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Clerk, Supreme Court of Appeals
Richmond, Va.

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Record No. 6387

In the
Supreme Court of Appeals of Virginia
at Richmond

LEWIS HAMPTON SHUMATE, JR.

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF WASHINGTON COUNTY

RULE 5:12 BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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.

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Record No. 6387

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 19th day of April, 1966.

LEWIS HAMPTON SHUMATE, JR., Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Circuit Court of Washington County
J. Aubrey Matthews, Judge

Upon the petition of Lewis Hampton Shumate, Jr., a writ of error and *supersedeas* is awarded him to a judgment rendered by Circuit Court of Washington County on the 6th day of October, 1965, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor; 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

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COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HEALTH
OFFICE OF THE CHIEF MEDICAL EXAMINER
404-406 North 12th St.
Richmond, Virginia 23219

CERTIFICATE OF BLOOD ALCOHOL ANALYSIS

#652341 Date of Report April 20, 1965

ACCUSED: LEWIS H. SHUMATE, JR.
Name of Court: Clerk, Washington County Court
Address: Abingdon, Virginia
Examined By: S/ A. S. Burleigh
Date: April 20, 1965 Time 10:59 am.
Received at Office of Chief Medical Examiner:
10 cc of Blood for Alcohol Content.
By: Marie E. Wiltshire
DATE: 4/20/65 TIME: 8 a.m.
The container seal when received had not been broken or otherwise tampered with.
The container was provided by the Chief Medical Examiner.
RESULTS:
Blood alcohol content 0.22% by weight.

TESTE:

Assistant Chief Medical Examiner

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COMMONWEALTH OF VIRGINIA
Lewis-Gale Hospital, Roanoke, Virginia
Name of Laboratory Approved by the State Health Commissioner

CERTIFICATE OF BLOOD ALCOHOL ANALYSIS

Date of Report May 14, 1965

ACCUSED: LEWIS H. SHUMATE, JR.
Name of Court: Washington County Court

Address: Abingdon, Virginia
Examined By: A. V. Torre, M.D.
Date: 5-13-65 Time: 2:00 PM
Received:
10 cc of Blood for Alcohol Content.
BY: George B. Snow, M.T. (ASCP)
DATE: 4-18-65 TIME: 3:15 AM
The container seal when received had not been broken or otherwise tampered with.
The container was provided by the Chief Medical Examiner.
RESULTS:

Blood alcohol content 0.21% by weight.

TESTE:
A. V. TORRE, M.D.
(Pathologist)

CME Form No. 11B-P
Revised 7-64
This certificate when attested shall be attached to the blood vial of the accused and returned to the Clerk of the Court in which the charge will be heard. The approved laboratory may retain a copy for its files.

page 5]

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This day came the Attorney for the Commonwealth, David D. Brown, Esquire, Joseph P. Johnson, Jr., Esquire, Thomas L. Hutton, Sr., Esquire, Thomas L. Hutton, Jr., Esquire, Attorneys for the defendant, Mary Jane Morgan, Court Reporter, who was sworn in the manner prescribed by law; came also the defendant in obedience to his recognizance.

The case was called, having heretofore been set for trial on this date; both sides announced ready; the defendant having waived trial by jury, the Attorney for the Commonwealth not objecting, the defendant was arraigned, and upon his arraignment entered in person a plea of not guilty to the charge contained in the warrant.

Thereupon, no jury being demanded, the Court proceeded to hear, and determine this case without the intervention of a jury; and having heard the evidence introduced on behalf of the Commonwealth, and the defendant, and argument of counsel, the Court is of the opinion that the defendant is guilty as charged in the warrant, and doth so find, and doth fix his

punishment at a fine of, Two Hundred Dollars, ($200.00), and pay the cost of this prosecution, and does revoke his privilege of operating motor vehicles in the Commonwealth of Virginia for a period of twelve months, it is therefor ordered by the Court that the defendant, Lewis Hampton Shumate, Jr., forfeit, and pay unto the Commonwealth, Two Hundred Dollars ($200.00), a fine and the cost herein, and that his driving privileges in the Commonwealth of Virginia, are revoked for a period of twelve months

page 6] Throughout the proceedings of this trial, certain objections were interposed, and motions made upon which the Court ruled, and which will appear more fully in the stenographic record herein.

Thereupon, the defendant by counsel, moved the Court that the execution of the sentence herein *imposed;* be suspended for a period of sixty days, which motion the Court doth grant, and the present bond to remain in full force and effect.

Thereupon, the defendant was permitted to depart.

Enter: October 6th, 1965
J. AUBREY MATTHEWS
Judge

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

NOTICE OF APPEAL

You are hereby notified that the undersigned, Lewis Hampton Shumate, Jr., will apply to the Supreme Court of Appeals of Virginia for a writ of error from a final order and judgment entered in the case above against the defendant on October 6, 1965.

ASSIGNMENTS OF ERROR

You are further notified that the undersigned will rely on the following assignments of error:

I.

The Court erred in admitting into evidence the statement of the accused (Tr. 3) without advising the accused that he had a right to counsel.

II.

The Court erred in shifting the burden of proof and burden of production of evidence to the accused as to page 8] compliance with the statute (Virginia Code §§ 18.1-55.1), concerning blood tests and their admissibility.

III.

The Court erred in admitting either blood test or the results thereof into evidence.

IV.

The Court erred in holding that the Commonwealth had substantially complied with the statute (Virginia Code §§ 18.1-55.1) concerning blood tests.

V.

The Court erred in holding that the accused had not substantially complied with statute (Virginia Code §§ 18.1-55.1) concerning blood tests.

VI.

The Court erred in admitting either blood test in evidence because the taking of the blood from the body of the accused and its subsequent testing was under compulsion of law and in violation of the Constitutions of Virginia (Article I, Sec. 8) and the United States (Amendments V and XIV).

VII.

The Court erred in not acquiting the accused because the Commonwealth did not send off his blood sample for testing to an approved laboratory, at his request, as required by statute. (Va. Code § 18.1-55.1).

page 9]

* * * * *

Filed December 3, 1966
C. W. SMITH, Clerk
Circuit Court, Washington County, Va.

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page 1]

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The Court: Both sides have heretofore advised the Court that they desire to waive the jury and let the Court determine the matters involved. Is that correct?

* * * * *

V. A. RICHARDSON,
having been sworn and examined, testified as follows:

page 2] DIRECT EXAMINATION

By Mr. Brown:

* * * * *

Q. And you are a Virginia State Trooper, sir?
A. Yes sir.

* * * * *

Q. You just go forward now and tell the Court about this incident with Lewis Hampton Shumate, Jr., his operation of a motor vehicle while under the influence on a public highway in Washington County, Virginia, please, sir?

A. On April 18th, at approximately two-forty-five A. M., in Washington County, Trooper Lloyd Lester, who is stationed in Clintwood—I was riding with him in his vehicle which was traveling west on Interstate Route 81, and we

page 3] came upon a 1963 Buick sedan, bearing Tennessee license. This vehicle, when we first came up behind

it weaved to the left. It went over the center line and then back to the right lane and then weaved back again, and at this point we stopped the vehicle. It was doing approximately fifty miles per hour. The operator got out of the vehicle and when he did so he was unsteady on his feet He was rocking and then unsteady in walking. When asked to produce his Registration and Driver's License he had some difficulty in locating them and took approximately five minutes. He first gave me his Voter Registration Card and then later produced his O L and Registration. His face was flushed and he had the odor which is associated with intoxicants, which was heavy about him. His eyes were red rimmed and he kept stating, after I advised him that he would be charged with driving under the influence, he kept stating, "My family will be heartbroken." He continued to make statements such as, "Why are you punishing me?"

Mr. Hutton: If Your Honor please, we object the statement unless he was advised that he had a right to counsel.

The Court: Overruled.

Mr. Hutton: Exception

Witness: (Continuing) Mr. Shumate was advised that he would be charged with driving while under the influence of intoxicants and further advised that when he page 4] operated a vehicle — a motor vehicle in the State of Virginia on our highways that he was deemed to have given his consent to a blood alcohol test in the event he was charged with the offense of operating while under the influence of intoxicants. He consented to the test. He was first taken to the County Jail in Abingdon—taken before Justice of the Peace, Robert L. Kelly, and then taken to the Johnston Memorial Hospital in Abingdon, and the blood test was taken. The containers were opened in his presence—the fact being called to his attention when the vial was removed from the cellophane, this was called to his attention, and after the blood was taken and placed in the containers and sealed, it again was called to his attention. He was returned to the Washington County Jail.

Q. Trooper Richardson, do you have a report of the sample which was sent to the Chief Medical Examiner and also one which was sent to a person or an institution of his choice for examination, sir?

A. Yes sir.

Mr. Johnson: If His Honor please, we are going to object to the introduction of these blood samples or the results.

The Court: On what grounds?

Mr. Johnson: The reason being that the law—the statute was not complied with, which we will later bring to
page 5] His Honor's attention. The arrest as made on April the eighteenth —

The Court: At two-forty-five P. M. — A. M.

Mr. Johnson: Yes, Your Honor. The blood test was not —

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Mr. Johnson: (Continuing) If His Honor please, the blood test or blood sample was withdrawn on April 18, 1965. On April 20, 1965, the Chief Medical Examiner of Virginia acknowledged receipt of the sample or container sent in by the Trooper — the Commonwealth. The defendant's receipt shows (Reading)

"Received at Lewis Gale Hospital, Roanoke, Virginia on the 13th day of May, 1965."

It is our position under the statute that it is supposed to be delivered to the Chief of Police or the Sheriff of the County and within seventy-two hours some disposition made.

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Mr. Johnson: If His Honor please, further, under 18.1-55 of the Code, it sets out the procedure which must
page 6] be followed. In Paragraph D, it says that it shall be withdrawn by a certain physician or technician, and D-1, D-2 and D-3 sets out the procedure in the following sub-section — procedure in which the trooper or arresting officer shall handle the blood test, and it is our position that they have not been complied with. The blood test was not delivered within seventy-two hours. It was not sent off. Further, we have a letter in another court file — we have another letter, Your Honor, in court file, "*Commonwealth* vs. *Edwin Lester Street*" — file of Mr. Street, on 6-15-65, and I would like to read this letter, if His Honor please. It is from the Lewis Gale Clinic, Roanoke, Virginia, dated May 21, 1965.

V. A. Richardson

"Clerk of the County Court
Washington County,
Abingdon, Virginia

Re: Lewis H. Shumate, Jr., and
Edwin Lester Street — Blood
Alcohols.

Dear Sir:

"It has come to our attention that the last run of blood alcohol determinations was out of control in spite of the simultaneous determination of known standards.

"If it can be arranged, we would appreciate re-
page 7] ceiving the unused portion of the sample for re-
peat determinations in event that the value deviates significantly from the State Laboratory determination.

"We are currently consulting with the State Laboratory, in Richmond, in order to adjust the factors which might have been operative in throwing the tests out of control.

"Your cooperation in this matter is greatly appreciated."

Signed by Anthony V. Torre, M. D.

This letter was never brought to the defendant's attention. He did not know about it. I discovered — heard about it in the trial sometime later and the defendant has never received that notice. He was never notified that it be sent back, and further, that there was no compliance — substantial compliance with the law.

If His Honor please, his sample, of course, was sent off — defendant's sample, on the 13th day of May, 1965, which the very date would indicate that the law has not been complied with — three weeks, and the statute sets out plainly that it must be done within seventy-two hours. And further, if His Honor please, we have testimony here —

page 8] The Court: I overrule you at this time, *Jr.* Johnson. If you want to, on your client's behalf, introduce evidence of your own to show non-compliance and it affected his rights, the Court will hear you, but I overrule you at this stage on the introduction of the alcoholic content reports.

Mr. Johnson: Yes, Your Honor, we except.

Mr. Hutton: Note an exception.
The Court: Proceed, Mr. Brown.

By Mr. Brown:
Q. Trooper Richardson, do you have copies of the report from the State Medical Examiner?
A. Yes, sir, I have.
Q. And what is the blood alcohol content analysis there in that report, sir?
A. The one from the Chief Medical Examiner's Office in Richmond —

Mr. Hutton: We object to that, Your Honor. We understand your ruling but for the purpose of the record, we except to the introduction of this testimony.
The Court: Overruled.
Mr. Johnson: Exception.
Mr. Hutton: Note an exception.

page 9] Witness: (Continuing) The blood alcohol content is zero, point two-two per cent, by weight.
Q. And the one from the Lewis Gale Hospital, sir?
A. Zero, point two-one per cent, by weight.

Mr. Johnson: We object to that also.
Mr. Hutton: We move to strike both for the reasons assigned — non-compliance of Section 18.1-55 of the Code.
The Court: Overruled.
Mr. Johnson: Exception.
Mr. Hutton: Exception.
Mr. Brown: That's all we have, Your Honor.

CROSS EXAMINATION

By Mr. Johnson:
Q. Trooper Richardson —

Mr. Hutton: (Interrupting) We move to strike the testimony of this witness as not being in compliance with Section 18.1-55 of the Code, with reference to the reports.
The Court: Overruled.
Mr. Hutton: Exception.

By Mr. Johnson:

Q. Trooper Richardson, sir, when you received the two containers from the technician at Johnston Memorial Hospital, Abingdon, Virginia, what did you do with them, sir?

page 10] A. Well, when I received them I advised Mr. Shumate what would be done with the two. The brown one I would keep and send myself to the Chief Medical Examiner's Office in Richmond. The blue one, I advised him that he would have the privilege to have it sent off, if he so desired, and a list was produced and given him to show him where it could be sent off. At that time he did not wish to fill out the form, and the blood was marked and turned over to the Jailer at the Washington County Jail.

Q. Was it turned over to Sheriff George L. Kite?

A. No, sir, it was not.

Q. Well, did you make any attempt to give it to him?

A. I was unable to contact him.

Q. What attempt did you make, sir, to, and how many attempts?

A. Nothing, other than a request through the Jailer. That was the only attempt that I made and I was advised that he could not be contacted.

Q. You didn't call him at his home?

A. Not myself, no.

Q. Did you call him at the office?

A. No, sir.

Q. You made no effort?

A. Well, he was not at the office, I was advised.

page 11] I was at the Jail.

Q. The following day, did you make any attempt to contact George Kite?

A. No, sir, I did not.

Q. Did you see Mr. Shumate sign the form to send the blood sample to Lewis Gale Hospital?

A. No, sir, I did not.

Q. Sir, I will ask you whether or not, at the hearing in Washington County Court, on the day that the matter was heard before Judge Campbell, if you saw the paper which was used to send the blood sample off?

A. Now, that was on May 7th, was it not? I remember seeing a form that had his signature. Is that the form that you are referring to?

Q. Yes, sir.

A. And request that it be sent to a certain hospital or place?

Q. Yes, sir.

A. I saw one on May the seventh.

Q. Where did you see that, sir? Was it in County Court?

A. It was in County Court. I don't know whether it was in the courtroom or in the Clerk's Office. I don't recall.

Q. Was that in the possession of Deputy Sheriff

page 12] John A. McCall?

A. I really don't remember. I know we called the Sheriff's Office and checked on it and it was brought up but by whom, I just don't remember.

Q. Is that the gentleman sitting there? (Indicating Deputy Sheriff John A. McCall)

A. I think so but I couldn't testify — be truthful in swearing to it. I just don't remember.

Q. Sir, do you know why the blood test hadn't been sent off as of May 7, 1965?

A. By my own knowledge, no, sir.

Q. You did see Mr. Shumate's signature on the slip of paper, didn't you?

A. I saw a signature on it, now whether it was his or not I couldn't say.

Q. Well, do you know of any reason whatsoever as to why it hadn't been sent off?

A. Well, it — do you want hearsay evidence or what?

Q. We don't object, no, sir.

A. As well as I remember the signature was — Mr. Shumate had signed in the wrong place on the form, and him living in Tennessee, for some reason, there was no way to contact him or he hadn't returned to sign in the proper place,

page 13] as well as I remember.

Q. And sir, on May 7th I signed the form in open court and the blood sample was sent off. Is that correct?

A. Yes, sir.

Q. Sir, I will ask you whether or not the case was continued at least two times?

A. It was continued, as far as I know, from May 7th until the 21st of May. It was tried in County Court on the 21st of May.

Q. Well, sir, do you know why it was continued on May 7th?

A. By your motion that the defendant had not had an

opportunity to find out the results of his blood.

Q. Yes, sir, and at that time, sir, didn't I ask you where the blood test was, and what was your answer?

A. Well, I didn't know where it was, as far as that goes.

Q. Do you know whether it was lost at the jail or where it might be?

A. No, sir, I don't.

Mr. Johnson: That's all, sir.

REDIRECT EXAMINATION

By Mr. Brown:

page 14] Q. Trooper Richardson, the form that Mr. Johnson is asking you about, where the request that it be sent to some particular institution, do you remember whether or not Mr. Shumate's name was signed to the form or whether it was printed to the form?

A. I don't recall.

Q. But you do remember that it wasn't in the place designated for his signature?

A. That is right, yes, sir.

Q. And in open court, Mr. Johnson signed for him to request that it be sent off, is that correct?

A. Yes, sir.

Mr. Brown: All right, sir.

The Court: Do you have that form, Mr. Commonwealth?

Mr. Brown: No, sir, I don't have it at all.

The Court: Do you know where it is?

Mr. Brown: No, sir. No, sir. I didn't even have this letter. I didn't have it at all.

Mr. Johnson: Trooper, do you know where the form is?

Witness: No, sir, I don't.

The Court: Trooper, you saw the form that Mr. Shumate signed and it was signed at the wrong place, is that correct?

page 15] Witness: Yes, sir, I saw the form and it had his signature on it.

Mr. Hutton: Sheriff, you don't — excuse me, may I ask the Sheriff where the form is?

Mr. McCall: It should be in the office.
Mr. Hutton: Could you get it for me?
Mr. Johnson: That is all we have from this witness.
Mr. Brown: That is all we have, Your Honor.

(Witness Excused)

The Court: Well, Mr. Commonwealth's Attorney, if you have that form in your Sheriff's Department, the Court would like to see it.

Mr. Brown: He has gone to get it now, sir.

Mr. Johnson: If His Honor please, we move to strike the evidence. The statute has not been complied with — not a substantial compliance in any sense —

The Court: As I understand, Mr. Brown, he is going to present the forms and whatever he has —

Mr. Brown: If Your Honor please, Judge Hutton requested the form and he is going after it, the Sheriff is going after it. For whatever purpose — we will put everything we have got in here.

Mr. Hutton: We shouldn't be compelled to produce evidence. The reason I requested it, I thought the

page 16] form was the best evidence.

The Court: Well, gentlemen, I am going to overrule you. I think there has been substantial compliance with the statute, according to the Trooper's evidence, and I am going to put the burden on you all, if you want to present evidence that there has not. As I understand the statute, that is what it says.

Mr. Johnson: If His Honor please, I don't want to belabor the point but I would like to point out this one thing. Trooper Richardson testified on May 7th, when the case was set, and we made a demand for the blood test and it could not be located. He didn't know where it was. We respectfully submit to His Honor that the defendant asked for the blood test — asked that it be sent off and they couldn't find it, by his own admission.

The Court: Gentlemen, there isn't any record before the Court that he ever asked for it to be sent off, except your statement there, Mr. Johnson.

Mr. Brown: I might point out, Your Honor, from his own

evidence and cross-examination he shows that the man didn't comply; that he had signed it in the wrong place and that they later waived it by signing it and sending it

page 17] off.

Mr. Hutton: The point I am making, Your Honor, he didn't deliver it to the Sheriff and this statute says he must deliver it to the Sheriff.

The Court: He delivered it to the Sheriff's Department and in the Court's opinion that is substantial compliance, sir.

Mr. Hutton: We except.

Mr. Johnson: Mr. McCall is one of our witnesses and we will have to wait until he comes back.

The Court: All right.

Mr. Hutton: Swear Mr. McCall, Mr. Clerk, please.

JOHN A. McCALL,

having been sworn and examined, testified as follows:

DIRECT EXAMINATION

By Mr. Johnson:

Q. Your name, sir?

A. John A. McCall.

Q. Mr. McCall, what is your occupation?

A. Deputy Sheriff of Washington County.

Q. Sir, do you have a form in your hand, and if so, would you tell His Honor what it is?

A. I have a form for the Chief Medical Examiner, describing procedure to obtain independent analysis of blood sample, and a list of laboratories approved by the State

page 18] Health Commission.

Q. Is the arresting officer's name on that, sir?

A. No, sir.

Q. Is the Sheriff's name on there?

A. Yes, sir.

Q. Whose name is it?

A. George L. Kite.

Q. Do you know who put that in there?

A. No, sir, I can't swear who did.

Q. On this form, "Please Forward the Blue Container with the Blood Sample of" — what is in that blank?

A. I can't read it.

John A. McCall

Q. Now, is there a check mark there, sir?
A. Yes, sir.
Q. Well, do you know who put that check mark there?
A. No, sir.
Q. Do you know how it got there?
A. No, sir.
Q. Do you know if Mr. Shumate put it there?
A. No, sir.
Q. Do you know whose name is on that line?
A. No, sir.
Q. Do you know whether or not the person that had him sign it checked there?

page 19] A. No, sir.
Q. Is there a date on there? Mailed a certain date?
A. Yes, sir, I marked it "Mailed 5-7-65," myself.
Q. And that has got signature printed, "Lewis H. Shumate, Jr., by Joseph P. Johnson, Jr., his counsel?
A. "Person From Whom Blood Was Taken — Lewis H. Shumate, Jr." and it is printed. Underneath, "Signed By Joseph P. Johnson, Jr., His Counsel."
Q. And that date is "Mailed, 5-7-65," is that correct?
A. Yes, sir.
Q. Now, sir, did I request on 5-7-65 that the blood sample be brought to court?
A. Yes, sir.
Q. Where did you find it?
A. I found it in the Sheriff's Office.
Q. Whereabouts?
A. In a little basket where we usually keep our blood samples.
Q. Was that form with it?
A. Yes, sir.
Q. Did you mail it?
A. Yes, sir.

page 20] Q. And you mailed it that day?
A. Yes, sir.
Q. Well, do you know where the sample had been prior to that date?
A. It had been in the Sheriff's Office.
Q. Do you know why it had not been mailed prior to

that time?

A. Well, it was improperly signed.

Q. How do you know so?

A. Well, we didn't have any idea whose it was.

Q. Well, if you didn't know whose it was, how could you find out when you went down to get it?

A. I don't recall as to how the blue sample is marked.

Q. It doesn't have a name on the outside, does it?

A. No, sir, I don't think so.

Q. Well, how did you know you were getting Mr. Shumate's sample?

A. I don't recall, Mr. Johnson, as to how we knew.

Q. How do you know you sent his off?

A. It was the one you wanted sent off.

Q. No, it was the one that I asked for but I am asking you how do you know you sent Mr. Shumate's?

A. Right now I don't recall how I knew it.

page 21] Q. Do you know anything about the letter from Mr. Torre, asking that it be sent back for re-testing?

A. No, sir.

Q. Do you know whether or not his sample was sent back and re-tested?

A. No, sir.

Mr. Johnson: If His Honor please, we would like to introduce this into evidence.

Mr. Hutton: Mark that Exhibit One.

By Mr. Johnson:

Q. Mr. McCall, do you know who gave this to Mr. Shumate to fill out?

A. The Justice of the Peace always gives it to them.

Q. R. L. Kelly?

A. Yes, sir.

Mr. Hutton: Mark that as Exhibit One.

Mr. Johnson: I would like to introduce that as Defendant's Exhibit Number One, Your Honor.

(Exhibit marked for identification and filed)

John A. McCall

Mr. Johnson: If His Honor please, again we make reference to the letter from Lewis Gale Clinic, May 21, 1965, signed by Anthony B. Torre, M. D. Without reading it into the record again, we make reference to it.

page 22] By Mr. Johnson:

Q. Do you know Mr. Edwin Lester Street?

A. Yes, sir, I know him.

Q. Do you know whether or not that his blood sample was sent at the same time that Mr. Street — or Mr. Shumate's was sent?

A. I don't recall mailing two of them at that time, no, sir.

Q. Well, I will ask you, on this certificate here addressed to Lewis Gale Hospital, Roanoke, Virginia, "Certificate of Blood Alcohol Analysis, Accused, Edwin Lester Street; Name of Court: Washington County Court, Abingdon, Virginia; Examined: By A. V. Torre, M. D., Date 5/13/65. —

Mr. Brown: If Your Honor please, I can't see that this is material on Mr. Street. The letter might be but as to Mr. Street's blood test, I don't see that that's material.

Mr. Johnson: If His Honor please, it is our position that the blood tests were mixed up and that Mr. Shumate did not get his blood sample, the analysis of it, and this letter would so indicate. They were both received on the same date. Mr. McCall testifies he doesn't know which one was sent off.

Mr. Hutton: We desire to introduce that Ex-
page 23] hibit which Mr. Johnson has as Exhibit Two.

Mr. Johnson: If His Honor please, we would like to introduce a copy of it and return that to Mrs. Patton.

The Court: Mark it Exhibit Number Two. Are you going to prepare the copy, Mr. Johnson?

Mr. Johnson: Yes, Your Honor, I will prepare a copy.

The Court: That will be marked Exhibit Number Two.

(Exhibit No. 2, marked for identification and filed)

By Mr. Johnson:

Q. Do you have the blood sample box, Mr. McCall?

A. I do.

Q. May we take a look at it, sir? On this it has got, "Lewis

Hampton Shumate, Jr." Who put that on there, sir?

A. I did.

Q. And do you know whether or not that is his blood sample?

A. Yes, sir.

Q. Well, sir, you just testified a few minutes ago that you didn't know which was his at the Jail. How do you know now that it is his?

A. Because I put that on there myself on April 18th at 3.45 A.M.

page 24] Q. Did you take the — have Mr. Shumate sign the form?

A. No, sir.

Q. Well, who did that?

A. The Justice of the Peace always does that.

Q. Well, how do you know that this was Mr. Shumate's blood sample?

A. That was turned over to me at the Sheriff's Office by Trooper Richardson.

Q. Was there anyone else in the Jail at that time?

A. Yes, sir, I am sure that there was another officer with him and the Justice of the Peace, Mr. Kelly.

Q. Well, do you know who marked the place for Mr. Shumate to sign?

A. I do not, no, sir.

Q. Did Mr. Shumate sign the slip at that time?

A. I don't know.

Q. Did you see the Justice of the Peace give him the form?

A. Yes, sir, I remember Mr. Shumate being in there and explaining to him his right for a blood test and giving him the form. I can't swear that he signed the form at that time.

Q. How long was Trooper Richardson at the Jail, sir?

A. I don't know.

page 25] Q. Did you write this on just as soon as he gave it to you?

A. Trooper Richardson asked if the Sheriff was there and as I recall I advised him that he was not and he asked me if I would accept that at the Sheriff's Office, and I advised that I would and dated it and signed as to whose it was.

Q. Why wasn't it sent off?

A. The form was improperly signed and as far as I was

concerned you couldn't tell whose paper it was.

Q. You mean the paper was not with the blood sample?

A. They were together, yes, sir, but still, we had no record of the name on it. You couldn't make it out at all.

Q. Sir, the doctor's name is on the front — as to where it was to be sent?

A. Yes, sir, it is printed underneath this.

Q. Well, whose writing is that underneath? Do you know?

A. I would say it is my writing, from what I can see of it.

Q. Well, was there any reason why you couldn't mail it if you put the address on it?

A. I don't know when I put this address on it.

Mr. Johnson: That is all, sir.

page 26] The Court: Mr. Sheriff, I want to get this straight. Defendant's Exhibit Number One, which shows in this blank, "Please Forward the Blue Container With Blood Sample of," which is not legible — was that placed there on April 18th, to your knowledge?

Witness: The blank was placed there with this one signature or whatever the writing is.

The Court: That is not readable.

Witness: That was all that was on the blank at that time.

The Court: Now, I take it then — do I understand correctly that where it says, "signature," underneath that, "Person From Whom Blood Sample Was Taken," and there is now printed, "Lewis H. Shumate, Jr.," that was signed by his attorney on May the seventh?

Witness: That is correct.

The Court: And there was no signature on this form until May 7, 1965?

Witness: That is correct. He signed it in County Court.

The Court: And Mr. Shumate at no time requested you to mail his sample off until May 7th?

Witness: No, sir, he didn't request me to, no, sir.

The Court: All right, sir.

CROSS EXAMINATION

page 27] By Mr. Brown:

Q. Sheriff McCall, was Mr. Shumate incar-

cerated? Do you remember?

A. To the best of my knowledge, he was bonded immediately afterward. I can't swear to that, no, sir. I remember Mr. Harris arranging bond for him at the time but I wouldn't say whether he was put back in jail or not.

Q. Do you know whether this form was executed on the night that Mr. Shumate was arrested or not? Whether this signature was put there or at a later time?

A. To the best of my knowledge he signed it at the designated place that night.

Q. All right, sir, and you now have the blue container that you mailed May 7, 1965, and he said you wrote, "Lewis Hampton Shumate" on that container and the date and time?

A. Yes, sir, I would swear that that is my writing, dated on the 4-18-65, at 3:45 A. M.

Q. And you sent the container that you marked and identified on April 18, 1965, at the request of Mr. Johnson, sent it on May 7, 1965?

A. Yes, sir, I mailed it myself when he requested it on May 7th.

Q. And up until that time, as far as you knew,
page 28] you had no request to send it, is that correct?

A. I know that I didn't have any request. I wouldn't say that the Sheriff's Office or the Sheriff didn't.

Q. Well, to your knowledge, was any form prepared that you could read, requesting that it be sent off?

A. No, sir.

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LEWIS HARRIS

having been sworn and examined, testified as follows:

DIRECT EXAMINATION

By Mr. Hutton:

Q. Mr. Harris, state your name, please, sir.

A. Lewis Harris.

Q. And where is your place of residence?

A. Abingdon, Virginia. Washington County.

Q. State whether or not on the evening that Mr. Shumate

Lewis Harris

was arrested here, April 18, 1965, if you were at the Jail at that time about bonding Mr. Shumate?

A. Yes, sir.

Q. About what hour, sir, did you arrive?

A. It was sometime in the early morning. Some-
page 29] time around three or four o'clock.

Q. Now, who was present when you got there, as near as you can recall, please?

A. The Justice of the Peace was there, Mr. Kelly.

Q. Mr. Kelly?

A. That's right. Mr. McCall was there and Mr. Eden.

Q. Mr. Eden?

A. Yes, sir.

Q. Was this gentleman over here, the Trooper, sitting by Mr. Brown, the Commonwealth Attorney, was he there?

A. I believe he was, yes, sir.

Q. And, of course, Mr. Shumate was there. He couldn't very well leave.

A. Yes, sir.

Q. And you did bond him?

A. Yes, sir.

Q. Now, what — just tell His Honor please, what, if anything, Mr. Shumate told the officers who were present there, with reference to that blood sample which is lying there in front of you.

A. Well, I recall them telling him he could send his blood off. I do know that they had a sheet and he signed it. As to where he signed it or anything about it —

page 30] Q. The Justice of the Peace, Kelly, read it to him?

A. Yes, sir.

Q. Did you see Mr. Shumate affix his signature?

A. I saw him with a pencil but I didn't see him put his name on there. I wasn't that close to him.

Q. Well, state whether or not you heard him direct any of the officers to mail that to some doctor or hospital for analysis?

A. They called off a number of names there that it could be sent to and told him he could mark one.

Q. Do you know whether or not he marked it?

A. He had a pencil and paper.

Q. Here is Exhibit 1. I show you, sir, Exhibit 1. Do you

recognize that sheet?

A. I saw them have a sheet in their hand but I wasn't close enough to identify it.

Q. Was it similar to this?

A. The only thing I could see was just a white sheet of paper. Mr. Shumate had a pen in his hand.

Q. And where were they in the Jail at that time?

A. There where they admit them into the Jail.

Q. State to the Court whether or not Mr. Shumate, at that time, made any statement with reference to that sample being mailed?

page 31] A. I heard him say that he wanted it sent off.

Q. Well, Mr. Shumate is pretty well known here — a farmer and business man. You knew him, didn't you?

A. Yes, sir.

Q. And did the officers know him by name?

A. Yes, sir, they did.

Q. And he has a place of business in Johnson City. Also, a place of business in this County and travels through here quite a bit. Isn't that right?

A. Yes, sir.

Q. Do you know why it wasn't mailed or anything about it?

A. No, sir.

Mr. Hutton: All right, you may examine.

CROSS EXAMINATION

By Mr. Brown:

Q. Mr. Harris, you say Trooper Richardson was there?

A. Yes, sir.

Q. Was he there when Mr. Shumate was given the sheet of paper and had the pen?

A. Now that I don't recall, Mr. Brown.

Q. You couldn't say that he was there when he was given the paper and the pen?

page 32] A. I remember Mr. Kelly telling him of his rights.

Q. Trooper Richardson is not stationed here in this County, is he?

A. No, I believe he is from Russell County.

Q. As far as you know, he doesn't know Mr. Shumate, does he?

A. I would say that he does not.

Q. And looking at that form there, it is not directed to the arresting officer, Mr. Richardson, to send it off, is it?

A. I still haven't read it, Mr. Brown.

Mr. Hutton: It doesn't have to be done.

Mr. Brown: It can be.

By Mr. Brown:

Q. Is it directed to the arresting officer?

A. "To Arresting Officer" is blank.

Q. All right, sir. And when did you bond Mr. Shumate?

A. Some time between three and four o'clock that morning.

Q. Well, was he actually taken back and put in the Jail part of the building there?

A. No, sir.

Mr. Brown: All right, sir.

Mr. Hutton: Stand aside, Mr. Harris.

page 33]

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LEWIS H. SHUMATE, JR.

having been sworn and examined, testified as follows:

DIRECT EXAMINATION

By Mr. Johnson:

Q. Your name, sir?

A. L. H. Shumate, Jr.

Q. Mr. Shumate, you were charged on April 18, 1965, by Trooper V. A. Richardson of the Virginia State Police, with operating a motor vehicle over a public highway while under the influence of intoxicating beverage or drugs, is that correct?

A. Yes, sir.

Lewis H. Shumate, Jr.

Q. Sir, were you taken to the hospital by Mr. Richardson for a blood test?

A. Yes, sir.

Q. Did he make any statement to you about taking the blood test?

A. Yes, he said it was the law in the State of Virginia — that you have a test.

Q. Did he tell you what would happen if you didn't take it?

A. I don't know. I don't remember.

Q. Sir, after the blood samples were taken, were you returned to the Washington County Jail?

page 34] A. Yes, sir.

Q. Was a blood sample given to you — a box?

A. Yes, at the Jail, I think.

Q. Do you know what happened to it?

A. No, I don't know what happened to it.

Q. I will show you Defendant Exhibit Number One and ask you whether or not you have ever seen that?

A. Yes, sir.

Q. Sir, I will ask you whether or not your signature is on that?

A. Yes, sir.

Q. Why did you put your signature at that particular place?

A. Well, I presume because it was marked here for it.

Q. Is there a check mark there?

A. Yes, sir.

Q. Now, is there another check mark at another place?

A. No, not that I can see. Oh yes, up here, where the blood went, yes.

Q. What color are those check marks?

A. Blue.

Q. Blue or black?

page 35] A. Well, it is a blue or black. It seems to be — I don't know what it is, black, maybe.

Q. Is the color of ink of those two check marks different than the color of ink of the other marks on the paper?

A. It looks darker to me.

Q. And you don't know who made those check marks?

A. No, sir.

Q. Did you ask that your blood test be sent off?
A. Yes, sir.
Q. Who did you direct to send the blood test off?
A. The officer at the Jail.
Q. And not until May 7, 1965, were you aware that the blood test had not been sent off?
A. That is right. I was not aware of it.
Q. You can say that that is your signature?
A. Yes, sir.
Q. On Defendant's Exhibit Number One, sir, did you —

The Court: In what spot is the signature that he put on Defendant's Exhibit Number One?

Mr. Johnson: Sir, would you initial after your signature on Defendant's Exhibit Number One? Sir, I will give you a yellow sheet of paper and ask you to sign it —

page 36] The Court: For the record, Mr. Johnson, where in the form is that signature that you say was his signature?

Mr. Johnson: If His Honor please, on Defendant's Exhibit Number One, the defendant, Shumate, has initialed after the name in the blank, "Please Forward the Blue Container With the Blood Sample of," the name — initial, Mr. Shumate.

The Court: — his signature follows thereafter, is that correct?

Mr. Johnson: Yes, sir.

Mr. Hutton: Just write your name, Mr. Shumate, on that sheet there, just as you ordinarily write it.

Mr. Johnson: Sir, we would like to introduce this as Defendant's Exhibit Number Two.

The Court: Three.

Mr. Johnson: Three — Mr. Shumate's signature.

(Exhibit marked for identification and filed)

By Mr. Johnson:

Q. Sir, what kind of work do you do?
A. I am in the furniture manufacturing business.
Q. And that is in Tennessee?
A. Johnson City, yes, sir.

Lewis H. Shumate, Jr.

Q. You do own a farm up in Smyth County?
A. Washington County.
page 37] Q. That's near Chilhowie, Virginia, I believe?
A. Yes, sir.
Q. On this particular morning you were going from the farm to your home?
A. Yes, sir.
Q. Is there anything else you would like to say, sir?
A. No, sir, I guess not. I was at the farm and was called home on account of sickness in my family and that is when it happened.
Q. Why were you on your way home?
A. I was called from my home that there was sickness in my family and I started home pretty late at night.

Mr. Johnson: That's all, sir.

CROSS EXAMINATION

By Mr. Brown:
Q. Mr. Shumate, you were driving your 1963 Buick in the west bound lane on Interstate Route 81, on April 18, 1965, about 2:45 A. M., weren't you, sir?
A. Yes, sir, I don't remember the exact time but that is substantially right.
Q. And you remember Trooper Richardson and Trooper Lester stopping you there, don't you?
A. Yes, sir.
page 38] Q. What explanation do you have, if any, for the fact that you were unsteady on your feet and weaving in the road and driving in the manner that you were?
A. Well, I don't know, Mr. Brown. I haven't been arrested too many times. It made me kind of nervous, I know that.
Q. Did you know that the officers were behind you? Is that what caused you to weave around the road, across the center lane, and so forth?
A. No, sir.
Q. And what explanation do you have for the manner in which you were driving on Interstate 81 on that date?
A. I don't know, sir. I was just careless I suppose.
Q. And when you got out you attribute your unsteadiness

on your feet to never having been arrested before?

A. Yes, sir, I do. That was a pretty scary experience.

Q. Your appearance, your flushed face and your eyes being red, you attribute that to being nervous also?

A. Well, that could have been some of it. I had been out all day, too, in the open.

Q. And the sun wasn't shining at this time, was it?

A. No, sir.

Q. You had been in the sun during the day?

page 39] A. Yes, sir.

Q. And do you attribute the odor of alcohol on your person to being arrested for the first time?

A. No, sir.

Q. Did you have several cans of Country Club beer in your car?

A. Well, it's possible.

Q. Did you have this beer in the car, Mr. Shumate?

A. I don't know, sir.

Q. Do you drink Country Club beer and were you drinking it on that occasion?

A. Well, we had had some people at the farm — some guests.

Q. How long had it been since you had had anything to drink before you were stopped?

A. Well, it was before supper.

Q. And you hadn't had anything to drink since supper time — about what time was supper?

A. It was between six and seven — around seven o'clock, I think.

Q. And from that time until 2:45 in the morning you hadn't had anything to drink?

A. No, sir.

Q. You say that the Trooper told you that the

page 40] law said you had consented to the taking of a blood test?

A. Well, the Trooper told me that the blood test was necessary under the laws of this State.

Q. Did he also tell you if you didn't take it you would lose your license for ninety days?

A. That, I don't know. I don't remember his saying that.

Q. But you consented to have your blood test taken?

Lewis H. Shumate, Jr.

A. Yes, sir.

Q. You went to the hospital and they took the blood test?

A. Yes, sir.

Q. And you don't know — when you got to the Jail, you don't know who gave you this form to fill out to designate some person or institution to test your blood?

A. No, it was one of the officers. I don't know which one.

Q. You don't know Mr. Kelly, the Justice of the Peace?

A. I know him when I see him. I am not personally acquainted with him.

Q. Well, did he or did he not give you this form to fill out?

A. An officer gave it to me. I don't remember

page 41] which officer. I don't remember.

Q. You were in control of yourself, weren't you, Mr. Shumate?

A. Yes, sir.

Q. You knew what you were doing?

A. Yes, sir.

Q. And you saw that there was a form there that had to be signed to send the blood test off, didn't you?

A. Yes.

Q. And you didn't read it? You just signed it any place anybody told you?

A. Well, it was marked and I think you had to designate the hospital and the place for a signature —

Q. Well, did you tell him where you wanted it sent?

A. Yes, I think I marked Roanoke.

Q. You marked it?

A. I can't be sure. I don't know. I was nervous and upset. I couldn't testify as to whether I marked it or whether the officer asked me and perhaps I told him. I can't be sure.

Q. And you can't say whether you marked the mark next to where your name was signed either, can you?

A. No, sir, I didn't mark that.

Q. You are sure about that?

page 42] A. Yes, sir. That was the only place that I saw to sign, where it was marked.

Q. But you are not sure about the mark — where you were to send it?

A. I don't know whether I marked it or told the officer. I know I specified Roanoke. I think the officer put the mark

Lewis H. Shumate, Jr.

there, come to think about it. He asked me and I told him.

Q. Mr. Shumate, when they gave you the form, Defendant's Exhibit Number One, was there anything written in any of these blank spaces? This blank space here that says, "To" blank, and has under it, "Arresting Officer" or "To, blank, Chief Police Officer." It says, "County, City or Town," blank, and then, "Person from whom blood sample was taken," blank — the signature is blank and then the signature placed below. There are one, two, three, four, five, six blank spaces there. Is that correct?

A. Yes, sir.

Q. Were any of those filled in?

A. I don't know, Mr. Brown. I don't recall.

Q. Do you know who filled in, "George Kite, Washington County, Virginia," in that form right there, sir?

A. No, sir, I don't.

Q. Didn't your attorney, Mr. Johnson, fill it in?

page 43] A. That I don't know.

Q. On May 7, *1958,* is this the same printing, Lewis H. Shumate, as George Kite?

A. It seems to be, yes, sir.

Q. So, when you signed this, if that is true, there wasn't any blank filled in on this form. Is that correct?

A. That I don't know. I mean just don't know by seeing it myself. I don't know.

Q. You just stuck your signature in there on any one of the blanks, is that correct?

A. Well, they marked one.

Q. Did they tell you to put your signature on it?

A. Yes, they had it checked.

Q. Did anybody tell you to put your signature where it was checked?

A. I think so.

Q. Why didn't you put it up here then, where it was checked?

A. Not enough room, I reckon. Here is the blank for it.

Q. Now, when did you do this — fill in the form? When did you get to the Jail, Mr. Shumate, and when did you fill in the form?

Lewis H. Shumate, Jr.

A. Well, it was the morning of the 18th. I
page 44] don't know exactly the time.

Q. How long from the time that you were apprehended out there in Interstate 81?

A. Before I signed this?

Q. Yes, sir.

A. I don't know. It must have been an hour or some such matter.

Q. And were you ever placed back in or incarcerated in the Jail?

A. No, sir.

Q. And how long was it from the time you signed the form until you left the Jail?

A. It must have been some forty-five minutes to an hour, perhaps.

Q. And when did your bondsman come, after you had signed the form or before — Mr. Harris?

A. I don't know. After, perhaps. I think it was after.

Q. Mr. Harris came after you had completed this form?

A. I think so, yes, sir.

Mr. Brown: That is all, sir.

REDIRECT EXAMINATION

By Mr. Johnson:

page 45] Q. Mr. Shumate, sir, I will ask you whether or not this Defendant's Exhibit Number One was taken by you away from the Jail?

A. No, sir.

Q. Well, what happened to it when you signed it?

A. I gave it to the officer.

Q. The officer that had this blue container?

A. Yes. It was one at the Police Station.

Mr. Johnson: If Your Honor please, we would like to introduce this blue container here, "Name: Lewis Hampton Shumate, Jr. Received at Police Office 4-18-65, at 3:45 A.M." We would like to introduce that as Defendant's Exhibit Number Five.

Mr. Hutton: Four, isn't it?

Mr. Johnson: Five.

(Exhibit marked for identification and filed)

By Mr. Johnson:

Q. Sir, the last time that you saw the blue container just introduced and this form here, Defendant's Exhibit Number One, they were together in the possession of the police officer?

A. Yes, sir.

Q. And when you gave it to the police officer, what directions did you give the police officer, when you

page 46] turned it over to him?

A. Well, the police officer said there were several places it could be sent and showed them to me and I told him to send it to Roanoke.

Q. And you gave this slip of paper to him?

A. Yes, sir.

Q. And the blue box?

A. Well, I didn't have the box in my hand. It was there, laying on the counter.

Q. Did you pay them any money?

A. Who?

Q. The Sheriff, to send it off?

A. No, sir.

Q. They didn't require any money from you?

A. No, sir.

Mr. Johnson: That's all, sir.

RECROSS EXAMINATION

By Mr. Brown:

Q. Mr. Shumate, were you present in the County Court on May 7, 1965, when your attorneys requested that this be sent off for you?

A. No, sir.

Q. Were you not here at all?

A. No, sir.

Q. And Mr. Johnson was your attorney at that time?

page 47] A. Yes, sir.

Q. And he told you later that he had your blood test sent off?

A. Yes, sir.

Q. Now, you said that you told them to send it to Roanoke. How did you happen to pick Dr. Anthony Torre at Roanoke? There are several here on Roanoke. Did you pick that particular person to send it to?

A. No, sir, I just picked the hospital. I have been in that hospital and happened to know it.

Q. You told them Lewis Gale, rather than Roanoke Memorial Hospital?

A. Yes, sir.

Mr. Brown: All right.

REDIRECT EXAMINATION

By Mr. Johnson:

Q. Mr. Shumate, I will show you *Defendan't* Exhibit Number Two, which is a letter from Lewis Gale Clinic, Roanoke, Virginia, and ask you whether or not you ever received a letter from the hospital of that nature?

A. No, sir.

Q. Were you ever notified by anyone that there had been some mix-up in your blood test?

A. No.

page 48] Q. Did you ever receive any letter from the Hospital or from the Chief Medical Examiner?

A. No, sir.

Q. Do you know Edwin Lester Street?

A. No, sir.

Q. Did you ever see him, to your knowledge?

A. Not that I know of.

Mr. Johnson: All right.

RECROSS EXAMINATION

By Mr. Brown:

Q. Mr. Shumate, the letter that Mr. Johnson is referring

to, Defendant's Exhibit Number Two, is directed to the Clerk of the County Clerk, Washington County, Virginia, isn't that correct?

A. Yes, sir.

Q. It wasn't directed to you, was it?

A. No, sir.

Q. All right, sir. Mr. Shumate, you heard the evidence here that your blood alcohol test came back from Richmond at twenty-two, isn't that correct?

Mr. Johnson: If His Honor please, that hasn't been introduced into evidence.

Mr. Brown: Why it has, too.

By Mr. Brown:

page 49] Q. The report has been filed. It came back from Richmond at twenty-two and your report came back at twenty-one. Is that correct? You have heard the Trooper testify here?

A. Yes, sir.

Q. And that is a one-hundredth variance, isn't it, sir, between the two blood tests?

A. I would say so.

Mr. Brown: All right, sir. That is all we have, sir.

Mr. Hutton: Stand aside, Mr. Shumate.

(Witness Excused)

The Court: Anything further, gentlemen?

Mr. Brown: No, sir.

The Court: Do you all care to argue the matter or do you want the Court to pass on it?

Mr. Brown: As far as I am concerned, the Court can pass on it, Your Honor.

Mr. Johnson: If His Honor please, we, of course, at this time renew our Motion to strike the evidence. I would point out to His Honor, in Defendant's Exhibit Number One, on 5-17-65, Defendant's Exhibit Number One was brought to court with a blue box which has been introduced into evidence as Defendant's Exhibit Number Five — Four.

The Court: Number Four.

page 50] Mr. Johnson: Four. Your Honor, we would present that there are two check marks, one by the place that Mr. Shumate said he was directed to sign and the other check mark was at the name of Doctor Anthony B. Torre. If His Honor will notice that the ink of the pen is black and that Mr. Shumate's signature is in blue, which certainly would indicate that there were two different pens used and that Mr. Shumate's version is true — that he was asked to sign at that particular point and he did sign it. More important, the form was taken from Mr. Shumate by a police officer. The little box — blue container, Defendant's Exhibit Number Four, had Mr. Shumate's name on it. Now, if there was some discrepancy in that form at that time, Mr. Shumate should have been made aware of it. Here, he was brought in; he was forced to take a blood test. He was told if he didn't, certain things would happen and yet they say that they let him go without complying with the form, filling it out correctly and that they refused to send it off. We appeared for trial in County Court on the seventh day of May. Trooper Richardson didn't know where the blood test was. They finally found it down at the Sheriff's Office. It was brought up here and later that day mailed, only

page 51] after they told me that we would have to have Mr. Shumate's signature, or either I sign it, at which time I signed it, to have it sent off. I don't know if I did the right thing or the wrong thing but the thing is, even at that point, I feel that Mr. Shumate had been prejudiced. The sample had not been delivered to the Sheriff, as set out in the statute. Further, it was not sent off within seventy-two hours. Even more so, they wouldn't send it because they said that he didn't fill out the form. He filled it out right there in their presence and he left after he gave it to the police officer. It was in the Sheriff's possession or the jail possession during that period of time. The letter, there was some mix-up somewhere along the line — exhibited into evidence by the defendant, they requested that the blood test be sent back. Now, I don't know whether or not if it had been sent back it would have been in Mr. Shumate's favor or against him. That is beside the point. They asked that it be sent back and he was never made aware of it, and we submit to His Honor that, just one step after the other — that this defendant has been prejudiced and he has not been able to call for evidence

in his favor, simply because the Commonwealth didn't comply with the statute. Now, when it was returned to
page 52] County Court, Mr. Shumate should have been advised. He was not. If there was some discrepancy in signature he should have been advised at that time and asked to do it right and we respectfully submit that the Commonwealth has not borne the burden of proof by introducing properly the blood test, and certainly, that is not a substantial complance with the law and that the charge should be dismissed, and we move to strike the evidence.

Mr. Hutton: If Your Honor please, I would like to add this just briefly, please, sir. We contend that, based upon this record, the provisions of 18-55.1 of the Code of Virginia have not been substantially complied with; that the rights of this defendant have been prejudiced thereby and that the motion to strike all the evidence should be sustained.

The Court: Overruled, gentlemen.

Mr. Hutton: Note an exception.

The Court: Do you care to say anything further, gentlemen?

(No answer)

The Court: Mr. Shumate, stand up, please, sir.

Based upon the evidence adduced, the Court finds you guilty as charged in the warrant and fixes your penalty at a two hundred dollar fine and costs and that
page 53] your driving privileges, I don't know that you have a Virginia permit, if you do, that is revoked for twelve months. If not, your driver's privileges in Virginia are revoked for twelve months.

Mr. Hutton: We would like to lodge a motion to set that verdict aside as being wholly contrary to the law and the evidence.

The Court: I will hear you any time that you care to, gentlemen. Do you want to hear it now?

Mr. Hutton: Well, for the reasons heretofore assigned — the provisions of Section 18-55.1 of the Code have not been complied with.

The Court: I take it you don't have anything further to add.

Mr. Hutton: Nothing further to add.

The Court: The Court overrules your motion.

Mr. Hutton: Note exception.

Mr. Johnson: If His Honor please, we would like for His Honor — we move the Court to stay execution of the sentence and give us an opportunity to apply to the Supreme Court for a Writ of Error.

The Court: All right, I will grant you sixty days.

Mr. Hutton: Let the order so show.

THESE WERE ALL THE PROCEEDINGS HAD IN THIS CASE ON THIS DATE.

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A Copy — Teste:

H. G. TURNER, Clerk.

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