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Clerk, Supreme Court of Appeals
Richmond, Va.

201 VA 907

Record No. 5104

In the Supreme Court of Appeals of Virginia at Richmond

KENNETH J. DYKEMAN

v.

COMMONWEALTH OF VIRGINIA

FROM THE CORPORATION COURT OF THE CITY OF NORFOLK, PART TWO

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5104

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 13th day of October, 1959.

KENNETH J. DYKEMAN, Plaintiff in Error,

against

COMMONWEALTH OF VIRGINIA, Defendant in Error.

From the Corporation Court of the City of Norfolk, Part Two

Upon the petition of Kenneth J. Dykeman a writ of error and *supersedeas* is awarded him to a judgment rendered by the Corporation Court of the City of Norfolk, Part Two, on the 6th day of March, 1959, in a prosecution by the Commonwealth against the said petitioner for a felony; but said *supersedeas,* however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

* * * * *

To any of the Police Officers of the City of Norfolk:

WHEREAS, Mark Woods Jr. and N. O. Neal Police officers No. ..... hereinafter called complainant, of the City of Norfolk, has this day made complaint and information on oath, before me, Robert R. Brown, a Justice of the Peace of said City, that on the 3 day of Oct., 1958, in said City Kenneth Dykeman hereinafter called accused, did unlawfully and feloniously did operate a auto in a reckless manner causing the death of one Frances Duncan White female 18 years of age. Place Hampton Blvd. and Claude Lane Time 1:45 a. m. and whereas I see good reason to believe that an offense has been committed:

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and take before the Police Judge of said City in the Police Court, Part 11, thereof the body of the said accused to answer said complaint, and be further dealt with according to law;

And moreover, upon the arrest of the said accused, by virtue of this warrant, I command you in the name of the Commonwealth of Virginia, to summon to appear at the same time and place to testify as witnesses on behalf of the Commonwealth touching the matter of said complaint, the above named complaint and the following persons:

and have there and then this warrant with your return thereon.

Given under my hand and seal this 3 day of Oct., 1958.

ROBERT R. BROWN
Justice of the Peace. (Seal)

Upon hearing the evidence on the foregoing charge, the above mentioned accused is sent on to the Corporation Court of the City of Norfolk No. 2, to the next term thereof, to-wit: the first Monday in November, 1958, to answer any indictment found against him and the witnesses above named were severally duly recognized each in the sum of One Hundred Dollars payable to the Commonwealth of Virginia, for their appearance before the Grand Jury of said Court to give evi-

dence of said charge, and not to depart hence without leave of Court.

Given under my hand this 17 day of October, 1958.

VERNON D. HITEHIRES, JR.
Police Judge.

Also city charges.

(on back)

WARRANT FOR FELONY.

Executed by arresting the within named accused this 3rd day of Oct., 1958.

N. O. NEAL
Police Officer.

M. WOODS
Police Officer.

Complainant was Notified.

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• • • • •

Be it remembered that on this 17th day of October, 1958 Kenneth James Dykeman Principal and Aetna Casualty & Surety Co., (H. A. Sheely) Surety, of said city, personally came before the Police Justice of said city, and jointly and severally acknowledged themselves indebted to the Commonwealth of Virginia in the sum of $1,500.00, of their goods and chattels and lands and tenements to be levied, and for the use of the Commonwealth to be rendered, waiving the benefit of their homestead exemption as to said obligation;

Yet upon the condition that the said principal shall personally appear before the Corporation Court No. 2 of said city at the next term thereof, to-wit, on the first Monday in November 1958 to answer charges against him of Manslaughter and at such other time or times to which said proceedings may be continued or further heard; and shall not depart therefrom without leave of said Court; this recognizance to remain in full force and effect until said charge is finally dis-

posed of or until it is declared void by order of said Court. Take and acknowledged before me in said City the day and year first above written.

VERNON D. HITEHIRES, JR.
Police Justice of the City of
Norfolk.

We, the undersigned, above named principal and surety, jointly and severally acknowledge the above obligation and the undersigned surety solemnly swears to the following statements in justification of his said surety.

1. My occupation is ..... 2. Business address.....
3. I own in fee simple real estate generally described as follows: ..... room house and lot size ..... No. .....
Street, ... Virginia, which was purchased by me from ..... on or about ....., 19 ...., for the sum of $....., recorded in D. B. ..... Page .....
4. The said real estate is now assessed for taxation on the land books of the County of ....., Virginia
Checked by—Tax Receipt .....
in my name, for the sum of $.... Certificate of Assessment..
5. There are no liens or encumbrances on said real estate save as follows: .....
6. My other indebtedness does not exceed $.....
7. I am contingently liable on ..... bonds or recognizances, aggregating the sum of $.....
8. There are no unsatisfied judgments against me in any the courts of this Commonwealth, nor any *scire facias* outstanding to the best of my knowledge.

Address
76 Chestnut St. No. Reading, Mass.
Lut. Kenneth J. Dykeman
RA 11346620
347 Trans. Q.
Fort Story, Va.

KENNETH J. DYKEMAN (Seal)
Principal.
H. A. SHEELY (Seal)
Surety.
AETNA CAS. & SURETY CO. (Seal)
Surety.

Pursuant to Chapter 336 Act 1954, of the General Assembly

of Virginia, non-appearance before a Court of record, in accordance with the conditions hereof, in the case of a misdemeanor, shall be deemed to constitute a waiver of trial by jury.

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The Aetna Casualty and Surety Company
Hartford, Connecticut

Certificate of Authority of Attorney(s)-in-Fact

KNOW ALL MEN BY THESE PRESENTS, That The Aetna Casualty and Surety Company, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, hath made, constituted and appointed, and does by these presents make, constitute and appoint H. A. Sheely of Norfolk, Virginia, its true and lawful Attorney(s), with full power and authority hereby conferred to sign, execute and acknowledge, at any place within the United States, or, if the following line be filled in, within the area there designated , the following instrument(s): For the Aetna Casualty and Surety Company, as surety, by his sole signature and act any and all Bail bonds required in civil or criminal proceedings, provided the amount of the bond shall not in any case exceed the sum of FIVE THOUSAND ($5,000.00) DOLLARS and to bind The Aetna Casualty and Surety Company, thereby as fully and to the same extent as if the same were signed by the duly authorized officers of The Aetna Casualty and Surety Company, and all the acts of said Attorney(s), pursuant to the authority herein given, are ratified and confirmed.

This appointment is made under and by authority of the following provisions of the by-laws of the Company which provisions are now in full force and effect and are the only applicable provisions of said by-laws.

ARTICLE IV—Section 8. The President, any Vice-President, or any Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact, and Agents to act for and on behalf of the Company and may give any such appointee such authority as his certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors may

at any time remove any such appointee and revoke the power and authority given him.

ARTICLE IV—Section 10. Any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the President or a Vice-President or by a Resident Vice-President, pursuant to the power prescribed in the certificate of authority of such Resident Vice-President, and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary or by a Resident Assistant Secretary, pursuant to the power prescribed in the certificate of authority of such Resident Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact pursuant to the power prescribed in his or their certificate or certificates of authority.

IN WITNESS WHEREOF, The Aetna Casualty and Surety Company, has caused these presents to be signed by its Secretary and its corporate seal to be hereto affixed, this 17th day of January, A. D., 1955.

THE AETNA CASUALTY AND
SURETY COMPANY,
By J. A. SWEARINGEN
Seal Secretary.

On this 17th day of January, A. D., 1955, before me personally came J. A. Swearingen, to me known, who, being by me duly sworn, did depose and say: that he is Secretary of The Aetna Casualty and Surety Company, the corporation described in and which executed the above instrument, at its Home Office; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; and that he executed the said instrument on behalf of the corporation by authority of his office under the by-laws thereof.

Certificate No. 491504

EMMA C. LATIMER
Seal Notary Public.

My Commission Expires Mar. 31, 1956.

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• • • • •

The Grand Jurors of the Commonwealth of Virginia in and for the body of the City of Norfolk, and now attending the said Court, at its November term, 1958, upon their oaths, present that Kenneth James Dykeman to-wit on the 3rd day of October in the year 1958, in the said City of Norfolk feloniously and unlawfully did kill and slay one Frances Duncan, against the peace and dignity of the Commonwealth of Virginia.

(on back)

Bond Forfeited
Trial 2-24-59
Judgment
Motion New Trial 2-24-59
Motion Overruled 3/6/59
..... 3/6/59
Mittimus
Capias
Suspension
Bailed 3/9/59
Fine and Costs Paid

We the jury find the defendant guilty of involuntary manslaughter and fix his punishment at one year in the city jail.

M. PALMER, Foreman.

Indictment for Manslaughter.

A true bill.

N. J. ....., Foreman.

Witness:

Edward Williams
John G. Whitehead
Joan Brennan
Dr. Robert A. Morton
Officers: J. E. Hinton
E. W. O'Hara
M. E. Woods
N. O'Neal

Costs:

Court	25.00
Witness	6.50
.....	.50
.....	.50
Jury	100.00
	132.50

* * * * *

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* * * * *

PLEA OF FORMER JEOPARDY.

To the Honorable Walter Page, Judge of the aforesaid Court:

Now comes the defendant, Kenneth J. Dykeman, and files his plea of Former Jeopardy upon the following grounds:

FACTS:

Kenneth J. Dykeman, a 20 year old soldier stationed at Fort Story, Virginia, was charged by the City of Norfolk Police with Reckless Driving and Manslaughter as a result of an automobile accident on Hampton Boulevard on October 3, 1958. In the accident one Frances Duncan, a passenger in the Dykeman car, lost her life. The car, titled in the name of Gertrude Poole, mother of the accused, and in the possession of the defendant, was occupied by the following persons at the time of the accident; Edward Williams, John Whitehead, Joan Brannon, the accused, and the

page 6 } deceased. Apparently the car went out of control near Hampton Boulevard Bridge and left the road. When the Police arrived they found the three men out of the vehicle and the two girls inside. A controversy arose as to the driver's identity which resulted in both Williams and Dykeman being charged. At a preliminary hearing in Traffic Court of the City of Norfolk on October 17, 1958, Dykeman was fined $500.00 for Reckless Driving and given 12 months in jail. He was also held for the action of the Grand Jury, for Manslaughter, and was subsequently indicted. Williams was dismissed. On the 16th day of January, 1958, at the election of the City of Norfolk, Dykeman was tried on the Reckless Driving charge which he had appealed. Dykeman

set up the defense that he was not the operator of the vehicle and after some fifteen minutes of deliberation the Jury acquitted the defendant. The commonwealth then set the Manslaughter case for trial on February 24th, 1958.

ISSUE.

The only issue involved in the case is:

Has the defendant, Dykeman, been already placed in jeopardy to the extent that any further prosecution under the same set of facts would operate as placing him in the position of being twice tried for the same offense? If so the second prosecution would contravene Paragraph Eight of the Constitution of Virginia or Paragraph 19-232 of the Code of Virginia.

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ARGUMENT.

Paragraph Eight of the Constitution of the State of Virginia is adopted from the Federal Constitution and basically provides that no person shall be twice tried for the same offense. Paragraph 19-232 provides: "If the same act be a violation of two or more statutes, or of two or more municipal ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others. Furthermore, if the same act be a violation of both a State and Federal Statute, a prosecution or proceeding under the Federal Statute shall be a bar to a prosecution or proceeding under the State Statute."

In *Henson* v. *Commonwealth*, 165 Va. 829, the court said: "The test is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. If the facts which will convict on the second prosecution would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been connected by the same set of facts." Also see Michie's Jurisprudence, Vol. 2, page 638.

The test then seems to be this:

If the same set of facts one relied upon to convict for the second offense that were relied upon in the first trial, then the second prosecution is barred.

page 8 } Much has been said by the proponents of "giving the prosecution two bites at the cherry," that our

Supreme Court in *Handley* v. *Commonwealth* has said that Reckless Driving and Driving Under the Influence are two separate offenses. We can see that a man may be completely intoxicated under the statute and still operate his car properly. Conversely one can see where a man might be completely reckless and be cold sober. *This is not our case.*

In order to convict Kenneth Dykeman of Manslaughter the Commonwealth must first place him behind the wheel of the death car. A jury of his peers has already taken him from behind this wheel and the only way he can be put back under that wheel is for the prosecution to hammer away at another jury the same identical facts that went for naught in a hearing for Reckless Driving. The only new evidence necessary would be the proof of the death of Frances Duncan as a result of the accident. This fact was well established and not contradicted in the Reckless Driving case for which Dykeman was acquitted.

Why then do we rely upon the Hundley case: Because in that case the court says this: "A test of the identity of acts or offenses is whether the same evidence is required to sustain them; if not, then the fact that several charges relate to and grow out of one transaction or occurrence does not make a single act or offense where two separate acts or offenses are defined by statute as in the instant case."

page 9 } I call the Court's attention to the language of the Court with regard to the following: "A test of the identity of acts *or* offenses"—

Notice that it does not say "acts and offenses. In other words if the acts are the same *or* the offenses the same a second prosecution is barred. Can there be any new acts in the Manslaughter case other than those which the City attempted to prove on January 16, 1959, in their prosecution of the misdemeanor?

An indictment must read a certain way in this case. It must set forth that "the accused caused the death of the deceased by operating his vehicle in a wanton and reckless manner calculated to cause her death."

The warrant for Reckless Driving read that "the defendant operated his vehicle on the streets of the City of Norfolk in a careless and reckless manner."

Where is the separation of acts?

If a jury on January 16, 1959, decided that the accused was not operating the death vehicle on October 3, 1958, and this jury was impanelled in a court of record and could have deprived the accused of his liberty for this offense, then certainly they can never try him again for the offense of Reckless Driving. What then did they decide? Namely that

there was no Reckless Driving by Dykeman. If he was not driving reckless he cannot be driving wanton—the act of driving or not driving has been established, the facts are the same, the acts are the same, the evidence is the same. Only the offense is different.

page 10 } We respectfully submit that based upon the foregoing that the pending charge of Manslaughter against the accused constitutes former jeopardy and shall be dismissed.

RICHARD G. BRYDGES.

RICHARD G. BRYDGES, p. d.
3115 Pacific Avenue
Virginia Beach, Va.

I certify that I have this 29th day of January, 1959, mailed a true copy of the above pleading to Mr. Reed Spencer Commonwealth Attorney, City of Norfolk, Va.

RICHARD G. BRYDGES
Counsel.

Filed 1-30-59.

L. BERRY DODSON, JR., D. C.

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* * * * *

In the Corporation Court of the City of Norfolk, Part Two, on the 6th day of February, 1959.

* * * * *

This day came the defendant, by counsel, said counsel being of the defendant's own choosing, and came as well the Attorney for the Commonwealth, and thereupon the Attorney for the defendant in the defendant's behalf moved the Court to quash the indictment for reasons stated in writing in his Plea of Former Jeopardy, heretofore filed herein on the 30th day of January, 1959, which motion being fully heard is overruled, and to the action of the Court in overruling said motion the defendant, by counsel, duly excepted.

* * * * *

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* * * * *

In the Corporation Court of the City of Norfolk, Part Two, on the 24th day of February, 1959.

Kenneth James Dykeman, who stands indicted for Manslaughter, this day appeared in Court pursuant to the terms of his recognizance, and came as well the Attorney for the Commonwealth, and the attorney for the defendant, said attorney being of the defendant's own choosing, and upon being arraigned, and after being advised by counsel, the said defendant plead not guilty to the said indictment, and thereupon came twenty lawful persons, free from exceptions, having been obtained from the *Venire Facias,* duly directed and issued in accordance with the statute in such cases made and provided, and summoned by the Sergeant of the City of Norfolk, from which panel the Commonwealth and the defendant each alternately struck four, leaving the following jury, to-wit: Selwyn R. Palmer, John C. Eicher, E. A. Vitlo, Wallace B. Gibbs, Harry L. Miller, Lemuel E. Jennings, William C. Murray, John R. Tucker, Mahlon Miller, Sr., Edward E. McConnehey, Nortie W. McClung and Claude R. Avery, who sworn the truth of and upon the premises to speak, and at the conclusion of the Commonwealth's evidence, thereupon the defendant, by counsel, moved the Court to strike the evidence introduced on behalf of the Commonwealth, which motion, being fully heard, is overruled, and to the action of the Court in overruling said motion the defendant, by counsel, duly excepted, and at the conclusion of all the evidence, thereupon the defendant, by counsel, again moved the Court to strike the evidence introduced on behalf of the Commonwealth, which motion, being fully heard, is overruled, and to the action of the Court in overruling said motion, the defendant, by counsel, duly excepted, and the aforesaid jury, having fully heard the evidence and argument of counsel, page 13 } returned a verdict in the following words: "WE THE JURY FIND THE DEFENDANT GUILTY OF INVOLUNTARY MANSLAUGHTER AND FIX HIS PUNISHMENT AT ONE YEAR IN THE CITY JAIL." Thereupon the defendant, by counsel, moved the Court to set aside the verdict of the jury and grant him a new trial on the grounds that said verdict is contrary to the law and the evidence, and on motion of the defendant, by counsel, the hearing of which motion is continued until the 6th day of March, 1959, at 9:30 o'clock A. M.

And the defendant was permitted to depart pursuant to the terms of his recognizance.

* * * * *

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* * * * *

2/24/59.

1. ~~Clarence H. Barker~~
2. Selwyn R. Palmer
3. ~~Irvin E. Warand~~
4. John C. Eicher
5. E. A. Vitlo
6. Wallace B. Gibbs
7. Harry L. Miller
8. Lemuel E. Jennings
9. William C. Murray
10. John R. Tucker
11. Mahlon Miller, Sr.
12. ~~Herbert E. Fentress~~
13. ~~Emma Rees~~
14. Edward E. McConneley
15. ~~Doris N. Neal~~
16. ~~Rosalie Womble~~
17. ~~William C. Murphy~~
18. Nortie W. McClung
19. Claude R. Avery
20. ~~Joan Nusbaum~~

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* * * * *

INSTRUCTION C1.

The Court instructs the jury that when a person operates an automobile on the highway in a grossly reckless and wanton manner, which shows a callous disregard of human life, and the death of another results as a consequence of such conduct, the operator of said automobile is guilty of involuntary manslaughter, and neither intent or malice are necessary elements of such crime.

If the jury believes from the evidence beyond a reasonable doubt that the deceased was killed by the operation of an automobile by the defendant under the circumstances above

set out, they should find the defendant guilty of involuntary manslaughter, and fix his punishment at confinement in the penitentiary not less than one nor more than five years; or by a fine not exceeding $1,000.00, or confinement in jail not exceeding one year, or both.

Granted 2/24/59.

W. PAGE, Judge.

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INSTRUCTION C2.

The Court instructs the jury that if they find the defendant not guilty of manslaughter as charged in the indictment, but guilty of assault and battery, then you should say so, and fix his punishment at confinement in jail for a period not to exceed twelve months or a fine not to exceed $500.00, either, or both.

Granted 2/24/59.

W. PAGE, Judge.

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INSTRUCTION C3.

The Court instructs the jury that you can and should draw reasonable inferences from the facts proven.

Granted 2/24/59.

W. PAGE, Judge.

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INSTRUCTION C4.

The Court instructs the jury that the credibility of the witnesses is a question exclusively for the jury, and the law is that, where a number of witnesses testify, directly opposite to each other, the jury is not bound to regard the weight of

evidence as equally balanced. The jury have the right to consider the appearance of the witnesses on the stand, their manner of testifying and their apparent candor and fairness, their apparent intelligence (or lack of intelligence), their means of information, their relationship to any of the parties, if same is proved, their interest, if any, in the result of the case, their temper, feeling or bias, if any has been shown, and from these and all the other surrounding circumstances appearing on the trial, determine which witnesses are more worthy of credit, and to give credit accordingly.

Granted 2/24/59.

W. PAGE, Judge.

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INSTRUCTION C5.

The Court instructs the jury that the accused is presumed to be innocent and that that presumption goes with him through all stages of the trial until the Commonwealth, upon whom the burden of proof rests, has shown beyond a reasonable doubt that the defendant is guilty.

A doubt engendered by sympathy or by a dislike to accept the responsibility of convicting the defendant is not a reasonable doubt. The law does not require proof amounting to absolute certainty, nor proof beyond all possibility of mistake.

If, after having carefully and impartially heard and weighed all of the evidence, you reach the conclusion that the defendant is guilty with such degree of certainty that you would act upon the faith of it in your own most important and critical affairs, then the evidence is sufficient to warrant a verdict of guilty.

Granted 2/24/59.

W. PAGE, Judge.

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* * * * *

INSTRUCTION D1.

The Court instructs the jury that the law presumes every person charged with crime to be innocent until the Commonwealth has established his guilt by evidence so strong, so

clear, and so conclusive, that there is left in the minds of the jury no reasonable doubt as to his guilt. This presumption is an abiding presumption, and goes with the accused through the entire case and applies at every stage thereof until repelled by adequate proof. And in this connection the jury is instructed that it is never sufficient that the accused, upon speculative theory or conjecture, may be guilty; or that by the preponderance of the testimony his guilt is more probable than his innocence. For until his guilt has been proved beyond all reasonable doubt in the precise terms as charged in the indictment, the presumption of innocence still applies and you must acquit the defendant.

And further, although the jury may believe from the evidence in this case, that there is strong probability that the accused is guilty of the offense charged in the indictment, still, if upon the whole evidence, there is any other reasonable hypothesis consistent with innocence, they cannot find the accused guilty, and this is true although it may appear from the evidence that the probabilities of his guilt are greater than the probabilities of his innocence.

Reasonable doubt in this connection is defined as proof of, and belief of, the guilt of the accused to a moral certainty.

Granted 2/24/59.

W. PAGE, Judge.

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INSTRUCTION D2.

The Court instructs the jury that if, after considering all of the evidence in the case, they entertain any reasonable doubt as to whether the defendant is the person who committed the offence charged, then the jury must find the defendant not guilty.

Granted 2/24/59.

W. PAGE, Judge.

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* * * * *

In th Corporation Court of the City of Norfolk, Part Two, on the 6th day of March, 1959.

* * * * *

On conviction for Involuntary Manslaughter, Motion for a new trial.

Kenneth James Dykeman, who stands convicted of Involuntary Manslaughter, this day again appeared in Court pursuant to the terms of his recognizance, and came as well the Attorney for the Commonwealth, and the Attorney for the defendant, said attorney being of the defendant's own choosing, and the motion for a new trial heretofore made in this cause and continued on the 24th day of February, 1959, this day having been fully heard by the Court, is overruled, and to the action of the Court in overruling said motion the defendant, by counsel, duly excepted. Whereupon it is considered by the Court that the said Kenneth James Dykeman be confined in the City Jail for the period of One Year, and that he be required to pay the costs of his prosecution. Thereupon the said defendant, by counsel, moved the Court for time in which to apply for a writ of error to the foregoing judgment, which motion, having been fully heard, is sustained, and the execution of the foregoing sentence is hereby postponed for the period of sixty days, or until the Supreme Court of Appeals of Virginia shall deny said writ if prior thereto. And, on motion of the Attorney for the Commonwealth, the Court doth hereby cancel the bail bond heretofore given by the defendant in this cause, and doth require of the defendant a new bail bond in the penalty of Two Thousand ($2,000.00) Dollars, with sufficient surety, to be given before the Clerk of this Court.

And the prisoner was remanded to jail.

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BE IT REMEMBERED that on this 9th dav of March 1959, Kenneth James Dykeman Principal, and cash by George

W. Vakos Surety, of said City, personally appeared before me, L. Berry Dodson, Jr., Deputy Clerk of the Corporation Court of the City of Norfolk, Part Two, and who being duly sworn stated that no application has been made before said court, or Judge thereof, nor are any proceedings pending before said Court or Judge to obtain bail on this charge, and thereupon the said parties jointly and severally acknowledged themselves indebted to the Commonwealth of Virginia in the sum of Two Thousand and no/100 Dollars ($2,000.00) of their goods and chattels and lands and tenements to be levied, and for the use of the Commonwealth to be rendered, waiving the benefit of their homstead exemption as to this obligation.

Yet upon condition that the said principal shall personally appear before the Corporation Court of the City of Norfolk, Part Two, on to-wit: the 5th day of May 1959, at ten o'clock, A. M., to answer charges against the said principal of Involuntary Manslaughter, and at such other time, or times, to which the said proceedings may be continued or further heard; and shall not depart therefrom without leave of said Court; this recognizance to remain in full force and effect until said charge is finally disposed of, or until it is declared void by order of said Court, or other competent court, pursuant to the statute in such cases made and provided.

Taken and acknowledged before me in said City, the day, month and year first above written.

W. L. PRIEUR, JR., Clerk
By L. BERRY DODSON, JR.

We, the undersigned, above named principal and surety, jointly and severally acknowledge the above obligation and the undersigned surety solemnly swears to the following statements in justification of said surety.

1. My occupation is Attorney at Law
2. Business Address 3115 Pacific Avenue, Virginia Beach
3. I own in fee simple real estate generally described as follows: ..... room house and lot of size ....., Street No. ..... City of ....., Virginia, which was purchased by me from ..... on or about ..... 19 ...., for the sum of $.....
4. The said real estate is now assessed for taxation on the
County
land books of the City of ....., Virginia, in my name for the sum of $.....
5. There are no liens or encumbrances on said real estate, save as follows: .....

6. My other indebtedness does not exceed $.....
7. I am contingently liable on ..... bonds or recognizances, aggregating the sum of $.....
8. There are no unsatisfied judgments against me in any of the courts of this Commonwealth, or any *scire facias* outstanding to the best of my knowledge.

Address 2702 Atlantic Ave.
Phone No. Bus. GA-86021
Res. GA 83489

GEORGE W. VAKOS (Seal)

Address 347 Transportation
Co. Fort Story, Va.
Phone No. .....

KENNETH JAMES
DYKEMAN (Seal)

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

Counsel for James Kenneth Dykeman, the defendant in the above styled case hereby gives Notice of Appeal from the order entered in this case on March 6, 1959, and sets forth the following assignments of error:

1. That the Court erred in overruling the defendant's Plea of Former Jeopardy.
2. That the Court erred in allowing a written statement of the Commonwealth's witness, Edward Williams, to be read to the jury when he, Williams, was present and available to testify.
3. The Court erred in allowing the Attorney for the Commonwealth to make improper argument to the jury.
4. The Court erred in refusing to set aside the verdict and grant a new trial on the ground that the verdict was contrary to the law and the evidence.

RICHARD G. BRYDGES
Counsel for James Kenneth
Dykeman.

RICHARD G. BRYDGES, p. q.
3115 Pacific Avenue
Virginia Beach, Va.

I certify that I have this 24 day of April, 1959, signed and delivered a copy of the above Notice of Appeal to Mr. Reid M. Spencer, 315 E. Plume Street, Norfolk, Virginia, Attorney for the Commonwealth.

RICHARD G. BRYDGES.

Filed 4-24-59.

L. BERRY DODSON, JR., D. C.

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STIPULATED TRANSCRIPT OF TESTIMONY.

Stipulated Transcript of the testimony introduced and proceedings had upon trial of the above entitled case in said Court, on the 24th day of February, 1959, before the Honorable Walter A. Page, Judge of said court.

Appearances: Mr. Reid M. Spencer, Attorney for the Commonwealth.
Mr. Richard G. Brydges, Attorney for the Defendant.

page 27 } PROCEEDINGS.

Prior to the court impaneling the jury, counsel for the defendant renewed his motion to quash the indictment by reason of his plea of former jeopardy, heretofore filed, which motion was overruled by the court and to which action of the court the defendant duly excepted. Counsel for the defendant then requested the court to allow him to reserve the right to do what was necessary to perfect the record of his plea of former jeopardy, which leave was granted without objection on the part of the Commonwealth, and pursuant thereto the court by order entered on the 5th day of May, 1959, allowed him to file a stipulated transcript of the testimony in the case of City of Norfolk *v.* Kenneth James Dykeman; certified copies of the ordinances offered as exhibits in said trial which

were withdrawn with the consent of the court; and the order of this court entered on the 16th day of January, 1959 in the case of City of Norfolk *v.* Kenneth James Dykeman, and make same parts of the record of his plea of former jeopardy in the case of Commonwealth *v.* Kenneth James Dykeman.

page 28 } JUDGE'S CERTIFICATE.

I, Walter A. Page, Judge of the Corporation Court of the City of Norfolk, Virginia, Part Two, do hereby certify that the foregoing is a true and correct Stipulation of the Testimony and proceedings of the case of Commonwealth *v.* Kenneth James Dykeman, tried in said Court on the 24th day of February, 1959.

I further certify that said Stipulations were presented to me for certification and signed within sixty (60) days after the final order in said cause, and that the Attorney for the Commonwealth had reasonable notice in writing of the time and place at which the same would be tendered for certification.

Given under my hand this 5th day of May, 1959.

WALTER S. PAGE, Judge.

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In the Corporation Court of the City of Norfolk, Part Two, on the 5th day of May, 1959.

• • • • •

ON CONVICTION FOR INVOLUNTARY MANSLAUGHTER.

This day came Kenneth James Dykeman, by counsel, and came as well the Attorney for the Commonwealth, and thereupon the said Kenneth James Dykeman, by counsel, with the concurrence of the Attorney for the Commonwealth, moved the Court that he be permitted to perfect the record of his plea of former jeopardy, heretofore filed in this cause, by allowing him to file herein a stipulated transcript of the testimony in the case of City of Norfolk *v.* Kenneth James Dykeman; certified copies of the ordinances of the City of Norfolk offered as exhibits in said trial, which were with-

drawn with the consent of the Court; and the order of this Court entered on the 16th day of January, 1959, in the case of the City of Norfolk *v.* Kenneth James Dykeman; and make same parts of the record of his plea of former jeopardy in the case of Commonwealth *v.* Kenneth James Dykeman, which motion, being fully heard, is sustained. And it is ordered that the aforesaid stipulated transcript of the testimony, copies of the ordinances and order of this Court be, and hereby are, made parts of the record in this cause.

• • • • •

TRANSCRIPT OF TESTIMONY.

Stenographic transcript of the testimony introduced and proceedings had upon the trial of the above-entitled case, in said court, on the 24th day of February, 1959, before the Honorable Walter A. Page, Judge of said court, and a jury.

APPEARANCES.

Mr. Reid M. Spencer, Attorney for the Commonwealth.
Mr. Richard G. Brydges, Attorney for the defendant.

• • • • •

page 3 } The reporter was sworn. The defendant was arraigned and pled not guilty to the said indictment. A jury was empaneled, sworn and charged. The witnesses were sworn, and excluded on motion of counsel for the defendant. Opening statements were made by counsel as follows:

Mr. Spencer: May it please the court and gentlemen of the jury. Some of you have not served this term. My name is Spencer. I represent the Commonwealth in the prosecution of this case. This is Mr. Richard Brydges who represents the defendant, Kenneth James Dykeman, who is before you today on an indictment charging manslaughter.

As you may know, the remarks of counsel, whether it be by way of opening statement or closing statement or during the course of the trial, are not evidence in the case and are not to be considered by you as such. You are to reach your verdict on the evidence that is presented to you from the witness stand and by way of physical exhibits. The purpose of the opening statement is so that I can explain to you, and so that the defense counsel can explain to you, what we expect to show.

The indictment which is before you, this piece of paper, is not evidence and is not to be considered by
page 3-a } you in weighing the guilt or innocence of the accused. By way of explanation of the indictment, as I mentioned a moment ago, it charges manslaughter. There are two degrees of manslaughter: voluntary and involuntary. Under this indictment there is a possibility of a verdict of assault, or assault and battery as well. At the outset let me say this to you: that the Commonwealth does not contend that this is voluntary manslaughter. At most we expect to show involuntary manslaughter. The difference between the two, so that you will understand why I say that, is that voluntary manslaughter is the killing in the heat of passion, and involuntary manslaughter is a killing in the careless performance of a lawful act, or in the performance of an unlawful but not felonious act.

What will our evidence be? The Commonwealth will first put on Dr. Robert A. Morton who will testify that he examined on the morning of October 3rd the body of one Frances Duncan, and that Frances Duncan was dead as a result of multiple and severe injuries received, according to his examination and according to the evidence presented to him, in an automobile accident.

We will then put on Police Officer J. E. Hinton
page 3-b } who was one of the district officers, and the first officer to arrive on the scene. Officer Hinton will tell you of the physical situation when he arrived, which was this: A call went out for the police to go to the 7200 block of Hampton Boulevard, that there had been an automobile accident. Hinton and his partner arrived at the scene and they found this automobile crashed against the south end of the North Shore Apartments. The automobile apparently had come down the north side of the Hampton Boulevard Bridge, proceeding in a northerly direction, and had struck the dividing island in the dual street there after it had gotten down off the bridge, had jumped the curb, gone across a portion of the island, knocked down some bushes, turned over, struck a guy wire of the telephone pole, bounced off of that and slammed up against the side of the apartment, and finally came to rest. He will testify that in the automobile were found, among other things, eight empty beer cans or bottles, an empty whiskey bottle, a number of empty Vodka bottles. That in the back seat of the car wedged into the car were two girls, one of whom was the deceased. Then on the left-hand side of the car by the door—and that door, the driver's door of this car, was

wired shut—he found Edward Williams. Standing also on the left side of the car was Kenneth James Dykeman, this defendant. That lying face-up in a position away from the car was John Whitehead. Hinton will tell you that he asked what had happened and who was driving the car, and that Dykeman, this defendant, spoke up and said, "We were." Hinton said, "What do you mean, 'We were?'" Dykeman said, "We were," pointing to Williams. Williams then spoke up and said, "Yes, we were both grabbing at the wheel. He was driving and was moving away from the wheel, and I tried to grab it, also."

page 3-c

All of the parties were taken to the hospital. Subsequently Dykeman was taken to the Portsmouth Naval Hospital for some minor treatment which he required. Approximately an hour after the accident Frances Duncan died. John Whitehead was also in the automobile and was quite severely injured. He was at DePaul Hospital. Edward Williams and Joan Brannan, the other girl who was also severely injured, were at DePaul. Edward Williams and Kenneth Dykeman were the two least injured parties involved in the accident. Of these two Dykeman appeared to be the most alert to the officer, who will next testify, and that will be Detective Mark Woods. Detective Woods will tell you that he at the hospital talked with Dykeman, and that Dykeman had first said that Williams was driving. He will tell you then that after discussing this statement with Dykeman, and about how the accident happened, that Dykeman told him he was drunk, that he did not know what had happened in the accident, but that Williams was driving. At this point a doctor and a nurse—and this all took place in the emergency room at DePaul Hospital—a doctor and a nurse who were working on the injured parties, and were standing near where Dykeman and Detective Woods were talking—the doctor spoke to the nurse and said, "This boy looks bad," speaking of John Whitehead. At that moment Dykeman, this defendant, turned to Officer Woods and said, "He is the one who was driving," speaking of Whitehead.

page 3-d

Now shortly after that Dykeman was taken by the Shore Patrol to the Naval Hospital in Portsmouth. William was taken by the Norfolk Police to the Detective Bureau. Whitehead, Joan Brannan and Frances Ducan were, of course, all kept in the hospital. They were quite severely injured.

After arriving at the Detective Bureau Officer Woods will tell you that he interrogated Williams and took a statement from him. Shortly after that the Shore Patrol returned

Dykeman to the Norfolk Police at the Detective
page 3-e } Bureau. At this time Dykeman was confronted
with Williams' statement. The statement was read to Dykeman by Williams. Dykeman was asked by the officers what he had to say about that. Dykeman answered, "Yes, I remember that I was driving the car, but I don't remember the accident"—words to that effect.

Again let me state that what I am saying is not evidence. It is what these officers and the other witnesses will say. That substantially is the Commonwealth's case. At the conclusion of all the evidence we will ask you to return a verdict of guilty of involuntary manslaughter as charged in this indictment.

Mr. Brydges: May it please Your Honor and Gentlemen of the jury. As Mr. Spencer said, I am Richard Brydges from Virginia Beach, and I represent this young man, Kenneth Dykeman, who is stationed at Fort Story. I want to say at the outset, as Mr. Spencer has said, that this indictment charging Kenneth Dykeman with manslaughter is an indictment that was returned by a grand jury on the basis of evidence only presented by the Commonwealth. The defendant had no right to appear at that hearing. He had no
right to counsel at that hearing. It is strictly a
page 3-f } one-way street. On the basis of only one side of
the story this indictment was returned.

Going into the facts of this matter and what we intend to prove and show you: On or about October 3rd of this last year Kenneth Dykeman and his friend John Whitehead and his other friend Edward Williams were going to attend a dance at Fort Story. The automobile in question, the Mercury which was wrecked, belonged to my client's mother, he not being old enough to have title to the vehicle, himself.

Gentleman, I want to say at this time before proceeding any further, we say that whoever was driving this automobile was driving it in such a careless and wanton and reckless manner that he should be punished. Nobody in this courtroom wants to see him punished any more than I do, or Mr. Dykeman, because the death of this young girl, actually a child, is a terrible thing. The only thing we want to avoid is charging the wrong person with that death. That is the basis upon which we stand before you.

Now, proceeding further, the evidence will show that Kenneth Dykeman, unlike most individuals, is not a person who likes to drive an automobile. When he has a beer or a drink of any kind he rebels against driving. The evidence will

further show that on this particular day he had
page 3-g } asked not to drive from early in the evening.
This will be substantiated by the Commonwealth's own witness.

They met these three girls at a dance: Frances Duncan, the deceased child, and Gwinder Tomac, and the lady sitting back here who was injured pretty badly, Joan Brannan. When they left Fort Story to take these girls home the seating arrangement was as follows: Mr. Williams, the boy who has been excluded as a witness, was under the wheel driving Dykeman's car at Dykeman's request. Seated next to Mr. Williams was Frances Duncan, his date for the evening. Seated next to Frances Duncan on the front seat was the accused, Kenneth Dykeman. On his left was Gwinder Brannan, his date, who is now Gwinder Tomac. On the back seat of this vehicle John Whitehead was seated with Joan Brannan, the girl back here.

Somewhere outside the West Gate of Fort Story, Gentlemen, Mr. Williams, driving the automobile in question, began to flirt with another automobile and passed it as a result on the wrong side. As a result of this the evidence will show that a girl screamed and that Mr. Dykeman here, the accused, snatched the keys from the ignition, saying "If you are going
to drive that way, get out and let somebody else
page 3-h } drive." The car was then stopped. Whitehead got
out of the car and Williams got out of the car, and they entered into a discussion about who would resume driving. The evidence will show that Dykeman insisted that Whitehead continue, never at any time saying, "I will drive, it is my car."

Now, at that particular time the seating arrangement changed. John Whitehead got under the wheel. Frances Duncan got in the back seat. Edward Williams got in the back seat, leaving on the front seat, seated in the same positions on the passenger side, Kenneth Dykeman, Gwinder Tomac, and John Whitehead driving.

Gentlemen, we proceed from that point on into Norfolk. The evidence will then show that Kenneth Dykeman did not know the City of Norfolk; that he had only been there one time previously; that he knew where none of these people lived; that he was a complete stranger to the area. Whitehead, who had been stationed at Fort Story longer, drove this vehicle to the door of Gwinder Brannan, now Gwinder Tomac. From the time the drivers changed the evidence will show without contradiction that Kenneth was asleep on the passenger side of the car; so much so that when Edward

Williams got from the back seat to escort Gwinder
page 3-i } Brannan into the house, this being a two-door car
and the driver's side being wired shut through
some previous accident, they had to shove Dykeman over so he would lean like this (illustrating) to allow Edward Williams to get out of the back. Gwinder Brannan got out the front and worked across his legs, and Edward Williams escorted Gwinder Brannan to her door. At this time that left Joan Brannan on the back seat by herself—no; Joan Brannan and Frances Duncan, the dead girl, in the back seat. It left on the front seat John Whitehead and Kenneth.

John Whitehead got tired of waiting for Edward Williams to come back from the front porch where he was standing with Gwinder Brannan, and moved to the back seat with Frances Duncan and that left, the evidence will show, still the defendant sleeping on the passenger side. At that point all hands went to sleep. Everybody was asleep.

Some 15 or 20 minutes afterwards Mr. Williams returned from the home of Gwinder Brannan. This is where we get to the meat of the coconut in this case. He says that he sat on the passenger side then, apparently waking up Dykeman. He claims that Frances Duncan was then on the front seat,
which of course is clearly not true. All of the evi-
page 3-j } dence is opposed to that. He says that Dykeman
was driving. He says that over the Hampton Boulevard Bridge, although this man does not like to drive and insisted upon not driving, that he was driving between 85 and 90 miles an hour when Williams objected to Dykeman's driving. He said, "If you don't like the way I am driving, drive your own damn self." And with that, at 85 miles an hour, he proceeded to crawl over the back seat or left the wheel. This is the story that Edward Williams would have you believe.

We believe it is impossible for the Commonwealth to establish beyond a reasonable doubt, which is the burden that is placed upon it, the Kenneth Dykeman should stand responsible for this death. Somebody should be responsible, but not just anyone. We believe that when his Honor instructs you on the basis of the evidence which I believe will be disclosed to you gentlemen today, that your verdict will be, "We, the jury, find Kenneth Dykeman not guilty."
Thank you very much.

page 3-k } Mr. Spencer: Judge, Dr. Morton is just about
to be called in a case across the hall. I related that to Mr. Brydges. The defense is willing to stipulate that Dr. Morton's testimony would be that the death of this girl, Frances Duncan, was the result of severe multiple injuries as a result of this accident.

Officer J. E. Hinton.

Mr. Brydges: We have no hesitancy in doing that, Your Honor.

The Court: All right.

OFFICER J. E. HINTON,

called as a witness on behalf of the Commonwealth, having been first duly sworn, testified as follows:

Examined by Mr. Spencer:

Q. You are Officer J. E. Hinton, a member of the page 4 } Norfolk Police Division?

A. Yes, sir.

Q. Officer Hinton, were you on duty on the early morning of October 3rd of last year?

A. Yes, sir.

Q. In the early morning of that day did you have occasion to respond to a call at Claude Lane and Hampton Boulevard?

A. Yes, I did.

Q. Is that location in the City of Norfolk?

A. Yes, it is.

Q. Approximately what time did you get this call?

A. Approximately 1:30-1:32, somewhere along in there.

Q. When you arrived at this place what did you find, please?

A. When we arrived on the scene we found a 1952 Mercury had wrecked in an accident, which was resting up against the building on the northeast corner of Claude Lane and Hampton Boulevard.

Q. What is that building, please? Do you know?

A. It is an apartment building.

Q. Go on, sir.

A. Our investigation revealed that the automobile had come down the north end of the Hampton Boule- page 5 } vard Bridge, had hit the sign in the center of the island, had turned over, went over to the southeast corner of Claude Lane and Hampton Boulevard and hit the guy wire from the telephone pole, had flipped back over and went to the north side of Claude Lane where it knocked the trees down and bushes, and rested up against the apartment building.

Q. I have here a number of pictures, Officer Hinton, which I will ask you to identify, if you can. Can you tell us what this shows, please?

A. Yes, sir. This is the automobile that we investigated.

Officer J. E. Hinton.

Mr. Spencer: I introduce this one.

By Mr. Spencer:
Q. I show you a second picture.
A. Yes, sir, that is the same automobile.

Mr. Brydges: How many do you have, Mr. Spencer?
Mr. Spencer: Five.

By Mr. Spencer:
Q. And here is another one.
A. Yes, sir.
Q. And a fourth?
A. Yes, sir.
Q. And a fifth?
A. Yes, sir.
Q. What does that fifth picture show?
page 6 } A. This fifth picture shows the scene after the car was towed away. It shows the one-way street sign there that I described earlier that the car had hit, and also the guy wire from the pole that the car had hit before it came up against the bushes next to the building which is shown in the picture.
Q. These bushes that you speak of, sir, was that just the shrubbery beside the building?
A. Yes, sir.
Q. Now, Mr. Hinton, this automobile shown in these pictures appears to be a convertible. Was it a convertible?
A. I believe, sir, it was a hardtop convertible.
Q. Where is the top? Can you tell us that, sir?
A. The top was mashed almost down level with the body of the car, along where the hood line would be.
Q. I show you a picture marked "C-4." This is the same car showing the right-hand side, is it not?
A. Yes, sir.
Q. And in that one can you see the top?
A. Yes, sir.

(The photographs were received and marked "C-1" through "C-5.")

By Mr. Spencer:
Q. When you arrived at the scene, sir, were there any people in this automobile?
page 7 } A. Yes, sir.
Q. How many?

Officer J. E. Hinton.

A. Two.

Q. Who were they?

A. They were the two ladies, Joan Brannan and Frances Duncan.

Q. Where were they in the automobile?

A. Frances Duncan was on the left side of the back seat, and Joan Brannan was on the right side of the back seat.

Q. Were there any other persons at the scene who were involved in this accident?

A. Yes, sir.

Q. Who else was there?

A. Kenneth Dykeman was standing by the left front door. John Whitehead was approximately twelve feet to the left of the driver's side, lying on the ground facedown. Edward Williams was leaning up against the left front side of the car.

Q. Did you talk with any of these people?

A. Yes, sir. Upon my arrival on the scene I asked who was driving.

Q. To whom did you address this question?

A. I asked Kenneth Dykeman.

Q. Did he answer?

page 8 } A. He stated, "We were."

Q. And what happened next?

A. I said, "Who is 'we?' " He said, "Williams and I."

Q. All right, sir.

A. I questioned Williams, and Williams said, "We were in the act of changing positions behind the wheel as we were coming over the bridge."

Q. During the course of this conversation with Dykeman and Williams did you have both of them in your presence at the same time?

A. Both of them were standing there together, yes, sir.

Q. After that did you have occasion to investigate and examine the interior of this automobile?

A. Yes, sir.

Q. Did you find anything; if so, what?

A. Yes, sir. We found three fifth bottles of Smirnoff Vodka that were empty, and one pint of Old Granddad that was empty, and eight empty beer cans.

When you were questioning Dykeman and Williams, what was their condition as to sobriety?

A. I could smell a strong odor of alcohol on their breaths. I could tell that they had been drinking.

Officer J. E. Hinton.

Q. Is there anything further, Mr. Hinton?

page 9 } A. Yes, sir. On the way to the hospital—we carried Williams to the hospital, ourselves.

Q. Was Dykeman there?

A. No, sir.

Q. Don't go into that.

A. At the hospital Dykeman and Williams were both standing together. John Whitehead was lying on a table in the emergency room at DePaul. The doctor there said, "He doesn't look too good." Along about that time the detectives came in and asked who was driving, and both Dykeman and Williams pointed to Whitehead and said that he was driving.

Mr. Spencer: You may inquire.

CROSS EXAMINATION.

By Mr. Brydges:

Q. Officer Hinton, of course you don't know who was driving, do you?

A. Not from actual knowledge, no, sir.

Q. You don't know how much, if any, of the contents of these alcoholic beverage containers was consumed that night, do you, or how old they were? Did you look at the

page 10 } labels on the Smirnoff bottles to see when they were purchased?

A. No, sir. Some of them were broken.

Q. Some bottles were broken?

A. Yes.

Q. In other words, there were just broken bottles lying in the back?

A. Some were broken and some were not. They stated that they had been to some party at some club at the base.

Q. You can tell the gentlemen of the jury, I am sure, from your observation, Mr. Hinton, whether or not they looked like they had just been broken, or whether or not they looked like they had been in the car for sometime. Could you tell?

A. I could not tell how long they had been in the car, no, sir.

Q. You could tell how long it had been since the Old Granddad and the three bottles of Smirnoff Vodka were purchased, couldn't you, Mr. Hinton?

A. I did not examine the A.B.C. label on it.

Q. That would have been pertinent, wouldn't it, Mr. Hinton?

A. No, sir, not when it is legal whiskey.

Q. I mean, to come and say to the jury there were eight bottles of beer, or whatever the case may be, and page 11 } three bottles of Smirnoff, and a bottle of Granddad, would convey that all of that whiskey was consumed that evening, would it not?

A. No, sir. I just stated what was in the car.

Q. When you asked in front of Mr. Dykeman who was driving the car, he stated that "We were," you say?

A. Yes.

Q. Indicating that none of the girls were driving?

A. That is correct.

Q. You are confident, are you not, Mr. Hinton, that Frances Duncan, the deceased girl, was in the back seat?

A. I know she was in the back seat when we arrived.

Q. She was pretty far gone, I guess, when you arrived, wasn't she?

A. At the time it did not appear that way. For a few minutes she appeared to be all right. But, she took about three steps out of the car and appeared to be all right, and then collapsed.

Q. She was pinned by the top in the back seat?

A. Yes, sir.

Q. Would it have been possible for her to crawl from the front to the back? It is doubtful?

A. Doubtful.

Q. Thank you, Mr. Hinton.

page 12 } By Mr. Spencer:

Q. Come down.

DETECTIVE MARK E. WOODS

called as a witness on behalf of the Commonwealth, having been first duly sworn, testified as follows:

Examined by Mr. Spencer:

Q. You are Detective Mark E. Woods, a member of the Norfolk Police Division?

A. I am.

Q. Did you participate in the investigation of this case?

A. I did, sir.

Q. When did you first receive knowledge of this accident, Mr. Woods?

Detective Mark E. Woods.

A. We were at the intersection of Princess Anne Road and Ballentine Boulevard when we heard the call come over of a serious accident in the 7100 block of Hampton Boulevard. We proceeded on over to the scene of the accident from there.

Q. At what time did you arrive at the scene?

page 13 } A. I would say we arrived at the scene about 2:05 or 2:08, somewhere in that area.

Q. Is this A.M. or P.M.?

A. A.M., sir.

By Mr. Brydges:

Q. 2:05?

A. Yes, sir, about.

By Mr. Spencer:

Q. What was your assignment of duty at that time?

A. Homicide Investigation.

Q. Is that still your assignment?

A. Yes, sir, it is.

Q. When you arrived at the scene what did you find?

A. When we arrived at the scene we found a 1952 Mercury sedan, Massachusetts License L53-522, that was sitting between the intersection of Claude Lane and the apartment building located at 7100 Hampton Boulevard. The car was sitting on all four wheels. The top had been depressed down to the top of the front seat. There was a right large area of wreckage there. We noticed some beer cans and bottles laying around, such as Vodka bottles. About seventy-five feet from the vehicle the transmission was resting in the center of Claude Lane. That would be to the east of where the car was sitting. There was a guy wire torn loose from

page 14 } a telephone pole that was located at Claude Lane and Hampton Boulevard. There were two or three crepe myrtle trees uprooted and scattered over the area.

When we arrived there we noticed a police patrol car had two men in the back seat, which were later identified as Kenneth Dykeman and Williams. An uniform accident car was there. They were taking a girl from the wreckage. The police car backed out to let them out and they carried her on to the hospital. We checked around at the scene for a few moments and followed the cars on to the DePaul Hospital.

Q. All right, sir. I show you five pictures which have been previously introduced in evidence, and ask you if the auto-

mobile shown in Pictures 1 through 4 is the automobile about which you have just testified?

A. It is, sir.

Q. Picture No. 5, does that show the intersection of Hampton Boulevard and Claude Lane?

A. It does.

Q. All right, Mr. Woods, after you arrived at the hospital will you tell us what happened, please, if anything?

A. When we arrived at the hospital the deceased, Frances Duncan, was in the third cubicle from the entrance to the emergency room. She was being worked on by

page 15 } approximately three or four doctors. Whitehead—that is, John G. Whitehead—was laying on the table next to her. Joan Brannan was in the first cubicle. At that time Dykeman and Williams were walking around in the emergency room. Mr. Dykeman had a slight laceration of the scalp. Williams had some scuff or burnt-looking marks on his hands where it looked like he had rubbed against concrete. He also had a laceration of the elbow.

Mr. Dykeman looked like he was in better control of himself of the bunch as far as injury goes, or anything else. The only damage you could note on him was the laceration, and his clothes were dirty on the shoulder and the pants leg.

I asked him who was driving the car. He stated that Williams was driving the car. We were there discussing how the accident happened. He said that he was asleep on the right-hand side of the car and he did not know how it happened—that is, the right-hand front seat.

A little later, the doctors in moving around from patient to patient, working on the more seriously injured—one doctor mentioned that Mr. Whitehead was injured right severely due to internal injuries. About that time Dykeman said that Whitehead was driving the vehicle. I kept speaking with Dykeman about the operator of the car and what

page 16 } had happened, and he said he did not know, that he was asleep from the time they had left Fort Story. If I might refer to my notes—

Q. Go ahead, sir.

A. (Does) At the hospital Dykeman stated that Whitehead was driving, and that he was in the right-hand front seat. The next statement he made, he stated that Williams was driving the car, and that he had been asleep since they left Fort Story. He said Williams was driving the car then, and the deceased, Frances Duncan, was in the front seat; that Whitehead and Joan—speaking of Joan Brannan—were oc-

Detective Mark E. Woods.

cupying the back seat. There was another girl he stated who was sitting on his lap just prior to the accident that they put out on the other side of the Hampton Boulevard Bridge. He kept placing the girls and the other men in different places in the car. Once he would say that one of the girls was in the back, and then she was in the front; that Whitehead was in the back and then he was driving; then Williams was in the back and Whitehead was driving. He kept shifting them round. He could not explain how the shifting was done without him being awakened.

The left-hand door, which would be the driver's door of the automobile, was secured with a wire. As I understand, the door did not operate or function at all, and in getting in and out of the back seat it had to be done through page 17 } the right-hand door. The front seat has to be folded over for a coupe. He stated that he was asleep from the time he left Fort Story, and yet all of this shifting was done. He never could verify it or clarify it in any way.

Q. If I may interrupt you a minute. Who was telling you about the shifting that was done?

A. Dykeman. He was placing the different people in the back and the front seats at different times. Different ones were supposed to be here and there, but he never could explain how this was worked with him there in the front seat.

Q. Were the statements which were made about where the people were sitting in the car, and the people shifting their positions in the car, were they made in the same statement in which Dykeman stated that he had been asleep in the right front seat ever since they had left Fort Story?

A. Yes, sir, it was about the same time. It was during the period while we were standing there waiting for the results of the injured to see what was going to happen.

The next statement he made, he stated that Williams and the deceased, Frances Duncan, were in the back seat, and the other girl and Whitehead were in the page 18 } front seat with him. About this time the Shore Patrol arrived. That was just after the girl had expired, Frances Duncan. We were going to take Williams down town with us, and Dykeman was carried over to the Portsmouth Naval Hospital by the Shore Patrol for treatment there.

Q. All right, sir. After you left DePaul Hospital where did you go?

A. We went to the Detective Bureau.

Detective Mark E. Woods.

Q. Upon your arrival at the Detective Bureau did you interrogate Williams?

A. Yes, sir. We spoke to Williams about the accident.

Q. Did he make a statement to you?

A. He did, sir.

Q. Was the statement taken down in writing, or was it simply an oral statement?

A. The statement was taken down in writing.

Q. Was it signed by Williams?

A. It was, sir.

Q. Was it made without threat or promise on your part, or any officer's connected with the Norfolk Police?

A. It was, sir.

Q. After taking the statement from Williams did you have occasion again to see the defendant Dykeman?

A. We did, sir.

page 19 } Q. About what time was this?

A. It was, I would say, approximately 6:00 in the morning; maybe a little later.

Q. At that time did you talk with Dykeman again?

A. Yes, sir. When Dykeman was returned from the Portsmouth Naval Hospital he came into the Homicide office where Detective O'Neal, Williams and myself were. We told Dykeman that he had been implicated by Williams in his statement in the operation of the vehicle in which Frances Duncan was killed.

Q. All right, sir. After telling him that what did you next do?

A. We asked him did he have any statement to make regarding the accident. He said that he did not know anything about the accident, that he was asleep. We then had Edward Williams to read his statement to Dykeman, and he did so.

Q. The statement which you had obtained from Williams and which Williams read to Dykeman. I ask you whether or not that statement put Dykeman as the driver of the automobile at the time of the accident?

A. It put him as the driver of the automobile just before the accident. In the statement Williams stated—

Q. Don't go yet into what the statement says. After the statement was read to Dykeman by Williams what

page 20 } did Dykeman say, if anything?

A. Dykeman stated that he remembered driving the vehicle up until the time of the accident, and after that he did not remember anything.

Detective Mark E. Woods.

Q. All right, sir. I ask you specifically whether or not Dykeman denied the truth of anything in the statement?

A. He said he did not remember anything after the accident; that he remembered right up to the accident and then he did not remember anything. He did not state that the statement was not true at all.

By Mr. Brydges:

Q. He did not say he remembered driving up to the time of the accident?

Mr. Spencer: I am not through with the witness. I am about to ask the witness to read Williams' statement.

Mr. Brydges: I thought you told me to go ahead and examine him.

Mr. Spencer: No, sir.

Mr. Brydges: Excuse me.

Mr. Spencer: Are you going to object?

Mr. Brydges: You mean to the reading of the statement?

Mr. Spencer: Yes.

page 21 } By Mr. Spencer:

Q. Read the statement.

Mr. Brydges: I object to the reading of the statement. The best evidence is the witness Williams, himself.

The Court: I think it possibly might be well if we exclude the jury for a moment.

(The following proceeding was had in the absence of the jury:)

Mr. Spencer: I submit, sir, that the statement is admissible as a declaration against interest which was undenied. I submit that for that reason the statement is admissible, and that the best evidence rule is not applicable in this case. The whole point here is that a man said to the defendant, "You did these terrible things," and the defendant did not deny them. That is the point.

The Court: The point of it is, you are offering it in effect not for the truth of the statement itself, but the reaction of the defendant to the statement. Is that correct?

Mr. Spencer: And for the truth of the statement to the extent that the defendant did not say it was not true.

Detective Mark E. Woods.

The Court: That is his reaction.

page 22 } Mr. Brydges: Why would the Commonwealth be entitled to have the statement of Williams read by Officer Wood and also reiterate the statement by the witness? It seems to me that one would be sufficient. The best one certainly would be to have Williams come in here and say, "Yes, I pointed a finger at him because I say he was driving."

When this matter was heard on January 16th and Williams was not here, I concurred with Your Honor on your ruling at that time. I think that a proper foundation has to be laid. A party has to be properly charged.

The objection was further argued, after which the following occurred:)

The Court: The court feels that it is proper.

Mr. Brydges: I would like for the Commonwealth to lay a proper foundation for it. All of the cases require that, Your Honor. This man has to be on notice that he is charged with an offense—that he has been officially charged with an offense. Otherwise, it would not be incumbent upon him to make any answer.

The Court: Your objection is not well founded, and the court will overrule the objection and will allow the reading of the statement.

page 23 } Mr. Brydges: I note an exception to Your Honor's ruling.

(The trial was then resumed in the presence of the jury.)

By Mr. Spencer:

Q. Officer Woods, will you read the statement of Edward Williams, please?

A. "Statement of Edward Williams, RA 17436580, white male, in regard to the fatal accident in which Frances Duncan, white female, eighteen, died as a result of the accident at the intersection of Hampton Boulevard and Claude Lane, approximately 1:45 A.M., October 3, 1958—"

Q. Excuse me. Is this the statement to which you have previously referred that was read to the defendant Dykeman?

A. It is, sir.

Q. Go ahead.

Detective Mark E. Woods.

A. "—as made to Detectives M. E. Woods and N. O'Neal, Homicide Office, at 5:30 A.M., October 3, 1958.

"Question: What is your full name?
"Answer: Edward Williams.
"Question: Where do you live?
"Answer: 347 Transportation Company, Fort Story, Virginia.
"Question: Are you a member of the Army; page 24 } is that correct?
"Answer: The Army is correct.
"Question: How long have you been in the Army?
"Answer: Two years, eleven months.
"Question: Did you know the deceased, Frances Duncan?
"Answer: Yes.
"Question: She was in your company this evening up until the time of the accident?
"Answer: Yes.
"Question: Would you tell us who was with you besides Frances Duncan when this accident took place?
"Answer: John Whitehead, Dykeman and a girl. Her name was Joyce. I do not know her last name.
"Question: Where were you sitting in the automobile?
"Answer: On the front seat, far right-hand side, next to Frances.
"Question: The driver was who?
"Answer: Dykeman.
"Question: Who occupied the back seat?
"Answer: Joan, or Joyce, and Whitehead.
"Question: Ed, I want you to tell me in your own words the events of last night leading up to the accident.
page 25 } "Answer: We let this young lady out, and we was going across the overpass. We were arguing with Ken about his driving. On the far side of the overpass, on the downhill side of the bridge, Dykeman left the controls of the car. We were going approximately 80 miles an hour. I told Dykeman to slow down or either stop the car and let me drive, and Fran said the same thing. We argued for about a minute. It does not take you any time to go down the bridge. He said, 'To hell with it, you drive,' and left the wheel. He got away from the wheel and came over to where I was on the far side of the car. I told him to get back to the wheel, and he said, 'To hell with it' again. We hit the wedge, the telephone pole and the guy wire, then the shrubbery, and wound up alongside the building.

Detective Mark E. Woods.

"Question: While you were in this group how much had you people had to drink?

"Answer: Over a fifth of Vodka and a six-pak of beer. It was five cans of beer and at least a fifth of Vodka; well over a fifth of Vodka and a six-pak of beer.

"Question: Who was the first person out of the car?

page 26 } Answer: I was. I came out of the window on the left-hand side—the driver's side of the car. The door is wired shut and you can't open the door. That is the reason I had to come through the window.

"Question: How did you get on the left-hand side of the car?

"Answer: I could not say. I don't know. That is where I came out of.

"Question: Who was driving the car when the accident occurred?

"Answer: Nobody.

"Question: How do you explain that nobody was driving the car at that time?

"Answer: Dykeman had left the wheel and was crawling over Fran, and that left nobody driving.

"Question: In what condition were you before the accident happened?

"Answer: I was drunk; not plastered. I knew what I was doing, but I was drunk.

"Question: What condition would you say Dykeman was in?

"Answer: He was drunk, too.

"Question: Was it prearranged between you and Dykeman before he abandoned the wheel that you

page 27 } would take his place as the operator of the car?

"Answer: It was not. I would drive when he did not want to. I started out driving, and we went down the road about five or ten miles outside the West Gate and then Dykeman drove.

"Question: In other words, he gave you no warning that he had ceased to operate the car?

"Answer: The only thing he said was this: "If you don't like my driving, you drive your own damn self.

"Question: Do you have a driver's license?

"Answer: I have, but I am registered in Illinois. It was lost in my wallet.

"Question: When did you lose your wallet?

"Answer: It was a good three weeks prior to the accident.

Detective Mark E. Woods.

"Question: Is this statement true to the best of your knowledge, made without threat or promise from me or any member of the Norfolk Police Division?
"Answer: Yes."

It is signed "Edward Williams."

Mr. Spencer: Your witness.

page 28 } CROSS EXAMINATION.

By Mr. Brydges:
Q. Mr. Woods, did you have occasion to give this Williams boy who made the statement a blood test?
A. Yes, sir.

Mr. Spencer: I object.
The Court: You all approach the bench.

(The court conferred with counsel, after which the following occurred:)

By Mr. Brydges:
Q. Where was this blood test taken, Officer Woods?
A. At DePaul Hospital.
Q. At what time?
A. 8:00 A.M.—wait a minute. 8:10 A.M. is when it was received at the lab, I believe it was. The blood test was taken, I would say, approximately at 2:30 or quarter to 3:00—around 2:30, I would say.
Q. What was the result of the blood test?
A. The blood test showed Point 21 percent alcohol by weight.
A. Intoxication.
Q. When he gave you this statement it was some hours after the blood test was taken. Is that correct?
A. As I stated, the blood test was taken ap-
page 29 } proximately at 2:00 or 2:30, somewhere in that area. The statement was taken at 5:30 A.M.
Q. You took him to headquarters I believe, Officer. Did you book him?
A. No, sir, we did not book him. We booked them both jointly.
Q. You put him in a cell?
A. No, sir. He was carried into the Homicide Office.

Detective Mark E. Woods.

Q. And you gave him something to eat, I believe?

A. I believe he had a couple of hamburgers and a cup of coffee. I know he had a cup of coffee.

Q. He was not free to go?

A. No, sir.

Q. He was being detained?

A. He was being detained.

Q. Officer Woods, we know, do we not, that one of the main portions of that statement that you just read is not true, don't we?

A. I know nothing of the kind. All I know is what the man told me. I wasn't there.

Q. Were you present when the people were removed from the vehicle?

A. No, sir. I did not see anyone seated in the vehicle.

Q. Do you know of your own knowledge that
page 30 } Frances Duncan was in the back seat or the front seat?

A. I have no knowledge.

Q. If Frances Duncan was in the back seat, if the evidence indicates that, Officer Woods, then Mr. Dykeman could not have crawled over her, could he?

A. I would rather not stipulate on that.

Q. It is a perfectly simple question. He could not crawl over her if she was in the back seat?

A. No, not if he was in the front.

Q. When you had Mr. Williams to read the statement to the accused, did you tell him that he was about to be charged?

A. He was told when he came in that Mr. Williams had implicated him in the accident, and that both of them would be charged jointly with the death of Frances Duncan.

Q. I see. Was he brought in or did he just walk in?

A. He was brought in by the Shore Patrol. They carried him from DePaul Hospital to Portsmouth Naval Hospital, and then brought him back over to Police Headquarters.

Q. Soon after that I believe they were both put in a cell?

A. I believe both of them were carried on down
page 31 } and processed, and then charged.

(Counsel conferred with the court, after which the following occurred:)

By Mr. Brydges:

Q. On a previous occasion, Officer Woods, you remember

testimony saying that Frances Duncan was in the back seat, do you not?

Mr. Spencer: Just a minute, sir. That is most objectionable, Your Honor, to bring up a previous occasion. The only time a previous occasion can be brought up is to contradict a witness. The officer has said nothing which is to be contradicted. The defense cannot, by rambling around in its own knowledge of this case, get in through this officer things that are not brought out through this officer.

Mr. Brydges: I withdraw it.

The Court: I sustain the objection. Gentlemen of the jury, disregard the question.

By Mr. Brydges:

Q. Thank you, Officer. That is all.

Mr. Spencer: We rest.

page 32 } Mr. Brydges: I would like to make a motion.

The Court: Members of the Jury, retire to the jury room.

(The following proceeding was had in the absence of the jury:)

Mr. Brydges: If Your Honor please, my motion would be to strike the Commonwealth's evidence with regard to this case on the grounds that the evidence that they have presented is insufficient to prove the guilt of the accused beyond a reasonable doubt. They have at no time placed the defendant behind the wheel of this death vehicle, except through the statement of Williams, which statement I believe the court can take judicial notice is at least in part untrue.

The evidence is uncontradicted that Frances Duncan's death occurred while she was sitting on the back seat of this vehicle. According to the statement of Williams she was sitting between him and the accused, and she had some conversation with him, sitting between the two of them, about his driving, and that he crawled over the top of her to get in a position of being on the passenger's side. All of this we know as a matter of fact is not true. If a portion is not true—and we know that it is not true—it is obviously a statement tending to take Williams off the hook

page 33 } and put the responsibility on Kenneth Dykeman.

I think in view of what has occurred in this

matter previous to this time, his Honor would be well within his discretionary rights in finding that this evidence is not sufficient to sustain a conviction beyond a reasonable doubt.

(The motion was further argued, after which the following occurred:)

The Court: It appears to me that it is a jury question. The court will overrule the motion and note your exception.
Mr. Brydges: I note an exception.

(The trial was then resumed in the presence of the jury.)

JOAN BRANNAN,
called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Examined by Mr. Brydges:
Q. Your name is Joan Brannan; is that correct?
A. Yes, sir.
page 34 } Q. On October 3rd I believe you were a passenger in this automobile that was wrecked. Is that correct?
A. Yes, sir.
Q. And you received the injuries for which you are now using these crutches as a result of that, did you not, Joan?
A. Yes, sir.
Q. You were subpoenaed here today, I believe, on behalf of the Commonwealth, were you not?
A. Yes, sir.

Mr. Spencer: I am going to object to that phraseology, sir. She was subpoenaed here by the Commonwealth on behalf of the truth.
Mr. Brydges: I assumed that that was what she was subpoenaed for.
The Court: Go ahead.

By Mr. Brydges:
Q. Joan, you were sitting in the back seat when the accident happened. Is that correct?
A. Yes, sir.
Q. Who was sitting in the back seat with you?
A. Frances Duncan and John Whitehead.
Q. Was Frances Duncan ever seated in the front seat from

the time the drivers were changed at the West Gate of Fort Story?

page 35 } A. Yes, sir.

Q. She sat in the front seat then?

A. Yes, sir.

Q. And then she got in the back. Am I correct in that?

A. Yes, sir.

Q. She remained in the back, did she not, Joan?

The Court: Objection sustained.

Mr. Spencer: I object to the leading.

By Mr. Brydges:

Q. How long did she remain in the back, Joan?

A. When we left Fort Story, she was in the front seat at Fort Story.

Q. When did she change?

A. When we stopped and changed drivers from John to Williams—from Williams to John.

Q. Joan, tell us about that exchange of drivers. Where did that occur?

A. While we were on the road from Fort Story to Norfolk.

Q. Where was Mr. Dykeman, the accused, sitting at that time?

A. He was sitting in the front seat.

Q. Next to which side?

A. The right-hand door.

page 36 } Q. You were sitting between—

A. Williams was driving. Frances was beside Williams. Dykeman was beside Frances. Gwinder was on Dykeman's lap.

Q. You were in the back seat, I believe, with John?

A. Yes.

Q. What occasioned the change of drivers, Joan?

A. He was driving along and this carload of sailors came by, and one of the sailors leaned out the window and called Williams a bad name. So, Williams said that he did not take that off of anybody. He speeded up the car so that he could catch up with this carload of sailors, and he passed them on the wrong side of the street and went off the road onto the gravel on the side. Then he went in front of them. Then Williams brought the car to a stop and then he got out.

Q. How was the car brought to a stop? Who occasioned the stop, if anyone?

A. I don't know, but the keys were out of the ignition.

Joan Brannan.

Q. Who started to drive after that?

A. Williams and John got out of the car and went to the right front fender, and they flipped a coin to see who would drive. Evidently John won. Then they came back. I
page 37 } got out of the back seat and got into the front seat. John started driving. Frances and Williams got into the back seat. Dykeman was still in the front with Gwinder on his lap.

Q. So there were four of you then on the front?

A. Yes, sir.

Q. At any time during that exchange between Williams and Whitehead did Dykeman ever say that he wanted to drive?

A. No, sir.

Q. After you started towards Norfolk with Whitehead then driving, Joan, what if anything did Dykeman do?

A. He fell asleep.

Q. Was he asleep when the car stopped at Gwinder Brannan's house?

A. As far as I knew he was.

Q. Had he said anything in the meantime?

A. No. But, we stopped one time before we got to Gwinder's house. Gwinder got off of Dykeman's lap and got in the back seat, and Frances got from the back seat into the front seat. He roused up then.

Q. So then after you stopped outside of the West Gate of Fort Story to allow Whitehead to drive, you stopped again?

A. Yes, sir.

Q. What exchanges were made then?

page 38 } A. Gwinder was on the front seat on Dykeman's lap, and Frances was in the back. Frances got out of the back and got in front on Dykeman's lap, and Gwinder got out of the front seat into the back with Williams.

Q. In the back seat were you and Williams?

A. No.

Q. Williams—

A. —and Gwinder.

Q. Alone?

A. Alone, yes, sir.

Q. When you stopped at Gwinder's house what changes were made?

A. Gwinder and Williams got out of the back seat and they went on the front porch. Frances got out and went to the back seat. That was vacated by the two.

Q. So then we have Whitehead under the wheel, Dykeman on the passenger side, you and Frances in the back?

Joan Brannan.

A. No. I was still in the middle.
Q. You were still in the middle?
A. Frances just got in there by herself.
Q. Frances was sitting back there by herself?
A. Yes, sir.
Q. How long did you have to wait for Williams to come back from taking Gwinder in the house?
A. I would not know exactly, but it seemed like
page 39 } it was about a half hour or forty-five minutes. It was quite sometime.
Q. How did you get in the back?
A. John got tired of waiting. He said that he was sleepy and that he had not had any sleep, that he was tired. He said, "Let's get in the back seat," and one of the other boys could drive; that when Williams got back they could decide then who was driving. I got in the back seat and John got in the middle between Frances and I. I got on the right-hand side.
Q. That placed you, Frances and John all in the back seat?
A. Yes, sir.
Q. And Dykeman on the passenger side in the front seat?
A. Yes, sir.
Q. What was his condition then?
A. He was still sleeping, as far as I know.
Q. Do you remember anything else?
A. No, I don't think so.
Q. When you awakened at the scene and you realized that an accident had taken place, was Frances still in the back seat?
A. I don't remember that.
Q. You don't remember that?
page 40 } A. No, sir.
Q. The last you knew, she was in the back seat?
A. Yes, sir.
Q. Had Mr. Dykeman when you left Fort Story asked someone else to drive?
A. He did not ask anybody. Williams just started driving.
Q. All right, Joan, thank you very much.

CROSS EXAMINATION.

By Mr. Spencer:
Q. Everybody was pretty drunk, weren't they?
A. I reckon they were drinking.
Q. Were you?
A. No, sir.

Joan Brannan.

Q. You were not drinking?
A. No, sir.
Q. Just tired?
A. Evidently. I can't remember going to sleep, if that is what you are talking about. I just can't remember.
Q. But you remember that you and John Whitehead got in the back seat?
A. Yes, sir.
page 41 } Q. With Frances? Frances was already back there, and you all got back there, and that made three of you in the back seat?
A. Yes, sir.
Q. With John in the middle?
A. Yes, sir.
Q. That is the last you remember?
A. Yes, sir.
Q. So you don't know whether Frances Whitehead got out of the back seat or stayed back there—I mean, Frances Duncan?
A. No, sir.
Q. Nor do you know, according to what you have said, whether Whitehead drove, Dykeman drove, or Williams drove, or for that matter whether Frances Duncan drove?
A. No, sir.
Q. You don't know?
A. No, sir.
Q. But the last thing you remember includes Kenneth Dykeman being on the right-hand side in the front seat asleep?
A. Yes, sir.
Q. How did you and John Whitehead get in the back seat?
A. We had to wake Dykeman up. It took us
page 42 } about ten minutes to get him up. He had to get out of the car so we could get out. He got out and he stood outside, and we got into the back seat, and then he just dropped over in the front seat when he got back in.
Q. So at least for that little period of time Dykeman was aroused?
A. Yes.
Q. After Dykeman had let you and John Whitehead in the back seat, you say he just sat back down where he had been?
A. He sat down and went over on the side of the seat.
Q. He went over on his side in the seat?
A. Yes.
Q. He was lying on his side in the seat?

A. Yes, sir.

Q. So for anybody to get in the front seat, he had to move one way or the other?

A. Yes, sir.

Q. Either he had to be awakened or picked up?

A. Yes, sir; just move him.

Q. But at this point you say you were asleep, so you don't know what happened?

A. No, sir. I can't remember going to sleep.

Q. After arriving at DePaul Hospital do you re-
page 43 } member talking with Officer Hinton?

A. No, sir.

Q. Do you remember talking with any police officer?

A. No, sir.

Q. You do not?

A. No, sir.

Q. Did you not tell Officer Hinton at DePaul Hospital—

Mr. Brydges: If Your Honor please, I called her as an adverse witness.

Mr. Spencer: There is no such thing as an adverse witness in a criminal case. He called her as his own witness.

The Court: It is cross examination. The court feels that the question is proper.

By Mr. Spencer:

Q. Did you not tell the police officer that Dykeman was driving the car at the time of the accident?

A. I don't remember it.

Q. Do you deny it?

A. No, sir, I don't deny it.

Q. So you don't deny that you did tell the officer that Dykeman was driving the car?

A. No, sir.

Q. Later on you were questioned the second
page 44 } time, and at that time you told Detective O'Neal
that you did not remember. Is that correct?

A. Yes, sir.

Q. On a third occasion Detective O'Neal came back to the hospital and interviewed you, and at that time you told him that you had talked to your lawyer, and your lawyer told you not to talk with anyone about the case?

A. Yes, sir.

Mr. Spencer: That is all.

Joan Brannan.

RE-DIRECT EXAMINATION.

By Mr. Brydges:

Q. To your knowledge, Joan, have you ever said that Dykeman was the driver of this car?

A. Not to my knowledge, no, sir.

Q. Were you unconscious when the accident happened?

A. I don't know.

Q. What was your first recollection, Joan?

A. I remember in the emergency room talking to Mother—just different things; not too much. I just barely remember her being there.

Q. Do you remember the first occasion that an officer questioned you about the case?

page 45 } A. I remember—I think it was Woods. He asked me what my name was. I remember telling him my name and address and phone number. I think it was Woods. I would not swear to anything.

Q. If you knew who the driver of this car was you would tell this jury, wouldn't you?

A. Yes, sir.

Mr. Spencer: Judge, that is grossly leading. I object.

The Court: She is your witness,, Mr. Brydges.

By Mr. Spencer:

Q. Have you filed suit in this matter yet?

Mr. Brydges: I think that is highly immaterial, Your Honor. What bearing would that have on the guilt or innocence of this boy here? I don't even know if she has a lawyer.

Mr. Spencer: I know that she has a lawyer, and she knows it. It could have a great deal of bearing on this case.

The Court: You all approach the bench.

(Counsel conferred with the court, after which the following occurred:)

Mr. Spencer: I have no further questions.

By Mr. Brydges:

Q. Joan, the Commonwealth's Attorney asked if

page 46 } you have counsel. I don't represent you in the other matter, do I, Joan?

A. No, sir.

By Mr. Spencer:
Q. Some other lawyer does?
A. Yes, sir.

GWINDER BRANNAN TOMAC,
called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Examined by Mr. Brydges:
Q. You are Gwinder Brannan Tomac?
A. Yes, sir.
Q. I believe you were also an occupant of this vehicle on October 3rd?
A. Yes, sir.
Q. At that time you were Gwinder Brannan?
A. Yes, sir.
Q. And have since married?
A. Yes.
page 47 } Q. Was there any relationship, or is there any relationship, between you and Joan, the young lady who just testified?
A. Yes, sir.
Q. What is that?
A. Cousin.
Q. Gwinder, on the 3rd day of October when you left Fort Story where were you sitting in the vehicle?
A. Edward was driving. Frances was next to him, and Dykeman was next, and I was on Dykeman's lap.
Q. Who was in the back?
A. Johnny Whitehead and Joan Brannan.
Q. How far did you drive in that situation?
A. I don't know.
Q. Do you remember changing?
A. Yes, sir.
Q. What happend when you changed, Gwinder?
A. Dykeman drove then. Then I was sitting next to Dykeman, Ed and Frances. Then Johnny Whitehead and Joan Brannan were in the back.
Q. Then you changed again?
A. Yes, sir.
Q. Who was driving then?
A. John Whitehead.
Q. Who was sitting on the front seat then?
page 48 } A. John, Joan, Dykeman and myself.
Q. Who was in the back?

A. Ed and Frances.
Q. Ed Williams and Frances?
A. Yes, sir.
Q. Ed Williams and Frances were in the back when you then got to your house. Is that correct?
A. No, sir. I was in the back with Ed when we got to my house.
Q. You changed again?
A. Yes, sir; just Frances and I.
Q. Who took you in the house, Gwinder?
A. Ed Williams.
Q. Did that leave anyone in the back?
A. No, sir.
Q. Everybody was in the front then?
A. Yes, sir.
Q. Do you know anything else about the accident at all?
A. No, sir.
Q. You were in the house, weren't you?
A. Yes, sir.
Q. Answer Mr. Spencer.

page 49 } CROSS EXAMINATION.

By Mr. Spencer:
Q. At the outset Edward Williams drove?
A. When we left Fort Story?
Q. When you first started moving in this automobile?
A. Yes, sir.
Q. And then Kenneth Dykeman drove?
A. Yes, sir.
Q. Where was he driving?
A. On the way to my house. Then John Whitehead drove, also.
Q. Then John Whitehead drove?
A. Yes, sir.
Q. When you arrived at your house how were the six of you seated in the car?
A. John Whitehead was driving. Joan Brannan was sitting next to him. Ed Williams—no; John Whitehead, Joan, Kenneth Dykeman and Frances were in the front.
Q. Slow down a minute.
A. Ed Williams was—
Q. John Whitehead was driving?
A. Yes, sir.

Gwinder Brannan Tomac.

Q. John Whitehead was driving, Joan Brannan was in the middle in the front?

A. Yes, sir.

page 50 } Q. And who was beside Joan?

A. Kenneth Dykeman.

Q. Where were you?

A. I was in the back.

Q. Who else was in the back?

A. Ed Williams.

Q. Ed Williams?

A. Yes.

Q. Where was Frances Duncan?

A. In front with Kenneth.

Q. Was she sitting on his lap?

A. Yes, sir.

Q. When you went on in the house, you don't know what happened after that?

A. No, sir.

Q. Had you been drinking?

A. No, sir.

Q. How about the boys?

A. The boys had been drinking.

Q. Were they drunk?

A. No, sir.

Q. They were not drunk?

A. I did not think they were.

Q. Would you say that Ed Williams was drunk?

A. No, sir.

page 51 } Q. Would you say that John Whitehead was drunk?

A. No, sir.

Q. Would you say that Kenneth Dykeman was drunk?

A. No, sir.

Q. Did any of them appear to have been drinking?

A. All of the boys—the three boys—had been drinking. None of the girls were drinking.

Q. Did all three boys look about alike?

A. Yes, sir.

Mr. Spencer: That is all.

RE-DIRECT EXAMINATION.

By Mr. Brydges:

Q. How old are you, Gwinder?

A. Sixteen.

Q. How old were you then?

A. I was fifteen when it happened. I turned sixteen on the 30th of October.

Q. Gwinder, what if anything was Dykeman doing most of the time from Fort Story to your house?

A. Most of the time he was sitting there talking. He fell asleep once.

Q. Was that the last thing he did?

page 52 } A. Yes, sir.

Q. Thank you.

RE-CROSS EXAMINATION.

By Mr. Spencer:

Q. Was this while you were sitting on his lap?

A. Yes, sir.

Q. It was suggested by counsel that the last thing you remember was him falling asleep.

A. After he fell asleep I stayed in the front, and then Ed asked me to get in the back, so Frances and I switched. That is how we stayed until I got to my house.

Q. He did not stay asleep all that time, did he?

A. He was asleep when I got out of the car.

Q. Was he asleep when you got in the back?

A. Yes, sir.

Q. Was he asleep when Frances Duncan got on his lap?

A. Yes, sir.

Q. All of this moving around in the car took place while Dykeman was asleep in the right-hand front seat?

A. Yes, sir.

Q. And in order to get in or out of the back you had to move that seat, didn't you?

page 53 } A. Yes, sir.

Mr. Spencer: That is all.

JOHN G. WHITEHEAD,

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Examined by Mr. Brydges:

Q. Your name is John Whitehead, and you are stationed at Fort Story. Is that correct, John?

A. That is correct.

John G. Whitehead.

Q. On October 3rd you were also an occupant of this 1952 Mercury. Is that correct?
A. That is correct.
Q. John, when you left Fort Story—

Mr. Brydges: I may lead him for one moment to get the occupants, Mr. Spencer.

By Mr. Brydges:
Q. I believe there were you and Ed Williams and the accused and Joan Brannan and Gwinder Brannan and Frances Duncan?
page 54 } A. That is correct.
Q. When you left the West Gate of Fort Story how were you situated in the vehicle?
A. When we left Fort Story I was sitting in the back seat with Joan Brannan. In the front seat were Kenneth Dykeman, Gwinder Brannan, Frances Duncan and Williams.
Q. Who was drivig?
A. Williams was driving.
Q. How far did he drive?
A. He drove approximately, oh, I would say around two miles—two or three miles outside the gate.
Q. What occasioned his stopping as the driver of the vehicle?
A. His stopping was at my request and Dykeman's request. We had been trying to get him to stop and he would not do it, and Dykeman reached over and turned the ignition off and took the key out of the dashboard.
Q. Who then drove? Why was that done John, if you recall?
A. We were traveling down the road coming to Norfolk. Some occupants of another car pulled up alongside of us and called Williams a name, and it made Williams mad and he proceeded to try to catch them. They would not let him pass on the passing side, so he passed to the right of the
page 55 } traveling car and ran off the road. He appeared to be driving fairly recklessly, so Dykeman reached over and cut the key off.
Q. After that what new seating arrangement came about?
A. At that time when the car stopped it made Williams mad. He and I flipped a coin to see which one of us would drive. I won the toss, and I proceeded to drive the car to Norfolk.
Q. Where did Williams get then?
A. In the back seat.

John G. Whitehead.

Q. Who was in the back seat with him?
A. At that time it was Frances Duncan.
Q. You were driving then, and Joan Brannan was beside you?
A. Yes.
Q. And Dykeman was next to the door?
A. That is correct.
Q. And Gwinder was on his lap?
A. That is correct.
Q. From that time, John, was there ever any other change?
A. Yes, there was. I believe it occurred just at the outskirts of Norfolk. We reached a red light, I think it was. page 56 } Gwinder Brannan got in the back seat and Frances Duncan came to the front seat.
Q. I see. She sat then, I believe, on Dykeman's lap?
A. That is right.
Q. Was there ever any change in drivers from the time that you took over from Williams?
A. Yes. Sometime or other there was a change. After we reached Gwinder Brannan's house—
Q. I mean before that.
A. No.
Q. There has been some testimony that there was a change prior to that. I wanted to get your version of that?
A. There wasn't.

Mr. Spencer: If Your Honor please, the defense asked that the witness be excluded. I object to him informing the witness as to what the testimony is.
The Court: Objection sustained.
Mr. Brydges: I understand.

By Mr. Brydges:
Q. So from the time you took over for Wiliams you drove all the way to Gwinder's house?
A. That is correct.
Q. Who took Gwinder into the house?
page 57 } A. Eddy Williams did.
Q. When he took her into the house who was in the back seat?
A. He and Gwinder Brannan went into the house.
Q. When they left who was in the back seat?
A. When they left Frances Duncan got out of the front seat and climbed into the rear.

John G. Whitehead.

Q. That left you and Joan and Dykeman on the front seat?
A. That is right.
Q. What was Dykeman doing, John?
A. He was sleeping.
Q. How long did you wait for Williams to return from Gwinder's front porch??
A. Well, I had no watch. Not knowing the time, I would say approximately 20 to 30 minutes.
Q. What did you do then?
A. We just sat there and talked, Joan and I.
Q. Do you remember Williams coming out of the house?
A. No, I don't.
Q. What did you do after that?
A. After he had been in there a reasonable length of time I became sleepy and drousy. I had been up all the
page 58 } night before. I decided that everybody was O. K and that Williams had gotten over his mad spell, so I would let him drive or whoever wanted to drive.
Q. Williams was mad?
A. He had been, yes.
Q. So what did you do then, John?
A. Joan and I got in the back seat with Frances Duncan. I proceeded to go to sleep.
Q. Were you asleep when the accident happened?
A. Yes, I was.
Q. Who was in the back seat when the accident happened?
A. When the accident happened, Frances Duncan was sitting on my left. I was sitting in the center. Joan Brannan was sitting on my right.
Q. Is there any question in your mind about that?
A. There is no doubt in my mind.
Q. All right, answer Mr. Spencer.

CROSS EXAMINATION.

By Mr. Spencer:
Q. Was it a pretty violent accident?
A. You mean the way the accident occurred—the impact of it?
Q. Did the car turn over?
page 59 } A. I could not verify that. I would say it did, yes.
Q. Would you say that it turned end-over-end?
A. That I could not say.

John G. Whitehead.

Q. Why do you say Frances Duncan was in the back seat at the time of the accident?

A. Because under the circumstances she would almost have to be.

Q. Then you are just giving us your opinion of what the circumstances indicated?

A. When I went to sleep I put my feet in Frances Duncan's lap. In order for her to move she would have to move me.

Q. Move you or your feet?

A. My feet, moving me in the process.

Q. Were you intoxicated?

A. No, I wasn't.

Q. You were not?

A. I was not.

Q. Partially intoxicated?

A. No, I would not say that I was partially intoxicated.

Q. Would you say you had been drinking?

A. I would say I had been drinking, yes.

page 60 } Q. Would you mind telling us how much you had to drink, over what period of time?

A. I had had one Coke highball and a drink out of another—Vodka and Coke.

Q. Getting right down to it, the main thing you are basing your statement on that Frances Duncan was in the back is that she was in the back when you went to sleep, and you had your feet in her lap?

A. That is right; and she was in the back seat when I woke up.

Q. When you woke up you were spinning around inside the car, weren't you?

A. That is correct.

Q. There is no reason to think that the others were any more secure in their seats than you were?

A. There is no reason to think that she would be over in the back seat when she was over in the front seat, either.

Q. How did you get out of the car?

A. I do not know.

Q. If you don't know how you got out of the car, how are you so certain where she was sitting?

A. Because at the time the accident was occurring I was awake, and from the time we hit something or came to an abrupt stop I was out.

page 61 } Q. Then if you were awake when the accident was occurring, I take it you mean the first accident when it struck the dividing island in the street?

John G. Whitehead.

A. When the car went into a sudden motion that wasn't a direct flight.

Q. The car wasn't actually in flight?

A. That I could not say, either.

Q. If you woke up at that time perhaps, Mr. Whitehead, you can tell us who was driving the car at that time?

A. Unfortunately I can't.

Q. You testified concerning this matter in Traffic Court, did you not?

A. That is correct.

Q. At that time you stated that you went to sleep approximately as soon as you hit the back seat?

A. Yes, that is right.

Q. You did not say anything else about who was seated where, did you?

A. I beg your pardon?

Q. You did not say anything else about who was seated where in the car

A. You mean at the time I went to sleep?

Q. Yes.

A. I don't remember whether I did or not. I don't think I did. May I ask a question there?

page 62 } Q. Yes, sir.

A. This is at the first hearing that we had?

Q. In Traffic Court; yes, sir, the first hearing in Traffic Court. Now, the reason that you all stopped Williams from driving was due to this argument that he was about to get in with people in another car who had yelled something to him?

A. That is right.

Q. You say that he was angry?

A. That is right.

Q. And he later cooled off?

A. Well, I assume he had. I guess he had, yes.

Q. You were not so upset about his driving that you insisted that you be permitted to drive, were you?

A. Well, I would not say that I could insist, because it wasn't my car. I was an occupant of the car, just like anyone else was, except the owner of the car. I did not feel it was my job to insist that I drive.

Q. And the owner did not say anything, did he?

A. Yes, he did.

Q. About who was going to drive?

A. No, he did not say anything about who was going to drive.

Q. You and Williams flipped a coin?

John G. Whitehead.

A. That is right.

page 63 } Q. Suppose Williams had won?

A. Off the record, he did win. I talked to you about it.

Q. And this is the first time you have mentioned that, isn't it?

A. That is right. It is the first time that question has come up.

By Mr. Brydges:

Q. About who won the toss?

A. That is right.

By Mr. Spencer:

Q. Do you remember regaining consciousness in the emergency room at DePaul Hospital?

A. Yes, I do.

Q. At that time I ask you whether or not you were informed that Dykeman had said you were driving the car?

A. That is correct.

Q. You were informed of that?

A. Yes, sir.

Q. Of course, that is untrue?

A. I beg your pardon?

Q. The statement that you were driving is untrue?

A. Very much so.

Q. You were in pretty bad shape, weren't you, Mr. Whitehead??

page 64 } A. Not as bad as I thought I was.

Q. How long were you in the hospital?

A. Six days.

Q. Six days?

A. Yes.

Q. Now, let's get over to the question of what you said in Police Court. You were asked by Judge Hitchings:

"Question: Tell us where you were, and who was driving, and what happened.

"Answer Is that at the time of the accident, Your Honor?

"Question Yes."

Do you remember that?

A. Yes.

Q. And then you went on to say, "Well, I could not actually say, Your Honor. When we pulled up to the house and let one

of the girls out, Williams walked her to the door. I was under the wheel at the time. We sat there approximately ten minutes, and I became sleepy. At that time myself and Joan Brannan moved to the back seat, which put Frances Duncan on my left. I was sitting in the center, and Joan Brannan was sitting on my right. At the time we moved out of the driveway I went to sleep. The only other time I woke up was while the accident was occurring. Unfortunately I was unpage 65 } able to see anything that went on."

Is that right?

A. That is right.

Q. "Question Were you knocked out?

"Answer I was asleep until the accident occurred. Whatever we hit, or whenever we hit it, it must have jarred me awake."

Is that right?

A. That is right.

Q. And then this:

"Question You did not notice who was driving or whether there was a girl in the front seat at that time?

"Answer When that happened, sir, I did not see anything. I was just conscious of rolling about the car."

A. That is right.

Q. But today you told this jury that you were also conscious of Frances Duncan holding your feet in her lap?

A. No, I did not say that.

By Mr. Brydges:

Q. You were the last person that Dykeman saw drive, weren't you, John?

A. As far as I know, yes.

Mr. Spencer: Your Honor, again he is leading page 66 } the witness.

The Court: Objection sustained.

By Mr. Brydges:

Q. Do you remember how Mr. Williams testified before Judge Hitchings?

Mr. Spencer: I submit, sir, that the question of how Williams testified is not admissible except to contradict Williams.

Mr. Brydges: Williams' statement has been read, Your Honor.

Mr. Spencer: Put Williams on and contradict it. Williams is here. The defense can call him if it so desires, but the defense cannot continue to try to get in stuff through witnesses through whom it is not admissible.

The Court: The court does not feel that the testimony would be admissible.

Mr. Brydges: I have no further questions.

(The court cautioned the jury not to talk to anyone, or allow anyone to talk to them, or to view the scene, or to read articles appearing in the newspaper, during the luncheon page 67 } recess. Thereupon, and adjournment was taken for lunch.)

AFTERNOON SESSION.

Met pursuant to the morning session, with the same appearances as heretofore noted.

KENNETH JAMES DYKEMAN,
having been first duly sworn, testified as follows:

Examined by Mr. Brydges:

Q. Your name is Kenneth Dykeman; is that correct?

A. That is right.

Q. How old are you, son?

A. Twenty.

Q. How old were you on October 3, 1958?

A. Nineteen.

This automobile that was involved in this accident belonged to you, or was in your possession?

A. It was in my possession.

Q. On the evening of October 3rd where had you and Mr. Whitehead and Mr. Williams been?

A. To a dance at Fort Story.

page 68 } Q. Talk loud enough, Kenneth, so these gentlemen can hear you.

A. To a dance at Fort Story.

Q. Did you meet these girls at the dance, Kenneth?

A. Yes.

Q. When you started home who was driving the car?

A. Williams.

Kenneth James Dykeman.

Q. Did he ask you about driving, or how did he happen to drive?

A. He had been driving previously. He kept right on driving.

Q. Had he ever driven your car before?

A. Yes.

Q. Did any of you have any specific dates with these girls, or how did you happen to meet them?

A. We had known them from previous dances. We just met them that night at that dance.

Q. When you began to come home, what time was it when you started to come home?

A. I would say around 11:30 to 12:00 o'clock.

Q. You say that Williams was driving. How were the rest seated?

A. Williams was driving. Frances Duncan was beside him. I was sitting by the passenger window and Gwin-
page 69 } der Brannan was on my lap.

Q. And Joan and John Whitehead were in the back seat?

A. Yes.

Q. What was the next thing that occurred after that, Kenneth?

A. The episode about the passing car, when I took the keys away. Whitehead and William flipped, and Whitehead—

Q. Talk a little louder.

A. Whitehead got in the car and started driving. Then I fell asleep right after that.

Q. What was the seating arrangement when you fell asleep, Kenneth?

A. Whitehead was in the driver's seat. Joan Brannan was beside him. I was still by the window. Gwinder was on my lap. Eddy Williams and Frances Duncan were in the back seat.

Q. What do you remember after that?

A. Nothing until the accident.

Q. Were you driving this car at the time of the accident?

A. No.

Q. Do you remember what you told the police officer when Williams read this statement to you? Do you re-
page 70 } member your exact words?

A. I told him that I remembered driving earlier in the evening, but not at the time of the accident.

Q. That was the statement you made in response to this statement of Williams. Is that correct?

Kenneth James Dykeman.

A. Yes.
Q. Answer Mr. Spencer.

CROSS EXAMINATION.

By Mr. Spencer:
Q. You don't remember anything from the time Whitehead started driving?
A. That is right.
Q. So what you are saying to this jury is that this was an awful thing to happen, but you don't know anything about it?
A. Yes.
Q. Did you ever see Officer Hinton before this accident?
A. I don't know who Officer Hinton is.

Mr. Spencer: Bring him in.

(Officer Hinton was brought into the courtroom.)

page 71 } By Mr. Spencer:
Q. Did you see him?
A. Not before the accident, no.
Q. You see him now, I mean?
A. Yes.

Mr. Spencer: Go back out.

(Officer Hinton left the courtroom.)

Mr. Spencer: For the record, that is Officer J. E. Hinton.

By Mr. Spencer:
Q. Had you ever seen him before the accident?
A. No.
Q. Do you know of any reason why Officer Hinton would say anything about you that was not correct?
A. No.
Q. Do you deny the truth of Officer Hinton's statement?

Mr. Brydges: If Your Honor please—
Mr. Spencer: I withdraw that.

By Mr. Spencer:
Q. Do you deny that you told Officer Hinton at the scene

of the accident that, "We were driving," when he asked the question: Who was driving?

A. Definitely.

Q. You deny that?

page 72 } A. Yes.

Q. Do you remember Officer Hinton asking you then, "What do you mean 'we?' "

A. No, I don't remember that.

Q. Do you deny that he asked you that?

A. Yes.

Q. Do you deny that you answered by saying, "Williams and I," or "he and I," pointing to Williams?

A. Yes.

Q. Did you know Detective Mark Woods before this occurrence?

A. No.

Q. To your knowledge does he have anything against you?

A. No.

Q. Do you deny that you answered by saying, "Williams were switching around in the car all of this time?

A. We did switch.

Q. You were asleep, you say. How do you know?

A. I wasn't asleep when Whitehead and Williams switched drivers.

Q. You were not asleep when Whitehead took over from Williams after the reckless incident involving the other car, but you were asleep, you say, from then on?

A. Yes.

page 73 } Q. Then I will ask you again, do you deny telling Detective Woods about how they switched around in the car when you got to the house where Gwinder Brannan lived?

A. Yes.

Q. Do you deny telling Officer Woods at the hospital, after the doctor had commented that Whitehead looked pretty bad, that Whitehead was driving the car?

A. Definitely, because I was talking to Whitehead at the time. I knew he wasn't that bad off.

Q. What do you mean when you say you knew he wasn't that bad off? You did not think he was going to die?

A. Of course not.

Q. You deny that then?

A. Yes.

Q. Do you deny what Detective Woods says about your reaction to Williams' statement, that you said, "Yes, I

remember driving right up to the time of the accident, but I don't remember the accident''?

A. Yes, I deny that I told him that I remembered driving, because I wasn't driving at the time of the accident.

Q. Do you deny what Gwinder Tomac said: that you drove at one point on the way from Fort Story into Norfolk?

A. Yes.

page 74 } Q. Do you deny what John Whitehead said: that at the hospital he heard you say that he was driving the car?

A. No, I don't.

Q. You don't deny that?

A. No.

Q. Did you say that?

A. I probably did, because he was the last person I remember driving.

Q. Well, a minute ago you said that you did not say that John Whitehead was driving, because you were talking to Whitehead at the time the officer spoke of?

A. I did not say it because of that reason.

Mr. Brydges: I don't believe he understood your question.

By Mr. Spencer:

Q. I don't understand your answer. Would you like to go back over it?

A. If you want to.

Q. I ask you first of all, do you deny what Officer Woods said: that at the hospital, after telling him about the accident and about Williams driving, after the doctor commented that Whitehead looked pretty bad, you then said that Whitehead was driving?

page 75 } A. I don't remember the doctor commenting as to that. I don't remember saying that Whitehead was driving.

Q. What was your answer to my question a minute ago when I asked you if you denied what Whitehead said: that at the hospital when he came to you said that he was driving?

A. I said that I denied it on account of I did not hear the doctor say that.

Q. I am not asking you what the doctor said. A minute ago you said no, that you would not deny that Whitehead had heard you say that, and you might have said it because you did not know; that the last time you remember, Whitehead

Kenneth James Dykeman.

was driving, and you probably thought he was at the time of the accident?

A. That is correct.

Q. You do state then that at the time of this investigation, during the course of this investigation, on one occasion you said that Williams was driving, and on another occasion you said that Whitehead was driving?

A. Yes.

Q. Were you drunk?

A. I had been drinking. I would not say I was drunk.

Q. How much had you had to drink?

A. I had a fair amount. I drank, I would say, maybe a half pint of Vodka and a couple of beers.

page 76 } Q. A half pint of Vodka and a couple of beers?

A. Yes.

Q. Was that at the club?

A. In the course of the evening. It is not a club; it is a dance hall.

Q. It is a dance hall?

A. Yes.

Q. Did you all do your drinking in this dance hall at the dance?

A. No; we went outside.

Q. You drank in the car?

A. Yes.

Q. All the empty liquor bottles that were in the car, was that liquor that was consumed that evening by people in your party?

A. No.

Q. How did the bottles get there?

A. A couple of nights before that I allowed a friend of mine to use my car.

Q. A friend of yours had left the empty liquor bottles in your car?

A. Yes.

Q. This was your automobile, as a matter of fact, wasn't it?

A. Well, it was in my possession, yes.

page 77 } Q. It was your car?

A. It was my mother's.

Q. It was registered in your mother's name because you could not register it, yourself?

A. Yes.

Q. I take it then by your statement now that you were asleep from the time Whitehead commenced driving after

the reckless incident involving Williams, and that you do not know who sat where in the automobile from then on?

A. After the accident was over I got out of the car, and Williams was already outside. We helped Whitehead out. Two girls were on the back seat.

Q. This car was a total wreck, wasn't it?

A. That is correct.

Q. Up to the time then that the accident was over and you all were helping Whitehead out, you don't know who sat where?

A. No. I only know where they were sitting when I went to sleep.

Q. I take it then that you deny the statement that Officer Woods made as to your telling him who sat where and at what time after Whitehead had started driving? In other words, from Whitehead taking over the wheel until taking the girl Gwinder home, and waiting at her house

page 78 } and leaving there and going to the place where the occident occurred?

A. I don't even remember going to Gwinder's house, because at the time of the accident I thought Gwinder was still with us. I even had one of the officers to look for her.

Q. But you were not drunk?

A. No.

Q. Do you always sleep this soundly, Mr. Dykeman, so that people can climb in and out of the seats, over and around you, and not awaken?

A. I usually sleep pretty sound, especially if I have had a little bit to drink.

Q. Does it occur often that someone has to shake you for ten minutes to wake you up?

A. Very often.

Q. Very often?

A. Yes.

Q. That happens very often with you?

A. Yes. I believe the post will verify that when they try to wake me up in the morning.

By Mr. Brydges:

Q. What was that, son?

A. I believe the people on the post will verify that when they try to wake me up in the morning.

page 79 } By Mr. Spencer:

Q. Do you deny that they did awaken you at

Kenneth James Dykeman.

Gwinder Brannan's house, and that you got out of the car to let them out?

A. I don't deny it. I don't remember its happening.

Q. You don't remember its happening?

A. No.

Q. You don't even know who was sitting on your lap then when you arrived, do you?

A. Gwinder was.

Q. Gwinder was? You state now that you and Williams helped Whitehead out of the car?

A. Yes.

Q. Did you state in Traffic Court that you did not know how Whitehead got out of the car?

A. I don't know what I said. I don't recall saying it.

Q. Do you deny that you said it?

A. No.

Q. After having this matter discussed with you by the police officers, you were taken into custody, were you not?

A. Yes.

Q. At that time were you lodged in the Norfolk
page 80 } City Jail?

A. Well, first I was put in jail right in the police station.

Q. A cell in the police station?

A. Yes.

Q. Later on were you lodged in the Norfolk City Jail?

A. Yes.

Q. At that time I ask you whether or not certain other prisoners asked you and Williams—Williams was in custody with you, was he not?

A. Yes.

Q. —asked you and Williams what had happened?

A. I believe so, yes.

Q. Did you not state in the presence of one Charles F. Smith—

Mr. Brydges: I object to that. You should have Charles F. Smith here to testify as to that.

Mr. Spencer: I can certainly lay the groundwork, Judge, for contradiction. I can't put on the witness until rebuttal. Do you mean he is here in the courtroom?

Mr. Brydges: Is he going to testify about it?

Mr. Spencer: That depends on what he says. If he admits it, no. If he denies it, yes.

page 81 } Mr. Brydges: The best evidence of what was said to him is the witness, himself.

Kenneth James Dykeman.

The Court: I think the question is proper. I overrule the objection. Note your exception.

By Mr. Spencer:

Q. Did you not state in the presence of Charles F. Smith, one of the other prisoners, that you were driving the car and that Eddy Williams was not driving?

A. No.

Q. You deny that?

A. Yes.

Q. I warn you that I intend to contradict you. To identify the time, if you would like, it was when you were brought in and you and Williams had some blood on your clothing, did you not?

A. I don't know if I did. I believe Williams did.

Q. Do you remember any of the prisoners asking what had happened—what you all were in there for?

A. Yes.

Q. Do you remember the question, whether anyone was hurt or if it was a bad wreck?

A. They asked a lot of questions. I don't remember exactly what they were.

Q. Do you remember anyone stating that a girl had been killed in the accident?

page 82 } A. I don't remember it. I imagine it was said.

Q. Do you remember someone asking who was driving, and if you all had been drinking?

A. No. I remember people asking us if we had been drinking.

Q. But you don't remember anyone asking who was driving?

A. Not to my knowledge.

Q. Do you deny then that when the question was asked you shook your head in acknowledgment, that you were driving?

A. Yes, I do deny it.

Q. I warn you that I intend to contradict you.

Mr. Spencer: That is all.

Mr. Brydges: We rest, Your Honor.

Mr. Spencer: I will need a recess, Your Honor.

(Thereupon, a short recess was taken, after which the following occurred:)

CHARLES F. SMITH, JR.,
called as a witness on behalf of the Commonwealth, having been first duly sworn, testified as follows:

Examined By Mr. Spencer:

Q. What is your name, please?

page 83 } A. Charles F. Smith, Jr.

Q. Are you presently in custody in the Norfolk City Jail awaiting transfer to the State Penitentiary?

A. Yes, sir.

Q. I ask you whether or not you were convicted of grand larceny in 1950 or '51 and sentenced to ten years in the penitentiary?

A. Yes, sir.

Q. Were you convicted in the Corporation Court of the City of Norfolk in recent months for statutory burglary and sentenced to three years in the penitentiary?

A. Yes, sir.

Q. Were you in custody in connection with this last offense of which you were convicted—were you in custody in the Norfolk City Jail on October 3rd last?

A. Yes, sir.

Q. Were you in a cell block when Kenneth Dykeman, this defendant, and one Edward Williams were brought into the cell block?

A. Yes, sir.

Q. At that time I ask you whether or not there was any conversation between you and this defendant concerning the reason for his being there?

A. Yes, sir.

Q. Did this conversation also involve Eddy Williams?

A. Yes, sir.

page 84 } Q. I ask you whether or not you understood that a young girl had died in connection with an automobile accident?

A. Yes, sir.

Q. I ask you whether or not Dykeman made any statement, this defendant, concerning the identity of the person who was driving the car at the time of the accident when the girl was killed?

A. Yes, sir, he did.

Q. What did he say?

A. Well, the conversation started and they were both—

Q. If you will pardon me, sir, we can't go into the whole conversation. I am limited only to the question of: Did Dykeman make a statement to you concerning who was driving the car at the time of the accident?

Charles F. Smith, Jr.

A. Yes, sir. Dykeman said that he was driving the car, that Eddy wasn't.

Mr. Spencer: Your witness.

CROSS EXAMINATION.

By Mr. Brydges:

Q. Mr. Smith, this was in the presence of Mr. Williams?

A. Yes, sir.

page 85 } Q. Did Mr. Williams call the jailer then and say, "Let me out. This man has finally confessed that he was the driver"?

A. No, sir, he didn't.

Q. What happened after this great admission, Mr. Smith?

Mr. Spencer: After what?

By Mr. Brydges:

Q. After this great admission in the jail—this great confession—what happened?

Mr. Spencer: If Your Honor please, counsel is entitled to wide latitude, but the Commonwealth is not putting this on as a great admission. We are putting this on as a statement of fact for what it is worth. I submit that the defense is not entitled to characterize it as a "great admission."

The Court: Rephrase your question.

Mr. Brydges: I fail to see anything wrong with the question, unless Your Honor wants me to rephrase it.

The Court: I think probably it should be.

Mr. Brydges: Would we be correct in calling it a "confession"?

The Court: You can refer to it as a "statement." That is what it has been referred to in evidence.

page 86 }

By Mr. Brydges:

Q. This statement that Mr. Dykeman is alleged to have made. Mr. Smith, it did not impress you one way or the other?

A. Yes, it did. They were both charged with the same thing, and they could not understand why they were being charged with the same thing. Dykeman made the statement that he could not understand, either, because he was driving

the car, so why should Eddy Williams be charged with the same charge that he was?

Q. Eddy did not do anything about that?

A. I don't imagine over there there is much you can do about it.

Q. Mr. Smith, this time that you got ten years, was that your first rap or did you have one before that?

A. I would rather not answer those questions.

Q. You won't answer that?

A. No, sir.

Q. Have you ever been in the penitentiary for perjury or moral charges?

A. No, sir.

Q. Always stealing?

A. No, sir, not exactly.

A. I would rather not answer those questions.

page 87 } Mr. Spencer: Judge, I should ask for a mistrial, but I am not going to do it. Defense counsel knows that he is entitled to ask if a man has been convicted of a felony, and no more—a felony or a crime involving moral turpitude. For defense counsel to stand up here and make a statement such as that, "Always for stealing," can be nothing more than his attempt to make this man appear contemptible. He is a convict, we admit. He has been convicted of larceny. That makes him a thief. He has been convicted of statutory burglary. That makes him a burglar. But, he is not entitled to belittle the man and make him a liar because of that. It goes to the jury for what it is worth.

Mr. Brydges: If Your Honor please, he opened it up. He said, "statutory burglary." I assume that is stealing.

Mr. Spencer: "Statutory burglary," I said. "Grand larceny," I said. The defense is not entitled to make the suggestion that "You are always stealing."

By Mr. Brydges:

Q. Let me ask you this, Mr. Smith: You got ten years that we know of in '51. You don't want to go beyond that, do you?

A. No, sir, I don't.

page 88 } Q. We can assume, I imagine, from that answer that there had been something prior to that?

A. That is for the court to decide.

Q. That is for the jury to decide. After serving that ten years which you just got through serving not long ago—

A. Yes, sir.

Charles F. Smith, Jr.

Q. —why is it that you only got the minimum over here when you were tried for the second offense?

A. I think you asked that same question before.

Q. I did, Mr. Smith.

A. The reason I got three years was because I had just got out of the penitentiary.

Q. You think the judge showed you some leniency because you had just come from the penitentiary?

A. And the other reason was because I was severely beaten by the police force.

Q. The policemen beat you?

A. Yes, sir.

Q. Did you tell the judge all about the policemen beating you?

A. No, sir, I didn't. Whether he knew about it, I don't know. My lawyer knew about it. Of course it was not admitted to my lawyer until the day I went to trial.

Q. The Norfolk police beat you?

A. Yes, sir.

page 89 } Q. That is all, Mr. Smith.

RE-DIRECT EXAMINATION.

By Mr. Spencer:

Q. Did the judge across the hall who sentenced you know that you were going to testify for the Commonwealth in this case?

A. No, sir.

Q. Are you under any impression that you got any leniency because you made this statement to an investigator from the City Attorney's Office?

A. No, sir.

Mr. Brydges: I did not ask that, Mr. Spencer.

Mr. Spencer: No, sir, but you inferred it. I am through.

RE-CROSS EXAMINATION.

By Mr. Brydges:

Q. Mr. Smith, when did they first start talking to you about this case here, about testifying in this case?

A. It was mentioned to me, I guess, maybe a little while after Dykeman was released from jail.

page 90 } Q. Dykeman got out of jail soon after he was put in?

A. Yes.
Q. Williams stayed there quite awhile, didn't he?
A. A little over a month.
Q. You got to know him right well?
A. Not too well.
Q. From your long association with him, you like him better than Dykeman, don't you?
A. I think Eddy is a good boy.
Q. Come on down, Mr. Smith.

By Mr. Spencer:
Q. Stay up there, Mr. Smith. Would you lie for Williams?
A. No, sir, I would not.

Mr. Brydges: I did not ask him that, if Your Honor please.
Mr. Spencer: If Your Honor please, counsel does not have to say something to get the impression over. Certainly the impression he is trying to create is that the man is lying for Williams against Dykeman.
The Court: You ask the question, and if Mr. Brydges wants to object I will rule on the objection.
Mr. Brydges: I object, Your Honor.
The Court: The court will overrule the objection.
Mr. Brydges: I note an exception.

page 91 }

By Mr. Spencer:
Q. Would you lie against Dykeman?
A. No, sir, I would not.
Q. All right, sir.

By Mr. Brydges:
Q. You would lie to help yourself, wouldn't you?
A. No, sir, I wouldn't.
Mr. Spencer: Judge, Mr. Fine—I mean, Mr. Brydges, should certainly know better than to make a side comment like that. I borders, sir, on contempt. I am trying to try the case within the rules of evidence, which is difficult with counsel going outside the rules. I am trying to get justice done both to the Commonwealth and to this defendant.
The Court: If you gentlemen will examine the witness and when you are through indicate it, then other counsel may examine.
Mr. Spencer: Judge, I will ask the court, if you will, please, to state to the jury that the comment by counsel,

"You would lie for yourself," is certainly improper and should be stricken from the record.

The Court: The court feels it properly should. The court will instruct the jury to disregard it.

page 92 } Mr. Brydges: I have no objection to the jury disregarding it.

By Mr. Spencer:

Q. Come down.

ROBERT M. BARRETTE,

called as a witness on behalf of the Commonwealth, having been first duly sworn, testified as follows:

Examined By Mr. Spencer:

Q. What is your name, please?

A. Robert M. Barrette.

Q. Are you presently in custody in the Norfolk City jail awaiting delivery to the Florida authorities for a parole violation?

A. Yes, sir.

Q. You have been previously convicted, have you not, of grand larceny of an automobile, for which offense you were placed on probation by the Florida authorities?

A. Parole.

Q. Parole?

A. Yes.

page 93 } Q. You served penitentiary time in Florida?

A. Nearly four years.

Q. The reason for your being in custody as a parole violator, what is that, sir?

A. Leaving the state limits of Florida.

Q. You were apprehended here in Norfolk as a fugitive from Florida?

A. Yes, sir.

Q. Have you ever been convicted of any other felony, sir?

A. No, sir.

Q. Were you in custody in the Norfolk City Jail on October 3rd last?

A. Yes, sir, I was.

Q. Were you present when this defendant, Kenneth Dykeman, and one Edward Williams were brought into the City jail?

A. Yes, sir.

Robert M. Barrette.

Q. Was there a discussion at that time concerning the reason for their being there?
A. Yes, sir, there was.
Q. In connection with this discussion did you come to understand that a girl—

Mr. Brydges: I object—that is all right.

By Mr. Spencer:
Q. —that a girl had been killed in an automobile
page 94 } accident?
A. Yes, sir.
Q. I ask you whether or not the question was asked this defendant and Williams: Who was driving, and if he had been drinking?
A. Yes, the question was asked.
Q. What did Dykeman say, sir, if anything?
A. Dykeman did not say anything to that question.
Q. What did he do, sir, if anything?
A. Williams answered the question by turning his head and nodding to him. He said that both had been drinking. The question, I believe the way it was phrased, was: "Who was driving?" Williams turned his head and nodded at Dykeman.
Q. What did Dykeman do, if anything?
A. He nodded his head in acknowledgment.
Q. How did he nod his head?
A. Backwards and forwards.

Mr. Spencer: All right, sir.

CROSS EXAMINATION.

By Mr. Brydges:
Q. You understand that he nodded his head in acknowledgment? Is that what you understand?
A. Yes, sir.
page 95 } Q. So they were in complete agreement while they were in jail, so far as you know, that Dykeman was driving?
A. That would be the understanding.
Q. They were both in jail?
A. Both were in jail.

Robert M. Barrette.

Q. In the same cell? One was there because each said that the other was driving, I assume?

A. No, I could not say that. From what I understood, they were in there on a manslaughter charge.

Q. They were not mad at each other, were they?

A. No, sir, they weren't.

Q. They got along pretty well, didn't they, Mr. Barrette?

A. Yes, sir.

Q. How much of a sentence did you have for this stolen car?

A. Five years.

Q. And you served four?

A. Nearly four.

Q. One stolen car?

A. One, the first offense.

Q. That is a right heavy sentence for a first offense, isn't it?

A. Very. That is the reason I am in Virginia.

Q. Any circumstances that would make it—

page 96 } Mr. Spencer: Judge, counsel knows better than that.

Mr. Brydges: Judge, this is cross-examination.

Mr. Spencer: Judge, the rule of evidence is that you can ask for convictions only.

The Court: The objection is proper and is sustained.

By Mr. Brydges:

Q. So Mr. Dykeman, Mr. Barrette, did not say anything at all in jail that would indicate in any way verbally that he was driving the car, did he?

A. Not verbally.

Q. Come down.

Mr. Spencer: We rest.

(The following proceeding was had in the absence of the jury:)

Mr. Brydges: I would like to renew my motion to strike.

(The motion was overruled and an exception noted. There were no exceptions to the instructions.)

page 97 } JUDGE'S CERTIFICATE.

I, Walter A. Page, Judge of the Corporation Court of the City of Norfolk, Virginia, Part Two, do hereby certify that the foregoing is a true and correct transcript of the testimony and proceedings of the case of Commonwealth vs Kenneth James Dykeman, tried in said court on the 24th day of February, 1959, and includes all the testimony offered, the motions and objections of the parties, the rulings of the Court, and the exceptions of the parties, and all other proceedings of said trial.

I further certify that the exhibits offered in evidence, as described by the foregoing record, and designated as Commonwealth's Exhibits 1 to 5, inclusive, are all of the exhibits offered upon said trial, and the originals thereof have been initialed by me for the purpose of identification.

I further certify that said transcript was presented to me for certification and signed within sixty days after the final order in said cause, and that the attorney for the Commonwealth had reasonable notice in writing of the time and place at which the same would be tendered for certification.

Given under my hand this 8th day of May, 1959.

WALTER A. PAGE
Judge.

page 98 } CLERK'S CERTIFICATE.

I, W. L. Prieur, Jr., Clerk of the Corporation Court of the City of Norfolk, Virginia, do hereby certify that the foregoing transcript of testimony and other proceedings of the trial of the case of Commonwealth vs Kenneth James Dykeman, duly certified by the Judge of said court, together with the original exhibits introduced upon the trial of said case, identified by the initials of said judge, were filed in my office on the 8th day of May, 1959.

W. L. PRIEUR, JR.
Clerk.
By L. BERRY DODSON, JR.
Deputy Clerk.

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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