

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BEDFORD

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

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TRANSCRIPT OF PROCEEDINGS

February 7, 1990

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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.  
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Reported by: Jacquelyn Keen

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

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

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

16 THE DEFENDANT: Just Jens Soering.

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

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

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

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

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

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

9 THE COURT: Yes, sir.

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

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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

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

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

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

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

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

13 THE COURT: His name was Risque  
14 Benedict.

15 MR. NEATON: Yes.

16 THE COURT: That's correct.

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

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

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

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

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

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

20 THE COURT: Well go ahead.

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

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

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

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

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

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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

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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

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

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

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

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

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

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

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

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

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

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

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

25 MR. NEATON: I understand that. And

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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

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

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

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

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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

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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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.

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

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

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

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

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

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

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

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

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

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

16 Briefly proceeding, Your Honor, quickly  
17 proceeding, I should say, the matter of  
18 **Morris Odell Mason v. -Commonwealth**, this  
19 is a **1979** case at **219 Va.**, beginning at  
20 Page **1091**. This was a capital murder case.  
21 As I stated, it is a 1979 case, and on Page  
22 1097 of that opinion, the Supreme Court of  
23 Virginia in 1979 cites with approval the  
24 Slayton case pertaining to Judge Burks.

25 Now in the Mason case just quickly,

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

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

25 The Court goes on to say, Mere

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

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

25 Moving quickly, Your Honor, to the

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

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

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

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

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

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

9           So the Court put on the record the  
10 reason that he could give a fair and  
11 impartial trial and there was no reason to  
12 do otherwise. The Supreme Court of  
13 Virginia, in affirming the fact that the  
14 Judge did not abuse his discretion by  
15 refusing to recuse himself stated on Page  
16 673, a trial judge must exercise discretion  
17 to determine whether he possesses such bias  
18 or prejudice as would deny the defendant a  
19 fair trial. Reasonable discretion. In  
20 support of that they cite Slayton, Judge  
21 Burks' case.

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

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

9 Moving very quickly if I might, Your  
10 Honor, to Stockton v. Commonwealth at 227  
11 Va., at 124, this being a 1984 decision.

12 In this case, this is a situation in which  
13 Mr. Stockton was being tried before the  
14 Court on a capital murder charge. The  
15 defense came in and pointed out the fact  
16 that the same judge had previously heard a  
17 case involving Stockton, and during the  
18 previous case, Stockton got up and cursed  
19 the Judge. So of course the defense was  
20 arguing, well Your Honor, our client has  
21 cursed you previously, that would have to  
22 cause some bias, some prejudice, somebody  
23 else ought to hear the case.

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

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

12 Another case, and I think this is  
13 nearly the last one, this being a 1983  
14 case, this being **Deahl**, D-e-a-h-l v. the  
15 **Winchester Department of Social Services** at  
16 **224 Va., 664.** This case again, as I  
17 indicated, a 1983 decision --

18 THE COURT: 220 what?

19 MR. UPDIKE: 224 Virginia.

20 THE COURT: All right, I have it.

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

1 Judge had heard a custody matter pertaining  
2 to these parties. Later the Court came  
3 back and had to hear a motion for  
4 termination of parental rights involving  
5 the same parties. The parties said, well  
6 Your Honor, you have already heard all the  
7 evidence, you've heard this matter, you  
8 should be recused. And the Court stated  
9 that he could provide a fair hearing,  
10 refused a motion for recusal and the  
11 Supreme Court upheld the exercise of  
12 discretion and stated that it again, citing  
13 the quote from Justice and Slayton saying  
14 that the Court must exercise reasonable  
15 discretion, and the Slayton quote, "Merely  
16 because a trial judge is familiar with a  
17 party and his legal difficulties through  
18 prior judicial hearings does not  
19 automatically or inferentially raise the  
20 issue of bias", and that's what's been done  
21 here.

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

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

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

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

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

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

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

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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

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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

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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?

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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

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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 acquaintance 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

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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

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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

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

10 THE COURT: What code section?

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

12 THE COURT: Okay, I'll read it.

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

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

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

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

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

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

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

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

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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

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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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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

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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

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

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

20 MR. NEATON: No, I'm not.

21 THE COURT: Well what are you saying?

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

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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

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

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

16 (Whereupon a recess was taken.)

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

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

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

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

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

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

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

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

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

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

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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

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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

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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

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

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

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

25 MR. UPDIKE: If I might, Your Honor.

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

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

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

1 offense occurred. To overcome this  
2 presumption, the accused has the burden of  
3 clearly showing that there is such a  
4 widespread feeling of prejudice on the part  
5 of the citizenry as will be reasonably  
6 certain to prevent a fair and impartial  
7 trial, those principals of law, of course  
8 being that the presumption that there can  
9 be a fair trial in the area where the  
10 offense occurred, and secondly, that the  
11 burden is upon the defendant to show  
12 otherwise that there is such a widespread  
13 feeling.

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

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

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

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

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

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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

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

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

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

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

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

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

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

8 I would think that it might save the  
9 county the time and the opportunity to give  
10 you or whatever Judge the opportunity to  
11 hear exactly what the cross-section of the  
12 community in Bedford County thinks about  
13 this case. I think that you recognize, I  
14 think we all recognize that perhaps the  
15 publicity in this case is unique, and I  
16 think that the effect on the people has  
17 been so great, that in all fairness to  
18 everybody in the case, but especially the  
19 defendant, I think that the trial should be  
20 moved physically out of this county.

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

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

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

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

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

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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 disciplinary rules and the rules governing practice of an

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

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

25 And I'm just wondering if questions of

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

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

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

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

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

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

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

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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

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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

1 as many things taken care of today as I  
2 can.

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

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

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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

1 day during the week of the 26th is fine  
2 with the defense, so the 28th, the 1st,  
3 2nd.

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

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

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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

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

END OF PROCEEDINGS.

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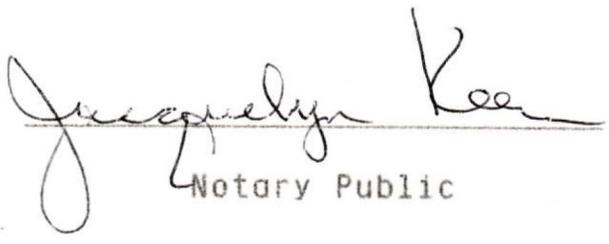
STATE OF VIRGINIA

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.

  
Notary Public