURCES

Homicide data from crime reporting agencies

Homicide data for all states, 1973 - 1976: computerized Supplementary Homicide Reports, supplied by Paul Zolbe, Chief, Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.

Homicide data for Alabama 1977 - 1978: xeroxed copies of individual Supplementary Homicide Report forms supplied by Michael Devine, Chief, Uniform Crime Reporting Program, Criminal Justice Information Center, State of Alabama, 858 South Court Street, Montgomery, Alabama 36130.

Homicide data for Florida 1977: computerized Supplementary Homicide Reports, supplied by Alan Knudson, Bureau Chief, Uniform Crime Reports, Department of Law Enforcement, Post Office Box 1489, Tallahassee, Florida 32302.

Homicide data for Georgia 1977: xeroxed copies of individual Supplementary Homicide Report forms supplied by Jan Trace, Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, P.O. Box 1456, Atlanta, Georgia 30301.

Homicide data for Ohio 1977: computerized Supplementary Homicide Reports, supplied by Herman Slonecher, Data Systems Division Chief, Ohio Bureau of Criminal Identification, Post Office Box 365, Columbus, Ohio 43140.

Homicide data for Texas 1977: computerized Supplementary Homicide Reports, supplied by Cal Killingsworth, Manager, Uniform Crime Reporting Bureau, Texas Department of Public Safety, Post Office Box 4143, Austin, Texas 78765.

Homicide data from vital statistics agencies

Homicide data for Alabama 1976 - 1978: Vital Statistics figures, supplied by Robert Schiller, Chief Statistician, Division of Vital Statistics, State Department of Public Health, State Office Building, Montgomery, Alabama 36130.

Death sentence data from various sources

Death Sentences for Alabama: figures supplied by John Carroll, Southern Poverty Law Center, 1001 S. Hull Street, Montgomery, Alabama 36101.

Death Sentences for Florida: forms supplied by Kay Isley, Citizens Against the Death Penalty, 215 Washington Street, Jacksonville, Florida 32202.

Death Sentences for Georgia: forms supplied by Patsy Morris, Georgia Committee Against the Death Penalty, 88 Walter Street, N.W., Atlanta, Georgia 30303.

Death Sentences for Ohio: forms supplied by Steve Van Dine, Research Coordinator, Adult Parole Authority, 1050 Freeway Drive, N. Columbus, Ohio 43229.

Death Sentences for Texas: supplied by Eric Troseth, Office of Court Administration of the Texas Judicial System, 1414 Colorado St., Suite 600, P.O. Box 12066, Capitol Station, Austin, Texas 78711.

Appellate review data from court records

Life and death sentences reviewed by the Georgia Supreme Court, 1970 - spring 1977: data collection instruments and card files of the Georgia Supreme Court obtained under subpoena and supplied by Millard Farmer, Team Defense, 15 Peachtree Street, Suite 831, Atlanta, Georgia.

Pre-Furman death sentence data from institutional files

Persons under the sentence of death at the time of the Furman decision in Florida: information coded from the Florida Parole and Probation Commission manual records; access authorized by Charles Scriven, Chairman of the Florida Parole and Probation Commission, 1309 Winewood Blvd., Tallahassee, Florida 32301.

Persons under the sentence of death at the time of the Furman decision in Georgia: information coded from Georgia Board of Pardons and Paroles manual records; access authorized by the Board of Pardons and Paroles, 800 Peachtree St., Room 610, Atlanta, Georgia 30308.

Vital Statistics Agencies (cont'd)

Homicide data for Georgia, April 1973 to December 1977: computerized Vital Statistics records supplied by Anne Allen, Statistician, Office of Health Services Research and Statistics, Division of Physical Health, 47 Trinity Ave., S.W., Atlanta, Georgia 30334.

Homicide data for Ohio 1975 - 1977: Vital Statistics figures, supplied by Karl Wise, Chief, Division of Vital Statistics, Room 620, Ohio Departments Building, 65 South Front Street, Columbus, Ohio 43215.

Homicide data for Texas, 1973 to 1977: Vital Statistics tabulations supplied by Tom Pollard, Statistician, Bureau of Vital Statistics, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

Indictment through sentencing data from court records

First Degree Murder Indictment followed through sentencing for 20 Florida counties for 1973 - 1976: forms supplied by Kay Isley, Citizens Against the Death Penalty, 215 Washington Street, Jacksonville, Florida 32202.

Indictments at all levels followed through sentencing for 20 Florida counties, 1976 - 1977: forms supplied by Kay Isley, Citizens Against the Death Penalty, 215 Washington Street, Jacksonville, Florida 32202.

Post-conviction data from institutional records

Persons imprisoned for all degrees of criminal homicide for Florida 1973 - 1977: computerized records supplied by Jerry Smith, Chief of Research, Department of Offender Rehabilitation, 1311 Winewood Boulevard, Tallahassee, Florida 32301.

Persons imprisoned for all degrees of criminal homicide for Georgia, 1973 - 1977: computerized records supplied by Tim Carr, Chief of Statistics, Department of Offender Rehabilitation, 800 Peachtree Street, N.W., Atlanta, Georgia 30308.

Sample of persons imprisoned for all degrees of criminal homicide for Georgia, 1973 - 1977: information coded from Georgia Board of Pardons and Paroles manual records; access authorized by the Board of Pardons and Paroles, 800 Peachtree St., Room 610, Atlanta, Georgia 30308.