VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BEDFORD

COMMONWEALTH OF VIRGINIA ]
]
V. ]
]
JENS SOERING ]

TRANSCRIPT OF PROCEEDINGS

February 7, 1990

APPEARANCES:

THE HONORABLE WILLIAM W. SWEENEY, PRESIDING

For the Commonwealth: James W. Updike, Jr., Esq.
Bedford County Courthouse
Bedford, VA 24523

For the Defendant: Richard A. Neaton, Esq.
One Kennedy Square
Suite 2026
Detroit, MI 48226

William H. Cleaveland, Esq.
Southwest Va. Savings & Loan Bldg.
Roanoke, VA 24001

Reported by: Jacquelyn Keen

ASSOCIATED REPORTING SERVICE
111 Euphan Avenue
Lynchburg, Virginia 24502
(804) 525-2345

FEBRUARY 7, 1990 P R O C E E D I N G S 9:30 A.M.

THE COURT: All right, gentlemen, you have a number of motions before me today in the Jens Soering case, and the first thing I wanted to make sure is that we are pronouncing the defendant's name correctly. I have heard many different pronunciations, gentlemen, I am guessing that it's probably Jens Soering and not Jens Soering, but please get me straight on that.

MR. NEATON: Soering is fine, Judge. Close enough.

THE COURT: Fine. It would be not Jens, but Jens Soering, is that correct, or am I still mispronouncing it, Mr. Soering?

THE DEFENDANT: Just Jens Soering.

THE COURT: Jens Soering, is that correct? Thank you. That's the first thing to get straight. Now I do have a number of motions here today, and I will be glad to take those up in any order which counsel desire. My thought, however, is that I am not in the position to rule on any suppression motions as to foreign confessions today, because obviously that's

going to take evidence, and there is no way that I could rule on those, although I have read your motions. Do both attorneys agree that we cannot make decisions on that today?

MR. UPDIKE: Your Honor, I have discussed that with Mr. Neaton as far as hearing that on another day, and we have both discussed our schedules, and I have contacted the Brittish officers, and I have a pretty good idea, I think of the Court's schedule. And we have some suggested dates that at the Court's pleasure, we would like to schedule a hearing on that at a later date that suits the Court.

THE COURT: Well that will be fine and I will be glad to do that, but there is a threshold issue as to whether or not I should remain in the case. And if I do not remain in the case, then it would seem to me that I would get out and not do anything further. So I can't set any hearings until we resolve the initial question of whether or not I should be recused, or whether I should recuse myself from further hearings

in this case. And I will say that I have read all the pleadings, and prepared in that respect. Now how shall we proceed, gentlemen, it's up to you. Mr. Neaton?

MR. NEATON: Well, we'd first like to take up the motion for recusal, since obviously that would govern any other motions that are in the case.

THE COURT: Yes, sir.

MR. NEATON: Judge, an attorney is always pretty nervous when he brings a motion to disqualify a trial judge, because you don't really know how that person will react. It's also a serious motion that is brought, because it speaks to the heart of the justice system, and it's a motion that a lot of people that aren't involved in the law perhaps don't understand, and that is why an attorney has to bring a motion to disqualify the judge to the judge that he is claiming shouldn't be sitting on the case, and then ask that judge, who he claims the might be biased, or at least appear to be biased, to then render an unbiased decision on the issue of whether

he's biased.

It's a confusing issue for people, perhaps that don't understand the law, but to a lawyer and to a judge in an important criminal trial, it's a motion that makes sense, because the duty of the Court is perhaps the highest duty that is imposed on a human being by the legal system, and that is it's a duty not only to be fair but appear to be fair. And the Canons of Ethics for judges in this Commonwealth state that if there is a reasonable question raised about the impartiality of a trial Court, that the trial Court should step aside, should recuse itself, so that at least the proceedings appear to be fair.

In your case, I think only you really know whether you're biased or not in this case. We have alleged it, because that is one of the requirements under the law in this state, that if the Court is actually biased, that's a ground for recusal. I think that there are three basic reasons why we allege that at least if you're not biased, that it might appear that you're

biased, and your impartiality can be reasonably questioned in this case.

The first reason speaks to whatever relationship you did or did not have with the deceased in this case. Attached to the motion was an excerpt from the transcript testimony of Phyllis Workman, who testified at the Elizabeth Haysom plea that in 1983, a party was given at the home of a Mrs. Abbott in the Lynchburg area for the family and close friends of Nancy Haysom and her husband Derek, and that they were welcomed back to the Lynchburg area at that party, and in attendance at that party was this Court.

Now I have not heard anything from Your Honor either in the transcript of the Haysom plea, or in any other meeting between us, or in any other court proceeding that has either confirmed or denied the accuracy of that testimony. I also recall that I believe in one of Elizabeth Haysom's statements that she made and were introduced at her plea, that there's some reference to another social

function at the Haysom home itself, which is the murder scene in this case. And I don't know if that's true or not, that you were there, but at least I recall that there was some allegation made that you were there.

I don't really know exactly what your relationship was, if any, with the deceased. I know that at least for two years at Virginia Military Institute, Nancy Haysom's brother also attended that college in the same class as you.

THE COURT: His name was Risque Benedict.

MR. NEATON: Yes.

THE COURT: That's correct.

MR. NEATON: And I don't know what relationship yu had with Mr. Benedict at all, I mean he was a classmate from the Lynchburg area, I understand that you're from the Lynchburg area, too, if that's correct. And it just seems to me that as this case has gone on, that we haven't had any feedback from you exactly as to what if any relationship you had with the Haysoms.

We brought it to you informally at first in chambers, and I haven't heard anything about it.

We wanted to talk to you about it before the January 16th hearing and we were unable to do so. And now we are here, and we're bringing it forward in a formal motion. And I'd like to ask you right now, what exactly is your relationship with the Haysom family and the Benedict family in the Lynchburg area. And I'd like you, if you would, to fully disclose that right now.

THE COURT: I'll be glad to do that.

THE COURT: Did you want to say anything before I do that, Mr. Updike?

MR. UPDIKE: Your Honor, at the Court's pleasure, I would state that I have a number of comments to make.

THE COURT: Well go ahead.

MR. UPDIKE: I would state that I have attempted to do some research, and I have some cases that might take some minutes to go through, and I'll do that now if the Court would like.

THE COURT: Since we're on this issue, I would like you to speak to it now.

MR. NEATON: I would indicate that I'm not done with my presentation, and I'm simply asking the Court at this point for purposes of information, in order to form a factual basis of this particular allegation, to state whether that allegation is true or to what extent it's true or not. I have not yet finished with my argument.

THE COURT: I'll certainly come back to you.

MR. UPDIKE: Your Honor, whatever the Court prefers. But it's our position that the allegations have been made here, such as close friends of the deceased, all kind of allegations here. And I have raised no criticism of the two counsel here, Mr. Cleaveland and Mr. Neaton for bringing the motions, but the nature of the motions and the language used in this one and all of them, we are submitting is improper, and in the form of allegations, and as counsel has stated, indicating that he did not know

whether these things were true or not, and there the allegation is stated there.

Well this kind of motion should be made without this kind of allegation. Now Your Honor, as I indicated, we can go through at this point my presentation, if the Court would like, or if Mr. Neaton wishes to finish his, but we would think that it would be better for the Court to hear from us before we hear from the Court personally, but of course whatever way Your Honor wishes to do it. Would Your Honor wish for me to go ahead and proceed?

THE COURT: No. I think if Mr. Neaton has further argument on this, let's let him finish, and then I'll hear your side, and then I'll be glad to make a public full disclosure about it.

MR. UPDIKE: Are the turnups authority, Mr. Neaton, or is that just a display?

MR. NEATON: No, the turnups are the symbol of our defense, that Bill and I stand for all underdogs in Bedford County, turnup truckers, and --

MR. UPDIKE: I see. Thank you very

much.

THE COURT: I assume that the focus has changed from me to the Commonwealth attorney with that remark, since I made no reference to turnups at the last hearing.

MR. UPDIKE: Yes, sir.

MR. NEATON: That is very correct, Judge.

THE COURT: Go ahead, Mr. Neaton.

MR. NEATON: Judge, we made the allegation of you being a close friend of the Haysoms' in good faith, and based upon the sworn testimony of Phyllis Workman at the Haysom sentencing, the date of the transcript is October 5th, 1987. And the questions that were asked of her by Drew Davis were, and do you recall when it was that you first met Elizabeth? Answer, yes, I do. When was that, and where was that?

Elizabeth's parents Derek and Nancy were in Lynchburg visiting in the home of a Buffy Abbott, and they had a dinner party. Elizabeth's cousin Risque was here, and they had a dinner party, a rather large party for relatives and close friends. I

was there; my husband and I were invited because we were related, and I think that information came through the Kempers, Al and his wife were there. Judge Dale Harris and Ted were there, and Judge Sweeney was there.

I think that the allegation has been made in good faith. Now Bill and I don't live in Lynchburg, and we don't know exactly everything that goes on over there. But what we have done is we have based that allegation, and taken the word close friend based upon the testimony of Phyllis Workman at the hearing on October 5th of 1987.

There are two other areas, though, in which our motion is based upon, and not only whatever relationship you have or don't have with the deceased, and the Benedict family, but also the second reason has to do with the working or the interaction between the Haysom plea and sentence and that effect upon you, and some of the statements that you made at that time. The one that they play all the time on the television in Roanoke says I think

words to the effect that, I think I now understand what this case is all about.

And the fact that by your acceptance of the Commonwealth's -- or the acceptance of the guilty plea to accessory before the fact, that you have endorsed not only the Commonwealth's theory of the case, which has been replayed over and over again in this area, but you have also endorsed the credibility of Elizabeth Haysom, who is a subpoenaed witness for the prosecution in this case.

And I think that that's important, because by the very fact that you sit on the bench, and you have accepted the plea, endorsed the Commonwealth's theory that that plea was accurate, that Elizabeth Haysom's testimony was truthful, and that -- at least as to her role in that particular offense -- and that you now sit in judgment of this case, I think that it raises at least a reasonable question of whether you appear to be fair in this case, and whether you would be open to defense theories that may be at odds with the

theory that Elizabeth Haysom pled guilty to, and whether when you exercise your discretion on the normal things that happen in a trial, whether your discretion would be affected by your statements and by the conclusions that you made and stated on the record at Elizabeth Haysom's sentencing.

Now I would he say in all fairness to you that you did not say at that sentencing that I have believed everything that Elizabeth Haysom told me, you never said that, but there is a certain aura or certain unstated sanction of what she did that occurred by the acceptance of her guilty plea.

THE COURT: Well let me stop you there. As I recall, I believe I specifically said in my ruling that I thought she had lied on a number of occasions, is that not correct?

MR. NEATON: That's correct. But you also talked about a new Elizabeth Haysom and an old Elizabeth Haysom.

THE COURT: That's the way I felt about it.

MR. NEATON: I understand that. And

I'm saying that at least from our perspective on this side of the courtroom that we at least reasonably question whether your feelings and your conclusions in that plea hearing are going to affect your ability to be open to any other theories that the defense might present in its case.

More importantly, the act of accepting the guilty plea as an accessory before the fact in and of itself acts as a sanction of the Commonwealth's theory of the case. And what I am saying to you is that that raises the spector and that raises a question, at least in appearance, of whether you as a judge have sanctioned that theory, so that a jury sitting in that jury box might know that and might believe that.

THE COURT: Well now I ask you, what should I have done at that point, should I have refused to accept the guilty plea, is that what you're saying?

MR. NEATON: No. I'm saying what you should do now is step aside in this case, because you have accepted the guilty plea.

I'm saying you did your duty in the first instance, but that duty creates problems in this case as it affects Mr. Soering.

The third issue has to do with the normal discretionary rulings that the Court makes in the, what I term the professional relationship that has arisen between you and the Commonwealth's attorney in this county. And I don't mean to suggest by that argument that there's anything improper by the professional relationship that develops over time between a judge and a Commonwealth attorney. When I was a prosecutor in Detroit the same type of professional relationship often develops between a judge and a prosecutor who practices frequently before a judge, and that a judge may give due respect to that prosecutor, or a defense attorney's positions that he takes.

But it seems to me that having looked at a number of cases that have been tried in this county, that the vast majority of discretionary rulings that come from Your Honor go in favor of the prosecution. And

I just wonder why, particularly in this case, when we were talking about a trial date, and why when the defendant was totally, while unwilling to waive his right to a speedy trial, why we didn't get a trial date in the middle of the speedy trial period, as opposed to the Commonwealth's position, or the defense position.

I suggested June the 1st, because I thought that that was as equally unreasonable as a March 8th trial date, Judge, and I suggest that Your Honor could have exercised its discretion and set a trial date that was fair, at least in the middle of the speedy trial period that would be fair to everybody. And I just -- and it just dawns on me, after -- and I just wonder, after having brought the question of recusal to you in chambers and getting no response, and having attempted to raise it before the January 16th hearing and getting no response, and then getting a trial date that I think is unreasonable, although we're going to try to be prepared

for that date, I think it's unreasonable, given the discovery and the things that we have to do, and then on the issue of the capital murder indictment, when a capital murder indictment is nolle prossed instead of dismissed, and I'm sitting here and I'm thinking, why when we talked to you before did you not disclose to us whatever relationship you had with the Haysoms?

THE COURT: Now wait, Mr. Neaton, you never asked me to. Be honest, you never asked me to. And it's my thought that in a criminal case, everything should be handled basically on the record.

MR. NEATON: Okay, I'm asking you to do it.

THE COURT: I am going to do it, but on the record today, not back there in chambers, because you never asked me to. Maybe I would have. I have never got that request.

MR. NEATON: We had asked that you consider it and get back to us, that's how I recall. Be that as it may, Judge, we're on the record now and the the motion is

before you.

THE COURT: Yes, sir.

MR. NEATON: In any event event, I think that at least from our perspective, that there is an appearance of impropriety, or a possible appearance of bias from the Court against Mr. Soering. I think that we have reasonably questioned the Court's impartiality in the case, at least on points two and three, and I know that the Court is now willing and will state its relationship if any with the Benedicts and the Haysoms on the record, and I think that the motion was brought in good faith, and I think that you should disqualify yourself.

THE COURT: Thank you sir. All right, I'll here the Commonwealth's position.

MR. UPDIKE: Yes, sir, Your Honor. I have a number of things to talk about if I might have just a brief period of the Court's time. First of all, if I could address this business about the meeting back in chambers. As the file will reflect, initially there was a letter sent to me by Mr. Cleaveland, in which he

complained that he was not able to reach me to arrange a hearing with Your Honor, at which time he wished to discuss certain matters and take up certain matters to facilitate the trial of this case.

I responded with a letter, a copy to Your Honor, a copy in the file, in which I stated to Mr. Cleaveland that I was trying a murder trial during that period of time, it would have been the murder trial in the Juvenile and Domestic Relations Court involving some juveniles, that because of the Christmas holidays and things of that nature, that I was involved, but that I responded at that time and I indicated in that letter that I felt like any kind of motions, especially not knowing what the motions were, would be premature, and should not be brought before the Court until the defendant was actually present here in Bedford County.

In response to that, Mr. Cleaveland called back and he indicated at that time that there were four matters that he wished to bring to the Court's attention, he asked

that I get Your Honor on the phone, I was present so that everyone could talk, and at that time he disclosed what those four matters were. They wished to introduce Mr. Neaton to Your Honor; that he wished to go through the process of admitting Mr. Neaton to practice law here in Virginia. We wished to discuss scheduling as far as when we could come before the Court after Mr. Soering's arrival, and we wished to address an issue that they had brought forth, and that was whether or not the defendant should be held in the custody of our Bedford County Sheriff's Department or the custody of the Roanoke City Jail.

Once we got back there, there was a mention by Mr. Neaton, and at that time he stated they didn't know what they were going to do, they just wished to bring this matter to the Court's attention. I promptly came back and stated that if it were brought to the Court's attention, I wanted the opportunity to respond and to address it. Therefore -- and if anything else had been said, Your Honor, I was

prepared based upon those letters to say wait a minute, we agreed to address four things, that was it, we're not taking up something like recusal of the presiding judge back in chambers.

When something was brought up, what are we going to do about the capital murder charge, that's exactly what I said. We're not going to address that today, we didn't agree to address that, we can address it later once the defendant got before the Court, we did address it. So all of this type of statement about well why didn't I hear this or why didn't I hear that, Your Honor was never asked to, and in addition, the matter of recusal was not one of the four matters that we agreed to discuss informally.

Proceeding to the motions themselves, there's one thing that I wish to address before I forget, and that is the issue of whether or not this is going to be a jury trial. We think that bears directly and very importantly on this particular motion. I assume from counsels' motions that they

have filed that they will be requesting a jury trial, however I have not discussed it with them.

As we all know under the law, the defense, the Commonwealth, the Court can require the case to be tried by a jury, and I will resolve that matter now by stating that the Commonwealth of Virginia in this proceeding will be requesting a jury trial in accordance with the constitution of Virginia, and we think that that takes care of that.

And I have discussed that, because some of the cases that I have here discuss that issue as well. Your Honor, if I might address first of all, a little bit out of order from what Mr. Neaton did the issue of Your Honor having presided in the trial of the co-defendant, Elizabeth Haysom, because I have found some cases on issues such as that, and we think that the law addressing those issues also applies to the some several others.

First of all, we would like to emphasize before even getting to the law

that Elizabeth Haysom pled guilty. She was charged with two counts of first degree murder, that's what the indictment stated, she pled guilty, and as we know under Virginia law, that satisfies the requirements for a finding of guilt, the Court needs to hear evidence to find that the plea was voluntarily entered, and that there is a sufficient basis for accepting the plea, not making any determination of fact.

Your Honor did not sit as fact finder in this case, as either presiding in a bench trial, or as a member of a jury. Also, as to the facts of the case, as Your Honor will recall, and as I know counsel know, because they've got transcripts of that trial, I put on evidence during the guilt phase of the hearing, much of which I summarized and was stipulated, officers from Brittain testified basically reading from letters and documents which were seized in England, and at the conclusion of the Commonwealth's evidence, Elizabeth Haysom and her counsel introduced no

evidence at all. There was no contest as to the evidence.

So as a result, Your Honor, you were in a position at that point, and after hearing a day and a half's worth of testimony, of not having any issue of fact before this Court. There was no contest as to that, the issue became sentencing later. So to suggest in any way that this Court has adopted the Commonwealth's theory in the matter of Elizabeth Haysom or has made any determination of fact, those kinds of allegations are incorrect factually and legally.

As far as the legal effect of having presided over a co-defendant's case, or having heard issues in one case that have some relevancy on another, we have some several cases here, if I could quickly, Your Honor, refer to. The first one that I would like to describe, and Your Honor may very well be familar with it, Slayton v. Commonwealth at 185 Va., starting at Page 371. It is a 1946 case, however it is cited with approval in the cases that I

will get to in a moment coming up into the mid 1980's. The reason for my earlier comment was that it was a case that came from Campbell County, the Honorable Charles E. Burks was presiding.

In this case, Your Honor, and I might state parenthetically, if there is any fear of bringing such a motion for recusal before Your Honor, my understanding of Judge Burks' reputation would require, I would think, even more feeling of intimidation, although I did not have the pleasure of knowing the gentleman, and most certainly not even appearing before him. But Judge Burks did have a reputation as a great scholar, and a reputation for speaking his mind, something that I like to try to do myself.

But this case, Judge, this is a case in which Mr. Slayton was charged with driving suspended, and there were three individuals in the car with him; excuse me, two other individuals. No, it was three individuals, Slayton, Carter, McDaniel and Lanier. Well they testified before the lower court and

Slayton was convicted of driving the car, driving suspended. They came up before Judge Burks at the Circuit Court level on appeal. The case was tried, Slayton, Carter, McDaniel, Lanier all testified that Slayton wasn't driving the car. The jury -- a jury heard the case, Your Honor, and after the jury had heard the case, the jury dismissed it.

Well Judge Burks expressed an opinion as to that finding of the jury, and stated that despite the fact that the jury had found Mr. Slayton not guilty, the Judge considered that Mr. Slayton had committed perjury on the stand in his courtroom in his presence. And not only did he state that, he put it in his formal order which was recorded with the Court. And here's a quote from that order: "Having heard all the evidence with respect thereto, the Court is of the opinion that the said Slayton has violated the law by driving while his permit was suspended and has committed perjury, notwithstanding the verdict of the jury to the contrary." So

Judge Burks made his opinion known.

Well shortly thereafter, Mr. Slayton and all these other three were charged with perjury, and as things worked out, they ended back before Judge Burks. And of course the defense raised the issue, well wait a minute, Judge, you said that Mr. Slayton my client has committed perjury, and all the other defendants, their attorneys were saying if you called him a liar, you have got to be calling our clients a liar as well. And they asked for the Judge to recuse himself, and they also asked that the case be moved out of Campbell County because of what the Judge had said.

Well, Judge Burks wasn't about to get out of the case and didn't, and the Supreme Court ruled on this. Now the Supreme Court began by pointing out that the attorneys didn't press this issue too terribly hard before the Supreme Court, and regardless of that, the Supreme Court came back and said that this was such a significant point that the Court was going to address it anyway.

And they cited a number of cases in support of their ruling.

And the Court started out by stating, it is well settled that a judge is not disqualified to sit in a criminal case because in the disposition of a matter arising out of the same facts he has formed or expressed an opinion as to the guilt of the accused. Frequently in the disposition of cases both civil and criminal a judge is called upon to form and express an opinion upon a matter or issue which may come before him in a subsequent proceeding arising out of the same stated facts. The Courts are practically unanimous in the view that neither the forming nor the expression of such a conclusion under such circumstances disqualifies a judge in a subsequent matter.

THE COURT: What's the name of that case?

MR. UPDIKE: Slayton, S-l-a-y-t-o-n v. Commonwealth, 185 Va., 371.

THE COURT: Have you Shephardized it to see if it's been modified or overruled?

MR. UPDIKE: Yes, indeed I have, Your Honor, and that's how I came up with these other cases, because the Supreme Court has continued to talk about it, and I'll have those cases for the Court in just a moment. And as it continued, such cases did not disqualify a judge in a subsequent matter, particularly where the issue of fact in the later proceeding is to be determined by a jury.

And Your Honor, we emphasize this particular case, because there are allegations of opinions, of expressions of ideas formulated, that sort of thing. Well Your Honor, here we have a case that was much closer. You see, what the defense here is arguing a situation of the Court having heard a co-defendant. In Slayton, Judge Burks not only heard the co-defendants, he heard the defendant himself, and he witnessed the perjury that occurred.

But as the Supreme Court of Virginia cited and stated, such an expression of an opinion does not disqualify the Judge,

especially when the case is to be tried before a jury, and the reasons being that the jury determines facts, that the jury determines guilt or innocence.

And as these later cases will point out, as long as any formulation of opinion by the Court has not been expressed to the jury members and they don't know anything about it, then the jury determines fact, the Court determines law. Now if an issue of law comes up time and time again, we would all expect the determination to be the same in accordance with stare decisis. Determinations of fact will be made by the jury.

Briefly proceeding, Your Honor, quickly proceeding, I should say, the matter of Morris Odell Mason v. -Commonwealth, this is a 1979 case at 219 Va., beginning at Page 1091. This was a capital murder case. As I stated, it is a 1979 case, and on Page 1097 of that opinion, the Supreme Court of Virginia in 1979 cites with approval the Slayton case pertaining to Judge Burks.

Now in the Mason case just quickly,

Your Honor, that was an instance in which the defendant was charged with capital murder, and he had 15 other non-capital charges. In that situation, the defendant pled guilty to all of them. And then once the Judge had sentenced him on the previous -- or I should say the non-capital charges, then the defense came in and said now wait a minute, Your Honor, you found me guilty on all these other charges, you can't proceed against me or render a finding on the charge of capital murder now, because you know that I am guilty of all these other things.

So there again, that's a situation, not co-defendant/defendant, but that's a situation of the same defendant. Again on Page 1097 the Supreme Court of Virginia stated, we have held that a judge is not disqualified to sit in a criminal case when in the disposition of a matter arising out of the same facts he has formed or expressed an opinion as to the guilt of the accused. There Slayton is cited.

The Court goes on to say, Mere

knowledge of the background information about a criminal defendant is not sufficient to require recusal, stating that just because the Court knew about this other background, that didn't require recusal. Now they go on to talk about non-jury cases. This is going to be a jury case, but even in a non-jury cause where the Court is making all determinations to be made as occurred here in Mason, the Supreme Court said, in non-jury cases it will be presumed that the trial judge did not confuse the evidence in one case with that in another.

That's in a non-jury case, again. Certainly, if you have that presumption in a non-jury cause, how could you not have it in a situation where the Court is not even determining fact, but rather the jury is. The Court continued by saying, it will also be presumed in the absence of an affirmative showing to the contrary that only material and competent evidence is considered by the Court.

Moving quickly, Your Honor, to the

matter of Buddy Earl Justice v. Commonwealth of Virginia at 222 Va., beginning at Page 667, this being a 1981 case, and if I could point out again on Page 63 of that decision, Slayton is quoted verbatim and cited with approval. Now the Justice case, Your Honor, we think is a very compelling case because of the factual situation existing.

In Justice, he was charged with capital murder, he was convicted of capital murder, he was sentenced to death, his case went to the Supreme Court of Virginia, and then it was remanded back before the Circuit Court for retrial. In that instance, once the matter came back the defense came in, they said, now wait a minute Judge, you have already heard this whole case, you have already heard all the evidence, you found me guilty, you have sentenced me to death, how can you be impartial and hear this case again.

Well Your Honor, that's an issue that arises for every judge who sits anywhere in any type of case; judges have to hear cases

on remand, judges have to hear cases when there are mistrials and they have to be tried again. Judges have to hear suppression hearings, and then during the course of the trial if the Court rules the evidence should be excluded, has to put it aside, all of that is part of being a judge, and part of the training that they have. All judges have to do it, and if there's any ruling that they can't, judges would be moving around the state much more than they ever did in the days of riding circuit, it would almost be like a merry-go-round of musical chairs. That's unacceptable, especially in view of the training of our judges.

But in Buddy Earl Justice, there you have the same defendant, not a co-defendant/defendant situation where you're saying that you have heard the co-defendant you can't hear the defendant, this is the very same defendant, this is the very same case, this is the very same evidence. Judge DeVoir heard all of it before.

They raised a matter of recusal, it was argued, Judge DeVoir stated, I think I can give him a fair and impartial trial based on the law and the evidence and what comes before the Court. And that's what the State pays me for, is to try these cases, and I'll be just as fair as I can, and I will deny your motion, gentlemen.

So the Court put on the record the reason that he could give a fair and impartial trial and there was no reason to do otherwise. The Supreme Court of Virginia, in affirming the fact that the Judge did not abuse his discretion by refusing to recuse himself stated on Page 673, a trial judge must exercise discretion to determine whether he possesses such bias or prejudice as would deny the defendant a fair trial. Reasonable discretion. In support of that they cite Slayton, Judge Burks' case.

Then they go on to cite the paragraph that I have already read to Your Honor from Slayton that concluded in the words, particularly where the later proceeding is

to be determined by a jury, that was read again. So that would be a much closer situation, Your Honor, than anything that we have here, and that was most certainly a proper ruling, a necessary ruling, and the retrial was tried by a jury, and as the Supreme Court indicated, there was no indication of any impartiality or any bias.

Moving very quickly if I might, Your Honor, to Stockton v. Commonwealth at 227 Va., at 124, this being a 1984 decision. In this case, this is a situation in which Mr. Stockton was being tried before the Court on a capital murder charge. The defense came in and pointed out the fact that the same judge had previously heard a case involving Stockton, and during the previous case, Stockton got up and cussed the Judge. So of course the defense was arguing, well Your Honor, our client has cursed you previously, that would have to cause some bias, some prejudice, somebody else ought to hear the case.

Again, the Supreme Court came back when the Court indicated on the record that he

knew of no reason why he could not give Stockton a fair and impartial trial, the Judge continued by stating he had no animosity toward Stockton for any remarks that had been made previously. The Supreme Court in reviewing this came back and said that the trial judge did not abuse his discretion in overruling the motion, and in support of this, the Court cited the Justice and the Mason cases that I have already gone over with Your Honor.

Another case, and I think this is nearly the last one, this being a 1983 case, this being Deahl, D-e-a-h-l v. the Winchester Department of Social Services at 224 Va., 664. This case again, as I indicated, a 1983 decision --

THE COURT: 220 what?

MR. UPDIKE: 224 Virginia.

THE COURT: All right, I have it.

MR. UPDIKE: They cite with approval our earlier Slayton decision and they quote from it again. In that case, Your Honor, that's a situation, not a criminal case, but it's a situation in which the trial

judge had heard a custody matter pertaining to these parties. Later the Court came back and had to hear a motion for termination of parental rights involving the same parties. The parties said, well Your Honor, you have already heard all the evidence, you've heard this matter, you should be recused. And the Court stated that he could provide a fair hearing, refused a motion for recusal and the Supreme Court upheld the exercise of discretion and stated that it again, citing the quote from Justice and Slayton saying that the Court must exercise reasonable discretion, and the Slayton quote, "Merely because a trial judge is familar with a party and his legal difficulties through prior judicial hearings does not automatically or inferentially raise the issue of bias", and that's what's been done here.

Finally, Your Honor, Stamper v. Commonwealth at 228 Virginia at 707, being a 1985 case, this case, I would state from the very outset, really doesn't have a lot

of applicability to this present case, because Stamper involved a lawyer who was being tried, and in that case the issue of the lawyer's competence came up, and as it turned out, the date on which this issue of competence pertained, the lawyer had appeared before the Judge who later heard the case.

But in the trial of the case, a motion for recusal was never made. The motion for recusal was made after verdict, and the argument was made that the trial Court should have on its own recused itself. And the Supreme Court ruled that this situation was not one that warranted recusal, and that the Court had not failed to exercise reasonable discretion.

The only reason that I point this out, Your Honor, is that the defense in that case made some of the same kind of arguments that the defense here in this case makes, and that is that there have been some prior rulings, and that they went the Commonwealth's way, and that's an indication of bias. Well in responding to

that, the Supreme Court says on Page 714, the defendant's motion points to several adverse rulings at trial as indications that the Judge was prejudiced against him. But if this were the criterion of prejudice, no rulings could ever be made which a party opposes.

And really, if you think about it, there would be no way that a judge could rule, because he's going to be ruling against one or the other, and then that would be an indication of bias. If I could quickly respond to that, Your Honor, I'm not prepared today to come before Your Honor with a list of my wins and losses, but from my memory, I have lost a bunch of rulings before Your Honor when you have prevailed, and I may, as the Court and anybody that knows me, once I lose, my response may not have been quite as calm as it should have been, but I have always tried to be respectful.

And my point being that I have lost a lot, and I expect to lose a lot more. And I'm amazed by an attorney from Michigan who

has previously stated that he didn't know the goings on in Lynchburg, how he can be so familiar with the going on here in the Court and the rulings over the years when it's hard for me to keep up with them myself, and I have been involved in a lot of them. But that's not fair, and that's the kind of accusation that we're critical of, of having been repeated in this particular motion.

Therefore, Your Honor, that goes to the matter of having presided over the co-defendant's trial, it was a guilty plea, and as these cases clearly show, that's no basis for recusal in a later proceeding, most especially when there's going to be a jury trial. And I just had one other case, which is a West Virginia case, State of West Virginia v. McKinney, that's at 358 Southeastern Reporter, beginning on Page 596, and that case just basically holds that the situation where a trial Court heard cases involving the same defendant, having heard previous cases in the hearing of the previous cases did not amount to a

basis for recusal.

And applying that law not only to that issue, but to these other issues, this issue of Mr. Benedict, and it's stated in here, because Your Honor, I have never in previous years, and most certainly since this matter has come up, discussed anything about Mr. Benedict, I'm just going here in my arguments based upon what's stated here on the page, and it says here something about going to VMI together, and that Mr. Benedict is the brother of Nancy Haysom. And they state, Your Honor, that is a basis for recusal.

As I understand this, and Your Honor knows these principals of law much better than I do, but it seems that the Canons of Ethics and the law require a Judge to recuse himself when there's some financial interest, when a case involves a relative, or if there's some close relationship, some very close friendship that exists that would cause the Court to be biased or even appear to be so.

Now Your Honor, we know when we

question jurors, that even with them, being related to somebody, even to the Commonwealth's attorney, there is a case on that, does not automatically cause grounds for removal from the jury panel. The question is whether or not they can accord a fair and impartial trial based on the law and the evidence, and that applies to the jurors, and that applies, we think to courts as well. A close relationship. Well this allegation here pertaining to Mr. Benedict, he is not the defendant, he is not one of the victims, he is a step removed being related to one of the victims.

THE COURT: Let me ask you this: I don't really recall; I have a recollection, but I know that he did not testify in the Elizabeth Haysom case. Was he even here in the courtroom? I don't know everybody who was in the courtroom.

MR. UPDIKE: I didn't either, Your Honor.

THE COURT: Did you have any contact with him?

MR. UPDIKE: Not during the trial, no, sir, and I don't know whether he was here. But Your Honor, the allegation here is that he went there two years, the class of '49, and Your Honor, I don't state anything to emphasize anyone's age, but that's better than 40 years ago. And to say that well somebody who's related to the victim went to school with somebody better than 40 years ago, I can't remember many of the people in my class, most of them if they walked through the door, my law school class, and I got out in '78, and to think about a relationship 40 years ago, that in and of itself, Your Honor, we feel is just ludicrous, that's no basis for getting out of a trial. If somebody were going to go back 40 years in every case that we have to try and find that somebody went to school with somebody that long ago, we'd never get any cases tried.

THE COURT: Well now Mr. Updike, in all fairness to the defendant, VMI is not exactly like other schools.

MR. UPDIKE: Well I wouldn't know, Your

Honor.

THE COURT: The VMI people who go to school together usually know each other, and it's a little bit closer than what you thought, it really is, and I want to be fair about that.

MR. UPDIKE: Okay, sir, and we're certainly glad that Your Honor did, but as I was stating, I did not go to VMI, and I have to talk about my own background.

THE COURT: That's right.

MR. UPDIKE: And I have to talk about the time lapse, it has been a good while. Going to the business about close friend, and Your Honor, we think -- we're just going on what's stated here, we don't know. But the allegation of it being a close friend, now there is a whole lot of difference between an accquaintance and a close friend, knowing of somebody and knowing them. Your Honor of course will address that.

But me going on this business of a close friend and going just entirely on what's stated here, it says the Court was a

close friend of the deceased and has attended at least one social function given by Mrs. Abbott, and it goes on. Well Your Honor, as I read this and I look at it, it strikes out at me as not making much sense.

If you have got a close friend and having attended one social function together, it would seem to suggest to me that the friendship is not all that close a friend. And a social function, though I was not in attendance here, can include a lot of people at a lot of different times, and that type of situation, again Your Honor, we would respectfully submit is not a situation of causing such closeness, or any interest in the outcome of the case or anything to cause recusal.

We think, Your Honor, that we have taken a little time, we recognize to address these issues, but we feel that it is an important matter, and we feel that the statements have been made here, they've been reported, and we think that a response was necessary. Thank you.

THE COURT: All right, Mr. Neaton, if

you would like to reply, I'd be glad to hear you.

MR. NEATON: Sure, thank you, Judge. I'd like to reply to the arguments that are basically in the order that Mr. Updike made them. First he indicated that well, Elizabeth Haysom pled guilty, and I don't really think that that makes a difference in our argument to the extent that we are arguing that by acceptance of the plea you have endorsed the Commonwealth's theory. It makes no difference whether that endorsement was by virtue of a plea or by virtue of a verdict, whether it be a jury verdict or a bench verdict.

I think also, the fact that he has alleged that there was no contest in the guilty plea is important, because at that time the Commonwealth's attorney presented an one-sided theory of the case, and perhaps neglected to present evidence that might be exculpatory or suggest a different theory of how the crime occurred.

I'd like to argue then against the Slayton case, because I have read the

Slayton case, and I'd like to say that at the outset the Slayton case addresses the issue of actual bias. I heard no case that was decided by or presented by the Commonwealth's attorney that addresses the issue of appearance of impropriety or address the issue raised in Canon 3-C of the Code of Judicial Ethics for this Commonwealth.

THE COURT: What code section?

MR. NEATON: 3-C, Judge, Page 64.

THE COURT: Okay, I'll read it.

MR. NEATON: I'd also like to distinguish the Slayton case, not because I think it's a particularly good decision, and it ought to be distinguished in that way, but because the facts of the case are different. In Slayton, you did not have the alleged purgerer in that case subsequently testifying against the other three co-defendants as a prosecution witness. And that is at least a possibility in this case, because Elizabeth Haysom is subpoenaed to testify in this case.

Secondly, Judge Burks was not in a position in Campbell County to be deciding a motion to suppress the defendant's statements. All he was asked to do was remove himself from the case and change venue. And in this particular instance there is also a motion pending as to whether certain evidence will be admissible. Moreover, the disqualification issue in the Slayton case never addressed the issue of whether or not the endorsement at the prior hearing of the perjury of the co-defendant would somehow affect the Judge's discretionary rulings in the subsequent trials of the other three individuals, and that is an allegation that we are making to this Court today.

But I think it's important to remember that Number 1, Slayton only addresses the issue of actual bias. It was decided a long time before, I think that this Canon of Judicial Ethics was written or adopted, and I think that what you have to look at also is not only whether or not you know in your own mind whether you can be fair or

not, but how it would appear to others objectively looking at this trial, whether you would appear to be fair, given the statements that you made at the Haysom plea, and given the opinions that you expressed there, and whether it would appear to be fair for you to sit as a judge, even in a jury trial, controlling the admission or the exclusion of evidence, and controlling the way that the trial is run, and how would others view that situation where you have endorsed the Commonwealth's theory of the case.

And I'm not even, when I say that saying that because you have endorsed the Commonwealth's theory of the case that you are actually biased, but what I am saying to you, Judge, is that it might appear to others that you are, and I suggest that it reasonably does, and that's what the Code of Judicial Conduct requires you to to look at and requires you to base your decision on in 1990, not in the 1940's.

The Mason case doesn't apply, because there's no co-defendant in the Mason case

testifying against Mason in a subsequent trial. The Justice case quotes Slayton with approval, but this case is not a remand or new trial based upon a mistrial like the Justice case was, this is a case where you have a co-defendant who's entitled to separate consideration of his guilt or innocence in this case, and you have a trial Court who two years or three years before has set -- has adopted the Commonwealth's theory of the case and did not reject the plea, because the evidence was insufficient.

The Stockton case again is a case only addressed to actual bias, that because the defendant cussed the Judge out in his earlier trial, that the Judge would be actually biased against the defendant, and you have to go one step further than that. The Deahl case simply says that because the Judge is aware of other problems that a defendant or a party may have had in a case, that that isn't of itself grounds for actual bias. Well there's more in this case than there was in the Deahl case, and

I think that if you read the facts of Deahl, which I have, and compare them to the facts of this case you'll find that this case presents a rather unique and compelling situation.

The Stamper case, again, let me just say that the Commonwealth attorney admits that the Stamper case really doesn't apply on the issue of actual bias. On the issue of the number of rulings for or against Mr. Updike, all I can say, Judge, is that I have asked people, and I make my allegations based upon information and belief.

The issue of the close friend, I think that you can resolve that by simply when you state for the record whatever your relationship was with the Haysom family. But I think, Judge, that you have to look at not only whether you know in your own mind if you're biased or not, you have to look at what your responsibility is to the justice system in this state, and you have to look at how people would view this trial under all of the facts and circumstances of

this trial.

You have to look at all the publicity in this trial, you have to look at everything that happened at the Haysom plea, and I admit, it was a plea, not a trial. And you have to look at everything, and how appearances are in this case. And I think that is the important thing in this case, and that is what the rule of ethics speaks to in this case, and that's what the Code of Conduct for judges and for attorneys speaks to in this case when they talk about avoiding the appearance of impropriety.

And I think that if you read the Canons, I think that you will conclude that there is a reason to challenge your impartiality in this case, and that you might, even though you may not be actually biased against Mr. Soering, that to some, you would appear possibly to be biased. And I think for that reason, for the sake of the justice system you ought to remove yourself.

THE COURT: All right, thank you, Mr.

Neaton. I don't really have any prepared comments, so the statement that I make is based on my best recollection. I could be wrong in some of these recollections, but I have no hesitation at all in disclosing my connections here. I never have had any notes, because what I am stating to the best of my recollection are the facts.

First, my connection with Mr. Updike, I have never had any social connection with Mr. Updike. As a matter of fact, there may have been a few times that we have had lunch together, but I'm very careful not to have lunch with him when a case is going on, and as a matter of fact I do not have lunch with him on a regular basis as many of the lawyers sitting in the courtroom well know. I have never felt that my relationship with the Commonwealth's attorneys in this area, Mr. Harry Garrett and Mr. Updike have been anything but professional, but that's just my feeling. I think Mr. Garrett, he usually said that I was not ruling in his favor enough, and I heard that more than I wanted to hear it.

But be that as it may, I don't think that's an important point here.

Unfortunately, judges in fairly small areas like this do not have the luxury of disqualifying themselves in all cases where they know one of the parties or know someone connected with the trial. I think that would be nice if we could do that maybe, because my own preference is to try cases where I don't know anybody in the trial. And frankly, that's one of the reasons that I enjoy sitting in Bedford, because I live in Lynchburg and try cases in Bedford, and I don't know as many people in Bedford County, and it makes it nice.

But I would say honestly that probably in 20 percent of all the cases I hear, criminal and civil, that I know someone connected with the trial, either the defendant, or a party or a critical witness in the trial, so that's really not too unusual in this area.

Now when the Elizabeth Haysom trial came up, I gave some serious thought on my own as to whether or not I should sit in

that case, because there are some connections here. There were two local lawyers defending in the Elizabeth Haysom case, one from Lynchburg and one from Bedford, and of course they knew or could easily find out what my connections were, but in that case there was not a motion for recusal. And I made the decision on my own that I could fairly try the case. I assume the feeling is that if I knew the victim's family well, that I would render harsh punishment to the -- if I knew the victim's family well, that I would render unduly harsh punishment to the defendant.

I don't think it really worked out that way in that case. As a matter of fact the criticism that I received from the Lynchburg newspaper was that I didn't give Elizabeth Haysom the life sentence, I gave her 90 years. I felt that that was an appropriate sentence in that case at that time and I still feel that way. But it didn't really follow that because I may have known one of the victims, that I was necessarily going to give the maximum

sentence to someone who had pled guilty to being connected with a murder.

As far as my connection with the victim's family, I did know Risque Benedict, who is a brother of Nancy. He did go to VMI two years, he did not graduate with me. Risque and I have never discussed this case. I think he's made a particular point of not discussing it with me, and I know that I have. Risque has not lived in this state a great deal of the time, I think now he's in California, and I expect maybe I have seen him four or five times since graduation, I'm not sure, but he's not someone I see on a regular basis. I think a lot of him, but he's not a very, very close personal friend, but certainly I know Risque Benedict and I would not deny that.

I knew Nancy Haysom mainly because of Risque. The statement in the defense allegation that I was a close friend of the Haysoms is simply not true; I was not, as everybody in this area who knows anything about it knows, I have never been in the

home of -- the Haysom home. I did attend a fairly large dinner party, as I recall, on one occasion at Mrs. Abbott's, and I really do not recall ever seeing either Elizabeth or Jens Soering, never.

Now it may be that they were there, it may be that they were somewhere where I was, but I really don't remember it. I could not describe either one of them, and I'm sure I would not have recognized either one had they come in a room, because I didn't know them. I only met Derek Haysom on one occasion to my knowledge, and that was at the party which has been mentioned at the Abbotts'; that's the only time I ever met him.

The Haysoms have never been in our house for any social engagements and we were never in theirs. I'm trying to think if there's anything else. But it did give me some concern prior to the Elizabeth Haysom case, because I'm not a complete stranger to the victim's family, and it gives me some concern now, Mr. Neaton, and I might say that I respect your right to

file the motion that you have filed, I'm professional enough to not have any malice toward you or to the defendant because of it. I have been on the bench about 24 year, I guess, and I think I have developed the capacity to not have feelings of that kind, I hope I have.

I must admit, though, that there have been some times here this morning when I felt that I was on trial, rather than Mr. Soering. You know, judges don't get to testify, we just have to take it sometimes, but that's a part of the job, and I would not be making these statements, except I think it's necessary to make these statements in view of the defense counsel's request that I do. But I think that's it, clearly and simply.

Now I think you have raised some serious questions about recusal, Mr. Neaton, and I think they deserve serious consideration on my part. I cannot rule on this matter today from the bench, I need to go back and give this matter some serious mature thought. I need to read some of

these cases that have been cited to me, because it's a question of law as much as a question of my own conscience. And I'm not real sure how I will decide on this.

But I would like to ask you this question, because I think it might have -- it could be an important question, not that it will affect my decision, but it's a pertinent question, what effect would my recusal in the case, my getting out of the case have on the speedy trial issue if my getting out of the case means that the March date will have to be further delayed? What is your position?

MR. NEATON: My position would be that whatever the law says that such an action would have, I would accept that. In other words, if the law says that because we brought the motion for recusal and you granted the motion, and that is delay to be charged to the defendant, then the law says that, and we accept that fact.

So while we are in a position where we're not going to step forward and affirmatively waive speedy trial, what

we're saying to you, Judge, that if by our actions we have brought on a waiver of a certain part of the speedy trial time limit, then that's just a consequence of us having brought the motion and and we accept that. And whatever our intent was on the 16th not to waive speedy trial, obviously, as a trial progresses and you develop a strategy, or file a motion that may result in delay, I mean if it's chargeable to us it's chargeable to us, if it's not, it's not.

But what we're saying is we'd like the trial to occur within the five-month period, that's what we're saying to the Court. But what we're also saying to you is that if by our actions today, and if you grant the motion, that that means that we have waived a certain portion, or that we have extended it another month or two, or however long it would take to get a replacement, then we have to accept that, because that's what the law says, and that's a consequence of our motion.

THE COURT: Well that's not the most

direct answer I have ever heard. I'm sure you can appreciate my position. I wouldn't want to be in the position if I decided to recuse myself of then finding that you follow that with an immediate motion that this whole case must now be dismissed, Judge, because you have recused yourself and now the case cannot be tried in March and the new date is outside of the speedy trial, so therefore the whole case has to be dismissed, I think that's a serious consideration.

I would think that if the motion -- if you're making the motion for me to recuse myself, that you should say one way or the other whether or not you would waive speedy trial as to any delay in the trial caused by my recusal; are you unwilling to say that?

MR. NEATON: No, I'm not.

THE COURT: Well what are you saying?

MR. NEATON: I'm saying we'll waive it if it means you'll grant -- if you grant the motion and it means that we waive speedy trial, we'll waive it, that's what

we mean, we'll waive it.

THE COURT: I probably left out something, because I probably should have written out everything I was going to say. But I have done the best I can. I think what I have said is accurate to the best of my knowledge, if it's not, charge it to failing memory. I have been here almost 25 years now and there are a lot of cases that come through these courts. I think we have argued this particular point. I am not prepared to give a ruling on it today, I do need to give it some serious consideration.

One part of me says that I really don't want to be in a trial where people don't want me. The other side of me says this case happened in my jurisdiction and I have the responsibility, and that getting out will cause a further delay in a case that's already been delayed too long. That's what's going through my mind, but I am going to approach it not from that angle, but from the angle of whether or not if I stay in the case, anything that I might do even with a jury trial might have some

effect on the defendant's rights. And if I feel that it might, or if I feel that it's viewed as improper for me to do it, or if I feel that this perhaps will create an appeal issue which might further delay the final disposition of this case, then I might recuse myself. Otherwise, I am going to stay in the case.

And I cannot tell you that, but I will say to you that I am not going to delay my ruling, and that I will give you a ruling on this and any other motions that come up today within one week from today, and they will be in writing. The Court will take a brief recess.

(Whereupon a recess was taken.)

THE COURT: What I'd like to do if possible is go ahead and finish up this hearing before taking a lunch break. I really don't know whether we'll be able to do that or not, because I'm not sure how much more we have. But I do know that there was a motion to disqualify the Commonwealth's attorney, which I think certainly could be or should be argued

today. Both sides realize, of course, that in the event that I decide to recuse myself, that I will make no further rulings in the case; it would not be appropriate for me to make any ruling at all once I recuse myself, that's clear. But in any event, I will hear those motions, if counsel desire. All right, Mr. Neaton.

MR. NEATON: Judge, it would be my preference, if it's possible, to defer any argument on motions until after you decide the recusal motion, only because I just wanted to avoid any further appearances. I don't know if it would be creating extra work, for example, if we do argue the remaining motions in front of you, and if you should decide to recuse yourself, then we'd have to argue the motions again in front of another judge.

THE COURT: Well, there are two sides to that. If we argue the motions today, you won't have to come back regardless of which way I rule. I think I will prefer, since these were set for hearing today, that they be argued today.

MR. NEATON: In terms of the venue motion, Judge, we were wondering if the Court wants a date on which we could present evidence in support of our claims made in the venue motion, or if the Court feels that it needs no evidence at this point to decide the motion, if you have any sense of direction you would care to give the defense at this time.

THE COURT: Well, I do have a sense, I do have a feeling about that, but I think probably both sides should at least have an opportunity to briefly express themselves on it. But I do have a feeling about that.

MR. NEATON: All right. Then I'll proceed with that. Our view on venue, Judge, is that we do recognize that the law in this state, as is the law in most states in the country, is that venue, the mere volume of publicity does not in and of itself justify a venue change. It can be a contributing factor that the Court can look at in judging whether or not a fair and impartial jury can be seated in the county in which the case has been brought.

But it's our position on venue that all of the publicity -- the publicity has gone beyond just reporting facts about this case, that the publicity has taken the form of editorials, it has taken the form of letters to the editor, it has taken the form of comments made by the Commonwealth's attorney and by others.

THE COURT: Excuse me, let me save you some time on this. I will take judicial notice of the fact that there has been a tremendous amountof publicity; and I'm not trying to be facetious, a tremendous amount of publicity about this case, not only in Bedford, but in Lynchburg, in Roanoke, in other states, in the Washington area, and that even in a lead editorial in the London times this case was discussed. So there's no question about the fact of publicity as far as I'm concerned.

MR. NEATON: It's the editorials and the expressions of opinion which have occurred, particularly in the last couple of years as the extradition process and appeals worked their way through the

European system that concerns us, because the articles just reporting facts report facts, but when the large newspapers and even perhaps television and radio stations start expressing opinions, and when people's opinions start being expressed in the form of the editorials that we cited in the motion and attached to the motion, it really concerns the defense whether or not we can get a fair jury in this county, and whether the more prudent course of events ought to be to move the case to another county in which the amount of publicity and the nature of the publicity has been less.

Certainly this case has been reported probably all throughout Virginia, as you said, but in other sections of the state it doesn't have the newsworthiness and the amount of inches in the newspaper and the amount of minutes on a local newscast that this case has produced over the last several years. And that's what concerns us. And that's why the motion is brought, it's not, for example, not like when the motion was brought in '87, by Elizabeth

Haysom's attorneys where as I read the motion, the motion simply said there's been a lot of publicity about the case, please move the case out of Bedford. What I'm saying is there's been a lot of publicity about the case, there's been a lot of opinions expressed publicly about the case; they have affected people in this county to the extent that you have people even dropping alleged when they talk about whatever crime that my client may have committed.

You have people expressing opinions on the street, coming up, saying we know your client -- I'll just relate a conversation alongside the courthouse from the last time I was here, somebody comes up to me and says, you know, talking about the issues raised in the recusal motion and saying well, we know your client was involved, but we think we want him to have a fair trial. I thanked them very much for their concern, but I mean it's that expression of feeling that is unsolicited by me at this point in the community where somebody comes up to me

and says that to me.

I'm sitting in a restaurant in Roanoke trying to eat a quiet breakfast the last time I was here the day after my client comes back, and overhear a couple of gentlemen at another table talking loud as one can hear in the restaurant expressing their opinion about the case. And so it's not the quantity of publicity that I am concerned about, it's the quality of opinions that exist in this area of Virginia.

And I'm not saying it's wrong for people to form opinions, but I'm saying the opinions exist, and I think that the prudent thing to do would be to move the case to another county where perhaps the feelings aren't as high, or perhaps the opinions haven't been formed during the four years that this case has been pending, so that the constitutional right to an impartial jury that the defendant has is greater protected.

Because as Mr. Updike has now said, that this is going to be a jury trial, and

I think that it's hard sometimes once you form opinions to change those opinions. I know it's true in my own life, if I form an opinion, the older I get the more difficult it is for me to change, and that's true for most people.

And it's not wrong for them to have the opinions, but it's wrong to run the Risque that because the folks around here have those opinions, that my client should run the Risque that people cannot honestly get in that jury box and say at the time -- they may honestly even say at the time I think I can set aside my feelings about the case and render a fair and impartial verdict, and they may have all the good intentions in the world, but they aren't able to accomplish it. And I think for his sake, and for the Commonwealth's sake in this case, we ought to have a different location for the jury trial.

THE COURT: All right, sir, thank you. Mr. Updike, would you have any comments on this issue?

MR. UPDIKE: If I might, Your Honor.

Mr. Neaton has conceded certain principals of law which are well known of course to him, and to me and to all of us. But if we could quickly emphasize those principals of law, and they are repeated in nearly every capital case, because this issue comes up, and there's nothing unusual about them, or really anything different about the expressions in the different cases.

But just one case for the purposes of the record, Stockton v. Commonwealth at 227 Va., 124, that being a 1984 decision. Within one paragraph they emphasize three principals of law very precisely, change of venue is within the sound discretion of the trial court, and refusal to grant it will not constitute reversible error unless the record affirmatively shows an abuse of discretion, and that being the first principal, that it is within the sound discretion of the trial Court.

The second one, as the paragraph continues, there is a presumption that a defendant can receive a fair trial from citizens of the county or city in which the

offense occurred. To overcome this presumption, the accused has the burden of clearly showing that there is such a widespread feeling of prejudice on the part of the citizenry as will be reasonably certain to prevent a fair and impartial trial, those principals of law, of course being that the presumption that there can be a fair trial in the area where the offense occurred, and secondly, that the burden is upon the defendant to show otherwise that there is such a widespread feeling.

And the third principal within this paragraph states the showing of either extensive publicity or widespread knowledge of the crime or the accused is insufficient by itself to justify a change of venue. So Your Honor, for these reasons, because of the presumption, and because of the defendant's burden, and because of the very principal that a lot of publicity in and of itself does not justify a change of venue. We feel that the effort should be made to impanel the jury here in Bedford County.

We know that there's been a lot of publicity, but as we also all know, the fact that people know certain things about a case, or know certain portions of the evidence, or even that they have formulated certain opinions does not automatically exclude them from the jury, but rather whether they can put aside any information outside the courtroom and decide the case fairly based upon the law and the evidence. And because of the presumption, Your Honor, we just feel that we can't just state because there's been a lot of publicity, that the people of Bedford County can't afford a fair trial.

And as far as the publicity itself and the nature of it, it was mentioned and it's mentioned in the motion for change of venue itself, referenced to certain comments that I made, and I'd like to get into that a little bit more in terms of the motion to disqualify me. But I would --

THE COURT: Well now I assume we're not arguing that point at this time.

MR. UPDIKE: No, sir, Your Honor. And

I'm just mentioning that, because it is stated within the motion for change of venue, and I'll get to that whenever we get to the other motion. But it would be our feeling, Your Honor, and what I have always felt would be a good way to approach a situation such as this, would be to bring in a number of Bedford County jurors on the first day of the trial, and for arrangements to be made for a change of venire to appear on the second day of the trial.

And the statute allows for a change of venire, and it would seem that under those circumstances we could actually find out whether or not a jury can be impaneled here in Bedford County, and if as we go through the voir dire examination which I should emphasize, as we all know, because of the publicity should be extensive, and to find out whether the individuals, the potential members of the jury know anything about the case, and if they do and cannot set aside that knowledge and those opinions, then they shouldn't be on the jury; we all know

that and agree with that. But that's the only way that I know of to find out what potential jurors know.

On the other hand, as we go through that process with a Bedford County jury, if it become obvious that a jury panel cannot be found here in Bedford, then we'd let the jury come in on the second day from whatever jurisdiction is selected by the Court. On the other hand, if a jury was selected from Bedford, then the jury from the other jurisdiction could be excused at the end of the day. And it just seems to me at least, that that would accomplish all ends, it would make sure that a fair and impartial jury is selected either from this county, or if that cannot be done, from somewhere else, and a trial delay would not result. Thank you.

MR. NEATON: Judge, a change of venire would be, I think inappropriate in this case, only because the venire, the new jurors would be coming into the intensely publicized area. And I think that if the Court is concerned about the existence of

the effect of the publicity upon jurors, then I think that the case has to be moved physically out of Bedford County.

I don't think, and although I appreciate the Commonwealth's concern and willingness to suggest that as an alternative in this case, I don't think that it would work in this particular case. Maybe there are other cases in which it might work, but here the jurors would still see the cameras, would still see the reporters, the news, and I'm not talking about in the courtroom, I'm talking about the papers, and the cameras outside. And I think you might be unfortunately in the position where you might have to sequester them.

And I think it would be an extreme inconvenience to bring people in from another part of this state when a smaller number of folks could just move to another part of the state and accomplish the same result. On the issue of whether you should try to select a jury here first, I would say Number One, the defense is prepared, if

the Court would set us a date at which we could bring witnesses in who would represent a cross-section of the community in Bedford County to testify as to their opinions about this case, and we could do so in person and by affidavit if the Court would so desire in this case.

I would think that it might save the county the time and the opportunity to give you or whatever judge the opportunity to hear exactly what the cross-section of the community in Bedford County thinks about this case. I think that you recognize, I think we all recognize that perhaps the publicity in this case is unique, and I think that the effect on the people has been so great, that in all fairness to everybody in the case, but especially the defendant, I think that the trial should be moved physically out of this county.

THE COURT: All right, sir. This is a matter left largely to the discretion of the trial judge, and it occurred to me that not all trials are moved because of extensive publicity. As I recall, the

trial involving the attempted assassination of Presiden Reagan was tried in Washington. As I further recall, the Buchannan cases, which resulted in a capital murder conviction in Amherst County were tried in Amherst County with Amherst County jurors, so it is not always true that extensive publicity mandates the moving of the case from the jurisdiction.

However, I am going to save both sides some time on this issue. And again, recall that any rulings that I make today are tentative rulings conditioned on a threshold ruling which I must make as to my further connection with the case. My own feeling is that it would probably be harder to try this case in Lynchburg or Roanoke than it would in Bedford County. But I think it will be difficult to try the case anywhere in the Commonwealth of Virginia where the prospective jurors have not read a great deal about this case and have not seen comments in the newspaper as I have, rather extensive comments, both from Mr. Updike and Mr. Neaton.

But I have -- it is my feeling that basically the defense is correct here, that in view of all the publicity, that this case should either be removed entirely to another county or city in the Commonwealth of Virginia for trial, or that a separate venire, jury from some other location somewhat distant from here should be brought in to hear the case. I have not made a decision as to which of those alternatives I would follow.

I might say that I disagree with some of the comments you made, Mr. Neaton, about the problems with venire being brought in. As a matter of fact, a jury that is brought in here from some distance goes back to their homes when the case is adjourned, and there's no need to sequester them. But in any event, I am basically granting the defense motion for a change of venire or a change of venue, and I will go beyond that and state that while this is not usual in non-capital cases in this Court, that I will also grant either individual voir dire or voir dire in groups of three. All

right, let's go to the next issue.

And I don't think that there's any need to bring in anymore testimony or affidavits on this issue. I accept the fact that there has been too much publicity on this case in Bedford County, and I will not try this case if I am in it, with Bedford County jurors. All right, sir, your next point.

MR. NEATON: The next point is the motion to disqualify the Commonwealth's attorney, which the defense now withdraws.

THE COURT: All right, sir. Thank you.

MR. NEATON: And the next point is the motion concerning the Court's request at the last hearing, and I entitled it motion to set aside gag order, I don't know if that's the proper terminology. I guess it's more of a motion brought as a means of asking the Court for clarification on what its request meant. And let me explain to you the problem, or the confusion -- concern I have about this, and that is clearly I reviewed the discplinary rules and the rules governing practice of an

attorney in this state that prohibit me from making comments about the evidence and the nature of the evidence in this case, and I would not do that whether you requested me to do -- not to do it, or whether that request was made at all.

What I am saying, though, is sometimes reporters come up to you and ask you, will call you or ask you, have you done this, have you filed the motion to change venue, have you filed this, have you received something from the Court. And I view your request, and I view it as a serious request by the Court, and view it as an order of this Court, because it's the sense of this Court that I shouldn't say anything. And I'm just wondering if that is what you meant. Because just my sense of courtesy, even as to members of the media would normally compel me to say well I'll save you a trip to Bedford, I did file the motion, or something like that, rather than to come 20 miles to the courthouse to look at the Court file.

And I'm just wondering if questions of

an informational nature such as those are what Your Honor meant by your request. And I'm simply asking, if that's what you meant, then I understand that, but I would like to be in a position to say yes or no at least to some of these motions; not to go wild in the papers trying my case, I don't want to try the case in the papers, it's already been tried in the papers. But I think that I just feel sometimes discourteous, that's all, when I say I can't even comment on whether I have done something or not, which I know is a matter of public record down here.

MR. UPDIKE: Your Honor, just for the purposes of the record, if I could emphasize that there's no reason for emphasis, because we all know this, but this matter came up last time, and both sides agreed, and the Court entered this particular order upon the concurrence of the parties here. And Your Honor, I just feel that the order should remain as it is. We feel that if we're going to talk about publicity and talk about the effect of it,

that as we agreed earlier, we should do everything possible to minimize publicity, and we think that this order has this effect.

If I might state, Your Honor, my view of the order, I personally have appreciated it, and I have not discussed it with any members of the media to know their feelings about it. But they're always very courteous, no problem with them, but I just wonder from their perspective, if for example Mr. Neaton files a motion, and we're dealing with a newspaper reporter and something is said, then isn't the editor going to tell the newspaper reporter, well you have got to get to Updike and get a copy from him, or if we're talking about electronic media, the same thing from news directors, and first thing you know, they have to be running back and forth, well this one said this, how about -- what does the other one have to say in an effort to present a balanced story.

Well my experience since the gag order has been entered has been complete

cooperation from members of the media. And they have realized that I couldn't comment on the case, they haven't taken their time or my time to ask questions, and it would seem to me that first of all, it's made it easier on me, but I would wonder if it didn't make it easier on them that they didn't have to go running around to see that there is a comment, they know that no comments are supposed to be made.

And concerning informational type of things, as I have looked since the gag order has been entered, it seems to me that the press has done an excellent job of finding out about every motion that's been filed, and I'm not sure that they need any help from counsel or me. For example one, and I can't recall which one it was, Mr. Neaton very courteously delivered it to me on a Friday, I think it was late in the day, but somehow they found out about it and it was in the next day's paper. So I'm just saying that I don't think that they need any help, they're doing right well in knowing what's in the file.

THE COURT: Anything else, sir?

MR. NEATON: I have no reply.

THE COURT: I have been reading motions in the morning paper at breakfast that I had never seen before, that's the truth. The news people are doing a pretty good job about keeping up on this case. Now let's put this in perspective. In the first place it's not a gag order, gentlemen, check the cases on it. A gag order traditionally is an order which gags the media or the press; that's what all the cases refer to when they refer to a gag order, and I never intended it to be that.

And let's make it clear that my order does not affect the media or the press in any way, I have placed no restrictions on them. I have only placed restrictions on counsel and myself about not discussing this case prior to trial. Now that's a -- as a matter of fact, I went back and checked, and the U. S. Supreme Court in the Urquidez case, I think it was Urquidez, actually recommended in high profile cases that the judges not gag the press, because

the judges have control over the attorneys as officers of the Court, and that the proper procedure for judges is to direct the attorneys not to comment.

And I must say, Mr. Neaton, that this was not one of your strongest motions. First, I think the terminology was wrong, and secondly, it really doesn't make any sense not to have an order of this kind to protect the integrity of this trial, which I'm sure you are interested in, as well as Mr. Updike and the Court. The motion to change or further explain that which is as clear as it can possibly be so far as I'm concerned is denied.

Are there any other matters to take up today?

MR. NEATON: No, Judge, there would be no other matters to take up. The only thing remaining would be to set a date for the evidentiary hearing on the motion to suppress the statements, and we can do that, probably by telephone after you issue your order.

THE COURT: I'd rather do it today, get

as many things taken care of today as I can.

MR. UPDIKE: Your Honor, realizing of course the effect of any further orders or rulings of the Court, if it's necessary for Detective Inspector Beever to be here, and Detective Constable Wright, I have talked to them about their schedules, and if I could briefly, Your Honor, go over the period between now and March the 8th, our situation was that they could have been here next week on the 14th, but there was a conflict with counsel which we understand, of course.

Following the week of the 19th, Detective Inspector Beever had some problems at the end of that week, and I didn't think that there were Court dates available during the first part. And then as we proceed through the week of the 26th, we were looking at possibly having this on March the 1st, which I know is Your Honor's motion day, and that's why I wanted to talk to you about that. Our thinking, or at least my thinking was if we tried it on

March the 2nd, should it continue over for any reason that would cause problems.

THE COURT: Let me ask you this: What about Wednesday February the 28th?

MR. UPDIKE: Yes, sir, Your Honor, the people would be available for that as far as coming from England. Of course I was just talking about moving it back another day, and I don't think that that really matters. But what I was trying to do is in talking to Ken and Terry, we were thinking that the case is going to start on March the 8th; rather than bringing them over here and sending them back, and then bringing them back again, that the closer we got to March the 8th, that we'd just leave them here. But there again, Your Honor, that's just one more day.

THE COURT: If the two of you all can agree on a date, I'm certainly not going to interfere. I've already said that this case will have to take priority over other settings. Is that the date that you all would like, March the 1st?

MR. NEATON: I told Mr. Updike that any

day during the week of the 26th is fine with the defense, so the 28th, the 1st, 2nd.

MR. UPDIKE: Could I correct something Your Honor? Detective Inspector Beever will be away from his home during this period of time, and would not come back to his home until Sunday the 25th. And that's why in his discussions with me, we were talking about them traveling to this country on Monday the 26th, and allowing us Tuesday and Wednesday to prepare for these motions that would be heard on Thursday, because it has been a long time since we have discussed this situation, if Thursday is possible; if not, Wednesday would be fine.

THE COURT: What I would like to do is set this up in the afternoon, so that previously scheduled matters on motion day involving a great number of attorneys could be to some extent accommodated. And I have no problem with staying here into the evening on this, if that becomes necessary. I suggest we set this for 3:00 p.m. on

March the 1st with the understanding that we'll try to stay here until we finish that day, would that be a problem?

MR. NEATON: That's no problem, Judge.

THE COURT: That would allow me to take care of most of my other work that day. How about you, Mr. Updike?

MR. UPDIKE: Oh, that is fine, Judge. I was looking at the calendar to see, because the Commonwealth is making this request, if there's any other way without interfering the Court's motions.

THE COURT: That would be fine, that will suit me just fine. Suppression hearing on the confession set for 3:00 p.m. March the 1st, 1990. Now again, I do think that we should keep everything on the record, and I would like an order prepared, either one of you to prepare an order reflecting what rulings I have made today, and showing exactly what was done. I think that's all, isn't it?

MR. UPDIKE: Yes, sir.

THE COURT: I think that's all, isn't it? I want to thank both counsel for the

way you have conducted the hearing. All right, let's recess court one hour for lunch.

END OF PROCEEDINGS.

STATE OF VIRGINIA

AT LARGE, to-wit;

I, Jacquelyn Keen, Notary Public in and for the State of Virginia at Large do hereby certify that the foregoing proceedings were taken before me, and that Pages 1 through 94 contained herein represent a true and accurate transcription of said proceedings to the best of my Stenographic ability.

Witness my hand this 27th day of July, 1990.

My commission expires September 30, 1993.

Jacquelyn Keen

Notary Public