

THE Duel

THE STRANGE CASE OF COMMONWEALTH V. HIGGINS

My career as a lawyer now spans five decades. It has provided a remarkable window on human nature. It has taught me again and again that life is stranger than fiction.

For strangeness, drama and ironies, no other case comes close to the first I worked on, *Commonwealth v. Higgins*. It became Montgomery County, Virginia's, Trial of the Century.

* * *

Sunday, October 11, 1959, dawned glorious over the small mountain town of Christiansburg. The fall colors were at their peak, and the weather was perfect. The town's two most prominent young men looked forward to a day with their lady friends. They had no clue their day would end in a tragedy.

Bill Flanagan, M.D., age 31, had come to town three years before to take over the family practice of beloved Dr. Sam Nixon, who had died of a stroke. Flanagan had recently secured a divorce from his wife on grounds of desertion. She and their young daughter had moved to New Jersey. Now he was seeing Betty Lou Higgins (not her real name), a pretty, vivacious blonde, legally separated from her husband, E. Garland Higgins, age 35, a town council member and prosperous petroleum distributor.

Higgins had imported his steady girlfriend for the Virginia Tech football weekend. On Sunday evening he would put her aboard a plane for her home in Norfolk.

Both Flanagan and Higgins were sports enthusiasts, enjoying golf and partying at the new country club, boating on Claytor Lake and hunting and fishing. Flanagan owned the lake's finest speed boat (Bobby Kennedy owned one just like it). It became crucial in Higgins' defense of the murder charge growing out of their Sunday night encounter.

Higgins had served as a Marine aviator in the Pacific, mustering out a first lieutenant with designation as an "expert"

in pistol marksmanship. Flanagan, a native of Bremono Bluff, Virginia, had served as a Navy physician in Korea after graduating from Washington and Lee University and the Medical College of Virginia. He, too, was good with firearms.

I had watched Dr. Flanagan shoot a limit of quail without a miss on our little farm two falls before. He'd come with two white and tan English Setters, the first dogs I'd ever seen point a bird. That experience spawned in me a love of bird dogs and bird hunting that persists to this day.

I can still see the tall, handsome doctor in his stylish bird-shooting trousers and coat and moccasin boots, calmly shouldering his Browning Sweet 16 to drop the quail rising from lespedeza. It was the first and last time our three coveys were shot in my lifetime (sadly, they are there no more). I was then a day student at Virginia Tech and operating the farm with my mother. My father had died in a car crash in 1954 when I was a high school junior.

But back to the fateful Sunday. That morning Flanagan, Betty Lou and her youngest child, Annie (not her real name), age 4, had driven in Betty Lou's 1958 Buick to Galax, her and Garland's hometown, and there taken the Blue Ridge Parkway for sightseeing. Galax furniture executive George Vaughan had seen them on the Parkway, Flanagan driving, Betty Lou sitting close, "sharing confidences," and Annie riding in the back seat with her feet dangling out the window.

Late that afternoon, they had driven to Roanoke and eaten supper at a drive-in restaurant on Williamson Road. About 9 they set off for home up Route 11 through Salem. Here fate intervened.

Garland Higgins was also driving west on Route 11, having dropped off his date at the Roanoke airport. Higgins spotted Betty Lou's Buick ahead and passed it. Flanagan was driving, and Betty Lou was sitting close and kissing his neck and ear with Annie in the back seat, Higgins would testify.

By Thomas S. Word, Jr.

Higgins pulled ahead and then stopped. When the Buick passed him again, Betty Lou was driving, and Flanagan was not in sight. Higgins followed the Buick to Christiansburg, a drive of an hour. Annie waved to him out the Buick's back window.

In Christiansburg, Higgins followed the Buick around town as Betty Lou seemed to be trying to lose him. Then she turned south at the town square on Franklin Street, toward Flanagan's home on the edge of town (he shared it with another single man).

Here Higgins, incensed, became aggressive, blowing his horn, blinking his lights and bumping the Buick, signaling he wanted Betty Lou to stop so he could extract Annie, he testified. Betty Lou did not stop, and when she reached the turnoff to Flanagan's house, she did not take it, instead continuing on Franklin, here called the Rogers Road.

At the edge of town, two miles from the town square, stood Jones Cash Store, a small filling station with two pumps and an unlit gravel parking lot. Here Betty Lou turned in and stopped, and so did Garland. Perhaps he forced her.

Just what happened next would be disputed at trial, but this much was undisputed: Higgins emerged from his car armed with a .22 automatic pistol; Flanagan emerged from the passenger side of Betty Lou's Buick armed with a .38 revolver. In seconds, Higgins fired between seven and 11 shots at Flanagan, and Flanagan fired six. Both men emptied their weapons.

Higgins was hit in the side by a shot from Flanagan's .38. Flanagan was struck in the mouth and the arm with two slugs from Higgins' .22. A third shot grazed his chest. Flanagan died of the head wound next morning in Radford Hospital where he'd been taken by ambulance. Higgins flagged down a passing car for a ride to the Christiansburg hospital, where he walked in the operating room still carrying his empty automatic and asking for a doctor. He nearly died, but made a full recovery.

In December, Higgins was indicted for murder in the death of Flanagan. Released on \$25,000 bond, he was tried beginning Wednesday, February 25, 1960, before an all-male, all-white jury in Montgomery County Circuit Court, Judge W. Southall Jordan presiding.

I was then a second-year law student. I volunteered to help the prosecution with legal research and jury instructions. Julius Goodman, the Commonwealth's Attorney since

1944, was a family friend. I attended the trial. I knew well all those involved. Flanagan was our family doctor. I had often been a guest in the Higgins home.

What I saw that week in the courtroom convinced me of the value of skilled advocacy, informed by an understanding of human psychology and attention to detail. It taught me lawyers were far from equal. It taught me law enforcement could be incredibly inept and that eyewitness testimony could be wildly unreliable.

Leading the defense was T. Warren Messick of Roanoke, age 60, dean of Southwest Virginia's criminal defense bar. Known for shedding tears before juries, and exacting tears from jurors, this trial would be the capstone of his storied career. He was assisted by W.S. "Buster" Roop of the Christiansburg bar.

Messick had defended many an outlaw during prohibition when Roanoke and the surrounding rural counties of Franklin, Floyd, and Henry were moonshine hotbeds. He had saved from execution young Buddy Lee Scott, convicted of a brutal murder in the parish house of Roanoke's Christ Episcopal Church. But Messick's most famous case, before *Commonwealth v. Higgins*, was a 1927 civil action against Ringling Brothers' Circus on behalf of Eko and Iko, the Ambassadors from Mars. More of Eko and Iko later.

Warren Messick's nickname was "Squeak" after his high-pitched voice. A short, paunchy man with thick glasses and a disheveled look, he proved a master with the jury, and more important, with the judge.

The defense depended on convincing the judge and the jury that Higgins was justified in using deadly force to remove his 4-year-old daughter from the car occupied by her mother and Flanagan. When the trial began the theory seemed a stretch. But soon into the case for the defense, it became clear Messick had Judge Jordan thinking his way.

Here is how the trial progressed. While no transcript was saved, the *Montgomery News Messenger* on March 3, 1960, published a detailed summary of the testimony, arguments of counsel and the court's rulings.

The second floor courtroom in the 1909 courthouse was



The shooting took place at this Montgomery County store.

packed, including the balcony built for black citizens but this week filled with whites. (The courthouse still had “White Only” and “Colored Only” restrooms in 1960.)

The judge began by explaining the charges and telling the jury it could find Higgins guilty of first- or second-degree murder or voluntary or involuntary manslaughter or assault, or find him not guilty. He described the elements of each crime and the permissible sentences, starting with death.

Prosecutor Goodman’s opening statement was brief and undramatic. He said he would show Flanagan was divorced in 1958 and that Garland Higgins was legally separated from his wife since May 28, 1958. He explained the facts about the chase and stop and that Higgins got out of his car and immediately shot rapidly across the hood of his car at Flanagan who was at the front of Betty Lou’s Buick. He said that seven .22 shells from Higgins’ weapon and Flanagan’s blood and teeth were found near the gas pumps.

Messick, also brief, began with Flanagan coming to town in 1956, becoming the Higgins family doctor, entering the Higgins home and stealing Garland Higgins’ wife.

The jury was then taken to see the crime scene at Jones Store.

A plat of the scene, made by the county surveyor, would remain on an easel before the jury throughout the trial. Witnesses would refer to it and mark points where events were seen or physical evidence found.

Four witnesses’ testimony bore on what happened at Jones Store. By far the most crucial was Paul William Reese, age 19, standing 50 feet from the action with an unobstructed view. He had just walked his date to her home on a hill 300 yards behind Jones Store. He had walked back down to the Rogers Road and was standing beside it when the two cars arrived at high speed, pulled into the parking lot and stopped close together.

He saw Flanagan first get out of Betty Lou’s Buick on the passenger side, and then Garland Higgins get out by his driver’s side door, raise his pistol and shoot rapidly several times across the hood. He then saw Garland move to the back of the cars. In about 30 seconds, a second fusillade erupted, during which he heard Flanagan return Higgins’ fire. He was scared and ran toward town. The night was clear with ample moonlight for Reese to see the action.

Unfortunately for the Commonwealth, and fortunately for Garland Higgins, young Reese was a convicted felon, found guilty at age 17 of three counts of house-breaking. But Reese had no motive to lie. Higgins did.

The prosecution made an error in not introducing corroborating evidence of Reese’s presence at the scene. This allowed the defense in final argument to assert he’d only read of the shooting in the newspaper and had not been there. I doubt the jury bought this argument.



Dr. William L. Flanagan

Garland Higgins

The second eyewitness was Elmer Jones, who owned the store and lived in a house just north of and slightly behind it. He was climbing the outside steps from his basement, having just fired his furnace, when he heard three rapid shots. He ran to the corner of his store, saw the cars and heard a man say, “He shot me.” Then he heard a second series of rapid shots, about 30 seconds after the first. His testimony on the timing of shots matched Reese’s.

He ran to the back of his house and found Flanagan, bleeding profusely and mumbling he’d been shot. He called an ambulance. Soon two deputy sheriffs, two state troopers and an ambulance arrived.

The third eyewitness, elderly Sam Jones, Elmer’s father, lived in a garage apartment just south of the store. He was awakened in his second-story bedroom by the sound of gunshots. He walked to a window and looked down on Betty Lou’s and Garland’s cars — he was 25 feet from Betty Lou’s Buick. He saw her and Annie in the car. He saw Garland Higgins standing in front of the cars near the highway waving his pistol and firing. He never saw Flanagan.

Both Jones men said they saw Betty Lou’s car moving back and forth during the firefight. This proved beneficial to Higgins. Reese testified the cars had not moved before the shooting ended. The differences in the three men’s stories demonstrated the inherent unreliability of eyewitness accounts of fast-moving events.

Two cars then arrived on the highway and were flagged down by the wounded Garland Higgins, still able to walk. The first was abandoned by its driver to Higgins in the middle of the road; the second driver took Higgins to the Christiansburg Hospital, where he walked in the operating room, gun in hand.

Higgins, the fourth eyewitness, took the stand in his own

defense. His testimony was summarized in the *Montgomery News Messenger* as follows:

Mr. Higgins took the witness stand and testified that he had become 36 years old Feb. 28. He said that he had been separated from his wife since some time in May, 1958, and that divorce action had been instituted by her but that a decree had never been granted. He said that he was still contesting the divorce. He said that the depositions of his wife had never been completed because once she didn't show up and once the attorneys were out of town. He said that the 1958 blue Buick Mrs. Higgins had been driving was owned by him and a bill of sale was shown. He said that he never transferred the title of the car to Mrs. Higgins. He said that he had pictures of his children and these were shown to the jury.

Mr. Higgins said that Dr. Flanagan advised the separation between him and his wife and that Dr. Flanagan was their family physician and that he had been in their house on several occasions. Mr. Higgins said that after the separation he first lived at a motel and then moved in to his old house. He said that his children visited with him often and that he had taken them to Galax and on other trips with him.

He said that on the night of Oct. 11, 1959, somewhere between a seafood restaurant and an amusement park on Route 11 near Salem he pulled up behind his black [sic blue?] Buick and "saw in it my wife and daughter Annie and someone else." He said that when he passed the car that he saw the other person was Dr. Flanagan driving the car and that his wife was kissing Dr. Flanagan on the neck and on the ear. He said that his daughter was in the back seat.

Mr. Higgins said that he pulled over in Salem, at a big house with what looked like a park in front of it, and waited for the car to come by. He said that when it passed him his wife was driving. He said that his daughter "leaned over the back seat and waved at me." He said that he did not see Dr. Flanagan but that he presumed he was in the car. He said that he followed them to Christiansburg through town and back out Route 11 to an automobile sales place on Route 11 where they turned around and came back into town; that he followed them around town some more and finally out the Rogers Road [Franklin Street]. In answer to a question as to why he was following the car, Mr. Higgins said, "I wanted to get my daughter out of that car."

He said that his daughter waved several times at him. He said that when they got to Jones' Store Mrs. Higgins pulled on the inside "and I pulled on the outside and started to get out. But from a remark that was made from the other car I reached back in and got my pistol out of the glove compartment. The keys were in the ignition and I took them and opened the glove compartment. I walked around the back of my car and walked around the back of hers." He said that he did not see Dr. Flanagan at that time; that he was still in the car.

He said that after the car stopped "Dr. Flanagan hollered

from the front of the car 'Back up, Betty! He's back of the car.'" He said that Dr. Flanagan was at the front of the car. Mr. Higgins said that his intention was "to get Annie out of the car." He said that his wife immediately started backing up fast and that "as she came back I jumped up on the back bumper and then fell off the left-hand side of the car at which time I saw a flash and felt a sharp pain through my stomach. I started firing 'til I didn't have any more shells." He said that there was another car there although he didn't remember any circumstances connected with how it got there. He said that then another car pulled [up] with Mr. Bibb in it. He said that when he saw the flash he did not hear a shot and that he had not fired his pistol at that time. He said that he did not remember whether he was knocked down and that he "just saw a flash and felt a sharp pain." He said that Mr. Bibb took him to New Altamont Hospital. Mr. Higgins said that he did not know how many shells were in his .22, that he had fired it the previous week two or three times at a groundhog and never reloaded it. He said that he had served in the Marine Corps for 42 months and that he had been awarded the "sharpshooter" designation for a rifle and an "expert" designation with a pistol.

The judge instructed the jury thus, according to the *Messenger*:

Judge Jordan said: "Gentlemen of the jury, this is the court's instructions, which are the laws of this case:"

He then said that the jury could find any of the four following: voluntary manslaughter; involuntary manslaughter; assault and battery; not guilty. He then outlined the sentences and fines for each charge – voluntary manslaughter, not less than one nor more than five years in the penitentiary; involuntary manslaughter, not less than one nor more than five years in the penitentiary, or a fine of not over \$1,000 or one year in jail or both; assault and battery, a fine not exceeding \$500 or a jail sentence of not more than 12 months or both; if not guilty, "you shall say that and no more."

The judge defined voluntary manslaughter as the unlawful killing of one human being by another from a sudden passion or malice or in mortal combat. He defined involuntary manslaughter as the unlawful killing of one human being by another contrary to the intention of the one who kills. He said that assault is any attempt or offer of force and violence to do corporal hurt and that battery is the actual infliction of the hurt, either by the party's own hand or some other means. He said that it was justifiable homicide when a man kills another in self defense, but that one cannot provoke an attack and then plead self defense. He said that the aggressor is one who brings on the conflict by some overt act or demonstration.

He told the jury that if they had reasonable doubt as to which grade then to find for the lower grade. He further said that the defendant was innocent until proven guilty and that if there were any reasonable doubt then the jury was to acquit him. He said that guilt must be proven clearly and

that a reasonable doubt must be based on evidence or lack of evidence and not sympathy or distaste for accepting responsibility.

The judge told the jury that they were the sole and exclusive judges of the credibility of each and every witness and that the character of the witnesses, whether good or bad, was to be considered. He said that circumstantial evidence was legal and proper and bore the same weight as direct testimony. He said that in determining the credibility of any witness the jury should consider the good character and bad character of the witnesses as established by the evidence. He said that regardless of any contract a father has a right to move children from immoral influences and that Garland Higgins had the right to remove his daughter from immoral influences. *He said that if the testimony of Garland Higgins was not inherently incredible then the jury had no right to discredit it and that they must find him not guilty* (emphasis added).

The judge said that if Dr. Flanagan instructed Mrs. Higgins “to back up” then the court instructs the jury that Garland Higgins had the right to defend himself and that if he shot Dr. Flanagan in so doing he would not be guilty of any offense and should not be found so. He said that if Garland Higgins got out of his car to get his daughter and that Dr. Flanagan struck Higgins then Higgins had the right to use force even to taking the life of Dr. Flanagan and that the jury must find him not guilty. He said that adultery may be established by circumstantial evidence and that if Dr. Flanagan and Mrs. Higgins displayed adulterous dispositions that this fact could be considered established.

He said that although the jury might believe from the evidence that Mr. Higgins was guilty, still if there is any reasonable hypothesis that he is not guilty then he must be found innocent.

“Now listen to counsel. One hour and a half to each side.”

The jury went out at 5:07 p.m. and returned a verdict of not guilty at 8:51 p.m. after an hour break for supper.

Warren Messick’s handling of Higgins’ testimony was adroit. Higgins did not say what he heard from Betty Lou’s car that caused him to get his pistol, only that a “remark was made.” This made it impossible for John Goldsmith on cross examination to cast doubt on what Higgins heard.

* * *

What influenced the judge to instruct the jury so favorably for Higgins, virtually compelling the not-guilty verdict? And what influenced the jury to find Higgins not guilty? Here Messick’s psychological mastery and selection of evidence proved critical.



John Goldsmith

evidence of adultery for the divorce case.

On March 4, 1959, on stakeout (pay \$25 a day plus travel expenses), Rice saw Betty Lou and Flanagan enter Flanagan’s house at 9:30 p.m. Rice called Higgins in Galax, and Higgins drove and met him. Together they resumed surveillance.

At 12:15 a.m., Betty Lou and Flanagan walked out the back door of his house and got in the Chevrolet belonging to Flanagan’s housemate. When they drove off, Rice and Higgins followed. They were spotted by the couple who tried to evade them by driving back streets of Christiansburg. Thinking they’d been successful, they drove east on Route 11 toward Roanoke and pulled in behind a fruit stand and stopped. Rice followed.

No one was at first visible to Rice and Higgins in the stopped Chevrolet. When Rice pulled up close, he saw Betty Lou lying on the front seat, “her head in Flanagan’s lap.” Higgins yanked open Flanagan’s door and demanded he get out. Flanagan said, “no.” Higgins grabbed his wrists in his hands and attempted to pull Flanagan out of the Chevrolet.

Flanagan stomped the accelerator and dragged Higgins, still gripping his wrists, across the lot 40 or 50 feet, Rice testified.

Rice estimated Flanagan’s speed at 30 to 40 miles an hour, which was, of course, impossible. Higgins finally released his grip, and the Chevrolet drove off. Rice and Higgins did not pursue.

This testimony came just before Higgins’ own. What did it prove?

It proved that Garland Higgins was guilty of an assault on Bill Flanagan, and that he wanted to do him bodily harm. But Judge Jordan was incensed by the incident. He saw it, at Messick’s urging, as proof of the adulterous conduct of Betty Lou and Flanagan and of Flanagan’s willingness to use

an automobile as a deadly weapon against Higgins.

Messick took a real gamble introducing Rice's testimony. But he judged correctly what Jordan's reaction would be. It persuaded him to instruct the jury that Higgins was justified in using any means to extract Annie from Betty Lou's car at Jones Store.

Messick put on early in the defense politically prominent character witnesses who testified to Garland Higgins' reputation for orderly conduct and truthfulness. Beginning with Circuit Judge Jack Matthews from Galax, he followed with State Senator S. Floyd Landreth; George Vaughan; Frank Felts, a trucking company owner and auto dealer; Christiansburg lawyer Kenneth I. Devore; Christiansburg postmaster Clyde Collins; and Lonnie Roberts, a respected Christiansburg businessman.

Felts also testified to having helped Flanagan purchase a Century Coronado 22-foot runabout, securing for Flanagan a discount on the \$8,500 asking price. This made Flanagan's the priciest boat on Claytor Lake.

In a master stroke, Messick called as a witness Virginia Tech student Ray Southern, who managed on weekends the dock where Flanagan kept his boat on Claytor Lake. He testified that Flanagan, Betty Lou and Annie sailed off in the boat most summer Saturday mornings, to return Sunday evenings.

The mental picture of this clearly disturbed Judge Jordan. With it, Messick completed the portrait of Flanagan as betrayer-physician, playboy, and womanizer, willing to subject Annie to scenes of immoral conduct.

In a final stroke of genius, Messick asked Flanagan's lawyer, a prosecution rebuttal witness, for the mileage on Betty Lou's Buick. He had to go to the courthouse parking lot to get it, which Judge Jordan allowed.

"22,678 miles," the lawyer stated from the witness stand on his return. In closing argument Messick rang the changes with the "22,678 miles in seven months on the new Buick she used with this man ... this betrayer ... who occupied a confidential relationship in her home."

That was a lot of miles in seven months in 1959. Messick's genius was in noticing it, and knowing what images it would evoke for judge and jury.

* * *

Judge Jordan struck the evidence of first-degree murder when the Commonwealth rested and of second-degree after the defense rested.

Was Judge Jordan justified in this striking of evidence? Only if the testimony of Paul Reese is deemed discredited. Or if, as might be plausibly argued, the fact that Flanagan emerged from the Buick with his .38 in hand created sufficient reasonable doubt Higgins was the aggressor, even if Higgins shot first.

How did Flanagan come to have the .38? On July 14, 1959, three months before the fatal shootout, he bought it at a Christiansburg filling station. Messick masterfully introduced this in evidence after Goodman implied the revolver belonged to Betty Lou.

Jim Mensh was at the time a dry-goods merchant in Christiansburg and later a casualty insurance agency owner. He is now retired. He was one of Garland Higgins' closest friends. So close that Garland's date for the fatal weekend stayed with Mensh and his wife. The couple ate supper in the Mensh home that Sunday evening. Higgins and his date left from there to drive to Roanoke to catch her plane home to Norfolk.

Mensh recalls that Flanagan's lawyer, now dead, had counseled Flanagan to arm himself, telling him Higgins kept a loaded pistol in his car and was out to get him. The March incident testified to by detective Rice demonstrated to Flanagan Higgins' desire to do him physical violence. A babysitter for Betty Lou testified to Flanagan having said to her, "I'll give you a ride home if you are not afraid of getting shot."

There exists in the court records one more chilling indication that Bill Flanagan was in fear of E. Garland Higgins before the fatal night. On September 30, 1959, less than two weeks before, Flanagan applied to Providence Life Insurance Company for a \$10,000 accidental death policy. The company cashed his check for the \$120 first premium, but had not issued the policy before his death. His executor sued, but the court issued summary judgment for the insurance company.

Perhaps the greatest shortfall of the Commonwealth's case was its forensic work, or lack of it. Betty Lou's Buick, critical evidence, bearing four bullet hits from Higgins' weapon, was allowed to be driven off by a civilian, photographer Doug Lester, right after the shooting to take Betty Lou and Annie home. Amazingly, no systematic search of the Jones Store parking lot was made by investigators. Dr. Flanagan's shattered teeth and seven spent cartridges from Higgins' automatic were found on October 12 by two schoolchildren after getting off their school bus, and handed over by them to Mrs. Elmer Jones. The cartridges and teeth, critical evidence, were found between the gas pumps and the highway, a space only 11 feet wide. Had investigators found them, the spots from which Higgins fired could have been calculated with accuracy. Flanagan's revolver was found October 12 beneath a peach tree in back of Jones Store, not by police but by a civilian search party lead by Flanagan's lawyer.

Another bit of chilling uncontested evidence came from Dr. Fawcett, the surgeon who operated on Flanagan at Radford Hospital. He testified the shot that struck Flanagan in the forearm was fired from no more than two feet away, indicating the shooters were face to face when Higgins fired that shot. The proof was powder burns around the wound.

* * *

I have stored three mental pictures, clear and sharp, from that long-ago time. The first is of Bill Flanagan and his set-
ters hunting quail on our little farm. The second is of State
Senator Floyd Landreth lumbering to the witness box to give
his character testimony for Higgins. I can hear Warren Mes-
sick say in his high-pitched twang, "Please identify yourself
to the court and the jury," and the huge, fat, bald senator,
who resembled the character Wimpy in the "Popeye" comic
strip, replying slowly, with all the dignity he could muster,
"SENATOR S. Floyd Landreth."

The third image is of Messick, shuffling to the jury box
for final argument, a .22 cartridge in his left hand and a .38
in his right. (He'd used these props throughout the trial when
examining witnesses and arguing to the judge.)

"Gentlemen, here is my client's little target round, and
here is Dr. Flanagan's bullet (placing them side by side,
pointing up, on the rail of the jury box). Which of these do
you think belonged to the aggressor?" Messick asked.

Soon Messick was crying, and the jurors began to wipe
tears from their eyes with their handkerchiefs.

Messick had put on a half-dozen witnesses to Garland
Higgins' target shooting with the .22, instructing his 15-year-
old son and other youngsters in marksmanship. Higgins had
purchased it in 1947 in a Galax hardware store.

* * *

Garland Higgins was afterwards granted a divorce on his
counterclaim of desertion. He moved back to Galax where
his father operated a companion oil business. He remarried
and had a child by that marriage. He died in Galax of cancer
in 1980, and his second wife is dead also.

Flanagan's executor sued Higgins for wrongful death, and
Higgins countersued for bodily injury. The cases were settled
simultaneously on undisclosed terms. (There is no record in
the court of approval of an infant settlement, indicating there
was no recovery for Flanagan's heir.)

Betty Lou moved from Christiansburg and remarried.

* * *

How wealthy was Dr. Bill Flanagan? The inventory of
his estate totaled \$56,286.94, including \$35,312.08 of life
insurance proceeds, the Century Coronado at \$4,000, and his
Oldsmobile 98, the year's hottest stock car, at \$2,100. He left
his estate in trust with his lawyer as Trustee for his daughter
to age 26. Accountings show \$75-a-month payments to the
mother for the daughter's care, and later payments for tuition
at William & Mary. They show two payments for Braille
equipment. Flanagan's daughter was blind from birth.

The file in Flanagan's divorce case tells in detail the story
of his income and expenses the year before his death. Here

is the exhibit he submitted in support of his testimony. He re-
quested his child support be set at \$75 per month. The court
set it at \$140 plus his daughter's medical expenses. His wife,
a school teacher, had asked for \$212.50.

Dr. William L. Flanagan

Average gross receipts - monthly		\$1,250.00
Expenses:		
House rent	\$	50.00
Office rent		85.00
Office salary		85.00
Taxes and license		10.00
Drugs and supplies		140.00
Income & prop. taxes		75.00
Auto exp. - gas and oil		75.00
Ins.: Liab.)		
Auto)		
Prop.)		
Life)		100.00
Car payments		100.00
Lights and fuel - office		15.00
Lights and fuel - home		10.00
Telephone (2)		50.00
Pay on notes:		
Bank of Chbg. \$2,500.00)		
Bank of Louisa \$1,500.00)		
Mrs. S. Nixon \$1,000.00)		
State of Va. (phys.		
scholarship) \$4,500.00)		100.00
Country Club		10.00
Personal living exp.		150.00
Pymt for support of child		<u>100.00</u>
		\$1,155.00
		Plaintiff's Exhibit A

Bill Flanagan's net income from his medical practice (be-
fore income tax) was about \$9,500 for 1958. He testified he
was working at full capacity. He then owed about \$9,500,
including \$4,500 for his education.

* * *

What can we gather looking back on this tragedy and its
courtroom drama?

First, that in 1960 in Montgomery County, Virginia, the
double standard prevailed. John Goldsmith for the prosecu-
tion tried to make the point that Betty Lou's conduct was no
different than Garland's. Messick countered with a straight
face that there was no evidence of Garland's adultery, and
the judge agreed.

With the '60s, the sexual revolution brought on by the
Pill, rock 'n' roll and youths' reaction to the Vietnam War
would change attitudes toward sex between consenting
adults. Betty Friedan's *The Feminine Mystique*, published
in 1964, launched the movement for gender equality. But in
1960 in Christiansburg, all that lay ahead.

In 1956, Grace Metalious published *Peyton Place*, a
steamy novel about a small New England town and adultery

among its bored housewives. The culture of Christiansburg at the time was not unlike Peyton Place.

Second, the “he needed killing” defense remained a staple of Appalachian justice, especially when a wife was seen as “taken” by a family doctor.

A final reflection on the tragedy. It was totally senseless. Jealously and pride were its cause.

* * *

Why did Betty Lou not testify? Because of Virginia’s strong exclusionary rule for testimony by one spouse against another in a criminal case. Had the crime been federal, Betty Lou could have voluntarily testified, but not so in a Virginia court.

There was, perhaps, an exception to the exclusionary rule that could have allowed her testimony. That exception applies when a defendant spouse’s conduct endangers the safety of the witness spouse or a minor child of the marriage.

The Commonwealth could have plausibly argued the exception applied. Surely Betty Lou and Annie were endangered by Higgins’ striking her Buick with his car and engaging in a gunfight, four of his shots hitting the car they occupied. This constituted an assault on Betty Lou and Annie. Julius Goodman and his co-counsel John Goldsmith of Radford, best known as counsel for labor unions in civil matters, did not want to risk creating potential reversible error, and so they did not argue for the admission of Betty Lou’s testimony.

What might she have testified? According to *The Roanoke Times* of October 12, 1959, she told Deputy Sheriff Meredith at the crime scene that when Garland Higgins emerged from his car at Jones Store, he yelled to her and Annie, “Duck down,” a clear indication he intended to shoot.

If Paul Reese’s testimony is to be believed, is there any doubt Garland Higgins shot first? Perhaps. No eyewitness testified to seeing Flanagan during the gunfight except Higgins.

As any bird hunter knows, two simultaneous shots often sound as if one. Many times on a quail or grouse hunt, two gunners will fire at a bird simultaneously and each be unaware his fellow hunter shot. It is possible that when Elmer Jones heard three shots as he climbed out of his basement, he really heard four shots or even five, fired from two pistols simultaneously.

The FBI ballistics expert testified the .22 and .38 cartridges held the same volume of propellant and that a witness could not have reliably distinguished the sound of one from the other by loudness. We know that Flanagan fired six times, and that Higgins fired somewhere between seven (the number of his spent cartridges found) and 11 (the capacity of his pistol’s magazine and chamber). All testimony confirmed the shots were all fired over a very brief time, perhaps as little as two minutes.

* * *

Ironically, Garland Higgins never sought custody of his children. He likely wanted Detective Rice’s testimony of Betty Lou’s adultery to lessen his financial obligations to her in the divorce. But Warren Messick convinced judge and jury that Higgins was justified in using deadly force to keep Annie from seeing her mother smooching with Flanagan on that fatal night of October 11, 1959.

* * *

T. Warren Messick would die two years later, a suicide. His most famous case before *Commonwealth v. Higgins* was *Muse v. Ringling Bros. and Barnum & Bailey Circus*.

George and Willie Muse, stage names Eko and Iko, were black albino twins, born in Roanoke to Harriet Muse. Side show promoters allegedly abducted them as children in 1899 to perform in the freak show of the Greatest Shown on Earth. In 1927 the circus came to Roanoke, and Harriet Muse, who believed they were dead, saw their images on a circus banner. She found her sons and they enjoyed a brief celebratory reunion at her home. When the circus prepared to leave Roanoke for Lynchburg, agents of the side show came for Eko and Iko and allegedly spirited them away against their will.

Enter Warren Messick with a suit for abduction. It was allegedly settled for a small sum, but Messick negotiated a lucrative contract for the twins, who in the 1930s became international celebrities and performed in tuxedos playing mandolins before British royalty. They eventually retired in Roanoke, their birthplace, where Willie lived to the incredible age of 108, dying there in 2001. (Google Eko and Iko for their pictures and story.)

* * *

What was life like in our little one-stoplight town in those days? Average annual household income was \$5,100, and an average home was worth \$6,000. A few years before I had asked my father, a self-educated lawyer and farmer, if the county had any millionaires. He said yes, two. A doctor (not Flanagan) and the owner of the movie theater in Blacksburg, which provided entertainment for Virginia Tech’s 1,800 students. My tuition as a Tech day student had been \$66 a quarter. I chipped in a dollar a week for carpool gas money (gas sold for 25 cents a gallon). We hitch-hiked everywhere, just as Paul Reese hitch-hiked home to Pulaski after witnessing the fatal shootout. Everyone knew everyone else and everyone else’s business.

My law school tuition was \$1,000 a year, happily covered by a \$1,400 annual scholarship that also covered my room rent.

* * *

Irony also attaches to Frank Felts’ role as a witness in *Commonwealth v. Higgins*. With a large home on Claytor Lake, he was a leading member of the affluent social set. And he had a genetic connection to firearms violence and

the “he needed killing” defense, so ingrained in mountain culture and justice.

Frank’s grandfather was Thomas L. Felts, a Galax lawyer and banker and co-founder of the Baldwin-Felts Detective Agency. It had begun as a security service for railroads, then became the same for mining companies in West Virginia and out West. On May 19, 1920, thirteen Baldwin-Felts detectives, appointed as deputy sheriffs of Mingo County, had gone to Matewan, West Virginia, to evict striking miners from their company-owned homes. Chief of Police Sid Hatfield and armed miners shot down seven of the detectives on Main Street, including two of Frank’s great uncles, Albert and Lee Felts.

Sid Hatfield and the miners were acquitted of murder on grounds of self-defense, or the “they needed killing” defense. On August 1, 1921, Felts’ detectives gunned down Sid Hatfield and deputy Ed Chambers on the steps of the McDowell County Courthouse in revenge. They too were acquitted of murder charges on the “they needed killing” defense. The 1987 movie *Matewan* depicts the story. The detective agency had gained its original fame for Thomas Felts’ rounding up of the Allens after the Hillsville Courthouse shootout murders in 1912.

* * *

One final irony bears mention. On the town square where Betty Lou made the fateful turn toward Jones Store, there stands a highway historical marker. It commemorates a duel fought on the site of Sunset Cemetery, a mile from Jones Store, in 1808. The duelists were lawyer Thomas Lewis, 22-year-old grandson of Revolutionary and French and Indian War General Andrew Lewis, and John McHenry, a local planter. The cause was politics. It was the first duel fought in Virginia with rifles, and both men died. They were attended by surgeon John Floyd, later governor and congressman, for whom an adjoining county was named. The duel resulted in the passage two years later of the Barbour Bill, outlawing dueling in Virginia. It did not stop the Flanagan-Higgins duel a century and a half later and a mile away. ■