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VIRGINIA,

IN THE GENERAL DISTRICT COURT OF THE COUNTY OF SUSSEX:

COMMONWEALTH

v.

FERRONE CLAIBORNE and
TERENCE JEROME RICHARDSON

Before The Honorable Gammie G. Poindexter

October 15, 1998

1:00 p.m.

-----oOo-----

PRESENT: Mr. J. David Chappell,
On behalf of the Commonwealth

Mr. Michael Morchower,
On behalf of Defendant Claiborne

Mr. David E. Boone,
On behalf of Defendant Richardson

Mr. Ferrone Claiborne,
Mr. Terence Jerome Richardson,
The Defendants

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1 THE COURT: Good afternoon. Two matters on
2 the afternoon docket?

3 MR. CHAPPELL: Yes, ma'am. There's also a
4 court reporter that I believe will need to be
5 sworn.

6 (Whereupon the court reporter was duly
7 sworn.)

8
9 THE CLERK: Terence Jerome Richardson. Ms.
10 Yvette Newby. Trooper T. J. Williams. Shawn
11 Wooden. Cpl. Aldridge. Det. Cheek.

12 THE COURT: These are the witnesses?

13 THE CLERK: Yes, ma'am.

14 THE COURT: Okay. All the witnesses
15 present? Where are you? Ferrone Claiborne.

16 THE BAILIFF: Your Honor, he's in the
17 lock-up.

18 THE COURT: Where are the two defendants?

19 THE BAILIFF: They're in the lock-up.

20 THE COURT: Okay, we'll wait until -- let me
21 see. Mr. Morchower, Mr. Boone, do you-all have any
22 witnesses?

23 MR. MORCHOWER: May we approach the bench?

24 THE COURT: Yes.
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(Counsel approached the bench, at which time an off-the-record discussion took place.)

MR. MORCHOWER: We have a stipulated proffer at the conclusion of the Commonwealth's evidence. Other than that, we have no witnesses.

THE COURT: Okay. Is that agreed?

MR. CHAPPELL: Yes, ma'am.

THE COURT: All right. Just trying to see, while we're waiting, who would have to be separated, other than the Commonwealth's witnesses.

MR. MORCHOWER: Only the Commonwealth's witnesses.

MR. CHAPPELL: There are no defense witnesses. With the proffer I think taking --

THE COURT: Okay, you don't have to leave now because I'm going to swear you in before you leave. I'm trying to wait until the defendants get here before we go too much further.

MR. CHAPPELL: Judge, we jointly agree waive any proffer of one witness's testimony in our evidence.

MR. MORCHOWER: We'll withdraw that representation.

THE COURT: Now who is this defendant?

1 THE BAILIFF: Claiborne.

2 THE COURT: Ferrone Claiborne. The record
3 will reflect that he's in the courtroom. You can
4 have a seat at your counsel table.

5 MR. MORCHOWER: We would ask that all
6 witnesses and potential witnesses be excluded.

7 THE COURT: Do you have any other potential
8 witnesses?

9 MR. CHAPPELL: They've all been called, Your
10 Honor. I would make the same motion for the
11 defendant.

12 THE COURT: Do you have any witnesses?

13 MR. MORCHOWER: No witnesses.

14 THE COURT: Potential witnesses.

15 MR. MORCHOWER: No witnesses have been
16 subpoenaed.

17 THE COURT: And this is Terence Richardson?

18 THE BAILIFF: Yes, ma'am.

19 THE COURT: Terence Richardson? Record
20 reflect he's in the courtroom. Have a seat at
21 counsel table. If you-all want to stand up there
22 you can.

23 MR. CHAPPELL: You want me to sit, too?

24 THE COURT: Yes. I don't know where you
25 want to put your witnesses.

1 MR. CHAPPELL: Judge Baker uses the podium
2 on this side. I don't know if that's --

3 THE COURT: This is the preliminary hearing
4 against the two defendants who are in court with
5 counsel. No plea is necessary. All of the
6 witnesses or potential witnesses who are going to
7 testify -- You called some names. Are those all
8 the witnesses, Mr. Chappell?

9 MR. CHAPPELL: Judge, they've previously
10 been called.

11 THE COURT: You want to call them?

12 THE CLERK: I've already called them.
13 They're all in the courtroom.

14 THE COURT: Stand and let me swear you.

15 THE CLERK: Det. Cheek just stepped in.
16 He's another one.

17 THE COURT: There is a motion to separate
18 the witnesses.

19 MR. CHAPPELL: Want me to read them off
20 again?

21 THE COURT: Yes.

22 MR. CHAPPELL: Trooper Williams. Derrick
23 Williams. Shawn Wooden.

24 THE CLERK: Come forward, please.

25 MR. CHAPPELL: Yvette Newby. Cpl. Aldridge,

1 who's standing. And Inv. Cheek.

2 THE COURT: Okay. All the Commonwealth's
3 witnesses? Potential witnesses?

4 MR. CHAPPELL: That's correct.

5
6 (Whereupon the witnesses were duly sworn.)

7
8 THE COURT: Who's the Commonwealth's first
9 witness?

10 MR. CHAPPELL: Judge, I would, for the
11 record, make a motion. I've talked to counsel
12 about this, but make a motion for a joint
13 preliminary hearing under the Rules of Court. I
14 don't believe there would be any objection.

15 MR. MORCHOWER: No objection.

16 MR. BOONE: No objection.

17 THE COURT: Let the record reflect that
18 there is no objection to a joint preliminary
19 hearing for Ferrone Claiborne and Terence
20 Richardson.

21 MR. CHAPPELL: Judge, again for the record I
22 would simply note that the rule is 7C:4D.
23 Commonwealth would allege that the acts committed
24 were contemporary and related, that they're both in
25 the jurisdiction of this court, and there would be

1 no prejudice to either defendant by having a joint
2 hearing.

3 THE COURT: Okay. Is there any --

4 MR. MORCHOWER: Well, we had no objection
5 because we reviewed that rule before. So we have
6 no objection.

7 THE COURT: I would have to look at it.

8 MR. CHAPPELL: Simply for the record we
9 believe that the rule was satisfied.

10 THE COURT: There's no objection.

11 MR. MORCHOWER: Yeah, we reviewed it and we
12 considered it in waiving our right to a separate
13 preliminary hearing.

14 THE COURT: Okay, for purposes of
15 preliminary hearing. Likewise Mr. Boone?

16 MR. BOONE: Yes, ma'am.

17 THE COURT: Okay. And there was a motion to
18 separate witnesses.

19 MR. MORCHOWER: Yes.

20 MR. CHAPPELL: Commonwealth would make a
21 similar motion.

22 THE COURT: Now, who is your first witness
23 again?

24 MR. CHAPPELL: Trooper Williams.

25 THE COURT: Trooper Williams. Right here.

1 The other witnesses, if you would go with Det.
2 Cheek. Do not discuss your testimony with anyone.

3 (Whereupon the witnesses were retired to the
4 witness room.)

5
6 THE COURT: Are you able to stand there,
7 sir? So we can all see and hear you?

8 THE WITNESS: That will be fine.

9 MR. CHAPPELL: Judge, I'm going to sit, if
10 it's permissible.

11 THE COURT: Pardon?

12 MR. CHAPPELL: I'm going to sit, if it's
13 permissible.

14 THE COURT: That's fine. Counsel can sit if
15 counsel does not object to everyone sitting and you
16 standing. Otherwise we'll move the court reporter
17 and put you in the witness box.

18 Go ahead, Mr. Chappell.

19
20 THOMAS JARRID WILLIAMS,
21 having been duly sworn, was called as a witness on
22 behalf of the Commonwealth, and testified as
23 follows:

24
25 DIRECT EXAMINATION

1 BY MR. CHAPPELL:

2 Q Trooper Williams, would you state your name
3 for the Court, please?

4 A Thomas Jarrid Williams.

5 Q And you are -- what's your occupation?

6 A I'm employed by the Virginia State Police,
7 State Trooper.

8 Q How long you been so employed?

9 A Approximately two years.

10 Q Did you have occasion to go to the Waverly
11 Village Apartments on April 25th, 1998?

12 A I did, sir.

13 Q Waverly Village Apartments are located in
14 Sussex County?

15 A They are.

16 Q Why did you go to the apartments on that
17 date?

18 A At around 11:14 that morning I heard on my
19 scanner, Sussex County dispatch dispatched a rescue squad
20 for someone being shot behind the Waverly Village
21 Apartments. I then heard Sussex County dispatch Cpl.
22 Aldridge, Rick Aldridge. They dispatched him out as an
23 officer being shot behind the Waverly Village Apartments. I
24 then in turn called Sussex on my surge radio and asked them
25 if an officer was shot. They said he was. And I advised

1 them I would be en route.

2 Q What time did you arrive at the scene?

3 A Um, I was in Wakefield at approximately five
4 to seven minutes later.

5 Q To Wakefield or Waverly?

6 A I was in Wakefield, and from Wakefield to
7 the apartments was approximately five to six minutes.

8 Q Now, what did you see when you arrived at
9 the Waverly Village Apartments?

10 A I observed a large crowd of people out in
11 front of the apartments. Chief Sturrup, who's employed by
12 the Waverly Police Department, was outside talking, out in
13 the front parking lot talking to the people. He was running
14 around asking questions, and I asked him where is the
15 officer. He advised me he was behind the apartments in the
16 woods.

17 Q Did you see a police car, did you ever see a
18 police car? And describe where it was.

19 A I did. A Waverly police car with the unit
20 number 5.

21 Q Did you know it was a certain officer's
22 vehicle?

23 A I did.

24 Q What officer was that?

25 A That was officer Allen Gibson, Jr., and I

1 recognized that as being his car and his number that we
2 called him on the radio.

3 Q Now, what did you do next in sequence?

4 A I ran -- I asked him again where is the
5 officer, and he said it's Allen. He's behind the apartments
6 in the woods. I ran back to the woods behind the apartments
7 and had to go over somewhat of a berm to get back to the
8 woods. When I ran back to the woods I observed Cpl.
9 Aldridge on his knees holding Allen's head.

10 Q The Allen you're referring to is the officer
11 Allen Gibson?

12 A Yes, sir, Allen Gibson.

13 Q Did you know Officer Gibson prior to this
14 incident?

15 A Yes, sir, I did. I went to high school with
16 him. I've known him basically all my life.

17 Q Did you know him to be a Waverly police
18 officer?

19 A Yes, I did.

20 Q When you got to Allen -- Was this located in
21 Sussex County?

22 A It was.

23 Q Can you describe what you actually saw when
24 you got to Allen himself?

25 A Allen was laying on the ground, his uniform

1 shirt was opened up. I could see that it was his uniform
2 displaying his Waverly Police Department badge -- patch on
3 the shoulder. I didn't see any badge on the shirt, but like
4 I say, Cpl. Aldridge had taken it open. He had undid his
5 top portion of his vest and that was laying off to the side.

6 Q I believe you said the uniform was a Waverly
7 police uniform?

8 A It was a uniform worn by Waverly police
9 officers.

10 Q And when you saw him, can you describe the
11 condition that you saw Officer Gibson in?

12 A When I first saw him I could -- he was
13 very -- his color was gray. Somewhat ashen. I observed a
14 hole, what appeared to be a bullet hole approximately -- I
15 would say an inch above his navel. Mid line. Directly
16 above his navel. His eyes were open at the time and he was
17 talking very slowly to Cpl. Aldridge when I got up to him.

18 Q Now have you had any experience before with
19 victims in this situation?

20 A I have, sir. I was on the rescue squad from
21 19- -- 1991 to 1996. I'm actually still on the rescue
22 squad. I'm certified emergency medical technician with the
23 State of Virginia.

24 Q Did you attempt to assist Allen in any way
25 medically?

1 A At that point, due to me having no --
2 nothing to work with as far as that goes, or there was no
3 external bleeding that I could see so there wasn't any --
4 there was no bleeding to -- to stop as far as externally.
5 Basically all I could do was give support until the rescue
6 squad got there and could administer some IV.

7 Q Did you tell Officer Gibson anything or try
8 to comfort him with any words?

9 A I did. I got down beside of him and I
10 called his name. And he recognized me and he said -- he
11 called me by my -- by my name that I go by, which is Jarrid.
12 I told him he was going to be all right. And that he was
13 going to make it. And he -- he told me no, he wasn't going
14 to make it, that he was dying.

15 Q Did he say that more than once?

16 A He did. He said that several times
17 before -- before he went unconscious or went into cardiac
18 arrest.

19 Q Now again when he said it, was his condition
20 any different than what you previously described; better,
21 worse, the same?

22 A His condition was worsening. As I stayed
23 there with him he kept telling me that he was going to -- he
24 was going to pass out, and I told him no, he needed to stay
25 with me. Told me that he -- he started telling me that

1 everything was going blurry. That he couldn't -- it was --
2 everything was getting blurry. He couldn't see. He told me
3 that his legs were starting to go numb. I encouraged him
4 that that was just his body's way of shutting off things
5 that it didn't need to try and keep alive the things that it
6 did need.

7 Q Now after the time that you -- Officer
8 Gibson told you he was dying, did he make any statements or
9 comments regarding the incidents that had occurred before
10 the shooting?

11 A I asked him, I said Allen, who did this to
12 you? He stated that there were two black males. One sort
13 of medium build with short, balding hair. Real short,
14 narrow. He described one as tall and skinny. He described
15 one of them with hair that would resemble dreadlocks pulled
16 back into a pony tail. He said they were both wearing dark
17 jeans. One of them had on a white T-shirt. One of them had
18 on an old blue baseball cap. He said that he had got in a
19 scuffle with them and one of them got his gun. He referred
20 to the one that had the gun as the skinny one. He said that
21 he was fighting with him and he was -- he was trying to move
22 his hands and show me. He said I tried to move the gun away
23 from me and he said they shot me with my own gun.

24 Q Did you see a gun at the scene?

25 A Um, Cpl. Aldridge told me that the gun was

1 laying in front of him. Chief Sturrup had the gun. Which
2 was Allen's gun.

3 Q Cpl. Aldridge told you it was laying in
4 front of him, meaning --

5 A He said that when he got there the gun was
6 laying beside of Allen, or not beside of him, but the best I
7 can remember, that it was up in front of him. And I don't
8 remember the exact distance that he -- that he stated, but
9 he said that while he was with Allen, trying to render aid
10 to him, that Chief Sturrup come up and got the gun. Before
11 he could tell him don't touch that, leave it alone, he got
12 the gun.

13 Q Did Officer Gibson make any other statements
14 that you could recall related to the incident that occurred?
15 Regarding the shooting, I should say.

16 A The best I can remember, he said that he
17 chased -- chased a black male into the woods, or he saw one
18 back into the woods, and he talked like that he was trying
19 to arrest one of 'em, or trying to subdue one of 'em, and
20 then he got in a rassling -- just, you know, got into a
21 scuffle with both of 'em. And that one of them got his gun
22 and that they shot him with it.

23 Q Can you describe just briefly for the Court
24 the area where Allen, Officer Gibson, was, meaning the
25 wooded area in relationship to I believe the apartment

1 complex?

2 A I would describe the wooded area as
3 approximately 50 to 75 feet, maybe more, maybe 100 feet
4 behind the apartment complex. There is a -- a grassy berm
5 that goes up, and you have to walk over that to get back
6 into the woods. On that berm it's kind of thick. There's
7 weeds and small trees growing up there. Once you get back
8 into the woods it's sort of opened up. It's not -- it's not
9 real thick, just -- just a thinly wooded area. Um, it looks
10 like a place where people have took their trash back there
11 to dump it. There's -- there was some old trash, the best I
12 can remember, laying back there.

13 Q Now, if you can give us next in sequence
14 what happened as you were attending to the officer. He made
15 certain statements to you. Can you describe what happened
16 next in sequence as far as your involvement?

17 A Um, I basically stayed with Allen throughout
18 the whole ordeal. Cpl. Aldridge told me that -- to go back
19 out and try and find out from some witnesses what had
20 happened, or if they had seen anything. I started back out
21 front, and like I say, I could see that Allen was in bad
22 shape and that he needed to -- to get to a hospital as soon
23 as possible. I called my dispatcher, advised them to get
24 the helicopter on the way, MedFlight. I went back out, and
25 there was so many people out there and so much going on I

1 felt that it was more necessary for me to be with Allen. So
2 I went back to Allen. And I got down by his side and he
3 said please don't leave me. And I told him I wouldn't. I'd
4 stay with him. That I wouldn't leave.

5 Um, he told me that he -- he told me again when I
6 got back to him, he said I'm going pass out or I'm going
7 unconscious. I told him to stay with me. I told him that
8 he was going to make it. That he needed not to give up
9 'cause he was going to make it. And he looked me straight
10 in the eye as if I'm looking you in the eye now and he said
11 Jarrid, I'm dying. I'm not going to make it.

12 He at that point started telling me to -- to tell
13 his family that he loved -- that he loved 'em. And he
14 referred to his -- a friend at that time. He gave her name,
15 Summer, and asked me if I would call her and tell her that
16 he had been hurt.

17 Q What was the next entity that attended to
18 him? Was it the rescue squad?

19 A Yes, the rescue squad did arrive. A short
20 time after that. They started tending to him and I just
21 kind of backed up out of their way, but I stayed there with
22 him and they started tending to him.

23 Q Did Officer Gibson go into cardiac arrest at
24 some point?

25 A Not at that time. After the rescue squad

1 got their IV started and loaded him onto the cot, they took
2 him around to the ambulance. And they took him over to the
3 Waverly Police Department where MedFlight was to land. I
4 was up in the back of the ambulance with him and he said he
5 was going to pass out. And at that time he called out again
6 the description. He several times during -- more than twice
7 told me the description of the two people. When he thought
8 he was going to pass out he would call out that description
9 again. I was fighting with two black males, one skinny, one
10 medium build with short, balding hair, one with dreadlocks,
11 old blue baseball cap, white T-shirt. The skinny one had a
12 white T-shirt on. He kept calling that out. And every time
13 that he would feel that he was going to pass out, or he
14 would pass out, he would call out that description again.
15 And at that time, while we were sitting in front of the
16 Waverly Police Department, as the helicopter landed Allen
17 went into cardiac arrest.

18 Q Did you go to the hospital? Petersburg
19 hospital?

20 A I did.

21 Q What time did Officer Gibson die?

22 A I don't remember the exact time but I think
23 it was somewhere around 2:30. I don't know. I don't
24 remember the exact time.

25 Q That afternoon?

1 A Yes, sir. It was the same day.

2 Q And there was an autopsy done on Officer
3 Gibson's body the next Monday in Richmond?

4 A The best that I know. I don't know any
5 details of the autopsy.

6 MR. CHAPPELL: Judge, we would offer the
7 autopsy report for purposes of establishing the
8 dead body.

9 THE COURT: Have you seen the report?

10 MR. MORCHOWER: Yes. No objection.

11 MR. BOONE: Judge, we have a copy. We have
12 no objection.

13 THE COURT: I will receive the report. Give
14 me a moment to glance at it.

15 MR. CHAPPELL: Judge, upon your perusal,
16 that would conclude the Commonwealth's examination.
17 I will defer to defense counsel.

18 THE COURT: Okay, go ahead.

19

20 CROSS-EXAMINATION

21

22 BY MR. MORCHOWER:

23 Q Sir, you never saw any -- any individuals in
24 and around Officer Gibson, did you? When you arrived.

25 A No, sir.

1 Q And the only description that Officer Gibson
2 gave you is the description that you have outlined.

3 A Yes, sir.

4 Q That's the only description or
5 identification he gave you.

6 A As I said before, he several times --

7 Q Repeated the same thing two times.

8 A Yes, sir.

9 Q But that's the only identification/
10 description that he gave you.

11 A Yes, sir.

12 Q And Officer Gibson did tell you on one
13 occasion that the gun just went off; is that correct?

14 A He said that he was --

15 Q Did he ever give you those words? It
16 just -- did he ever tell you specifically, quote, it just
17 went off?

18 A He said he was scuffling with the
19 individuals and the gun went off.

20 Q And you didn't see either of these two
21 gentlemen in the woods, did you?

22 A No, sir, not in the woods.

23 Q This is at the time you arrived.

24 A Yes, sir.

25 Q And you think you arrived within four

1 minutes of 11:14?

2 A It was approximately 11:14 when I heard the
3 call go out, and by the time they got through talking to the
4 rescue squad and to their deputies and I called in -- I had
5 to come from Wakefield. I was at the red light in Wakefield
6 and --

7 Q Five, six minutes later, at most?

8 A It wasn't very long. I can tell you that.

9 Q So what are we saying?

10 A It -- six minutes at the most.

11 Q At the most?

12 A But I'm thinking --

13 Q Maybe four?

14 A Maybe four to six.

15 Q Yes, sir. And you never saw these
16 individuals on the highway, did you?

17 A I did not.

18 Q That is the two defendants.

19 A I did not.

20 MR. MORCHOWER: That's all I have, Your
21 Honor.

22 THE COURT: Okay. Mr. Boone?

23 MR. BOONE: Thank you, Judge.

24

25 CROSS-EXAMINATION

1 BY MR. BOONE:

2 Q Trooper Williams, when you arrived at the
3 Waverly Village Apartments, the first person you saw was
4 whom?

5 A The first person that I identified with was
6 the Chief of Waverly, which was Chief Sturupp. Chief Warren
7 Sturupp.

8 Q And can you describe what you observed
9 reference Chief Sturupp?

10 A He was running around talking to -- it
11 seemed to be a thousand people standing in the parking lot.
12 I know that there wasn't that many, but the whole parking
13 lot was full. Of just people. I don't know where they all
14 came from. But what I observed him doing, he had a gun in
15 his hand. Um, and at that time I did not observe -- he
16 usually wears a gun in a holster on his side. I did not
17 observe whether he still had a gun in his holster or not,
18 but I observed him just running around talking to people.

19 Q Well, was he talking or was he yelling?

20 A He was yelling.

21 Q And what was he yelling?

22 A He was wanting to know --

23 MR. CHAPPELL: Judge, I would object. I
24 think it's hearsay.

25 THE COURT: He's under cross.

1 MR. CHAPPELL: The rules of evidence still
2 apply.

3 THE COURT: He's trying to create, I would
4 think, the situation at the time the officer
5 arrived.

6 MR. BOONE: I'm not offering it for the
7 truth, if the objection is hearsay.

8 THE COURT: Oh, is the objection hearsay?

9 MR. CHAPPELL: Hearsay.

10 THE COURT: Oh.

11 MR. BOONE: If the objection is hearsay, I'm
12 not offering it for the truth.

13 MR. CHAPPELL: I don't know what the
14 relevance would be.

15 THE COURT: Although we've had quite a bit
16 of hearsay here this morning. I think that Mr.
17 Boone says it's not being offered for the truth or
18 veracity. Objection overruled. Go ahead, Mr.
19 Boone.

20

21 MR. BOONE, continuing --

22 Q What was he yelling?

23 A He was yelling, who did it, who shot my
24 officer? I want to know who the -- who was the one that
25 shot my officer. He did use some -- some curse words in

1 that, and I would rather not say.

2 Q Was it a rather chaotic scene?

3 A It was. He seemed -- from my experience he
4 seemed to be in shock. He would -- he appeared as someone
5 that would be in shock and that they didn't really know what
6 they were doing.

7 Q And you indicated he had a gun in his hand?

8 A He did have a gun in his hand.

9 Q And did your investigation reveal that
10 apparently was the gun of Chief Gibson? I'm sorry, Mr.
11 Gibson?

12 A I don't -- I can't say for a fact that it
13 was because I didn't see him pick the gun up.

14 Q Well, when you went back in the woods, did
15 you not see a --

16 A When I went back in the woods Cpl. Aldridge
17 told me that the gun -- I said where's his gun, because for
18 my safety I wanted to know --

19 THE COURT: Now that is hearsay.

20 MR. CHAPPELL: I'm not objecting to it.

21

22 A For my safety I wanted to know where the gun
23 was and who had it.

24 Q I understand.

25 A And he told me at that time that Chief

1 Sturruup had come back and picked up the gun.

2 Q And you did not see a gun in the vicinity of
3 Mr. Gibson when you went back there.

4 A I did not, because for my safety I wanted to
5 know where it was.

6 Q All right. And when you saw Chief Sturruup
7 with a gun, waving it in the vicinity of these people, this
8 was within five or six minutes of the radio transmission
9 that you received at 11:14.

10 A That's when I arrived at the -- in the
11 parking lot.

12 Q Okay. Now, I'm going to show you, if I
13 might, a handwritten document and ask you if you recognize
14 this. Three-page handwritten document.

15 A I do, sir. That's my notes that I had
16 written down.

17 Q And do you have the original notes, sir?

18 A I'm sorry?

19 Q Do you have the original three-page --

20 A I do, sir.

21 Q Do you have them with you?

22 A Yes, sir.

23 Q If you could turn to those notes.

24 Specifically page 2, four lines down.

25 Mr. Morchower asked you if your recollection of Mr.

1 Gibson's words to you, if he included it just went off, and
2 your answer was well, he said the gun went off. I'm going
3 to ask you to look at your own notes. When were these notes
4 prepared, by the way?

5 A I took the notes -- I started writing the
6 notes that evening after I got home and calmed down. I
7 started writing them then and I finished them the next
8 morning.

9 Q All right, so this matter was still fresh in
10 your mind.

11 A Yes, sir.

12 Q You go down actually to the third line.
13 There's a sentence, "He" -- speaking of Mr. Gibson -- "he
14 said they were trying to get my gun."

15 A Jarrid.

16 Q What's the next word?

17 A Jarrid. That's my middle name. That's what
18 he called me.

19 Q All right. "And I tried to stop them but
20 somehow they got it and it just went off."

21 A Yes, sir. That is what I wrote.

22 Q Is that what he said?

23 A Yes, sir. That's what I wrote down.

24 Q All right. The next thing, it says, "I
25 tried to wrestle --" This is him speaking, Mr. Gibson

1 speaking. "I tried to wrestle it away from them and get it
2 pointed away from me but they shot me. They shot me with my
3 own damn gun."

4 A Yes, sir.

5 Q Is that what he said?

6 A Yes, sir.

7 Q Then you go down, the last sentence in that
8 paragraph, and it says, "I was fighting with tall skinny
9 one. They were trying to get my gun. The tall skinny one
10 had it."

11 Is that what he said?

12 A Yes, sir.

13 THE COURT: Tall skinny one what?

14 MR. BOONE: Had it. Speaking of the gun.

15 THE COURT: Oh, had it. Okay.

16

17 MR. BOONE, continuing --

18 Q Then at the bottom of the first page of
19 those notes, "I asked him, who did this to you? And he said
20 he chased a black male into the woods and got in a scuffle
21 with two black males, one tall, skinny, with dreadlocks and
22 a pony tail, and one medium build, both had dark blue jeans.
23 One with short, maybe bald on top, hair."

24 Is that correct?

25 A Yes, sir.

1 Q So he described, of these two black males,
2 he described one as being tall and one being short.

3 A Yes, sir.

4 Q And he described one of them with dreadlocks
5 and one of them with short hair.

6 A Yes, sir.

7 Q And of the two, he told you that it was the
8 tall skinny one who shot him.

9 A Yes, sir.

10 MR. BOONE: Sir, I'm going to ask you if you
11 will --

12 Or actually, Judge, I would ask that those
13 three pages of notes be introduced as a defense
14 exhibit. I would ask Your Honor to read the entire
15 three pages.

16 THE COURT: Do you have any objection, Mr.
17 Chappell?

18 MR. CHAPPELL: Judge, I think it's -- his
19 testimony has been consistent with the written
20 statement. I'm not sure what the utility would be.
21 If it can be shown there's some inconsistency --

22 THE COURT: So you'd object as being --

23 MR. MORCHOWER: Surplusage?

24 THE COURT: -- hearsay?

25 MR. CHAPPELL: Mr. Morchower took the words

1 out of my mouth.

2 THE COURT: What's the basis of the
3 objection?

4 MR. CHAPPELL: Judge, I think he's testified
5 to what's in here. Certainly any inconsistencies
6 can be brought out on cross. That can be explored.
7 He's here. You'd be reading what essentially I
8 suppose could be a hearsay objection.

9 MR. BOONE: Let me lay some foundation then.

10

11 MR. BOONE, continuing --

12 Q Trooper Williams, have you read these notes
13 for preparation for this proceeding today? Have you read
14 them recently?

15 A I did not read them word for word this
16 morning. Um, I looked over them to --

17 Q Refresh your recollection?

18 A They refresh my recollection of the times
19 and things like that.

20 Q So you did refer to them this morning to
21 refresh your memory.

22 A I looked over them.

23 Q All right.

24 A But not thoroughly.

25 Q And these notes were prepared the night of

1 the incident.

2 A The night and the next morning.

3 MR. BOONE: And the next morning. Judge,
4 he's used the notes to refresh his recollection and
5 there is some inconsistency. When Mr. Morchower
6 asked him specifically didn't Mr. Gibson say,
7 quote, the gun just went off, that was not the
8 recollection of the witness. The witness's
9 recollection was that he said the gun went off.
10 And instead of it just went off. And I think there
11 is certainly a difference between those two
12 statements.

13 THE COURT: I guess the point the Court is
14 making is that, in the record, what difference
15 there may be. It's in the record.

16 MR. BOONE: I understand, but I'm not trying
17 to impeach the officer. I'm trying to offer that
18 statement as evidence.

19 THE COURT: I mean he's -- it's been
20 clarified in the record. Am I right?

21 MR. BOONE: You're right in the sense he's
22 agreed that's what his notes say.

23 THE COURT: He's agreed, so I'm just saying
24 ordinarily my understanding is that those notes
25 would be hearsay if objected by the Commonwealth's

1 Attorney.

2 MR. BOONE: That's fine. I'll withdraw the
3 request.

4
5 MR. BOONE, continuing --

6 Q Now, sir, did you participate in the arrest
7 of Mr. Terence Richardson?

8 A Um, I think that I -- to be honest with you,
9 sir, I can't remember which one -- which one -- I
10 participated in one of them. I think that it was Mr.
11 Richardson. To the best of my recollection.

12 Q And do you recall when that took place, what
13 date?

14 A No, sir, I do not. I do not recall the
15 exact date.

16 Q Do you recall what Mr. Richardson, his
17 description appeared to be to you when you arrested him? Or
18 when you participated in the arrest?

19 A I do not recall. Are you asking what he was
20 wearing, or what he --

21 Q Did you take a picture of him at the time of
22 his arrest?

23 A No, sir, I did not.

24 THE COURT: Was a picture taken?

25 THE WITNESS: Ma'am, I don't know. I was

1 riding --

2 THE COURT: You don't know one way or the
3 other.

4 THE WITNESS: I was riding with Cpl.
5 Aldridge.

6 THE COURT: Mr. Boone, I'm just thinking,
7 I'm sure -- this man was arrested for capital
8 murder -- a picture was taken at the time of the
9 arrest. I'm not sure. The Commonwealth's
10 Attorney -- this would be relevant to the case. I
11 assume one of the officers has the arrest picture?

12 MR. CHAPPELL: I'm sure.

13 THE COURT: Asking him his opinion of what
14 this man looked like --

15 MR. BOONE: I'm not asking him opinion.

16 THE COURT: It's kind of broad to me.

17 MR. BOONE: I'm not asking him opinion. I'm
18 asking him to describe. There's evidence from the
19 dying declaration as to the two individuals who
20 perpetrated this crime.

21 THE COURT: It just seems rather subjective.
22 It's just like you standing right there. It's a
23 hundred people, fifty people in here, asking
24 everybody to describe what you look like. I just
25 think it's too broad. You know, the reason I'm

1 doing some of this is -- what time is it? It's
2 2:12 in the afternoon and we really want relevant,
3 competent evidence before the Court. I just think
4 that we can look at this picture and that would be
5 good -- the best evidence of what he looked like.

6 MR. BOONE: I understand, but he doesn't
7 have the picture so he can't produce it.

8 THE COURT: I understand. But if you want
9 him to say the man was not thin or the man was not
10 tall, it's rather subjective. You look at Officer
11 Allen's height, what he called tall and what he
12 calls tall, all of this is just very subjective.

13 MR. BOONE: Well, Judge, if you have two
14 people and a person says one of them is tall and
15 one of them is short, we know that one of them's
16 taller than the other. So if we bring two suspects
17 in and one is tall, and one is short, then I think
18 we can figure out which one he's referring to. But
19 I'll withdraw it. I'll ask him a different --

20 THE COURT: Well, I think if you want to ask
21 him -- are you asking between Ferrone Claiborne and
22 Terence Richardson which --

23 MR. BOONE: I haven't gotten to Mr.
24 Claiborne yet. I'm still on Mr. Richardson.

25 THE COURT: Which two?

1 MR. BOONE: The two suspects. They're both
2 in here for preliminary hearing.

3 THE COURT: Which one?

4 MR. BOONE: The evidence is that the tall
5 skinny one is the one he was wrestling with the gun
6 over. I'm just trying to figure out which one.

7 THE COURT: I think it's too subjective.
8 I'm going to deny -- I don't think he's a competent
9 witness to answer that.

10 Do you have other questions?

11 MR. BOONE: I have other questions, yes, I
12 certainly do.

13 Did you describe the hairstyle of Mr.
14 Richardson when you participated in his arrest?

15 MR. CHAPPELL: Judge, I don't know whether
16 he even knows which one he dealt with.

17 THE COURT: Wait a minute, wait a minute.
18 I'm going to object. For this man -- I mean it's
19 just so many different styles. So many people
20 would interpret it different. I have a -- I have
21 an idea of what dreadlocks look like. He may have
22 a different idea and Officer Allen may have a
23 different idea. I think the best evidence is
24 the -- is the picture at the time of the arrest.

25 MR. BOONE: Well, Judge, I agree with you.

1 But I don't have the picture. And he doesn't have
2 the picture. I agree with you. But I've got to
3 get some evidence before Your Honor. It's my
4 burden at this point to try to --

5 THE COURT: It seems like to me --

6 MR. BOONE: -- to try to present evidence.

7 THE COURT: It seems like to me you want him
8 to comment on Officer Gibson's --

9 MR. BOONE: No, no, no.

10 THE COURT: -- evaluation of the witness.

11 MR. BOONE: Not at all.

12 THE COURT: Of the two suspects.

13 MR. BOONE: I'll try it again, and that's
14 not where I'm going.

15

16 MR. BOONE, continuing --

17 Q Did you participate in the arrest -- forget
18 about Officer Gibson -- arrest of Terence Richardson?
19 Gentleman sitting to my right. This gentleman right here.
20 Did you participate in the arrest?

21 A I was there. I did not put any hands on
22 him. I was in with the officers that arrested him.

23 Q So you saw him being arrested?

24 A I did.

25 Q Can you describe his haircut at that moment?

1 THE COURT: Mr. Boone --

2 MR. CHAPPELL: I think the Judge has ruled.

3 THE COURT: I keep saying -- I'm going to
4 rule. The picture, the Commonwealth is not able --
5 Are you going to be able to produce a picture at
6 the time of the arrest of these two defendants?

7 MR. CHAPPELL: I'm sure there is one.

8 THE COURT: Would you check with one of the
9 witnesses and make sure that they have not -- make
10 sure that there is a -- it would be in a police
11 department -- I mean the sheriff's office.

12 MR. CHAPPELL: Well, Judge, I mean the
13 picture will speak for itself.

14 MR. BOONE: I agree. I would rather have
15 the photograph. If we can produce it I will
16 withdraw the question.

17 THE COURT: I don't think that -- I think
18 it's just too subjective what this man looked like.
19 It's just too subjective.

20 MR. BOONE: Well, Judge, I couldn't disagree
21 with you more. And with all due respect to the
22 Court, if it say was it a black male or a white
23 male, I think there's a big difference between a
24 black male and a white male. Was it a male or a
25 female. Did he have a beard, did he not have a

1 beard. Did he have blue eyes, did he have brown
2 eyes. What was his height. Things of that sort.
3 His weight. These are questions that I'm allowed
4 to go into.

5 THE COURT: You represent -- let me get this
6 straight. You represent Mr. Richardson.

7 MR. BOONE: Yes.

8 THE COURT: So what is your question to him,
9 what the man looked like?

10 MR. BOONE: I must be speaking Greek. I
11 asked him what was his hairstyle. I've asked this
12 question three times and you keep asking me are you
13 asking him what he looked like. I'm not asking him
14 what he looked like.

15 THE COURT: I tell you what, if he gives an
16 answer, I'm going to give it very little weight.

17 Do you know anything about this man's
18 hairstyle?

19 THE WITNESS: No, ma'am, I'm not a
20 hairstylist, but -- to be honest with you I really
21 don't recall what his hair looked like that day. I
22 mean I really -- really don't recall. I was there
23 with the officers. I was riding with Cpl. Aldridge
24 who transported the man. He sat behind me while we
25 transported him to Waverly Police Department.

1 MR. BOONE: That's fine. Did --

2 THE WITNESS: No, I'm sorry. It was not Mr.
3 Richardson that we transported. This was another
4 gentleman with him.

5 THE COURT: Mr. Boone, in all fairness, the
6 same thing with the -- the dying statement of the
7 defendant -- of the victim, Officer Gibson. The
8 same thing. You know, in terms of description of
9 the hair. It's just -- it's very -- it's a very
10 subjective thing. I think he can tell if it was
11 blond or black or maybe even red. But when you
12 start talking about styles and --

13 MR. BOONE: Well, would you agree that
14 there's a difference between a shaved head or
15 dreadlocks?

16 THE COURT: Mr. Morchower -- you don't look
17 like Mr. Morchower --

18 MR. MORCHOWER: I would object to him
19 analyzing my hairstyle.

20 THE COURT: If you ask him to tell you the
21 color of the hair, I mean you have a beard and he
22 doesn't. I can tell you that kind of thing. But I
23 don't see where the hairstyle -- Is there a picture
24 of the two?

25 TROOPER BRITTON: Your Honor, Officer Cheek

1 went down to the office to get it.

2 THE COURT: That's fine. That will save us
3 a lot of time.

4 THE COURT: Other questions of this officer?

5 MR. BOONE: Yes, just one more.

6 Reference the statement by Mr. Gibson to
7 you, sir, did he make the statement, "They kept
8 rassling for my gun, both of them?"

9 THE COURT: What are you reading from? Is
10 that the officer's notes?

11 MR. BOONE: I'm just asking him a question,
12 if he made that statement. If Mr. Gibson made that
13 statement to him.

14

15 MR. BOONE, continuing --

16 Q Did he say both of them?

17 A If you'll give me a minute to look through
18 my notes.

19 Q Okay.

20 A Without looking at the notes --

21 Q Sir, it might help if I would direct your
22 attention to the Virginia State Police SP110 form dated
23 4/27/98. Second paragraph.

24 A State police what form, sir?

25 THE COURT: Are those his notes?

1 MR. BOONE: Judge, this is an internal
2 memorandum prepared by the Virginia State Police
3 reference this gentleman's statement.

4 THE COURT: Okay, who was that prepared by?

5 MR. BOONE: The Virginia State Police.

6 THE COURT: This --

7 MR. BOONE: Of his -- of the interview with
8 this gentleman.

9 THE COURT: But this is not his -- this was
10 something prepared by --

11 MR. BOONE: I'm just asking him if Mr.
12 Gibson --

13 THE COURT: I think he should have an
14 opportunity to look at it. Would you let him look
15 at what he -- I'm sure you've seen it, Mr.
16 Chappell. I'm sure you've got one.

17 MR. CHAPPELL: Yeah.

18 MR. BOONE: Second paragraph, sir.

19 THE WITNESS: I think this was the agent at
20 the hospital that took my statement. Um, the best
21 I can recall he did state that it was -- that he
22 was fighting, rassling with both of them. I think
23 I said that earlier.

24 MR. BOONE: Okay.

25 THE WITNESS: In my statement. That he was

1 rassing with both of them.

2 MR. BOONE: Thank you, sir. That's all I
3 have, Judge.

4 MR. CHAPPELL: I have no redirect, Your
5 Honor.

6 THE COURT: Okay.

7 MR. CHAPPELL: Judge, I would call Shawn
8 Wooden next.

9 THE COURT: Oh, I have one question. I'm
10 sorry.

11 MR. CHAPPELL: Judge, I'm sorry. Judge, the
12 picture is apparently on the way.

13 THE COURT: I'm sorry. I did have
14 something.

15

16 EXAMINATION BY THE COURT:

17 Q You're saying you arrived at the scene at
18 what time?

19 A Um, it was approximately four to six minutes
20 later. I came from Wakefield.

21 Q And what time would that have been?

22 A It should have been around 11:18 to 11 --

23 Q In the morning.

24 A According to my watch, or my clock.

25 Q In the morning?

1 A Yes, ma'am.

2 Q Now, you had mentioned something about
3 cardiac arrest. Were you with the officer when that
4 occurred?

5 A Yes, ma'am, I was.

6 Q And from your experience, did you feel that
7 he died? Is that --

8 A Um --

9 Q Or do you know?

10 A I was with him at the time and he went into
11 cardiac arrest immediately after. Immediately after he went
12 into cardiac arrest they began CPR on him. The paramedic
13 was with him. And when they got him to the hospital he --
14 he was -- he did have a heartbeat on his own. But he was --
15 his breathing was being assisted and he was unconscious.
16 The last words that I can remember him telling me was
17 that -- I asked him how old he was. And he -- he at that
18 point couldn't talk, and I said are you the same age as me,
19 are you twenty-five. And he -- he kind of shook his head,
20 it was kind of a yes and no, and I asked him was he
21 twenty-six and he -- at that point he looked up at the
22 ceiling and his eyes got fixed.

23 Q What time would that have been; do you
24 recall?

25 A I do not, ma'am. I do not recall the exact

1 time.

2 Q The time you got the --

3 A It may have been -- time flies in a
4 situation like that. It could have been thirty minutes and
5 felt like an hour. It could have been an hour. I --

6 Q It was shortly. Wasn't any more --

7 A It was short. I really didn't look at my
8 watch. The rescue squad got there and worked on him for a
9 few minutes. We took him to the police department. I'm
10 going to -- I'm going to say no more than -- no more than an
11 hour, but probably forty-five minutes to an hour.

12 THE COURT: Okay. Thank you, Officer.

13 Any other questions prompted by my
14 questions?

15 MR. CHAPPELL: No, ma'am.

16 MR. BOONE: Judge, just one. And you may
17 have answered this. The date of the offense, sir?

18 THE WITNESS: 4/25/98.

19 MR. BOONE: Thank you.

20 THE COURT: Trooper, I would ask that you
21 remain separated. Do not discuss your testimony
22 with anyone.

23 (Whereupon the witness was retired to the
24 witness room.)

25

1 THE COURT: Commonwealth's next witness.

2 MR. CHAPPELL: Shawn Wooden.

3 THE COURT: Do you feel you're going to be
4 comfortable testifying standing up? Are you all
5 right?

6 THE WITNESS: Yeah.

7 THE COURT: All right.

8 MR. CHAPPELL: Judge, I would interrupt. I
9 do have the photograph.

10 THE COURT: Show it to counsel. Is that
11 both defendants or just one?

12 THE BAILIFF: Just Mr. Richardson.

13 THE COURT: Just one.

14 TROOPER BRITTON: I have the other one if
15 you want it, Your Honor.

16 THE COURT: This is Mr. Boone's.

17 MR. BOONE: And Judge, I was requesting a
18 photograph of both individuals.

19 THE COURT: You want the other --

20 MR. BOONE: Right, if possible.

21 THE COURT: I don't know. Am I to look at
22 this? I'm -- see if you can get the other picture
23 also. While we're -- you want to proceed with this
24 witness?

25 MR. CHAPPELL: Yes, ma'am.

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SHAWN WOODEN,

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

DIRECT EXAMINATION

BY MR. CHAPPELL:

Q Could you state your name, please?

A Shawn Wooden.

THE COURT: You're going to have to sort of project your voice. There are parties on the other side of the room to hear you. I need to hear you.

A Shawn Wooden.

Q And Shawn, how old are you?

A Twenty-five.

Q And where do you live?

A Waverly.

Q Waverly, Virginia?

A Yes.

Q And Shawn, do you know Terence Richardson?

A Yes.

Q And how do you know Terence Richardson?

A He's a friend from about five years ago.

1 Q You've known him about five years?

2 A Yes.

3 Q Do you recognize him here today?

4 A Yes.

5 Q Can you point him out to the Court?

6 A Right here.

7 Q We've got four men sitting over there.

8 MR. MORCHOWER: Two of them can be
9 eliminated I think rather --

10 THE WITNESS: Yeah. The one with the Afro.

11 THE COURT: Start counting from here and go
12 around the table.

13 THE WITNESS: Third person.

14 THE COURT: Third person.

15 MR. CHAPPELL: Third person from my side?

16 THE WITNESS: Yeah.

17 THE COURT: Let the record reflect that is
18 Terence Richardson.

19

20 MR. CHAPPELL, continuing --

21 Q And you say you know him -- you've known him
22 about five years?

23 A Yes.

24 Q How have you known him, as a friend,
25 acquaintance? Something like that?

1 A Friend.

2 Q Friend?

3 A Yeah.

4 Q Do you know Ferrone Claiborne?

5 A Yes.

6 Q And do you recognize him here today?

7 A Fourth person.

8 MR. MORCHOWER: We'll stipulate the
9 identification.

10 MR. CHAPPELL: He's the fourth person.

11 THE COURT: Fourth person seated --

12

13 MR. CHAPPELL, continuing --

14 Q How do you know Ferrone Claiborne?

15 A By him being in Waverly. Seeing people that
16 I know.

17 Q About how long have you known him?

18 A Maybe about the same length of time.

19 Q About the same?

20 A Yeah.

21 Q Now, did there come a time where Terence
22 Richardson lived in your residence?

23 A Yes.

24 Q And if so, when was that?

25 A It was in, um, April, about -- I'll say

1 about the 20th of April, something like that. He stayed
2 there for about a week or so.

3 Q Okay. I want to draw your attention to
4 April 25th, Saturday, this year. Was Terence in your
5 residence at that point?

6 A Yes.

7 Q Okay. And was he in your residence that
8 morning at some point?

9 A Yes.

10 Q At some point did you-all go somewhere?

11 A Yes.

12 Q If so, if can you describe that to the
13 Court.

14 A Well, on the 25th of April, we left to go
15 down to, um, meet Ferrone. We were supposed to go to
16 Petersburg.

17 Q When you say me, you mean you and who else?

18 A Terence and Ferrone.

19 Q Okay.

20 A So we met Ferrone at -- on Railroad Avenue
21 at Peace Funeral Home.

22 Q Now this is in Waverly?

23 A Yes.

24 Q Now, why were you -- what was the reason for
25 meeting?

1 A Um --

2 MR. MORCHOWER: I'm going to object. I
3 don't think -- the reason for leaving I don't think
4 is relevant and material. He left, and he may say
5 we left him behind for a hundred million reasons.
6 I don't think it's germane to this case. Or would
7 assist the Court in reaching any kind of
8 conclusion.

9 MR. CHAPPELL: I believe it will, Your
10 Honor. The question was the reason for meeting
11 with these three individuals. I think it's very
12 relevant.

13 THE COURT: I think it helps set the stage
14 of what's going on. The Court will allow it.

15
16 A What, you say the reason for meeting him?
17 Oh, because we was supposed to go to Petersburg to get some
18 drugs. But when we got to the Peace Funeral Home, they said
19 that -- Ferrone said we didn't have to go to Petersburg
20 then, that he could get it now. So then we went on down to
21 the, um, Waverly Village.

22 Q Let me back you up a little bit. You're at
23 Peace Funeral Home, right?

24 A Yes.

25 Q Now who was there?

1 A Ferrone.

2 Q Ferrone was there.

3 A Yeah.

4 Q Now did you get there on your own legs, a
5 bicycle, vehicle?

6 A I rode a bicycle.

7 Q And did Terence ride anything?

8 A No.

9 Q Okay. But everybody met at Peace Funeral
10 Home.

11 A Yes.

12 Q Okay. And what happened at that point?
13 Where -- where did you three go from there?

14 A To Waverly Village.

15 Q All right.

16 A To the apartments. And, um, while we was
17 standing there, we was talking for a minute, and he said he
18 had to go meet somebody. So they started proceeding to the
19 back of the -- to the back of the apartments. And they told
20 me if I see somebody coming, you know, for to --

21 MR. MORCHOWER: Judge, can we move the
22 witness over here in the middle so you can hear and
23 we can hear?

24 THE COURT: I don't know why he's over
25 there. It doesn't make sense. I'm having a little

1 trouble. See if you can bring him a little closer.

2 Now your problem is he needs to turn and
3 face this direction.

4

5 (Whereupon the witness was relocated.)

6

7 THE COURT: Now, sir. Where were we?

8 MR. CHAPPELL: Judge, I believe we were at
9 Peace Funeral Home.

10

11 MR. CHAPPELL, continuing --

12 Q And you indicated that you-all were going to
13 Waverly Village Apartments; is that correct?

14 A Yes.

15 Q Now, what was the reason for going to
16 Waverly Village?

17 A Um, so they could meet somebody for to get
18 some drugs from 'em. The original person they supposed to
19 meet to make the buy from.

20 Q Now, was it supposed to be somewhere else
21 before? This meeting? Some other location?

22 A Yes. We were supposed to go to Waverly -- I
23 mean to Petersburg first.

24 Q Now, at this point were Terence Richardson
25 and Ferrone Claiborne talking during this period of time?

1 A Yes.

2 Q About what was going on? What did Terence
3 say?

4 A Well, when we was at Peace Funeral Home they
5 was talking among their self at first.

6 Q Okay. And did you hear anything? Any of
7 that?

8 A No.

9 Q From either -- from either of the
10 defendants?

11 A No.

12 Q You heard talking but you couldn't make out
13 what it was?

14 A Right.

15 Q Okay. Now, how did you-all get to Waverly
16 Village?

17 A I rode the bike. They walked.

18 Q All right. At some point did you arrive at
19 Waverly Village?

20 A Yes.

21 Q Okay. And how long did it take you to get
22 there, or you three to get there?

23 A About ten minutes. Or maybe less.

24 Q Okay. Did you-all arrive at the same time?

25 A Yes.

1 Q Okay. Now, when you got to -- to Waverly
2 Village in about ten minutes, is this an apartment complex?

3 A Yes.

4 Q Can you briefly describe for the Court the
5 layout of the complex?

6 A Well, when you first come in the -- the
7 apartment area, you have a office in the front by a
8 telephone booth. Then you have a apartment directly in the
9 front and one behind it. Then you have two that go down the
10 side. Then you have one in the back by the woods area.

11 Q And how -- approximately how far is the
12 woods from the back of that last apartment area, as you
13 described it?

14 A Um, about ten, fifteen feet.

15 Q Can you describe the wooded area behind the
16 apartments?

17 A Um, well, not really. I don't know. I
18 describe it with the area. Just a lot of trees back there.

19 Q It's just woods.

20 A Yeah.

21 Q Okay. And all this is located in Sussex
22 County.

23 A Yes.

24 Q Now, where were you in the complex
25 initially? Or where were the three of you when you first

1 got there? Set the stage for the Judge.

2 A Up by the pay phone.

3 Q And that's at the entrance, the front
4 entrance that you've described.

5 A Yes.

6 Q Now, at that point did either Ferrone
7 Claiborne or Terence Richardson tell you anything as to
8 where they might go?

9 A They said they was going to meet the guy in
10 the back. So they --

11 Q They said what?

12 A They was going to meet a guy in the back.

13 Q Meet a guy in the back.

14 A Yeah.

15 Q Now who said that, do you remember which
16 one?

17 A Ferrone.

18 Q Ferrone said that? They were going to meet
19 a guy in the back.

20 Now, what happened at that stage, or at that point?

21 A They started walking -- well, they told me,
22 then they started walking towards the back. And I started,
23 you know, waiting there. And they said if somebody come to
24 let them know. So --

25 Q Now who said that?

1 A Terence.

2 Q Terence said that?

3 A Yes.

4 Q Okay, did Ferrone say anything similarly?

5 MR. MORCHOWER: Objection, leading question.

6

7 A No.

8 Q Terence made that statement?

9 A Yes.

10 Q And what did you do at that point?

11 A Well, I stayed up there by Arthur Coleman

12 house, apartment.

13 Q All right, now where is that? If you can

14 approximate for the Court, where is that in relationship to

15 where you were at the front of the complex?

16 A Just like, um, on the same side where the

17 main office at. It's like the last apartment across from

18 the back apartment where the woods at. Where --

19 Q So it's fair to say it's toward the back of

20 the complex?

21 A Yes.

22 Q But not at the far -- farthest set of

23 apartments.

24 A No.

25 Q Is it set off to the side as well?

1 A Yeah, it's to the side.

2 Q And what did Terence Richardson and Ferrone
3 Claiborne do at that point?

4 A They went around the back of the -- the back
5 apartment, the one near the wooded area.

6 Q The farthest one in the back.

7 A Yes.

8 Q They go together, were they close to each
9 other?

10 A They walked around there together.

11 Q Okay. And where did they -- where did
12 they -- where did you lose sight of them?

13 A When they went around the corner. To the
14 back apartment.

15 Q And that's where the woods is.

16 A Yes.

17 Q Behind that area.

18 Now, were you told to do anything in particular if
19 somebody showed up?

20 A Yeah. To, you know, to make a holler or
21 something if I see somebody come.

22 Q And Terence indicated for you to do that?

23 A Yes.

24 Q Now, when you-all were in your respective
25 positions, you don't know where Terence Richardson and

1 Ferrone Claiborne went after you lost sight of them, is
2 that --

3 A No, I didn't.

4 Q At some point did you see a Waverly police
5 vehicle?

6 A Yes.

7 Q Okay. And when was that in relationship to
8 the events you've just described?

9 A After they had went around.

10 Q After they had gone behind the back
11 building.

12 A Yes.

13 Q Okay. Did the police car come up at that
14 point?

15 A Yes.

16 Q To the complex? And where did the police
17 car go?

18 A He went up on the side where the -- the
19 other side like where the entrance at. They have a dumpster
20 over there on the other side of the back apartment.

21 Q Now, about what time was this, do you
22 recall, when you saw the police vehicle, the Waverly
23 vehicle?

24 A Shoot, I can't quite remember now. It was
25 around about 10, 9-something.

1 Q Was that in the morning?

2 A Yes.

3 Q And what happened -- can you describe the
4 maneuvers of the vehicle, what the vehicle was doing?

5 A The vehicle pulled to the side.

6 Q Okay. Did you see the vehicle stop?

7 A Yes.

8 Q Okay. And did you continue to watch the
9 vehicle?

10 A No. After, um, after he got out, you know,
11 went to the back --

12 Q Is this the officer?

13 A The officer. Yeah.

14 Q Okay. And did you recognize the officer?

15 A Yeah, I had talked to him before.

16 Q And did you know who he was?

17 A I didn't know his name. He had stopped me
18 before, thinking I was somebody else.

19 Q Was he a new officer?

20 A Yes.

21 Q And what did the officer do when he got out
22 of the vehicle?

23 A He started towards the back. But then he
24 came back, you know, to the vehicle.

25 Q Now when you say the back, what are you

1 referring to?

2 A To the -- the back of the, um, the last
3 apartment that's near the woods.

4 Q Okay, the same apartment you've already
5 described that the defendants went behind?

6 A Yes.

7 Q Did the officer make it all the way back
8 behind the apartment at this point?

9 A After he left back from his vehicle, yes.

10 Q Okay. And where did you -- did you lose
11 sight of the officer at some point?

12 A When he got around the side of the
13 apartments.

14 Q Okay. Just like you lost sight of the two
15 defendants.

16 A Yes.

17 Q Now, can you give us an estimation of time
18 as to when you saw the officer go behind the building, and
19 you saw the defendants go behind the same building on the
20 other side?

21 A Um, well, it wasn't about -- it wasn't too
22 long afterwards. I'll say about six minutes. Six, seven
23 minutes, something like that. It wasn't too long
24 afterwards.

25 Q Now, did you make any kind of audible --

1 audible noise to the defendants as you were told to do?

2 A Yes.

3 Q Okay. And what did you do?

4 A Said "Skoo doo". I screamed that out.

5 Q That was yelled out.

6 A Yeah.

7 Q Now when was that yelled? In other words in
8 relationship to when the officer was there.

9 A When I seen him go around.

10 Q He went around the building?

11 A Yeah.

12 Q Was it when you lost sight of him?

13 A No, before I had lost sight of him.

14 Q And after you -- did you yell once or more
15 than once?

16 A Once.

17 Q Okay. And what did Terence Richardson and
18 Ferrone Claiborne do when you made this skoo doo noise?

19 A Well, I seen Terence look around the corner
20 of the building and went back. But I never seen Ferrone.

21 Q Did you see Terence's whole body, or part of
22 his body, his face; do you recall?

23 A His face when he peeped around the corner.

24 Q Did he look at you?

25 A He just looked around. And I started riding

1 back on the bike.

2 Q Now were you at the same location, though,
3 when you saw Terence pop his head around?

4 A Yes.

5 Q Okay. And what did Terence do when -- after
6 this?

7 A Went back around.

8 Q Did you lose sight of him again?

9 A Yes.

10 Q He went back in the same direction he'd
11 come?

12 A Yes.

13 Q And what -- what did you do at that point?

14 A I started running back up towards the front
15 on the bicycle.

16 Q All right. And why did you do that?

17 A Because I had already let them know that
18 somebody, you know, was out there, and so I was leaving.

19 Q You were intending just to leave the
20 complex?

21 A Yeah.

22 Q All together? Did you -- did you go to any
23 particular area of the complex?

24 A I was going towards the -- the front to --
25 like where the office, behind the office the way there's a

1 path that leads to the road.

2 Q And that's basically the area that you
3 entered the complex? Or close to the area?

4 A It's close to the area.

5 Q Did you wait for Terence Richardson and
6 Ferrone Claiborne?

7 A No.

8 Q You were just leaving.

9 A Yeah.

10 Q Now, as you were leaving, did you hear
11 anything unusual?

12 A A gunshot.

13 Q Okay. And where were you when you heard
14 this shot?

15 A At that point the gunshot came before I even
16 got to the, um, the office part. It's like where I was
17 leaving from Arthur Coleman house.

18 Q And when you heard the shot, what did you
19 do?

20 A I stopped a minute. I turnt. Then I went
21 on behind the -- the office, through that -- it's a ditch
22 back to the main road. And from there I went to Dogwood to
23 my grandmother's house.

24 Q So you continued to leave the complex area.

25 A Yes.

1 Q At that point you say went to your
2 grandmother's house?

3 A Yes.

4 Q And where is that located?

5 A On Dogwood.

6 Q And that's in Waverly.

7 A Yes.

8 Q Town of Waverly, Sussex County. How long
9 did it take you to get to her house?

10 A About two minutes. Less. About a minute or
11 so on the bike. After I heard the gunshot I just took off
12 on the bike.

13 Q Now, did you stay at your grandmother's
14 house?

15 A No, 'cause wasn't nobody home.

16 Q And about what time was this?

17 A This was about 10-something. I can't, you
18 know, recall the exact time now.

19 Q It was still in the morning?

20 A Yes.

21 Q What did you do after you left your
22 grandmother's house?

23 A Went down Railroad Avenue back to my house.

24 Q And about how far is that?

25 A About two miles, I guess. Or a mile.

1 Q About two miles?

2 A Yes.

3 Q Now, when you got back to your house, did
4 anything unusual happen then?

5 A When I got to my house, um, well, I got a
6 phone call. From this girl -- this girl from, um, Sussex
7 Trace Apartments. She was calling for a friend of mine to
8 ask, um, was he at home. And so then she's telling me
9 something about that, um -- something about a police had got
10 shot. You know, something about a police being shot or
11 something.

12 Q And when you got home, did anybody come to
13 the residence soon thereafter?

14 A Yes.

15 Q Okay. And who was that?

16 A Terence.

17 Q Terence Richardson?

18 A Yes.

19 Q Okay. And do you recall what he was
20 wearing?

21 A Yes.

22 Q Okay. And what was that?

23 A He had on some jeans and a light shirt with
24 a marijuana plant on the front. With, um -- he had another
25 shirt like over top of it, a plaid shirt.

1 Q Is that what he had on when you saw him
2 previously that day?

3 A Yes.

4 Q What did Ferrone Claiborne have on?

5 A I can't remember what he had on. See, I
6 didn't see him afterward.

7 Q What about during the earlier part of the
8 day when you saw him?

9 A I don't remember what he had on then.

10 Q Now, you say Terence Richardson came to your
11 house. Can you describe how he looked at that point?
12 Terence?

13 A Nervous.

14 Q Okay. And did he come into the house?

15 A Yes.

16 Q Okay. And what happened when he came into
17 the house? This is Terence.

18 A When he came into the house he looked
19 nervous and, um, but he didn't say -- I asked him then did
20 they get the stuff, you know what I'm saying.

21 Q What do you mean by stuff?

22 A The drugs they were supposed to go get.

23 Q And what did Terence say?

24 A No.

25 Q Terence said no?

1 A Yeah. So at that time the phone rung again
2 and I had exited the house to go back across the yard to get
3 the person that the phone was for. And, um, so when I went
4 and got the person that the phone was for, he was talking to
5 the other person on the phone. So she was telling him
6 about, you know, what had happened then. And --

7 Q Did Terence hear that?

8 A Hear the conversation?

9 Q Right.

10 A No, he couldn't hear the conversation on the
11 telephone.

12 Q Okay.

13 A So they was talking and, um, but then the
14 person that came to my house to use the phone said what
15 police got shot, and he was asking like which one, you know,
16 which officer was it, was it -- he was asking was it Lumpy,
17 or something like that. And, um --

18 Q Did Terence make a response to that?

19 A Yes.

20 Q What did Terence Richardson say?

21 A He said it was a new cop.

22 Q That had gotten shot?

23 A Yes.

24 Q And did you react to that?

25 A Yeah.

1 Q To that comment?

2 A So at that point, um, I started thinking,
3 well, didn't nobody, you know, know who was shot, so how
4 would he know. So then he told me, um, he wanted to talk to
5 me.

6 Q He meaning Terence Richardson?

7 A Yeah.

8 Q And what happened then?

9 A We went out on the front deck in the front
10 of my trailer and we stood there and talked. And then he
11 just said it was a accident.

12 Q Terence said -- what did Terence tell you
13 about it?

14 A Well, he said it was a accident. That he
15 accidentally shot the cop, and if I tell anybody, something
16 will be done to me and my family. So that's why I never
17 said anything.

18 Q And can you describe his -- Terence's
19 demeanor when he was telling you this? This was outside,
20 nobody else was there; is that correct?

21 A Correct.

22 Q Okay. You said he looked nervous before?

23 A Yeah, he looked nervous then, and you could
24 tell it was true, 'cause you know, the look he had in his
25 eyes. Like you know, he was scared and like he was sorry,

1 MR. MORCHOWER: Mr. Boone's going to lead,
2 Your Honor.

3 THE COURT: Mr. Boone.

4 MR. BOONE: Thank you, Judge.

5

6 CROSS-EXAMINATION

7

8 BY MR. BOONE:

9 Q Mr. Wooden, good morning, sir, or good
10 afternoon.

11 A Good afternoon.

12 Q The testimony you've just given to Judge
13 Poindexter, is that the statement that you initially made to
14 the police when you were questioned?

15 A What, when they first questioned me?

16 Q Yeah.

17 A No, I told them I didn't know anything.

18 Q Did you ever make a statement that Terence
19 had stayed with you the night before?

20 A Yes.

21 Q Speaking about Friday night, early Saturday
22 morning. Did you initially tell them that, tell the police
23 that?

24 A Yes.

25 Q Did you tell the police that the two of you

1 you know. Like he was worried.

2 Q And after -- after you had that
3 conversation, did he -- did Terence say anything about what
4 you were to do? As far as knowing this?

5 A Just not to say anything to anybody. You
6 know. So -- or something would happen. So then I went
7 outside to the -- back in the house. Then went out the back
8 door to the clothesline where my girlfriend was at. And,
9 um, you know, was talking to her about it. So I told her,
10 you know, she couldn't say nothing, you know, about it
11 because, you know, what might happen and stuff. So he just
12 stayed around. You know. Just stayed around the house, and
13 every time I left he left with me. And wherever we went.

14 Q Did Terence stay with you fairly closely the
15 next couple of days, or the next day?

16 A Yes, I'm saying every time I left he was
17 right with me.

18 Q Was that unusual?

19 A Yeah, 'cause I thought, you know, he was
20 going home. You know, going back home after afterwards.
21 You know, after that happened I thought he would leave but
22 he just stayed right up under me then.

23 MR. CHAPPELL: Thank you, Shawn. If you'd
24 answer the defense attorneys in whatever order the
25 Court directs.

1 got drunk that night?

2 A Got drunk what night?

3 Q That Friday night. Early Saturday morning.

4 A Yeah, I got drunk Friday night. I drink
5 every night when I'm at my house, if I decide to.

6 Q Okay. Well, I'm not asking you if you
7 actually drank that night. I'm asking you if you made a
8 statement to the police that's different than what you've
9 just told the Judge. In other words did you initially tell
10 the police I don't know anything about this shooting,
11 Terence spent the night with me and we didn't wake up until
12 noon?

13 A Yeah, I told them that.

14 Q Was that true or false?

15 A That was false.

16 Q And you've been convicted of a felony, have
17 you not, sir?

18 A Yes.

19 Q What felony is that?

20 A Um, it was carjacking.

21 Q I'm sorry?

22 A Carjacking.

23 Q Carjack?

24 A Yeah.

25 Q That was in Sussex County?

1 A Yes.

2 Q And you were convicted back in '94 on that
3 charge?

4 A I believe so.

5 Q Okay. Have you been convicted of any other
6 felonies?

7 A No.

8 Q Have you ever been convicted of a
9 misdemeanor involving moral turpitude, that means lying,
10 cheating, or stealing?

11 A No.

12 Q Now has anyone had a conversation with you
13 about what will be done for you in exchange for your
14 testimony in this case?

15 A No.

16 Q Well, has anyone suggested that you won't be
17 arrested if you testify in this case?

18 A No. Not be arrested for what? I'm just
19 telling the truth. I would have told the truth from the
20 beginning --

21 THE COURT: Just respond, sir. Respond to
22 the question.

23

24 Q Has anyone suggested to you that if you
25 testify in this case, you will not be charged as an

1 accessory?

2 A No.

3 Q And have any promises been made to you by
4 anybody involved in this case as to any other help the
5 Commonwealth might give you?

6 A No.

7 Q Now when you made a statement to the police
8 that wasn't true, was that your initial statement to the
9 police?

10 A What you mean?

11 Q Untruthful statement.

12 A What you mean by the initial? What's --

13 Q Okay, let me rephrase that. You've admitted
14 to Judge Poindexter that you initially made a statement to
15 the police that wasn't true.

16 A Yes, I told 'em -- I didn't write no
17 statement, I don't think. I just told 'em, you know.

18 Q Okay. When was that statement made? What
19 date, if you recall?

20 A I can't recall what date.

21 Q Was it within a few days of the shooting?

22 A It was -- I guess it was the same day of
23 Terence arrest. I believe. I'm not sure.

24 Q Do you know when that was?

25 A No.

1 Q Do you recall if your initial statement,
2 your first statement to the police, was within a week of the
3 shooting? Or more than a week? If you recall.

4 A It was within a week. It wasn't after a
5 week.

6 Q Okay. And the second statement, you
7 actually made a second statement to the police, did you not,
8 that was not true? In other words you told the police a
9 story. You said Terence and I spent the night at my place,
10 we woke up around noon, we don't know anything about the
11 shooting. That was your first statement to the police.
12 True?

13 A Yes.

14 Q Okay. And you've admitted that was not a
15 truthful statement.

16 A Right.

17 Q All right. Did you not then make a second
18 similar statement to a polygraph examiner?

19 A Yes.

20 Q And you made in essence the same statement
21 to that polygraph examiner, did you not?

22 A Yes.

23 Q I think that was at state police
24 headquarters, maybe?

25 A Yeah.

1 Q And you were -- after you made that
2 statement, you were then put on a polygraph machine, were
3 you not? A lie detector test.

4 A Yeah.

5 Q And you were asked, were you present when
6 the shot was fired that caused the death of Officer Gibson.
7 Do you recall being asked that question?

8 A I can't recall what questions I was asked
9 then but I was asked questions.

10 Q Did you answer the questions truthfully that
11 the polygraph examiner asked you?

12 A No.

13 Q Now had this state police polygraph examiner
14 advised you of your Miranda rights before he asked you these
15 questions? Do you know what Miranda rights are?

16 A No.

17 Q Did he tell you that you had the right to
18 remain silent, you didn't have to answer his questions --

19 THE COURT: Mr. Boone, why are we getting
20 into all of that?

21 MR. BOONE: I'm sorry?

22 THE COURT: Why are we getting into all of
23 that? He said he did not tell the truth.

24 MR. BOONE: I understand. But I just want
25 to know, for instance he's testified today after

1 being sworn. I'm just curious if he had any type
2 of procedure when he made that statement. At the
3 state police headquarters. Was he sworn, was --

4 THE COURT: I don't think it's relevant. He
5 doesn't even know what Miranda is. It doesn't make
6 any difference whether they had or they hadn't. He
7 said under oath today that at the second time he
8 told a -- he did not tell the truth.

9 MR. BOONE: Thank you.

10

11 MR. BOONE, continuing --

12 Q Were you placed under oath on either of
13 those occasions when you made an untruthful statement to the
14 police?

15 A No, not that I recall.

16 Q When did you first tell the police a story
17 that's consistent with what you've told the Judge today?

18 A I told them the truth the same day at the,
19 um, that I took that polygraph test. The same night. I
20 told 'em the truth then. I went on and told them what
21 really happened.

22 Q And did you tell the truth after you were
23 told you flunked the polygraph?

24 MR. CHAPPELL: Objection, Judge.

25 Inadmissible.

1 THE COURT: Well, it's so clear to me. I
2 don't know what --

3 MR. CHAPPELL: Well, I make the objection.
4 It's not admissible evidence. I'd ask that it be
5 stricken.

6 MR. BOONE: I'm not asking --

7 THE COURT: You mean whether he flunked it?

8 MR. CHAPPELL: Yes, ma'am.

9 MR. BOONE: I'm not asking him if he flunked
10 or passed. I'm asking if he made this other
11 statement after he was told.

12 THE COURT: Oh, the results? The Court will
13 allow that. Maybe I'm jumping ahead of you-all,
14 but I -- I can see what happened.

15

16 MR. BOONE, continuing --

17 Q Do you understand the question? The
18 question to you is after you were told the results of the
19 polygraph, did you then tell the truth?

20 MR. MORCHOWER: Or change his story.

21

22 A No, I told the truth after I told them what
23 the circumstances was. Then they gave me the results of the
24 thing.

25 THE COURT: Oh, okay. So that's his

1 response.

2

3 Q And do you recall on how many occasions you
4 told the police or representatives of the Commonwealth a
5 story that was not true? You've just told the Judge about
6 two different times. How many times total did you tell the
7 police a story that wasn't true?

8 A I told 'em that one time that it was not
9 true when they first took us down.

10 Q I understand. You just told the Judge about
11 two different times where you told an untruthful story about
12 what happened. My question is other than those two times,
13 were there any other times you told the police a --

14 A Everything that I told them was true.

15 Q You've described the way Terence was dressed
16 on this date. Blue jeans, a T-shirt with a marijuana leaf
17 on it with the word blunted; is that correct?

18 A Yes.

19 Q And did the word actually say b-l-u-n-t-e-d?
20 Was that the word?

21 A I don't recall what the words -- marijuana
22 something. I just told 'em blunted. The shirt had a
23 marijuana leaf on it.

24 Q Did it have a word on it?

25 A I think it had marijuana under the leaf. Or

1 over top of it.

2 Q A picture of a marijuana leaf and the word
3 marijuana?

4 A Yes.

5 Q Okay. And what are you saying about
6 blunted? That's where you're losing me.

7 A That's what I just said, blunted as in a
8 marijuana blunt.

9 Q That's what it meant?

10 A Yeah. That's what I was saying. I didn't
11 say that it had that on the shirt.

12 Q Oh, that's what I'm trying to figure out.
13 So he had on blue jeans. Terence had on blue jeans on this
14 date and a white T-shirt with a marijuana leaf that may have
15 had the marijuana. Right?

16 A Yes.

17 Q And do you recall if either Terence or Mr.
18 Claiborne was wearing a hat?

19 A No.

20 Q No, they weren't wearing a hat?

21 A No. Not that I recall.

22 Q Were you wearing a hat?

23 A No.

24 Q Was Officer Gibson wearing a hat?

25 A Did he have a hat on? I don't recall him

1 having a hat on when I seen him go around the side.

2 MR. BOONE: Your Honor, that's all I have.

3 Thank you.

4 THE COURT: Thank you. Mr. Morchower?

5

6 CROSS-EXAMINATION

7

8 BY MR. MORCHOWER:

9 Q Sir, so you told the police three different
10 stories?

11 A Yeah, I told 'em -- yes.

12 Q Three different stories.

13 A No, I told 'em two different stories.

14 Q All right.

15 THE COURT: I think you're saying times.
16 Three different times. He's saying --

17

18 Q Well, the first time, the first interview
19 was with the police, was a couple of days after the
20 shooting.

21 A Yes. I believe so.

22 Q Second time was when you were picked up and
23 taken to police headquarters for a polygraph.

24 A Yes.

25 Q So you told them once -- you told them that

1 that -- your first version was two days after the shooting.
2 The second version was when you went to take the polygraph?

3 A And that second version was the same thing
4 as the first version.

5 Q Right.

6 A So that's one version.

7 Q That's one version. In fact when they
8 picked you up, they drove you to the police headquarters to
9 take the polygraph.

10 A Yes.

11 Q And you had talked about this for part of
12 the time you were in the car, in the vehicle, heading to the
13 state police barracks. You talked about the incident; is
14 that correct?

15 A No. I don't recall talking about it.

16 Q So you stuck to the first two versions for
17 about a week.

18 A I don't know how long I stuck to it. I
19 stuck to it --

20 Q How long did you stick with the first two
21 versions? Which were the same. How long did you stick with
22 that version -- those -- that version?

23 A I stuck with it until I explained to them
24 the incident where I had that version.

25 Q All right. So you are saying that -- you're

1 saying that you are a convicted felon; is that right?

2 A Yes.

3 Q How many times over?

4 A It ain't no how many times over. One time.

5 Q Yeah? Do you have any pending felony
6 charges against you now?

7 MR. CHAPPELL: Objection. It's irrelevant.

8 MR. MORCHOWER: Well, it goes to
9 credibility.

10 THE COURT: Well, I guess he's trying. The
11 question was asked were there any deals made. The
12 Court will allow it.

13

14 MR. MORCHOWER, continuing --

15 Q Do you have a pending felony charge now?

16 A Yes.

17 Q What jurisdiction?

18 MR. CHAPPELL: Objection. Irrelevant.

19 THE COURT: If it's Sussex it's relevant.

20 Is it Sussex?

21 THE WITNESS: No.

22

23 MR. MORCHOWER, continuing --

24 Q Have you talked with the Sussex
25 Commonwealth's Attorney about your other case that's pending

1 now?

2 A Have I talked to him about it?

3 Q Yes.

4 A Yeah. They don't have nothing to do with
5 that.

6 THE COURT: Sir, you are to answer the
7 questions.

8

9 Q My question is did you speak with this
10 Commonwealth Attorney at all about the pending charge in the
11 other jurisdiction?

12 A No, I didn't speak to him about it, talk
13 about it.

14 Q Never mentioned it to the Commonwealth
15 Attorney. Who's sitting over here.

16 A No, I didn't speak to him about it. He
17 asked me about it.

18 Q All right. And did you discuss it with him?
19 Or respond. Did you respond to his questions?

20 A Yeah, I responded.

21 Q All right. Now, did you talk to any -- any
22 sheriff or deputy sheriff from Sussex about the case that is
23 now pending in a neighboring jurisdiction?

24 A No.

25 Q So the first time the pending charge was

1 mentioned was when this Commonwealth Attorney mentioned it
2 to you. Or asked you about it.

3 A Yes.

4 Q That's the only time you mentioned it to any
5 law enforcement connected with Sussex.

6 A I believe so, yeah.

7 Q You believe so or it is so?

8 A I believe so. That's the only time I
9 talked. I don't talk about it.

10 THE COURT: Are you saying you don't know or
11 are you saying yes or you're saying no?

12

13 A I'm saying no, because I don't talk about
14 it.

15 Q When you were arrested in the neighboring
16 jurisdiction did you mention anything about any matter or
17 any situation in Sussex to any law enforcement officer in a
18 neighboring jurisdiction?

19 MR. CHAPPELL: Judge, I don't see where the
20 relevancy of all of this is.

21 THE WITNESS: No.

22 THE COURT: Well, I could see it could be
23 relevant if there was any promises made to this
24 man.

25 MR. CHAPPELL: Well, I mean that's the

1 question that's coming.

2 THE COURT: The Court will allow it. Go
3 ahead, Mr. Morchower.

4 Did you understand the question, sir?

5 MR. MORCHOWER: I'll repeat it.

6

7 MR. MORCHOWER, continuing --

8 Q To your knowledge did any officer from the
9 neighboring jurisdiction where the current charge is
10 pending, you're saying you never mentioned anything about
11 Sussex to any of them.

12 A No. As I recall I ain't talked to them
13 about no Sussex.

14 Q Now, when you were interviewed by the state
15 police in this case, early on, the first version when you
16 had -- the first version, didn't you give the police a
17 Leonard Newby as a suspect in the murder, or in the shooting
18 of the police officer?

19 A Did I --

20 Q Yes or no.

21 A Yes.

22 Q And you gave Newby's name because he had
23 dreads and a ponytail?

24 A I just gave it to 'em 'cause that's the only
25 person I could think about other than Terence that had

1 dreads. Or plaits in their head.

2 Q So you just gave up a name. Right? Of a
3 person who might have don't shooting. Is that correct? Yes
4 or no.

5 A No, that's not -- no, that's not correct. I
6 gave that for to comply with the story that I gave 'em,
7 because I had a reason to give 'em that story first.

8 Q So you just picked Newby because he had a
9 pony -- he had dreads. So you picked his name and you
10 picked him out. Right?

11 A No, because that's what, you know, other
12 people were saying, so I just --

13 THE COURT: Is your answer yes or no?

14 THE WITNESS: Yes.

15 THE COURT: All right.

16

17 MR. MORCHOWER, continuing --

18 Q So you didn't just pick his name out of thin
19 air, did you? You didn't pick Leonard Newby's --

20 THE COURT: Mr. Morchower, he's said about
21 three times this man had dreads or plaits.

22

23 Q No, I'm talking about the person. Did you
24 pick Newby out of thin air or did you pick Newby out because
25 other people were mentioning his name?

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(Whereupon the photograph was presented to the Court.)

THE COURT: Okay. Anything further?

MR. CHAPPELL: Judge, that's the Commonwealth's case on preliminary hearing.

THE COURT: Commonwealth's case. Okay.

MR. MORCHOWER: Judge, on behalf of Mr. Ferrone Claiborne, there is just absolutely no evidence, Your Honor, I respectfully submit to the Court, that ties him directly or indirectly, any -- there's nothing concrete, unlike some of the evidence that the Court heard, in reference to Mr. Claiborne there is no evidence, there's no nexus. Now the Court knows mere presence, the only evidence you have is that he was there. Somewhere in and around the apartments. Probably in and around the apartments sometime -- we don't know exactly when. But at some point you heard from the one witness who said he was there at some point. But there's nothing to tie him in, unlike you have -- unlike the other evidence that the Court heard that I'm going to -- I'll let two other lawyers quarrel over that evidence.

In terms of this defendant, there's just no

1 evidence, Your Honor, to tie him in to the shooting
2 other than he might have been in and around the
3 area when the shooting occurred. And even on a
4 probable cause inquiry, which is a matter of
5 interpretation, but there is no probable cause in
6 the way of evidence to believe that he participated
7 in the shooting, Mr. Claiborne. There's just none.
8 Directly, indirectly, forensically, through any
9 police statement. Through any statement from --
10 from the victim. There's nothing to tie in this
11 defendant with the shooting. There's no nothing.
12 And I'd like to have -- I'll reserve any final
13 argument until I hear what the Commonwealth can
14 argue in terms of specific evidence that has a
15 probative -- that has probative value other than
16 possibly mere presence. Which is never enough in
17 any jurisdiction in any court in the Commonwealth
18 of Virginia or anywhere else in this country.

19 THE COURT: Okay. Mr. Chappell?

20 MR. CHAPPELL: Judge, to respond to --

21 MR. BOONE: Judge, could I make my motion
22 first?

23 THE COURT: Let me just get -- since it's
24 two defendants, get one on one. Let the
25 Commonwealth's Attorney respond to the argument of

1 Mr. Morchower.

2 MR. CHAPPELL: Judge, I think the Court, for
3 purposes of Mr. Claiborne, needs to look at the
4 totality of evidence from both of the
5 Commonwealth's witnesses. I'll start with Trooper
6 Williams, who gives the description of the --
7 essentially what amounts to a dying declaration
8 from Officer Gibson. You heard as well as we did
9 the description of the two individuals. The
10 struggle that occurred. The concert of action
11 between the two individuals that we know ultimately
12 led to a shooting and death of Officer Gibson.

13 We also think you pair that up with the
14 testimony of Shawn Wooden, who indicates that the
15 purpose for all of them being together that morning
16 was for a drug transaction. In fact Mr. Claiborne
17 indicated when they got to Peace Funeral Home and
18 then ultimately to Waverly Village that they were
19 going to see a guy at the back for that purpose.

20 Of course you've heard the testimony from
21 Shawn Wooden regarding where these individuals did
22 go in the back, behind the apartment complex.
23 You've also heard that the wooded area where
24 Officer Gibson was found is directly in the back,
25 behind the last apartment building. We submit to

1 the Court that Officer Gibson went on one side of
2 this building in the back at the same time that
3 Claiborne and Richardson went on the other side to
4 the back. They had a lookout for this drug
5 transaction, which was Shawn Wooden, who indicates
6 that he made certain verbal motions when, or verbal
7 utterances when the officer drove up. We had the
8 officer going back. We have the two defendants
9 going back. We have from Trooper Williams the
10 description of the individuals. The struggle that
11 occurred with the gun. And of course the
12 subsequent death of the officer.

13 Judge, we submit for probable cause purposes
14 that the defendant Claiborne was in fact obviously
15 not the trigger man. The evidence is that Terence
16 Richardson fired the shot, fired the fatal shot.
17 We do believe for purposes of the hearing that
18 taking in totality all of the circumstances, that
19 Mr. Claiborne's role in this does rise to a
20 principal in the second degree to the killing and
21 believe that that's where the case stands at this
22 point. We do think there's evidence beyond simply
23 presence that Mr. Morchower has alluded to.

24 MR. MORCHOWER: In response, briefly?

25 THE COURT: Yes, sir.

1 MR. MORCHOWER: Judge, if you even look at
2 Mr. Terence Richardson's statement, he said that he
3 accidentally shot the officer. He. Didn't say
4 they. There's just no evidence, Your Honor. It
5 doesn't -- you know, it's most unfortunate what
6 occurred in terms of Mr. Gibson losing his life.
7 But there's nothing to tie in Mr. Claiborne. And
8 whether it's a -- it's a police officer or anyone
9 else, there's got to be some probative evidence.
10 Not just speculation. The Commonwealth is
11 speculating that he, Mr. Claiborne, went back
12 there. That he participated in the shooting.
13 Because even the dying declaration doesn't -- we're
14 not going to assert -- I don't think the Court's
15 going to consider evidence of a probative value
16 that there was a tall skinny guy with dreadlocks
17 and a ponytail and another one who wore a baseball
18 cap and a white shirt. The Court knows you can't
19 make any -- any kind of identification, none
20 whatsoever. You can't make it on dreadlocks. You
21 can't make it on tall skinny kid. You can't make
22 it on dreadlocks --

23 THE COURT: The ID is on Shawn -- what's his
24 name? Shawn Wooden's testimony.

25 MR. MORCHOWER: The ID is.

1 THE COURT: I agree with the officer's
2 description, as I said earlier. It's -- it would
3 be so subjective for a -- for a young officer. I
4 mean he may see --

5 MR. MORCHOWER: I understand.

6 THE COURT: -- see braids and think it's
7 dreadlocks. I know what dreadlocks are. But they
8 could be, for a person who is not familiar with
9 hairdos, African-American hairdos, may say
10 dreadlocks when they're thinking about braids. So
11 the Court doesn't give that much credence to the
12 testimony of the dying declaration. But the ID by
13 Shawn Wooden -- and the Court would have to accept,
14 which I do. Even though it's clear there was a
15 third statement that he gave. He's a convicted
16 felon. It may be some interest he had. But
17 looking at the witness and his demeanor and the way
18 he testified --

19 MR. MORCHOWER: What does he say about
20 Claiborne?

21 THE COURT: Claiborne was with him.
22 Claiborne went back, the three men were together.

23 MR. MORCHOWER: He went back. Mere
24 presence. Mere presence. There's case law.

25 THE COURT: Mr. Morchower, I understand what

1 you're saying. That coupled with the dying -- now
2 we get back to the dying declaration in terms of
3 what happened. What do you know, except for the
4 dying declaration.

5 MR. MORCHOWER: And what does that show?
6 It's no intent.

7 THE COURT: Identity. The two men who were
8 back there struggled. And the Court finds for
9 preliminary hearing -- for the preliminary hearing
10 that the one in the struggle with the officer was
11 indeed Ferrone Claiborne. The other one, Terence
12 Richardson.

13 MR. MORCHOWER: You're furnishing -- you're
14 furnishing facts that are not in evidence. Which I
15 think is improper.

16 THE COURT: The Court finds based on my
17 understanding and recollection and appreciation of
18 the testimony of the -- Trooper Williams, the Court
19 finds that the activity or the involvement of
20 Ferrone Claiborne in the struggle has been
21 established.

22 Do you have other motions or arguments?

23 MR. MORCHOWER: I'd like to have the case
24 set for trial next week so we can have an innocent
25 man released on bond. At least until then.

1 THE COURT: You're asking for a trial.

2 MR. MORCHOWER: I'm asking for an immediate
3 trial date and I'm asking for bond for this young
4 man under these circumstances because of the flimsy
5 evidence that the Court has heard.

6 THE COURT: Right now we're at the
7 preliminary hearing. Any other motions relating to
8 Mr. -- Mr. Boone, do you have any?

9 MR. BOONE: I certainly do.

10 THE COURT: The Court will hear from you.

11 MR. BOONE: Well, Judge, I assume the
12 prosecution has a motion to amend the warrant. The
13 date.

14 MR. CHAPPELL: I do, Judge. Thank you.
15 Judge, the warrant is dated the 26th and we would
16 amend to conform with the evidence to April 25th.

17 THE COURT: Okay, which one is that?

18 MR. CHAPPELL: That would be for Mr.
19 Richardson.

20 THE COURT: Okay. This is Mr. --

21 MR. CHAPPELL: Terence Richardson. They
22 apparently went over to the date of the swearing
23 out, which was the next day. The 25th should be
24 the --

25 THE COURT: So Claiborne's warrant should be

1 amended?

2 MR. CHAPPELL: Claiborne's is correct.
3 Richardson's --

4 THE COURT: Okay, motion of the Commonwealth
5 to amend the date to conform with the evidence.
6 Court will grant. April 25th.

7 MR. BOONE: Judge, I have a motion to
8 strike, and I'm not going to repeat Mr. Morchower's
9 argument, but I would certainly adopt it. That was
10 excellent, I thought it was excellent, I might add.

11 I think we all agree that this is a sad
12 situation, and it's equally sad that we've got to
13 have this preliminary hearing today after a
14 Richmond police officer was shot and killed in the
15 line of duty. But nevertheless, the Court, in your
16 duty as an impartial judge, has to look at the
17 evidence and call the shots as you see them.

18 Here, I would suggest, that if you look at
19 the Commonwealth's evidence in the light most
20 favorable to the Commonwealth, and certainly that's
21 what you've got to do at this point. I suggest
22 here, Your Honor, that their evidence shows that
23 this is a manslaughter case. What better witness
24 than Allen Gibson? Allen Gibson told Trooper
25 Williams, we were struggling over my gun and it

1 "Just went off."

2 You've got a Glock .45 caliber handgun with
3 a clip in it. Now we don't know how many bullets
4 are in that clip, but the argument I'm making is if
5 this were an intentional killing, the perpetrator,
6 the individual pulling the trigger, would arguably
7 pull the trigger more than once. But here you've
8 got a dying officer saying the gun just went off.
9 As we were struggling for it. That's a
10 manslaughter case. It's under one of two theories.
11 It could be argued that it's involuntary
12 manslaughter, it's recklessness, the way the
13 defendant was trying to grab the gun away from the
14 officer. That was certainly unlawful. Certainly
15 criminally negligent. It also could be argued that
16 there is a mutual combat over the firearm. And it
17 went off. But nevertheless, we know what the
18 eyewitness, who is the victim of this crime, said.

19 Then you've got, within minutes of the
20 shooting, the statement made by Mr. Terence
21 Richardson to Shawn Wooden. He said I accidentally
22 killed the police officer. Accidentally. So for
23 this case to -- and I realize this is a probable
24 cause hearing. It doesn't take a lot of evidence
25 to --

1 THE COURT: Exactly.

2 MR. BOONE: I understand that. But for it
3 to be certified as murder -- forget capital murder.
4 We'll concede that if you find it to be murder it's
5 capital, because the officer was performing his
6 duties as a police officer. But the question is
7 was it murder. If it was Terence Richardson who
8 pulled the trigger, did he intend to kill the
9 officer, was it with premeditation. That's
10 required for the case to be a first degree murder
11 case.

12 And of course for it to be a second degree
13 murder case the Commonwealth would have to show
14 even though it wasn't premeditated it was an
15 intentional killing with malice aforethought. Here
16 all they can show, Your Honor, is that an officer
17 goes into the woods, and within minutes, within
18 minutes, he's killed by his own weapon. As he lies
19 dying he says we were struggling over my weapon.
20 It just went off.

21 I was going to argue something else but I
22 won't because I realize your position with
23 principal in the second degree, but as far as what
24 the nature of the offense is, I very strongly urge
25 Your Honor to certify it as a manslaughter case.

1 THE COURT: Okay. Mr. Chappell?

2 MR. CHAPPELL: Judge, we think Mr. Boone's
3 arguments are, as always, well formulated and
4 thought out. I do think they are arguments that
5 should be for a trier of fact at the circuit court
6 level.

7 For purposes of this proceeding, you have an
8 officer who admittedly, and I think everybody will
9 acknowledge, was performing lawful duties. You
10 have what the evidence shows to be a drug
11 transaction, an illegal transaction in the back.
12 You have this police officer shot with his own --
13 his own duty weapon, his own statement. It's
14 something to the effect that I was shot with my own
15 damn gun. There is a struggle. Clearly we think
16 for purposes of this hearing that the Commonwealth
17 on Mr. Richardson has proven the case or put on
18 evidence sufficient to certify the matter as he is
19 charged.

20 Of course Mr. Richardson admits to the
21 shooting. He also throws accident in the mix.
22 That's something, I think, to be considered at some
23 point, but I think for purposes of today we do have
24 a killing. Of a police officer. In the
25 performance of his duties with his own weapon

1 during a transaction -- a felony criminal
2 transaction, which is a drug transaction. That
3 never went down by Mr. Richardson's own admissions
4 to Mr. Wooden that they never got the drugs. We
5 feel taken in totality, as in the other case, that
6 the evidence is sufficient to certify. We would
7 ask you to do that.

8 MR. BOONE: Judge, just briefly, if I might
9 rebut.

10 THE COURT: Yes.

11 MR. BOONE: There's no evidence that a drug
12 transaction went down. Officer Gibson said there
13 were two individuals. Two, not three. Secondly,
14 Mr. Shawn Wooden said I never saw the drug dealer
15 that we were supposed to meet. No one has seen a
16 drug dealer. Plus when Terence Richardson came to
17 him minutes later, Shawn asked him did you get the
18 drugs. And he had said no. So there is no
19 evidence of any drug transaction. I want to make
20 sure that's clarified to the Court.

21 THE COURT: I don't think I have to find
22 that, because you look at 18.2-316, it's very
23 broad. It says when such killing is for the
24 purpose of interfering with the performance of his
25 official duties.

1 MR. BOONE: But by definition it has to be a
2 premeditated murder.

3 THE COURT: It's rather broad.

4 MR. BOONE: But first degree murder is a
5 lesser included offense of capital murder. To be
6 capital murder it's got to be a premeditated,
7 intentional killing.

8 THE COURT: But I'm just saying in terms of
9 the Commonwealth establishing that a drug deal had
10 occurred --

11 MR. BOONE: No, I agree a hundred percent.
12 He made the argument so I just want to clarify.

13 THE COURT: It is -- what is it, willful,
14 deliberate, and --

15 MR. BOONE: I think his argument was tending
16 to persuade you of the felony murder doctrine. I'm
17 not sure where he was going with that. But anyway,
18 the point I was making is that's not a correct
19 statement of the facts as I heard them. But for
20 purposes of this statute we don't need them. And I
21 agree it's a probable cause hearing. If all we
22 had -- if all we had was Officer Gibson saying
23 Terence Richardson shot me with my weapon, if
24 that's all we had, bingo, it would be certified as
25 capital murder. I have no question. I would not

1 be standing here arguing. But it was Officer
2 Gibson himself who said the gun just went off as
3 they were struggling over it. There is a situation
4 where two people, Officer Gibson and Terence
5 Richardson, are jostling, trying to get the gun
6 away from each other. Boom, it goes off. That is
7 not murder. That's manslaughter. And this case
8 should be certified as manslaughter.

9 I stand here, and I'm sure there's relatives
10 of Officer Gibson in the courtroom. We all mourn
11 Officer Gibson. All of us. But the amazing thing
12 about this case, it's Officer Gibson, I think, who
13 set the record straight. He's the one, as he's
14 dying, said I want to let everybody know what
15 actually happened. He's the person who said that.
16 And that is something that speaks louder than
17 anything I can say in my argument. That's what
18 happened. And I'm sorry that it was a police
19 officer. I'm sorry that it was anybody. But it
20 just happened to be a police officer. But we can't
21 say well, because it was a police officer, boom,
22 let's automatically certify it as a capital murder
23 case. I think Your Honor has to say wait a minute,
24 Mr. Commonwealth, there's got to be evidence of
25 premeditation and intentional shooting. The record

1 shows it was an accident.

2 THE COURT: Mr. Boone, you can be assured
3 that I would not do that, sir.

4 MR. BOONE: I'm sorry?

5 THE COURT: I would not do that just because
6 you have a murder of a police officer.

7 MR. BOONE: No, but I think we all agree
8 that sometimes we as a society treat cases
9 differently when the victim is a more important
10 person than a less important person, or a police
11 officer --

12 THE COURT: Well, I think more important is
13 to look at our purpose here today. This is not a
14 trial on the merits, guilt beyond a reasonable
15 doubt. When you start counting up the years that
16 all of us have been in this business, we probably
17 all agree it's a rather archaic system, the
18 preliminary hearing, because I generally take the
19 position if you have identity, you have activity
20 within the scope of the statute, which in this case
21 is very broad, that it is not the role and place in
22 the preliminary hearing to get into the various
23 degrees of whatever it is and what have you.
24 Because the Commonwealth did not have to put on all
25 this evidence and the defense usually put on no

1 evidence.

2 MR. MORCHOWER: We can represent that the
3 Commonwealth has put on its best face for this
4 preliminary hearing.

5 MR. CHAPPELL: Well --

6 THE COURT: Yes, sir. I'm not going to even
7 consider that. And what --

8 MR. CHAPPELL: Mr. Morchower can always get
9 one in.

10 THE COURT: You-all are not in this court
11 often and you know what I did for twenty years
12 before I got here. And I don't think it's a role
13 of the district court judge in preliminary hearing
14 to comment. And I try not to do that. To comment
15 on the Commonwealth's evidence. And I was trying
16 not to do that. All I would say, that within the
17 scope of the purposes of the preliminary hearing --
18 and I listened to the evidence very carefully, I
19 think, about the dying declaration. And the
20 statements of Shawn Wooden together. The
21 Commonwealth's case may have fallen short, but
22 based on the evidence before me, I do find that
23 there's probable cause to certify these two cases
24 to the grand jury and I'm going to do that.

25 Mr. Chappell will give you the dates, I

1 think, next month. I don't have the dates.

2 MR. MORCHOWER: Would the Court -- in terms
3 of bond, would the Court review that? In view of
4 what the Court heard in the way of evidence? In
5 terms of Mr. Claiborne? No record and he was
6 employed --

7 THE COURT: No, the problem is once I
8 certify the case I believe I lose jurisdiction.

9 MR. CHAPPELL: Judge, I would certainly --

10 THE COURT: I think the better approach
11 would be to have a bond hearing in circuit court.

12 MR. MORCHOWER: Tomorrow?

13 THE COURT: I don't know. I'm going to sign
14 these papers right now. I did -- I did look at --
15 I don't recall the defendants. I looked at some
16 information earlier. I'm going to certify the
17 matters. If you want a bond, it will probably have
18 to be a motion at the circuit court. I don't have
19 the dates. I really don't. I'm sure Mr. Chappell
20 would not stand in the way -- you want to keep
21 these to the earliest dates as possible.

22 MR. MORCHOWER: The problem is in this
23 jurisdiction, as the Court knows from its years of
24 experience, to locate a judge, you're unfortunately
25 bound by the court's next date in this

1 jurisdiction. I don't think it's fair to wait
2 until the court arrives in this jurisdiction --

3 THE COURT: What is your term day?

4 MR. CHAPPELL: The regular term day would be
5 November 10th.

6 THE COURT: Okay. That's thirty days. The
7 judge will be here on November 10th if you want to
8 have he -- and the case will be set for trial
9 sometime --

10 MR. CHAPPELL: We typically do it that day,
11 but I'm assuming we will be together well before
12 then. We can address the bond situation well
13 before then.

14 THE COURT: There's no reason in the next
15 sixty days -- and that's not my responsibility.
16 But usually the grand jury is one month and the
17 trial is the next month; is that right?

18 MR. CHAPPELL: It varies. But I don't see
19 it as a problem.

20 MR. MORCHOWER: Thank you, Your Honor.

21 THE COURT: Is there any other business to
22 come before the Court at this time? If not, we'll
23 stand adjourned.

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CERTIFICATE

I, Debra D. Bowden, hereby certify that I, having been duly sworn, was the court reporter in the General District of the County of Sussex on October 15, 1998, at the time of the matter recorded herein.

I further certify that I have transcribed the proceedings faithfully and accurately, to the best of my ability.

Given under my hand this 30th day of October, 1998:


Debra D. Bowden - Court Reporter

Jack Davis & Assoc., Inc.

P. O. Box 717
Quinton, Virginia 23141-0717
Tel/Fax: (804) 966-2422

Virginia License ID #: 11-1936
Federal ID #: 54-1764451

Via facsimile

PRIVILEGED AND CONFIDENTIAL

August 5, 1998

David E. Boone
Boone, Beale, Cosby & Long
27 North 17th Street
Richmond, Virginia 23219-3607

Re: Commonwealth v. Terence Jerome Richardson

Dear David:

I completed my review of the Discovery materials which were recently submitted by Dave Chappell, Sussex County Commonwealth's Attorney. Much of it is not pertinent. The relevant documents have been arranged in a logical order for inclusion in the Trial Book. Barbara has what she needs to put it together. There are some additional documents which we had received earlier, which should be placed in the Trial Book at a later date. I think you have everything you will need for the Preliminary Hearing 8/10/98.

We had earlier discussed the three things we had going for us, namely:

1. Yvette Newby's statement to Waverly Chief of Police, Warren Sturrup, that she had been pressured to say what she did to authorities under a threat of bodily harm. The Chief did not ask her any questions, only listened to what Newby was telling him. The assumption of what she was referring to are obvious. **This information is still standing.**

2. Waverly Officer Ken Russell, and former brother-in-law of Officer Allen Gibson, having seen Leonard Newby, who did have actual dreadlocks, in the Sussex Trace Apartments, a short distance from where the shooting took place in the Waverly Village Apartments, on the morning of the shooting. This information had come from Chief Sturrup. I spoke with Officer Russell and he said he had not seen Newby, but had been told by a woman in the Waverly Village Apartments, whom he believed to be Hope Pierce, that she had heard that someone had seen Newby in Sussex Trace that morning (4/25/98). When Joe Higgins and I were in Sussex and Surry Counties last Friday, we interviewed Ms. Pierce. She didn't even remember having told Officer Russell about having been told by someone about Leonard Newby being seen in Sussex Trace, until prompted. She didn't know where she had heard that. She is extremely upset with Chief Sturrup about his conduct following the shooting, and is still waiting for an apology. **This initial information appears to be extremely flawed.**

3. Again, according to Chief Sturrup, Shawn Wooden, probably the Commonwealth's key witness, contacted Surry Sheriff Harold Brown after the shooting to say that "they had the wrong man; that Ferrone Claiborne was not even there". This obviously created the impression that Wooden lied when he made his statement about being the lookout for Richardson and Claiborne, but that Wooden was also there, or how would he know. Last Friday, Higgins and I interviewed Sheriff at length. He recalled receiving a call several days after the officer was shot, from Shawn Wooden's father, whom he knew. Mr. Wooden was concerned that the police were looking at the wrong man. Sheriff Brown recalled that Mr. Wooden had been told by his son that "Claiborne wasn't there, he was with him watching cartoons that entire morning", or words to that effect. Mr. Wooden then put Shawn on the phone and he told Sheriff Brown the same thing. The Sheriff then related this information to Chief Sturrup. It should be noted the Sheriff apparently got it wrong. When he received this information, Shawn Wooden was telling the Sheriff's Department that Terance Richardson was with him watching cartoons that morning (not Claiborne), and persisted in this story until he failed a polygraph by the VSP in Chesapeake on 5/11/98, and made a statement, putting himself in the middle as a lookout man for the defendant and his co-defendant. This again appears to fall through the cracks as anything of value for the defendant.

As we have discussed, witnesses have described a shirt similar to the one worn on the morning of the shooting by the Defendant, as having been worn by one of the assailants; white with a marijuana leaf, and some red on the front. A shirt was taken from Defendant's father's house during the early morning hours of 4/26/98. The Defendant's father is Nathan Westbrook, and he lives a short distance from where the shooting occurred. The defendant had not been there for about two weeks, but did from time to time stay with his dad. Defendant had his own room, for which he did not pay rent. Mr. Westbrook gave permission for the search of the Defendant's room, where the similar shirt was located, tucked back, I think, in a stereo. The defendant states he used that shirt to clean his shoes. It was damp and soiled when recovered by police.

There are three issues with respect to Discovery, that I think need to be pursued:

1. There is no lab report concerning the Gun Shot Residue test on Officer Gibson's hands (that I can find). One was conducted and submitted.

2. The Medical Examiner's report stated that there was no evidence of stippling (gun powder residue). This would indicate the weapon was fired at a distance of 12 - 18 inches. In looking at the ME's report, it appears that she was making reference to her examination of the victim's skin, since I located a separate report from the Sussex County Sheriff's Department, submitting for examination Officer Gibson's clothing, which would have shown stippling, not his skin.

3. The results of the laboratory examination of the officer's clothing for

David Boone
August 5, 1998
Page Three

evidence of stippling.

I'll call Det. Tommy Cheek, Sussex County, tomorrow about these three issues, and get word to you through Barbara; I'll be doing it on the fly tomorrow, because I'll be out of town part of the day.

I noted that there is information that Officer Gibson did take out a \$60,000. life insurance policy on his life, shortly before the shooting. The beneficiary was his former wife, the mother of his daughter. He took out a smaller policy on his daughter. This was all connected to his employment with the Waverly PD, where he had recently gone to work.

There is also information in the Discovery materials, that Officer Gibson may have attempted to commit suicide on 12/5/95, in Norton, Virginia. I have not delved into this situation, as I just came across the information today.

We discussed the information that Officer Gibson's last statement before loosing consciencesnous was that the "tall thin one" (according to Deputy Sheriff Rick Aldridge), was the one he was grappling with over his weapon. According to the ME report Officer Gibson was 5'11", and Chief Sturrup, 5'11 and 1/2", and he probably would not have referred to someone his own approximate height as "tall". It is noted that the defendant is about 5'8", 150, whereas the co-defendant is 6', 165. According to what Officer Gibson told Deputy Aldridge, he and the assailant were grappling over the gun when it went off; implying it was an accident. Obviously, the "tall" one, given the two defendants, would be Claiborne, not our client. You will see in the information contained in the Trial Book, that there is some discrepancy in the description provided by Officer Gibson and the reports of others.

Lastly, you said you wanted me to attend the Preliminary 8/10/98. Do you want to ride down together or meet there. I need to know, and the time of the PH.

Sincerely,



Jack Davis

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VIRGINIA,

IN THE CIRCUIT COURT OF THE COUNTY OF SUSSEX:

COMMONWEALTH

v.

98-314

TERENCE JEROME RICHARDSON

TRANSCRIPT of the stipulation of facts and other incidents in the trial of the above styled matter, as heard on December 8, 1999, before The Honorable James A. Luke, Judge.

-----o0o-----

PRESENT: Mr. J. David Chappell,
On behalf of the Commonwealth

Mr. David E. Boone,
On behalf of the Defendant

Mr. Terence Jerome Richardson,
The Defendant

-----o0o-----

ORIGINAL

1 THE COURT: Let the record show that the
2 defendant, Terence Jerome Richardson, is present
3 accompanied by his attorney, Mr. Boone.

4 Defendant ready to be arraigned, Mr. Boone?

5 MR. BOONE: Yes, Judge.

6 THE COURT: Mr. Chappell?

7 MR. CHAPPELL: Yes, sir. Judge, we would
8 proffer to the Court an amended indictment which I
9 would proffer to the clerk. It's my understanding
10 that the defendant is prepared to plead guilty to
11 that amended indictment.

12 THE COURT: The clerk will please arraign
13 the defendant on the amended indictment.

14
15 THE DEFENDANT, TERENCE JEROME RICHARDSON,
16 WAS ARRAIGNED ON AN INDICTMENT CHARGING THAT ON OR
17 ABOUT THE 25TH DAY OF APRIL, 1998, IN THE COUNTY OF
18 SUSSEX, HE DID UNLAWFULLY AND FELONIOUSLY KILL
19 ALLEN W. GIBSON, JR., BY COMMITTING INVOLUNTARY
20 MANSLAUGHTER ON THE SAID ALLEN W. GIBSON, JR.

21
22 THE CLERK: What say you, guilty or not
23 guilty to the indictment as amended?

24 THE DEFENDANT: Guilty.

25 THE CLERK: To involuntary manslaughter?

1 THE DEFENDANT: Guilty.

2 THE COURT: Before accepting your plea --
3 that's the only charge, isn't it?

4 MR. BOONE: Yes, Judge.

5 THE COURT: Before accepting your plea the
6 Court must ask some questions of you. You may have
7 a seat.

8 What is your full name?

9 THE DEFENDANT: Terence Jerome Richardson.

10 THE COURT: And your date of birth?

11 THE DEFENDANT: 5/23/71.

12 THE COURT: What was the last grade of
13 school that you completed?

14 THE DEFENDANT: Twelfth.

15 THE COURT: Are you the person charged in
16 the indictment which the clerk just read?

17 THE DEFENDANT: Yes.

18 THE COURT: Do you understand that charge?

19 THE DEFENDANT: Yes.

20 THE COURT: Have you discussed with Mr.
21 Boone what must be proven in order for you to be
22 found guilty?

23 THE DEFENDANT: Yes.

24 THE COURT: Have you discussed with him
25 whether you should plead guilty or not guilty?

1 THE DEFENDANT: Yes.

2 THE COURT: After that discussion, was it
3 your decision that you plead guilty?

4 THE DEFENDANT: Yes.

5 THE COURT: Are you entering that plea
6 freely and voluntarily?

7 THE DEFENDANT: Yes.

8 THE COURT: Because you are in fact guilty?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you understand that when you
11 plead guilty, you waive your right to trial by
12 jury?

13 THE DEFENDANT: Yes.

14 THE COURT: You waive your right to confront
15 any witnesses who may testify against you?

16 THE DEFENDANT: Yes.

17 THE COURT: Or to remain silent?

18 THE DEFENDANT: Yes.

19 THE COURT: Has anyone connected with your
20 arrest and prosecution, such as the Commonwealth's
21 Attorney or the police, forced you in any way to
22 enter this plea of guilty?

23 THE DEFENDANT: No.

24 THE COURT: Have you discussed with Mr.
25 Boone what the maximum punishment for this crime

1 is?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Are you entirely satisfied with
4 his services?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Do you understand that by
7 entering this plea, you may waive your right to
8 appeal the decision of the Court?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you understand all the
11 questions I've asked of you?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: May I have a statement of facts,
14 Mr. Chappell?

15 MR. CHAPPELL: Yes, Your Honor. This matter
16 occurred on April 25th, 1998, in the County of
17 Sussex, a Saturday morning. It involved Officer
18 Allen Gibson, who was an officer with the Waverly
19 Police Department. At the time he was patrolling
20 in the Waverly Village Apartment area of Waverly.

21 Judge, the Commonwealth's evidence would
22 come from several sources. The initial witness,
23 Shawn Wooden, the Commonwealth would have called.
24 Shawn Wooden would have indicated to the Court that
25 Terence Richardson was staying with him at the time

1 of the offense. Terence Richardson indicated to
2 Shawn Wooden that morning that he was going to get
3 some dope with Ferrone Claiborne, a codefendant.
4 And for Shawn Wooden to come along with them.

5 They in fact did that, went to the Waverly
6 Village Apartments. Terence Richardson and Ferrone
7 Claiborne went to the back of the apartment
8 complex. Furthermore Shawn Wooden's testimony
9 would be that he was instructed to be a lookout if
10 he saw anything that occurred. In fact Officer
11 Gibson pulled up at that general time frame and at
12 that particular time frame Terence Richardson,
13 after he got a signal, an audible signal from Shawn
14 Wooden, in fact did run behind the complex into a
15 wooded area behind the apartment complex, as did
16 the codefendant, Ferrone Claiborne.

17 Several moments went by and Shawn Wooden
18 would testify that he heard what he thought was a
19 shot ring out. Upon hearing that shot, Shawn
20 Wooden left on his bicycle, left the area, and went
21 back to his house in another part of Waverly.
22 Approximately about fifteen minutes later Shawn
23 Wooden would testify to the Court that Terence
24 Richardson came back to the house looking out of
25 breath, nervous, and concerned. After some period

1 of time -- at that time Shawn Wooden would indicate
2 to the Court that Terence Richardson took him
3 outside and indicated to him that Terence
4 Richardson had shot, accidentally shot the cop.

5 Judge, we would also produce a witness from
6 the Commonwealth's perspective, Jervona Jones, who
7 was the girlfriend of Shawn Wooden, who would
8 corroborate in many respects the testimony of Shawn
9 Wooden.

10 Your Honor, the Commonwealth's next series
11 of witnesses would have been two law enforcement
12 officers who arrived at the scene very shortly
13 after Officer Gibson was shot. Would be in the
14 nature of dying declarations. The initial
15 statement would be from Cpl. Rick Aldridge, who
16 came to the apartment complex about 11:30 a.m. that
17 morning and got the message that an officer was
18 down. When he reached the area in the back of the
19 complex, he saw Officer Gibson lying on the ground.
20 Would testify to the Court that he was in and out
21 of consciousness. Deputy -- excuse me, Cpl.
22 Aldridge would testify that they observed a wound
23 in the abdomen area of Officer Gibson around his
24 navel.

25 Officer Gibson was able to give Cpl.

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Aldridge a description of the assailant/assailants, indicating they were wearing blue jeans and white shirts and that one had dreadlocks. Further Officer Gibson told Cpl. Aldridge that the tall, thin one wrestled with him over his gun when the gun went off.

Next the Commonwealth would have produced Trooper Jarred Williams, who also came to the scene shortly after Officer Gibson was shot. And after Cpl. Aldridge got there. Again this was around 11:30 a.m. on the -- on the morning in question. He also noticed a hole, a bullet hole about one inch above Officer Gibson's navel. Officer Gibson told Trooper Williams that he believed he was dying and proceeded to give him other identifying information on his assailants. Officer Gibson told Trooper Williams that he had chased a black male into the woods and got into a scuffle with two black males who were attempting to get his gun. He described to Trooper Williams one was tall and skinny with dreadlocks. The other was short with bald on top hair.

Trooper Williams would further testify that Officer Gibson told him that he was fighting with the tall, skinny one. The tall, skinny one got the

1 gun and the gun just went off.

2 Officer Gibson died at approximately 2:30
3 p.m. And the cause of death was a gunshot wound to
4 his abdomen. And Judge, at this point I'd like to
5 introduce the autopsy report to establish the
6 death, and that's in the Court's file.

7 MR. BOONE: No objection, Your Honor.

8 THE COURT: Be admitted as Commonwealth's
9 Exhibit "1".

10 MR. CHAPPELL: Judge, the Commonwealth would
11 also have called forensic scientist Ann Jones,
12 which a certificate of analysis is also on file,
13 Judge. I believe the front of the file. I had
14 pulled it out. Would ask that that be admitted.

15 The crux of that, Your Honor, is that Miss
16 Jones would testify that the bullet involved was
17 from Officer Gibson's duty service revolver. That
18 only one shot was fired. There were other bullets
19 from the firearm that were not fired. Miss Jones,
20 through examination of the hole in the front panel
21 of Officer Gibson's shirt, and the gunshot residue,
22 was able to determine that the muzzle of the
23 firearm was not in contact -- would not have been a
24 contact wound, but it was up to eighteen inches,
25 the muzzle of the firearm, from Officer Gibson's

1 shirt, or the wound. So in other words the
2 distance of the pistol to Officer Gibson's body was
3 less than an arm's length. Ms. Jones would testify
4 that it could have been as close as three inches
5 from Officer Gibson's body, more likely it was
6 between six and twelve inches from his body.

7 Judge, I would also introduce that
8 certificate of analysis which I believe has been
9 pulled for the Court --

10 MR. BOONE: No objection.

11 MR. CHAPPELL: -- be admitted as
12 Commonwealth's Exhibit "2".

13 Judge, also I would also move for
14 introduction of the preliminary hearing transcript
15 which also has some additional details. I believe
16 that's without objection.

17 MR. BOONE: Again no objection.

18 THE COURT: I think that's already a part of
19 the record, but it would be admitted as Exhibit
20 "3".

21 MR. CHAPPELL: Thank you, Your Honor.

22 THE COURT: Yes, sir.

23 Mr. Boone, would you agree that if tried,
24 the recitation of Mr. Chappell would be the
25 Commonwealth's evidence?

1 MR. BOONE: Yes, Judge.

2 THE COURT: Thank you.

3 Court finds the plea of guilty to be freely,
4 intelligently, and voluntarily entered with an
5 understanding of the plea and its consequences.
6 Accepts the plea at this time, finding the
7 defendant guilty as charged in the indictment.

8 Is there a motion, sir?

9 MR. BOONE: Yes, sir, Judge, we'd have a
10 motion for a presentence report, sir.

11 THE COURT: That motion is granted.
12 Returnable -- if we can agree on a date. February
13 9?

14 MR. BOONE: Bad day.

15 THE CLERK: That's Judge Luke's day.

16 THE COURT: What's my day in March?

17 THE CLERK: Perhaps the 10th? I'm sorry,
18 excuse me.

19 It would appear to be the 15th of March.

20 MR. BOONE: The 15th of March is good.

21 THE CLERK: That's the day after term day.

22 THE COURT: I want to know what my day is.

23 THE CLERK: March 8th.

24 MR. BOONE: That's good.

25 THE COURT: Okay. Set sentencing for March

1 the 8th at 9 a.m.

2 MR. CHAPPELL: Judge, is the Court
3 considering the defendant's bond at this time post
4 conviction? Commonwealth would move that it be
5 revoked pending sentencing based on the nature of
6 the crime.

7 THE COURT: Mr. Boone?

8 MR. BOONE: Judge, I would respectfully
9 object to that motion of the Commonwealth. I can
10 tell the Court that the defendant has no prior
11 criminal record. He was incarcerated from the date
12 of his arrest up through the end of 1998 until we
13 had a bond hearing before Judge O'Hara. Judge
14 O'Hara at that time heard a very extensive summary
15 of the facts. And based on that summary of the
16 facts granted bond, and the defendant was
17 subsequently released. He is living with his aunt
18 in Richmond. He has had absolutely no problems and
19 no -- anything at all. Any problems whatsoever for
20 the past year while he's been on bond.

21 I will also tell the Court, although the
22 Court of course is not bound in any way by the
23 guidelines, according to my calculations the
24 guidelines come out no incarceration. The
25 defendant was incarcerated for a period of months

1 prior to his release.

2 But that all said and done, I would ask Your
3 Honor to continue his bond on the same terms and
4 conditions as set by Judge O'Hara.

5 MR. CHAPPELL: Judge, the nature of the
6 facts of the case demand, I believe would demand a
7 substantial penitentiary sentence. We believe that
8 ought to start right here, right now.

9 THE COURT: The difference in when bond was
10 set earlier and today is that the defendant is
11 now -- has now been convicted of a felony. And
12 that felony, though greatly reduced from its
13 original state, is still a homicide. The Court
14 thinks a motion to revoke the bond is proper, and
15 orders that the defendant be remanded to jail to
16 await sentencing.

17 MR. CHAPPELL: Judge, with the reduction of
18 the initial charge, the remaining firearm charge
19 does not lie or have a basis for it, so the motion
20 would be to nol-pros it.

21 THE COURT: I think that motion is proper.

22 MR. BOONE: Yes, sir.

23 THE COURT: So order.

24 MR. BOONE: Yes, sir.

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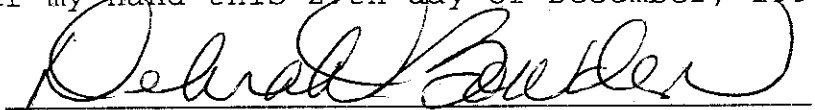
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CERTIFICATE

I, Debra D. Bowden, hereby certify that I, having been duly sworn, was the court reporter in the Circuit Court of the County of Sussex on December 8, 1999, at the time of the matter recorded herein.

I further certify that I have transcribed the proceedings faithfully and accurately, to the best of my ability.

Given under my hand this 27th day of December, 1999:


Debra D. Bowden - Court Reporter

Tab	Gov. Exh.	VOLUME IV
1		Sussex County Circuit Court – Ferrone Claiborne and Terence Richardson
2		Misc.
3		Dinwiddie County Jail – Ferrone Claiborne visitation
4		Southside Regional Medical Center – Alan Gibson medical reports
5		Photographs, mug shots
6		Letter from David Novak, AUSA advising Warren Sturrup of a federal grand jury investigation in which he is the “target”
7		Virginia State Police crime scene diagram
8		Virginia State Police Physical Evidence Recovery report
9		Virginia Division of Forensic Science Certificate of Analysis and FBI Laboratory reports <ul style="list-style-type: none"> - Alan Gibson’s service pistol and clothing - Hair samples from Alan Gibson, Terrance Richardson, and Ferrone Claiborne
10		Southside Regional Medical Center – Eric Garrett report
11		Office of the Chief Medical Examiner – Report of Investigation by Medical Examiner on Alan Gibson
12		Mug shots (?)
13		<i>United States of America v. Warren Sturrup</i> Discovery provided on May 8
14		VCIN criminal record check – Terence Richardson
15		Sussex County Sheriff’s Office Rescue Dispatch Log – April 25, 1998

16	Virginia State Police – Terence Richardson’s T-shirt
17	FBI FD-302 report – Douglas Davis, Jr.
18	FBI FD-302 report – Officer Tony Hill
19	Misc.
20	VCIN criminal record check – Warren Sturup

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VIRGINIA,

IN THE CIRCUIT COURT OF THE COUNTY OF SUSSEX:

COMMONWEALTH

v.

98-313

FERRONE CLAIBORNE

COMMONWEALTH

v.

98-314

TERRANCE JEROME RICHARDSON

TRANSCRIPT of the testimony, and other incidents in
the presentence hearing and sentencing in the above styled
matters, as heard on March 8, 2000, before The Honorable
James A. Luke, Judge.

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PRESENT: Ms. Lyndia M. Person,
On behalf of the Commonwealth

Mr. Michael M. Morchower,
On behalf of Defendant Claiborne

Mr. David E. Boone,
On behalf of Defendant Richardson

Mr. Ferrone Claiborne,
Mr. Terrance Jerome Richardson,
The Defendants

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Wanda Taylor Brown

Direct..... 23 - 24

Alonzo Tyrone Scott, Sr.

Direct..... 25 - 26

Annie Richardson Westbrook

Direct..... 27 - 29

1 MS. PERSON: The matters of Ferrone
2 Claiborne and Terrance Richardson.

3 Your Honor, these matters are before the
4 Court for sentencing. The Commonwealth has
5 received a copy of the presentence report and we
6 are prepared to go forward.

7 THE COURT: Let the record show that the
8 defendant Ferrone Claiborne is present accompanied
9 by his attorney, Mr. Morchower. That the defendant
10 Terrance Richardson is present accompanied by his
11 attorney Mr. Boone. We are here for sentencing.
12 The Court has the presentence report in each case
13 and has reviewed it.

14 Are there any additions or corrections to
15 the report, primarily the report in the Richardson
16 case, as Mr. Claiborne's case is a misdemeanor?

17 MR. BOONE: Judge, good morning, sir.
18 Judge, on page 1, the cover page at the bottom,
19 under plea agreement, says yes. That should be no.

20 THE COURT: That's correct. I've made that
21 correction also.

22 MR. BOONE: Then on page 2, we again, at
23 the -- under narrative of current offense, it
24 indicates under the terms of the plea agreement.
25 Of course there is no plea agreement.

1 THE COURT: Same thing, yes, sir.

2 MR. BOONE: Then the facts aren't quite
3 correct. Here it indicates that Mr. Claiborne was
4 the lookout, when in fact it was Mr. Wooden that
5 was the lookout. It was Mr. Claiborne and Mr.
6 Richardson, under the Commonwealth facts, that went
7 into the woods with Officer Gibson. So those facts
8 are a little skewed.

9 Additionally it indicates that Shawn Wooden
10 witnessed the defendant Terrance Richardson coming
11 to his house out of breath. Things of that sort.
12 That wasn't the evidence. The evidence was that --
13 Shawn Wooden in fact testified at the earlier
14 hearing -- that Terrance Richardson came to his
15 house and he appeared to be nervous.

16 So with those corrections, we find the plea
17 agreement and the sentencing guidelines to be
18 correct.

19 THE COURT: I'm not going to make any
20 changes as to the factual things you say because
21 the Court's at the disadvantage of not having been
22 present at the preliminary hearing, and has only
23 heard a recitation as we're doing this morning. So
24 I understand your position.

25 MR. BOONE: Yes, sir.

1 THE COURT: Ms. Person?

2 MS. PERSON: Your Honor, I believe under the
3 Claiborne case, although a presentence report
4 wasn't required, one was done. There were
5 corrections or additions to that report.

6 THE COURT: They're on file. That Mr.
7 Morchower --

8 MR. MORCHOWER: Yes, sir, they're in the
9 file. We've reviewed them, Your Honor.

10 THE COURT: Evidence for the Commonwealth?

11 MS. PERSON: Your Honor, the Commonwealth
12 would call --

13 Well, first, before we begin, we would like
14 to introduce to the Court and for purposes of the
15 record, those family members of slain Officer
16 Gibson who are present in the courtroom this
17 morning. We have testimony from three of those
18 persons. But just for introduction purposes, Mrs.
19 Suzie Gibson, who is -- stand up -- Officer
20 Gibson's mother. Alan Gibson, Sr., who's his
21 father. Crissana Gibson, his daughter. Tanya
22 Gibson, his sister-in-law. Bonnie Mullins, his
23 grandmother. Sandra Jones, his aunt. Roger
24 Barker, his uncle. Keith Barker, a cousin. And
25 Summer Pressing, his fiancée.

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20 Gibson's mother. Alan Gibson, Sr., who's his
21 father. Crissana Gibson, his daughter. Tanya
22 Gibson, his sister-in-law. Bonnie Mullins, his
23 grandmother. Sandra Jones, his aunt. Roger
24 Barker, his uncle. Keith Barker, a cousin. And
25 Summer Pressing, his fiancée.

1 THE COURT: Good morning to you. You may
2 have a seat.

3 MS. PERSON: Commonwealth's first witness
4 would be Suzie Gibson.

5
6 MARIAN SUZETTE GIBSON,
7 being first duly sworn, was called as a witness on
8 behalf of the Commonwealth, and testified as
9 follows:

10

11 DIRECT EXAMINATION

12

13 BY MS. PERSON:

14 Q Good morning. Would you state your full
15 name for the record, please.

16 A My name is Marian Suzette Gibson.

17 Q And Mrs. Gibson, where do you live?

18 A I live in Big Stone Gap, Virginia, which is
19 in Wise County.

20 Q And you are related to Alan Gibson, Jr.; is
21 that correct?

22 A Yes, ma'am, I'm his mother.

23 Q Can you tell the Court what, if any, injury,
24 either psychological or physical, has been suffered by you
25 or your other family members as a result of the death of

1 Alan Gibson?

2 A Yes, ma'am, a lot of suffering and
3 psychological damage has been done since my son was killed.
4 His nine-year-old little girl has been in counseling since
5 three days after her daddy was buried. She -- it is being
6 told to me that she should at least stay in counseling for
7 another two to three years.

8 Q How often does she go to counseling?

9 A For the first year and-a-half that she went
10 to counseling she had to go at least twice a month. In the
11 past eight months she goes once a month, except when an
12 occasion like this comes up. A lot of times when we go to
13 court I will have to call and have him to work her in.

14 Q Now how much contact did you have with his
15 daughter before Officer Gibson's death?

16 A I've had a lot of contact with his daughter
17 because he had custody of his daughter since she was two
18 years old. She lived with her father. And they lived close
19 to us all the time and so we were always real close.

20 Q Was she living with you at the time of his
21 death?

22 A Yes, Alan had left her with me. She was in
23 school in Wise County, and when he got the job in Waverly he
24 left Crissana there with me so that she could finish out the
25 school year, and after her school year was over he was

1 planning on bringing her to Waverly to live with him.

2 Q Now, can you tell us if you've noticed any
3 difference in her before his death and after his death?

4 A Yes, before his death she was a carefree
5 little girl. You know, doing things that all children do.
6 Since her father has gotten killed there's days when she
7 goes to school and she has a tummy ache. She has headaches.
8 Because she starts missing her daddy and she starts thinking
9 about her daddy and she can't cope with not being able to
10 talk about it at school. A lot of times after her daddy was
11 first killed I would have to go to school, sometimes two to
12 three weeks, and check her out -- two or three times a week,
13 and check her out early. She's no longer that carefree
14 little girl that can go out and play and just be carefree,
15 because before she can go to play she has to make sure that
16 if Nanny's home by herself, Nanny's got the doors locked,
17 because she's afraid somebody's going to hurt me.

18 Q When you speak of Nanny, who are you
19 referring to?

20 A Myself. She calls me Nanny.

21 Q All right.

22 A If she's going out, she won't go outside
23 after dark. If we have to go out after dark, there's -- we
24 live in the mountains, so there's woods all around us, so
25 she doesn't like to go out after dark any more. If we have

1 to, and we're going down the steps to our car, and a car
2 goes by, she ducks down because she don't know who's going
3 by. She doesn't know what's going to happen. So she's
4 scared. She has to sleep with me every night because she's
5 afraid to sleep by herself. She won't go in the bathroom
6 and take a bath because she's afraid to shut the door, so I
7 have to leave the door open, or -- and us just not go
8 through to the bathroom.

9 Q Okay, Mrs. Gibson, we're going to call
10 Crissana in a few minutes and let her testify. Can you tell
11 us if there's been any injury suffered by you or any other
12 family member?

13 A I also had to start attending counseling. I
14 attended for about eight months, and then I had to stop
15 because of the insurance that I got would not pay because it
16 was preexisting. I've not been attending counseling and
17 just -- I continue to have nightmares, and they seem within
18 the last few months to be getting worse. I wake up in the
19 night dreaming of my son's funeral and dreaming -- just
20 wanting to see him again, and I wake up screaming and crying
21 for him. I have -- I've had to go to the doctor and he put
22 me on antidepressants because I couldn't cope with what I
23 needed to do and the things I needed to do. Because I cried
24 all the time. I was sad. And I just couldn't cope with it,
25 so I had to be put on antidepressants to cope with the

1 things I need to do every day. My husband also has had to
2 be put on antidepressants because he couldn't cope with his
3 job any more because of the pressure and the stress.

4 Q Was Alan your only son?

5 A No, I have one other son that was sixteen
6 months younger than Alan.

7 Q Have you noticed any change in him?

8 A Yes, ma'am. I raised both of my sons to be
9 trusting people. You trust people and -- to be good men.
10 And now it's hard to face the fact that I have a son that no
11 longer trusts anyone. He could not even be here in this
12 court today because he could not trust to leave his two
13 children at home and him travel here without them. He could
14 not trust to leave his wife in the motel room with his
15 children and him be here today. He's full of anger.
16 He's -- he's sad. He feels like he has no one, not even a
17 friend, because he lost his best friend. And it's hard to
18 see the only son you have left like that.

19 Q Mrs. Gibson, it's almost -- in April of this
20 year will be two years, I believe, since the death of your
21 son. Have you noticed that any of these problems have been
22 getting better?

23 A No, ma'am, they only seem to get worse.

24 Q Finally, Mrs. Gibson, let me ask you one
25 last question, and you can be brief. Is there anything else

1 that you would like the Court to be made aware of as a
2 result of the death of your son?

3 A Of all of the things that this has done to
4 all of the family, my only concern is with Alan's daughter,
5 because she -- one night she started crying. It was like 9
6 or 9:30. I already had her dressed for bed. She just
7 started crying, Nanny, I want my daddy. Please take me to
8 see my daddy. We had to take her to the cemetery. That's
9 the only place we could take her to see her father. And
10 then she calls me one night in the bathroom, crying, wants
11 to know when is she ever going to get to see her daddy
12 again. And I told her, I said honey -- I thought she meant
13 can we go to the cemetery again. But that wasn't what she
14 meant. And I asked her, I said honey, I said we've
15 explained this to you. The only way that you can see your
16 father is in the resurrection when God's day comes. Then
17 you can see your father again. She said I know that, Nanny,
18 but I just want to know how much longer do I have to wait
19 before resurrection day comes. And it's hard to answer a
20 question like that to a ten-year-old little girl wanting to
21 know how much longer before the end of time comes because
22 she wants to see her father.

23 Q Then your main concern then is your grand-
24 daughter.

25 A Yes.

1 MS. PERSON: Thank you, Mrs. Gibson. I
2 don't know if Mr. Morchower and Mr. Boone have
3 questions. Would you answer them if they do.

4 MR. MORCHOWER: No, ma'am. Thank you.

5 THE COURT: Thank you, ma'am.

6 (Whereupon the witness stepped down and
7 remained in the courtroom.)

8
9 MS. PERSON: Commonwealth would call
10 Crissana Gibson.

11
12 CRISSANA GIBSON,
13 being first duly sworn, was called as a witness on
14 behalf of the Commonwealth, and testified as
15 follows:

16
17 DIRECT EXAMINATION

18
19 BY MS. PERSON:

20 Q Good morning.

21 A Morning.

22 Q Would you state your name, would you speak
23 real loudly and state your name for the Court?

24 A Crissana Tenee Gibson.

25 Q And Crissana, how old are you?

1 A Ten years old.

2 Q And you are the daughter of Officer Alan
3 Gibson, Jr.; is that correct?

4 A Yes, ma'am.

5 Q And you live in Wise County with your
6 grandmother?

7 A Yes, ma'am.

8 Q Crissana, can you tell the Court how the
9 death of your father has affected you?

10 A It's made me very sad. Um, I have to sleep
11 with my grandmother because I'm afraid.

12 Q You need a few minutes?

13 A (Nods head.)

14 Q Do you not want to talk about it, Crissana?

15 A (Shakes head.)

16 THE COURT: Crissy, we understand how you
17 feel if you don't think you can talk. That's okay.
18 If you'd like to go back to your seat you may do
19 that also.

20 (Whereupon the witness stepped down and
21 remained in the courtroom.)

22

23 MS. PERSON: Sandra Jones.

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SANDRA JONES,

being first duly sworn, was called as a witness on behalf of the Commonwealth, and testified as follows:

DIRECT EXAMINATION

BY MS. PERSON:

Q Would you state your full name to the Court, please?

A Sandra Ellen Jones.

Q And you live in Wise County also?

A Yes, I do.

Q How are you related to the Gibsons?

A I'm Suzie's sister.

Q And Suzie is Officer Alan Gibson's mother.

A Yes.

Q Are you close to your sister?

A Yes. She's my baby sister and we were the last two at home and we've always done everything together, including having our first child two days apart.

Q Have you noticed a change in your sister since Officer Gibson's death?

A Yes, I have.

Q Can you tell the Court what you've noticed?

1 A I know that before Alan was killed, Suzie .
2 and I were really close and we used to always go places
3 together, do things together. And we would -- even when the
4 kids were smaller, Alan and his brother and my children,
5 we'd take them on vacations together and everything. But
6 after Alan was killed it was like Suzie and her other son
7 and his family and Alan, her husband, and Crissana just
8 started clinging together. They were afraid to be away from
9 each other. Even at family picnics they would all be at one
10 table just like they were just -- you know, isolated.
11 And --

12 Q Is this different from how they acted
13 before?

14 A Yeah. Because Suzie would -- if I would ask
15 her to let's take the kids and go somewhere, she was afraid
16 to go. She said I'm afraid to go away from home. I'm
17 afraid to travel. I don't want to be away from Doug and his
18 family. I don't want to be away from my husband. Crissana
19 is terrified to be away from any of her family members. She
20 wants everybody to ride together in the same vehicle.
21 They've had to rent vans before to even come up here because
22 she's so afraid for them to ride separately. Suzie was
23 afraid for them to ride separately. And it's like they have
24 to be looking at each other or be with each other all the
25 time. And I saw Suzie, who was always a fun-loving,

1 outgoing person, she'd laugh all the time. She would make
2 friends really easy. She started being withdrawn. And not
3 wanting to go out.

4 Q Mrs. Jones, let me ask you this. It's
5 been -- April of this year will be two years since Officer
6 Gibson's death. Have you noticed any change in -- have you
7 noticed these things getting better?

8 A No. Because the last time that we had to
9 make the trip out this way to get together Suzie and I were
10 staying in a room together. And, um, she woke me up in the
11 middle of the night crying. I thought she was just laying
12 over there crying. And I was asking her, Suzie, honey,
13 what's wrong, what's wrong. And she wouldn't answer me.
14 She just kept crying. So I got out of bed and I went over
15 and I tried to wake her up. She was still sleeping. I was
16 saying Suzie, wake up, wake up. And she was saying oh God,
17 I want him back, I want my son back. I can't get him out of
18 there. I can't get him out of there. And she was saying
19 she was having to dig in the dirt to try to get her son out
20 of there. I thought I was going to have to call an
21 ambulance for her because she -- she had broken capillaries
22 around her eyes the next morning where she cried so hard.

23 Q And this was in December?

24 A This was in February. And she was so
25 depressed the next day, and when we got home she was

1 extremely sick after that. She -- she ended up with
2 vomiting and all sorts of things. And she's just -- she's
3 not the -- none of the family is the same. Because it's had
4 such a far-reaching effect on us. That when it changes one
5 family member's life, and you know that a child is suffering
6 and crying because it wants a parent that it's never going
7 to have again, that it affects everybody that is around 'em.
8 There's no fun at family gatherings any more. In fact
9 there's not even family gatherings any more because
10 everybody is thinking of Alan. Alan's birthday is two days
11 before my first child's birthday. He was killed nine days
12 before his twenty-sixth birthday. And that's what we have
13 as memories.

14 Q Mrs. Jones, is there anything else that you
15 would like the Court to be made aware of?

16 A Yes, because Crissana used to laugh and talk
17 and tell me where her daddy would take her and things they
18 would do together. And she thought it was so neat that her
19 daddy was even willing to go to school to take night classes
20 to learn how to do her hair for her because she wanted her
21 hair made in pony tails and stuff. And he said honey, I'll
22 go to school and take some classes. He even checked into it
23 to try to learn how to do her hair for her. And her father
24 was all she really had. That was her life. And it's gone
25 now.

1 MS. PERSON: Thank you, Mrs. Jones. I don't
2 know if Mr. Morchower has any questions.

3 MR. MORCHOWER: No questions.

4 MS. PERSON: That would be all the evidence
5 the Commonwealth would present at this time, Your
6 Honor.

7 THE COURT: Mr. Morchower?

8 MR. MORCHOWER: Mr. Claiborne has no
9 evidence, Your Honor.

10 THE COURT: Mr. Boone?

11 MR. BOONE: Judge, I have two witnesses.
12 I'll be brief. If I could call Rev. Rose.

13
14 (Whereupon the witness was duly sworn.)

15
16 THE WITNESS: First I'd like to recognize
17 the Gibson family. You have my condolences. My
18 heart's with you.

19
20 EUGENE ROSE, SR.,
21 being first duly sworn, was called as a witness on
22 behalf of Defendant Richardson, and testified as
23 follows:

24
25 DIRECT EXAMINATION

1 BY MR. BOONE:

2 Q Would you please tell Judge Luke your full
3 name, sir?

4 A Say again.

5 Q Will you tell Judge Luke your full name.

6 A My name is Eugene Rose, Sr.

7 Q And Mr. Rose, how are you employed?

8 A I am unemployed now presently after
9 retirement last Thursday from the United States Post Office
10 in Norfolk, Virginia.

11 Q The young man sitting to my left, Terrance
12 Richardson, do you know him?

13 A I knew this young man even before he were.

14 Q If you will, you know why we're here today.
15 We're here for sentencing, and Judge Luke has to make the
16 determination as to the appropriate sentence that Terrance
17 should receive. If you will, tell Judge Luke what you know
18 about Terrance that might help Judge Luke make this decision
19 today.

20 A Your Honor, Terrance grandmother, she has
21 now been deceased. She was my oldest sister, Teresa
22 Richardson. Your Honor, this young man, I've known him even
23 before he were, because his mother, the oldest daughter of
24 my sister, Teresa Richardson, he was born. And while this
25 young man at a very young age, I would always, because I

1 spent twenty-two years in the military service, and I would
2 always come up here to Sussex County, Yale, Virginia. This
3 is where I was born. Where all of my ancestors was born.
4 Where my kindred here was born. Where all of us who now
5 hold office at Sussex County really was born.

6 But Your Honor, I wanted to say something about
7 this young man. This young man come from a rich heritage.
8 And because of that rich heritage, Your Honor, what he has
9 done or has been alleged to have done, I share with you,
10 Your Honor, I love this young man. He's just like my son.
11 I never have taught him the virtues of ill responsibility.
12 I have shared with this young man even at the very earliest
13 age of what it was to come up and give back to the community
14 of which we live. And that's wherever we are, Your Honor.
15 And this is what it is I'm saying about our heritage. My
16 daddy -- I called him Papa; Johnny Rose -- he did not raise
17 up someone to have committed such as has been stated by --
18 by my grand nephew.

19 But my grand nephew has some good virtues about
20 him, Your Honor, because in this family, we have professors,
21 we have two professors at Virginia Tech. We have one at New
22 York University. And we have engineers.

23 The point is, Your Honor, that is nothing concerned
24 about what has happened with this family. The Gibson
25 family. The point is I'm saying this young man, I love him.

1 If not, I would have never stood up for him, and I have.
2 I've stood out for him. And I'll do it again if it means
3 that I can get his life straightened out. And that's what
4 we need today, Your Honor, in this county. Sussex County.
5 We need more people to be concerned as to what's going on.
6 And what's going on in this county and every place else.
7 And that's drugs. Drugs are the most hideous crime. It
8 robs us. White and black. It robs us of all that we do.

9 Now I'm not saying that basically -- I don't agree
10 about anything that my nephew allegedly has done. But I can
11 say this much. He has some good characters in him. Because
12 Uncle Gene, your old Uncle Gene does not condone any
13 foolishness. Is that right, Brother Terrance?

14 And so I say all of these things because a mother
15 going to love their child. And it's so right because they
16 carry them for nine months. And I applaud you, Mrs. Gibson.
17 And you see, when something is gone, you can't bring it
18 back. But I will say in part what God says. God says he
19 will -- he will forgive all of us for what we do. But there
20 are those of you who have to be concerned while we're yet
21 here. And I feel like I'm responsible not for just
22 Terrance, but for every young male, whether he be white,
23 colored, black, pink, or purple. I'm responsible to help
24 and so are they. To make a community a better place in
25 which we can live.

1 And so I've said all these things, Your Honor,
2 because you know, this young man has some characteristics
3 about him. They need to be brought out and a change need to
4 be brought about him so that he can be brought back to sew
5 it, not be taken away from. And I know he is capable of
6 doing that. I have had him in my care. Not twenty-four
7 hours a day, but at each time, whether it's a month, two
8 months, or a year, hey, you know Uncle Gene. Uncle Gene.
9 You know that, don't you, Brother Terrance?

10 And so I just want to say, Your Honor, that there's
11 a lot of good qualities about this young man. I just going
12 to have to be more of a mentoring figure. I didn't do all
13 that I should have done. And I'm saying that I'm not -- I
14 didn't do enough. And there's much to be done. Because you
15 give them up in here. They go and they come back and you
16 get them back again. I don't want you to come back again.
17 And you're going to be mentored because Uncle Gene going to
18 come wherever you are. Uncle Gene going to give you the
19 opportunity to always call him. And we're going to
20 fellowship. Fellowship means ifrst of all you're going to
21 have to --

22 MS. PERSON: Your Honor --

23 THE WITNESS: I'm sorry, ma'am, but I want
24 to share with you basically about the background of
25 our family.

1 MR. MORCHOWER: Thank you. Thank you very
2 much.

3 THE COURT: Thank you.

4 (Whereupon the witness stepped down and
5 remained in the courtroom.)

6
7 MR. BOONE: Call Wanda Brown.

8
9 WANDA TAYLOR BROWN,
10 being first duly sworn, was called as a witness on
11 behalf of Defendant Richardson, and testified as
12 follows:

13
14 DIRECT EXAMINATION

15
16 BY MR. BOONE:

17 Q Mrs. Brown, will you tell Judge Luke your
18 full name, please?

19 A My name is Wanda Taylor Brown.

20 Q And where do you live, ma'am?

21 A Stony Creek, Virginia.

22 Q And how do you know Terrance Richardson?

23 A I knew Terrance when I moved to Waverly in
24 the early '80s. Um, I was -- my ex-husband sister was
25 dating Terrance. Uncle Terrance -- Terrance uncle was my

1 cousin.

2 Q So you've known him for most of his life?

3 A Yes.

4 Q Will you tell Judge Luke what it is you
5 think might help him in making the appropriate sentence
6 decision today?

7 A Um, like I said, I mean I've been -- I have
8 been knowing him ever since the early '80s. Um, he used to
9 come to my house and sit around and talk to my daughter.
10 Um, I never known him to get into any trouble. Um, in the
11 neighborhood everybody liked him because he had utmost
12 respect for his elders. He had never been around me and
13 used foul language.

14 What else can I say? Like I say, I mean he never
15 got -- I never known him to get in any trouble. When I
16 moved out of Waverly, I moved to Wakefield, Virginia, and
17 when I moved to Wakefield he also came there to see me. So
18 I mean like I said, he just -- I never known him to get into
19 any trouble. And to me he's a nice young man.

20 MR. BOONE: All right, thank you. Answer
21 the Commonwealth's questions.

22 THE COURT: Any questions, Ms. Person?

23 MS. PERSON: No, I don't.

24
25 (Whereupon the witness stepped down and
remained in the courtroom.)

1 MR. BOONE: Call Alonzo Scott, please.

2

3 ALONZO TYRONE SCOTT, SR.,

4 being first duly sworn, was called as a witness on
5 behalf of the Commonwealth, and testified as
6 follows:

7

8 DIRECT EXAMINATION

9

10 BY MR. BOONE:

11 Q Mr. Scott, good morning. Will you please
12 tell Judge Luke your full name?

13 A My name is Alonzo Tyrone Scott, Sr.

14 Q And Mr. Scott, where do you live?

15 A I live in Hopewell right now.

16 Q All right. How do you know Terrance
17 Richardson?

18 A Terrance is my cousin and, um, we went to
19 school together. I been knowing him all my life.

20 Q You wanted to speak to Judge Luke reference
21 what you know about Terrance. Please do so.

22 A Yes, sir. Judge Luke. On the day Officer
23 Gibson was killed, I had -- I had the opportunity to be
24 around Terrance that day. And, um, he was right there
25 amongst everybody else. And looking back at that day, I --

1 I've said from the beginning, I'll say it again, I would bet
2 my last dollar that Terrance didn't commit this crime. He
3 was right there in front of me as -- as everybody was
4 around, and, um, you know, wasn't nothing wrong. He wasn't
5 out of breath. He wasn't hysterical --

6 Q Mr. Scott, I'm not asking you to give your
7 opinion as to whether he did it or not. That's already been
8 decided. You have the opportunity if you want to take it to
9 tell Judge Luke what you know about Terrance as far as his
10 character.

11 A Oh, I'm saying Terrance is the type of
12 person that would help you out any way he could. I mean
13 when I was living there in Waverly, I -- I had the
14 opportunity to be around Terrance every day, and if anything
15 I needed he was there to help me out. I mean he would do --
16 he would do that for you. It is nothing bad that I can say,
17 you know, about Terrance. Um, like I said, if you needed a
18 helping hand, he was right there. You know. He would give
19 you you his last dime if he had it. And --

20 MR. BOONE: Okay, thank you.

21 Thank you, sir.

22 MR. MORCHOWER: Thank you.

23 THE COURT: You can step down.

24 (Whereupon the witness stepped down and
25 remained in the courtroom.)

1 MR. BOONE: Judge, my last witness, Annie
2 Westbrook.

3 ANNIE RICHARDSON WESTBROOK,
4 being first duly sworn, was called as a witness on
5 behalf of Defendant Richardson, and testified as
6 follows:

7
8 DIRECT EXAMINATION

9
10 BY MR. BOONE:

11 Q Good morning, ma'am. Please tell Judge Luke
12 your full name.

13 A My name is Annie Richardson Westbrook.

14 Q And you are Terrance's mother.

15 A Yes, I am.

16 Q Will you tell Judge Luke what it is you
17 think might help him in deciding an appropriate punishment.

18 A Okay. Terrance is my only son. My only
19 child. This has been hard on me also. Terrance was raised
20 with lots of values. Respect. Manners. This is the way I
21 was raised and I raised him the way that my mom raised me.
22 And he is a good, caring person.

23 Terrance also has two kids. He has one daughter,
24 six, that he loves very much. He has a two-year-old son
25 that he's barely known because he was born during this

1 situation.

2 Terrance went to Sussex Central. His grades were
3 average. He graduated. He excelled in certain sports. My
4 grandmother -- his grandmother, I'm sorry, my mom, she loved
5 Terrance very much. And she was with us through all of
6 this. She has passed since this, and I think the stress of
7 all of this is what happened with her.

8 Terrance has a lot of friends. He mingles with
9 people very well. Older people. They always cared about
10 him. I mean a lot of older peoples felt like Terrance was
11 their child because he was mannerly. I've never heard
12 Terrance use profane language around me because I wouldn't
13 tolerate that.

14 Like I say, Terrance is a caring person. He's a
15 good person. I would never have expected to be in this
16 courtroom with him. And he was a person that didn't get in
17 trouble. Even through high school he didn't get into
18 trouble. And I always used to thank the Lord that I didn't
19 have to go through all of this when he was growing up like a
20 lot of parents did.

21 But like I said, this has been hard on us also.
22 And I know that the Gibson family have had a lot of hardship
23 and sorrow, and I'm sorry for them. But my family also,
24 Terrance also. And I just wanted to, um, speak to you,
25 Judge Luke, that my son is a good person. He is a good

1 person.

2 THE COURT: Any questions of Ms. Westbrook,
3 Ms. Person?

4 MS. PERSON: No questions.

5 (Whereupon the witness stepped down and
6 remained in the courtroom.)

7
8 MR. BOONE: Judge, that would be our
9 evidence. Thank you.

10 THE COURT: Argument from the Commonwealth?

11 MS. PERSON: Your Honor, we have two
12 defendants here. I guess I'll deal with them one
13 at a time. Mr. -- I don't know --

14 THE COURT: I don't care which order you do
15 them in. I would anticipate dealing with Mr.
16 Morchower's client first.

17 MS. PERSON: That's fine. That's the one I
18 was going to argue.

19 We haven't heard anything on Mr. Ferrone
20 Claiborne. Your Honor has the presentence report.
21 The Commonwealth would submit that although he's
22 charged and convicted as a misdemeanor, that Mr.
23 Claiborne is just as culpable as Mr. Richardson.
24 But the fact is he has been charged with a
25 misdemeanor. The maximum punishment he can receive

1 is twelve months in jail and a \$2,500 fine. The
2 Commonwealth would submit that that is entirely
3 appropriate in this case for Mr. Claiborne's
4 actions.

5 The Commonwealth is well aware that he has
6 spent some nine to ten months already in jail. And
7 that giving him an active twelve-month sentence may
8 not -- if he's given credit for that time, it may
9 not be any additional punishment for him. But
10 because of the fact that he's charged with a
11 misdemeanor, the Commonwealth would ask for the
12 maximum punishment. Not only the twelve months,
13 but the \$2,500 fine as well.

14 I don't believe that there is a whole lot
15 that we can say in this case because of the crime.
16 Well, because of the charges that he is charged and
17 convicted of.

18 In the matter of Terrance Richardson, we
19 have quite a different matter. The Court has the
20 presentence report, and the Commonwealth would note
21 that unlike a lot of presentence reports we review,
22 there's nothing particularly aggravating about the
23 information contained in the report. The defendant
24 is twenty-eight years old. He was twenty-six at
25 the time of the offense. And he has no criminal

1 record. To his credit, he has no juvenile record.
2 Although he's been charged several times, he's
3 never been convicted of anything. I think he does
4 have a speeding ticket or speeding conviction on
5 his record.

6 There appear to be few problems in his
7 family life. Indeed his mother has testified. His
8 uncle has testified. And they say that he was
9 brought up in a good home. Taught good values.
10 But apparently he's lived back and forth between
11 his parents, and I believe the report said that he
12 had lived with his father some and his mother some.
13 He's the father of two children that he obviously
14 doesn't support on a regular basis. There's no
15 court order in place, but --

16 MR. BOONE: Judge, I'm going to object to
17 that. There's no evidence before this Court that
18 he does not support his children. In fact the
19 presentence report indicates that he does
20 contribute to their support, so I would certainly
21 object to that.

22 MS. PERSON: Commonwealth said on a regular
23 basis, Your Honor. I think that the presentence
24 report bears out what I'm saying.

25 THE COURT: I think that both of you are

1 correct in this, and I'd just ask you to move
2 along.

3 MS. PERSON: Again to his credit, he's
4 finished high school. He even claims to have been
5 involved in Rowan Technical Vocational Center.
6 Attends church on a regular basis. Although the
7 probation officer characterized his employment as
8 irregular, the Commonwealth would characterize it
9 really as no work record. I mean he's twenty-eight
10 years old, and all he has is a five-month
11 employment history. He does state that at age
12 twenty-eight he relies on his family for financial
13 assistance.

14 He's denied drug or alcohol abuse and
15 apparently, is in good physical health. Plans to
16 continue living with his parents, and the only plan
17 he's formulated to help himself is to obtain
18 employment.

19 Now the probation officer made no
20 recommendation as to sentencing. But with all
21 factors considered, the sentencing guidelines
22 suggest a sentence of probation, no incarceration.
23 Although the defendant has nothing particularly
24 aggravating in his background, the Commonwealth
25 believes that there are ample reasons to deviate

1 from the guidelines in this case. And as Your
2 Honor knows, the sentencing guidelines are
3 discretionary. They're not mandatory. And the
4 Court, if there are sufficient and just reasons,
5 can deviate.

6 Commonwealth believes that this is a case
7 for an upward departure from the guidelines and
8 would ask the Court to consider that for several
9 reasons. First, the defendant's conduct was
10 reprehensible. He indicated a total disregard for
11 authority and the law by not submitting to Officer
12 Gibson when he was approached. And further by
13 trying to take the officer's gun from him. He
14 engaged in a tussle with the officer. And the
15 Commonwealth would just mention that his uncle has
16 testified that he was raised with a rich heritage
17 and that he was taught values, and respect. His
18 mother testified that he was raised with a lot of
19 values, respect, and manners.

20 And the Commonwealth would have to ask, what
21 happened to those values, respect, and manners on
22 April the 28th of 1998 when he would not submit to
23 the authority that Officer Gibson had and showed to
24 him and engaged in a tussle with him? He managed
25 to take his gun from him. The gun went off.

1 Officer Gibson was killed. And instead of being
2 the responsible person that his family would have
3 us believe he is, and was, and offering the officer
4 assistance, which he should have done if he really
5 were that type of person, he ran. He ran because
6 he knew what he had done was wrong. He didn't want
7 anybody to know it.

8 His reprehensible conduct continued when he
9 lied about what happened. He lied to the police
10 officers. And then he enlisted the support of his
11 friends by asking them to lie for him as well. He
12 wanted to cover up what he had done because he knew
13 it was wrong. And for those actions he must be
14 punished.

15 Secondly, we have to consider the victim and
16 the victim's family in this case. Most of the time
17 sentencings focus on the defendants, and they
18 should. But in this particular case, Your Honor,
19 the Commonwealth believes that it is appropriate
20 that the Court take a long, hard look at the
21 victim, the victim's family, and the impact that
22 this tragedy has had on their family. The loss of
23 life is tragic in any situation. But we submit
24 that this -- in this particular case it's more
25 egregious than most.

1 We have an obviously dedicated, ambitious
2 officer who was not given the chance to make the
3 difference in society that he sought to make
4 because of the senseless, irresponsible act of the
5 defendants. But Officer Gibson's not the only
6 person that we need to consider. We have a mother
7 and a father who have lost the oldest of their two
8 sons. We have a brother who will never know the
9 continued closeness and love of a sibling. And we
10 have a ten-year-old child who knew nothing but her
11 father's love and has been deprived of that and
12 will be deprived of that for the rest of her
13 natural life.

14 I think that what Crissana started to say
15 and her actions on the stand say volumes about the
16 effect that this tragedy has had on the family, and
17 particularly on Crissana. She doesn't understand
18 what happened to her father, and we can do
19 everything we can today and for the rest of her
20 life and she will never be able to understand. But
21 because of the senseless, irresponsible acts of
22 Terrance Richardson, she has to live with that, and
23 the Commonwealth believes for that he ought to be
24 punished.

25 And finally, Commonwealth believes that the

1 defendant ought to be punished so that the
2 community can receive a message. We cannot allow
3 the defendant to walk out of the courtroom today
4 with just a slap on his hand. Whether you call it
5 involuntary manslaughter, an accident, or whatever,
6 the defendant killed a police officer in the line
7 of duty. If we allow him any less than the maximum
8 time, we send a message to the community that
9 there's no value, first, to the victim's life.
10 Second, we say you don't have to submit to
11 authority when you're approached by a police
12 officer, who is, by the way, in uniform. And
13 thirdly, we say just in case you don't comply, and
14 you claim accident, you can get away with it. You
15 don't have to have any responsibility for what you
16 do.

17 The message that we need to send is that
18 every life is valuable, particularly that of a
19 police officer, a person who has sworn to uphold
20 the law and who is trying at the time to do that to
21 make our community safe and a better place for us
22 to live.

23 Secondly, we need to send a message that you
24 do have to submit to authority. If you are
25 approached by a police officer, then the person

1 who's raised in a responsible home with a lot of
2 values, the thing for you to do is to submit to
3 that authority rather than to wrestle the gun from
4 him and to shoot him.

5 And thirdly, the message we need to send is
6 that in case you don't comply, and something
7 happens, then you have to bear the consequences of
8 what happens. Consequences in this case are to be
9 time in the penitentiary. The maximum sentence
10 allowed by law for this crime is ten years, and the
11 Commonwealth would submit that that is not enough
12 for what happened and the effect that it has had on
13 the community and the victim and the victim's
14 family.

15 Commonwealth is asking that the Court would
16 consider, would strongly consider, and we would
17 submit that the Court has the responsibility and
18 the duty in this case to strongly consider the
19 maximum time in this case, and we would ask the
20 Court to sentence the defendant to ten years in the
21 penitentiary.

22 THE COURT: Thank you. I guess I'll keep
23 the same order and go back to you, Mr. Morchower.

24 MR. MORCHOWER: Thank you, Your Honor.

25 Your Honor, as the Court knows, Mr.

1 Claiborne entered a defacto Alford plea of
2 guilty to the charge. The maximum sentence is
3 twelve months. And I'm going to leave it up to the
4 Court's discretion to impose what the Court thinks
5 is appropriate under the circumstances.

6 THE COURT: All right, thank you. Let me
7 ask you one thing. I also have on today's docket a
8 capias to be dealt with which was issued by the
9 Court alleging that your client broke terms of his
10 bond. Do you represent him on that?

11 MR. MORCHOWER: Yes, Your Honor, I would ask
12 the Court to handle that --

13 THE COURT: I want to handle it --

14 MR. MORCHOWER: Handle it -- he was
15 arrested, he's been incarcerated since the capias
16 was served. Which is --

17 THE COURT: Has been two and-a-half months.

18 MR. MORCHOWER: -- two and-a-half months
19 ago. I would ask the Court to dismiss the capias
20 under the circumstances. We did not petition the
21 Court for any relief. We realized that the matter
22 was -- would mature on today's date.

23 THE COURT: Because the capias carries a
24 possibility of a jail sentence, he's entitled to
25 counsel. If you represent him I don't have a

1 problem. If you don't I'd have to advise him of
2 his right to counsel.

3 MR. MORCHOWER: Well, I'll represent him so
4 we can move the case along.

5 THE COURT: Thank you, sir.

6 Mr. Boone?

7 MR. BOONE: Judge, may it please the Court.
8 First I want to thank you for the opportunity to
9 speak for Mr. Richardson. Much like his relatives,
10 I certainly express my condolences to the Gibson
11 family. Obviously this is a sad situation. I
12 would suggest for everyone in the courtroom. The
13 Gibson family understandably are very saddened by
14 the death of their loved one. And there's nothing
15 that the Commonwealth can do or defense counsel or
16 the Court can do to change that.

17 I would like to speak for my client because
18 he is not being given the opportunity to speak for
19 himself. And I want to address that issue.

20 This case for the past two years has had
21 more peaks and valleys than any case that I've ever
22 been involved in. And I've been in this practice
23 for twenty-four years. David Chappell was an
24 elected constitutional officer for his county. He
25 reviewed the facts in this case. Practically under

1 a microscope. He gave a lot of thought to what
2 should happen with this particular case and how it
3 should be tried, and he ultimately made the
4 decision to amend the indictments to involuntary
5 manslaughter.

6 MS. PERSON: Your Honor, I'm going to object
7 to this. I'm not sure that this has anything to do
8 with the factors set out in the statute that should
9 be argued at sentencing. The defendant has been
10 indicted and stands convicted of involuntary
11 manslaughter, and I think that under this statute
12 there are several factors that we need to confine
13 our argument to regarding sentencing, and what the
14 former Commonwealth Attorney did is not one of
15 those factors.

16 THE COURT: It has a lot to do with why we
17 are here in the particular posture that we find
18 ourselves, whether you like it or not. The
19 Commonwealth has been given great latitude, and I
20 think correctly so, this morning, and I'm going to
21 allow Mr. Boone to have his say.

22 MR. BOONE: Thank you, Judge.

23 Of course this Commonwealth Attorney was not
24 present when all this took place with Mr. Chappell.
25 At any rate, the decision was made to amend the

1 indictment. It was amended and the defendant pled
2 guilty.

3 Now, from that day, which was the last day
4 we were in court, until today, many things have
5 happened. And I -- and I certainly want to address
6 them briefly.

7 Immediately after court, it seemed like
8 everybody wanted to put a spin in the press on this
9 case with the exception of Mr. Richardson and
10 myself. My client did not speak to the press and
11 neither did counsel.

12 The Judge was attacked in the press for
13 accepting a plea agreement, when in fact there was
14 no plea agreement. This Court had absolutely no
15 discretion, as the Court well knows. It was never
16 a plea agreement presented to this Court. Comments
17 were made to the press pro and con with reference
18 to the facts of the case. Mr. Chappell gave a full
19 page interview to the press days after the
20 arraignment, and I thought that was totally
21 improper and I say so today.

22 Mr. Richardson cannot address the Court
23 today. He cannot address the family today because
24 the federal government, at the urging of the family
25 of Mr. Gibson, has decided to investigate and

indict him for this same offense. And I have been advised by the federal government that they intend to do that. A grand jury has been convened and witnesses have testified. So anything Mr. Richardson might want to say today would and could be used against him in the federal trial.

The Commonwealth Attorney stands here today and says well, I think you should disregard the guidelines. You know, I find it interesting as a defense attorney with these so-called guidelines, when the guidelines are high, and suit the Commonwealth Attorney's agenda, they'll be waving it like a flag. Boy, this is a great guideline. But when that guideline doesn't say what the Commonwealth's Attorney wants it to say, disregard it, Your Honor. Don't pay any attention to it whatsoever. It's totally voluntary.

And the Commonwealth Attorney stands here today and says here are the reasons I want you to give an upward departure. First of all because his actions show disrespect. He lied to the police about his actions afterwards. We must consider the victim and the victim's family and we must send a message to the community.

Well, in any criminal case -- in any

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1 community? Well, there are a lot of messages. I
2 must admit I agree with part of the message that
3 the Commonwealth Attorney has alluded to. When a
4 police officer gives instructions to an individual,
5 whatever those instructions are, obviously they
6 should be abided by. And they should be followed.
7 And I don't think anybody can argue with that.
8 That's the law and that's the way our society must
9 operate or we're going to live in an uncivilized
10 society.

11 But when an individual doesn't follow the
12 directions and a crime is committed, you've got to
13 look beyond the crime when you decide what the
14 appropriate disposition should be. Certainly you
15 should look at the victim's family and at the
16 victim and the facts surrounding this case. I
17 don't suggest otherwise. But you've also got to
18 look at the defendant. And in this case you look
19 at this presentence report. Apparently the
20 Commonwealth's Attorney sees more presentence
21 reports than I do. I've been reading them for
22 twenty-four years. I don't think I've ever seen a
23 presentence report this clean. This young man has
24 no blemishes whatsoever. He's got a speeding
25 conviction, and that's it. And the worst the

1 Commonwealth's Attorney can say about him is he
2 doesn't seem to have stable employment.

3 He's a high school graduate. He's got good
4 family. Family members in the courtroom. He's
5 well loved. He has no criminal history. And in a
6 nanosecond -- a nanosecond -- a mistake occurred
7 that affected many people. All the people in this
8 courtroom and many other people. In that
9 nanosecond Officer Gibson's life was taken, but
10 let's keep in mind that his life was taken through
11 an accidental killing. It was an accident. And I
12 would analogize this case to a police officer
13 pursuing a speeder with his lights and sirens going
14 and the speeder decides to try to outrun the police
15 officer. And based on those actions, the police
16 officer crashes and hits a tree and dies. That's
17 an accidental killing. I would analogize this case
18 to that type of case.

19 That is what the defendant pled guilty to.
20 And the last thing I want is for the Commonwealth
21 Attorney, through the predecessor, David Chappell,
22 to amend the indictment and then come through the
23 back door and say well, you know, he pled guilty to
24 involuntary manslaughter but by God let's give him
25 the maximum sentence because it was a police

1 officer, and the feds are going to come through the
2 back door and indict him if they get their way and
3 et cetera and et cetera.

4 I say to this Court that you have the
5 responsibility and I know you understand this. But
6 I want to make sure that everybody in the courtroom
7 understands this. You have the responsibility to
8 follow the tennets of justice. And justice
9 includes everything that has been said in this
10 courtroom today. Including -- including putting
11 emotions aside and feelings aside over effects that
12 the crime may have upon others.

13 So I say to this Court, the sentencing
14 guidelines suggest probation. They also suggest up
15 to six months in jail. I'm not suggesting that is
16 the appropriate sentence. I'm not going to tell
17 you what the appropriate sentence is, unlike the
18 Commonwealth. I'm going to leave that up to Your
19 Honor. But I will say to Your Honor, you have a
20 young man before you who has an unblemished
21 background. Who stands in good stead in the
22 community. Who has made a mistake. Let's punish
23 him for that mistake, and not the mistake that
24 exists only in the minds of some individuals that
25 are not in tune with the facts of this particular

1 case. Thank you.

2 THE COURT: Thank you.

3 Anything further from the Commonwealth?

4 MS. PERSON: Yes, sir, just very briefly.

5 Evidently Mr. Boone didn't hear the
6 Commonwealth's comments when I first began. I said
7 that this presentence report, like most I review,
8 is -- well, there's nothing really aggravating
9 about the defendant's background. In fact I
10 enumerated those factors that I thought were to the
11 defendant's credit. He's argued that the statute
12 makes no distinction about the status of the
13 victim, but the Commonwealth would suggest that --
14 and would urge the Court to certainly take into
15 consideration the fact that this was a police
16 officer in the line of duty who was killed by
17 accident. He wasn't on his leisure time. He was
18 trying to apprehend the defendant, and the
19 defendant turns around, struggles with him, takes
20 his gun, and shoots him. And the Commonwealth
21 certainly believes that the Court ought to take
22 that into consideration when you're considering
23 what punishment he ought to get.

24 Mr. Boone has analogized this situation to
25 an accidental killing from speeding, and his logic

1 escapes me. Speeding and hitting a tree is
2 certainly not like somebody tussling and fighting
3 with the purpose of taking somebody's gun and then
4 the gun being shot and the person killed. To me
5 they are just absolutely not the same situation.

6 Again the Commonwealth believes regardless
7 of the fact, whatever the feds are going to take,
8 taking into consideration all the factors in this
9 case, everything that happened, all the factors
10 about the defendant, of course we have to consider
11 the victim. The Commonwealth still believes and
12 would urge the Court to consider the maximum
13 sentence in this case. We have an officer who is
14 no longer with us. He's never going to be with us.
15 He's taken away something from the community and
16 from the victim's family that can never be
17 replaced. He made an irresponsible decision that
18 day and he has to pay the consequences for it. And
19 again the Commonwealth has no problem with urging
20 the Court to give him the maximum time for this
21 offense.

22 THE COURT: Thank you.

23 Ferrone Claiborne, stand up, please.

24 Do you have anything you wish to say before
25 the Court pronounces sentence on you?

1 DEFENDANT CLAIBORNE: No, sir.

2 THE COURT: Having been found guilty of
3 being an accessory after the fact, a misdemeanor,
4 the Court sentences you to twelve months in jail
5 and imposes a fine of \$2,500. I note that you have
6 very likely served that jail sentence. I don't
7 keep the records, but I think you've served enough
8 time to have served it. And certainly you'll be
9 given credit for such time you have served.

10 I also have issued against you a capias in
11 December. The capias arose out of your being
12 arrested, and I don't have the facts, but I
13 understand subsequently convicted of a misdemeanor
14 in the City of Hopewell.

15 DEFENDANT CLAIBORNE: Yes, sir.

16 THE COURT: Which was, in the eyes of the
17 Court, a breach of your bond. I don't know if
18 you-all care to put on any evidence about that. I
19 heard Mr. Morchower --

20 MR. MORCHOWER: Judge, he was drinking in
21 public, which led to his arrest.

22 MS. PERSON: Your Honor, Commonwealth has a
23 certified copy of the conviction order.

24 THE COURT: They admit that he was
25 convicted.

1 MR. MORCHOWER: Disorderly conduct. No
2 aggravating circumstances.

3 THE COURT: Do you have anything further to
4 say about that?

5 DEFENDANT CLAIBORNE: No, sir.

6 THE COURT: The terms of bond in this case
7 and in every case are that one obey all the laws of
8 the Commonwealth, keep the peace and be of general
9 good behavior. You were arrested and subsequently
10 convicted for not doing those things. The Court
11 finds you guilty of the contempt charge for which I
12 had you arrested. I sentence you to six months in
13 jail on that, which is the maximum time allowed
14 without a jury for a contempt charge. Again I
15 suspect you have served the time.

16 Sheriff, he's in your custody until the jail
17 determines whether he's served his time.

18 MR. MORCHOWER: Thank you, Judge. Nice to
19 see you.

20 THE COURT: Nice to see you.

21 (Whereupon Defendant Claiborne was returned
22 to the lockup, and Mr. Morchower left the
23 courtroom.)

24 THE COURT: Quite a bit has been said this
25 morning by and on behalf of the Gibson family, and

1 in behalf of the defendant. I don't think I can be
2 near as eloquent as the Rev. Rose. Uncle Gene, he
3 called himself, but I hope we heard him. Because
4 if I heard him correctly, he said that he loved his
5 nephew. He did not condone what he had done. That
6 he knows he must be punished. And finally he says
7 how can I help. I want to do what I can for him.
8 In a nutshell that's what we are here for.

9 When courts sentence those who have been
10 convicted of crimes they have objectives. I'll
11 note a couple of those. They are obvious if you
12 think about them. To protect society against
13 crime. To deter others from committing crimes.
14 And two that I would think are central to this case
15 are punishment or retribution. And upholding
16 respect for the law.

17 Society is outraged at a crime of this
18 nature. Society doesn't have to know what the
19 facts are. It probably doesn't have to know
20 whether the defendant is technically guilty, for it
21 assumes that no one will harm or can justifiably
22 resist an officer in uniform.

23 Unfortunately, Officer Gibson did not have
24 the time, was not given the time to earn the
25 respect of the people of the Town of Waverly in

1 Sussex County.

2 Finally I must say that as this has played
3 out, we don't know -- we don't know that the
4 defendant is a really bad person. We do know that
5 he had very little work record. We do know that he
6 had virtually no criminal record -- two minor
7 traffic infractions and a drunk in public. We do
8 know that you, Mr. Richardson, were out in the wee
9 hours of the morning. That for a reason that we
10 don't know you were confronted by Officer Gibson.
11 That for a reason we don't know Officer Gibson
12 removed his pistol from its holster. And in his
13 words, was accidentally shot. And we do know that
14 you fled.

15 Why were you there and what were you doing
16 are questions that will remain unanswered, but they
17 will ring in the ears of the Gibson family and the
18 people of the Town of Waverly for a long, long
19 time.

20 I have heard Mr. Boone in your behalf state
21 that you did not wish to say anything, but you do
22 have that right and I must give you that
23 opportunity.

24 Please stand.

25 And I take it he chooses to remain silent.

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MR. BOONE: That's correct, Judge.

THE COURT: The Court sentences you to ten years in the state penitentiary. I suspend five years of that sentence for a period of twenty-five years. I order that upon your release you be of general good behavior, obey all the laws of the Commonwealth, keep the peace, pay the costs of this proceeding, and that you be under supervision of the probation office for a period of two years pursuant to the provisions of 19.2-292 of the Code of Virginia.

Mr. Boone will tell you and I will tell you that that two years is an additional two years in prison if you do not comply with the terms of your probation. It is nothing except two years of supervision if you obey the law and do the things which you are supposed to do.

I also order that you subject yourself to random drug screens if required by the probation office.

Sheriff, the defendant's in your custody.

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CERTIFICATE

I, Debra D. Bowden, hereby certify that I, having been duly sworn, was the court reporter in the Circuit Court of the County of Sussex on March 8, 2000, at the time of the matter recorded herein.

I further certify that I have transcribed the proceedings faithfully and accurately, to the best of my ability.

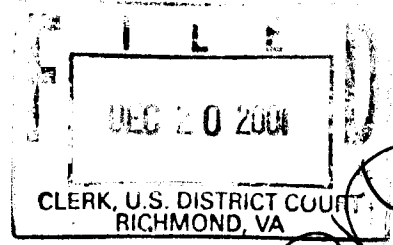
Given under my hand this 25th day of April, 2000:



Debra D. Bowden - Court Reporter

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION



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UNITED STATES OF AMERICA,

v.

TERENCE JEROME RICHARDSON AND
FERRONE CLAIBORNE,

Defendants.

Criminal No.
3:00CR00383

June 13, 2001

VOLUME IX

COMPLETE TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

155

DIANE J. DAFFRON, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

1 APPEARANCES:2 DAVID NOVAK, Assistant United States Attorney
3 Richmond, Virginia

4 Counsel on behalf of the United States

5
6 BOATWRIGHT & LINKA
7 Richmond, Virginia

8 BY: JOHN B. BOATWRIGHT, III, ESQ.

9 Counsel on behalf of Defendant Richardson

10 BARNES & BATZLI, P.C.
11 Chesterfield, Virginia

12 BY: MICHAEL HUYOUNG, ESQ.

13 Counsel on behalf of Defendant Richardson

14 WHITE, BLACKBURN & CONTE, P.C.
15 Richmond, Virginia

16 BY: CHARLES A. GAVIN, ESQ.

17 Counsel on behalf of Defendant Claiborne

18 RICE, EVERHART & BABER
19 Richmond, Virginia

20 BY: JEFFREY L. EVERHART, ESQ.

21 Counsel on behalf of Defendant Claiborne

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1 (The proceedings in this matter recommenced
2 at 9:00 a.m.)

3

4 THE CLERK: Criminal No. 3:00CR00383, the
5 United States of America v. Terence Jerome Richardson
6 and Ferrone Claiborne.

7 Mr. David Novak represents the United
8 States.

9 Mr. John B. Boatwright, III, and Mr. Michael
10 Huyoung represent the defendant, Terence Jerome
11 Richardson, and Mr. Jeffrey L. Everhart and
12 Mr. Charles A. Gavin represent the defendant, Ferrone
13 Claiborne.

14 Are counsel ready to proceed?

15 MR. NOVAK: The United States is ready.

16 MR. BOATWRIGHT: Ready on behalf of
17 Mr. Richardson.

18 MR. EVERHART: Mr. Claiborne is prepared.

19 THE COURT: Ladies and gentlemen, yesterday
20 afternoon or this morning -- I'm not sure which, it
21 doesn't make any difference -- one of the jurors was
22 talking with the court security officer and indicated
23 that the jury was having some difficulty with the
24 problem with what happened to the T-shirt and the
25 pictures.

1 The court security officer didn't discuss
2 the matter substantively but did say, "Just use your
3 common sense." I figured you needed to know that
4 information. I don't know which juror it was right
5 now.

6 Do we know yet which one it is?

7 MR. MACK: I don't know. I've just been
8 made aware of it. I'll know her when I see her.

9 THE COURT: Well, there was a lady sitting
10 there who had long hair, a lady sitting back there who
11 has short hair, a lady sitting here who has real long
12 hair. And she's kind of blonde, and I think her
13 father was a Chesterfield police officer. There's
14 another lady sitting back here on one of these rows
15 with short hair.

16 Do you know where she was sitting, roughly?

17 MR. MACK: Front row.

18 THE COURT: Long, black hair.

19 MR. MACK: Dark hair.

20 THE COURT: Long, dark hair?

21 MR. MACK: Yes, sir.

22 THE COURT: Sitting over at that end?

23 MR. MACK: Yes, sir.

24 THE COURT: I don't remember. Can you go
25 find out what her number is?

1 THE CLERK: If you have your original list,
2 I may be able to tell.

3 THE COURT: I think I know which one it is.
4 She works for the State Agriculture Department. Can
5 you just go find out what the number is, if not the
6 name?

7 All right. We'll find out who it is in a
8 minute, but what's your position, gentlemen, if
9 anything?

10 MR. NOVAK: I'm not sure what you're asking
11 us, Judge. I don't think there's anything to do,
12 frankly. It's just a comment she made, right?

13 THE COURT: Well, it's a comment that she
14 made, and there was a comment that the court security
15 officer made in response.

16 She just outlined that the jury was having
17 some difficulty because of the absence of evidence,
18 the absence of the photographs, and I think the
19 testimony -- the testimony of one photograph -- one of
20 the witnesses testified that when photographed the
21 T-shirt wasn't torn.

22 MR. NOVAK: Right, the father of the
23 defendant.

24 THE COURT: Right. In fact, if I remember
25 correctly, you told the jury in your closing argument

1 that if you believed that that evidence was falsified
2 and you believe that man was lying about the pictures
3 he took and what condition it is to acquit because you
4 didn't want a conviction on that basis, if I remember
5 right.

6 MR. NOVAK: That's exactly right, but I
7 think --

8 THE COURT: Then you have that communication
9 coming from a juror, and the CSO who's a person not on
10 the jury who just said, "Use your common sense," which
11 is nothing more than I told the jury, than you told
12 the jury, than they told the jury. I mean that
13 happened.

14 I figure that if I were trying the case, I
15 would like to know this information, and always
16 lawyers armed with information can make whatever, if
17 any, decisions they want to make. You don't want to
18 do anything?

19 MR. NOVAK: I don't want to do anything. I
20 don't think anything has been done.

21 THE COURT: One of the law clerks says that
22 the court security officer also told a juror,
23 "Whatever your position is, stick to it." I didn't
24 hear that. That wasn't told to me, but I figure since
25 I know that, I need to tell you that, too, over this

1 issue, on this issue.

2 MR. NOVAK: I think that's a different
3 issue. But as to the first comment you made us aware
4 of, I don't think there's anything occurred there
5 that's not occurred during the trial, in terms of
6 argument by both sides. So I don't think there's any
7 problem there.

8 As to No. 2, if there's a comment like that,
9 I think the Court should correct that today and give
10 an instruction about how you deliberate again.
11 Similar to an Allen charge-type situation where you're
12 basically supposed to discuss the evidence and be open
13 to everybody else's opinions, but you know, while
14 also --

15 THE COURT: I haven't asked Mr. Mack whether
16 he said that, the court security officer, whether he
17 said that or not.

18 MR. NOVAK: Is Mr. Mack who we're referring
19 to?

20 THE COURT: Yeah.

21 MR. NOVAK: Well, I would ask him.

22 THE COURT: Right. I'm just saying I
23 haven't asked him. I know the first part, the
24 conversation, because it was related to me, and that's
25 why I decided to relay to you Ms. Lewis, having heard

1 what I said, said she heard the other comment that I
2 related to you.

3 MR. NOVAK: Why don't we ask Mr. Mack,
4 first, and then if that was said -- which I'll be
5 surprised, frankly, if it was said. But if he did say
6 that, I would ask you to give essentially a modified
7 Allen charge and ignore what anybody else told you,
8 deal with what occurs in the jury deliberation room.

9 THE COURT: All right. What's your
10 position, Mr. Boatwright and Mr. Everhart?

11 MR. BOATWRIGHT: As to the first set of
12 remarks, I don't think there's anything to be done, as
13 you have said and as Mr. Novak said. That's exactly
14 what all of us called upon the jurors to do anyway.

15 As to the second, I guess wait and see if it
16 really happened. If it did happen, the portion of the
17 instruction you have already read dealing with
18 reexamining your beliefs --

19 THE COURT: Well, it's contradictory to my
20 instruction, in a way.

21 MR. BOATWRIGHT: In a way, not 100 percent
22 contradictory but somewhat, yes. The portion of the
23 instruction that you read talks about --

24 THE COURT: Well, I can deal with that in an
25 instruction, I suppose. You deal with it the way you

1 deal with an Allen charge. You just have a different
2 situation to deal with.

3 You just say, look, you've got this
4 information, and we want you to reexamine the law as
5 if you have to reexamine your views, et cetera.

6 MR. BOATWRIGHT: Right.

7 THE CLERK: It's Juror No. 36.

8 THE COURT: Number 36. Juror 36.

9 THE CLERK: Yes, sir.

10 THE COURT: All right. Mr. Mack, excuse me
11 a minute, but Ms. Lewis indicated that when the juror
12 talked about the position over the photos, that she
13 understood that you may have said to the juror,
14 "Whatever your position is, stick to it."

15 Did that happen, or did anything happen?

16 MR. MACK: Nothing happened.

17 THE COURT: Did you not say that?

18 MR. MACK: No, sir.

19 THE COURT: Okay.

20 MR. BOATWRIGHT: That takes care of that.

21 THE COURT: All right.

22 MR. EVERHART: Judge --

23 THE COURT: What's your position?

24 MR. EVERHART: We would ask the Court not to
25 address the first exchange. I don't think it's

1 necessary.

2 THE COURT: You would ask what?

3 MR. EVERHART: I would ask the Court not to
4 address -- we would ask the Court not to address the
5 jury regarding the first exchange between the juror
6 and the court security officer. I agree with
7 Mr. Novak and Mr. Boatwright. It's just a comment and
8 a response that doesn't have any significance, in my
9 opinion.

10 THE COURT: Just so I'm correct, anybody
11 need to explore anything that was said any further?

12 MR. NOVAK: That's the government's
13 position.

14 THE COURT: Your position?

15 MR. BOATWRIGHT: I don't.

16 THE COURT: Do you want to talk with the
17 juror, for example, either one of you?

18 MR. NOVAK: No, I'd like them to start
19 deliberating.

20 THE COURT: I understand that, Mr. Novak. I
21 too want them to do that.. I'm sure they do.

22 What?

23 MR. NOVAK: I'm sorry. I meant there's
24 nothing else, is my point.

25 THE COURT: You don't want to talk to the

1 juror herself?

2 MR. BOATWRIGHT: No, I don't.

3 THE COURT: You don't, either?

4 MR. BOATWRIGHT: No.

5 MR. EVERHART: No, sir.

6 THE COURT: You don't want me to talk to the
7 jury generally.

8 MR. NOVAK: No.

9 MR. BOATWRIGHT: I don't, either.

10 MR. EVERHART: No, sir.

11 THE COURT: All right. Looks to me like we
12 just call the jury back. Thank you very much.

13 I guess I have to -- I better tell you--all I
14 am buying pastries for the jury in the morning because
15 they got tired of bagels. They didn't say it, but I
16 knew they would.

17 MR. BOATWRIGHT: Is there any left over?

18 THE COURT: I do it all the time, but I
19 don't do it for lawyers.

20

21 (Jury entered the courtroom at 9:25 a.m.)

22

23 THE COURT: All right. Ladies and
24 gentlemen, I'm sorry. There was something I needed to
25 take up with the lawyers, and I kept you from your

1 task. And the only thing I can say is I hope you did
2 enjoy some of the treats that were in there for you
3 today.

4 You're going to be able to return to your
5 deliberations now, hearing that all of the jury is
6 present and accounted for. We will send you lunch
7 menus, if you feel as if you need them. Remember that
8 it takes about an hour to get it here. So we need it
9 an hour before you want to have lunch.

10 Thank you very much, and you may return to
11 the jury room and continue your deliberations.

12

13 (Jury exited the courtroom at 9:28 a.m.)

14

15 THE COURT: I'm going to give those three
16 gentlemen there the Sir Walter Scott Award.

17 All right. You may be in recess. I mean,
18 we're going to be in -- I have another hearing I need
19 to attend to, and you-all can go back to your offices
20 if you want to.

21 We'll tell the jury -- Mr. Mack, will you
22 tell the jury that if they have a question, I'm
23 letting the lawyers go back to their offices, and it
24 will take 30 minutes or so for them to get back here
25 and explain so that's what the delay will be if there

1 is a delay.

2 MR. MACK: Yes, sir.

3 THE COURT: Mr. Gavin, you can't go.

4 MR. GAVIN: Thank you.

5 THE COURT: You have another trial.

6 All right. Thank you all. Please leave
7 with Mr. Neal and with Ms. Lewis the telephone number
8 where you can be reached, and make sure that wherever
9 you are, you're available to that phone.

10 MR. BOATWRIGHT: Judge, I'm going to be here
11 no matter what. So I just want to let you know that.

12 MR. HUYOUNG: Judge, I'll be in the Fourth
13 Circuit Court Law Library.

14 MR. EVERHART: Mr. Neal has my numbers.

15 THE CLERK: That covers it.

16 THE COURT: Thank you-all very much.
17 You-all are excused, and I'll continue the hearing I
18 started just a minute ago.

19 MR. EVERHART: Judge, you said you want me
20 to give them to Ms. Lewis as well right now.

21 THE CLERK: I'll give them to her.

22 THE COURT: I don't know that you want that
23 on the record.

24 MR. EVERHART: I'm happy to do it. You said
25 you were going to begin your hearing, and I didn't

1 want to interrupt that.

2 THE COURT: All right. Go ahead. Thank
3 you.

4
5 (Recess taken.)

6
7 THE CLERK: Mr. Everhart is on this phone.
8 He's on my speakerphone, but he can hear. Are you
9 there, Mr. Everhart?

10 MR. EVERHART: Yes, I am.

11 THE COURT: Can you hear all right,
12 Mr. Everhart?

13 MR. EVERHART: Yes, Your Honor.

14 THE COURT: All right. Speak up, please.

15 Everybody else is here. I have a question
16 from the jury. The question is, "We, the jury, would
17 like to see the computer animation of the trajectory
18 of the bullet that killed Officer Gibson," and then it
19 has "AP-12." Is that the exhibit?

20 MR. NOVAK: Yes, it is, sir.

21 THE COURT: All right. What's your
22 position?

23 MR. NOVAK: Well, No. 1, it's in evidence.
24 So they are allowed to see it.

25 THE COURT: Any objections?

1 MR. BOATWRIGHT: No, sir. Just the only
2 question I have is that it's played in the proper
3 manner.

4 THE COURT: Okay.

5 MR. NOVAK: That's the issue. The issue is
6 the practical consideration.

7 THE COURT: Wait just a minute. Do you have
8 any objection?

9 MR. BOATWRIGHT: No, sir.

10 MR. GAVIN: No, sir.

11 THE COURT: Mr. Everhart?

12 MR. EVERHART: No, sir.

13 THE COURT: So they're going to see it.

14 Now, the question is how do we play it?

15 MR. NOVAK: What we have is it's also on a
16 standalone computer, which I will get our computer
17 person, Ms. Noble. I didn't know what the question
18 was before I came here. So I will forthwith get her
19 down here. All she has to do is hit a button and play
20 it.

21 THE COURT: You mean she has it on a
22 portable computer?

23 MR. NOVAK: A PC, personal computer. And
24 that can be played for the jury in their jury room.
25 The only thing is she's going to have to hit the

1 button.

2 THE COURT: Well, either that or she has to
3 show them how to hit the button.

4 MR. NOVAK: Or we show a court security
5 officer how to hit the button.

6 THE COURT: The other thing is we can bring
7 them in here and play it.

8 MR. NOVAK: For them to see it, you're
9 talking about a PC. Otherwise, we're going to have to
10 hook up the Elmo.

11 THE COURT: Put the PC up there in front of
12 the jury and hit the button. What does it take, five
13 seconds?

14 MR. NOVAK: Five seconds, you're right.

15 THE COURT: Punch it three or four times.

16 MR. NOVAK: Whatever you want to do, Judge.

17 THE COURT: I think that will be the easiest
18 way to do it.

19 MR. NOVAK: It's going to take a little bit
20 of time. I'll go back and track her down and get this
21 lined up.

22 THE COURT: Tell the jury we have to get the
23 equipment to allow it to happen and that we will do
24 that, and in the meantime, I'm going to start
25 selecting the other jury.

1 MR. NOVAK: That's fine, Judge.

2 THE COURT: So take the defendants down.

3 MR. NOVAK: I figure this is going to take
4 me about a half an hour.

5 THE COURT: All right. I think what we'll
6 do -- is Judge Spencer using his courtroom?

7 THE CLERK: I've been here all morning. I
8 have no idea.

9 MR. MACK: Yes, he is.

10 THE COURT: He's got a trial?

11 MR. MACK: I don't know yet.

12 THE COURT: He did have a bench trial. I
13 think he moved it. I don't know whether he's finished
14 or not. Well, we'll work it out. Maybe we'll play
15 it -- we'll play it somewhere.

16 You get it down here, and then I think what
17 we'll do is this: We'll take it to the jury room, and
18 the court reporter and I will go to the jury room and
19 record that it's being played.

20 MR. NOVAK: Okay.

21 THE COURT: If they want to keep that
22 computer in there, show them -- is that the only thing
23 that's on there?

24 MR. NOVAK: The only thing that's on there.

25 THE COURT: And we'll show them how to

1 operate it in case they want to.

2 MR. NOVAK: That's fine.

3 THE COURT: Is that all right with the
4 defense?

5 MR. BOATWRIGHT: Yes, sir.

6 MR. GAVIN: Yes, sir.

7 THE COURT: Mr. Everhart?

8 MR. EVERHART: Yes, sir, that's fine.

9 THE COURT: All right. Thank you. We'll be
10 in recess, and take the defendants. Bring Mr. Clark
11 back, and then get the other jury here.

12 MR. NOVAK: Judge, may I just ask one
13 question? When I get her down here with the computer,
14 who do you want me to communicate with, Mr. Neal?

15 THE COURT: Talk with Ms. Hooper, and
16 they'll take care of it.

17 MR. NOVAK: Yes, Judge.

18 THE COURT: All right. Here's Mr. Neal.

19 THE CLERK: Court Exhibit 1.

20 THE COURT: Court Exhibit 1.

21 Thank you very much. We'll be in recess.

22

23 (Recess taken.)

24

25 THE COURT: The court reporter, Ms. Noble

1 from the U.S. Attorney's Office and myself are in here
2 with the jury. The jury has requested to look at
3 Exhibit AP-12, I believe, and Ms. Noble is on a
4 computer.

5 She's going to show them how to operate it,
6 and then we're going to leave the exhibit and the
7 computer in here. The only thing on computer is the
8 exhibit, right?

9 MS. NOBLE: Correct.

10 THE COURT: Go ahead and show them how, and
11 we'll record it.

12 MS. NOBLE: It's very easy to use. The F5
13 key will display the program. It starts with a blank
14 screen. The over arrow goes to the next screen. If
15 you want to go back --

16 THE COURT: Wait a minute. We don't want
17 that. All I want is the moving picture, AP-12.

18 MS. NOBLE: Okay. This is part of it.

19 THE COURT: Turn it this way so in case you
20 have another slip, it won't be played to everybody. I
21 want you to erase everything on there but that little
22 one show.

23 It needs to be up higher.

24 A JUROR: Perry Mason didn't have all this
25 stuff. All he had was --

1 THE COURT: You're on the record.

2 Is everything else erased?

3 MS. NOBLE: Uh-huh.

4 THE COURT: So all that is here is the
5 diagram -- I mean the animation. Now, show them how
6 to use that. You can turn it around so they can see
7 how to use it.

8 MS. NOBLE: You just have to move these --
9 this is the mouse. With your finger, move the arrow
10 here to this triangle. Click this button, and it will
11 play.

12 THE COURT: Does it stop automatically?

13 MS. NOBLE: It stops automatically.

14 A JUROR: Does the screen have a lighter.
15 It's very hard to see.

16 MS. NOBLE: You can pause it.

17 THE COURT: Do you know how to do that?

18 A JUROR: Yes, sir.

19 THE COURT: Nothing else is on the computer?

20 MS. NOBLE: Correct. I deleted it all.

21 THE COURT: All right. Ladies and
22 gentlemen, we're leaving it to you now.

23 I tell you now I'm going to tell the lawyers
24 that the picture came up, and I'm going to tell you
25 now to disregard the picture. That is not in

1 evidence.

2 I know you're not focusing on it. You're
3 focusing on what you wanted, and I'm going to tell the
4 lawyers about it and if there's anything else that
5 needs to be done. But right now, consider yourself
6 instructed, and I'm sure that you will follow the
7 instructions. Thank you.

8 All right. We're leaving.

9

10 (Recess taken.)

11

12 MR. EVERHART: Hello?

13 THE CLERK: Mr. Everhart, Judge Payne is on
14 the bench. I'll let him take over.

15 THE COURT: Both defendants are here, and
16 all counsel are here -- well, Mr. Everhart by
17 telephone.

18 I took the computer in, and when -- is it
19 Ms. Noble?

20 MR. NOVAK: Yes, sir.

21 THE COURT: When Ms. Noble was setting up
22 the computer and showing them how to use it, the first
23 thing that flips on the screen is a sign that says
24 "Autopsy" and a picture of Officer Gibson, which is --
25 I was told, I thought, that the only thing on there

1 was this demonstration, this animation.

2 The picture that was shown was shown
3 briefly. I realized it and asked her to turn it
4 around. She turned it around. I don't think all the
5 jury even saw it, just about maybe three or four of
6 them right at the corner where she was working.

7 The picture was from, I would say not neck
8 but just below the neck up. That's all it was. And
9 it said "Autopsy" on the left side, and then there was
10 a picture about the collarbone up of the officer's
11 face.

12 And I asked Ms. Noble to erase it. She
13 erased everything but the animation, and I instructed
14 the jury that they could not pay any attention to it,
15 that it wasn't evidence and they should absolutely
16 disregard it and I was going to tell you-all about it
17 as well.

18 MR. NOVAK: May I please speak?

19 THE COURT: Yes.

20 MR. NOVAK: Judge, that was incorrect. That
21 is in evidence. That whole exhibit is the -- you
22 recall we introduced that.

23 THE COURT: No, I don't.

24 MR. NOVAK: We had an agreement amongst
25 ourselves that in return for us not introducing the

1 autopsy photos, we would show -- it's a continuum,
2 that photo -- I think there is one or two photos and
3 then the animation. So she just erased part of the
4 exhibit that was introduced into evidence.

5 THE COURT: Well, then I made a mistake.
6 You shouldn't have put the picture in anyway. It
7 doesn't have anything to do with anything.

8 MR. NOVAK: Judge, we agreed to that.

9 THE COURT: You may have agreed to it, but
10 you know, I asked you in here, in court, "Is that the
11 only thing on there, the animation?"

12 "Yes," that was the answer.

13 MR. NOVAK: And it is the answer, Judge.

14 THE COURT: No, but it isn't. That wasn't
15 an animation, Mr. Novak, it was a picture.

16 MR. NOVAK: But, Judge, it's one exhibit.
17 That's as if you're asking me, respectfully, that --

18 THE COURT: What difference does it make
19 that the picture is not -- they're not interested in
20 the picture. They're interested in the animation.

21 MR. NOVAK: It's fine. Look, it's erased.
22 That's fine. But my point, though, Judge, is what I
23 told you was accurate, that that is the exhibit. I
24 can't -- I mean, when I called Ms. Noble, I
25 specifically asked her, I said, "Is there anything

1 else on there?" The answer was no. I can't change
2 the evidence. I mean, that's the evidence that went
3 in that they stipulated --

4 THE COURT: If you're prejudiced by it, then
5 we can do something about it.

6 MR. NOVAK: Well, I'm not saying that,
7 Judge. What I'm answering you --

8 THE COURT: Both of you got the -- I'm not
9 criticizing you. But the question I asked was, "Is
10 the animation the only thing they asked for, the only
11 thing on AP-12?"

12 And I was told, "yes." And when I took it
13 in there, that thing showed up. So I just said to
14 take the rest of it off, and that's it.

15 MR. NOVAK: All right. But I'm just trying
16 to make clear, Judge, when you asked me that, it's
17 because it's a continuum. It's not an isolated part.
18 It's like saying the jury wants to see the barrel on a
19 gun. We don't disassemble the gun and give them just
20 the barrel. The entire gun is the exhibit. That's my
21 only point. I don't care that it's deleted now.

22 THE COURT: Is it a point with a difference?
23 Do I need to do anything as a result of that point?

24 MR. NOVAK: No, I would just -- well,
25 frankly, no. I mean, my only thing, my only

1 suggestion would be that if this becomes an issue
2 again that they not be instructed that that was not in
3 evidence because that photo actually was in evidence,
4 but at this point to me --

5 THE COURT: Well, I can tell you from the
6 reaction when I told them to disregard it, they didn't
7 give a hoot about the picture. They were interested
8 in that animation, and that's all they wanted to see.

9 MR. NOVAK: I believe you, and I agree with
10 that. I want to make sure we're accurate in terms of
11 what the record says.

12 THE COURT: All right. Enough said.
13 Anybody else have anything to say?

14 MR. BOATWRIGHT: No, sir.

15 MR. GAVIN: No, sir.

16 THE COURT: Is there such a thing as the
17 Ides of June?

18 All right. We'll be in recess. The jury
19 has had lunch delivered now?

20 THE CLERK: Yes, sir, the jury has lunch.
21 Do you want to inquire of Mr. Everhart if he has any
22 comments?

23 THE COURT: Well, I assume -- I said does
24 anybody else. I assume he can hear.

25 THE CLERK: I'm sorry.

1 THE COURT: But you better check.

2 THE CLERK: Can you hear us, Mr. Everhart?

3 MR. EVERHART: Yes, sir.

4 THE COURT: I just know with the cell phone,
5 he might have gotten cut off. So I assume nobody has
6 anything else to say.

7 You-all take 45 minutes for lunch. If they
8 have questions during that period of time, I'll just
9 tell them that you-all have gone to lunch.

10 MR. NOVAK: Judge, may I still go back to my
11 office and keep working on that brief?

12 THE COURT: Yes.

13 MR. NOVAK: I'm trying to get it done.

14 THE COURT: All right. Anything else?

15 MR. BOATWRIGHT: No, sir.

16 THE COURT: All right.

17

18 (Recess taken.)

19 (Jury entered the courtroom at 3:20 p.m.)

20

21 THE CLERK: Mr. Foreman, has the jury
22 reached a unanimous verdict in this matter?

23 MR. FOREMAN: Yes, we have.

24 THE CLERK: Would you hand it to the
25 marshal, please, sir?

1 MR. FOREMAN: (The foreperson complied.)

2 THE COURT: All right. Publish the verdict,
3 please.

4 THE CLERK: Thank you, Your Honor.

5 Would the defendant, Terence Jerome
6 Richardson, please stand?

7 Criminal No. 3:00CR383-01, the United States
8 of America v. Terence Jerome Richardson. We, the
9 jury, unanimously find the defendant Terence Jerome
10 Richardson as to Count One guilty as charged in Count
11 One of the superseding indictment.

12 Answer to the question, 1, if you found the
13 defendant guilty, answer the following with respect to
14 Count One: Did the offense involve 50 grams or more
15 of cocaine base? Answer, yes.

16 Count Two, we, the jury, find the defendant
17 Terence Jerome Richardson not guilty as charged in
18 Count Two of the superseding indictment.

19 Count Three, not guilty as charged in Count
20 Three of the superseding indictment.

21 So say we all this 13th day of June, 2001,
22 signed Kenneth Mitchell, Foreperson.

23 You may be seated, sir.

24 Would the defendant Ferrone Claiborne please
25 stand.

1 Criminal No. 3:00CR383-02, the United States
2 of America v. Ferrone Claiborne. Verdict, we, the
3 jury, unanimously find the defendant Ferrone Claiborne
4 guilty as charged in Count One of the superseding
5 indictment.

6 Answer to the question, 1, if you found the
7 defendant guilty, answer the following with respect to
8 Count One: Did the offense involve 50 grams or more
9 of cocaine base? Answer, yes.

10 We, the jury, on Count Two find the
11 defendant Ferrone Claiborne not guilty as charged in
12 Count Two of the superseding indictment, and not
13 guilty as charged in Count Three of the superseding
14 indictment.

15 So say we all this 13th day of June, 2001,
16 signed Kenneth Mitchell, Foreperson.

17 You may be seated, sir.

18 Ladies and gentlemen of the jury panel, are
19 these your unanimous verdicts in this case?

20 THE JURY: Yes.

21 THE COURT: Is there any reason we can't
22 excuse the jury?

23 MR. NOVAK: Not from the government.

24 MR. BOATWRIGHT: No, sir.

25 MR. EVERHART: No, sir.

1 THE COURT: Ladies and gentlemen, on behalf
2 of the Court and the parties and the lawyers, I want
3 to thank you for the discharge of one of the most
4 important civic duties a citizen can have.

5 We know that it is a great imposition upon
6 you and your time, upon your families, upon the time
7 of your employers, and we know that it is never, never
8 easy to sit in judgment on a fellow citizen. We know
9 the toll that that takes on you when you have to do
10 it.

11 And nonetheless, it is critically important
12 if our system of justice is to work that we have
13 citizens such as yourself who are willing to discharge
14 this critically important responsibility, and we're
15 truly grateful for what have you done.

16 And you're excused to go about your duties.
17 The only real other thanks that I can give you is to
18 tell the jury clerk you're excused from any further
19 jury service during your term, considering the
20 contributions that you've made to the process so far.

21 Thank you very much. You're excused with
22 our gratitude.

23

24 (Jury was discharged and exited the
25 courtroom at 3:25 p.m.)

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THE COURT: Mr. Neal, if you would inform the jury clerk of the names of the sitting jurors and the alternates, I'll appreciate it.

THE CLERK: Yes, sir.

THE COURT: And you'll inform the alternates so they're free.

THE CLERK: Yes, sir. We may need your calendar, Your Honor.

THE COURT: I thought I had it out here.

THE CLERK: If you want to look at your calendars, we're going to have to go past August the 27th, past August 27th to meet the requirements in the Guideline Order.

THE COURT: How about August 30? August 30 at 8:30 in the morning?

MR. HUYOUNG: That will be fine for me, Your Honor.

MR. BOATWRIGHT: Judge, I have a problem then. I have a prior commitment.

THE COURT: The 31st? Is it going to be a long sentencing, do you think, or not?

MR. NOVAK: I think a little bit longer than the norm. I frankly haven't thought it out, Judge. Leave at least an hour.

1 THE COURT: September 21st at 8:30 in the
2 morning? Is that all right?

3 MR. GAVIN: Not for me. Not for me, Your
4 Honor.

5 THE COURT: August 31 at 8:30?

6 MR. HUYOUNG: Available, Your Honor.

7 MR. BOATWRIGHT: Yes, sir.

8 MR. EVERHART: Yes, Your Honor. Did you say
9 8:30, Your Honor?

10 THE COURT: 8:30.

11 MR. EVERHART: Yes, sir.

12 MR. GAVIN: Yes, sir.

13 THE COURT: All right. Sentencing will be
14 at 8:30 in the morning on August 31.

15 All right. Mr. Claiborne and
16 Mr. Richardson, would you stand up?

17 Your sentencing is on August 31 at 8:30 in
18 the morning. And there's going to be a presentence
19 report, and the probation officer is going to want to
20 interview you in connection with the presentence
21 report.

22 And you'll have counsel present at the time,
23 and then you will get a copy of the presentence
24 report. You need to review it, go over it and tell
25 your lawyer if there's anything that you object to.

1 And then they can file objections.

2 And if you don't do that, then whatever
3 right you have to object to the presentence report
4 will be lost and waived.

5 Do you understand that, Mr. Claiborne?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Do you understand that
8 Mr. Richardson?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Has the Sentencing Guideline
11 Order been signed?

12 MR. BOATWRIGHT: It has for Mr. Richardson.

13 MR. EVERHART: I'm sorry. I have mine right
14 here to your left.

15 THE COURT: Thank you very much.

16 All right. We'll be in adjournment.

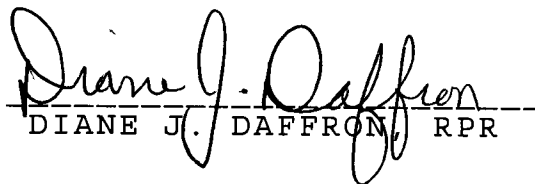
17 (The proceedings in this matter concluded at
18 3:28 p.m.)

19

20 I, Diane J. Daffron, certify that the
21 foregoing transcript is a correct record of the
22 proceedings taken and transcribed by me to the best of
23 my ability.

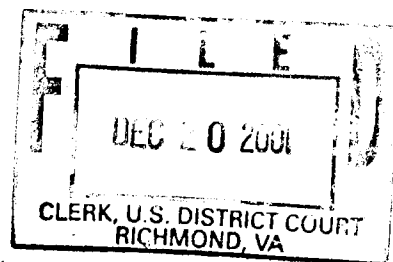
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DIANE J. DAFFRON, RPR

12/20/01
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION



UNITED STATES OF AMERICA,

v.

TERENCE JEROME RICHARDSON AND
FERRONE CLAIBORNE,

Defendants.

Criminal No.
3:00CR00383

September 27, 2001

COMPLETE TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

15c

DIANE J. DAFFRON, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

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1 APPEARANCES:2 DAVID NOVAK, Assistant United States Attorney
3 Richmond, Virginia

4 Counsel on behalf of the United States

5
6 BOATWRIGHT & LINKA
7 Richmond, Virginia

8 BY: JOHN B. BOATWRIGHT, III, ESQ.

9 and

10 BARNES & BATZLI, P.C.
11 Chesterfield, Virginia

12 BY: MICHAEL HUYOUNG, ESQ.

13 Counsel on behalf of Defendant Richardson

14
15 WHITE, BLACKBURN & CONTE, P.C.
16 Richmond, Virginia

17 BY: CHARLES A. GAVIN, ESQ.

18 and

19 RICE, EVERHART & BABER
20 Richmond, Virginia

21 BY: JEFFREY L. EVERHART, ESQ.

22 Counsel on behalf of Defendant Claiborne

23

24

25

1 (The proceedings in this matter commenced at
2 2:00 p.m.)

3

4 THE CLERK: Criminal No. 3:00CR00393-01, the
5 United States of America v. Terence Jerome Richardson
6 and Criminal No. 3:00CR00393-02, the United States of
7 America v. Ferrone Claiborne. Mr. David Novak
8 represents the United States of America.

9 Mr. John B. Boatwright, III, and Mr. Michael
10 HuYoung represent the defendant Terence Jerome
11 Richardson. Mr. Charles A. Gavin and Mr. Jeffrey L.
12 Everhart represent the defendant Ferrone Claiborne.

13 Are counsel ready to proceed?

14 MR. NOVAK: The United States is ready, Your
15 Honor.

16 MR. BOATWRIGHT: Ready on behalf of
17 Mr. Richardson, sir.

18 MR. EVERHART: Ready on behalf of
19 Mr. Claiborne, Your Honor.

20 THE COURT: All right.

21 MR. NOVAK: May I approach, Your Honor?

22 THE COURT: Yes.

23 MR. NOVAK: Judge, we're obviously here for
24 the defendants' sentencing after a jury convicted them
25 of participating in a conspiracy to distribute

1 50 grams or more of crack cocaine. It provides for a
2 mandatory minimum sentence of ten years and a maximum
3 penalty of life.

4 We have conferred, and there are two sets of
5 unresolved objections. The first addresses the weight
6 of the drugs, and the second addresses the role of the
7 acquitted conduct as it relates to the murder of
8 Officer Gibson. And I'll be prepared to address those
9 when you're ready.

10 THE COURT: Have you-all agreed on the
11 application of the enhancement 2D1.1(b)(1) for
12 possession of a weapon, 3A1.2 for official status?

13 MR. NOVAK: No, Judge. All those
14 enhancements I put under the set of whether the Court
15 is going to attribute the acquitted conduct as to
16 Officer Gibson, meaning that if the Court decides that
17 you don't believe the government could prove beyond a
18 preponderance of the evidence that they participated
19 in the murder, then there's no issue as to those.

20 But if you do find that we've proved by a
21 preponderance of the evidence that these defendants
22 participated in the killing of Officer Gibson, then
23 the enhancements certainly are at issue.

24 I put them in as a subset, I guess, as to
25 the issue of the acquitted conduct.

1 THE COURT: Well, you have the burden to
2 establish the drug weight.

3 MR. NOVAK: Yes, I do, sir.

4 THE COURT: And it is the government who has
5 objected to the failure of the presentence report to
6 use the cross reference in Section 2D1.1(d). So you
7 have the burden to establish that.

8 MR. NOVAK: I think I have the burden on
9 everything.

10 THE COURT: Is there anything the defendants
11 have the burden on?

12 MR. NOVAK: On their downward departure
13 motion, the downward departure motion only comes into
14 play --

15 THE COURT: It's a conditional downward
16 departure motion.

17 MR. NOVAK: Right, depending on what you
18 decide to do as to the acquitted conduct, that's the
19 murder.

20 THE COURT: All right. Are you going to
21 call witnesses?

22 MR. NOVAK: No, Judge. We're going to rely
23 on the trial record.

24 THE COURT: Do you have any witnesses?

25 MR. BOATWRIGHT: We do not on behalf of

1 Mr. Richardson.

2 THE COURT: Any witnesses?

3 MR. EVERHART: Nor do we on behalf of
4 Mr. Claiborne.

5 THE COURT: All right. It's your argument.

6 MR. NOVAK: Judge, do you want to hear the
7 drug weight first and then argue back and forth?

8 THE COURT: All right.

9 MR. NOVAK: Judge, as to the drug weight as
10 to Mr. Richardson, the probation officer found
11 329 grams of crack cocaine for him, and for
12 Mr. Claiborne 385 grams of crack cocaine.

13 And that was, frankly, based upon a meeting
14 that I had with the probation officer before the
15 transcript had been prepared by Ms. Beverly, and I
16 just relied upon my notes.

17 Since then, the transcript has been
18 prepared, and we have cited the provisions as to what
19 we believe support our view as to the amount of drugs.
20 And as to Defendant Richardson, it should be Level 34,
21 and as to Mr. Claiborne, it should be Level 36.

22 I begin by noting for the Court that the
23 jury did, of course, have a special verdict form from
24 which they found more than 50 grams. So we are, at
25 the very minimum, a Level 32.

1 The question is that Level 32 runs from 50
2 to 150 grams. The question now, are we, first, over
3 150 grams, and as to Mr. Claiborne, are we over
4 500 grams?

5 And I turn initially as to Mr. Richardson to
6 the testimony of Ronald Williams, known as Booty, who
7 testified at trial.

8 THE COURT: Excuse me just a minute. I
9 thought the probation officer determined for
10 Mr. Richardson, 274 grams of crack cocaine.

11 MR. NOVAK: I'm sorry, Your Honor?

12 THE COURT: Your paper says that the
13 probation officer determined 329, and therefore, you
14 agree with the probation officer. I believe the
15 probation officer for Mr. Richardson has established a
16 drug weight of 274.

17 Mr. Burnside, am I wrong in reading the
18 report?

19 THE PROBATION OFFICER: No, Your Honor, that
20 was on the addendum.

21 THE COURT: 274?

22 THE PROBATION OFFICER: 274 is correct, Your
23 Honor.

24 THE COURT: All right.

25 MR. NOVAK: Was that in the original?

1 THE PROBATION OFFICER: No, sir, it was not.
2 It wasn't originally, but after reading the testimony
3 and drawing my calculation, it came out to 274 grams.

4 THE COURT: So do you agree with 274 or not?

5 MR. NOVAK: No, I agree with 329, as I've
6 stated in our position papers based upon the testimony
7 as we put forth. Frankly, I think that's actually a
8 low number when you look at the transcript.

9 And the reason I say that is this: The
10 evidence that gets us well over the 150 grams is the
11 defendant's role in what I described at the trial in
12 the Dogwood Crew, when they were selling, beginning
13 certainly in 1991.

14 Now, Mr. Williams testified that that went
15 on until at least 1993 -- and I've cited the pages in
16 the transcript -- and that he was supplying
17 Mr. Richardson an amount of 1/16th of an ounce, which
18 is 1.7 grams, on a weekly basis during those three
19 years.

20 That was corroborated by Eulanda Holloman
21 and Jermont Perry. Actually, Mr. Perry went beyond
22 that. Mr. Perry, who you will recall, was
23 Mr. Richardson's cousin, testified -- and again, we
24 gave you the citations in our papers -- that he
25 observed Mr. Richardson selling not only from 1993 but

1 the whole way into 1995.

2 So what we had done is, in terms of an
3 approximation, I took just the three years that
4 Mr. Williams testified to, and I gave him two weeks
5 off of the year, as if he had two weeks vacation.

6 And I multiplied it. It comes to 50 weeks,
7 and if you gave him times three years alone, that's
8 150 weeks, times 1.7 grams is 255 grams alone.

9 One of the things I did want to point out as
10 to Mr. Richardson, this testimony by Mr. Williams had
11 to be necessarily believed by the jury, and the reason
12 for that is this, Judge. No other time period for
13 which we called witnesses gives us 50 grams or more in
14 and of itself.

15 The other evidence that we had as to
16 Mr. Richardson came from Frankie Richardson, his
17 cousin, who testified that he had supplied him for
18 three months in 1996 with an 8-ball, which is
19 3.8 grams, on a weekly basis. That results in a total
20 of a little over 45 grams. That in and of itself is
21 under 50 grams.

22 Tony Tyler testified that he supplied
23 Mr. Richardson with a quarter ounce of crack on three
24 or four occasions in 1997. If you give it the light
25 most favorable to the defendant, three occasions.

1 That comes out to 21 grams, still below 50 grams.

2 If you look at Mr. Woodens' testimony, he
3 testified that on the day of the murder that
4 Mr. Claiborne possessed a quarter ounce of crack from
5 which he was involved in the sale to Mr. Richardson.
6 That's 7 grams, again, under 50.

7 My point, first of all, is that I believe
8 that the jury necessarily had to believe that the
9 defendant's role in distributing drugs from the '91 at
10 least to the '93 time period because that's the only
11 amount in and of itself that gets you over the
12 50 grams.

13 If Ronald Williams is to be believed, as we
14 are suggesting that he should, based upon the evidence
15 that we put forward, at 150 weeks times 1.7 grams,
16 that's 255 grams.

17 And then if you add up the other numbers, as
18 I've just said, the different time periods as it
19 relates to Mr. Richardson, Mr. Tyler and then finally
20 as to Mr. Wooden the day of the murder, you have
21 329 grams.

22 If you put aside the 7 grams from the date
23 of the murder, you're still at 320. You're still well
24 above the 150 grams necessary to get to Level 34.

25 And while I frankly thought we could have

1 made an argument maybe getting it to 500, I wanted to
2 err in favor of the defendant. That's the reason I do
3 not object to the weight to go beyond that, to
4 Level 36, as to him.

5 As to Mr. Claiborne, however, that's a
6 different story because Mr. Williams testified that he
7 was supplying Mr. Claiborne twice the amount that he
8 was giving Mr. Richardson during that same time
9 period.

10 There was an eighth of an ounce, which is
11 3 grams, and again, 3 grams at that same rate that is
12 calculated for Mr. Richardson comes out to about
13 150 grams.

14 And again, there was some other testimony in
15 there that '93 to like '95, '96 time period, there was
16 some general evidence about that at trial, but I've
17 excluded that. And I've erred in favor of the
18 defendant and only argued '91 and '93.

19 Mr. Tyler, of course, testified that he
20 supplied Mr. Claiborne with 4 ounces of crack cocaine.
21 That's an additional 112 grams. Well, that alone puts
22 you over the 500 grams, with Mr. Williams' testimony,
23 which again, I suggest the jury had to believe to get
24 over the 50 grams.

25 George Drew also testified that he had

1 supplied Mr. Claiborne --

2 THE COURT: I'm not following your argument
3 that they had to believe Williams' testimony to get
4 over 50 because if you add all the others together, it
5 would be more than 50.

6 MR. NOVAK: As to Mr. Richardson, if you
7 added the Frankie Richardson testimony and the Tony
8 Tyler testimony, yes, that would put you over 50. But
9 as to one single period of time -- those don't overlap
10 as to one single period of time.

11 I'm suggesting the fact that they found over
12 50 grams, I think, corroborates what our view is, that
13 Mr. Williams -- they believed his testimony.

14 Could they have done it the other way?
15 You're right. I agree with that, but I also am saying
16 none of those time periods in and of itself were over
17 50. But also the time period during Mr. Williams'
18 testimony was corroborated by other evidence that it
19 actually went beyond the '93 time period.

20 Lastly, Judge, as I just said, Mr. Drew
21 testified about 1/16th of an ounce on five to ten
22 occasions, and Mr. Wooden testified about the 7 grams.
23 And I think in the light most favorable to
24 Mr. Claiborne, that comes out to 576 grams, which puts
25 us over the 500 mark, and, therefore, his testimony

1 would be Level 36 to begin with.

2 And, frankly, Judge, I was going to start
3 off with agreeing as to the probation officer as to
4 both of them are Level 34, but my view is, looking at
5 the testimony, I could not in good faith say that
6 Mr. Richardson sold under 500 grams.

7 If you decide otherwise, that's fine, but I
8 just felt compelled to argue that because the
9 testimony showed otherwise. And I think that's all I
10 have to say as to the drug weight.

11 THE COURT: All right. Counsel for
12 Mr. Richardson.

13 MR. BOATWRIGHT: Good afternoon, Judge.

14 THE COURT: Good afternoon.

15 MR. BOATWRIGHT: If the Court please, as is
16 clear, I hope, from the -- our position with respect
17 to the sentencing factors that addresses -- that I
18 offered that addresses only the question of drug
19 weight, we have focused, I think, more on the question
20 of whether the Court can credit each and every one of
21 the witnesses with being truthful about the things
22 that they said.

23 In the case of -- for example, in the
24 case -- as noted by Mr. Burnside, in the case of Larry
25 Stith, one of the people that the government says it

1 is relying on, Larry Stith starts off testifying in
2 this case on -- pardon me, starts off testifying by
3 saying that he had been selling crack cocaine in
4 Waverly, Virginia, on and off for six years.

5 Despite that, he said he never saw
6 Richardson selling drugs, and later on, he's coaxed,
7 essentially, into saying he did see him selling drugs
8 in 1996.

9 But he then acknowledged that
10 Mr. Richardson -- and he knew this from personal
11 observation -- moved to the Ramada Inn in Petersburg
12 and stayed there for approximately a one-year period,
13 during 1997 and 1998.

14 If that's true, then obviously there has
15 been no testimony that anything other than drug
16 consumption took place at the Ramada Inn on
17 Mr. Richardson's part. There was never any allegation
18 or testimony that he was selling drugs from the Ramada
19 Inn at that point.

20 Remember, Mr. Stith -- and we agreed that
21 all the grand jury transcripts were accurate in what
22 they said. So he was cross-examined on this point,
23 and he tells the grand jury specifically that
24 Richardson was not selling drugs.

25 He had not seen Mr. Richardson with drugs,

1 and specifically, he had not seen him selling drugs at
2 Waverly Village Apartments in the playground area. He
3 told the grand jury that.

4 Then he comes to trial and says, well --
5 first, he says that, no, he wasn't selling drugs,
6 period, and then later on he says, well, yes, he was.
7 He was selling drugs a little bit, essentially.

8 And I would suggest to the Court that under
9 those circumstances it is very likely and, indeed,
10 more than conceivable that the jury did not credit his
11 testimony, and I don't think the Court should credit
12 his testimony either.

13 For those reasons, he shot himself in the
14 foot in about two or three different ways, and they
15 were fatal wounds, I would suggest.

16 With respect to the other witnesses upon
17 which the government relies, Mr. Williams, his
18 testimony was very vague when you come right down to
19 it.

20 Mr. Novak asked him how much -- "In 1991,
21 how much crack cocaine was Terence Richardson
22 selling?"

23 "Probably, maybe a sixteenth a week, you
24 know. We weren't really selling that much.

25 "Was he using at the time?"

1 "Not then, I don't think.

2 "Do you know when he started using?

3 "Probably about '93. About '93."

4 The government is relying on this highly
5 qualified testimony, highly qualified in the sense he
6 was qualifying his remarks, not that he was qualified
7 to give the testimony, qualifying everything he says,
8 modifying it with the weasel words "probably,"
9 "maybe," "I think," "I'm not sure," things of that
10 nature.

11 "And that went on when, from 1991 to when?"

12 "Well, I was incarcerated a lot, and he went
13 to jail in May of 1993." Then he says, "I mean,
14 Terence wasn't really selling. He was just doing it
15 off and on," contrasting that with Mr. Claiborne's
16 situation.

17 Then the government turns to Jermont Perry.
18 Jermont Perry, who's seeing these matters occur when
19 he, Mr. Perry, was 13 or 14 years of age, he says he's
20 seen him selling crack two or three times a week in
21 1993 and 1994, but he doesn't know what quantities are
22 involved or what the sale price was or what he was
23 supposed to be selling.

24 Eulanda Holloman, same sort of situation.

25 "Was Terence Richardson involved in selling crack

1 cocaine with you?"

2 "Yes."

3 "How long did he sell crack cocaine with
4 you?"

5 "It wasn't quite a year. It wasn't quite
6 year, I don't think."

7 She gets locked up in 1993, and there's no
8 further testimony from her about what Terence
9 Richardson was supposed to have been doing thereafter
10 regardless of when she may have been released from
11 incarceration.

12 As I said in our position, there's
13 uncertainty about the amounts being sold, and
14 secondly, you've got people talking about but a slice
15 of the pie. And they're not able to talk about the
16 entire time periods that the government relies upon.

17 Part of the testimony that they rely upon in
18 terms of the Frankie Richardson/Tony Tyler
19 provisioning of drugs is supposed to have occurred in
20 the later portions of the conspiracy.

21 This has to do with primarily the testimony
22 of -- it starts off with Tony Tyler, who, of course,
23 is a man who's been convicted of perjury previously,
24 in addition to his other felony problems.

25 And he says, "I sold Richardson

1 quarter-ounce quantities of cocaine basically three or
2 four times."

3 Most of the testimony he gave, however,
4 dealt with his dealings with Frankie Tiger Richardson
5 and Ferrone Claiborne. It was Tiger that comes in and
6 says, "Well, we're selling roughly 168 grams."

7 One-third of that is attributed to
8 Mr. Richardson on the basis that the three of them
9 were selling over roughly a three-month period.

10 And I think the -- frankly, after the
11 objections were filed or the position paper was filed,
12 Mr. Burnside went back and in fact arrived at a lower
13 figure under those circumstances.

14 The government is taking the position,
15 apparently, that --

16 THE COURT: His original figure was 329.

17 MR. BOATWRIGHT: The starting figure, yes,
18 sir, but on this particular instance, with reference
19 to the Tony Tyler and Frankie Richardson testimony,
20 the amount he attributed to Mr. Richardson on the
21 basis of that testimony originally was 56 grams.

22 After a review of the transcript,
23 Mr. Burnside comes down to 42 grams, and that's part
24 of the overall reduction from 329 to 274.

25 It's our position that, of course weighing

1 the credibility of the witnesses, you had every
2 opportunity to see each and every one of them testify,
3 and we can't just blindly accept their testimony.

4 The government is simply saying, for
5 example, with respect to Ronald Williams, well, the
6 jury must have believed everything he said. Well, we
7 don't know that.

8 The jury could have picked and chosen the
9 portions of his or any other witness who testified
10 about drug quantities and arrived at a conclusion that
11 there was certainly enough credible evidence to
12 establish beyond a reasonable doubt that there was at
13 least 50 grams or more involved in the conspiracy.

14 But I don't really think you can
15 conclusively establish anything more than that from
16 their verdict. I don't think that you can then leap
17 from that and say, well, they had to and at least
18 credit everything Ronald Williams said about drug
19 weight.

20 That, I think, is a leap that's unsupported
21 by the evidence and by logic itself. If the Court,
22 for example, did, however, not, for example, find
23 Ronald Williams' testimony sufficiently credible, that
24 would drop 204 grams out of the equation.

25 And you would still be left with an amount

1 that is in accordance with the jury's verdict, but it
2 would be an amount less than 150 grams. And it would
3 be an amount, then, that would move Mr. Richardson
4 from offense Level 34 to 32.

5 I don't think that I should belabor the
6 credibility aspects of these witnesses because you
7 heard the testimony just as well as I did.

8 And the purpose of our position paper was to
9 point out aspects of their testimony that the Court
10 should consider, we hope, in determining whether these
11 various witnesses that the government relies so
12 heavily upon should be believed and accepted in their
13 entirety or whether there should be partial acceptance
14 or indeed non-acceptance of their testimony.

15 We urge you for those reasons to conclude
16 that the amount involved was less than 274 and at the
17 point which he steps down from Offense Level 34 to
18 Offense Level 32. Thank you, sir.

19 MR. GAVIN: Good afternoon, Judge.

20 THE COURT: Good afternoon.

21 MR. GAVIN: Judge, on behalf of
22 Mr. Claiborne, we would also like to argue that all we
23 can ask for is a sentence based on some reliable
24 evidence.

25 The government put forth on evidence, and

1 there's evidence in the record that Mr. Ronald
2 Williams' testimony in the record says what it says.
3 Mr. Tony Tyler's testimony in the record says what it
4 says.

5 But the question is, is it reliable, and can
6 we feel comfortable sentencing Mr. Claiborne based on
7 what their testimony is.

8 Mr. Burnside originally found that
9 Mr. Claiborne was responsible for 385 grams. Keeping
10 in mind that our range for purposes of a Level 34 are
11 150 to 500, we've got to get below 150, or the
12 government's got to get above 500, that their case
13 rises or falls based on Ronald Williams and Tony
14 Tyler.

15 THE COURT: The probation officer and the
16 government both say 562.7 grams.

17 MR. GAVIN: That was in the addendum.

18 THE COURT: And they both say that figure.

19 MR. GAVIN: That's correct. Originally 385,
20 now 562.7. So they have made the leap, and the
21 probation officer has now, based on evidently a
22 reading of the transcript, made the leap from a
23 Level 34 to a Level 36.

24 So now we're in the unfortunate position of
25 not only trying to get it to a Level 32 of under

1 150 grams, we're trying to get it back to a Level 34,
2 which would be between 150 and 500.

3 As stated, the government's case with regard
4 to drug weight rises or falls on the testimony of two
5 individuals; Ronald Williams, who also is known as
6 Booty, and Tony Tyler.

7 Ronald Williams is the individual that
8 testified that between 1991 and 1993 Mr. Claiborne was
9 selling approximately 3 grams per week. And then the
10 probation officer multiplied 3 grams per week times
11 the number of weeks in a year for three years, and he
12 came up to a high weight to begin with, 420 grams.

13 That in addition to Tony Tyler's testimony,
14 which was that in 1997 and 1998 he sold Mr. Claiborne
15 4 ounces, for another 112 grams. Those two in and of
16 themselves put Mr. Claiborne over 500.

17 Only with one of those two, and in
18 particular only with Ronald Williams' testimony, can
19 the government get beyond 500 based on the presentence
20 report.

21 That is because the presentence report
22 indicates that the only two other individuals to which
23 weight is attributed are George Drew -- and 22
24 additional grams are attributed to Mr. Claiborne as a
25 result of George Drew's testimony -- and Shawn

1 Wooden -- three individuals, I'm sorry.

2 Shawn Wooden, 7 grams are attributed to
3 Mr. Claiborne as a result of Shawn Wooden's testimony,
4 and Larry Stith, 1.7 grams are attributed to
5 Mr. Claiborne as a result of Larry Stith's testimony.

6 So, I mean, they roughly come up to 30 1/2,
7 30.7 grams with those three persons or those three
8 individuals' testimony, and the other two, which would
9 put them over the hoop.

10 Those three added to Tony Tyler would not be
11 enough. Those three added to Ronald Williams would
12 not be enough. So you're going to have to -- you're
13 going to have to adopt Ronald Williams's testimony as
14 being accurate and truthful to get over the 500.

15 Our position is that Ronald Williams'
16 testimony was not truthful and reliable, and, in fact,
17 the lesser than 150 position is the right position.

18 In so arguing, what we would say is -- and
19 this Court is aware of facts and recalls facts like no
20 Court I've ever seen, but Ronald Williams testified
21 that he was distributing 3 grams a week to
22 Mr. Claiborne per week, which I find severely
23 incredible insofar as -- and ask the Court to keep in
24 mind that Mr. Claiborne is 15 years old.

25 I was just handed today, and it's also noted

1 for the record in the presentence report at
2 Paragraph 44, that Mr. Claiborne at some point in time
3 in 1991 was actually confined in Poplar Springs
4 Hospital.

5 And Poplar Springs produces a letter
6 indicating that between October 14th, 1991 and
7 November 22nd, 1991 he was actually an inpatient
8 hospitalized. So that's at least a month and a half
9 or a month and a week that he was not capable of
10 distributing.

11 THE COURT: How much does that deduct?

12 MR. GAVIN: Six times 3 grams per week. So
13 that would be 18 grams just from that.

14 We were also produced with a record from --
15 of a Henrico County elementary school indicating that
16 he was in elementary school in Henrico through April
17 of 1991, when he was, I guess, moved to Sussex County,
18 which is where the Poplar Springs referral was
19 derived.

20 So his testimony that every week there was a
21 distribution, I find and would ask the Court to find
22 it's just not credible. There was testimony in the
23 record itself --

24 THE COURT: How long was he in Henrico
25 public schools?

1 MR. GAVIN: Well, the presentence report
2 indicates that he went to Sussex from 1992 and 1993,
3 which would be consistent with the government's
4 evidence.

5 He was not in Henrico schools, we know, any
6 longer than April of 1991. So a portion or at least
7 the second two-thirds of 1991 and 1992 and 1993, he
8 was in Sussex County.

9 THE COURT: Was that January to April of
10 '91, he was in public schools in Henrico County?

11 MR. GAVIN: He was in public schools in
12 Henrico County.

13 THE COURT: That's January, February,
14 March --

15 MR. GAVIN: April.

16 THE COURT: April.

17 MR. GAVIN: First of April.

18 THE COURT: Okay. So it's three months.

19 MR. GAVIN: Three months. So that's
20 12 weeks at another 3 grams a week for 36 additional
21 grams.

22 THE COURT: What was the date of the Poplar
23 Springs confinement?

24 MR. GAVIN: Poplar Springs was inpatient
25 from October 14th, 1991 to November 22nd, 1991, and

1 then he was partially hospitalized as a day patient
2 from November 25th, 1991 to December 13th, 1991. So
3 that would be basically another two weeks and another
4 6 grams.

5 Now, I might as well --

6 THE COURT: What was the period of
7 hospitalization?

8 MR. GAVIN: The hospitalization was from
9 October 14th to November 22nd.

10 THE COURT: That's five weeks.

11 MR. GAVIN: Yes, sir.

12 THE COURT: How much is that?

13 MR. GAVIN: Five to three would be 15 grams.

14 THE COURT: What was your next point?

15 MR. GAVIN: Then he was a day patient and
16 not an inpatient for an additional 18 days, so another
17 two weeks.

18 THE COURT: Well, where is Poplar Springs?

19 MR. GAVIN: Poplar Springs is in Petersburg.

20 THE COURT: All right. What does a day
21 patient mean?

22 MR. GAVIN: Day patient just means he was
23 attending day treatment classes. It doesn't prevent
24 him from being --

25 THE COURT: Two weeks, that would be what?

1 Six more grams?

2 MR. GAVIN: Yes, sir.

3 THE COURT: So your contention is that from
4 562.7 there ought to be deducted 67 grams?

5 MR. GAVIN: Yes, sir.

6 THE COURT: Thirty-six for the time he was
7 in Henrico schools, and 31 for the time that he was in
8 the Poplar Springs Hospital in 1991?

9 MR. GAVIN: Yes, sir.

10 Now, I am mindful of the government's
11 position that he was going back and forth, according
12 to them.

13 THE COURT: You can't go back and forth when
14 you're in the hospital.

15 MR. GAVIN: That's correct. But --

16 THE COURT: I guess you can, but the odds of
17 doing it successfully are slim and none.

18 MR. GAVIN: Their position is that his
19 mother was dating someone in Sussex and that they were
20 traveling back and forth and that these events were
21 taking place on the weekends. It still goes to the
22 credibility of Mr. Williams.

23 Some other things that I'd like to point out
24 on the creditability of Mr. Williams, as the Court may
25 recall, Ronald Williams was a business partner,

1 quote/unquote, with Eulanda Holloman.

2 And Eulanda Holloman testified that they
3 weren't moving 3.5 grams a week. Actually, he
4 testified that they were moving 3 to 4 ounces a week,
5 the two of them. Eulanda Holloman testified that they
6 were only moving like an ounce a week.

7 And as the Court recalls, all these people
8 live within a slingshot distance of one another. They
9 all live close to the same houses from one another.

10 And also Ronald Williams, with the proximity
11 of these persons to one another, it's reasonable to
12 infer that some of the weight that he might be
13 attributing to Mr. Claiborne is overlapping with some
14 of the weight that he's dealt with with other
15 individuals.

16 So, I mean, I think he's guessed on the high
17 side, and I would submit to you the very, very, very
18 high side of any type of testimony.

19 Eulanda Holloman also testified that she
20 didn't see at that time in 1991, 1992 and 1993
21 Mr. Claiborne distributing, and she was right there in
22 the same proximity.

23 So Mr. Williams had some things that he was
24 looking for from the government, I believe, and I
25 would submit that he said whatever they wanted him to

1 say to get him those things.

2 The next thing would be Tony Tyler. Tony
3 Tyler says that he sold Mr. Claiborne 4 ounces in 1997
4 and 1998 for a total of 112 grams. Miraculously,
5 nobody else really during that time frame, 1997 and
6 1998, has testified that Mr. Claiborne was moving that
7 kind of weight, the 4 ounces.

8 Everyone -- as a matter of fact, Frankie
9 Richardson testified before the Court that he was
10 involved in basically a business with Calvin Uroff
11 (phonetic), who they called "Man," and they were being
12 supplied by Tony Tyler.

13 But Frankie Richardson didn't say anything
14 about Mr. Claiborne being supplied by Tony Tyler, and
15 if they're as close-knit in that community as they
16 would have you believe, then they would know exactly
17 who was being supplied by Tony Tyler.

18 Mr. Tyler basically came in here and made
19 these allegations, but there's really no other
20 corroborating evidence to support that he was moving
21 that kind of weight. As a matter of fact, Mr. Tyler
22 admitted that he had no money.

23 And it defies logic to think that Mr. Tyler
24 would keep giving him weights of crack cocaine when he
25 was not being paid for it, and he finally admitted

1 that to Mr. Everhart, that he was not being paid for
2 it.

3 The other individuals that testified around
4 that time frame say that Mr. Claiborne was selling
5 weights, but they were small weights. And they were
6 occasionally, and nothing like the 4 ounces that
7 Mr. Tyler would have you believe.

8 So, Judge, I would have to say that if you
9 have to look to reliability evidence, I don't know
10 that we can rely on any evidence from Mr. Williams
11 and/or Mr. Tyler based on their testimony other than
12 what the jury attributed, which would be 50 grams or
13 higher.

14 So we would submit that the proper
15 sentencing range should be based on 50 grams to
16 150-gram range or 32.

17 MR. NOVAK: Judge, very briefly to address
18 this point by Mr. Claiborne. I have not seen anything
19 about Poplar Springs. Nothing was given to me --

20 THE COURT: Did you offer anything in
21 evidence, or did you give it to Mr. Novak?

22 I'm sorry. I thought you had it.

23 MR. NOVAK: No.

24 MR. GAVIN: Judge, we didn't, and we didn't
25 because it was handed to us as Mr. Claiborne's father

1 walked in.

2 THE COURT: All right.

3 MR. GAVIN: There it is.

4 THE COURT: And the presentence report talks
5 about -- shows that he was in school, I believe.

6 MR. NOVAK: Well, not to what he said.
7 Actually, it doesn't. I was going to address it. If
8 he wants to introduce this, that's fine.

9 THE COURT: Do you want to introduce that
10 document?

11 MR. GAVIN: Yes, sir.

12 THE COURT: Any objection?

13 MR. NOVAK: No, sir.

14 THE COURT: Claiborne Hearing Exhibit 1 will
15 be -- may I see it?

16 MR. NOVAK: My point, Judge, is the math,
17 with all due respect, that Your Honor calculated, the
18 numbers were off by ten.

19 THE COURT: Well, it might be. My math is
20 not very good. I thought I was taking his figures.

21 MR. NOVAK: Taking his figures, we've got an
22 extra ten there because five weeks, which he agreed to
23 during a hospitalization at Poplar Springs, Item 3 is
24 he said 15 grams.

25 THE COURT: Then you add two more weeks for

1 6 grams.

2 MR. NOVAK: Right. But you add 15 to 6, you
3 get 21, not 31. You gave him 31 total.

4 THE COURT: You're right.

5 MR. NOVAK: So 21. Then even if -- now, on
6 the school issue, if you look at page 48 of the PSR
7 for Mr. Claiborne, there's nothing about Henrico
8 schools, and there's no evidence in the record about
9 Henrico schools.

10 The only thing that you do have is the last
11 time that he attended school was in '92 to '93 in
12 Sussex, and not only does it say -- which is
13 consistent with what our proof is, but it also says he
14 missed -- basically, for every day he went, he missed
15 one.

16 He missed 83 days and attended 93 days,
17 which is consistent with what you -- you even heard
18 how he would come down on weekends when he moved away,
19 from down in Sussex.

20 So this time period of the three months that
21 they want to say should be taken off in Henrico,
22 there's no evidence to support that whatsoever, but
23 even if you did, even if you gave him --

24 THE COURT: Excuse me. I thought he said
25 that the presentence report --

1 MR. NOVAK: It doesn't say that.

2 THE COURT: -- showed that. And I'll give
3 him a chance to address it and tell me, but the
4 presentence report shows that he was in school during
5 1992 and '93.

6 MR. NOVAK: That's it.

7 THE COURT: And doesn't show where he was in
8 1991, is the point, I suppose.

9 MR. NOVAK: Right, Paragraph 48. If they
10 have something different, I'll be glad to hear it, but
11 even if -- Judge, even if they did and even if you
12 took the three months --

13 THE COURT: I see. It's '92, '93, not --

14 MR. NOVAK: Right. And that's when he's in
15 Sussex, when he's living down there, and he's missing
16 as many days as he's going to school.

17 MR. GAVIN: Judge, may I interrupt
18 Mr. Novak?

19 MR. NOVAK: Sure.

20 THE COURT: If it will make the argument go
21 more efficiently, that will be fine.

22 MR. GAVIN: It will because it's my error.
23 This transcript was handed to me as Mr. Claiborne's
24 father walked in, and I transposed the numbers.

25 The date of discharge, from the transcript

1 from Henrico County, is not April 1st. It's
2 January 4th. So there should not be any reduction
3 based on school.

4 THE COURT: All right.

5 MR. NOVAK: Thank you, Mr. Gavin.

6 So then in the light most favorable to the
7 defendant, you're taking 21 grams off the 562 for the
8 Poplar Springs time period, and that comes out to,
9 under my math, 541.

10 And the rest is a credibility issue, which
11 I'm not going to belabor. We've already argued that,
12 and I know you've considered it.

13 THE COURT: All right. Anybody have any
14 further argument on drug weight?

15 MR. BOATWRIGHT: There is one thing I
16 neglected to say, Your Honor, if the Court please.

17 THE COURT: All right.

18 MR. BOATWRIGHT: In the addendum on page --

19 THE COURT: Just a second. Addendum to
20 whose?

21 MR. BOATWRIGHT: To Mr. Richardson's.

22 THE COURT: Just a second.

23 All right. That's the addendum. What page?

24 MR. BOATWRIGHT: Page A2.

25 THE COURT: Page A2?

1 MR. BOATWRIGHT: A2, yes, sir, the next to
2 the last paragraph, which starts off with the name
3 "Shawn Wooden." That very brief paragraph where Shawn
4 Wooden observed Claiborne with 7 grams of cocaine on
5 the day Officer Gibson was killed, if this amount was
6 to be purchased by the defendant, add 7 grams.

7 First off, if Mr. Wooden was estimating what
8 he thought he saw and, secondly, we take the position
9 that even if you believe that that's a reasonably
10 accurate estimation, that should not be attributed to
11 Mr. Richardson as part of any drug conspiracy
12 calculation.

13 The testimony that Mr. Wooden gave was that
14 this transaction involved Mr. Claiborne as the seller
15 and Mr. Richardson as the buyer, and we respectfully
16 suggest to the Court that there's nothing to suggest
17 that Mr. Richardson was anything more than an end-use
18 purchaser.

19 Under those circumstances, he can't be
20 involved in a conspiracy with Mr. Claiborne at that
21 time because he's not a participant in transactions.
22 He's simply a recipient, a purchaser.

23 For that reason, we think that those 7 grams
24 should not be attributed to him. Thank you.

25 THE COURT: All right.

1 MR. NOVAK: Do you want me to respond to
2 that, Judge?

3 THE COURT: I want to ask you a question.
4 Turning to page 5, excuse me -- sorry, page 2 of your
5 opening brief on drug weight, do those quantities in
6 the second paragraph and the one that carries over to
7 the top of page 3 add up to 329 grams?

8 MR. NOVAK: I hope so.

9 THE COURT: Was that what you're trying to
10 say?

11 MR. NOVAK: Right. That's how I came up
12 with the number. I sat down with my calculator, and
13 I'd be embarrassed if that didn't.

14 I did just want to make one comment. Are
15 you done with that, Judge?

16 I just want to make one response to
17 Mr. Boatwright on this buyer/seller argument. It
18 wasn't raised. So I didn't brief it.

19 But there's ample case law from the Fourth
20 Circuit that says that buyer/seller relationship
21 doesn't exist in a conspiracy on an isolated occasion,
22 but when you have an ongoing relationship, as these
23 defendants did, since 1991 to '98, that is part of the
24 conspiracy, even if it was a buyer/seller
25 relationship. And it would be attributed.

1 I don't have the cases handy because it
2 wasn't raised in the --

3 THE COURT: But it's the law.

4 MR. NOVAK: I'm sorry?

5 THE COURT: But it's the law.

6 MR. NOVAK: It's clearly the law. With
7 that, Judge, I have nothing else to say.

8 THE COURT: All right. With respect to
9 Mr. Richardson, I've looked at the presentence report
10 and briefs, and I believe that the correct drug weight
11 for Mr. Richardson is 329 grams based on the original
12 calculation and based on the amounts to which the
13 testimony cited on page 2, last full paragraph for the
14 government's brief refers.

15 As to Mr. Claiborne, the amount of drugs
16 based on the addendum and the information cited, the
17 transcript that was cited in the government's brief,
18 should be 562.7 minus 21, which is the amount of time
19 that he was in the hospital in 1991 at Poplar Springs
20 inpatient from October 14th to November 22nd and
21 outpatient for 18 days thereafter.

22 So that would be a total weight of 541.7,
23 and the testimony cited at those pages confirms that.

24 If it's believed, the testimony of those
25 witnesses was found credible by the jury generally in

1 effecting the conviction by the vote of guilty.

2 And the testimony of the government has
3 proved by a preponderance of the evidence the drug
4 weights as I have found them, even if, as the
5 defendants argue, there are matters which could affect
6 the credibility of the witnesses who testified to the
7 amounts that were involved in arriving at those drug
8 weights.

9 I think that takes care of the finding on
10 drug weights.

11 All right. The next issue is the
12 application of the cross reference in Section
13 2D1.1(d).

14 MR. NOVAK: May I proceed, Your Honor?

15 I would start with one other brief I'd cite
16 if I could, and that's this: As the Court well knows,
17 the jury found 50 grams. So the statutory maximum is
18 life, and the mandatory minimum is ten.

19 Mr. Richardson has raised an Apprendi issue,
20 but really I think purely to preserve it, depending
21 upon the evolving law from the Supreme Court
22 because --

23 THE COURT: It's correct, isn't it, that our
24 Circuit has held that there isn't any Apprendi issue
25 under the U.S. v. Promise decision?

1 Who was going to argue this, Mr. HuYoung or
2 Mr. Boatwright?

3 MR. HUYOUNG: The legal aspects, yes, Your
4 Honor.

5 THE COURT: Huh?

6 MR. HUYOUNG: I'll argue the legal aspects.
7 Mr. Boatwright will argue the facts.

8 THE COURT: Okay. But our Circuit has held
9 that there isn't an Apprendi problem created if the
10 sentence is within the life -- if the maximum sentence
11 is life under the Guidelines, isn't that right?

12 MR. HUYOUNG: Your Honor, that's correct, as
13 far as on the face value of what the prescribed
14 maximum sentence would be.

15 Of course in my brief, I point out that it's
16 our position that the prescribed maximum statutory
17 sentence will be what the Guidelines indicate, and I
18 think I briefed that in my brief, Your Honor.

19 THE COURT: That issue has, however, been
20 dealt with in our circuit, too.

21 MR. HUYOUNG: Correct, by United States v.
22 Kintor.

23 THE COURT: And you're preserving the issue
24 because there are other decisions in other circuits
25 that may go the other way?

1 MR. HUYOUNG: Correct.

2 THE COURT: Or our own Circuit has reviews
3 before it which might result in a change. You're
4 entitled to do that, and it's preserved. But for
5 these purposes, your argument is rejected.

6 MR. HUYOUNG: Thank you, Your Honor.

7 THE COURT: It's fully preserved.

8 MR. HUYOUNG: Thank you.

9 MR. NOVAK: Judge, any issue becomes the
10 role of the murder of Officer Gibson. As we have
11 fully briefed in our position paper, of course, the
12 fact that they were acquitted in the murder does not
13 preclude the Court from considering it.

14 And we have given the Court basically two
15 different routes to address it; one of which is a
16 direct contravention of the jury verdict, and the
17 other one is not. In fact, it's frankly consistent
18 with Mr. Everhart's argument to the jury.

19 The first of which is the one that I believe
20 would -- you could argue contravenes the jury's
21 verdict is the application of the cross-reference to
22 the murder guideline. And that's the first one I'll
23 address.

24 But, Judge, I will say this: I think the
25 first question the Court has to answer, respectfully,

1 is whether the Court finds that these two defendants
2 participated in the killing of Officer Gibson and
3 whether the government has proved that beyond a
4 preponderance of the evidence.

5 If the answer to that is no, there's no
6 further reason for us to discuss either the
7 cross-reference or the upward departure. If the
8 answer to that question is yes, then the issue becomes
9 the level of intent.

10 THE COURT: What's the evidence on
11 participation? What's your record on participation?

12 MR. NOVAK: Well, there's multiple pieces of
13 evidence which we point to.

14 First of all, Judge, I note the Court has
15 just -- in attributing the drug weight, the Court just
16 credited the testimony of Shawn Wooden by attributing
17 7 grams of crack cocaine to each of these defendants,
18 as we argue rightfully so.

19 But the Court has necessarily credited his
20 testimony. So to be consistent throughout this, I
21 would ask the Court to again credit his testimony.

22 But I begin, as we do with our papers, by
23 saying you have the dying declaration from Officer
24 Gibson that was testified to initially by Deputy
25 Aldridge and then in painstaking detail by

1 Mr. Gibson's long-time friend, Trooper Jarrid
2 Williams.

3 And you had the description that you start
4 with, the medium build and the two black males, first
5 medium build, short with maybe bald, narrow or narrow
6 hair on the top, the second being tall, skinny,
7 dreadlocks pulled back with a ponytail. They both had
8 white T-shirts at the time.

9 Of course, our argument to the jury was, as
10 we argue here again today, the only difference at all
11 between that description and these two defendants is
12 the fact that we argue that the height was mixed up,
13 really as to the height of Mr. Richardson alone.

14 And Mr. Richardson obviously is shorter than
15 Mr. Claiborne, but our view of that is that it's
16 because at the time that Officer Gibson was attacked,
17 he was obviously in a fight for his life. He wasn't
18 out there with a tape measure that was measuring his
19 assailants.

20 But also the fact, as you recall, there was
21 that berm that was kind of behind the apartment
22 complex. That's where Mr. Richardson initially ran
23 out with the gun, stood on top of that hill, according
24 to testimony of Evette Newby, and then ran back.

25 And we would suggest that that explains why

1 there is a difference in the height. But in all other
2 aspects, that dying declaration by Officer Gibson,
3 which I believe, frankly, both sides argued to the
4 jury was credible --

5 THE COURT: Did that occur after the shot or
6 before the shot?

7 MR. NOVAK: Which?

8 THE COURT: Mr. Richardson running up the
9 berm.

10 MR. NOVAK: After the shot as he was laying
11 on the ground.

12 THE COURT: So it affected his perception.

13 MR. NOVAK: Absolutely. First of all, if
14 you're shot by anybody and you're looking up, they're
15 going to look 10 feet tall because of the event that
16 he went through. When you place that person running
17 up a berm, it's going to certainly distort it further.

18 THE COURT: What about the difference in the
19 hair?

20 MR. NOVAK: I'm sorry?

21 THE COURT: Officer Gibson described the
22 witness as having dreadlocks.

23 MR. NOVAK: Right.

24 THE COURT: And he didn't have dreadlocks.
25 He had pigtails of some kind.

1 MR. NOVAK: Well, pigtails that were pulled
2 back that if a cap is worn is consistent with somebody
3 that could describe that as dreadlocks. You saw the
4 picture of what Mr. Richardson looked like at the time
5 of his arrest, which was, as I recall, two days
6 after -- not two days, maybe the next day after the
7 attack.

8 Some people call cornrows dreadlocks. I
9 think when it's pulled back and sticking out under a
10 ponytail, certainly a dying declaration by a guy who's
11 using his last breath to describe somebody, I think it
12 certainly could be construed as dreadlocks. And he
13 also said --

14 THE COURT: Wait just a minute. There isn't
15 any evidence that some people call cornrows
16 dreadlocks? That's extra-record.

17 Your argument is, I assume, that when
18 someone is dying, they may not recall precisely what
19 the hairstyle is called but that his description of it
20 was reasonably proximate to what Mr. Richardson
21 actually wore. Isn't that your argument?

22 MR. NOVAK: That's exactly my argument,
23 better said by the Court than I.

24 THE COURT: All right.

25 MR. NOVAK: But I would also point out the

1 additional factor. Of course, he described both the
2 assailants as having a white -- wearing white
3 T-shirts.

4 Then you get to the white T-shirt issue, the
5 fact that a white T-shirt that was taken from the
6 bedroom of Mr. Richardson in the early morning hours
7 of the day after the attack which would really be --

8 THE COURT: That's the shirt with the
9 marijuana leaf?

10 MR. NOVAK: The shirt with the marijuana
11 leaf, which is torn, and it's got dirt on it
12 consistent with a scuffle. And it's described by
13 Evette Newby, who's looking out the window, as being
14 the shirt that Mr. Richardson is wearing.

15 And how else could she know that, unless she
16 did see the T-shirt? She can't have ESP knowing what
17 kind of clothes that he has lying in his bedroom,
18 certainly cannot have ESP as to the fact that it would
19 be torn and have the dirt on it unless she did indeed
20 see him wearing that T-shirt.

21 And of course, that was the person that had
22 the greatest opportunity to see because Mr. Richardson
23 is the one that travels to the top of the berm
24 immediately after the shooting. So when you add the
25 T-shirt in, that also corroborates the description.

1 Then you have Officer Gibson. Of course,
2 his initial comments that he made to Deputy Aldridge
3 was that he had followed two men into the woods, were
4 engaged in a drug transaction back in those woods.

5 And you heard overwhelmingly, Judge, that
6 the area in the Waverly Village Apartments was these
7 defendants' drug turf. You, frankly, saw the majority
8 of the drug dealers down in Waverly, unfortunately,
9 and you didn't see any body doubles that applied to
10 these two.

11 You saw who sold drugs down there, and it
12 was these two defendants. They sold in concert, which
13 is another point when you talk about this description
14 of Officer Gibson. He's describing the two people
15 that are together that fits in all the ways except for
16 as we've noted.

17 And it happens that it fits these two guys
18 who are regularly together selling drugs on their
19 turf. So you have that before we even talk about
20 corroborators.

21 Then, as we argued to the jury as well, the
22 murder occurred on a Saturday, and as you heard during
23 that time period, Mr. Claiborne was traveling on the
24 weekend from Hopewell to Waverly to sell drugs. And I
25 don't believe in coincidences, and I would argue to

1 the Court that neither should the Court.

2 It was not a coincidence this happened on a
3 Saturday. It happened because he was in Waverly,
4 Mr. Claiborne, to sell drugs, and that's what he was
5 doing when this murder occurred.

6 Also, of course, when you get to the
7 standard of the preponderance of the evidence, we have
8 the fact that these defendants pled guilty in the
9 state system, which is beyond a reasonable doubt
10 standard as opposed to preponderance.

11 Mr. Richardson has admitted that he
12 participated in this killing. Of course, in the state
13 system, he admitted it as to involuntary manslaughter.
14 Now, you heard various explanations for that at trial.
15 But the Court should consider the fact that he exposed
16 himself to ten years imprisonment by that guilty plea.

17 And of course, he was only sentenced to five
18 years, but still, that is a healthy dose of
19 incarceration to serve if you're not the person that
20 participated in this killing. But that guilty plea
21 alone put him there.

22 By the way, there's no Bruton issue in terms
23 of sentencing. So you can also consider his
24 admissions during a guilty plea as it relates to
25 Mr. Claiborne and vice versa.

1 Of course, Mr. Claiborne pleads guilty to
2 accessory after the fact to involuntary manslaughter,
3 adopting all the facts as read during the guilty plea
4 of Mr. Richardson but with the additional fact being
5 that when he after the murder saw Deputy Ernest Giles,
6 he failed to report his knowledge of the murder when
7 in fact he knew he was at the scene.

8 So, of course, he had the knowledge when he
9 had this conversation with Deputy Giles. So their
10 guilty pleas alone establish that they participated in
11 a killing.

12 Now, we can argue about the level of intent
13 down the road as it applies to which route the Court
14 should go, but those guilty pleas are completely
15 consistent with what our second approach is as to
16 the --

17 THE COURT: I'm hearing participation right
18 now.

19 MR. NOVAK: All right. We haven't even
20 talked about the eyewitness testimony, which I'll
21 address now, which is the testimony of Shawn Wooden
22 and Evette Newby.

23 Obviously, there was a lot made of their
24 testimony at the time of trial. Evette Newby
25 obviously is a drug abuser, and she obviously had some

1 problems. But how else could she know that she could
2 identify the shirt that was worn by Mr. Richardson?

3 How else could she identify Mr. Richardson
4 and Mr. Claiborne, that they were both back there,
5 particularly when Mr. Claiborne was really living in
6 Hopewell and only coming up on the weekend unless they
7 were in fact there?

8 How else would she know that Mr. Wooden,
9 ultimately, would say that he was back in the woods as
10 well as then this fake alibi that Mr. Richardson had
11 would fall apart? How else would she know that would
12 come to be unless she did indeed see them outside of
13 her window?

14 Then we get to Mr. Wooden, and obviously
15 Mr. Wooden gave a couple different stories. When he
16 first was contacted, he said he doesn't know anything.
17 The second time, he said it was Mr. Richardson and
18 Mr. Claiborne but they were in the back of the woods
19 and he was in the front.

20 But what he did on that second occasion --
21 well, it is in fact true that he did lie on that
22 occasion, when he testified in the preliminary hearing
23 in Sussex County -- he never said it was somebody else
24 that committed the murder.

25 All he did was minimize his own role in the

1 offense. He took himself out from behind the woods,
2 and I suggest to you that he did it because he wanted
3 to -- he didn't want to get himself involved in
4 getting charged with the murder. And ultimately, when
5 he was charged with obstruction, that's when he told
6 the story as he testified to.

7 But the end of the day with Shawn Wooden is
8 this: Why would he testify that he was in the woods
9 unless he was there? Because by Mr. Richardson using
10 Mr. Wooden as his alibi, it's obviously Mr. Wooden's
11 alibi as well because if they stuck together, they
12 could both alibi each other as being at the trailer
13 and neither one of them would have been subject to
14 prosecution.

15 The only reason for Mr. Wooden to do so was
16 if he was in fact in the woods, and all he did -- yes,
17 he did lie, but he lied to minimize his role. He
18 never pointed to others as the assailants.

19 That brings us then to the fictitious alibis
20 that were given by these defendants. Mr. Richardson
21 on two separate -- well, actually three separate
22 interviews laid out this alibi that he was at
23 Mr. Wooden's trailer watching television.

24 Of course, you know that's not true because
25 No. 1, frankly, I've never heard of a case where a

1 defendant puts on an alibi and the alibi testifies
2 against him that he was the person that did the crime.

3 But not only do you have Mr. Wooden's
4 testimony rebutting that, you also know from the phone
5 records and the telephone times which were stipulated
6 to at trial, that they do not match by a window of a
7 half an hour, the key half an hour, that being the
8 window from 11:00 to 11:30 as to Mr. Richardson's
9 story that he had moved everything up a half an hour
10 in order to cover the time of the murder.

11 I would suggest to you, as I did to the
12 jury, that that was consciousness of guilt.

13 Mr. Claiborne's alibi was even more
14 ridiculous. Mr. Claiborne when interviewed by Melanie
15 Duncan on April 28th said that he was asleep at his
16 Uncle Roosevelt's place and did not leave there until
17 1:30.

18 Of course, we get to trial and his own
19 witnesses said that's not true. His cousins, those
20 two young men, Jontay and Eon Shaw testified that they
21 not only saw him leave at the time of the murder early
22 in the morning around nine o'clock, when they got up
23 to leave to go play football or to go to somebody's
24 friend, you recall that they testified that they saw
25 him in the area known as The Pines, which is down near

1 the murder site, as you went from the trailer down
2 towards the shortcut you could take from the ball
3 field down to the murder site shortly before the time
4 of the murder, around eleven o'clock.

5 Also, then, you have his other alibi
6 witnesses, Marilyn and Michelle Claiborne, who said
7 they saw him walking on the street directly in front
8 of the -- at the intersection by his uncle's apartment
9 at 11:20 or 11:30. They had a 15-minute swing, I
10 guess, either way.

11 But again, completely inconsistent with his
12 "I was asleep at my uncle's place until 1:30."

13 THE COURT: You say the false alibis are
14 another reason to establish --

15 MR. NOVAK: Consciousness of guilt.

16 THE COURT: -- participation.

17 MR. NOVAK: Then of course --

18 THE COURT: What about beyond participation?

19 You've now said the dying declaration of Officer
20 Gibson, the testimony of Newby and Wooden, false
21 alibis, the guilty pleas in the state courts, the
22 descriptions --

23 MR. NOVAK: I've not addressed the
24 admissions that each of them made to witnesses. Do
25 you want me to address that, Judge?

1 THE COURT: That establishes that they were
2 there.

3 MR. NOVAK: Yes. Because as to -- for
4 example, Mr. Tyler testified -- of course, his was
5 redacted at the time of trial for Bruton issues, but
6 of course, that need not be here at sentencing.

7 He had testified that Mr. Claiborne had told
8 him that he was there, but of course -- although this
9 is redacted by the time we got to trial, that
10 Mr. Richardson had done the shooting.

11 But the other interesting one is this:
12 Derrick Marshall as it relates to Mr. Claiborne.
13 Derrick Marshall, you will recall, was a drug dealer
14 from Farmville.

15 He had been selling drugs down there
16 essentially forever in multiple -- I can't even
17 remember how many convictions for drugs, was somebody
18 who lived his entire life in Farmville, which is
19 basically on the other end of the state from Waverly.
20 It's certainly a substantial distance.

21 His only knowledge of this case was he was
22 in the lockup with Mr. Claiborne when Mr. Claiborne
23 got arrested for drugs. He had not been charged with
24 murder. There is no information on the news at that
25 time about a federal indictment for murder or anything

1 like that.

2 He's in the lockup back there with
3 Mr. Claiborne, and he's crying. Mr. Claiborne is
4 crying about how he had been framed, and Mr. Marshall
5 had asked him, "What is it they say you did?"

6 And he said, "Selling some drugs."

7 And Mr. Marshall said, "Well, if they're
8 doing this, there's something else going on. What
9 else did you do?"

10 And that's when Mr. Claiborne said he was at
11 the murder but he had only cleaned up.

12 Of course, there's no evidence as to the
13 actual murder that that's what occurred, but I would
14 suggest to you that that is what gives it its
15 credibility. If Mr. Marshall was enhancing or trying
16 to get a sentencing break -- which obviously he was
17 trying to get some help on his time -- he would have
18 said the right thing. He would have taken facts that
19 he knew and said them accurately.

20 Instead, I would suggest that you have
21 somebody who is isolated from the situation. His only
22 knowledge is what could come from Mr. Claiborne, who
23 was spinning it to the best he could to somebody else
24 in jail.

25 THE COURT: What admissions did

1 Mr. Richardson make?

2 MR. NOVAK: Mr. Richardson made admissions
3 to Joe Jones. I'm sure you will never forget
4 Mr. Jones, who testified at trial, who recanted his
5 grand jury testimony that he had been at Dobie's and
6 he had seen Mr. Richardson and that he had said he had
7 killed a cop.

8 By the time we had gotten to trial, of
9 course, Lord only knows what Mr. Jones said because he
10 was all over the place and never did explain what was
11 true and what was not true.

12 But what was clear is he was absolutely
13 terrified, as somebody who lives in that neighborhood
14 and has lived in that neighborhood all his life, and
15 certainly had no motive to lie. There was no deals or
16 anything. It was clearly somebody who was just
17 afraid.

18 THE COURT: What admissions other than the
19 one testified to by Mr. Jones?

20 MR. NOVAK: Mr. Ellsworth, his cousin, this
21 is the funeral situation where Mr. Ellsworth goes to
22 see -- it was Mr. Richardson's grandmother's funeral,
23 and they are at a store.

24 And actually, Mr. Ellsworth's testimony was
25 really that Mr. Richardson was apologetic. He was

1 sorry. He didn't mean to shoot the police officer but
2 that he had.

3 Then, of course, you also have what is not a
4 direct admission to the shooting but is that he had
5 been involved in something inappropriate earlier that
6 day, was during, you recall, the night of the murder,
7 Mr. Richardson had gone to this party at John Brown's
8 trailer in a different part of Waverly, got extremely
9 intoxicated, got into a fight with someone.

10 And one of the witnesses had overheard him
11 say that he had already killed one guy earlier today
12 and he could do it again or something to that effect.
13 And we have multiple witnesses that put him at this
14 party getting drunk and getting into an altercation
15 with a fellow Brandon Gilchrist, as I recall.

16 But one witness alone, Keith Jackson, said
17 about that admission as well.

18 THE COURT: Does that summarize the evidence
19 as to the participation?

20 MR. NOVAK: Participation, yes, Judge.

21 THE COURT: The next issue on the cross
22 reference is what qualifies it as murder under 18
23 U.S.C. Section 1111, i.e., what evidence do you say is
24 malice aforethought?

25 MR. NOVAK: Well, I would say there are

1 three facts, again, as we argued to the jury,
2 remembering, of course, as we've noted in our
3 pleadings, malice aforethought is defined as wanton
4 and reckless disregard for the life of Officer Gibson.

5 Three pieces of evidence make it clear to us
6 that this is a murder that qualifies under 1111. One
7 is essentially this: Obviously they did not go into
8 the woods with the idea of killing Officer Gibson.
9 That certainly -- that's not what the evidence is.

10 The evidence, we suggest, shows they went in
11 to do a drug deal. They were surprised by the
12 officer. They both began to struggle. The malice
13 aforethought can be formed in a matter of moments.

14 When you jump a police officer and you take
15 his firearm, you're not doing it to play Tiddly-Winks.
16 You're taking that firearm off of him to use it. You
17 remember this is a gun that's being pulled out. It's
18 a holstered weapon. He's pulling it out of his
19 holster, and the gun is wrestled away from him.

20 And we would suggest that taking a gun off
21 of an officer alone is wanton and reckless disregard
22 for the life of not only the officer but the other
23 people around, including the person who takes the gun
24 off.

25 THE COURT: Well, the evidence is not that

1 they took it off of him. The evidence is that it was
2 wrestled away from him.

3 MR. NOVAK: Yes, and it was in the hand of
4 Mr. Richardson.

5 THE COURT: But that can be done simply to
6 effectuate your escape, can't it, not to kill
7 somebody?

8 MR. NOVAK: All right. Let's go to the next
9 two points that I would make.

10 Number 2 is as they struggled with Officer
11 Gibson, they clearly learned that he had a bulletproof
12 vest on, and as you saw during the trial, the weight
13 of that -- and I would suggest to you it's not a
14 coincidence that you saw the bullet path that went
15 into the carrier and hit the bottom of the Kevlar and
16 then deflected downward into his body.

17 And I suggest to you that that is
18 circumstantial evidence to the fact that
19 Mr. Richardson was trying to shoot under the
20 bulletproof vest.

21 THE COURT: What evidence is there that
22 there were powder burns consistent with the discharge
23 of a weapon that went off during the struggle
24 accidentally, consistent with what Officer Gibson
25 said, which was we were struggling and it went off?

1 MR. NOVAK: Ann Jones, the forensic
2 scientist, the ballistics expert, testified that she
3 examined the powder burns that were on Officer
4 Gibson's shirt, and she determined after doing various
5 test fires that it was clearly that the gunshot came
6 from less than 18 inches away from his body but more
7 likely in the area of 6 to 12 inches away.

8 That was her testimony at the time of trial.
9 She also testified, I think, to the final and most
10 important point, though, of all, as to the level of
11 intent, is that there were three safeties in the
12 firearm.

13 The most important one as applies here is
14 the 7 1/2-pound trigger safety, such that the finger
15 would have to be directly on the trigger and pulled to
16 give 7 1/2 pounds of weight directly on the trigger
17 and that there's no way in the world that that is an
18 accidental shooting with that in mind.

19 Mr. Richardson had to intentionally pull
20 that trigger back in order to do that. So we suggest
21 that --

22 THE COURT: Why couldn't that be accidental
23 in the sense that Officer Gibson pulled it during the
24 struggle?

25 MR. NOVAK: I'm sorry, Judge? I didn't hear

1 you.

2 THE COURT: Why couldn't it be accidental in
3 that it was the pressure of Officer Gibson's finger
4 during the struggle? You're saying that in order to
5 exert 7 1/2 pounds of pressure you have to
6 deliberately intend to pull the trigger.

7 MR. NOVAK: Right.

8 THE COURT: That's probably right.

9 MR. NOVAK: Yes.

10 THE COURT: But why couldn't 7 1/2 pounds of
11 pressure be exerted during the struggle for the gun?

12 MR. NOVAK: By Mr. Richardson or by Officer
13 Gibson?

14 THE COURT: By either one of them.

15 MR. NOVAK: Well, the testimony, first of
16 all, by Shawn Wooden, if you credit him, which you did
17 certainly as to drug weight, was he heard a gunshot
18 and looked up, and you have the gun in
19 Mr. Richardson's hand.

20 THE COURT: So it wasn't in Officer Gibson's
21 hand at the time it went off.

22 MR. NOVAK: Exactly. Right. You saw the
23 firearm. I don't have the firearm here today. If I'd
24 known this would be an issue, I would have, but it's
25 just not practical or it doesn't make common sense if

1 you can get two fingers within the trigger area
2 because there was the trigger guard where the trigger
3 was.

4 THE COURT: Strange things happen when
5 fights are going on over weapons. What if Officer
6 Gibson had his hand around there and they were
7 fighting and somebody pulled his finger, not put
8 another finger in there but pulled his hand and it
9 went off?

10 MR. NOVAK: Pulled Mr. Richardson's hand?

11 THE COURT: Suppose what happened was
12 Mr. Richardson pulled -- Officer Gibson's hand was on
13 the pistol.

14 MR. NOVAK: But that's not what the --

15 THE COURT: Just listen.

16 Is on the pistol, and the during the fight,
17 Richardson and Claiborne were fighting with him.
18 There was pressure going on. Claiborne was pulling it
19 from behind. Richardson was struggling from the
20 front.

21 And somebody, I don't know who, pulled
22 Officer Gibson's hand enough to exert 7 1/2 pounds
23 worth of pressure on the trigger, and it turned also
24 and shot him from 6 1/2 feet away.

25 What would that scenario do, if believed?

1 MR. NOVAK: Well, that would go to
2 involuntary manslaughter. Well, no, it would not go
3 because you still have -- that's wanton and reckless
4 disregard to the value of human life because you're
5 struggling with an officer while he has his firearm
6 off.

7 The law requires somebody when they're
8 instructed to halt or under arrest to stop, not to
9 struggle with the officer. The Court is well aware of
10 that.

11 And when you do not, when you instead of
12 stopping, you attack the officer and particularly when
13 he pulls his weapon out and you're struggling over the
14 firearm, I would submit to you that that would
15 constitute wanton and reckless disregard for his life.

16 THE COURT: What other scenarios could have
17 occurred in the killing of Officer Gibson than those
18 we have just discussed?

19 MR. NOVAK: May I just discuss that
20 scenario? I would say for you to find that, Judge,
21 you're discrediting Officer Gibson's dying declaration
22 where he said, "They shot me with my own firearm," not
23 I shot myself. You also would be discrediting
24 Mr. Wooden.

25 I would suggest to you the only evidence in

1 the record is that --

2 THE COURT: But it would be consistent with
3 Mr. Wooden, would it not, for that to have happened as
4 I described it, and then the next step was that
5 Mr. Richardson grabbed the gun and took off with it?

6 MR. NOVAK: I don't know, but as I recall
7 the testimony -- and if I can just step back, I have
8 my notes.

9 Mr. Wooden testified that after the shot, he
10 turned around and saw Mr. Richardson standing with the
11 gun. I don't think there's that time break under the
12 Court's scenario there that would be necessary for him
13 to reach down.

14 As I recall Mr. Wooden's testimony,
15 according to my notes, is that he's testing the crack.
16 He hears the shot. He turns around.
17 Self-preservation purposes alone, he's scared to
18 death. And that's when he sees Mr. Richardson with
19 the gun.

20 Most notably, the dying declaration of the
21 officer, which I would urge the Court to credit as
22 both defendants' argue to the jury was credible,
23 discounts that view.

24 I think now the other alternative is the gun
25 is in Mr. Richardson's hand and perhaps Officer Gibson

1 is struggling and he pushes on the hand and that
2 causes it to go off.

3 Maybe that's the alternative to what you're
4 saying, and that certainly would be consistent with
5 the evidence. Other than the issue of the 7 1/2
6 pounds, maybe you could make that argument.

7 But I would still argue that even if that's
8 true, that's what happened, and you have Mr. Claiborne
9 on his back and you've got Mr. Richardson is trying to
10 get the gun off, maybe it was just to run off, and
11 Officer Gibson grabs him and they're fighting back and
12 forth and the gun goes off, that's still wanton and
13 reckless disregard because when he pulls out the
14 weapon -- first of all, they have to stop to begin
15 with, when instructed to do so.

16 And certainly when he pulls out the weapon
17 and continues to struggle, that is wanton and reckless
18 disregard, I would suggest to the Court, for the value
19 of human life, and therefore, we believe the cross
20 reference should apply.

21 THE COURT: All right.

22 MR. BOATWRIGHT: If Your Honor please.

23 THE COURT: Yes.

24 MR. BOATWRIGHT: Mr. HuYoung and I have
25 agreed that I would address the factual matters, and

1 he would address the second portion of what Mr. Novak
2 just talked about, which is the intent questions and
3 questions of law.

4 THE COURT: I'll let you split your argument
5 any way you want to.

6 MR. BOATWRIGHT: Thank you, sir.

7 THE COURT: What other scenarios can you
8 envision by which Officer Gibson was killed other than
9 those which I have just completed discussing with
10 Mr. Novak? Is there anything else that would be
11 consistent with any version of the evidence?

12 MR. BOATWRIGHT: Well, I think it is -- as
13 Your Honor pointed out, I think Your Honor's question
14 about couldn't it have occurred in the way that you
15 described; that is, Officer Gibson has the hand on the
16 gun, there's pulling and tugging going on and hands
17 are not pointed in different directions, that is a
18 completely credible scenario.

19 THE COURT: Right. Let's assume that that's
20 the scenario. Mr. Novak says that's wanton and
21 reckless disregard for human life under the facts of
22 this case.

23 MR. BOATWRIGHT: If Your Honor please, that
24 Mr. HuYoung --

25 THE COURT: All right. I'll let him address

1 that.

2 MR. BOATWRIGHT: With reference to the
3 factual matters that he began with, there's one thing
4 that he hasn't referenced at all, factually speaking,
5 with regard to this aspect of this hearing, and that
6 is the fact that we had a 12-member jury listen to the
7 evidence over a period of some days and deliberated
8 20-some hours over a period of three days.

9 And I recall sitting here through that
10 entire eight-day period watching those good people
11 take notes, be very attentive --

12 THE COURT: They were paying attention.
13 There isn't any question about it.

14 MR. BOATWRIGHT: And everything that
15 Mr. Novak says to you does violence to what they did.
16 They rejected everything he said, for some reason,
17 regarding the murders.

18 THE COURT: Well, I think probably what they
19 did was find that the proof standard beyond a
20 reasonable doubt was not met. That isn't the standard
21 here.

22 The standard here is either preponderance or
23 clear and convincing evidence, one of the two. I
24 think our circuit holds that it's preponderance of the
25 evidence.

1 MR. BOATWRIGHT: As I say, I'll let
2 Mr. HuYoung address that issue.

3 THE COURT: But, I mean, there's a different
4 standard.

5 MR. BOATWRIGHT: I know that. I understand
6 that there's a different standard, Judge, but the fact
7 of the matter is he made these very same arguments to
8 them, too. And for whatever reason, they were all
9 rejected.

10 First off, let's talk about the dying
11 declaration. He has consistently sought to have the
12 Court -- first the jury and now the Court accept the
13 parts of Officer Gibson's remarks that he likes over
14 and over again.

15 And he has consistently tried to explain
16 away the part that is inconsistent with his theory as,
17 well, he was lying on the ground; well, he was in
18 extreme pain; well, this explanation, that
19 explanation.

20 THE COURT: Are you talking about the
21 description?

22 MR. BOATWRIGHT: Yes. The fact of the
23 matter is the description is simply inconsistent with
24 these two young men. There's no question about it.

25 Officer Gibson was 5 feet 11 inches tall.

1 Mr. Claiborne is, I believe, about 6 feet tall.

2 Mr. Richardson is shorter than I am, and I'm 5'8",
3 5'8 1/2". The heights don't work. They just don't
4 work.

5 You talked about dreadlocks and cornrows.
6 There was no evidence in the record that people
7 sometimes confuse dreadlocks with cornrows, and I
8 think you're right. That's extra-record supposition
9 on the part of the United States unsupported by the
10 evidentiary record.

11 Also, when you did see the picture of
12 Mr. Richardson's cornrows that extended beyond the
13 hairline, they were about, you know, an inch, inch and
14 a half long. The question is could you gather those
15 into a ponytail. As I suggested to the jury, no, you
16 couldn't.

17 His physical description --

18 THE COURT: He didn't say a ponytail. I
19 thought he said dreadlocks, or maybe I'm wrong about
20 that.

21 MR. BOATWRIGHT: He said -- I believe the
22 officer said something about a ponytail, and I believe
23 Mr. Novak will correct me if I'm wrong.

24 So the physical --

25 THE COURT: So he didn't say anything about

1 dreadlocks?

2 MR. BOATWRIGHT: No, he did say dreadlocks.
3 The officer did say dreadlocks, yes.

4 THE COURT: You're saying there was another
5 aspect to the hair description that --

6 MR. BOATWRIGHT: That is incorrect, that you
7 couldn't pull back what he had, those little pigtailed
8 as you described them, into a ponytail. There just
9 wasn't enough to do it.

10 All you had to do to see that is just look
11 at the picture. Remember, Officer Gibson didn't give
12 this statement once. He gave it repeatedly, to
13 Aldridge and then to Trooper Williams any number of
14 times.

15 And it was clear according to the testimony
16 that he was trying to give the best description he
17 could give. I could see if one time he said something
18 and then later corrected himself or vice versa, but he
19 was completely consistent just about each and every
20 time he opened his mouth during the time he was out
21 there in the woods.

22 So this is not a matter of someone just
23 getting it wrong because they've been hurt because --

24 THE COURT: This goes to the argument that
25 they are not participants?

1 MR. BOATWRIGHT: Exactly right.

2 THE COURT: Mr. Richardson.

3 MR. BOATWRIGHT: Exactly right. The T-shirt
4 issue, well, the officer saw -- supposedly encountered
5 these two people in the woods and says they're wearing
6 white T-shirts.

7 But I think Mr. HuYoung made it very clear
8 in his last submission to the Court that if he had a
9 marijuana leaf on there and the officer saw that, that
10 is certainly something for a law enforcement officer
11 that would stick in your mind. That was not
12 mentioned.

13 Let's go to the question of the guilty
14 pleas. You ruled when we had the whole discussion and
15 the presentation of the evidence relating to the entry
16 of those guilty pleas in state court the jury was to
17 consider the guilty pleas as it would other evidence,
18 not as conclusive on the question of whether they were
19 involved in the officer's killing or not, and I assume
20 the Court has the same attitude today.

21 There was an absolutely, very legitimate way
22 to explain the guilty pleas on the part of both of
23 these individuals. Mr. Novak brushes off quite
24 cavalierly the question of the fact that
25 Mr. Richardson was looking at possibly being executed

1 if he were found guilty.

2 Sure, maybe it's a decision Dave Novak
3 wouldn't make, to take the chance of receiving a
4 sentence up to ten years in the penitentiary rather
5 than face execution, but Terence Richardson was the
6 one who had to make that decision that day.

7 And he made a decision based on the facts
8 that were elicited at the time of this trial and which
9 show that there was every reason, every reasonable
10 reason for him to do that, even if he was not a
11 participant in the killing of the officer. He avoided
12 being either incarcerated for the rest of his life or
13 for losing his life.

14 With respect to the question of the alibis,
15 first off, Mr. Novak forgot we didn't put on the
16 alibis. He put on the alibis, and it may have
17 backfired to some extent on him because quite frankly
18 when you talk about Mr. Richardson's discussion about
19 the TV shows, well, remember -- and Mr. Novak forgets
20 this -- he got the sequence of the shows that he said
21 he watched with the children correct.

22 He got one of the shows off by a half an
23 hour. Now, he says that shows consciousness of guilt
24 because he's trying to cover up. I say, well, have
25 you ever made a mistake about the time that you saw a

1 show or when it came on? I think it's just as likely
2 that that is the case as it is that it shows
3 consciousness of guilt, taken by itself or with anyone
4 else.

5 The admissions, Joe Jones, I'm almost
6 surprised to hear the government --

7 THE COURT: Don't spend too much time on
8 that.

9 MR. BOATWRIGHT: I won't. Mr. Ellsworth, I
10 think Mr. Ellsworth was completely discredited by the
11 testimony that we put on in our case. He -- the
12 problem with Mr. Ellsworth is he didn't know certain
13 things.

14 First off, he didn't know that Terence
15 Richardson was under a bond condition that required
16 him to be with people at all times.

17 Second off, he didn't know that
18 Mr. Richardson was in a setting where it would have
19 been impossible, virtually impossible for him to get
20 away to go 20 or 30 minutes, I believe his aunt said,
21 to the nearest convenience store, to her home and to
22 be found behind that convenience store by
23 Mr. Ellsworth talking to a group of complete strangers
24 about the killing that he had participated in some
25 months before.

1 Judge, I think -- I started off my closing
2 argument centering on Mr. Ellsworth because I thought
3 his testimony was so incredibly devoid of credibility,
4 and I would ask you to find that today.

5 He didn't come forward until after he got in
6 trouble, and it worked perfectly for him. He got out
7 of trouble by doing that, but he didn't make a peep
8 about that until he got in trouble in April of 1998.

9 And remember, he said he was with his wife
10 and child. Nobody brought the wife and child forward
11 to corroborate his testimony, but we brought witnesses
12 forward to destroy his testimony. And I think we did
13 destroy it, just like I think Joe Jones' credibility
14 was suspect for different reasons.

15 Mr. Ellsworth, I think, simply just got
16 caught in a lie. It's as simple as that. And I
17 believe what I said to the jury is correct then, and I
18 believe it is today. Mr. Ellsworth probably
19 rationalized it by saying, I'm probably helping
20 Terence.

21 They say he shot, deliberately killed the
22 trooper. If I say he said it was just an accident,
23 well, that helps me, but it helps him, too, because
24 then it shows it was an accident. He didn't mean to
25 do it.

1 The testimony about what took place at the
2 party the night of the day that Officer Gibson was
3 killed, yeah, there was one person who said that he
4 made some admission to the effect that he had killed
5 one person that day and wouldn't mind killing another.

6 If you recall, there were other witnesses
7 who came forward and said they never heard any such
8 remark being made, and they were standing right there.
9 Mr. Novak forgot about that. Other people said it
10 didn't happen, just as simple as that.

11 THE COURT: I think they said they didn't
12 hear it.

13 MR. BOATWRIGHT: They were in a position to
14 hear it if it had been said, and for that reason, I
15 think any -- the reference to the party at Joe Brown's
16 house just didn't add anything to the equation.

17 The question of Shawn Wooden, I reviewed his
18 testimony, and I suppose, really, his testimony
19 factually speaking is more relevant to what
20 Mr. HuYoung is about to address.

21 But as to whether he is believable or not, I
22 mean, Mr. HuYoung has pointed out very adequately and
23 the government has conceded, this so-called true story
24 didn't come out until after he was charged with
25 obstruction of justice in this court. And he got

1 ten years as a result. The so-called final, complete,
2 100 percent true version.

3 And I would suggest to the Court that the
4 jury was quite right to reject his testimony on
5 credibility grounds, and you would be as well
6 justified as they were in doing the same.

7 Mr. HuYoung will address the remaining
8 issues.

9 MR. HUYOUNG: If it please the Court, I'll
10 attempt to address the remaining issue, just to try to
11 answer your question on whether it's reckless and
12 wanton.

13 Although I disagree that the Guideline
14 should be applicable as far as the cross reference,
15 it's a cross reference to first degree murder, to
16 murder, and under 18, 1111, murder is killing of a
17 human being with malice aforethought perpetrated by
18 poison, lying in wait, or any other kind of willful,
19 deliberate, malicious and premeditated killing. Then
20 it goes into some aspects of felony murder.

21 Anything else is either second degree, even
22 wanton or reckless. That's if that is involuntary
23 manslaughter, which we'll get to those issues later,
24 but that doesn't kick in the cross reference.

25 The cross reference only kicks in if this

1 Court deems by clear and convincing evidence, and
2 that's the standard that I'm asking this Court to
3 impose, instead of the preponderance of the evidence.

4 It just stands jurisprudence on its head by
5 saying we've got a first degree murder case, came into
6 court, proved beyond a reasonable doubt, jury didn't
7 find it, different standard, and then we go down to
8 preponderance of the evidence to net Mr. Richardson
9 and Mr. Claiborne a life sentence.

10 The case law in other jurisdictions and even
11 referred to in the Fourth Circuit, even with the case
12 that Mr. Novak supplied the Court with, the Montgomery
13 case, even though it sort of gleaned it by saying,
14 well, even in this case, meaning the Montgomery case,
15 we felt there was clear and convincing evidence.

16 I think the trend in the case law, in the
17 dicta that is cited in all the cases dealing with
18 either upward departures or even in determining what
19 standard to use in regards to Sentencing Guidelines go
20 to the clear and convincing evidence when there is
21 such a drastic enhancement.

22 In this case, Mr. Richardson's maximum
23 sentence would be, I believe, 210 months. I may have
24 quoted that incorrectly.

25 THE COURT: No, that's right.

1 MR. HUYOUNG: But it goes from that to
2 mandatory life. If that isn't the tail which wags
3 the -- well, substantive offense, Judge, then I don't
4 know what else there is.

5 THE COURT: Let's assume for the moment that
6 the standard is clear and convincing evidence.

7 MR. HUYOUNG: Then the argument that we
8 would impose to the Court is that's a higher standard
9 that the evidence does not meet.

10 THE COURT: Why doesn't it? Remember, a
11 murder with malice aforethought is murder. "Malice
12 aforethought" means either to kill another person
13 deliberately and intentionally or to act with callous
14 and wanton disregard for human life.

15 Now, let's assume for the moment that what
16 we're dealing with is the clear and convincing
17 evidence standard. Why isn't what happened here in
18 any of the -- I think we have posited three possible
19 scenarios.

20 Why aren't any of those clearly and
21 convincingly shown to be wanton, callous and reckless
22 disregard for human life? That's his argument.

23 MR. HUYOUNG: Judge, struggling with a gun,
24 assuming that's correct, it's not wanton and disregard
25 for life. You're struggling. You're just trying to

1 get away, and the gun goes off.

2 THE COURT: No, struggling for the gun is
3 not struggling to try to get away.

4 MR. HUYOUNG: Well, struggling for the gun,
5 Judge, still doesn't amount to that standard. When
6 you say, well, why isn't it clear and convincing
7 evidence, I think that's a determination that the
8 Court has to make.

9 What is proof beyond a reasonable doubt?
10 What is clear and convincing evidence? What is a
11 preponderance of the evidence? Those are standards
12 that the Court will judge according to the facts of
13 the case.

14 And, Judge, again, if you look at malice
15 aforethought, you're looking at what happened in this
16 situation, even assuming that there was a struggle for
17 the gun. Judge, that still doesn't amount to that
18 level of wantonness. You're just struggling with a
19 gun, and the gun goes off.

20 If that's the evidence, if that's what the
21 Court views it to be, that does not --

22 THE COURT: Why isn't that reckless
23 disregard for the human life with the person with whom
24 you're struggling as well as your own?

25 MR. HUYOUNG: Well, Judge, I think it takes

1 two individuals to struggle. There's two individuals
2 struggling.

3 THE COURT: One of them has the right to
4 have the gun here. It's an undisputed issue. One
5 fellow by law is entitled to carry the gun. He's
6 entitled to hold the gun on another person, and the
7 other person is trying to take it away from him, i.e.,
8 resisting arrest.

9 During the course of resisting arrest, if
10 you wrestle with the officer, why isn't that a callous
11 disregard for the officer's life as well as your own?

12 MR. HUYOUNG: Judge, I think --

13 THE COURT: If you wrestle holding the gun.

14 MR. HUYOUNG: If Mr. Richardson -- if
15 Mr. Richardson was the one that was struggling with
16 the gun, I don't think he had any intent there to do
17 any harm or intent to kill. I think if we're just
18 looking at, you know, wanton disregard, I don't think
19 that meets the standard of first degree, Judge.

20 THE COURT: It's the definition of malice
21 that was given to the jury over nobody's objection.
22 It's the definition of malice that is accepted in most
23 circuits, including our own, malice aforethought.

24 Why isn't that sufficient to be malice
25 aforethought if the facts proof it?

1 MR. HUYOUNG: Well, Your Honor, in this
2 situation, the government was relying on the aspect
3 that Mr. Richardson got that gun, pointed it and shot
4 him. He stressed so much on that 7 1/2-pound trigger
5 pull. Your Honor, here we have --

6 THE COURT: Yes, Mr. HuYoung, I agree there
7 was a lot of stress on that, but I've been reflecting
8 on this in the last several days. I sort of worked
9 through for myself, how could this conceivably have
10 happened? What are the scenarios that ought to be
11 assessed?

12 Because it is those possible scenarios that
13 might provide the key to whether the conduct was
14 properly to be fitted within the definition of malice
15 aforethought, callous and reckless disregard for the
16 life of Officer Gibson.

17 And I have come up with three about which I
18 have questioned Mr. Novak and Mr. Boatwright. If
19 there are others, I would like to be informed what
20 they might be. If not, then if you would just maybe
21 address why you think all or any of those three do not
22 represent callous and reckless disregard for the life
23 of Officer Gibson.

24 MR. HUYOUNG: Judge, we -- of course, we
25 don't know what happened in the woods back there.

1 Only certain individuals know, and our position would
2 be none of those individuals are in this courtroom.

3 But, Your Honor, in viewing the versions as
4 to what happened, again, I don't know what else to say
5 other than it's our position that Mr. Richardson
6 wasn't back there.

7 I know this Court has probably made another
8 determination or will make another determination, but
9 the government didn't proceed on the case based on the
10 fact that there was just a struggle back there.

11 And I don't think we can just come back in
12 here and say, well, let's look at all the other
13 alternatives that can happen.

14 THE COURT: Wait just a minute. I thought
15 that Wooden testified to a struggle, and Ms. Newby
16 testified to a struggle. And the officer's dying
17 declaration included reference to a struggle over the
18 gun.

19 Now, I thought they did proceed on that
20 ground as well. They proceeded on both grounds. I
21 think the government argued -- and maybe I'm wrong,
22 tell me if I'm wrong -- that they intentionally shot
23 him and they shot him below the vest.

24 But if that didn't happen and you believe
25 what you were saying, then it was reckless disregard

1 for the officer's life to be wrestling over the gun
2 with Officer Gibson.

3 And the jury didn't return a verdict, didn't
4 find the United States had proved either of those
5 theories beyond a reasonable doubt, but they did
6 proceed on both of those theories, I believe. Did
7 they not?

8 MR. HUYOUNG: Judge, it's my position and
9 our position that the government proceeded with that
10 intent. According to the evidence --

11 THE COURT: With the intent part of the
12 malice definition, not with callous and reckless
13 disregard part?

14 MR. HUYOUNG: Right. Your Honor, again, the
15 government in its brief said if you don't find that it
16 was an intentional-type murder, then based on the
17 admissions by Mr. Richardson in the state court, then
18 it becomes involuntary manslaughter.

19 And, Judge, the Guideline just cross
20 references to first degree murder, and I don't know
21 what else to argue --

22 THE COURT: Here's the question I have that
23 I don't think either one of you addressed, and the
24 cases don't seem to address. Well, maybe you have
25 addressed it and I haven't really understood it.

1 The cross reference kicks you automatically
2 to first degree murder.

3 MR. HUYOUNG: Correct.

4 THE COURT: All right. The statute which
5 animates the cross reference, that's 18 United States
6 Code Section 1111, says, "One, murder is the unlawful
7 killing of a human being with malice aforethought.

8 "Two, every murder of certain kinds is
9 murder in the first degree." And then it goes on and
10 says, "Any other murder is murder in the second
11 degree."

12 So what rationale is there for the Guideline
13 to say go to the first degree murder when the animated
14 statute that referred to in the cross reference
15 guideline actually defines the kind of murder we're
16 dealing with here is second degree murder?

17 I'm telling you, how does that fly, and what
18 do you have to say about that?

19 MR. HUYOUNG: Judge, if it is second degree
20 murder, then the Guideline does not apply because it
21 only refers to first degree. That -- because there's
22 a part of the Sentencing Guidelines that say if you go
23 to another guideline, if you cross reference it to
24 another guideline, you just go to that specific
25 guideline.

1 You don't go to the whole guideline and all
2 its part. For example, the guideline that it refers
3 to is first degree, which is 2A1.1. That's first
4 degree. Second degree is 2A1.2.

5 If the government wants to cross reference
6 to 2A1.2, then that's fine. We'll take it because the
7 base offense level is 33, which is a lot less than
8 what Mr. Richardson's base offense level is now.

9 So the argument would be that it only
10 applies in those cases where it deems it first degree.
11 If the Court deems it as first degree --

12 THE COURT: Are you saying that the drug
13 trafficking -- I mean that the Guideline dealing with
14 deaths that occur in the course of drug trafficking
15 automatically makes a murder for purposes of
16 sentencing that occurs during the course of drug
17 trafficking a first degree murder in effect."

18 MR. HUYOUNG: No, Your Honor. In fact, the
19 drug guideline does take into effect murders that
20 are -- and deaths that occur as a result of using the
21 drugs. So there is that aspect of it.

22 For example, the Guideline is clear -- well,
23 if the Guideline is clear, it says that if a death
24 occurs from the actual usage of the drugs. And I know
25 that's not the point here, but it does take into

1 effect that death as a factor.

2 Here, again, the cross reference says if a
3 murder occurs -- in 2D1, if a murder occurs which
4 constitutes the murder that's listed in the statute --

5 THE COURT: That isn't what it says. Let's
6 go see what the Guideline actually says. 2D1.1(d)(1)
7 says that if a victim was killed under circumstances
8 that would constitute murder under 18 U.S.C. Section
9 1111, had it been within the United States
10 jurisdiction, then you apply 2A1.1, which is first
11 degree murder.

12 Now, my question was and what I'm trying to
13 understand about your argument is this: Section 1111
14 describes two kinds of murder, first degree and second
15 degree.

16 The facts of this case, wanton disregard, do
17 they fit in the first degree murder? If they don't,
18 they then have to fit somewhere else. Where is it?
19 The second degree murder. So let's assume for the
20 moment that they don't fit in the first degree murder
21 facts. They do fit in the second degree murder facts.

22 What is the legal effect of a Sentencing
23 Guideline imposing a first degree murder sentence for
24 what is clearly a second degree murder?

25 It has to be that in the case of drug

1 trafficking, which is in the head of this section that
2 we're dealing with, 2D1.1, that if you have a victim
3 killed in the drug trafficking, Congress in adopting
4 the Guidelines is saying that's first degree murder.

5 Otherwise, this Guideline makes no sense to
6 me. So that's what's troubling me, and I thought you
7 were heading that way in your argument. Then you went
8 off somewhere else.

9 MR. HUYOUNG: I have a tendency to do that.

10 THE COURT: I may have misdirected you. How
11 about taking that issue on.

12 MR. HUYOUNG: Judge, I would say that if
13 that's the case, you're turning a second degree
14 murder -- if it was a second degree murder that was
15 committed, you're turning that into a first degree.

16 THE COURT: Doesn't that mean that now the
17 sentencing dog is wagging -- the sentencing tail is
18 wagging the substantive dog?

19 MR. HUYOUNG: Yes, sir.

20 THE COURT: Because you've shifted the whole
21 level from second degree to first degree.

22 MR. HUYOUNG: That's correct.

23 THE COURT: Is that the best argument you've
24 got?

25 MR. HUYOUNG: That's the best argument

1 you've made for me, yes, sir. That's the best
2 argument I've got, yes Your Honor.

3 THE COURT: And there are no cases that deal
4 with this, do they, on this Guideline?

5 MR. HUYOUNG: There are no United States
6 Supreme Court case dealing with the cross reference,
7 not one single one.

8 THE COURT: There's another case dealing
9 with the precise issues.

10 MR. HUYOUNG: Right.

11 THE COURT: There are plenty of cases that
12 say it's all right to apply --

13 MR. HUYOUNG: Correct. The Fourth Circuit
14 and those cases deal with -- well, there's no case
15 dealing with this fact situation. All of them are
16 clear-cut, first degree, drug turf wars, that kind.

17 And, Judge, again, I know we're just dealing
18 with that cross reference, and we're asking the Court
19 to view it as if it is the tail that's wagging the dog
20 of the substantive point that we use clear and
21 convincing evidence. Thank you, Your Honor.

22 THE COURT: All right. Go right ahead.

23 MR. EVERHART: Thank you, Your Honor. If it
24 please the Court, with the Court's permission, I'll
25 try to address the cross referencing issue, and

1 Mr. Gavin at the appropriate time will address the
2 second issue which Mr. Novak can bring up in a minute.

3 Judge, it's like the Yogi Berraism. It's
4 deja vu all over again. Quite frankly, as Mr. HuYoung
5 said, it just seems to stand everything on its ear
6 that we were here back on June 11th and I made a
7 closing argument regarding the alleged murder of
8 Officer Gibson by my client, Ferrone Claiborne.

9 Mr. Novak made his closing statement and his
10 rebuttal regarding that same alleged murder. The jury
11 came back and ruled for whatever reason -- and with
12 all due respect to Your Honor, I can't speculate as to
13 what swung the balance in those arguments.

14 I don't know if it was something Mr. Novak
15 said, Mr. Boatwright said, something I said. For
16 whatever reason, the jury determined Mr. Claiborne was
17 not guilty.

18 Quite frankly, the question that leaps into
19 my mind -- and probably, I'm the least smart guy in
20 this room -- why in the world based on the way these
21 Guidelines work would the government ever charge a
22 murder?

23 It seems to me this is a whole heck of a lot
24 simpler. Don't charge the murder. Come in and say
25 there was a murder, and all we have to do now is prove

1 it by a preponderance of the evidence or clear and
2 convincing evidence.

3 So why do we even have juries? It's
4 mind-boggling to me that --

5 THE COURT: You're making the argument that
6 was rejected by the Supreme Court in United States v.
7 Watts --

8 MR. EVERHART: I understand.

9 THE COURT: -- that you can't consider
10 acquitted conduct, and maybe under Apprendi, maybe now
11 that Apprendi has been decided, the Supreme Court will
12 revisit that. Maybe our own court of appeals will.

13 But I quite frankly am deeply troubled by
14 the line of decisions that says that you can consider
15 acquitted conduct for many of the same reasons you
16 press.

17 But the Supreme Court of the United States
18 has held otherwise, and I can't change that. There's
19 no way to distinguish the decision that holds that.

20 MR. EVERHART: I understand, Judge.

21 THE COURT: Mr. Everhart, other than
22 grouching about it, what good does it do?

23 MR. EVERHART: Sometimes Don Quixote has to
24 tilt at windmill. So I'll do a little tilting. But
25 be that as it may --

1 THE COURT: Why don't you see if you can hit
2 something that will land that might do some good on?

3 MR. EVERHART: I'll try, Judge. Judge, as
4 to Ferrone Claiborne, Mr. Novak gave you a summary of
5 what his version, his rendition is, if you will, of
6 the facts.

7 As I argued back on June the 11th, the first
8 question is, was Ferrone Claiborne there? Who puts
9 him there? Mr. Novak said then and he says today, he
10 basically says Evette Newby and Shawn Wooden.

11 Well, we can dance around this all we want.
12 The day after the killing, Evette Newby gave a
13 statement, and I read it to the jury. And my
14 recollection is this was introduced into evidence,
15 Your Honor.

16 I don't have the exhibit number, but it's
17 signed Evette Newby, dated April 26th, '98. I
18 believe -- I don't know whose writing this is, quite
19 frankly. It doesn't appear to be Ms. Newby's.

20 THE COURT: It was the investigating
21 officer, I believe.

22 MR. EVERHART: And it says in full, "I said
23 what do you mean?"

24 And he said, 'Don't worry about it. Never
25 you mind.' The other two, Coop and the other BM,"

1 which I assume stands for black male, "in a dark,
2 medium-sized car with nice rims in the parking lot."

3 Newby described the three as, one, Terence
4 Richardson, 'T', live Dogwood Street, BM, early
5 twenties, blue jeans and a white T-shirt with
6 'w/green' on it, braided dreads with dark cap, medium
7 sized.

8 Two, Coop 'Faltz', mother Brenda Turner,
9 black male, early twenties..." It says "BM," if the
10 Court allows, I'll just say black male. "...early
11 twenties, small dreadlocks, tall and muscular.

12 "Three, UNK," which I believe is an
13 abbreviation for unknown, "BM, early twenties, light
14 skin, 'poppy' eyes and 'knots' (small dreads
15 starting), skinny and taller than T but shorter than
16 Coop."

17 Well, none of those is Ferrone Claiborne.
18 You recall the evidence the government put on.
19 Mr. Claiborne has had during the course of this whole
20 thing very close-cut hair as he has today. So I don't
21 know how this Court can put any credence into what
22 Evette Newby comes in and says.

23 The primacy argument certainly indicates it
24 wasn't Ferrone Claiborne. She may come in today or
25 next week and say it was, but the first time she gave

1 a statement, no, that wasn't what she said. It's not
2 like she just said, oh, I just got him confused with
3 somebody. This is specific stuff.

4 It's like Jeff Everhart, mother Harriet
5 Everhart, in describing somebody different or
6 describing me in his place. It's just hard to believe
7 she's credible.

8 Shawn Wooden, of course he lied under oath
9 before. I guess it's -- I don't know how you'd say
10 that now we have to believe him. Remember, Your
11 Honor, he couldn't tell you what Ferrone Claiborne was
12 wearing.

13 He could hardly even remember what he was
14 wearing. But he did admit on cross he owned a number
15 of white T-shirts, and he said he thought he was
16 wearing blue jeans. Well, be that as it may.

17 The government also put on other witnesses,
18 Judge. You remember Hope Wilkins, who was a lady who
19 lived there at the Waverly Village Apartments, who as
20 far as I'm aware, had no discernible reason to lie.

21 She, you'll recall, testified she saw
22 Officer Gibson cruise the court in a clockwise manner.
23 Then she saw him exit his car. She told Your Honor
24 that she knew who Ferrone Claiborne was. She saw him
25 there, in her words, every blue moon.

1 But she told you, "I didn't see Ferrone
2 Claiborne there that day," and she told you she was
3 standing over there -- remember, Judge, there are four
4 buildings. It's a three-quarters of a square, in
5 other words.

6 She was standing down there near that
7 electrical box or phone box or whatever it is near the
8 playground, which of course Shawn Wooden says Ferrone
9 Claiborne walked right through there.

10 It's one thing to say believe Shawn Wooden,
11 but is the government telling you to believe Shawn
12 Wooden over their other witness, Hope Wilkins, who has
13 no record, no involvement, no inconsistent statements.

14 I suggest to you you just can't do that. It
15 doesn't comport with the testimony of Evette Newby,
16 who said she saw - you remember she said - from her
17 window.

18 And if I'm in the area of this box that we
19 kept hearing about, there's a building here. There's
20 a building over here to my right, another building,
21 and then there's a building where Evette Newby lived.
22 Evette Newby said she saw Ferrone Claiborne right over
23 here near this box.

24 Remember, she's the one that said he looped
25 around. That doesn't comport with what Hope Wilkins

1 said, also, Chenette Gray, who was called by the
2 United States.

3 Mr. Novak makes light of Mr. Claiborne's
4 alibi, and I'll grant you it wasn't the greatest
5 alibi. But of course, by his own evidence, Chenette
6 Gray says she heard sirens and at that instance, she
7 saw Ferrone at the corner of Butler and Franklin.

8 He was all alone. He was on a bicycle. He
9 stopped and talked with her for five to ten minutes,
10 and then he went on his way. I asked her, if you
11 remember, was he nervous? Was he sweating? Was there
12 anything unusual about him? Her answer was no.

13 Judge, common sense says if you just
14 participated in what Mr. Novak wants you to believe
15 Ferrone Claiborne participated in, I tell you -- I
16 guess anything is conceivable, but you'd have to be
17 one cool customer.

18 And if you just participated in this
19 struggle that we keep hearing about, wouldn't
20 something be messed up, your clothing a little bit
21 disheveled, a little perspiration, something?

22 Again, Judge, as Mr. Boatwright touched on,
23 Mr. Novak wants you to accept the statement, the
24 statements, if you will, of Officer Gibson in every
25 way but what tells you it wasn't Ferrone Claiborne.

1 And I have to tell you, I've listened to
2 Mr. Novak make this argument two or three times now,
3 that Officer Gibson's ability to perceive or his
4 perception is affected by the fact that -- I think
5 what he's saying is after he's shot, Officer Gibson
6 was laying on the ground.

7 And Terence Richardson, who by the
8 government's evidence, is the shooter, appeared to be
9 taller because he, Terence, ran up onto the berm, and
10 as Officer Gibson is lying there, he perceives Terence
11 to be taller.

12 Of course, that completely neglects the fact
13 that if you accept this evidence that the government
14 is putting on, there was a struggle. I can sit here
15 and struggle with anybody in this room, and my
16 recollection or my perception of him is going to be
17 based on the struggle.

18 So if I'm struggling with somebody who's
19 taller than me, I'm going to describe that person as
20 tall. If I'm struggling with somebody who's shorter
21 than me, I'm going to describe them as short.

22 Whether I ultimately end up on the ground
23 and they look tall from on the ground, I'm basing my
24 perception on the physical struggle, and I suggest to
25 you that that is a plausible explanation. And of

1 course if it is plausible, then Ferrone Claiborne
2 can't be the man. He can't be involved, Judge.

3 Now, Your Honor posed a question, and you
4 said you'd been pondering possible scenarios under how
5 this could have happened. Quite frankly don't know
6 ultimately where it would lead you, but one that
7 occurs is that perhaps one of the assailants or the
8 people struggling with Officer Gibson actually got
9 that gun.

10 You recall the testimony was that Officer
11 Gibson started to draw his gun and there was a
12 struggle. It seems to me that if one of those parties
13 happened to get the gun, it's not inconceivable to me
14 that Officer Gibson might be trying to get it.

15 And what you have, in essence, is a tug of
16 war, and if I'm the tuggee and I happen to have my
17 finger on that trigger, I don't think it's at all
18 inconceivable that the gun can go off.

19 Now, is that wanton and reckless disregard?
20 I suggest to you it's not. But you've got a struggle
21 going on. Mr. Novak can tell you why. It certainly
22 doesn't rise to the level of first degree murder.

23 And this whole notion that somehow there was
24 a struggle and you know there's a bulletproof vest and
25 you could be so accurate as to glance of the bottom of

1 that vest and that bullet be driven down into the
2 femoral artery is just absolutely ridiculous.

3 I've heard it three or four times, and it's
4 just -- what that's asking you to believe is is this
5 really wasn't a struggle. It was something that was
6 planned out.

7 And I suggest to you, Judge, there's no
8 evidence of that, and that's why it can't be first
9 degree murder. Even if with the malice aforethought,
10 there has to be an intent, at least that's what I
11 thought the instructions we had said.

12 THE COURT: Instruction said intent,
13 deliberate or with callous and reckless disregard for
14 the life of a human being.

15 MR. EVERHART: And my recollection is the
16 government didn't argue that. Maybe my recollection
17 is wrong, but I have a pretty good memory. And I
18 think Your Honor's comports with mine. That wasn't
19 what they argued.

20 THE COURT: No, my impression is otherwise.
21 I don't base it on memory. My recollection of the
22 case was or impression was that they did argue both
23 prongs of it.

24 MR. EVERHART: They might have. Mr. Novak
25 will --

1 THE COURT: But principally in response to
2 what you-all argued, I believe.

3 MR. EVERHART: They might have, and
4 Mr. Novak will correct me. I know he'll correct me if
5 I'm wrong. I've not tried to misstate what they did
6 argue. I'll rely on him to tell you.

7 Judge, also, going back to the
8 identification, both of the law enforcement personnel
9 who arrived on the scene, Rick Aldridge and Trooper
10 Jarrid Williams, their descriptions are a little bit
11 different.

12 But under both of their descriptions that
13 they say they got from Officer Gibson, it just can't
14 be Ferrone Claiborne. Of course, Rick Aldridge says
15 that Officer Gibson told him, "I saw two black males
16 run into the woods." He said, "They had dreadlocks,
17 and one probably had a ponytail, both had on jeans and
18 white T-shirts." He says he was fighting with the
19 tall, skinny one when the gun went off.

20 That goes back to what I said a minute ago.
21 I think the perception was formed during the struggle.
22 I think otherwise his statement might be the tall,
23 skinny one ended up with the gun.

24 But he's saying, I'm struggling with the
25 tall, skinny one, and the gun goes off. "He" being

1 Officer Gibson, and of course, Trooper Jarrid
2 Williams, who Mr. Novak places a lot of stock in his
3 testimony and don't know any reason not to, he says
4 that -- he says Officer Gibson told him there was a
5 tall, skinny one with dreadlocks in a ponytail.

6 You can't disregard the fact, as
7 Mr. Boatwright said, Ferrone is taller than Terence.
8 Ferrone's never had dreadlocks. He certainly didn't
9 have them that day, if he's ever had them.

10 One short, medium build, balding, both
11 wearing white T-shirts. Said about the gun, it just
12 went off. Quite frankly, I don't know -- I mean, we
13 can sit here and speculate about what happened.

14 The Court and counsel for the government and
15 for the two defendants, we can sit here and bounce
16 back and forth ideas about what happened.

17 The reason we allow dying declarations is
18 the theory is that the person who's making the dying
19 declaration knows they're dying, and therefore it's
20 credible. And they're trying to get out, if you will,
21 what happened.

22 And I think Mr. Novak made that argument two
23 or three times. Officer Gibson wanted one day for the
24 people that did this to be prosecuted. Doesn't it
25 seem plausible or realistic that if Officer Gibson

1 thought the person that took the gun had shot him
2 intentionally, he would say the son of a gun took my
3 own weapon and killed me? He shot me. I'm dying.

4 THE COURT: He said they shot me with my own
5 gun. He said two things. They shot me with my own
6 gun, and he also said we were struggling and it went
7 off or it just went off. I'm not sure which. He said
8 those two things.

9 MR. EVERHART: He did, and those two are not
10 inconsistent.

11 THE COURT: No.

12 MR. EVERHART: But I think "it just went
13 off" certainly belies murder. So I would ask Your
14 Honor to consider -- Judge, there are a couple ways I
15 think you can rule or find that this doesn't apply to
16 Ferrone Claiborne.

17 First of all, I suggest to you the
18 government hasn't proved even by a preponderance of
19 the evidence or by clear and convincing evidence that
20 Ferrone Claiborne was there and participating. So
21 that addresses the participation issue.

22 Mr. HuYoung and Mr. Boatwright both
23 addressed the murder. I thought I addressed that
24 during the closing arguments. I suggest to you,
25 Judge, they haven't. So as to the cross reference to

1 murder, I would ask you to rule that the government
2 has not borne their burden.

3 Had not given a lot of thought until Your
4 Honor raised it but it certainly does seem backwards,
5 shall we say, if the reference says if it's murder and
6 the murder, like you said, is first degree murder and
7 second degree murder.

8 But then the Guideline says -- automatically
9 makes it first degree murder. It does seem, as you
10 said twice, putting the cart before the horse.

11 THE COURT: Well, it just says apply 2A1.1,
12 and 2A1.1 --

13 MR. EVERHART: Which is first degree murder.

14 THE COURT: Yes, but the fact that it
15 describes it as first degree murder doesn't have any
16 significance when used with the term "apply." What
17 has significance is the offense level of 43.

18 And one way to read that statute is to say
19 we, Congress, have decided that if you kill somebody
20 in the course of drug trafficking, then the offense
21 level is 43, even if it's second degree murder, as
22 opposed to saying it's first degree murder.

23 They're converting second degree murder into
24 first degree murder. Then the tail is not wagging the
25 dog, maybe.

1 MR. EVERHART: Thank you.

2 THE COURT: All right. I think we'll take a
3 15-minute recess. Will that be sufficient, or do we
4 need 20 minutes? Would 20 be more realistic?

5 THE MARSHALL: Yes, sir.

6 THE COURT: We'll take a 20-minute recess.

7

8 (Recess taken.)

9

10 MR. EVERHART: Judge, if I may, just to put
11 on the record, Mr. Gavin reminded me, we had filed
12 motions to adopt the arguments made by Mr. Boatwright
13 and Mr. HuYoung on behalf of Terence Richardson,
14 specifically the Apprendi argument.

15 So we would ask the Court to note our
16 joining in that and also joining in what Mr. HuYoung
17 suggested to Your Honor, that the burden should be --
18 or the burden of proof should be clear and convincing
19 evidence. So we would join in those arguments.

20 THE COURT: All right. Is there any
21 objection?

22 MR. NOVAK: No.

23 THE COURT: Motion is granted.

24 Do you have anything to say, Mr. Gavin?

25 MR. GAVIN: No, sir, that was...

1 THE COURT: All right.

2 MR. NOVAK: I just have a couple very brief
3 points, Judge. One is addressing the three scenarios
4 that you gave. One is the scenario with the officer
5 having his finger on the trigger itself, which I
6 suggest should be rejected due to the testimony of
7 Mr. Wooden, as well as the dying declaration.

8 But there's another scientific fact which I
9 neglected to point out to the Court; that is, the
10 gunshot residue tests were administered to Officer
11 Gibson's body, and there was no gunshot residue on his
12 hand, which if he had had his hand on the trigger, it
13 would be there as well. So that excludes that as one
14 of the three scenarios.

15 Secondly, while still addressing the facts,
16 Mr. Boatwright made reference to the ponytail issue.
17 The reason that -- the officer said, the dying
18 declaration was that it looked like a ponytail because
19 he had a cap on at the time.

20 And you will recall that when he was
21 arrested, Mr. Richardson, that Trooper Williams was
22 present, and Trooper Williams testified that he had
23 observed him and he did have the cornrows sticking out
24 from underneath his hat in what appeared to him to
25 look like a ponytail.

1 And then I asked him specifically in front
2 of the jury if the description given by his dying
3 friend fit that of what he observed of Mr. Richardson,
4 and he said that it did.

5 But the most important issue, I guess, I
6 just want to address real quickly on rebuttal is this
7 issue about cross referencing of the Level 43. You
8 had posed a question, why do we go with a Level 43 if
9 it's second degree murder?

10 And I think there's somewhat of a
11 misunderstanding on the defense side here. This case
12 was never charged as first degree murder. It was
13 charged and the indictment reads second degree murder.
14 The jury was instructed as to second degree murder
15 including malice aforethought, with both the intent --
16 intentionally killing or the wanton disregard.

17 It doesn't really matter what I argued.
18 Although I did focus on the intentional thing, it
19 doesn't really matter. The question is what the proof
20 is and the fact that they were instructed on wanton
21 and reckless disregard.

22 But as to the issue you've noted about the
23 tail wagging the dog, I would suggest that's not
24 correct, and the reason for that is quite simply what
25 you noted, which is clearly the Sentencing Commission

1 and Congress, by adopting it, has concluded that any
2 murder that occurs in the context of a drug
3 trafficking crime merits punishment the same as first
4 degree murder, whether it's first or second degree.

5 And the driving force there is not the
6 murder because otherwise it would still be Level 33
7 for second degree murder. The driving force is the
8 context of the crime, that being the drug activity.

9 And that's what they have been convicted of,
10 the drugs. So it's not the tail wagging the dog,
11 which I suggest is the reason why the standard should
12 remain the preponderance standard, as all the cases in
13 our Circuit indicate.

14 In the alternative, if the Court wants to
15 apply clear and convincing standard, as the Court did
16 in United States v. Montgomery, which is a case I
17 believe directly on point, I think we should --

18 THE COURT: I thought Montgomery, the court
19 said, the district court said it meets the burden of
20 proof whether the level is preponderance or clear and
21 convincing.

22 MR. NOVAK: That's what I'm saying. Under
23 either scenario, I'm submitting that our evidence
24 proves clear and convincing. So I agree with your
25 comment was to Mr. HuYoung at the end when you were

1 directing him.

2 My only difference of opinion, Judge, would
3 be that you said this is a unique case. I would
4 suggest it's not a unique case. We have cited, I
5 think, three Fourth Circuit cases that talk about drug
6 trafficking offense or another offense that the
7 defendant was convicted of but acquitted of the
8 murder.

9 THE COURT: No, no. I didn't mean it was a
10 unique case in that way. I was trying to say that
11 each case has to be assessed on its own facts. It's
12 unique in that sense.

13 MR. NOVAK: I misunderstood you. I'm sorry.

14 Just as to the burden of proof, the only
15 other thing I would throw out there is the one case
16 they cited, the Cordoba-Murgas case, a Second Circuit
17 case from this year that also said it's preponderance
18 of the evidence standard.

19 But again, if you want to hold us to the
20 clear and convincing standard alternatively, I think
21 we've met our burden there. I'll leave it to the
22 Court to rule on unless you have any further
23 questions.

24 THE COURT: Anything else on this issue?

25 Well, the background of the issue is whether

1 to apply the cross reference under United States
2 Sentencing Guideline 2D1.1. That Guideline says, to
3 begin, it is under Part D of the Guideline Manual,
4 which is encaptioned "Part D - Offenses Involving
5 Drugs."

6 2D1.1 is captioned "Unlawful Manufacturing,
7 Importing, Exporting or Trafficking (Including
8 Possession with Intent to Commit These Offenses);
9 Attempt or Conspiracy."

10 And Section 2D1.1(d) says, "If a victim was
11 killed under circumstances that would constitute
12 murder under 18 U.S.C. Section 1111, had such killing
13 taken place within the territorial or maritime
14 jurisdiction of the United States apply Section 2A1.1
15 (First Degree Murder)."

16 Section 2A1.1 is under the heading part of
17 the manual, Part A - Offenses Against the Person, and
18 under Section 1, Homicide; and 2A1.1 is First Degree
19 Murder. And all it says is (a) is Level 43.

20 Now, there are some application notes.
21 18 U.S.C. Section 1111, to which Guideline 2D1.1(d)(1)
22 applies and refers, defines murder as the unlawful
23 killing of a human being with malice aforethought.

24 The section goes on to describe certain
25 crimes as first degree murder and says any other

1 murder is the second degree murder.

2 The key issue here is whether the defendants
3 committed or participated in the killing of Officer
4 Gibson with malice aforethought. I think that before
5 actually getting to that issue we have to assess what
6 is the burden of proof or the standard of proof here.

7 Generally, application of the preponderance
8 standard at the sentencing satisfies the due process
9 requirements of the Constitution. That's the rule of
10 U.S. v. Watts, citing McMillan v. Pennsylvania. It's
11 also been decided such by our Court of Appeals in U.S.
12 v. Williams, U.S. v. Crump, U.S. v. Washington.

13 Furthermore, there's no prohibition against
14 considering conduct for which the defendant has been
15 acquitted for relevant conduct for the determination
16 of his sentence. That's provided in Guideline 1B1.3.

17 Also, it's clearly decided in United States
18 v. Watts and Williams and in United States v.
19 Martinez, as well as United States v. Claiborne.

20 There are situations as described in
21 McMillan v. Pennsylvania in which an application of
22 the cross reference or some enhancement can create due
23 process problems.

24 That arises under the Supreme Court comment
25 that the enhancement is to be viewed with suspicion

1 and may present due process difficulties if the
2 enhancement or here the cross reference becomes the
3 tail which wags the dog of the substantive offense.

4 Our Court of Appeals in United States v.
5 Montgomery, decided recently, has interpreted the
6 Supreme Court's admonition in McMillan to say that
7 proof by a preponderance of the evidence is sufficient
8 as long as the enhancement is not a tail which wags
9 the dog of the substantive offense, citing McMillan.

10 In Watts, interestingly, the Supreme Court
11 acknowledged but did not decide that there was a
12 divergence opinion among the circuits as to whether
13 extreme circumstances relevant conduct that would
14 dramatically increase the sentence must be based on
15 clear and convincing evidence.

16 I paused for just a moment to note that
17 absent the application of this cross reference, the
18 defendant, Mr. Richardson, is facing a maximum
19 punishment under the Guideline calculations of
20 210 months and that Mr. Claiborne is facing a maximum
21 punishment under the Guideline calculations of
22 327 months.

23 Is that correct with the drug -- the drug
24 calculation didn't change when I found that it was not
25 274 but 329. The punishment stays the same.

1 MR. BOATWRIGHT: That's correct, Judge.

2 MR. GAVIN: Yes, sir.

3 THE COURT: So those punishments are
4 correct.

5 Under the application of the cross
6 reference, the defendant is facing a mandatory life
7 imprisonment, each one of them.

8 MR. NOVAK: Judge, I'm sorry. May I correct
9 you? I think the statement as to Mr. Claiborne is in
10 error. Did you say maximum of 327? Is that what you
11 said? He's Category Four, Level 36 now, as opposed to
12 Level 34.

13 MR. EVERHART: He said 327.

14 MR. NOVAK: Is that what he said?

15 THE COURT: 327 is the maximum?

16 MR. NOVAK: You're right. I was wrong. I
17 thought I -- I misheard you. I'm sorry.

18 THE COURT: All right. Now, I've
19 forgotten -- oh.

20 The application of the cross reference here
21 will result in a life sentence for each of the
22 defendants. To begin, it perhaps is wise to address
23 the concerns raised by Mr. Boatwright and by
24 Mr. Everhart, and that is the use of acquitted
25 conduct.

1 In this instance, we have an advocated for
2 use conduct which has been scrutinized by the
3 prosecutor in the state court and as to which the
4 prosecutor decided to accept a plea of involuntary
5 manslaughter for Mr. Richardson and accessory after
6 the fact for Mr. Claiborne, yielding a punishment of a
7 maximum of ten years with an actual sentence of five
8 years for Mr. Richardson and a sentence of time served
9 for Mr. Claiborne.

10 The record, if I recall correctly, before me
11 is that if the reason that plea was accepted by the
12 prosecutor there was that the prosecutor did not
13 believe that there was sufficient evidence to acquit
14 the defendants of capital murder or murder, it carries
15 a stiffer sentence.

16 Then this case was brought, and the
17 defendants were charged with murder under 18 U.S.C.
18 Section 1111.

19 And the jury was asked to decide in a
20 prosecution that, in my judgment, could not have put
21 on a more forceful case and that left virtually no
22 stone unturned in the presentation of evidence and in
23 the articulation -- in the argument of the theory, the
24 government's theory and what the evidence showed.

25 And the jury found, for whatever reason it

1 found, that the reasonable doubt standard had not been
2 satisfied and acquitted the defendants of these
3 charges.

4 The United States Supreme Court in United
5 States v. Watts and the Sentencing Guidelines
6 themselves and in other cases cited in Watts and our
7 circuit also, the law is acquitted conduct can be
8 considered.

9 I happen to believe that there's something
10 fundamentally wrong with that notion, when a jury
11 acquits after a trial that's been tried by fine
12 lawyers, and the government certainly has been
13 represented as best it could be. Nobody could try the
14 case any better if it were tried 100 times.

15 I hope that following the decision in
16 Apprendi, the Supreme Court will revisit the issue of
17 United States v. Watts and reflect upon the potential
18 and serious problem that that causes in a
19 constitutional way because there are -- it becomes too
20 easy to use acquitted conduct in sentencing
21 proceedings as the Supreme Court has made the law.

22 And that creates quite difficult
23 circumstances in many cases. One of them is
24 articulated and found in United States v. Lombard,
25 where a defendant was charged with firearm offenses

1 because he was acquitted of two killings in the state
2 courts.

3 And the Court goes on at great length to
4 discuss the vicissitudes and consequences of applying
5 this Guideline, and then goes on to say that what the
6 judge should have done is to have downwardly departed
7 after applying this Guideline.

8 To me, that distortion of the approach to
9 sentencing which is just simply not the right way to
10 approach matters is caused at root by the decision in
11 United States v. Watts and the cases on which it
12 decided that permit use of acquitted conduct.

13 The defendants have preserved their
14 objections. I think that perhaps Apprendi may be
15 heading us in a direction of jurisprudence in which
16 that rule may change, but that is for the Supreme
17 Court of the United States or the Congress to change.

18 It is not for United States district judges
19 to change when their controlling circuit law and the
20 Supreme Court of the United States believes or hold
21 otherwise, and so I will consider the conduct of which
22 they are acquitted.

23 There are a number of cases in which this
24 same scenario, sadly, has played itself out. United
25 States v. Rooks, United States v. Crump, United States

1 v. Montgomery, all involve circumstances where in the
2 course of drug trafficking of one sort or another,
3 people have been killed by the use of weapons in
4 connection with a drug trafficking offense.

5 And there has arisen a discussion in the
6 jurisprudence of sentencing and the application of
7 this Guideline whether the proof standard ought to be
8 a preponderance of proof or a clear and convincing
9 evidence standard.

10 The Second Circuit in U.S. v. Cordoba-Murgas
11 held that a preponderance standard rather than a clear
12 and convincing standard applied. The Tenth Circuit in
13 United States v. Moss has held that the preponderance
14 standard applies and acknowledged, though, the
15 difficulties with that standard.

16 In United States v. Singletary, I think
17 teaches also that relevant conduct should be decided
18 by a preponderance of the evidence standard. United
19 States v. Lombard explains in great detail why that is
20 problematic.

21 In our circuit, the Crump decision applies
22 the preponderance standard to the consideration of
23 2D1.1(d)(1), and I believe that Rooks, which I
24 mentioned earlier, U.S. v. Rooks, which was decided in
25 August of this year, correctly says that Crump is the

1 rule of our circuit and that that panel in Rooks looks
2 like it might have preferred to have decided the case
3 another way.

4 But it said that it was bound by the
5 precedent in the circuit and under the rule, that one
6 panel cannot change another panel's decision in this
7 circuit, and certainly a district court cannot do
8 that.

9 However, in Montgomery, decided on July the
10 17th of this year, the court said proof by a
11 preponderance is sufficient as long as the enhancement
12 is not a tail which wags the dog of a substantive
13 offense.

14 And in a parenthetical suggesting that
15 McMillan suggests that the clear and convincing
16 standard should be applied when considering acquitted
17 conduct, that would substantially increase the
18 defendant's sentencing. That's dicta. It was not
19 necessary to the decision.

20 So I think where our court is, is here the
21 court has not clearly decided whether the clear and
22 convincing standard applies in a circumstance such as
23 here where the sentence could go from 210 months to
24 life, to 327 months to life.

25 And I think that if forced to confront that

1 question directly after Apprendi, the United States
2 Court of Appeals for the Fourth Circuit will decide
3 the clear and convincing evidence standard is the
4 standard that is to be applied to a determination of
5 this circumstance, not the preponderance of the
6 evidence standard.

7 And I base that on the decision in
8 Montgomery and the decisions of which it cites,
9 acknowledging that the court might very well say that
10 it is the preponderance standard that applies.

11 Now, that brings us to an assessment of the
12 application of the 2D1.1(d)(1) to the facts of this
13 case, which as they have been presented here deal with
14 two aspects of the issue.

15 The defendants contend they did not even
16 participate in the murder of Officer Gibson. Officer
17 Gibson's dying declaration provided a reasonably
18 accurate description of the two defendants.

19 There were some differences. There were, in
20 fact, a couple of significant differences in his
21 description and the actual appearance of the
22 defendants on the date in question.

23 That evidence has to be taken in perspective
24 with the fact that this was a statement given by a man
25 mortally wounded, and our powers of observation and

1 powers of articulation can be affected drastically
2 when suffering from a mortal wound and shock, such as
3 that which was described to be what Officer Gibson was
4 suffering by.

5 So his description, although imperfect, was
6 sufficiently connected to the defendants to have
7 identified and placed them there if other evidence
8 tends to support that dying declaration.

9 I find that the guilty pleas in the state
10 courts constitute judicial admissions of participation
11 in the event and presence at the event. I recognize
12 that there may have been reasons why the pleas may
13 have been entered because they may have received
14 favorable treatment, the defendants may have received
15 favorable treatment.

16 But the fact of the matter is there was
17 admitted into evidence the statement of facts and the
18 text of the guilty pleas, and in both of those
19 instances, these defendants admitted being present and
20 participating in one way or another, albeit different
21 than what is accused here by the United States in the
22 killing of Officer Gibson.

23 They both gave false alibis to other people.
24 People don't need to concoct stories that aren't true
25 if they are, in fact, not present at the event. The

1 eyewitness testimony of Ms. Newby and Mr. Wooden tends
2 to confirm what happened as related by Officer Gibson
3 in his dying declaration.

4 It recites -- they recited confirmatory
5 facts that show there was a struggle going on, a
6 struggle for the gun, and they confirmed the facts
7 that Officer Gibson, shown in the record, that these
8 two men went back to do a drug deal.

9 They were drug dealers in the area, and they
10 went back to do a drug deal. And he found them out.
11 He followed them back there, and he caught them in the
12 act. And he was doing his duty, and that's confirmed,
13 it seems to me, by the record in toto.

14 The admissions that Mr. Claiborne and
15 Mr. Richardson made to others, yes, the testimony of
16 some of those witnesses has some holes in it, so to
17 speak.

18 But in general, it certainly isn't
19 inherently unbelievable and tends to be corroborated
20 by the physical evidence and the dying declaration of
21 Officer Gibson.

22 Now, the question then -- so I find that by
23 clear and convincing evidence and perforce by a
24 preponderance of the evidence that both defendants
25 participated in the killing of Officer Gibson.

1 And the question then resolves itself into
2 whether or not this participation was with malice
3 aforethought because that's the specific standard for
4 applying the cross reference in Section 2D1.1(d)(1).

5 And so the Court must determine whether
6 Officer Gibson was killed under circumstances that
7 would constitute murder under 18 U.S.C. And as I
8 explained earlier, that means the unlawful killing of
9 a human being with malice aforethought.

10 And the definition of malice aforethought is
11 the killing of another person deliberately and
12 intentionally or to act with a callous and wanton
13 disregard for human life. That is the instruction
14 that the jury was given with no objection.

15 A killing is done with malice aforethought
16 if it is done with callous and wanton disregard for
17 human life.

18 That is the rule in United States v.
19 Vega-Penarete from the Fourth Circuit in 1992 and
20 United States v. Sheffey from the Sixth Circuit and
21 United States v. Black Elk from the Eighth Circuit and
22 United States v. Taylor from the Seventh Circuit and
23 United States v. Wood from the Tenth Circuit.

24 The question then is, under the facts did
25 the defendants act with malice aforethought? What

1 happened here was that these people went into the
2 woods to do a drug transaction, which was their
3 business.

4 And the officer followed them in the pursuit
5 of his responsibilities charged unto him as a matter
6 of law. He obviously had his gun drawn, and they
7 acted together to take it away from him.

8 The evidence was that Mr. Claiborne was
9 pulling on his back and Mr. Richardson was pulling on
10 his front. And they struggled with him and Ms. Newby
11 says that. The other testimony confirms it, and the
12 dying declaration of Officer Gibson confirms it.

13 I have thought from the evidence about how
14 it is that any scenario could be that this particular
15 tragedy actually took place, how it occurred, and we
16 have discussed here today three possible scenarios,
17 and as the defense points out, there may be others.

18 But all that I can envision, all scenarios
19 that I can envision involve a common thread; and that
20 is, people who were acting unlawfully, people who were
21 violating the laws, attempting to take a weapon from a
22 law enforcement officer who was attempting to arrest
23 them, and in the process that officer was killed.

24 It's unlikely from the physical evidence, there being
25 no powder marks on Officer Gibson's hands and the fact

1 that the shot was likely 6 to 12 inches away, that
2 this was a self-inflicted wound.

3 And it also would be consistent to find that
4 based on Officer Gibson's own words, which says, "They
5 shot me with my own gun." There are three safeties on
6 this gun, and it takes 7 1/2 pounds of pressure in
7 order to pull the trigger on this gun.

8 Now, that's not the heaviest, tightest
9 trigger or loosest trigger. It's a medium amount of
10 pressure on the trigger. But somebody has to do it
11 and pull it.

12 And what happens, Mr. Wooden said, as soon
13 as that shot was fired, he turned around, and in whose
14 hand was the gun? The gun was in Mr. Richardson's
15 hand, and the officer was on the ground.

16 That bespeaks of an intentional shooting, an
17 intentional act that jeopardizes the life of whoever
18 was on the business end of that gun.

19 I agree that one does not attack a police
20 officer in the course of his duty and try to take his
21 gun away from him unless one intends to do something
22 with that gun.

23 Of course, it's also possible that they
24 could have been attempting to hold him in some kind of
25 hostage position and tie him up and make a getaway,

1 but that's very unlikely.

2 Whatever is the situation, if you take the
3 gun and try to get it, you're charged with the
4 knowledge that guns go off and particularly in the
5 course of struggles, and a reasonable person would
6 know that.

7 Wrestling with someone who has a gun
8 reasonably can be calculated and understood to present
9 a risk to the life and safety of everybody who is
10 involved in that struggle but particularly so if the
11 gun belongs to a police officer and the officer is
12 attempting to keep the person from getting the gun,
13 that's the person he's trying to arrest or to keep it
14 from being used on him.

15 I think that all those taken together teach
16 and lead to the finding by clear and convincing
17 evidence that this killing of another was with malice
18 aforethought as the law was defined, and under those
19 circumstances, the cross reference applies.

20 And it applies even though the jury found
21 the defendants not guilty by virtue of the ruling in
22 United States v. Watts and it's progeny.

23 So the objection of the United States to
24 failure to apply the enhancement is sustained, and the
25 enhancement will be applied.

1 Under those circumstances, the maximum
2 punishment or the punishment ranges are what,
3 Mr. Burnside?

4 THE PROBATION OFFICER: Punishment ranges in
5 both cases, Your Honor, will be life imprisonment.

6 THE COURT: And that's under the Guideline
7 as well as the statute. Is there any change in the
8 sentencing parameters for either defendant other than
9 that one, Mr. Burnside?

10 THE PROBATION OFFICER: No, Your Honor.

11 MR. NOVAK: Judge, I actually disagree to
12 some extent, only in the sense that as we argued in
13 our papers that if you score the murder and the
14 offense level as you just did, as we requested, you
15 can't double count and use it in their criminal
16 history category. I mean, it still --

17 THE COURT: Wait a minute. I'm talking
18 about the sentencing parameters now. The total
19 offense level, I haven't gotten to those yet.

20 The total offense level, Mr. Burnside, in
21 Mr. Richardson's case is what, 34?

22 THE PROBATION OFFICER: It is, Your Honor.

23 THE COURT: And with a criminal history of
24 2, the parameters are life imprisonment, no probation.

25 How about any of the other parameters, have

1 they changed?

2 THE PROBATION OFFICER: Your Honor, with the
3 criminal history category base offense level of 34,
4 it's 168 to 210 months. With Your Honor's finding
5 that the cross reference applies, it moves to 43, and
6 it's life imprisonment, period.

7 THE COURT: Right. Are there any changes in
8 the other parameters?

9 THE PROBATION OFFICER: No, Your Honor, not
10 that I'm aware of.

11 THE COURT: Now, criminal history, are there
12 any changes in the criminal history for Mr. Richardson
13 by virtue of the findings that I made so far?

14 THE PROBATION OFFICER: No, Your Honor.

15 THE COURT: Mr. Novak, do you say there is?

16 MR. NOVAK: I disagree. Necessarily, to
17 favor the defendant, it actually goes from 2 to 1
18 because you can't double count. The reason he went
19 from Category 1 to 2 is because the officer at that
20 time scored the state conviction as prior criminal
21 history.

22 But now since you're including the offense
23 level, that's relevant conduct. So you have to knock
24 that out of the criminal history category.

25 THE COURT: Because you don't include in the

1 criminal history anything that is relevant conduct, is
2 that your point?

3 MR. NOVAK: Yes.

4 THE COURT: Do you agree or disagree,
5 Mr. Burnside?

6 THE PROBATION OFFICER: I agree with
7 Mr. Novak, Your Honor.

8 THE COURT: Does anybody disagree with that
9 for Mr. Richardson?

10 MR. HUYOUNG: No.

11 THE COURT: The answer is they do not. So
12 the offense level is 1.

13 MR. NOVAK: Criminal history category.

14 THE COURT: I mean criminal history category
15 is 1. Now, does that change any other parameters in
16 the view of Mr. Burnside or Mr. Novak?

17 MR. NOVAK: No.

18 THE PROBATION OFFICER: No, Your Honor.

19 THE COURT: All right. Mr. HuYoung, does it
20 change any of the other parameters?

21 MR. HUYOUNG: Not as far as coming up to
22 that base level offense. I would now entertain a
23 motion that the Court consider a downward departure.

24 THE COURT: I'm not even at that point, yet.
25 I'm trying to get straight where we are.

1 MR. HUYOUNG: That's fine, Your Honor.

2 MR. NOVAK: Do you want to do Mr. Claiborne?

3 His criminal history category is 4 to 3.

4 THE COURT: Yes. Now, over to

5 Mr. Claiborne, Mr. Burnside.

6 THE PROBATION OFFICER: Yes, Your Honor.

7 THE COURT: The same adjustment was made for
8 his criminal history?

9 THE PROBATION OFFICER: Yes, Your Honor.

10 THE COURT: So that would go from 4 to 3?

11 THE PROBATION OFFICER: That's correct, Your
12 Honor.

13 THE COURT: What are the parameters, then?

14 His level stays at 36. The custody with the
15 application --

16 MR. NOVAK: It's 43, Judge.

17 THE COURT: I'm sorry. Level 43. But
18 because of the application of the Guideline --

19 THE PROBATION OFFICER: Yes, Your Honor.

20 THE COURT: And Mr. Richardson's level is at
21 43, also; is that right?

22 THE PROBATION OFFICER: That's correct, Your
23 Honor.

24 THE COURT: I think you told me to do that.

25 I'm not sure I did it, Mr. Burnside.

1 Yes. All right. So it's life imprisonment
2 is the sentence, then?

3 THE PROBATION OFFICER: Yes, Your Honor.

4 THE COURT: Any other parameters?

5 THE PROBATION OFFICER: Not that I'm aware
6 of, Your Honor.

7 THE COURT: All right.

8 MR. NOVAK: Judge, before we address the
9 downward departure --

10 THE COURT: Yes.

11 MR. NOVAK: -- may I make one point?

12 Actually, may I make two points?

13 Since you've applied the cross reference, it
14 moots our motion for upward departure.

15 THE COURT: Yes, it does.

16 MR. NOVAK: I would just like to -- if for
17 any reason the Fourth Circuit or the Supreme Court
18 would vacate the cross reference, I want to preserve
19 the right to argue on a resentencing the upward
20 departure argument as well, but I think it's mooted
21 today. Do I preserve that?

22 THE COURT: I agree it is mooted, and
23 anything that is rendered moot by this decision is not
24 foreclosed from future application in the event of a
25 resentencing. In like fashion, all of the other

1 enhancements that you have sought are moot.

2 MR. NOVAK: That's what I was just going to
3 say because you can't go any higher than 43. As long
4 as I can preserve them in case there's a resentencing
5 at any point, I will just agree that they're moot and
6 move straight into the downward departure motion.

7 THE COURT: The government's objection to
8 the failure to apply enhancements for 2D1.1(b)(1) on
9 the basis of 3A1.2, on the basis of 3C1.2, on the
10 basis of 3C1.1 all are rendered moot by the decision
11 just made.

12 The United States preserves the right to
13 make those arguments in the event a resentencing is
14 ordered.

15 MR. NOVAK: Thank you, Judge.

16 THE COURT: Now, I think we are at the issue
17 of a downward departure. I think it is undisputed
18 that the Court has the power downwardly to depart.

19 That clearly is in this situation. That's
20 the clear teaching of United States v. Lombard, and
21 indeed, sequential prosecutions can be the basis of a
22 downward departure under United States v. Koon, I
23 believe. So I don't think that's the issue.

24 MR. HUYOUNG: Thank you, Your Honor. I
25 would ask the Court to --

1 THE COURT: Just a minute.

2 Do you agree, Mr. Novak?

3 MR. NOVAK: Yes.

4 THE COURT: There's the authority to do it.

5 MR. NOVAK: Right. I filed a response a
6 couple days ago saying that, Judge.

7 THE COURT: All right.

8 MR. HUYOUNG: Judge, basically, in regards
9 to the downward departure, we are looking at the basis
10 for that as the successive prosecution.

11 And also, as even though the Court ruled on
12 acquitted conduct and used it to do the cross
13 reference, I think in a way we're looking -- we're
14 asking the Court to view that and say, all right, we
15 have this case.

16 It started out in state court, the
17 combination of all factors. It came to federal court,
18 and basically, I think everyone is in agreement that
19 maybe the state sentence was not enough for these
20 defendants.

21 So we come in here to federal court. We try
22 the case. They were found not guilty by the jury of
23 the main offenses, and I don't think we can deny that
24 those were the main offenses. If not, we wouldn't
25 have spent all that time to try case.

1 The jury comes backs with an offense of
2 conviction of the drug conspiracy and as this Court
3 has just done, cross referenced it.

4 Now we get to is this a unique case? Is
5 this the kind of case that takes it out of the
6 heartland of cases? And it's my contention or our
7 contention on behalf of both defendants that it is.

8 Judge, we cited a case on the Cordoba-Murgas
9 case, which I cited in my briefing. It held the
10 preponderance of the evidence, and it held that, yes,
11 the cross reference does apply on that specific
12 category.

13 But that doesn't mean that you have to apply
14 the life sentence if there are some circumstances. In
15 that case it cited it and I cited it in my brief on a
16 downward departure based on successive prosecutions,
17 based on acquitted conduct, based on the facts that it
18 came back with a not guilty plea and based on the fact
19 that just the scope of the trial where the focus was
20 on the murder case, this Court can downwardly depart.

21 Judge, in this situation, this is what
22 happened. In this situation, we tried the case, and
23 the U.S. Attorney did what it's entitled to do and
24 felt obligated to do. And that is to come to the
25 Court and ask for the cross reference and other

1 departures.

2 Those have been made moot now because of the
3 cross reference, but in this situation, as with United
4 States v. Koon, which is the premier case on downward
5 departures, there are a myriad of factors that the
6 Court can view and look at and make a determination
7 whether a downward departure should be applied.

8 In this case, one is successive
9 prosecutions. It was made clear in Koon that that was
10 one of the factors that it looked at. And, Judge,
11 here we just ask the Court to downward depart because
12 of the fact that the focus also was on the murder and
13 that the Court -- the jury came back and acquitted
14 them.

15 If the reason why you have downward
16 departures as stated in Koon is because the defendants
17 have now been through -- this will be the third run
18 through the gauntlets. They've been through it in
19 state court. They went through it at trial and now at
20 sentencing.

21 And, Your Honor, even regardless of which
22 version of the facts or what happened back there in
23 the woods, if -- the Court had made a point that
24 anyone who struggles with a police officer, you know,
25 does put himself in a wanton disregard of that police

1 officer's life.

2 In looking at the application notes, it does
3 say in Application Note 1 that if the defendant did
4 not cause the death intentionally or knowingly, a
5 downward departure may be warranted to the extent the
6 departure may be based on the defendant's state of
7 mind. Then it says "recklessness or negligence."

8 I know it doesn't state the word "wanton,"
9 but if the Court has made the determination that the
10 struggle was in the nature of negligence or wanton
11 disregard for life, then even at that Guideline
12 application of the cross reference, it does allow the
13 Court to downwardly depart.

14 Your Honor, this is, again, an atypical
15 case. We come through procedurally atypical. We
16 are -- these defendants have received the life
17 sentence or will receive a life sentence if this Court
18 doesn't depart.

19 It's an extreme departure, as indicated not
20 only in the Lombard case, which this Court has found,
21 and the facts in Lombard, I would argue were worse.
22 There was no struggle in that case. The two men who
23 Mr. Lombard and his co-defendant shot were just lying
24 there asleep, and they shot him with a shotgun.

25 And the same applies --

1 THE COURT: But the offense of conviction in
2 that case was the firearms offenses, possession of a
3 firearm.

4 MR. HUYOUNG: Correct.

5 THE COURT: So what happened was the -- and
6 we have an offense of conviction that's drug
7 trafficking here. I mean, that's a significant
8 difference, don't you think? How do you deal with
9 that difference?

10 MR. HUYOUNG: Your Honor, I guess when you
11 start looking at the moral point of view; and that is,
12 some people consider gun offenses worse than drug
13 offenses, I think you look at the result.

14 And the result is that both defendants in
15 both scenarios end up getting a life sentence. In
16 fact, the base level offense I believe in the Lombard
17 case was a little bit higher than what Mr. Richardson
18 was looking at. It was in the three hundreds.

19 So in regards to saying, well, that was a
20 weapons offense and this wasn't, I don't think you can
21 make that distinction. I don't think there's that big
22 of a difference.

23 But going to the Cordoba-Murgas case, which
24 I cited, that wasn't a drug transaction. That was an
25 intentional killing of an individual to protect the

1 identify. I think it was a killing dealing with an
2 informant.

3 Judge, again, I know that you viewed the
4 evidence as clear and convincing, but it's clear and
5 convincing that there was a struggle going on. These
6 defendants didn't go in there with the intent that --
7 I think even the government has conceded they didn't
8 go in there just to kill this person.

9 So, Judge, based on this scenario of what
10 has transpired through this court, based on the fact
11 that we had an eight-day jury trial, we would ask the
12 Court to downwardly depart.

13 THE COURT: The Fourth Circuit says that if
14 the requirements are met for downward departure, we
15 have to arrive at a method for departure.

16 MR. HUYOUNG: Correct, Your Honor.

17 THE COURT: It has to be a principled method
18 for departure. Is it the level-by-level approach or
19 the analogous offense approach?

20 MR. HUYOUNG: Judge, I think both are
21 available here.

22 THE COURT: What is the analogous offense
23 and what level would you take it?

24 MR. HUYOUNG: Judge, of course, in my brief,
25 I said let's get it back down to 34, but the only

1 thing that I can argue, Judge, is you look at United
2 States v. Koon. They departed down three levels.
3 They departed down three levels to that point.

4 If you look at the wanton disregard, if the
5 Court views that that conduct that it used to upwardly
6 depart is wanton disregard of human life, then that
7 amounts to a second degree murder.

8 And if you look at the methodology of doing
9 the downward departures, well, second degree murder
10 starts at 33, and I know the government and this Court
11 has ruled that it's a drug offense so it automatically
12 kicks it up.

13 But in looking at equivalent Sentencing
14 Guidelines, you look at second degree murder at 33.
15 You look at maybe a down -- if you look at how much
16 departure using other cases, if you looked at the Koon
17 decision and downwardly departed three.

18 I've been through the Guidelines, and I
19 tried to find an equivalent to come up with to argue
20 that. But there aren't too many downward departures
21 in the Guidelines, unfortunately. So, Judge --

22 THE COURT: Not in the Fourth Circuit.

23 MR. HUYOUNG: Right.

24 THE COURT: Not that have been sustained.

25 MR. HUYOUNG: Correct. And also looking at

1 the Fourth Circuit court cases.

2 Judge, I would ask the Court --

3 THE COURT: How many Guidelines' cases do
4 you know of other than Lombard where the cross
5 reference involved a downward departure in a situation
6 like this?

7 MR. HUYOUNG: The Lombard and the
8 Cordoba-Murgas, even though they didn't -- and in
9 fact, in both cases, they didn't say that they would
10 downwardly depart. They just said let's remand it
11 back to the district court for the district court to
12 consider a downward departure.

13 And, Judge, I'll be quite frank with the
14 Court. I don't know how we can equate this factual
15 situation as far as what these two defendants have
16 been through and equate a downward departure.

17 I would ask the Court to view -- you know,
18 you start at the base level that they originally
19 started off with. You look at the conduct which then
20 puts them at life.

21 And I would ask the Court to find a level
22 that's somewhere in between that, and I would argue,
23 as I argued in the -- in my brief, if you look at
24 specific Guidelines, you look at 2D1.1, which is the
25 drug Guideline, if it was an intentional murder, then,

1 of course, it goes to 43.

2 As I made reference to earlier, it does
3 include deaths that have occurred as a result of using
4 the drugs. Like if the dealer gave the drugs to
5 someone intentionally meaning to cause death or
6 intentional overdose, then it refers to 43.

7 The next level, I believe, is 38, and I
8 think -- I may be mistaken, Judge, but, Judge, I
9 believe that's 38. So if you're looking at a basis or
10 something that the Sentencing Commission was looking
11 at to say that a death had occurred, then we're
12 looking at that 38 level.

13 Judge, I would ask the Court to, at the very
14 minimum, at least reduce the offense level down to 38
15 because you're looking at this specific Guideline, the
16 specific Guideline dealing with drugs, and death is a
17 factor in that.

18 THE COURT: All right.

19 MR. HUYOUNG: Thank you, Your Honor.

20 MR. GAVIN: Judge, on behalf of
21 Mr. Claiborne, we would like also to make a downward
22 departure motion. I think the Court has acknowledged
23 that the Court is authorized to do it.

24 From an analogous point of view, it doesn't
25 appear that successive prosecution is an encouraged

1 factor, nor is it a discouraged factor. It's simply
2 an unmentioned factor for purposes of departures.

3 It's sort of unclear on whether the Court is
4 considering it successive prosecution as an
5 unmentioned factor in addition to the fact that they
6 were acquitted of the same conduct as an unmentioned
7 factor or not.

8 But I'd ask the Court to consider both of
9 those as unmentioned factors, first, successive
10 prosecutions as set forth in Koon, and then the role
11 of acquitted conduct, which I don't know that that has
12 been addressed.

13 But I would say it should also be at least
14 be analyzed by the Court of Appeals as an unmentioned
15 factor.

16 Judge, while I believe this case is atypical
17 and why it deserves a motion for downward departure is
18 because we wouldn't be here today if the
19 Commonwealth's Attorney in Sussex County had convicted
20 these gentlemen and they had received a 28-year
21 sentence that the minimum is they're going to get here
22 today.

23 It is totally remote that we would even be
24 here at all if they had been convicted and prosecuted
25 and pursued down there. We're here solely because the

1 ends of justice down there were not met, and that's
2 why I believe this case is atypical.

3 Successive prosecution, you know they are
4 entitled to do it. Watts says they're entitled to do
5 it. I mean, everyone says they're entitled to do it.
6 The cases and lawyers, it appears, have argued very,
7 very, unsuccessfully. It's not a fair defense. It
8 just won't work.

9 So they are entitled to do it, but I think
10 it's something that the Court can consider, especially
11 in light of the facts with regard to Mr. Claiborne.

12 Mr. Claiborne, even in the factors set forth
13 by the Court, was behind Officer Gibson and certainly
14 may not have known what was going on in front of him,
15 even though he was acting in concert.

16 So I would ask the Court to take that into
17 consideration as well, as well as what to apply. The
18 Court and Mr. HuYoung noted that second degree murder
19 base offense level comes in at 33.

20 If you would take the base offense level for
21 second degree murder at 33 and then look at the
22 enhancements as sought by Mr. Novak, you see under
23 2D1.1 Subparagraph (b)(1), you apply a two-level
24 enhancement because a dangerous weapon was used.

25 Second, if you looked at the fact that the

1 victim was a law enforcement officer under 3A1.2, then
2 a three-level enhancement would apply.

3 The last enhancement, the two-level
4 enhancement, under 3C1.2, that deals with whether the
5 defendant recklessly created a substantial risk of
6 death or serious bodily injury while fleeing from a
7 law enforcement officer, I would submit that there's
8 really no evidence that they were fleeing, if the
9 Court adopts the approach that they were wrestling
10 with it because if they were wrestling with him and he
11 was shot during the wrestling, they never fled.

12 So I don't think that that two-level
13 enhancement would apply regardless of the facts. I
14 would say, Judge, and I would argue that the two-level
15 enhancement for a dangerous weapon be merged into the
16 second requested enhancement, which is the three-level
17 enhancement because the victim was a law enforcement
18 officer.

19 So if you were to take the second degree
20 murder base offense level of 33 and then apply the
21 three-level enhancement because the victim was a law
22 enforcement officer, you would come up with a 36 base
23 offense level with Mr. Claiborne's reduced criminal
24 history category of 3. That could still be an awful
25 lot of time for Mr. Claiborne to serve.

1 THE COURT: What is that sentence?

2 MR. GAVIN: Well, 36 is 235 to 294, my
3 colleague says.

4 MR. EVERHART: 293, Your Honor.

5 MR. GAVIN: 293.

6 THE COURT: All right.

7 MR. GAVIN: So, Judge, I'd say that based on
8 the rulings and the facts that have been set forth by
9 the Court that that would be an appropriate departure
10 for the facts as they apply to Mr. Claiborne.

11 THE COURT: All right. Mr. Novak.

12 MR. NOVAK: Judge, as Mr. HuYoung conceded,
13 there are, at least to my knowledge, only two reported
14 cases where there's been the issue about downward
15 departure after the cross reference applied, and those
16 are the two cases that he has cited, Cordoba-Murgas
17 and Lombard, both of which have substantial
18 differences from this case.

19 In Cordoba-Murgas, the main basis --

20 THE COURT: I think U.S. v. Jett in the
21 Fourth Circuit allowed it, but it was not a lot of
22 discussion in it.

23 MR. NOVAK: Judge, that's the one I'm not
24 familiar with. So I plead ignorance there, but as to
25 the other two, I can address those.

1 And the substantial basis for the departure
2 in Cordoba-Murgas was the fact that the sentencing
3 court had substantial doubts as to whether the
4 defendants had committed -- participated in the
5 killing at all.

6 And of course, here you found by the clear
7 and convincing standard. They were applying the
8 preponderance standard there. And also, you have the
9 state guilty pleas here, which they did not have
10 there.

11 And in Lombard, the main basis for downward
12 departure there was -- what the First Circuit was
13 suggesting was a fundamental fairness because had the
14 defendant been successfully prosecuted in the state
15 system in Maine, the maximum penalty was life but with
16 the possibility of parole.

17 Whereas in the state system, the -- or in
18 the federal system, obviously there's no parole and
19 it's just mandatory life, and they were concerned
20 about that. Whereas here, had the defendants been
21 fully prosecuted in the state system, they could have
22 received the death penalty. Whereas here, the maximum
23 punishment is life imprisonment.

24 What I would suggest to the Court is this:
25 Obviously, the Court has discretion to downwardly

1 depart based on successive prosecutions, from Koon and
2 the cases thereafter, but there has to be a reason.

3 Why is it that there is a departure? And
4 neither defendant has pointed to that other than to
5 say, well, we've been through this a couple of times,
6 but they haven't pointed to a reason.

7 Whereas in Koon, the officers did point to
8 the fact that they had private counsel. They had been
9 out on bond, and it was high-profile case. And they
10 had suffered all the problems that were associated
11 with the enormous outcry that obviously occurred to
12 Mr. King in that case.

13 These defendants have failed to do so.
14 Mr. Richardson has been in custody the whole time
15 since then. Mr. Claiborne got out of jail after the
16 sentencing, was arrested on a drug offense and was
17 detained based upon his drug activities, not based
18 upon the murder in this case. So he would have been
19 in custody anyhow.

20 They both got court appointed counsel, and
21 there has not been some backlash against their family
22 or anything like that, at least that's been put forth
23 here, as I think occurred in the Koon case.

24 So I think the question is, if there had not
25 been a state prosecution, would the life sentence be

1 appropriate for two drug dealers who killed a law
2 enforcement officer who is trying to arrest them for
3 their drug trafficking activities? And I think the
4 answer is clearly yes.

5 Then the next question has to be, is there
6 some reason based upon the successive prosecution that
7 these defendants suffered that merits the reduction?
8 They pointed to none other than rhetoric. So it
9 should stay at the Level 43.

10 Now, if by chance, however, you would
11 entertain it, you were asking about the two
12 approaches, I would suggest to the Court that the
13 level-by-level reduction approach would not be
14 appropriate here.

15 But if it does, it makes what I thought were
16 originally the enhancements for gun, obstruction of
17 justice, resisting arrest, those are no longer moot
18 because I think you have to do the levels not from 43
19 but what the final offense level would be.

20 So you'd have 43. You can conceivably go
21 higher. Let's say you gave them the gun enhancements.
22 That would be two more. Resisting arrest, that would
23 be three more. Obstruction is two more. You could
24 conceivably go up to 50. Then you'd have to take the
25 offense levels down from that.

1 What I would suggest -- again, we're against
2 the departure, but if you would do it, I think you
3 have to turn to the analogous Guideline.

4 What Mr. Gavin offered, his approach, with
5 all due respect to him, it's just totally
6 inappropriate because it completely ignores what
7 they're convicted of, which is drug trafficking.

8 It just says second degree murder. It
9 doesn't talk about the context that it occurred. He
10 wants to just have second degree murder with the gun
11 and resisting arrest and ignore the entire drug
12 trafficking context.

13 What I would suggest is even if you did it
14 that way, even if you entertained a downward departure
15 and you did the analogous Guideline approach, you
16 would do what I suggested in terms of our upward
17 departure motion, which is you start at their drug
18 offense level, now 34. It would be 36 before the
19 cross reference.

20 Then you would look to the injury caused to
21 the victim based upon the murder, and as we pointed to
22 the alien smuggling guideline, it's the only guideline
23 that talks about a killing that's other than
24 involuntary manslaughter.

25 There are several Guidelines that talk about

1 two-level increase for bodily injury, four levels for
2 serious bodily injury, six levels, I think, for
3 life-threatening injury. But all the other Guidelines
4 go straight to 43.

5 The only Guideline that has an intermittent
6 number for a non-first or second degree murder is the
7 alien smuggling, and that's eight. So if you add
8 eight to Mr. Claiborne's number of 36 for the drugs,
9 that's 44 right there.

10 And Mr. Richardson, eight to 34, that's 42.
11 We haven't talked about the gun application, which
12 would necessarily apply. That's two more. That puts
13 Mr. Richardson over 43.

14 My point is that even if you looked at a
15 departure and you looked at the analogous Guidelines,
16 you'd still come up with Level 43 because that is what
17 is appropriate for a drug dealer who kills a police
18 officer who is trying to arrest them when they were
19 engaged in a drug trafficking activity.

20 Therefore, we would ask you to deny the
21 downward departure and sentence them to life
22 imprisonment.

23 THE COURT: Anybody have anything else?

24 MR. BOATWRIGHT: There is one thing I'd like
25 to point out. Judge, Mr. Novak glossed over something

1 about the consequences to Mr. Richardson and his
2 family from the successive prosecutions.

3 Both Mr. Richardson and Mr. Claiborne
4 through their family retained private counsel for the
5 state court prosecutions at what must have been great
6 expense. They hired two of the probably most
7 high-priced criminal lawyers in this city to represent
8 them.

9 They both eventually got out on bond while
10 those matters were still pending. As the Court knows,
11 it costs money to get out on bond. Finally, once the
12 cases were adjudicated, Mr. Claiborne was in a
13 situation where he had already served the time that he
14 needed to satisfy the sentence that he received.

15 Mr. Richardson did not. He went back to
16 jail, and up until the time he was taken into custody
17 for this matter, he was serving time in the state
18 prison.

19 In fact, although he served a great deal of
20 his sentence at what you term a medium security
21 facility, when the Department of Corrections became
22 aware that these charges were pending but not yet
23 served on him, he hadn't been taken into federal
24 custody, in other words, he was transferred to the Red
25 Onion Prison in Southwest.

1 A. Virginia, which is a maximum -- one of the super
2 max prisons.

3 That would be unprecedented for someone
4 convicted only of involuntary manslaughter in the
5 state system. The financial effect on Mr. Richardson
6 and his family was enormous because they came before
7 the Court here destitute.

8 His family -- neither family had any more
9 money left to hire any more lawyers, and that's why
10 they had to ask for court-appointed lawyers. I'm not
11 suggesting that the court-appointed lawyers are bad,
12 but they caused Mr. Richardson and his family's
13 coffers to run dry.

14 And that was a consequence to them, and his
15 imprisonment was a consequence to him. And the
16 conditions of his imprisonment were a consequence to
17 him.

18 And for Mr. Novak to say that those things
19 aren't factors that they had to suffer, they're
20 analogous in many respects, not all respects,
21 certainly, and perhaps not to the degree of in some
22 respects that Sergeant Koon experienced, but they
23 certainly experienced adverse consequences as a result
24 of successive prosecution.

25 THE COURT: Anyone else?

1 MR. HUYOUNG: Your Honor, if I may just --

2 THE COURT: Sir?

3 MR. HUYOUNG: If I could just say one more
4 matter. I know Mr. Novak was saying, well, can we
5 please look at this upward departure and the factors
6 there.

7 Of course, as I cited in my brief, Judge, I
8 just rely on that, there are some aspects or some
9 enhancements that he wanted to use, like under --

10 THE COURT: That are double counted?

11 MR. HUYOUNG: Yes, Your Honor, that are
12 double counted. Some of them just are specific. I
13 think under --

14 THE COURT: Oh, I don't think there's any
15 question. You can't use but one of those 3C things, I
16 don't think. You'd have to pick one because they
17 are -- otherwise, you really are into double counting,
18 particularly under the facts of this case.

19 MR. HUYOUNG: Yes, sir, thank you.

20 THE COURT: All right. Under United States
21 v. Koon, the Court is first required to assess whether
22 it has the power to downwardly depart. In this case,
23 it does. That's been decided in United States v. Jett
24 and United States v. Lombard and United States v.
25 Cordoba-Murgas and other cases.

1 In United States v. Rybicki, our Court of
2 Appeals described the five-step analysis that is to be
3 used by sentencing courts when deciding whether to
4 depart.

5 The first step in that analysis is to
6 determine the circumstances and consequences of the
7 offense of conviction, and that, of course, is a
8 factual inquiry. The circumstances and consequences
9 of the offense of conviction here are set out fully.

10 The defendants have been engaged in the drug
11 trade and have trafficked in significant quantities of
12 drugs, and in the course of trafficking in drugs, they
13 engaged in conduct in which they killed a police
14 officer who was in the course of doing his duty.

15 And the consequences here involve a
16 potential life or life sentence for each of the
17 defendants unless there is a departure, and that
18 occurs because of the requirements of the Guideline.

19 The Court then has to decide in the second
20 step whether any of the circumstances or consequences
21 of the offense of the conviction appear atypical such
22 that they potentially take the case out of the
23 applicable Guidelines' heartland.

24 Unfortunately, I am sad to say that this is
25 not an atypical case. Crump, Rooks, Montgomery and

1 all the cases they cite, legion upon legion talk about
2 cases, and our federal reporters talk about deaths
3 caused by the use of guns in connection with drug
4 trafficking activity.

5 So it isn't unusual at all. Perhaps the
6 only thing atypical about this case is that
7 fortunately we do not have the high number of police
8 officers killed in the course of attempting to arrest
9 people in drug activities, but there are a number of
10 those cases also reported.

11 I don't think that the fact that there is
12 successive prosecution here is anything that takes
13 this case out of the heartland of cases where people
14 are killed in the manner that Officer Gibson was
15 killed here at all.

16 So I think that I don't really find any
17 factor that takes this case out of the heartland. The
18 fact that it's unusual that we don't have police
19 officers killed in the course of trying to arrest drug
20 dealers more often isn't what makes for atypicality in
21 the Rybicki analysis.

22 We should be grateful that these events
23 occur as seldom or occur not as often as they do. But
24 those who were trafficking drugs, those who are caught
25 are not free to resist arrest, to take guns from

1 police officers, to engage in conduct that will result
2 in the death of a police officer.

3 And to suggest by way of a downward
4 departure that this is warranting -- it warrants some
5 kind of leniency on the facts of this case is simply
6 wrong. This is not a case like Lombard. Lombard
7 involved a case where there was a federal prosecution
8 for possessing guns.

9 Here the federal prosecution and conviction
10 is for substantial drug trafficking, and the
11 application of the cross referencing here is key to
12 the drug trafficking Guidelines and offenses and
13 designed for the very purpose of protecting people
14 from drug traffickers who would use guns.

15 And nobody is more entitled to that
16 protection than a law enforcement officer trying to do
17 his duty and stop the drug trafficking. So I find
18 that the successive prosecution here certainly does
19 not meet the model of Lombard or any of the other
20 courts who have considered downward departure.

21 So in fact if you look at Lombard apart from
22 the successive prosecution end of it, what Lombard is
23 approaching and is criticizing is acquitted conduct,
24 and it's using the mode of downward departure to get
25 around the effects of using acquitted conduct.

1 And I decline to engage in that sophistry.
2 The Supreme Court or our Court of Appeals has held
3 that acquitted conduct can be used. I don't like it.
4 I don't think it's right.

5 But I also think it is wrong to twist the
6 Guidelines into finding atypicality because you think
7 that the use of acquitted conduct ought to have been
8 decided by the Supreme Court of the United States
9 differently than it was.

10 And therefore, for the foregoing reasons,
11 the motion for downward departure is denied.

12 Is there anything else that you have to say,
13 Mr. Novak?

14 MR. NOVAK: Nothing else, Judge.

15 THE COURT: All right. Anything you have to
16 say on behalf of Mr. Richardson, either one of you?

17 MR. HUYOUNG: Your Honor, just preserving
18 all our valid objections.

19 THE COURT: They're on the record.
20 Mr. Richardson, is there anything you'd like to say
21 before sentence is imposed? If you do, stand up, and
22 I'll hear what you have to say. You're not obligated
23 to say anything.

24 Yes, one of you come up.

25 DEFENDANT RICHARDSON: Your Honor, I'd just

1 like to say that -- I mean, I didn't do no murder.
2 You know what I'm saying? And we been acquitted of
3 it, and we still getting charged for the same thing
4 all over again.

5 And the only thing they did was used us for
6 a murder, and they added a drug charge. And that was
7 the only way they could bring up a murder, was to add
8 a drug charge.

9 I mean, I've been sitting here doing time.
10 All this time, I've been sitting at Red Onion State
11 Prison. I mean, I've been put in prison that I ain't
12 supposed to been in.

13 And then about my guilty plea. I mean, they
14 had the two top -- the two lead investigators in the
15 case tell the two witnesses to lie and say us. They
16 admitted this on the stand.

17 I mean, look at the courtroom that I had to
18 go in down there. I mean, it was either get lethal
19 injection or end up with life in prison, knowing they
20 already stacked the deck against us.

21 I mean, it's not like I went in there and
22 just said, well, I'm going to plead guilty. Mr. Boone
23 came to me and told me, he said, there's something
24 fishy going on. He knew even if they knew that we was
25 innocent, that they were going to try to railroad us

1 anyway. So I had no choice.

2 Even though he's sitting here telling me to
3 plead guilty to this, I still didn't want to do it,
4 and I still keep my innocence today about it. I mean,
5 I had no choice.

6 Yeah, it won't nothing I could do but sit
7 there and admit and end up with five years. I still
8 didn't want to do five years. I even wrote him a
9 letter to even take back that five years, to try to
10 get back the five years.

11 I mean, a man that's sitting here guilty of
12 something like that wouldn't even try to take back no
13 five years. He would go ahead and try to do his five
14 years and try to come on home. I was still ready to
15 fight my case.

16 I mean, I had a habeas written up and
17 everything, but by the time it was time for me to put
18 my habeas in, I had an indictment for a whole new
19 charge.

20 And then the fact that all these --
21 everybody came in here to testify was people that are
22 two- and three-time losers. I mean, they had stuff to
23 gain. I mean, we had witnesses, some of them was in
24 the same bullpen together.

25 As we left out of the courtroom, we would

1 sit there and hear them tell the next man what to come
2 in here to say. So they were putting their stories
3 together.

4 I mean, for me -- and they said out of an
5 eight- or ten-year period, all these people in the
6 hall has been busted. I wasn't never busted. I never
7 had indictments. I mean, Officer Moe Williams and
8 Tommy Cheeks, they knew everybody down there that sold
9 drugs. Everybody.

10 I'm sorry for what happened to their family
11 member, but it wasn't me. It was other people
12 involved. Their names were called, too. They grabbed
13 Eric Garrett for it. Shawn Wooden called me, and I
14 knew this man.

15 This man I knew, he had dreadlocks. He wore
16 his hair back in a ponytail. He fit the description.
17 There was also George Drew's brother that was picked
18 up, that had a short haircut.

19 I mean, it wasn't just me and Mr. Claiborne
20 that was accused of this. And as far as the T-shirt,
21 I mean, that's already tells the fact right here.
22 Evette Newby, Moe Williams sat there and told her what
23 to say. I mean, they admitted this.

24 I mean, I know that they would just come in
25 here and just lie and say, well, Moe Williams and

1 Tommy Cheeks told us to say this, and you know, they
2 came in and admitted all this.

3 I mean, we was found not guilty of it, and
4 we're still being finished for this. I can understand
5 you giving us time for the drug charge because that's
6 what we were found guilty of.

7 I mean, we come back in here for the third
8 time for the same thing, for a murder charge that
9 we've been acquitted of, and we still end up with life
10 in prison. I mean, my family and his family are
11 paying for it.

12 THE COURT: Stand up, Mr. Richardson.

13 Pursuant to the Sentencing Reform Act, it is
14 the judgment of the Court that the defendant Terence
15 Jerome Richardson is hereby committed to the custody
16 of the United States Bureau of Prisons to be
17 imprisoned for a term of life.

18 This sentence is to be served consecutively
19 to the sentence he is now serving in the Virginia
20 Department of Corrections. The defendant is remanded
21 to the custody of the United States Marshal.

22 Upon release from imprisonment, the
23 defendant shall be placed, if he is released -- that
24 is sufficient. If you cannot control yourself, you
25 may leave the courtroom.

1 If the defendant is released from
2 imprisonment, he shall be placed on supervised release
3 for a term of five years. Within 72 hours of release
4 from custody of the Bureau of Prisons, he shall report
5 in person to the Probation Office in the district to
6 which he is released.

7 If he is ever released and on supervised
8 release, he shall not commit any federal, state or
9 local crimes. He shall be prohibited from possessing
10 a firearm or other dangerous device. He shall not
11 illegally possess a controlled substance.

12 He shall comply with the standard conditions
13 of supervised release recommended by the Sentencing
14 Commission with the following special condition: He
15 shall provide the probation officer all financial
16 information.

17 He shall participate in a drug testing and
18 treatment program which may be residential and will
19 include all testing and the cost to be paid by the
20 defendant as directed by the probation officer.

21 Three, he shall not use a pager or other
22 device of that sort.

23 Considering all the financial factors, the
24 defendant is not capable of paying a fine, and none
25 will be imposed. A special assessment in the amount

1 of \$100 is imposed. A special assessment is due
2 during the period of incarceration.

3 Upon release from custody, if that ever
4 occurs, payments of any unpaid balance shall be a
5 special condition of supervised release.

6 Is there anything else the United States
7 needs to do in Mr. Richardson's case?

8 MR. NOVAK: I think I need to dismiss the
9 original indictment.

10 THE COURT: The original --

11 MR. NOVAK: Actually, I think that only
12 applied to Mr. Claiborne. I'm sorry. It did not
13 apply to Mr. Richardson.

14 THE COURT: All right. Mr. Richardson, you
15 may be seated.

16 Except as ruled on here, the presentence
17 report is accepted and filed as adopted and the
18 addendum will be prepared reflecting the rulings of
19 the Court and submitted along with the presentence
20 report.

21 That is the case for both Mr. Richardson and
22 for Mr. Claiborne.

23 Anything that you wish to say on behalf of
24 Mr. Claiborne, or anything that he wishes to say
25 before sentence is imposed?

1 MR. EVERHART: Judge, just to preserve the
2 record, note our exceptions which we've already made.

3 THE COURT: You don't have to renew them.
4 You-all have all your objections.

5 MR. EVERHART: Thank you.

6 THE COURT: Mr. Claiborne, do you have
7 anything to say before sentence is imposed?

8 DEFENDANT CLAIBORNE: How are you doing,
9 Your Honor? I just wanted to say, I mean, this whole
10 thing, I'm not the only one that agree that this is
11 not fair, which it's not.

12 Mr. Novak know what's going on. Mr. Talbert
13 know what's going on, and I forgot his name. He know
14 what's going on.

15 Through the whole course of this trial, Moe
16 Williams never reached the stand, and he was one of
17 the head investigators. He was one of the ones that
18 arrested me. He never -- I mean I didn't even see him
19 in the courtroom but like two times, and nobody never
20 mentioned his name about nothing. Nobody never
21 requested him or nothing.

22 Like he said, Mr. Novak, he come to me with
23 deals, asking me to lie on this man. I mean, he
24 didn't ask me to lie, but he come to me with deals.
25 And I ask him, what can I say? He's telling me, okay,

1 you're facing life.

2 Believe me, if I knew something about that
3 murder, I would have said something. I know I'm
4 sitting here facing a life sentence, and he come to me
5 telling me I can get seven years. Why wouldn't I take
6 it? Why wouldn't I take it?

7 He's telling me -- he's not telling me what
8 to say, but he's showing me the facts. He's saying,
9 this is the facts of the case right here. I'm not
10 going to tell you what to say, but you can do it.
11 It's up to you.

12 If you don't agree with it, I'm going to
13 back door you on the drugs anyway, and that's coming
14 out of his mouth. It's not fair. I'm being
15 railroaded, and he knows what he did.

16 Mr. Novak, he sit there, and he told the
17 witnesses -- you said at the beginning of the trial
18 that you wanted the witnesses to be separated, if I
19 recall that correctly. You said that you wanted the
20 witnesses to be separated.

21 But they put me and Mr. Richardson in the
22 same -- not the same bullpen, but it's three bullpens
23 in the back. And we was in the -- I think it was the
24 first bullpen, and all the guys who testified about
25 the drugs was in the third bullpen.

1 And that man actually sit there and heard
2 them guys saying, we need to go in there and say what
3 Mr. Novak wanted us to say. Y'all need to do that.
4 This is our third time.

5 He like -- I mean, I don't know who said it,
6 but they used words like, we need to say what he's
7 going to say; man, I don't care; I just going to do
8 it; I ain't going to jail for nobody for a long time.

9 And they was being coerced. They had a lot
10 to gain, and I don't think that was right at all. I
11 mean, as far as the drug charges, I'm 15 years old
12 back in 1991, and you want to tell me that I know
13 something about some drugs.

14 And I'm just saying, for example, if I did
15 know something about some drugs at the age of 15,
16 Mr. Williams didn't even -- he didn't even know how
17 old I was at the time. He didn't even know where I
18 was living at the time.

19 But all he know is he was giving me drugs,
20 and he was a cooperating witness. I mean, it's just
21 not fair. I mean -- and I'm -- I mean, I'm sorry for
22 whatever happened, to what may have happened to
23 Mr. Gibson.

24 And I want y'all to know that. I apologize
25 for that or whatever might happen, but I think they

1 need to do their job and find the real killer because
2 he could be still out there.

3 Mr. Leonard Newby name was called. Lewis
4 Langford name was called. If you feel -- if y'all
5 feel like y'all had the right guys, why would you go
6 out there and get blood samples from the other guys
7 when we were already incarcerated? Evidently you had
8 doubt.

9 It ain't right. I think y'all need to still
10 investigate. I mean, it ain't right, Your Honor.
11 It's not right.

12 My next question is the step towards appeal
13 or something. It's not right. That's about it.

14 THE COURT: Pursuant to the Sentencing
15 Reform Act of 1984, it's the judgment of the Court
16 that the defendant Ferrone Claiborne is hereby
17 committed to the custody of the United States Bureau
18 of Prisons to be imprisoned for a term of life.

19 The defendant is remanded to the custody of
20 the United States Marshal. If ever released from
21 imprisonment, the defendant shall be placed on
22 supervised release for a term of five years.

23 Within 72 hours of release from the custody
24 of the Bureau of Prisons, the defendant shall report
25 in person to the Probation Office in the district to

1 which he is released.

2 If ever released while on supervised
3 release, the defendant shall not commit any federal,
4 state or local crimes.

5 Please remain seated in the courtroom.
6 Please remain seated in the courtroom, unless the --
7 please, unless the marshal excuses you.

8 While on supervised release, the defendant
9 shall not commit any federal, state or local crimes.
10 He shall be prohibited from possessing a firearm or
11 other dangerous device. He shall not illegally
12 possess a controlled substance.

13 He shall comply with the standard conditions
14 of supervised release recommended by the Sentencing
15 Commission. He shall comply with the following
16 special conditions as well: He shall incur no lines
17 of credit or charges without the approval of the
18 probation officer.

19 He shall provide financial information as
20 requested by the probation officer. He shall
21 participate in a program approved by the probation
22 officer for substance abuse, which may include
23 residential treatments or testing to determine the use
24 of drugs or alcohol with the cost to be paid by the
25 defendant as directed by the probation officer.

1 Considering all the financial factors, no
2 fine will be imposed because the defendant is not
3 capable of paying one.

4 He shall pay a special assessment in the
5 amount of \$100 which is due and payable immediately.
6 It's due and payable during the period of
7 incarceration, and if ever released from custody,
8 payment of any unpaid balance shall become a special
9 condition of supervised release.

10 You may return to your seat.

11 Mr. Claiborne and Mr. Richardson, go ahead
12 to your seat.

13 Please stand up now, Mr. Claiborne and
14 Mr. Richardson. I like to be able to see them.

15 I tell you now that you have a right of
16 appeal. In order to exercise that right, you must
17 file a written notice of appeal with the Clerk of the
18 Court, and that must be done within ten days of the
19 date of the judgment of the Court.

20 If that's not done in that way, in that time
21 and in that place, then whatever right of appeal that
22 may exist is lost forever.

23 Do you understand what I said,
24 Mr. Claiborne?

25 DEFENDANT CLAIBORNE: When can I -- I mean,

1 can I do that today? I mean, as soon as possible.

2 THE COURT: I'll attend to that. The first
3 question is, did you understand what I said?

4 DEFENDANT CLAIBORNE: Yes, sir.

5 THE COURT: Mr. Richardson, do you
6 understand what I said?

7 DEFENDANT RICHARDSON: Yeah.

8 THE COURT: Now, I know that all four
9 counsel are court appointed, and the Court appreciates
10 your service in this matter. You're obligated to file
11 a notice of appeal if one is to be filed, and you can
12 consult with your clients respecting when and how that
13 is to be done.

14 I frankly do not know whether two or one
15 counsel is permitted on appeal, but if you wish to
16 stay in the matter on appeal, I'm sure the Fourth
17 Circuit will be glad to have your service in the
18 matter.

19 Mr. Claiborne and Mr. Richardson, I have
20 heard what you have had to say. I have studied hard
21 and long over this case. I have every confidence that
22 you participated in the murder of Officer Gibson and
23 that you did so with malice aforethought.

24 And the fact is that the record is quite
25 clear in that respect, and it has been proved by clear

1 and convincing evidence. I hope that while you're in
2 prison you can do something to rehabilitate your
3 lives.

4 And the Court wishes you well in the
5 rehabilitation of your life and in the service of your
6 sentence. The rehabilitation of life was not an
7 option open to Officer Gibson.

8 MR. NOVAK: I just need to dismiss the
9 original indictment against Mr. Claiborne.

10 THE COURT: All right. The original
11 indictment against Mr. Claiborne is dismissed.

12 We are in adjournment.

13

14 (The proceedings in this matter concluded at
15 6:00 p.m.)

16

17

18 I, Diane J. Daffron, certify that the
19 foregoing transcript is a correct record of the
20 proceedings taken and transcribed by me to the best of
21 my ability.

22

23

24

25



DIANE J. DAFFRON, RFR DATE 12/20/01

EXHIBIT E

D
SG
MR

my cousin and I were watching the T.V. show "Rec
The first part of the show had gone off. My aunt told
me to go outside and play with "Quay". He is my
three year old cousin. We were riding Bikes that's when
I saw ERIC walking Behind Evette's house. I know
his name is ERIC because someone called out his
name when he was going behind Evette's and he
turned around. They called ERIC from Hope's house
After they called ERIC - he ^{ERIC} yelled back to the guy
at Hope's that he would "meet him around the
other side". ERIC told the guy that he was
going to get a lawnmower from his grandmother.
ERIC went Behind Evette's and then I didn't
see him.

EXHIBIT E

A couple of minutes went by then a police
officer drove up and parked in front of Evette's. He
got out of the car and walked Behind Evette's house.
He was just looking around down at the grass.
He had something in his hand. He picked it up
and talked in it. I couldn't hear what he said
but someone talked back to him but I don't
know what the other person said either. The
policeman started walking BACK AROUND the Building
kind of like he was going back to his car.
That's when I saw the man with the "daendo" peeping
around the other end of the building. He was watching
the policeman. I'm not sure what kind of clothes

E

he had on but I know he had a white shirt. He was kind of fat and he had hair on his chin. The guy with "dreads" ran back towards the woods when he saw the police. The police started running towards the woods too, I think he saw the man with the "dreads". I saw the police put his radio on his hip I think, I know he didn't have the radio in his hand. The police went to the hill and started walking real slow he had pulled his gun, it was on his right hand and it was pointed towards the sky. He had both hands on his gun. The man with the "dreads" had already gone into the woods. The policeman was on his tiptoes walking real slow. He went into the woods too. When the policeman went into the woods I heard something loud, it scared me but my cousin "Quay" went towards the noise. ~~When~~ We got to the hill and I grabbed "Quay" and his bike. I saw the police on the ground with blood on his stomach. I heard something running through woods. I looked at the policeman and I saw a radio in his left hand. His right hand was shaking. The noise I heard in the woods was the guy with the "dreads". He had blood on his shirt. Both me and "Quay" got off of the hill as fast as we could. I

E

3

MR

Knew that "Quincy" had forgotten his Bike, so I turned around and was thinking about going to get it. But that's when I saw the guy with "dreads" come back up the hill. He cops looking all around. I saw the blood on his shirt again and he also had blood on his hands. He had something in his hands it could have been a bottle or a gun I'm not sure but it was pointing down and it was in his right hand. He then ran back down the hill back where the police was on the ground. After the guy with the "dreads" went back down the hill I ran over and got "Quincy's" Bike and I went inside.

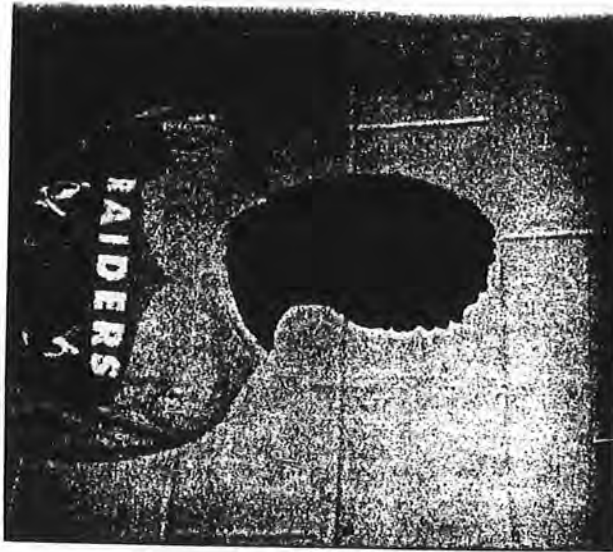
When I heard the loud noise that scared me I heard the police calling for help, he said "help" a couple of times and that's all he saw.

Statement of Shaniqua Gay
 given on 4-25-98 at 9:46pm

SAA Steven
 Dep V.P. Ricks

Shaniqua Gay
 Shaniqua Gay
 Shaniqua
 Jue Russell

12
Mugshots
(2)



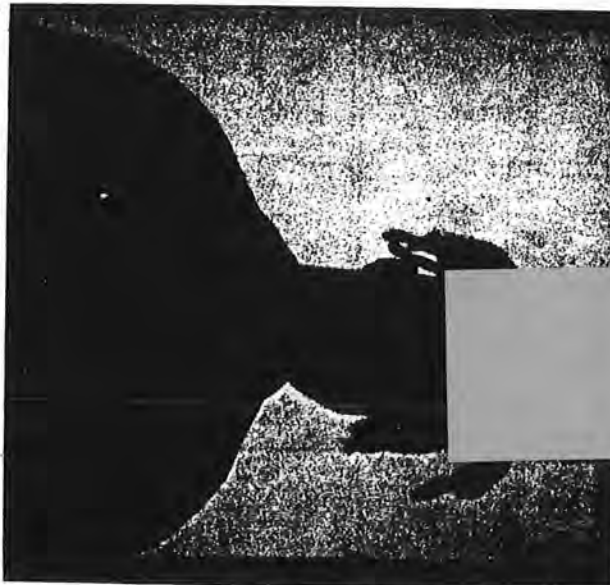
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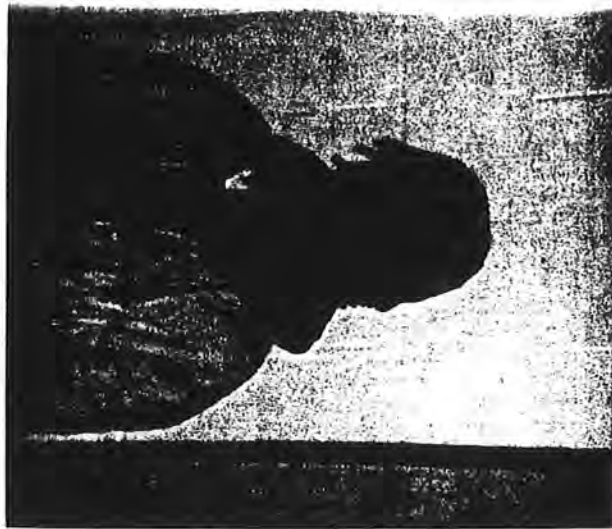
SG
4/25/98
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Shannon
Blay

Spruco
FILE FOLDERS
LETTER SIZE - SP1111/8
Manufactured in the USA,
by SP Products Co., Merrick, GA

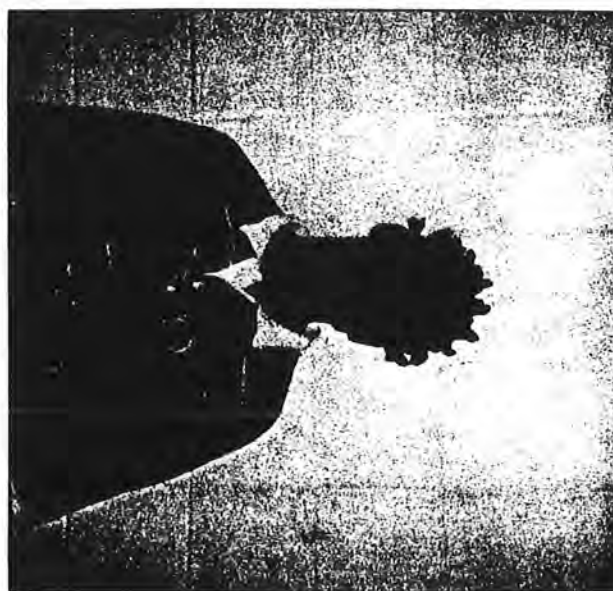


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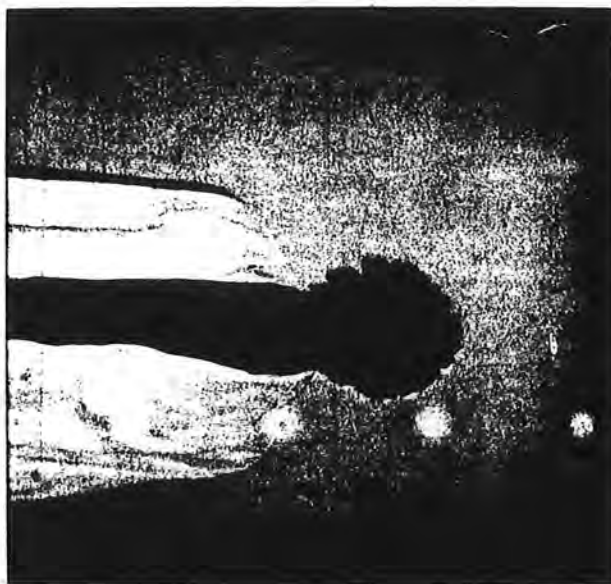
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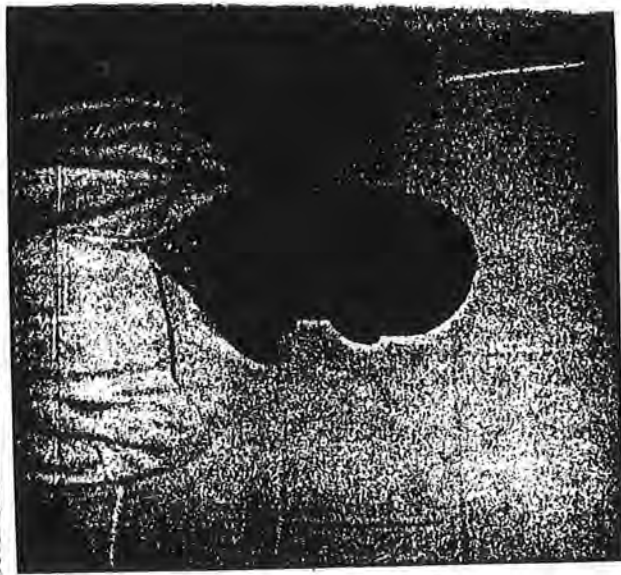
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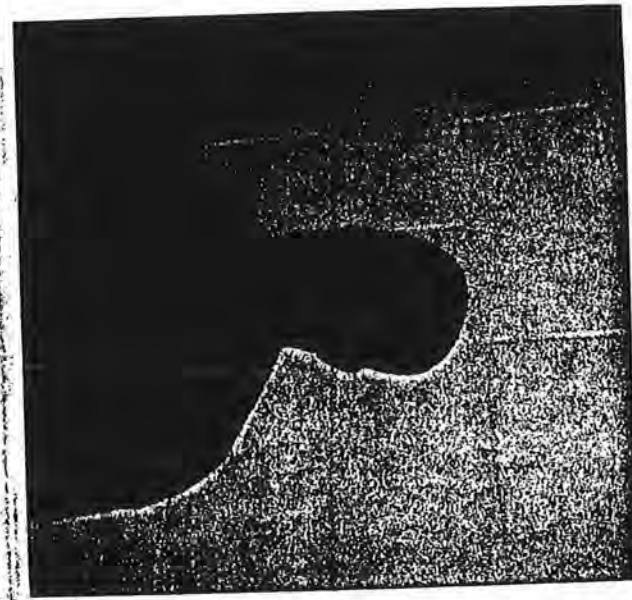
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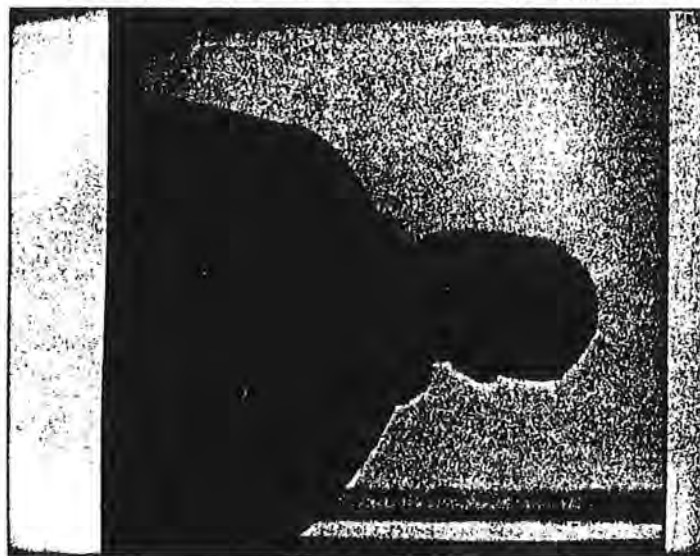
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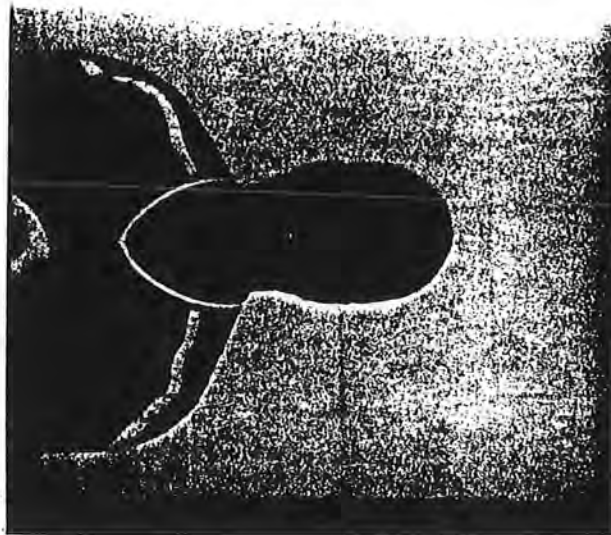


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338 Bruce St
Galloway Terr. Franklin

off parole 3-9-97
sept - 3, '96 ~~Retained~~ Released
8 yrs - ~~5000~~ sus. for Larceny

4.30.98

State Police message on answering machine
A male caller called in and stated
Leonard Newby was involved and has cut his
tires.

H. Dickerson also involved had tires but has since
cut them off.

Sony White who is the boyfriend of Evette
Newby was involved in the shooting of the officer.

John on shot area officer

Male caller indicated Herman Newby who is the
brother of Evette Newby was involved and that
he had tires has since cut them or made them

5-4-98
AREA OFF
11114
HAMCOCK

U.P.

~~unman persons~~

Nelson Fisher

3-26-98 Hired.

1260 c Hambroning Dept.

Leonard Newby 230-19-3039.

129 Lyman Rd. Spring Grove 23881 294-0436

Personnel Office Gwaltney

**CIRCUIT COURT OF THE COUNTY OF SUSSEX
COMMONWEALTH OF VIRGINIA**

COMMONWEALTH OF VIRGINIA)	Case No. 98-314
)	
vs.)	
)	
FERRONE CLAIBORNE and)	
TERENCE JEROME RICHARDSON)	
_____)	

AFFIDAVIT OF DAVID E. BOONE

I, David E. Boone, being first duly sworn upon my oath depose and state that the following matters are both true and correct made upon personal knowledge and belief, and if called as a witness, I am competent to testify thereto:

1. I am an attorney formerly licensed in the Commonwealth of Virginia (retired).
2. In 1998, I represented Terence Richardson in the above-captioned case, *Commonwealth of Virginia v. Ferrone Claiborne and Terence Jerome Richardson*, No. 98-314.
3. My representation of Mr. Richardson was done with the help of a private investigator Jack Davis, a retired Special Agent with the Federal Bureau of Investigation.
4. The defense of Mr. Richardson was surrounded around the dying declaration of the Officer saying that "I tried to stop them but they got it [officer's service revolver] and it just went off". An identification defense was never raised because we had no information that anyone else was a suspect in the case. Our focus was to have the murder charge reduced to involuntary manslaughter.
5. After lengthy negotiations with the lead prosecutor on the case, David Chappel, and a conversation *in-camera* with the trial judge, Mr. Richardson pleaded guilty to involuntary manslaughter pursuant to my recommendation on December 8, 1999.

6. To the best of my recollection, prior to the guilty plea, I did not receive a copy of a photo line-up from the prosecutor, investigating authorities or my investigator Jack Davis, that indicated that another suspect had been identified in two separate photo identifications, as the man running from the scene of the crime.

7. I also do not recall receiving a handwritten statement from a witness identifying another suspect running from the scene of the crime.

8. I also do not recall receiving information that the same suspect who had been identified in the photo lineup, was named as the perpetrator on a Sussex County Tip Hotline 4 days after the crime.

9. In writing this affidavit, I had the chance to review relevant portions of the record in an effort to refresh my recollection, including a letter I wrote to Mr. Richardson on January 18, 2000.

10. In this letter to Mr. Richardson, I explained to him that it was in his best interest to not withdraw his guilty plea, because there was no credible evidence to support his claim that he was not at the scene of the crime.

11. If I had information that someone else was identified as running from the crime scene, I certainly would have mentioned that in my letter to Mr. Richardson. Further, it would have definitely changed my defense of Mr. Richardson. Instead of a plea agreement, I would have used the identification evidence in an effort to exonerate my client.

Dated 12/1/2020

Sworn before me on this 1st
day of December, 2020.

Carol J. Linn
Notary Public



David E. Boone

**CIRCUIT COURT OF THE COUNTY OF SUSSEX
COMMONWEALTH OF VIRGINIA**

COMMONWEALTH OF VIRGINIA)	Case No. 98-314
)	
vs.)	
)	
)	
FERRONE CLAIBORNE and)	
TERENCE JEROME RICHARDSON)	
_____)	

AFFIDAVIT OF J. DAVID CHAPPELL

I, J. David Chappell, being first duly sworn upon my oath depose and state that the following matters are both true and correct made upon personal knowledge and belief, and if called as a witness, I am competent to testify thereto:

1. I am an attorney licensed in the Commonwealth of Virginia and have been so since 1988. I am currently the Assistant Commonwealth's Attorney for Brunswick County.

2. In 1998, I was the elected Commonwealth's Attorney for Sussex County. In that role, I represented the Commonwealth of Virginia in the above-captioned case, *Commonwealth of Virginia v. Ferrone Claiborne and Terence Jerome Richardson*, No. 98-314, from April 25, 1998 through December 31, 1999.

3. As significant as these cases were, being over twenty-two (22) years ago at their origin and my having prosecuted many thousands of cases since then, I currently have limited recollections of specific events involving these matters. Being no longer the Commonwealth's Attorney for Sussex County, in writing this affidavit I no longer have my case file in these matters available to me if it even still exists, contributing to my limited recollections.

4. Ferrone Claiborne and Terence Richardson (hereinafter referred to as “Defendants”) were represented by Michael Morchower, Esquire and David Boone, Esquire (hereinafter referred to as “Defense Counsel”), respectively. The defendants were charged with the murder of Waverly Police Officer Allen W. Gibson.

5. The lead investigative agency in these matters was the Sussex County Sheriff’s Office, with the lead investigators being Robert E. “Moe” Williams and Tommy Cheek (hereinafter referred to as “Commonwealth’s Investigators”). I recall that defense counsel had their own investigator, and I likewise recall the Commonwealth’s investigators and the defense investigator having a good working relationship.

6. My office employed an “open file” discovery policy in these cases, and there was a collegial relationship between myself and defense counsel. This included formal and informal discovery, telephone calls and at least one major discovery conference that will be detailed below. I made no distinction between what I considered exculpatory versus inculpatory evidence. My view in these cases, as it has always been throughout my career as a prosecutor, is that defense counsel makes that decision when reviewing the Commonwealth’s evidence.

7. I have a specific recollection of a major discovery conference that occurred at my request at the Sussex County Courthouse. I believe it occurred after the preliminary hearing, but well before the eventual trial date. Both defense counsel attended, as did the Commonwealth’s investigators who brought their investigative file. I brought my case file as well, and recall going through it piece of paper by piece of paper. My purpose in having this meeting was to ensure that defense counsel had access to all the collective Commonwealth’s evidence. The meeting lasted for several hours and was not limited in its scope, and there was significant interaction by everybody present. At the conclusion of that meeting, I was fully convinced that defense counsel had the same

case information that the Commonwealth did. A major reason why I recall this meeting is that at this meeting David Boone first suggested a possible plea to involuntary manslaughter, something I had not considered at the time, a plea that was ultimately entered on December 8, 1999 by Terrence Richardson.

8. In my prosecution of these cases based on the evidence I had available to me at the time, I did not believe there was any issue as to the identities of the two criminal agents in these matters, and they were the defendants. To the best of my recollection, I do not recall receiving information that anyone other than the defendants were responsible for the death of Officer Gibson. Likewise, to the best of my recollection, I do not recall receiving information that any person identified someone other than the defendants in a photo lineup as the perpetrator in the death of Officer Gibson or any accompanying statements reflecting that.

9. While defense counsel had no obligation to provide me with their trial strategies, we had an excellent working relationship and willingly shared information with each other, and I do not recall that defense counsel ever expressed to me their defenses would be based on identification, i.e., that their clients were not present at the scene of the crime.

10. On December 8, 1999, the Commonwealth accepted pleas to lesser charges to resolve the matters. Terrence Richardson pled guilty (I believe pursuant to North Carolina v. Alford) to involuntary manslaughter and Ferrone Claiborne pled guilty (I believe pursuant to North Carolina v. Alford) to accessory after the fact. I was widely criticized at the time by Officer Gibson's family and by local law enforcement for the reduced charges being too lenient.

11. The charges were reduced based on the evidence I had before me at that time that included the Wavery Chief of Police mishandling critical evidence and a key witness, Evette Newby, making multiple inconsistent statements as the case progressed over a year and a half, in

addition to the unpredictability of Sussex County juries. The reductions were not based in any way on a belief by me that the defendants did not commit the crimes they pled guilty to.

12. Based on the evidence I had before me at the time, there being a factual basis to support the defendants' guilty pleas, I had no doubt that the defendants were the criminal agents in the death of Officer Gibson and had I thought otherwise I would not have agreed to accept their guilty pleas.

Dated 12-16-2020

J. David Chappell
J. David Chappell

Sworn before me on this 16
day of Dec, 2020.

Ann M Connell
Notary Public

ANN M CONNELL
NOTARY PUBLIC
Commonwealth of Virginia
Reg. #109811
My Commission Expires Nov. 30, 2022