**IN THE**

**COURT OF APPEALS**

**OF VIRGINIA**

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**Record No. 1078-00-1**

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**LERICO KEARNEY,**

***Appellant,***

***v.***

**COMMONWEALTH OF VIRGINIA,**

***Appellee.***

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**Appeal from the Circuit Court of City of Suffolk**
**The Honorable Westbrook J. Parker, judge presiding.**

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# *BRIEF OF APPELLANT*

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## Assignments of Error

I. That the Trial Court erred in overruling the motion for a mistrial based on the Commonwealth's repeated comment upon the failure of the accused to testify.

II. That the Trial Court erred in the sentencing phase of the jury trial by not instructing the jury as to the unavailability of parole.

## Questions Presented

I. Whether the Trial Court erred in overruling the motion for a mistrial based on the Commonwealth's repeated comment upon the failure of the accused to testify.

This question relates to the correspondingly numbered assignment of error and was addressed to the Trial Court at App. 151.

II. Whether the Trial Court erred in the sentencing phase of the jury trial by not instructing the jury as to the unavailability of parole.

This question relates to the correspondingly numbered assignment of error and was addressed to the Trial Court at App. 163-64 & 165-66.

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# *BRIEF OF APPELLANT*

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## Statement of the Case

Lerico Kearney (Mr. Kearney or the defendant) was arrested on warrants issued on December 19, 1997 charging the capital murders of two individuals as a part of the same transaction, use of a firearm in the two murders and possession of a firearm by a convicted felon. A preliminary hearing was held on June 15, 1998, after which the charges were certified to the Grand Jury of the Circuit Court of the City of Suffolk which indicted Mr. Kearney on June 24, 1998.

On September 14, 1999, a little more than a week before trial, the Commonwealth moved to disqualify Mr. Kearney's retained counsel because the Commonwealth intended to call another of counsel's client's to testify as to admissions Mr. Kearney allegedly made. The Trial Court granted the motion, new counsel were appointed and the cases were scheduled for trial.

Trial of the murder and use of a firearm charges was had before the Honorable Westbrook J. Parker and a jury on February 9, 10, 11, 14 and 15, 2000. The jury acquitted Mr. Kearney of one murder and firearm charge but convicted him of first degree murder and the other firearm charge. The jury, after hearing evidence as to punishment, fixed the sentence at life imprisonment for the murder and three years for the use of a firearm. The case was continued to April 14, 2000 for the preparation of a presentence report.

After the sentencing hearing, the court imposed the sentences fixed by the jury. The court granted a motion to nolle prosequi the possession of the firearm by a convicted felon.

Mr. Kearney timely filed his notice of appeal. The petition for appeal was granted in part by order entered February 5, 2001. After argument before a three-judge panel, the petition for appeal was granted in further part by order entered May 8, 2001.

**Statement of the Facts**

The trial of the case covers nearly 1000 pages of transcript and the Commonwealth introduced over 100 exhibits. Only a relatively small portion of this evidence concerns facts which were in issue.

On November 21, 1997, a neighbor heard five or six “pops” between 9:00 and 10:00 p.m., but thought it was a loose shutter. Tr. 420.[1] Another neighbor discovered a six-year-old child in the street, Tr. 424, and her husband took the child to his apartment where two bodies were discovered. Tr. 428-29.

The bodies were those of Gene Artis and his sister, Yvonne Giles. According to his girlfriend, Artis didn't work and supported himself by gambling and dealing drugs. App. 12 & 20. He was "a good gambler." App. 19. "Gene took chances and he played and he won." App. 20.

Artis was in possession of a quantity of crack cocaine, Tr. 501-02, a .32 caliber pistol with almost 50 rounds of ammunition, Tr. 529-31, and about $750 in cash at the time of his death. Tr. 503-04. Giles was in possession of a .25 caliber automatic pistol at the time. Tr. 543.

A large quantity of physical evidence (hair samples, blood samples, latent fingerprints, bullets and cartridge casings) was recovered from the scene. Tr. 505-10, 534-38 & 545-50. DNA, fingerprint and firearms identification analyses of this evidence did not connect Mr. Kearney to the scene. Tr. 568-70, 575-77 & 577-79.

Sgt. S. W. Smith of the Suffolk police was first on the scene and "everything wasn't exactly in neat fashion." Tr. 445. Some dice and currency were in Artis' pockets. Tr. 496-98. Other dice and currency were in the dresser, in the couch and on the floor. Tr. 498-99.

The medical examiner testified that Artis died from gunshot wounds to the chest and head and that Giles died from a gunshot wound to the head. Tr. 596. The time of death could not be approximated because the bodies had been refrigerated. Tr. 611.

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[1] Citations to Tr. ___ are to the transcript of the trial which is contained in five consecutively paginated volumes.

The firearms identification expert testified that a .45 caliber bullet killed Giles. Tr. 620. Fired bullets at the scene were from the same .45 caliber weapon, *Id*., and cartridge casings found were of both .45 and .380 caliber. Tr. 619-20.

Sabrina Norfleet testified that she was dating Artis. App. 4. She also knew Mr. Kearney. App. 6. On an unspecified date prior to Artis' death, she saw the two gambling. App. 6-7. Artis was winning "I'm going to say I guess about five grand." App. 7. She also saw Artis win large sums of money from Larry Skinner ($3,000), Barry Skinner ($500) and "I don't know how much he beat out of Sam Skinner, But I – I can tell you this, Gene was a good gambler. He didn't lose too many games." App. 19.

On November 21, 1997, in the afternoon, she saw Artis. App. 8. Later around 6:00 or 7:00 p.m., she spoke to him at the East Coast filling station. 648-49. She argued with him because she "heard that he was messing with my sister." App. 9. Thirty minutes to an hour later she saw him riding with Mr. Kearney in a car "I guess out towards Franklin Street" where Artis lived. App. 9-11.

One Casey Davis saw Mr. Kearney on November 20, 1997 with a .45 caliber weapon. App. 26. The next day about 8:30 p.m., he saw Mr. Kearney and Quinton Parrish riding away from Franklin Street in a white Mitsubishi Gallant. App. 34-35. He had seen Parrish, who was also known as QP, in the car previously. App. 36.

Travis Chalk was with Davis when he saw Mr. Kearney on November 20. App. 41. The next day, he was at Mr. Kearney's house when Artis arrived and Mr. Kearney said "if he don't have a G or better, I'm a kill him. 'Cause I'm tired of

him winning my money and coming with no money." App. 43. Mr. Kearney and Artis then started "shooting dice" and parted about an hour later saying "they would …get back up later and finish shooting dice." App. 43-44. Later in the evening, sometime after 7:00 p.m., Davis saw Artis in a white Chevrolet, followed by Mr. Kearney and QP in a white Mitsubishi Gallant, heading toward Franklin Street. App. 44-46.

Willie Green, who had multiple felony and larceny convictions and who had previously given the police a contrary statement, testified that he saw Mr. Kearney and QP together on November 21. App. 75-77. Marcus Hardy, also a convicted felon, testified that he was with Green at about 8:30 p.m. or 9:00 p.m. and that Mr. Kearney and QP were headed towards QP's house. App. 83-85.

Mr. Kearney and QP had been seen together in a white Mitsubishi Gallant one other time before November 21. App. 89. There was apparently a white Mitsubishi Gallant in front of the Franklin Street apartment when the police arrived. *See*, Commonwealth's Exhibit No. 1. This car was "not processed" by the police. Tr. 770. The car was stopped on December 11 in an unrelated traffic matter. Tr. 770-71. The occupants of the vehicle on that occasion were unrelated to anyone in this case and the car was registered to yet another person unrelated to anyone in this case. Tr. 772-74.

On November 21, Veronica Davis saw QP on Franklin Street heading "away from the courthouse." He was walking fast. She tried to talk with him and he "took off running." App. 93-94 & 97. This was some time after dark, but she couldn't say if it was 5:00 p.m., 8:00 p.m. or 11:00 p.m. App. 96. She also saw

someone else, who she didn't know, get into "a white looking car…either white or gray" on the opposite side of the street from the apartment. App. 95.

To connect Mr. Kearney to the foregoing, the Commonwealth called Tony Earl Boothe. Boothe was in prison on federal conspiracy, drug and weapons convictions. App. 98. He had entered into an agreement to cooperate in order to induce the United States Attorney to move to reduce his 23 ½-year sentence. App. 99-100. As reflected by the sentence, Boothe was a "major distributor of drugs." App. 110-11. He had also been previously convicted of forgery. App. 108.

Boothe said that in December 1997, he went to Mr. Kearney's house. App. 102-03 & 109. He said he went in order to collect $3,800 that he said Mr. Kearney owed him for four and one-half ounces of crack cocaine. App. 103. When the two were alone, App. 103, Boothe said Mr. Kearney told him that he couldn't pay him in full because he had "lost the money gambling" and that "he had to kill two people to get the money back." App. 104.

Boothe also said that he had spoken with Mr. Kearney in April 1999. At this time, "I asked him, um, why did he kill the people to get the money. And he said, um, that he had to do what he had to do to get his money back. He also said regardless whether he lost or not, lost the money or not, he was still going to go get his money or not, regardless. Said he was not going to leave there without losing." App. 819.

Boothe says Mr. Kearney said that "he put the gun to the people heads. Um, the other guy searched the house, searched the people, and um, they killed

– he killed the people after that." App. 109. He said that Mr. Kearney had said that someone named "PC" was with him. App. 106.

Boothe was interviewed by the prosecutor in August 1999 and said he didn't know who Mr. Kearney was. App. 106.

## Argument

### I. Whether the Trial Court erred in overruling the motion for a mistrial based on the Commonwealth's repeated comment upon the failure of the accused to testify.

The accused is not required to testify and there may be no comment upon his failure to do so. U.S. Const., amend. V, *Griffin v. California,* 380 U.S. 609 (1965), Va. Const., art I, § 8, Va. Code § 19.2-268, *Elliott v. Commonwealth,* 172 Va. 595, 595, 1 S.E.2d 273 (1939).

The prosecutor in the present case repeated no less than 15 times that the Commonwealth's evidence or that of one or another of their witnesses had not been either "refuted" or "contradicted."

Beginning at the end of a long summary of the evidence, the prosecutor said: "None of that has been refuted. Nothing in the evidence that you've heard in this courtroom over these last several days has refuted those facts. Nothing has refuted those facts." App. 142. A few sentences later he said: "That's established evidence in this case, ladies and gentlemen, that's not been refuted." App. 143.

With regard to the testimony that Mr. Kearney had "lost money big" to one of the decedents, he said: "That's not refuted. That's not been refuted at all. That has not been contradicted at all. That is established evidence in this case." App. 149. Then with regard to the testimony about the supposed threat to recover the

money, he said: “That has not been refuted. That has not been contradicted.” *Id*. Then about the testimony that the defendant and someone else followed one of the decedents on the date in question, said: “That has not been refuted. That has not been contradicted. That is established evidence in this case.” App. 149-50. Continuing, he said: “The car. That has not been refuted, ladies and gentlemen.” App. 150. Then again, “It’s not been refuted. It’s not been contradicted.” *Id*.

When carefully analyzed, these comments cannot be anything other than an invitation to condemn Mr. Kearney for not testifying. Who but Mr. Kearney would the jury expect to refute that he “lost money big to Artis”? Who but Mr. Kearney would the jury expect to contradict that he hadn’t threatened Artis? Who but Mr. Kearney would the jury expect to refute that he had followed Artis?

Then finally about the key testimony of Tony Boothe, “But has there been any evidence, any evidence in this case, that contradicts what he said –.“ *Id*.

The last was perhaps the most egregious of all of the prosecutor’s transgressions because “what he said” was that Mr. Kearney had told him that he had killed two people. These conversations were with no one else but the witness Boothe and Mr. Kearney present. In other words, no one other than Mr. Kearney could possibly have contradicted “what he [Boothe] said.”

These comments were in the Commonwealth’s opening summation not in rebuttal. They were not in response to anything the defendant had argued. There was no defense tactic of characterizing the plea of not guilty as a statement of the defendant that the charges were not true. In such case, the defendant can be

said to have 'opened the door' or invited the error. *Johnson v. Commonwealth,* 236 Va. 48, 49, 372 S.E.2d 134 (1988).

This isn't a case where defense counsel focused the jury's attention on her silence and the prosecutor's closing remarks added nothing to the impression that had already been created by her refusal to testify after the jury had been promised a defense by her lawyer and told that she would take the stand. *Lockett v. Ohio,* 438 U.S. 586, 595 (1978).

The test for whether a comment by the prosecutor infringes the right of the defendant not to testify is "whether, in the circumstances of the particular case, 'the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *Hines v. Commonwealth,* 217 Va. 905, 907, 234 S.E.2d 262 (1977), *quoting*, *Knowles v. United States,* 224 F.2d 168, 170 (10th Cir. 1955).

*Hines* involved a drug case where the defendant had made a statement to the police that the large sum of money had had came from gambling. Where the defendant had made such a statement, the prosecutor was allowed to rhetorically ask the jury "did you hear witnesses on behalf of the defendant come in here and tell you that he was gambling." 217 Va. at 906, 234 S.E.2d at ___.

*Knowles* also presents a situation where the defendant, this time through his counsel, made a remark to which the prosecution was entitled to respond. In that tax case, defense counsel had indicated that defendant had received the income as an agent. Thus the prosecutor was entitled to respond by stating that there was no evidence of any agency. 224 F. 2d at 170.

This case is different from both *Hines* and *Knowles* because the defendant had made no statement and the defense counsel had not yet argued. But the comments, and the prosecutor repeated these comments some 15 times, were not merely that the Commonwealth's case was uncontradicted, but it was that the testimony of specific witnesses was uncontradicted.

Where the comment is on specific testimony, then one must look to that specific testimony to see if there is another witness who could have "contradicted' the prosecution evidence. An example is a case involving a so-called controlled drug buy using an informant under the observation and control of the police. When the prosecutor argued that there was "no evidence to refute" the police officer's testimony, the attention of the jury was clearly focused on the failure of the defendant to testify for there were no other available parties to the conversation. *State v. Perkins*, 374 So. 2d 1234, 1237 (La. 1979).

In this case, the prosecutor again and again pointed out testimony as being unrefuted or uncontradicted. The most important of these instances was with regard to the two conversations with jailhouse informer, Tony Boothe. There were only two parties or witnesses to these conversations, namely Mr. Kearney and the informer. Thus, a comment that the testimony was uncontradicted was no different than saying that the defendant failed to take the stand and deny that the conversations took place. The motive to improperly bolster these conversations is clear since these conversations are the base upon which the entirety of the Commonwealth's case rests.

The same is true for the testimony that there was to be continued gambling at the decedents' home that evening. There is no evidence that anyone other than the decedents and the defendant were present. Thus, it was clearly pointed out to the jury that the defendant had not taken the stand to deny that he had gambled with the decedent that evening.

Yet another instance was the testimony of Sabrina Norfleet who testified that the defendant and the decedent were together earlier in the evening of the date in question. Again, there was no one else who could have contradicted that testimony other than the defendant.

In this case, it is crystally clear that the comments made by the prosecutor were made with the intent, and had the effect, of pointing out the failure of the defendant to take the stand and contradict or explain the evidence against him.

**II. Whether the Trial Court erred in the sentencing phase of the jury trial by not instructing the jury as to the unavailability of parole.**

Mr. Kearney asked for, and was refused, instructions that parole had been abolished in Virginia and how his time off for good behavior would be calculated. Instructions 16A & 16B, App. 167 & 168; App. 163-64 & 165-66.

This aspect of the case is controlled by *Fishback v. Commonwealth,* 260 Va. 104, 532 S.E.2d 629 (2000).

In *Fishback* the defendant requested an instruction advising the jury that he would be ineligible for parole. The instruction was denied. After deliberating some time, the jury asked if the sentences would be concurrent, reduced by the judge or by parole. The trial court responded that "'you should impose such pun-

ishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.'" The Court observed that "in the context of achieving the goal of 'truth in sentencing,' it simply defies reason that [parole] information ought not to be provided to the jury by an instruction of the trial court." The Court thus overruled *Coward v. Commonwealth*, 164 Va. 639, 646, 178 S.E. 797, 799 (1935) and the cases decided thereunder and held that "henceforth juries shall be instructed, as a matter of law, on the abolition of parole for non-capital felony offenses committed on or after January 1, 1995 pursuant to [Va.] Code § 53.1-165.1."

The Court further ruled that "because this is a new rule of criminal procedure it is limited prospectively to those cases not yet final on this date." In doing so, it cited to the case of *Mueller v. Murray,* 252 Va. 356, 478 S.E.2d 542 (1996). There the Court quoted *Caspari v. Bohlen,* 510 U.S. 383, 390 (1994) to the effect that "'[a] state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.'" *Mueller*, 252 Va. at 361. The judgment of conviction herein is therefore not yet final and upon retrial, *Fishback* requires that the jury be instructed regarding the abolition of parole.

## Conclusion

For the foregoing reasons, it is respectfully submitted that this Honorable Court reverse the judgments of conviction of June 8, 2000 and enter final judgments of acquittal.

**Respectfully submitted,**

**LERICO KEARNEY**

By:_____
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## Certificate

I, Joseph R. Winston, a member of the Bar of this Court, hereby certify:

(a) The appellant is LeRico Kearney, defendant below. Appellee is the Commonwealth of Virginia.

(b) The names, addresses, and telephone numbers of counsel are:

| ***Counsel*** | ***Party Represented*** |
|---|---|
| Joseph R. Winston (VSB # 17746)<br>Special Appellate Counsel<br>Public Defender Commission<br>701 East Franklin Street, Suite 1416<br>Richmond, Virginia 23219<br>*Phone: (804) 225-3297*<br>*Fax: (804) 371-8326*<br>*email: Joe_Winston@pdcmail.state.va.us* | Defendant-Appellant<br>(court-appointed) |
| Mr. John H. McLees, Jr.<br>Senior Assistant Attorney General<br>900 East Main Street<br>Richmond, Virginia 23219<br>804-786-2071 | Commonwealth of Virginia |

(c) that on June 20, 2001, I served three copies of the foregoing document on the foregoing counsel, which include all of the parties required to be served, by depositing three copies of it in a United States mailbox with first class postage prepaid and addressed as listed above.

(d) Appellant desires to state orally and in person the reasons why the judgment below should be reversed.

_____

Joseph R. Winston