

This First Page Is A Set Of Notes Concerning The 2002 Murder Trial of Diane Fleming - see Court transcripts below

She was sentenced to 20 years for tainting Gatorade with methanol + 30 years for murder of her husband, Charles

Habeas Corpus [Petition](#) denied by Judge Cleo Powell on March 22, 2006

(This version of the trial transcript was first posted Sept, 2014, and last edited Feb, 2016)

from Certificates Of Analysis

Gatorade bottles containing creatine mixed on Sunday, June 11, 2000 (mL methanol drunk/remaining)

		<i>Gatorade</i>	<i>Drunk at 7 pm June 11</i>	<i>~3.6%</i>	<i>21? / 0 mL</i>
<i>Item 13</i>	<i>Commonwealth 7</i>	<i>Fruit Punch Gatorade (ph 3.27)</i>	<i>at work Sept 30, 2/3 full</i>	<i>4.7% *</i>	<i>17 / 34 mL</i>
<i>Item 11A</i>	<i>Commonwealth 6</i>	<i>Lemon Lime Gatorade (ph 3.07)</i>	<i>at work Sept 30</i>	<i>3.6% *</i>	<i>0 / 21 mL</i>
<i>Item 11B</i>	<i>Commonwealth 6</i>	<i>Fruit Punch Gatorade</i>	<i>at work Sept 30</i>	<i>3.6% *</i>	<i>0 / 21 mL</i>
<i>Item 7</i>	<i>Commonwealth 10</i>	<i>Gatorade</i>	<i>in refrigerator June 14</i>	<i>3.3% *</i>	<i>0 / 19 mL</i>

*creatine mix was 1.5TBs/20FLOz [p.65](#) (Hospital called police on June 14) *measured "relatively quickly" after June 14*

Methanol levels determined by laboratories MCV and VFL for Charles Fleming blood samples: (From Bayati report)

<i>Sample taken 7:30pm June 12:</i>	<i>750 & 600 mg/L</i>	<i>(= .1 & .08 %)</i>
<i>Sample taken 6:10pm, June 13:</i>	<i>200 & 100 mg/L</i>	<i>(= .026 & .013 % = 260 & 130 ppm)</i>
<i>Empty can taken by detectives on June 21:</i>	<i>It had been in the Fleming garage trash can for 10 days.</i>	

Diane early email recalls windshield washer bottle as not opened. [p.19](#) [p.20](#)

Technical misunderstandings and errors:

Joseph Saady: Lethal dose of methanol is 75-120 mL, but less if given over a period of time [p.51](#)

Methanol can build up over time and reach a lethal threshold [p.54](#)

Christopher Acker: Formic acid cause acidosis making cells not signal properly which then causes death [p.41](#)

Charles had had some symptoms for about a month [p.41](#)

Charles nighttime ethanol could rev up his enzyme level and convert more methanol, or would he be protected? [p.41](#)

Craig Cooley: No evidence of suicide, [p.60](#) Charles did not commit suicide [p.99](#) Color effect from windshield washer unknown [p.98](#)

Warren Von Schuch: Gatorade mix made Charles sick, [p.96](#) Methanol built up to lethal from multiple poisonings over period of time [p.96](#)

Compare to Woodrow Monte: Lethal dose: 7.4 mL / 150 lb female, as patient 17 [ref 16](#) (About 1/10 of Saady's number and 1/100 that for test animals.)

Formic acid is listed as a GRAS food additive by the FDA.

The acidosis is caused by lactic acid from anaerobic metabolism due to formaldehyde damaging mitochondria and cellular oxidation.

The lactic acid shows up before acidosis develops and before formic acid can be detected.

Text Editing: The originals were OCR converted with permission by legal owners Cook & Wiley to this text-searchable ASCII in 2014 by Dr. Edward H Takken, and then posted with [Analysis Reports](#) and other trial materials at [more.CouldItBeFormaldehyde.info](#), Appendix A

Comments added to the original court proceedings are in italic serif, like this page. The table of contents on [page 2](#) is expanded to include links, and the bottom of every page has a link ↑ back to this TOC. The original court proceedings pagination numbers have been retained in their original text position but now put in brackets as <pnnn>. The page layout here has been optimized for printing double sided with short edge binding.

<p001>

VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

COMMONWEALTH OF VIRGINIA

v.

DIANE FLEMING

CR0IF01484-01,02

February 19, 2002

Volume One of the testimony and other incidents in the above, when heard before The Honorable Cleo E. Powell, Judge, and a jury, beginning at 9:06 a.m.

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APPEARANCES:

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CHARLOTTE P. FLEMING	<i>Charles mother, Diane's mother-in-law</i>	17 <54>	<86>	<68>
CHARLES L. FLEMING, SR.	<i>Charles father, Diane's father-in-law</i>	21 <69>	<72>	
WILLIAM H. BAILEY, JR.	<i>Coworker of Charles</i>	23 <74>		
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Sentencing: *Instruction to Jury* 117, *Jury Findings* 119 (20 years for adulteration of a substance + 30 years for first degree murder.)

(The court reporter was duly sworn. The defendant was personally present, together with her counsel.)

THE COURT: Good morning, counsel.

MR. DAVENPORT: Good morning, Your Honor.

MR. COOLEY: Good morning, Your Honor.

THE COURT: Are there any issues, gentlemen, that we need to take up before we bring the jury in?

MR. DAVENPORT: Not from the Commonwealth.

MR. COOLEY: Not before the jury.

----- *Arraignment* -----

THE COURT: Is your client ready to be arraigned, Mr. Cooley?

MR. COOLEY: She is, Your Honor.

THE COURT: All right. would you please stand with your counsel, ma'am?

THE DEFENDANT: (Complying.)

THE CLERK: Are you Diane Fleming?

THE DEFENDANT: Yes, I am.

THE CLERK: The grand jurors of the County of Chesterfield, on their oaths, present that Diane Fleming, on or about June 14, 2000, in said county and within the jurisdiction of the circuit court of said county, did unlawfully and feloniously kill and murder Charles Linwood Fleming, Jr., against the peace and dignity of the Commonwealth of Virginia. <p004>

What is your plea, guilty or not guilty?

THE DEFENDANT: Not guilty.

THE CLERK: And on your plea of not guilty, do you desire a trial by jury or by The Court?

THE DEFENDANT: By jury.

THE COURT: Ms. Fleming, I am going to ask you a series of questions. If at any time you don't understand a question, ask me to repeat it or rephrase it. If at any time you would like to confer with <p005> counsel prior to responding to my question, please feel free to do so. For purposes of

answering my questions, I'm going to ask you to raise your right hand and be sworn.

THE DEFENDANT: (Complying.)

COURT: State your full name for the record.

DEFENDANT: Diane Fleming.

COURT: Ma'am, how old are you?

DEFENDANT: Forty four.

COURT: What's the highest level of education you've obtained?

THE DEFENDANT: About one year of college.

THE COURT: So, you do read and understand the English Language; is that correct?

THE DEFENDANT: That's correct.

THE COURT: You are the Diane Fleming that was just charged in the two indictments that we just read into the record?

THE DEFENDANT: Yes, I am.

THE COURT: All right. Do you understand the two charges that have been brought against you, ma'am?

THE DEFENDANT: Yes, I do.

THE COURT: And do you understand what the Commonwealth will have to prove in order for you to be found guilty of those two offenses? <p006>

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand the range of penalties associated with the offenses?

THE DEFENDANT: Yes, I do.

THE COURT: Have you had ample time to discuss your case with counsel?

THE DEFENDANT: Yes.

THE COURT: And have you provided him with the names of all the witnesses you want him to call on your behalf?

THE DEFENDANT: Yes, ma'am.

THE COURT: And are all those persons present here today, Mr. Cooley?

MR. COOLEY: They are on call for 4:00 this afternoon.

THE COURT: Okay. And you have had ample time to prepare your case with your client, counsel?

MR. COOLEY: I have, Your Honor.

THE COURT: And Mr. Cooley is retained, Ms. Fleming?

THE DEFENDANT: Yes, he is.

THE COURT: And have you been satisfied with his services so far?

THE DEFENDANT: Yes.

THE COURT: And you are ready for trial this <p007> morning?

THE DEFENDANT: Yes.

THE COURT: Mr. Cooley, are you ready for trial this morning?

MR. COOLEY: Yes, Your Honor.

THE COURT: All right. Thank you very much. I find that both pleas have been voluntarily entered. I accept both not guilty pleas. You desire to have a trial by jury?

THE DEFENDANT: I do.

THE COURT: You may take your seat with counsel, please. Both pleas are accepted as being voluntarily entered. Is the Commonwealth ready for trial, Mr. Davenport?

MR. DAVENPORT: We are, Your Honor.

THE COURT: So, for purposes of me advising the jury, do we expect this to go a full three days?

MR. DAVENPORT: Your Honor, after going through the evidence with Mr. Cooley, it would be very likely that it would be two days. Would you concur, Mr. Cooley?

MR. COOLEY: I would concur in that, Your Honor.

THE COURT: And just as a matter of logistics, gentlemen, I would assume that we would

go until 5:00 or 6:00 in the afternoon and break and come back tomorrow. <p008>

MR. DAVENPORT: Yes, ma'am.

MR. COOLEY: That's fine, Your Honor-

THE COURT: And as far as I will ask the witnesses a question with regard to /// or the jurors, the prospective jurors a question with regard to their knowledge of any prospective witnesses that may be called. Do you all want to give me that list and let me call it or do you want to call it from counsel table?

MR. COOLEY: Whatever The Court's preference is.

THE COURT: What I generally do is just ask each to stand and identify the witnesses they may proceed that way.

DAVENPORT: Yes, ma'am, we agree with that.

COURT: All right. If there is nothing further.

MR. COOLEY: Judge, I would like to just forewarn, one juror on the panel that is

close friends defendant. Her name is Catherine Barbour. She is on the second page, third entry.

THE COURT: Number 12 on the random list.

MR. COOLEY: And I'll leave it to The Court's and the Commonwealth's discretion whether they want to leave her on the panel.

THE COURT: Mr. Davenport?

MR. DAVENPORT: Your Honor, because of the <p009> relationship, it probably is just a good idea just at this juncture, we would ask that she be stricken from the panel.

THE COURT: And that is agreeable with the defendant that Ms. Catherine Barbour, juror number 12 on the random list, be stricken?

MR. COOLEY: I agree she would be struck for cause if she were called.

THE COURT: All right. Any other issues with regard to the panel? Okay, sheriff, bring in the panel.

Jury Selection

(The prospective jurors entered the courtroom.)

THE CLERK: Will the prospective jurors please come forward as I call your name and have a seat in the jury box: Susan K. Farmer, Stephen M. Sunseri, Andrew J. Piffat, Tracy A. Fuller, Diane P. Larue, Susan M. Shoop, Susan T. King, Richard M. Rowsey, Gladys B. Miller, Bettie K. Hooker, Teresa L. Hazelwood, Edriene G. Ognelodh, Marilee B. Soltis, Brian J. Sarnecki, Ralph E. Black, Mary L. Toth, Teresa M. Reynolds, C. W. Rogers, Debra A. Thweatt, Melissa Y. Reisner.

I need each of you to stand and raise your right hand, please. <p010>

(The prospective jurors were duly sworn for voir dire examination.)

THE COURT: Good morning, ladies and gentlemen. My name is Cleo Powell and I'm the judge assigned to try this case this morning. First of all, I would like to thank you all for your presence here this morning.

Not all of you will be needed to remain and assist us in trying this case, so we go through a process of asking you some questions to determine which of you will be asked to stay and which of you will be allowed to leave to return to your normal duties. I will ask you some questions first, some basic questions, and then the attorneys may have some questions of you. And I will ask specifically or especially that those of you in the box and those of you in the first seats, those of you whose names were called, respond to the questions as they're being asked. But I will also ask those of you whose names have not been called to also listen to the questions as they're being asked because it may be necessary to ask you to respond to those

same questions before the process is completed.

First of all, you have been summoned here this morning to assist in the trial of the case <p011> involving Ms. Diane Fleming. The case is styled Commonwealth versus Diane Fleming. And the Commonwealth alleges that on or about June the 14th of 2001 // of the year 2000, here in the County of Chesterfield, Diane Fleming did murder one Charles Linwood Fleming, Jr. And they further allege that on or about that same date, Ms. Fleming adulterated or caused to be adulterated a substance with the intent to kill or injure another.

The Commonwealth is represented by Mr. William Davenport and Mr. Warren Von Schuch seated here at counsel table closest to you. And Ms. Fleming is represented by Mr. Craig Cooley seated there at counsel table next to his client.

With regard to the questions that I'm going to ask you, the first are fairly simple. Are each of you at least 18 years of age or older?

THE JURY PANEL: Yes.

THE COURT: And have each of you resided in the County of Chesterfield for at least the last six months?

THE JURY PANEL: Yes.

THE COURT: Have each of you resided in the State of Virginia for at least the last year?

THE JURY PANEL: Yes.

THE COURT: And each of you are citizens of the United States? <p012>

THE JURY PANEL: Yes.

THE COURT: And I am correct that none of you have ever been convicted of a felony?

THE JURY PANEL: No.

THE COURT: I have introduced to you the attorneys who are going to try the case. Are any of you related by blood or marriage to either Mr. Davenport, Mr. Von Schuch or Mr. Cooley?

THE JURY PANEL: No.

THE COURT: Do any of you know them personally?

THE JURY PANEL: No.

THE COURT: Are any of you related in any way to any member of the Commonwealth Attorney's office?

THE JURY PANEL: No.

THE COURT: Mr. Cooley, what is your firm, sir?

MR. COOLEY: I am a solo practitioner, Craig S. Cooley.

THE COURT: Solo practitioner, thank you very much. I have also introduced you to the defendant, Ms. Diane Fleming. Are any of you related by blood or marriage to Ms. Fleming?

THE JURY PANEL: No.

THE COURT: And do any of you know Ms. Fleming personally?

THE JURY PANEL: No. <p013>

THE COURT: As you sit there right now with the very brief introduction that I have given you about the case, do any of you have any facts about this case, did you gather any facts about this case, do you know anything about this case other than what I told you in the introduction? Mr. Rowsey?

MR. ROWSEY: Yes.

THE COURT: Mr. Rowsey, you have some information about the case?

MR. ROWSEY: I worked with and I knew Mr. Fleming.

THE COURT: You knew Mr. Fleming. And when did you work /// you say you worked with him and you knew him?

MR. ROWSEY: I worked in a department that he had maintenance over /// jurisdiction over the maintenance.

THE COURT: And when did you work with him, sir?

MR. ROWSEY: I guess three years ago, three and a half years ago.

THE COURT: So, around 1999?

MR. ROWSEY: Yes, ma'am.

THE COURT: Would the fact that you knew Mr. Fleming cause you, sir, to give any greater weight or any less weight to any evidence coming in given by the Commonwealth than you would to the defense? Does the fact that you knew him, would that cause you not to be able to sit here and hear the facts and decide the <p014> case on your own?

MR. ROWSEY: I believe it would.

THE COURT: Okay. Mr. Davenport?

MR. DAVENPORT: Yes. Strike him for cause.

THE COURT: Mr. Cooley?

MR. COOLEY: That's fine.

THE COURT: Thank you very much, Mr. Rowsey. You are free to return to your seat in the audience. Please don't leave yet.

THE CLERK: Larry E. Lynch.

THE COURT: Mr. Lynch, if you would come forward, please, and sit in the empty chair.

MR. LYNCH: (Complying.)

THE CLERK: If I can get you to raise your right hand before you take your seat.

(Larry E. Lynch was duly sworn for voir dire examination.)

THE COURT: Thank you, Mr. Lynch. Mr. Lynch, I'm going to ask you for the record

the questions I've just asked the other members of the jury pool. Are you at least 18 years of age or older, sir?

MR. LYNCH: Yes.

THE COURT: Have you lived in the County of <p015> Chesterfield for at least the last six months?

MR. LYNCH: Yes.

THE COURT: Have you lived in the State of Virginia for at least the last year?

MR. LYNCH: Yes.

THE COURT: And you are a citizen of the United States?

MR. LYNCH: Yes.

THE COURT: And you have never been convicted of a felony?

MR. LYNCH: No.

THE COURT: All right, sir. I introduced the attorneys. Did you see them as they stood?

MR. LYNCH: Yes.

THE COURT: Do you know any of them? Are you related to any of them by blood or marriage?

MR. LYNCH: No.

THE COURT: Do you know any of them personally?

MR. LYNCH: No.

THE COURT: Are you related by blood or marriage to any member of the Commonwealth Attorney's office?

MR. LYNCH: No.

THE COURT: And do you know Ms. Fleming personally?

MR. LYNCH: No.

THE COURT: As you sit there right now, based on <p016> the very brief information I gave about the case, do you have any information about the case that would cause

you not to be able to sit here and hear the evidence and try the case on the evidence that's presented?

MR. LYNCH: No.

THE COURT: All right. Okay. Ladies and gentlemen, the rest of you may join back in at this point. Have any of you expressed any or formed any opinion as to the guilt or innocence of the defendant, Ms. Fleming?

THE JURY PANEL: No.

THE COURT: Do each of you understand that Ms. Fleming is presumed by law to be innocent of the offense of which she is charged and that that presumption remains with her throughout the trial?

THE JURY PANEL: Yes.

THE COURT: Do you understand that the law requires that the Commonwealth prove the defendant's guilt beyond a reasonable doubt?

THE JURY PANEL: Yes.

THE COURT: Do you understand that during the <p017> trial, the defendant is not required to testify or to produce any evidence?

THE JURY PANEL: Yes.

THE COURT: And do you understand that the defendant's election not to do so, should she choose not to present any evidence, should not be considered by you, the jury, in arriving at your verdict?

THE JURY PANEL: Yes.

THE COURT: As you sit there now, the attorneys tell me that they expect that the case will take today and tomorrow. We will, of course, take a break this afternoon, but we'll expect it to go all day today and at least all day tomorrow. Do any of you have any prior commitments that would preclude you from turning your full attention to this

case for the next two days? Anything other than work or babysitting commitments that you would need to make a phone call to take care of?

Mr. Sunseri, yours went down.

MR. SUNSERI: I have a business trip scheduled for this evening.

THE COURT: Is it something that you can reschedule?

MR. SUNSERI: I could reschedule it if you require me to do so.

THE COURT: Ms. Shoop?

MS. SHOOP: Yes. I was recently hired as a program manager for a project that has a very short time limit. I just started in February and my whole role is to bring <p018> it to conclusion by April 30th and it involves a national advertising campaign. Two days is a bit challenging.

THE COURT: Is it something that you could work with us on, ma'am, if it became necessary?

MS. SHOOP: If it became necessary, absolutely.

THE COURT: Thank you, I appreciate that.

Ms. King?

MS. KING: Yes. I run a volunteer lunch program for a small private school. I have someone covering for me today, but I have 300 students that won't have anyone to give them their lunch for the rest of the week if I'm not there.

THE COURT: We wouldn't keep you the rest of the week, probably just today and tomorrow.

MS. KING: There is no one covering for me tomorrow.

THE COURT: Okay. Could you make arrangements sometime during the day to possibly have that done?

MS. SHOOP: I can try.

THE COURT: Ms. Miller.

MS. MILLER: I'm a high school math teacher and we can't find math substitutes for the SOL tests that are coming up. They told us three days originally. That is ///

THE COURT: Yes, ma'am. <p019>

MS. MILLER: /// really hard. That's really hard.

THE COURT: Right. We've /// the lawyers anticipate that it will be done in two, that we don't need you for the full three. I understand it would be a difficulty, but if you were required to be here, you could make arrangements to do that?

MS. MILLER: Yes, someone will babysit my children at school.

THE COURT: Okay. Who else had an unavoidable conflict, something that you just could not make arrangements? All right. Thank you, ladies and gentlemen.

The lawyers will have some questions of you and I'll ask that you answer their questions. If there is a question that you would like to have the answer heard outside of the presence of the audience and would like just for the lawyers to hear you, that prompts some response that you would like to be heard in private, just let us know at the appropriate time.

Mr. Davenport.

MR. DAVENPORT: Yes. Thank you, Judge. Ladies and gentlemen, my name is Billy Davenport. I am the Commonwealth's Attorney here in Chesterfield. I just have a few questions for you. For one, I want to ask, have any of you ever been charged with or the victim of a crime of violence? <p020>

THE JURY PANEL: No.

MR. DAVENPORT: Any of you have any family or close friends who have been charged with or victims of a crime of violence?

THE JURY PANEL: No.

MR. DAVENPORT: This is a case that involves circumstantial evidence, you've heard that term before. And the defendant can be convicted on circumstantial evidence alone. And you'll get a jury instruction, along with some other instructions that The Judge will give you. Judge Powell just talked about proof beyond a reasonable doubt. Because the evidence will be entirely circumstantial doesn't lessen the burden for the Commonwealth, the burden is still beyond a reasonable doubt.

But to give you some idea of what circumstantial evidence is, let me kind of give you this scenario that I think is probably pretty common to what we do on a daily basis. Say the night, you go to bed, and you look outside before you do and it's dry, it's wintertime and you live there with your spouse. And you get up the next morning and look outside and there is eight inches of virgin snow lying on the ground. The snow is not falling anymore. You didn't see the first snowflake and <p021> you didn't see the last one. You see eight inches of virgin snow.

And you look out at your mailbox, and that's where the paper is usually delivered, and you don't see a track anywhere, no tire tracks, no footprints, nothing. And you go into the bathroom and you come back and you look out and you see tire tracks going over to your mailbox and away from your mailbox. You go into the kitchen and you start making breakfast. And then you go back and you look out and you see some

footsteps in the snow, footprints out to the mailbox and back in. And then you walk into the foyer, and there, laying on the table, is a newspaper inside one of those yellow plastic sleeves.

Now, you didn't see it snow the first snowflake or the last snowflake, you didn't see anybody come and deliver the paper, and you didn't see anybody go get the paper, but the paper is inside. Those things were proven by circumstantial evidence. You understand that? That instruction, along with some others, will be given to you at the end of this case. And my question to you is: Whether or not you may agree with the instructions, can you follow the instructions of law that The Judge will give to you?

THE JURY PANEL: Yes. <p022>

MR. DAVENPORT: And apply what you find out and hear from the facts?

THE JURY PANEL; YES.

MR. DAVENPORT: Thank you very much.

THE COURT: Mr. Davenport, while you are there, would you please identify for the members of the jury panel the witnesses you plan on calling? And if those witnesses are present in the courtroom, I would ask you to stand if your name is called.

MR. DAVENPORT: Well, Mr. Von Schuch has that list, so he will call them. P

THE COURT: Thank you.

MR. VON SCHUCH: Charlotte Fleming and Charles Fleming, Mr. Bill Bailey, Mr. Chuckie Tanner, Mr. Jeffrey Tanner. Dr. Chris Acker from Johnston Willis Hospital is not here, Your Honor. He'll be on call. Ruth Baker from the Chesterfield County Police Department, Mike Monroe from the State Police, Sandy Parrish from the Chesterfield County Police Department, Dr.

Saady from the State Department of Toxicology, Kathy Curry, Bob Skowron from the Chesterfield County Police Department and Terry Patterson from the Chesterfield County Police Department.

THE COURT: Ladies and gentlemen of the jury panel, <p023> that list of names that you have heard /// thank you folks, you may take your seats /// are you related by blood or marriage to any of those folks on that list of names you've heard?

THE JURY PANEL: No.

THE COURT: Do you know any of those folks personally?

THE JURY PANEL: No.

THE COURT: Have any of you ever been treated by Dr. Chris Acker from Johnston Willis Hospital?

THE JURY PANEL: No.

THE COURT: Thank you very much. Mr. Cooley, do you have any questions?

MR. COOLEY: Thank you, Your Honor. May it please The Court.

Good morning to you, ladies and gentlemen. I have a pretty good panorama to try to talk to everybody, but the purpose of what we're doing right now, this is /// the legal term for it is voir dire. It's an opportunity for the attorneys to ask questions of you to be sure that when we conclude the process we're in right now that we end up with 12 folks who can be fair, fair to both sides, to the prosecution and to the defense in this case. And that's really what this is about. And while we have an opportunity to kind of delve into you, <p024> we understand that you're not the folks who are here and that you're not on trial. And I want to ask you a couple of very brief questions. The Judge has told you the basic overview of this case in terms

of what the law is and the requirements as to proof beyond a reasonable doubt. What I want to ask of you is as you enter this case today, as you sit here, are you prepared to listen to the evidence that comes before you from the witness stand, from exhibits and to judge this case fairly? Can you do that?

THE JURY PANEL: Yes.

MR. COOLEY: Will you do that?

THE JURY PANEL: Yes.

MR. COOLEY: All right. And Mr. Davenport told you, gave you a scenario, and we all agree, this is a purely circumstantial case. And the law of circumstantial evidence is, in part, as he has said, but the difference between a normal case and a circumstantial case is, number one, as he said, circumstantial evidence can be sufficient to convict somebody, purely circumstantial. The difference, however, is when the Commonwealth relies completely upon circumstantial evidence, they not only have to establish a theory by which somebody could be guilty, the defendant in this case, but they have to exclude every <p025> reasonable theory by which she might be innocent or somebody else might be guilty. That's the difference.

And what /// using Mr. Davenport's scenario, if you get up in the morning, you look up and you see eight inches of pure, new snow and you see a single line that starts at one end of your yard and goes right straight across, it's about two inches wide, what you can deduce from that circumstantial evidence is somebody rode a bicycle across your yard. That much would be proven. Who rode the bicycle across your yard would not be proven by those circumstances.

Do you believe that you can sit here today and judge this evidence,

circumstantial as it is, and determine whether or not the Commonwealth has not only proven its case beyond a reasonable doubt, a theory that this young lady would be guilty, but has excluded every reasonable theory by which she would be innocent? Can you judge this case in that framework?

THE JURY PANEL: Yes.

MR. COOLEY: Thank you very much. The Judge asked that we tell you who our witnesses are, so I'm going to list those. Our witnesses have been asked to not come until 4:00. There are several who are here.

And to those who are here, if you will stand. <p026>

You're going to hear a number of character witnesses and they will be brief and I will comment on that in opening statement, but Pastor Ken Ruppert, Shawnee Hansen, Betty Rickmond, Doug Nichols, Marchia Swanson, Dick Wienbarg, Jackie Meeks, Linda Dugent, Kristine Rieger, Corrina Madera. You'll also hear from Mr. Chris Jones, Regina Morris. You will hear a stipulation in relation to Dell Statton. You will hear from Barbara Dowdy. Jeffrey Tanner, who is both a defense and prosecution witness. Linda Dugent, from Diane Fleming, the defendant in this case, and Scott Gardner and Rhonda Quinn. Do any of you recognize those names or have any reason to think you could not judge this case if you heard from them? Ms. Miller?

MS. MILLER: I know one of those people, Shawnee Hansen.

MR. COOLEY: OK. Would your --

MS. MILLER: I just worked with her at Friends of Homeless.

MR. COOLEY: Would your association with her cause to judge this case either for the

prosecution or for defense any differently than you would if you did know her? No.

MR. COOLEY: Judge, thank you very much. We're <p027> satisfied with the panel.

THE COURT: All right. Thank you, Mr. Cooley. Counsel, are you satisfied with the panel so far?

MR. DAVENPORT: Yes, we are, Your Honor.

MR. COOLEY: Yes, we are, Judge.

THE COURT: All right. Ladies and gentlemen, the attorneys are going to go through a further process of this voir dire process to determine which of you will be asked to stay and which of you will be allowed to leave. While they are going through that process, I'm just going to take this opportunity to give you a brief overview of how you can expect your next couple of days with us will progress and proceed. For those of you who may have sat on a trial before, a jury before, you probably already know all of this.

But for the others of you, you can expect the case will progress in approximately four stages. The attorneys will come to you first with their opening arguments. And I will advise you that their opening arguments are just that, their opening statements. That's not the evidence in this case, but it's their opportunity to give you some information with which you can fit the evidence that you will hear later into that framework. <p028>

The Commonwealth goes first. The Commonwealth will go first in opening statements, the Commonwealth will go first in the presentation of evidence, the Commonwealth will go first in the closing arguments because the Commonwealth has the burden of proof throughout the trial. So, the structure of our system is that the

person with the burden of proof goes first in each stage of our proceedings.

The Commonwealth will come first with its opening arguments if he chooses to make one; then defense, if he chooses to make one, will make his opening argument. After they finish, then they will begin to call their witnesses. And that's when we need you to pay particular attention to what's going on in the case. The evidence which you will need to decide this case is the evidence that comes to you when a witness is called and he or she takes their place in front of the witness box, they're sworn to tell the truth, then the lawyers proceed to ask them questions. And you will need to pay special attention when those folks are testifying. While we do have a court reporter here, we don't have the capability, once you start your deliberations, if you've forgotten what someone said or if you disagree as to what someone said, to play back for you what that evidence was. So, we need you to <p029> listen carefully and capture it as it's being presented to you from the witness box.

The Commonwealth will present its case. The defense may or may not choose to present evidence, but if they do, they will go next in sequence.

After the evidence is presented to you, then I will instruct you as to the rules of law that you are to apply to the facts of the case as you find those facts.

After I have instructed you on the rules of law, then the attorneys will come back before you with their closing argument. Again, that's not the evidence in this case. You will have already heard the evidence in the case and the attorneys will make an argument to you with regard to what they

believe their evidence has shown. After the closing arguments, then you will be allowed to go into the jury room to begin your deliberations.

Because it's a two—day trial, of necessity we will take a break tonight. We will take breaks during the day. When there is a break in the case, you're instructed not to begin to discuss the case even among yourselves. You're not to discuss the case until all of the evidence has been presented to you, the arguments have been made to you, you know what the law is that you are to apply to the facts and you are all together in <p030> the jury room. At break time you should not discuss the case among yourselves.

You should not remain within hearing of anyone who is discussing the case. If we take a break and you're at lunch, for instance, and the folks at the next table are discussing the case, please remove yourself from hearing distance of that discussion. Should someone attempt to approach you while we're on break and discuss the case, please refuse to do that and immediately, upon your return to the courtroom, make one of the deputy sheriffs aware of that attempt at contact.

I hope you all are in a position where you can see and hear us. If at any time today or tomorrow there comes an opportunity where you cannot hear or you cannot see, let me know, let one of the attorneys know, let one of the deputies know so we can make that possible.

From time to time the attorneys may make objections in the case. Please don't

consider that as an attempt on their part to keep something from you that you need to know, but they are governed by rules of evidence. So, it's their job if they believe that there is evidence that is not properly before you, the trier of fact, to make an objection.

If I sustain the objection, any evidence that may have come in over the objection should not be considered <p031> by you. If I overrule the objection, that evidence is proper evidence for you to consider. I thank you for your time and attention, and in just a minute, we'll call some names.

THE CLERK: As I call your name, please take a seat back in the audience. Stephen M. Sunseri, Andrew J. Piffat, Susan M. Shoop, Susan T. King, Gladys B. Miller, Teresa L. Hazelwood, Brian J. Sarnecki, Ralph E. Black.

THE COURT: Counsel, before the panel is sworn, are you satisfied with the panel as composed?

MR. DAVENPORT: Yes, ma'am, the Commonwealth is.

MR. COOLEY: Yes, Your Honor.

THE CLERK: I need each of you to stand and raise your right hand.

(The jurors were duly sworn to try the case.)

THE COURT: All right. Thank you, ladies and gentlemen. Counsel, are you ready for your opening?

MR. DAVENPORT: Your Honor, I'd ask the sheriff for a glass of water. Could I get one from you?

MR. COOLEY: There would be a motion to separate, Your Honor.

THE COURT: All right. <p032>

MR. DAVENPORT: Yes. We would join in the motion.

THE COURT: All right. Ladies and gentlemen, there has been a motion made to separate the witnesses. The reason that we do that is obvious, so that each of you will testify of your own independent knowledge of the facts. I will ask, when I finish speaking, that any witnesses who are present here in the courtroom would rise and step outside of the courtroom. Please don't discuss your testimony or the case before or after the time that you are called to testify. We will call you back in at the appropriate time.

Witnesses, before you move; ladies and gentlemen who were not placed on the jury panel, on behalf of the litigants, the attorneys and the judges here, I would like to thank you for your presence here. If you were not present this morning, we could not have seated a jury to try this case. So, I would like to thank you for your presence here this morning. At this point you are free to either leave the courtroom or you may stay and observe the proceedings.

All witnesses, please step out, and jurors who would like to leave.

(The witnesses left the courtroom.)
<p033>

THE COURT: We're ready for the opening, counsel.

Opening by Prosecution

MR. DAVENPORT: Thank you, Your Honor. May it please The Court, Mr. Cooley, ladies and gentlemen of the jury, the evidence in this case will show that on June the 11th of 2000, Diane Fleming, seated over there with her counsel, the defendant in this case, killed and murdered her husband, Charles Linwood Fleming, Jr., by putting methanol in his Gatorade which ultimately caused his death on June 14th of 2000.

The evidence will show that they were married on September the 8th of 1990 and they had one child by their union, a little girl by the name of Meagan, who was born in 1993. The evidence will show that Ms. Fleming brought two children, two boys into this marriage from two prior marriages, a boy by the name of Charles, who they call Chuckie, and a boy by the name of Jeffrey.

The evidence will show that Charles Linwood Fleming, Jr., worked at Philip Morris and he provided well for his family by his work there. He had a couple of insurance policies that totaled \$432,000 and if he were /// if he died during the time he worked at Philip Morris, there was some insurance that would pay his family, his wife and children if he died at the time he was working at Philip Morris. The evidence will show <p034> that Ms. Fleming worked outside of the home before Meagan was born as a pharmacy technician and was knowledgeable about the effect of medication and other substances on the body.

The evidence will show that on May the 15th of 2000, just one month before Charles was killed, an e-mail, an inquiry was made on Charles' computer and this inquiry was about methanol poisoning and

the amount of methanol it would take to kill an infant and the amount it would take to kill an adult. The defendant also perused her husband's computer and checked his outgoing and incoming e-mails and knew from those searches that he had made searches about opportunities of employment in Australia, the Bahamas, the Cayman Islands and Bermuda and other places in the United States.

The evidence will show that Charles Linwood Fleming had just received his MBA in December of 1999 before he was murdered in June of 2000. It will show that he was progressing in his employment at Philip Morris, he had just been promoted. He had /// they had just built and moved into a house in 1998 and he had just built a shed behind the house.

It will show /// the evidence will show that he loved his children, Meagan, of the marriage that he had <p035> with Diane, and Chuckie and Jeff, who he insisted be brought into their home.

It will show that he was the impetus behind Chuckie receiving his bachelor of science degree in information systems from VCU. It will show that he substantially raised Jeff, who was only seven years old when Diane and Charles were married. It will also show that he attempted to make Chuckie more independent while he lived at the house by requiring him to buy his own food and do his own laundry. He had given him an ultimatum that in /// by August of 2000, he would like to see him out on his own. And he did those things to try to prepare his son to be out on his own. The evidence will show that Chuckie did graduate from VCU in May of 2000. Mr.

Fleming was sort of a workout fanatic. He kept his body in top shape.

The evidence will show that on Sunday, the 11th of June of 2000, the family woke up and ate breakfast together at the house. That about 9:00 or 9:30, Diane, Meagan and Jeff went on to Sunday school at the Lutheran Church of Our Savior which is located on Hull Street. It was Teacher Appreciation Sunday. The defendant was a Sunday school teacher and they had a Sunday school party. The evidence will show that later on that morning that Chuck and Chuckie came in separate cars <p036> because Chuckie had to go to work at the Food Lion that's right across from Clover Hill High School up on Route 360, Hull Street.

It will show that after church, Chuckie went on to his employment at Food Lion and the rest of the family, in two cars, went to the Price Club or Costco right up on 360. They went there for the purpose of purchasing some Gatorade, among other things, but the Gatorade was for Chuck. And after they located where the Gatorade was, Chuck went on home. And Diane and Meagan and Jeff then finished shopping there at the Price Club and went on to the GNC store, it's a health store where you buy things like creatine which you'll hear from the evidence in this case. Creatine is something you mix with stuff like Gatorade to build muscle mass. This was for Chuck to help him in his quest to stay in top shape.

The evidence will show that they returned home, Meagan, Jeff and the defendant, about 1:30 or two o'clock. And the defendant and her husband mixed one bottle of Gatorade and creatine. He tasted it and put it in the refrigerator. He then, a

little bit later on that day, left to play basketball and came back home from playing basketball and took that cold bottle of Gatorade and creatine out of the refrigerator and drank it, then went out into the garage where the drinks and <p037> Gatorade and things were kept and got four more bottles and came in and he and the defendant mixed four more bottles of Gatorade and then put those in the freezer /// in the refrigerator. He than began to feel bad and went on to sleep.

About 9:00 or 9:30 that evening, Chuckie came back from work from the Food Lion and he found his mother in the kitchen mixing Gatorade and creatine. And she told him, These are Chuck's, don't mess with them, and put those four bottles back into the refrigerator. The evidence will show that she bought windshield washer fluid on a regular basis and actually serviced the cars when the windshield washer fluid reservoirs got low.

You'll find from the evidence that early the next morning, Chuck got up. He was not feeling well. He, though, took three of the four bottles that were in the refrigerator

and went on to work anyway. He got to work and he drank about half a bottle of that Gatorade, got sicker, left work and headed home.

On his way home, he passed Diane and Meagan and Jeff, who were leaving out of the neighborhood. Diane called back to the house where Chuckie was still at home and told him, Chuck is on his way home. Chuck got home. He laid on the couch and got sicker and sicker. About <p038> 5:30 or 6:00 that evening, he began to have shortness of breath, got to a point where they called the rescue squad.

The rescue squad came. They transported him to Chippenham Hospital. He lapsed into a coma and he died on June the 14th of 2000 after the life support was unplugged. The cause of death will be given to you by evidence of medical examiner which will show that it was methanol poisoning.

It will show also that the defendant, Diane Fleming, sent an e-mail to her mother-in-law, Charlotte Fleming, on August the 14th of 2000 specifying the

amount of methanol it would take to kill an infant and an adult. It will also show that the family consumed the balance of the case of the Gatorade after Charles' death on June 14th of 2000.

There will also be evidence from a neighbor, a friend of the defendant, Diane Fleming, a lady by the name of Kathy Curry, who will tell you that Diane brought over the brain to a computer, they call it the tower, and secreted it or hid it over there even though there was a police investigation ongoing as to who had murdered her husband.

And at the end and conclusion of this case, I will ask you to find Diane Fleming guilty of the first degree <p039> murder of Charles Linwood Fleming, Jr. I thank you for your attention to me and your attention to the voir dire and I thank you for your attention throughout this case, and now I ask you to direct your attention to Mr. Cooley.

THE COURT: Thank you, Mr. Davenport. Mr. Cooley.

MR. COOLEY: Thank you. With The Court's permission, permission of the Commonwealth. Good morning to you, ladies and gentlemen.

Under our procedures, the Commonwealth gets to go first and they will do that throughout this trial. So, Mr. Davenport gets to tell you what he believes the evidence will show and he gets the first bite of the apple. And in the presentation of evidence, they go first and we go second and they get to go again if they'd like. Closing argument, they go first, we go in the middle and they go last. So, they're always going to have the opportunity to give you that first impression of the case and that first impression of the evidence. I go second and I can't change that, but what I can ask you to do is try to keep an open mind. This concept, and you understand that, the value of first impression, you've heard that phrase.

Psychologists, psychiatrists call it the concept of <p040> primacy. What we hear first, we tend to believe, and sometimes we believe it even in the face of overwhelming evidence to the contrary. I can't change the concept of primacy, but what I can do is ask that each one of you keep an open mind during the presentation of this evidence and judge this case not on what Mr. Davenport has to say, not on what I have to say, but on whether the evidence that comes before you establishes this case beyond a reasonable doubt against Ms. Fleming or against somebody else or if there is, indeed, a reasonable doubt.

There are five people who lived in the Fleming household. Charles, who is known as Chuck, the father, who is deceased. Diane Fleming, the 44-year-old mother of three that is the defendant in this case. And

then there are three other folks. Meagan is the eight-year-old daughter of both Chuck and Diane Fleming. And then there are two stepsons to Charles or Chuck Fleming who live there. Jeffrey, who at the time was a senior at Midlothian High School and was about to graduate. He was in his graduation week. In fact, this week was a time frame when he was to participate in all of the things that go on, the religious services and ultimately the graduation ceremony that week. And then there is a fifth person. And it gets confusing because <p041> he is also known as Chuck, but most everyone calls him Chuckie. And so those are the five folks. Chuckie is a 26-year-old stepson who lives at the residence. Now, let's talk for a moment, let me show you what the evidence will show about Diane Fleming. She is 44. She is the mother of the three children I have just outlined to you. She has no prior criminal record, period, and you're going to hear from a substantial number of character witnesses.

And let me forewarn you that character evidence is extremely limited. And what I have to do is, within a very narrow set of questions, ask them, Are you familiar with her reputation in the community for this. If so, in a one or two-word answer, what is that reputation. They are not allowed, under the rules of evidence, to tell you all the glowing things they might like to. They're simply prohibited from that. It is not that they don't know those things, it is that we cannot ask those things. So, when you hear those limited questions, understand why they are limited and why my questions are limited to those things.

Now, the Commonwealth has placed Diane Fleming, a lady who has been actively involved in a great number of

charities and community services and who has served her family well, they have placed her in the most untenable <p042> position a mother can be placed. They have put her in a position where she must either protect her son or defend herself. And that is the dilemma that she faced as this case developed and it is the dilemma that she faces in this courtroom.

She believed that Chuckie could not and would not have committed this crime. She believed that there were things that Chuckie might have done that might make him look bad and she took some actions, including removing the C-drive, one of the hard drives, from the computer that showed the horror sites that he would go to, the Mutatis and things like that, that she didn't think really had anything to do with whether he committed any crime, but thought it made him look bad, thought that the police would look at that as being a likely situation.

The evidence in this case is going to speak quite eloquently to Diane Fleming's innocence and I think it will speak just as persuasively as to who, in fact, committed this act and is responsible. Diane has chosen to protect her son. I, however, am charged with protecting her and it is my call as to what evidence and what pieces of evidence are presented to you. I want you to compare Diane Fleming's candor with the police to that of Chuckie Tanner. Her son has the previous <p043> husband's name, Tanner. So, we have Chuck Fleming, who is the victim in this case, and we have Chuckie Tanner, who is the stepson, the 26-year-old stepson.

I want you to consider the timing that the evidence will show about this case and

what ridiculous timing it would be for Diane Fleming to decide that this is the time that she wants to kill her husband. Because it is the day /// the week that her son, Jeffrey, is graduating. It is the week that her parents are arriving, coming from the Midwest to be /// to drive in to be present for his graduation. By the timing of this, Jeffrey's graduation is destroyed. It is to become a horrendous time for this family, not a joyous time. Think about the wisdom of a mother, the decision of a mother that it would take to decide, Well, this is the week I'm going to take some action and kill my husband.

I ask you to compare her candor as she talked with the police and compare it to that of her son, Chuckie, in the things that he told the police and what he did. Diane called the doctor on Sunday /// excuse me, on Monday when Chuck, her husband came home from work and was sick. She kept saying, Do you want me /// do you want me to call the doctor.

No, I'll be all right. No, I'll be all right. <p044> Finally she does call the doctor. She tells him the symptoms. Finally she talks Chuckie /// excuse me, Chuck into allowing her to call the ambulance to take him to the hospital. And while he is being treated, ultimately the doctor suggests to her that this is poisoning, that he has got methanol poisoning, where could this have come from.

And she cooperates fully with the police in every way possible to open her house, to show the things that he had had access to and tells them about what had gone on. In every interview, you're going to hear from the detectives, she was consistent with what she told them from beginning to end and she was consistent in her

cooperation with them. She told them, not they had to find out on their own, she told them about Chuck's participation in these bodybuilding situations or trying to build his or get solid abs and pecs and things.

And she told them he, for the first time, started in using creatine and mixed it with Gatorade. Did she hide the fact that she participated? No. Told them, Chuck and I, my husband and I mixed this stuff and put it in this Gatorade. She didn't hide that. If she is the person who is perpet /// performed this act, you would think that she would say, I don't know anything about that. No, she tells them, This is what he did and I <p045> helped him do it. From the beginning she tells them that.

They go through the house and they look and they go through the garage and she helps them find everything, that's the evidence, that was in the garage that might possibly have methanol in it. And she tells them everything that might have /// he might have had to drink. Now, they don't go to the refrigerator and take out the milk. They don't go to the refrigerator and take out applesauce. They don't go to the refrigerator and take out anything except the things that she says, He had this to drink, we mixed this up. And the things that she points out to them include the Gatorade bottle that is still there in the refrigerator that turns out to have methanol in it.

Now, this doesn't happen on the day that Chuck gets sick. This doesn't happen on the second day when he's in the hospital. This doesn't happen on the third day when he passes away. This happens when the police come to the house after all of that is in process on the day of his death and they recover it.

Now, if you stop and think for a moment, what the evidence is going to show you is that /// the theory of the Commonwealth is that she knows that that Gatorade sitting in her refrigerator has methanol in it. That's <p046> their theory. And they recover it four days down the road. During that four days, she has in her house an eight-year-old daughter that she loves more than life itself and both of her parents. She's at the hospital with Chuck, her husband, unless the police ask her to come home to help them. So, if she knows it's there, it means that she exposed all the people she loved, including her eight year old and her parents, to drink something that they wouldn't have known had methanol in it and she was willing to do that. That's the Commonwealth's theory of this case.

Did she get on the Internet to find out about methanol poisoning? She sure did. When the doctor said to her that we think this is methanol poisoning, you need to check your house to see what this could have come from, she gets on the Internet and she does a check, she does a search for methanol poisoning. Now, every /// you going to hear from probably two computer experts, one from the Commonwealth and one for us. They're both going to agree. They are going to tell you, There is no way when we go back in July and pull this up, everything that's been done on this computer, we can tell you what day that search was done, cannot tell you that. The computer's dates and times get off. If you change any type of software or anything <p047> on it, may kick it off. They cannot tell you what date that was done. She can tell you because she came home from the hospital when the doctor had told her that and did the search and that's what it shows.

Now, I'm going to ask you to compare, if you would, Chuckie's candor with the police and what the evidence is going to show about the stepson, Chuckie. When Chuckie is interviewed by the police, they ask him about his relationship with his stepfather, with Chuck. He said, Oh, everything is fine, we got along fine. Sounds good to them, except he failed to mention that on three separate occasions the police had had to respond because of fights and disputes between Chuck and Chuckie, three times. Failed to mention that.

He failed to mention to you that he was charged and convicted of assault and battery of his stepfather, Chuck, the previous year. Failed to mention that to the police with his candor. He failed to mention that he had discussed with his youth /// his former youth leader, and you'll meet her, Ms. Linda Dugent, that his relationship with his stepfather was so bad that he might want to move in with her and her family and she discussed that with him. Did not, she referred him back to his psychiatrist to discuss it and ultimately he did not move in with her. Didn't mention that to the police when he talked about <p048> what a fine and good relationship he had with his stepfather.

He failed to mention to the police that his stepfather had ordered him out of the house, had set a deadline, as Mr. Davenport acknowledged in his opening statement, of August 1st. He's 26 years old. He's still living at home. He's still in college. And Chuck said, When you finish your classes, you're out of here, you cannot stay here anymore.

Did they get along? Of course they did not, but when he talked to the police, he

said, We get along just fine. He denied /// Chuckie denied to the police that he had gone to work on June 12th after his stepfather had come home from his own work and was sick.

MR. DAVENPORT: Your Honor, may we approach the bench?

(Conference at the bench without the hearing of the jury, as follows)

MR. DAVENPORT: Your Honor, you know, I'm agreeable to all kinds of latitude, but this is opening statement, not opening argument. And if he's going to couch it in terms of what his evidence will show, fine, but it's getting into the argumentative stage right now and is <p049> not appropriate for opening statement. So, I would just ask you to caution him to stick to what he believes that his evidence will show and not argue the case at this time.

MR. COOLEY: Judge, there is evidence of this. It's in the Commonwealth's summary of the case that they gave to me and I have the witness here, both witnesses, the policeman who says he denied that and I have the deli manager to whom he made the statement. So, it is evidence. The fact that it doesn't agree with the Commonwealth's theory is not my problem. I'm arguing the evidence.

MR. DAVENPORT: Judge, this is not argument stage. This is a statement of what he wants to put in, and, you know, I'm agreeable to that. He can say, This is what I believe that the evidence will show. I've said and made perfectly clear this is not argument. You said argument to them, but this is opening statement and that's what it is, it's our theory. He can say whatever he wants that he thinks his evidence will show, but he is getting into the argumentative stage right now and that's what I have a concern about. I don't know /// I don't mind him saying this

is what he believes the evidence will show, but when he goes on like the evidence is already in, it's not. <p050>

THE COURT: My admonition to Mr. Cooley is just to state what he believes this is what his evidence will show.

MR. DAVENPORT: Thank you very much, Your Honor.

(Thereupon, the following proceedings continued within the hearing of the jury.)

MR. COOLEY: The evidence in this case that we will produce to you from the deli manager at the Food Lion where Chuckie Tanner worked will tell you that when he came in June 12th that he said to her that Chuck, his stepfather, was sick and he thought he was trying to kill himself. when the police brought that to his attention and asked him, he denied making such a statement.

The evidence will also show that he frequented horror sites on the Internet and spent a good deal of his time on the computer doing just that. It will show from Food Lion employees that he /// and from the person who was, in fact, threatened, that he threatened to kill the manager at Food Lion and she will be here to testify to that. And that he threatened her and others. That is the Chuckie Tanner that you will get to meet probably at some point this morning or this afternoon. <p051> The person who did this may not have intended to kill Chuck. They may have intended to make him sick, that's a possibility. Diane Fleming cannot answer that because the evidence will show she did not participate in this.

The insurance that Mr. Davenport mentions to you existed. She knew about one policy. She thought it was 250, it ended up being 280. When the evidence is produced as to that, what you'll see is that it

was some months after his death before the insurance company contacted her about it. And, indeed, while it is true, as Mr. Davenport commented, there is a policy or a form of protection to the surviving family members of a Philip Morris employee that if an employee dies that there will be a monthly payment to them, it doesn't begin for four years after the date of death.

And I suppose if you take the evidence of \$250,000, \$280,000 or even 430,000 and you compute what the interest will be, what the evidence would show the interest will be on that, you're dropping /// assuming that it's ten percent interest, which the evidence would show it isn't, but it was, you're dropping an income from 70-some thousand dollars a year to 40-some thousand year at ten percent interest, even if it earned that. So, it's somewhat of a /// I would argue to you that the <p052> evidence would show that that is somewhat of a red herring.

Mr. Davenport commented that there is a perusal of her husband's e-mails by Diane Fleming, but he didn't tell you the timing of that perusal. Yes, she got on the Internet. She got a code breaker that allowed her to get into what he was doing on his e-mail. She did that after his death because the police wanted to know what he might have

been doing. And she found that he was looking at making application for jobs in other parts of the world. She didn't find that out before he died, she found that out after he died.

So, timing is somewhat important. And when we give you these things, I think it's important when you look at the evidence that you look when this happened. It didn't happen, as might have been suggested, before Chuck is killed, it happens after he is dead and she is trying to find out what could have possibly been involved here.

Are there other alternatives? Well, I suggest to you that one thing you're going to hear from the evidence is this; that at Philip Morris, where Chuck Fleming worked, there is an open lab and they store and keep out, I'm not sure why, but they keep out on the counters two forms of methanol. Some of it is in <p053> bottles, some of it is in spray cans, spray bottle types of things and it's there at where he works. And, indeed, after this, after his death, another employee, Dale Statton, comes up and brings to his supervisor a bottle of methanol that he has in his locker. And the evidence will be that anyone can come and go into that area and there is no security at that lab as to anybody could come in and get methanol if they chose to. I

don't know whether there is any potential here that Chuck did himself in. I think that's probably not likely, but it certainly can't be excluded. Maybe Chuckie, when he said something to the deli manager, knew something that the rest of us didn't.

I'm going to ask you to do this, ladies and gentlemen, and I want you to be fair. And I want you not just to be fair to me and to Diane Fleming, I want you to be fair to the prosecution. I want you to look at this evidence and I want you to gauge it on what comes before you. And I want you to look through it and see the reasonable doubt, not because I say it's there, but because the evidence says it's there. In conclusion, I would tell you that the problem that the Commonwealth's evidence has is that it can't rule out anybody with certainty and it cannot rule in anybody with certainty. I ask you to harken to the <p054> evidence, and when you conclude /// all the evidence is concluded and you go to deliberate, I ask you to be fair. Thank you very much.

THE COURT: Thank you, Mr. Cooley. Mr. Davenport, are you ready with your first witness?

----- *Charlotte Fleming* -----

MR. DAVENPORT: Yes, ma'am, I am. My first witness would be Charlotte Fleming, Your Honor.

THE COURT: Sheriff, would you call Charlotte Fleming? Ms. Fleming, if you would come forward to the sheriff to be sworn.

THE WITNESS: Yes ma'am.

CHARLOTTE P. FLEMING, called by the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. DAVENPORT:

Q Good morning.

A Good morning.

Q Would you give your name to the ladies and gentlemen of the jury, please?

A I'm Charlotte Fleming.

Q Ms. Fleming, do you know the defendant, Diane Fleming, seated here beside Mr. Cooley? <p055>

A I do.

Q How long have you known her?

A Almost 12 years.

Q Okay. She married your son at some time; is that correct?

A She did.

Q Do you remember when that was?

A September of '90.

Q Okay. And did they have any children?

A One daughter, Meagan.

Q And when was she born?

A On February the 24th of 1993.

Q Okay. Now, your husband is still living; is that correct?

A He is.

Q And where do you all reside?

A In Colonial Heights.

Q How long have you resided there?

A Twelve, 13 years.

Q And where did your son and the defendant live?

A In Woodlake subdivision.

Q Is that right /// approximately how far is that from

Colonial Heights?

A About 32 miles one way.

Q Did you have frequent contact with the defendant? <p056>

A Yes, very frequent.

Q Now, would you qualify that by telling the ladies and gentlemen of the jury how often?

A Oh, well, we /// at least once a week, we were there to pick up the children to take them somewhere. If we had birthdays, we were there a little bit more. We had daily contact /// well, not daily, but almost daily on the telephone.

Q And was that talking to your son or to Diane?

A That was talking to Diane as much as to my son.

Q Now, you mentioned children. Who are those other children?

A Diane had two sons, Chuck and Jeffrey Tanner.

Q Okay.

A And both of them were part of our lives, too.

Q Now, do you know if who /// where they came from, what marriage?

A Chuckie was by her first marriage and Jeffrey was by her second marriage.

Q How often would you see Chuckie and Jeff when they first got married back in 1990?

A Oh, once a week, and then they would come and spend a weekend with us just about every month, they would spend Friday, Saturday with us before Meagan was born.

Q Now, when your son married Diane, were the boys <p057> living with Diane?

A When he married her, when they moved in together, the boys were not with them. They married in September, the boys came shortly before then to start school.

Q Okay. Now, do you know where these boys were living before?

A Northern Virginia with Jeffrey's biological father and he was also Chuckie's adopted father.

Q Okay. All right. I want you to tell the ladies and gentlemen of the jury something about your son. He went to school in Colonial Heights?

A Yes, he did.

Q What type of a student was he? Could you kind of tell them something about his upbringing?

A Well, he was an A student, never required books to be brought home. He played, he was an avid sportsman. He loved basketball, he lived and breathed it. He liked to teach other people because he thought he was pretty smart, so he tutored a lot of his buddies that weren't quite as smart so they could stay on the teams.

Q After he graduated, what did he do?

A He went to two years of VCU and then he got accepted into apprentice school in Newport News and went there for the year apprentice.

Q What type of an apprentice trade was he in? <p058>

A Millwright.

Q And where did he go from down there?

A Well, he stayed in Newport News there after he finished his apprentice and they sort of moved him around from shop to shop, especially when the layoff came, they sort of hid him so he wouldn't get caught in the layoff and they wouldn't have to terminate him. And he left there and came to Philip Morris in '90.

Q In 1990? That's the same year that Diane and he were married?

A Yes.

Q All right. While he was at Philip Morris, did he continue his education?

A Oh, yes. He continued with his education because he had gotten his master's in December of '99 prior to his death.

Q Okay. Now, can you tell us something about his physical habits? You talked about him being an athlete. Now, let's talk about the last two years of his life. Was he still doing things that were good for the body?

A Oh, yes. He still played ball and he worked out quite a bit. I mean, he looked like /// it was like a small gym in their upstairs of their home. He had all kinds of equipment. He ran. So, he was a real health nut.

Q Was he ever married before he married Diane? <p059>

A Yeah. He married his high school sweetheart, Becky Hamler and that was in '84 and they were divorced in '88.

Q Were there any children born of that marriage?

A No.

Q Okay. Now, you talked about the frequency of contact that you had with Ms. /// with Diane Fleming. With that contact, did you ever discuss her relationship with your son?

A Oh, yes. We were good friends and I think she felt she was confident in talking with me. I usually tried /// we usually talked about problems that she had, and so she talked openly about her marriage.

Q Did she talk openly about her son's relationship with your son and, in fact, Chuckie and Jeff?

A I'm sorry?

Q Did she talk to you about the relationship between her sons, Chuckie and Jeff, and your son?

A Yes. Jeffrey and he had a very close relationship from day one. You know, Jeffrey was in Boy Scouts /// I mean Cub Scouts, so he went with him on several things, and he was in soccer, so Chuck supported him in that. His relationship with the oldest boy was a little bit more strained for various reasons, because Chuckie was older and he had some difficulties in school. And Chuck was very adamant that the boys were going to do well in school, so he stayed on Chuckie <p060> a little bit about school.

Q A little while ago we talked about the boys coming up here to live with /// or coming down here from Northern Virginia to live with Chuck and Diane. Do you know whether or not that was at Diane's insistence?

MR. COOLEY: Well, Judge, I'm not sure, we're getting pretty far afield here, the relevance or the admissibility of the question.

MR. DAVENPORT: I'll withdraw the question.

THE COURT: All right. Thank you, counsel.

Q Let's get back to your relationship with Diane. Did you ever talk to Diane about a lady by the name of Rhonda Quinn?

A Yes, I did.

Q And will you tell the ladies and gentlemen of the jury in reference to what did you talk to Diane about Diane /// about Rhonda Quinn?

A She called me several times ///

Q This is Diane that called you?

A Diane. And she was extremely upset because she believed my son was having an affair with Rhonda Quinn, a woman that he worked with and had previously gone to school with. She /// it was more like advice, you know, what should I do, and finally we decided she really needed to confront him openly with it. That prompted him to sort of /// to call <p061> us /// me and talk to me about it and I encouraged him to think strongly about breaking up a marriage that had children involved in it. And they seemed to have healed from that and that's when they decided they were going to sell a house, the first house they built, and build a new one and start their life over again.

Q So, your husband /// your son died in June of 2000?

A Yes, sir.

Q How much before this was this relationship with Rhonda Quinn?

A '96.

Q '96. Did you ever discuss Rhonda Quinn with her anymore after 1996?

A After the affair was terminated, we didn't bring it up much at all.

MR. DAVENPORT: All right. Sheriff, could you?

Q Ms. Fleming, I'm going to ask the sheriff to hand you a piece of paper.

MR. DAVENPORT: And, Your Honor, I've already showed it to Mr. Cooley. He has a copy of it.

THE COURT: All right. Thank you.

(The witness was shown the exhibit.)

Charlotte Fleming (C mother, D mother-in-law)

Q And I'm going to ask, Ms. Fleming, can you identify that piece of paper.

A It was one of the e-mails that Diane and I <p062> frequently sent back and forth to each other.

Q Would you refer to the next-to-last paragraph, start down there where it talks about /// the next-to-last paragraph on the first page where it talks about methanol poisoning and would you read that for the ladies and gentlemen of the jury?

A (Reading:) I have a call into the company that makes the brand of windshield washer fluid that we had here. Even though we know it wasn't opened, if they want to play that game, then we'll have to find out what other chemicals may be present in it. My attorney said that if those chemicals weren't present in Chuckie's system /// Chuck's system or in the drinks, that would prove it was a pure form of methanol like they have at the plant, but we aren't going to tell the police we have that information just yet.

Also, the material safety data sheet on it that I got online from the manufacturer says large quantities swallowed may be fatal or cause blindness. That's definitely not the amount the detectives say could have been present that wouldn't change the color of the drink. They're confusing the facts of pure methanol. Another source says that while two tablespoons could be fatal to a child, two eight ounces of windshield washer fluid could be fatal for an adult. My attorney said that hiring a private investigator was a good idea. It leaves me /// <p063>

Q Let me ask you to stop right there. That was the part that I wanted you to read.

MR. DAVENPORT: Your Honor, we would ask that that be admitted as our first exhibit and I would ask that it be published to the jury.

THE COURT: Any objection, Mr. Cooley?

MR. COOLEY: No, Your Honor.

THE COURT: Admitted as Commonwealth's 1. Sheriff please publish it to the jury once it is stamped.

MR. DAVENPORT: Thank you, Your Honor.

Q Ms. Fleming, did Chuckie finally graduate from VCU?

A Finally.

Q Okay. Do you know when he graduated?

A 2000, right before Chuck's death.

(The exhibit was published to the jury.)

Q Do you know any of the situations /// I want you to give this in formation, if you know it, through Diane of any ultimatums or any things that were done in Chuckie's life to prepare him for being out on his own.

A Well, accordingly, she told me that she and Chuck, my son, had decided that they needed to ready Chuck -- Chuckie to move out of the house. I think they had given him an ultimatum of around August. And so they were trying to prepare him and they were having him buy his own food, like he would have to if he moved out, and prepare it, some of the <p064> household chores that he would have to do if he moved out. So, they were trying to ready him to be able to be self-sufficient when he did move out on his own.

MR. DAVENPORT: Just could I have one second, Your Honor?

THE COURT: Yes.

MR. DAVENPORT: Sheriff.

Q Ms. Fleming, the sheriff is handing you a photograph and I'd ask if /// could you identify that?

(The witness was shown the exhibit.)

A It's my son.

MR. DAVENPORT: Your Honor, we would ask that that be marked as our second exhibit and published to the jury.

THE COURT: Any objection, Mr. Cooley?

MR. COOLEY: No, Your Honor.

THE COURT: All right. Marked as Commonwealth's /// admitted as Commonwealth's 2 and publish it to the jury, Sheriff.

(The exhibit was published to the jury.)

MR. DAVENPORT: Thank you, Ms. Fleming.

THE COURT: Ms. Fleming, if you would remain, please, and answer any questions from Mr. Cooley.

THE WITNESS: I'm sorry.

MR. COOLEY: Thank you. <p065>

CROSS-EXAMINATION BY MR. COOLEY:

Q Good morning to you, Ms. Fleming. Ms. Fleming, just let me ask you a couple of things, if I can. The discussions that you had with Ms. Fleming, Diane Fleming, about the situation with Rhonda Quinn and your discussions with your son, all of that occurred back in 1996?

A Yes, sir.

Q And after that, as you've indicated, they tried to rebuild their lives, they bought a new home and things went on?

A Yes, sir.

Q All right. Now, this e-mail that you've identified a few moments ago starts off by talking about a vacation that was planned at some point late in the summer; is that right?

A Yes, sir.

Q And that's something that had been planned by the whole family, you and your husband and Chuck, your son, and Diane, all of you had planned and made arrangements, like at the end of the year before, to make /// to rent a cottage down at Nags Head?

A No, sir, that was a plan that she and her son /// husband /// my son had. They went every year. After Chuck's death, we decided we would join the family, so. <p066>

Q Okay. I'm sorry. I may have misstated.

A Yes, sir.

Q They had planned it way in advance?

A Yes, sir.

Q It wasn't something that she planned after he passed away and said, Well, I'm going to go off?

A (Indicating in the negative.)

Q And you and your husband joined them?

A Yes, sir.

Q Okay. And you and she were discussing during this /// this e-mail is dated August 14th of 2000, right?

A (Indicating in the affirmative.)

Q And you all were discussing back and forth the /// what caused your son's passing, correct?

A Correct.

Q And /// and she thought all along that that methanol did not come from the windshield washer fluid, correct?

A That's what she indicated.

Q Because the windshield washer fluid that was in the garage was, in her estimation, unopened and completely full, correct?

A That's what she said.

Q And she was concerned, she believed that the methanol may have come from his work where it was a pure methanol and wouldn't have had a blue color to it or <p067> anything, correct?

A That's what she believed.

Q Right. And that's what she was conveying in this; is that correct?

A Yes, sir.

Q All right. And she told you in that that she had checked on the Internet and looked at these things about the /// how much it would take, how much methanol it would take to injure a child versus an adult?

A Yes, sir.

Q And she had concerns about the color, the blue color of the windshield washer fluid and why it wouldn't have effected the coloring of the Gatorade?

A Yes, sir.

MR. COOLEY: Ms. Fleming, I'm sorry for your loss. Thank you for being with us today.

THE COURT: Thank you, Mr. Cooley.

Redirect, Mr. Davenport?

MR. DAVENPORT: Your Honor, I left out a little portion there when I had her on the witness stand on direct and I hope Mr. Cooley will indulge me.

MR. COOLEY: If he'll indulge me in additional cross.

MR. DAVENPORT: I certainly will, Your Honor.

THE COURT: Thank you. <p068>

REDIRECT EXAMINATION BY MR. DAVENPORT:

Q Ms. Fleming, did your son ever have to be taken to any facility to be /// because of any psychological or depression or any problems when he grew up in your home?

A No, sir.

Q And during the last six months of his life, did you notice any change in his mental state, any way that he acted or reacted to things?

A No, sir.

MR. DAVENPORT: Thank you very much. That's all I have, Your Honor.

THE COURT: Mr. Cooley.

MR. COOLEY: I don't have any additional. Thank you.

THE COURT: Thank you, Ms. Fleming. You are /// do we anticipate needing Ms. Fleming to testify?

MR. DAVENPORT: We do not, Judge.

THE COURT: You may remain in the courtroom if you'd like, ma'am.

(The witness left the stand.)

THE COURT: Your next witness, please. <p069>

MR. DAVENPORT: Mr. Charles Fleming, Sr., please.

THE COURT: Mr. Fleming, if you would come forward to the deputy sheriff here.

CHARLES L. FLEMING, SR., called by the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. DAVENPORT:

Q Good morning.

A Morning.

Q Mr. Fleming, would you give your full name to the ladies and gentlemen of the jury, please?

A My name is Charles Linwood Fleming.

Q Charles Linwood Fleming, Jr., was your son; is that correct?

A Yes.

Q Now, the defendant, Diane Fleming, seated here with Mr. Cooley, did you know her?

A Yes.

Q Would you explain to the ladies and gentlemen of the jury how often you spoke to her, especially during the last two years of your son's life?

A Quite often, I'd say once or twice a week while he <p070> was living.

Q Was that over the phone, mostly?

A On the phone and in person.

Q Okay. Did you ever ask her about her access to your son's computer?

A Yes, I did.

Q Did you ever ask her about having his password?

A Yes, I did.

MR. COOLEY: If we can have the time frame, Judge, that we're making reference to here.

THE COURT: Mr. Davenport, please.

MR. DAVENPORT: Yes.

Q Would you /// when did you have a conversation with her where she told you any factors about her husband's computer and her access to it?

A Around August the 10th of the year he died.

Q So, this is a couple of months after he died?

A Yes, sir.

Q Okay. Now, what did she tell you about her access to his computer?

A Well, I asked her how hard it would be to get into the computer. She was telling me something about she had gone into the computers to look, you know, at some of the jobs he had applied for, something like that. And I asked her how hard it was to get his password and she said that <p071> they had each other's password.

Q Okay. Did she tell you that /// whether or not she perused her husband's e-mail, incoming and outgoing? A Do you mean before or after?

Q Before.

A I don't remember her telling me that she did it too much before. I know she told me that she did, but I'm not sure whether she meant before or afterwards.

Q All right. Did you ever talk with her about the Gatorade and creatine that was mixed on the 11th of June of 2000?

A Yes, I did.

Q Would you relate to the ladies and gentlemen of the jury what she told you with reference to that Gatorade, how it was mixed and who did it?

A She told me that she and /// I think she said she and my son had mixed one together and then later on she had mixed four more after

he had gone to bed, I believe is what she said.

Q All right. Do you know of any reason why anybody would want to kill your son?

A God knows I didn't.

MR. DAVENPORT: That's all the questions I have, Your Honor.

THE COURT: Cross, Mr. Cooley. <p072>

MR. COOLEY: Thank you, Your Honor.

CROSS-EXAMINATION BY MR. COOLEY:

Q Good morning to you, Mr. Fleming.

A Good morning.

Q Mr. Fleming, do you know how many password accounts your son had?

A No, sir. I understood from her it was just one.

Q And did you mix, at some point, Gatorade and windshield washer fluid?

A Are you asking me did I mix it?

Q No, I don't mean that was involved in this incident. After the incident, did you mix Gatorade and windshield washer to see how it would effect color and such?

A No, sir, I didn't.

Q Did you discuss that with Ms. Fleming about doing that?

A Not to my knowledge, I didn't.

Q Did you all have a number of discussions relating to the mixture of colors that windshield washer fluid and such?

A The only thing that I questioned about was how many different brands of Gatorade that they used, and I believe she said they used orange only.

Q You think she said orange only?

A Yeah, I believe that's what she said.

Q And have you discussed that with the police?

A I'm not sure, probably.

Q I'm not asking what you discussed, just did you discuss that with the police?

A I believe that I was asked about it and I think did, but I'm not really sure exactly what was said to the police. <p073>

Q Did the police tell you that there were three types of Gatorade in this one mixture /// one box that they purchased?

A I don't believe the police told me that.

MR. COOLEY: That's fine. Thank you very much.

THE COURT: Redirect, counsel?

MR. DAVENPORT: None, Your Honor.

THE COURT: All right. Thank you, Mr. Fleming.

You may step down. May Mr. Fleming be excused?

MR. DAVENPORT: Yes.

THE COURT: You may remain in the courtroom or you may be excused.

(The witness left the stand.)

MR. DAVENPORT: Your Honor, the Commonwealth's next <p074> witness is Bill Bailey, please.

WILLIAM H. BAILEY, JR., Called by the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. DAVENPORT:

Q Good morning, Mr. Bailey.

A Good morning.

Q Would you give your name to the ladies and gentlemen of the jury, please?

A My name is William H. Bailey, Jr.

Q How are you employed?

A I'm employed at Philip Morris Park 500 plant.

Q All right. How long have you worked there?

A I've worked for Philip Morris 21 years.

Q Did you work with Charles Fleming, Jr.?

A Yes, sir, I did.

Q When did you first come to know him?

A I first came to know him when he came to Park 500 and I came to work in the maintenance department there at Park 500

Q Can you tell us about when that was?

A Around 1993, I believe somewhere in that period.

Q What capacity were you working in at that time and <p075> what capacity was he working in back in '93?

A I was in /// superintendent for the maintenance department, he was a mechanic and then became a supervisor during that period.

Q Okay. Did you have frequent contact with him on the job?

A Fairly frequent, yes.

Q See him on a daily basis?

A Just about every day, yes.

Q All right. Can you tell the ladies and gentlemen of the jury something about whether or not he /// his advancement at Philip Morris?

A He was a very good supervisor and had been advancing through the ladder program of being promoted.

Q And can you tell us whether or not he was promoted very shortly before he died in June of 19 /// of 2000?

A Yes, sir, he had just been promoted recently before he passed away.

Q Do you know whether or not he was pursuing education as he was working at Philip Morris?

A He had gotten a master's degree.

Q All right. Do you know how long before?

A No, sir, I don't know the exact date.

Q Did you have occasion to see him on the /// well, let's talk about the last couple of months of him working <p076> there. Did you notice any changes in his personality or in the way he did his work or anything?

A No, sir, I did not.

Q And I want to direct your attention to the 12th of June of 2000, that would have been a Monday and that would have been the last day that he worked there. Did you see him on that day?

A Yes, sir, I did.

Q All right. And did you notice his condition when he came in?

A That morning he appeared to be ill, said he thought he had the flu.

Q All right. Did you /// were you there when he left?

A He /// we were in a meeting that morning and he said he thought he had the flu and I suggested that he go home and get some medical attention. He left after that and went back to his office area and then left shortly after that to go home.

Q Is that the last time you saw him?

A Yes, sir.

MR. DAVENPORT: Your Honor, that's all the questions I have.

THE COURT: Cross, Mr. Cooley?

MR. COOLEY: I don't have any questions.

THE COURT: All right. Thank you, sir. <p077> May Mr. Bailey be excused?

MR. DAVENPORT: Yes, ma'am.

THE COURT: Mr. Bailey, you may remain in the courtroom or you may leave, sir. Thank you. (The witness left the stand.)

THE COURT: Next witness.

Charles Tanner (Chuckie)

MR. DAVENPORT: Yes, ma'am. Charles Tanner, please.

THE COURT: Charles Tanner, please.

CHARLES L. TANNER, JR., called by the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. DAVENPORT:

Q Would you give your name to the ladies and gentlemen of the jury, please?

A Charles Lee Tanner, Jr.

Q Do they call you Chuck?

A Yes, and sometimes /// well, most times at home they call me Chuckie.

Q How do you prefer me to call you today?

A Chuck, please. <p078>

Q All right, Chuck. What is your relationship to the defendant?

A I am her son.

Q Now, you were born of a prior marriage; is that correct?

A Yes.

Q And what was your birth name?

A Charles Ellinghouse.

Q Did there come a time when your mother married again?

A Yes.

Q And when was that?

A I think it was in 1980 or 1981.

Q And who did she marry at this point /// at that time?

A Charles Tanner, Sr.

Q Did that man adopt you at a certain point?

A Yes.

Q And you took his name; is that correct?

A Yes.

Q All right. Did it come a time when you came to live with your mother and Charles Tanner /// Charles Fleming, Jr.?

A Yes.

Q Do you know when that was? <p079>

A It was in June of 1990.

Q And how old were you at that time?

A Fourteen.

Q Where had you been living before that?

A Northern Virginia.

Q And who had you been living with?

A My adopted father.

Q Okay. Was your brother also living there with you, your stepbrother?

A Yes.

Q Can you tell the ladies and gentlemen of the jury something about your relationship with Charles Fleming?

A He was my stepfather.

Q Did he treat you like a son?

A Yes.

Q Did he provide for you?

A Yes.

Q During your time in living at the house, did you go to college at VCU?

A Yes, I did.

Q And did you ultimately finish VCU?

A Yes.

Q What year was that?

A It was in May of 2000, about a month before he died. <p080>

Q Did he push you to get your studying done and do everything you needed to do to get your degree?

A Yes.

Q Was he adamant about you doing those things?

A Yes.

Q As a result of that, was /// were the police ever called to come over to your house?

A Only once.

Q When was that?

A In October of '98.

Q Okay. As a result of that, can you tell the ladies and gentlemen of the jury what happened then?

A We had a discussion that resulted in a physical altercation, and I was arrested and charged with misdemeanor assault.

Q Did you go to juvenile court?

A Yes.

Q Can you tell the ladies and gentlemen of the jury what happened in juvenile court?

A I pleaded guilty and I was put on a year's probation and there were no charges.

Q All right. Now, during the /// from that time in 1998 on, what was your relationship with Charles?

A Well, I still considered him a stepfather.

Q Okay. Did he ever make you do things or tell you <p081> that he would like to have you out of the house at some time

A He said he'd like to see me be out on my own by August of 2000.

Q Was that given as an ultimatum?

A Well, I'm not sure if it was an ultimatum, but he said he'd like to see me at least try to be out by then.

Q Did your mother and him do any things in preparing you to be out on your own?

A Well, I started doing my own laundry and, for a time, I was buying my own groceries.

Q Okay. I want to take your memory back to the events of June the 11th of 2000. Can you remember that day?

A I think it was a Sunday.

Q Do you remember what you did that morning when you got up?

A Well, I think I ate breakfast and got ready for church.

Q Who all was at the house that morning?

A The whole family was.

Q And who were they?

A Me, my stepfather, my mom, my brother and sister

Q Okay. Did there come a time when you all /// you went to church that morning?

A Yes.

Q And did your mother and any other people go to <p082> church before you?

A Well, I think my mom, my brother and sister left around 9:30 or so to go to Sunday school.

Q Okay. Did there come a time when you left to go to church?

A Yes.

Q And did you drive by yourself?

A Yes, I did.

Q Did Charles go to church that day also?

A Yes. He left the house not too long after I did.

Q After church, what did the family do?

A Well, I left to go to work and they went to Costco.

Q Where do you work? Where did you work back then?

A I worked at the Food Lion at Deer Run.

Q Okay. What kind of work did you do there?

A I worked in the deli.

Q Did you stay at work all that afternoon?

A Well, as I remember, I did. I only got half hour lunch break and I think I stayed in the store or if I went out, it might have just been to one of the stores in the shopping center.

Q Now, this Food Lion that you worked at, where was it located?

A It was on Hull Street directly across from Clover Hill High School. <p083>

Q I'm going to hand you a piece of paper that I've shown Mr. Cooley and ask can you identify this record.

(The witness was shown the exhibit.)

Q Do you know what that is?

A It looks like my time clock report.

Q Can you see the date, 6/11/2000 there?

A Yes.

Q Can you see what time you came to work?

A 12:56.

Q Can you see what time you clocked out?

A For the evening or for lunch?

Q For lunch.

A 4:22.

Q Can you see what time you clocked back in after lunch?

A 4:49.

Q And can you see what time you left that evening?

A 8:36.

MR. DAVENPORT: All right. Your Honor, we would like this to be our next exhibit, please.

THE COURT: Any objection, counsel?

MR. COOLEY: No objection.

THE COURT: Admitted as Commonwealth's 3.

MR. DAVENPORT: Let's just put that last in. Your Honor, it's three pages. We'd have it

marked <p084> collectively as our next exhibit.

THE COURT: All right. All three pages to be marked collectively as Commonwealth's 3.

Q Mr. Tanner, you mentioned that you left church and you went to work at the Food Lion. Do you know where your family went at that time?

A They went to Costco.

Q And when you say they, can you tell the ladies and gentlemen of the jury who you mean?

A My mom and my stepfather and my brother and sister.

Q And they were driving two separate cars; is that correct?

A Yes.

Q Okay. When you got off of work at 8:22 that evening, do you remember what you did?

A Well, I think I may have gone to WalMart or someplace, I'm not sure where, but usually if I got off early, I would go someplace before going home.

Q Okay. Do you remember what time you arrived home that evening?

A I guess it was sometime between 9:00 and 9:30.

Q Do you remember whether or not your stepfather was still up?

A No, I think he was already in bed.

Q Did you see your mother when you went in the house? <p085>

A Yes.

Q Did you see her in the kitchen?

A Yes .

Q And can you tell the ladies and gentlemen what she was doing?

A Well, she had some bottles, just a few bottles of Gatorade on the counter and this stuff called creatine and I asked her what that was for and she said Chuck was taking that for /// it was some kind of exercise supplement, I'm not sure what, but she said that it was for muscle building and said I didn't need to be drinking it.

Q Did she /// did she make any statement to you about not drinking the bottles that she was putting in there for Chuck?

A Well, she said I didn't need to drink it because it had creatine in it, and since I don't lift weights or anything, I shouldn't be drinking it.

Q Now, I want to direct your attention to the next morning, June 12th. Do you remember getting up on that morning?

A Yes.

Q Do you remember whether or not your stepfather was already gone to work when you got up?

A Yeah, I think he was already gone.

Q Did there come a time when he came back home? <p086>

A Yes.

Q And what time was that?

A It was around nine o'clock.

Q Did you receive a call from your mother immediately before he got there?

A Yes.

Q And what /// what did she tell you?

A Well, she just /// I was getting ready for my eye doctor appointment and she called and said he was on his way home.

Q All right. And when he got home, did you notice how he looked?

A No. I didn't notice how he looked until I went downstairs, he was just laying on the couch.

Q Did you see him throw up or do anything like he was sick?

A No.

Q Did there come a time that day when medical or emergency people were called to the house?

A Yes.

Q And what time was that?

A It was around 5:00 or 6:00 that evening while I was at work.

Q Did they transport him on to the hospital; do you know? <p087>

MR. COOLEY: Judge, if he was at work /// we're not disputing that he was transferred, but I don't think this witness can answer that.

THE COURT: Sustained.

MR. DAVENPORT: That's fine. I withdraw it, Your Honor.

Q Now, the bottles of Gatorade that you saw your mother mixing with creatine when you came home from the Food Lion about 9:30 on Sunday, did you ever touch those bottles?

A Well, I think I may have touched them to move them out of the way if I put drinks in the refrigerator.

Q Did you open any of those bottles and put any methanol in them?

A No.

Q Do you know who did?

A No.

Q Where do you keep the drinks that you have for the family? Where are they kept?

A After we buy them, they're normally put out on the shelves in the garage and whenever

we run out of them in the refrigerator, we usually go and get them from the garage and put them in the refrigerator and get them cool.

Q Do you know what happened to the rest of that case of Gatorade that was in the garage?

A Well, I think after he died, eventually we drank <p088> them.

Q Do you have windshield washer fluid of your own in the garage?

A No.

Q Who handles the windshield washer fluid at your house?

A Well, I think either my mom or stepfather.

Q Do you know of any reason why anybody would want to kill your stepfather?

A No.

MR. DAVENPORT: Could I have a minute, Your Honor? Your Honor, that's all the questions I have of this witness.

THE COURT: Thank you, counsel. Mr. Cooley.

MR. COOLEY: Thank you, ma'am.

CROSS-EXAMINATION BY MR. COOLEY:

Q Good morning to you, Mr. Tanner.

A Good morning.

Q Mr. Tanner, that Sunday morning, June 11th, you got up and ultimately you go to church, correct?

A Yes.

Q Do /// would, as a normal situation, you and your <p089> stepfather, Chuck, ride together?

A Sometimes.

Q Is it constantly you'd ride together? Is it rare for you to not ride together?

A Well, he didn't go to church very often on Sunday, but sometimes whenever he did, he would ride with me.

Q Okay. And on this occasion he did not?

A No.

Q And so you ended up with three separate cars at church; is that correct?

A Yes.

Q And then you left from church and went to work?

A Yes.

Q And you were working at the Food Lion and you went over to work there and then you left at some point a little after 8:00 and you think you went to WalMart?

A I think so.

Q And the next day, did you go back to work at the Food Lion?

A Yes, that afternoon.

Q And did you have a deli manager there named Trish Jones?

A Yes.

Q And on that day, on Monday, did you tell her that Chuck was sick and you thought that he was trying to commit <p090> suicide?

A No, I didn't.

Q You did not tell her that? In fact, what you told the jury is when you left and went, you knew he wasn't feeling well, but you really didn't think /// didn't realize he was that sick; is that right?

A No.

Q Did you do anything with this Gatorade? I understand the Commonwealth's question to you and you said well, you might have touched these bottles moving them around in the refrigerator, correct?

A Yes.

Q Did you drink any of the Gatorade yourself? Do you remember?

A Which ones?

Q Well, any of them.

A Just the ones that were out in the garage.

Q Okay. So, you think you drank some of them?

A Yes.

Q But you left the one in the refrigerator alone?

A Yes.

Q And, of course, it wasn't until somewhat later in the week, well after Chuck died, that the police got the lab reports back and realized that there was methanol inside that Gatorade, correct? <p091>

A Yes.

Q And so during that intervening time before the police realized that Gatorade contained the methanol, everybody there still had access to that Gatorade both in the garage and in the refrigerator?

A Yes.

Q And everybody continued to drink it, apparently?

A As far as I know, yes.

Q Well, you answered to the Commonwealth's Attorney that it was all consumed, you thought /// you thought it was all used; is that right?

A Yes.

Q Now, once you came home that night on the 11th of June, once you came home after getting off work and apparently going to WalMart, you came home and went to bed at some point?

A Well, I think I may have stayed up for a while and watched TV.

Q And your mom would have gone on to bed and she sleeps in a room with your dad in the same bed, correct?

A Yes.

Q Or your stepdad, I'm sorry. And you have a separate bedroom?

A Yes.

Q And the TV is downstairs? <p092>

A Yes.

Q And where is it in relationship to the kitchen?
A It's in the room right next to the kitchen.

Q And where is the access to the garage and the Gatorade?

A It's /// there is a door off the hallway leading into the living room—kitchen area that goes out to the garage.

Q So, the garage, where the /// where we now believe to be untainted Gatorade, entrance through the kitchen and the room with the TV are all in one small area on the first floor; is that correct?

A Yes.

Q You are how old?

A Twenty-six.

Q And you, as of today, still live in the home; is that correct?

A Yes.

Q Did you at any time threaten to kill your stepfather, Chuck?

A I don't think I ever threatened to kill him aside from that one incident.

Q And that one incident was what you've told us to be the one time that the police came and that was in October of 1998? <p093>

A Yes, sir.

Q So, on that occasion, you threatened to kill him, but you don't think you did any other time?

A No.
Q Did you have a female manager at Food Lion by the name of Gina Morris?
A Not Food Lion, at Winn-Dixie.
Q Oh, Winn-Dixie, I'm sorry. Did you have a manager named Gina Morris at Winn-Dixie?
A Yes.
Q And did you threaten to kill her?
A Yes.
Q And she complained to your parents; is that correct?
A Yes.
Q And you and your stepfather had an argument at that time, correct?
A Well, it wasn't really an argument, he was just mad and said I shouldn't have done that.
Q In fact, he told you that he was tired of you threatening to kill people, didn't he?
A Well, I don't remember exactly what he said, but he was disappointed and said I could have gotten in a lot of trouble for doing that.
Q You had a conversation with the police after <p094> Chuck's passing in which they asked you whether or not or what kind Of relationship you had with Chuck, correct?
A Yes.
Q And you lied to them, correct?
A Well, I don't remember exactly what I said to them.
Q Well, you told them your relationship with him was fine, correct?
A Well, I don't remember saying that.
Q All right. So, you deny saying that?
A Well, what I'm saying is I can't remember.

Q Okay. Your relationship with Chuck was not fine, was it?
A Well, I'd say it was typical.
Q Typical of what?
A Well, even though he provided for me, I just couldn't accept him as a father. I still considered him a stepfather.
Q And both of your /// both your natural father and your adopted father are certainly still living, correct?
A Yes .
Q And you were /// you were 26, so if you didn't like the relationship, you certainly could have left the house, couldn't you?
A Yeah.
Q And, in fact, you discussed with your former church <p095> youth counselor, a Linda Dugent, the potential of coming to live with her and her family, didn't you, because of the relationship, your difficulties with the relationship with your stepfather?
A I don't remember telling her that.
Q You don't remember that, either?
A No.
Q Do you remember having a discussion with her about your relationship with Chuck?
A No.
Q You don't remember that. Do you remember her urging you to go back to the /// your psychiatrist and get counseling relating to that relationship before you decided whether you would come live with her or try to stick it out living with Chuck?
A I don't remember us ever talking about my stepfather. I mean, it may have come up, but I don't remember me ever saying I would live with her or urge me to do anything.
Q Did Chuck, your stepfather, drink every day?

A You mean alcohol?
Q Yes.
A Well, in the evenings he would have a couple of drinks before he went to bed.
Q All right. And was he into kind of a health kick,<p096> playing basketball frequently?
A Well, he played basketball and worked out, but I don't know if I would consider it a health nut.
Q In fact, the police had been called not just one time to respond to disputes between you and Chuck, but a total of three times, hadn't they?
A I don't /// I only remember that one time in October of '98.
Q Do you remember the police responding to the Autumn Woods address in Brandermill when you and Chuck were having a dispute, your neighbor calling them?
A No, I don't.
Q Don't remember that. Do you remember the police coming to the beach house in Nags Head when you and Chuck were having an altercation?
A Well /// well, I think I do remember that because we were out in the driveway having a discussion. I think he was raising his voice or something and there was a police car pulling up in the driveway and he said that a neighbor complained here in Southton [sic], was worried.
Q So, you do remember that time that the police responded to a dispute?
A Yes, but I don't remember anytime them coming to Autumn Woods.
Q All right. Is it possible that you, as part of the <p097> relationship that you were having with Chuck, put something into the Gatorades, knowing they were going to be for him, that night when you were down

there watching TV thinking that it might make him sick but not intending to kill him? Is it possible that you did that?

A No.

Q Are you sure that that is not something that you just don't remember?

A No, I wouldn't have done anything to hurt him.

Q Even though you threatened to kill him?

A Yes.

Q And even though you pled guilty to assault and battery of him?

A Yes.

Q You all had computers in the house; is that correct?

A Yes.

Q Did you have a computer?

A Yes.

Q Did you have access to all the other computers in the house?

A Yes.

Q And did you have the ability to get online from anywhere in the house?

A Just the computer in the office and the one in the <p098> rec room.

Q So, two of them you could get on?

A Yes.

Q And did you have /// I mean, did you need any special code to get in, password or anything or did it automatically go to it?

A Well, the cable modem didn't require a password, but I think if I ever used AOL, it would have required a password.

Q But the cable modem did not? You could just automatically get to the Internet with that?

A Yes.

Q Did you have a habit of going to horror sites?

A Yes.

Q And did you bring up /// was it Mortatis, is that one of them?

A Yes.

Q And other folks in the house knew you did that; is that correct?

A Well, I think my mom, just my mom knew it.

Q Just your mom. Okay. When you got the ultimatum that you had to move out, what were your plans? A Well, I thought I'd finish school, and then look for a job, and, hopefully, after I found a job, I'd save up enough money, then move out. <p099>

A So, you were going to finish school in May and you did that?

A Yes.

Q And another month had gone by now and it's now mid June and /// when Chuck gets sick, right?

A Yes.

Q So, you had the rest of that month, you had half a month of June and the full month of July and were you going to try to get a new job and save up enough money in that month and a half to be able to move to a new location?

A Probably not.

Q Had you located a new residence? Had you rented anyplace that would be available on August 1st?

A No.

Q Had you discussed with anybody the potential of being a roommate at some new location?

A No.

Q Sharing the bills at that new location?

A No.

Q Had you talked to anybody at your church or anywhere else about the possibility of you moving in with them?

A No.

Q Did you have any money in your savings account?

A Yes. <p100>

Q How much?

A I can't remember how much I had at that point.

Q Okay. Since Chuck's passing, you've been able to continue to reside at the home; is that correct?

A Yes.

MR. COOLEY: Judge, may I have one moment?

THE COURT: Yes, sir.

MR. COOLEY: That's all the questions I have for Mr. Tanner.

THE COURT: Redirect?

MR. DAVENPORT: Just a couple.

REDIRECT EXAMINATION BY MR. DAVENPORT:

Q Where do you live now?

A I still live at home.

Q Let me ask you about your mother's employment before Meagan was born. Did she work outside the home?

A She was a pharmacy tech.

Q And whereabouts did she work?

A Well, she worked at Chippenham Hospital and also for a time she worked at Comp-U-Dose.

MR. DAVENPORT: That's all the questions.

MR. COOLEY: Judge, I'm sorry. I have one additional question. I apologize. <p101>

THE COURT: Yes, sir.

RE-CROSS—EXAMINATION BY MR. COOLEY;

Q You said that on the morning that Chuck came home from work on June 12th that you got a call from your mother telling you that he might be coming home?

A Yes.

Q Did she also tell you that she thought he might want the briefcase that they had in the car, she and Jeffrey and Meagan had in the car and to tell him she would be back in just a couple of minutes as soon as she dropped Meagan off so he could take the briefcase back to work?

A Yeah, I think I remember her saying something about that.

MR. COOLEY: Thank you very much. That's all the questions.

THE COURT: Does that prompt anything?

MR. DAVENPORT: Nothing further, Your Honor.

THE COURT: May this witness be excused?

MR. DAVENPORT: Yes, ma'am.

THE COURT: All right, sir. You may either remain ///

MR. COOLEY: Judge, I would ask that he not be excused. There is some potential we'll be calling him.

THE COURT: All right. Mr. Tanner, if you would <p102> step back outside. Please do not leave.

(The witness left the courtroom.)

THE COURT: Counsel, we're going to take a ten-minute recess. Sheriff, will you take the jury out, please?

(The jury left the courtroom and a recess was taken.)

THE COURT: Are we ready for the jury?

MR. DAVENPORT: Yes, ma'am.

(The jury returned to the courtroom.)

THE COURT: All right. Let the record reflect all twelve jurors are back and seated in the jury box and we are ready for your next witness.

MR. DAVENPORT: Yes, ma'am, Your Honor. Jeffrey Tanner, please.

JEFFREY L. B. TANNER, called by the Commonwealth, first being duly sworn, testified as follows: <p103>

DIRECT EXAMINATION BY MR. DAVENPORT:

Q Would you state your full name for the ladies and gentlemen of the jury, please?

A Jeffrey Lewis Benjamin Tanner.

Q Mr. Tanner, you are the son of the defendant in this case, Diane Fleming; is that correct?

A Yes.

Q Charles Linwood Fleming, Jr., was your stepdad; is that correct?

A Yes.

Q I want to take your memory back to June the 11th of 2000 and ask you to relate to the jury what you did that day and what the family did that day to the best of your knowledge.

A We had woken up early for church on a Sunday, and Mom, my sister and I left early to go to Sunday school. And after Sunday school, my brother and Chuck arrived for church. After church, my brother had gone to work and the rest of us had gone to Costco. We did some shopping at Costco and then Chuck had left early because we had to find what we were looking for. Mom and I and my sister had continued to do some shopping.

Q What were you looking for at the Price Club, at Costco? <p104>

A Some sort of mix you would put into a drink, some sort of exercise.

Q Did you buy any drinks or Gatorade or things like that at the Price Club?

A I believe we bought the Gatorade at Price Club.

Q Did you go to the GNC store afterwards?

A I believe we may have.

Q And do you know what you purchased at the GNC store?

A No.

Q Now, when you say, We went to the Price Club, it was you and your mother and Meagan in one car and Chuck was in another?

A Chuck was in another car.

Q You say your brother had gone on to work, your brother Chuckie?

A Uh-huh.

Q Where did he work?

A At the time I believe he worked at Food Lion.

Q And where was that located?

A On Hull Street.

Q And this Costco you're talking about is the one over on 360 or Hull Street also?

A Yes.

Q Did there come a time when you left there and went <p105> home?

A Yes.

Q Would you tell us what you did when you got home and what happened that day?

A when we got home, I helped Chuck move some furniture around upstairs in the rec room.

Q When you say Chuck, you're referring to your stepfather?

A Yes. Because he had gotten a new weight bench and we had to make room for it. And so Mom had gone out, I believe, to pick up some weights from the store. So, while she was gone, Chuck and I moved the stair

climber down to the base /// to the shack outside. And then when she got home, I took the stuff out of the Jeep and took it upstairs.

Q when you took the stuff out of the Jeep, what are you talking about that you took out of the Jeep?

A The weights.

Q Okay. Now, did you handle any Gatorade that afternoon?

A No.

Q Did you see any Gatorade in the garage that afternoon?

A Yes.

Q Did you see any Gatorade in the kitchen?

A Yes. <p106>

Q Did you see any Gatorade in the refrigerator?

A Yes.

Q Did you see your mother and your stepfather mix the Gatorade with the creatine?

A No.

Q Did you help mix any creatine and Gatorade?

A No.

Q Did you handle any of the bottles of Gatorade that afternoon?

A Just to put them in the fridge.

Q Did you open any of the bottles?

A No.

Q Did you put any methanol or any other substance in those bottles?

A No.

Q Now, I want to take you back to the time when you came to live with your stepdad, Charles Fleming. Do you remember how old you were then?

A I was around seven.

Q Okay. And where did you come from? Where had you been living before that?

A I had been living in Alexandria with my father.

Q Who else lived there with you?

A My brother, my dad's wife and her daughter.

Q Okay. And so what type of arrangement, what were <p107> you living in up in Alexandria?

A An apartment.

Q And you came /// after your mother and your stepfather were married, you came to live with them in Chesterfield County?

A Yes.

Q Did you /// did Charles Fleming treat you as a son?

A Yes.

Q Did he provide for you?

A (Indicating in the affirmative.)

Q Did he help you with your school?

A Yes.

Q Did he help you with athletics?

A Yes.

Q Did you ever have any altercations or any harsh words with him?

A No.

Q Do you know of any reason why anybody would want to kill him?

A No.

Q Now, I want to take your attention now back to the 12th of June of 2000, the Monday after that Sunday that you talked about a few seconds /// a few minutes ago. And do you remember that day?

A Yes, I do. <p108>

Q would you tell the ladies and gentlemen of the jury what you did that day and if you saw Chuck that day, and if you saw him,

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what he looked like and how he acted and what happened that day?

A Basically, I was off of school that whole week because I was exempt from all of my exams. So, I went with my mom to take my sister to school that morning. On our way, we passed Chuck coming home. We figured that he had gone on his way back to pick up his briefcase that he had left. The briefcase was in the Jeep, which we had, so we called my brother at home and told him to tell Chuck that we would be right back because we figured that's why he was coming home. When we got home, Chuck was laying on the couch and you could tell that he had /// that he wasn't feeling well, that he had gotten sick earlier that day.

Throughout the day, he just got worse and worse and was just getting sicker and sicker. So, Mom called the doctor and the doctor said to try some /// a flat soda. So, I ran up to the pool to the soda machine to get the soda and brought that home. And then Mom had gone to the Winn-Dixie pharmacy to pick up some suppositories that she was told to get. And then throughout the day, he just continually got worse and worse. And Mom had taken Meagan to swim team practice and I stayed home just to make sure everything was okay with Chuck. I picked Meagan up from swim team practice, <p109> and when I pulled into our driveway, because that's when the ambulance came following behind me.

Q Now, did you ever see your brother, Chuckie, that day after you came /// after you came home from church on Sunday?

A No.

MR. DAVENPORT: That's all I have, Your Honor.

THE COURT: Cross, Mr. Cooley?

MR. COOLEY: Thank you, Your Honor.

CROSS-EXAMINATION BY MR. COOLEY:

Q Good morning, Mr. Tanner.

A Good morning.

Q I'm going to call you Jeffrey if that's all right.

A That's fine.

Q Now, Jeffrey, you said you didn't see Chuckie that evening?

A No.

Q On Sunday evening, were you already in bed when he or to your room before he came home?

A I'm assuming. I don't remember.

Q But you didn't see him?

A But I didn't see him.

Q And your bedroom is where in the house? <p110>

A On the third floor.

Q And Chuckie's bedroom is on the lower level; is that correct?

A Second level.

Q Second level. Now, you were in the middle of your graduation week?

A Yes.

Q And didn't have to take exams?

A (Indicating in the affirmative.)

Q Good times?

A (Indicating in the affirmative.)

Q And did you have to attend any school services? Was there a religious service on the night, Sunday night?

A Sunday evening I had a baccalaureate.

Q And graduation later in the week, did your grandparents come over?

A Yes.

Q Where did they come from?

A Missouri.

Q And that's Ms. /// your mom's parents; is that correct?

A Yes .

Q And they're seated here in the courtroom; is that right?

A Yes. <p111>

Q And they came from Missouri. Did they fly in or

did they drive in or how did they get there?

A They drove.

Q And they were going to be there for your graduation that week; is that right?

A Yes.

Q And did they arrive Tuesday or so or do you recall?

A I don't remember.

Q They were there through this situation?

A Yeah.

Q And for the record, you shook your head but ///

A Yes.

Q Okay. Thank you very much.

A Sorry.

Q Now, Mr. Davenport asked you some questions about relationships and such. And you got along fine with your stepfather, Charles; is that right?

A Yes.

Q Would you /// how would you describe the relationship between your mom and her husband, Chuck?

A They had a little more relationship, normal. They had the typical little arguments here and there, but other than that, it was pretty normal.

Q Ever any physical altercations or anything like that? <p112>

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A No.

Q How about your brother, Chuckie?

A That relationship was a little rougher.

Q Well, let me ask you specifically: How many times are you aware of police being called to respond to disputes between Chuck and Chuckie?

A Three.

Q Where were those three times?

A The first one I remember happened at the beach in Nags Head. The second time, I'm not sure if it was over a dispute or not, but all I remember is the police came by the house and rang the bell.

Q What road did you all live on?

A Autumn Woods.

Q Autumn Woods?

A Yes.

Q And the third time?

A And the third time happened at our house in Foxcroft.

Q And that's the point in time when Chuckie was arrested?

A Right.

Q When you come into you all's house, do you all normally come in the front door or do you all normally come into the back door? <p113>

A The back door.

Q How does that open into the /// where does that come into?

A The living room.

Q Is that where the TV is?

A Yes.

Q And is that basically attached to where the kitchen is?

A Yes.

Q And is there another door that goes out into the garage from that area?

A Yes.

Q So, once one was into that area where the TV is, one would be able to, within a second or two, go to the refrigerator and also go out to the garage if they wanted to?

A Yes.

Q Did your brother, Chuckie, use a computer frequently?

A Yes.

Q Did you have occasion to see certain websites that he might be using?

A Yes.

Q And did you talk with him about that or did you see that or how did you know about that?

A I just saw it. <p114>

Q Where would you see him doing that?

A I would see him in the office on the computer.

Q Are there /// is the office, does it have a door on it?

A Yes, it has glass pane door.

Q Is it a double door?

A Yes.

Q Or single?

A Double door.

Q And you can see through that?

A Yes.

Q And you can see the face of the computer through there?

A Yes.

Q And what websites did you see him on?

A They were like horror websites.

Q Mutatis and things like that?

A Yes.

Jeffrey Tanner (D son, C step son)

Q Or do you know? On this Sunday, May /// I'm sorry, June 11th of the year 2000, you and your mom and Meagan, your eight-year-old sister, went to church?

A Yes.

Q And you went early. Why did you all go early?

A Because it was Teacher Appreciation Day for Sunday school. <p115>

Q All right. And were you involved in that or was your mom involved in that?

A We were both involved in that.

Q All right. And did Chuck and Chuckie come together?

A No.

Q How did they come?

A Chuckie drove his car and Chuck drove the other.

Q Was that unusual?

A Yeah, I think.

Q And after church, Chuckie went on to work. And then the rest of the family, now stuck with two cars, both cars and all four people go to Costco?

A Yes.

Q And you're looking there because you /// your stepfather wants some kind of additive, some exercise additive that might help him?

A Yes.

Q Now, tell the folks, please, the ladies and gentlemen of the jury, what was he trying to do. What was he doing with his exercise routine? Did he have something that he was trying to add or something he was trying to get rid of?

A Something he was trying to get rid of. He had been commenting lately about /// he exercised a lot, several times <p116> a

week, and he played basketball several times a week as well. And he had lately been talking about how he didn't understand why doing all this exercising and everything, he couldn't lose his gut.

Q His gut?

A Yes.

Q And what did he /// before going to Costco and looking for this, had he been trying anything else that you were aware of?

A Not that I know of.

Q Take any kind of pills or anything of that?

A I think there were some bottles of vitamins or something in the pantry he was trying to take.

Q when you went to Costco, did he name anything he was looking for?

A Not to my knowledge.

Q And were you looking for something to mix this additive with?

A Yes.

Q And is that why the decision was made to get the Gatorade?

A Yes.

Q And they brought the Gatorade back /// you all brought the Gatorade back home; is that right?

A Yes. <p117>

Q And you don't really remember if you went by GNC, but you remember back closer to the time that you did tell the police that you went to the nutrition place?

A Yeah.

Q And then when you all got home, you went about your business; is that right?

A Yes.

Q And you helped Chuck move some things?

A Right.

Q And then you went off to your ceremony?

A Yes.

Q Now, when you were /// when you got up the next morning, did your stepdad normally /// had he already gone to work most of the time when you got up?

A Yes.

Q And was that true on this occasion?

A Yes.

Q And you don't know what he consumed after he left the house?

A No.

Q You don't know what he took with him after he left the house?

A No.

Q After he left the house, right. But at some point in the morning, roughly nine o'clock, he comes back home? <p118>

A Yes.

Q And you know that because you and your mom and Meagan, as I understand your testimony, were traveling to take Meagan to school?

A Yes.

Q And you see him pass by?

A Yes.

Q And your mom assumed he must be looking for the briefcase that was in the Jeep?

A Yes.

Q And she called home and talked to Chuckie?

A Yes.

A As far as you know from what was said in the car at that time, was it her expectation that Chuck was going to go back to work?

A Yes.

Q When you all got home, in fact, what was his condition?

A He was lying on the couch and he wasn't feeling well.

Q Now, the Commonwealth's Attorney asked you about the Gatorade. Did the Gatorade stay in the refrigerator?

A Some. Most of it stayed out in the garage, but there were a couple of it in the refrigerator.

Q There came some point later in the week when Chuck <p119> was in the hospital and /// either at the very end or after he had passed away that the police came and began to take stuff, your mom was showing them things that he had taken. Were you there when that happened?

A I believe so.

Q There came a point in time when they took some Gatorade; is that correct?

A Yes.

Q But it was some time thereafter, maybe even a week later, before anybody advised there were lab reports that showed there was something in the Gatorade; is that correct?

A Correct.

Q In the meantime, did you all continue to drink the Gatorade?

A Yes.

Q And basically used it up; is that correct?

A Yes.

Q Was Meagan in the house, your eight-year-old sister?

A Yes.

Q Were your grandparents, Mr. and Ms. Fleming /// I'm sorry. The parents of your mom, Diane Fleming, were they present?

A No.

Q They didn't stay the whole time past your <p120> graduation?

A No.

Q But they were there during the part of the week while Chuck was in the hospital?

A Right.

Q And they were there at the time of his passing?

A Yes.

Q And for several days thereafter?

A Yes.

Q And then they left to go back?

A Yes.

Q Your mom called the doctor for Chuck when he was sick on that Monday?

A Yes.

Q Your mom gave /// told the doctor the symptoms that he had?

A (Indicating in the affirmative.)

Q Your mom tried to get him to go to the hospital to get her /// to let her call an ambulance for him?

A Yes.

Q And then she did call the ambulance for him?

A Yes.

Q And she followed the ambulance to the hospital?

A Yes. Q

Q You stayed there with Meagan? <p121>

A Yes.

Q The Commonwealth's Attorney asked you if you knew of any reason that anybody would want to kill or /// let me change it to harm Chuck, your stepfather. Is there any reason your mom had to do that?

A No.

Q Based on relationships, was there any reason that your brother might have had to want to harm Chuck?

A No /// yes.

MR. COOLEY: Thank you very much.

THE COURT: Redirect.

MR. DAVENPORT: No, ma'am.

THE COURT: All right. Thank you, sir. You may /// may this witness be excused?

MR. DAVENPORT: He can.

MR. COOLEY: Yes, ma'am.

THE COURT: All right, sir. You may remain in the courtroom or you may go back outside. (The witness left the stand.)

THE COURT: Next witness.

MR. DAVENPORT: Your Honor, while Mike Monroe is my next witness, may I confer with the clerk?

THE COURT: Yes. <p122>

MR. DAVENPORT: Mike Monroe, Your Honor.

MICHAEL P. MONROE, called by the Commonwealth, was duly sworn.

THE COURT: Mr. Davenport.

MR. DAVENPORT: Thank you, Your Honor.

DIRECT EXAMINATION BY MR. DAVENPORT:

Q State your name for the ladies and gentlemen of the jury, please.

A My name is Michael P. Monroe.

Q How are you employed, Mr. Monroe?

A I work with the Virginia State Police as a special agent.

Q And what is your specific job as a special agent?

A I work in our computer evidence recovery unit examining computers and computer evidence that is brought in.

Q With reference to Commonwealth versus Diane Fleming, did you have occasion to be called in to do any work in this particular case?

A Yes, I did.

Q Would you tell the ladies and gentlemen of the jury what you did and what you found? <p123>

A I was asked to examine several computers, and out of those, I was asked to look for specific information. I conducted an examination looking for this specific information. And out of the several computers, I located information on one

particular computer that was deemed to be pertinent.

Q That computer was the computer of Charles Fleming?

A Yes, sir.

Q Now, what did your search reveal?

A I located, in the Internet history, information indicating that there had been some Internet activity on that computer in the form of visiting certain web pages.

Q I specifically want to direct you to methanol poisoning and ask if you found that there had been any activity on the Internet with reference to that and what you found.

A I found three occasions of visits to the Internet sites or Internet activity related to methanol poisoning.

Q All right. From your investigation, were you able to determine at least the date that the computer said that those searches were made?

A Yes. The date on the computer was May 15th, year 2000.

Q Okay. And specifically what information did you find? <p124>

A I found one search that had been conducted for methanol poisoning and I also found two other web pages that had been viewed, one /// both relating to /// one to methanol poisoning and one to methanol.

Q Okay. I'm going to hand you a series of papers and ask can you identify these.

(The witness was shown the exhibit.)

A Yes, this is my report.

Q And you submitted that to The Court? It's got your initials on it?

A Yes, it does.

MR. DAVENPORT: Your Honor, we'd ask for that to be admitted collectively as our next exhibit.

THE COURT: Any objection, Mr. Cooley?

MR. COOLEY: No objection, Your Honor.

THE COURT: Admitted as Commonwealth's 4.

MR. DAVENPORT: And, Sheriff, I would ask you to hand another report, if you would, to the witness.

(The witness was shown the exhibit.)

Q Special Agent Monroe, can you identify that?

A No, I'm unfamiliar with this.

Q Not familiar with that?

A No.

Q Look at the second page of that and see if it refreshes your memory. <p125>

A No, sir.

MR. DAVENPORT: Can the witness be handed the last exhibit back?

(The witness was shown the previous exhibit.)

Q In that ///

A That is not a part of this (indicating).

Q That is /// is that a different date on the bottom of that, look and see if it is?

A Yes. Yes, it is.

Q Okay. Now, the May the 15th date that you have testified to that you found a search for methanol poisoning, is that the report that you submitted?

MR. COOLEY: I understand that it's to ask a question, but, Judge, I think that's not really the testimony. I think what he's testified to is as of the date he received it, it appeared to be the May 15th date is what was on it. Is that correct?

MR. DAVENPORT: And, Judge, I don't dispute that at all. I mean, what I've asked him is that what the computer said the date was.

THE COURT: Yes.

MR. DAVENPORT: I'm not asking him can he tell this jury that that was the date that it was taken, that it was inquired, but that's at least the date that the computer said that it was inquired. <p126>

THE WITNESS: Are you referring to this item here (indicating)?

Q Did that talk about methanol poisoning in there (indicating)?

A That is correct. And that is the date that the computer indicated was the time at that time. That was the time on the computer at that time

Q Okay. Now, what date was it that you did this inquiry?

A Actually printed these documents on August 15th.

Q Okay. Now, when you looked at the computer for the first time, was the date and the time on the computer correct with the date and the time of that particular date?

A Yes, it was.

Q Okay. And if you /// you can't tell, just because an item is printed out May 15th, that that's exactly the date that it was printed out, can you?

A Not unless I'm there, no.

Q Okay. So, all it can do is just register a date and you're /// you can't show that it wasn't done on the 15th, though, can you?

A No, I can only relate the time on the computer when I examined it.

MR. DAVENPORT: Okay. Your Honor, that's all the questions I have of this witness.<p127>

THE COURT: All right. Cross?

CROSS-EXAMINATION BY MR. COOLEY:

Q Good morning to you, Mr. Monroe.

A Good morning.

Q Special Agent, let me ask you, I just want to make sure that we're all following along on this. When you got 0 it, you got these computers on July 20th of year 2000, correct? That's when they were brought to you?

A I believe that that's correct without looking.

Q Well, the first paragraph of the first page of that exhibit ///

A Yes, sir, July 20th.

Q /// says July 20th, that's when it was submitted to you?

A That's right.

Q And you completed your review on August 20th?

A That's correct.

Q Now, assuming that nobody changed anything on the computer between July 20th and August 20th, so let's assume you looked at it the instant it came in on July 20th, can you tell the ladies and gentlemen of the jury that the search that was done for methanol poisoning was not done on July 19th? <p128>

A No. I can only tell you what the clock was when I examined it.

Q And the fact that when you examined it that the clock appears to be on time, that does not in any form or fashion establish what time or date it was when that inquiry was made?

A No.

Q And even the fact that it prints out, when you check it, May 15th, that does not mean that it was done on May 15th?

A It means that the clock on the computer at the time it was done read May 15th.

Q But that could have been wrong? It could have been done on July 10th and it might have said May 15th?

A That's correct.

Q And when you change software or hard drives or things on the computer, does that effect this /// these computers at times?

A It effects them in some way, yes.

Q Can it change the time and date?

A The date and time is generally held by the hardware and battery, and as long as that hasn't been effected ///

Q So, if you change the battery, that would change?

A Yes.

Q If you change the hardware, that might change it? <p129>

A If it effected the battery and the clock, yes, s

Q All right, sir. And you were shown a second document there. What is the date? Up there where it says

Health Central ///

A Uh-huh.

Q /// what does it /// and it says, Search for. What is the date it shows up there at the top?

A At the top?

Q Uh-huh. Let me approach and show you.

MR. DAVENPORT: Let me see first.

MR. COOLEY: I'm sorry.

Q Let me ask you ///

MR. COOLEY: May I, Judge Powell?

THE COURT: Yes, you may.

Q Can you see that small print? What's the date it shows right there (indicating)?

A October 20, 2000.

Q October 20, 2000?

A Uh-huh.

Q And what date does it show down here (indicating)?

A At the bottom? Your finger is in the way.

Q I'm sorry.

A October 20, 2000.

Q Does that necessarily mean that that's the date this one was generated (indicating)?

A No, sir.

Q All right, sir. You said there were three different occasions that there was some search. They were actually all done within a five to ten-minute time frame; is that right?

A Yes.

Q It wasn't three different dates? It could have been, I suppose.

A No. They were all done very close together.

Q So, one was at /// it shows 9:55, one shows /// a second one shows 9:55 a.m. and the third one shows 9:59 a.m.

A That's correct.

Q Is that time correct?

A It is the time reflected by the computer at the time.

Q Could it be correct?

A It could be correct.

Q Is it just as likely it's incorrect?

A It could be incorrect.

Q What time is it showing, Eastern Standard or Central Standard or Greenwich time?

A The time we're looking for is Greenwich Mean Time.

Q So, it wouldn't be for right here in Midlothian, Chesterfield, Virginia? If it says 9:55 a.m. and it was actually showing 9:55 a.m. right this second, what time would it be?

A If this is 9:59 a.m., which is Greenwich Mean Time, that would be 1:59 p.m. Eastern Standard Time.

Q So, even if the time is correct, it's not correct in one sense? It's correct for Greenwich, but it's not correct necessarily for Chesterfield?

A No. Greenwich Mean Time is a reference point we rely on to determine time around the world.

MR. COOLEY: All right, sir. That's all the questions I have. Thank you.

THE COURT: Redirect?

MR. DAVENPORT: Yes.

REDIRECT EXAMINATION BY MR. DAVENPORT:

Q This is common to all computers; is that correct?

A Yes, all computers, personal computers.

Q So, you have to take that particular time and add a certain number of hours to it to get what time that you would say that that particular thing could have come off of the computer on that particular date; is that correct?

A Well, in this particular instance, I know that this is capturing Greenwich Mean Time, and I know that that's what's been recorded, and I know what the difference is between Greenwich Mean Time and Eastern Standard Time, and I make that adjustment.

Q In your search and your expertise as a computer analyst, can you // does anything that you discovered say that it wasn't done on May the 15th?

A No. I have found nothing that would indicate it was not done on May 15th.

Q And the computer time and date was right at the time that you began to analyze the computer?

A Actually, I checked the date and time on the 16th. I did not start the computer // I took the hard drive out and conducted my examination. I went back on the 16th and actually turned the computer on and checked the time.

Q And the time was correct for the date and time on that particular day?

A That's correct.

MR. COOLEY: Could we get a clarification, Judge?

RE CROSS-EXAMINATION BY MR. COOLEY:

Q The 16th of what?

A I'm sorry.

THE COURT: You certainly may ask him.

A August 16th.

Q August 16th?

A August 16, 2000. <p133>

MR. COOLEY: Thank you.

THE COURT: All right. May this witness be excused?

MR. DAVENPORT: Yes, ma'am.

THE COURT: Thank you, sir. You may be excused.

(The witness left the stand.)

THE COURT: Your next witness.

MR. DAVENPORT: Dr. Acker, please. May I talk to Mr. Cooley just a moment, please?

THE COURT: Yes, sir.

CHRISTOPHER G. ACKER, M.D., Called by the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. VON SCHUCH:

Q Good morning, Dr. Acker. Would you give the ladies and gentlemen of the jury your full name, please?

A My name is Christopher G. Acker, the G is for Gerard

Q And you pronounce it Acker?

A Yes. <p134>

Q Is that A-C-K-E-R?

A A-C-K-E-R.

Q Sir, are you employed?

A Yes, I am.

Q And in what capacity?

A I'm a nephrologist, kidney doctor.

Q Okay. Now, you are a licensed Virginia /// licensed physician in the Commonwealth of Virginia; is that correct?

A That's correct.

Q And you currently work at Johnston Willis Hospital?

A Johnston Willis and Chippenham, we go to a number of hospitals in the city.

Q Now, you say you're a kidney doctor. Does the /// can you tell the ladies and gentlemen of the jury, does the kidney have function in any way to filter toxins in the body?

A That's the primary job for the kidney. It also helps control the amount of acid in your blood, your sodium, potassium, calcium, things like that.

Q If someone, then, had ingested a poison, it would be appropriate to consult with kidney specialists such as yourself; is that right?

A Right. A number of toxins are handled with dialysis, which is one of the jobs that we do.

MR. VON SCHUCH: Okay. Your Honor, I would offer him as an expert at this point. <p135>

MR. COOLEY: We'll stipulate his expertise.

THE COURT: All right. He is so designated as an expert.

Q Dr. Acker, let me refer you to the /// I believe it would be a Monday, June 12th of 2000. Did you have occasion at that time to be employed, to be working in the Johnston Willis Hospital complex?

A Yes.

Q All right. And I believe at that time, you had occasion to see a patient by the name of Mr. Charles Fleming?

A Right. Actually, I think Charles Fleming came to Chippenham, but the hospitals are considered one hospital. So, the records that you have that may say Johnston Willis may actually be Johnston Willis/Chippenham.

Q Okay. Do you know approximately what time of the day it was that you saw him?

A I would like to say it was in the late morning or early afternoon, but I could not.

Q And can you tell the ladies and gentlemen of the jury what your diagnosis was and what you did for him after you determined what the problem was?

A I was called by the emergency room physician at the /// that Mr. Fleming had a very severe acidosis, he had too much acid

in his blood, a life-threatening amount of acid in his blood. And the etiology, you know, why his acid in his blood <p136> was so high was not clear at that time, but one of the things that we do as part of our job is we do what's called electrolyte fluid balances, and his situation was something that we can frequently treat with dialysis where we kind of neutralize the acid that's in his blood. And basically I was requested to see him for a presumed toxic ingestion, none of the labs actually had returned at that point, and to consider him for treatment with dialysis to correct the amount of acid that was in his blood.

Q Did you do that?

A We did that.

Q Did you get any response from the patient?

A Not really. His clinical situation just continued to deteriorate.

Q Did there come a point in time when you had occasion to receive the blood work back and examine that?

A Yes.

Q What were you able to determine upon the examination of the blood work?

A I was contacted by the nurses, I believe from the ICU at that point, that his methanol level was positive.

Q And did you correct the treatment or did you continue with the dialysis at that time?

A He had been undergoing dialysis and hemoperfusion Hemoperfusion is where you use a charcoal cartridge in the <p137> dialysis system to /// molecules that will absorb or hook onto the charcoal will then be removed from the blood. So, he was undergoing hemoperfusion and dialysis sequentially. So, when the methanol level came back, we added, as I recall, an ethanol

drip and subsequently a medication called Antizol, which is kind of the antidote for those types of poisonings.

Q Did any of those processes help him in any way?

A They corrected his acid in his blood, but his overall condition just continued to deteriorate.

Q Did there come a time when he subsequently was pronounced brain dead?

A Yes.

Q And did you /// based upon the treatment that you gave him and the results of that treatment and the lab work showing the level of methanol in his blood, could you determine how much methanol he had ingested to put himself in that condition?

A No.

Q Were you able to determine how much methanol was ingested or what time the methanol would have been ingested to put him in that condition at the time you saw him?

A From the lab work, no. **He had had some symptoms, though, for about a month before he came to the emergency room that were, you know, odd symptoms,** I guess, for a patient, had been evaluated by some other physicians. <p138>

Q Is someone /// what is the impact of alcohol on /// in other words, if someone ingests methanol, what's the impact of alcohol on the methanol and the likelihood of poisoning?

A He /// as I recall from his medical record, he would drink alcohol at night when he got home, I guess. The enzyme which converts the ethanol, like what you would get from beer or he, I think, drank bourbon, the enzyme that would convert that to the metabolite, you know, what /// the product

Christopher Acker (hospital treating physician)

that would develop from that is the same enzyme that's used for methanol. **So, if he was taking ethanol at nighttime at home and then was being given methanol at some point, you know, whether or not the enzyme level would be revved up and he would convert a lot more of the methanol at that point or would he be protected because he had been taking the ethanol during that time period, I guess you would have to ask a toxicologist.**

Q Okay. How lethal is methanol?

A Very lethal.

Q How exactly does it /// in other words, the toxic levels rise and what impact does that have on the body that causes brain death?

A One of the early or actually the earliest metabolite is formaldehyde which everybody knows or has heard of. The next metabolite is called formic acid and **it's <p139> probably from the formic acid that the severe acid level his body developed. And the problem, from a medical standpoint, in terms of the formic acid, when /// cells have to, in order to operate properly, they have to be at a certain pH or there has to be just a certain amount of acid in the body. When that amount of acid is /// as in this situation /// very high, the cells don't work properly. So, electrical impulses aren't generated properly in the brain. The electrical impulses through the nerves that travel through the brain are not properly conducted. The muscles won't contract properly. A lot of enzymes that do lots and lots of different functions won't operate properly when the amount of acid in the blood is excessive.**

Q The eventual cause is organ failure and brain death?

A Right.

Q What type of /// the way /// how would you describe someone /// the suffering of someone who was /// who died eventually of methanol poisoning? What did you see this patient or observe this patient go through in terms of the pain and suffering?

A He was very ///

MR. COOLEY: Judge, I'm not sure of the relevance of that. We're not disputing the cause of death. The issue here is who caused this. <p140>

MR. VON SCHUCH: And this would certainly be directly relevant to suicide which Mr. Cooley has raised.

MR. COOLEY: That's fine if it's relevant to that.

THE COURT: Okay. The objection is overruled. This witness may answer.

Q I'm sorry?

A He was very agitated when I saw him in the emergency room. I can't recall if we had to give him some sedation in order to do the dialysis safely, but eventually he required to be put on a ventilator, which is a breathing machine to kind of support his respiratory system. But initially when I saw him, he was very agitated, couldn't really give me a history. How much pain he actually was feeling, you know, I really don't know, but he was writhing around in the bed, basically, and couldn't cooperate with me.

Q How long a period of time did that last before he eventually lost consciousness?

A I'd have to speculate, hours.

Q Dr. Acker, would you please /// let me just ask you one other question and ask you if you've ever had occasion to see this

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(indicating), and I don't know that you have.

(The witness was shown the exhibit.)

A I've never seen the top form, the second page, I've never seen any of these, to be honest with you. <p141>

Q Okay. Do you recognize that to be a typical autopsy report from the Medical Examiner's office?

A I've never seen one truly from the Medical Examiner's office, but the diagrams are what I would expect with the autopsy.

Q With an autopsy report?

A Right.

MR. VON SCHUCH: Your Honor, I'm going to offer the autopsy report.

MR. COOLEY: We're not in dispute, Judge, as to the cause of death. We'll work out any problems with language in it and I'm not going to object to it.

THE COURT: All right, counsel. To be admitted as Commonwealth's 5.

MR. VON SCHUCH: Your Honor, I would offer the autopsy as a Commonwealth's exhibit.

THE COURT: Yes, sir.

MR. VON SCHUCH: Dr. Acker, would you answer any questions, please, Mr. Cooley has.

CROSS-EXAMINATION BY MR. COOLEY:

Q Good afternoon to you, Dr. Acker. Doctor, if I can, just a couple of questions. Did you have any conversations at any time with Ms. Fleming, the lady seated <p142> here?

A Yes.

Q Did you ask her about bringing in anything or did a nurse in your presence ask her about bringing in things that he might have ingested or had to drink?

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A I /// since all this had occurred, I have reviewed my notes from the medical record and discussions I had with Dr. Torrissi, who is the lung doctor that had seen her. Once the methanol level came back, I don't know if it was exactly that day or the following day, Peter Torrissi said, I think we should have the police contacted and have brought in anything that, you know, he may have ingested that could have contained the methanol.

Q And did /// do you know who brought in the items?

A I do not know exactly.

Q But you know that some items came in that were tested?

A As far as I know, they were brought in, right.

Q And do you remember having any direct conversation or was it Dr. Torrissi that had any conversation with Ms. Fleming?

A I could not say definitely myself.

Q Now, Doctor, you have come here to tell the ladies and gentlemen of the jury your medical findings, correct?

A Right. <p143>

Q And you're here to tell us what caused the injuries that you saw?

A Right.

Q You are not here to tell them who caused those?

A I don't know who, right.

Q And you can tell them that his body contained methanol and that is what initiated the cause of his death?

A That's right.

Q But you cannot tell them how it got into his system?

A He /// well, methanol generally is taken by mouth. There are reports of people breathing in air or methanol as a gas.

Q Like a spray bottle type of?

A Well, the ones that I had read were actually with older copying machines. Sometimes methanol would be generated from the copy machines. That's one particular odd type of ingestion. Usually it's taken by mouth.

Q Okay. Let me rephrase it. You cannot tell them whether it came from a Gatorade bottle or from a beer or from a water bottle, just whatever it was, had methanol in it?

A I was told that of the items that were brought in ///

Q Don't tell us what you were told. But you as a doctor looking at the condition that you saw ///

A As a patient, I could not tell how it got into him. <p144>

Q And you started to say you were told.

A Right.

Q Go ahead and finish.

A A number of items were subsequently brought in, most of which tested negative, but as I recall, a Gatorade bottle ///

Q Tested positive?

A /// tested positive.

Q But you cannot tell them that that is, in fact, the source of the methanol that got into Chuck?

A Not definitely the source.

MR. COOLEY: Thank you very much.

THE COURT: Redirect?

MR. VON SCHUCH: No redirect, Your Honor. Dr. Acker may be excused.

THE COURT: All right. Thank you, Doctor. You may be excused.

(The witness left the stand.)

THE COURT: Next witness.

Christopher Acker (hospital treating physician)

MR. VON SCHUCH: Call Ruth Baker, please.

E. RUTH BAKER, called by the Commonwealth, first being duly sworn, testified as follows: <p145>

DIRECT EXAMINATION BY MR. VON SCHUCH:

Q Good morning, Detective Baker. Would you give the ladies and gentlemen of the jury your full name, please?

A Yes. Elizabeth Ruth Baker.

Q And you are employed?

A Yes.

Q With the Chesterfield County Police Department?

A Yes.

Q As an investigator; is that correct?

A That's correct.

Q Did you have occasion in that capacity to respond to /// it may have been Chippenham Hospital to investigate a methanol poisoning that occurred to Mr. Fleming?

A Yes.

Q All right. would you tell the ladies and gentlemen of the jury what you did, please?

A Yes. I responded to Chippenham Hospital on June 14th of 2000 and met with Dr. Christopher Acker and Ms. Diane Fleming and the parents of Charles Fleming, Jr. Mr. Fleming was in the ICU there at the hospital.

Q Okay. And what information did you receive at this time?

A At that time I was informed by Dr. Acker that <p146> Mr. Fleming was terminally ill. He was hooked up to respirators at that point and that the /// they had done a toxicology

screen which had come back positive for methanol.

Q Okay. And what did you do upon receiving that information?

A After receiving that information, I spoke with Ms. Fleming. She agreed to go back to the house with myself, Detective Ash, my sergeant at the time, now Lieutenant Skowron, and I had notified a forensic technician to meet us at the house to look for anything that may have contained methanol.

Q Okay. And can you tell us what you observed at the house, please, and what you did at the house?

A Yes. Dr. Acker had listed some common things that methanol was found in, the most common of which being windshield washer fluid. We looked in the garage. Ms. Fleming had pulled some things out that she thought would be helpful to us. There was some bottles of windshield washer fluid in the garage. That was Krystal Kleer brand methanol windshield washer fluid and that was clearly labeled, Danger, Contains methanol.

Q Okay.

A We also looked inside the house. She took me throughout the house looking at different things to see if there was anything else in the residence that contained <p147> methanol. And our forensic tech collected several items that were in the garage.

Q Okay. The /// did you have occasion to see a case of Gatorade in the garage when you were in there looking around for what might contain methanol?

A Yes. There was an open case of 20 ounce variety pack of Gatorade which Ms. Fleming had told me that she had

purchased at the Costco earlier on Sunday afternoon, which would have been June 12th.

Q Had she /// do you recall /// they come in a container. Could you look at that and determine how many Gatorades were missing or had been used or pulled from that container?

A I don't know the exact number. I believe it was a case of 24 and it was a relatively full case. I don't remember how many were in the case at that time.

Q Okay. Did you have occasion to examine the /// or question her and, as a result, examine the refrigerator and see if any of the mixed Gatorade that was in the house had been /// was still there?

A Yes. When I spoke with Ms. Fleming, I asked her to go over the past few days, starting with Friday, the events that she and Mr. Fleming had done throughout the weekend, anything that Mr. Fleming had eaten or drank in the past three days and to go over that with me. She stated to me <p148> that on Sunday the 12th, she ///

MR. COOLEY: Judge, could I /// actually, I think it's June the 11th.

MR. VON SCHUCH: I don't know. I don't know.

MR. COOLEY: June 12th is ///

THE WITNESS: That's correct, it is.

THE COURT: I don't have a calendar in front of me.

MR. VON SCHUCH: We have Sunday, Monday and Thursday was the 14th. He was pronounced brain dead.

THE WITNESS: It was June the 11th. Sunday the 11th. Pardon me.

Q Okay.

A Sunday the 11th, they had /// her, her daughter Meagan, who was 7 at the time, and her younger son, Jeffrey, I believe was 18 at the time, had gone to church. It was Sunday School Appreciation Day, so they had gone to Sunday school earlier that day or earlier in the morning. And Mr. Fleming and her older son, Chuckie, who goes by Chuck Tanner, went later for Sunday services. They attended church and then they left.

They went to Costco, they being her and Jeff, Meagan and Chuck, Sr., went to Costco. Chuckie went on to his job at the Food Lion in Deer Run, I believe he had to be at work at one o'clock. At the Costco, her husband wanted to see if they carried a product called creatine, which is a <p149> muscle building supplement. They did not and he left a few moments later. Ms. Fleming and her children continued to shop and she purchased the case of Gatorade. They left there. She went by the GNC, which is a health store that's right down from Deer Run, and purchased the container of Gatorade [sic] and went home from there. Her husband was already there at that time.

That afternoon her husband took her daughter to the pool and then came home. Sometime during that afternoon, she and Chuck, Sr., had mixed up one bottle of the Gatorade with the creatine per the instructions on the creatine. And he had tasted it, it was hot, he placed it in the refrigerator to get cold. He then went to basketball, I think it was around 4:30 that afternoon, and he came home from basketball around 7:00 where he drank the one bottle of the Gatorade.

She stated to me that he then went out to the garage, got four more bottles of the Gatorade and brought them into the house

and she and him mixed up those four bottles of the Gatorade with the creatine and placed them in the refrigerator. She stated when he got home from the basketball, he was hot. It was very warm that day. And that evening, he pretty much just laid around, he wasn't feeling all that great. He did not eat any dinner. He ate some ice cream and he went to bed earlier than normal, approximately 9:30. He would usually go to bed around 10:30 or 11:00 I <p150> believe is what she had said. So, he had drank the one bottle of Gatorade that evening, they had mixed up the other four and then later he went to bed. The persons that were at the house at the time were herself, Jeffrey and Meagan and, of course, Chuck had gone to bed. And Chuckie came home from work shortly thereafter.

The next morning Chuck awoke and she said that he left for work or he got up around five o'clock that morning, he was feeling very bad. He told her he felt awful. She said he was very slow moving, very lethargic and that he just wasn't feeling well and he left for work. At approximately nine o'clock, she was taking Jeff and her daughter, Meagan, out, and as they were driving out of the neighborhood, she saw Mr. Fleming coming back into the neighborhood. And when she returned home, Mr. Fleming was on the sofa. He had soiled his clothes and she asked him about it and he said he had vomited at work and had been vomiting since. She washed those clothes, tended to him and said that he was sick the majority of the day.

She called the doctor and got a suppository for him, went to pick up that suppository from the pharmacy, returned home and he had stopped vomiting, but was short of breath. At this time it was probably about, I think she said, five o'clock in the afternoon,

maybe four o'clock in the afternoon on that Monday, which was the 12th. And she <p151> called 911 and rescue responded and took him to Chippenham hospital.

Q Okay. Now, as I understand it, she said that she and Chuck had mixed one bottle and then he went to play basketball?

A That's correct.

Q And then he drank that bottle?

A After basketball, yes.

Q And then they mixed four more?

A Yes.

Q And he didn't drink any more of those four that night; is that what she told you?

A That's correct.

Q And when he got up in the morning, he was feeling bad?

A Yes. She said he was feeling badly. The four bottles, she said that he had taken three of those four to work and had left one in the refrigerator, which is the one that she gave to us on that Wednesday when we went to her house.

Q Now, I believe you actually were involved in the recovery of the three from work; is that correct?

A That's correct.

Q All right. I'm going to show you these three items and ask you if you can identify those. <p152>

(The witness was shown the exhibit.)

A Yes, these two (indicating) were packaged in a plastic type grocery bag that were in a refrigerator outside of his office that was in a common area and this one was on his desk and it was about half full.

MR. VON SCHUCH: Your Honor, I would offer the two full ones first of all in order and then the half-full one subsequent to

that. And I've lost track of the numbers that have been assigned by the clerk.

THE COURT: Six and 7. Any objection?

MR. COOLEY: No, Your Honor.

THE COURT: The two full ones will be admitted as Commonwealth's 6. The half-full one to be admitted as Commonwealth's 7.

MR. VON SCHUCH: Detective Baker, would you answer any questions Mr. Cooley has, please.

CROSS-EXAMINATION BY MR. COOLEY:

Q Good afternoon to you, Detective Baker.

A Good afternoon.

Q Now, Detective, you came to the residence with Ms. Fleming on /// the first time was on June 14th?

A Yes, sir, I met her there.

Q Okay. And you had asked or somebody had asked her <p153> to come back to assist you all; is that correct?

A Yes, sir.

Q And she did that?

A Oh, yes, sir.

Q And this would have been the third day that her husband was at the hospital?

A Yes, sir.

Q And she identified for you, she walked around the garage and showed you anything and everything and assisted you and the techs when they got there; is that correct?

A Yes, sir.

Q Did you all take some photographs of things?

A Yes, the techs did.

Q And among those things, did you take a picture of full bottle of what you have described as windshield wiper fluid?

A Yes, sir.

Q And did there come a point in time where that was developed?

Q Pardon me?

A The picture was developed. I'm sorry.

A Yes, sir.

Q And did you take pictures of other things as well?

A Yes, sir.

Q All right. I'm going to ask you, if you would, to <p154> look at these photographs and tell us if that, indeed, reflects /// and you may have better ones than /// the Commonwealth, I think, gave me copies, so you may have better ones. If you do, it's certainly fine to place those in evidence. Are those accurate?

(The witness was shown the exhibit.)

A Yes, sir.

Q And would you take your pen and put your initials or a little number 1 or something up by the picture that shows the fluid, the blue windshield wiper fluid?

A Yes, sir. It's picture 2, top right corner.

MR. COOLEY: Judge, I'll move to introduce that as Defense Exhibit A.

MR. VON SCHUCH: No objection, Your Honor.

THE COURT: All right. Mark it as Defense Exhibit A and move it into evidence.

Q And Investigator Baker, thereafter did you submit that to the lab, that container?

A Yes, sir.

Q And I'm going to ask you, if you would, to look at this report.

(The witness was shown the exhibit.)

Q And would you tell the ladies and gentlemen of the jury if that is, in fact, one of the lab reports that came back relating to that? <p155>

A Yes, it is.

Q And what is the second entry in terms of /// there are two things that are submitted; is that correct?

A Yes, sir.

Q What is the second one?

A Item 006 is for the windshield washer fluid and it states the volume, 3820.4 milliliters; tolerance limits, 3709-3860 milliliters.

Q All right. Let's stop for a moment. It's telling you /// in the tolerance, it's telling you what a full bottle should normally have; is that correct?

A Yes, sir.

Q And it says 3720 milliliters?

A No. No, sir.

Q I'm sorry.

A The bottle contained 3820.4 milliliters.

Q That's what it contained?

A Yes, sir.

Q And what's the full tolerance? What's the range that the manufacturer considers okay for being full?

A The tolerance is 3709 to 3860 milliliters.

Q So, the bottle, when you received it and submitted it, was not only within the tolerance for it being completely full, but closer to the upper end of its maximum volume ///

A Yes, sir. <p156>

Q /// than to the lower end of its maximum volume that the person /// that the

manufacturer could sell it and say, This is a full bottle?

A Yes, sir.

MR. COOLEY: Move to introduce that as an exhibit.

MR. VON SCHUCH: No objection.

THE COURT: All right. Admitted as Defendant's B.

Q Now, when you came to the house, those things like windshield wiper fluid that the doctor had told you were likely to have methanol or would have methanol, those things you noticed right way?

A Yes, sir.

Q And then /// and, of course, looking around the garage, you saw things like yellow liquids and red liquids and you didn't know, and none of us would unless we were a chemist, I suppose, whether that contained any methanol or not?

A Correct.

Q So, you seized and collected a variety of those things or you had the technicians do that?

A Correct.

Q As part of a normal investigation?

A Yes, sir.

Q And to not do that would be incorrect and would be against your training? <p157>

A Correct.

Q Now, there were other things that you took from the house to have tested because Ms. Fleming pointed them out to you, correct?

A Yes, sir.

Q And one of those things was in the refrigerator, correct?

A The bottle of Gatorade, yes, sir.

Q The bottle of Gatorade. And she told you that Chuck had, her husband had had some of this to drink, and that altogether there had been as many as five bottles, one that he drank and four more?

A Yes, sir.

Q And did you take /// let me ask you: From the refrigerator, did you take anything out of the frozen foods?

A No, sir.

Q Did you take the milk?

A No, sir.

Q Did you take orange juice?

A No.

Q Coca-Colas?

A No, sir.

Q So, you would not have taken anything out of the refrigerator, I take it, except for the fact that Ms. Fleming said, This Gatorade bottle is something that he mixed up and <p158> put something in, correct?

A Yes, sir.

Q And you took that, and then ultimately that turned out to have some methanol in it?

A Yes, sir.

Q But now, you were there on the 14th of June?

A Yes.

Q And assuming that what she had told you was true, this Gatorade bottle would have been in that refrigerator open to anybody in the house from June 11th in the evening until you got there on June 14th?

A That's correct.

Q And it was not on June 14th that you discovered that it had any type of methanol in it, correct?

A Correct.

Q You submitted it to the lab?

A Yes, sir.

Q Do you remember how much longer, do you remember a date that you all found out that that had, in fact, methanol in it?

A It was relatively quickly, I don't remember a date.

Q But it was after the 14th, certainly?

A Yes, sir.

Q And, in fact, the lab report that came back, the official lab report, didn't come back until October sometime, <p159> correct?

A Correct.

Q But some advance notice was given to you, either from the hospital or from ///

A Yes, we knew /// we knew within a few days, but, again, I don't know a date.

Q And did, at that point in time, you go back and take any additional items? Did you go back to the house to see if there was any Gatorade still there?

A We did go back to the house to see if there were more Gatorades still there. Some of the Gatorades had been drunk during that time period and there was an empty Gatorade bottle that was found in the trash can.

Q Was there /// but there were still some Gatorades there, correct?

A Yes, sir.

Q And an indication that somebody had /// either then or before that, had something to drink as well and thrown away a container?

A Yes. And Ms. Fleming stated that some of her children had drank some of the Gatorade during that time frame.

Q Now, you interviewed some folks and there was some discussion with the folks at work that Chuck indicated he had the flu; is that correct? <p160>

A Yes, sir.

Q And you do not know whether he had the flu or not, correct?

A No, sir.

Q So, his ill feeling, whether it be on the night of Sunday night or Monday morning, may have been from methanol, correct?

A Correct.

Q It may have been from the flu, correct?

A I suppose, yes, sir.

Q Or it could be from both, could have the flu and have some methanol?

MR. VON SCHUCH: Judge, that calls for conjecture on the part of the witness. She's not capable of answering.

THE COURT: Sustained. Sustained.

Q Did you go to the place of work of this gentleman?

A Yes.

Q Chuck Fleming?

A Yes.

Q And did you find on site there any methanol?

A Yes.

Q And was it in more than one form?

A Yes.

Q Was it in more than one container? <p161>

A Yes.

Q Were there multiple containers of it?

A Yes.

Q Were some of them spray bottles?

A Yes.

Q Some of them regular bottles of liquid?

A Yes. Q

Q Was it blue in color or was it clear in color?

A Methanol in its original form is clear in color.

Q Okay. When you went to this place of work, what you saw, was it clear or was it blue?

A It was clear.

Q Did you see anything in the /// in the Gatorade bottles that had a blue tint to it?

A No.

Q And those have been introduced into evidence, correct, three of them have, is that correct, so far?

A Yes.

Q And one of those was at work and was recovered and it was opened and some of it had been consumed from it, correct?

A Yes.

Q And the other two appeared to be full; is that correct?

A Yes. <p162>

Q And you do not know when in time that was consumed by Chuck Fleming?

A No.

Q Did you have occasion to go to the Deer Run Food Lion and speak with a Ms. Trish Jones?

A Yes.

Q And you went there because Chuckie Tanner worked there; is that correct?

A Correct.

Q And you had a conversation with Ms. Jones?

A Yes.

Q And she advised you of some things that Chuckie had said to her on June 12th ///

A Yes.

Q /// when he came into work; is that correct?

A Yes. Yes, sir.

Q Did you confront Chuckie with that statement?

A I did not.

Q Were you present when that happened?

A No.

Q Did you make that part of your report to the Commonwealth's Attorney?

A I don't remember.

Q Well, let me ask you this: Do you know who it was that discussed that with Chuckie? <p163>

A Detective Akers, I believe.

Q All right.

A And I may /// I may have been present at the time. We worked together hand in hand. I know he interviewed Chuckie a couple of different times when I wasn't there, but I may have been there when he spoke with him about that.

Q Let me /// so we lay this foundation, you had the conversation with Trish Jones, it would have been in /// at some point after June 12th, correct?

A Yes.

Q And she advised you that there had been a statement by Chuckie?

A Yes.

Q That Chuck was sick and he thought he was trying to commit suicide?

A That's correct.

Q You either passed that on to another detective to address with Chuckie or you may have been present when that was taken up with Chuckie?

A That's correct.

Q Throughout these conversations, Ms. Fleming advised you that she was a participant in this mixture of this Gatorade and this creatine; is that correct?

A Yes.

Q And she turned the creatine over to you or took it <p164> to the hospital at you all's request?

A Yes.

Q Took alcohol from the bottles, bourbon and such, that her husband drank from throughout those three days, took those to the hospital at you all's request?

A Yes, she did.

Q And delivered any of those items that could have been consumed either to you or to the hospital ///

A Yes.

Q /// to facilitate the diagnosis?

MR. COOLEY: That's all the questions I have.

THE COURT: Redirect?

MR. VON SCHUCH: Yes, ma'am.

REDIRECT EXAMINATION BY MR. VON SCHUCH:

Q How many days was it /// I think you indicated three days /// when you responded from the time, from that Monday until you responded to the hospital and found out that methanol was what you were looking for? Do I understand that correctly?

A No. When we responded to the hospital on that Wednesday, which was June 14th, the doctor told us at that time that it was methanol poisoning. We were not called prior to Wednesday the 14th. <p165>

Q Okay. And when you received that information, as I understand it, you then responded to the house; is that correct?

A Yes. As I ///

Q And /// I'm sorry. And when you got there, you found a case of Gatorade in the garage?

A Yes.

Q And some more had been drank out of that?

Ruth Baker (police investigator)

A Yes.

Q But the one that was in the refrigerator had been there since Monday?

A That's correct.

Q So, people were drinking out of the case, but not the refrigerator in the house?

A That's correct.

MR. COOLEY: Judge, I'm not sure she can answer that. I think the earlier testimony from the Commonwealth's witness was that ///

THE COURT: Without a foundation, I sustain the objection.

Q Now, the /// do you have that lab report in front of you that Mr. Cooley showed you?

A No, I don't.

MR. VON SCHUCH: Could you get it, hold it up, please? <p166>

(The witness was shown the exhibit.)

Q What it indicates is the tolerance or the volume level was between 3709 and 3806; is that correct?

A 3860.

Q 3860, excuse me.

A Yes, that's correct.

Q And what /// the volume found in the bottle was 3820.4; is that correct?

A Correct.

Q So, that would be almost 40 milliliters less than the maximum that could be contained in that bottle; is that correct?

A Correct.

Q Now, did you have occasion to talk to the defendant about her familiarity with washer fluid, particularly that windshield washer fluid?

A Yes.

Q And what did she indicate to you?

A She stated that she would typically change the fluids on the vehicles, that she had purchased the bottle of windshield washer fluid.

Q And how long do you recall or did she make any statement to you as to how long ago she had purchased that?

A I believe she said March.

Q Now, during the course of your investigation, did <p167> you find any or did you investigate anything and did you find anything that would indicate that methanol from Philip Morris found its way into the Fleming refrigerator?

MR. COOLEY: Well, Judge, I think that would absolutely have to cause her to speculate. He is asking her what ///

MR. VON SCHUCH: I'm asking her what she found.

THE COURT: The witness may answer as to what she found. The objection is overruled.

A I did not find anything from Philip Morris or how it would have gotten from Philip Morris to the residence.

MR. VON SCHUCH: Thank you, that's all.

THE COURT: Does that prompt anything, Mr. Cooley?

MR. COOLEY: Very briefly.

RECROSS-EXAMINATION BY MR. COOLEY:

Q Well, let me ask you this: Chuck Fleming worked at Philip Morris?

A Yes, sir.

Q And he came home to this residence every day, correct?

A Yes, sir.

Q So, there is at least a link, we're not asking you to speculate, we have somebody who

Ruth Baker (police investigator)

was going daily between <p168> those two locations, correct?

A Correct.

Q And you cannot say, you cannot tell these ladies and gentlemen that Mr. Fleming did not bring methanol from Philip Morris to his residence?

A No, sir.

Q You cannot say that?

A No, sir.

Q Could have happened, you just don't know whether it did or didn't?

A Don't know.

MR. COOLEY: Thank you very much.

THE COURT: May this witness be excused?

MR. VON SCHUCH: Yes, that's all the questions I have.

THE COURT: All right. Thank you, Detective, you may be excused.

(The witness left the stand.)

THE COURT: Counsel, I think I am going to give the jury a lunch break at this point unless there is a small bit of evidence that we could put in if this would be an appropriate time.

MR. DAVENPORT: That's what I was going to suggest, <p169> Your Honor. There is a stipulation that Mr. Cooley and the Commonwealth has made and entered into with regard to the life insurance and any monthly benefits that may be payable to Ms. Fleming and her children should Mr. Fleming die ///

THE COURT: All right.

MR. DAVENPORT: /// when he was working.

THE COURT: That's a written stipulation,

Mr. Davenport?

MR. DAVENPORT: Yes, ma'am. The first one, we would like it as our next exhibit, life insurance of \$150,000, and then it talks about the survivor income benefit, Payable on the first month following the fourth anniversary of death. And then it says, To spouse, \$1,550 for 42 months, that's \$18,605 a year; to eligible children, \$310.08 or \$3,721 a year. And then it goes on to say, Spouse will receive the benefit until she turns 65 or until she remarries, whichever occurs first. His eligible children will receive the benefit until they turn 19 or until they turn 25 if they're in school. We'd ask that that be our next exhibit.

And then we have another one that talks about insurance, four times his salary, and the total insurance amount would be \$282,000. And attached to it is a claim form and then notes of /// that capture dates <p170> and times that inquiries were made about this insurance. And as a package, I would like this to be our next exhibit, Your Honor.

THE COURT: There is a stipulation, so there is no objection, Mr. Cooley?

MR. COOLEY: No objection, that's correct.

THE COURT: The life insurance package is admitted as Commonwealth's 8, which is the first package of \$152,000. The four times his salary package is admitted as Commonwealth's 9.

And ladies and gentlemen, there is a stipulation, you can consider that as evidence in the case just as evidence coming from the witness box.

MR. DAVENPORT: Thank you, Your Honor.

THE COURT: All right. I'm going to give the jury a lunch break.

And as a housekeeping matter, those of you who are in the audience, when the jury is

going in and coming out, if you would just remain seated please until they are either back in the jury room or until they are out of the door. Thank you for that.

Ladies and gentlemen of the jury, I'm going to give you a lunch break. I'll ask that you be back at 1:30. I'm going to give you about 40 minutes. I will tell you there is a cafeteria downstairs. You can get lunch <p171> there or if you would like to leave the building, if you're not familiar with this area, go out to Route 10, make a left and you'll find a number of fast food places, restaurants, Ukrop's Cafe, that type of thing.

Please remember my admonition not to discuss the case either among yourselves or to remain in the hearing of anyone who is discussing the case. Enjoy your lunch. Come back here when you're done. Do you have anything that you need to get out of the jury room such as your coat, your purse?

(The jury left the courtroom.)

THE COURT: Court will be in recess until 1:30.

(A luncheon recess was taken, after which the following proceedings were had:)

MR. COOLEY: I'm sorry, I had asked that one previous witness, Chuckie Tanner, not be released and I think he's been directed to stay at the courthouse. I do not have any objection to him leaving the courthouse. If we call him, it would be tomorrow and I will notify him if we plan to call him. I would not want him sitting in the courtroom, I object to that. I think <p172> he's outside. If he could be advised that he could leave, just be alerted to remain available for tomorrow.

THE COURT: Ask Chuckie Tanner to step to the back door, please.

MR. DAVENPORT: Your Honor, he may be down in my office.

THE COURT: Okay. Mr. Davenport advises me that he may be in his office. If we could perhaps ask someone down there.

MR. DAVENPORT: If The Court would call Kathy at 3948, she would get him right up here.

THE COURT: Okay. Thank you.

(Mr. Charles L. Tanner, Jr., entered the courtroom.)

THE COURT: Mr. Tanner, I just need to speak to you for just a moment. You may remain where you are. I had asked you to remain

here at the courthouse in anticipation of you being called. It does not appear as if you will be recalled to the stand today, but there is a possibility that you will be recalled tomorrow. So, you are allowed to leave the building. You may leave now.

And you will call him, Mr. Cooley?

MR. COOLEY: I will notify him if we need him in the morning. <p173>

THE COURT: Okay. You will be notified if you need to return in the morning. I will admonish you in anticipation of the fact that you may need to return, do not discuss the case or your testimony with anyone until that period.

MR. CHARLES L. TANNER, JR.: I understand.

THE COURT: All right. Thank you, sir.

(Mr. Charles L. Tanner, Jr., left the courtroom.)

THE COURT: Counsel, are we ready for the jury?

MR. DAVENPORT: We are, Your Honor.

MR. COOLEY: Yes, Your Honor.

THE COURT: All right.

(The jury returned to the courtroom.)

THE COURT: The record should reflect that all twelve jurors are back, seated in the jury box.

Mr. Von Schuch, your next witness, sir.

MR. VON SCHUCH: Dr. Saady, please.

JOSEPH J. SAADY, Ph.D., called by the Commonwealth, was duly sworn.

MR. VON SCHUCH: Your Honor, before I begin, we do have a stipulation. The forensic technician, if she <p174> were here, to speed this up, would testify that this item that I have here (indicating) was the Gatorade that was recovered from the refrigerator in the defendant's home by Detective Baker. She made reference to it. I would offer that as a Commonwealth's exhibit at this time.

MR. COOLEY: We'll stipulate to it, Your Honor.

THE COURT: All right.

MR. VON SCHUCH: And this (indicating) would be washer fluid and the sample from the washer fluid, windshield washer fluid that was found in the garage of the defendant's home, and I believe Detective Baker has made reference to that already. And I would offer that into evidence at this time.

MR. COOLEY: We would stipulate to that /// as to the chain and that is the item.

THE COURT: All right. Thank you, Mr. Cooley. The Gatorade from the refrigerator will be entered as Commonwealth's 10 and the washer fluid and sample therefrom will be entered as Commonwealth's 11.

Ladies and gentlemen, a stipulation, again, is to be considered by you as the evidence coming from the witness stand. <p175>

DIRECT EXAMINATION BY MR. VON SCHUCH:

Q Would you give the ladies and gentlemen of the jury your name, please?

A Joseph J. Saady.

Q And, Dr. Saady, are you employed, sir?

A Yes.

Q And where and in what capacity?

A The chief toxicologist for the State of Virginia and clinical associate professor at Virginia Commonwealth University.

Q And can you tell us a little bit about your area of expertise, please, exactly what is it?

A Toxicology is the study of chemicals and their interaction on living organisms. I have been working in the field since 1972. And prior to that, I have a bachelor's degree in chemistry from the University of Richmond. One of the things that a toxicologist is is a chemist. I have a master's degree in pharmacology and toxicology from the Medical College of Virginia and a Ph.D. from Medical College of Virginia in pathology, toxicology.

MR. VON SCHUCH: Your Honor, at this time we would offer Dr. Saady as an expert in the area of toxicology.

THE COURT: Any objection?

MR. COOLEY: No objection. <p176>

THE COURT: The doctor is accepted as an expert in the field of toxicology.

Q Dr. Saady, can you tell the ladies and gentlemen of the jury, methanol is a toxic poison; is that correct?

A Yes.

Q And taken in quantity, it is capable of causing human fatality; is that correct?

A Yes.

Q How much methanol is needed to cause the death of an individual?

A If taken at one time, approximately 75 to 120 milliliters of fluid.

Q Okay. And ///

A But a lesser amount if given over a period of time.

Q Does /// did you have occasion to examine the Commonwealth's exhibit that was just offered, the Gatorade bottle recovered from the refrigerator?

MR. VON SCHUCH: Sheriff, would you show that to Dr. Saady, please?

(The witness was shown the exhibit.)

Q Let me ask you if you've had occasion to recover that?

A Yes. My initials are on the evidence according to our standard operating procedures.

Q Okay. And did you also have occasion to examine <p177> the three Gatorade bottles submitted that were found at Philip Morris, Mr. Fleming's place of employment, recovered by Ruth Baker? I'll show you those items and ask you if you can identify them.

(The witness was shown the exhibits.)

A Container 11, number 16, two of these I can easily see my initials /// there is my initial there. All of these have my initials on them.

Q Okay. Let me ask you first about the three that were recovered from /// by Detective Baker from Philip Morris from the defendant /// from the victim's, excuse me, the victim's work area. Did you have occasion to determine if there was a presence of methanol in any of those three bottles?

A I believe I analyzed all of the bottles, item 13, yes. The results were /// did you wish for me to read?

Q Yes. I'm asking you, first of all, did you find methanol present in those three bottles

recovered from the victim's work area by Detective Baker. Did you find the presence of methanol in those three bottles?

A I'll need to specifically look. In this item (indicating), 4.7 percent was found. This was one of the ones you were speaking of?

Q Uh-huh.

A This is // <p178>

Q Item 7 was one from the refrigerator, so it would be the other three.

A Item 7 contained methanol, 3.3 percent, and that's the second one. The third one /// eleven eight [11A] /// the third one contained methanol, 3. /// excuse me, 3.3 percent. Those are the three that you asked me about.

Q Okay. Now, so you found the presence of methanol in all three bottles from Philip Morris, the one that was opened, you found it /// how much did you find in the one that was opened, 4.7 milliliters?

A 4.7 percent.

Q 4.7 percent. In the other two, you found three point what percent?

A 3.6 percent and 3.3 percent.

Q In the item 7 that was found in the victim's refrigerator at home, what percent did you find in that? First of all, did you find the presence of methanol in that and in what percent?

A You called that item 7?

Q Yes.

A Item 7 had 3.3 percent.

Q That's correct. The other two /// the other two items /// the other three items from work had methanol as well, correct?

A Yes. Those were the three that I just looked at. <p179>

Q One was 4.7, one was 3.6 and the other one was going to be approximately the same thing, 3.6?

A Do you have the item number? Item 11A contained 3.6.

Q It's 11B.

A 11B contained 3.6 percent methanol.

Q Okay. So, two /// the two full bottles that you found /// that were /// that you had that were recovered by Detective Baker from Philip Morris had approximately the same amount or the same percentage of methanol as the one found in the refrigerator at home; is that correct?

A Yes.

Q 3.6 to 3.3?

A Approximately.

Q Dr. Saady, I'm going to show you this and ask you if you can identify this.

A Okay.

(The witness was shown the exhibit.)

A This is a certificate of analysis from my examination. It's signed by me. There are three pages describing the results from the analysis of a number of items, 12 items.

Q Okay. And does that contain your analysis of the four bottles of Gatorade in front of you?

A Yes. <p180>

MR. VON SCHUCH: Your Honor, I would offer that at this time as a Commonwealth's exhibit.

THE COURT: Any objection, counsel?

MR. COOLEY: Let me make sure which one we're putting in. No objection.

THE COURT: Admitted as Commonwealth's 12.

MR. VON SCHUCH: Dr. Saady, would you answer any questions Mr. Cooley has, please.

CROSS-EXAMINATION BY MR. COOLEY:

Q Dr. Saady, let me ask you about those. The three bottles that /// and you may not know where they came from, but there were three bottles at Philip Morris, and they are the ones that you have told us have 3.6 and 3.6 and 4.7 percent. The one that was open, which would have been marked I'm sorry, which would have been marked item 13, do you see that?

A Yes.

Q That had 4.7 weight by volume?

A Yes.

Q By far the largest weight per volume amount of methanol of all the bottles that you tested, correct?

A It had a higher percentage, yes.

Q Now, that could have occurred because somebody <p181> added more methanol at the time that they were consuming it, correct? Could be that correct?

A It could have occurred from someone adding additional fluid containing methanol to the Gatorade bottle.

Q And it also could be that when /// if all these bottles were mixed at the same time, one of them just got considerably more than the others? That could be true, too, right?

A One bottle could have received a small percentage more, not necessarily /// it would depend on the total contents of the bottle.

Q All right, sir. Let me ask you: All these bottles appear to be the same size; is that right?

A Approximately.

Q And all of them /// can you tell what the total number of ounces are for these Gatorades?

A I would have to make an estimate based on /// do you mean that is remaining in the bottle ///

Q No.

A /// at the time?

Q No. What size bottle, assuming they're full to their normal capacity.

A This says 20 ounces.

Q How many /// can you tell the ladies and gentlemen of the jury how many milliliters of methanol was in, let's <p182> say, the one that you tested that was full, that would be 11B? 11A and 11B were both full when you received them.

MR. COOLEY: Will you stipulate to that?

MR. DAVENPORT: Is it a mathematical thing that you do to come up with it?

MR. VON SCHUCH: I hope not.

MR. COOLEY: Don't ask me. I'm not a mathematician.

MR. VON SCHUCH: 11A and 11B.

Q 11A and 11B were full when you received them and they were taken from Philip Morris. Can you tell how many milliliters of methanol are in either of those?

A Yes, I can. I'm working that out now. It's taking 3.6 of 20 ounces. I wish I would have brought a calculator.

MR. DAVENPORT: Here we go. We've got a calculator.

THE WITNESS: Oh, thank you.

A So .72 ounces of methanol in 20 /// of pure methanol in 20 ounces. So, there are approximately 28 milliliters per ounce, 20 milliliters of pure methanol.

Q Can you say it was pure?

A No.

Q So, if it was pure there, we've got 20 milliliters in that one bottle? In each of those bottles; is that right?

A Yes. <p183>

Q So, adding those two bottles together, that would be 40 milliliters, 20 and 20; is that correct?

A Yes.

Q And adding the one that was taken from the refrigerator that had 3.3 percent and that also was full, we would assume somewhat slightly less than 20.

A Correct.

Q Maybe 18 milliliters, something like that. So, now we're at 58 milliliters. And the one that was 4.7, can we assume that that was maybe 30 milliliters in amount?

A It would be a larger amount, 36 milliliters.

Q Thirty-six. So, if we add 58, 20, 20 and 18, and the 36, we have 94 milliliters, correct?

A Yes.

Q Now /// and in the one that was open, that's the only one we know that something disappeared out of, correct? The others are all full when you get them?

A I don't know which one you're speaking of, but some were full and some were less than full.

Q The item that had 4.7 percent in it, item 13, that was not a full bottle?

A Okay.

Q And that was recovered, you'll stipulate, I think, from Philip Morris, the open container.

A I'll accept that. I don't have knowledge of it. <p184>

Q Can you tell how much methanol is missing from the one open container?

A I can approximate it if I could open the evidence and look at it.

Q Okay. All right. I don't have any objection to that.

MR. DAVENPORT: We don't either.

THE COURT: That's fine. That would be the one marked Commonwealth's 7?

MR. COOLEY: No, that would be 13.

THE COURT: Gentlemen, I think you're confusing the jury a little bit. I have 12 exhibits marked as Commonwealth's exhibits. What I think you're referring to are lab report numbers.

MR. COOLEY: I beg your pardon.

A Now you're referring to item 11B?

Q No. I'm referring to item 13 on your report and we're dealing with the item numbers, not exhibit numbers. I probably used the term exhibit numbers and I apologize for that, my use of that phrase.

A Item 13 is container 14. Okay, this is container

14. No, I do not need to remove it because this is in a clear container.

Q All right. Can you tell how much methanol is missing from that bottle? <p185>

A No.

Q Okay.

A I can tell how much, approximately, an estimate of the amount of fluid missing.

Q All right. Let's do that, then. Let's start with that. How much fluid is missing?

A The total is 20 ounces. It appears that approximately 30 percent is /// maybe-one third is gone. So, one-third of 20 is about 6 to 7 ounces are missing.

Q All right. If we assume that the missing liquid had the same mixture of methanol and Gatorade.

A Yes.

Q And the full bottle you indicated would have 36 milliliters of /// I'm sorry, 36 milliliters of methanol.

A Yes .

Q And then if a third of it is missing, then we would be missing a total of 12 milliliters of methanol, correct?

A One-third would be approximately 12.

Q Now, assuming for the moment that we started with these bottles and that the only thing that has been consumed is that third of that bottle, which means that 12 milliliters are missing. How does that compare, Dr. Saady, to the figure that you told the ladies and gentlemen of the jury of 75 to 120 milliliters, if ingested all at one time, would be necessary to cause death of an adult? <p186>

A That would be less. If this (indicating) is the only thing consumed, then the quantity is probably insufficient to cause death in the dilution mentioned here. It may be

sufficient to cause blindness, but not /// probably not death if this amount of volume at the 4.7 percent were the only methanol consumed.

Q Dr. Saady, you've come here to tell us what you found inside those bottles, correct? What you tested and found inside the bottles?

A That's one of the things, I believe, that I'm here for.

Q You have not come to tell these ladies and gentlemen who put anything in those bottles?

A I have no knowledge of that.

MR. COOLEY: Thank you very much.

THE COURT: Redirect?

REDIRECT EXAMINATION BY MR. VON SCHUCH:

Q Dr. Saady, does methanol levels of /// methanol levels /// in other words, if someone consumes methanol over a period of time, does it build up in the system?

A Yes, it does.

Q And at some point in time, you would reach a critical mass where it would be sufficient to cause a lethal <p187> episode; is that correct?

A Yes.

Q Okay. That's all the ///

A Especially if not treated.

MR. VON SCHUCH: That's all the questions I have.

THE COURT: Does that prompt anything, Mr. Cooley?

MR. COOLEY: It does not.

THE COURT: And may the doctor be excused?

MR. VON SCHUCH: He can.

THE COURT: All right. Thank you, Doctor. You may be excused.

(The witness left the stand.)

THE COURT: Next witness, counsel.

MR. DAVENPORT: Yes, Your Honor. The next witness is Kathy Curry.

And, Madam Court Reporter, I think it's K-A-T-H-Y, C-U-R-R-Y.

KATHLEEN CURRY, called by the Commonwealth, first being duly sworn, testified as follows: <p188>

DIRECT EXAMINATION BY MR. DAVENPORT:

Q Good afternoon, Ms. Curry.

A Good afternoon.

Q Would you give your name to the ladies and gentlemen of the jury?

A Yes. My name is Kathleen Curry.

Q All right. Where do you reside? Where do you live?

A Fox Branch Court.

Q Is that in the Foxcroft subdivision?

A Yes, it is.

Q And do you know the defendant in this case, Diane Fleming?

A Yes, I do.

Q How long have you known her?

A About three and a half years.

Q And do you live close to where she lives?

A I do.

Q Could you tell the ladies and gentlemen of the jury in relation to your house, how far and where does she live?

A She lives on the main street coming into the Fox Branch community, little community, and I live on the first street turning right around the corner from her house about three or four houses down. <p189>

Q So, it's walking distance?

A Oh, yes.

Q During this three and a half year time, have you developed a friendship with the defendant?

A Yes, I have.

Q And have you been over to her house?

A Yes, I have.

Q And has she been over to your house?

A Yes.

Q I want to take your attention back to June the 12th of 2000. Do you remember that time?

A Very well.

Q Could you tell the ladies and gentlemen of the jury why you remember that date?

A That was the day that my husband and I had taken our daughter to South Carolina to a school, a behavioral modification school, because our daughter was having a lot of behavioral problems.

Q At that time did you know that there was anything going on in Diane Fleming's life or their life at that time?

A No.

Q Okay. Did there come a time after June the 12th that you talked with Diane Fleming?

A I don't exactly remember the day, I think it was maybe the next day that I got home. <p190>

Q When did you get home?

A That /// late, very late the night of 12th, might even have been past midnight.

Q Okay. Do you remember when Mr. Fleming died?

A It was the 14th, I believe.

Q All right. And were you in town at that time or out of town?

A I was in town. I went to the hospital to see Diane, but we left /// we took on /// the 12th

was on a Monday, and on that Thursday, my husband and I had gone to Texas for a family reunion.

Q Okay. And when did you come back?

A It was about a week later.

Q All right. After you came back, did there come a time when you talked with Ms. Fleming?

A Oh, yes. Uh-huh.

Q And would you tell the ladies and gentlemen of the jury what you talked about?

A Oh, we tried /// we /// we just tried and tried and tried to figure out what could possibly have happened. I mean, we went inside, outside, everywhere trying to figure out what could have happened.

Q Was this while you were over at her house?

A That and I was a friend.

Q Okay. Did she ever come over to your house? <p191>

A Yes. Uh-huh.

Q Did she ever bring any property over to your house?

A Yes, she did.

Q Would you tell the ladies and gentlemen of the jury approximately when that was and what she brought?

A That is my problem, I'm not exactly sure of the date. I was going through a very emotional time at that time with my daughter, so I can't remember the date. But Diane did bring over a computer tower, asked me to /// well, we sat it down in the laundry room and asked me to keep it there for a short while because she really wanted to find out /// her husband had had an affair earlier, a few years earlier, so she had wanted to break into his password, into his email to check to see if there was anything

that she could figure out what could have happened. I mean, I think any woman would have done the same thing.

Q Did she tell you what this tower was?

A She just said that it contained the software that she used to break into the email. Which, as far as I know, that was all that was on it and she was just afraid that that would make her look /// it would make her look like she was the jealous wife or something. And that's understandable, it probably would have.

Q Now, this piece of property, can you show the ladies and gentlemen of the jury how big it was? <p192>

A It was a computer tower (indicating).

Q So ///

A It was a long ///

Q So, use both your hands.

A (Indicating.)

Q About 18 inches tall?

A I guess, about like that (indicating).

Q How wide, about eight inches wide, something like that?

A I didn't actually take it out of the bag and look at it, but it was a regular computer tower.

Q Was it in a bag that you could see through?

A Not that I could recall. It was a plastic bag from some business and it was not see-through.

Q And did she hide it in your /// you said utility room?

A That's not the exact word that I would use.

Q Or did she put it in your utility room?

A Yes.

Q Whereabouts did she put it?

A In the utility room next to a corner by a garbage can.

Q You couldn't see it if you came in the utility

A Well, you could see a bag sitting there. You <p193> couldn't see what was in the bag unless you went inside and looked.

Q Did you ever look inside the bag yourself?

A No, I didn't.

Q And you never took anything out of the bag?

A No, I didn't.

Q And tell me again what she told you was in that bag.

A Computer tower and it contained the software that she used to break into Chuck's email so she could see, maybe he was having an affair again, maybe it started up again, maybe it would tell something.

Q All right. Did it come a point in time where she took that tower back home?

A Yes.

Q Would you tell the ladies and gentlemen of the jury when that was?

A That was probably about the middle of September because my oldest daughter got married September 3rd and I went to Phoenix, Arizona around the middle of August. The tower was still in my house. Then I came home /// well, during the time I was there for the wedding, my son, who at the time was going through the police academy, just really had a fit with me that it was there. And I said, I reassured him that it was fine because it was nothing substantial, it <p194> was just something that would make her look like a jealous wife. And, I mean, I would feel the same way. If the shoe was on the other foot, I would have felt the same way.

Q And as a result of your conversation ///

A My son had a fit and said, Please, don't hesitate, as soon as you get home, she takes that out of your house.

Q As a result of your conversation with your son-in-law ///

A My son.

Q Your son, excuse me /// did you call the police at some point in time?

A No, I didn't. I came home /// because I believed Diane is innocent and I do believe that what she told me was the truth and I do believe that what was in there was just the software.

Q But you don't have any of your own personal knowledge?

A No, I don't.

Q Just what she told you?

A Exactly. So, she did come and she did take it out.

Q All right. Did you at some point in time contact the police with reference to this tower?

A Yes, it was a while, took quite a while and I finally did because I feared for my own safety.

Q Now, tell me why you feared for your own safety. <p195>

A I felt /// well, it had been suggested to me that I might get in trouble for hiding this as evidence, even though I don't believe it was. I thought, Oh, gosh, I don't want to get in any trouble, so I went to see a lawyer. And that's when my lawyer told me that I needed to talk to the detective on the case.

Q And do you remember about when that was?

A Oh, gosh. I'm not really good on dates. I believe it was last /// the end of last year.

Q So, like, December of '90 /// of 2001?

A It might have been December, yeah. I believe it was right around November, December. I think it might have been.

Q So, a year and a few months passed ///

A Yes.

Q /// from the time that she took it out of there ///

A Yes.

Q /// until the time you came to the police?

A Yes.

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

THE COURT: Cross.

CROSS-EXAMINATION BY MR. COOLEY:

Q Good afternoon to you, Ms. Curry. <p197> wife?

A Right.

MR. COOLEY: Thank you very much.

THE WITNESS: You're welcome.

THE COURT: Redirect?

MR. DAVENPORT: No, Your Honor.

THE COURT: May the witness be excused?

MR. DAVENPORT: Yes, she may.

THE COURT: Thank you, ma'am. You may leave or remain in the courtroom.

(The witness left the stand.)

THE COURT: Next witness.

MR. VON SCHUCH: Call Detective Patterson, please.

TERRY L. PATTERSON, called by the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. VON SCHUCH:

Q Give The Court your name, please.

A Terry L. Patterson.

Q And, Mr. Patterson, you're an investigator with the Chesterfield County Police Department; is that correct? <p198>

A That's correct.

Q You were also involved in the investigation of the death of Mr. Fleming; is that correct?

A Yes, sir, I was case supervisor.

Q And did you have occasion to become involved approximately a year later in talking with Ms. Fleming about this?

A Yes, sir, I believe it was the latter part of April of last year.

Q Can you tell the ladies and gentlemen of the jury exactly what you did and how it worked out, please?

A Yes, sir. I /// we had a computer that we needed to return to Ms. Fleming, so I responded to her house and met with her. And basically I was there to return the computer, but I wanted to introduce myself to her because there was a /// the case manager before me was actually the one that had started the case and then I had inherited the case when he was promoted. So, I had never had the opportunity to meet with Ms. Fleming. So, I just wanted to introduce myself to her so she could put a face with a name on phone calls and so forth. And while I was there, the conversation kind of moved from her front

porch around to her garage where I put the computer in the garage for her. And I just asked her some questions pertaining to the death of her husband.

Q Would you tell the ladies and gentlemen of the jury <p199> what you asked her and what statements she made to you please?

A Well, basically what we did, I had her to go through the scenario of the events that had taken place. And she described to me the events that led up to the police's involvement in the case. She told me that /// she said that that Sunday morning that they went to church, and she described that she and her child, Meagan, and her son, Jeffrey, rode together and they had gone to church. It was, I believe, Sunday School Teacher Appreciation Day. And that her husband, Charles, and her older son, Chuckie, they rode together and they arrived a short time later.

After church the entire family in two automobiles went by Costco and picked up some Gatorade. And Ms. Fleming and Jeffrey and Meagan then left Costco and continued shopping and Charles, her husband, and her other son, Jeff /// her other son, Chuckie, went home from there, and that eventually Chuckie went to work from the home and Charles was at home. And she got in from doing her shopping. She had purchased some creatine at the GNC store and that she mixed one of the bottles of Gatorade up with the creatine for Charles to try it to see how it tasted. But she said it was kind of warm, so he didn't really like the taste of it, so he decided he would put it in the refrigerator and wait for it to cool down, he would try it then and see how he liked it. <p200>

Later on in the afternoon, Charles took Meagan to the swimming pool and when he returned from there, he eventually left and went and played basketball. She said he wasn't feeling well when he got back from playing basketball, but it was a hot day and he seemed to be kind of exhausted and he just said he wasn't feeling well. And she said that the two of them together /// that Charles had pulled four more Gatorades out of the case they had purchased, brought them into the house and between the two of them, they proceeded to mix the creatine and the Gatorade to whatever the specified amount was that you were supposed to mix this creatine with the Gatorade to achieve this amount that he was supposed to consume within a 24-hour period.

Q Did she indicate to you what happened to the Gatorade that had been mixed up earlier and put into the refrigerator to cool down?

A She said that he drank that when he got home from playing basketball, that he had consumed that one.

Q Did she tell you when Chuckie, the oldest son, came home?

A She said she thought it was around 9:30 that night.

Q So, the first Gatorade was mixed and drank and the victim went to bed before Chuckie came home from work; is that correct?

A Yep. <p201>

Q Is that what she told you? I'm sorry. I didn't mean to break you up. Go ahead.

A I'm sorry. Ms. Fleming said that Charles had gone to bed sometime between 9:00 and 9:30 to the best of her recollection and that Chuckie had gotten home just sometime shortly after that.

Q Did she indicate to you that she had /// was mixing, in the process of mixing any Gatorade when Chuckie came home?

A No.

Q Did she indicate to you what happened the next morning when the victim woke up?

A She said he still was not feeling well, but as he often did, he was very diligent, he would still go to work even on days he didn't feel very well. And that pretty much he went through the same routine, he gets up pretty early, I think around 5:00 a.m., 5:30 and generally leaves by 6:00. And she said that he had taken four of the bottles of Gatorade that they had mixed up from the refrigerator, he had taken those four bottles with him to work at Philip Morris.

MR. VON SCHUCH: Would you answer any questions

Mr. Cooley may have for you, please.

CROSS-EXAMINATION BY MR. COOLEY:

Q Good afternoon to you, Detective Patterson. You <p202> were not involved in the case in its inception back in June of 2000?

A No, sir, I was not.

Q But you've had a chance to review all the documents?

A Yes, sir.

Q Have you ever seen a lab report that showed that there was any methanol in the first bottle that was consumed?

A No, sir, I haven't seen that report.

Q There is no such report, correct?

A I haven't seen a report.

Q All right, sir. So, the first bottle that was consumed, there is no evidence that you're aware of that there was any methanol in that at all when Chuck drank it?

A Not that I'm aware of.

MR. COOLEY: Thank you very much.

THE COURT: Redirect.

MR. VON SCHUCH: No redirect.

THE COURT: May the detective be excused?

MR. VON SCHUCH: Yes.

THE COURT: Thank you, Detective. You may be excused.

(The witness left the stand.) <p203>

THE COURT: Next witness?

MR. DAVENPORT: Your Honor, that's the Commonwealth's case.

THE COURT: All right.

MR. COOLEY: I have a motion.

THE COURT: All right. Sheriff, would you take the jury out.

(The jury left the courtroom.)

THE COURT: Mr. Cooley.

MR. COOLEY: Thank you. Respectfully, Judge, I'm going to have a motion to strike as to both counts. We, as counsel, have to play the cards that are dealt us and we have to make our best presentation on the evidence that we have to offer. And I think both representatives of the Commonwealth Attorney's office have done that in this case. But if there is a scintilla of evidence in what has been presented to This Court that points a finger at Ms. Diane Fleming and excludes anyone else, much less specific people, I don't know what it /// where it lies.

You have a multitude of folks who could have done this. You have a quantity of roughly 12 milliliters of missing methanol from the bottles have that have been <p204> attributed as containing methanol. There is no more of an indication that /// with the exception she had access to the bottles, as did every other person who was in that house, as did Chuckie Tanner, who the evidence from the Commonwealth's witnesses, suggests had a motive, an opportunity. And even from his own mouth, having threatened to kill his stepfather, came home from work and stayed downstairs watching TV while the others had gone to bed. So, he has an even better opportunity to attain these things.

You cannot show that the methanol contained in the Gatorade, in fact, killed Mr. Fleming. The Commonwealth has not

demonstrated what killed him other than it's methanol. The source of it, some of it may have come from the one open Gatorade cap or bottle. The fact that it has 4.7 or .47 percent as opposed to 3.3 or .36 or .33 could well suggest that more was added when it got to work where there is pure methanol available.

And, you know, I don't know that I have direct evidence that there was any type of suicide attempt, but I don't know where there is evidence that excludes that as a potential when you look at the circumstances of the bottle that was in the refrigerator and two of the bottles there all are very similar in their mixture, but the one that happens to be open and with items missing <p205> that we know in all likelihood that he consumed that morning has a higher percentage. Could that mean he added it? It could. Does it mean it with certainty? Of course it doesn't. But there is no evidence in this case that excludes that as a potential.

And there is certainly no evidence in this case that excludes Chuckie Tanner as an equally likely candidate or even the greatest more likely candidate to have been trying to injure his stepfather.

There is zero evidence in this case of Diane Fleming doing anything. And you know, Your Honor, folks who are guilty, folks who have a guilty conscience and mind figure out ways to hide what they've done. So, people who knew that that Gatorade had methanol in it would have dumped it out before the police got there four days later. People who knew that windshield washer fluid had methanol in it certainly wouldn't be volunteering to the police, Oh, I do that. I add the windshield

washer fluid. I change things in the car. That is absolutely consistent with somebody who is innocent and is simply trying to help them find out what happened to her husband.

Now, if they had laid out a case where she had taken Gatorade and dumped it all, if they had laid out a case where she said, Mom and Dad and Meagan and Jeffrey, <p206> do not drink any of this Gatorade in the refrigerator that I'm just leaving here knowing it's got some kind of poison in it, that would be a different story. But you don't have anything like that. She doesn't know that the Gatorade has methanol in it.

She points out the Gatorade to the police in the first place. They didn't take milk. They didn't take anything else out of the refrigerator. They only took out what she pointed out to them and she is pointing out what her husband has consumed from and what he has done. And throughout all of that time, that Gatorade sat in there equally exposing to any of her family members that no one suggests that she doesn't love or didn't want them to be healthy.

And so I suggest to you that the circumstances in this case demonstrate conclusively her innocence and they certainly do not exclude any reasonable theory by which she would be innocent. And as a matter of law on the evidence that has been produced in this courtroom, there is no basis by which a conviction could stand. And I would urge upon This Court that it strike both counts. And I thank you for listening to me.

THE COURT: Thank you, Mr. Cooley.
Mr. Von Schuch.

MR. VON SCHUCH: Your Honor, Mr. Davenport had <p207> indicated the evidence in this case would be a circumstantial case. Essentially what we have done is put together a scenario, first of all starting with the fact that the poison came from inside the house. What evidence do we have of that? Well, I would submit we have this evidence: It consists of a bottle of Gatorade in that refrigerator. The evidence concerning that bottle of Gatorade was that it was one of three others that were mixed Sunday evening in that house and taken to work /// three of them which were taken to work by him the next morning. The one in the house had methanol in it in almost the exact same quantities as the others that were taken to work. It is obvious that the poison came from inside the house and it remained in the house in that one bottle of Gatorade, was put in the Gatorade in that house, not at Philip Morris.

Starting there, you then go to the question of no one accuses Meagan of doing it, no one accuses Jeffrey of doing it. The issue of suicide came up by Mr. Cooley and the Commonwealth's evidence on that has been that, first of all, you have a victim in this case who was a /// described at times as a health nut. He was starting a new bodybuilding campaign and as a result was starting to take creatine to assist him in that. This is a situation where someone who cares that much about their <p208> health, about the way they look, about the different aspects of their physique is not going to mutilate that with a poison of this nature.

You can take Tylenol and kill yourself. You can take sleeping pills and kill yourself. You don't have to go and log on to a computer and take one of the most horrible things you can possibly do to induce your death. Dr. Acker described it as

him writhing on the table for hours before losing consciousness. This is not a suicide or way that you commit suicide, certainly not someone like him.

In addition to that, you have no evidence of him being suicidal. Mr. Bailey at work testified that he was upbeat, he was looking forward. We know that he was on his computer looking for jobs in other places, foreign countries. So, we know that he is an individual who is upbeat, not suicidal. His father talked to him twice a week. There had been no change in his demeanor, was planning for the future and was someone who was simply not going to be taking his life, if he's contemplating it, in this fashion. So, I would submit suicide has not been established in this case.

The issue comes down to between Chuckie and the defendant in this case. You know, Mr. Cooley had indicated earlier that Ms. Fleming is in a difficult <p209> situation because she either has to cover for Chuckie or perpetuate a fraud to protect him. And I would submit to The Court that she does not suggest and there is n suggestion that she is that type of a person that she would allow someone who killed her husband to go on unaccounted for and allow them to deny responsibility for that.

There is, in this case, a situation where this poisoning obviously did not occur on the 12th or the 11th. It could not have because there was not enough Gatorade in all four of those, he would have had to drunk all four of those bottles to kill himself. There was not enough Gatorade in any one of those bottles to have done it.

That being the case, his history, according to Dr. Acker as well as Chuckie, was drinking in the evening. And alcohol, according to Dr. Acker, interferes with the

effects of methanol and neutralizes it in the system which means that the attempts could have gone on for some period of time and he was protecting himself, unwittingly, by taking alcohol. Certainly the 12 ounces /// the 12 milliliters that is missing is not sufficient to have caused him any harm from the alcohol that he drank that morning at Philip Morris. <p210>

What we have is an individual who woke up feeling very poorly, so poorly that when he got to work, he was told to go home. That when he did go home, he deteriorated to the point that he was, in effect, already dead, and beyond recall and repair at the point he was admitted to the hospital. What he drank before he went to bed was a bottle of Gatorade. It was mixed with Chuck, the victim's presence, and his wife's presence. He then disappeared from the house with Meagan and to play basketball while his wife remained in the house. He returned and drank that and woke up sick.

And at the time that occurred, Chuckie was not in the house, he was at work. So, in effect, you take Chuckie out of the equation that way, through that piece of evidence, circumstantially. Which leaves the only one possible to be the defendant in this case, Ms. Diane Fleming. That essentially is what the evidence shows and that is the picture that is painted from all of the evidence.

It's not going to be a situation where the Commonwealth /// and I think Mr. Davenport was candid when he told the jury, We're not going to be in a situation where we're going to move forward and show the jury that we have this particular piece of evidence that shows that Ms. Fleming committed this crime. It's a

<p211> situation where we have presented evidence that excludes other people from having committed.

It's a situation, much like a case that you would study in law school, where you lock five men in a cell at night, one of them wakes up dead, you know it had to be one of the four. How do you establish which one did it? By excluding as many as you can by saying some were handcuffed, some were shackled, etc., etc. But that's the nature of the case. And I would submit to The Court that at this point in time, based upon the Commonwealth's exclusion of everybody in the home, which we showed the poisoning came from, that the victim /// that the jury question is raised as to whether or not the defendant in this case committed the crime.

THE COURT: Mr. Cooley.

MR. COOLEY: Well, of course, the burden is on the Commonwealth to do more than raise the question whether she could have been. And I agree that they've raised the question that she could have, but they haven't excluded anyone else in that house as also being equally culpable or potentially culpable.

And I note and the Commonwealth says, Well, the bottle he drank in the afternoon was when Chuckie was at work, but they have zero evidence to you that there was any methanol in that bottle. For all we know, that is <p212> exactly /// it had creatine and had Gatorade in it. The only bottles we know had methanol are those that are found after Chuckie comes home late at night and is by himself downstairs. There is zero evidence that she put any type of methanol into anything and

there is zero evidence that excludes Chuckie as the greater potential of being the criminal agent.

And as to suicide, I don't have to establish that there was a suicide. They have to exclude any reasonable theory that it could have been. If you ask me is it the most likely scenario, it is not and I wouldn't make that argument, but the fact is that there is .47 as opposed to .33 or .36 methanol in that one that's open at work raises at least a question, well, could more have been added once he got there. They have not excluded that.

Now, Mr. Von Schuch says in his statement, in his argument, that he concedes that the Gatorade is not the source of the cause of death. It is not what killed him. It may have contributed at some point, but it certainly was not enough to kill Chuck Fleming. So, where did it happen, when did it happen, and by whose hand did it happen are all unanswered questions. The Commonwealth has not produced one scintilla of evidence to suggest to you that she did anything other than be at <p213> the house like the other folks there. And I kept waiting to hear the Commonwealth's theory of why she he been singled out as opposed to Chuckie or somebody else and it simply is not there, Your Honor.

And this is a case where the Commonwealth's evidence simply falls short, period, of being susceptible to being proof beyond a reasonable doubt. And I respectfully urge that The Court strike both counts.

THE COURT: All right. Thank you, counsel. Well, as all counsel know, we are not at the proof beyond a reasonable doubt stage yet

and the Commonwealth is entitled to certain inferences on a motion to strike. There is evidence in the case from which /// which allows them to survive that motion to strike, specifically among that, the timing of the ingestion of the first bottle of Gatorade and the onset of the illness, inquiries regarding methanol and the secreting of the software tower. So, they've put on evidence certainly to survive a motion to strike and the motion is denied.

Mr. Cooley, are you ready with your case? I know you said you told witnesses not to appear until 4:00.

MR. COOLEY: Your Honor, if /// I don't know. All of our witnesses could be released or told to be here // I told them 4:00 based on what I believed from our <p214> discussions last week would be the earliest I would need them. I suspect I will be ready to go. I would ask for maybe a 10 or 15-minute recess for me to see what I've got present and we'll start with what we've got, even though they might not be the order I would prefer.

THE COURT: Why don't we take a 15-minute recess?

MR. COOLEY: Thank you.

(A recess was taken.)

THE COURT: Mr. Cooley, can we proceed?

MR. COOLEY: Yes, we can.

THE COURT: All right. We'll bring the jury in.

(The jury returned to the courtroom.)

THE COURT: All right. All the jurors are back and seated in the jury box and we're ready to proceed, counsel.

----- *Kenneth Rupp* -----

MR. COOLEY: Your Honor, our first witness would be Pastor Kenneth Rupp.

KENNETH M. RUPPAR, called by the defendant, first being duly sworn, testified as follows: <p215>

DIRECT EXAMINATION BY MR. COOLEY:

Q Good afternoon to you, Pastor.

A Good afternoon.

Q Would you tell the ladies and gentlemen of the jury, please, your full name and your profession?

A Kenneth Mill Rupp. I am the pastor of Lutheran Church of Our Savior here in Richmond.

Q And how long have you been pastor there?

A Little over three years.

Q And are you familiar with the young lady seated to my right, Ms. Diane Fleming?

A Yes, I am.

Q How long have you known Ms. Fleming?

A A little over three years since I've been with the congregation.

Q Are you familiar with her reputation in the community in which you know her?

A Yes, I am.

Q And I have some very limited questions that I can ask you, so if you will, can you tell the ladies and gentlemen, number one, are you

familiar with her reputation in that community for truth and veracity?

A Yes, sir.

Q And in a one or two-word answer, can you tell the <p216> ladies and gentlemen what that reputation is?

A Honest and reliable.

Q Are you familiar with her reputation in the community for peacefulness and tranquility?

A Yes.

Q Can you tell the ladies and gentlemen of the jury what that reputation is in a one or two-word answer?

A Peaceful and nondisruptive.

Q Are you familiar with her reputation in the community for general character, good or bad?

A Yes, I am.

Q And can you tell the ladies and gentlemen of the jury what that reputation is?

A Again, very reliable, dependable and the person who helps out in many ways in a variety of organizations.

MR. COOLEY: Thank you very much, Pastor. Those are all the questions I am allowed to ask. And if the Commonwealth or The Court have any, please answer those.

THE COURT: Cross?

MR. DAVENPORT: Just one.

CROSS-EXAMINATION BY MR. DAVENPORT:

Q Pastor, you have heard and you know through your contact with Ms. Fleming the answers to all of the questions <p217> that you've just given to Mr. Cooley?

A Yes, sir.

Q If you knew that Ms. Fleming had hid evidence in a criminal case, would that change your opinion?

A It wouldn't fit with the opinion that I have, no, sir.

Q It would be different than the opinion you have?

A Yes, sir.

MR. DAVENPORT: Thank you.

THE COURT: Redirect?

MR. COOLEY: No, Your Honor.

THE COURT: May this witness be excused?

MR. COOLEY: He can be and we would ask that he be.

THE COURT: All right, sir. You may either remain in the courtroom or you are free to leave.

(The witness left the stand.)

MR. COOLEY: Judge, our second witness would be Betty Rickmond.

BETTY P. RICKMOND, called by the defendant, first being duly sworn, testified as follows: <p218>

DIRECT EXAMINATION BY MR. COOLEY:

Q Ms. Richmond, would you tell The Court and ladies and gentlemen of the jury, particularly, your full name and your profession?

A Yes. My name is Betty Parrish Rickmond and I am retired from the Dupont Company.

Q And do you know the young lady seated to my right, Ms. Diane Fleming?

A I sure do. She is one of my best friends.

Q How long have you known her?

A Eight years.

Q And in what capacity have you come to know her?

A Well, we became acquainted at church. We serve on the same committees and she's on the committee that I chair at Lutheran Church of Our Savior and she's one of the most devoted ones.

Q Let me ask you, are you familiar with her reputation in the community in which you know her for truthfulness and veracity?

A Yes, indeed.

Q Can you answer, and I'm sorry to limit you like this ///

A Oh, yes.

Q /// but can you answer to the ladies and gentlemen <p219> of the jury what that reputation is in a one or two-word answer?

A Outstanding.

Q Are you familiar with her reputation for peacefulness and tranquility?

A Yes, indeed.

Q And can you tell us what that reputation is?

A Well, I've always known Diane to be a truthful person. She is devoted, like I say, and she's conscientious and I've never known anyone to ever even assume that Diane has lied about anything.

Q And are you familiar with her reputation for general character, good or bad character? Are you familiar with that reputation?

A Excellent character.

MR. COOLEY: I thank you for being here. If you would answer any questions that The Court or the Commonwealth might have for you, please do so.

THE COURT: Mr. Davenport, Mr. Von Schuch.

MR. DAVENPORT: Yes, ma'am.

CROSS-EXAMINATION BY MR. DAVENPORT:

Ms. Rickmond, you've known Ms. Fleming for eight years? <p220>

A Yes.

Q And I think you characterized you all's relationship as her being your best friend, right?

A I said she is one of my best friends, yeah, yeah.

Q All right. Do you all live close to one another?

A Well, no. No. I live /// well, I live about probably 12 miles or so from Diane. She lives in Woodlake and I live closer in town.

Q You all go to the same church and have for some time; is that correct?

A Yes, uh-huh.

Q Now, if you knew that she had hid or secreted evidence in a criminal case, would that change your opinion of her truthfulness, her veracity?

A No, because it would be hard for me to believe.

Q Okay. But would it be an aberration of her character to do something like that?

MR. COOLEY: Judge, if I could, it's not her opinion, it's reputation evidence. That is the limitation on character. She can only answer to reputation. He's asking would it effect her belief. And I don't mind him asking, but I really think we're getting far afield of what the limitations are.

THE COURT: All right. Mr. Davenport, would you care to respond? <p221>

MR. DAVENPORT: Well, Your Honor, it matters what /// how she's come up with /// to giving the answers to Mr. Cooley's questions about her truthfulness and veracity. And all I'm asking her is if knowing this fact, that is that her friend, Diane Fleming, had secreted or hid evidence in a criminal case, would that bear on her opinion, would it make it different.

MR. COOLEY: And, Judge, I understand that that's an argument that he's attempting to make. I don't think that's the evidence in this case. The question suggests that that is the evidence in this case, that she has hidden evidence. I don't agree with that.

THE COURT: Let's get back to the original objection that it's asking whether it would change her opinion may be different from

asking what her reputation in the community is. So, I'll allow the first question and I sustain the objection as to the second one.

Q Would it change your opinion?

A No. If you're my friend, you're my friend forever.

MR. DAVENPORT: Okay. Thank you very much.

THE WITNESS: You're welcome.

MR. COOLEY: Thank you very much.

THE COURT: Thank you, ma'am. May this witness be excused?

MR. COOLEY: She can be, Judge, and we would ask <p222> that she be.

THE COURT: All right, ma'am. You may remain or you may leave.

(The witness left the stand.)

MR. COOLEY: Judge, we may or may not have someone who has arrived.

THE COURT: Okay. Let's call for them.

MR. COOLEY: If we can check to see if Ms. Linda Dugent has arrived.

THE COURT: Nugent?

MR. COOLEY: Dugent, D-U-G-E-N-T.

LINDA M. DUGENT, called by the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COOLEY:

Q Good afternoon to you, Ms. Dugent.

A Hi.

Q Could you tell The Court and the ladies and gentlemen of the jury, please, your full name and your profession?

A Uh-huh. My name is Linda Mason Dugent and I'm a <p223> parish nurse and an RN.

Q And are you a parish nurse for a particular church?

A Yes, Lutheran Church of Our Savior.

Q Have you also, in the past, served at times as a youth counselor and such at the church?

A Yes, I have.

Q And in that capacity, did you come to know someone by the name of Chuckie Tanner?

A Yes, I did.

Q And were you his youth counselor for a period of time?

A I don't know if I would call it a counselor, as a youth advisor at the church, you know, which is responsible for the youth group activities and talked with him.

Q Did there come a point some time in the not too distant past where you had some discussions with Chuckie Tanner regarding his relationship with his stepfather, Chuck Tanner [sic]?

A Yes.

Q Can you tell the ladies and gentlemen of the jury what that involved? What was the discussion?

MR. VON SCHUCH: Your Honor, I'm going to object to the hearsay part of the answer that would be mandated by the question.

THE COURT: To the extent that it calls for <p224> hearsay, Mr. Cooley.

MR. COOLEY: Judge, I asked on cross-examination of Mr. Chuckie Tanner whether or not he had this discussion about the relationship and made some requests of her and he denied that and so I think ///

MR. VON SCHUCH: Well, if he is doing it for impeachment purposes, he needs to give her the exact statement and proceed to question whether or not that statement was made by Mr. Tanner. He can't just simply ask her to talk about the issue. He's got to give her the exact statement, the question that he asked.

THE COURT: I'll ask Mr. Cooley to rephrase.

Q Was there a discussion with Chuck Tanner, Chuckie Tanner about his relationship with Chuck Tanner [sic]?

A Yes.

Q Did he describe to you a stormy and difficult relationship?

A I knew he was not happy at home, that's all he said.

Q Did he /// did you discuss with him him coming to live with you and your family?

A He asked if he could come to live with me and I told him that I ///

MR. VON SCHUCH: Again, Your Honor, I object to the hearsay part of it. <p225>

MR. COOLEY: Judge, this is exactly what he denied and I'm narrowing it down. I am not required to /// I have to ask him the

question, Did you have this discussion, and he denied it and then she can /// that opens the door for her to describe the discussion.

MR. VON SCHUCH: You can't impeach the witness unless you give the /// him an opportunity to answer yes or no. And if you do that, you then have to bring back the individual and you have to ask did he make this statement to you. Otherwise, it's hearsay, it falls outside the impeachment section.

THE COURT: I'm looking at my notes to find statements made by Mr. Tanner. Mr. Cooley, are you going to ask her specifically with regard to the specific statement Mr. Tanner made to you?

MR. COOLEY: Well, I don't think I'm limited, but I can do that. The specific question I asked him was whether or not he had discussed with her going to live with her and her family. And I then asked him if she referred him back to his psychiatrist or counselor to discuss that before that decision was made.

THE COURT: And in an attempt to impeach him, ask her the specific question with regard to the response Mr. Tanner gave you.

Q Did you /// did you discuss with him or did he ask <p226> you whether he could come live with you and your family?

A Yes, he did.

Q Did you advise him that he should get counseling from his psychiatrist or his doctor or therapist?

A Yes, I did.

Q And, thereafter, did he come to live with you?

A No, he did not.

Q Are you familiar with the lady, young lady seated to my right?

A Yes .

Q How long have you known Ms. Fleming?

A About ten years.

Q Are you familiar with her reputation in the community in which you know her for truthfulness?

A Yes.

Q In a one or two-word answer, can you tell us what that is?

A Tell you ///

Q What her reputation is.

A Excellent.

Q Are you familiar with her reputation for peacefulness and tranquility?

A Yes.

Q And can you tell us, in a one or two-word answer, what that is? <p227>

A Excellent.

Q And are you familiar with her reputation for general character?

A Yes.

Q And what is that?

A Excellent.

MR. COOLEY: Thank you very much, Ms. Dugent. Answer any questions that the Commonwealth or The Court might have for you, please.

CROSS-EXAMINATION BY MR. VON SCHUCH:

Q Ms. Dugent, Mr. Cooley asked you if you had or if you are familiar with her reputation. That means did you discuss it with other people.

A Yes, I did.

Q And during the course of those discussions, did // was it discussed about the fact that she may have hid or concealed evidence from the police in this case? Was that discussed as well?

MR. COOLEY: Judge, again, that assumes that that's a correct statement and that is not a correct statement and I object to that question being phrased that way and some suggestion put to this witness as to something she couldn't possibly know since that's their theory of <p228> today.

THE COURT: Let me see the lawyers here at the bar.

(Conference at the bench without the hearing of the jury, as follows:)

THE COURT: I'm assuming that the evidence that we're talking about is the software tower.

MR. DAVENPORT: Yes, ma'am, it is.

THE COURT: And you're objecting to their saying that she hid it?

MR. COOLEY: It wasn't evidence in the case. It was what she did afterwards. She made an effort afterwards, after he was dead. It had nothing to do with evidence that related to whether or not she wanted to see his emails. Their only evidence is that she entered into the computer.

MR. DAVENPORT: That's his evidence.

MR. COOLEY: That's my /// that's the explanation for it, but their suggestion is that that's evidence or that she hid evidence in the case and that's not /// that's not the situation. At best for them it's argument as to what it is, but for them to ask a character witness if she has hidden evidence would that change their opinion, that suggests that's a proven <p229> fact. That's not a proven fact. It is not a fact.

MR. DAVENPORT: Your Honor, what the question was is if you heard these things, not couching it as a proven fact. But a fact has come up in this case and it is a factor in this case that you had when you denied his motion to strike. It's part of her guiltiness in this particular matter and us showing that. And all we're asking, he's bringing character witnesses in here, we're saying if this were a factor that you had to process, would it change your opinion. That's in this case. We can't do anything about the fact. It's in this case. We're not quoting something out of the air or something from somewhere else.

MR. COOLEY: But it's not her opinion that's being allowed. If we're going to go into her opinion or what she thinks, then I'm entitled to bring in all the reasons, not just reputation. If we're limited to her answering questions about her reputation in the community, what she thinks of her doesn't come in.

THE COURT: To rephrase the question, Mr. Davenport asked it, I sustained your objection, would it change her opinion.

MR. COOLEY: How could she answer whether it would change the opinion of others in the community on reputation? How could she possibly answer that? <p230>

MR. VON SCHUCH: My question is in discussions that you have had, did you ever hear it discussed or was it ever discussed, her concealing evidence in this case.

THE COURT: And that's right.

MR. COOLEY: Again, it assumes a fact that is not in evidence in this case and ///

MR. VON SCHUCH: Two things, but just responding to those two parts of this. Number one /// the adultery is an attempt to confuse. Number one, whether or not

hiding and concealing is an appropriate description, and, two, whether or not the way it's being asked is appropriate.

THE COURT: I agree. It seems to me that there is some evidence from which the jury can draw the conclusion that she hid the tower. The tower subsequently became evidence in the case, did it not, evidence that the detective used to bring charges against her?

MR. COOLEY: No, ma'am, not to my knowledge.

MR. DAVENPORT: Or lack thereof the same. It becomes the fact that if she's intent on knowing the killer, if she's intent on the police doing their work, she's secreting evidence in the case, that goes to her credibility, that goes to general character.

MR. COOLEY: It's not evidence in the criminal case <p231> and they don't have any evidence that it is. Their own witness says that it is something she brought in, that she was doing after he was dead. Her wanting to get into the computer to see if there was possibly someone else who committed the crime, he was having an affair or to give her some lead who committed the offense.

MR. VON SCHUCH: They weren't able to get it.

MR. COOLEY: That's not evidence. It didn't happen.

MR. VON SCHUCH: Explain why you put that evidence on.

MR. DAVENPORT: In opening statement, Mr. Cooley, if you remember his opening statement, said that what Diane did was that she brought this over to her friend's house to help Chuckie, to help him. Well, that's not what this witness is testifying to. This witness testified she brought it over there to help herself not to be looked at as a jealous wife.

THE COURT: It seems to me that perhaps the question should be asked is if you found that she secreted evidence that could have been relevant to the investigation of the case. That's the only thing Mr. Cooley, you can't object to, perhaps it could have been relevant to the case. And the question Mr. Von Schuch asked as to whether there had been conversations <p232> in the community from folks whom this witness has drawn her opinion is certainly a valid question, discussions of this fact within that community.

MR. COOLEY: Your Honor, that assumes it's a fact as opposed to if you believe that she secreted something to hide something relevant to the case. I think that's an issue for the jury, not a proven fact.

THE COURT: You may ask if you should believe that she secreted the evidence or secreted evidence that may have been relevant to facts or to the investigation of the case.

(Thereupon, the following proceedings continued within the hearing of the jury.)

Q Ms. Dugent, I believe I had asked you about the discussions, about the basis that you had /// your testimony here today relies upon what you had heard others say about the reputation of Ms. Fleming and you indicated that you had heard others talk about it and that was what you were indicating to the jury; is that correct?

A Correct.

Q Okay. My question to you would be: In those discussions, was it ever mentioned or discussed about the /// anything about Ms. Fleming secreting evidence which may have <p233> been relevant in this case? A No.

MR. VON SCHUCH: That's all the questions I have. Thank you.

THE COURT: Does that prompt anything, Mr. Cooley?

MR. COOLEY: It does not.

THE COURT: May this witness be excused?

MR. COOLEY: She can be and we would ask that she be.

THE COURT: Ma'am, you may leave or you may remain in the courtroom. Thank you.

(The witness left the stand.)

THE COURT: Next witness.

MR. COOLEY: Judge, let me check again. They're kind of getting here as quick as they can. Sheriff, could I ask you to call for Ms. Trish Jones? How about Ms. Dowdy?

BARBARA R. DOWDY, called by the defendant, first being duly sworn, testified as follows: <p234>

DIRECT EXAMINATION BY MR. COOLEY:

Q Good afternoon to you.

A Good afternoon.

Q Would you tell the ladies and gentlemen of the jury your full name?

A My name is Barbara Roberts Dowdy.

Q And do you go by Roberts Dowdy?

A Dowdy.

Q Ms. Dowdy, would you tell the ladies and gentlemen of the jury where you are employed?

A I'm employed in Richmond at Philip Morris, U.S.A.

Q And are you at a particular location?

A I actually work at several locations known as the Richmond processing plants.

Q And is there a particular one that you dealt with at which Mr. Chuck Fleming was employed?

A Yes, sir.

Q And which one is that?

A Park 500.

Q And are you a security /// are you in charge of security or have some role in security?

A I'm the safety manager for the Richmond processing plants.

Q And did you have occasion to meet with some <p235> detectives and such at the time that you became aware of Mr. Chuck Fleming's death?

A Yes, sir.

Q Is there a lab at Philip Morris?

A Yes.

Q And does that lab contain any forms of methanol?

A Yes.

Q And is that lab open and available to employees?

A Yes.

Q Does it contain both containers like bottles and such of methanol and also spray bottles of methanol?

A When you say spray bottles ///

Q Why don't I do this: Just describe, if you will, the nature of how it's contained.

A It's contained in larger vessels and it's shipped to the plant from the vendor. And then when it's used in the laboratory, it's put into smaller containers, some of which may be more of a squeeze bottle in nature.

Q After this occurred and you were called in by the detectives and such, did there come a point in time where a Mr. Dell Statton, I may be mispronouncing that, brought forward to a supervisor certain /// a bottle of methanol?

A I was not privy to that.

Q All right. Are you aware of that?

A Yes, sir. <p236>

Q All right. And I think the Commonwealth has agreed to stipulate to that. So, there came a point in time where you became aware that another employee, Mr. Statton, had a bottle of methanol in his locker?

A Yes, sir.

Q And produced that to his supervisor after becoming aware of the death of Mr. Fleming?

A Yes, sir.

MR. COOLEY: Thank you very much, ma'am. If you'll answer any questions The Court or the Commonwealth might have for you.

CROSS-EXAMINATION BY MR. VON SCHUCH:

Q Good afternoon, Ms. Dowdy. Ms. Dowdy, what do you all use methanol for at Philip Morris?

A We use it in our production laboratories in the /// for gas and liquid chromatographs. It's used in the standard preparation.

Q Is it pure in form?

A Yes, sir.

Q Do you also use it in solvents and detergents and so forth?

A Not to my knowledge, no, sir.

Q And is there a certain individual who is <p237> responsible for dispensing the methanol? Is there some controls over it?

A Usually the lab supervisor is the person responsible for putting it into /// from a larger vessel into a smaller vessel for use by the laboratory technicians.

Q And when it was used, what department would it go to or where was it used?

A It was used in the laboratory.

Q In the laboratory itself?

A Yes.

Q Did Mr. Fleming work in the laboratory?

A No, sir.

Q The methanol that you all used, you indicated that it would be transferred from large containers to small containers. How large were the small containers?

A About a pint in size.

Q About a pint?
A Yes, sir.
Q And how long have you all had the setup or that system that you would do that?
A Oh, it's been for a number of years.
Q For a number of years?
A I suspect since we've had those particular types of instruments.
Q Do you know Ms. Fleming? <p238>
A Yes, sir.
Q And how long have you known her?
A Four or five years.
Q Four or five years?
A Uh-huh.
Q And did she ever visit her husband on the job?
A Not to my knowledge, no, sir.
Q Okay. Did you work in the same department as him?
A No, sir.
Q Okay. So, I guess you probably /// your answer would be you don't know whether or not she ever stopped by the job, visited him on the job and so forth?

A That's correct, I do not know.
MR. VON SCHUCH: That's all the questions I have.
THE COURT: Redirect, Mr. Cooley?
MR. COOLEY: Very briefly.

REDIRECT EXAMINATION BY MR. COOLEY:
Q When you visit Philip Morris, you all do some work that would be considered, for the industry, anyway, secret work; is that correct?
A Yes, sir.
Q And do you have to have any kind of identification or anything to go in? <p239>
A Yes, sir.
Q And do you have to check in; do you know?
A Correct, yes, sir.
Q Sign in when you come through the gate?
A That's correct.
Q Get a badge and go in that way?
A That's correct.
Q So, if Ms. Fleming had visited, that would be available and checkable by the Commonwealth or anybody else, correct?

A Yes, sir.
Q And you're not aware of any time that you can say that she ever visited Mr. Fleming?
A No, sir.
Q The lab that you have described is not locked?
A No.
Q And anybody with the proper identification badge or a regular employee would be able to access that lab, correct?
A Yes, sir.
Q And if they wanted to, they could pick up, as did Mr. Statton, the methanol that was there?
A Yes, sir.
MR. COOLEY: Thank you very much. That's all the questions.
THE COURT: May Ms. Dowdy be excused? <p240>
MR. COOLEY: Yes, ma'am.
THE COURT: Thank you, Ms. Dowdy. You are free to leave or you may remain in the courtroom.
(The witness was excused.)

Diane Fleming

MR. COOLEY: Judge, I'll try one more time to see if Trish Jones is out there. One more, Ms. Gina Morris. Diane Fleming.

DIANE FLEMING, the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COOLEY:

Q Ms. Fleming, would you tell the ladies and gentlemen, please, your full name?

A Diane Fleming.

Q And how old are you?

A Forty-four.

Q And you are the mother of Chuckie, of Jeffrey and of Meagan; is that correct?

A Yes, I am.

Q And you are the widow of Chuck or Charles Fleming, Jr.? <p241>

A Yes, I am.

Q Have you ever been convicted of a felony?

A No.

Q A misdemeanor involving lying, cheating or stealing?

A No.

Q You were married to your husband, Chuck, for how long?

A Almost ten years, it would have been ten years that following September.

Q Can you tell the ladies and gentlemen, was he involved in any effort to change his physique in June, May or June of the year 2000?

A Oh, yeah, he always was. He had a workout regimen. He lifted weights several times a week, played basketball, but that really wasn't to work out, that was just because he liked to play basketball. He was always researching like how to do the weights, like doing sets to get the most effect, and he tried different things. But the previous fall

he had tried protein shakes to try to gain more muscle mass, tried that for a month or two, and then the idea of the creatine came up.

Q And when he played basketball in the summer, did he /// is that something that his body handled well or something that he had any difficulty with? <p242>

A Well, if it was hot, he always felt really bad whenever he came home from playing ball.

Q Did there come a point in time, and I'm going to bring you specifically to June 11th, that he was looking for anything in particular?

A Well, for a week or two before that, he had been talking about researching this creatine, which was a supplement that he had read about online that would help increase muscle size. I think it actually worked by pumping more water into your muscles or something.

Q Had you offered any opinion to him about the wisdom of using creatine?

A I didn't think it sounded like a good idea because I had looked it up and I think it could cause some problems with your liver or kidneys or something, but then so could the protein, if I remember.

Q Okay. On June 11th, that Sunday, can you tell the ladies and gentlemen, how did your day begin?

A Jeffrey and Meagan and I left for church about 9:30 or a little before. We didn't have Sunday school, we had the Sunday School Teacher Appreciation ceremony. After that was over, the eleven o'clock service. Chuck and Chuckie arrived. They had driven separately, which was odd. Because normally if Chuckie wasn't working, he would just ride with Chuck, and if he was working, like he was that day, Chuck would

ride <p243> with him so that he could just ride home with me.

Q So that Chuckie could take that car and Chuck could ride home with you?

A Right. And I don't remember /// at some point during service or something, I became aware that they had arrived in two separate cars and I'm like, you know, why.

Q Well, after that, after the service, did you all go anywhere?

A Right. We had already talked about it beforehand, going to Costco to see if they had this creatine powder that he was looking for because that's where we had also found the protein shake mixture that he had used a few months before. And they didn't have that, so /// but he also wanted to find something to mix it in because they recommended fruit juices or sports drinks and he didn't drink fruit juices. So, we saw that they had the individual bottles of Gatorade and he said, Well, we'll try this. He wasn't sure if he would like Gatorade.

Q After you pointed that out, did he stay there at Costco?

A No. I finished with other shopping and then, you know, he went on home because he had his own car.

Q And did you go anywhere from Costco?

A I told him I would stop and see if GNC /// because we didn't know for sure if they had the creatine or not, but <p244> I stopped at one near our home.

Q Just on the chance that somebody might not know what GNC is for those of us who are not nutritionally oriented ///

A It's stands for General Nutritional something. They sell vitamins and supplements.

Q And did you stop there?

A Yes, I did.

Q And what did you buy?

A The creatine powder.

Q And then at that point you were still with Meagan and with Jeffrey?

A Right. I think they waited in the car because I was just in there for a minute.

Q Was there anything special going on that week with Jeffrey?

A Well, that was graduation week.

Q Okay. Were you expecting guests at your residence?

A My parents were due in Tuesday from Missouri.

Q Can you /// after you all left GNC, where did you go? A Home.

Q And once you got home, what did you do?

A Well, I showed Chuck that I found the creatine. And he picked out one of the ones that /// he said, Well, <p245> let's try this flavor. We mixed it up. It read /// it was like **one and a half tablespoons** or something like that that we mixed with it. So, we got a measuring thing and mixed it and he tasted it and said, you know, he'd see how it tasted after it got cold. Because, you know, Gatorade, I don't think, tastes real good warm. And we put it in the refrigerator.

Q Okay. Were any other bottles mixed at that point in time?

A No, not at that point.

Q And did /// was Chuck expecting a gift at any point?

A Well, the following weekend after that was Father's Day and he had been out cleaning the garage, all the sudden moving things around because I think he knew he was getting a router table for Father's Day.

Q Was that something the whole family was contributing to?

A No, that was just /// that was from me. And I think he saw /// when the UPS guy brought it, he saw the writing, even though /// he was kind of around back of the house, I ushered him in.

Q And as he was cleaning up out there, what were you doing?

A I don't really recall. I was just in the house.

Q Did there come a point in time later in the day <p246> when any other Gatorade got mixed?

A After he had gone to the pool with Meagan for a little while and then went to play ball /// that was a regular Sunday routine /// he drank that one that we had mixed earlier. And then he brought four more out. There were three different flavors and so he brought /// there were two of one flavor and one of each of the others and he said, well, let's mix up four of these.

Q Do you have any idea, of the one that he drank, do you know where he disposed of the bottle?

A I don't know. He was walking around, I think still puttering out in the garage. It wasn't until later, I think it was June the 20th, that Detective Skowron and Akers were there and we were going through the garage again, that we actually looked in the trash can of the garage and found an empty bottle in there. And I said, Maybe this is the one that he drank because no one else ever /// excuse me /// threw anything /// you know, no one else drank anything out in the garage normally.

Q And is that item 14 on the lab report?

A Apparently so because it was an empty bottle and they took an empty bottle that day.

Q And could you /// you said that he went off to play basketball. Was June 11th a hot day?

A Yes. <p247>

Q And when he came back from basketball, what did he do?

A Well, he was hot. Excuse me, my allergies. He was out and I fixed dinner, but I made a light dinner because usually when it was hot, he didn't want a lot to eat after playing ball. And he didn't really eat anything, which wasn't uncommon, may have eaten a little bit, but not really.

Q What did he do after that?

A He just kind of laid on the couch and watched TV. I think later he did eat some ice cream. And then he went to bed about /// he usually went to bed between 9:30 and 10:00, I believe it was a little bit earlier that night. It was more like between 9:00 and 9:30.

Q Let's talk about the Gatorade. Where had the package of 24 Gatorades been placed?

A Right outside the garage /// the door leading into the kitchen out in the garage.

Q And did anybody do anything with any more of the Gatorade after he came back from basketball?

A After he came back from basketball?

Q Was anything done with mixing any Gatorade?

A Well, that was when he /// after he drank the one that he drank after playing ball is when he brought out four others and sat them on the counter and said, you know, mix up these four for tomorrow. <p248>

Q Did they mix well? When you put the creatine in them, did they mix up?

A No. It was /// that was one thing that kind of bugged us because the powder wouldn't completely dissolve. It kind of stayed on

the bottom, you know, like a white layer. And we kept shaking it trying to figure out, you know, maybe if we shake it hard enough, it will dissolve.

Q Now, once that was mixed, it was put in the refrigerator; is that right?

A Yes.

Q Now, at some point Chuck goes to bed?

A Uh-huh.

Q And then you go to bed?

A Yes.

Q And do you all sleep in the same room?

A Yes, we do.

Q In the same room?

A Yes.

Q When you went to bed, do you know where Chuckie was?

A He had already come home before I went to bed.

Q He had come home from work?

A Yes.

Q You heard his description that he stayed up late and watched TV? <p249>

A (Indicating in the affirmative.)

Q Do you remember whether he did or didn't?

A No, I wouldn't know.

Q The next morning did anything occur with /// did your husband get up?

A He got up about /// he usually got up about quarter after /// five-thirty or quarter to six. He got up. He was always out of the house in like 10 or 15 minutes. I was still in bed because I don't get up until later. And I became aware that he was over here (indicating) getting dressed in the chair and he was kind of groaning and making noises. And, you know, so finally I said, What's wrong. And he said, Well, I really

don't feel good. And, you know, we kind of talked about that, what's wrong, you know, Well, stay home. No. You know, which was typical, he'd usually /// he woke up a lot of times not feeling good and still went to work..

Q Now, you said you slept later. How late did you sleep?

A Probably 7:00 or 7:30.

Q Okay. Did you have to do anything with your daughter?

A I had to get her off to school.

Q So, did you get up and get her off to school?

A Uh-huh. <p250>

Q And when you /// did you take her to school on that day?

A Yes. On that day she had something that she had to take to school and I don't remember what it was, something that you didn't want to take on the bus. So, I drove her to school because it's real close by and Jeffrey went with us just for the ride.

Q Okay. And as you were driving to school, did you see anything?

A On Lakebluff Drive, we met Chuck coming back home. And I had noticed when we got in the Jeep /// because he alternated vehicles each week. The previous vehicle he had drove /// driven the Jeep and he had driven the car that week. His briefcase from work with a big, thick stack of papers of stuff he was working on for Philip Morris was still in the Jeep. So, I said to Jeffrey, Oh, I bet he's coming back after his briefcase. So, I got on my cell phone and called Chuckie who was still at home and said, Chuck is on his way home. If he's there for the briefcase, tell him I'll be right back, I've run to take Meagan to school.

Q Did you have any concept that he was sick or going to stay home at that point?

A Not really because, you know, he often went to work sick. So, once he went to work, I didn't really think a lot more about it. <p251>

Q When you got home, when you came back from dropping Meagan at school, where was he?

A He was laying on the couch.

Q And did he stay home the rest of the day?

A Yes, he did.

Q And there were indications that he had been sick at that point?

A Yes. He had a stain on his pants.

Q Did you ask him if he wanted you to call a doctor?

A Oh, yeah. And he said, No, I'm /// I can't go to the doctor because I can't stand to ride in the car because I'm too sick, and just typical.

Q Later that day did things seem to be getting any better?

A I was gone for a little while running some errands, and when I came back, he had changed clothes. So, I washed, you know, put the soiled ones in the washer. And he was telling me that he had thrown up several times while I was gone in an hour or two.

Q Did there come a point in time where he complained of something other than nausea?

A Well, much later, after I had /// finally I said, Let me call the doctor and see if I can get something for your nausea, maybe he'll give you something or call in something over the phone. The nurse said to try Diet Coke <p252> flattened /// I mean flattened Coke, which I sent Jeffrey up to the drink

machine at the pool because we didn't have anything but Diet Coke and he was trying that and it wasn't helping. He was still /// couldn't hold it down. So, I had a call into the doctor and the nurse said, If you haven't heard anything back by five o'clock, we've called in something, some suppositories or something for him. So, at five o'clock, I left and ran up to the Winn-Dixie pharmacy to pick those up.

And when I got home, I met Jeffrey coming /// excuse me /// he was going to pick Meagan up from swim practice, and I said /// we rolled down the windows and I said, How is Chuck, and he said, He's upstairs. Which he hadn't been in the mood to walk around. So, when I got there, he was upstairs and he was trying to lay on the bed. He was complaining about being short of breath. And I said, Well, I got these suppositories and he said he wasn't nauseous anymore. So, he was real uncomfortable. He was trying to get comfortable, and he said when he laid down, he couldn't breathe. And I said, Well, you know, what do you want me to do, do you want me to take you to the hospital or what. And he didn't know. He just /// he said, I don't know, I don't know, I don't know what's wrong. Finally, I said, Well, can I /// finally I asked him several times, Can I call 911, can I call an ambulance. And finally he said yes. That was <p253> probably about between 5:30 and 6:00. Well, I got home at 5:30, so it was probably about 6:00.

Q Did you call 911?

A Yes, I did.

Q Did an ambulance come?

A Right.

Q And they took him to the hospital?

A Yes, they did.

Q And you followed them to Chippenham; is that right?

A Yes.

Q And did you stay there?

A Yes.

Q And you stayed there from that point in time until hours of the the early next morning?

A Until after they had gotten him moved into the ICU. And, I don't know, it was probably one or two o'clock, I left. I think my father-in-law had gone to stay with the kids at home.

Q This would have been early now Tuesday morning?

A Right.

Q And then you went home and helped take care of the kids?

A Because I needed to get Meagan off to school.

Q And you returned to the hospital?

A (Indicating in the affirmative.) <p254>

Q Did there come a point in time over those days that he was at the hospital that a doctor approached you and told you what they thought was wrong with him?

A Well, in the emergency room, they didn't really know. They were asking all kinds of questions, could he have had a lot of aspirin or something because I guess they were already seeing some acidosis or something. And, you know, I mentioned the creatine because I was beginning to kind of get suspicious that this substance, you know, could not be reacting well with him.

Q You told them about the creatine?

A Right, because that was the first thing that I became suspicious of.

Q And then what happened after that?

A Well, by the time he got in the emergency room, he was pretty confused and everything. He wasn't able to really help them out. So, you know, they were having to ask me all the questions about what he had had. He was just really out of it and incoherent. By the time they got him up into the ICU, he was even worse. I don't think he /// the last coherent thing he said or semicoherent thing he said was in the emergency room. And then from then on, you know ///

Q Did there come a point in time where a nurse asked you to bring certain things to the hospital?

A Yes, it was the next day. That morning, the next <p255> day, Tuesday, before I came to the hospital, I talked /// and I believe it was Dr. Acker who was here. I've talked to so many, but I believe he was the one I talked to, who told me the toxicology had come back and it was methanol.

And we discussed things that he had, exposure he had had to anything, and he asked me to bring in the creatine powder. I don't know how the discussion about alcohol came up, but he asked me if he drank any alcohol. I brought in two bottles of the /// of bourbon and then the drink bottle that he had used when he /// the water bottle he had used when he went to play basketball even though I had washed it. I said, Well, I've washed it by hand, because it couldn't go in the dishwasher, so he said go ahead and bring that in. So, I brought in those four things at the hospital there in the ICU. The nurse came and did all the paperwork, you know.

Q Up until the time that the doctor said to you this appears to be methanol poisoning, did you have any idea what was wrong with Chuck?

A No. I still kind of thought the creatine was making him sick.

Q After the doctor told you he had methanol poisoning, did you know the source of it?

A No.

Q Did you have anything to do with the source of it?

A No. <p256>

Q Had you knowingly, intentionally or in any way to your knowledge put any type of methanol substance in anything that Chuck had consumed?

A No.

Q Now, once the doctor said to you this is methanol poisoning, were you /// did you try to find out what it could have come from?

A Oh, yes.

Q What did you do?

A I went on the Internet because I didn't know what methanol was other than by its name that it was a form of alcohol. I believe the doctor may have mentioned some things, but then I was looking online because /// this is kind of in between being at the hospital and everything. I was looking online to see what it could be because they were mentioning solvents and paints and, you know, all kinds of things.

Q Before you did that, going online to see what was involved with methanol poisoning at the time that your husband was in the hospital, had you gone online any time before that in the past to look up methanol poisoning?

A No.

Q Had you gone online in May to look up methanol poisoning?

A No. <p257>

Q And did you find information on the Internet about methanol poisoning when you did, when you got on the Internet when your husband was in the hospital?

A Yeah. The search that they had as evidence looked exactly like what came up whenever I pulled up methanol poisoning.

Q And did you share some of that in an email with Chuck's mother, Ms. Fleming, at some point, some discussions of some of the things that you ///

A Yes.

Q And, again, that was well after /// at that point, well after his passing?

A (Indicating in the affirmative.)

Q Now, did there come a point where you went back to the hospital and some decisions had to be made?

A Well, on Tuesday they were still trying to get to /// once they knew what they were dealing with, they were trying to reverse it and try the dialysis to get this out of his blood and trying the ethanol infusion, and that was most of what was going on Tuesday all day and it wasn't really doing much good. On Wednesday morning before I got there, just whenever I had talked to doctor /// I believe it was Dr. Acker again and he had told me he thought we were dealing with poisoning here and I should get the police involved. And I didn't know how to do that. I was like, you know, you're <p258> asking me. So, I called a family friend of ours who is /// I believe he is a sergeant with Chesterfield County Police, Mr. Shott.

Q Mr. Shott?

A Seven-thirty in the morning, I called him and said he knew nothing of what was going on because I hadn't talked to him or his wife in the last couple of days. And I said, I need to

get the police involved, how do I do that. I know I don't just call up 911. So, he said he would make the contacts and everything for me and get the right people called.

So, when I got to the hospital later that morning, Chuck's condition was quite a bit worse. He was /// they had like a warming inflatable thing on him. And at some point, I believe, that morning they were saying they had done a CAT scan and that the CAT scan had revealed that he had suffered a major brain bleed. So, we were /// we were talking about /// on one hand they were talking about EEGs and, you know, whether or not he had any brain activity, but then they were saying that this brain bleed that he had suffered for some reason as a result of all this was not something that he could have survived anyway. So, they started talking about discontinuing life support. They were asking us and kind of telling us, you know. They wanted my permission, but they were saying that it was something that they had to do anyway. <p259>

Q You've used the term we several times. Who else was there? Who participated with you?

A His parents.

Q And they were there offering advice and suggestions?

A (Indicating in the affirmative.)

Q Ultimately it was a joint decision to remove him from ///

A Right. I kind of wanted to wait another day because there was this strange technicality with /// he was an organ donor and the Lifenet rules /// they had to have another EEG within so many hours, and it was going to be the next day before they could do that, in order to use his organs, which seemed, like, really weird. So, we talked

about it for a couple of hours, whether or not. They urged me to go ahead and give permission to do it because they didn't want to go through it another day.

Q And you did?

A (Indicating in the affirmative.)

Q The Commonwealth's Attorney would stipulate to some information about the insurance.

A (Indicating in the affirmative.)

Q What insurance did you know that you and your husband had?

A I knew that there was a policy that we were both on <p260> that I had, like, 30,000, I think there was something like 1,000 for each child, and then I thought it was like 250,000. That was the only thing that ever came to the house and it came on an annual basis, I think, or the first of the year or the anniversary date, which would have been in January anyway, I think. That was, you know, the only one I knew about. He had gotten rid of some others whenever he had gotten this one, because, you know.

Q There was /// there turned out to be a second policy, a \$150,000 policy. Did you know anything about that?

A Not until two weeks later when I finally went to Philip Morris to take care of all the paperwork because prior to that I just hadn't been able to deal with it, but I needed to take care of the medical insurance and everything because the end of the month was coming. And I sat down with Diane Fleshman, and she had the letter all typed up ready to mail to me outlining the benefits, and it had mentioned the \$150,000 policy in addition to the monthly benefits that wouldn't start for four years.

Q Were you aware of that monthly stipend?

A At some point, I was. I can't remember if I knew about it beforehand or not.

Q It would not take effect at his death, though, it wouldn't take effect for four yours down the road after his death? <p261>

A Right.

Q Chuck's income per year was \$70,000 some a year according to that document?

A About that.

Q And the monthly amount that you would receive as shown on that paper, do you remember what that was?

A I looked right after, I went back and looked.

Q It totaled up to something like \$18,000 a year?

A Right.

Q It wouldn't start until four years down the road?

A (Indicating in the affirmative.)

Q Not something you would benefit from immediately?

A No.

Q There came a point in time when the police asked you to come to the house and meet with them?

A Well, that /// backtracking, that Wednesday afternoon, that night Chuck passed away, the police had asked if I could meet them back at my house so they could look for items containing methanol. So, I met them back there. Detective Baker and I, we went through the garage and looked at things. The evidence techs weren't there yet. And I looked, you know, showed underneath the sink, any of the cleaning chemicals, everything we had. And while the evidence techs were taking things, she and I were talking in the living room. <p262>

Q And this /// She's testified that she came out on June 14th?

A Right.

Q Now, you had called Sergeant // I want to say Shott?

A Right.

Q And did he come to the hospital?

A Right.

Q And did he bring somebody that was head of crimes against persons?

A Right. That's who he told me that he would contact, that that was the right person to contact and he would do that. I don't recall if they were there when I got to the hospital or if they arrived shortly thereafter.

Q That was in response to your call?

A Right.

Q And then ultimately these other detectives who may well have worked in that same department took over; is that correct?

A Right.

Q And when you met with Detective Baker, Investigator Baker, did you hide anything from her?

A No.

Q Did you show her everything that you thought Chuck had had any association with? <p263>

A Yes.

Q And the creatine had already been taken to the hospital; is that correct?

A Yes, it was already at the hospital.

Q You told her about mixing creatine, you and Chuck had mixed it, you told her that?

A Right.

Q And did you show her any that remained in the refrigerator?

A I had told them about that he had taken some to work and I gave her the one that was still in the refrigerator.

Q Now, that was on June 14th?

A (Indicating in the affirmative.)

Q Did you know when you gave that to her it had any kind of adulteration, any kind of methanol or anything else in it other than the creatine?

A No. It wasn't until weeks later that they informed me of that.

Q Up until /// well, okay. Let's /// it was weeks later that you found out that it, in fact, had methanol in it? A (Indicating in the affirmative.)

Q The other Gatorades were there. Did you ever do anything with them? Did you dump any of them out? Did you /// <p264> or had they all been consumed by the time you found out there was any problem?

A I believe they had all been consumed, but whenever on Wednesday when we came back and I was showing them things, in addition to taking that one, they took like one of each flavor of the ones out in the garage. And I remember we were discussing that only five had been mixed out of there, but there were more than five gone. And, you know, I said, Well, I've been at the hospital, I'm sure the kids have been drinking these.

Q Did you all /// let me ask you this: At this point in time, did you take Meagan and yourself and anybody else in the house to go and have a blood test done?

A No, it wasn't until later.

Q Did you at some point do that?

A Yes.

Q And was that test /// were you tested for methanol?

A About a week or so later.

Q And Dr. McLeod did you and the boys?

A (Indicating in the affirmative.)

Q And Meagan went to the ///

A Pediatrician /// well, she had it done at Chippenham, but her pediatrician ordered it.

Q There was a point in time after Chuck's death that you wanted to make some inquiries relating to what might be <p265> on his emails; is that correct?

A Well, the emails, I had /// we had each other's passwords. I /// you know, at some point later on, I guess I went in there just to /// just /// you know, my mind was going a million directions, we're still trying to figure out what happened and why.

Q And did you try to find out things?

A Oh, yes.

Q Was there a time where you got any special software that allowed you to enter any programs that you had been blocked out of?

A I downloaded a program the last week in June that was a password cracking program because there was one disk that had password protected word /// protected word document on it.

Q And did you want to enter into that?

A It was something I had had from, you know, four and a half years previously when the incident with, you know, Rhonda that I just hung onto in case. And then I hadn't really thought that much about it until this came up and I wanted to see what was on it, if there was anything useful.

Q Did that lady, Rhonda, did she work at Philip Morris?

A Yes.

Q With Chuck? <p266>

A (Indicating in the affirmative.)

Q Now, let me ask you this: Your suspicions of his affair happened in 1996?

A Right, in the beginning of '96.

Q You all got past that?

A Right.

Q You bought a new home?

A (Indicating in the affirmative.)

Q Were you living happily?

A Yes.

Q To your knowledge was he involved with anybody else at that point in time?

A No.

Q Were you involved with anybody else?

A No.

Q Have you been since his passing?

A No, I haven't.

Q Now, did there come a point in time where the police began to focus their attention on somebody within the family and mention that to you?

A Probably a couple of weeks later they /// you know, I /// they had been in contact with me, asking questions all along, and it was probably shortly before the Fourth of July that it seemed like their questions got like they were focusing on someone in my family. <p267>

Q And who was that?

A Mainly my son.

Q Which son?

A Oh, Chuckie.

Q were you concerned about some /// the appearance of some things such as websites and such that Chuckie frequented?

A Yes, after /// on the day that Detective Baker and I were sitting in the living room discussing that they were going to come

and made an appointment for the next day or day after that to have someone examine the computer, because she was asking if the one there in the office, which she could see from the living room, was the one that we usually used to access the Internet. And I told her that it was and she was sitting there, like, just glaring because Chuckie happened to be on the computer at the time. And, you know, I became kind of concerned that they were /// I felt like it was witch-hunt, they were looking for something. And I was concerned because things already /// I could see where they could make a case against Chuckie just based on past things and I didn't want them to get any other ideas because he looked up these horror websites or Mutato or something, these message boards.

Q Did you think Chuck had done something to harm Chuck?

A No. I just /// no. <p268>

Q Did you think somebody in the house had done something to harm Chuck?

A No.

Q Do you know what happened to Chuck?

A No.

Q Do you know who the source of any of this was?

A No, I don't.

Q What did you do relating to the computer?

A Well, like I said, I thought /// I thought it was just a witch-hunt. And so I took the hard drive out and replaced it with another one and transferred the information over.

Q Did you do that with the thought that that computer had any evidence as to somebody causing Chuck harm?

A No. When Kathy had suggested later that her son had said something about tampering

with evidence or something, I said, Well, as far as I'm concerned, there is no evidence on here, it's just stuff that they could use to, perhaps, show my son in an unfavorable light.

Q To your knowledge was there anything else there that would have related in any form or fashion to this case other than the horror websites?

A Not that I could find and I had been looking, too.

Q You cooperated with the police on each occasion that you were asked to? <p269>

A Up until they started targeting my family, and then I was advised by an attorney that I didn't have to talk to them and neither did the boys. Up until then, I was telling them anything they needed to know and letting them have access to anything.

Q That counsel was not me?

A No, it wasn't.

Q That predated me. You heard Chuck say /// Chuckie, I'm sorry, say today that you were mixing Gatorade late in the evening when he came home?

A Uh-huh.

Q Do you remember any such thing?

A That's something we've talked about since then because that's not my recollection. I know Chuck went and got the four and set them here (indicating). And my recollection is that within a fairly reasonable time period after that, I mixed them. You know, he was there in the living room-kitchen area back and forth and I was hovering around the kitchen like I usually did in the evenings, you know, cleaning up after dinner and stuff.

The only possible explanation I have for that is like we were shaking them a lot,

you know, trying to /// I know /// remember taking them back out and shaking them and I'm sure Chuck did too because we wondered how long does this stuff take to dissolve, you know, how long does it have to. <p270> Then later reading either on the package or something else, I read that it wouldn't dissolve, that it said that it will never completely dissolve.

Q Had you realized that there was methanol and potential poison in that one bottle that was left in your refrigerator from Sunday evening or Monday morning until the police took it at your /// when you gave it to them, had you realized that had methanol in it, would you have left it there?

A Oh, no. I didn't know there was methanol in it until /// I'm not sure how long it was before the police informed me.

Q All the folks in your house would have had access to the refrigerator?

A (Indicating in the affirmative.)

Q Including Meagan?

A (Indicating in the affirmative.)

Q Including Jeffrey?

A (Indicating in the affirmative.) My parents were -staying there. They came in on Tuesday night right in the middle of the whole ordeal of Chuck being in the hospital.

MR. COOLEY: If you would, Ms. Fleming, answer any questions that the Commonwealth's Attorney or The Court might have.

THE COURT: Mr. Davenport, I think maybe I should <p271> give the jury a stretch break before we begin and let them refresh themselves.

(The jury left the courtroom and a recess was taken.)

THE COURT: All right, Sheriff, you can bring the jury in.

(The jury returned to the courtroom.)

THE COURT: All right, Mr. Von Schuch, you were crossing.

MR. VON SCHUCH: Thank you.

CROSS-EXAMINATION BY MR. VON SCHUCH:

Q Good afternoon, Ms. Fleming. Ms. Fleming, let me ask you first of all regarding your husband: There had been a problem, I guess, in the family insofar as the situation with Rhonda Quinn in '96 and I think you answered Mr. Cooley that you all had settled down now and you had bought a new house and things were relatively quiet in the family; is that correct?

A Uh-huh. <p272>

Q And so in terms of his situation or your relationship with him, you knew of no problems with your /// between him and you at this time? There was nothing wrong with your relationship, is that your testimony?

A That's correct.

Q He was, in fact, at this time starting a new bodybuilding program; is that correct?

A Yes.

Q And that's what the creatine was for?

A Right. It wasn't really new, he had the same exercises. He had been exercising, this is just something else he wanted to try.

Q Something else he wanted to try and do. And that you knew of no problems at his job or anything of that nature?

A None.

Q And he was content and happy with his work? In fact, I think he had just gotten a MBA, hadn't he, some years before?

A The previous fall.

Q The previous fall?

A (Indicating in the affirmative.)

Q So, you knew of nothing in his life, he seemed to be upbeat, there was nothing unusual in his life /// going on in his life that you were aware of; is that correct? <p273>

A That's correct.

Q I think he had talked to his father /// I guess you heard the testimony of his father as well this morning, that he had talked with him at least twice a week; is that correct?

A Not to my recollection. He may have spoken to his mother a couple of times, once or twice a week.

Q Okay. But he was in touch with his parents?

A Somewhat.

Q In short, there was nothing that was ever suggested to you that he was suicidal or would attempt to commit suicide or anything of that nature; isn't that correct?

A Not recently.

Q Not at the time that this occurred?

A That's correct.

Q Now, the other four people in the house were Meagan, who was approximately how old at the time?

A She was seven.

Q And that was the child that you and Charles had, Chuck had?

A Yes, she is.

Q Okay. And she was only seven years old at the time and you have absolutely no idea or suggestion that she had or was in any way

or could in any way be involved in this at all? <p274>

A No.

Q And that would /// the same thing would go for Jeffrey; is that correct?

A That's correct.

Q There were no problems between Chuck and Jeffrey that you were aware of?

A No.

Q Okay. Now, Chuckie was going to have to move out of the house?

A Yes.

Q You were aware of that?

A (Indicating in the affirmative.)

Q And that did not make you happy?

A I didn't ///

Q I mean, you weren't pleased with that?

A I didn't mind it.

Q You didn't mind it?

A (Indicating in the negative.)

Q He was how old at this time, 26?

A No, he's 26 now.

Q He was how old 24, 25?

A Twenty-four.

Q He was 24 years old. And it was Chuck who really gave the order that he wanted him out of the house, correct?

A Right. We talked about it and decided on /// that 275 he was never going to make the move if we didn't give him a deadline.

Q Okay. And that's /// and you were /// am I correct to understand that there was /// that he was learning to do his washing, that you were making him do those things to gear him up to moving outside the house?

A He had been doing that for a few months.

Q So, he is 24 years old, he had never really conquered the laundry thing?

A No. You know, it was just easier for me to do it.

Q It was /// you were concerned, were you not, that he would be able to sustain himself outside the home? He's got to pay rent, so forth, so on, maintain a car, do his own laundry, maintain a job.

A Well, he needed to find a better job. On his job then, it would have been really tough.

Q Okay. It was your preference that he remain in the home?

A Not indefinitely.

Q Well, he's there now.

A Well, he still hasn't found a better job.

Q And this is some --

A And he has been helping me out with rent.

Q /// almost two years later? I'm sorry?

A And he's been helping me out with rent. <p276>

Q Okay. But this is almost two years later and he's still in the home?

A Yes.

Q Is that correct?

A Yes, it is.

Q Reference to /// as you well know, there was a bottle that was found and confiscated by the police in your refrigerator?

A Yes.

Q Okay. You're aware that that bottle /// you are aware now that that bottle contained methanol poisoning?

A Yes, I am.

Q Okay. That that was one of the bottles that you and Chuck mixed on the Sunday night, correct?

A As far as I know.

Diane Fleming (Phillip Morris safety officer)

Q Okay. Therefore, knowing what you know now and the fact that it was located in your house and that the evidence is that it never went with him to work, that the only person or persons who could have placed methanol in that bottle had to have access to that bottle or your refrigerator?

A We're assuming he never took it to work.

Q Well, there is no evidence that he did. It was in the refrigerator. Isn't that where you found it?

A That's right, but I don't really recall if it was in there in that brief period between the time he left and <p277> when he came back.

Q Well, are you suggesting to this jury that he too} four bottles to work, drank part of one, left two there and brought this one home and put it in the refrigerator?

A I don't know.

Q Because you're a bright woman, obviously knowing all this, it has occurred to you that whoever put that poison in there might have been in the house; isn't that correct?

A Yes.

Q You had to have thought about?

A (Unintelligible) to me.

Q Now, insofar as the computer is concerned, do you recall Ms. Curry being at your house when Detective Baker came with the search warrant for the computer?

A No. We were in Williamsburg at the Pottery when they were trying /// my father-in-law reached me and said they were trying to reach us and to come back home.

Q All right. Well, you returned home?

A Right.

Q And Ms. Curry was with you?

80 ↑

A Right. Well, I dropped her off at her house first.

Q Are you telling me that Ms. Curry was not with you when Detective Baker was executing the search warrant on your home looking for the computer?

A I believe she was at her house. <p278>

Q Do you know that for a fact?

A I dropped her off there. I don't believe she came back to our house ///

Q Okay. So what you're telling ///

A /// until later on when we were talking about Cathy being sick.

Q So, it's your testimony /// it's your testimony that she was not present?

A That's not the way I recall it.

Q But you were present?

A Yes.

Q And Detective Baker asked you for all the computers and the hardware that you had in the house; isn't that correct?

A Uh-huh.

Q And you didn't tell her about the computer that you had given to Ms. Curry; isn't that correct?

A It wasn't a computer, it was just a hard drive.

Q The hard drive. You had not told /// you didn't tell Ms. Baker about the hard drive that you gave Ms. Curry?

A They just asked about the computers.

Q Isn't that correct? You did not tell her?

A Right.

Q Is there any particular reason why you didn't tell Ms. Curry, when you gave it to her to hold, that it would <p279> show Chuckie in a bad light and that's the reason you were giving it to her?

A I thought that we had had that discussion.

Diane Fleming (Phillip Morris safety officer)

Q Yes, but Ms. Curry seems to recall that what you told her is that it would put you in a bad light, making you look like a jealous wife.

A I think that conversation may have been about something else, I don't remember.

Q Do you deny making the statement to Ms. Curry that the reason why you gave her the computer was that it would make you look like a jealous wife?

A That wasn't /// I don't recall making that statement.

Q You don't recall making that statement to her. You certainly don't recall ever telling her that it was because Chuckie would be put in a bad light?

A I thought that we had that conversation.

Q That you had it doesn't bother me, it's what you said that concerns me and what I'm asking you is what you said. Did you tell Ms. Curry that you were giving her the computer because it would make Chuckie look /// it would put Chuckie in a bad light?

A I know we had the conversation that I felt it was a witch-hunt and that there was stuff that was inconsequential that could be used, you know. <p280>

Q My question was: Did you tell Ms. Curry that you were giving her the computer to hold because it would put Chuckie in a bad light? Did you tell her that?

A I thought I did.

Q You thought you did. Now, a search warrant was executed, you had given the computer to Ms. Curry, Ruth Baker did not find the search /// the tower?

A It was a hard drive, it wasn't a tower. It was a little (indicating).

Q Hard drive, did not find the hard drive because it was with Ms. Curry?

A That's correct.

Q Where is it now?

A I threw it out.

Q So, you retrieved it back from Ms. Curry; is that correct?

A (Indicating in the affirmative.)

Q And when did you do that?

A Somewhile later.

Q Somewhile later. And did you /// you did not take that to Detective Baker and say, Here, this is also part of the computer system that we had in our house at the time?

A No, I didn't.

Q You threw it out?

A Yes, I did. <p281>

Q So, we don't have that here today to know exactly what was on there, do we?

A No.

Q Now, when you first went to the hospital on the 12th and you were informed at that time, correct me if I'm wrong, but I think you indicated that the doctors were concerned that /// and explained to you that he had methanol?

A Not at first. It wasn't until the next day that the toxicology reports came back.

Q Okay. And when you /// that would have been the Tuesday?

A That's right.

Q Okay. On Tuesday when the toxicology reports came back, you then knew that he had methanol poisoning?

A That's correct.

Q And you raised the issue with him at that time about creatine and Gatorade; is that correct?

A We raised that issue in the emergency room as a possible cause of the sickness.

Q So, you were suspicious at that /// that would have been Monday?

A Right.

Q So, you were suspicious Monday that the Gatorade may have impacted his health, that that may have been where he got the methanol or that may have been the cause of some <p282> of this; is that correct?

A Not the Gatorade, the creatine.

Q The creatine. Well, you knew you had mixed the creatine into the Gatorade?

A That's correct.

Q Right. And there was still a bottle in the refrigerator?

A Uh-huh. Yeah.

Q And you were suspicious of it at that time?

A Not of it containing methanol.

Q So, you did not /// is that your explanation as to why you didn't remove it from the refrigerator?

A Never thought about it.

Q Mr. Cooley, in his opening statement, indicated that you were in a /// well, let me ask you this first: Mr. Cooley /// do you recall Mr. Cooley asking or discussing with the jury in making his opening statement that you were in a difficult position, that you either had to cover for Chuckie or take the blame yourself, words to that effect? Do you recall him making that suggestion to the jury?

A Yes.

Q Would you tell this jury if you knew Chuckie did it?

A I don't know that he did or didn't.

Q The question is: Would you tell them if you knew <p283> that he did?

A I don't know how to answer that because it's not the case. I don't know anything like that.

Q Would you take the blame for him?

A No.

Q So, you're really not in the position Mr. Cooley suggested to the jury, then, are you? And you have no idea how that methanol got in that Gatorade in your refrigerator?

A Not at all.

MR. VON SCHUCH: That's all the questions /// one other, I'm sorry.

Your Honor, Mr. Cooley has allowed me to do this at this time so I can sit down. This /// there is a stipulation that this is the bottle of empty Gatorade that was recovered by Detective Akers from the garbage can in the garage of Ms. Fleming's home. It was sent to the lab and was analyzed for fingerprints. Charles Lee Tanner or Chuckie Tanner's prints were sent as well as Diane Fleming's. There were two latent fingerprints, two fingerprints that were recovered from that bottle and they were consistent with Chuckie Tanner or Charles Lee Tanner. Here are the lab reports. I would offer the bottle as a Commonwealth's exhibit and the lab reports as a secondary or subsequent exhibit.

THE COURT: And there is no objection, Mr. Cooley? <p284>

MR. COOLEY: No objection.

THE COURT: The bottle will come in as Commonwealth's 13 and the lab report as Commonwealth's 14.

MR. COOLEY: Very briefly.

REDIRECT EXAMINATION BY MR. COOLEY:

Q Ms. Fleming, you said you called to the emergency room's attention that he had started taking that /// this creatine?

A That's correct.

Q At that point in time were you /// did you have any idea that he had methanol poisoning?

A No.

Q Were you telling them, I think that might have methanol in it?

A No.

Q You were just telling them you thought that's why he might be sick?

A That's why he might be sick.

Q And later you were asked to bring a great number of things to the hospital?

A Right.

Q Including the creatine. <p285>

A Right.

Q And anything else that he might have consumed like the alcohol.

A Right. I don't recall that he specifically asked for alcohol. That's /// it seems like they may have, that's why I brought the bourbon.

Q When you changed the hard drive ///

A Yes.

Q /// in this computer, was that done to protect yourself or was that done to protect Chuckie?

A To protect ///

MR. VON SCHUCH: Judge, again, I think that's been asked and answered and it's a leading question on top of that. I would object to it on that basis.

THE COURT: Nonleading, and it has been asked and answered, Mr. Cooley.

MR. COOLEY: All right, Your Honor. I won't ask it again. I don't have anything further. Thank you.

THE COURT: Thank you very much, ma'am. You may return to counsel table.

(The defendant resumed her seat at counsel table.)

MR. COOLEY: Judge, we would call Trish Jones if we could.<p286>

PATRICIA A. JONES, called by the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COOLEY:

Q Good afternoon to you, Ms. Jones. Would you tell the ladies and gentlemen of the jury, please, your full name and your employment?

A Patricia Ann Jones. I work at Food Lion.

Q And do you work at a particular store?

A Right now I work at the Genito store.

Q And you've moved around some as you're needed by the store; is that correct?

A Yes.

Q And what is your responsibility at the store?

A I'm deli manager.

Q And in that capacity, did you have occasion at some point to work with a Mr. Chuckie Tanner?

A Yes.

Q And were you working with him during the middle of June in the year of 2000?

A Yes, I was.

Q And can you tell the ladies and gentlemen of the jury, you became aware that his stepfather /// you ultimately <p287> became aware that he died; is that correct?

A Right.

Q And before that, did you become aware that he was sick?

A That his stepfather was sick?

Q Yes.

A No.

Q How about on June 12th, did you have any conversation with Chuckie?

A Yes.

Q Can you tell the ladies and gentlemen what Chuckie said to you?

A He had told me that his stepfather had died and that he had thought that he committed suicide. And I told him /// asked him did he need some more time off, you know, because he had died and he said no, that he was fine.

Q The week before he got sick and died, was there any difference in the way that Chuckie Tanner behaved at work?

A He had /// he had a temper. He was, you know, a little bit /// he was moody. He seemed, I don't know, different things. If you asked him to do certain things, he was /// he would get upset.

Q Were there any incidents involving brooms?

A Yes. I asked him to sweep the floor. It was at night, I was working with him at night and he slammed the <p288> broom down on the floor, he didn't want to do it, but it's part of his job.

MR. COOLEY: Ms. Jones, if you would, answer any questions that Commonwealth or The Court might have for you.

THE COURT: Cross, counselor?

MR. DAVENPORT: Yes, ma'am. Thank you.

CROSS-EXAMINATION BY MR. DAVENPORT:

Q Ms. Jones, how many times a week would you see Mr. Tanner?

A How many times would I see him? Probably three to four times a week.

Q You worked at lots of different stores?

A Well, no, I worked there at that store for a while, at Deer Run.

Q And let me get this straight. How do you remember the date, June the 12th, 2000?

A It just /// it was in my head. I mean, he's the kind of person you don't forget.

Q But, I mean, I'm not asking you about the person, I'm asking you about the date.

A I just remember it.

Q You just remember it? <p289>

A Uh-huh.

Q Have you talked to Mr. Cooley about this before you came here?

A No.

Q This is the first time you saw Mr. Cooley?

A That's the first time I met him.

Q Did you talk to him over the phone?

A I talked to him to ask him what time to be here.

Q Well, if you will, can you give me some understanding of how you remember June the 12th? Do you remember what date /// what day of the week that was?

A No, I'm not sure.

Q But June 12th sticks in your mind?

A Yeah.

MR. DAVENPORT: That's all I have, Your Honor.

THE COURT: Redirect.

MR. COOLEY: No, Your Honor. Can she be excused?

THE COURT: Yes, ma'am, you may be excused. Thank you. (The witness left the stand.)

THE COURT: Next witness.

MR. COOLEY: Doug Nichols. <p290>

DOUGLAS A. NICHOLS, called by the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COOLEY:

Q Mr. Nichols, good afternoon to you. Would you tell the ladies and gentlemen of the jury, please, your name and your profession?

A My name is Doug Nichols. I'm a construction manager.

Q And did you know Mr. Chuck Fleming?

A Yes, sir.

Q How long did you know Chuck?

A Probably eight years, nine years.

Q Eight years to nine years before his passing?

A Yes, sir.

Q Do you know the young lady seated to my right?

A Yes, sir.

Q And how long have you known Diane Fleming?

A Probably the same amount of time.

Q Are you familiar with her reputation in the community where you know her?

A Yes, sir.

Q And are you familiar with that reputation as to truthfulness? <p291>

A Yes, sir.

Q And what is that reputation?

A I would think it was excellent.

Q Are you familiar with her reputation as to peacefulness and tranquility?

A I believe, again, it would be very good.

Q And are you familiar with her reputation for general character, good or bad?

A Excellent also.

MR. COOLEY: All right, sir. Mr. Nichols, answer any questions that The Court or the Commonwealth might have for you.

CROSS-EXAMINATION BY MR. DAVENPORT:

Q Mr. Nichols, you worked with Charles Tanner for eight years?

A No, I knew him.

Q Knew him for eight years?

A Yes, sir.

Q And how many times a week would you see him?

A We played basketball together on the church basketball team. So, during the winter, I would see him once a week.

Q Did you go to church with him? <p292>

A Yes.

Q And you all went to the Lutheran Church of Our Savior?

A Yes.

Q Now, you also knew Diane, she went to church there and was a Sunday school teacher, correct?

A Yes.

Q And for the general reputation, general character, peace and tranquility, his reputation /// or her reputation for truth, veracity, those kind of things, have you ever talked to anybody about her character?

A A few people.

Q All right. And in talking to these people, did you discuss whether or not she had secreted evidence in a criminal trial?

A No, sir, I did not talk about that.

Q If you had discussed that and you knew that to be a fact, would that change your idea of her?

A If I knew ///

Q Knew that she had.

MR. COOLEY: Again, Judge, it's not his opinion that's at issue here, it's the reputation

MR. DAVENPORT: Your Honor, it's part of the information that would be processed to come to the statement that he gave Mr. Cooley that he knew this, he <p293> knew her general reputation for truth and veracity, for character and for peace and tranquility. And what I'm asking him is if this was added into it, would that change his answers to Mr. Cooley.

THE COURT: I think the question that was asked of this witness was would it change his opinion and I think Mr. Cooley's objection that it's the reputation of the community that is relevant is well-placed. So, therefore, I'm sustaining the objection. MR.

DAVENPORT: Thank you, Judge. That's all I have.

THE COURT: Next witness /// excuse me.

MR. COOLEY: If I can very briefly, Judge.

REDIRECT EXAMINATION BY MR. COOLEY:

Q Mr. Davenport asked you, he used the name Chuck Tanner, do you know Chuck Tanner

to be somebody different than Chuck Fleming?

A Yes. Chuck Fleming is Diane's husband.

Q That's who you've known for ten years?

A Yes.

Q And you've played basketball and that sort of thing?

A Yes, with /// I'm sorry /// Chuck Fleming.
<p294>

MR. COOLEY: That's all the questions. I just wanted to clear that up.

THE COURT: May he be excused?

MR. COOLEY: Yes.

THE COURT: Thank you, sir. You may be excused.

(The witness left the stand.)

THE COURT: Your next witness.

MR. COOLEY: Yes, Your Honor. Jackie Fleming /// I'm sorry, Jackie Meeks. I beg your pardon. Judge, if it assists, I have three additional witnesses that are left.

THE COURT: Are they all character?

MR. COOLEY: Two are character and one is more than character, but all three are very brief.

JACQUELINE N. MEEKS, called by the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COOLEY:

Q Good afternoon to you, Ms. Meeks.

A Good afternoon.

Q Ms. Meeks, tell the ladies and gentlemen of the <p295> jury, please, your full name and your profession.

A My name is Jacqueline Norman Meeks and I am a preschool teacher at the Giving Tree Preschool.

Q Do you know the young lady seated to my left?

A Yes, I do.

Q How long have you known her?

A Probably 10 to 12 years.

Q And how do you know her, in what community?

A I first met Diane when she joined our church. We have children that are the same age.

Q And have you had any other dealings with her, any other ///

A We live in the same neighborhood.

Q Okay.

A And both our girls go to the same dance school.

Q Now, are you familiar with her reputation in the community where you know her?

A Yes, I am.

Q Are you familiar with that reputation as to truthfulness?

A Yes.

Q And what is that reputation?

A Diane is seen by the people in the neighborhood and the women that I talk with at the dance school in very good faith. They see her as a devoted mother. <p296>

Q I know you want to give me some answers, but I am required to limit you. In terms of her reputation as to truthfulness ///

A Uh-huh.

Q /// is it good?

A Yes, it is.

Q And are you familiar with her reputation as to peacefulness?

A Yes.

Q And in a one or two-word answer, can you tell us what that is? Is it good? Is it bad?

A I would think it is very good.

Q And are you familiar with her reputation for general character?

A Yes.

Q And what is that reputation?

A I think it would be excellent. MR. COOLEY: Okay. Answer any questions that The Court or the Commonwealth might have.

CROSS-EXAMINATION BY MR. DAVENPORT:

Q Ms. Meeks, in answering Mr. Cooley's questions about you're being aware of her reputation in the community ///

A Uh-huh. <p297>

Q /// did you speak to others or talk to folks so that you could answer his questions?

A Yes, I did.

Q In those discussions, did it ever come up that Ms. Fleming had secreted or hid evidence in a criminal case?

A No.

MR. DAVENPORT: That's all I have, Your Honor.

THE COURT: Thank you. May this witness be excused?

MR. COOLEY: If she could.

THE COURT: Ma'am, you may be excused. Thank you.

(The witness left the stand.)

MR. COOLEY: Gina Morris.

REGINA A. MORRIS, called by the defendant,
first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COOLEY:

Q Good afternoon to you, Ms. Morris.

A Hello.

Q Would you tell the ladies and gentlemen of
the jury, please, your full name and your
profession? <p298>

A Regina Ann Morris. I'm the store manager of
Winn-Dixie on Genito Road.

Q And do you know a Chuckie Tanner?

A Yes, sir.

Q Can you tell the ladies and gentlemen of the
jury when and how you came to know him?

A Chuck worked at the store that I took over
and he had been there, he had been
employed there for a while. Chuck had
worked there for a long time. He talked to
me a lot about issues. I had let him come to
my house because I knew there were some
problems. There were certain /// one time
he couldn't go home or something, so he
came to my house. And then there was an
issue at work that one of the girls accused
Chuck of sexual harassment, so I had to
bring Chuck in the office and talk to him
about that issue. And I told him to not to
mess with the girls and that I had to call our
corporate office then. And during this time
right after that, Chuck had told the kids in
the parking lot that he was going to have
to ///

MR. DAVENPORT: Your Honor, that's /// I
object to what he told the kids in the
parking lot.

THE COURT: Sustained.

Q Just, if you would, direct what was said to
you.

A I was told that Chuck was planning to ///

MR. DAVENPORT: Your Honor, my objection
would be <p299> anything that was told to
her.

THE COURT: Rephrase it or ask it again. You
can't tell him anything someone else told
you.

MR. COOLEY: Judge, if I can, I don't want to
argue with The Court's ruling. This is an
area that Mr. Tanner acknowledged that he
had, in fact, made the statement, so I don't
think we're at issue over it. I don't think
we're trying to impeach him at this point,
just bring her to a point.

THE COURT: All right.

MR. DAVENPORT: Well, Your Honor, I think
that he has to ask the exact.

MR. COOLEY: Well, I'm not trying to impeach
him, he admitted this.

MR. DAVENPORT: All right.

Q In response /// don't tell us what was said to
you by other folks /// what did you do
relating to Chuck Tanner?

A I called our security office in and they
separated me from him because they were
scared of what he would do to me.

Q Did you at some point have any conversation
relating to Chuckie with Ms. Fleming or
with Chuckie or his father, Chuck Fleming?

A Yes, sir. The police department was called
because Chuck had threatened to kill ///
<p300>

Q Well, don't tell us that.

A Okay.

Q The police department was called. What
happened?

A The police department was called after our
security had /// had asked Chuck to leave
the building and not come back. I called
Diane because I was worried what would
happen concerning the situation. We were
scared /// I was scared maybe he would do
something to himself.

Q And did you /// and was there a conversation
in which Chuck Fleming, Chuckie's
father //

A In the background when I was talking to
Diane, Chuck Fleming ///

MR. DAVENPORT: Your Honor, anything in
the background and anything that Ms.
Fleming might have said to her is hearsay.

THE WITNESS: No, I heard him ///

MR. VON SCHUCH: Judge, can we approach
the bench?

THE COURT: Yes. Wait just a minute, please.

(Conference at the bench without the
hearing of the jury, as follows:)

MR. VON SCHUCH: Your Honor, the
Commonwealth would ask that this entire
line of question and answer of this <p301>
witness be excluded and that the jury be
told to disregard it. It's totally irrelevant.
Mr. Cooley said the reason he called her
was to impeach Mr. Tanner about the issue
of Mr. Tanner threatened to kill someone.
Mr. Tanner admitted that. If he admits it,
there is no impeachment of it. What is
available /// what is the relevance of what
happened at the 7-Eleven to Chuckie
Tanner in this case?

THE COURT: What is the relevance?

MR. COOLEY: It was not to impeach him.

MR. VON SCHUCH: It would be hearsay.

MR. COOLEY: If they're of the assumption /// say they're right. If their objection is that it's not impeachment, it isn't impeachment because he has already acknowledged it. It's corroborative of what he said and he also acknowledged that his father had told him not to threaten /// he was tired of his threatening to kill people.

THE COURT: But it's hearsay, Mr. Cooley.

MR. COOLEY: Not if they make the right objection, I would agree.

MR. VON SCHUCH: In terms of corroborative, there is no, you know, that may /// that's somehow indicative we impeached Chuckie Tanner's credibility. I don't think it's impeached. He admitted it. It's not <p302> relevant. It's not admissible. I'm asking The Judge to instruct the jury to disregard the whole thing.

MR. COOLEY: It is going to violent demeanor, capable of violent acts, something that is admissible, that is worthy of consideration, relevant, probative of the issue before them.

THE COURT: It seems to me that if Mr. Tanner denied it, you would probably /// it would stand for impeachment. Mr. Tanner never

denied it, he admitted to it. There is no exception to the hearsay rule that allows it in as corroborative with. It is hearsay.

MR. VON SCHUCH: I would ask The Court to strike what she said in evidence already.

MR. COOLEY: I disagree with that. If they had a motion /// what she's testified to is accurate. It's not inadmissible in terms of not being relevant, not being probative. And it is hearsay and the objection is hearsay, The Court sustained it, I won't ask anything further. That doesn't mean that what's already been testified to is strikeable.

MR. VON SCHUCH: The whole thing is strikeable, not for impeachment, as Mr. Cooley says, and cannot be /// it has no relevance. You're not allowed to bring in individual acts against a witness of bad character before a jury. He is a witness in the case and this is <p303> not relevant and admissible under any theory of law.

THE COURT: I think if the objection is the relevancy, it would have been properly sustained, but I think, quite frankly, telling the jury to ignore it is just emphasizing ///

MR. VON SCHUCH: Take a chance.

THE COURT: I don't think you can at this point. And if I tell the jury to ignore it, it

just draws attention to it. If you want to me to tell them to ignore it ///

MR. DAVENPORT: I do, Judge.

THE COURT: I'll tell the jury to ignore hearsay with regards to what someone told someone in the parking lot.

MR. COOLEY: I agree and I won't ask anything further.

(Thereupon, the following proceedings continued within the hearing of the jury.)

THE COURT: Ladies and gentlemen, I believe Mr. Cooley has concluded his examination of this witness. There was a statement which came in over objection with regards to a statement, that this witness testified to, allegedly said by Mr. Tanner in a parking <p304> lot to some other folks that will be stricken from the record. So, you are to disregard any statement that he may have made to someone else in the parking lot.

MR. COOLEY: Judge, we'd ask that she be excused at this time.

THE COURT: The witness may be excused. Thank you.

(The witness left the stand.)

MR. COOLEY: And our last witness, Judge, is Ms. Shawnee Hansen.

THE COURT: Ms. Hansen.

SHAWNEE HANSEN, called by the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COOLEY:

Q Good afternoon to you, Ms. Hansen. Would you tell the ladies and gentlemen, please, your full name and your profession?

A My name is Shawnee Hansen. I'm the director of Richmond Friends of the Homeless.

Q And do you know the young lady seated to my right, Diane Fleming? <p305>

A Yes, I do.

Q How long have you known her?

A About four years.

Q And in what community and what capacity have you come to know her?

A Well, Diane comes down twice a month as a volunteer at our lunch program and helps prepare the food for the homeless and volunteers in different ways.

Q Do you know her from socializing as well?

A Yes.

Q And how long altogether have you known her?

A About four years, I think.

Q Are you familiar with her reputation in the community for truthfulness?

A Yes.

Q And what is that reputation in a one or two-word answer?

A A-plus.

Q And what is /// are you familiar with her reputation as to peacefulness?

A Yes.

Q And what is that reputation?

A A-plus.

Q And are you familiar with her reputation as to general character? <p306>

A Yes.

Q And what is that reputation?

A Excellent.

MR. COOLEY: Thank you very much. Answer any questions that The Court or the Commonwealth might have.

CROSS-EXAMINATION BY MR. DAVENPORT:

Q Good afternoon, Ms. Hansen.

A Hello.

Q You have known Ms. Fleming for how many years?

A About four years.

Q All right. And during that time a couple of times a month, she comes down to work with you?

A Yes.

Q Other than those couple of times a month, do you see her?

A Yes.

Q Where do you see her?

A Well, we maybe go to the movies or out to dinner.

Q So, you see her socially also?

A Yes.

Q The community of folks that Mr. Cooley asked you about in the community you know her reputation for truthfulness, have you talked to other folks about her as far <p307> as her character, her truthfulness, her veracity, her general character?

A Uh-huh.

Q And in those conversations with other folks, has the subject ever Come up that she has secreted evidence in a criminal trial?

A No.

Q Ever?

A No.

Q Thank you very much.

A Uh-huh.

THE COURT: May the witness be excused?

MR. COOLEY: I would ask that she be, Judge.

THE COURT: Thank you, ma'am. You may be excused.

(The witness left the stand.)

MR. COOLEY: Judge, we have four additional witnesses that were scheduled for tomorrow morning.

THE COURT: Yes.

MR. COOLEY: I know that the excitement level of these character witnesses will be disappointing, but I think that we will rest rather than make them come and continue the case. So, it is at this time the defense would rest. <p308>

THE COURT: All right. Any rebuttal from the Commonwealth, gentlemen?

MR. DAVENPORT: No, ma'am.

THE COURT: All right.

MR. COOLEY: There would be a motion, Your Honor.

THE COURT: All right. Sheriff, would you take the jury out, please.

(The jury left the courtroom.)

MR. COOLEY: Your Honor, respectfully, I am going to have a motion to strike as to both counts. And, of course, I need not remind The Court the burden of proof is

substantially different now than it was when I made my motion to strike at the conclusion of the Commonwealth's evidence. We are now at the conclusion of all the evidence and the burden is whether the Commonwealth's case has been proven beyond a reasonable doubt and whether, as a matter of law, This Court can allow the jury to go beyond where we are at this stage.

The Commonwealth's evidence did not establish that Ms. Fleming was an actor in the death of Chuck Fleming. The defense's case has established that she is a person of high character, a person who has not had any prior criminal record and she has testified that she took no <p309> role in this, did not know about it, and the Commonwealth's evidence just does nothing to refute that.

There is not one scintilla of evidence that's been produced in the Commonwealth's case nor elicited on cross-examination that changes the posture of this case in any form or fashion. The Commonwealth has the burden to carry its case beyond a reasonable doubt. And in this case, I think you /// look, everybody would agree that everybody in that house has to be under some degree of suspicion and I would waive the seven year old. I think we can agree that the seven year old had no role in this. But everybody beyond her, there has got to be at least some suspicion that they could have played a role in this. And certainly there is not just suspicion, not just probability, but, frankly, close to probably proof beyond a reasonable doubt as to Chuckie Tanner being the more likely actor in this case.

But there is certainly not /// the instruction to the jury and the law is that

suspicion, no matter how strong, is not sufficient, that even probability of guilt is not sufficient. And in this case, the Commonwealth's evidence has not even gotten above suspicion. It hasn't gotten to strong suspicion, it certainly hasn't gotten to probability. <p310>

They have no evidence that shows that Diane Fleming did one thing that contributed to the death of her husband. They've got ample evidence that she did much to try to save him, that she did everything she could by cooperating with the police that they would have had no thought of securing had she not told them about the creatine.

Another thing of interest at this point, Judge, is that the creatine itself was produced, delivered to the hospital, and, for all we know, is fraught and full of methanol. And not one /// we don't know anything about that. We know it was produced by her and delivered to the hospital. There is not one bit of evidence that tells us what result might have ever come out had they checked the /// that creatine.

So, we have zero evidence that establishes that Chuck died, number one /// even the Commonwealth concedes that the /// whatever was in the drinks, whatever was in this Gatorade, did not kill him. It may have been something that contributed, but certainly the quantity is not sufficient to have killed him. And there is no evidence that the original drink that he drank in its entirety had any methanol in it. And there is no evidence that the methanol wasn't fraught with that /// excuse me, that the creatine wasn't fraught with <p311> methanol.

So, there is no evidence at this point, Judge, and for the Commonwealth's evidence to carry beyond this, it is a very different burden. I respectfully urge The Court to strike the Commonwealth's evidence at this point as to both counts.

THE COURT: Counsel.

MR. DAVENPORT: The evidence that the Commonwealth has produced has brought about a question for the jury to answer. Insofar as the creatine in the /// the methanol in the Gatorade is concerned, if you remember from the testimony of Diane Fleming, she was concerned about the creatine or at least she said concerned about creatine and Gatorade on June the 12th while she was at the hospital, but she does nothing to take that bottle of creatine and methanol /// creatine and Gatorade out of the refrigerator and take it, give it to the police. She does nothing about it until sometime later.

Additionally, as far as the perusal of the computer is concerned, the May the 15th date, there is evidence that they cannot tell that that was the date, but they can't tell that it wasn't the date. It raises a question for the jury as to when that inquiry was done on the computer. She had access to the computer. She had the password to the computer. <p312>

Insofar as her testimony concerning her hiding evidence in this particular case, I think it's pretty clear that she has told one story here and told her best friend some other story. The story she told her best friend Diane /// Kathy Curry was that she was putting it in her house because it might put her in a bad light. The testimony that she gave here today and she'd like you to believe is that she was trying to protect her

son. Your Honor, these are questions that the jury can consider and the jury can ask.

As far as suicide is concerned, through all the witnesses and through Ms. Fleming, we've eliminated suicide. We eliminated Meagan. We've eliminated Jeff. And as far as Chuckie is concerned, Your Honor, he was not home at the time when Chuck was there mixing the Gatorade with Diane and then Chuck leaves to go play basketball and comes back and ingests that one bottle. Now, the jury could consider that and consider that during the time he was playing basketball, she had spiked that with methanol. She has the opportunity to do these things. She has a pharmacy background. She has knowledge of these substances on the body.

And the questions that have been raised by the Commonwealth in all of the evidence that we have submitted to This Court are questions that the jury can <p313> properly consider. Your Honor, we have gone past our burden at this point and I would ask you to overrule the motion to strike and let the jury decide this case.

THE COURT: Mr. Cooley.

MR. COOLEY: Very briefly, Judge. This is a circumstantial case and the law is clear that the Commonwealth can't just come in and produce a theory by which a jury or judge could think that she did it. That's not enough. They've got to exclude every reasonable theory by which she could be innocent and they haven't even come close to that. They've created a theory by which you could think, well, she could have done it. I'll concede that. But they certainly have not excluded every reasonable theory by which she would be innocent.

They have not excluded Chuckie Tanner. And despite what they say, particularly with the enhanced quality of methanol in the open container at work and the availability of methanol at work, they have not excluded that it could have occurred at work. He is coming back and forth from work where there is methanol accessible. Respectfully, Judge, they have not excluded every reasonable theory.

And as a matter of law, it is not a choice for the jury to make. It's a jury question if it wasn't a <p314> circumstantial case, but when it's a circumstantial case, as a matter of law, This Court has to find that they have excluded every other reasonable theory and I just don't believe this evidence supports that.

THE COURT: Counsel, I'm going to reserve ruling on the motion to strike and allow the case to go to the jury. Do you want to submit it to them tonight or bring them back in the morning?

MR. DAVENPORT: Your Honor, we haven't exchanged jury instructions and gotten everybody /// it would probably be a better course of action for us to maybe meet here a little while before the jury comes back tomorrow and get that out of the way and then argue the case.

THE COURT: All right.

MR. COOLEY: I agree, Your Honor.

THE COURT: Sheriff, if you would bring the jury out and I will retire them for the night.

(The jury returned to the courtroom.)

THE COURT: Is that still the plan, gentlemen?

MR. DAVENPORT: Yes, Your Honor, it is.

THE COURT: Ladies and gentlemen of the jury, we are going to take a recess for the night and we're going <p315> to bring you back tomorrow morning at 9:00. I will remind you that the case has not been turned over to you for your deliberations, and so even if two of you walk out of the building together, please don't begin to discuss the case. Don't listen to the television or listen to the news or read the newspaper or anything about any accounts of the case. And come back tomorrow prepared to deliberate on the evidence, please.

If you need assistance getting to your cars, one of the sheriff's deputies are outside waiting to assist you to your car, but please don't discuss the case with anyone prior to you returning in the morning or read anything about it. Thank you very much and have a good evening. If you'll come back, be here at nine o'clock, one of the sheriff's deputies will put you back in the jury room.

(The jury was excused for the day, after which the following proceedings were had before The Court in this matter.)

THE COURT: Counsel, if you all would put together instructions either tonight or first thing in the morning and if I can have them at 8:45 tomorrow morning to review them before we bring the jury back. <p316>

MR. DAVENPORT: Yes, ma'am. We will.

MR. COOLEY: That's fine, Your Honor. Thank you for your patience with us today.

THE COURT: Thank you all. Court will be in recess.

(The trial recessed at 5:44 p.m., to continue at 8:45 a.m. February 20, 2002.)

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IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

CERTIFICATE OF COURT REPORTER

I, Lori McCain Jones, hereby certify that I, having been duly sworn, was the Court Reporter in the Circuit Court of the County of Chesterfield, Virginia, on February 19, 2002, at the time set out in the caption above; further, that the foregoing is a true and accurate record of the first day of trial herein.

Witness my hand this 9th day of June 2002. I

Lori McCain Jones

My commission expires: January 31, 2004

Received & Filed

Chesterfield Circuit Court,

Judy L Worthington, Clerk

Teste: 6-13-02

B. Herrmoann, deputy clerk

COMMONWEALTH OF VIRGINIA

v.

DIANE FLEMING

CR01F01484-01,02

February 20, 2002

Volume Two of the testimony and other incidents in the above, when heard before The Honorable Cleo E. Powell Judge, and a jury, beginning at 9:15 a.m.

<p318>

Filed Mar 17 2008

U.S. Court of Appeals

Fourth Circuit

VIRGINIA:

----- **End Day One** -----
----- **Begin Day Two** -----

[Day 2 links and more headings are on [page 2](#)]

<p319>

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I N D E X, Day 2

===== SENTENCING PHASE =====

DIRECT

COMMONWEALTH'S EVIDENCE

CHARLOTTE P. FLEMING 97<378>

DEFENDANT'S EVIDENCE

MARCHIA L. SWANSON 99<386>

SHAWNEE HANSEN 100<388>

BETTY P. RICKMOND 101<391>

JACQUELINE N. MEEKS 101<394>

----- *Instructions to Jury by Judge Cleo Powell* -----

<p320>

(The defendant was personally present, together with her counsel.)

THE COURT: Good morning, ladies and gentlemen. I have the instructions. I've marked and numbered them and I believe we're ready for the jury.

MR. DAVENPORT: Yes, ma'am.

(The jury entered the courtroom.)

THE COURT: Good morning, ladies and gentlemen. Let the record reflect that all twelve of the jurors are back and seated in the jury box.

Ladies and gentlemen, we are at that stage of the trial where I will now read to you the law that you are to apply to the facts of the case as you find the facts once you begin to deliberate. I will read them to you. I'll ask that /// you will have them with you when you go into the jury room, but I will ask that you listen to me as I read them to you because I think they will help you to develop a framework in which you will then fit the closing arguments that the attorneys will make to you and to begin your thought processes. So, I will read these to you.

Once I've read these to you, the attorneys will <p321> come to you with their closing arguments. As you saw yesterday, the Commonwealth will come first and then defense counsel and then the Commonwealth will have an opportunity to reserve time to address you one final time before you begin your deliberations. Once they've made their closing arguments, I will then give you just a few suggestions with regard to how your deliberations should proceed and then you will begin to

deliberate on the case. These are the instructions of law.

The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt.

This does not require proof beyond all possible doubt nor is the Commonwealth required to disprove every conceivable circumstance of innocence; however, suspicion or probability of guilt is not enough for a conviction. There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all <p322> the evidence in the case.

You are the judges of the facts, the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witness on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and if any have been shown, their prior inconsistent statements or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in this case, then you may accept or discard all or part of the testimony of the

witness as you think proper. You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

The fact that the defendant has been indicted by a grand jury is not evidence against her and you should not consider it.

You must not consider any matter that was rejected or stricken by The Court. It is not evidence and should <p323> be disregarded.

It is permissible to infer that every person intends the natural and probable consequences of his or her acts.

It is not necessary that each element of the offense be proved by direct evidence, for an element may also be proved by circumstantial evidence. You may convict the defendant on circumstantial evidence alone or on circumstantial evidence combined with other evidence if you believe from all the evidence that the defendant is guilty beyond a reasonable doubt.

When the Commonwealth relies upon circumstantial evidence, the circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt. The evidence as a whole must exclude every reasonable theory of innocence.

If you believe from the evidence that a witness previously made a statement inconsistent with his testimony at trial, the only purpose for which that statement may be considered by you is its bearing on the

Instructions to Jury by Judge Cleo Powell

witness' credibility. It is not evidence that what the witness previously said is true.

The defendant, Diane Fleming, is charged with the <p324> crime of adulteration of a substance with the intent to kill or injure an individual who ingests, inhales or uses such substance. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime: That the defendant adulterated or caused to be adulterated any food, drink, prescription or over-the-counter medicine, cosmetic or other substance, and that the adulteration was with the intent to commit murder or injure the individual ingesting or inhaling or using such substance.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the offense, then you shall find the defendant not guilty.

The defendant is charged with the crime of first degree murder. The Commonwealth must prove beyond a

reasonable doubt each of the following elements of that crime: That the defendant killed Charles Linwood Fleming, Jr., and that the killing was malicious, and <p325> that the killing was willful, deliberate and premeditated and occurred by poison.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty of first degree murder, but you shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first two elements of the offense as charged, but that the killing was not willful, deliberate and premeditated, then you shall find the defendant guilty of second degree murder, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above offenses, then you shall find the defendant not guilty.

Willful, deliberate and premeditated means a specific intent to kill adopted at some time before the killing, but which

need not exist for any particular length of time.

You have been instructed on more than one grade of homicide, and if you have a reasonable doubt as to the <p326> grade of the offense, then you must resolve that doubt in favor of the defendant and find her guilty of the lesser offense. Of course, if you have a reasonable doubt as to whether he is guilty /// of course, that should be she /// of first degree murder or second degree murder, you shall find her guilty of second degree murder. If you have a reasonable doubt as to whether she is guilty at all, you shall find her not guilty.

Along with the instructions, ladies and gentlemen, you will have two verdict forms. The verdict forms are fairly self-explanatory. While you probably cannot see them from here, you will see a finding and a signature line or /// a first finding would be one of guilty, the second finding would be one of not guilty, depending on your verdict. Then you would sign, the foreperson would sign on the line at the appropriate verdict. And you will be able to see this more closely when you take it back to the jury room.

Those are the /// that is the law that you are to apply to the facts as you find them. The attorneys will now come to you with their closing arguments. I will ask that you turn your attention to them for their closings.

MR. VON SCHUCH: May it please The Court, good morning ladies and gentlemen. As The Court told you <p327> when you were seated earlier, what we are going to have the opportunity to do is make to you what is a closing argument. You've now been given the law, and you've sat here and heard the evidence from myself for the Commonwealth as well as Mr. Davenport and now we want to give you an idea of how to apply the law to the facts and come up with some solution. Mr. Cooley will have that same right and that same opportunity. This is not California, so I don't anticipate that this will take more idea been that than an hour or so, but we do want to give you some as to how this should be resolved.

First of all, and I know it is something that has talked about since you were first seated here, and is the instruction dealing with the burden of proof and the defendant's presumption of innocence. The burden of proof is the yardstick that you use to measure the evidence by when you're trying to draw some conclusions about what happened here. What it requires is that you find beyond a reasonable doubt each of the elements of those offenses.

Now, you say to me, What is reasonable doubt. Actually, there was an old instruction that took about two-and-a-half pages to explain reasonable doubt. I think it can be put this way; applying your common sense to what you've heard of the testimony and from the <p328> witness stand, do you believe Ms. Fleming is guilty of poisoning those drinks. If you do, then we have met our burden beyond a reasonable doubt. If applying your common sense to what you heard, you do not believe that, then we have not met our burden. And

I think that's the easiest way to go about it. What we're asking for in this case, right from the beginning, right through the end, is simply an application of your walking and talking common sense.

In that same instruction is the defendant's presumption of innocence and this is not something that we take lightly. Every criminal defendant in the past 250-year history of the Constitution has been afforded that right. It is in the same instruction as our burden of proof and they're related in this way. At such time as you, applying your common sense to what you have heard from the evidence, believe that Ms. Fleming is guilty, at that time her presumption disappears.

Now, this case sort of, as we went through this yesterday, kind of takes a life of its own. There were some surprises. There were some things neither one of us anticipated. There was some interesting people who appeared.

Mr. Cooley has pointed to Chuckie. And I think it's important to emphasize who we're talking about, <p329> Chuck Fleming and Chuckie Tanner. Chuckie Tanner is the son. We've used the word Chuck and Chuckie, you know, in place of /// one in place of the other and I just want you to understand we're talking about two different people.

And it was interesting. He was 24 years old when this happened. And yet, at 24 his stepfather is required to pull him aside and lecture him about the fact that you aren't supposed to threaten to kill people. Now, most people who are 24 have captured that notion by that time. He is an interesting individual, but that doesn't mean he is guilty of any crime.

Diane Fleming produces /// I don't even know the number /// a number of people from the church and from the community to say she is an honest person, A-plus, A-plus. But when Ruth Baker goes to execute a search warrant on her house asking her for her computers and her hard drives, she has already given one to Ms. Curry and she doesn't tell Ruth Baker about it. And when she gets it back from Ms. Curry, she destroys it. We don't have it. We don't know what's on that computer. We don't know what those e-mails are. We don't know what she knows about methanol poisoning. It's all gone. Now, that is just really not an honest thing to do. And it really just isn't honest. <p330>

Dr. Saady indicated to you that there really wasn't enough poison in any one of those four bottles, the three that he took to work or the one that was left in the refrigerator, to have killed him. So, what we're left with /// and this is why we asked and got into this issue with other people before he testified /// is **the fact that and what he said was that this builds up in your system, though. It builds up in your system.** And one of the things that sometimes prolongs the effect of it is the fact that alcohol tends to dissipate the impact of methanol and its toxicity.

Dr. Acker indicated that, and it was Chuckie and some of the other family members that testified that one of the things Chuck Fleming did in the evening was he would come home and drink a cocktail, drink quite a bit in the evening. **So, we're talking about a situation where this was not a one-night shot, but whoever did this had been doing it for some period of time. That's the only conclusion you can**

draw from this. And that certainly is willful, deliberate and premeditated.

I know Mr. Cooley is going to suggest to you that, well, see, he drank that Gatorade that Sunday night and then he woke up the next morning and he wasn't feeling good, he might have had the flu. Well, you know, this is June. This is the middle of June. Emergency rooms <p331> around here aren't crowded with people dying of the flu. I mean, it just doesn't happen like that.

I think, perhaps, the way to start is to look at /// well, there is two specific bottles in question, but the one bottle that was in that refrigerator had methanol in it in approximately the same dosage as the others at Philip Morris. And I think the way to solve it is to understand and try and contemplate who put the poison in that bottle. Who had access to that? Where did that come from? The poison came from the house. That's what it tells you. That's the place you begin. That bottle had never left the house. It was purchased, it was mixed, it was put in the refrigerator. And it excludes Philip Morris. It came from in the house.

And it's nice to have a confession and have someone say, Hey, I did it, or to have an eyewitness say, I was standing around the corner and I noticed that they flipped on the lights and they mixed all this and this person did this and then they put it in the refrigerator or to have a witness. We don't have that in this case, largely because it came from in the house.

So, what's the best way to go about figuring out what happened here and applying your common sense to this evidence? And I would submit that would be, as you look at the evidence, you

exclude those who could not <p332> possibly have done it because there are only four eligible candidates inside that house. The first thing you need /// well, it's five, the victim himself.

Now, let's talk about that. Mr. Cooley has waved the notion of suicide here. It wasn't suicidal, this was not a suicide. You don't kill yourself with methanol poisoning and die writhing on a hospital table in pain and confusion for hours. Mr. Tanner was moving forward in life. He was starting a new fitness program. He was not a health nut, as someone said, but he was concerned, he was physically fit, an athletic individual. You don't mutilate your body this way if you're an athletic individual.

At work Bill Bailey testified he was outgoing, uplifting, moving on with his life. And he had apparently been searching the Internet for job openings overseas, which may cause you to wonder exactly how honest Diane Fleming is with you when she tells you their relationship was great.

He was looking forward. Those people don't kill themselves. People that kill themselves are depressed or isolated or isolate themselves and act different and unusual. His mother talked to him twice a week. His father talked to him. This was not a case of suicide.

And that leaves you with your four. And no one <p333> here is suggesting that Meagan did this. She is a little eight-year-old girl. And Jeffrey is an interesting case. I believe Jeffrey Tanner would walk into traffic to detour around an anthill to avoid stepping on an ant. I mean, he is just that type of individual. There was nothing in the relationship of Jeffrey and Chuck Fleming that would cause this to occur.

Which leaves us with two, Chuckie Tanner and his mother, Diane Fleming. Now, I asked Diane Fleming when she testified, You're an intelligent woman and you've had the opportunity to reflect upon this. If you didn't do this, you obviously have to know who did, this is your home. And she assured me that she would not take the blame if Chuckie did it and she said she didn't feel like she needed to answer my other question because she knew he didn't. Now, depending on how honest you believe she is, that would certainly exclude Chuck or Chuckie.

But we do have another way. Now, Diane Fleming attempted to make the case and suggested to you that the first bottle /// and this is important, that the first bottle, you recall, that was mixed was warm and was put in the refrigerator and Chuck Fleming went out and played basketball and came back and then drank it, mixed <p334> the other four and went to bed. And she attempted to suggest to you that that bottle, that first one that he drank, was in the garbage, that was the empty one in the garbage. And that's why I offered the bottle and the reports which show the fingerprints /// and the fingerprints were recovered off of it, that's unusual to begin with. In this case we got fingerprints and they belong to Chuckie Tanner, not Chuck Fleming. That was not the bottle that Chuck Fleming drank from.

We don't have and never could find the first bottle to see what was in it that Chuck Fleming drank. And it was then that he went to bed and it was after that he woke up sick, so sick that the people at work wanted him to go home. The other bottles were mixed after that.

Now, where was Chuckie Tanner when that first bottle was mixed, when that first bottle was put in the refrigerator, when that first bottle was drank by Chuck Fleming, the last thing he had that evening? Where was he? He was at work. He could not have been involved with that bottle at all. And there is no other source, there is nothing else that Chuck Tanner /// or that Chuck Fleming drank or ate that would have put him over the top to the point where, less than 18 hours later, he arrives at the hospital and he is already dead, he just

doesn't die right then. It's like a deer that's been <p335> shot and runs a little bit before he falls. Chuck Tanner /// Chuckie Tanner didn't poison his mother /// his father, his stepfather.

And that leaves you with Diane who was the only one who had access to that bottle and who is the only one who knows where that bottle is. Now, as you go through this, you will find, as you look at this evidence, that Diane Fleming is the one that did this, and it's not because I say so

and it's not because Mr. Cooley says no. It's like he said, it's like Mr. Cooley told you in the beginning, because that's where the law and evidence take you. And based upon that law, and on that evidence, I would ask you to find Ms. Fleming guilty.

Thank you for your attention and I would ask that you give the same to Mr. Cooley. Thank you very much.

THE COURT: Thank you, Mr. Von Schuch. Mr. Cooley.

MR. COOLEY: Thank you, Your Honor. May it please the Court, the Commonwealth, good morning to you, ladies and gentlemen. when we started yesterday morning, the Commonwealth told you that their evidence was going to show certain things. They told you, first of all, that their evidence was going to show that Chuck Fleming was killed by Gatorade, by drinking Gatorade that had been spiked with methanol. That's what they told you. They <p336> also told you that that Gatorade was spiked with windshield wiper fluid that came from the garage. And lastly they told you that the evidence was going to show that this young lady, Diane Fleming, committed that murder. That's what they told you that their evidence would show.

What has the evidence shown here? Well, let's start with did the Gatorade kill him. No, that is not the source. We know that for a variety of reasons, not from our witnesses, but from their witnesses. What is the totality of the amount of methanol that was consumed by Chuck Fleming? It's 12 milliliters. It came from the open bottle, open container that's up there (indicating) that was recovered at work and it had that higher level of methanol than any of the other bottles. But that's the only one that was opened and consumed and it had 12 milliliters of methanol in it. That was the testimony from their doctor, their toxicologist, Dr. Saady.

The first thing they asked him, Dr. Saady, how much methanol would it take to kill a person, an adult.

Seventy to 120 milliliters.

How much did Chuck Fleming consume?

Twelve milliliters.

So, we know, and Mr. Von Schuch conceded in his <p337> argument, that the drinking of the Gatorade did not do it, it had to be a combination, perhaps spread out over a length of time. So, number one, he did not die just from drinking the Gatorade.

The second issue then is, and they told you, this methanol came from the garage where she had access. It came from the windshield wiper fluid. Well, that's not true. How much was the methanol in each bottle? Two of them Dr. Saady said had 20 milliliters. Twenty and 20 is 40. One of them had a little less, had 18 milliliters. So, now we have /// 18, 20, 20, we have 58. And then the last one, the one with the higher percentage in it, had 36. When you add 36 and 58 together, you have 94 milliliters of methanol that was in those Gatorade bottles.

There is an exhibit up here labeled B. It is the one that shows what they did when they tested that blue bottle of windshield wiper fluid they took from the garage. It was full and its maximum capacity /// when a manufacturer puts out a bottle that's filled with liquid, there is a certain industry standard that you fill it up to a certain point and there is a range which is considered acceptable that's on here. And the range of tolerance, the amount it could accept and be considered full was 37.9, 3,709 milliliters to 3,806 <p338> milliliters.

When they tested this bottle, it had 3,820; so, 40 milliliters from the maximum capacity this bottle could hold. The most methanol that could have ever been taken out of this bottle is 40 milliliters. 94 milliliters, however, are in the Gatorade. So, we know it didn't come from here.

The other question is did you ever hear anybody in the Commonwealth's evidence testify to the effect of adding blue liquid to the Gatorade. Did anybody get up here and tell you that they ran a test and poured 20 milliliters of blue fluid into those Gatorade bottles and it effected the color or didn't effect the color? You don't know. The evidence doesn't show you that. The assumption would be that if you mix blue with orange, you might get a little strange color. If you mix blue with lemon/lime, you might get an even stranger color. No one indicates that to you.

There is no evidence that this specific windshield wiper fluid was ever used for anything. It's a red herring. It's blue in color, but it's a red herring. It's out in the garage they say. Well, that must be what she did, but there is no evidence of that. And no evidence that she did anything with it.

You could believe that maybe Chuckie went out and <p339> did that. Or maybe Chuckie, when he went by Wal-Mart on his way home, stopped by Wal-Mart and got something else that had methanol in it. You could believe that. There is no evidence one way or the other. There is no evidence that they produced to you that Diane Fleming did anything to adulterate this Gatorade or did anything to her husband.

And while the Commonwealth argues about this bottle that Chuck drank in the afternoon, that Sunday afternoon, there is zero evidence /// and that was their last witness, the detective that came in /// there is no evidence, period, that that bottle was spiked at all. They're suggesting to you, Well, he drank that and that's really what

helped do him in. There is no evidence that that bottle of Gatorade had been spiked with methanol of any kind.

And what's interesting, the Commonwealth says, Well, that bottle that's out in the garage couldn't have been, that couldn't have been it. Why? Because Chuckie's fingerprints were on it. Well, that doesn't mean that Chuck didn't use it, it just means that Chuckie handled it last. And maybe the reason Chuckie was handling it was to mix some of that /// pour out some of that Gatorade from those other bottles so that he would have room to put a little methanol in there. <p340>

You know why you don't get fingerprints off of bottles? Think about it. When you go to your refrigerator and get out a cold can or a cold bottle, what's on it? Condensation, it's got /// usually it's a little wet on the outside when you get one that's cold. And the effect of that is it doesn't adhere or let your fingerprints be left there. Well, once it dries, once you've finished it and thrown it in the trash can and somebody comes along and picks it up, then your fingerprints do adhere. That is just as logical an assumption as what the Commonwealth asks you to accept without any evidence one way or the other.

And, lastly, in terms of what they didn't prove, does it occur to you, what is the one thing that we know was added, that everybody agrees was added to these bottles? Creatine, everybody agrees creatine was mixed in these bottles. So, did the creatine have methanol in it? Was it adulterated somewhere else? Was it adulterated at the manufacturer by some kook who decided that I'll just stick some of this in there? Was it adulterated at the house? Do we know?

What happened to it? She delivered to the hospital and took it to them. Do we know what effect it had? Do we know if it was ever tested? Do we know if the creatine did or didn't have any methanol in it? No. <p341> There is no evidence at all for you produced by the Commonwealth as to what was in the creatine that she complained about from the beginning and told them about from the beginning.

All the Commonwealth has proven to you in this case, ladies and gentlemen, is that Chuck Fleming died of methanol poisoning. They have told you how he died, they have not demonstrated to you in any form or fashion from what source and by whose hand. They have not done that. The evidence does not establish that.

Now, Mr. Von Schuch talks about the suicide alternative. And, look, I'm not suggesting to you that suicide is the most logical theory here. I am not saying that. What I am saying to you is that when you look at could Chuck have done that, number one, at his work there is access to methanol, easy access. Another employee, Mr. Statton, brought it in, he had some. Methanol is open and available at the lab and it's pure methanol, not blue in color. It's clear in color. If you mixed it with Gatorade, you wouldn't notice it.

Is it likely he did it? I don't think so. I don't think he likely committed suicide. Can I absolutely exclude it? I don't think I can. You know, it's true that some people get very depressed and commit suicide, but there are lots and lots of them. And most of the <p342> teenage suicides in this country are totally inexplicable because the kid seems perfectly fine and perfectly happy, he is an A student or she is, and all of a sudden, they just take their life for no

reason. And I can't exclude that as a potential.

I am also concerned from the evidence that there is this higher content of methanol in the one that's at work that he is drinking from. That concerns me because that is inconsistent with the .33, .36, .36 that is in the other bottles. All of a sudden you've got one that's one-and-a-half times as much methanol in this one bottle that he is consuming. Does that raise a question? It does. Does it prove that he committed suicide? I don't think it does, no. Does it raise a question? Yes, it does. And that's the issue in this case, is there another alternative.

Well, aside from the suicide alternative, ladies and gentlemen, there is a much greater alternative that cannot be excluded in this case and let's talk about that. That is the case against Chuckie. If I were a prosecutor arguing this case to you with the evidence that you have, my suggestion to you is /// if I were a prosecutor, I would look at four things: Does the person have opportunity to commit the crime, does the person have a motive or motivation to commit the crime, <p343> does the person have a negative relationship with the victim of the crime and does the person that I'm accusing have a demeanor or temperament that would make him or her capable of committing such a crime. Those are the four things I would look at.

And let's talk about those because, opportunity, Chuckie tells you that he came home from work, And I left early and I went by Wal-Mart, he thinks, and he came home. What did he do? After everybody else went to bed, he stayed downstairs watching TV. His brother, Jeffrey, is up on the third floor, his mom and dad are in their

bed on the second floor. He is down where the TV is which is right next to the refrigerator which is right next to the Gatorade and right next to the garage. That is exactly where he is. Did he have opportunity to spike that at that point in time? He certainly did. So, opportunity is there.

Does he have a motive? Well, ladies and gentlemen, I ask you. You take all the people Mr. Von Schuch says live in this house. Which one has the motive to kill his stepfather or their husband? Who's got the motive? It's Chuckie. It's not Diane. The motive is there, the motivation is there. He disliked him, and if you got any other impression from that stand when he testified yesterday, I'd be surprised. Yeah, I assaulted and <p344> battered him. How did you feel about that afterwards? Well, I still considered him my stepfather. He didn't say, I still considered him my dad, I still considered him my friend. He said, I still considered him my stepfather.

Chuckie has a motivation. He have a motive to do this. He may not have intended to kill his stepfather, he may just have wanted to make him sick. He may have wanted just to make him a little bit ill and things got a little carried away, he didn't realize that it would build up as it did. Who has an ultimatum from the father, and mother, for that matter, they've got to move out of the house? Who is 24 living at home? Who has taken all this time to get through college and getting fussed at? Who has been told, Look, you can't live at this house anymore after August 1st, your mom and I have talked about this and she stands behind her husband, you've got to get out of here? If we don't set a deadline, he'll never get out. He's got to get a new job, he's got to get new living quarters.

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It is mid June, he's got 45 days. Has he found an apartment? Has he found a place to move? No. Has he found a roommate to help underwrite the expense of moving out on his own? No. Has he even looked for any such place? Apparently not. Has he got a new job? Is <p345> he looking for a new job? No. So, what's he going to do? August 1 is coming up and he's got to get out of the house. Has he got a motive? Has he got a motivation? Has he had an ultimatum? Of course he has. And it's clear and it's obvious and you cannot exclude it as a reasonable theory that he committed this crime and not Diane Fleming.

Is there a history of a relationship here? Well, yes, there is. He's been /// three times the police have had to respond to disputes between Chuckie and Chuck. Three times the police have had to come to separate them in this situation, one resulting in him pleading guilty to assaulting and battering his stepfather.

Was he candid with the police? No. He tells the police, Oh, my relationship with my stepfather was fine, it was okay. Was that true? Was that candid? Was he candid with you? You know, he told you that, No, you know, I never said anything to Trish Jones up there at work about my stepfather committing suicide, I never said that. Well, that's what he told you. That's what he told the police. Trish Jones told you something to the contrary.

I want you to look at the nature of the beast. I want you to look at Diane Fleming and what you've heard from all the folks who have known her ten years, friends <p346> of her husband, friends of her, pastor, folks that she works with with Friends of the Homeless, folks that she works with in every capacity who have

seen her every day or many days over the last ten, six, eight years, whatever length of time they've known her, and have had that opportunity to gauge her and judge her as a person. You know that much about her personality.

She didn't have to testify. She has an absolute right to remain silent and not be subjected to cross-examination, direct examination or your perusal. She didn't do that. She didn't want to do that. She has no record. She's never been in trouble. She comes before you and she tells you as best she can what she can. She doesn't know who killed Chuck, her husband. She doesn't know if Chuckie did it. She hopes he didn't. She just doesn't know. And from this evidence, ladies and gentlemen, you do not know who committed this crime. Judge the nature of the beast.

While Diane is loving, giving, forgiving, a good family person and a good person to this community, Chuckie is threatening, aggressive, threatens to kill his stepfather, by his admission, threatens to kill his manager at work, by his admission. Gina Morris, this diminutive little lady that came in yesterday, the manager, says that he threatens to kill her, says that <p347> she has to get the police because she's afraid of him. You also know from Gina Morris that Chuck had /// well, you know because of that situation and his admission, Chuckie on the stand, that when this happened, when he threatened to kill Gina Morris, that according to Chuckie, his father told him he's tired of him threatening to kill people. Chuck told Chuckie, I'm tired of you threatening to kill people.

What else do you know about Chuck /// I'm sorry, Chuckie? And Mr. Von Schuch is right, I'm sorry not to use the Y on his

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name. Chuckie goes to horror sites. He's involved with pulling up on the Internet horror websites so he can look at those things. Trish Jones, who told you she's a deli manager, says the week before Chuck died that Chuckie at work was agitated. He's always quick tempered, but he was worse during this week before. There is this broom throwing incident and she said he was uptight. And this is timed right to the incidents that began. Could he have already been in the process of feeding things into /// what does he take? Chuck drank every night. Could he have put something in his drinks every night? We don't know that.

Could he have already been involved in that? Could the evidence support that? Yes, it could. Does it prove it beyond a reasonable <p348> doubt? No, but it could have been what he was doing. Is it consistent with why he would be so agitated, why he would be involved with this? I think it is.

Why is it he would say to this lady, My father is /// or my stepfather is committing suicide? Why would he say that? That makes no sense at all. And now why does he deny it to you and deny it to the police? Do you think that Trish Jones simply made that up?

And last, but not unimportant, is the young man, Jeffrey. And I agree with Mr. Von Schuch's evaluation, Judge. He is a very nice young man and he got put in a posture, because Mr. Davenport asked the question, do you know anybody, opened that door up, do you know of anybody that would have a reason to kill your stepfather. Well, the answer to that question is yes, there is one person in that household that had the motivation and had the temperament and the history with his

stepfather to be able to hurt his stepfather. And that is not Diane Fleming, that is Chuckie Tanner.

And I mentioned in my opening statement and I mention it to you again, the timing of this event. You know, if Diane Fleming decided she was going to do in her husband, could she have picked a worse time for her family to do it? Of all the times that she would pick, it's when her son, Jeffrey, who I think you probably <p349> gained an appreciation for, as we have, was about to graduate from high school. Do you think that she was prepared to just ruin his week because she wanted to do in her husband that week?

Her parents were coming from Missouri to be there for the event. Do you think she wanted to ruin all that week so that they would be at the hospital and involved with funeral arrangements in the middle of a point in time when her youngest /// or her middle child, her youngest son had an important time in his life, so important that his grandparents traveled half a country to be present for? The timing makes no sense.

And when her parents and her eight-year-old daughter and Jeffrey and her are present in the house while Chuckie is sick in the hospital /// excuse me, while Chuck is sick in the hospital from Sunday, Monday, her parents arrive on Tuesday and through Thursday before the police come and she points out the things that Chuck has consumed, during all of that time that bottle of Gatorade is sitting there quite able to poison her daughter, her son Jeffrey or her parents, and for that matter, her. Why does it sit there? Because she has no idea it has methanol in it. She may think it's got creatine in it, but she has no idea it has

methanol. Why? Because she didn't put it there. Who did? <p350> Probably Chuckie, but certainly not Diane.

Now, the Commonwealth has brought to you three negative circumstances in this circumstantial case and said, Look at these things, they suggest, they don't prove that Diane had anything to do with it, but they suggest that she might have. The first one is the computer search. Diane Fleming has never denied that she went to the computer and looked up methanol poisoning. When did she do it? At the very time that the doctors at Chippenham Hospital told her that this appeared to be methanol poisoning and she went to find out what causes it. She never denied that.

But the Commonwealth has this /// when they check back on her computer to see did she /// did anybody, not just her, but did anybody, Chuckie, Jeffrey, anybody in the house, they all had access to the Internet because it's automatic on the modem, just goes to it. Is there a point on this paper that says that that search was done in May? The problem with that is the expert said there is no way for him to say that that date was accurate. It could be changed around. It could have been done the day before he got it. It could have been done July 19th. It could have been done anytime. The fact that the date on it says a date does not mean that's when it was done. <p351>

So, that proves nothing. It doesn't establish anything, but the Commonwealth wants to say, Well, okay, that date on there says it might have been done in May, so that means whoever did it did it in May. Does that prove she did it? No. Does it prove that it was done in May? No. But it's

a circumstance that they want to throw in to you.

And then they say insurance, there was insurance. Well, how many middle class families have no insurance? Is it a problem for her that her husband gets insurance? Is there some indication in this evidence that she runs over there to collect this money and this is going to be some great boon to her? She goes from a family income of \$70,000 to an annual income, annual income of \$18,000 starting four years from his death. This is not some great windfall to this family or to Diane Fleming.

And let's say you take all the money. She didn't know there was a \$150,000 policy, but let's assume she gets \$430,000 and she puts in the bank and says I want to earn interest or she invests it and wants to earn interest. How much would the income on that be? How long would that last a family with the income and the demands that a family has that was earning 70,000? How long will that last? It's nothing. I mean, families whose principal breadwinner dies find out just like that <p352> (indicating) how little insurance really is when they thought they had this huge amount. That's nothing. That is not a basis to go harm somebody that is the principal breadwinner in your house.

And then they say the third circumstance is the hard drive, the hard drive. And she says it's this and her friend says it's this. There are /// this is /// you've got to remember that Kathy Curry is her constant companion and both these ladies are in a substantially traumatic circumstance. And I admire /// Ms. Curry came in and she told you /// I know that had to be difficult for her /// but she's placing her daughter in a behavior modification

school and this is a very traumatic time for her. And it is all after Chuck's death. And this is a very traumatic time for Diane Fleming. She has lost her husband and the police are suggesting to her that her son has committed this offense. And she is traumatized and they're talking constantly.

Both these conversations, in all likelihood, occurred. One or both of them may be wrong as to whether it applied to the computer hard drive or not, but it is simply that. It is two folks, lots and lots of conversations over a long period of time and they have simply /// one or both have mixed up when and what that was associated with. Both of them are correct. <p353>

Both statements were correct. One is that Chuckie went to these horror sites and she saw the detective glaring at him on those sites when he was sitting inside the office on his website and the detective was talking with her and she thought they were on a witch hunt for Chuckie and she acted to protect him. She also did not want to look like a jealous wife checking to see, breaking through a /// getting a password device or software that would let her check on anything else. Those are true, but they are not hiding evidence in this case.

And I suggest to you that if you really want to look at what the evidence /// what was done with the evidence in this case, instead of hiding it, Diane Fleming brings it forward. The Commonwealth has made the hard drive, the removable hard drive the focus of their case because it's the only thing they've got to hang their hat on. It's the only piece of evidence that they can point out and say, Well, this wasn't exactly what she should have done, and it wasn't. That's right, it wasn't, but it's not hiding

evidence in the case. It was an effort to protect her son.

Now, step back from all of this for a moment and let's just say, Okay, what did she do. What did she do that related to this evidence in this case? Well, what <p354> the evidence shows is that Diane Fleming brought forward the evidence, the real evidence in this case. She is the one that initiated bringing forward the evidence. She calls the police. She goes to the house. She meets with the police. And when they are going through things and saying, Well, what did he ingest, what did he have, what could this be, what could it be coming from, she goes to the refrigerator and points out to them, This is one of the Gatorade bottles that we mixed the creatine in.

Does she say, He must /// he mixed this? Number one, does she say nothing about the Gatorade? No. Does she bring their attention to the Gatorade? Yes, she does. Does she tell them, Oh, he mixed it, I didn't know anything about it? No. She says, We mixed it, I helped him mix it. She puts herself in the middle of the thing and she points out the one item that leads them to the discovery that Chuck had consumed these Gatorades and that they had methanol in them.

Detective Baker told you when they went to the refrigerator, she didn't take the milk, she didn't take the orange juice, she didn't take Coca-Colas. What did she take? She took the Gatorade bottle. Why? Because Diane Fleming told her that that Gatorade bottle was there and might have something to do with her husband's <p355> illness. People who have a guilty conscience, who know that they have committed the crime, they don't preserve evidence, they dump evidence. This has

been sitting there since Sunday night or Monday morning. If she knew that she had committed this offense, that she had spiked this Gatorade, don't you think in four days she would have poured it down the drain?

Don't you think that she might not have said to the police, Hey, look at this Gatorade bottle, it could have something to do with my husband being sick? Why would she do that? People with a guilty conscience don't bring evidence forward, they do everything that they can to pass over, Well, there are things in the refrigerator, There is the garage, you can look all around and get whatever you like. That's not what she did. She points it out and people with a guilty conscience don't do that.

If you knew that the windshield wiper fluid was or could be the source of the methanol /// and she did because at that point she had checked on the Internet and this police are telling her this could be it, windshield wiper fluid is a common thing. If she knows that that could be the source of methanol that killed her husband, why in the world would she suggest to the detective, Well, I change all the fluids in the car? <p356>

Don't you think she would be saying, Gosh, I've never touched the car, I don't know anything about windshield wiper fluid, I don't know anything about anything in the garage, I'm just a sweet little housewife? Don't you think she would try to take on that kind of approach? Do you think she would say, Yes, this is the windshield wiper fluid because I change it, you know, I do things with the car? That's consistent with her having no thought whatsoever of a guilty conscience.

When you have a guilty conscience, you separate yourself. Indeed, ladies and gentlemen, when you have a guilty conscience, you say things like, Well, I don't remember, I can't remember, I don't think, I really can't remember. You forget when you have a guilty conscience two of the three times the police have to respond to a dispute between you and your stepfather.

Now, Mr. Von Schuch invokes common sense and I do to you as well, ladies and gentlemen. How many times have you /// and you don't have to answer this /// how many times have the police had to respond to a dispute between you and a parent? Do you think you would remember when those things happened? Do you think that Chuck just happened to forget?

Do you think that Chuckie or Trish Jones is lying <p357> about that statement of suicide? Do you think that Linda Dugent, the parish nurse and the youth director who knew and cared for Chuckie, is lying about him having a discussion with her about the rough relationship and the difficulties he and Chuck were having and asking her if he could come live at her house with her family? Do you think she is lying about that or do you think Chuckie is? Do you think Chuckie is lying about the other two police responses or do you think Jeffrey, his younger brother is?

You've got to pick because if Chuckie is telling the truth, then all three of those people just came in to do nothing but fib to you. They don't know me, they don't know Diane, they don't know Chuckie except for the dealings that they've had that arose in this case. Do you think they came in and just wanted to lie about it or do you think he's guilty?

The problem for the Commonwealth in this case is two-fold. Number one, their evidence can't rule out anybody. It can't rule out anybody in that household. And, look, I'll concede Meagan didn't do anything. And I'm, frankly, prepared to concede that Chuck /// that Jeffrey didn't do anything. But there is no possibility that this evidence that the Commonwealth has produced can exclude a reasonable potential that Chuckie did <p358> something and that's their burden. But just as important as the fact that their evidence can't rule out anybody is the fact that their evidence can't rule in anybody.

They keep saying to you that she did it. Think back, individually, collectively. When you go back to deliberate, look at all the evidence and the exhibits and think about all the evidence that you've heard. Tell me one /// and you don't have to answer /// tell yourself one bit of evidence that says that anybody saw her do anything, observed her do anything or leads you to the absolute conclusion beyond a reasonable doubt that she did anything. The evidence in this trial makes it a much stronger case against Chuckie than it does against Diane Fleming.

The Commonwealth concedes the Gatorade is not the source of the lethal dose to Chuck. So, then, where, when and by whose hand was he poisoned? Where did it happen? When did it happen? And by whose hand? Have those questions been answered to you? I don't think so. The Commonwealth rests its case and brings to you a case in which it leaves open the question of when, where and by whom, and on that evidence it suggests to you that their case has been proven beyond a reasonable doubt. It has a burden of proof, ladies and gentlemen, to <p359> answer

those questions, not just with could be's, but beyond a reasonable doubt. And not just beyond a reasonable doubt as to her, but to the exclusion of any other reasonable potential.

The circumstantial instruction The Judge read to you, and all the instructions are important and all of this instruction is important, but I want to just point out some things to you as I close. The first paragraph says just what Mr. Von Schuch and Mr. Davenport said to you, you can convict purely on circumstantial evidence. But the second paragraph says when the Commonwealth relies upon circumstantial evidence, the circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilty. Even if you thought she probably did it, that's not sufficient. I don't believe

the evidence supports that, but even if you thought that, that is not sufficient.

The third paragraph draws the distinction between a regular case and a circumstantial case. It is so important that when they drafted this, they broke grammatical rules and made it a one-sentence paragraph. And that third sentence says, The evidence as a whole must exclude every reasonable theory of innocence. So, <p360> if there is any reasonable theory by which somebody else committed this act, you are obligated to acquit in this case.

The Commonwealth, in its closing argument, is still asking the question who. It's still asking the question where. Your oath and your promise at the beginning of this case was to be fair. Your oath and your promise was to look at this evidence and to gauge this evidence against the measuring stick of beyond a reasonable doubt and to the exclusion of any other reasonable theory.

And I would suggest to you that this is not a case of middle ground. There is no middle ground in this case. She is either guilty or she is not. They have either proven to the exclusion of all others that she committed this act or they have not done that. There is no middle ground in punishment in this case. You must decide this case on this evidence.

And there is an eight-year-old girl who sits at home and awaits your decision just like we do and I ask you to bear in all /// in your minds all of the considerations of this family and all of the potentials that this evidence raises as to the potential or likelihood that somebody else committed this act and not Diane Fleming. Thank you very much.

Thank you. <p361>

THE COURT: Thank you, Mr. Cooley.

Mr. Davenport.

MR. DAVENPORT: Thank you, Your Honor. May it please The Court, Mr. Cooley, ladies and gentlemen of the jury: The best way to try to show it wasn't you is to try to put it on somebody else. And what I want us to do here in the next few minutes is go through the evidence as you've heard it. You've heard everything that came from that witness stand over there and they were examined by the Commonwealth and the defense, Mr. Cooley.

And let's look at the mixing of the Gatorade and the creatine for just a moment. The evidence shows that after church, Diane and Chuck mixed one bottle. No dispute as to that. And that bottle was tasted, it was hot, it was put in the refrigerator, and at some point Chuck went to play basketball and came back and ingested that. And Mr. Von Schuch is right. At that particular point in time on that day on June 11th, 2000, Diane was home and Chuckie was at Food Lion. Now, Charles Linwood /// Charles Linwood Fleming comes home and ingests that bottle and some evidence is that he goes out to the garage, gets four more bottles and comes in and they mix it.

But do you remember Charles Linwood Fleming, Sr., <p362> when he came to testify, Charles Fleming's dad? He was on the stand and off the stand. Do you remember what he asked her about the mixing of the creatine and what he said? His statement was that she said that she mixed the four bottles after Charles went to bed.

Now, that's exactly what Chuck said /// Chuckie said when he came home from work. He said when he came home from work, his stepfather was in the bed and she

was mixing creatine and Gatorade in the kitchen. She told him, These are Chuck's, don't mess with them. Remember? He doesn't work out, Chuck works out, it might hurt him. Also told you about it not dissolving in the bottom of the bottle. So, here we have at least two stories, two different conflicting stories from Diane and only one from Chuckie.

The next comes to the computer search on May the 15th. There has been a lot of to-do about that. And, you know, Mike Monroe is a special agent, state police, he's an expert in the field. He comes in and testifies that when he looked at the computer, the time was right, the clock was right and the date was right, and all he did was search back through it and he found this search that was done about methanol poisoning on May the 15th of 2000. Now, there is a suggestion that a lot of things could have happened. The power could have gone <p363> off, the batteries. Do you remember all that testimony? But there is no evidence that any of those things happened. There is no evidence of any of those things. So, conclusively we can conclude that May the 15th was a date that came off the computer.

Next, and I want you to listen to this because you remember Diane Fleming taking the stand and testifying about being at the emergency room and one of the physicians suggesting that her husband had been poisoned and she needed to go home and get those things that she believed that could have /// he could have ingested in the recent past. Do you remember her testifying to that? Now this is what really, really bothers me. At home she knew that the only difference in Chuck's lifestyle was that he had bought this Gatorade that she

had helped buy from the Price Club and gone to get the creatine.

You remember she said he doesn't drink juice, he usually drinks other sports drinks? So, Gatorade was a new product around the house. It was the right size. And she goes home and she gets, she says, the bottles of bourbon, other used drink bottles and all this stuff. And she said when she was at the hospital and heard this, in her mind she was concerned was the Gatorade and creatine. <p364>

But you know what? She doesn't come back to the hospital with that empty bottle that Chuck had drank on Sunday after he came home from playing basketball or the one out of the refrigerator. I mean, that would be the most paramount thing in her mind at that time. What was different in his life? Well, what was different is he has ingested creatine and Gatorade, but she doesn't bring those two things with her to the hospital. I suggest to you that that is consistent with guilt and inconsistent with innocence.

And then look at this, if you were worried as a mother about the fact that the Gatorade that's in the garage could have some taint to it, you quarantine that stuff, you gather it up, nobody touches that. You don't know what's going on unless you're the one who spiked the five bottles. Then you don't have to worry about the things that are in the garage because you know they're not spiked. I suggest to you that that's consistent with guilt and inconsistent with innocence.

And then as far as the character witnesses are concerned, ladies and gentlemen, these are wonderful people who came and testified yesterday. All of them

believe in her, they do. Even her friend and neighbor, Kathy Curry, she can't believe that she would do something like this. But let's look at what she did. <p365> She took this tower and she made Kathy Curry a part of her hiding this tower.

And she either lied to Kathy Curry and has told a different story here about why she did it. You remember, Kathy Curry comes forward. Now, this is a situation that would stand out in her mind, all of a sudden the wife of a dead man comes with this evidence and puts it in her house and she testifies, truthfully, that she said it was because it would show her as a jealous wife. And now Mr. Cooley and she wants you to believe she was protecting Chuckie.

And then when Ms. Kathy Curry has some reservations about this and asks her to come get it, she comes and gets it. Does she, then, have some reservation, too, My goodness, they're investigating the murder of my husband, you know, I need to go to the police and give this over to them and say, Look, you know, it doesn't have anything on it, but I just want you to see it? Remember her testimony about that? She said it was inconsequential to the case. She is going to make a determination about what the police should see and what the

police shouldn't see about who murdered her husband.

She hides it. She makes her best friend or one of her best friends a part of it. She lies about it. And then she destroys it. We don't have it. You can't see <p366> it. I can't see it. But you have to believe her that it is inconsequential to the case. I suggest to you that that is consistent with guilt and inconsistent with innocence. It certainly doesn't paint as a model of character, as a model of truth, as a model of veracity, as a model of things that you would want to believe in.

And then we have some other things that the Commonwealth has told you that we would put on and show you and we did. The insurance, Mr. Cooley makes some deal about it, but \$432,000 is a lot of money. And then with social security and then 1,600-and-some dollars a month from the Philip Morris, there is some money there.

And then the affair with Rhonda Quinn, do you remember that? And then Chuckie is given this ultimatum to move out. And then I think the proof is in the pudding on that one, he's still there. And then the fact that she does purchase and service the vehicles as far as windshield wiper fluid is

concerned and the fact that she has a pharmacy background.

Now, if you isolate these pieces and they just set out there, they're fairly meaningless. But if you combine them, if you combine them together with allowing her flesh and blood to consume the balance of that Gatorade after she knew, or if you take her concern for the truth, that it could have been something in the <p367> Gatorade, it could have been something in that case and you combine it with that, with the hiding of evidence, the lying about it and the destroying it, then I think we have a pattern of behavior that has shown you in this case beyond a reasonable doubt that Diane Fleming is guilty of the first degree murder of her husband, Charles Linwood Fleming. It also shows you, it gives you all of the elements of adulteration of foods or substances in order to harm or kill a person.

Ladies and gentlemen, Diane Fleming is guilty of first degree murder. I ask you to hold her to that and return a verdict of guilty. I also want to thank you for your attention during this trial. You have been very attentive to all of the witnesses, all of the evidence, all of the lawyers. We appreciate your service. Thank you.

----- *Instruction To Jury* -----

THE COURT: Thank you, Mr. Davenport.

Ladies and gentlemen, the case is now being turned over to you for your deliberations. I will make a couple of suggestions to you. The first is that when you get into the jury room, the first thing you will want to do is to select a foreperson. It will be the job of the foreperson to make sure that your deliberations proceed in an orderly fashion

and that everyone has an opportunity to express his or her <p368> opinion.

As I told you before, you do have the verdict forms on which to record your verdict. Your verdict must be unanimous. You must deliberate when everyone is present together in the jury room. When you have a verdict, you must notify the deputy sheriff and he will let us know. Take the time that you need to deliberate the

case. It's an important case both to the Commonwealth and to the defendant, so take the time you feel necessary to reach a decision in the case.

(The jury retired to the jury room to consider their verdict at 10:27 a.m.)

THE COURT: Court will be in recess.

(A recess was taken, after which the following proceedings were had:)

----- *Verdicts Found By Jury* -----

THE COURT: Ladies and gentlemen, we have been informed that the jury has reached a verdict and the sheriff is about to bring them in. I will admonish all of the persons sitting in the courtroom that when that verdict is published, there is to be no reaction to the verdict whatever it might be. I will reserve the right <p369> to remove anyone from the courtroom who is disruptive of the process.

Sheriff.

(The jury returned to the courtroom at 1:05 p.m.)

THE COURT: All right. If the jury foreperson would rise and identify him or herself for the record, please.

MR. C. W. ROGERS: C. W. Rogers.

THE COURT: Mr. Rogers, I understand that the jury has reached a verdict.

MR. C. W. ROGERS: Yes, ma'am.

THE COURT: All right. If you would hand those forms to the sheriff, I am going to

inspect them and I am going to hand them back to you and I am going to ask the defendant to rise and I'll ask you to publish the verdict to the defendant.

THE DEFENDANT: (Complying.)

THE COURT: And, Mr. Rogers, if you would, please rise and read the verdict onto the record.

MR. C. W. ROGERS: We, the jury, find the defendant guilty of the crime of adulteration of a substance with intent to kill or injure the individual who ingests, inhales or uses such substance as charged in the <p370> indictment.

We, the jury, find the defendant guilty of the crime of first degree murder as charged in the indictment.

THE COURT: All right, sir. If you'll hand those back to me.

MR. C. W. ROGERS: (Complying.)

THE COURT: Thank you very much. Counsel, are there any issues before I dismiss the

jury? Would you like to have the jury polled?

MR. VON SCHUCH: May we approach the bench, Your Honor?

THE COURT: Yes.

(Conference at the bench without the hearing of the jury, as follows:)

MR. COOLEY: Yes, we would like them polled.

MR. VON SCHUCH: We would ask Your Honor and we would have a motion that the jury not be dismissed until later on.

THE COURT: Obviously I didn't intend to dismiss them until sentencing. I misspoke.

(Thereupon, the following proceedings continued <p371> within the hearing of the jury.)

THE COURT: Ladies and gentlemen, the defense counsel would like to have the jury polled. And obviously I misspoke when I said before I dismiss the jury. There is the sentencing phase. Ladies and gentlemen, I

am going to call your name, and as I call your name, I am going to ask the question with regard to each of the verdicts if this is your verdict. As I call your name, if you would stand, please, and answer yes or no with regard to the question are these your verdicts.

Susan Farmer. Ms. Farmer, are these your verdicts?

MS. FARMER: Yes.

THE COURT: Thank you.

Tracy Fuller. Ms. Fuller, are these your verdicts?

MS. FULLER: Yes.

THE COURT: Diane Larue. Ms. Larue, are these your verdicts?

MS. LARUE: Yes.

THE COURT: Bettie Hooker. Ms. Hooker, are these your verdicts?

MS. HOOKER: Yes.

THE COURT: Edriene Ognelodh. I'm sorry.

MS. OGNELODH: That's okay.

THE COURT: Ma'am, are these your verdicts? <p372>

MS. OGNELODH: Yes.

THE COURT: Marilee Soltis. Ms. Soltis, are these your verdicts?

MS. SOLTIS: Yes.

THE COURT: Mary Toth. Ms. Toth, are these your verdicts?

MS. TOTH: Yes.

THE COURT: Teresa Reynolds. Ms. Reynolds, are these your verdicts?

MS. REYNOLDS: Yes.

THE COURT: C. W. Rogers. Mr. Rogers, are these your verdicts?

MR. ROGERS: Yes, ma'am.

THE COURT: Debra Thweatt. Ms. Thweatt, are these your verdicts?

MS. THWEATT: Yes.

THE COURT: Melissa Reisner. Ms. Reisner, are these your verdicts?

MS. REISNER: Yes.

THE COURT: Larry Lynch. Mr. Lynch, are these your verdicts?

MR. LYNCH: Yes.

THE COURT: All right. Counsel, obviously we have the sentencing phase. I think, perhaps, while the motion is being made, I'll send the jury into the jury <p373> room and let one of the sheriff's deputies take their lunch orders and we'll get lunch up here for them and then see for the rest of the trial.

(The jury left the courtroom, after which the following proceedings were had:)

MR. COOLEY: Judge, respectfully, I'm /// in this posture, I think I actually have two motions. The Court had taken under advisement the motion to strike the Commonwealth's evidence at the conclusion of all the evidence and I reurge that motion. This /// as a matter of law, the Commonwealth's evidence did not exclude and cannot exclude other reasonable theories by which Ms. Fleming would be innocent. And The Court took that matter under advisement, so I now move The Court again to grant that motion to strike the Commonwealth's evidence.

Insofar as we now have a jury verdict which I believe is contrary to law, I would also move to set aside the verdict as contrary to the law and the evidence and to enter verdicts of not guilty as to both counts. That would be both motions at this time.

THE COURT: All right. Thank you, counsel.

MR. DAVENPORT: Your Honor, the matter was properly <p374> before the jury. The motion to strike was overruled at that particular point in time. And for all the reasons that the Commonwealth offered at that time, we reiterate those.

And as far as the verdict being contrary to the law and the evidence, it certainly is not. The jury had the occasion to have heard from not only the defense witnesses, but the defendant herself, and I would ask you to overrule those motions.

THE COURT: Your motion, Mr. Cooley. Would you like to be heard?

MR. COOLEY: Judge, again, I think I have laid out both in my motions to strike at the conclusion of their evidence and at the conclusion of all the evidence and I will adopt those arguments made in closing summations to the jury.

But I would urge upon The Court that this is one of those cases /// and I recognize that the Supreme Court has suggested that circuit court judges should allow the cases at times to go to the jury even when they recognize that the correct decision is to strike the case, but frequently the jury will make the right decision and that participation is appropriate. But when they don't, it's appropriate to strike the Commonwealth's evidence and I think that's the posture <p375> we're in and I ask The Court to do so.

THE COURT: As both counsel /// all counsel probably suspect, I have pondered since yesterday when I took the motion under advisement what position am I legally required to take should the jury come back with the verdicts that they came back with. And I recognize the strength of the defense argument, but when I look at the facts of this case and the verdict that the jurors have

reached, having pondered it last night and most of the day up until now, I conclude that it was a jury issue for the jury to decide whether the Commonwealth had met their burden under the circumstantial evidence case whether there were facts under which this jury could disbelieve the testimony of the defendant, disbelieve the theory of the defense case that there was someone else who had /// who could be guilty of this crime that the Commonwealth had not successfully ruled out.

And there are facts in this case from which the jury could have reached the conclusion that they did based on which evidence they credited and which evidence they discredited. And so, the motion to strike and the motion to set aside are denied.

MR. COOLEY: Note our exception, please, ma'am.

THE COURT: The objection is noted for the record.

MR. COOLEY: Judge, in terms of the sentencing <p376> phase, I will have either three or four witnesses.

THE COURT: Okay.

MR. COOLEY: I remind The Court, as I have written to The Court, that I have had notices from the Virginia Supreme Court to make arguments at 1:30 and 1:40 today.

THE COURT: Yes, sir.

MR. COOLEY: They have agreed to do that by conference call, but I will need to make those contacts.

THE COURT: All right. Why don't we do this. We have ordered lunch for the jury. If you all have the instructions, I will review those. We will let the jury have their lunch and then your calls and we will come back for the sentencing.

Sheriff, I will want you to take the defendant into custody, please.

(The defendant was taken into custody.)

THE COURT: The instructions have been reviewed and agreed upon?

MR. DAVENPORT: Yes, they have, Your Honor. May I?

MR. COOLEY: Judge, there will be some that will need to be removed, there are some other theories there.

THE COURT: Why don't you all agree as to the set you want me to give, have the sheriff bring those back <p377> to me. We will resume at the conclusion of your calls.

(A luncheon recess was taken, after which the following proceedings were had.)

----- *SENTENCING PHASE* -----

THE COURT: We're ready for the sentencing phase. Sheriff, please bring Ms. Fleming back out.

(The defendant was returned to the courtroom.)

THE COURT: We're ready for the jury.

(The jury returned to the courtroom.)

THE COURT: All right. The jurors are back and seated in the jury box. Ladies and

gentlemen of the jury, you have found the defendant guilty of the two charges and it is now time to set an appropriate punishment. This phase of the trial will proceed much as the last phase of the trial did with the attorneys having an opportunity to make opening statements to you should they choose to do so, presentation of the evidence and then I will instruct you on the law and then the attorneys will make their

closing arguments. Is the Commonwealth ready? <p378>

MR. DAVENPORT: Yes, ma'am. We would waive opening in the penalty phase and we would let The Court know that we have just have one witness, Ms. Charlotte Fleming.

MR. COOLEY: I'm prepared to waive opening and I would reserve closing.

----- *Charlotte Fleming* -----

CHARLOTTE P. FLEMING, called by the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. DAVENPORT:

Q Ms. Fleming, you were previously sworn and testified in the guilt phase of this matter; did you not?

A Yes, sir.

Q Would you give your name to the court reporter again for record purposes?

A Charlotte Pearson Fleming.

Q Ms. Fleming, Charles Linwood Fleming, Jr., the man that was murdered and /// by Diane Fleming, was your son; is that correct?

A That's correct.

Q How old was he when he died?

A Thirty-seven.

Q Okay. How many other children do you have? <p379>

A Two.

Q Okay. And which one was Charles in the scheme of things?

A My daughter, Teresa, is by a previous marriage and Chuck /// Charles was my firstborn and has a brother named Jeff.

Q Okay. Now, did these siblings grow up with Charles?

A Oh, absolutely.

Q Okay. And what's the age difference, just so the ladies and gentlemen of the jury can kind of understand where he comes from?

A Teresa was three years older than Chuck and Chuck was three years older than Jeffrey. So, it was three years between all of them.

Q Did any other family members live in the home?

A No.

Q So, it was just you and your husband and three children; is that correct?

A Correct.

Q Would you tell the ladies and gentlemen of the jury something about his upbringing,

something about him as a young boy and then on into adulthood?

A Well, he was a typical little boy, mischievous, would sell his brothers and sisters toys to make money <p380> because he really liked money. He'd sell their schoolbooks or we would have to go retrieve them. They fought like brothers and sisters. He was very athletic. He played everything from balls to basketball to football to baseball. He started high school and I used to fuss when he didn't bring books home, but how can you fuss when he was a straight A student? He never had to study. He would look at a book and that was it. He helped his buddies keep their grades so they could stay on their teams. So, they would write in his yearbook how much he did for them.

He later married. The first marriage didn't work out.

Q Was that to his high school sweetheart?

A Yes.

Q And what was her name?

A Betsy Hamner.

Q And how long did that marriage last?

A Four years.

Q And no children were born of that marriage?

A No children.

Q And then there came a time later on when he married Diane; is that correct?

A Yes, he married Diane. She brought two children, Chuckie and Jeffrey, with her to the marriage and we fell in love with the boys and they stayed with us a lot and became <p381> like our first grandchildren until Meagan was born. We loved Diane and the boys a great deal. They moved here, made their life here. As he went /// when he came here, he was working for Philip Morris.

He had a grandfather and a grandmother who he was very close to. They were my parents. He spent a lot of time with them. My father got sick, had cancer and we would go over there at night and all have supper together and do house chores, mow the grass. So, that was a big event for us until he died and then he stayed close with my mother. I don't believe she ever really recovered after he died. She sort of gave up because he was a real light in her life. And two years after he /// a year after he died, she died also.

Q Okay. Now, did you have frequent contact with him during the last three years of his life?

A More so in the last three years probably, and particularly the last few months because my mother was so sick. So, I tried to keep him up on what was going on, him and Diane both. So, I would call frequently at the office and let him know, you know, how she was doing and that he needed /// and he

would always go by and see her at the hospital.

Q I know you've testified that he received his MBA in December before he was murdered in June.

A Yes, sir. <p382>

Q And he had moved into a new house a couple of years before, 1998, I think you said. And other than those things, did he share his plans and dreams with you?

A Well, I'm convinced that if he hadn't died, he » would probably be in the midst of building another house because he always had to have some plans where he was moving on with his life.

Q Now, Ms. Fleming, I'd like for you to reflect back on June the 11th and the days following June 11th of 2000 and explain to the ladies and gentlemen how you came to know your son's fate.

A We received a telephone call from Diane. She was en route to the hospital following the ambulance. We got to Chippenham. I never had a conversation with him after that, he was in so much pain. They moved him into ICU right around eleven o'clock. I went home, took a quick shower, came back. Diane went back home to the children and I stayed with him throughout the night right beside his bed. He was in a coma at that time. I believe I was the first one to hear the news of what the doctors suspected was the problem with methanol because Dr. Acker spent the night there and he was back and forth into the room with us. I don't think any parent should have to watch their child die in that fashion.

Q Were you there when he passed?

A I was there when they took him off the respirator. <p383> I think he was

technically dead at midnight on Monday night.

Q When was the last time you were able to communicate with him; do you remember that?

A In the emergency room /// well, I take that back. When we first came up to ICU, I believe Diane was there with me and we were talking, and he seemed to want to say something. He raised up, but it could have been pain that he was in that was causing muscle spasms. When I got back to the hospital, I sat beside his bed. I held his hand, but I never got any reaction from him from then on.

Q Before that time, do you remember the last time that you talked with him?

A Yeah, it was Saturday before, which would have been the 9th, I believe.

Q The 10th.

A The 10th, okay. Megan had a dance revue and we all went, the whole family, and so, of course, Chuck was there. And towards the end of it, we were having a little family dispute over who was going to have Meagan the next week because he had decided he was going to be off and I was off and I wanted to take her to King's Dominion. So we were having an argument which day. And we spent a couple of hours with them at school that day.

Q And you saw him in person that day and you conversed with him. Did you ever talk with him over the <p384> phone after that?

A No. I didn't talk to him on Sunday. That was my last conversation with him.

Q Would you tell the ladies and gentlemen of the jury how your life and your family's life has been impacted by your son's murder?

A I don't believe it's in God's plan that parents have to bury a child, especially under these

circumstances. I'm not even sure that I can give you a true picture of what a death of a child does to a parent unless you've experienced it. There is a hole in your heart that you feel like you're suffocating or you're drowning. To know that /// especially when you have to watch them die and know there is nothing you can do to help them. My husband and my life will never be the same. His brother and sister will never be the same. Our family and our friends have suffered right along with us this whole 20 months. I don't believe their life will be the same. A death by murder is something that changes you forever. I don't believe you can ever be the same person. Hopefully you'll be a better person.

But Meagan, his daughter, is the one that has lost it more than any of us. She'll be nine years old the 24th of this month.

She idealized her father. He took her places that she doesn't go anymore. He played with her in the snow and took her swimming. I hope and pray that we can keep his <p385> memory alive. We have lots of pictures and I hope that I'll have an opportunity to let her see every one of them. But she's the one that's lost everything in this.

MR. DAVENPORT: Thank you, Ms. Fleming. Would you answer Mr. Cooley's questions, please.

MR. COOLEY: I don't have any questions for you, Ms. Fleming. Thank you for being here.

THE COURT: Thank you, Mr. Cooley. Ms. Fleming, you may return to your seat.

(The witness left the stand.)

THE COURT: Any further evidence, Mr. Davenport?

MR. DAVENPORT: Not from the Commonwealth, Your Honor.

THE COURT: All right, Mr. Cooley.

MR. COOLEY: Your Honor, actually, I think the Commonwealth has to stipulate at this point as to the record.

MR. DAVENPORT: Yes, ma'am. We would stipulate that Ms. Diane Fleming has no criminal record and that would be entered as part of this record in this case.

THE COURT: Ladies and gentlemen of the jury, there has been a stipulation between the Commonwealth and defense counsel that the defendant, Ms. Diane Fleming, <p386> has no criminal record and that should be considered by you as evidence in the case.

MR. COOLEY: Call Marchia Swanson.

THE COURT: Mr. Swanson.

MR. COOLEY: Ms.

THE COURT: I'm sorry. Ms. Swanson.

MARCHIA L. SWANSON, called by the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COOLEY:

Q Ms. Swanson, good afternoon to you. Can you tell the ladies and gentlemen, please, of the jury your full name?

A Marchia Lynn Swanson.

Q And what is your profession?

A I'm a mom. I'm a homemaker.

Q And do you know Ms. Diane Fleming, the young lady seated over here?

A Yeah.

Q How long have you known her?

A Several years.

Q And in what capacity do you know her?

A She's my friend from church and our children are also friends. <p387>

Q Have you had an opportunity to observe her over those years?

A Yes.

Q Is she active in community affairs and church affairs?

A Yes.

Q And tell the ladies and gentlemen of the jury what in your church does she participate in.

A She is active. She's a Sunday school teacher. She's active with /// we do an outreach program and we do several things with our outreach program. She's on my committee, which is the CARITAS committee, which is sheltering homeless people in our church for a week. We do Friends for the Homeless together which is the feeding program for the homeless people downtown.

Q Has she been active in those things that you've just mentioned, the CARITAS and ///

A Oh, yes. Yes. We just finished CARITAS and Diane was a tremendous help with that.

Q And has she continued to do that during the time that she has been under the pressure of this pending trial?

A Yes, she has.

Q You know her to have qualities that are worthy of consideration?

A Yes. She's a good person, a kind person, <p388> compassionate person, giving of herself.

MR. COOLEY: Thank you very much. Answer any questions that the Commonwealth Attorney or The Court may have.

MR. DAVENPORT: No questions, Your Honor.

THE COURT: Thank you, Ms. Swanson. You may return to your seat.

(The witness left the stand.)

MR. COOLEY: Ms. Shawnee Hansen.

THE COURT: Ms. Hansen. SHAWNEE HANSEN, called by the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COOLEY:

Q Ms. Hansen, good afternoon to you.

A Hello.

Q Can you reintroduce yourself, please, to the ladies and gentlemen of the jury?

A Yes. My name is Shawnee Hansen. I'm the founder and executive director of Richmond Friends of the Homeless.

Q And do you know /// and you do know Ms. Diane <p389> Fleming; is that right?

A Yes, I do.

Q How long have you known her?

A About four years.

Q And have you worked with her capacities and had opportunities to be

A Yes, I have

Q And can you were and what you all

A Yes. Well, church. She prepares time to see what kind tell these folks did together? Diane comes down in different with her? what those capacities once a month with her lunch. She often would call ahead of of supplies we needed. We are a totally volunteer—based organization, so we rely on our helpers to give us things that we need. Diane never came down that she didn't bring a case of cups or plates or just

something to help in that way. Then she also started coming down with a bunch of her neighbors once a month. So, twice a month I would see her with that.

On many occasions we try to do some special things with these inner city children. One evening I remember in particular, we were going to take them out to that wonderful Christmas pageant that West End Assembly of God puts on. And we were going to take the children out to dinner and then to the pageant. And I was looking for some volunteer moms to do that. Diane said she would be happy to do it. I said, Well, <p390> you know, we'll stop at McDonald's first and take the children to the Christmas pageant. She said, Hey, it's Christmas. We're going to take the kids to Red Lobster. And just anything for the children she did so joyfully and couldn't do enough for those little children.

At Easter time we would try and get some Easter things for the children. Diane made sure that her church put together a really nice basket for the kids, she knew that they wouldn't have anything otherwise. And, you know, just nothing was too much trouble for her.

When the Chesterfield County Fair came, none of the children had ever had the opportunity to go to the fair. When the State Fair came, you know, Diane was right there doing whatever she could to enrich the lives of these little children.

Q Do you have an association with her through the church?

A Well, I don't go to that church.

Q That's fine. Your association is principally through ///

A Richmond Friends of the Homeless and she is my friend as well.

Q Are you here to tell the folks, the ladies and gentlemen of the jury that she has qualities that are worthy of their consideration? <p391>

A Well, Mr. Cooley, I work with over 500 volunteers and I have a lot of people come down to my program all the time. If my board of directors said to me, We need you to pick a volunteer of the year, we're going to give that award to someone, without question it would be Diane. She is just such a wonderful, giving, caring person. She is a wonderful mother. She is just someone I admire very, very much.

MR. COOLEY: Thank you very much. Answer any questions that the Commonwealth Attorney or The Court may have.

MR. DAVENPORT: Your Honor, we have no questions.

THE COURT: Thank you, Ms. Hansen. You may return to your seat.

(The witness left the stand.)

MR. COOLEY: Ms. Betty Rickmond.

THE COURT: Ms. Rickmond.

BETTY P. RICKMOND, called by the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COOLEY:

Q Good afternoon to you again, Ms. Rickmond. Would <p392> you again introduce yourself to the ladies and gentlemen, please?

A I'm Betty Parrish Rickmond.

Q And, Ms. Rickmond, you know Diane Fleming?

A Yes, I do.

Q How long have you known Diane?

A Eight years.

Q And can you tell these folks how it is that you have come to know her and how frequently you see her?

A Well, first I /// when I first became acquainted with Diane, it was through church and we were on the outreach committee that I chair now. And, you know, you have people on committees, but you always have one or two that really excel, that are always there that you can always

depend on, you know, and that's Diane. I mean, regardless of what we got involved in, she was there to participate and you always knew that, you know /// you got a handful of people, she is one of those handful that you can always depend on.

And, you know, then we started having the CARITAS. They had just begun the CARITAS program when I came to the Lutheran Church of Our Savior. And, you know, I've seen this girl clean up vomit from a homeless person that was pregnant that had gone into the ladies room and been sick. I've seen her clean it up. How many people you know would clean up vomit from somebody that was a total stranger? I've seen her <p393> go on /// she goes online to try to purchase, you know, clothing for people who may be excessively heavy or fat. And that's the type of person that I know, you know.

And, also, I'm acquainted with Diane outside the church. Just last Friday night, Diane and her little girl, who adores her, one of my little friends in my neighborhood who has become like my little adopted granddaughter, they've become friends, and she and I took the girls to the Brittany

Spears movie, the opening of that, you know. And I've been to the fair with Diane. I was along with the group that took the homeless kids to the fair. And, you know, Meagan is up on the Ferris wheel watching for her mom, you know, she doesn't want her mom out of her sight.

And this is the type of mother that /// I just can't believe she is going to be separated from her child, you know. It's just unbelievable. And I don't know what else to say. I'm just devastated.

Q You are here to let these folks know that she has many qualities that you are familiar with ///

A Yes.

Q /// that are worthy of consideration?

A Yes, indeed.

MR. COOLEY: Thank you very much. Answer any /// I'm sorry.

Do you have any questions? <p394>

MR. DAVENPORT: We have no questions, Your Honor.

THE COURT: Thank you, Ms. Rickmond. You may return to your seat.

(The witness left the stand.)

MR. COOLEY: Jackie Meeks.

THE COURT: Ms. Meeks.

JACQUELINE N. MEEKS, called by the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. COOLEY:

Q Ms. Meeks, can you tell the ladies and gentlemen of the jury, please, your full name and your profession?

A Jacqueline Norman Meeks and I'm a preschool teacher.

Q And you have known Ms. Diane Fleming how long?

A About ten years or more.

Q And can you tell the ladies and gentlemen how is it that you deal with her and how it is that you know her?

A I first met Diane through our church. We both have daughters that are just a few months apart and we got to be even closer after our girls were born. They're involved in

<.p395> activities together. They go to the same dance class every Thursday night. They're in Sunday school together. And she lives in our neighborhood. The girls were on the swim team together last year.

Q You see a good deal of her?

A Yes.

Q In a variety of locations and places?

A Yes, I do.

Q Have you had an opportunity to observe her as a parent?

A Many times.

Q And how would you describe her parenting skills?

A She's just a very loving, warm mother. I mean, Meagan adores her.

Q You have had the opportunity to see how she treats other folks around her?

A Yes.

Q And can you speak to that issue?

A I am /// as people before me have testified, Diane is the type that's always there. No matter what needs to be done or who needs help, she is there, first one to always be there to help in any way.

Q Okay. Are you here to tell these folks that she has many qualities worthy of their consideration?

A I certainly am. <p396>

MR. COOLEY: Thank you very much, Ms. Meeks. Answer any questions.

MR. DAVENPORT: No questions, Your Honor.

THE COURT: Thank you, Ms. Meeks, you may return to your seat.

(The witness left the stand.)

MR. COOLEY: That is the evidence at this time.

THE COURT: All right. Thank you, sir.

----- *Instruction To Jury* -----

Ladies and gentlemen of the jury, I will now instruct you as to the law that you will apply to the sentencing phase of the trial and then the attorneys will come to you with their closing arguments with regard to sentencing.

You have now found the defendant guilty. You should impose such punishment as you feel is just under the evidence and in the instructions of The Court.

Parole has been abolished in Virginia. You may assume that the defendant will serve the full sentence. Any person sentenced to a term of incarceration for a felony offense committed after January 1, 1995 shall not be eligible for parole upon that sentence.

You have found the defendant guilty of the crime of adulteration of a substance with the intent to kill or <p397> injure the individual who ingests, inhales or uses such substance. Upon consideration of all the evidence you have heard, you shall fix her punishment at a specific term of imprisonment, but not less than five years nor more than 20 years or a specific term of imprisonment, but not less than five years nor more than 20 years and a fine of a specific amount, but not more than \$100,000. There is a signature line, as before, for you to write the punishment and the foreperson to sign.

You have found the defendant guilty of the crime of first degree murder of Charles Linwood Fleming, Jr. Upon consideration of all the evidence you have heard, you shall fix her punishment at imprisonment for life or imprisonment for life and a fine of a specific amount, but not more than

\$100,000 or a specific term of imprisonment, but not less than 20 years or a specific term of imprisonment, but not less than 20 years and a fine of a specific amount, but not more than \$100,000. Lines for your sentence and the signature line for the foreperson.

All right. Counsel.

MR. DAVENPORT: The Commonwealth will waive opening in this phase.

THE COURT: All right. Mr. Cooley.

MR. COOLEY: Thank you, Judge. <p398>

Good afternoon to you, ladies and gentlemen. In the trial phase I recognize that character witnesses and character testimony, because of the limitations, is a very sterile thing, but it's the limitation that we're stuck with.

You've had an opportunity at this procedure where there are no limitations to have some of that testimony expanded so that you know that you're dealing with a lady who has given to the community, loved her daughter, loved her family and has extended that love to the homeless children, to the underprivileged children of this community, of this county and city and has extended that love through a commitment of her time, a commitment of her emotions, a commitment of her energies as well as a commitment of money to see that those folks had the things that she thought they should have and to be given the opportunity she thought they should be given. I never know what impact additional testimonies might have.

You are in this posture at this point, the minimum sentences that you can impose on

Diane Fleming is 25, a total of 25 and that's the minimum. You must be unanimous in your verdict or we go back to square one and start at not guilty and proceed from there. You have to be unanimous. This is a horrendous punishment <p399> at the minimum; the maximum is all the more. And I ask you to give consideration to that. And as I asked you to do at the beginning, and I know you're trying to do, is be fair and I ask you to do that. Thank you very much.

THE COURT: Thank you, Mr. Cooley.

Mr. Davenport.

MR. DAVENPORT: Thank you, Your Honor. May it please The Court, ladies and gentlemen of the jury: You heard the impact that this has had on the family of Charles Linwood Fleming, Jr. Mr. Cooley used a word that I'm going to use, horrendous. This was a horrendous act, a horrendous death. You have a range of punishment and that punishment should fit this crime. So, I ask you to use your judgment, reflect on the facts, reflect on the impact and render a verdict that reflects the punishment necessary to fit this horrendous crime, thank you.

THE COURT: Thank you, Mr. Davenport.

Ladies and gentlemen of the jury, again, a final instruction. Your foreperson needs to make sure that your deliberations proceed in an orderly fashion. You will have the instructions to take back with you along with your verdict form. Your verdict must be unanimous. Take the time that you need to reach your verdict. <p400>

(The jury retired to the jury room at 2:48 p.m. to consider their verdict.)

THE COURT: Court will be in recess.

(The defendant was removed from the courtroom and a recess was taken. The defendant was returned to the courtroom at 3:10 p.m. and the following proceedings were had:)

THE COURT: Counsel, we have a question from the jury. The question, which I will make a part of the record, is "Can The Judge make the terms concurrent or is it automatically consecutive?" Would either side care to be heard on the response to give to the jurors?

MR. VON SCHUCH: Judge, from the Commonwealth's point of view, I think there is an instruction of law that reads the jury is to impose such punishment as it feels proper and is not to concern itself with what may happen afterwards and I think that is the law. That being the law, I think the Commonwealth would ask The Court to simply instruct them according to the law.

MR. COOLEY: I agree with that.

THE COURT: All right. Counsel, do any of you have <p401> any objection to me going to the door and telling them that or would you like them brought back into the box?

MR. VON SCHUCH: No, ma'am. No objection.

MR. COOLEY: No objection.

(Judge Powell entered the jury room and then returned to the courtroom.)

THE COURT: Court will be in recess.

(The defendant was removed from the courtroom and a recess was taken. The defendant was returned to the courtroom and the following proceedings were had:)

THE COURT: Bring in the jury.

(The jury returned to the courtroom at 3:49 p.m.)

THE COURT: Mr. Rogers, if you would please hand those verdict forms to the sheriff.

MR. C. W. ROGERS: (Complying.)

THE COURT: And, Ms. Fleming, if you would stand, please.

THE DEFENDANT: (Complying.)

----- *Jury Sentence Findings* -----

THE COURT: Mr. Rogers, if you would stand and read <p402> those verdicts into the record, those sentences.

MR. C. W. ROGERS: On the crime of adulteration of a substance, we, the jury, upon consideration of all the evidence, fix the defendant's punishment at 20 years specific term.

The crime of first degree murder, we, the jury, upon consideration of all the evidence, fix the defendant's punishment at a specific term of 30 years.

THE COURT: All right, sir. Thank you very much. You may be seated.

Ladies and gentlemen of the jury, this concludes your participation in the trial. On behalf of the litigants, the Commonwealth and the judges here in the County of Chesterfield, I want to thank you very much for the time and attention and the deliberation that you gave to the matter

before you. Your work here is done. And on behalf of myself and the other judges, I thank you very much. You may leave now. If you need some assistance getting to your cars, you may let the deputy on the back door know.

(The jury was dismissed.)

THE COURT: All right. Counsel, are there any postjury motions? <p403>

MR. COOLEY: Your Honor, there would be a motion for a presentence report.

THE COURT: All right. April 22nd or the 25th, Mr. Cooley.

MR. COOLEY: 25th.

MR. DAVENPORT: 25th.

THE COURT: April 25th at nine o'clock.

MR. DAVENPORT: Yes, ma'am.

MR. COOLEY: Yes, ma'am.

THE COURT: We will order a presentence report and on April 25th at nine o'clock, Ms. Fleming, I will sentence you with regard to

the two offenses on which you were found guilty.

MR. DAVENPORT: Thank you, Your Honor.

MR. VON SCHUCH: Your Honor, the only other thing would be that I believe, according to the law, the defendant's bond must be revoked until the sentencing date. We would make that motion. That would be the only motion that the Commonwealth has at this time.

THE COURT: All right. Do you want to be heard, Mr. Cooley?

MR. COOLEY: I understand that to be a mandatory provision.

THE COURT: Okay. All right. The defendant's bond will be revoked and she'll be held until the sentencing <p404> date.

(The defendant was removed from the courtroom.)

THE COURT: If there is nothing further, gentlemen, court will be in recess.

MR. DAVENPORT: Thank you, Judge.

(The trial concluded at 3:53 p.m.)

<p405>

CERTIFICATE OF COURT REPORTER

I, Lori McCoin Jones, hereby certify that I, having been duly sworn, was the Court Reporter in the Circuit Court of the County of Chesterfield, Virginia, on February 20, 2002, at the time set out in the caption above; further, that the foregoing is a true and accurate record of the second day of trial herein.

Witness my hand this 26th day of June 2002.

Lori McCoin Jones

My commission expires:

January 31, 2004