

FOURTH DAY
 IN THE COURT OF COMMON PLEAS
 IN AND FOR PHILADELPHIA COUNTY
 FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
 CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	JANUARY SESSIONS, 1982
	:	
v.	:	
	:	
MUMIA ABU-JAMAL, a/k/a	:	
WESLEY COOK	:	NOS. 1357-59

Friday, June 4, 1982

253 City Hall, Philadelphia, Pennsylvania

BEFORE: ALBERT F. SABO, J.

APPEARANCES:

JOSEPH J. MC GILL, ESQ.,
 Assistant District Attorney,
 For the Commonwealth;

MUMIA ABU-JAMAL,
 In Propria Persona;

ANTHONY E. JACKSON, ESQ.,
 For the Defendant.

MR. MC GILL: Your Honor, both Dr. Coletta and Dr. Cudemo are present.

MR. JAMAL: The defense would call Dr. Regina Cudemo.

DEFENDANT'S EVIDENCE (CONTINUED)

REGINA CUDEMO, M.D., Sworn.

DIRECT EXAMINATION

BY MR. JAMAL:

Q Dr. Cudemo, are you a medical doctor?

A Yes, I am.

Q Were you working as a medical doctor in Jefferson Hospital on December the 9th of 1981?

A Yes, I was.

Q What room or area of that hospital were you assigned to?

A The Crisis Center in the Emergency Room.

Q Could you speak into the microphone, please?

A The Crisis Center in the Emergency Room.

Q And, to make sure everyone hears you, what area or areas of the hospital were you assigned to that night?

A The Crisis Center in the Emergency Room.

Q When did--at what time did you begin working at the

Crisis Center and when did you leave?

A Five o'clock that afternoon of that day, and my on-call duty was finished at 8:30 the 9th in the morning.

Q On the morning of the 9th, did you happen to see a black man lying on the floor of the Emergency Room where you were working?

A Yes, I did.

Q Did you see him brought into the Emergency Room?

A No, I did not.

Q Were any police around?

A Yes, there were.

Q How many?

A I do not remember the exact number.

Q Approximately.

A Four to six.

Q Dr. Cudemo, how far were you from the man surrounded by police?

A I would estimate eighteen to twenty feet.

Q What were they doing to that man?

A The only thing I witnessed was that they were standing around him, and at one point it seemed that one of the policemen had raised his leg, but I could not see below his knee.

Q He raised his leg?

A Yes.

Q Would you illustrate how you saw that leg raised?

A In a standing position, just I saw the thigh.

Q OK. Can you stand up for us?

A Sure. In this manner (indicating).

Q Show me again, please.

A OK. Standing like this (indicating).

Q I am sorry. You saw him raise his leg as I am doing here at the Bar of the Court (indicating)?

A Yes.

Q And, did you see his leg go down?

A (There was no response.)

Q Did you, doctor?

A I don't remember that specifically.

Q You remember it being raised, but you don't remember it going down, doctor?

A No, I do not.

Q Did his leg remain like this, or did you turn, doctor?

A I continued to watch, but I did not any longer focus on the policeman's leg.

Q What were you focusing on?

A I noticed the black man on the floor raise his head, arms and head and right leg.

Q So, you saw a policeman raise his leg?

A Yes.

Q And, you saw the black man on the ground raise his right hand or raise both hands that were hand-cuffed?

A Yes, both hands.

Q And, raise his leg as well, did you say?

A Yes, his right leg.

Q But, you didn't see the policeman's leg go down, doctor?

MR. MC GILL: Objection.

MR. JAMAL: I am trying to make clear what this witness is saying.

MR. MC GILL: Objection, Your Honor. Repetitious.

THE COURT: Objection sustained.

Go ahead. Let her testify.

BY MR. JAMAL:

Q How close was the policeman to that male that you saw on the floor, Dr. Cudemo, approximately?

A He was no more than a foot away.

Q Did you see the man actually kicked, doctor?

A I did not see the policeman's foot hit the black man, no.

Q Did you see anything between that policeman and that black man, doctor?

A No, I did not. The counter was in the way.

Q Say that again.

A The counter was in the way of my view. I saw nothing in between.

Q The counter was in your way of view? I don't understand you.

A That's why I couldn't see below the policeman's knee.

Q Was the black man below the policeman's knee?

A Yes, he was.

Q But, you could see the black man, couldn't you?

A When he raised his head and arms and leg, yes.

Q You didn't see the trunk of the black man? Is that what you are saying?

A Not at that time, no.

Q Were you able to hear anything during this time? And, if so, what?

A I thought I heard a groan at the time that the black man raised his arms, hand, and leg.

Q Did you hear anything else, doctor?

A Not that I can remember right now.

Q Did you hear a thud, doctor, a noise?

A I may have. I can't recall right now.

Q You are not sure right now? Is that correct?

A I am not sure.

Q Who was in the immediate area when you heard the groan and the noise you may or may not have heard?

A One of the Jefferson Security Guards.

Q Any other policemen, doctor?

A Well, there were the policemen standing around the man and another policeman on the phone at the nursing station.

Q Dr. Cudemo, did you see--point of clarification: Did you see the policeman raise his leg or swing his leg?

A I saw his leg raised. I could not see much below his knee.

Q Did you see a swing of his leg, doctor? That's the question.

A There was the suggestion of one.

Q A suggestion of a swing?

A Yes.

MR. MC GILL: Objection, Your Honor. I ask to strike that.

THE COURT: That is all right.

MR. JAMAL: What did you say, Your Honor?

THE COURT: That is all right.

BY MR. JAMAL:

Q Did you hear the black man say anything, doctor?

A No, I did not.

Q Were you directed by police to leave that area,

A Yes, I was.

Q Did you leave?

A I walked back towards the Crisis Center.

Q So, you left the area where the black man and the policemen were, didn't you, that immediate area?

A I left that area, yes.

Q On February the 3rd at 9:05 in the morning, did you make a statement to the Sergeant Farcas (sic)?

A Yes, I did.

Q Would you identify this and tell me if this is that statement or if it is not.

MR. MC GILL: Your Honor, I object. This is his witness.

MR. JAMAL: I am identifying the document, Judge.

THE COURT: You may go that far.

THE WITNESS: Yes, this is the statement I gave.

BY MR. JAMAL:

Q You signed those pages at the bottom?

A Yes, I did.

Q Did you intelligently and knowingly answer these questions posed to you by Sergeant Farcas (sic)?

A Yes, I did, to the best of my ability.

Q In your statement you said you saw a black security guard crying, correct, doctor?

A Yes, sir; yes, sir.

Q Again, according to your statement--

MR. MC GILL: Objection, Your Honor.

THE COURT: I'll have to sustain the objection at this time, Counsel.

MR. JAMAL: OK.

BY MR. JAMAL:

Q When you saw that black security guard crying, did she give you an impression why she was crying?

MR. MC GILL: Objection.

THE COURT: Sustained.

BY MR. JAMAL:

Q Did she tell you why she was crying?

A I cannot remember her words.

Q Did she tell you why she was crying? I didn't ask you if you remembered the words. Did she tell you why she was crying?

MR. MC GILL: I would object, Your Honor.

How would she know unless she remembered the words?

THE COURT: I'll sustain the objection.

BY MR. JAMAL:

Q Do you remember the gist of what she was saying to you,

doctor?

MR. MC GILL: Again, objection, Your Honor.

THE COURT: Sustained.

BY MR. JAMAL:

Q Do you have any idea why she was crying, doctor?

MR. MC GILL: Objection as to her state of mind as to someone else.

THE COURT: Sustained.

BY MR. JAMAL:

Q Did she say anything to you?

A Yes, she did.

Q Do you remember anything of what she said to you?

A Only by impression. I do not remember her words.

Q What was your impression of what she said to you?

MR. MC GILL: Objection.

THE COURT: Sustained.

BY MR. JAMAL:

Q Doctor, didn't she give you the impression she was crying because that black man was being beaten?

MR. MC GILL: Objection, Your Honor.

THE COURT: Sustained.

BY MR. JAMAL:

Q You are a medical doctor, doctor?

A Yes, I am.

Q Are you a psychiatrist as well?

A I am in training at Jefferson in psychiatric residency, yes.

Q Was that man hand-cuffed--strike that.

Was the man you saw lying on his back, doctor, the black man?

A In the front of the Emergency Room?

Q Correct.

A Yes.

Q Lying on the floor, right?

A Yes.

Q Were you ever told why you were ejected from that area?

A The question from the policeman was: Was I directly involved in the medical care here? When I finally answered "No," he asked me to leave. That's all.

Q Did you see blood on the E.R. floor, doctor, that night?

A Yes, I did.

Q Was that blood in the area where that black man was lying?

A No, it was not.

Q In the general area, doctor?

A No, it was not.

Q The policeman that you described as raising his leg in the direction of that black man on the floor--

MR. MC GILL: Objection. She did not say in the direction of.

THE COURT: Can you rephrase your question?

BY MR. JAMAL:

Q The policeman that you said you saw raise his leg-- what part of the body did you see of that policeman?

A While standing there before he raised his leg, I seen above--

Q I can't hear you. Say that again.

A At the time he raised his leg--

Q Right.

A --I could see his knee and above.

Q Above?

A Um-hmm.

Q Did you see his face?

A (There was no response.)

Q Could you see his face?

A I could see his face.

Q Would you be able to identify him?

A No, I would not.

Q Were you the only doctor assigned to that Crisis Center that you spoke of?

A At that time, yes.

Q Were there any nurses in that area?

A Do you mean working in the Crisis Center?

Q Yes, when you were there when the policemen and the black man were there.

A Oh, not that I remember.

Q You don't remember any nurses? Is that correct? In that Crisis Center of the Emergency Room?

A I was working with the nurse in the Crisis Center, but the Crisis Center is not where I was standing when I witnessed the policeman standing by the black man.

Q OK. And, there is a distinction between the Crisis Center and the Emergency Room, right?

A Yes, there is.

Q It is not the same area?

A Yes.

Q Right. When you were in the Emergency Room, did you see any nurses in the area?

A There were many nurses working there.

Q Could you identify any?

A I remember two.

Q Do you remember their names?

A Carol Honemhai, H-o-n-e-m-h-a-i---I am not certain.

Q Carol--what was that last name? H-o-n-e--

A Honemagee (sic) is how you say it.

Q H-o-n-e, then m-a-g-i?

A Something like that.

Q Any other nurses, Dr. Cudemo?

A The only other nurse I remember working that night was--
I think her name was Nancy Hager (sic).

Q Nancy?

A Hager (sic).

Q OK. And, the question I asked you about the Crisis
Center I repeat about the Emergency Room.

Did you see any other doctors in the Emer-
gency Room in addition to yourself?

A I had seen Dr. Coletta and perhaps one or two other--
Dr. Goldberg, I believe his name was.

MR. MC GILL: Your Honor, I would object
only to the time. Is this after the incident she tes-
tified to, before, or during?

THE COURT: I don't have the slightest idea.

MR. MC GILL: That's why I object to it.

THE COURT: Well, the objection is sustained.

BY MR. JAMAL:

Q The Dr. Goldberg that you named--was he in the Emergen-
cy Room during the time you saw the police and the black
man on the floor?

A He was in the room behind me. He was in the Emergency Room. There are many rooms in the Emergency Room.

Q They are sectioned off by curtains? Isn't that so?

A Yes.

Q How close were you to Dr. Goldberg?

A Oh!

Q Generally, approximately.

A I'm not even aware of where he was at that specific time you are talking about. I would imagine that he was in the trauma room which is approximately ten, fifteen feet away.

Q Could you see Dr. Goldberg physically?

A I don't remember seeing him at that time.

Q OK. In addition to Dr. Coletta and Dr. Goldberg, did you see any other medical doctors in that Emergency Room at that time?

A I believe I did, but I don't know their names.

Q Doctor, before you saw this policeman raise his leg, how long were you in the Emergency Room?

A In the entire Emergency Room? I am not sure what you are asking me.

Q In the entire Emergency Room, in that area.

A Well, I had been wandering back and forth between the Crisis Center and the front of the Emergency Room.

Q Is the Crisis Center a section of the Emergency Room?

A Yes, it is, but--

Q So, when one talks about the Crisis Center, you could be talking about the Emergency Room as well?

A Yes.

Q OK. How long were you in that general immediate area?

A You mean in the medical or the Crisis Center? Which immediate area? I am sorry.

Q The Emergency Room.

A As I said, I was wandering back and forth, and I had been doing that several times that night, because there were other patients in the medical part that I had been consulted to see.

Q OK. So, you were moving between the medical room, the Crisis Center, and the whole Emergency Room?

A Um-hmm.

Q Did you leave the Emergency Room at all the entire evening?

A No.

Q OK. How long were you in that medical--I mean, that Emergency Room?

A Well, I started work at five o'clock. You mean the entire shift?

Q I can't hear you.

A I started working at five o'clock.

Q In the medical room--I mean, in the Emergency Room?

A In the Crisis Center.

Q And, you didn't leave until eight the next morning?

A I mean, earlier in the evening I had gone to dinner and occasionally downstairs for a soda, but the entire time that Lieutenant Faulkner had been there and the police and all, I had been there. I did not leave.

(There was an off-record discussion between Mr. Jamal and Mr. Jackson.)

Q Doctor, in that immediate area where you saw the policeman raise his leg and the black man laying on the ground, how long had you been in that immediate area?

A I don't remember exactly.

Q Approximately.

A Perhaps five minutes.

Q How long were you in that area before you saw the policeman raise his leg, doctor?

A Between the time I became aware that he was there and the time I saw the policeman--that the man was laying on the floor and the time I saw the policeman raise his leg, no more than a few minutes.

Q Two minutes, three minutes?

A Possibly less. I am not sure.

Q Did you hear the policeman say anything while you were there?

A The--which policeman?

Q Any of the policemen.

A Only the policeman who had said to me, "Are you directly involved in the medical care?"

Q Did you hear that man who was on the floor say anything?

A No, I did not.

Q Did you at any time examine that man who was lying on the floor?

A Not professionally, no, no, I did not.

Q Did you notice any injuries to that man?

A Not at that time.

Q Can you describe the man that you saw lying on the floor?

A I had only seen him from behind. I could not tell you what he looked like.

Q So, you only say the back of his head?

A That's right.

Q The back of his back?

A His hand, his arms, things like that.

Q Do you know if that man is me?

A At this time I could not say for sure.

MR. JAMAL: Cross-examine.

CROSS-EXAMINATION

BY MR. MC GILL:

Q Doctor, you were at the Crisis Center and the Emergency Room for what total period of time? From five o'clock on?

A From five o'clock until--well, I gues at approximately 6:30 I had to go take a shower, or maybe that was more like 7:00, 7:30, perhaps.

Q OK. Is it fair to say, doctor, that there was a great deal of activity taking place in that Emergency Room in the treatment of Officer Faulkner, the bringing in of the defendant, a number of policemen around? Was it fair to say that there was quite a lot of activity?

A Yes.

Q And, would it be fair to say that you were moving--at least from what you tell me, I understand you were moving back and forth from the Crisis Center to where the nurses' station was? Is that correct?

A Yes.

Q And, part of your functions, among other things, because of the hustle and bustle of things, did you do any paperwork or answer any phones, or do anything like that?

A I had done a little of that off and on, but it was very sporadic and short, you know.

Q Was it in a sense somewhat of a disorganized time because of all the activity?

A Yes.

Q People taking other people's jobs, people going here and there, and such things as that?

A Yes.

Q Now, the distance from the Crisis Center--approximately how far in terms of carlengths--let me use, for example, a station wagon right now, a station wagon carlength--is it to the Emergency Room where you saw this black male?

A Approximately four or five station wagon carlengths.

Q Four or five station wagon lengths?

A Approximately.

Q Is it fair to say not only were you walking back from where the Crisis Center was some five station wagons away from you to the nursing station where the phones or other things were, but you were also walking in other directions doing other things?

A That's true.

Q Did you spend most of your time in the Crisis Center?

A Probably more there than anywhere else.

Q Now, when you moved back and forth through this area--when I speak about "the area," I am speaking where these doors open where the black male was--what do you call that?

A treadle, or something?

A A treadle.

Q OK. A treadle.

A Yes, it was.

Q That would at least be, perhaps, longer than four or five carlengths from where the black male was?

A It wasn't in a straight line, but it was probably another carlength from the position to the Crisis Center in addition.

Q Now, obviously, the primary objective of you in that very chaotic time--actually, there were many objectives for you? Is that correct?

A Yes.

Q You are not trying to focus solely on the defendant or somebody else that is around there? You weren't supposed to do that? That wasn't your job?

A That's correct.

Q You weren't a security officer, or anything like that?

A No.

Q As a result of that, isn't it true when you were moving back and forth, you don't know, first of all, how long the black male was there? Is that correct?

A That's true.

Q You don't know how long he stayed there when you left?

Is that true?

A That's true.

Q You don't know anything at all about what he did before you saw him? Would that be correct?

A That's correct.

Q As a matter of fact, right before or right after you saw what you said you saw in relation to that Officer, you don't know what he was doing with his leg or his arms? Would that be correct, before you saw what you saw?

A That's correct.

Q As a matter of fact, of all the time you had spent going back and forth and going to other areas of the hospital, would it not be fair to say that a very, very small part, small amount of the entire time that you were in that general area did you spend taking a glance or a look at that black male? Wouldn't that be correct?

A That's correct.

Q As a matter of fact, you mentioned a few minutes. But, isn't it possible that it might even be less than one minute, a matter of seconds, thirty seconds, say, or forty-five seconds?

MR. JAMAL: Objection. Objection to what is possible.

THE COURT: Will you rephrase the question,

please?

MR. MC GILL: Yes.

BY MR. MC GILL:

Q Is it even possible, or would it be consistent with your recollection, that the time would be even less than one minute that you were in observation of what was occurring?

A It is possible.

Q Now, doctor, you were--as I understand it, what you saw really was obstructed by some partition? Isn't that correct?

A It was the counter, the table top.

Q OK. Isn't it true, doctor, that you are a doctor?

A Yes.

Q Isn't it true that when an individual who is shot with a significant wound in the right side, a deep wound in the right side of his chest--isn't it true that when that individual, whatever he wants to do with his arms, if he would raise his arms like that, would that not cause some kind of a pain?

A I would imagine so.

Q As a matter of fact, just a one- or two-inch cut with a knife, a two-inch cut with a knife in the chest area--if you move your arms, wouldn't that cause a pain?

A I would think so.

Q And, you can imagine the pain of a bullet going almost all the way through you? Would that not also cause pain?

A I guess so.

Q And, by the way, you saw nobody at all punching or grabbing at that black male, did you?

A No, I did not.

Q You saw nobody cursing or screaminig at that black male, did you? Did you see any of that?

A No, I did not. No, I did not.

Q And, I think you mentioned before it is possible that you could have been there five, six, ten minutes, as far as you know in that particular spot? Wouldn't that be possible?

A That would have been possible.

Q You simply had too many other things to do to worry about that black male? Isn't that correct?

A That's true.

MR. MC GILL: Thank you.

MR. JAMAL: No further questions.

The defense calls Dr. Anthony Coletta.

THE COURT: Gentlemen, there is no reason for the doctor to stay, is there?

MR. MC GILL: No. I have no reason.

THE COURT: Very well. Doctor, you may go.

ANTHONY V. COLETTA, M.D., sworn.

DIRECT EXAMINATION

BY MR. JAMAL:

Q Dr. Coletta, what is your position at Jefferson Hospital?

A Thire year surgical resident.

Q Were you at Jefferson and on duty on the 9th of December 1981?

A Yes, I was.

Q Did you see me at that hospital?

A Yes, I did, sir.

Q Did you examine me?

A Yes, I did.

Q What were the extent of my injuries?

A Your major injury was a gunshot wound to the right chest just below the right nipple. You had injuries that I noted to the head and neck region including swelling of the right side of your neck and the right chin, a laceration of the forehead, swelling over your left eye, and a laceration of your left lower lip.

Q Did you notice any swelling on the right side of my

neck and jaw?

A Yes, I did.

Q Did you notice any injuries to my eye?

A There were no ocular injuries that I noted; in other words, injuries to the eyeball itself. It was as I noted before: Swelling over your left eye, more on the bony portions than to the eye itself.

Q Were you then a surgical resident for three years at Jefferson?

A Yes. It will be three years this coming July.

Q How long have you been a medical doctor?

A I have been out of medical school for three years.

Q In your three years as a medical doctor, you have seen numerous injuries, haven't you?

A Yes, I have.

Q Numerous lacerations, swellings, shootings, and so forth?

A Yes, sir.

Q In your capacity as a medical doctor, have you been able to determine with reasonable certainty what could have possibly caused those injuries?

MR. MC GILL: Your Honor, I have to object to that. I think that is too open, too open a question.

THE COURT: What was that?

MR. MC GILL: What could possibly cause that injury? I think that is too open. It is too broad.

THE COURT: Can you rephrase the question somehow?

BY MR. JAMAL:

Q As a doctor, have you had occasion to determine the cause of certain injuries?

A I think the best way I could answer that would be to say that we generally look at the injuries as either blunt injuries or penetrating injuries, and when you see swelling, soft tissue swelling, that generally indicates to us blunt injury; in other words, nonpenetrating. It didn't penetrate the skin. That generally indicates blunt type injury.

Q In the case of what? I didn't hear you.

A Swelling usually indicates a blunt injury.

Q Right.

A A laceration, and so forth, would usually indicate either sharp objects or more penetrating type injuries, so I think to that extent, that you can say that the regions of your face and neck that were swollen I could say were due to blunt injury, but that would only be an impression, and no more.

Q What was my condition when you first saw me, doctor?

A In my estimation, your condition was critical when I first saw you.

Q Could you elaborate why you made that medical determination?

A Upon my initial examination of you, you were--you looked to me to be anemic. I could tell that you had sustained a substantial amount of blood loss. Your pulse was rapid and your blood pressure was low, in my estimation, and I immediately noticed the injuries to your face and neck, and I felt that somewhere there probably was a more serious injury, although there was no overt blood loss.

I mean, you weren't hemorrhaging externally, but I felt that you probably had more serious wounds somewhere else. I couldn't explain your over-all condition just based on the injuries to your head and neck.

So, in the sense that you wereⁱⁿ/what we call hypovolemic shock--low volume type of shock--

Q Was I conscious, doctor?

A You were conscious.

Q Now, when you saw me, when you examined me, what room in the Jefferson Hospital did this take place?

A In what we call the cardiac room. It was in the Emergency Room that is equipped to handle life-threatening

emergencies.

Q Was I hand-cuffed?

A Yes, you were.

Q Did I talk to you?

A You did talk to me, yes, sir.

Q Did you hear me speak to anyone else other than you?

A No, I did not. I did not hear you speak to anybody else but me. My attention was directed to your life-threatening injuries.

Q Did you hear anyone speak to me, doctor, other than yourself?

A No, not to my recollection.

Q Can you describe who was in that immediate area with the two of us?

A There was myself; I called several nurses to assist me. Shortly within that period of time there was a more junior resident, a second-year surgical resident, and there were several Officers, some definitely Philadelphia Police Officers, some, perhaps, security officers from Jefferson.

Q You heard me make no statements?

A No, I did not.

Q To anyone other than yourself?

A Other than myself, no.

Q When I spoke to you, was I--when I spoke to you, what

was the nature of the conversation?

A I was struck by the fact that you appeared at that point frightened. I guess you could say "frightened." You wondered--you kept asking me what I was doing to you, and with the tone that, perhaps, I was hurting you, or you were wondering what was going on, because a lot of things happened very quickly at that point.

Q You suggest that I may have been frightened? Is that correct?

A Well, at that point, when I think that--I had to act quickly, and I think that perhaps you sensed that you had a life-threatening injury. That's, again, an impression of mine.

You kept asking me, "What are you doing, and what is going on? Why are you doing this?"

Q In other words, I was concerned about what you were doing to my body, correct?

A Yes, exactly.

Q At any time did I curse you?

A No.

Q At any time did you hear any policemen curse me?

A No, I did not.

Q Threaten me?

A No, I did not.

Q Say anything to me?

A No, I did not.

Q Do anything to me?

A Nope.

Q Were any other medical personnel other than that second-year surgical resident--and, for the record, can you identify that second-year surgical resident?

A His name was Nakazato, N-a-k-a-z-a-t-o.

Q N-a-k-a--

A N-a-k-a-z-a-t-o. His first name was Paul.

Q Doctor, can you give me that again?

A N-a-k-a-z-a-t-o, Nakazato. And, by the time I had-- after a certain period of time--I don't believe that I could say exactly how long--but, by that time, two other surgical physicians had arrived in the Emergency Room, two doctors that were on call at home; in other words, I was sleeping at the hospital, and they were notified immediately once the trauma had occurred and Officer Faulkner had been brought into the Emergency Room.

And, they arrived when I was attending to you. It was Dr. Bruce Jarrell and Dr. Miguel Deleon.

Q Is that Jarrell, J-a-r-r-e-l-l?

A That's right.

Q According to your professional observation, what was

my state of mind when you attended me?

A As I said before, I think I would have probably described it as apprehension.

Q Apprehensive?

A Yes, fear, apprehension. That's what I sensed your state of mind was by the time I got to you. I guess I would have to say that when I got to you, you were in early stages of what we call "hypovolemic shock" or shock from blood loss, so I sensed that you were probably weakened by the blood loss, and, perhaps, if you had gone further, you would have fainted, or, in other words, sir, I think that you were sensing these things and you were apprehensive.

Q What were you doing to my body, doctor?

MR. MC GILL: Your Honor, I would object to that. I think at this point it is beyond the scope of this Motion.

THE COURT: It certainly is. I have been waiting patiently. The objection is sustained.

BY MR .JAMAL:

Q Dr. Coletta, did you have occasion to see Dr. Cudemo on the scene?

A No, I did not.

Q Did you see her at all that evening or that morning that she was there?

A I think I saw her later on that morning up in the intensive care unit.

Q The approximate time that you saw her?

A I am not sure that I could accurately recall. It was sometime after seven, I guess, in the morning, but I couldn't recall.

MR. JAMAL: Cross-examine.

CROSS-EXAMINATION

BY MR. MC GILL:

Q Doctor, the defendant asked you whether you had remembered seeing him, and you said you had treated him, and you went into the fact that you had treated him. You stated that, did you not?

A I did treat him.

Q Isn't it a matter of fact, doctor, that after the police brought--really after the police brought the defendant into that hospital, the very same hospital that Officer Faulkner was in dying, that you, after the police brought him in that hospital, literally saved his life?

Isn't that correct?

A That's correct.

Q And, had you not been there, had you not been brought into the hospital quickly, he would most likely, in your judgment, have died? Is that correct?

A Yes.

Q These injuries that you were talking about--I think you mentioned a four-centimeter laceration to the top part of the forehead--the forehead area. Is that correct?

A Right.

Q Then there was a swelling, also, in the forehead area. Is that correct?

A That's right.

Q Also, there was some swelling on the right portion of the neck--if you notice where my right arm--right hand, rather--is going--cheek side and below toward the neck area. Is that correct?

A Yes.

Q And, a slight laceration of the lower lip? Isn't that correct?

A That's right.

Q And, they are the injuries which you observed in your treatment of this defendant? That's correct?

A OK. That's right, along with the gunshot wound.

Q Other than the gunshot--other than--I am sorry. I should have made that clear. Other than the gunshot wound.

A Right.

Q Did you see any fractures at all, any fractures around his head area where the swelling was, the side of his face,

anything of that nature?

A Let me say that we really wouldn't be able to see a fracture, but I did not. Oftentimes you can feel bony abnormalities, but I did not appreciate anything that I thought would be a fracture.

Q You are able to tell at least where there is a fracture, even though from feeling or whatever, in your experience that there was a fracture?

A That's right. You can have an impression, and, then, document that impression by X ray.

Q After this defendant was treated by yourself and Dr. Jarrell, among others, and all the records were completed, there was no indication that you were aware of of any fractures found? Is that correct?

A That's right.

Q Now, these type of injuries that we are talking about, doctor, if--and, I'll give you hypothetical facts--if an individual (this defendant) was kicked in about the center area of the chest with, perhaps, a portion of the foot hitting the right cheek and neck area, if that same individual while in the process of being hand-cuffed was pushed so that his head would hit--resulted in hitting the pavement or street or curb area, if this individual while being taken to a wagon had hit a pole, fell down, and a portion

of his face and head had hit the ground--are you with me with all of that?

A Yes.

Q Now, in that factual situation, are those injuries consistent with that happening?

A Yes.

MR. JAMAL: Objection.

THE COURT: Overruled.

BY MR. MC GILL:

Q Doctor, Dr. Jarrell was the attending physician?

A Yes, sir.

Q You have seen the records of the hospital, have you not?

A Yes, sir.

Q And, what is the difference between an attending physician and a resident?

A An attending physician has finished his training, finished his residency, and is a member of the attending staff of the hospital. Residents or surgical residents are surgeons in training.

Q In reference to the injuries that he had noted down which were the same as yours, did you have occasion to take a look at the record? And, would you read in reference to the swelling above the eye what the words of Dr. Jarrell

were?

A "Mild orbital swelling."

Q What was that?

A "Mild orbital swelling."

Q "Mild orbital swelling." OK. Are those injuries consistent with something of this size hitting that individual?

MR. JAMAL: Objection.

MR. MC GILL: With force.

MR. JAMAL: Objection.

THE COURT: I will allow him to answer it.

Overruled.

THE WITNESS: Can I answer it?

THE COURT: Yes.

MR. MC GILL: Yes, you can answer it.

THE WITNESS: With force, in my own estimation and my own impression, I have to emphasize that I would think that that instrument would do more injury.

BY MR. MC GILL:

Q It would cause a breaking, wouldn't it, or a fracture if he was hit in the head?

MR. JAMAL: Objection. Are we going to choose instruments? Does anyone have a blackjack in the courtroom? A slapjack, perhaps?

MR. MC GILL: If he wishes to object, he may, but, at least, follow the Rules of Procedure.

THE COURT: Go ahead.

BY MR. MC GILL:

Q Is that correct?

A I am sorry?

Q There were no fractures at all. That sort of thing would cause a fracture, wouldn't it?

A I believe that it probably would.

Q Let me ask you this, too, doctor: Did this defendant appear--and, to quote your words, did this defendant appear conscious and alert when you did speak to him?

A Yes.

Q And, he made sense when he spoke to you?

A Yes.

Q So, you were able to understand him?

A Yes.

Q He was, therefore, responsive?

A Yes.

Q Did this defendant make any complaint to you about being physically hurt or kicked or punched or hit by police?

A No.

Q That was a very busy and chaotic time, wasn't it, doctor?

A Yes, it was.

Q And, you had observed a number of policemen over a period of hours while you were there? Isn't that correct?

A Yes, I did.

Q From what you observed, would you characterize how the police conducted themselves?

A I would say from what I observed not only during that short period of time in the Emergency Room, but several days thereafter, the police that I observed conducted themselves as absolute professionals.

Q Absolute professionals? And, during that time when they were acting like absolute professionals, the man accused of shooting the man that was dying in the same hospital was very close to where he was eventually saved by you? Isn't that correct?

A Right.

MR. MC GILL: Thank you.

REDIRECT EXAMINATION

BY MR. JAMAL:

Q Dr. Coletta, when we were conversing, what did I say to you?

MR. MC GILL: Objection. Improper redirect,
Your Honor.

THE COURT: No. I will allow him.

MR. MC GILL: Yes, sir.

THE WITNESS: We were saying things like,

"What are you doing? Why are you doing this?"

BY MR. JAMAL:

Q I was asking you questions about what you were doing?
Correct?

A Right, and, you also--I asked you if you had any pain
anywhere, and you indicated to me that you felt the bullet
in your back, or you felt something in your back, which is
what directed my attention back there.

Q Did I tell you I was beaten, doctor?

A No, you did not.

Q Did I tell you I was shot?

A To my recollection you did not say, "I have been
shot."

Q So, I was asking you about what you were doing to me,
correct?

A Right.

Q In the course of that Emergency Room procedure that
you were doing, did you have an occasion to push a tube in
my lung?

MR. MC GILL: Objection.

THE COURT: Sustained.

BY MR. JAMAL:

Q The point is: I didn't say anything to you other than the medical questions you asked? Is that correct?

A That's right.

Q Did you have occasion to see any injuries to my lower trunk?

A I did not notice any injuries to that region.

Q Did you look in that region?

A Yes.

Q Did you notice anything on my legs?

A No.

Q Did you look?

A Yes.

Q My knees?

A I looked.

Q And, you saw nothing, doctor?

A I saw nothing that called my attention to those regions.

Q You saw no swellings, doctor?

A No, I did not.

Q The prosecution showed you a stick and asked you if that stick or a stick of that type would deliver the kind of injuries that you saw? Isn't that correct?

A Yes, he did.

Q As a matter of fact, you don't know what kind of stick

was used, do you, doctor?

A No, I don't.

MR. MC GILL: Objection, Your Honor. It is assuming something was used.

MR. JAMAL: He has answered the question.

MR. MC GILL: Objection. Mr. Jamal--

THE COURT: The objection is sustained.

MR. JAMAL: He has still answered the question.

BY MR. JAMAL:

Q Did I tell you an Officer shoved me to a pole or beat me?

A No, you did not, no.

MR. JAMAL: OK. No further questions.

MR. MC GILL: Thank you, doctor. Thank you for coming. You may leave. There is no need for you to remain further. Thank you for coming.

MR. JAMAL: Judge, can you hold the doctor for five minutes? There is something we have to check out. Dr. Coletta.

MR. MC GILL: Well--

MR. JAMAL: Judge, could we have a five-minute recess?

MR. MC GILL: I have no objection, Your

Honor.

MR. JAMAL: Counsel needs to make a call.

(A five-minute recess was taken.)

(After recess):

THE COURT: Does the defense have any more witnesses?

(There was an off-record discussion between Mr. Jamal and Mr. Jackson.)

MR. JAMAL: No, sir.

THE COURT: Do you have any other witnesses?

MR. JAMAL: No. The defense rests.

MR. MC GILL: Your Honor, the Commonwealth has no rebuttal, sir.

THE COURT: Any argument by the defense on the Motion?

MR. JAMAL: Judge, it is the defense's position in this Motion to suppress that no such statements or alleged confessions were made.

On the Motion to suppress the testimony of Inspector Alphonso Giordano, it is clear that the alleged confession was made during a custodial interrogation in the back of a police wagon. I was not free to go, move, to do as I wished.

It is clear, Judge, or it should be clear,

that even if believed--that alleged confession even if believed--should not be admitted based on the Miranda rulings and other rulings of the Court. The Miranda Opinion has declared that the warnings are required when a person being interrogated was "in custody at the station, or otherwise deprived of his freedom of action in any significant way."

I think it's safe to assume that when a man is hand-cuffed, has a life-threatening wound, has been beaten as I contend occurred, my freedom is very restricted. My freedom to move has been restricted. I have been deprived of any freedom of independent action, and I was in custody under restraint, under arrest.

It's my contention and belief that even if believed, even if Giordano's statements were to be believed, that the statements were still obtained in violation of the Constitutional rights of the Fifth Amendment of the U. S. and Pennsylvania Constitutions.

I think it's clear that if the Court agrees that the interrogation was illegal, then the fruits of that interrogation should also be declared inadmissible in the trial.

You've heard a security officer by the name of Priscilla Durham at Jefferson Hospital come up and

tell you certain things.

It is my contention and belief that the allegations were false, but even if believed, they came as a result of a beating, several beatings, that were inflicted by the police at the scene at 13th and Locust, at the hospital, and inside of the hospital.

You heard a Dr. Cudemo testify to a policeman picking a leg up. She didn't see the leg go down, but we can assume that the leg just didn't stay there. And, what was between that leg and myself? Where did that leg land, if, indeed, it landed? You know what I mean.

It is obvious that there was a beating at that hospital. We are not getting the whole story here. There was a beating at 13th and Locust Street, and any statements taken under that extreme coercion, the beatings, should also be ruled inadmissible.

The security officer, Priscella Durham, is, in fact, a security officer that was functioning in a security function, aiding the police at Jefferson Hospital.

It is interesting to note that Dr. Coletta heard no statements. He did say that.

I asked him about my medical condition. I

asked him about my injury. I asked him about what he was doing to my body. I asked him about what was he doing poking things into my body.

But, there was no threats, no curses going to police who were around the scene. At no time in that Emergency Room were police away from me or was I alone.

And, Dr. Coletta heard me say nothing to those policemen, because, in fact, nothing was said.

I contend further that this second wave of statements came in the middle of February, about three months after the incident in question. It seems at least strange that police would wait several months before reporting what is clearly an incriminating statement.

The policemen know the law. I am sure they reviewed the law and found that any Judge would decide that Inspector Giordano's statement was inadmissible.

"Well, we got to find us another confession. Why not create one? Why not make one? Why not build one? Why not put words in my mouth that didn't come out of my mouth?"

Hence, the need for this Motion to suppress, because it is damaging. It's very strange that a

policeman like Police Officer Bray would wait three months before reporting a damaging statement, an alleged confession. Not only is it improbable, but it is unbelievable.

But, even if believed, any statements made at that hospital came as the result of a beating, Judge. You have heard policemen say they ran my head into a pole. It was an accident. They were carrying me and passed me over to some other policemen, and my head went into a pole. It was all an accident, Judge.

I am sure you have heard a lot of trials in your day. I am sure you have heard a lot of lies in your day, and it's your decision.

But, I assure you that nothing that happened that night is an accident. My head did go into a pole. It just didn't happen to go that way. I was pushed into a pole, and I was beaten at the scene.

The doctor wasn't there, but I was, and the policemen were there as well. And, in their reports that they submitted to their inspectors of that night, to their investigators, to their Sergeants, to their superiors, there was no mention about my head being rammed into a pole there. There was no mention about me being beaten, kicked.

One policeman said he looked at me and he didn't see any injury. "No. I saw a pool of blood under the man, but I didn't see anything on his chest. I didn't see anything on his head."

I was just sitting in a pool of blood. That blood was my blood. That injury I sustained was a life-threatening, serious injury. I suggest that I was resisting being hand-cuffed by punching and kicking when they said I was conscious but I couldn't walk.

So, on the issue of the statements alleged by Policeman Bray and Inspector Giordano on Constitutional rulings of the inadmissibility of statements, I don't think you have any other choice but to reject those statements.

On the issue of identification, you've heard one witness, Cynthia White, describe the man as short to the police at the scene. I'm sure that a man's tallness or shortness is a relative matter, but I think it can be said very safely that I am not a short man. Those were her words. I didn't put them in her mouth. Those were the words that she gave.

Does she know what short means? Can we assume that she knows what short means? Can we assume that she knows what tall means? And, is height an

indication of identification?

Robert Schulbert (sic), as well, identified the man as 200, 225 pounds. I have never been 200, 225 pounds. He saw a man with tan and gray clothes. I am wearing tan today, but it is very clear that the identifications that he offered both by Cynthia White and Robert Schulbert (sic) are faulty. I think you should rule on that as well.

You heard a policeman say that he walked up near my body and kicked the weapon away from me, but you heard other policemen also say, who were also at the scene, say they saw no such thing, that they saw no policemen kick near me or kick me.

One moment, Judge.

(There was an off-record discussion between Mr. Jamal and Mr. Jackson.)

MR. JAMAL: There is a very strong issue here, Judge, of suggestion, that when Robert Schobert and Cynthia White were taken to that wagon, what did the police say to them? Did they say, "We just want you to look at somebody for a minute"? Did they say, "We want to show you the man who we think shot the cop"? What did they say to Schobert or White? It's very important.

And, what did Inspector Giordano say he saw when he opened the wagon? He said he saw a man lying on his back with his head looking at him. He said he couldn't see any blood on the forehead, because there was so much hair over the forehead.

It is very clear to me that at the very least it was a suggestive identification. It's very clear, also, that the words, the weight, the height, described by the witnesses conflict with what stands before this Court right now.

I haven't been short since my teens. I haven't been 225 at any time in my life, and will never be.

But, again, those are the words and the descriptions that were offered by the witnesses. I didn't ask them to create those descriptions. It came out of their own mouths.

In creating an identification, it's very clear that the total circumstances have got to be taken into consideration.

That if a man is lying on his back, if he is--if you are looking at a man who is upsidedown, essentially, that creates some question of identity.

So, for those reasons, I would like to have

that Motion for suppression granted.

THE COURT: Mr. McGill?

MR. MC GILL: Your Honor, for the record, I have noticed Mr. Jackson conferring with Mr. Jamal in between the short interim of his argument as I have noticed and I am sure the Court has noticed his consultations during the course of all of this morning's proceedings consistent with the conduct of both individuals during the course of these proceedings from the beginning.

At this point, Your Honor, I would have no objection if Mr. Jackson would like to supplement argument.

(There was an off-record discussion between Mr. Jamal and Mr. Jackson.)

MR. JAMAL: I have no objection.

MR. JACKSON: May it please the Court, my comments would be brief in that Mr. Jamal, I believe, has very succinctly presented to the Court the very issues that this Court must decide with respect to the identification as well as the alleged statements that were given by Mr. Jamal.

I'd like to take this opportunity, if I might, just to briefly focus in on the individual wit-

nesses and the specific legal question I believe that this Court has to deal with.

With respect to Inspector Giordano, the Commonwealth has never contended at all that the Police Inspector Giordano at any time from the time of Mr. Jamal's arrest until this day--they do not contend that Mr. Jamal has ever been given any Miranda warnings, so the question before this Court was not whether or not they gave him the warnings adequately or timely, because that is not in issue.

Is there a need to give that warning? I think Your Honor is well aware of what the Miranda and the progeny says, that, in fact, once an individual is within the custody of the police that, indeed, before the police are able to interrogate that witness that they must give those warnings; otherwise, any statement whatsoever must be ruled inadmissible.

Clearly, Inspector Giordano came upon the scene at some point in time when Mr. Jamal was in custody. He was in the wagon. He was hand-cuffed.

As a result of Mr. Jamal's questioning, of course, Inspector Giordano said, "Well," when he went in the wagon, in his mind he was not a suspect.

Well, I believe that Your Honor merely has to

review the circumstances, and, as Mr. Jamal said, it is the totality of the circumstances that Your Honor must consider before making that ruling.

We know from the testimony of the Officers that have testified on behalf of the Commonwealth that Mr. Jamal was found at the scene, that he was handcuffed, that he was placed in the wagon, that one or several Officers were told--allegedly told--that Mr. Jamal played some role in this incident, so he was placed in the wagon.

I think common sense would tell Officer-- Inspector Giordano that, indeed, there was one man in that wagon, possibly another man in another wagon, that there were other people at the scene. They were certainly not handcuffed. They were certainly not in police custody.

Why then this one man in custody? Because of investigation? Well, if, in fact, Inspector Giordano was investigating, why, then, did he not go and speak to each and every other person who was at the scene?

I think the answer is clear: Because he was a suspect. Even before Inspector Giordano entered that wagon, what was his purpose? He says that he

wanted to see whether, in fact, the person was armed. You don't need to question anyone. He was hand-cuffed. He was injured. And, he said, in fact, he noted that the man was bleeding himself.

If he wanted to look for a weapon, all that he had to do was to search him, if, in fact, that was his purpose.

But, what did he do? As incredible as it sounds, he says that he asked Mr. Jamal, "How you doing?"

No response. "How you feel?" No response.

Then what did he say? "Where is the weapon?" And, this alleged statement came out. Certainly, he was interrogating him, whether you call it an inquiry, whether you call it a question. I think the Courts have clearly said that that is an interrogation. It is a custodial interrogation.

Those interrogations our Courts have consistently frowned upon. I think, in particular, aside from Mr. Jamal being in custody, aside from the coercive atmosphere in which Inspector Giordano confronted Mr. Jamal, we know out of the mouths of the police officers that, at least, Mr. Jamal--his face had been pushed to the ground several times. How many we don't

know.

We know for a fact that Mr. Jamal's head was rammed into a pole. How severely, we can only attest to that by the injuries as attested to by the doctor, and you can see the scar on Mr. Jamal's head.

I would say even under those circumstances, even if the warnings had been given, the question presented to this Court was whether, in fact, if Mr. Jamal made a statement, whether it was a knowing and intelligent waiver based on the fact that he was injured mortally, critically wounded. We know that he had the wound to his head.

So, the question that this Court would have to decide even if--even if--Inspector Giordano read the complete Miranda warnings was whether, in fact, Mr. Jamal was in a position physically and mentally to respond and intelligently waive his rights.

There is no suggestion whatsoever that Mr. Jamal at any time waived any right with respect to those statements--that statement--that he allegedly gave to Inspector Giordano.

I think patently the statement allegedly given to Inspector Giordano is inadmissible, and I can think of no reason whatsoever -- there is no *res gestae*,

Your Honor, with respect to an exception to the Miranda warnings.

Inspector Giordano did not merely come upon the scene and Mr. Jamal was mouthing or spouting off some confession or some statement.

At that time--at the time that Inspector Giordano came to the scene--he was in custody. Police had been there for some period of time, certainly long enough to arrest him, hand-cuff him, beat him, hit his head, and put him in the wagon and shut the wagon before Inspector Giordano.

I don't think the Commonwealth can claim in any way whatsoever that the statement, if there was a statement, that the statement was part of some res gestae, some excited utterance.

There was no reason for an excited utterance. He was in the wagon, and he was quiet, particularly in response to two questions allegedly asked by Inspector Giordano.

The fact that the statement that Inspector Giordano subsequently gave to the police shows a reversal--the statement says, "Well, I went in and I asked him about the weapon first, and, then, I asked him how he was doing, if he was injured," out of con-

cern for Mr. Jamal's life, I would suspect.

But, the question is: When did he make-- when did he make the inquiry with regard to the weapon? If Your Honor were to consider any inquiries, any questions with regard to Mr. Jamal's health would not, in fact, be used against him.

I would suggest, Your Honor, based on the totality of the circumstances, any question, even his name, would not be permissible without the warnings, certainly any questions with regard to his health, if, in fact, he has been injured, if he has been shot.

There is then a link between Mr. Jamal and the incident itself, so any questions that would suggest a link between Mr. Jamal and the incident that happened would be an interrogation consistent with the rulings of our Courts of Pennsylvania as well as the United States Supreme Court with regard to the Miranda warnings.

And, I don't think there is any question about that that Inspector Giordano, whether he asked about the gun first or if he asked about the gun the last question, either way, the question is inadmissible and any statement that would come from those questions would be inadmissible.

I would not argue the point, Your Honor, as to whether or not this statement was made in that that is obviously a jury question, a question of fact, but, indeed, with respect to the legality of the statement, the admissibility of the statement, I think clearly it has been pointed out that it is inadmissible.

We then have the statement, Your Honor, of the security Officer Durham. The question before this Court is whether, in fact--I believe it is a twofold question: (1) whether, in fact, the security Officer Durham was acting in concert with the police, because, then, of course, Miss Durham would be in the same role, in the same status, as a police officer.

The police officers cannot do indirectly what they can't do directly. They cannot say, "Well, I can't question you, so I will send an agent of mine to question you."

The security Officer Durham said that she didn't ask any questions, that, indeed, the Commonwealth would have you believe that there was just an excited utterance, that, indeed, perhaps, Mr. Jamal's statement (if there was a statement) was part of the *res gestae*. There was an excited utterance.

And, of course, again, we know that this

utterance, if there was one, was after he was arrested at the scene, and we have gone through the injuries, and after he had been transported from the scene to the hospital, brought into the hospital, dropped, or, at least, he fell to the floor, that he said something to the effect that, "Yes, I shot him, and I wish I could shoot all the other police officers," or some words to that effect.

So, the question is: Was this security officer working in concert with the police? Where were the police when she was there, right there? What did the police do?

Well, we know there is at least the suggestion by Dr. Cudemo that at about that same time was the time that this security Officer Durham saw Mr. Jamal.

What did Dr. Cudemo say? She didn't hear Mr. Jamal say anything. Did she hear the police officers say anything? No, she heard nothing whatsoever.

She, in fact, also saw that there was a police officer's leg raised. The Commonwealth has suggested in its questioning that, in fact, Mr. Jamal must have raised his hands, and that's where the groan came from.

Well, if the police officers didn't strike him and didn't kick him, why would he be raising his arm to cause self pain? I think common sense tells you if something is going to cause you pain, you don't do it, so he is not going to do that.

That groan that Dr. Cudemo heard was as a result of the kicking. Your Honor is certainly well aware of circumstantial evidence. There is no direct evidence that an officer kicked him at that scene, but, certainly, with the leg raised and the subsequent groan, I think that would be consistent with him being kicked.

So, the question is when and if Mr. Jamal said something after being struck by the police officer, what was he saying? "If you let me go, I'll kill all of you officers." He is saying if he said that, "That would be a natural response if my hands were cuffed and someone was kicking me. I think I would say, 'If you let me go, I'll kill all of you.'"

Whether that is a threat--and, he is not charged with that; Your Honor doesn't have to consider whether or not that was a legitimate threat or actual threat.

But, whether, in fact, he made a statement,

that statement was coerced in any way whatsoever by the police. The statement--and, we've heard it--if this security officer heard it, isn't it awfully strange that the security officer was there, the police were there, no police officer came in and said that they heard him say that, just this security officer.

And, I'm suggesting, Your Honor, that if, in fact, Your Honor would assume that the statement was made, that, in fact, that statement was made as a result of coercion and the physical abuse that Mr. Jamal was suffering at the hands of the police at that very moment.

Your Honor, before going to the other police officer who indicated that he heard a statement, I'd like to focus on the issue of the identification which I believe is obviously a very critical issue.

Cynthia White has testified--and, again, the credibility is a collateral matter with respect to the decision that Your Honor has to make here, but, again, common sense obviously is a relevant consideration.

Cynthia White says to the police that the person who shot the police officer was short. Your Honor may make your own decisions as to whether or not Mr. Jamal is short.

Cynthia White says, when the question was posed by Mr. Jamal, "Am I short?"

Her response, "Well, you are not tall."

Well, one cannot be tall and be a number of other things and not be short. One could be a giant, but I am not going to get into that.

She said she couldn't answer the question as to whether Mr. Jamal was short. Why is that important? It is important in the totality of the circumstances, because we know from all of the witnesses that there have been a number of descriptions given as to who it was that supposedly shot Officer Faulkner.

We have heard that he was short. We heard that he was six feet, 225 pounds, and we have heard, "I don't know what the person looks like."

So, why is that important, again? And, interestingly enough, Cynthia White says she was at the scene. She told the police officer that she saw what happened.

They didn't take her to the wagon to look in. Interestingly enough, they took Mr. Schobert to the wagon. I believe they took Mr. McGilty (sic) to the wagon, and I am not certain of that.

But, they did not take Cynthia White to the

wagon to look in there. Why? They never asked her to look at the person who was inside the wagon. If, in fact, the police officers believed her, and they believed that they had a legitimate reason to suspect that Mr. Jamal had committed the crime, the natural thing to do is see if this is the person.

I am saying, "Let's see in a nonsuggestive manner. We have someone in the wagon we would like you to look at. Then you tell us in your own words what if anything that person may have had to do with the crime."

They didn't even take Cynthia White there. When did Cynthia White see him? From her testimony, she says that she saw someone run out of the parking lot across the street.

We can assume, Your Honor, that she was at one point, and she saw at the most a profile of the individual going to shoot the officer, if you accept her testimony.

She then says after the initial shot the person stood over the officer with his back to her. Again, no ability to see the person's face. We then hear that she walked a little closer after the shooting and the person was sitting on the curb.

How was the person sitting on the curb? He was sitting on the curb with his back to the Volkswagen, which, again, would place his back towards her.

When would she have seen his face? There was no testimony by her that would have suggested when she could have seen anyone's face.

For that reason, Your Honor, we have in the past asked for a lineup. A lineup has consistently been denied by His Honor, Judge Ribner.

We come before you, Your Honor, to contest that identification procedure in that the first opportunity, we are contending, that Miss White, Cynthia White, had to see Mr. Jamal was when he was brought in on January 8th at a preliminary hearing in this very courtroom, and, then, she comes in and says, "Yes, that's him."

By that time we know from all of the descriptions that the man had dread locks. Mr. Jamal obviously has dread locks.

So, what else do you do to determine whether, in fact, her statement, her description, is true that Mr. Jamal is, in fact, the person that she saw? We go to what physical description she has given. She has given descriptions of clothing--strike that. No

description of clothing.

The only physical description that I recall that she gave to the police was that he was short, in his early twenties, and that he had a moustache.

I think the Court records would show, and, certainly, the police photos will show Mr. Jamal had his beard on December the 9th. He is not short.

That is the only thing Your Honor has to go on, the physical description that she gave at that time. Is it consistent? The physical description that she gave is inconsistent with Mr. Jamal's appearance, again recognizing that she had no ample opportunity to review or to see or to observe whoever it was that she saw run across the street and do whatever it is that she saw.

For those reasons, Your Honor, I would ask that the identification of Mr. Jamal be suppressed.

I know that again she has testified on January the 11th, and she has been at this hearing where she again identified Mr. Jamal, and I am suggesting that the out-of-court identification was inadequate, and that the only identification that has been made has been in court after Mr. Jamal has obviously been arrested and arraigned, or arrested and certainly held

on the charges of murder, and it is easy.

She would be an imbecile or an idiot to think Mr. Jamal was not the person the police think committed the offense. What is that? There is the suggestion: Whoever they have at that table must be the one.

She admitted that she had never seen Mr. Jamal before this alleged incident, so it is not a situation where she knows this man and she only has to see a fleeting glimpse of him as one would do if you know somebody.

I know my son when I see him, even if I see the back of him. She had never seen Mr. Jamal before. Your Honor can take judicial notice of the fact with the hair style it obscures to some extent the face of someone.

Certainly, that night--and, again, we are in a well lighted courtroom today, but, certainly, that night we know it was dark, even though close to four o'clock in the morning.

I am suggesting to this Court that even if she saw what she claims that shw saw, there is no testimony even from her own lips that she had an adequate opportunity to see whoever that individual was.

THE COURT: Mr. Jackson, aren't you arguing weight rather than admissibility?

MR. JACKSON: No, I am not, Your Honor. For this very reason, Your Honor: I don't believe that you can consider the legalities of the identification without addressing the attendant credibility question, and I appreciate the credibility is a fact question, and Your Honor must make a legal determination, but Your Honor must make that legal determination based on some fact, so you have to determine what the facts are that happened.

THE COURT: But, isn't it whether or not the someone in authority somehow influences the identification?

MR. JACKSON: Yes, Your Honor.

THE COURT: Well, where is it?

MR. JACKSON: Well, fine. Well, the influence is, Your Honor, she said she made an identification. The only time that we have is that she made an identification when she comes into court on January the 8th.

THE COURT: Are you saying that/^{if}nobody makes an identification before that, they can't come in at the time of trial and make an identification?

MR. JACKSON: No, I am not, sir.

THE COURT: Well, what are you saying?

MR. JACKSON: What I am saying is that she comes in on January the 8th to make an identification. The Court has to decide: Was there an adequate opportunity for her to observe the individual at the scene?

THE COURT: That goes to weight. That's what you argue for the jury.

MR. JACKSON: I understand that. But, the question of the suggestion, Your Honor, is whether, in fact, there is a suggestion when he is brought in court as a defendant as to whether or not that suggests to the individual that that is the person he saw.

THE COURT: I am saying to you if nobody makes an identification, there is no lineup prior to trial, anybody who goes in and identifies the defendant, that is illegal. That is improper. That's what you are saying.

MR. JACKSON: No, I am not.

THE COURT: That's the impression I got.

MR. JACKSON: I am suggesting to Your Honor that the legal question is whether, in fact, there has been some agency of law enforcement that has suggested--

THE COURT: Right. If somebody had said, "Here is a picture of the fellow, so that when you see

him, this is the guy."

That's improper.

MR. JACKSON: But, implicit in that same thing, Your Honor, is when she comes into court, and he is the defendant sitting at Counsel table--

THE COURT: Right. And, I said you unless somebody has picked someone out at the lineup, that person could never come into court for the first time and identify the defendant,

MR. JACKSON: No. They could. But, you must do what they do here.

THE COURT: Suppose I saw somebody do something, and I said to the police, "I saw this. I saw the fellow shoot him."

And, they don't ask me to give them a description, and I don't give them a description, and the very first time I see him is when he comes into court.

Can't I testify, "That is the man"?

MR. JACKSON: No, I am not saying that, Your Honor. But, as a matter of law, the Court has to determine whether or not that is legal.

THE COURT: No, no. That is weight. You are now arguing weight? That's for the jury. Whether or not that person really saw what they saw, that's

weight.

Now, when you talk about suppressing identification, you are talking about law enforcement officers doing something improper that influences that identification.

MR. JACKSON: And, I am saying--

THE COURT: But, that we don't have here. Everything that you are arguing goes to weight, not admissibility. That's for the jury to decide, not for me to decide.

Whether or not they say they saw what they saw is for the jury.

MR. JACKSON: I understand.

THE COURT: Whether or not the police did anything to improperly influence identification is for me to decide. That's where you come into the suppression.

MR. JACKSON: Fine.

THE COURT: We don't have that here.

MR. JACKSON: Your Honor, omission. An omission are facts this Court can consider.

Obviously, if Cynthia White was at the station and the officer said, "Here is a photograph. Go in and make sure that that's him," that's an act of

commission that Your Honor could make a clear determination on.

The question here is if there are acts of omission.

THE COURT: I don't know of any such law, unless you have some.

MR. JACKSON: Your Honor, let--

THE COURT: You mean the police have to have a lineup, or they have to do something?

MR. JACKSON: Let me present the argument, and Your Honor must make the decision.

THE COURT: I am trying to get to the law. Do you have law on this point, or is this just logic that you are arguing?

MR. JACKSON: I believe it is logic, Your Honor.

THE COURT: You don't have any law?

MR. JACKSON: I believe I might be able to find some as well, because it seems to me if Your Honor would give me some opportunity to define the acts of omission as well, I am not necessarily talking about the lineup, but proper police procedure with respect to identification.

The police are not supposed to do a certain

number of things. If the police fail to do certain things, is that also objectionable?

THE COURT: Let's be specific in this particular instance.

MR. JACKSON: In this particular instance.

THE COURT: What did they do that--did they neglect to do that they should have done?

MR. JACKSON: Why, not opening the wagon and letting her see that that is the individual.

THE COURT: That goes to the weight. That's what you are going to argue to the jury.

MR. JACKSON: I understand it goes to the weight, but there they have a situation where she says the person is short and in his early twenties.

THE COURT: When somebody says "short" or "tall," who knows really what that means?

MR. JACKSON: There is a very easy way to find out.

THE COURT: I am a very bad judge of height or weight, but that doesn't mean I don't recognize you when I see you. I can't tell you how tall you are or how much you weigh, but, sure enough, when I see you in the hallway, I know you.

MR. JACKSON: I appreciate that.

THE COURT: Some people have better powers of observation. Some people can look at you and tell you exactly how much you weigh, how tall you are. Right, Counsel, to within an ounce? They can even tell you the color of your eyes. I know people that I have seen. I don't know the color of their eyes, but I know them. I don't even know the color of your eyes.

MR. JACKSON: I am not arguing that point, Your Honor, that some people are good and some aren't.

THE COURT: Right. And, this you have to take into consideration. And, when someone gives a statement of a height, and you are talking about an inch, two inches, three inches, what is the big deal?

MR. JACKSON: If I am talking about somebody I see in a distance that I may underestimate or overestimate, it is really an approximation or what I as an individual think his height is.

Now, just as she said, you are not tall to her is short. Maybe she thinks somebody tall is seven foot six. I don't know, but that's an individual's impression.

THE COURT: I don't see how that affects a Motion to suppress identification. There has to be some legal right violated in order to suppress that

identification.

What you are arguing now is all dealing with weight, which is something that the jury would have to decide. We are now in a Motion to suppress, only. That's all, whether any Constitutional rights were violated in any way.

MR. MC GILL: That's the only thing.

MR. JACKSON: Well, Your Honor, very well. I have made my argument.

THE COURT: I am just trying to tell you my problems here, what I have to look at. It is not whether I believe her or disbelieve her. It's a question that would be for the jury.

The question is whether or not the police did anything improper that somehow makes her identify him.

MR. JACKSON: Your Honor, I appreciate what you say with regard to the weight of the evidence and the weight of the testimony, but I am suggesting to the Court in my argument that as a matter of law the police failing to present Cynthia White at the scene to Mr. Jamal, in effect, denied Mr. Jamal his right to be identified in a proper manner.

THE COURT: Well, unless you show me--that

doesn't necessarily follow, because you take the other argument. They took Schobert, or whatever his name was, and said, "Yes, that's him," and, then, argue that that is improper.

MR. JACKSON: No, no, Your Honor. It is how it is done.

THE COURT: That's what I am saying. In the one case you say that is improper. In the other case you say they should have taken her over.

I don't know. Maybe police officers should and should not do certain things, but the fact that somebody doesn't do something, you can't show that that somehow violates his Constitutional rights, because if that were true, he would be entitled to a lineup before he even comes to trial.

That's basically not the law.

MR. JACKSON: Your Honor seems to argue that a failure of the police to act is not objectionable.

THE COURT: I didn't say that. I am just saying: Does it somehow violate his Constitutional rights? Is there anything in the law that states he must be identified right then and there? I don't know of any such law.

MR. JACKSON: There is no such law that says he must be identified right there at the scene or any other time. I would agree with that, Your Honor.

But, what I am contending is that as a matter of law in this circumstance with regard to Cynthia White, the fact that they had an opportunity and they failed to exercise that opportunity--

THE COURT: You may be right. They had an opportunity, and some police officer didn't take advantage of the opportunity. But, does that make it suppressible?

MR. JACKSON: I am saying under the circumstances, where Mr. Jamal is brought into court, I am saying she did not have an adequate opportunity--

THE COURT: That's an argument to the jury.

MR. JACKSON: Very well, Your Honor.

THE COURT: You are going to weight, and I am not denying weight. I am only concerned right now with admissibility, not how much weight Miss White's testimony should be given as to identification. That's a question for the jury.

MR. JACKSON: And, I understand.

THE COURT: My only question is: Is it admissible for whatever weight it might have? If not,

the jury could decide it has no weight at all. It doesn't mean anything.

I am letting it be admitted. That somehow it carries some weight--that is still for the jury.

MR. JACKSON: I appreciate that fact.

THE COURT: This is all I am concerned with at this time: admissibility. That's all. Not how much weight it has.

MR. JACKSON: Very well, Your Honor.

With regard to Albert McGilty (sic), the suggestion is--if I may have a moment--

THE COURT: Which one is that?

MR. JACKSON: Albert McGilty (sic).

MR. MC GILL: The last civilian witness did not see the shooting. He saw him running across the street.

THE COURT: While he was running across the street.

MR. MC GILL: Yes.

MR. JACKSON: I withdraw that as to Mr. McGilty (sic). There is no identification issue there.

Excuse me one moment.

(There was an off-record discussion between

Mr. Jackson and Mr. Jamal.)

THE COURT: Did you talk about Schobert?

MR. JACKSON: Yes. I think I am going to talk about McGilty (sic), too, Your Honor. I am just going to confer with Mr. Jamal.

(There was an off-record discussion between Mr. Jackson and Mr. Jamal.)

MR. JACKSON: Your Honor, could I have a few moments, please?

(There was an off-record discussion between Mr. Jackson and Mr. Jamal.)

MR. JACKSON: May it please the Court, Your Honor, very briefly, with regard to Mr. Schobert and Mr. McGilty (sic), the argument would be the same with respect to them, and that is whether, in fact, the police officers' conduct with respect to the show-up, the identification, in the back of the wagon was legal, whether there was any suggestion on the part of the police that would taint the identification process.

What we are suggesting, Your Honor, based on what the officers have said prior to them placing him in the wagon that they have gotten statements from various people, and they suspect that Mr. Jamal is a suspect. He was placed in the wagon.

What did the police officer say to those witnesses when they were presenting them? We are suggesting to this Court, notwithstanding some comment to the contrary, that the police officers have said, "We have got the man. Make sure. Isn't that him?"

Of course, Your Honor says, "Well, they then have the opportunity of saying, 'No, that is not him.'"

But, I'm suggesting to the Court that the police officers, in fact, suggested to Mr. Schobert who was eighty to eighty-five feet away who described the man, again, six feet, 225 pounds--he looked in the wagon, and he saw a black man who, in effect, was upsidedown and his hair on his face, and says, "Yes, that's him," and we heard him say yesterday, "That's him."

We heard Mr. McGilty (sic) also look into the--

THE COURT: Who did you say? I took notes, and I don't have the facts that you are talking about.

MR. JACKSON: All right. I am not suggesting, Your Honor, that--

THE COURT: All I can go by is from what I heard from this witness stand. I am looking at Schobert's testimony and McGilty's (sic) testimony, and

that doesn't say what you are saying.

MR. JACKSON: All right. Your Honor, I am not suggesting--and, that's what I am saying--that the witnesses may not necessarily have said the very words that I have said. I am asking Your Honor--

THE COURT: I know. But, when it comes to admissibility, must I not take what I hear here?

MR. JACKSON: Understandably, and that was my point earlier about you making your decisions of law based on the facts that you hear.

THE COURT: Right. That's admissibility.

MR. JACKSON: Yes, sir.

THE COURT: That's admissibility. And, he says both of them said that the police didn't say anything. They just opened the door.

MR. JACKSON: I understand that.

THE COURT: And, they asked him if he could identify the man who ran from the parking lot, as far as McGilty (sic) was saying, and he says, "Yes," and they opened the door and they did not tell him who was in the wagon, and he said, "That is the man."

MR. JACKSON: Fine. What I am asking Your Honor to do is--you have heard what the witnesses have testified to. I am asking Your Honor obviously to

exercise your discretion and common sense with respect to both of these witnesses as saying that the police got this brief statement from them, "Yes, I saw everything," or, "I saw something," whatever it is. I don't believe the words are that important as to what they did say.

Then what did the police say? They had just taken them over to the wagon, and as your notes reflect as well, they don't say that they have anybody in the wagon.

Well, why is the man going to the wagon?

THE COURT: To look and see.

MR. JACKSON: At who?

THE COURT: To identify the man that he says ran from one part of the lot to the other, as far as McGilty (sic) is concerned.

MR. JACKSON: But, there is no testimony that the police told him there was anybody in the wagon. That is the point, Your Honor.

THE COURT: No, no, no, no, no. You are missing the point.

MR. JACKSON: I don't believe so, Your Honor, and that's what I am saying. I am suggesting, Your Honor--

THE COURT: The police officer asked them to look into the wagon, is what he says, and he did, and he said, "Yes. That is the man that shot the officer."

What you are asking me to do is to somehow forget what that witness said and say that the police officer said something else. You are implying that.

I can't do that. Now, you might be able to do that when you are talking to the jury, but we are talking about admissibility.

MR. JACKSON: I understand that, Your Honor.

THE COURT: And, taking from what I have from what I heard from the witness stand--and, that's all I can go by as far as admissibility is concerned--there is nothing there.

In other words, he didn't say, "The police officer said, 'The guy that you say shot the officer is in the back. Would you make sure that that is him.'"

He didn't say anything like that. He just asked him if he could identify the man who was in the back.

MR. JACKSON: He didn't say that. He just said, "Look in the wagon," is what he said that the police said to him.

THE COURT: The police asked him to look

into the wagon, asked him if he saw the man who shot the officer, that he said shot the officer, and he said, "Yes."

MR. JACKSON: OK. Well, Your Honor--

THE COURT: And, no. He asked him that first, and, then, he opened the door, and, then, he identified the defendant.

MR. JACKSON: Fine. OK. Your Honor, I am asking you to consider the logical omission of evidence. You have to accept or reject and judge the credibility of witnesses to determine admissibility.

THE COURT: That is not true. Only as to that point, not whether or not he was really able to observe him.

MR. JACKSON: I understand.

THE COURT: See what I am talking about?

MR. JACKSON: Yes, sir.

THE COURT: Only the credibility as to what he says the police did at that time.

MR. JACKSON: I understand that. So, the point is, Your Honor--

THE COURT: What you are asking me to do is to disbelieve him and presume that the police did something improper.

MR. JACKSON: To some extent you are very right, Your Honor; that is exactly what I am asking you to do. And, I am asking you to do that based on common sense, Your Honor, not--I am not asking you to presume facts that are not necessarily in evidence.

Your Honor well knows that you are certainly able to use your common sense, your judicial discretion, in determining what the facts are.

Again, if someone tells--well, I am not going to get into two examples, Your Honor. You certainly can use your common sense to determine if someone is telling the truth and what they are telling the truth about.

If someone says that, "Yes, the police said, 'Come to the wagon. I am going to open wagon,'" what were they going there for?

THE COURT: To see if you can identify the man who shot the officer.

MR. JACKSON: Where was the indication that there was a man in the wagon? What I am saying is--

THE COURT: Well, if there was a woman in the wagon, it's up to him to say, "That is a woman. That is not the one."

MR. JACKSON: Your Honor, I am a little bit

before you. What I am suggesting to you is if he says, "Yes, I saw something happen," and the police says, "Yes? Come with me. I am just going to open the wagon," I am suggesting to you that the police said something to him about what or who was in the wagon.

That's what I am saying.

THE COURT: You are asking me to assume facts that I haven't really heard.

MR. JACKSON: Isn't it reasonable and logical that the police would say something about who or what was in the wagon?

THE COURT: I am sure they did.

MR. JACKSON: That's my point.

THE COURT: But, the thing is you are asking a man today, six months later, to remember the exact words that somebody may have said six months ago. That's pretty difficult.

MR. JACKSON: Not necessarily the exact words, but some indication of what the police said to him.

THE COURT: I think he did say, but when the notes are transcribed, it will show it. But, I think he did say to him, "Can you identify the person who is in the wagon?"

MR. JACKSON: I don't recall that at all, Your Honor. It is just that he was taken to the wagon, Your Honor. Your recollection, unfortunately, is going to rule with respect to your decision on admissibility.

I am simply suggesting to the Court that in order for you to make a proper determination of admissibility of this identification that you have to consider the testimony of what was given as well as what was not given in order to determine what credible evidence you are going to use as a factor in your determination, and I am suggesting that for the police or for this witness to simply say, "Yes, I told the police I saw everything," and that for no reason whatsoever he was told, "Well, we are just going to take you to the wagon. We don't know what was in there: a barracuda, a police dog, a woman, a chicken, or child. We don't know," is what he would have you believe, and I am suggesting to this Court--

THE COURT: Well, he did say that the police made no suggestion to him that the man in the wagon was necessarily the man that he saw.

MR. JACKSON: Your Honor, you and I both know that the suggestibility that we are determining

today is a legal determination, certainly not for Mr. Schobert or Mr. McGilty(sic) to decide what suggestion is.

THE COURT: Only as to admissibility. You keep arguing on weight. You forget there are different things here, and whether I admit it or not is still for the jury. It is for them to decide.

MR. JACKSON: I understand. But, Your Honor, you just indicated that he said that it wasn't suggestive. What does that mean to you in making a legal determination that it wasn't suggestive?

THE COURT: Well, let me say this: All he says is the police officer asked him to look into the wagon. Right? He looks into the wagon, and he says, "That is the man that I saw shoot the police officer."

You are saying you don't particularly like that.

MR. JACKSON: Well, it is not a matter of my liking it. I don't believe it.

THE COURT: You may not believe it. You may not believe it, but unless there is some evidence that would convince me that there was some suggestiveness about the identification, how can I refuse its admissibility?

MR. JACKSON: Well, Your Honor, I--

THE COURT: By conjecture?

MR. JACKSON: Well, Your Honor, I have presented the argument, and I believe that there is ample opportunity for you to reasonably believe that something was said, and for the witness' failure to answer it is some indication that something is amiss, Your Honor.

THE COURT: Let me say this: This other fellow, McGilty (sic)--he testified that he even saw the police put this defendant in the wagon.

MR. MC GILL: Your Honor, the name is McGilton (sic).

THE COURT: What is his name? Albert McGill (sic)?

MR. MC GILL: No. Just to clarify it, M-a-g-i-l-t-o-n.

THE COURT: Oh, wait a while! M-a-g-i-l-t-o-n?

MR. MC GILL: Yes.

THE COURT: M ilton?

MR. MC GILL: Yes.

THE COURT: I am sorry.

MR. MC GILL: That's all right, Judge.

Albert Magilton.

THE COURT: I spelled it wrong. M-a-g-i-l-t-o-n. OK. Yes. He is the one that said he saw him coming from the parking lot.

Actually, he didn't see the actual shooting, though.

MR. JACKSON: That's correct, Your Honor.

THE COURT: But, he says the man he saw running from the parking lot with his hands behind his back is definitely this defendant. That's what he is saying.

MR. MC GILL: That's correct.

MR. JACKSON: That's correct.

THE COURT: And, when he identified him in the wagon, he said, "That is the man that I saw running from the parking lot."

He didn't even say, "That is the man I saw shoot him."

Notice: If he is going to lie, he could go a step further and say, "Yes, I saw him shoot him."

MR. JACKSON: Let's go further with respect to Mr. Schobert and Mr. Magilton. The wagon was open at the same time for both of those witnesses.

Mr. Magilton was specifically asked, "Is

that the man?"

"Yes."

Well, what man are they talking about? The man that he saw running across the parking lot? Fine. We have no problems with that whatsoever, no problems.

Mr. Schobert was still there. What was he asked? Nothing other than, "Look in the back of the wagon."

That's what we have. Your Honor, you have your own notes there as well, and I have mine. There was nothing.

Why is that? Because, on the one hand Schobert is saying, "I saw who did the shooting." Magilton is only saying he saw a man run across the parking lot.

So, why is it if both of them are viewing the man at the same time one is asked, "Is that the man?" The other isn't.

THE COURT: Because, maybe it was different officers that took them there.

MR. JACKSON: It was the same time, Your Honor.

THE COURT: You can't say that they were both at the very same time. My notes don't indicate

that. Nobody asked them that question.

MR. JACKSON: Your Honor, based on the testimony, I believe, of one of the police officers with respect to when the door was opened, or something like that, that's when they saw him. One time. One time for the witnesses; one time for Inspector Giordano, the only time the wagon was open.

THE COURT: Well, I don't know. I can't honestly say that, because I don't think anybody asked anybody that question.

MR. JACKSON: It was asked when they were shown the defendant.

THE COURT: That's right.

MR. JACKSON: I don't think the specific question--

THE COURT: Maybe they were together or separate.

MR. JACKSON: The specific question may not have been asked, and I agree with you.

THE COURT: I don't have any way of knowing that.

MR. JACKSON: Well, Your Honor, one of the police officers--and, I don't recall--and, I guess I could go--one of the police officers indicated--and, I

believe it was perhaps in the wagon crew--indicated when the witnesses went up to make an identification-- and, it was Magilton and Schobert that went up--

THE COURT: Schobert is the guy that said he never lost sight of the defendant from the time he first saw him shoot the police officer until he saw him put in the wagon.

MR. MC GILL: Judge, may I interrupt? I would really like to get into this aspect of it.

MR. JACKSON: Your Honor, the defense would rest.

MR. MC GILL: Mr. Jackson, if you have anything else, I really don't want to interrupt you, if you have anything more.

MR. JACKSON: Just one moment.

(There was an off-record discussion between Mr. Jackson and the defendant.)

MR. JACKSON: Nothing further, Your Honor.

MR. MC GILL: May I proceed, Your Honor?

THE COURT: You may.

MR. MC GILL: I'll try to take fifteen minutes at the most.

Your Honor, in reference to this issue, since this is fresh in the mind of the Court, I should

like to address that, the identification issue.

Your Honor, it just doesn't matter under the law whether or not an individual officer would take someone to a wagon and say, "Is this the man you saw? Is this the man you saw shooting? Is this the man you saw running across the street?"

And, then, open up the door. Or, if he opens the door, "Can you identify the man who ran across the street," or, "Can you identify the man who shot the officer?"

Then he opens the door and says, "This is the man."

It just doesn't matter. The reason under the law--which I am sure the Court is well aware of from your responses, and I have known Your Honor for a while--the least suggestive--the least suggestive identification procedure by the police is what we have in this case. The least suggestive.

The reason is this: No. 1, where you have suggestive identifications, the concern is obviously that the police do something to focus your attention to an individual at some time away from the crime: for example, showing a photograph down at the police station eight hours, two hours, two weeks, or three

months later, and asking, "Is this the man that did it?"

That is suggestive. A one-on-one show-up somewhere down the line, say a week, two weeks, three weeks, this would give you a suggestive--potentially suggestive identification.

The least suggestive identification--and, as a matter of fact, the type of identification which has been endorsed and suggested by the Supreme Court is on-the-scene identifications.

The reason? Simple. When the individual who identifies the man is right on the scene, is then taken up to the man that he just saw and identifies him, or says that he is not the man, then the police are able to either keep that man in custody or release him to go.

So, the Supreme Court of this Commonwealth has encouraged on-the-scene identifications just for that purpose, both for prompt law enforcement arrests, as well as prompt releases.

Suggestive? The least suggestive. As a matter of fact, it's the kind of identification which the Supreme Court suggests to have.

In this particular case, it is particularly

unique in that the witnesses, all three of them, as I recall the testimony, from the time that they first saw the defendant to the time that the defendant--that is, two of the three--shot the officer to the time that they were taken to the wagon after they observed the defendant shoot the officer, he never left their sight.

That is a unique and textbook example of nonsuggestive identification: never left their sight. So, they see him sitting at the curb, and, then, taken to a wagon, and, then, they are asked by a police officer, "Can you identify the man who did it," when the police arrived, and, then, they go up to him, look right at him, having seen him just moments before do the act, and identify that man as the man who shot the officer, two of them--or, one of them there, and, then, one across the street. The least suggestive identification.

In reference to Cynthia White, I believe what may have been the motive, the intent, of Counsel in articulating his objection to her identification, he may have said or meant to say that where there is no lineup and the first confrontation that the witness has the man that she saw is at a one-on-one

confrontation at a preliminary hearing or a bail hearing, or whatever, there may at times be a requirement-- there may be a requirement for a lineup before that hearing. If there is no lineup before and if the first time she sees him is at the hearing, that identification could be suppressed.

The basis for, however, the requirement, since it is within the discretion of the Court, is a much different factual situation than was presented in this case, because in the cases--and, I will cite *Commonwealth v. Warren Sexton*, among some others--you are dealing with an individual who goes into the store; a robbery occurs; a victim or a witness sees an individual that they never saw before, and only has a glance, second glance, of the individual who then runs away.

They then do not see him anymore. It was that glance. The first time they see the individual is at the hearing, which could be anywhere from maybe two weeks, three weeks, a month, whatever.

In that situation--and, that is not even universal in itself--but, in that situation, a lineup may be necessary.

The facts of this case completely differ,

and that was part of the argument that was presented before Judge Ribner.

Can that--excuse me. Strike that.

In this particular case, Cynthia White saw an individual, the defendant, three carlengths away. While still focusing on the defendant as he ran across the street, killed the officer, then moved and sat down at the curb, her eyes always were on the defendant.

She then, rather than turn away or walk away, walks up to the defendant when the police arrive, comes within four feet, similar to the distance that I am now, and looks at the defendant and sees a portion of the defendant's face, as she saw a portion of the right face as he was running away.

It is the same man. As he was taken by the police to the wagon over there, she also sees and mentions to officers that she saw what happened. Within four feet, and as they were carrying on, she was then, having told the officers, then taken down to homicide to an interview, never shown any photographs or never having done anything else before a preliminary hearing.

As you can see from those facts, no lineup at all would have been required. He never left her sight.

Mr. Magilton, the same thing. I have already dealt with that, so in all of those situations, Your Honor, the police action, particularly in bringing the witness to the wagon, because that was the only police action--the only reason I put Cynthia White on was to show this Court how close she came to the defendant as she walked up, to show to this Court that he was always in her view, to show that there was absolutely no need at all for a lineup and what a witness would necessarily have to go through in that situation.

So, Your Honor, I would suggest--or, I would say to the Court not only with the facts as presented to this Court, Constitutional in its application and reference to the law, but that type of on-the-scene identification was what is endorsed and encouraged by the Supreme Court.

In reference to the other aspects of the Motion to suppress, Mr. Jackson was quite right that the issue of whether or not statements are made is not a subject matter of this particular suppression hearing. It's the subject matter of the trial for a jury to concern itself with.

This with all due respect to the Court is

one of the problems, one we do have with well-intentioned self representation. It may at the time get into areas that may not be relevant to the Motion.

Mr. Jackson was quite right. The fact situation is for a jury to be concerned with.

In reference to coerciveness, first of all of the hospital statements, No. 1, there were no questions being asked by either the security officer or Officer Bray. The statements, the comments, made by the defendant were made as what is called in legal language "blurt-outs," no response, statements, oral exclamations or oral comments that are made without questions.

There is no evidence before this Court of any kind of coerciveness directly related to any of the blurt-outs, and, as a matter of fact, there was no request or no question to bring about the blurt-outs, so there would be no question, then, of voluntariness of blurt-out, since it was not a response to a question, and there was no evidence of any kind of direct coercive influence.

In reference to the statement made to Inspector Giordano, Counsel raised the issue--as a matter of fact, Mr. Jamal also raised the issue--of custodial

interrogation. Now, in reference to that, the Court could well see, based on the facts presented, that the defendant at the time he made the statement to Inspector Giordano was in custody. It would be difficult for the Court to see otherwise.

But, the key issue in that particular response, that particular dialogue, was whether it is custodial interrogation, and the key word is "interrogation."

Rather than just to talk about the law, I'll cite the Court an April 8th, 1981, decision of Commonwealth v. Robert Hankins, which I will give to the Court at the conclusion.

And, the Court found that it is appropriate-- strike that.

I'll rephrase it. The Court found that a question asked by police in order to neutralize a life-threatening situation, that need not be preceded by Miranda warnings.

As the Court well knows, there are questions that a policeman is allowed to ask, administrative questions, a question as to the wellbeing of an individual, a number of questions that they can ask.

Along with those questions, depending upon

the circumstances, a question that directly relates to the safety of the operation, the safety of the surrounding individuals, the safe of the defendant, or the individual himself who is being questioned, are questions that are permissible; however, you can go no further than to determine the life-threatening or absence of life-threatening situation.

In this situation where we have Inspector Giordano who goes to the wagon, is told this man is the man who supposedly shot the officer--if I recall, he had heard that from an individual which I brought out from him that he had heard that before he went in the wagon--then he goes into the wagon, and sees the defendant, and he also sees a gun--or, excuse me; not a gun--a holster, an empty holster.

Now, when he recognizes this and sees that situation right there, his questions were, first of all, how was he? Was he hurt? And, then, the request of: Where is the gun?

Once that response was given to him, he was not permitted to ask any other questions under the law. He had then found out and had determined where the gun was. It wasn't in some other pocket. It wasn't in on the floor nearby where, perhaps, in some way he

might be able to get to it. He found out it wasn't there. It wasn't around somewhere under a car where the police didn't know it was.

Before they left, not only would they pick the evidence up, but, more importantly, so that someone else might not pick that gun up and kill another officer or a civilian or anybody.

Now, under those circumstances, it is incumbent, it is necessary, it is required by officers of the law, and it's part of their duty to neutralize that situation, get the weapon out of the way, and go about their business.

That's what happened here, and the law permits it. Specifically, Your Honor, *United States v. Castellano* (sic) which is cited by the Hankins Court. *Castellano* (sic) is 500 F. 2nd 325, 5th District, 1974.

FBI agents asked the object of a search pursuant to a warrant if he had a gun within reach prior to reading him his Miranda warnings.

In concluding that the question was proper, and, therefore, the answer admissible--and, I am quoting from the Opinion--"The safety of the operation was the agent's primary concern. No rational investigatory

purpose could have prompted such a question about premises which the agents were authorized to search."

The safety of the operation. The primary concern was to neutralize that. The law, Your Honor-- and, I would ask, since I only have one copy, I would give this to Mr. Jackson for his review, as well as Mr. Jamal.

THE COURT: We will get copies made. Let me ask you one question. Mr. Jackson raised the issue as to whether or not the--he first asked, "Where is the gun," or, "Are you hurt?"

Does it make any difference?

MR. MC GILL: Your Honor, I believe that well under the present law that I cited to the Court it does not make a difference on that particular situation.

What it does is it just adds weight to the question, because it shows that the purpose was not investigatory to get incriminating evidence, but the purpose was one of administrative, and, also, the wellbeing of the individuals nearby.

By asking him whether he was hurt or not, obviously that is not incriminating. That is to find out how he is, should he get to a hospital. He

doesn't know. He just arrives on a scene.

So, right away you are talking about noninvestigatory there. The second step is he takes over. He sees the whole story, so he neutralizes that situation quickly.

So, either way it is significant, but not necessary. It is significant, Your Honor, because it adds weight to the showing at this Motion that the purpose was not to obtain incriminating statements, but the purpose was an administrative one for health reasons, about safety for public welfare reasons.

In terms of coerciveness, Your Honor, again I have handled that area. I would just like to make a statement of record that it is certainly not my recollection. I think I saw it appear somewhere, also, but I would object to the word "ram."

Nowhere in the officer's testimony was the word "ram" used. It may have been some argumentative statement by Mr. Jamal.

The officers stated they had carried Mr. Jamal who was resisting to the wagon, and his head did make contact with the pole. He hit the pole with his head, but I would object to the word "ram," because it wasn't used.

Nothing else, Your Honor.

MR. JAMAL: Judge, I'd like to address some of the issues raised by the prosecution. Mr. McGill spoke about blurt-outs. Again, it is my position that no such blurt-outs took place, that the first word blurt-outs came three months after this incident occurred.

MR. MC GILL: Your Honor, I would object to this. I think we have had sufficient argument. It is clear that is not a matter of the suppression hearing at this point. I think we have had long enough argument, and I would object to this.

MR. JAMAL: Well, the point I am making in terms of relevance and in terms of admissibility is that no such statements were heard by either Dr. Coletta or Dr. Cudemo, or even alleged by them.

THE COURT: You have to understand that not everyone may have been within that area to hear it within that time. That is a question for the jury.

MR. JAMAL: Again, the point that must be made--

THE COURT: Two people can see an incident happen, and one sees it happen differently than another. Two people can be there. One person gives

it one way, and the other person gives it another way, or one person comes in five seconds later and didn't even hear the statement, so that is not material.

Whether or not you actually made this statement is really for the jury. My only problem is: Is it admissible for them even to consider it? That's the question.

MR. JAMAL: On the question of admissibility to even be considered, the Supreme Court has ruled that a confession must be given of the free will and rational intellect.

THE COURT: Nobody is saying anything about that. They are saying these are blurt-outs. The jury would have to believe that you actually blurted out that statement. You see, it has nothing to do with the Motion to suppress. Don't misunderstand.

MR. JAMAL: OK. I get your point, but the point I am making is that even if such blurt-outs were made, if they came after physical coercion--now, of course, Mr. McGill would not consider that coercion. It was not his head that was rammed. It was not pulled or carried. It was rammed into a pole. I consider that at a very minimum some kind of abuse.

And, in the event of such abuse, coercion,

beating, then that alleged confession (the blurt-outs that were spoken about) would have to be suppressed.

THE COURT: Well, you forget that that security guard at Jefferson Hospital says that nobody did touch you. Nobody had beat you. Nobody had done anything to you.

MR. JAMAL: I don't forget that at all, Judge. Of course, that doesn't mean it didn't happen.

MR. MC GILL: Judge, I object. I think we have gone over this. These are the dangers of this sort of thing. I object, Your Honor, to any further argument. It has been covered completely.

Mr. Jamal and Mr. Jackson have made their positions very well before.

THE COURT: Yes, you have taken that position before, and I have heard it.

MR. MC GILL: I would also point out that all the interviews at the hospital from January on when there were many--were taken as a result of the investigation which was requested and granted by the Police Department. That's one of the reasons why it started at that time, because they had requested the investigation.

But, even that has nothing to do with it.

It is just, Your Honor, that I believe we have exhausted that area, and I would object to any further argument, unless there is a new point.

THE COURT: All right. I will render my decision at three o'clock this afternoon.

MR. MC GILL: Judge, before you leave, I just want to add a further statement that when the prosecution was arguing, that Inspector Giordano had entered the wagon and was looking for weapons, it was-- You've heard an officer say in this court that he had two guns in his hand. He was standing in the street.

THE COURT: I say once again: What one officer does, another officer may not know.

Let me read that case that the District Attorney has given me.

MR. JAMAL: Judge, before you leave, I'd like you to address the Motion to provide notes of testimony of trial. I asked you that several days ago, and--

THE COURT: You what?

MR. JAMAL: Provide notes of testimony.

THE COURT: Well, I am sorry. I already explained to you it is impossible.

MR. JAMAL: Judge, if you ordered it, it

would be possible, wouldn't it?

THE COURT: Hey! You do what I do.

MR. JAMAL: Judge, why are you getting up when I am addressing the Court?

THE COURT: You have to address that to me after a while. I want to get a bite to eat. It is 1:30. I have to have a bite to eat. I would like to think about my decision here.

Bring this up afterwards. I can only do one thing at a time. All right? I will see you at three o'clock.

(A luncheon recess was taken until 3:00 p.m. this date.)

(After recess):

THE COURT: Do you have something to say?

MR. JAMAL: Yes, Judge. I'll wait until you rule on the motion.

THE COURT: All right.

All right. It is the decision of this Court that the Motions to suppress the statements, the physical evidence, and identification are denied.

The Court will file written findings of fact and conclusions of law.

Is there any other motion at this time?

MR. MC GILL: I have no Motions, Your Honor.

THE COURT: Mr. Jamal, are there any other motions at this time?

MR. JAMAL: Judge, the Motion as to the alleged confession--

THE COURT: What is that?

MR. JAMAL: The Motion as to the alleged statements?

THE COURT: They have been denied.

MR. JAMAL: OK. I'd like to renew my motion for John Africa to assist me as backup Counsel in this trial, Judge.

THE COURT: Once again, for the fourth time, that is denied.

MR. JAMAL: Judge, I gave your court clerk here a copy of a Petition to provide testimony, notes of testimony.

THE COURT: What about the notes of testimony?

MR. JAMAL: I would like to have them supplied to me, as I cannot afford to purchase them.

THE COURT: Well, they will be. When I get mine, you will get yours. We understand that.

MR. JAMAL: When will you get your notes of

testimony?

THE COURT: When will I get mine? Well, I have completed a few cases now, and I have still been waiting maybe three, four months, but I will get them.

MR. JAMAL: Can I get a daily transcript, Judge?

THE COURT: Oh, I'd love to have a daily transcript, but that is a physical impossibility.

MR. JAMAL: Judge--

THE COURT: I have been waiting three or four months for notes to be transcribed.

MR. JAMAL: I understand that you are waiting for your notes to be transcribed, but I am asking if it is possible for you to order daily transcripts to be provided to me.

THE COURT: I wish I could. I am trying to tell you that it is just physically impossible. I am waiting for notes in cases that have already been completed.

MR. JAMAL: Judge, obviously, you deal with several cases a week, several a month, several a year.

THE COURT: No, no, no. I only take one at a time.

MR. JAMAL: Well, one at a time, but, obvi-

ously I am talking about this case.

THE COURT: I am talking about this case, too. Some day maybe they will have audio-visual tapes, and then you could have it on a daily basis, but until that time, I wish I could have them and you could have them on a daily basis, but it is not possible.

MR. JAMAL: Judge, is it possible for you to order it to be done?

THE COURT: It's silly to order something that I know can't be done. If I could do it, I wouldn't be waiting three months for notes from a case that has been completed three months ago.

MR. JAMAL: Well, Judge, I know that it can be done, because it has been done in other trials.

THE COURT: It has?

MR. JAMAL: Yes.

THE COURT: I don't know of anybody that gets it, but it's fine if you could do it.

MR. JAMAL: In the case of John Africa v. the U. S. Government in the Federal Court.

THE COURT: Well, the U. S. Government may have other resources, but I don't know.

MR. JAMAL: You are saying the City of Philadelphia doesn't have the resources to provide a daily

transcript, Judge?

THE COURT: I am afraid not.

MR. JAMAL: Isn't that really your order, Judge?

THE COURT: No, it is not my Order. I would be glad to order a daily transcript if I thought I could get it, but I am not going to order something that I know that I can't get. That would be a nullity.

I can appreciate what you want, and, like I say, I wish I could have it, too, but I have to be practical. It's just not possible.

MR. JAMAL: Judge, on the question of legal runners, you said you would take that under advisement.

THE COURT: Legal runners? I told you you already have two legal runners, and any further legal runners you want, take up with Superintendent Owens.

MR. JAMAL: The issue here is not Superintendent Owens, Judge. I am addressing you.

THE COURT: Well, I already made the decision. I am not going to order Superintendent Owens to do anything that he can't do. You already have two runners.

MR. JAMAL: Judge, Superintendent Owens did

not say that that was not possible.

THE COURT: Why don't you talk to him?

MR. JAMAL: I am talking to you.

THE COURT: Why don't you and Mr. Jackson talk to him?

MR. JAMAL: I am talking to you.

THE COURT: I say I am not making an order, period.

MR. JAMAL: OK.

THE COURT: I am not going to go into that again. I have already made my decision yesterday.

MR. JAMAL: Yesterday you said you would take it under advisement, defense's request to have assistance at this table.

Have you ruled on that?

THE COURT: No, I haven't ruled on that.

MR. JAMAL: Judge, when do you intend to rule on that? because, it is important that you rule on that as soon as possible.

THE COURT: I have to rule on one thing at a time. You brought this up now for the first time.

MR. JAMAL: No. You said yesterday you would take it under advisement.

THE COURT: Yes, I did, and if you want my

opinion, that is denied.

You see, if Mr. Jackson were running this case, he would be the one that is asking all the questions.

MR. JAMAL: So, what is the use of having Mr. Jackson ask questions if you are going to deny motions? Is it important to you who presents the Motion?

THE COURT: You are the one that is going to represent yourself.

MR. JAMAL: Judge, would you answer my question?

THE COURT: I have already answered it. There is going to be no one else sitting at that Counsel table but you and Mr. Jackson. That's it.

Any other Motions?

MR. JAMAL: Judge, it seems as if I am being tied to defense Counsel that has expressed a very clear and obvious interest to withdraw in this case.

I have said to you that Mr. Jackson has expressed unwillingness to function in the role to which--can I finish my statement?

THE COURT: I know that. We went through all of that.

MR. JAMAL: Judge, you might be bored by this, but this is vitally important to me.

THE COURT: I only have to rule one time, and you have an automatic exception to my rulings. For you to bring it up every day is silly, too.

MR. JAMAL: Judge, it is not silly.

THE COURT: Once I have made a ruling, I am not going to change it.

MR. JAMAL: This is very serious.

THE COURT: That's why I said I am not going to change it any more. I made the decision. He is your backup Counsel. That's it.

Now, you can bring it up today. You can bring it up next week, and the answer is still going to be the same.

So, why keep bringing it up?

MR. JAMAL: Why do you have no objection when Officer Thomas can sit at the prosecution table, and you object to someone who I feel comfortable with sitting at the table with me to give me advice and counsel on my trial?

THE COURT: There is nobody sitting there with him.

MR. JAMAL: There was yesterday, Judge.

THE COURT: Well, you have Mr. Jackson sitting there.

MR. JAMAL: Well, Judge, he has been appointed to sit there.

THE COURT: Well, OK.

MR. JAMAL: He has expressed an unwillingness to function there. I have expressed difficulty with functioning with him. I have said every day I have been in this trial who I would like to represent myself, Judge.

And, of course, you have issued your opinion. What I am saying to you is it is not a silly or frivolous matter, Judge.

THE COURT: I didn't say it is a frivolous matter. I said that I made a decision, and I am sticking to it, period, and for you to continually bring it up every day isn't going to change my mind. I have made up my mind on that point, and that's it.

Now, all I am saying is why continue to bring it up? I only have to make the decision once. That's it.

MR. JAMAL: That doesn't make it right, Judge.

THE COURT: Well, the only one that can

answer that question is the Appellate Court. You see, it's like a--you know, I am like an umpire, only I am at a little bit of a disadvantage. When an umpire calls the strikes, you are out, and there is no appeal.

But, at least, with me, when I say three strikes and you are out, you have the right of appeal, and if the Appellate Court sees I made a mistake, they reverse me. If I didn't make a mistake, they affirm me, so you at least have that benefit of the judicial process.

MR. JAMAL: Judge, we are not talking about a ballgame, are we?

THE COURT: I am just giving you an analogy so you can understand.

MR. JAMAL: I understand.

THE COURT: All right. So, I made the decision. So, why do you keep arguing with me about it?

MR. JAMAL: Because, it is important to me, Judge.

THE COURT: I am sorry. Everything is important. That's why I tell him to try your case for you, but you want to try it yourself.

MR. JAMAL: Judge, can he get me acquitted?

THE COURT: Can you get yourself acquitted?
Who can guarantee anything?

MR. JAMAL: Can I guarantee the right of
Counsel?

THE COURT: When the facts are brought up,
it is what the jury believes. Nobody can guarantee
you anything.

MR. JAMAL: Judge, if you can't tell me that
he can help me--

THE COURT: He can help you.

MR. JAMAL: How do you know?

THE COURT: He can help you.

MR. JAMAL: How do you know, Judge?

THE COURT: Because, he knows the law. He
knows more about it than you do.

MR. JAMAL: And, John Africa knows more about
it than I do.

THE COURT: Does John Africa know more than
Mr. Jackson?

MR. JAMAL: Yes, he does.

THE COURT: Let him take the Bar exam and
get admitted.

MR. JAMAL: Judge, again you are playing
games with my life, Judge.

THE COURT: No, I am not playing games. I am telling you what the law is. You are the guy playing games.

MR. JAMAL: John Africa represented himself.

THE COURT: Fine. He can just as you can. I don't think it is smart, but you can represent yourself.

MR. JAMAL: Judge, obviously (OK?), if your rulings are hurting me, and you are comparing it to a ballgame, this is not a ballpark.

THE COURT: I am just giving you an analogy here. If it was a ballpark, you would have no right of appeal, but at least here you do have a right of appeal.

If you think my decision is wrong, appeal it.

MR. JAMAL: I still, Judge, have the right to argue under protest and to disagree with your opinions.

THE COURT: You have done that several times already. This is the fourth time.

MR. JAMAL: It doesn't matter.

THE COURT: I am telling you I have already made my decision, and I am not changing it, period.

MR. JAMAL: You said you would take it under

advisement, the decision to have someone at this table.

THE COURT: Right. And, I have taken that under advisement, and I have denied that, too.

MR. JAMAL: Based on what, Judge?

THE COURT: Based on my decision.

MR. JAMAL: Based on what?

THE COURT: Counsel, I am not here--Counsel, I am not here--

MR. JAMAL: I am Counsel?

THE COURT: Yes, you are Counsel. I am not here to justify or explain to you every reason why I make a decision.

When I make a decision, the only one I have to answer to is the Appellate Court when it goes on appeal, not to you.

During the course of this trial there will be a lot of decisions I have to make, and I am not going to justify them to you.

Whether you understand them or not, I am just going to make them, period. If I am wrong, I will be reversed. If I am right, I will be affirmed.

It's as simple as that, but I am not here to educate you on reasons why I do things. I make my decision. That's it.

MR. JAMAL: I think it is clear why you are denying it.

THE COURT: If you think it is wrong, you take an appeal.

MR. JAMAL: I think it is clear why you are doing it. You are trying to ensure a conviction.

THE COURT: I am not trying to ensure a conviction. Look! I would be happy to let you try this yourself if I was interested in a conviction. That's why I am trying to convince you to let Mr. Jackson handle the case.

If you want to try it, be my guest.

MR. JAMAL: Does it matter at all who I wish to be my defense Counsel?

THE COURT: Here we go arguing again.

MR. JAMAL: Judge, this is not a trifle to me. It is vitally important to me.

THE COURT: Mr. Jackson has been appointed. That's all.

MR. JAMAL: It is not a trifle to me, Judge. It is vitally important to me, because I am fighting for my life. I am not fighting for your ballgame

THE COURT: Take an appeal if you think I am wrong. I have made my decision.

MR. JAMAL: Judge, before Judge Ribner a Motion to--I mean, a Petition to distribute questionnaires to proposed jurors was submitted, but--and, it was denied.

MR. JACKSON: No. It was deferred.

MR. JAMAL: Deferred; excuse me. And, we would like you to examine it and rule on that.

THE COURT: You mean you want to show me questions that you want to ask the jurors?

MR. JAMAL: These are not specific questions, but issues that we wish to address in the question. These are proposed areas of questioning.

THE COURT: If you want to submit questions to me that you intend to ask the jurors, I will be glad to consider those questions and rule on them for you.

MR. MC GILL: I don't think that is what he means. Perhaps Mr. Jackson can explain.

(There was an off-record discussion between Mr. Jamal and Mr. Jackson.)

MR. JAMAL: Judge, these are not questions. It's a proposed questionnaire to present to a potential panel of jurors so that they would have answered this questionnaire.

THE COURT: Well, that's what we have an individual voir dire for.

MR. JAMAL: I understand individual voir dire, Judge.

THE COURT: Mr. Jackson has been in my courtroom before, and he knows exactly how I handle these matters. We bring the entire panel in here. I give them certain general instructions, ask some general questions, and, then, they are brought in one at a time, and both the District Attorney and yourself have an opportunity to address whatever questions you want to address.

You can ask them anything you want.

MR. JAMAL: I understand that, Judge, but the nature of this Petition that I am trying to present to you now is not specific questions, but a questionnaire, a proposal for a questionnaire to submit to potential jurors.

THE COURT: Well, you see, I follow the Rules set down by the Supreme Court, and the way I handle it is the way the Rules read, and that's the way we are going to do it.

If you want the Supreme Court to change its Rules, petition them to change it.

MR. JAMAL: One second, Judge.

(There was an off-record discussion between Mr. Jamal and Mr. Jackson.)

MR. JAMAL: OK. Judge, we'd like to--I'd like to submit this Petition to the Court so that you can examine it. Read through it.

THE COURT: I have it.

MR. JAMAL: Oh, you have it? OK. This source material noted here was not attached to the Petition. It was not in the Court file. It is additional information about why we think it is necessary, why we think it is necessary.

Would you examine it and read it?

Judge, if you wish Mr. Jackson to summarize the material that is before you, he is quite willing to do so.

THE COURT: If you want to summarize it, fine. I am sure--

MR. JAMAL: Will it make any impact on your ruling, Judge, or have you already decided, Judge?

THE COURT: I don't know. If it conforms to the Rules of the Supreme Court, fine. Do you want him to say something?

MR. JACKSON: May it please the Court, what

you have before you, Your Honor, is with respect to the Petition for Mr. Jamal to be allowed the opportunity to propound questions that would be submitted to the veniremen prior to them coming into the courtroom.

The individual voir dire would be conducted pursuant to the responses to that questionnaire.

Your Honor, the materials that you have, the source materials that you have before you, are included in an affidavit of a Courtney Mullin, C-o-u-r-t-n-e-y M-u-l-l-i-n, I believe is her name.

There is an article by Courney Mullin as well as an affidavit. You also have an article from the American Journal of Trial Advocacy written by Daniel J. Ryan and Peter J. Neeson, who are both members of this Bar, the Bar of Pennsylvania and the Bar of Philadelphia. They both practice in Philadelphia.

The procedure we are suggesting is not unusual. It has been used here in Philadelphia a number of times. Most recently, Mr. Ryan and Mr. Neeson propounded a questionnaire as well as a mock trial.

The matter has not reached the Appellate Court with regard to Mr. Neeson and Mr. Ryan in that the matter was settled prior to that. I believe Judge Doty was the Judge handling that matter. It was a

civil matter involving a malpractice case. I am sorry, A civil matter against the City of Philadelphia as a result of a claim of police abuse where the plaintiff in the case was injured by police officers.

This article, as well as the accompanying affidavit and articles that have been written with respect to this whole issue of jury, said when you have a highly publicized case regarding police, when there are implicit issues of race involved, then it may be necessary in order to insure fairness to the defendant, in order to obtain the most capable and fair-minded jurors, it may assist this Court, assist the defendant as well as the prosecution, to extract information that would indeed indicate a bias, a possible bias, of the prospective juror.

There is also, Your Honor, a national survey that has been conducted with regard to citizens in general how they feel about defendants who have been arrested for criminal offense.

Fifty percent of those people who were interviewed indicated that if a man was arrested, then he must be guilty of something. I acknowledge and appreciate the fact that that question would be allowed in a voir dire; however, I think a case of this nature, a

case that has received the visibility, the publicity, and picks up the motion as much as it does, would require some assistance on the part of Mr. Jamal to insure that he received the most--the fairest-minded jurors available.

Mr. Jamal is not suggesting, and the Petition does not suggest, that he is looking for an all black jury or an all white jury. What the Petition is hoping to do, Your Honor, is that even if the jurors are all white, that is not the issue. That would be acceptable so long as he has had an ample opportunity to question and elicit the potential bias of the proposed jurors.

I don't think, Your Honor, based on my experience, not just with Your Honor, but based on my experience of practicing here in Philadelphia, I don't think that the manner, the technique of voir dire here in Philadelphia, will allow Mr. Jamal to elicit that information.

THE COURT: Why not?

MR. JACKSON: Well, as Your Honor well knows, open-ended questions are extremely limited; in other words, you would ask a juror, you know: Would you be fair to both the prosecution and the defense? Yes.

Rather than: How would you be as a juror?
That question: How would you be as a juror? would tell me a lot more. It would tell Mr. Jamal a lot more about the prospective juror's bias in a case, rather than directing what their answer should be, "Yes," or, "No," and that is the problem.

When we conduct a voir dire, as Your Honor knows, you are normally limited to a "yes" or "no" answer.

THE COURT: I wouldn't say that.

MR. JACKSON: Pardon me?

THE COURT: I wouldn't say that.

MR. JACKSON: Well, fine, you wouldn't say it, Your Honor, but I think you know from experience that by and large open--

THE COURT: Everything that you can ask in writing, you can ask orally when the jurors are brought in individually. I don't see any difference.

MR. JACKSON: Your Honor--

THE COURT: You see, we are bound, Mr. Jackson, by the Rules of Criminal Procedure as set down by the Supreme Court and by the decisions of the Supreme Court in the selection of the jury, and that's all I am going to do.

MR. JACKSON: Fine, Your Honor. I am not asking or requesting or soliciting that Your Honor exceed the Rules of Pennsylvania Criminal Procedure or the Constitution of the United States or of Pennsylvania.

The proposal that we are making is consistent with the Constitution. It's consistent with the Rules of Criminal and Civil Procedure here in Pennsylvania. We would not ask Your Honor to do anything unusual like that.

What we are saying, Your Honor: The questions would be reasonable and fair questions, that if we were to ask each and every juror those questions, only to then have the answers, and, then, a series--in other words, we would ask a juror a question in a questionnaire. We would have those answers. Based on those answers, we would then ask additional questions orally.

THE COURT: The question you would submit to them in writing you can ask them, and whatever their answer is, you can follow it up.

MR. JACKSON: I appreciate the fact that we can certainly do that orally. What I am suggesting, No. 1, is that once we get the answer to the question-

naire, we can ask them orally those series of questions that would flow from their responses.

If we asked the question, those individual questions that would be on the questionnaire of the juror, we would then have to go through all of those series of questions. Question No. 1. We get the response. Then the whole host of questions that would come and follow question No. 1.

It is going to take forever.

THE COURT: It may very well. I don't know.

MR. JACKSON: Are you suggesting, Judge, that you are going to allow us to have a full opportunity to ask open-ended questions of the prospective jurors?

THE COURT: You may ask any questions that the Supreme Court of Pennsylvania has said is a proper question.

MR. JACKSON: OK, Judge. Just so that I am clear and so that I can explain this to Mr. Jamal: The Supreme Court has said a number of things with respect to questions that may be asked of prospective jurors, without delineating what those questions are, and as Your Honor knows, it is an interpretation of what the Supreme Court says that will guide us in

those questions.

With regard to an issue of race, as Your Honor knows, oftentimes we are required to ask: Is there anything about my physical condition, my color-- not my color. Is there anything about my physical presentation that would cause you any bias? And, the answer would be whatever it is.

What I am suggesting to you, Your Honor, is that there are specific questions that Mr. Jamal needs to ask these prospective jurors.

THE COURT: Like what? Give me an example.

MR. JACKSON: Because I am black, would that prejudice you in any way?

THE COURT: You have an absolute right to ask that.

MR. JACKSON: Is there anything about black folks that would offend you?

THE COURT: Go ahead. Unless the District Attorney objects, I see no problem.

MR. JACKSON: Fine, Your Honor. Based on what you are saying, I don't think the issue needs to be pursued.

THE COURT: Do you have any problems?

MR. MC GILL: Your Honor, I think so that

Mr. Jackson understands what Your Honor says and I understand it, too, certainly those two questions that you had mentioned--that he had mentioned--and that you said were appropriate, I would certainly agree to as being appropriate questions to be asked each venire-person; however, I do not believe that Your Honor is saying that all the open-ended questions that Mr. Jackson may have in mind you will permit.

I think consistent with all of the trials that I have had in the courts over the number of years including a number of capital cases, I believe that there would be both timewise, as well, Your Honor, as scope--excuse me--both in terms of efficiency and in terms of scope, Your Honor, I believe that there should be a limitation in questions.

THE COURT: Well, the only way I can tell is if Mr. Jackson would write up a list of these questions and submit it to me, then I could go over them, and I could decide which ones are admissible and which ones aren't.

MR. MC GILL: Allow me. If we could, Your Honor, I would request that this be done.

THE COURT: Well, Mr. Jackson can do it over the weekend.

MR. MC GILL: And, I will also, Your Honor, try to get a list of questions.

THE COURT: Then submit it to me, and I'll rule on them.

MR. MC GILL: I would also like to get a list of questions, and there may be--and, perhaps Mr. Jackson could understand this, also. There may be other questions beyond what he has on his list.

For example, you may approve just ten questions after we argue, because there may be several questions that are open and implicitly I would believe to be, to use a word that I think is broad enough to explain it, that might be somewhat confusing.

I would certainly object to that, but what I am saying is that even though we may agree to ten questions, he would have some opportunity to follow up if it would require that.

THE COURT: Sure, and if there are objections to a question, then I make a ruling.

MR. MC GILL: Yes.

THE COURT: That's what we have an Appellate Court for, to see whether my rulings were proper.

MR. MC GILL: I think also in the past with myself and Mr. Jackson who has appeared before you a

number of times that there will be sometimes questions presented. You will discuss them with Counsel. And, I, obviously, because of the Court Order and the interests of justice, do not have any problem at all with constant communication as has been the situation between Mr. Jackson and Mr. Jamal. Both of them could confer and decide as to a question, as I may confer with one of the individuals involved in my case, as to what a particular question would be, or advice on certain things.

However, I think that for the interests of time, Your Honor, particularly, rather than constant objections to questions, that before the questions begin, that we would sit down and go over each one and pose our objections to each one, with the hope that it would not be an endless discussion after each one that you might deny.

THE COURT: That's a good idea. Submit written questions that you propose to ask, and I will rule on them.

MR. MC GILL: However, I do believe that I would like to stay within the same scope of the nature of questions which I understand the Supreme Court would permit, rather than making true open-ended ones.

I will mention that right now. I am not about to agree to a number of the questions I have seen there.

THE COURT: Let's wait and see, and I'll rule on them. All right?

MR. MC GILL: Fine.

THE COURT: Anything else?

MR. JAMAL: Judge, these are 115 questions.

THE COURT: OK. Do we have a copy of these?

MR. JAMAL: We don't have a copy, but we'd like you to make a copy of these. Could you make a copy of these and provide them to the defense?

By no means are we saying that is all of the questions that we would like to ask, but there are some that give--do you have a copy of that, Judge?

THE COURT: No. These are yours. Oh, here is an extra copy. Oh, here! Give this to Counsel.

MR. JAMAL: I only have one copy.

THE COURT: All right. I will make an extra copy.

MR. JAMAL: By no means are we saying that is all the questions we would like to ask.

THE COURT: Well, if you want any more questions, prepare them, and I will look at them.

Will you give this back to Mr. Jamal? This belongs to him.

Anything else?

MR. JAMAL: May we have one moment, Your Honor?

THE COURT: Surely.

(There was an off-record discussion between Mr. Jamal and Mr. Jackson.)

MR. JACKSON: Your Honor, may it please the Court, with respect to the jury issue, we have nothing further to present.

I would just like to speak in behalf of the issue of having someone at Counsel table. I appreciate that Your Honor has made the ruling, and I think, though, Your Honor, we are about to cross the threshold into a different area. That is the area when we are going to have a jury.

Your Honor has, of course, witnessed the fact that at various times there were individuals within the courtroom with whom Mr. Jamal wished to communicate or some of those people wished to communicate with Mr. Jamal.

Of necessity, because they are not at Counsel table, I have had to go back and forth to the spec-

tators' gallery, back and forth. I don't think that that situation is going to be at all reasonable and fair under the circumstances where we have a jury sitting in place, and we, perhaps, going back and forth to the gallery with messages and making comments.

THE COURT: I was hoping that you wouldn't be doing that.

MR. JACKSON: Your Honor--

THE COURT: Let me say this: You have tried cases as an attorney. You are an attorney, and you have tried a case.

MR. JACKSON: Yes, sir.

THE COURT: How many times have you gone into the spectators and taken questions from them and asked the witness additional questions?

MR. JACKSON: Well, Your Honor--

THE COURT: Look! You have the District Attorney's entire file. You have all the statements from everybody that is involved in this case. You know as much about the case as the District Attorney does.

There is no reason why you have to have questions from spectators in order to examine the witnesses on the bench.

MR. JACKSON: But, Your Honor, I think the problem is that you've characterized these individuals as spectators, and, perhaps, I have, too, and they are more than that, and that is just the point.

They are not just spectators. These are people who he believes can advise and counsel him properly. Your Honor, if you will, please--

THE COURT: Yes, but if it is going to be that he needs somebody to hold onto their hand in order to try this case, then maybe he ought to take another look at whether he is really competent to try this case himself.

MR. JACKSON: Your Honor, I understand your comment. Your Honor has never--and, Mr. Jamal has pointed out, I don't think anyone has suggested that Mr. McGill is not competent or that Detective Thomas is holding his hand.

And, Your Honor well knows many times in front of you, Judge, the District Attorney will have a D.A. or a witness sit at Counsel table.

THE COURT: That is all right, but he can't go to somebody else in the spectators. If he is just going to have that one person there, fine, and that's all you are going to have right over here is just the

one person.

Now, if you need a break because you want to confer, or you want to reserve the right to call the witness back later on, fine. There are ways of doing this, but I am not going to have people jumping up and going and giving questions while he is cross-examining.

MR. JACKSON: But, Your Honor--and, perhaps I am begging the question and predicting--to deny him that is going to deny him perhaps the right to effectively cross-examine.

THE COURT: No, no, no. Well, that's his problem. He wants to be the attorney. Fine.

MR. JACKSON: And, Your Honor has--

THE COURT: But, I am saying, you know, when I was an attorney practicing law and you are an attorney practicing law, do you stop and go over and say, "Well, give me some questions to ask."

You know your case. I am saying you have everything that the District Attorney has. You should be prepared, or Mr. Jamal, since he is the attorney, should be prepared to know exactly what questions to ask and how to proceed accordingly.

MR. JACKSON: I understand that, Your Honor. I am a lawyer. I have been trained as a lawyer. There

is nothing to preclude me if, in fact, I was the representing lawyer for Mr. Jamal if I had a witness on there if I wanted to back and forth after every question. Your Honor would not stop me from doing that.

THE COURT: But, I think it would be very foolish.

MR. JACKSON: That's one thing. It may be foolish, but the point is I wouldn't be precluded from doing it. Mr. Jamal wouldn't be precluded from doing it.

THE COURT: I am not so sure about that. There has to be a certain amount of decorum in the courtroom.

MR. JACKSON: That's what we are trying to insure.

THE COURT: The only way you are going to do it is the way I am suggesting. Now, if he wants to get back to that witness, he can always reserve the right to call him back later on.

And, when we have a break, he can have this conference, or whatever he wants, in order to get additional questions, if he feels he hasn't covered an area.

MR. JACKSON: Your Honor, many times even

defense Counsel will have people at the table other than the defendant even in the selection of jurors. In this jurisdiction or other jurisdictions, they will have social scientists and other experts available at Counsel table.

At some point in time some of those persons might be removed. I don't think what he is asking is anything unreasonable. I don't think he is asking for anything that is unprecedented.

He is simply asking for someone to sit along with me and him to assist in the preparation and the inquiries that he will have of witnesses.

And, Your Honor, I think what he is asking is reasonable.

THE COURT: I don't think it is really reasonable at all, because he is not requesting somebody who happens to be an expert in some field that he needs.

MR. JACKSON: I think he is, Your Honor. Whether Your Honor can fully understand or appreciate or accept that individual, Mr. Jamal does. He is saying that he wishes to defend himself.

THE COURT: If you follow this to a logical conclusion, then you would have twelve people sitting

up there.

MR. JACKSON: No. That would be unreasonable. That would be unreasonable.

THE COURT: It is unreasonable to me for him to have anybody but you. And, when it becomes necessary to have somebody else and to confer with somebody else, he can always do that when we take a break.

We will take a break, and he can confer and get whatever additional guidance he thinks he needs.

MR. JACKSON: Anticipating the difficulty, Your Honor, the problem I have then is that if he wants to take a break each time he wants to confer with that person, this case will go on forever, and I think, Your Honor, it is reasonable to make this presentation to you now.

THE COURT: I have been watching him, and he has been cross-examining witnesses all along.

MR. JACKSON: Yes, sir.

THE COURT: And, he knows how to ask questions. Now, in the end, if he feels he wants to talk to you about something, or he feels he has to have some more questions, we can always take a five-minute break.

MR. JACKSON: Your Honor, it is the burden that is being placed on him as a defendant.

THE COURT: There are a lot of burdens being placed on me with additional people at Counsel table.

MR. JACKSON: We are only asking for one other person.

THE COURT: I don't think that one other person is qualified to assist him in any way. I don't see where that person is necessary.

MR. JAMAL: Judge, you said you don't think the person is necessary and you don't think they are qualified.

Isn't that, again, a determination for me to make?

THE COURT: Not necessarily, because I have to run an orderly procedure in this courtroom.

MR. JAMAL: Judge, what you have heard, none of it has been disorderly. We haven't suggested that someone--as a matter of fact, the scenario that happened the other day was quite disorderly. You made no comment about that, did you, Judge?

THE COURT: No. We had no jury here. That is not going to be any problem.

MR. JAMAL: What I am saying to you, Judge--

THE COURT: What I am saying to you: After you finish examining, if you want additional time, you ask for a five-minute break.

MR. JAMAL: Why is it disorderly having someone sitting there?

THE COURT: Why is it so necessary? You mean you don't have the confidence in yourself to try this case as a lawyer?

MR. JAMAL: Yes, I do have the confidence in myself.

THE COURT: That's why I am saying you ought to think about this again, because if you have confidence in yourself, you don't need someone else over there.

MR. JAMAL: What if I don't have confidence in him?

THE COURT: Then you don't have to confer with him if you don't want to. You do whatever you want. I told you he is your attorney.

If you want to confer with him, fine. If you don't want to, that's your problem, not mine.

MR. JACKSON: Exactly, exactly.

THE COURT: Now, if you don't have confidence in yourself, if you don't have faith in yourself that

you could stand up here as a lawyer and try this case by yourself, then I think you ought to think twice and let Mr. Jackson handle it.

MR. JAMAL: That's your opinion, Judge.

THE COURT: You don't have to take it, just as you don't have to take his advice, either. If you don't want to take it, fine, don't take it. I am giving you good advice.

MR. JAMAL: Again, that's your advice and your opinion.

THE COURT: Let's adjourn court until Monday morning.

MR. MC GILL: Judge, I would make one statement to follow up what you had said concerning selection. As I understand, Your Honor, of course the Commonwealth agrees that Mr. Jamal might have the additional person of his backup Counsel present at the table.

The Commonwealth, myself, Your Honor, inasmuch as Your Honor also had said it would only have, then, for the record, one other person at my table, other than myself, no one other than that, so there would be two here and two there, meaning the defense table.

I want to make that clear for the record, so that there would be no additional people on either side other than two.

I understand that is what your Order was, wasn't it?

THE COURT: That's what I said.

MR. JAMAL: Judge, is the problem two people or three people, or is it the person that I would like to have as backup Counsel?

THE COURT: Look, Mr. Jamal! I have already told you.

MR. JAMAL: Judge, can you answer my question?

THE COURT: I am not going to stay here all day.

MR. JAMAL: I have not asked you to stand here all day.

THE COURT: I have made my decision, and that's it. I don't have to justify it to you.

MR. JAMAL: You made your decision before I asked you the question, Judge.

THE COURT: I don't have to justify it to you.

MR. JAMAL: I have asked for an answer to a

question.

THE COURT: I am not here to answer your questions.

MR. JAMAL: Judge, if I only had two people at that table--

THE COURT: I am not here to answer your questions, so that's it.

Do you have anything else?

MR. JAMAL: Who is here to answer my question, Judge?

THE COURT: Mr. Jackson will answer it for you.

MR. JAMAL: Am I not Counsel for the defense?

THE COURT: Yes, you are, but I have nothing further to say to you. I have made a decision.

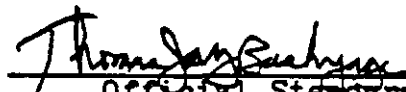
Is there anything else?

If not, I will see you Monday morning at 9:30.

MR. JAMAL: Judge, I would like for him to leave.

THE COURT: He is here by my Order.

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.



Official Stenographer

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

Judge