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Clerk, Supreme Court of Appeals
Richmond, Va.

Record Nos. 6875,6876

In the Supreme Court of Appeals of Virginia at Richmond

DELBERT LEWIS

v. Record No. 6875

COMMONWEALTH OF VIRGINIA

DELBERT LEWIS

v. Record No. 6876

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF TAZEWELL 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

Record No. 6875

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 16th day of January, 1968.

DELBERT LEWIS, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Circuit Court of Tazewell County
Vincent L. Sexton, Jr., Judge

Upon the petition of Delbert Lewis a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Tazewell County on the 11th day of September, 1967, in a prosecution by the Commonwealth against the said petitioner for a felony (Indictment No. 1); 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.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6876

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 16th day of January, 1968.

DELBERT LEWIS, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Circuit Court of Tazewell County
Vincent L. Sexton, Jr., Judge

Upon the petition of Delbert Lewis a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Tazewell County on the 11th day of September, 1967, in a prosecution by the Commonwealth against the said petitioner for a felony (Indictment No. 2); 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

* * * * *

page 1 }

* * * * *

APR 5 1967

STATE OF VIRGINIA) To-Wit: No. P-6428
COUNTY OF TAZEWELL)

TO ANY SHERIFF OR POLICE OFFICER:

Whereas, Donald Peery Bowling has this day made complaint and information on oath before me, Floyd Griffith, Jr. Justice of the Peace of the said County, that Delbert Lewis in the said County did on the 4th day of March, 1967: Unlawfully and feloniously commit a crime against nature in and upon Donald Perry Bowling, in Violation of Section 18.1-212 of the Code of Virginia of 1950 as Amended.

Against the Peace and Dignity of the Commonwealth.

These are, therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the County Court of the said County, the body (bodies) of the above accused, to answer the said complaint and to be further dealt with according to law. And you are also directed to summon:

..... color ..... Address ..... ☐
..... color ..... Address ..... ☐
..... color ..... Address ..... ☐
..... color ..... Address ..... ☐
..... color ..... Address ..... ☐

as witnesses. F. J. G.

Given under my hand and seal, this 5th day of March, 1967.

FLOYD GRIFFITH, JR. (Seal)
Justice of the Peace

page 2 }

JOE K. McFARLANE

Attorney and Counsellor at Law
Box 516
Richlands, Virginia 24641

March 6, 1967

Hon. Albert G. Peery, Judge
Tazewell County Court
Tazewell, Virginia 24651

Re: Commonwealth vs. Delbert Lewis
(Two Counts)

Dear Judge Peery:

I have been employed to represent Delbert Lewis on two felony charges set for hearing in Richlands on March 27th.

I hereby move the Court for a Bill of Particulars in the case, requiring the Commonwealth to show in said Bill of Particulars the place in Tazewell County that the alleged offenses took place and at what hour or approximate hour on the 4th day of March the offenses were committed.

I feel that I should have this bill of particulars by the 20th day of March in order to properly represent the accused on March 27th.

Thanking you very much, I am,

Sincerely yours,

J. K. McFARLANE

JKM/s
CC: Mr. Wade S. Coates
Commonwealths Attorney
Tazewell, Virginia 24651

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* * * * *

In response to the defendant's motion for a Bill of Particular, the Attorney for the Commonwealth states that the offense took place between the hours of 8:00 P.M. and 9:30 P.M. on the 4th day of March, 1967, on State Secondary Route 636 at a point approximately one-half (½) mile from

its intersection with State Secondary Route 627 in Tazewell County, Virginia.

WADE S. COATES
Commonwealth's Attorney for the
County of Tazewell, Virginia

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* * * * *

IN THE CIRCUIT COURT OF SAID COUNTY:

The jurors of the Grand Jury, in and for the county aforesaid, impaneled and sworn at the term hereof commencing on the 9th day of May, 1967, and now attending said Court upon their oath present that Delbert Lewis heretofore, to-wit, on the ..... day of March, 1967, in the said county. Did feloniously make an assault upon one Donald Perry Bowling, a male child about the age of fourteen (14) years, and then and there feloniously did commit the detestable and abominable crime against nature, by then and there, to-wit, on the day and year aforesaid, in the County aforesaid, feloniously having carnal knowledge of the body of the said Donald Perry Bowling, against the order of nature, against the peace and dignity of the Commonwealth of Virginia.

Upon information of James Dexter Bowling, Donald Perry Bowling, F. D. Barton, Charles Vencill and Forrest Wood.

Witnesses, called on by the Grand Jury, sworn in Court, and sent to the Grand Jury to give evidence.

page 5 } OATH OF COURT REPORTER

(Required by Rule 1:10)

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF TAZEWELL,

COMMONWEALTH
VS. CASE NO. P-6428(I)
DELBERT LEWIS

I, Catherine S. Wilson, a Court reporter, do solemnly swear that I will take down and transcribe the proceedings faithfully and accurately in the above styled case, to the best of my ability, and be subject to the control and discipline of the Court.

So help me God.

CATHERINE S. WILSON

Subscribed and sworn to before me this 25th day of May, 1967.

RHEA F. MOORE, JR., Clerk

page 6 } INSTRUCTION NO. 1

The Court instructs the jury that if you believe from the evidence in this case beyond a reasonable doubt that Delbert Lewis did voluntarily carnally know James Dexter Bowling by or with the mouth, you shall find him guilty of a crime against nature as charged in the indictment and fix his punishment by confinment in the Penitentiary not less than one (1) nor more than three (3) years.

If you shall find the defendant not guilty, you shall say so and no more.

Given 5-25-67. V. L. S., JR.

page 7 } INSTRUCTION NO. 2

The Court instructs the jury that if you believe from the evidence in this case beyond a reasonable doubt that Delbert Lewis did voluntarily carnally know Donald Perry Bowling by or with the mouth, you shall find him guilty of a crime against nature as charged in the indictment and fix his punishment by confinement in the Penitentiary not less than one (1) nor more than three (3) years.

If you shall find the defendant not guilty, you shall say so and no more.

Given 5-25-67. V. L. S., JR.

page 8 } INSTRUCTION NO. 3

The Court instructs the jury that if any person carnally know any male or female person by mouth or voluntarily submit to such carnal knowledge, he shall be guilty of a crime against nature. In this connection the Court instructs the jury that in order to constitute such offense there must be a penetration, however slight.

Given 5-25-67. V. L. S., JR.

page 9 } INSTRUCTION NO. 4

The Court instructs the jury that where the state has established a *prima facie* case and the defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilt of the accused.

Given 5-25-67. V. L. S., JR.

page 10 } INSTRUCTION NO. A

The Court instructs the jury that the defendant is presumed to be innocent of the charge in the indictment unless and until the Commonwealth proves the defendant guilty beyond a reasonable doubt. This presumption of innocence is not a mere form, to be disregarded by the jury at pleasure, but is a substantial part of the law of the land and follows the defendant throughout the trial and applies at each and every stage thereof unless and until the Commonwealth proves the guilt of the defendant beyond a reasonable doubt.

If, upon consideration of all the evidence in the case, both for the Commonwealth and for the defendant, you have a reasonable doubt as to the guilt or innocence of the defendant, then you must resolve that doubt in favor of the defendant and find the defendant not guilty.

Given 5-25-67. V. L. S., JR.

page 11 } INSTRUCTION NO. B

The Court instructs the jury that in every criminal case the burden is on the Commonwealth to prove the guilt of the defendant beyond a reasonable doubt. This means that the burden is on the Commonwealth to prove, beyond a reasonable doubt, each and every material element of the crime charged in the indictment.

It is not sufficient that the jury may believe the guilt of the defendant probable—mere suspicion or probability of guilt, however strong, can never justify a conviction. In order to convict, the evidence must be of such character as to produce in the minds of the jury a belief of the guilt of the defendant to the exclusion of a reasonable doubt.

The jury are not allowed to speculate or go outside the evidence and consider what they think might have taken place, but the jury must confine their deliberations to the evidence introduced, and if the jury after considering all the evidence, does not believe the defendant guilty beyond a reasonable doubt, then the jury must find the defendant not guilty.

Given 5-25-67. V. L. S., JR.

page 12 } INSTRUCTION NO. C

The Court instructs the jury that the jury is the sole judge of the weight of the testimony given and of the credibility of the witnesses who have testified.

In determining the weight and credibility of any witness, the jury has the right to consider the intelligence of the witness, his or her conduct, appearance or demeanor while testifying, the fairness and candor of the testimony, as well as the interest of such witness in the outcome of the trial, the relationship, if any, of the witness to the principals involved, and from these and all other facts and circumstances in the case, give to the evidence of such witness such credit as the jury may believe it entitled to.

Given 5-25-67. V. L. S., JR.

page 13 } INSTRUCTION NO. D

The Court instructs the Jury that it is incumbent upon the Commonwealth not only to prove that the crime against nature was committed but also that it was committed by the defendant. In that connection, the Court instructs the Jury that the identification of the defendant as the perpetrator of the crime must be with such reasonable certainty as to preclude a reasonable doubt to the contrary.

Given 5-25-67. V. L. S., JR.

page 14 } INSTRUCTION NO. E

The Court instructs the jury that the reputation of an accused when proven, whether good or bad, is a fact to be considered by the jury, but its weight as affecting the guilt or innocence of the accused is a matter for the determination of the jury in connection with the other facts proven in the case.

Given 5-25-67. V. L. S., JR.

page 15 } COMMONWEALTH
V. Indictment No. 1.
DELBERT LEWIS

We, the jury, find the defendant guilty of a crime against nature by and with Donald Perry Bowling, as charged in the indictment, and fix his punishment as follows:

Guilty as charged and fix his punishment at 1 year in the penitentiary.

EW. DICKERSON, Foreman

page 16 }

* * * * *

On the 25th day of May, 1967, came the Attorney for the Commonwealth, and the defendant, Delbert Lewis, who stands indicted of a felony, to-wit: crime against nature as charged in the indictment, appeared in open Court according to the condition of his recognizance; and also came James W. Harman, Jr. and J. K. McFarlane, his attorneys.

Whereupon the accused was arraigned and after private consultation with his attorneys, pleaded not guilty to the indictment, which plea was tendered by the accused in person, and the Sheriff of this County having returned the writ of *venire facias* issued by the order of this Court entered on the 28th day of April, 1967, together with the names of twenty (20) persons summoned by him in pursuance thereof and taken from the list of three hundred (300) names attached to said writ and drawn by the Clerk of this Court in the manner provided by law and of the veniremen so summoned and attending fifteen (15) of them were found to be free from exception and qualified in all respects to serve as jurors in this case, whereupon, the Court directed the Clerk of this Court to issue a *venire facias* directed to the Sheriff of this County commanding him to summon five (5) persons of this County from a list furnished to him by the Judge of this Court to complete the panel and serve as jurors in this case, and the *venire facias* being issued by the Clerk and returned executed by the Sheriff, the said five (5) persons so summoned appeared in open Court and were examined upon their *voir dire,* and said persons were found to be free from exception and qualified in all respects to serve as jurors in this case, and the said five (5) persons and the said
page 17 } fifteen (15) persons heretofore qualified constituted the panel of twenty (20) persons free from

exception and qualified in all respects to serve as jurors in this case.

And the Attorney for the Commonwealth and the attorneys for the defendant having each alternately, beginning with the Attorney for the Commonwealth, stricken from said panel the names of four (4) said veniremen, and the remaining twelve, to-wit:

W. G. French	George J. Hodock	H. M. Christian
Charlie T. Robertson	C. L. Gemmell	T. W. Dickenson
Charles Bentley Butt	L. C. Marshall	Elbert S. Money
B. Frank McGlothlin	Thurman Raines	C. E. Green

constituted the jury for the trial of the defendant, and were sworn the truth and upon the premises to speak and having heard the evidence, the instruction of the Court and the argument of counsel, were sent to their room to consult of their verdict and after some time returned into Court and presented their verdict in the following words and figures, to-wit:

"We, the jury, find the defendant guilty of a crime against nature by and with James Dexter Bowling, as charged in the indictment and fix his punishment as follows: guilty as charged and fix his punishment at 1 yr. in the penitentiary.

T. W. Dickenson Foreman"

Counsel for the accused moved the court to set aside the verdict and asked the Court for time in which to assign their grounds in writing, which motion was granted and the defendant was granted a period of twenty-one (21) days in which to file their grounds in writing to support their motion to set aside the verdict of the jury.

Thereupon the defendant by counsel moved the Court to allow him to remain upon his same recognizance and the Court having considered the same overruled said motion to which ruling the defendant by counsel excepted.

And the defendant was remanded to jail.

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* * * * *

STATE OF VIRGINIA) To-Wit: No. P-6429
COUNTY OF TAZEWELL)

TO ANY SHERIFF OR POLICE OFFICER:

Whereas, James Dexter Bowling has this day made com-

plaint and information on oath before me, Floyd Griffith, Jr. Justice of the Peace of the said County, that Delbert Lewis (19) in the said County did on the 4th day of March, 1967: Unlawfully and feloniously commit a crime against nature in and upon James Dexter Bowling, in Violation of Section 18.1-212 of the Code of Virginia of 1950 as Amended.

Against the Peace and Dignity of the Commonwealth.

These are, therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the County Court of the said County, the body (bodies) of the above accused, to answer the said complaint and to be further dealt with according to law. And you are also directed to summon:

..... color ..... Address ..... ☐
..... color ..... Address ..... ☐
..... color ..... Address ..... ☐
..... color ..... Address ..... ☐
..... color ..... Address ..... ☐

as witnesses:

Given under my hand and seal, this 5th day of March, 1967.

FLOYD GRIFFITH, JR. (Seal)
Justice of the Peace

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* * * * *

IN THE CIRCUIT COURT OF SAID COUNTY:

The jurors of the Grand Jury, in and for the county aforesaid, impaneled and sworn at the term hereof commencing on the 9th day of May, 1967, and now attending said Court upon their oath present that Delbert Lewis heretofore, to-wit, on the ..... day of March 1967, in the said county. Did feloniously make an assault upon one James Dexter Bowling, a male child about the age of sixteen (16) years, and then and there feloniously did commit the detestable and abominable crime against nature, by then and there, to-wit, on the day and year aforesaid, in the county aforesaid, feloniously having carnal knowledge of the body of the said James Dexter Bowling, against the order of nature, against the peace and dignity of the Commonwealth of Virginia.

Upon information of James Dexter Bowling, Donald Perry Bowling, F. D. Barton, Charles Vencill and Forrest Wood.

Witnesses, called on by the Grand Jury, sworn in Court, and sent to the Grand Jury to give evidence.

page 20 } OATH OF COURT REPORTER

(Required by Rule 1:10)

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF TAZEWELL,

COMMONWEALTH
VS.
CASE NO. P-6429(II)
DELBERT LEWIS

I, Catherine S. Wilson, a Court reporter, do solemnly swear that I will take down and transcribe the proceedings faithfully and accurately in the above styled case, to the best of my ability, and be subject to the control and discipline of the Court.

So help me God.

CATHERINE S. WILSON

Subscribed and sworn to before me this 25th day of May, 1967.

RHEA F. MOORE, JR., Clerk

page 21 } COMMONWEALTH
V. Indictment #2
DELBERT LEWIS

We, the jury, find the defendant guilty of a crime against nature by and with James Dexter Bowling, as charged in the indictment, and fix his punishment as follows:

Guilty as charged and fix his punishment as 1 yr. in the penitentiary.

GEO. DICKENSON Foreman

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* * * * *

On the 25th day of May, 1967, came the Attorney for the Commonwealth, and the defendant, Delbert Lewis, who stands indicted of a felony, to-wit: crime against nature, as charged in the indictment, appeared in open Court according to the condition of his recognizance; and also came James W. Harman, Jr. and J. K. McFarlane, his attorneys.

Whereupon the accused was arraigned and after private consultation with his attorneys, pleaded not guilty to the

indictment, which plea was tendered by the accused in person, and the Sheriff of this County having returned the writ of *venire facias* issued by the order of this Court entered on the 28th day of April, 1967, together with the names of twenty (20) persons summoned by him in pursuance thereof and taken from the list of three hundred (300) names attached to said writ and drawn by the Clerk of this Court in the manner provided by law and of the veniremen so summoned and attending fifteen (15) of them were found to be free from exception and qualified in all respects to serve as jurors in this case, whereupon, the Court directed the Clerk of this Court to issue a *venire facias* directed to the Sheriff of this County commanding him to summon five (5) persons of this County from a list furnished to him by the Judge of this Court to complete the panel and serve as jurors in this case, and the *venire facias* being issued by the Clerk and returned executed by the Sheriff, the said five (5) persons so summoned appeared in open Court and were examined upon their *voir dire,* and said persons were found to be free from exception and qualified in all respects to serve as jurors in this case, and the said five (5) persons and the said fifteen
page 23 } (15) persons heretofore qualified constituted the panel of twenty (20) persons free from exception and qualified in all respects to serve as jurors in this case.

And the Attorney for the Commonwealth and the attorneys for the defendant having each alternately, beginning with the Attorney for the Commonwealth, stricken from said panel the names of four (4) said veniremen, and the remaining twelve, to-wit:

W. G. French	George J. Hodock	H. M. Christian
Charlie T. Robertson	C. L. Gemmell	T. W. Dickenson
Charles Bentley Butt	L. C. Marshall	Elbert S. Money
B. Frank McGlothlin	Thurman Raines	C. E. Green

constituted the jury for the trial of the defendant, and were sworn the truth and upon the premises to speak and having heard the evidence, the instruction of the Court and the argument of counsel, were sent to their room to consult of their verdict and after some time returned into Court and presented their verdict in the following words and figures, to-wit:

"We, the jury find the defendant guilty of a crime against nature by and with Donald Perry Bowling as charged in the indictment and fix his punishment as follows: guilty as charged and Fix his Punishment as 1 yr. in the penitentiary.

T. W. Dickenson Foreman"

Counsel for the accused moved the Court to set aside the verdict and asked the Court for time in which to assign their grounds in writing, which motion was granted and the defendant was granted a period of twenty-one (21) days in which to file their grounds in writing to support their motion to set aside the verdict of the jury.

Thereupon the defendant by counsel moved the Court to allow him to remain upon his same recognizance and the Court having considered the same overruled said motion to which ruling the defendant by counsel excepted.

And the defendant was remanded to jail.

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* * * * *

On the 15th day of June, 1967, came the Attorney for the Commonwealth and cames James W. Harman, Jr., one of the attorneys for the defendant, and moved the Court for additional time in which to file their grounds in writing in support of their motion to set aside the verdict of the jury in this case. The Court after hearing argument of counsel considered the motion and granted the same. It is, therefore, considered and ordered that the defendant be allowed ten (10) days additional time from this date in which to file his grounds in writing in support of the motion to set aside the verdict of the jury.

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* * * * *

MOTION TO SET ASIDE VERDICT

* * * * *

The defendant, Delbert Lewis, respectfully moves the Circuit Court of Tazewell County, Virginia, to set aside the verdicts of the jury rendered against him on May 26, 1967, in the two criminal trials under the style above given, and assigns the following grounds:

(1) That the verdicts of the jury are contrary to the law and the evidence in the case.

(2) That the verdicts of the jury are contrary to the law in the evidence, among other reasons, for the following grounds:

a. That when all the evidence is taken as a whole, both for the Commonwealth and the defendant, the evidence of the Commonwealth is of such nature that no reasonable man should convict the defendant thereunder.

b. That the evidence of the prosecuting witnesses, to-wit, Donald Peery Bowling and James Dexter Bowling, and particularly the evidence as to the identification of the defendant as the perpetrator of the crime, is inherently incredible.

c. That the Commonwealth's Attorney filed his Bill of Particulars in the instant cases to the effect that the crime was committed between 8:00 p.m. and 9:30 p.m. on the evening of March 4, 1967, and that the defendant, Delbert Lewis, by the introduction of testimony of himself and eight additional witnesses, clearly accounted for his whereabouts the entire time from 7:30 p.m., until approximately 10:00 p.m.

d. That the Court erred in not permitting the witness, Leonard Lewis, to testify as to the conversation be-
page 26 } tween Leonard Lewis and Floyd Webb, a Deputy Sheriff of Tazewell County, Virginia, which conversation took place in the presence of the defendant.

e. That the evidence of two prosecuting witnesses was to the effect that the perpetrator of the crime was operating a yellow Corvair, and the evidence of the investigating officers was to the effect that they had been alerted to look for a yellow Corvair, and the evidence is clear, not only from the defendant's witnesses, but also from the Commonwealth witnesses, that the defendant was operating a white Corvair on the evening in question.

f. Both prosecuting witnesses testified that at the time they were let out of the car, that the older boy wrote down the license number of the car, and that the same was reported to the police promptly. If this is correct, the testimony of the officers is incredible, because the only evidence was that Officer Dowdy secured a license number as he met the Lewis car, and called into the police station for verification. It is respectfully submitted that if the Bowling boys had secured the license number as they testified, the officers would have known the owner of the car within a matter of minutes after the report of the crime to them instead of waiting until approximately 10:20 p.m., according to the testimony of Officer Spangler and Officer Dowdy. The testimony of these two officers is challenged by the testimony of Officer Vencill who testified that when he was called into the police station at approximately 9:40 p.m., he was furnished a license number for the vehicle in question, and if the officers had the license number they could have gone directly to the Lewis home.

g. Commonwealth's exhibit No. 1, being the order book of James Dexter Bowling, shows on the face of it the number 586-705, under which had been written "Delbert Lewis tag number", which was heavily marked out by ink. There is also the following number on the front page of Exhibit No. 1, marked out "35705". It is respectfully submitted

page 27 } that the words "Delbert Lewis tag number" and the license number 586-705 could only have been written down by James Dexter Bowling after a report had been received from the Sheriff's office as to the owner of the car, or the words "Delbert Lewis tag number" would not have been on the order book. It is also respectfully submitted that the number "35705" must have been the number which James Dexter Bowling wrote down, if he wrote any number down, at the time the car drove off.

h. It is inconceivable that the Lewis car could have been the car involved because, if so, the tire tracks found by Trooper Barton at the scene of the alleged crime in McGuire Valley would have had to match the tires on the Lewis car. It was testified by the defendant that Trooper Barton stated to him that the tires on his car did not match the tire prints found in McGuire Valley, and this statement was not denied by the Commonwealth, and this is the only evidence in the case that was not subject to human error.

i. The testimony of Mr. Billy Duff, the train dispatcher for the Clinch Valley Division, should have been stricken for the reason that he was unable to testify as to the time the train passed Doran Crossing. His testimony was to the effect that it "apparently would have passed Doran about 10:05 or 10:10".

(3) That the verdicts of the jury should be set aside for the reason that the defendant, after the trial, had discovered evidence in his favor that he could not have discovered prior to trial, and that the Commonwealth had available to it evidence tending to substantiate the position of the defendant, which was surpressed by the Commonwealth in violation of the 14th Amendment of the Constitution of the United States, and in support thereof, the defendant submits the following:

a. Affidavit of the defendant, Delbert Lewis, to the effect that he could not, with due diligence, discover the

page 28 } evidence until after the completion of the trial.

b. Affidavit of Dan Goodman to the effect that on the night of March 3, 1967, he was accosted by a man in a white car for the purpose of a crime against nature, who was definitely not the defendant, Delbert Lewis, and which incident occurred only one-fourth of a mile from the point the Bowling boys were picked up.

c. Affidavit of Mary B. Davis, proprietor of the Arcade, wherein the Bowling boys were picked up, to the effect that a man who came in the store and left immediately prior to the Bowling boys, was definitely not Delbert Lewis.

d. Affidavit of Viola Lewis relative to conversation with the prosecuting witness, James Dexter Bowling, to the effect that the defendant did not get a fair trial, and that he was unable to tell his full and complete story as to what occurred and to the effect that if another trial was had, he would explain how he got the license number.

e. Affidavit of Emory Morris, Jr., Deputy Sheriff of Tazewell County, Virginia, to the effect that prior to the trial of this case, James Dexter Bowling talked to him about how he could get money out of the case.

f. Affidavit of Floyd Webb, a Deputy Sheriff, to the effect that he received a radio report of the crime at approximately 9:00 p.m. on the evening of March 4, when he was at Cliffield, reporting an alert for a yellow Corvair, but no license number being given, and that immediately thereafter, he saw a Town of Richlands police car just west of Cliffield and talked to Officer Spangler, and further to the effect that James Dexter Bowling told Deputy Webb that he could not positively identify Delbert Lewis as the man who had done the act.

g. Affidavit of Clarence Davis, Sheriff of Tazewell County, Virginia, to the effect that on the evening of March
page 29 } 4, 1967, between the hours of 8:30 p.m. and 9:00 p.m., he was at the Jail office and heard a radio request for a license number 586-705, which was later checked out to be the Leonard Lewis car, and that while Deputy Young was checking the ownership of that particular license number, another call came in from Richlands police requesting a check on Virginia license number 578-439, which was checked out to be a 1966 Corvair automobile owned by William G. and Phyllis B. Belcher, of 202 Fairfax Avenue, Richlands, Virginia, and which information was also relayed to the Richlands police.

h. Affidavit of Jack B. Sykes to the effect that as an automobile salesman from Modern Chevrolet Sales, he sold William G. and Phyllis B. Belcher a 1966 yellow Corvair automobile on February 15, 1966, and on April 28, 1967, the owners traded the same on a new station wagon.

i. Affidavit of Floyd Griffith, Jr., Justice of the Peace, of Richlands, Virginia, to the effect that James Dexter Bowling and Donald Peery Bowling appeared with Walter Asbury at the Police Department in the Town of Richlands on the evening of March 4, 1967, at 8:45 p.m., and that someone had

entered the name of William G. Belcher, license No. 578-439 on the radio log for that evening.

j. Affidavit of J. K. McFarlane, relative to police log book.

(4) The law is clear that when the Commonwealth has evidence favorable to the defendant, and that the same is surpressed, the defendant has been denied the rights accorded him by the 14th amendment of the Constitution of the United States, and the defendant must either be released or the case remanded for a new hearing.

In support thereof, the defendant cites the case of *Brady* vs. *Maryland,* 83 Sup. Ct. 1194 (1963), wherein the Court review the history of the rule, and held that *supression* by the prosecution of evidence favorable to an accused violates due process, where the evidence is material either to the guilt or punishment irrespective of the good faith or bad faith of the prosecution.

page 30 } In the recent case of *Giles* v. *Maryland,* 87 Sup. Ct. 793 (1967) the Court substantiates and extends the rule of *Brady* v. *Maryland* wherein a police report of an investigation was denied the defendant and in which report there were certain inconsistencies between the testimony of the State witnesses and the investigating officer's report, and the Supreme Court of the United States vacated the judgment of conviction against the defendant and remanded the case for further proceedings in line with the decision of the Court.

(5) It is respectfully submitted that there is no evidence whatsoever that the investigating officers at any time checked out the Belcher automobile or made any investigation in connection therewith, that the Belcher automobile was the same color as originally reported, that this evidence was available to the Commonwealth from the evening of March 4, 1967, to the present time, and that the Commonwealth *supressed* this evidence; that the evidence was unobtainable by the defendant until after the completion of the case; that the Commonwealth knew, or then had the official police record to show that the report of the crime was made at 8:45 to the police station at Richlands, but filed a Bill of Particulars to the effect that it occurred between 8:00 p.m. and 9:30 p.m., and the Commonwealth introduced evidence by the two prosecuting witnesses to the effect that they were let out of the car after nine o'clock, and the uncle of the prosecuting witnesses also testified that they came to his home after nine o'clock, and that after talking to them he took them to the Police Department in Richlands. It is inconceivable that with the evidence available to the Commonwealth from the official police records at Richlands, showing the report of the crime at 8:45, that the

Commonwealth would permit and offer the testimony of the two prosecuting witnesses and their uncle showing that the boys were let out of the car at 9:15 in the evening. It is also inconceivable that the two boys had the license page 31 } number as testified, and if they reported the same directly to the *plice,* that Officer Spangler and Dowdy would not have had the information at 10:15 when they left the Police Department. It is interesting to note that the Commonwealth did not offer the evidence of either Spangler or Dowdy to the effect that around 9:00 p.m. that evening they were at Cliffield, some 15 miles out of their jurisdiction, looking for the same car.

The attention of the Court is called to the testimony of the defendant, Delbert Lewis, wherein he stated that during the investigation on the evening of March 4, he provided the Commonwealth's Attorney with the places he had been, the approximate times, and the names of the people who had seen him, which statement was not denied by the Commonwealth. In the light of this testimony, it is inconceivable that the Commonwealth would not check out the Belcher automobile, and it is respectfully submitted that the concealment of this evidence is in violation of the due process clause of the 14th Amendment of the United States Constitution.

For the foregoing reasons, the defendant respectfully moves the Court to set aside the verdict of the jury and order the defendant a new trial.

Respectfully submitted,
DELBERT LEWIS

By JAMES W. HARMAN, JR.
Of Counsel

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Delbert Lewis, after being first duly sworn, deposes and says:

That he is the defendant in two certain indictments on which he now stands convicted before the Circuit Court of Tazewell County, Virginia, and that since the date of his trial, to-wit, on May 26, 1967, he and his attorneys have secured certain evidence that was not available to any of

them prior to trial, and that the defendant could not have secured such evidence by due diligence prior to the trial of his case for the reason that the same was known only to the law enforcement officers of Tazewell County, Virginia, and the Town of Richlands, and that it was only by accident that information of this evidence came to the said Delbert Lewis.

DELBERT LEWIS

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Dan Goodman, of Cedar Bluff, Virginia, having been duly sworn according to law, deposes and says:

That on the night of March 3, 1967, he had visited Coy Horn's Furniture Auction across the street from the Arcade Building, and before the auction was over I started walking to my home up on Claypool Branch. When I got past the old market building in Cedar Bluff, I saw a car parked at the side of the road. When I walked up, he pulled his car out in front of me, and said, "Hey, buddy, how would you like to make a lot of money". I told him, I don't need your damn money". He started to back up, and he pulled around in front of me and kept saying, "Come here, Buddy", and all the time he was unbuttoning his trousers. He was a short person and had short black hair. I didn't get a good look at his clothes. He had me in pretty close quarters. No houses or anything nearby. I pulled out a flash light when he kept say, "Come here, Buddy, come here, Buddy," and told him, "you better get up that road where you are going before you get yourself killed". He pulled out and started on up the road. I thought he stopped around the curve, so I got out of the road and walked home through the fields. I took the car he was riding to be a white car. The man appeared to be somewhere between 20 and 30 years of age. I did not know Delbert Lewis at that time, but I have since visited him at the jail, and can definitely say that the man who accosted me was not Delbert Lewis.

DAN GOODMAN

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Mary B. Davis, Cedar Bluff, Virginia, after being first duly sworn according to law, deposes and says:

That she is the owner and proprietor of the Arcade, a business establishment in the Town of Cedar Bluff, Virginia; that in the early evening hours of Saturday, March 4, 1967, Dexter Bowling and Donald Peery Bowling came to my place of business to take orders for eggs; I had dealt with the Bowling boys for at least a year or probably longer in the egg business, and I had known them prior to that; while the boys were in the store a man came in whom I had not known and who did not speak to me. He was a young man with short black hair and was dressed in a khaki shirt and khaki trousers; he did not speak to me, went to the rear of the store for a few minutes and then left; very shortly thereafter the Bowling boys followed the man out.

At the time this happened, it was getting dusky dark, and the outside lights had already come on; from my place in the store I was unable to see whether or not the man in the khaki clothes was in an automobile or not, and I do not know whether the Bowling boys got in the car, if he had a car.

At the time this occurred I had never met Delbert Lewis, and the first time I saw him was in the Tazewell County Jail on Thursday, June 15, 1967. Delbert Lewis was definitely not the man who came into my store on the evening of March 4, 1967, and to my knowledge he has never been in or about my place of business in the Town of Cedar Bluff.

MARY B. DAVIS

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Viola Lewis, after being first duly sworn according to law, deposes and says:

That she is the mother of Delbert Lewis; that on Saturday, May 27, 1967, which was two days after the trial of Delbert Lewis, she and her husband went to Whittaker's Fruit Market on the Baptist Valley Road, a few miles east of the Town of Cedar Bluff; that while her husband was in the market, she

remained seated in the car outside; that shortly thereafter James Dexter Bowling walked by the car she spoke to him and asked him if he didn't think he made a mistake in identifying Delbert Lewis as the one who had committed a crime against him, and he said "Yea, I felt like he didn't get a fair trial, I could have been mistaken for there are a lot of people that look like that and have a Corvair car. I tried to tell them that the car had a damaged back door on the right side and they wouldn't let me say that. I told them that the car was yellow, had a 2-Way radio and an *antena* on the back, right hand side, that the man had short, black hair and said his name was Robert Johnson and that he was an insurance man from Marion. They thought I didn't know what a 2-way radio looks like, but as big as I am I know one when I see it. They seemed to think I was a poor little boy and didn't know what I was talking about".

I asked James Dexter Bowling if he would go to Tazewell and tell what he had told me. He stated that he wanted to talk to his little brother about it and for me to come by for him on Monday between 9 and 10 o'clock. On Monday morning at the stated time I went by for him, but he had decided not to go. His grandfather, Alex Asbury, was there and said he didn't want the boys mixed up it in any further. At that time I asked James Dexter Bowling how he had gotten the license number of Delbert's car and why one number was erased or marked out. He said "You have another

page 36 } trial and I will tell you".

VIOLA LEWIS

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Emory Morris, Jr., after being first duly sworn according to law, deposes and says:

That I am a Deputy Sheriff for Tazewell County, Virginia, and have been such from a date prior to March 4, 1967, and to the present time. That after the arrest of Delbert Lewis on the evening of March 4, 1967, I was called on several occasions between that date and the date of the trial of Delbert Lewis to the home of Donald Peery Bowling and James Dexter Bowling. On one of the occasions, while talking to the older boy, James Dexter Bowling, he mentioned the question of money, and although I do not remember the

exact wording of our conversation, he was seeking information from me as to how he could get some money out of the pending case. As I recall I told him that the question of money was something I knew nothing about, and could not advise him.

I further state that I have just recently received information that this particular young man, James Dexter Bowling, has just recently left the area and joined the Job Corps.

EMORY MORRIS, JR.

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Floyd Webb, after being first duly sworn according to law, deposes and says that he is now, and has been continuously since prior to March 4, 1967, to the present time, a Deputy Sheriff of Tazewell County, Virginia.

That on the evening of March 4, 1967, at about 9:00 p.m., of that day, I was at a truck stop at Cliffield, a few miles west of the Town of Tazewell, Tazewell County, Virginia. As I left the truck stop, I heard a radio report in connection with an alert for a yellow Corvair automobile from the police station at Richlands. At this time, no license number was given. Just a few hundred yards west of the truck stop I saw a Town of Richlands police car parked on the road, and Police Officer Don Spangler standing beside the car. I stopped my car and talked to Mr. Spangler, as I was interested as to why he was so far from Richlands. He advised me as to the charge made by the two Bowling boys, and stated that they were on the lookout for a yellow Corvair.

I proceeded on west, and as I reach Claypool Hill a radio report came in giving the license number of a car that the officers were looking for. By the time I reached the Town of Richlands, the name of the owner of the car had been given over the radio, and I proceeded to the Lewis home. The two boys were there with Richlands officers, and I talked to James Dexter Bowling and asked him, very carefully, as to whether or not he could positively identify Delbert Lewis. At this time, he told me definitely that he could not positively identify Delbert Lewis as the one who had committed the act. Thereupon, he went to the rear of my car with Town Officer Sayers, where the two talked, but I could not hear what was said.

After Sayers and James Dexter Bowling came back to the front of my car, I again asked him whether or not he could identify the defendant, and at this time he said he could identify him as the man who had perpetrated the crime.

FLOYD A. WEBB, JR.

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Clarence Davis, after being first duly sworn, deposes and says:

That I am Sheriff of Tazewell County, Virginia, and have been Sheriff from a period prior to March 4, 1967, to the present time; that on the evening of March 4, 1967, sometime between the hours of 8:30 p.m. and 9:00 p.m., I was in the jail office with Deputy Ward Young, one of the jailers of Tazewell County; that sometime prior to 9:00 o'clock of that day, Richlands Police Department requested a license number check to the Sheriff's office, which license number was Virginia License No. 586-705; that while Deputy Young was checking the record on this particular car, another call came in from Richlands requesting a check on the license number 578-439. I wrote this number down on the radio log, and Richlands was informed that the first license number was to a 1965 Chevrolet Corvair, issued to Leonard Lewis, of 108 Franklin Avenue, Richlands, Virginia; Richlands was also informed that license number, Va. 578-439 was a 1966 Chevrolet Corvair, Special Coupe, issued to William G. and Phyllis B. Belcher, of 202 Fairfax Avenue, Richlands, Virginia.

CLARENCE DAVIS

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Jack B. Sykes, after being first duly sworn according to law, deposes and says:

That he is a car salesman for Modern Chevrolet Sales, Honaker, Virginia; that on February 15, 1966, he sold to

William G. and Phyllis J. Belcher, Richlands, Virginia, a 1966 yellow Corvair automobile; and that on April 28, 1967, he traded this car in on a new station wagon.

JACK B. SYKES

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Floyd Griffith, Jr., after being first duly sworn according to law, deposes and says:

That I am a Justice of the Peace, residing at Richlands, Tazewell County, Virginia; that on the evening of March 4, 1967, I was at the Police Station in Richlands, Virginia, manning the telephone and monitoring the police radio; that while I was on duty Walter Asbury came in with James Dexter Bowling and Donald Peery Bowling and informed me that a crime had been committed against the Bowling boys. As is customary, I made an entry on the police log book showing the date and time. That the entry I made shows that Walter Asbury and the Bowling boys arrived at the police station in Richlands, Virginia, on March 4, 1967 at 8:45 P.M.

Before making this affidavit, I checked the log book and found the foregoing statement to be true and correct. I also noted that on the same date some one else had entered the name of William G. Belcher and the license no. 578-439.

FLOYD GRIFFITH, JR.

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J. K. McFarlane, after being first duly sworn, deposes and says:

On June 20, 1967, after having heard certain rumors as to the time James Dexter Bowling and his brother came to the Police Station at Richlands, I went by the Police Station in Richlands and asked the Chief of Police, Covo Gardner, if I would be permitted to check the police radio log book. He seemed reluctant to let me do so, and asked me what I thought

the Commonwealth Attorney would say about it. I stated that I did not care what he would say about it, that I desired to look at the log.

Without further comment, he took me into the inner office and removed the log book from the safe, which at the time he removed it from the safe was opened at the date, March 4, 1967. The log showed that Walter Asbury and the Bowling boys checked into the Police Station at 8:45. I also noted on the log the name of William G. and Phyllis B. Belcher, along with the license No. 578-439 had been entered on the log book.

J. K. McFARLANE

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Indictment No. 1

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Indictment No. 2

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This day came the attorney for the Commonwealth and the defendant, by his attorneys, and the defendant, by Counsel, again moved the Court to admit the defendant to bond pending the decision of the Court on the motion of the defendant to set aside the verdict of the jury in each of the above indictments, which motion was resisted by the attorney for the Commonwealth.

Upon consideration whereof, and it appearing to the Court proper so to do, it is considered and ordered that the motion of the defendant, by counsel, for bond, be, and the same is hereby, denied, to which action of the Court, the defendant, by counsel, excepted.

It further appearing that the Court has not yet set a date for the final hearing on the motion of the defendant to set aside the verdict of the jury in each of the above cases, it is

further considered and ordered that said hearing be set for Thursday, August 17, 1967, at 11:00 a.m.

EXAMINED:

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Enter this order this 21st day of July, 1967.

....., Judge

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MOTION TO SET ASIDE VERDICT—REPLY

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The Commonwealth in reply to the motion to set aside the verdicts in these cases respectfully replies as follows:

(1) That the verdicts of the jury are not contrary to the law and the evidence in the case.

(2) That the verdicts of the jury are not contrary to the law and the evidence for the following reasons:

(a) The jury heard all the evidence for the Commonwealth and the Defendant and did not chose to accept the evidence with regard to the alibi set forth by the Defendant.

(b) Both of the Bowling boys positively identified the Defendant as the perpetrator of the crime and say they were with him for approximately one (1) hour. It certainly could not be said that their identification is inherently incredible.

(c) After a fair presentation of the evidence by the Commonwealth and the Defendant, and after the jury was properly instructed by the Court, the jury chose to accept and believe the evidence of the Commonwealth rather than accept the alibi as set forth by the Defendant.

(d) The Court ruled properly by not permitting Leonard Lewis to testify as to the conversation beween Leonard Lewis and Floyd Webb, a Deputy Sheriff of Tazewell County, Virginia.

(e) The jury chose to accept the evidence of the two prosecuting witnesses even though they apparently were
page 45 } confused as to whether the automobile in question was a yellow Corvair or a white Corvair.

(f) In reply to paragraphs f., g., and h. it is submitted that the jury heard the evidence as it was presented and developed at the trial that the testimony of the officers with regard to the licenses number is certainly not incredible and again it certainly is not inconceivable that the Lewis car could have been the car involved in the *prepetuation* of the crime.

(i) The testimony of Mr. Billy Duff was properly admitted by the Court.

(3) The Commonwealth respectfully represents that the Defendant has not discovered any evidence in his favor that he could not have discovered prior to trial and the Commonwealth further states that no evidence whatsoever was suppressed in violation of the 14th Amendment of the Constitution of the United States and replies to the allegation set forth in the motion to set aside the verdict as follows:

(a) The Commonwealth states that Delbert Lewis could have with due diligents discovered all the evidence set forth in the said motion prior to his trial had he exercised due diligents and had he properly investigated the facts of the case available to him and properly interrogated the officers who had investigated the case.

(b) The affidavit of Dan Goodman is immaterial and irrelevant as to whether the Defendant, Delbert Lewis was the perpetrator of the crime in question.

(c) The affidavit of Mary B. Davis is irrelevant and immaterial and certainly it does not matter whether or not the man who came in her store and left immediately prior to the Bowling boys was Delbert Lewis or not.

page 46 } (d) With regard to the affidavit of Viola Lewis to the effect that James D. Bowling made certain statements to Viola Lewis, clearly there would be no end to criminal litigation if a new trial were awarded on the basis of later alleged statements of witnesses for the prosecution.

(e) The affidavit of Emory Morris, Jr., Deputy Sheriff is irrelevant and immaterial as to whether or not Delbert Lewis was the perpetrator of the crime in question. It is submitted that probably any of us who would be subject to the experience which Delbert Lewis subjected the Bowling boys to would be interested in a civil suit against him for monetary damages.

(f) An affidavit of Officer Christopher Spangler, is filed herewith stating that it was after 10:00 p.m. instead of 9:00 p.m. that he talked with Floyd Webb, Deputy Sheriff at Cliffield, Virginia. With regard to the statement of Deputy Webb relative to the identification of Delbert Lewis by James

Dexter Bowling, again it is stated that clearly there would be no end to criminal litigation if a new trial were awarded on the basis of later alleged statements of witnesses for the prosecution.

(g) With regard to affidavit of Clarence Davis it is submitted that the facts stated therein are irrelevant and immaterial but in order to disprove the same with regard to the time element, there is filed herewith affidavits of Town Officers Charles Vencill and Boyden Sawyer.

(h) The affidavit of Jack B. Sykes is irrelevant and immaterial.

(i) An affidavit of Boyden Sawyer is filed herewith in order to show how the name of William G. Belcher happened to appear on the radio log book.

(j) Various other affidavits are filed herewith by William G. Belcher and others, certifying under oath where the Belcher automobile was located on the evening of March 4, 1967 and showing it could not have been involved in any manner in this crime.

page 47 } (k) An affidavit of Covo Gardner, Chief of Police of the Town of Richlands certifies that the radio log book was not *surpressed* and would have been shown to the attorneys of Delbert Lewis had such a request been made.

(4) It is submitted by the Commonwealth that evidence favorable to the Defendant must have been suppressed in order that the Defendant be denied his rights accorded him by the Fourteenth Amendment of the Constitution of the United States and that the evidence must be material to his guilt or innocence. In the case quoted by the Defendant, the police report of the investigation was denied the Defendant but in the present case no where is it shown that the radio log book at the Police Department in the Town of Richlands was denied the Defendant. It has been shown by the Chief of Police had a request been made, the log book would have been available for their study or investigation. Furthermore, it is stated that this evidence was obtainable by the Defendant until after the completion of the case which certainly is not born out by the facts as shown by the affidavits filed herewith.

Also filed herewith is a photo copy of the radio log of March 4, 1967, showing the entry by Floyd Griffith with regard to the licenses number of the Lewis automobile to have been entered after 11:00 o'clock p.m. In other words, after Floyd Griffith had signed off at 11:00 o'clock p.m. he re-

turned and made the entry from memory showing the same to be 8:45 p.m. which from the other evidence in the case would have been earlier than the actual time this radio call was received. An affidavit is signed by Officer Charles Vencill to the effect that Floyd Griffith did not make the entry at 8:45 p.m. but returned and made said entry at 11:00 p.m. that night. For such reasons, the Commonwealth respectfully submits that the verdict of the jury in this case should be allowed to stand and not be set aside.

WADE S. COATES
Attorney for the Commonwealth

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Aug 23 1967.

Teste: RHEA F. MOORE, JR., Clerk

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I, Christopher Spangler, Jr., Town Officer for the Town of Richlands, do hereby certify that on the evening of March 4, 1967, I talked with Floyd Webb with regard to a Corvair automobile. This conversation definitely took place after 10:00 o'clock p.m. on that evening. Another Town Officer did not get off duty until 10:00 o'clock p.m. and we had already taken him home before our conversation with Deputy Floyd Webb.

Given under my hand this 17 day of July, 1967.

CHRISTOPHER SPANGLER, JR.

* * * * *

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Aug 23 1967.

Teste: RHEA F. MOORE, JR., Clerk

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We, Charles Vencill and Boyden Sawyer, Police Officers for the Town of Richlands, in reply to the affidavit of Clarence Davis, Sheriff of Tazewell County, Virginia, do hereby certify that no request was made to Clarence Davis, Sheriff, or the Sheriff's office in Tazewell, Virginia for any information with regard to Leonard Lewis car or the William G. Belcher car until after 9:30 p.m. on the evening of March 4, 1967.

When the call was made to the jail for a request for License No. 586-705, it was after 9:30 p.m. and we were informed by Floyd Griffith, Jr. that he was going to telephone for the information as he did not want to put the license number on the air since the party being looked for had told the Bowling boys he had a two-way police radio and could hear if they went to the police.

Given under our hands this 17th day of August, 1967.

CHARLES VENCILL
BOYDEN SAWYER

* * * * *

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Aug 23 1967.

Teste: RHEA F. MOORE, JR., Clerk

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I, Boyden Sawyer, Town Officer of the Town of Richlands, do hereby certify the following to be true and correct:

It appears that inquiry has been made as to how the license number and name of William G. and Phyllis B. Belcher happened to be entered on the radio log book of the Richlands Police Department for the evening of March 4, 1967.

I was working the night shift the evening of March 4, 1967 and was on duty when I was alerted to be on the lookout for a yellow Corvair automobile and while passing thru the

Brickyard Section of the Town of Richlands, I observed a Corvair parked near Kelsey Tire Company with Virginia license number 578-439 which I reported to the police station in Richlands. This number was called into Tazewell by telephone and later the message was radioed to Richlands at which time the entry was made on the radio log book by H. R. Long who was assisting Floyd Griffith, Jr. Shortly thereafter the Lewis boy was identified by the Bowling boys as the perpetrator of the crime in question and no further investigation of the Belcher automobile was needed.

At no time either before or after the trial of Delbert Lewis have I been questioned by Delbert Lewis or his attorneys relative to my participation in the investigation of the crime alleged aganst Delbert Lewis.

Dated this 14th day of August, 1967.

BOYDEN SAWYER

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Aug 23 1967.

Teste: RHEA F. MOORE, JR., Clerk

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I, William G. Belcher, do hereby certify that on the afternoon of March 4, 1967, Raymond McGlothlin and I played golf at Lake Boneventure Country Club near Cleveland, Virginia, and that upon our return to Richlands at approximately 6:00 o'clock to 6:30 P.M. I loaned Raymond McGlothlin my 1966, 2-door, yellow Corvair in order that he could visit his brother who lives in the Brickyard section of the Town of Richlands and he returned the car to me later that night.

Given you my hand this 17 day of July, 1967.

WILLIAM G. BELCHER

* * * * *

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Aug 23 1967.

Teste: RHEA F. MOORE, JR., Clerk

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I, Raymond McGlothlin, do hereby certify that on the afternoon of the 4th day of March, 1967, William G. Belcher and I played golf at Lake Boneventure Country Club near Cleveland, Virginia, and that upon our return to Richlands at approximately 6:00 o'clock to 6:30 P.M. I borrowed William G. Belcher's 1966 yellow two-door Corvair and took the car to the Brickyard where I parked it near Kelsey Tire Company at which time I went to Ronnie McGlothlin's trailer, he being a brother of mine, where I left the Corvair parked and where it remained until after 11:00 P.M., at which time I returned Mr. Belcher's car to him at his home in Richlands, Virginia, and my wife picked me up there and we returned to my home at Jewell Ridge, Virginia.

Given under my hand this 17th day of July, 1967.

RAYMOND McGLOTHLIN

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Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Aug 23 1967.

Teste: RHEA F. MOORE, JR., Clerk

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I, Roberta Jean McGlothlin, wife of Raymond McGlothlin, do hereby certify that on the evening of March 4, 1967, at approximately 6:00 P.M. to 6:30 P.M. I was at the trailer of Ronnie McGlothlin's with his wife, Ada McGlothlin, when my husband, Raymond McGlothlin, returned from a golfing trip. He was driving Mr. William G. Belcher's 1966 yellow Corvair, and it was parked near the trailer and near Kelsey Tire Company where it remained until after 11:00 P.M. at which time Raymond McGlothlin returned it to the home of William G. Belcher where he parked the car and was picked

up by me and we returned to our home at Jewell Ridge, Virginia. Raymond McGlothlin remained at the trailer during this period of time with myself and Ada McGlothlin, who is Raymond McGlothlin's wife.

Given under my hand this 17th day of July, 1967.

ROBERTA JEAN McGLOTHLIN

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Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Aug 23 1967.

Teste: RHEA F. MOORE, JR., Clerk

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I, Ada McGlothlin, wife of Ronnie McGlothlin, do hereby certify that on the 4th day of March, 1967, my husband, Ronnie McGlothlin, was bowling and that evening after 6:00 P.M. Roberta Jean McGlothlin was at our trailer when her husband, Raymond McGlothlin, came to the trailer. Raymond McGlothlin remained there until after 11:00 P.M. when my husband, Ronnie McGlothlin, returned from his bowling, Raymond McGlothlin being in the company of his wife and I from shortly after 6:00 P.M. until after 11:00 P.M.

Given under my hand this 17th day of July, 1967.

ADA McGLOTHLIN

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Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Aug 23 1967.

Teste: RHEA F. MOORE, JR., Clerk

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I, Charles Vencill, Police Officer for the Town of Richlands, do hereby certify that on March 4, 1967, Floyd Griffith returned to the police station after 11:00 p.m. and made an entry at that time with regard to a license number belonging to Leonard Lewis, showing the time of said communication to have been at 8:45 p.m. It is further stated for the record that this call would have come from Tazewell definitely after 9:30 p.m. rather than 8:45 p.m.

Dated this 17th day of July, 1967.

CHARLES VENCILL

* * * * *

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Aug 23 1967.

Teste: RHEA F. MOORE, JR., Clerk

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* * * * *

I, Covo Gardner, Chief of Police of the Town of Richlands, do hereby certify that no time prior to the trial in the Circuit Court of Tazewell County, Virginia, of Commonwealth vs. Delbert Lewis held on May 26, 1967, did J. K. McFarlane, James W. Harman, Jr., Delbert Lewis, or anyone on behalf of Delbert Lewis ask or request to see the radio log book for the evening of March 4, 1967, and I further certify that had such a request been made the radio log book for the evening of March 4, 1967, would have been shown to Delbert Lewis or his attorney. When a request to see the book was made, it was shown to Mr. J. K. McFarlane, Attorney for the defendant, this being after the trial of Delbert Lewis in the Circuit Court.

Given under my hand this 21st day of July, 1967.

COVO GARDNER

* * * * *

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Aug 23 1967.

Teste: RHEA F. MOORE, JR., Clerk

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page 59 }

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CRIME AGAINST NATURE, INDICTMENT NO. 1.

* * * * *

On the 29th day of August, 1967, came the Attorney for the Commonwealth and John W. McClintock, Jr., Special Prosecutor in this case, and also came the defendant, Delbert Lewis, who was on the ..... day of May, 1967, convicted of a felony, to-wit: crime against nature; and also came J. K. McFarlane and James W. Harman, Jr., attorneys for the defendant.

And it appearing to the Court that upon the conviction of the defendant on the ..... day of May, 1967, the defendant by counsel moved the Court to set aside the verdict of the jury and to grant a new trial and the Court allowed the defendant twenty-one (21) days to file the motion and grounds in writing and after a time allowed the defendant additional time to file his motion in writing which motion was duly filed and after a time the Attorney for the Commonwealth filed his answer to the motion to set aside the verdict and thereupon the attorneys for the defendant orally argued the motion to set aside the verdict and time for adjournment having arrived this case was adjourned.

On the 11th day of September, 1967, came again the Attorney for the Commonwealth and John W. McClintock, Jr., Special Prosecutor in this case, and the defendant, Delbert Lewis, appeared in open Court in the custody of the Sheriff of this County, and came also J. K. McFarlane and James W. Harman, Jr., attorneys for the defendant.

And the attorneys for the defendant resumed their argument of this case and having concluded their argument the Attorney for the Commonwealth started to argue the case. Thereupon the attorneys for the defendant moved that the

answer of the Commonwealth in opposition to the
page 60 } motion to set aside the verdict be stricken and
dismissed from the record on the grounds that the answer was not signed by anyone on behalf of the Commonwealth and thereupon the Court allowed the Attorney for the Commonwealth to sign the answer in open Court and thereupon the attorneys for the defendant objected to the presence of Mr. John W. McClintock, Special Prosecutor in this case, and the Court overruled the defendant's motions, to which rulings the defendant by counsel excepted.

And thereupon the Attorney for the Commonwealth and the Special Prosecutor presented their arguments in opposition to the motion to set aside the verdict and the Court having considered the written pleadings in this case and the oral arguments overruled the motion to set aside the verdict and to grant the defendant a new trial to which ruling the defendant by counsel excepted.

It being demanded of the accused if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the said Delbert Lewis be and he is hereby sentenced to confinement in the Penitentiary of this Commonwealth for the term of one (1) year, the period by the jury ascertained as aforesaid, and that the Commonwealth of Virginia recover against the defendant the sum of $..... its cost by it about its prosecution in this behalf expended.

Thereupon the defendant by counsel indicating to the Court his intention to apply to the Supreme Court of Appeals of Virginia for a writ of error, the execution of the aforesaid sentence is hereby suspended for a period of sixty (60) days or until the Supreme Court of Appeals of Virginia acts upon the petition for such writ of error.

Thereupon the defendant by counsel moved the
page 61 } Court to set a bond for the defendant and to allow
him to be at liberty pending action of the said Supreme Court of Appeals upon his application for writ of error, which motion the Court after consideration denied, to which ruling the defendant by counsel excepted.

And the defendant was remanded to jail.

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* * * * *

CRIME AGAINST NATURE, INDICTMENT NO. 2.

On the 29th day of August, 1967, came the Attorney for the Commonwealth and John W. McClintock, Jr., Special Prosecutor in this case, and also came the defendant, Delbert Lewis, who was on the ..... day of May, 1967, convicted of a felony, to-wit: crime against nature; and also came J. K. McFarlane and James W. Harman, Jr., attorneys for the defendant.

And it appearing to the Court that upon the conviction of the defendant on the ..... day of May, 1967, the defendant by counsel moved the Court to set aside the verdict of the jury and to grant a new trial and the Court allowed the defendant twenty-one (21) days to file the motion and grounds in writing and after a time allowed the defendant additional time to file his motion in writing which motion was duly filed and after a time the Attorney for the Commonwealth filed his answer to the motion to set aside the verdict and thereupon the attorneys for the defendant orally argued the motion to set aside the verdict and time for adjournment having arrived this case was adjourned.

On the 11th day of September, 1967, came again the Attorney for the Commonwealth and John W. McClintock, Jr., Special Prosecutor in this case, and the defendant, Delbert Lewis, appeared in open Court in the custody of the Sheriff of this County, and came also J. K. McFarlane and James W. Harman, Jr., attorneys for the defendant.

And the attorneys for the defendant resumed their argument of this case and having concluded their argument the Attorney for the Commonwealth started to argue the case. Thereupon the attorneys for the defendant moved that the answer of the Commonwealth in opposition to the

page 63 } motion to set aside the verdict be stricken and dismissed from the record on the grounds that the answer was not signed by anyone on behalf of the Commonwealth and thereupon the Court allowed the Attorney for the Commonwealth to sign the answer in open Court and thereupon the attorneys for the defendant objected to the presence of Mr. John W. McClintock, Jr. Special Prosecutor in this case, and the Court overruled the defendant's motions, to which rulings the defendant by counsel excepted.

And thereupon the Attorney for the Commonwealth and

the Special Prosecutor presented their arguments in opposition to the motion to set aside the verdict and the Court having considered the written pleadings in this case and the oral arguments overruled the motion to set aside the verdict and to grant the defendant a new trial to which ruling the defendant by counsel excepted.

It being demanded of the accused if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the said Delbert Lewis be and he is hereby sentenced to confinement in the Penitentiary of this Commonwealth for the term of one (1) year, the period by the jury ascertained as aforesaid, and that the Commonwealth of Virginia recover against the defendant the sum of $..... its cost by it about its prosecution in this behalf expended.

Thereupon the defendant by counsel indicating to the Court his intention to apply to the Supreme Court of Appeals of Virginia for a writ of error, the execution of the aforesaid sentence is hereby suspended for a period of sixty (60) days or until the Supreme Court of Appeals of Virginia acts upon the petition for such writ of error.

page 64 } Thereupon the defendant by counsel moved the Court to set a bond for the defendant and to allow him to be at liberty pending action of the said Supreme Court of Appeals upon his application for writ of error, which motion the Court after consideration denied to which ruling the defendant by counsel excepted.

And the defendant was remanded to jail.

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NOTICE—Indictment No. 1

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NOTICE—Indictment No. 2

* * * * *

TO: Wade S. Coates, Esquire, Commonwealth's Attorney for the County of Tazewell, Virginia.

You are hereby notified that the undersigned, of Counsel, for Delbert Lewis, will, on Monday, September 25, 1967, at

10:00 o'clock a.m. of that day, or as soon thereafter as the matter may be heard, present the record in each of the above styled cases to the Honorable Vincent L. Sexton, Jr., Judge of said Court, for certification by said Judge, in order that the defendant may seek a writ of error from the order of said Court in each of said two cases.

This September 22, 1967.

Respectfully,

DELBERT LEWIS

By JAMES W. HARMAN, JR.
Of Counsel

* * * * *

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Indictment No. 1—Crime against Nature

* * * * *

Indictment No. 2—Crime against Nature

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERRORS

The defendant, Delbert Lewis, by Counsel, hereby gives notice of his intention to seek a writ of error from the final judgment and order of the Circuit Court of Tazewell County, Virginia, entered in each of the above styled matters on the 11th day of September, 1967, wherein the defendant was sentenced to a term of one year in the State Penitentiary on each indictment; and the defendant sets forth the following assignments of error:

1. That the verdicts of the jury in these cases are contrary to the law and the evidence in the cases, and are not supported by the evidence.

2. That the evidence of the prosecuting witnesses, to-wit, Donald Perry Bowling and James Dexter Bowling, is inherently incredible and not worthy of belief, and that no

reasonable man could have convicted the defendant on the basis of such evidence.

3. That when all of the evidence of the cases, taken as a whole, both for the Commonwealth and the defendant, is fully considered, the Commonwealth did not prove the guilt of the defendant beyond a reasonable doubt in either case.

4. That the Commonwealth's Attorney filed a bill of particulars in the instant cases to the effect that the crimes were committed between 8:00 p.m. and 9:30 p.m. on the evening of March 4, 1967, and that the Commonwealth was bound thereby; that the evidence of the Commonwealth did not correspond to the time schedule set out in the Bill of Par-
page 67 } ticulars; and that the defendant, by the introduction of testimony of himself and eight additional witnesses, clearly accounted for his whereabouts the entire time of the evening of March 4, 1967, from 7:30 p.m. until after 10:00 p.m.

5. That the Court erred in not permitting the witness, Leonard Lewis, to testify as to the conversation between Leonard Lewis and Floyd Webb, a Deputy Sheriff of Tazewell County, Virginia, which conversation took place in the presence of the defendant.

6. That the Court erred in permitting the introduction of evidence by the Commonwealth over the objection of the defendant.

7. That the rights of the defendant guaranteed under the Constitution of the Commonwealth of Virginia and the Constitution of the United States were violated by the investigating officers.

8. That the Commonwealth had available to it evidence tending to substantiate the innocence of the defendant, which evidence was suppressed by the Commonwealth in violation of the rights of the defendant.

9. That the Court erred in permitting the Commonwealth fifty-six days in which to prepare and file a reply memorandum to defendant's motion to set aside the verdicts of the jury.

10. That the Court erred in permitting the Attorney for the Commonwealth to sign the reply memorandum to the defendant's motion to set aside the verdicts during argument.

11. That the Court erred in permitting the filing of the Commonwealth's reply memorandum for the additional reason that it was prepared by John W. McClintock, Jr., and the affidavits secured by him; and the Court further erred in permitting John W. McClintock, Jr. to argue in opposition to defendant's motion, the said John W. McClintock, Jr., admittingly representing the personal interests of William G. Belcher, a third party.

12. That the Court erred in denying defendant bond and keeping the defendant in custody, while giving the Commonwealth fifty-six days to prepare and file a memorandum in opposition to defendant's motion to set aside the
page 68 } verdicts of the jury.

13. That on September 11, 1967, the defendant, in open Court, was sentenced by the Judge of the Circuit Court of Tazewell County, Virginia, to a term of one year in the State Penitentiary on each of said two indictments in conformity with the verdicts of the jury; on October 6, 1967, appellant, by Counsel, secured from the Clerk's Office of the Circuit Court of Tazewell County, Virginia, the official file in order to prepare notice of appeal and assignments of error, and to commence preparation of petition for appeal. It is respectfully submitted that on the 6th of October, 1967, no order had been entered by the Court showing sentencing of the defendant, although the official record showed that the defendant, by Counsel, on September 21, 1967, had given notice to the Attorney for the Commonwealth that the defendant would, on September 26, 1967, present the transcript of testimony to the Judge for certification; the transcript shows that it was received by the Judge of the Circuit Court on the 26th of September, 1967, and was signed by the Judge as correct on October 2, 1967.

The defendant, by Counsel, further states that after ascertaining the Court file did not contain an order showing the sentencing of the defendant on September 11, 1967, that the Attorneys for the Defendant made a personal examination of the criminal order books in the Clerk's Office of the Circuit Court of Tazewell County, Virginia, and Counsel for defendant certify that on October 6, 1967, the last order entered in the order books and signed by the Judge was an order entered August 12, 1967, adjourning the May, 1967, Term of the Circuit Court of Tazewell County, Virginia, which order was found in Criminal Order Book 11, page 598, and that the Clerk had noted immediately below the signature of the Judge "end of this book". It is further certified that Counsel for defendant then made an examination of the Criminal Order Book 12, and that as of October 6, 1967, there were no entries whatsoever in said book and that page one and subsequent were completely blank.

page 69 } For the reasons mentioned in this paragraph of this Notice of Appeal and Assignments of Errors, the defendant, by Counsel, prays that the defendant be im-

mediately released from custody for failure of the Circuit Court to enter any orders in connection with this proceeding prior to the filing of the notice of appeal.

Respectfully submitted,

DELBERT LEWIS

By JAMES W. HARMAN, JR.
Of Counsel

Filed in the Clerk's Office of the Circuit Court of Tazewell County, Virginia, Oct. 6, 1967.

Teste: ELIZABETH BELER, Deputy Clerk

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Indictment No. 1—NOTICE

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NOTICE—Indictment No. 2

* * * * *

TO WADE S. COATES, ESQUIRE, COMMONWEALTH'S ATTORNEY FOR THE COUNTY OF TAZEWELL:

You are hereby notified that the undersigned, Counsel for Delbert Lewis, due to the fact that the final order had not been entered at the time of the presentation of the transcript on September 26, 1967, will, on Friday, November 3, 1967, at 11:00 a.m. of that day, or as soon thereafter as the matter may be heard, again present the transcript of the record in each of the above styled cases to the Honorable Vincent L. Sexton, Jr., Judge of said Court, for certification by said Judge, in order that the defendant in said two indictments

may seek a writ of error from the orders of said Court in each of said two cases.

This October 31, 1967.

Respectfully,

DELBERT LEWIS

By JAMES W. HARMAN, JR.
Of Counsel

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Nov. 1, 1967.

Teste: ELIZABETH BELER, Deputy Clerk

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* * * * *

Indictment No. 1—Crime against Nature

* * * * *

Indictment No. 2—Crime against Nature

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERRORS

The defendant, Delbert Lewis, by Counsel, hereby gives notice of his intention to seek a writ of error from the final judgment and order of the Circuit Court of Tazewell County, Virginia, entered in each of the above styled matters wherein the defendant was sentenced to a term of one year in the State Penitentiary on each indictment; and the defendant sets forth the following assignments of error:

1. That the verdicts of the jury in these cases are contrary to the law and the evidence in the cases, and are not supported by the evidence.

2. That the evidence of the prosecuting witnesses, to-wit, Donald Perry Bowling and James Dexter Bowling, is inherently incredible and not worthy of belief, and that no

reasonable man could have convicted the defendant on the basis of such evidence.

3. That when all of the evidence of the cases, taken as a whole, both for the Commonwealth and the defendant, is fully considered, the Commonwealth did not prove the guilt of the defendant beyond a reasonable doubt in either case.

4. That the Commonwealth's Attorney filed a bill of particulars in the instant cases to the effect that the crimes were committed between 8:00 p.m. and 9:30 p.m. on the evening of March 4, 1967, and that the Commonwealth was bound thereby; that the evidence of the Commonwealth did not page 72 } correspond to the time schedule set out in the Bill of Particulars; and that the defendant, by the introduction of testimony of himself and eight additional witnesses, clearly accounted for his whereabouts the entire time of the evening of March 4, 1967, from 7:30 p.m. until after 10:00 p.m.

5. That the Court erred in not permitting the witness, Leonard Lewis, to testify as to the conversation between Leonard Lewis and Floyd Webb, a Deputy Sheriff of Tazewell County, Virginia, which conversation took place in the presence of the defendant.

6. That the Court erred in permitting the introduction of evidence by the Commonwealth over the objection of the defendant.

7. That the rights of the defendant guaranteed under the Constitution of the Commonwealth of Virginia and the Constitution of the United States were violated by the investigating officers.

8. That the Commonwealth had available to it evidence tending to substantiate the innocence of the defendant, which evidence was suppressed by the Commonwealth in violation of the rights of the defendant.

9. That the Court erred in permitting the Commonwealth fifty-six days in which to prepare and file a reply memorandum to defendant's motion to set aside the verdicts of the jury.

10. That the Court erred in permitting the Attorney for the Commonwealth to sign the reply memorandum to the defendant's motion to set aside the verdicts during argument.

11. That the Court erred in permitting the filing of the Commonwealth's reply memorandum for the additional reason that it was prepared by John W. McClintock, Jr., and the affidavits secured by him; and the Court further erred in permitting John W. McClintock, Jr. to argue in opposition to defendant's motion, the said John W. McClintock, Jr., ad-

mittingly representing the personal interests of William G. Belcher, a third party.

page 73 } 12. That the Court erred in denying defendant bond and keeping the defendant in custody, while giving the Commonwealth fifty-six days to prepare and file a memorandum in opposition to defendant's motion to set aside the verdicts of the jury.

13. That the Court erred in not requiring the Attorney for the Commonwealth to promptly prepare and present appropriate orders showing conviction and sentence, in order that the defendant might pursue his attempt to seek writs of error from the Supreme Court of Appeals.

14. That the Court erred in not awarding the defendant a new trial on the ground of after-discovered evidence.

Respectfully submitted,

DELBERT LEWIS

By JAMES W. HARMAN, JR.
Of Counsel

Filed in the Clerk's Office Circuit Court of Tazewell County, Virginia, Nov. 1, 1967.

Teste: ELIZABETH BELER, Deputy Clerk

* * * * *

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* * * * *

The above-entitled matter came on for trial in open Court before a Judge and Jury, commencing at 9:30 A.M. on the 25th day of May, 1967.

BEFORE:
HONORABLE VINCENT L. SEXTON, JR., JUDGE.

APPEARANCES:
WADE S. COATES, ESQ., Tazewell, Virginia, Attorney for the Commonwealth.
J. K. McFARLANE, ESQ., Richlands, Virginia, and

Donald Peery Bowling

JAMES W. HARMAN, JR., ESQ., Tazewell Virginia, appearing on behalf of the Defendant.

PROCEEDINGS

The Court: Is the Commonwealth ready?
Mr. Wade S. Coates: Yes sir.
The Court: Is the Defendant ready?
Mr. J. K. McFarlane: Yes sir.
The Court: There are two indictments. Shall we let the record show formal arraignment and plea of not guilty as to both indictments?
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Mr. J. K. McFarlane: Yes.
The Court: You may swear the Jury, Mr. Clerk.
The Clerk: Will you twelve gentlemen stand and raise your right hands?

(Whereupon, 12 jurors are duly sworn.)

The Court: Make your opening statements, gentlemen.

(Whereupon, opening statements are made by Mr. Wade S. Coates, on behalf of the Plaintiff, and by Mr. J. K. McFarlane, on behalf of the Defendant, after which the following proceedings were had.:)

The Court: Call your witnesses.
Mr. Wade S. Coates: Donald Peery Bowling.

Whereupon,

DONALD PEERY BOWLING was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:
Q. What is your name, please?
A. Donald Peery Bowling.
Q. Now, Donald, Mr. Harman and Mr. McFarlane and these gentlemen and the Court have to hear you. I am going to ask you to speak in as clear and loud a voice as you can. Can you do that?
A. Yes sir.

Donald Peery Bowling

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Q. How old are you, Donald?
A. 15.
Q. How old were you on March 4th of this year?
A. 14.
Q. When were you 15?
A. May 10th.
Q. Donald, is your mother living?
A. Yes sir.
Q. Who is your mother?
A. Eva Riley.
Q. Is your father living?
A. Yes sir.
Q. Do they live together?
A. No sir.
Q. They are separated, divorced?
A. Yes sir.
Q. Where do you live?
A. Raven Nest Branch.
Q. With whom do you live?
A. My mother.
Q. Where were you and your mother living on March 4, 1967?
A. Laurel.
Q. On Laurel Creek?
A. Yes sir.
Q. About how far is that from Raven Nest Branch?
A. About two miles.

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Q. On March 4th, if you remember that day, did you have occasion to be visiting on Raven Nest Branch?
A. Yes sir.
Q. Where were you visiting?
A. Alex Asbury.
Q. Who is Alex Asbury?
A. He is my grandfather.
Q. Do you know what time of day you went over there?
A. Around 4:00 o'clock, I would say.
Q. Did you have your evening meal there?
A. Yes sir.
Q. Is James Dexter Bowling your brother?
A. Yes sir.
Q. Where does he live?
A. He lives over there with Alex Asbury, my grandfather.
Q. He lives with your grandfather?
A. Yes sir.

Donald Peery Bowling

Q. Was he living there at that time?
A. Yes sir.
Q. I want you to tell the jury what you and James Dexter did after the evening meal. Do you know what time you had the evening meal?
A. I would say around 5:00 o'clock.
Q. Around 5:00 P.M.?
A. Yes sir, or maybe 6:00.
Q. Or maybe 6:00 o'clock?
Vol. I A. Yes sir.
5/25/67 Q. What did you do after the evening meal?
page 5 } A. We went to the store.
Q. What store is that, son?
A. Stella Brewster's.
Q. Where is Stella Brewster's store?
A. On Raven Nest Branch.
Q. How far is it from your grandfather's?
A. It couldn't be further than a mile, just a little piece.
Q. How were you traveling?
A. Walking.
Q. Who went with you?
A. Dexter.
Q. Was it dark then?
A. Not hardly.
Q. I didn't understand you.
A. I said not hardly.

The Court: See if you could talk a little louder. I am having a little trouble hearing you. Can you jurors hear him all right?

Q. Do you know how long you stayed at Brewster's store?
A. Just a few minutes. I am not for sure how long.
Q. Was it dark when you left the store?
A. It was kindly dusky dark.
Q. What did you do then?
Q. Went to Cedar Bluff with James Price? Were
Vol. I you accompanying him or were you just catching a
5/25/67 ride?
page 6 } A. We just rode down with him.
Q. Where did you go in Cedar Bluff?
A. The Arcade.
Q. Now, tell the jury where the Arcade is.
A. Well, it is right straight across from the Cameo Drive-In in Cedar Bluff.

Donald Peery Bowling

Q. Straight across from the Cameo Drive-In in Cedar Bluff. What was your business at the Arcade?
A. To take, to see how many eggs they wanted.
Q. Does somebody sell eggs?
A. Yes sir.
Q. Who sells the eggs?
A. Dexter.
Q. Did you take care of your business?
A. Yes sir.
Q. Do you know what time it was when you got through taking care of your business?
A. No sir.
Q. Was it dark then?
A. It wasn't plumb dark.
Q. Then, what happened, son?
A. This boy pulled up in his car and made us get in with him.
Q. What boy?
A. Delbert Lewis.
Vol. I Q. Do you see him in the Courtroom today?
5/25/67 A. Yes.
page 7 } Q. Will you point him out to the jury?

(Witness points to defendant)

Mr. Wade S. Coates: May we show in the record that the witness indicated the defendant, who sits at Counsel table with Mr. McFarlane and Mr. Harman?
The Court: Yes sir.

Q. Donald, go ahead and tell the jury just exactly what you observed and what happened.
A. In front of all this crowd?

Mr. Wade S. Coates: He said in front of all this crowd?
The Court: Yes sir. Go ahead.
A. Well, he pulled in and picked us up in his car.
The Court: Can you talk a little louder? All of us have to hear you.

A. He opened the door and pulled a gun and told us to get in and took us up on Creek Road and asked us to do so and so, and we told him no.
Q. What did he ask you to do? Tell the jury what he asked you to do.

Donald Peery Bowling

A. He told us to suck him.

Q. Go ahead now.

A. And here come a car up the Creek Road, and he pulled out and told us to bend down in the seat, and then he come on across Laurel Creek and went to McGuire Valley and made us do that.

Q. Went to McGuire Valley and made you do what?

A. Made us suck him.

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Q. I will ask you, if in McGuire Valley, if he inserted his male organ into your mouth?

A. Yes.

Q. Donald, can you tell the jury in a little more detail where you went after you said you went up Creek Road, just exactly what happened as you went up Creek Road and where did you go before you went to McGuire Valley?

A. Before that, we went to the trash dump and a car come along and we went on back down the Creek Road and down the Laurel Road and went on over across Laurel between Pine's Grocery, and then come on down into McGuire Valley.

Q. Donald, when you went into McGuire Valley, what did he do? What course, what route did he follow?

A. Well, I think it was Jim Bailey lives there where you turn off at. Let's see—back this side of Twin Pines Grocery.

Q. Back this side of Twin Pines Grocery.

A. Back the other side.

Q. I mean, back the other side?

A. Yes sir.

Q. And did he drive straight to the spot that this act occurred? What did he do then?

A. He went on and kept on getting in more houses. He pulled in front of one and turned and come back and parked.

Mr. James W. Harman, Jr.: I couldn't hear a word he said, Judge.

The Court: Donald, you are going to have to talk a little louder. Go slowly and talk a little louder.

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Q. Is this where the act took place?

A. Yes sir.

Q. Donald, do you know the man that sits at Counsel table with me, this officer?

A. Yes sir.

Donald Peery Bowling

Q. I will ask you if you and your brother got in the car with this officer and took him over the route, showed him the route that you said the defendant followed?

A. Yes sir.

Q. Showed him everywhere you went and where you stopped?

A. Yes sir.

Q. Donald, when this act took place in McGuire Valley, can you tell or detail to the jury just exactly what happened and what he did, etc.?

A. Well, he made us suck him and come on back down the Valley, on down to where you turn over to Raven Nest Branch, and he let us out.

The Court: Talk a little louder.

A. Well, after we left McGuire Valley, we come on down the Valley and come on into where you turn off to go over on Raven Nest Branch. He stopped there and let us out. I looked at the tag number two or three times and took it down in my head and told Dexter what it was, and he wrote it down. I looked at the time and it was 15 after 9:00 when he let us out.

Q. 15 after 9:00?

A. Yes sir.

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Q. What kind of watch did you have, son?

A. I had a pocket watch.

Q. What kind of car was he driving?

A. A Corvair, a 1965 Corvair.

Q. Do you know what color it was?

A. Well, I thought it was yellow.

Q. What else did you notice about the car, if anything?

A. The back doors wouldn't open. As far as I know, they wouldn't open.

Q. Did you notice anything else about it?

A. They was a few tools laying in the back floor board.

Q. Anything else?

A. And they was a little old garbage disposal up front hanging about the radio.

Q. Anything else, son?

A. No sir.

Q. Did you see a set of license tags?

Mr. McFarlane: I object.

Mr. Harman: I object.

Donald Peery Bowling

The Court: One of you do the objecting, please.

Mr. McFarlane: I think we started at the same time.

The Court: You all had better decide who is going to do the objecting and who is going to cross-examine the witness. I sustain the objection. Don't lead the witness.

Mr. Wade S. Coates: You may cross examine.

CROSS EXAMINATION

By Mr. J. K. McFarlane, of Counsel for the Defendant:

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Q. Now, what time was it, Donald, when you got down to what you call the Arcade?

A. I don't know for sure.

Q. What?

A. I don't know for sure.

Q. You had your watch, didn't you?

A. Yes sir, but I didn't look at it.

Q. Now, didn't you say at the preliminary hearing that you got down there shortly before 8:00?

A. No sir.

Q. What?

A. No sir.

Q. You didn't say that?

A. No sir.

Q. Well, about what time was it?

A. I don't know.

Q. You don't have the least idea?

A. We left the house about 6:30 or something like that, I guess. I wouldn't be for sure.

Q. What time was it when you left there?

A. I don't know that either.

Q. What?

A. I don't know that either.

Q. You don't know that either. How come you to know the time you got out of the car at Raven Nest Branch when you came back?

A. I had a watch.

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Q. You had your watch then but you didn't have it to start with?

A. Yes sir, I did. I had it all the time.

Q. Had it all the time?

A. Yes sir.

Q. Now, let's start back. You went over on what do you call it—the Creek Road?

Donald Peery Bowling

A. Yes sir.
Q. That leads off to Raven Nest Branch Road, does it?
A. Yes sir.
Q. How far was it over there to where you stopped the first time after you turned off on the Raven Nest Branch Road?
A. How far on the road before we turned off on it?
Q. Yes.
A. Well, it wasn't very far, just a little piece.
Q. Now, did he make you take your clothes off?
A. Yes.
Q. Which one took the clothes off first?
A. Both of us together.
Q. Both of you together. Now, how come you to move from there over to the next place?
A. They was a car coming.
Q. Car coming?
A. Yes sir.
Q. Did you put your clothes back on before you moved?
A. No sir.
Q. Kept them off?
A. Yes sir. He made us lay down in the seat.

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Q. Now, after this alleged acts you claim over there in McGuire's Valley, Donald, when did you put your clothes on?
A. As soon as—he told us to get back in the car and put our clothes on.
Q. Put your clothes on. I believe when you arrived home, you were carrying your underwear in your hands?
A. Yes sir, under our arm.
Q. Why didn't you put your underwear back on?
A. Just didn't.
Q. How is that?
A. I said we just didn't.
Q. Well, is there any reason why?
A. No.
Q. What did you do with your underwear, Donald?
A. We took it and went in Walter Asbury's with it.
Q. What did he do with it?
A. He didn't do anything with it.
Q. What?
A. He didn't do anything with it. I laid it down in the back room.
Q. Where are they now? Do you still have that same underwear?

Donald Peery Bowling

A. Yes sir.
Q. Did you turn that over to the police?
A. No sir.
Q. Didn't turn it over to them?
A. No.
Vol. I Q. Did your brother turn his over to them?
5/25/67 A. No sir.
page 14 } Q. Neither one. Do you know why, you are claiming this act here that he made you all do, what you said here, why was it necessary for you to take your clothes off?
A. He made us do each other like that?
Q. How is that?
A. He made us do each other like that.
Q. Made you do each other like that?
A. Yes sir.
Q. Well, why would that have been necessary to take your clothes off?
A. I don't know.
Q. What?
A. I don't know.
Q. And you don't know why you didn't put your underwear back on? Now, there, Donald, where you said you got in the car at the Arcade there in Cedar Bluff, that Arcade building is jammed right up against the Esso Service Station there, isn't it?
A. Yes sir, pretty close.
Q. Brilliant lights on there? A crowd there all the time?
A. No sir.
Q. What?
A. No sir, not no crowd.
Q. And you mean to tell this jury that this boy drove up there in those brilliant street lights that they have—what do they call them—arc lights or Mercury lights—and took something that looked like a gun and forced you all into his car?
Vol. I
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page 15 } A. Yes sir. I believe it was a gun.
Q. You were right there at help. Why didn't you run?
A. We couldn't have run.
Q. How was that?
A. If we had run, we might have got shot.
Q. I didn't hear you.
A. I said maybe if we run, we might have got shot.

Donald Peery Bowling

Q. Might have got shot. How far was it from the door of the Arcade? The door comes right up almost to the sidewalk, doesn't it?

A. No sir. It is not too far from the sidewalk. We was about—

Q. In fact, anything you claim is going on out there could have been seen inside the Arcade, couldn't it?

A. I don't know.

Q. You don't know. It has a glass front, doesn't it?

A. Yes sir.

Q. Lit up there and lit up outside? And you tell this jury that a man drove up there and pulled something that looked like an automatic pistol and forced you in, right there in what amounted under the lights almost broad daylight?

A. Yes sir.

Q. Now, who got the license number?

A. I took it down in my head and called it two or three times—

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Q. You took it down in your head?

A. I called it off two or three times and told Dexter to write it down. I told him what it was.

Q. Did he have a pencil and paper with him?

A. Yes sir.

Q. It was after dark. How did you see the license plate?

A. He has got a little light over his tag.

Q. Light?

A. A little light over his tag, under it, or something.

Q. Does Dexter carry a pencil and paper with him all the time?

A. Most all the time.

Q. Most all the time. How long did this car wait there after he let you all out?

A. He just let us out and pulled out.

Q. How is that?

A. He just liet us out and pulled out.

Q. Just let you out and pulled out. You had to get this from a moving car. Isn't that right?

A. Yes sir.

Q. From where you were coming down Baptist Valley toward Cedar Bluff—you were coming back toward Cedar Bluff, then, weren't you?

A. Yes sir.

Q. Now, there where the road turns into Raven Nest Branch, it is not much more than 25 or 30 feet to a curve, is it?

Donald Peery Bowling

A. It is a little further than that to a curve.

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Q. It is right on that curve. A fellow would have to read pretty fast to read three times, to read a license number three times, wouldn't he, and call it out? How long after you called it out three times before Dexter was able to get his pencil and paper out?

A. He got it out as soon as he got out of the car.

Q. He got it out and had it ready?

A. Yes sir.

Q. Why did you have to call it out three times? Why wouldn't one time have been enough?

A. Well, I aimed to make sure it was it.

Q. What?

A. I wanted to make sure it was it.

Q. You wanted to make sure it was it?

A. He had a stereo or something like that in the car, and he said it was a two-way radio.

Q. Didn't you testify at the preliminary hearing that you struck a match to get that license number?

A. No sir.

Q. You didn't do that?

A. No sir.

Q. Now, you said this was a yellow Corvair. Is that right?

A. Yes. It looked yellow or white can look yellow under street lights. It is hard to tell.

Mr. Harman: His answer is not responsive to the question.

Mr. Coates: Your Honor, please—

The Court: He answered under the street light it looked yellow.

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page 18

By Mr. McFarlane:

Q. You weren't under the street lights all the time, were you?

A. Not all the time. Whenever I got in the car, I was.

Q. It looker yellow every other time, too, didn't it?

A. Yes sir.

Q. Whether it was under the lights or not?

A. Yes sir.

Mr. McFarlane: That is all.

Donald Peery Bowling

RE-DIRECT EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. Donald, before this event happened, did you know the defendant, Delbert Lewis?

A. No sir.

Q. Had you ever seen him before?

A. If I had, I didn't know him or don't remember seeing him.

Q. Are you familiar with his car?

A. No sir.

Q. After this event happened, what did you and your brother do?

A. After we got out of the car?

Q. Yeah.

A. Well, we took the tag number down and then we come on up to our Uncle Walter's and asked him what to do about it.

Q. Reported to Uncle Walter?

A. Yes sir.

RE-CROSS EXAMINATION

By Mr. J. K. McFarlane, of Counsel for the Defendant:

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Q. When you got out of the car, you looked at your watch and it was 9:15?

A. Yes sir.

Q. You are positive of that?

A. Yes.

Q. And that was how many miles from Richlands?

A. It would be about four miles or five miles, something like that.

Mr. McFarlane: That is all.

Mr. Coates: That is all.

The Court: You may stand aside.

(Witness excused)

Mr. Coates: James Dexter Bowling.

James Dexter Bowling

WHEREUPON,

JAMES DEXTER BOWLING was called as a witness, and after first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. What is your name, please?

A. James Dexter Bowling.

Q. Now, James, don't look at me. Look right at the jury and Judge and speak up so that the jury can hear you, and Mr. Harman can hear you and Mr. McFarlane, and we can get it down. Speak loudly. Where do you live?

A. Raven Nest Branch.

Vol. I Q. Is this in Tazewell County, Virginia?

5/25/67 A. Yes sir.

page 20 } Q. How old are you?

A. 16.

Q. Were you living on Raven Nest Branch on March 4, 1967?

A. Yes sir.

Q. With whom do you live?

A. Alex Asbury, my grandfather.

Q. How long have you lived with Mr. Alex Asbury?

A. Every since I was a baby.

Q. On March 4th, the evening of that day, did you see your brother, Donald?

A. Yes sir.

Q. Where did you see him?

A. I saw him at my house.

Q. Where does Donald live?

A. He lives with Mom.

Q. Where was your mother living at that time?

A. On Laurel.

Q. Do you know about what time your brother came to Alex Asbury's house?

A. Well, it was in the evening.

Q. Before supper?

A. Yes sir.

Q. Did he have the supper meal with you?

A. Yes sir.

Q. Do you know about what time you all had

Vol. I supper?

James Dexter Bowling

5/25/67 A. No sir.
page 21 } Q. After supper, did you leave the house and go anywhere?
A. Yes sir.
Q. Where did you go?
A. We went to the store over there, Stella Brewster's store.
Q. Do you know what time you went over there?
A. No sir.
Q. What was the purpose of going to Stella Brewster's store?
A. Well, to get some candy.
Q. And where did you go from there?
A. Caught a ride to Cedar Bluff.
Q. What was the purpose of going to Cedar Bluff?
A. To see Mary Davis at the Arcade about an egg contract.
Q. To take orders for eggs?
A. Yes sir.
Q. Who sells eggs?
A. I do. I sell them for my grandfather.
Q. Did you go to the Arcade?
A. Yes sir.
Q. Do you know what time you all got to the Arcade?
A. No sir.
Q. Did you see Mrs. Davis?
A. Yes sir.
Q. What time did you leave the Arcade?
A. I wouldn't know.
Vol. I Q. Tell the jury if anything unusual happened to
5/25/67 you upon leaving the Arcade and, if so, what?
page 22 } A. Well, as I left the Arcade, why, this car drove up and the door flew open, and this boy told me to get in. He had a gun, and we got in.
Q. How was he holding the gun?
A. The gun was up like that (indicating up near his body). He held it up on his arm. We got in, and he drove us out by the Arcade up the road there and out on to the old Kentucky Turnpike up there, and up Indian Creek, and turned across Raven Nest Branch and went across Laurel and turned around and came back and up the Creek Road and made us strip off up there, and then this car started coming, and he started up, and we come back off of there and went back across Laurel and then up to the grocery there, and we went up in McGuire Valley.

James Dexter Bowling

Q. Out by West's Grocery?
A. Yes. Earl Adkins runs the place there now.
Q. Now, we have gotten to McGuire Valley. Now, tell the Court where you went there and what happened, and the jury.
A. Well, he made us get out of the car, Donald first, and then me, and made us suck him.
Q. You said Don first and then me?
A. Yes sir.
Q. Go into details as to what he did and what was said and what took place. Describe to the jury.

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A. Well, he had him get out of the car first and me stay in the back seat. I could see through the window. He made Don get down on his knees, and then he put Don back in the car and had me to get out and made me get down on my knees, told us to get back in the car and put our clothes on. Anyway, he pulled on out and came back down around Busthead, and he let us off where you turn across Raven Nest Branch.
Q. James, did his male organ enter your mouth?
A. Repeat that question.
Q. Did his male organ enter your mouth?
A. Yes sir.
Q. When did he make you take your clothes off?
A. Whenever we went up on Creek Road.
Q. Did you get out of the car then?
A. No sir.
Q. Did you put your clothes back on when you left?
A. Yes sir, after we got back in the car in McGuire Valley, he told us to put our clothes back on.
Q. Well, I am talking about when you left the Creek Road?
A. No sir.
Q. James, do you know this Trooper that sits here with me?
A. Yes sir.
Q. Trooper Barton?
A. Yes sir.
Q. I will ask you if after this occurrence you accompanied Trooper Barton and showed him the route you followed by which the defendant took you?

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A. Yes sir.
Q. After you left McGuire Valley, what took place?
A. Well, he just drove down there to Twin Pine Grocery and come across Busthead hill and pulled

in where you turn across Raven Nest Branch and let us out there and told us not to report to the police anything because he had a two-way radio in his car and he had another set of license plates in under his seat there that he was going to put on and told us if we reported to the police, why with his two-way radio he could hear what was said over it, and he would come hunting for us. So whenever we got out of the car and opened the door and started walking up through there and turned around and took his license plate number.

Q. Did you record his license plate number?

A. Yes sir.

Q. Do you have it with you today?

A. Yes sir.

Q. Is this where you recorded it originally?

A. Yes sir. This is the very number I wrote down that night.

Q. This is the one you wrote down that night?

A. I wrote it down that night.

Q. This is what you wrote it down on?

A. Yes sir, it is.

Mr. Coates: Your Honor, please, I would like to introduce this memorandum in evidence as Commonwealth Exhibit No. 1.

The Court: That will be Commonwealth's Exhibit No. 1.

Q. James, I will ask you to stand up here now and approach the jury and point out to the jury which one of these numbers is the number you wrote down.

Vol. I
5/25/67 The Court: Let him take a pencil and circle it.
page 25 } Mr. Coates: Your Honor, please, I have a red pencil here.

The Court: Let him circle the number that he took down that night.

By Mr. Coates:

Q. What did you with the number that you took?

A. I put it back in my coat pocket.

Q. Did you convey this information to anyone?

A. No sir, not until after I got to the police station.

Q. And gave it to the police?

A. Yes sir.

Q. You mentioned license plates in the car.

A. Yes sir. They was another license under the front seat.

Q. How do you know?

A. Well, he told me they was there, and I run my hand back under there and felt them.

Q. What did you observe about the car, if anything?

A. Well, the thing he called a two-way radio. They was a red plastic garbage can on the right hand side by the radio, and it had bucket seats and tools in the back floor board.

Q. I will ask you if you went to the police station and gave the police this information?

A. Yes sir.

Q. After you were let out at the Raven Nest Branch road, tell the jury what you did then.

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A. Well, I went to my Uncle's house and—

Q. Who is your Uncle?

A. Walter Asbury.

Q. Go ahead.

A. And told him about it, and he was getting ready to go to bed, and he just slipped his shoes on and told me he would take me to the police station.

Q. Did he do this?

A. Yes sir, he did.

Q. How far is it from the Raven Nest Branch road to your Uncle's house?

A. A little piece.

Q. Is it on the same side of the ridge that the Baptist Valley intersection is or on the other side?

A. Yes sir, it is. After you go across, you get right up on top of the hill up there and go out a hollow there just a little piece.

Q. Is McGuire Valley located in Tazewell County, Virginia, if you know?

A. No sir, I don't.

Q. Did you point out to officer Forrest Wood where this act took place?

A. Yes sir.

Q. Did you point out to Trooper Barton where this act took place?

A. Yes sir.

Q. I will ask you if you knew Delbert Lewis prior to this time?

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A. No sir.

Q. Had you ever seen him?

James Dexter Bowling

A. Not that I know of.
Q. Were you familiar with his car?
A. No sir.
Q. Did you ever have any trouble with Delbert Lewis?
A. No sir.
Q. Do you go to school?
A. Yes sir.
Q. Where do you go to school?
A. Cedar Bluff.
Q. I will ask you if you see the person in the Courtroom today that committed this act upon you, and if so, point him out.
(Witness looks all around the Courtroom)
A. No sir—yes sir, over here (points to defendant).
Q. Sitting there at Counsel table, is he?
A. Yes sir.
Q. Sitting at Counsel table with Mr. McFarlane and Mr. Harman?
A. Yes sir.

Mr. Coates: Your witness.

CROSS EXAMINATION

By Mr. James W. Harman, Jr., of Counsel for Defendant:
Q. Dexter, are you sure?
A. Yes sir.
Q. You looked at a young man sitting in the Courtroom for a long time. Could he have been the one?
Vol. I 5/25/67 page 28
A. No sir.
Q. You turned and stared at him for a while, for a long time. Why did you do that?
A. Well, he is similar to the man.
Q. He is similar looking to the man sitting here at the table, isn't he?
A. Yes sir.
Q. Just almost exactly alike. Isn't that right?
A. Yes.
Q. Now, then, can you tell this jury under oath that this is the man here?
A. Yes sir, I can.
Q. But the other man looks almost exactly like the man sitting here at the table with Mr. McFarlane and me?

A. Almost.
Q. You say you are 16?
A. Yes sir.
Q. You go to Cedar Bluff school?
A. Yes sir.
Q. What grade are you in?
A. Seventh.
Q. Seventh Grade?
A. Yes sir.
Q. And you sell eggs for your grandfather?
A. Yes sir.

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Q. On this particular night in question, the weather wasn't too good, was it?
A. No sir.
Q. It was cold and raining some, spitting some snow, just a generally pretty nasty day all day, hadn't it been?
A. Well, yes sir.
Q. In fact, the weather was so bad that if you all hadn't caught a ride you wouldn't have gone down to the Arcade, wouldn't have walked all the way down to the Arcade that night, would you?
A. Well, no sir.
Q. But you caught a ride and went down there, and did you take orders for some eggs?
A. Yes sir.
Q. Do you remember how many eggs you were to deliver to the Arcade?
A. Yes sir.
Q. How many?
A. 5 dozen.
Q. 5 dozen. Is that written in the book that has been introduced here in evidence?
A. No sir. Some pages have been tore out. They was old customers, you know.
Q. There are quite a number of orders listed in this book, aren't there, Dexter?
A. Yes sir.
Q. Then they go on over to another page with a couple of orders?
A. Yes.

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Q. But, as you deliver them, do you tear the pages out?
A. No sir.

James Dexter Bowling

Q. Well, why, then were these other pages torn out?

A. Well, these here was just lately sold, and the others were sold on back.

Q. Now, then, you have been asked and you have outlined in red a certain number on the front of this memorandum book?

A. Yes sir.

Q. And you state to the jury that is where you wrote it down that particular night, the license number of the car?

A. Yes sir.

Q. Now, I will call your attention to the inside of the back cover of the memorandum book, and I find a number written there and ask you to call that number off. Is that in your handwriting?

A. Yes sir.

Q. And what is that number there?

A. 586-705.

Q. When was that number written?

A. It was written down later on.

Q. And above it—is this in your handwriting, the 4th day of March, Saturday night?

A. Yes sir.

Q. When was that written down?

A. It was written down just before we had a hearing of it at Richlands.

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Q. In Richlands?

A. Yes sir.

Q. And there are quite a number of other things, 9RW5FC. What does that deal with, these numbers here?

A. Well, they are initials.

Q. Are they initials for people?

A. Egg customers.

Q. Your egg customers?

A. Yes sir.

Q. There is written also—is this in your handwriting, Mattie Williams Hospital, Second Floor, Room 207?

A. Yes sir.

Q. What, if anything, does that have to do with this case?

A. It don't have anything to do with this case. That is where my mother was in the hospital?

Q. That was just another memorandum?

A. Yes sir.

James Dexter Bowling

Q. On the back of the memorandum book—is this in your handwriting, Trooper Barton phone number, and then a number?

A. Yes sir.

Q. When was that written down?

A. Well, it was written down later on.

Q. The night this happened?

A. No, after that.

Q. After that?

A. Yes.

Q. There is, also, written on the front of it—is this in your handwriting, Richlands Police Department and a phone number?

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page 32

A. Yes sir. That was made afterwards.

Q. Afterwards?

A. Yes sir.

Q. There is, also, on the left side of the front, Mr. Griffith, Justice of the Peace and a phone number. Is that in your handwriting?

A. Yes sir.

Q. And when was that written down?

A. After that.

Q. Did you write the entire license number down or only the last three or four numbers at the time?

A. The entire license.

Q. The entire license number?

A. Yes sir.

Q. How did you see the license number?

A. Well, whenever he went to pull out, why we was standing behind the car because we had to walk up this road here and as he pulled out, there was a light over the license plate so we looked and took the number down.

Q. Now, didn't you testify before Judge Peery that one of you all struck a match and got that license number?

A. Yes, he struck a match so that I could see here on my book to write it down.

Q. Who struck the match?

A. Donald, my brother.

Q. Donald struck the macth?

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page 33

A. Yes sir.

Q. Now, you saw the license number, yourself?

A. Yes sir.

Q. Did your brother, Donald, see the license number?

James Dexter Bowling

A. Well, I reckon he did.

Q. But you don't know, do you?

A. I don't know that he saw it. He saw it after I wrote it down.

Q. He saw it after you wrote it down?

A. Yes sir.

Q. But you don't have any recollection or any knowledge of his actually seeing it on the car, do you?

A. Well, he could have looked whenever I looked.

Q. But what you wrote down is what you saw yourself. Is that right?

A. Yes sir.

Q. And you say to this jury that this was written down there at the Raven Nest Branch where the road leads off to Busthead road, Busthead mountain?

A. Off the Baptist Valley.

Q. Cutting up toward Raven Nest Branch, and you wrote it down immediately?

A. Yes sir.

Q. I will call your attention to something that has been written here on the book and marked out. Is this in your handwriting?

A. Yes sir.

Vol. I 5/25/67 page 34 } Q. And there are some pen marks through it, isn't it, marking it out?

A. Yes sir.

Q. And on it, you see if I am reading it right. Check me. 35705. Is that what is written on there?

A. Yes sir.

Q. Now, isn't that what you wrote down that night?

A. No sir.

Q. But the 705 corresponds with the 705 over here that you wrote down, didn't it? Do you know what that is?

A. Yes sir.

Q. Will you explain to the jury what that is?

A. Well, it is where I took a phone number down and made a miss in the numbers and scribbled it out and wrote them numbers.

Q. Do you know whose number that is or not?

A. No sir, I don't.

Q. You don't?

A. No sir.

Q. But the last three numbers in the license number over here are the same, aren't they? 705.

James Dexter Bowling

A. Yes sir.
Q. The 35 and 86 are different?
A. Yes.
Q. When you got to your Uncle's that night, you and your brother were covered with mud up to about your knees, weren't you, pretty well muddy and dirty from being out?
A. Well, yes.
Vol. I 5/25/67 page 35
Q. Your shoes were muddy, your trousers were muddy, oh, up to about here? (indicating knees)
A. Yes sir.
Q. How far did you say it was from where the Raven Nest Branch road starts there off the Baptist Valley road until you get to your Uncle's?
A. Well, a few hundred yards.
Q. What kind of road is that?
A. It is hard surface up to where you turn out the hollow there.
Q. Up to where you go to your Uncle's, isn't it?
A. Yes sir.
Q. Then, how far from where you leave the hard top road is it before you get to your Uncle's?
A. Well, just a few steps.
Q. Just a few steps?
A. Yes sir. It is muddy and sloppy.
Q. Now, then, you had gone to the Arcade and your story is that you got into the car at the Arcade?
A. Yes.
Q. The man forced you into the car, took you up on Raven Nest Branch road, over into Laurel and back out over on the Creek Road and then on over into McGuire Valley?
A. Yes sir.
Q. Now, then, according to your story, from the time you left the Arcade until you got into McGuire Valley, you were never out of the car?
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A. No sir.
Q. You say that when you got on the Creek Road he stopped and made both of you take your clothes off?
A. Yes sir.
Q. You did that in the car. Is that right?
A. Yes sir.
Q. Now, then, you didn't get out of the car until you got to McGuire Valley and during that period of time, were you and your brother seated in the car without any clothes on?

A. Yes sir.
Q. Did you take your shoes and socks off at that time?
A. Yes sir.
Q. Sitting there stark naked?
A. Yes sir.
Q. When you got out of the car there in McGuire Valley, did you have any clothes on?
A. No sir.
Q. Did you put your clothes back on in the car or did you stay out of the car to put your clothes on?
A. In the car.
Q. In the car?
A. Yes sir.
Q. Did you put your underwear back on when you got in the car or not?
A. No sir.
Q. Why?
Vol. I A. Well, I didn't want to take time to.
5/25/67 Q. Was it a cold night?
page 37 } A. Pretty chilly.
Q. Nasty, uncomfortable, damp, wasn't it?
A. Yes sir.
Q. Then you say the man let you, drove you back and let you out where the Raven Nest Branch Road comes into the Baptist Valley road?
A. Yes sir.
Q. You got out there, and that road is hard surfaced, isn't it?
A. Yes sir.
Q. Then, the road up across the ridge going up toward Raven Nest Branch is hard surfaced, isn't it?
A. Yes sir.
Q. Then, you have got just a few steps from there to your Uncle's house?
A. Yes sir.
Q. How far would you say a few steps is.
A. Well, from here down to the bottom of the Courtroom or a little further.
Q. You mean outside the Courtroom or to just this wall here or what?
A. Outside, down to where you go out of the Courthouse. You just turn off the hard surface road and go around a little curve.
Q. Well, then, by that do you mean it would be approxi-

mately—would you say one hundred feet. Does that sound reasonable to you?

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A. Yes sir.
Q. About one hundred feet.
A. Yes sir.
Q. And did you and your brother get that muddy in that short distance?
A. Well, it is pretty sloppy and muddy out through there.
Q. Pretty sloppy and muddy?
A. Yes sir.
Q. And you got mud up to your knees going out there?
A. As you said, it was sloppy and muddy, and we could have got some of that on us before.
Q. Now, Dexter, I am not asking you what you could have done. I am asking you what happened on this night. Did you get all that mud on you walking out from the hard top road out to your Uncle's house?
A. No sir.
Q. You didn't?
A. No sir.
Q. Where did you get the rest of it?
A. Before we went to Cedar Bluff.
Q. Before you went to Cedar Bluff?
A. Yes sir.
Q. Well, how did you get it on you before you went to Cedar Bluff?
A. Well, walking back and forth out the road there.
Q. Walking back and forth out the road?

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A. Yes.
Q. What color car did this man have?
A. White.
Q. Didn't you testify before that he had a yellow car?
A. Yes sir but white looks yellow in electrical lights.
Q. Now, who told you that?
A. Well, it does.
Q. It may or may not but who told you that white looks yellow in electric light?
A. Well, nobody told me that.
Q. Now, you told Judge Peery it was a white car, didn't you?
A. Yes sir.
Q. And now, a month or two later, you come and tell this jury that it was a yellow car. I mean, you tell them it was a

white car. I am all mixed up. Let's start over. You told Judge Peery it was a yellow car, didn't you? Isn't that your testimony in this preliminary hearing, that it was a yellow car?

A. No sir.

Q. Now, think back.

A. It was the night we thought it was a yellow car. Whenever we had the hearing, I found out it was a white car.

Q. How did you find out that it was a white car?

A. Well, the night we went over there.

Q. After you had seen the car somewhere, a white car, then you decided it was a white car, wasn't it?

A. Yes sir.

Q. But, until you saw a car, you were under the distinct impression that it was a yellow car that picked you up?

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page 40 }

A. Well, yes sir.

Q. And then the police take you around town and they finally find a car, and it is a white car, and then you say it is a white car. That is what happened, isn't it?

A. Yes sir.

Q. You said the man had a gun. What kind of gun was it?

A. Well, I couldn't see all of it. I wouldn't know just what kind it was.

Q. Well, there are all kinds of guns. Was it a pistol, shotgun or what?

A. Pistol.

Q. A pistol?

A. Yes sir.

Q. When did you see the gun?

A. Whenever he told us to get in the car.

Q. And how many times during the course of the evening did you see that gun again—all evening long?

A. Yes sir.

Q. Did he carry it in his hand all the time?

A. Yes sir.

Q. He did? As he was driving along, he held the gun in his hand?

A. Yes sir.

Q. And when he forced you and your brother to take your clothes off, he had his gun in his hand?

A. Yes sir.

Q. And when he got you and your brother out

James Dexter Bowling

Vol. I of the car and made you do an unnatural act on
5/25/67 him, he had the gun in his hand?
page 41 } A. Yes sir.
Q. What color is that gun?
A. Well, I could just see the top of it. Blue steel.
Q. Blue steel?
A. Yes sir.
Q. Could you tell whether or not it was a revolver or an automatic?
A. I couldn't tell.
Q. Could you see whether there was a cylinder on the side or not? You know the difference between a revolver and an automatic?
A. Well, it looked to be an automatic.
Q. It looked to be an automatic, and it was blue steel?
A. Yes sir.
Q. Now, when you got in the car, did you ride in the front seat or the back seat?
A. Front seat.
Q. And where did your brother ride?
A. In the back seat.
Q. In the back seat, and you all stayed in that position the whole time?
A. Well, no sir.
Q. When did you change?
A. Whenever he pulled up in McGuire Valley.
Q. When you got to McGuire Valley?
Vol. I A. Yes.
5/25/67 Q. But you rode in the front seat from the time
page 42 } you left the Arcade all the way up Raven Nest Branch and over into Laurel and up on the Creek Road and back to Laurel and then over into McGuire Valley? You were in the front the whole time?
A. Yes sir.
Q. And when he made you take your clothes off, you stayed in the front seat?
A. Yes sir.
Q. And your brother stayed in the back seat?
A. Yes sir, and then he made me get over in the back seat after we got our clothes off after we got in McGuire Valley.
Q. After you got to McGuire Valley?
A. Yes sir.
Q. Now, you said that he made your brother do the act first?

James Dexter Bowling

A. Yes sir.

Q. You were sitting in the front seat, and he made your brother get out of the back seat.

A. I was sitting in the back seat when he made my brother get out.

Q. Is that right?

A. He had done made me get over in the back seat.

Q. He made you get in the back seat?

A. Yes sir.

Q. You said this man said that he had a two-way radio. Did you see it in the car?

A. Well, it could look similar to a two-way radio but I didn't know what it was at the time.

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Q. You didn't?

A. I just know what he told me it was.

Q. You knew he told you he had a two-way radio?

A. Yes sir.

Q. Now, then, when the police, after driving you around town, found the car, did that car have a two-way radio?

Mr. Coates: Your Honor, please, I don't believe it is in evidence that the police ever drove him around over town.

Mr. Harman: I asked him if they did, and he said they did.

The Court: I believe you, on direct examination, asked if he showed the officer the road they took.

Mr. Coates: Yes, the route they took, but I never asked him anything about being in town.

The Court: You may ask him if the police drove him around town.

By Mr. Harman:

Q. Did you ride around town with the police looking for a car?

A. No sir.

Q. When you went to the police station, you told them there was a yellow car, didn't you?

A. Well, yes sir.

Q. You didn't go out, but did the police go looking for a car?

A. Yes sir.

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Q. And what was it, two or three hours later that they came back and asked you to identify a car?

A. Yes sir.

James Dexter Bowling

Q. Now, you went up there and they showed you a white car, didn't they?

A. Yes sir.

Q. And you decided then it was a white car instead of a yellow?

A. Well, I looked at the inside first where I had described the other, and the inside looked just like the other.

Q. The inside looked just like the other?

A. Yes sir.

Q. But it didn't have a two-way radio in it, did it?

A. Well, it had a thing just like he told me up there and told me it was a two-way radio.

Q. Told you it was a two-way radio?

A. Yes sir.

Q. You never did see this other set of license plates that he talked about, did you?

A. Well, I run my hand back in under there and felt them and it was license plates.

Q. They were there?

A. Yes sir.

Q. Now, when did you do that?

A. Whenever we was coming back down Busthead hill, and he was telling us not to call the officers.

Q. At that time, he had this gun in his hand the whole time, didn't he?

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A. Yes sir.

Q. And you reached under the seat, and it was under your side of the seat, the right side?

A. Yes sir.

Q. And you felt the license plate or something that felt like it under the seat?

A. Yes sir.

Q. Now, where was your brother at this time?

A. He was in the back seat.

Q. Did you pull the plates out and look at them?

A. I pulled the edge of them out, the end of them out.

Q. The end of them out?

A. Yes, and pushed them back. They were black license plates.

Q. Black license plates?

A. With white numbers.

Q. What was the number on those?

A. I wouldn't know. I never took the number down.

Q. You never took the number down?

A. No sir.

Q. Now, the number you took down was a 1965 license number, wasn't it, black with white letters on them? Is that right? License numbers have changed since this happened, haven't they, in Virginia?

A. Yes sir.

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Q. I don't believe anybody ever asked you—we got the color of the car, but what kind of car was this?

A. It was a Corvair.

Q. A Corvair, and was it a two door or four door car?

A. Four door.

Q. Four door?

A. Yes sir.

Q. I believe you did say it had bucket seats in it. Is that right?

A. Yes sir.

Q. Now, then, how much, fow far could you reach under that seat when you reached under there?

A. Well, you could reach all the way out the back side.

Q. You could reach all the way through. Is that right?

A. I didn't reach all the way through, though.

Q. No, but I mean was there room for you to do that?

A. Well, I don't know.

Q. Well, you felt under there. Was there space between the bottom of the seat and the floor that you could get your hand under?

A. Yes sir.

Q. Well, now, about how big a space was it?

A. Well, about this wide (measuring with his fingers).

Q. By that, do you mean, and I am estimating here, you held your fingers out about three inches. Is that about what it was?

A. Something like that.

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Q. Could you get your entire hand under the seat?

A. Well, I could stick my fingers back under there.

Q. Your fingers?

A. Yes sir.

Q. Did you feel anything else under there, under the seat, when you felt those black license plates?

A. No sir.

Q. What did the man say when you pulled them out, these black license plates?

James Dexter Bowling

A. Well, he had told me they was there and told me if I didn't believe it to feel under there and see if they was, so I seen for myself.

Q. He told you to reach under there and see?

A. Yes sir, if I didn't believe it.

Q. But those you didn't take the number off of?

A. No.

Q. And you mean to say that when this fellow threatened you not to tell the police, that he had a two-way radio and would monitor police broadcasts, and that he had another set of license plates under the seat, and he asked you to look under there and to check and be sure, and let you pull them out?

A. Well, he wanted me to take a look and make sure that I didn't think he was lying, that he did have another set of license plates he could put on in place of the others.

Mr. Harman: That is all.

Vol. I Mr. Coates: That is all.

5/25/67 Mr. Harman: One other question I overlooked.

page 48 } By Mr. Harman:

Q. Do you have a watch?

A. No sir.

Q. Does your brother have a watch?

A. Well, he was carrying a pocket watch at that time.

Q. On that particular time?

A. Yes sir.

Q. Do you remember him looking at his watch when he got out of the car, when the man let you all out?

A. Well, yes sir.

Q. And what time was it?

A. Well, it was between 10 and 15 after 9:00.

Q. Between 10 and 15 minutes after 9:00?

A. Yes sir.

Q. Did you see the watch or did he tell you what time it was, or do you remember?

A. Well, he just told me. I just glanced at the watch but I didn't take no close look at it.

Q. Pocket watch?

A. Yes sir.

Q. Now, what kind of watch is it? Do you know?

A. No.

Q. What kind of face does it have on it?

James Dexter Bowling

A. Well, a glass face and the numbers.

Q. Is the dial white-like or is it black or green or what? Do you remember?

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A. Well, it is white with black numbers.

Q. White with black numbers?

A. Yes sir.

Q. The numbers are black?

A. Yes sir.

Q. And he said something and you glanced at it, and you say it was about somewhere between 10 and 15 after 9:00?

A. Yes sir.

Q. Now, when you looked at the watch, was that before or after you wrote down the license number?

A. After I wrote down the license number.

Q. After you wrote down the license number? And the car was gone and it had disappeared?

A. Yes sir.

Q. And as I recall, there is a pretty sharp turn down there, right below where that road comes off, isn't there?

A. Yes sir.

Q. Was there any other traffic on the road?

A. No sir.

Q. Now, then, would you please tell the jury how you saw that when the car was gone, and you had finished writing down the license number, and there are no lights out there at all in the country. How could you tell it was between 10 and 15 minutes after 9:00?

A. Well, the numbers on that has got that there stuff on them.

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Q. You can read it at night?

A. Yes sir.

Q. It is one that has radium or whatever it is that they put on it? Is that right?

A. Yes sir.

Q. You are sure about that?

A. Repeat the question.

Q. You re sure about that?

A. Well, pretty sure. I could read the numbers.

Q. You could read the numbers? You could read the numbers in the dark, after the match had been blown out or had gone out?

A. Well, I don't know whether he had blown it out yet or not.

Mr. Harman: That is all.
Mr. Coates: You may stand aside.
The Court: Is that all, Mr. Coates?
Mr. Coates: Yes sir.
The Court: Stand aside.

(Witness excused)

Mr. Coates: Walter Asbury.

WHEREUPON,

WALTER ASBURY was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. Please state your name.
Vol. I A. Walter Asbury.
5/25/67 Q. Where do you live, Mr. Asbury?
page 51 } A. I live between Cedar Bluff and Baptist Valley.
Q. In what area?
A. Sir?
Q. What is the community called that you live in?
A. Well, there is a Cross Roads Church there. Some of them calls it that. It is where you turn across going towards Raven Nest Branch.
Q. Where you turn across going towards Raven Nest Branch?
A. Yes sir.
Q. Mr. Asbury, do you know James Dexter Bowling and Donald Peery Bowling?
A. Yes sir.
Q. Are they related to you?
A. Yes sir.
Q. What is the relationship?
A. They are my nephews.
Q. They are your sister's children?
A. Yes sir.
Q. Do you live with your father or separate and apart from him?
A. I live in my own house.

Walter Asbury

Q. How far is that from where your father lives?
A. I wouldn't know exactly but it is not far. He just lives on down the road a little below me there.

Vol. I
5/25/67 Q. Mr. Asbury, I want you to tell the jury what state of repair the road is in front of your house.

page 52 } Mr. Harman: We object to what state of repair the road is in there in front of his house.
Mr. Coates: It has been brought in here—
The Court: Let him answer what kind of road it is.

A. It is a dirt road, some of it a little rough right in front of my house, between my house, well, on each side of my house.
Q. I will call your attention to the evening of March 4, 1967, and ask you if you saw your nephews, Donald Peery Bowling and James Dexter Bowling?
A. I did.
Q. Where did you see them?
A. They come to my house.
Q. About what time, if you know, did they come to your house?
A. It was after 9:00. I didn't look at the time.
Q. Describe their condition when they arrived at your house.
A. They come running in looking kind of white and shaking with their underwear under their arm.

The Court: I didn't understand the last you said. They came in sort of looking white and shaky.

A. Had their underwear rolled up under their arm.

By Mr. Coates:
Q. Did either or both of these boys make a complaint to you?
A. They both come out there, and Dexter come running on in and told me that he wanted—

Mr. Harman: We object to what Dexter told
Vol. I him. He asked him if they made a complaint. The
5/25/67 question could be answered yes or no.
page 53 } The Court: You can answer that yes or no.

A. Yes sir.

Walter Asbury

By Mr. Coates:
Q. What was the nature of the complaint that they made or Dexter made?
A. He told me what a fellow made them do.

Mr. Harman: Well, now, we object to this. It is purely hearsay.
Mr. Coates: Your Honor, please, now, this is a sex case. It would be a part of the *corpus* of the case.
The Court: That is correct.
Mr. Coates: The first and original complaint.
The Court: I overrule the objection.
Mr. Harman: We note our exception.

By Mr. Coates:
Q. Go ahead and answer.
A. He told me what a fellow made them do.
Q. And what did he say?
A. They told me that they wanted me to give them advice, what for them to do.
Q. What did they tell you a fellow made them do?

The Court: Go ahead and answer.

A. Suck him.
Q. What did you do then?
Vol. I A. I told them to report it to the police station.
5/25/67 Q. Did you take any action, then, Mr. Asbury?
page 54 } A. Yeah. They said what phone to use, and I told them I would take them.
Q. You told them you would take them?
A. Yes sir.
Q. Where did you take them?
A. I took them to the police station in Richlands.
Q. And it was reported there?
A. Yes sir.

Mr. Coates: Your witness.

CROSS EXAMINATION

By Mr. James W. Harman, of Counsel for the Defendant:
Q. Mr. Asbury, you say this was after 9:00 but you don't know the exact time?
A. No. I didn't look at no watch or clock.

Walter Asbury

Q. Do you know what time you got to the police station in Richlands?

A. I don't believe I looked there either.

Q. Well, now, didn't you testify before Judge Peery that these boys came to your house at 9:20?

A. Approximately. It was after 9:00. I don't know exact. I didn't look.

Q. But didn't you testify or tell Judge Peery that they came in at 9:20?

A. Not exact.

Q. Not exactly.

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A. No sir.

Q. But you did mention something to Judge Peery about 9:20, didn't you, in your testimony before him?

A. I don't recall if I did or not but it was after 9:00.

Q. Well, just out of pure curiosity, how do you know it was after 9:00. There must be something in your mind that tells you that it was after 9:00. Now, what was it?

A. Well, I went over to the barn to put hay down to the cows, and I come back and I looked at the clock, and it was 9:00. And I knowed then it wasn't but a short space of time there until this occurred.

Q. You remember looking at the clock when you came back from the barn. That is how you set the time?

A. Yes sir.

Q. Had you seen either of those boys earlier that day or not?

A. I don't recall if I did or not.

Q. And you say that when they came in each one was carrying his underwear under his arm. Is that right?

A. Yes sir.

Q. How long was it from the time they came until you took them to the police station?

A. Approximately around 5 minutes.

Q. 5 minutes?

A. Yes sir.

Q. Did the boys put their underwear on before you took them to the police station or not?

A. No sir.

Q. What did they do with it? Did they take it with them?

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A. One of them left his underwear there. I don't know whether the other one left his there or not. One of them did leave his there.

Q. One of them left it? You don't know which one?
A. No.
Q. Did they come back and pick it up later on or is it still there?
A. No. They got it.
Q. When did he come and get it?
A. I wasn't there. I asked my wife about the underwear and she said that.
Q. She said that one of them left his underwear there and the other, then, must have taken his with him, didn't he?
A. I didn't say that. I don't know if he did or didn't.

Mr. Harman: Stand aside.

RE-DIRECT EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:
Q. Mr. Asbury, by any chance prior to this time, did you know the defendant, Delbert Lewis?
A. No sir.

Mr. Coates: That is all.
The Court: Stand aside.

(Witness excused)

Mr. Coates: Charles Vencill.

WHEREUPON,

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CHARLES VENCILL was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:
Q. What is your name, please, sir?
A. Charles Vencill.
Q. What is your occupation?
A. Policeman for the Town of Richlands.
Q. Were you a policeman for the Town of Richlands on March 4, 1967?
A. Yes sir, I was.
Q. Mr. Vencill, were you on duty in the evening of that day?

Charles Vencill

A. Yes sir.

Q. Mr. Vencill, were you either at the station or called to the station when James Dexter Bowling and Donald Peery Bowling made a complaint to the station?

A. We were called in.

Q. What time did you come in?

A. Approximately 9:40 P.M.

Q. Did you attempt to locate a Corvair automobile?

A. Yes sir.

Q. Were you furnished with the license number for this vehicle?

A. Yes sir.

Q. Did you determine to whom this vehicle was registered?

A. The Department run a check on the license number and gave it to us.

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Q. To whom was it registered?

A. Leonard Lewis, 106 Franklin Street.

Q. Did you know Mr. Lewis?

A. No sir.

Q. Where is 106 Franklin Street?

A. That is in the brickyard section of town.

Q. I will ask you if you went to 106 Franklin Street on this evening?

A. Yes sir.

Q. Tell the jury what happened, what you did, and what was done?

A. Well, we went to 106 Franklin Street and found a white Chevrolet Corvair as the boys had described. They described a yellow Corvair. This was a white one, and we called the Police Department back and had a Deputy Sheriff to bring Dexter and Donald Bowling to 106 Franklin Street to see if they could identify the car.

Q. What Deputy Sheriff brought them over?

A. Deputy Sheriff Floyd Webb and Trooper Owens.

Q. Do you know where he is today?

A. No sir.

Q. Do you know what he did last night?

A. He dispatched, I believe, at the jail on the midnight shift.

Q. On the midnight shift?

A. I believe that is right.

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Q. Did the boys get out of the car?

A. Yes sir.

Q. Did Mr. Webb get out?

page 59 } A. No sir.

Q. Tell the jury what took place.

A. Well, Mr. Lewis and one of his other sons had come out of the house at this time. When Donald and Dexter came over, I asked Donald if this was the boy that had later been with him, or forced him into a car as he said, and he said it was, it wasn't. It wasn't.

The Court: Said what?

A. That it wasn't the boy.

The Court: Was or wasn't?

A. Wasn't. Wasn't the boy. I, also, asked Dexter, and he said it wasn't, and I asked Mr. Lewis if he had another son, and he said that he did. I asked him to come out, so he did. He came out. As he came out on the porch, Donald said that it was the one.

By Mr. Coates:

Q. Now, who came out on the porch?

A. Delmer, or Delbert.

Q. Delbert?

A. Yes. Donald said it was the one that he had seen late, early in the evening, and I asked Dexter then, and he said, "I believe it is." He wasn't for sure at that time.

Q. Then, what happened?

A. I asked Mr. Lewis to come on out in the street. He came out in the street, and we walked down to the police car's light, and then Dexter said that it was the one.

Q. Did you look at Mr. Lewis's, at the Corvair

Vol. I automobile?

5/25/67 A. Yes sir. We looked at it.

page 60 } Q. Will you tell the jury what you observed from looking at the automobile?

A. It was a white '65 or '66. The registration came back as a '65 Chevrolet Corvair. The boys had described the car as having a damaged right rear door, which you couldn't tell from the outside. It wasn't damaged on the outside. They said it had bucket seats in it and had a police radio mounted on the dash, and had a set of license plates under the right front seat of the bucket seats.

Q. Anything else?

A. That is all I recall at this time.

Q. Now, what did you find in the car?

A. Well, by looking through the window, they was a set of

Charles Vencill

—the boys said they was some tools in the back seat, or back floor board. They was a soldering iron.

Q. What kind of soldering iron?

A. It was a pistol-grip looking electric, I imagine. A soldering iron and a ruler, one of those fold-up rulers in the back.

The Court: Fold-up what?

A. Ruler.

By Mr. Coates:

Q. You mentioned license plates?

A. License plates. I asked Mr. Lewis, Mr. Delbert Lewis, if he had any extra license plates in the car. He said he didn't believe there was. I asked him if he would look and see, and he looked, and there was a set of Virginia license plates under the right front seat. He got the tags out.

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Q. What about the police radio? Was there a police radio?

A. It was a stereo tape player mounted on the dash.

Q. I will ask if you observed a garbage container in the car.

A. Yes sir. They was, I believe, it was red, in the front.

Q. And you mentioned the door and left it?

A. They said that the right door was damaged, had damage on it but you couldn't see it from the outside.

Q. Did you check the right door?

A. Not that night.

Q. Did you later?

A. Yes sir.

Q. What was the condition of the door?

A. The door was hard to open.

Mr. Coates: Your witness.

CROSS EXAMINATION

By Mr. J. K. McFarlane, of Counsel for the Defendant:

Q. The door was just hard to open?

A. Yes sir.

Q. Wasn't damaged, was it?

A. No sir, didn't see any.

Q. Now, when did you get the license number?

A. Well, I can't pinpoint the time. It was a short time after

Charles Vencill

the boys had reported it to us, and Mr. Griffith, the Dispatcher at the Police Station, had called the Sheriff's Office of Tazewell County to get a check on the number.

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page 62 } Q. What kind of check?

A. To find out who the car, who the number was registered to, the tags.

Q. You said at first when you got over to the Lewis home, Mr. Lewis and one of his boys came out, and they said that that was not the man. Is that right?

A. Yes sir.

Q. Then, you asked him if he had another son, and Delbert came out?

A. Yes sir.

Q. And Donald said that wasn't the man. Is that right?

A. That was the man.

Q. Well, you said that one said when he first came out, it wasn't the man?

A. Donald said it was the man. Dexter said he didn't believe it was.

Q. Dexter is the biggest one, isn't he?

A. Yes sir.

Q. Dexter never made up his mind as to that being the right man until you and Boyden Sawyers took him out behind the car and talked to him?

A. No sir, we didn't take him behind the car.

Q. You had to talk to him a while before he made up his mind that Delbert was the man, didn't you?

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page 62-A } A. No sir. I advised the boy that this was a serious charge and he wanted to be sure of what he was talking about. That is the only thing that was said to him. I think that was said in front of the defendant.

Q. That was there in the light but he had a hard time making up his mind?

A. Well, it didn't take him too long.

Q. Didn't take him very long, but it took him some time, didn't it?

A. He said it was the man in the light.

Q. He said he wasn't certain for a long time?

A. When he first came out on the porch, he wasn't for sure.

Q. Well, what did you and Mr. Sawyers talk to him about?

A. We told him it was a serious charge what he was talking about, and he wanted to make sure that it was, that he knew what he was talking about.

Charles Vencill

Q. Do you have Mr. Sawyers here?
A. No sir. I don't think so.
Q. After you talked to him there a while, he then decided that this was the man?
A. After we walked down to the police car in the lights, he said it was.
Q. But up when he was in the same light and everything he was up in McGuire's Valley there, he said he didn't believe that was the man. Isn't that right?
A. I don't know what kind of light they had in McGuire Valley.

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Q. Do they—they don't have any, do they?
A. I don't know.
Q. You said they told you it was a yellow Corvair. How long after that was it before they decided it was a white one?
A. I don't know whether they ever decided or not.
Q. What color was it under the street light?
A. It was white to me.
Q. White. But when they came down there, they told you and they told at the preliminary hearing, all, that it was a yellow Corvair, didn't they?
A. Yes sir.

Mr. McFarlane: That is all.
Mr. Coates: That is all.
The Court: Did you ever state what the license number was on this car? Did you state that?
A. No sir. They didn't ask me.

By Mr. Coates:
Q. What was the license number?
A. It was 586-705.
Q. 586-705?
A. Yes sir.

Mr. Coates: You may stand aside.

(Witness excused)

Mr. Coates: Come around, Trooper Barton.

Trooper Franklin D. Barton

WHEREUPON,

TROOPER FRANKLIN D. BARTON was called as a witness, and after first being duly sworn, was examined and testified as follows:

Vol. I
5/25/67 DIRECT EXAMINATION

page 64 } By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. Please state your name.
A. Franklin D. Barton.
Q. What is your occupation?
A. Virginia State Police Trooper.
Q. How long have you been a Trooper?
A. 10 years.
Q. Trooper Barton, were you on duty on the evening of March 4th when this crime was supposed to have taken place?
A. Yes sir.
Q. On that evening, did you see the victims?
A. Yes sir.
Q. I believe you, also, saw the defendant?
A. Yes sir.
Q. Later on, did the defendant, or did the victims rather, take you and show you where they stated that the defendant had taken them on a tour before the act took place?
A. Yes sir.
Q. Did they show you where the act took place?
A. Yes sir.
Q. Tell the jury, outline the route they followed.
A. Well, from the Arcade they went up Indian Creek to the Raven Nest Branch Road, which turns left off the Baptist Valley road, traveled over to, on to Laurel. They went up Laurel Creek a short distance and turned around and came back and off Laurel Creek, they turned up what

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page 65 } is known as the Creek Road, up to an overpass, a railroad overpass, was, also, where much garbage had been dumped there and to where they had stopped the first time. After leaving there, they came off the Creek Road, across Laurel Creek to the Bandy road at West Grocery and turned right at West Grocery toward Busthead, and came down to the McGuire Valley Road, State Route 636, and turned up the McGuire Valley Road and

had gone some distance up the McGuire Valley road to where they turned around and came back out to where they stopped the second time and to where the alleged offense occurred.

Mr. Harman: We object to him testifying to where the alleged offense occurred. He can testify to where the boys asked him to drive. We ask the jury to be instructed—

The Court: That is right. This witness doesn't know where the offense occurred.

Mr. Harman: He was taking these boys on a ride and they showed him where to go.

The Court: That is right.

By Mr. Coates:

Q. On a later date, Mr. Barton, I will ask you if you made a time test on that route and how long did it take you to drive it and if so, describe to the jury what you did.

A. The time from the Arcade in Cedar Bluff over the entire route going up Laurel Creek, turning around, coming back to the Creek road and then leaving there and going across Laurel Creek to the Bandy road and then to the McGuire Valley road and to where they stopped is approximately 30 minutes. This is traveling at an average speed of approximately 25 miles per hour.

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Q. An average speed of 25 miles per hour?

A. Yes sir.

Q. Trooper, I believe that this, that you, also, attempted to make certain tests on tire prints that you found.

Mr. Harman: I think before he can decide that, he has to show the Court that the tire tests are proper and material to the case—made certain tests on tires.

The Court: You had better bring it down and tie it in.

Mr. Coates: In that event, your Honor, we will leave it off. You may cross examine. Oh, one more question.

Q. Mr. Barton, at the place indicated by these victims where the offenses were alleged to have occurred, is that in Tazewell County, Virginia?

A. Yes sir.

Q. While they are conferring, I will ask you if the entire area covered by this route and shown to you was in Tazewell County?

Trooper Franklin D. Barton

A. Yes sir.

Mr. McFarlane: No questions. Oh, I would like to ask one. Sorry, Trooper.

The Court: Mr. Harman is making the objections so let him do the questioning.

CROSS EXAMINATION

By Mr. James W. Harman, Jr., of Counsel for the Defendant:

Q. Trooper, one question. You said that you were or that you ran a time test sometime later after these boys had showed you where they had been or supposed to have been, and that you ran this test at an average speed of 25 miles per hour, and you drove that in 30 minutes?

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A. Approximately 30 minutes.

Q. Approximately 30 minutes, and that was driving time?

A. That was driving time.

Mr. Harman: That is all.

RE-DIRECT EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. Including turning around?

A. Yes sir, including turning around.

Q. From what point to what point?

A. From the Arcade to the place indicated.

Q. What place indicated?

A. To where the place indicated that the offense occurred.

RE-CROSS EXAMINATION

By Mr. James W. Harman, Jr., of Counsel for the Defendant:

Q. Just a minute, Trooper. You didn't stay there, did you?

A. No sir.

Q. Well, didn't you time yourself coming out from McGuire Valley?

A. Well, actually, the time was over to where the boys were let out by the defendant.

Q. Then, it wasn't to the place where they indicated the offense occurred? The 30 minutes was from the Arcade making this round-about trip and back to where the Raven Nest Branch road cuts across the ridge?

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5/25/67 A. That is true. Yes.

page 68 } The Court: Stand aside.

(Witness excused)

Mr. Coates: Your Honor, please. I may rest but I would like to confer for just a minute.
The Court: Beg your pardon?
Mr. Coates: I say I may rest.
The Court: Well, you can make up your mind during lunch hour. We will take an adjournment for lunch now. You, gentlemen of the jury, please do not talk about this case with anyone nor allow anyone to discuss it with you or in your presence. It is 12:30 P.M. now. Come back at 1:30.

(Whereupon, at 12:30 o'clock P.M., the above-entitled matter was recessed, to reconvene at 1:30 o'clock P.M. on the same day.

AFTERNOON SESSION

1:30 P.M.

The Court: Are you ready to proceed, gentlemen?
Mr. Coates: Yes sir.
The Court: Bring the jury in.

(Whereupon, the twelve jurors entered the Courtroom, after which the following proceedings were had:)

Mr. Coates: Boyden Sawyers.

WHEREUPON,

Vol. I 5/25/67 BOYDEN SAWYERS was called as a witness, and after first being duly sworn, was examined, and testified as follows:

page 69 } DIRECT EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:
Q. Please state your name.
A. William B. Sawyers, known as Boyden, Police Officer for the Town of Richlands.

Boyden Sawyers

Q. You are an officer for the Town of Richlands?
A. That is correct, sir.
Q. And on March 4, 1967, you were an officer?
A. Yes sir, I was.
Q. Were you on duty on the evening of that day?
A. Yes sir, I was.
Q. What officer were you working with?
A. Officer Charles Vencill.
Q. I will ask you if on the evening of that day if you and Officer Charles Vencill had occasion to go to the home of Mr. Leonard Lewis located on Franklin Street, I believe, in the Brickyard Section, of the Town of Richlands?
A. We did.
Q. Thereafter, did Officer Webb bring James Dexter Bowling and Donald Peery Bowling to the home?
A. He did.
Q. Tell the jury what happened after these boys got there.
A. When these boys arrived, this gentleman in question came out on the porch of his house. One of the boys immediately identified him and when he came on out into the car lights, the other poy positively identified him. This subject is the one in question.

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Q. And was that Delbert Lewis?
A. It was.

Mr. Coates: Your witness.

CROSS EXAMINATION

By Mr. J. K. McFarlane, of Counsel for the Defendant:
Q. Now, which one identified him when he first came out?
A. The smaller boy, the smaller Bowling boy, was the one that identified him.
Q. Now, the other boy, Dexter, he first said it wasn't, didn't he?
A. Pardon?
Q. Dexter first said he was not the man, didn't he?
A. He did not in my presence.
Q. Didn't you hear him say he didn't believe that was the fellow?
A. No sir, I did not.
Q. You didn't hear that?
A. No sir.
Q. How far were you from Officer Vencill?
A. I would say 6 or 8 feet, maybe the length of the car.
Q. Did you walk with the boys to the back of the car?

A. No sir, I did not.
Q. Didn't walk with them anywhere?
A. No sir.
Q. So you—did you hear everything that was said there?
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A. I couldn't say as to that.
Q. You didn't hear the big one at first say that he was not certain?
A. No sir, I did not hear that.

Mr. McFarlane: That is all.
Mr. Coates: That is all.
The Court: Stand aside.

(Witness excused)

Mr. Coates: If the Court please, we rest.
The Court: The Commonwealth rests. Are you gentlemen ready to proceed?
Mr. McFarlane: Yes sir. Come around, Delbert.

WHEREUPON,

DELBERT LEWIS was called as a witness, and after first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. J. K. McFarlane, of Counsel for the Defendant:
Q. You are Delbert Lewis?
A. That is correct.
Q. Where do you live, Delbert?
A. I live at 104 Franklin Avenue.
Q. How long have you lived in Richlands?
A. Well, for the last 19 years, going on 20.
Q. How old are you?
A. I am 19.
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Q. Delbert, relate to the Court and the jury here what took place on the night of March 4th as far as you were concerned, your whereabouts, and what not?
A. Well, I worked that Saturday, and I got off work about 6:00 or later, by the time I got home, and I went in and I cleaned up.

Delbert Lewis

Q. Who do you work for?
A. I work for Barnett, Inc.
Q. Barnett, Inc.?
A. Yes sir. I went in and I cleaned up and ate my supper, and around 7:30 or later, I left the house. I went to City Motor Company, which is just right across the railroad tracks from my house. I walked across the lot looking for a car I would like to have, and from there, I didn't see anyone there. From there, I went to Bud's Motors, which is about two blocks from City Motors. I walked across their lot. The lot was closed. I didn't see anyone there. From there, I went to B & G Motors where I talked with Beecher Smith. He talked to me from the time I was there about a small Sunbeam automobile that he had on the lot, and later I talked with Doug Tatum about the Sunbeam car. He was the regular salesman, and I was there for a little while before, I would say about 15 to 20 minutes, before they released the car to me to test drive. I took it to my home, picked up my father, drove him to the Bill Hankins home, which is about three blocks from where we live at. It is a pretty good size, you know, ways out to this house. I turned around and brought him back home, and my mother give me orders not to buy the car and everything, and then she sent me to the store, to Donley's Restaurant. It is now Thrifty Market. It has changed hands since then. I talked there to Andy Warner and Doug Donley.

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Q. What did you go to Donley's Restaurant for?
A. A box of aspirin. My mother sent me for them, and my younger sister, Rita Mae, was in the car with me, and I was there 15 or 20 minutes. It wasn't very long, and from there, I took my sister home and took the car back to the lot, and we talked for a few minutes, and then I left and went across town to Simmonds Chevrolet and just drove by slowly off the road, and there I was passed by a cruiser, a town cruiser. I don't know who was in it or anything. From there, I went up to Bundy's Jewelry, made a left hand turn over to Second Street, made a left down Second to, I don't know the name of the Street, the street where Ammar Store is. From there, down Front Street, and I went to Hill Top Drive-In.
Q. Who did you talk with at the Hill Top Drive-In?
A. Linda Griffith. She was the curb girl there, and she talked with me for a few minutes and then went in and placed my order, and she went backwards and forth to other cars that was coming in. She spoke to me and talked to me about

Delbert Lewis

different things. Mostly, I was telling her about the car, and I drank my milkshake there that I had ordered. I ordered a strawberry milkshake, I believe. From there, I went to Ovie's Drive-In, which is just a little ways down below the Hill Top, and I was looking for one of the boys that I work with, and I talked to Peery Johnson there, and he hadn't seen Glenn Hess, the boy I was looking for, and I pulled back out on the road and was blocked by a train, which was coming up then and goes across 460. I was blocked there for 5 or 10 minutes. Then, I drove straight to my home and got there ahead of the train, crossed over and went into the house and went to bed. Then, about, well, when I was awakened, about 10 minutes to 11:00, my brother woke me up. He said the cops are outside and something happened to your car, and so I looked out the window, and I couldn't see any other car besides the police cars and everything there in front of the house. I would say about six or seven car loads of police in front of the house and lights all over the place and everything. Dad went out first. He dressed quickly and went out first with Reece, my brother, and as I went back and slipped on a pair of pants and a shirt and come out the door of the house and went out into the street, and I didn't know what was going on. They wouldn't tell me anything. I asked them what was wrong, and they didn't say anything, and then, Mr. Vencill pulled me over to the side and told me what I was accused of, and I told him he was crazy, and about that time—the boys were already there—they were looking in my car and everything, looking at it. I didn't know what was going on. Then, Boyden Sawyers asked me if I would open the doors on my car so I unlocked it and opened the doors, and he said, "Do you have an extra set of tags for your car?" I told him that I didn't, and previous to the time that I found the tags under the seat, I had taken them from my sister's Falcon and put them in my car along with a fishing rod, while her car was going to the garage. It was going into the garage, and I took everything out of it, tools, and everything, so that you know, they wouldn't be removed from the car, and put them in mine, and through cleaning the car and everything, the tags were just shoved up under the seat. The fishing rod just found its way into the house, and I had forgotten completely about them until I reached up under the seat and pulled them out, and then Mr. Sawyers asked the boys to step over and

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look at the car and see if they could identify anything in it, and right off, they started, the red trash can there, I remember that and I remember the bucket seats, and I remember the two-way radio. They called it a two-way radio then, a two-way radio there and everything, looking inside my car with the lights on, and so they weren't sure it was me. They say one of the boys were sure it was me, and the other wasn't. I kept hearing them say that I am not sure if this is the one or not, and then Boyden Sawyers, Vencill, took them over behind Mr. Webb's car across the road, took them in behind Mr. Webb's car, and talked to them, and they come back and both boys said, "That is him." From there, we went over to the police station, and they wrote up all the charges and everything and called Mr. Coates in, along with Mr. Woods. They talked to me. I did not refuse any help letting them search my car and everything. I didn't mind because I was not guilty of anything, and from there, all this has taken place.

Q. Now what—before we come to that, though, do you know what time it was when you got to Hill Top Drive-In?

A. I left B & G Motors around 8:30. It was after their closing hour. They was selling a pick-up truck, and there was only one dealer tag that they had, and I returned the car as quickly as I could. It was after 8:00. I would say around 8:30 before I left the car lot, and when I got to the Hill Top, I would say it was about 15 minutes till, 10 or 15 minutes till 9:00.

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Q. Do you know exactly how long you stayed at the Hill Top Drive-In before you went on to Ovie's Drive-In?

A. Well, as I was driving towards Ovie's, I remember glancing at my watch and it was around 9:30 and when I got there, I would say it was around 9:30.

Q. Was Ovie's—did you go in at Ovie's?

A. No. I pulled in on the lot.

Q. Well, who did you see there?

A. Peery Johnson.

Q. Who were you looking for?

A. I was looking for Glen Allen Hess, a boy that I work with.

Q. A boy that you work with. Did you talk to Peery?

A. Yes, I talked with him, asked him if he had seen him or knew where I could find him. He hadn't seen him so I left.

Q. The police came. Did they ever come back any more after that first night?

Delbert Lewis

A. Well, they came back that night. Boyden Sawyers and Coates, Mr. Coates here, and Woods and Sawyers came back and looked at the car. I suspected after they went up to McGuire Valley they did this. They looked at the car and took mud samples off of it, and then, they hadn't been gone but about 30 minutes until Vencill and Sawyers came back and got the tire serial number off the front of the car, the front two tires.

Q. Got the serial number off the front tires?

A. Yes sir.

Vol. I Q. Did they get the tires at that time?

5/25/67 A. No sir. Mr. Coates and two cars of State

page 77 } Police were over there on Sunday, about 1:00 or 1:30, and asked if they could have the right front tire off my car.

Q. Did you let them have it?

A. I agreed to but my mother asked that the car be taken to the police station before they removed the tire on account of our neighbors.

Q. You mean the police officers coming in there and that is why she wanted that?

A. Yes.

Q. Did they take it?

A. Yes sir. I drove it over to the police station and signed all releases on the tire and let them have it.

Q. Now, this dirt sample you say they got that night, how long was that after the first time they were over there?

A. Well, it was about 2:00 or 2:30 in the morning before we got home from the police station.

Q. That first time they came over, they took you to the police station?

A. That is right.

Q. You got back from there about what time?

A. About 2:00 or 2:30, and then Mr. Coates and Mr. Woods come back over there with Mr. Vencill and Boyden Sawyers, and asked for a mud sample and wanted to look at the car again.

Q. Did they get the mud sample?

A. Yes sir. I took my knife and raked it off the

Vol. I front bumper.

5/25/67 Q. You raked it off for them?

page 78 } A. Yes sir, off on to a yellow pad.

Q. Now, when did they get the tire?

A. It was about 1:00 or 1:30 that they come and asked

for the tire, and by the time they got it, it was about 2:00 on Sunday, the next day.

Q. The next day. Have they brought that tire back yet?

A. I got it back after the hearing. I requested it back after the hearing at Richlands.

Q. Now, did they take any finger prints?

A. They took my finger prints in the police station the same time that they took the tire and then fingerprinted the back door on the car, the same day, on Sunday.

Q. Checked the back door for finger prints?

A. Yes sir.

Q. Did they ever give you any report as to the finding of finger prints?

A. No sir. I never heard any more about them since they taken them.

Q. Did you ever get any report as to the result of the dirt sample?

A. No sir. I never heard nothing.

Q. They never gave you that?

A. No sir.

Q. Did they ever give you any report as to the result of the checking of the tire, the tire prints?

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A. Well, I didn't hear anything until the day of the hearing at Richlands but Trooper Barton said that plaster cast he made of the tire marks in the Valley didn't match any of the tires that I had on my car.

Q. Do you own a pistol?

A. No sir. I have never owned a gun in my life.

Q. Have you seen these two boys here that have charged you prior to the time you were charged down there that night?

A. No sir. If I have, it was passing them on the street or something, not to know.

Q. You never saw them to know them?

A. No sir.

Q. You heard the charge made against you, Delbert. I will ask you to state to the jury whether or not that was true.

A. The—what they charge me with?

Q. Yes.

A. It is absolutely not true, and I had no idea of ever trying any such thing.

Q. You say you are 19 years of age?

A. Yes sir.

Q. Have you ever been charged with any crime of any kind?

Delbert Lewis

A. No sir, not even a parking ticket.
Q. How long has it been since you finished high school?
A. Oh, I quit in September of this year, this school year.
Q. This school year?
A. Yes sir.
Q. And have been working for Barnett since?
Vol. I A. Since June of last year.
5/25/67 Q. Since June of last year but you continued in
page 80 } school on up until this year?
A. Until September when school commenced again.

Mr. McFarlane: Cross examine.

CROSS EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:
Q. Delbert, I believe you stated you work for Barnett, Inc.?
A. Yes sir.
Q. How long have you worked there?
A. Well, it will be, June 21st of this year, I will be there a year.
Q. A year. You started working there when you, about the time you got out of school?
A. I worked with Cyphers Plumbing for the past two school years I was in school, and then I got on down at Barnett's and I changed jobs in June.
Q. You dropped out of school to work full time this fall?
A. Yes sir.
Q. You worked at Barnett's until about 5:30 on this Saturday?
A. No sir. It was after 6:00.
Q. I thought you said you got home about 6:00.
A. I stated that I got home, that I got off work around 6:00 and by the time I got home, it was after 6:00.
Q. You cleaned up and left home about 7:30?
A. Yes sir.
Q. And you were driving?
Vol. I A. Yes sir.
5/25/67 Q. And you live at the end of Franklin Street.
page 81 } Where you live is pretty close to the railroad tracks?
A. Yes sir, it is.
Q. And not too far from the Brickyard crossing?

A. About two blocks from there.

Q. And you got into your car and drove over to City Motors?

A. That is correct.

Q. And it was closed up?

A. I don't believe it was closed. I seen, I believe it was Mr. Overbey, a salesman there for Mr. Vermilya, the manager, standing in the office.

Q. You didn't go in?

A. No, I didn't.

Q. Did you stop your car?

A. Yes sir, I did.

Q. Looked around?

A. I got out and walked across the used car lot.

Q. How long did you stay there?

A. About five or ten minutes.

Q. You weren't timing yourself?

A. No. Just roughly.

Q. You would have no reason to time yourself or know how long you stayed at any particular place?

A. No.

Q. So these are estimates?

A. All these are estimates as near as I can.

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Q. In other words, you stayed there a while?

A. For about five or ten minutes.

Q. And then you went over to Bud's?

A. Yes.

Q. Bud's is pretty close by, isn't it?

A. It is about two blocks, I believe.

Q. Up the street on Floyd Street?

A. On Floyd Street.

Q. And you didn't see anybody at Bud's?

A. No, their lot was closed.

Q. Their lot was closed. Then, you went on to B & G?

A. That is correct.

Q. What time did you arrive at B & G, if you know?

A. It was a few minutes before 8:00.

Q. Of course, you don't know what time it was?

A. No, but I know it was around, I would say, about 15 minutes to 8:00, ten or fifteen minutes.

Q. You say about 7:45, then. That is your best estimate?

A. That is my best estimate.

Q. And you saw Mr. Beecher Smith and looked at a Sunbeam and Doug Tatum let you try it out?

A. That is correct.

Q. You took it home with you, and your mother cautioned you not to buy it?

A. Yes sir.

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Q. Then, you went up to Donley's grocery?

A. Yes sir.

Q. You went there.

A. Well, first, I took my father out to Bill Hankins' house.

Q. Went to Bill Hankins? That is a couple of blocks?

A. Well, it is pretty good sized blocks. It is over next to Farmer Street.

Q. And then you went to Donley's?

A. That is right.

Q. Who runs Donley's? Who was running it then?

A. Then, it was being run by Andy Warner and his brother, Buddy, and they had two boys helping them, Doug Donley and Buddy Monk, I believe, was helping.

Q. Doug Donley and who?

A. Buddy Monk, I believe, was helping then. I am not sure about that.

Q. Buddy Monk. You went over there to get a box of aspirin?

A. And I, also, bought a RC Cola.

Q. And did you look at your watch then?

A. No sir, I didn't.

Q. And about what time was that, if you know?

A. Well, it was around 8:00, I would say.

Q. You are guessing again?

A. Yes sir, but I found out different after I asked Andy what time it was up there.

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Q. And then you returned home and returned the car to B & G?

A. That is right.

Q. Then you drove to Simmonds?

A. That is right.

Q. Just drove by there. Did you stop?

A. I pulled over to the sidewalk out of the traffic and just rolled up in front of Simmonds.

Q. And then rolled on?

A. Yes.

Q. And then you turned at Bundy's and made a switch around the block?

A. I went around Farmers.

Q. Around that section, that block in there? You came back to Front Street. That is right, isn't it?

A. Yes.

Q. And you went West on Front Street, and you first stopped at Hill Top Drive-In?

A. That is correct.

Q. Now, Hill Top Drive-In, I believe, is located just West of the Corporate limits of Richlands on the left hand side of the road, is it?

A. It is left. I don't know whether it is West or not.

Q. Towards Raven?

A. Yeah, towards Raven.

Q. And you saw Linda Griffith there?

A. Yes sir.

Q. Did you look at your watch then?

Vol. I A. No sir.

5/25/67 Q. How long did you stay there, if you know?

page 85 } A. I would say between 25 and 35 minutes. It started getting crowded, and I just left.

Q. And you went down to Ovie's? That is right?

A. That is right.

Q. And at Ovie's you saw—who was that you saw at Ovie's?

A. Peery Johnson.

Q. Did you look at your watch at Ovie's?

A. Between Hill Top and Ovie's I looked at it.

Q. Between Hill Top and Ovie's?

A. Yes sir.

Q. What time was it then?

A. It was between—just glancing at my watch, it was between, I would say, between 20 minutes after 9:00 and 9:30.

Q. And you didn't stay at Ovie's long?

A. No. I wouldn't know, wouldn't have stayed there very long if the train hadn't caught me.

Q. Where did the train catch you?

A. About two cars back from the signals at Doran crossing.

Q. Train caught you at Doran crossing? What time was that? Did you look at your watch?

A. No sir, I didn't.

Q. How long did you stay there?

A. As soon as the train went up, it seemed like hours, just a few minutes, maybe 10 or 15 minutes.

Q. Well, that was before 10:00?

Vol. I A. That is correct.

5/25/67 Q. I believe you stated you got home at 10:00?

page 86 } A. Yes sir.

The Court: Go home what time?
A. 10:00.

By Mr. Coates:
Q. You were definitely at home at 10:00 o'clock?
A. Yes sir. I looked at my watch then because I usually catch a chewing if I am out after, any later than that.
Q. Looked at the watch at 10:00 o'clock.
A. It was before 10:00 o'clock. It hadn't got on the hour yet.
Q. Before 10:00 o'clock?
A. Maybe 5 minutes till.
Q. And you say there was six or seven police cars when you first got home? I mean, when you first got up?
A. When I first got up and looked out the window, the whole front of the house was covered up with cops, and they was lined up around the corner.
Q. Lined up around the corner. Who was there when you got outside?
A. Well, when I got outside, they were two of the Town Police cars that was there, and one of them left, and after they got to telling me what I was accused of, there was Webb's car. He is a Deputy Sheriff, and Boyden Sawyers' car.
Q. Well, now, Boyden and Mr. Vencill were riding together?
Vol. I A. Yes sir.
5/25/67 Q. And turned up there was Webb's car and
page 87 } Boyden's car, and who was driving the other police car? Do you know?
A. Well, I believe Jimmy Steele was down there.
Q. Was Jimmy Steele there when you came out of the house?
A. Well, I think I seen him going up the road. He drives No. 5 car, and I believe that he had backed out, and I believe I seen two cars, or it was one or two cars belonging to the state.
Q. You saw two state cars?
A. Possibly two state cars. It might have been the same one. When I looked out the window, I am almost positive there was one there.
Q. Do you recall meeting a Town of Richlands car at the Southwest Tire Company?

Delbert Lewis

A. No sir, I do not. I was told that one had followed me home but when I looked through my rear view mirror when I started to cross the crossing, they was no car behind me, and I didn't pass any.

Q. You didn't meet one at the Southwest Virginia Tire Company?

A. No sir, I did not. They was no car in behind me as far as my rear view mirror could reach.

Q. Well, you didn't meet one coming toward Raven as you were coming toward Richlands. That is what I mean, what I am having reference to. I say, you didn't meet one coming West as you were coming East, coming North as you were coming South?

A. As I was going home?

Vol. I Q. Yeah.

5/25/67 A. I didn't meet any police car that I know of.

page 88 } Mr. Coates: That is all.

RE-DIRECT EXAMINATION

By Mr. J. K. McFarlane, of Counsel for the Defendant:

Q. Just one other question. Delbert, you spoke here on this particular night of having talked to Andy Warner, Doug Donley, Linda Griffith, Peery Johnson, Doug Tatum and Beecher Smith. When was the first time you ever told anyone whom you had seen and talked to that night?

A. I told Mr. Coates around—

Mr. Coates: I didn't get the question. Would you read it, please?

(Whereupon, the record was read by the Reporter as follows:

"QUESTION: Just one other question. Delbert, you spoke here on this particular night of having talked to Andy Warner, Doug Donley, Linda Griffith, Peery Johnson, Doug Tatum and Beecher Smith. When was the first time you ever told anyone whom you had seen and talked to that night?)

A. I told Mr. Coates about 12:00 that night, on Saturday night, in the Council room at City Hall.

Q. That was before you had been charged with anything?

Delbert Lewis

A. That is correct.

Q. Had you been told at that time as to what time this crime was alleged to have taken place?

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A. No sir. I had, I had heard the rumor there and from what I could get out of some of the guys in the police station there, it was between dark and the time that I come in there, and then at your house when we had a meeting Friday night before the hearing, you had the paper from Mr. Coates' office.

Q. You are referring now to the Bill of Particulars that we asked for alleging this?

A. Yes sir.

Q. But you had given them a list of all these names?

Mr. Coates: Your Honor, please, Mr. McFarlane is leading the witness.

The Court: Don't lead the witness.

Mr. McFarlane: Well, he has already stated he has. That is all.

RE-CROSS EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. One more thing. You were standing by when Mr. Barton dusted the car?

A. Yes sir.

Q. And you know he wasn't able to lift any prints?

A. He got a heel print, I believe he called it, and a thumb print, I believe, is what he called it, a thumb print on the latch of the door, and about one-half way in front of the handle was a heel print he called it.

Q. He made the statement that the prints that he lifted off after he examined them would be of no value because they weren't of sufficient quality, didn't he?

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A. I don't believe he told me or my father that in our presence.

Q. He told me that in your presence, though, didn't he?

A. I don't know.

Q. You don't recall?

A. I don't recall him telling my father and I that but he may have told you.

Mr. Coates: That is all.

Leonard Lewis

The Court: Stand aside.
Mr. Harman: Leonard Lewis.

WHEREUPON,

LEONARD LEWIS was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. James W. Harman, Jr., of Counsel for the Defendant:
Q. Your name is Leonard Lewis?
A. Yes sir.
Q. Where do you live, Mr. Lewis?
A. Richlands.
Q. What do you do?
A. I am a coal miner.
Q. For whom are you employed?
A. At Jewell Valley Coal Corporation.
Q. About how long have you worked there at Jewell Valley, Mr. Lewis?
A. Well, seven years this last time.
Vol. I Q. Then, you had worked for them prior to that?
5/25/67 A. Yes sir, off and on 32 years.
page 91 } Q. How long have you lived at Richlands?
A. Ever since 1922.
Q. What kin are you to the defendant here, Delbert Lewis?
A. He is my son.
Q. How many sons do you have, Mr. Lewis?
A. I have 4.
Q. Is Delbert the—where does he come in age compared to the others?
A. Well, he is—my older son is 27 and then Delbert is 19.

Mr. Coates: Mr. Lewis, if you will look at the Court then I can hear you.
Mr. Harman: Everybody has got to hear you, Mr. Lewis, the Court, the jury and the Commonwealth Attorney.

By Mr. Harman:
Q. You say Delbert is 19?
A. Yes sir.
Q. Is Delbert employed anywhere?
A. Yes sir at Barnette, Inc.

Leonard Lewis

Q. About how long has he been working with Barnette?
A. Well, approximately, about a year, I will say.
Q. And had he worked for anyone else prior to that time?
A. Yes sir, he worked for Buford Cyphers.
Q. What time work does Delbert do for Barnette? Do you know?
A. Yes sir. He plumbs, refrigeration work.

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Q. Has he taken any special schooling since he has been with them in further of his ability as a plumber and as a refrigeration man?
A. Yes sir. He has taken a refrigeration course and plumbing together.

Q. Mr. Lewis, I will call your attention to the night of March 4th of this year, which was a Saturday night. Do you recall that evening? Do you remember that particular evening?
A. Yes sir.
Q. Had you worked on that day or not, yourself?
A. I had worked on the night before. I work on the third shift at Jewell Valley mines. I go to work at 12:00 and get in about 9:00 in the day.
Q. About 9:00 in the day?
A. Yes sir.
Q. Had Delbert worked for Barnett's on that particular Saturday?
A. Yes sir.
Q. Were you home when Delbert came in that evening?
A. Yes sir, I was. He come in about 6:00 o'clock, something around 6:00.
Q. Something around 6:00?
A. Yes sir.
Q. Had your wife already prepared supper or do you recall?
A. Well, I just don't recall for sure. I think she had, though, and Delbert come in and washed and eat supper and went to his room and dressed, and he went to a car lot.
Q. Now, did you go with him when he left the house?
A. No sir, I didn't.

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Q. Now, at that time, did Delbert have a car that he drove?
A. Yes sir he did.
Q. What kind of car was it?
A. '65 Corvair.
Q. Was it licensed to him or to you?

Leonard Lewis

A. It was licensed to me.

Q. But was it for his use basically?

A. No sir. Well, we worked between, you know. He has tools to haul back and forth, and we use the car between us. I have one and he uses one.

Q. Just sort of a family work car, then, for the men?

A. That is it. Yes.

Q. Had there been any prior talk with Delbert about trading cars?

A. Yes sir. He had went to trade that evening.

Q. Was that with your approval or not?

A. No, it wasn't. I told him he had a good enough car for a while until he got it paid for.

Q. Who was actually paying on the car, Mr. Lewis?

A. Delbert was paying on it.

Q. Do you know what time he left the house?

A. I would say it was around 7:30 or 15 to 8:00.

Q. Did you go with him or not?

A. Not when he went to the car lot. No sir.

Q. About how long was he gone?

Vol. I 5/25/67 page 94 } A. Well, he wasn't gone too long until he came back with a car to try out.

Q. Did you see the car?

A. Yes sir.

Q. What kind of car was it?

A. Well, it was a little car, just a two seater. Sunbeam or something like that in a red. I believe it was a Sunbeam. I am not sure about that now. It was a small car. Just two people can ride in it. We taken it for a ride then. He wanted me to try it out. We went out through the Hankins addition, out through the Brickyard, Peery's Branch, and tried it out and come back to the house.

Q. Then, what happened?

A. Well, his mother wanted him to go to the store and get a box of aspirins. One of the kids had a sore throat. He taken the little girl and went back to the store and bought a box of aspirins.

Q. Do you know about how long he was gone that particular trip?

A. Something around 5 or 10 minutes, something like that.

Q. When he returned to the house, did he stay there any length of time?

A. No sir. He just talked a few words.

Mr. Coates: Your Honor, please, to try to expedite the matter, I will ask Mr. Harman to not lead the witness.

The Court: Don't lead the witness, Mr. Harman. He can state what happened.

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A. Well, he stayed a few minutes, just a little while, and his mother told him to get the car back to the car lot, that it was getting late, and he had a good enough car.

Q. Do you know about what time it was when he left?

A. Well, it was—I didn't look but it was after, around 8:00 o'clock, a little bit after, somewhere around there.

Q. When was the next time you saw him, Mr. Lewis?

A. Well, sir, when the policemans woke us up.

Q. About what time was that?

A. Well, I didn't check my clock or watch then. I would say it was around 11:00 o'clock, approximately. Maybe, it was a little bit after, a little after 11:00.

Q. Now, was Delbert at home when the policemen woke you up?

A. Yes sir. My other son, the one next to him, woke him up.

Q. Did you see him when he came in? When he went to bed?

A. No sir, I had went to sleep. My wife, she was up and the kids were watching television.

Q. Do you know what policeman came there and woke you up?

A. Well, actually, neither one of them didn't wake us only by the light and the radios woke my son up, and he came into my bedroom. He said, "Dad—

Mr. Harman: Don't go into what he said.

A. He called me, said they was policemens out there all over Delbert's car, so I went out right at once. My wife, she did, too. My two boys come right on out.

Q. Now, which son was it that came in and woke you?

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A. Reece.

Q. Reece. Is he younger than Delbert?

A. Yes sir, he is.

Q. When you went out there, about how many police officers were outside?

A. Well sir—

Mr. Coates: Your Honor, please, I will ask Mr. Harman not to lead the witness.

Mr. Harman: He said the place was covered up with police officers. I just asked him how many.

The Court: You said when he went out there, how many. That might be leading but go ahead.

A. They was Mr. Boyden and Mr. Vencill, and another car pulled in. I just don't know now who to describe to you because I was excited and shook up about this but the radios and the speakers were all going, flashing lights, so I began to want to know what was the trouble.

Q. Did anyone advise you as to what the trouble was?

A. No sir, not for a few minutes.

Q. Were you the only one that went out of the house or did someone go with you?

A. Well, practically all of us went together, just as fast as we could get out there. In just a few minutes, I asked Mr. Sawyers first what had happened. He said to wait just a minute and we will find out here, and so he said this car had been tagged or something like that, is in trouble, and so directly why Mr., the Deputy Sheriff, brought two boys over there.

Q. Did you know the Deputy Sheriff that brought the boys?

Vol. I 5/25/67 page 97 } A. I know him well, worked with him several years.

Q. Was that Officer Webb?

A. Yes, Mr. Webb.

Q. Now, you say he brought two boys over. Did you know the boys that he brought over there?

A. No sir. At that time, I didn't.

Q. Had you ever seen those boys before so far as you know?

A. Not that I know of. He opened the door of the car and said, "Leonard, what in the world is going on here?" He said, "I had a call and—

Mr. Coates: Your Honor, please, I object to what somebody said.

The Court: Who is Leonard?

A. I am Leonard.

Leonard Lewis

Mr. Coates: Your Honor, he is detailing a conversation he had with some third person.

The Court: Don't state conversation.

By Mr. Harman:

Q. Well, at that time when you were talking to Deputy Sheriff Webb, was your son, Delbert, out there? Was he there at the time?

A. Yes sir.

Q. Now, just what did Deputy Sheriff Webb say?

Mr. Coates: Your Honor, please.

A. He cautioned these boys—

The Court: Just a minute.

A. He—

Vol. I
5/25/67 page 98 } The Court: Just a minute. Keep quiet a minute. until I tell you to go ahead. That would be hearsay evidence.

Mr. Harman: This is a statement made in the presence of this defendant, and the Commonwealth Attorney very carefully brought out this morning that Deputy Sheriff Webb was not here and would not be here today. He brought that out by one of the officers who testified that this officer had worked on the night shift, so it was made in the presence of the defendant, and it certainly is proper now. This is an officer making a statement to the father of a boy who is being charged with a serious offense.

The Court: You may call the officer if you want to. You can have him here.

Mr. Coates: He has had every right to issue process.

The Court: You can get Webb here all right if you want to.

Mr. Harman: As I say, the Commonwealth Attorney very carefully brought out this morning that he was not having him here. I think we have the right to show then what transpired in the presence of this defendant.

The Court: I think the shoe is on the other foot. If the Commonwealth were trying to bring something out, it would have to be in the presence of the defendant.

Mr. Harman: That is right.

The Court: I sustain the objection. You may call Mr. Webb.

Mr. Harman: We note our exception.

Leonard Lewis

By Mr. Harman:

Q. Well, without going into detail as to what was said, Mr. Lewis, was a charged placed against your son at that time?

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A. No sir.

Q. What did these two boys do?

A. Well, they come up there and right at the car, and then they backed off a few feet from the car and said they wasn't for sure. One of them said to the other, "I am not for sure." So they backed off down from the car and all of us, and they come back, and they recognized that this would be the right one.

Q. Now, you say they backed off. Where did they back off to?

A. Well, they backed off from where we was standing at the car.

Q. Did anyone accompany those two boys when they backed off?

A. Yes sir. Mr. Sawyers and Mr. Vencill was there at the back talking to them.

Q. At the time the boys came back and said that they were sure that this was the one, at that time did you know what the charge was against your son?

A. That was when they told me what it was.

Q. After the identification had been made?

A. That is right. Mr. Sawyers come back and read his rights off and said that that was the boy and told me and him what he was charged with.

Q. Did he serve a warrant on him at that time or not?

A. No sir, he didn't.

Q. What did you all do next?

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A. We went to the Town Hall.

Q. How did you go, Mr. Lewis?

A. I rode my car, and I believe my son went over with Mr. Sawyers. I am not for sure about that.

Q. Do you know about what time you arrived at the Police Station?

A. It was approximately 12:00, I would say.

Q. Were the two boys taken back to the Police Station?

A. Yes sir.

Q. How long did you stay at the Police Station until you were allowed to return home?

A. Well, it was around 2:00 or 2:30, something like that.

Q. Did the police ever return to your home after that?

Leonard Lewis

A. No sir, not until Mr. Coates was down and, I believe, it was Mr. Vencill and Mr. Sawyers and Mr. Woods, I believe, was with Mr. Coates.

Q. Now, when did they come back?

A. Just as, well, it was around 3:00, something like that, I would say.

Q. That was 3:00 in the morning?

A. Yes sir. To the best of my opinion, it was around 3:00.

Q. What did they do?

A. They came over and looked the car over, and Mr. Coates started to scratch some mud off the fender and my son, he said, "I will do it." He got down and scraped some mud off the fender. They taken it over and put it in Mr. Coates' car, and I presume it was his car, or Mr. Woods' car, one of the other, and then, just in a few minutes, well, come back then Mr. Boyden and Mr. Vencill wanted a number off the two front tires, serial number. We hadn't gone to bed yet, and we was sitting there talking, and we went right out there, me and my son. We didn't start the car. We just opened the doors and steered the wheels around and helped them get the serial number.

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Q. Now, did the officers come back any on the following day during the daylight hours?

A. On Sunday, they did.

Q. Do you know what time that was, about?

A. It was around noon.

Q. What did they want at that time?

A. They wanted the right front tire.

Q. Did you permit them to take the right front tire?

A. Yes sir.

Q. Did they take it there at the house?

A. No. They started to, and we had had so many calls there and all, and such a scene, well, my wife, she come out and told them she would appreciate it if they would take the car off and take it over there and keep it and get what they wanted off of it. Mr. Coates said, "I think it is very embarrassing." My son taken it over there and give them the tire.

Q. How many officers showed up on Sunday to get this tire?

A. Well, they was a couple cars of them.

Q. Two cars. Did you go over to the police station with them when your son took the car over there?

A. Yes sir. I went over there with them. They

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got the tire and they finger printed the right rear door, and then they finger printed my son.

Q. Did they get any prints off the right rear door?

A. I haven't been told if they had. I believe I heard Mr. Barton say it was smudged or smudge-like on the right rear door.

Q. Has the tire been returned to you or to your son?

A. Yes sir. After the hearing down town, it was.

Q. Have you received a report on the tire?

A. No sir.

Q. Have you received a report on the dirt sample?

A. No sir.

Mr. Harman: Cross examine.

CROSS EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. Actually, Mr. Lewis, despite this being an investigation, the officers and the Commonwealth Attorney were very, very polite to you and tried to be considerate and nice. Isn't that true?

A. Well, what we have been asked and told, we went along with everyone of them.

Q. I understand, and the officers tried to be considerate?

Mr. Harman: We object to a self-serving declaration by the Commonwealth Attorney.

Mr. Coates: This is on cross examination, your Honor.

The Court: He is on cross examination, and the witness already stated that there were two or three car loads of officers up there. I think he would have a right to ask. Objection overruled.

Mr. Harman: Exception noted.

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By Mr. Coates:

Q. Isn't that right, Mr. Lewis?

A. Well, we haven't had no arguments, no cross words, as far as I know of.

Q. No arguments, no cross words. Everybody was polite to you and to your son?

A. That is true. Yes sir.

Q. And at the Police Station, you were aware that efforts were made to be very certain of the necessity before a charge, before one was made.
A. Well, that is possible. Yes sir.

Mr. Coates: That is all.
The Court: Stand aside.

(Witness excused)

Mr. McFarlane: Call Reece Lewis.

WHEREUPON,

REECE LEWIS was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. J. K. McFarlane, Attorney for the Defendant:
Q. State your name.
A. Reece Lewis.
Q. Are you a brother to Delbert?
A. Yes sir.
Q. How old are you?
Vol. I A. 16.
5/25/67 Q. Do you go to school?
page 104 } A. Yes sir.
Q. At Richlands High School?
A. Yes sir.
Q. Reece, I believe you were over there at your home on the night of March 4th when the officers came over there with these two Bowling boys?
A. Yes sir.
Q. Were you on the outside of the house at the time they came over?
A. Yes sir.
Q. Tell the Court and the jury just what you heard.
A. Heard the boys say?
Q. Yeah.
A. Well, they were standing beside my brother's car.
Mr. Coates: Reece, now speak slowly and a little more distinct so that I can hear you, too.
A. They were standing by my brother's car, and I heard

the smallest boy—I don't know his name—he kind of looked up and said to his brother, "It is dark and I am not sure." He said that or dark and I can't be sure, or dark and I couldn't tell. It was either one of those. Anyway, he said he wasn't sure that it was my brother.

Mr. McFarlane: Cross examine.

CROSS EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. When did you come out of the house?

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A. Well, I came out right after my father come out.

Q. Did you come out with your father?

A. No. He came out about two minutes before I did.

Q. When did Delbert come out?

A. He came out sometime after we did.

Q. After you did?

A. Yes.

Q. Your father was out and then you came out?

A. Yes.

Q. And then Delbert came out?

A. Yes. He was in bed asleep.

Q. And you saw the boys when you came out?

A. When I first came out.

Q. Yes.

A. No.

Q. Did you see the police officers?

A. Yes sir.

Q. When did the boys come?

A. I think they arrived later in a police car. I am not sure but they weren't there. They weren't outside the car anyway when I was there, when I first came out there.

Q. They weren't outside of the car?

A. As far as I know.

Q. As far as you know?

A. Yes.

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Q. You don't really know when they arrived?

A. Well, it was some time after my brother came out. They were there before my brother was there. That is right. They were there before my brother was there.

Q. They were there when your brother came out?
A. That is right.
Q. Where were you when your brother came out?
A. I was right there.
Q. You were right where?
A. With my father, standing beside the police officer.
Q. Standing beside the police officer. Where was the police officer standing?
A. Beside the car.
Q. What car?
A. My brother's car.
Q. Were they—that would make six of you?
A. I don't know.
Q. You were there. You ought to know how many were standing there.
A. All kinds of policemen. They was policemen there. I don't know how many.
Q. How many policemen were there?
A. That I don't know.
Q. Did you recognize Mr. Sawyers and Mr. Vencill?
A. I don't know. I think, I know Mr. Sawyers was there.
Q. What about Mr. Vencill?
A. I am not sure.

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Q. And you heard one of three statements?
A. Well, they just said one statement but—
Q. Well, you have stated to the jury three ways. Which way did you hear it?
A. I heard that the little one say he wasn't sure. That is all I know. He wasn't sure.
Q. Wasn't sure?
A. About my brother.
Q. The little one. It wasn't the big one?
A. No, it wasn't the big one.

Mr. Coates: That is all.
The Court: Stand aside.
Mr. Harman: Beecher Smith.

WHEREUPON,

BEECHER SMITH was called as a witness, and having first been duly sworn, was examined and testified as follows:

Beecher Smith

DIRECT EXAMINATION

By Mr. James W. Harman, Jr., of Counsel for the Defendant:

Q. You are Beecher Smith. Is that right?

A. Yes sir.

Q. Where do you live?

A. Richlands.

Q. What business are you engaged in?

A. I work at B & G Motors.

Q. How long have you been with B & G Motors?

A. A little while before Christmas.

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Q. Mr. Smith, do you know the defendant, Delbert Lewis?

A. Yes, I do.

Q. About how long have you known Mr. Lewis?

A. About 12 years. He used to live out by me.

Q. Mr. Smith, I call your attention to Saturday night, the 4th of March, 1967. Do you remember hearing that Mr. Lewis was charged with a crime on or about that evening?

A. Yes sir.

Q. Did you see the defendant, Delbert Lewis, at any time on the evening of the 4th of March?

A. Yes, I did. He came over there. We had a car over there, a sports car, and he came over and wanted to try it out. I have such a cold I can hardly talk. He come over there, and we put him a tag on it. This was about 25 minutes after 7:00.

Q. It was about 7:25 when he came over?

A. Yes, that is right.

Q. You all put a tag on the car for him?

A. Yes sir, we sure did.

Q. Did you let him take the car to try out?

A. Yes sir.

Q. Did you or anyone from B & G Motors go with him when he left the lot?

A. No sir. They wasn't nobody with him.

Q. Do you know about how long he was gone with the car?

A. Well, not exactly. It was a right smart bit, though. It could have been a little after 8:00 when he come back. I wouldn't say for sure.

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Q. What time do you usually close at B & G?

A. Well, we like to get away from there at 8:00. We hardly ever stay there until 8:00 unless we have somebody comes there.

Doug Tatum

Q. Did he buy the car that night?
A. No sir.
Q. You say he came back around 8:00. What did he do with the car when he came back?
A. He parked the car, and we took the tag off of it.

Mr. Harman: Cross examine.

CROSS EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:
Q. Came back about 8:00?
A. Well, it could have been a little after 8:00. We never noticed, you know. We was in a hurry.
Q. You close up at 8:00?
A. Well, I say practically that. It could have been a little after. I wouldn't say for sure.
Q. About closing time. You, of course, don't know just exactly?
A. No sir. I never noticed when he came in, came back.

Mr. Coates: That is all. You may stand aside.

(Witness excused)

Mr. McFarlane: Doug Tatum.

WHEREUPON,

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DOUG TATUM was called as a witness, and after first being duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

By Mr. J. K. McFarlane, of Counsel for the Defendant:
Q. State your name, please.
A. Douglas Tatum.
Q. Where do you live, Doug?
A. Raven.
Q. What business are you in?
A. I am a salesman for B & G Motors.
Q. Where is that car lot?
A. 2625 West Front Street, Richlands, Virginia.

Doug Tatum

Mr. Coates: Mr. Tatum, if you will look directly forward, then we can all hear you.

By Mr. McFarlane:

Q. Did you have occasion to talk to Delbert Lewis over here on the night of March 4th, this year?

A. Yes sir.

Q. Tell what the occasion was.

A. Well, he come by the lot, and we had a little car that he was interested in, and he asked if he could try it out, and I asked him his name and who his parents were, and then I give him permission to try the car out.

Q. About what time was it when he took the car?

A. About 25 after 7:00.

Q. When did he get back with it?

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A. Oh, I would say it was close to 8:00. It could have been a few minutes after 8:00. I wouldn't be for sure about it, about the time.

Q. Well, what time do you usually close?

A. Well, we don't have any particular hours to close, 7:00 or 8:00, in that neighborhood, are usually the closing hours.

Q. I will ask you whether you had to wait on this particular occasion.

Mr. Coates: Your Honor, please, he is leading the witness.

The Court: Don't lead the witness, Mr. McFarlane. Ask him another question.

Q. Do you know whether it was before 8:00 or after 8:00? Was it before 8:00 or after 8:00 when he came back?

A. I would say it was probably a few minutes after 8:00 when he returned the car.

Q. Why do you make that statement?

A. Well, for one reason the time factor. When you have a car, during the time he had the car, he had it a little longer than I expected for him to have it, and that was the reason I would say it was probably a few minutes after 8:00 when he returned.

Mr. McFarlane: Cross examine.

CROSS EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. Doug, you, of course, weren't looking at the time?

A. No sir.
Vol. I Q. You are not sure?
5/25/67 A. No sir. I couldn't be definite as far as the
page 112 } time. I couldn't be definitely sure of it.

Mr. Coates: That is all.
The Court: Stand aside.

(Witness Excused)

Mr. Harman: Andy Warner.

WHEREUPON,

ANDY WARNER was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. James W. Harman, Jr., of Counsel for the Defendant:
Q. Your name is Andy Warner? Is that right?
A. Yes sir.
Q. Where do you live, Mr. Warner?
A. In Richlands.
Q. What business are you in?
A. Wholesale and retail, sir.
Mr. Harman: Turn around and look straight ahead so that everyone can hear you.
Q. Is that the wholesale concern known as M. O. Warner's?
A. Yes sir.
Q. And the retail business?
A. That is the Thrifty Market in the Brickyard Addition.
Q. Formerly known as Donley's Store or Restaurant?
A. Yes sir.
Vol. I Q. On the 4th of March, of this year, did you
5/25/67 have occasion to be at the Thrifty Market or
page 113 } Donley's Restaurant in the Brickyard Addition?
A. Yes sir.
Q. Do you know the defendant here, Delbert Lewis?
A. Yes sir, I do.
Q. On the evening of that day, did you have occasion to see Delbert Lewis?
A. Yes, I did, sir.
Q. Where did you see him, Mr. Warner?

Andy Warner

A. In our store.
Q. Do you recall the approximate time?
A. Yes sir, I do. It was approximately, like you say, about 10 minutes to 8:00, quarter till, 10 minutes till.
Q. 10 minutes or 15 minutes to 8:00, something like that?
A. Yes sir.
Q. Did you talk to him or not?
A. Yes, I did.
Q. Was there anyone with him or do you know?
A. No, there wasn't. He was by himself.
Q. Do you know whether he walked, whether he rode, or how he got there?
A. He was there in a car, yes sir.
Q. Did you notice the car?
A. Yes, I did, sir.
Q. What kind of car was it?
A. It was a 1967 Alpine with a red bottom and a black convertible top.
Q. That is a pretty sharp looking sports car?
A. Yes, it is. It is very outstanding.
Q. Is it a type of car that would attract the attention of the average man?
A. Yes, it is.
Q. Did you happen to go out to look at it?
Mr. Coates: Your Honor, Mr. Harman is leading the witness. I will have to object.
The Court: I sustain the objection to the leading of the witness. Let him testify.
Q. Did you go look at the car or not?
A. Yes sir, I went to the door and looked out at it but I didn't get in it.
Q. About how long was the defendant, Delbert Lewis, there at your place of business?
A. Like you say, approximately ½ hour.
Q. Approximately ½ hour?

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Mr. Coates: The witness keeps answering the question, telling Mr. Harman like he says, and the witness is testifying, and I would assume.
The Court: You can cross examine him on that, why he says that.

By Mr. Harman:
Q. You say approximately ½ hour?

A. Yes sir.

Q. Do you know whether he did any business with you or not?

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A. Yes, he did.

Q. What did he buy?

A. Aspirin, Bayer Aspirin, to be exact.

Q. What consumed the rest of the time, Mr. Warner?

A. Just us talking. He stood and drank a coke. We just talked about nothing in particular. I couldn't exactly tell you what it was, but we always talk when he comes in the store. He comes in quite often.

Q. And you say he was there approximately ½ hour?

A. Yes sir.

Mr. Harman: Cross examine.

CROSS EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. Mr. Warner, I assume from your answers that you have been having some conversation with Mr. Harman?

A. No sir, I haven't. I have never talked to Mr. Harman at any one time, at all. This is the first time.

Q. You have never talked to Mr. Harman?

A. No sir.

Q. Well, why do you make answers "like you say" when Mr. Harman hasn't said?

A. He said approximately, and I said approximately.

Mr. Harman: If the Court please, what is he trying to do, badger the witness. I know he is on cross examination. He has asked the question, and he got an answer, and now he is continuing to pursue the matter.

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The Court: The man is on cross examination.

Mr. Harman: That is right.

The Court: I overrule your objection.

Mr. Harman: Note the exception.

By Mr. Coates:

Q. Did Mr. Harman say that he stayed at your store about ½ hour?

A. No sir.

Q. You answered Mr. Harman's question, "like you say, Mr. Harman, he stayed about ½ hour."

Andy Warner

Mr. Harman: May it please the Court, now he has asked this witness one time if he had ever talked to me, and the witness said that he had never talked to me about this, and he continues to badger the witness. We object to that line of questioning. It is improper in this case.

The Court: The objection is overruled. He is on cross examination.

Mr. Harman: Note the exception.

By Mr. Coates:

Q. Will you answer, Mr. Warner?

A. The reason I answered in that way is because it was an, approximately ½ hour.

Q. Why did you say, "like you say"?

A. That was the question asked.

Q. When Mr. Harman asked the question, did he say, "was he there ½ hour"?

A. I don't remember exactly how he stated it. No.

Q. Did you take out your watch when this young man got there?

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A. No sir. I carry a watch on my wrist.

Q. Did you look at your watch?

A. No sir. I had been looking at my watch. I always did when I worked over there. I had to work 14 hours a day for 7 days a week, and I had a habit of looking at my watch.

Q. Well, when did you look at it before he got there?

A. As a matter of fact, just a few minutes before he got there. It was right at a quarter—I couldn't tell you exactly the time but it was about 15 or 10 till 8:00 because we had been scrubbing the floors.

Q. You couldn't tell us the exact time he got there. Is that right, Mr. Warner?

A. I could tell you that it was about 10 or 15 minutes till 8:00.

Q. But you couldn't tell the exact time?

A. Well, I don't think anyone could. No.

Q. And you couldn't tell us the exact time that he left, either?

A. No, but I could come pretty close, I believe.

Q. Did you say that he left at 7:50 in County Court?

A. Pardon.

Q. Did you say in County Court that he left at 7:50?

A. No, I didn't.

Q. Did you testify in County Court?
A. Yes, I did.
Q. Did you say at that time that he left at 7:50?
Vol. I A. No, I didn't.
5/25/67 Q. You are positive?
page 118 } A. You mean 10 minutes till 8:00?
Q. 10 minutes till 8:00?
A. No, I didn't.
Q. You are positive that you didn't?
A. Yes, I am.

Mr. Coates: That is all.
The Court: Stand aside. Stand aside.

(Witness excused)

Mr. McFarlane: Doug Donley.

WHEREUPON,

DOUG DONLEY was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. J. K. McFarlane, of Counsel for the Defendant:
Q. State your name.
A. Doug Donley.
Q. How old are you, Doug?
A. I was 17 May 17th.
Q. You live there in Richlands, do you?
A. Yes sir, that is right.
Q. What do you do, Doug?
A. Well, for the last 4 months, I have been working for Andy Warner in his grocery store.

Mr. Coates: I didn't understand you.
The Court: You work for whom?

Vol. I
5/25/67 A. I have been working for Andy Warner.

page 119 } The Court: Face this way, and speak a little more distinctly, so that we can all hear you.

A. O-k.

By Mr. McFarlane:

Q. Were your parents the ones who owned this place of business prior to the time that Andy took it over?

A. Yes sir, that is right.

Q. Doug, I will ask you whether or not you were at a, I believe, they called it Donley's Restaurant at that time—were you there on the night of March 4th of this year?

A. Yes sir, I sure was.

Q. Did you see Delbert Lewis any time there that night?

A. Yes sir, I sure did.

Q. What was he doing there? Do you know?

A. Well, all I know is he came in and bought a box of aspirins and an RC but when he came there, I was in the back room. I was back there working, and when I came out, this was on scrub night. This was on Saturday night. We always scrub on the weekend night, and so, it was about 5 minutes till 8:00, and I had been working since about 7:00 that morning, and I always get around to watching the clock, you know, because it was almost closing time. We always close at 9:00, and when he came out, or when I came out, I just glanced up at the clock, whether they was ready to start fixing the mop water, and it was 5 minutes till 8:00, and Delbert was up there.

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Q. How long did he stay?

A. Well, he stayed until 15 after 8:00.

Q. How do you know it was 15 after 8:00?

A. Well, because when Delbert left, I asked Andy if it was time to start mopping, and he said that it was. He looked back there at the clock and said yes.

Mr. McFarlane: Cross examine.

CROSS EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. You say you are a clock watcher, Doug?

A. Yes sir, I sure am when it gets around to about 9:00.

Q. You are more intrested in watching the clock than working?

A. No sir, I wouldn't say that.

Q. And how long had you been working there that day?

A. Well, I had been working since about 7:00 o'clock that morning.

Linda Griffith

Q. Been working since 7:00 that morning?
A. Yes sir.
Q. And how old are you?
A. I am 17 years old.
Q. How old were you then?
A. I was 16.
Q. And you remember when this boy was in there?
A. Yes sir, I sure do.
Q. You are pretty good friends?
A. Well, we are fair friends, I guess.
Vol. I Q. And what about his younger brother?
5/25/67 A. Who, Reece?
page 121 } Q. Yes.
A. Yeah, he is about like Delbert.
Q. And you noticed all these times, kept track of them, and kept them in mind?
A. Yes sir.
Q. And, of course, you haven't talked about this case or discussed it since that time?
A. No sir, sure haven't.

Mr. Coates: That is all.
The Court: Stand aside.

(Witness excused)

Mr. McFarlane: Linda Griffith.

WHEREUPON,

LINDA GRIFFITH was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. James W. Harman, Jr., of Counsel for the Defendant:
Q. Your name is Linda Griffith? Is that right?
A. Yes sir.
Q. How old are you, Linda?
A. I am 19.
Q. Where do you live?
A. I live in Richlands, Virginia, on Franklin Avenue.
Q. Do you know the defendant here, Delbert Lewis?
A. Yes sir.

Linda Griffith

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Q. About how long have you known Delbert?
A. I have gone all through school with him and ever since I was small.
Q. Do you work, Linda?
A. Yes sir.
Q. Where do you work?
A. I work at the Hill Top Drive-In, Doran, Virginia.
Q. How long have you worked there?
A. Since December 29th.
Q. What is the nature of your employment at Hill Top?
A. I am a curb girl.
Q. Linda, I call your attention to the evening of the 4th of March of this year. Were you working on that evening, Saturday evening?
A. Yes sir.
Q. Do you recall whether or not you saw Delbert Lewis on that evening?
A. Yes sir, I did.
Q. Where did you see him?
A. He came—

Mr. Coates: Linda, I beg your pardon, but would you look forward? When you turn your head completely from me, I just can't hear you at all.
Mr. Harman: Everybody has to hear you, Linda, so face the Judge and then we can all hear.

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Mr. Coates: Face the Judge and not Mr. Harman.

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By Mr. Harman:
Q. Where did you see him on that evening?
A. He came to the Hill Top.
Q. Did he order anything?
A. Yes sir. He ordered a strawberry milkshake.
Q. A strawberry milkshake. Do you have any idea as to the approximate time that he came there on that night?
A. Yes sir. It was approximately 15 to 9:00.
Q. Approximately 15 to 9:00?
A. Yes sir.
Q. Did he get out of the car or stay in the car?
A. He stayed in the car.
Q. Do you have any idea how long he was there?
A. He was there until 9:30.

Linda Griffith

Q. Other than taking his order, did you carry on any conversation with him?
A. Yes sir, I did.
Q. Once or several occasions?
A. Well, on several occasions. I would go by the car and say something to him, talk to him.
Q. Was there anyone with him?
A. No sir.
Q. Did you see him when he left?
A. Yes sir, I did.
Q. Do you know which direction he drove when he left?
A. He drove down toward Raven when he left.
Q. And you say he left at approximately 9:30?
A. Yes sir.

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Mr. Harman: Cross examine.

CROSS EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:
Q. Linda, you say you live on what Avenue?
A. Franklin Avenue.
Q. That is the same street that Delbert lives on, isn't it?
A. Yes sir.
Q. And are you related to Delbert?
A. Yes, I am.
Q. What is the relation?
A. We are second cousins.
Q. Of course, you are kin and life-long friends?
A. Yes sir.
Q. And he got to the drive-in about 8:45, you think?
A. Yes sir.
Q. That is the approximate time?
A. Yes sir.
Q. You didn't look at your watch, and by approximate time he left about 9:30?
A. Yes sir.
Q. That is the time, the best you can fix it in your own mind, after you thought about it later on?
A. Well, it was 9:30 when he left.

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Mr. Coates: That is all.

page 125 } RE-DIRECT EXAMINATION

By Mr. James W. Harman, Jr., of Counsel for the Defendant:
Q. Linda, one other question. You are, also, a sister to Mr. Floyd Griffith?

Mr. Coates: Your Honor, please, I think that is an improper question.
A. Yes sir.
The Court: I didn't get the question.
Mr. Harman: I asked her if she was not a sister to Floyd Griffith, Justice of the Peace, at Richlands?
The Court: Mr. Floyd Griffith.
Mr. Harman: Yes sir.
The Court: All right.
A. Yes sir, I am.
Mr. Harman: That is all.
The Court: Do you have any other kin folk in the Town of Richlands?
A. Yes sir, quite a few.
The Court: Stand aside.

(Witness excused)

Mr. McFarlane: Peery Johnson.

WHEREUPON,

PEERY JOHNSON was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Vol. I 5/25/67 By Mr. J. K. McFarlane, of Counsel for the Defendant:
page 126 } Q. I believe your name is Peery Johnson?
A. Yes sir.
Q. Where do you live, Peery?
A. Raven.

Mr. Coates: I didn't catch your name. I am sorry.
A. Peery Johnson.
Mr. McFarlane: Look at the Court and the Jury and talk out loud, Peery.

Peery Johnson

By Mr. McFarlane:
Q. What do you do?
A. Curb boy.
Q. What?
A. Curb boy.
Q. Curb boy. Where?
A. Ovie's Drive-In.
Q. Ovie's Drive-In. I will ask you, Peery, if on the night of March 4th, this year, if you saw Delbert Lewis, here?
A. Yes, he was there.
Q. Are you acquainted with Delbert?
A. No sir. Well, I have met him. I hadn't met him until about a month before he came down that night.
Q. You say you saw him on this night?
A. Yes sir.
Q. Where did you see him?
A. At Ovie's Drive-In.
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Q. What did you do, or what did he do there?
A. He came in and asked me if I had seen Glen Allen Hess and I told him that I hadn't. We talked about five minutes. It was time for the movie to break, and we were starting to get busy, or we would have talked longer.
Q. It was time for the movie to break. What time does it break?
A. It usually breaks about 9:30.
Q. And he left at that time?
A. Yes.
Q. You are positive as to the time that you talked to him?
A. It was, yes, it was at least 9:30 or maybe it was just a few minutes after.

Mr. McFarlane: Cross examine.

CROSS EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:
Q. What time did he get down to the drive-in, Peery?
A. About 9:30.
Q. About 9:30, and stayed for a while and left?
A. Stayed about 5 or 10 minutes.
Q. You talked to him?
A. Yes sir.
Q. He was looking for somebody, was he?

A. Yes sir.
Q. And he went on. Which way did he go when he left?
A. Towards Richlands.

Vol. I
5/25/67 Mr. Coates: That is all.

page 128 } RE-DIRECT EXAMINATION

By Mr. J. K. McFarlane, of Counsel for the Defendant:
Q. Just a minute. Did you see him when he pulled out?
A. Yes sir.
Q. Did he proceed on towards Richlands immediately?
A. He had to wait on a train.
Q. Oh, he had to wait on a train. He was heading back towards Richlands?
A. Yes.

Mr. McFarlane: All right.
The Court: Stand aside.

(Witness excused)

Mr. Harman: Jim Edwards.

WHEREUPON,

JAMES P. EDWARDS was called as a witness, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. James W. Harman, of Counsel for the Defendant:
Q. You are James P. Edwards. Is that right?
A. Yes sir.
Q. Where do you live, Mr. Edwards?
A. Cedar Bluff.
Q. What is your business or occupation?
A. I own a contracting firm and appliance retail outlet in Richlands.
Vol. I
5/25/67 Q. Do you know the defendant, Delbert Lewis?
page 129 } A. Yes sir.
Q. Is he an employee of yours?

A. Yes sir.

Q. Approximately, how long has he worked for you, Mr. Edwards?

A. One year.

Q. Mr. Edwards, are you generally familiar with the people in the Richlands area?

A. Yes sir.

Q. Do you know generally all your employees there at Barnett, Inc., and your contracting concern?

A. Yes sir.

Q. Do you know the general reputation of the defendant, Delbert Lewis?

A. Yes sir.

Q. In and among his associates as being a peaceful and law abiding citizen?

A. Yes sir.

Q. Is that reputation good or bad?

A. Very good.

Q. Do you know the reputation of Delbert Lewis among the community and his associates as being a truthful citizen?

A. Yes sir.

Q. Is that reputation good or bad?

A. Very good.

Vol. I
5/25/67 Mr. Harman: Cross examine.

page 130 } CROSS EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. Have you ever heard it discussed, Mr. Edwards?

A. No sir.

Mr. Coates: That is all.

The Court: Stand aside.

(Witness excused)

Mr. McFarlane: Mrs. Daisy Pruett.

Mrs. Daisy Pruett

WHEREUPON,

MRS. DAISY PRUETT was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. J. K. McFarlane, of Counsel for the Defendant:
Q. Are you Mrs. Daisy Pruett?
A. Yes sir.
Q. Where do you live, Mrs. Pruett?
A. I live at Richlands.
Q. Do you know Delbert Lewis here?
A. Yes sir. I have known him for about four years.
Q. What is his general reputation in the community there as to a peaceful, law abiding citizen.

Mr. Coates: I believe Mr. McFarlane has failed to ask her if she knows the people in the community where he lives.
The Court: You had better ask whether or not if she knows the people. Ask her whether—

Vol. I
5/25/67 A. Well, I think—

page 131 } The Court: Just a minute. Ask her if she knows the people generally in the neighborhood where the defendant lives.

By Mr. McFarlane:
Q. Do you know the people—
A. Yes sir. I know most of the general, everybody in Richlands. Everybody knows me.
Q. What is his—

The Court: Ask her if she knows the reputation.

By Mr. McFarlane:
Q. Do you know his reputation? Do you know the reputation of Delbert Lewis?
A. Well, I do know that he works.

Mr. Coates: Now, your Honor, please.

A. He works all the time. He is a good boy. He lives right next door to us. He has lived there four years. I have never heard any bad thing about him, nothing.

The Court: Mr. McFarlane, you had better frame your question properly, and then she can answer in response to that.

A. His general reputation is real good.

The Court: The first question, I will frame it for him. Do you know what his general reputation is for being a peaceful and law abiding citizen?

A. I have never heard of him being in any trouble or anything unlawful or anything.

Vol. I
5/25/67 The Court: Now, Mr. McFarlane, you may proceed.

page 132 } By Mr. J. K. McFarlane:

Q. Do you know his reputation—

A. Well, his reputation—

Q. Wait a minute—as to truth and veracity, his reputation in the community as to being a truthful person?

A. Well, practically, he was a very small boy when he lived there, first came there, moved there and bought this property next to us, so he was small. He can grow up in four years, so he has grown up quite a bit in the last four years, and he really works so much I can't see why he could have any time to be very bad because he is very busy all the time.

The Court: The question is as to his reputation as to truth and veracity.

A. His reputation is clean and nice.

By Mr. McFarlane:

Q. As to truth?

A. That is the truth.

Q. As to being a truthful person?

A. Yes.

Mr. McFarlane: That is all.

Mr. Coates: No questions.

The Court: Stand aside.

(Witness excused)

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5/25/67 Mr. Harman: Dempsey Smith.

page 133 } WHEREUPON,

DEMPSEY SMITH was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. James W. Harman, Jr., of Counsel for the Defendant:
Q. Your name is Dempsey Smith?
A. Yes.
Q. Where do you live, Mr. Smith?
A. Richlands.
Q. Do you know the defendant, Delbert Lewis?
A. Yes, I do.
Q. About how long have you known him?
A. All his life.
Q. Mr. Smith, do you know the people in the area in which Delbert Lewis lives, the area of Richlands?
A. Yes, I do.
Q. Do you know the general reputation of Delbert Lewis in his community as being a peaceful law abiding citizen?
A. Yes.
Q. Is the reputation good or bad?
A. Good.
Q. Do you know the reputation of Delbert Lewis in that community as to being, as to his truth and veracity?
A. Yes sir. It is good.
Vol. I Q. It is good?
5/25/67 A. Yes sir.

page 134 } Mr. Harman: Cross examine.

CROSS EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:
Q. Have you ever heard his reputation for truth and veracity discussed by the people in the community?
A. No sir, I haven't.

Mr. Coates: That is all.
The Court: Stand aside.

(Witness excused)

Mr. McFarlane: Mr. Hagy.

Thomas Witten Hagy

WHEREUPON,

THOMAS WITTEN HAGY was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. J. K. McFarlane, of Counsel for the Defendant:

Q. State your name, please.
A. Thomas Witten Hagy.
Q. What do you do, Mr. Hagy?
A. I am presently Principal of Richlands High School.
Q. Are you acquainted with Delbert Lewis here?
A. Yes sir.
Q. Do you know the people in the community in which Delbert lives?

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A. I have right many patrons of my school living in that vicinity. Yes sir.
Q. What is his general reputation in that community as to being a peaceful, law abiding citizen?
A. I think he has a fairly good reputation.
Q. What is his reputation as to truth and veracity?
A. I always found him to be a—

Mr. Coates: If your Honor, please, not what he knows—
The Court: Not what you know, personally, but his reputation, if you know.
A. It is good as far as I know, sir.

By Mr. McFarlane:

Q. How long was he a student of yours, Mr. Hagy?
A. I think I had him around 8 years as Principal of the Richlands Elementary School and 1 year while I have been Principal of the Richlands High School.

Mr. McFarlane: Cross examine.

CROSS EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. Have you ever heard his reputation discussed by the people in his community?
A. No sir.

Mr. Coates: That is all.
The Court: Stand aside.

(Witness excused)

Mr. Harman: The Defense rests, your Honor.
Vol. I The Court: Anything else, Mr. Coates?
5/25/67 Mr. Coates: Yes sir. Call Edward Lee Dowdy.

page 136 } WHEREUPON,

EDWARD LEE DOWDY was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:
Q. Please state your name.
A. Edward Lee Dowdy.
Q. Where do you live, Mr. Dowdy?
A. I live at Hill Creek near Richlands.
Q. Near Richlands?
A. Yes sir, in Richlands.
Q. Mr. Dowdy, on March 4th of this year, were you employed as a police officer for the Town of Richlands?
A. Yes sir, I was.
Q. On the night of that day, were you on duty?
A. Yes sir.
Q. Do you recall—do you know Delbert Lewis?
A. I know him, now, sir. I didn't know him at that time.
Q. Do you recall being on the lookout for a certain white Corvair automobile?
A. Yes sir, I do.
Q. Do you presently have that license number with you?
A. Yes sir.
Vol. I Q. Did you see that vehicle?
5/25/67 A. Yes sir.

page 137 } Mr. Harman: If it please the Court, I don't believe the Commonwealth Attorney has laid the proper foundation for rebuttal or laid any foundation for being on the lookout for a white Corvair automobile. This is rebuttal evidence, and he has to come in with something proper to show that it is rebuttal.

Edward Lee Dowdy

Mr. Coates: Your Honor, please, in the examination of Mr. Delbert Lewis, I asked him if at—

The Court: Maybe we had better let the jury stand aside here. Gentlemen, stand aside for a minute, please.

(Whereupon, the jury returned to their room.)

Mr. Coates: I take it your Honor, in rebuttal evidence, the purpose of it is to refute a statement of evidence.

The Court: If you lay a proper foundation.

Mr. Coates: You can offer rebuttal evidence without necessarily impeaching him.

The Court: Well, what is your purpose here?

Mr. Coates: This witness—

The Court: You stated you asked Delbert something.

Mr. Coates: I asked him if he did not meet a police car at 10:30 or 10:20, I believe it was, in front of Southwest Virginia Tire *Comaany*.

Mr. Harman: Now, there was no time limit mentioned in Mr. Coates' question. I remember him asking the question but he did not mention any time.

The Court: Can you go back to your notes there on cross examination of Delbert?

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The Reporter: Yes sir.

page 138 } (Whereupon the Reporter read as follows:

"QUESTION: Do you recall meeting a Town of Richlands car at the Southwest Tire Company?

ANSWER: No sir, I do not. I was told that one had followed me home but when I looked through my rear view mirror when I started to cross the crossing, they was no car behind me, and I didn't pass any.

QUESTION: You didn't meet one at the Southwest Virginia Tire Company?

ANSWER: No sir, I did not. They was no car in behind me as far as my rear view mirror could reach.

QUESTION: Well, you didn't meet one coming toward Raven as you were coming towards Richlands. That is what I mean, what I am having reference to. I say, you didn't meet one coming West as you were coming East, coming North as you were coming South?

ANSWER: As I was going home?

QUESTION: Yeah.

ANSWER: I didn't meet any police car that I know of.")
The Court: He was looking for this number, and he saw a car. It speaks for itself. Tell the jury to come back.

(Whereupon, the jury returned to the Courtroom.)

The Court: All right, gentlemen, proceed.
Mr. Coates: Mrs. Wilson, what was that last question?

(Whereupon, the Reporter read as follows:

Vol. I "QUESTION: Did you see that vehicle?" That
5/25/67 was the last question, and the answer was "Yes."

page 139 } By Mr. Coates:
Q. Where did you observe this vehicle?

Mr. Harman: I hate to delay this but he hasn't even identified the vehicle by anything yet.
The Court: Identify it by license number or—

Q. What was the license number that you were looking for?
A. I wasn't looking—I didn't have the number of the vehicle at that time. When I seen the vehicle, I called the police station by radio and asked for the license number.
Q. And did you receive the license number?
A. Yes sir.
Q. Did you get the license number off the vehicle you met?
A. Yes sir. I looked back through the back glass and read the number. It had a very bright tag light on the back of it.
Q. Had a very bright tag light?
A. Yes sir.
Q. And what was the number?
A. It was 586-705, Virginia, '66.
Q. What did you do, then?
A. After I called the police station and got the license number, I knew that it was the same car that I had just passed. Sergeant Spangler was driving the car, and we turned around and went back East and tried to overtake it.
Q. Did you overtake it?
A. No sir, did not.
Vol. I Q. What time was this?
5/25/67 A. It was about 10:20.

Edward Lee Dowdy

page 140 } Mr. Coates: That is all.

CROSS EXAMINATION

By Mr. James W. Harman, Jr., of Counsel for the Defendant:

Q. Mr. Dowdy, where did you see this car?

A. When I first seen the car, it was near the Southwest Tire Company.

Q. And you were going which way?

A. I was going West.

Q. And which way was this car going?

A. This car was coming East.

Q. And you say you had not received any report on any license number, to be on the lookout for a car with license number, and so on?

A. I didn't have the license number.

Q. What called your attention to this car?

A. I was watching for a Corvair of that description.

Q. Green color, red, black or what?

A. No sir. I was watching for a yellow or light colored Corvair.

Q. What color car was this that you met?

A. It was a white Corvair.

Q. It wasn't a yellow one, was it?

A. No sir.

Q. Now, then, Mr. Dowdy, let me ask you one further question. The cars were proceeding in opposite directions, and as—were you driving or was the other man driving?

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A. The other man was driving.

page 141 } Q. As you passed the car, you looked through the back glass and the light, the tail light was so bright you could read the tag?

A. Yes sir.

Q. Now, then, were you able to read all six numbers?

A. Yes sir.

Q. And at the Southwest Tire Company, you met it and the car proceeded on East and you all turned around and couldn't find the car?

A. We didn't turn right there where it happened.

Q. Well, where did you go?

A. We went down West of Mullins Motel there and turned around. The reason we were slow in doing this was while I was getting the license number back from the police station.

Edward Lee Dowdy

Q. You could have certainly turned around at most any place along there, couldn't you, Mr. Dowdy?
A. Yes sir.
Q. This was at 10:20. How do you fix that time?

The Court: What time did you say?
Mr. Harman: He said 10:20.

By Mr. Harman:
Q. That is what you testified to, wasn't it, Mr. Dowdy?
A. Yes sir.
Q. How do you fix the time at 10:20?
A. We were in the police station getting information on this car. I was supposed to have got off duty at 10:00, and I asked Sergeant Spangler to take me home at 10:15. He was drinking, had part of a cup of coffee, and he finished his coffee, and we left.

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Q. And you were on your way home then?
A. Yes sir.
Q. You left at 10:15 and around 10:20 you say you saw the car at Southwest Tire Company?
A. Yes sir.
Q. On a heavily traveled Saturday night. Lots of traffic, wasn't there?
A. I would say the traffic was normal for Saturday night.
Q. Well, in Richlands, that is a lot of traffic compared to Tazewell, wouldn't you say? A lot of cars on the street.
A. I don't know anything about the Tazewell traffic situation. There were several cars.
Q. Was this car in a line of cars or off by itself?
A. There was traffic behind the car and to the best of my memory, it was quite a ways behind the car, and there was traffic that got between us and the car when we turned.
Q. You have been fired from the Richlands Police Department?

Mr. Coates: Your Honor, please, now.
The Court: I sustain the objection.
Mr. Coates: Mr. Harman knows that is improper.
Mr. Harman: I know there is—
The Court: I sustain the objection.
Mr. Harman: That is all.
The Court: Stand aside.

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page 143 } Mr. Coates: Mr. Spangler.

WHEREUPON,

DONALD SPANGLER was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. I believe that your name is Donald Spangler?

A. Yes sir.

Q. What is your official position in the Town of Richlands?

A. Police Sergeant.

Q. Mr. Spangler, were you a police Sergeant on March 4, 1967?

A. Yes sir.

Q. Did you have occasion to be on duty on the evening of that day?

A. Yes sir.

Q. On that evening, did you have occasion to proceed Westwardly along Front Street toward the Hill Creek Road?

A. Yes sir.

Q. About what time of the day or night did you go along there?

A. Approximately, I believe, about 10:20.

Q. What time did you reach the station, if you know?

A. It was shortly after quarter, within minutes

Vol. I after a quarter after 10:00.
5/25/67 Q. Where were you going?
page 144 } A. We were, Officer Dowdy—his time was up. His shift was pulled at 10:00, and I was taking him home.

Q. Sergeant Spangler, I will ask you if you were on the lookout for a yellow or white color Chevrolet Corvair automobile?

A. Yes sir.

Q. At anywhere along the route did you observe such an automobile?

A. Yes sir.

Q. White?

Donald Spangler

A. Yes sir.
Q. I said white?
A. Yes sir, white.
Q. What?
A. A light color Corvair.
Q. But where did you observe it?
A. At front of, along about the front of the Southwest Tire Company.
Q. Did you check the license number of the vehicle?
A. Officer Dowdy checked the vehicle as we passed it. He checked it from the rear.
Q. Officer Dowdy checked it from the rear?
A. Yes sir.
Q. Then, what did you do?
A. He called the Police Department and asked them to repeat, or to give us the number of the vehicle in question, that they were looking for.

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Q. Did you get that information?
A. Yes sir.
Q. Do you have an independent recollection of what the license number was on the vehicle and what they gave you?
A. The number was 586-705, I believe.

Mr. Coates: That is all.

CROSS EXAMINATION

By Mr. J. K. McFarlane, of Counsel for the Defendant:
Q. How do you remember this number so well?
A. Well, I remembered it at that time for quite some time but I have refreshed my memory since.
Q. When you got a report out to look for a car, what color Corvair did they tell you to look for?
A. Well, the first, they said a yellow.
Q. Was this car yellow?
A. No. It was a light color car but under the lights you couldn't tell exactly what color it might be.
Q. Well, what color was it, white or yellow?
A. It was an off-white, I would say is what it is.
Q. Now, there had been a lot going on around town hall there, hadn't there, for a right smart little bit?
A. Well, I wasn't in there for too long. We got the call to come in, and they give us that information, and we left out

shortly after so I don't know what all was going on beforehand.

Q. Had the Bowling boys been brought in at that time?

A. Yes sir. They were there at that time.

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Q. They were there?

A. Yes sir.

Q. How long had they been there before you went out?

A. They were there when I went in, and they were still there when I went out. I don't know the exact length of time.

Q. Now, when you came in, what time was it when you got in, when they called you in?

A. When they called us in—well, one of the officers that went off at 10:00, I had just let him off at home when we got the call to come back to the station. It was within minutes after 10:00.

Q. How long did you stay there?

A. Just a short while. We got what information that we did get from the Dispatcher and we—

Q. What did you do while you were there waiting?

A. Well, he give us what information he had at that time on the vehicle in question.

Q. Did you drink any coffee?

A. Yes sir. I drank about maybe ½ cup of coffee while he was telling us.

Q. But you checked your time? You made certain as to the time you got in and the time you left. Do you do that all the time?

A. At that time, what brought the time out was Officer Dowdy, in a kidding way, looked at the clock and said, "How about taking me home? I have worked 15 minutes over-time." He was just a joking. That is how the time came out.

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Mr. McFarlane: I believe that is all.

Mr. Coates: That is all.

The Court: Stand aside.

(Witness excused)

Mr. Coates: Mr. E. H. Tucker.

E. H. Tucker

WHEREUPON,

E. H. TUCKER was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:

Q. Please state your name.

A. E. H. Tucker.

Q. What is your occupation, Mr. Tucker?

A. Special Investigator for the Norfolk & Western Railway Company.

Q. Out of what office do you work?

A. Bluefield, West Virginia.

Q. Out of the Division Headquarters?

A. Yes sir.

Q. Mr. Tucker, are you familiar with the records in the Division Headquarters?

A. Yes sir, I am.

Q. Are you familiar with the schedule, train schedules on the Norfolk & Western Branch of the Division?

A. I am familiar with the procedure as it is kept.

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Q. Will you outline the procedures to the jury and tell the jury how they keep the records of the movement of trains.

A. We have what is known as a Chief Dispatcher in Bluefield, in the Chief Dispatcher's office. In that office, we have a train dispatcher, and that dispatcher is situated at a board whereby he can designate the movement of trains on any given point along the line. In this instance, on the Clinch Valley, we have a Clinch Valley dispatcher. He is situated so that he can tell at any time, most any time, exactly where a train is, the movement of that train, what he does, when he moves, and all pertaining to it.

Q. Are official records of the company kept of the movement of these trains?

A. That record is required by the I. C. C. Interstate Commerce Commission.

Q. Do you have the, as inspector or Special Agent or Special Investigator for the Norfolk & Western Railway, access to those records?

A. I have.

Mr. Harman: If it please the Court, at this time we want to object to the records coming in through Mr. Tucker, as merely a Special Agent. If the dispatcher keeps the records, the best evidence rule requires that the dispatcher be here. Now, Mr. Coates could have had the dispatcher here. Instead, he gets the railroad detective to come in.

The Court: Are these the original records of the company?

A. Yes sir. They are 24 hour records kept every day.

Mr. Harman: Now, the dispatcher, who made the records, can introduce it but not the railroad detective, who has nothing to do with the record. We object to any further testimony as to this. I don't know what he is going to say but I know it is coming improper.

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The Court: I will have to sustain that objection. I think the man who made the record will have to be here to testify. You may call and see if you can get him here.

Mr. Coates: All right. If the Court will give me an opportunity, I will call. Will you call him, Mr. Tucker?

The Court: Where does he live, Mr. Tucker?

Mr. Tucker: Bluefield.

The Court: See if you can get him here, get him up here right away.

The Court: (Speaking to the jury) You gentlemen may retire to your room.

(Whereupon, the jury retired to their room.)

The Court: If this is going to be the last witness, while we are waiting for him to come, perhaps, we could go over the instructions.

(Whereupon, the Court and Counsel retired to Chambers to discuss the instructions, as follows:

The Court: Let me see your instructions.

Mr. Coates: This will be Instruction No. 1.

The Court: All right. That will be No. 1. Let's see the next one. That will be Instruction No. 2. That is all right.

Mr. Coates: This is Instruction No. 3.

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The Court: Do you have any others?

Mr. Coates: This is the last.

The Court: That will be No. 4. Instruction No. 4 given. Now, let's see what the Defense has.

Mr. Harman: Will this be No. A?

The Court: Yes sir. No. A given.
Mr. Harman: This is No. B.
The Court: That is all right. Instruction No. B given.
Mr. Harman: This will be No. C.
The Court: All right. Instruction No. C given.
Mr. Harman: And this is No. D.
The Court: Instruction No. D given.
Mr. Harman: This is the last one. Instruction No. E.
The Court: No. E given.
The Court: Is that all, gentlemen?
Mr. Coates: Yes sir.
Mr. Harman: Yes sir.

(Whereupon, the discussion of instructions by Court and Counsel in Chambers was concluded, after which the following proceedings were had:)

The Court: Bring the jury in, Sheriff.

(Whereupon, the twelve jurors were returned to the Courtroom, after which the following proceedings were had:)

The Court: Are you ready to proceed, Mr. Coates?
Mr. Coates: Yes sir.
Vol. I The Court: All right, call your witness.
5/25/67 Mr. Coates: Mr. Duff.

page 151 } WHEREUPON,

BILLY DUFF was called as a witness, and after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Wade S. Coates, Attorney for the Commonwealth:
Q. Please state your name.
A. Billy Duff.
Q. What is your occupation, Mr. Duff?
A. Train Dispatcher, Norfolk & Western Railway Company.
Q. Were you a Train Dispatcher for the Norfolk & Western Railway Company on March 4, 1967?
A. Yes sir.
Q. What division or section do you work on?

Billy Duff

A. The Clinch Valley District of the Pocahontas Division.
Q. Clinch Valley District?
A. Yes sir.
Q. On that date, what shift did you work?
A. 3:00 P.M. to 11:00 P.M.
Q. Mr. Duff, I will call, will ask you to explain to the jury the system used by the Norfolk & Western Railway Company in keeping track of the movements of trains in the Clinch Valley District.
A. The movement of trains in the Clinch Valley District of the Norfolk and Western, the entire movement is controlled from a traffic control system located at Bluefield. This is a series of switches and signals, all controlled by the Dispatcher at Bluefield, and we have charge of the entire district, from Bluefield to Norton and from Iaegar to Cedar Bluff. This system is an electric air system. In other words, we have this central switch board and when the train starts out of Bluefield, he lights up my circuit at the Bluefield, Virginia, and we follow the movement of the train as each signal circuit is lit up by the train and as its rear passes over, then, of course, the light goes out, and we follow his movement along, and of course, if we have a train in the opposing direction, we can operate the switch to put the opposite train in the siding or vice versa, and it is all controlled by switches and signals from Bluefield.

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Q. Mr. Duff, on March 4, 1967, between 9:30 and 10:30 of the evening of that day, I will ask you what trains, if any, and what time the trains would have come by Doran, and you have your original sheet with you?
A. Yes sir.
Q. I you will show it to the jury and explain—
A. Gentlemen, this is a record used primarily by the railroad for a permanent record for all the trains that are moved on this district in a 24 hour period. It is a record primarily kept for the railroad and the Interstate Commerce Commission. This gives all the information pertaining to any trains originating on the Clinch Valley District. This particular sheet is dated March 4th. The trains on the right hand side are the Eastern bound, and the trains on the lefthand side are the Western. The only train that could possibly be—

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Q. Let me interrupt you. Did you personally keep this record between 3:00 and 11:00?

Billy Duff

A. Yes sir. I have my name up here from 3:00 to 11:00.
Q. You made those records?
A. Yes, between those hours.
Q. All right, go ahead.
A. This train is what we call the St. Paul train crew that left St. Paul at 5:30 P.M. and gets into Bluefield at 12:30 A.M. This train was by Finney at 8:30, stopped at Swords Creek and picked up 37 loads and 1 empty, and leaving Swords Creek with a total of 130 loads and 4 empties, and he didn't stop at Richlands. We had a West bound pusher waiting on him. He came right on through there and he wasn't stopped from Swords Creek until he got to Richlands. This train here, apparently, would have passed Doran about 10:05 or 10:10.

Mr. Harman: We object to his statement of "apparently would have passed Doran." He has a figure there showing when it left Finney, and when it left Richlands, and the other is purely supposition on Mr. Duff's part.

By Mr. Coates:
Q. Mr. Duff, how long have you kept records of this type?
A. 34 years.
Q. Are you able to ascertain from your years of experience of about where a train is at any given minute?
A. Yes sir, if it had been much different from that, we would have put it on the sheet if it had stopped.

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page 154 } The Court: Let him testify.

A. I would say that the train passed Doran in the neighborhood of 10:10 P.M. That would be fairly close.
Q. I believe you have a pusher that went by Richlands?
A. By Richlands at 10:15. It would have passed Doran at 10:20.
Q. And what did that pusher consist of?
A. Just four units.
Q. Four units?
A. Yes sir.
Q. Did you all keep a record of the weather that day?
A. Yes sir. The weather at 6:02 was cloudy, 66, at Norton, and cloudy, 63, at Bluefield, the midnight record.
Q. Were any other trains by during that period of time?

Billy Duff

A. No sir.

Mr. Coates: Your Honor, please, I would like to exhibit this to the jury but I do not desire to introduce it.

The Court: If it becomes necessary to introduce it as an exhibit, we can make a *zerox* copy of it.

Mr. Coates: You may cross examine.

Mr. Harman: If it please the Court, we would like to make a motion in Chambers.

The Court: Let the jury stand aside, and you can make it out here.

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5/25/67 (Whereupon, the jury retired from the Courtroom to their room.)

page 155 } The Court: All right.

Mr. Harman: The defendant moves that the evidence of Mr. Duff be stricken from the record for the reason that the Commonwealth Attorney never asked anything dealing with a specific time. Mr. Duff, without being asked, volunteered the information that the only train that could be affected in this case was a train that left Finney at 8:30. The Commonwealth Attorney never asked him relative to any particular time, whether it was morning or evening. Mr. Duff just volunteered the information. It would certainly indicate that—

The Court: Well, it would indicate that the Commonwealth Attorney talked to his witness.

Mr. Harman: That is right.

The Court: That is proper.

Mr. Harman: This witness had the entire record, and he came in and just volunteered the information about this. I don't know whether the witness, Mr. Duff, even knows what the case is about yet or not.

Mr. Duff: You are exactly right.

The Court: I overrule your motion to strike the evidence.

Mr. Harman: We note our exception.

The Court: All right. Do you want to cross examine?

Mr. Harman: I see no point in cross examining.

The Court: Is that all of this witness?

Mr. Coates: That is all, your Honor.

The Court: Stand aside.

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page 156 } The Court: All right, bring the jury back in.

(Whereupon, the jury returned to the Courtroom.)

The Court: Gentlemen, we have finished the evidence in this case and have considered the instructions. At one time I thought we would go on and try to finish this case this afternoon but it is 5:30, and you worked late yesterday. I had, also, thought about bringing you all back at 9:00 in the morning, but I believe we will wait until 9:30. I am going to release you all now. Please do not talk about this case with anyone or allow anyone to discuss it with you or in your presence. Come back in the morning at 9:30, and the gentlemen will argue the case, and then give it to you for your decision. Court is adjourned until 9:30 tomorrow morning.

(Whereupon, Court was adjourned until 9:30, Friday morning, May 26, 1967.)

MORNING SESSION—May 26, 1967—9:30 A.M.

(Whereupon Court was reconvened and the jury was brought into the Courtroom, and the following proceedings were had.)

The Court: You gentlemen of the jury turn around and listen to the instructions of the Court. Then you may listen to the argument of Counsel.

(Whereupon, the instructions were read to the jury by the Court, after which the closing arguments were presented by respective Counsel.)

Vol. I 5/25/67 page 157 } The Court: You gentlemen of the jury may now retire to your room to consider your verdict. Appoint one of your members as Foreman, and you have two cases, Indictment No. 1 and Indictment No. 2. The No. 1 indictment is with reference to Donald Peery Bowling, and No. 2 with reference to James Dexter Bowling. It will be necessary for you to return two verdicts. I have prepared four verdicts. After you have arrived at the verdicts in these cases, knock on the door and the Sheriff will bring you out.

(Whereupon, the jury retired to the jury room to consider their verdict.)

The Court: Let the record show that the jury, in open Court, returned a verdict of guilty in each of the two cases, fixing the punishment of one year in the penitentiary in each case.

Mr. Harman: May it please the Court, the defendant, by Counsel, moves the Court to set aside the verdict as contrary to the law and evidence. We further ask that due to the fact that there are other trials that we be given sufficient time to file our reasons in writing within a time that the Court may determine.

The Court: How long do you want—10 days?

Mr. Harman: I am going to be tied up in Court through the 1st of June.

The Court: Let's use our regular time of 21 days.

Mr. Harman: At this time, we would, also, advise the Court that the defendant is under bond. May he remain under the same bond until the Court has ruled on our motion?

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The Court: I don't think so. I think he had better stay with us. Sheriff, you may take charge of the defendant.

I, Catherine S. Wilson, a Shorthand Reporter, do hereby certify that I did appear at the time and place as specified in the caption hereof for the purpose of taking down in Shorthand Characters and transcribing into the English language the testimony as given by the foregoing witnesses; that I was first duly sworn by the Court to accurately and correctly take down and transcribe the said testimony; that the foregoing is a true and correct transcript of the said testimony; that I am neither Counsel for nor related to any of the parties hereto and have no interest in the matter whatsoever.

CATHERINE S. WILSON
Court Reporter

Received September 26, 1967.
VINCENT L. SEXTON, JR., Judge

Signed October 2, 1967.
VINCENT L. SEXTON, JR., Judge

Received again Nov. 3, 1967 and signed again this November 3, 1967 at request of defense counsel.
VINCENT L. SEXTON, JR., Judge

* * * * *

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* * * * *

The above-entitled matter came on to be heard on the 29th day of August, 1967.

BEFORE:
HONORABLE VINCENT L. SEXTON, JR., JUDGE.

APPEARANCES:
Wade S. Coates, Attorney for the Commonwealth, assisted by Mr. John W. McClintock, Jr.
J. K. McFarlane and James W. Harman, Jr., Attorneys for the Defendant.
The Defendant in person.

PROCEEDINGS:

The Court: All right, gentlemen, proceed.

By Mr. James W. Harman, Jr., Attorney for the Defendant:
If it please the Court, the defendant, Delbert Lewis, was tried on two indictments on the 25th and 26th days of May, 1967, by agreement of the Attorney for the Commonwealth and the defendant, and on both of those indictments a jury in this County found him guilty and fixed his punishment at two years in the penitentiary. At the time, we made a motion to set aside the verdict. We have filed our grounds in writing to set aside the verdict, our grounds being that the verdict was contrary to the law and the evidence and for after discovered evidence.

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We respectfully submit that the evidence of the Commonwealth is such that no reasonable man could actually believe the testimony of the two prosecuting witnesses. The Court was present at the time of the hearing and saw the two young men or boys, who testified, saw their manner, their demeanor, their intelligence, and it is respectfully submitted that the Court should set aside the verdict on that ground because it is clear that these boys could not know the full purport of what they were saying, and we submit that their testimony is actually incredible. We, also, submit that there was this

point brought out, and it was very clearly brought out, that neither of these boys could clearly and carefully identify the defendant at the outset, and to be very frank with you, one of the boys had difficulty in identifying him in the Courtroom, although he was sitting here at Counsel table with Mr. McFarlane and myself. The boy looked around, and it took him, it seemed like a long time, a matter of quite some seconds, before he was able to identify him. In fact, the Court will probably recall that he looked at a man sitting in the Courtroom for some length of time, trying to make up his mind. So, the identification, even in the Courtroom, is not clear. The identification at the Lewis home on the night in question, when the officer came, was such as to leave a very grave doubt that these boys were not prompted by someone to identify the defendant. Now, the evidence is clear that they said they were not sure, and they were taken out of the hearing of the defendant by one of the police officers and behind a police car, where he talked to them, and then they came back and the boys made a positive identification.

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Now, then, we also file as a ground a ruling of the Court in the testimony of Mr. Leonard Lewis, the father of the defendant, in which Mr. Leonard Lewis was asked a question about a conversation which took place with Officer Webb, Deputy Sheriff of this County, in the presence of the defendant. Now, Officer Webb—it was clearly brought out by the attorney for the Commonwealth that morning—that Officer Webb was not here and would not be here to testify. Now, then, we put Mr. Lewis on, and objection was made, and the Court, we say, improperly sustained the objection of the Commonwealth Attorney as to a conversation carried on in the presence of the defendant, and was so stated, and it should have been brought out to the jury as to what the conversation was with Deputy Sheriff Webb, particularly, due to the fact that the Commonwealth said that they were not going to summon him because he worked the night shift the evening before the trial, and we submit that that is an improper ruling of the Court, and it could have a very good bearing because the testimony in that particular instance was going right to the nub of the whole thing, the actual identification by these boys as to whether or not the defendant was the perpetrator of the crime testified about.

Now, then, all the way through the evidence of the Commonwealth by the two boys is to the effect that it was a yellow Corvair, and that is what they reported, and that is what they testified about.

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However, the Court will possibly recall this, that during the testimony of these two boys, they very quickly, when asked about this on cross exmination, volunteered the information that under the lights—they were Mercury vapor lights—and under the Mercury vapor lights, a yellow car looked white. They both used exactly or almost *verbatim* that expression that a white car looked yellow, I mean, that a yellow car looked white. Now, it is very clear that these two boys—it is obvious from their intelligence and their ability to see and know things—it was obvious that they had been coached as to this type of statement because it was a voluntary statement. It was not in response to the questions by Counsel for the defendant, but it was brought out and was not responsive. Now, then, it is, also, very clear that the defendant at this time was the owner of a white Corvair. It was not a yellow Corvair, and later on, for some reason, the police officers decided this is the car. Now, then, as to this, I think this is of extreme importance as to determining the credibility of these two prosecuting witnesses. They were let out, apparently, around 9:00 o'clock, or a little after 9:00, according to their testimony. Now, then, they say that the older boy wrote down the license number, and when they got to the police station, they reported it to the police. Now, that is their testimony, and one of them says that, and their testimony is in conflict, but they do agree that the older boy wrote down the license number, and he filed it as an exhibit. One of them said he called it out, and the older boy wrote it down on a pad where he had taken egg orders, and he wrote the license number down on that, and he said he wrote it down, and when he got to the police station, he said it was a yellow Corvair, and that was the license number. Now, then, their Uncle testified that they came and talked to him for just about five minutes, and he took them down to the police station. They came in about 9:15. Now, apparently, according to the Commonwealth's evidence, and they are bound by it, nobody got the license number until officer Dowdy secured that license number at about 10:20 that evening as Officer Spangler was taking him home from the police station. They were heading West on Front Street going toward Doran or Raven. They met a white Corvair coming in the opposite direction. He looked in the mirror, of all things, and gets the license number, and then he calls in to the police station, said it took them sometime to get it because they, apparently, had to check at Tazewell. Well, now, they admit that was after 10:20 because they left there around 10:15 or 10:20. His

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shift had ended at 10:00. Now, then they are looking for a white Corvair, I mean a yellow Corvair, and he sees a white Corvair. He looks into the mirror, gets the license number, calls it on the radio, when the license number was already reported, according to the prosecuting witnesses, approximately an hour before that. Now, the Commonwealth has these discrepancies and they are bound with it. Now, then, in spite of that fact, Officer Vencill, who was, also, their witness, comes on and says that he called the police station at 9:40 by radio, and that he asked for the information, and he is furnished the license number for the vehicle in question, and he knows at 9:40, some 40 minutes before Officer Dowdy sees this, as to the license number they are looking for, although Officer Spangler and Officer Dowdy, both, say that when they were at the station, between 10:00 and 10:15, they had no such license number. They didn't know. The boys said they reported it as soon as they get there. Now, then, we call the attention of the Court to the exhibit, which is Commonwealth Exhibit No. 1, the pad that the boys, the older boy, carried in his pocket. On that, it shows on the face of it, the number 586-705, and, apparently, on there is written "Delbert Lewis tag number." Now, then, if the Court will note, somebody has taken a pen and marked out "Delbert Lewis tag number", when that was his tag number, and why was it done unless it was done by coaching so that it wouldn't be too obvious. Now, then, on front of Exhibit No. 1, is also written 35705. 35705, we submit, is the number he wrote down, if he wrote any number down, because one of them struck a match, and he reached in his pocket and got his watch out and looked at it by the match light, and he wrote the number down by match light, and the little boys says, the younger one, said he called the number out three times so that he could be sure. Now, there is no explanation as to 35705. We don't know what that number is except that it is actually the last three numbers or the same numbers on the Delbert Lewis tag number. Now, is that something beyond the realm of possibility? That is the number—35705—this boy wrote down. It is respectfully submitted that this other Delbert Lewis tag number was actually written down after this all came into the police station, and this 35705 is what he wrote down out there in the dark, and the last three numbers of Delbert Lewis tag number, plus the 35, is something entirely different.

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Now, one thing that is of extreme interest in this case is this. The evidence is clear that Trooper Barton came to the

Lewis home and took samples of dirt from the Lewis car underneath, and that Delbert Lewis helped him; that he, also, when the car was at the police station, he took fingerprints on the Delbert Lewis car, and he, also, took tire prints on the Delbert Lewis car. Then, the officer went up into the area where this is supposed to have taken place, and it was on the 4th of March, and he testified that it was slightly muddy, but there is absolutely no evidence before this Court as to the fingerprints except Delbert said that he asked the officer, and that the officer said they were smudged and they could tell nothing. There is absolutely no information before this Court as to the dirt samples which were taken from under the car, and there is no evidence before this Court as to the tire prints. Now, then, it is respectfully submitted that if the Delbert Lewis car had been in that area that night, and the condition of the tire was such as described, that there would have been tire prints, and Trooper Barton, being the trained officer that he is, would have found those tire prints, and they would have been introduced here in Court. It is significant that the tire prints, that there was no testimony on that. I believe, also, your Honor, that Delbert Lewis testified, not Trooper Barton, that in talking to Trooper Barton, Trooper Barton said that he found some tire prints but that they didn't correspond to the prints on Delbert's car. I think he was, also,—no—that is the testimony of Delbert Lewis. Now, then, if he didn't find the prints, it is certainly inconceivable that they would come in here and try to, as they have, to say that this is the car, when they have a yellow Corvair instead of a white one. They have mud samples, dirt samples, which nobody knows what happened to. They take tire prints. They go up there and get other samples, and they don't correspond. There is a question as to the identity of the accused as the actual perpetrator of the crime. The last three numbers of the license number of Delbert Lewis are, also, on that book, but the first two are not on the book as far as the number 35705, and it is respectfully submitted that that must have been the number that James Dexter Bowling wrote down on that particular night, and later on, this other must have been added after they found out that the Lewis car might have been the car in question.

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The Court: I see a number 35765 on here.

Mr. Harman: The way I read it was 35705.

The Court: Well, this 35705 has been struck out. Bring me the phone book off of my desk, will you, please? There is another memorandum here, school office. I don't know what that means.

Mr. Harman: My recollection is that the boys testified they went to Cedar Bluff Elementary School.

The Court: Is that how it is listed, Cedar Bluff?

Mr. Harman: I guess. That is where they went.

Vol. II 8/29/67 page 9 } I don't know what school office they could be referring to. Some of them are listed under schools.

The Court: 963-5765 seems to be the number of the Cedar Bluff School, Cedar Bluff. I don't see any 35705. That is struck out. All right, go ahead.

Mr. Harman: If it please the Court, the testimony of Mr. Duff, who was called by the Commonwealth in rebuttal, was improperly admitted to the Court because Mr. Duff could only tell the approximate time. In other words, he was in Bluefield, and all he could do was to show from his records that the train, that a train left some yards some 20 or 30 miles away at a certain time; that it had to pick up some empties or drop some empties and pick up some full cars, and that it passed the Richlands yard at a certain time. Then, he drew a conclusion as to when it may or may not have passed the Doran crossing. Now, there is absolutely no reason for permitting him to draw that as a—he is an expert and unless he can show when it passed this particular crossing in question, which was dealing with where Ovie's Drive-In was, then that evidence was improperly submitted because it is a conclusion on his part and is not evidence and was improperly admitted before the jury in this case. His testimony is to the effect that the train would have apparently passed the Doran crossing at about 10:05 or 10:10.

Now, then, going back to the tires, the defendant testified that Trooper Barton told him and Trooper Barton did not come back on the stand to deny this, that the tire prints on the Delbert Lewis car did not match the tire prints

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The Court: Where are you?

Mr. Harman: We are on page 78 of the transcript, at the bottom of the page, and that, at that time, he is asked by Defense Counsel, "Did they ever give you any report as to the result of checking those tires for tire prints?" His answer is this: "Well, I didn't hear anything until the day at Richlands, but Trooper Barton said the plaster cast he had made of the tire marks in the Valley didn't match any of the tires that I had on my car." Now, then, if it please the Court, the tire marks are not subject to human error. I mean, they are either these tires or not the tires, and the Trooper, according

to this, and it is undenied, went to McGuire Valley to the scene, and he made plaster casts of the tire marks he found there, and they didn't fit the defendant's tires. It is clear that the Commonwealth had this evidence, and that brings us to this point. The Commonwealth took the dirt from the defendant's car, made no report about it. They took the car to take fingerprints—no evidence about it. They took the car for tire prints. I believe they testified they took a tire off, and they had this evidence and they didn't introduce it. We had to bring it out by the defendant. Now, the Commonwealth has a duty to see that justice is done just as he has a duty to prosecute a man who is guilty.

The Court: Did you question Barton on any of this?

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Mr. Harman: If it please the Court, Mr. Coates started to say something about tires, and he had not laid the proper foundation, and I objected to him bringing it out at that particular time. Mr. Barton was put on for one point only, that he had made the run up there in thirty minutes, and the Court sustained the objection, and Mr. Coates never put him back on. Mr. Coates had the right by laying a proper foundation to go into this, but he didn't. He hadn't done so.

The Court: Did you call Barton again?

Mr. Harman: No sir. We put it on by the defendant.

The Court: I say, though, did you question Barton or call him again?

Mr. Harman: We did not call him again. No. But as I say, the testimony was that they took the dirt, and I think Mr. Woods took the dirt. I am not sure but I believe he did. Forrest Wood stayed in the witness room all day, in the Commonwealth's witness room, and was never called. He took the dirt from under the thing, according to Delbert Lewis. I don't know who took the fingerprints. They were taken down at the police station. Trooper Barton took the tire and tire prints, but the Commonwealth had Mr. Woods back here all day, and he was the one that helped take the dirt. Now, then, it is respectfully submitted that this evidence is incredible.

In addition to that, we have filed various and sundry affidavits of evidence that we could not have secured prior to the trial of the case, and we feel that a jury should have the benefit of this evidence for such as it is, and then let them come to a decision on it. Now, we filed the

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evidence of Delbert Lewis that he was unable through due diligence to have secured this evidence. The biggest reason for that is this. The evidence

that we have secured through these affidavits comes up as testimony by witnesses for the Commonwealth here before the Court. Now, then, the affidavits are filed with the petition, and first, we have the affidavit of the defendant, Delbert Lewis, that he could not have secured the evidence, and that certain evidence was in the hands of the law enforcement officers of this county. Now, then, to substantiate the position of the defendant, we filed the evidence of, the affidavit of Dan Goodman, a resident of Cedar Bluff, who testified that on the evening, made affidavit that on the evening immediately preceeding the time this offense was to have occurred—

The Court: When was the offense?

Mr. Harman: March 4, 1967.

The Court: March 4th?

Mr. Harman: Yes sir.

The Court: All right.

Mr. Harman Now, this is on March 3, 1967, the evening immediately preceeding that, he was at a Coy Horne's furniture auction, which was in the Town of Cedar Bluff, immediately across from the Arcade Building, and when it was over, he started walking to his home on Claypool Branch, going up Claypool Hill. When he got past the old market, he saw a car parked beside the road. When I came up, the man pulled his car out in front of me and said, "Hey, buddy, how would you like to make a lot of money?" I told him, "I don't need your damned money." He started to back up, and then he pulled around in front of me and kept saying, "Come here, buddy", and all the time he was unbuttoning his trousers. He was a short person with short black hair. I didn't get a good look at his clothes. He had me in pretty close quarters, no houses or nothing nearby. I pulled out a flashlight when he kept saying, "Come here, buddy, come here, buddy." I said you had better get up that road where you are going before you get yourself killed. He pulled out and started up the road. I thought he stopped around the curve so I got out of the road and walked on through the field. I took the car he was driving to be a white car. The man appeared to be somewhere between 20 and 30 years of age. I did not know Delbert Lewis at that time, but I have since visited him in the jail and can definitely say that the man who accosted me was not Delbert Lewis. Now, then, here is a young man between 30 years of age in a white car, the immediate evening before, with black hair. The defendant, it is clear, has brown hair, and here is a man who is attempting to do the same thing to another stranger, who has never seen Delbert Lewis be-

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fore. After this information comes out—we didn't know anything about it until after the case was over, and he goes to see Delbert Lewis, and Delbert Lewis is not the man. He is positive of that. It would indicate that there is someone else in the vicinity making these improper advances to people.

Now, then, Mary V. Davis is the next affidavit filed. She is the owner and proprietor of the Arcade, which is the place of business in the Town of Cedar Bluff, where the Bowling boys were selling eggs. They so testified that they sold there. She says that they had been in and out of her place on business for over a year, and she knew them before that. Now, then, she said that on the evening in question, when the boys were there, a man came into the store, whom she didn't know, and didn't speak to her. He was a young man with short black hair, dressed in khaki shirt and khaki pants, and went to the rear of the store for a few minutes and left, and very shortly after that, the boys followed the man out. She said at the time this happened it was getting dusky dark, and the outside lights had already come on. Now, then, from her place in the store, she couldn't see what happened after that. At that time, when this happened, she had never met Delbert Lewis before. When this information came to our knowledge, after the trial, we asked her to come, and she came to the jail, and she saw him on Thursday, the 15th of June, of this year. She said he was definitely not the man who came into her store on that particular evening, but your Honor's attention is called to the fact that her description of the man that came into her store and the description Dan Goodman gave of the man who stopped him are similar.

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Now, then, Mrs. Lewis, the mother of the defendant, filed an affidavit that on the 27th day of May of this year, a few days after the trial, she and her husband were at Whittaker's Fruit Market in Baptist Valley, east of Cedar Bluff, and that while her husband was in the market, she was in the car, and while she was seated in the car, James Dexter Bowling walked by, and she spoke to him. She asked him if he didn't think he had made a mistake in identifying Delbert Lewis as the one that had committed the crime, and he said, "Yes, I felt like he didn't get a fair trial. I could have been mistaken because lots of people look like that and have a Corvair car." This further is her conversation with James Dexter Bowling, quoting: "I tried to tell them that the car had a damaged back door on the right side, and they wouldn't let me say that. I told them the car had a two way radio and an antenna on the

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back right hand side, and the man had short black hair, and his name was Robert Johnson, and he was an insurance man from Maryland. They thought that I didn't know what a two way radio looked like but as big as I am, I know one when I see it. They seemed to think I was a poor little boy and didn't know what I was talking about." She asked James Dexter Bowling if he would come to Tazewell and tell what he told her, and he said he wanted to talk to his brother and for her to come back between 9:00 and 10:00 o'clock on Monday. The time and date set, they went back, and he said that he had decided not to go. His grandfather, Alex Asbury, was there and he said that he didn't want the boys mixed up in it any further. At that time, I asked James Dexter Bowling how he got the license number on Delbert's car, and one number was erased and marked out, and he said you have another trial, and I will tell you."

Emory Morris is the next affidavit. He is a Deputy Sheriff for this County.

The Court: Emory Martin?

Mr. Harman: Morris. Emory Morris. He was a Deputy Sheriff prior to and on March 4th of this year, says, "that after the arrest of Delbert Lewis on the evening of March 4th, he was called on several occasions between that date and the time of the trial to the home of Donald Peery Bowling and James Dexter Bowling, and on one of the occasions was when the older boy mentioned the question of money, although Mr. Morris doesn't remember the exact wording of the conversation, the Bowling boy was seeking information as to how he could get money from this pending suit, and he further states that James Dexter Bowling has just recently left and joined the Job Corp."

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The next affidavit is that of another Deputy Sheriff of this County, Floyd Webb, who was not summoned by the Commonwealth as a party, as a witness. He is a Deputy Sheriff of this County, and he says that about 5:00 P.M. of March 4th, he was at a truck stop at Cliffield, a few miles West of the Town of Tazewell, and as he left the truck stop, he heard a radio report in connection with an alert for a yellow Corvair automobile from the police station in Richlands. At this time, no license number was given. Now, that is specifically in stride because the Bowling boys said they immediately gave it to the police when they reported in. Now, then, 200 yards West of this truck stop, he saw a Town of Richlands police car parked along the road with police officer Don Spangler standing beside the car. He stopped his car and talked to Mr.

Spangler, said he was interested in why he was so far from Richlands. Spangler advised him of the charge made by the two Bowling boys and said they were looking for a yellow Corvair. Now, this was approximately 9:00 o'clock in the evening, but officer Spangler certainly said nothing about that in his testimony because he had been to look for the car and was taking Dowdy home, and that time was around 10:15 when he left. Now, then, Officer Webb goes on to say that he proceeded on West and as he reached Claypool Hill, he got a radio report giving the license number of the car that the officers were looking for, apparently, this being the Lewis license number. By the time he reached the Town of Richlands, the name of the owner of the car had come in over the radio, and he proceeded on to the Lewis home. He said the two boys were there with the Richlands officers. He talked to James Dexter Bowling and asked him very carefully as to whether or not he could positively identify Delbert Lewis. At this time, he told him definitely that he could not positively identify Delbert Lewis as the one who committed the act. Therefore, he went to the rear of my car, that is, Mr. Webb's car, with Town Officer, Mr. Sawyers, where these two talked but I couldn't hear what was said. After Sawyers and James Dexter Bowling came back to the front of the car, I again asked him whether or not he could identify the defendant, and at this time he said he could identify the defendant as the man who perpetrated the crime. Now, then, it is clear from the affidavit of Officer Webb that for some reason, Officer Sawyers took this boy back there to influence him to identify him because the boy was clear when he talked to Webb that he couldn't identify Delbert Lewis. Now, then, the attention of the Court is called to the contra affidavits filed by the Commonwealth in this case of Officer Spangler, and it points up the fact that Officer Spangler's affidavit is not full and complete, and for some reason, he is trying to cover up.

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Here is the adffidavit. "I, Officer Spangler, a Town Officer for the Town of Richlands, do hereby certify that on the evening of March 4, 1967, I talked to Floyd Webb with regard to the Corvair automobile. This conversation definitely took place after 10:00 P.M. of that evening. Another Town Officer did not get off duty until 10:00 P.M., and I had already taken him home before our conversation with Deputy Floyd Webb", but the attention of the Court is called to the fact that there is no question of Spangler as to where the conversation took place. He does

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not deny that it took place at Cliffield, some 15 miles from Cedar Bluff because Officer Spangler's testimony under oath before this Court was that they were, after Dowdy called in for the license number, they went back, and he didn't go to Cliffield, stayed in Richlands. Now, that is the witness for the Commonwealth, and he is under oath on two occasions, one in the affidavit, and the other here before the Jury, and we submit that you can put absolutely no credence in any thing that man says. He doesn't explain it at all. He makes an affidavit and says just as little as he can, but he doesn't answer the question that he was at Cliffield, and I want to know why, unless he is afraid that he has violated the express instructions of the Town of Richlands and taken one of their police cruisers some 15 miles from the corporate limits. I don't know what he is trying to do but he changes the time, and he doesn't say anything about the place.

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Now, this affidavit is the affidavit of the Sheriff of this County, and he said that on the evening of March 4th of this year, sometime between the hours of 8:30 P.M. and 9:00 P.M., he was at the jail office with Deputy Ward Young, one of the jailors, of this County.

The Court: When was that affidavit made?

Mr. Harman: This affidavit was signed on the 23rd day of June of this year. And that prior to that, the Richlands Police Department requested a license check to the Sheriff's Office of the license number 586-705; that while Mr. Young was checking the records on this particular call, another call came in from Richlands requesting a check on license number 578-439. The Sheriff goes on to say that he wrote this number down on the radio log, and Richlands was informed that the first license number was a 1965 Chevrolet Corvair registered to Leonard Lewis, 108 Franklin Avenue, Richlands, Virginia, and was, also, informed that the license number 578-439 was a 1966 Chevrolet Corvair Special Coupe registered to William P. and Phyllis B. Belcher of 206 Fairfax Avenue, Richlands, Virginia. Now, there are two requests within a matter of moments from the Richlands Police Department to the Sheriff's Office of this County for what they call a 10-28, a license report, and Richlands was advised as to that and given the names of the owners of these cars.

Now, then, the next affidavit is the affidavit of Jack P. White stating that he is a car salesman for Modern Chevrolet Sales in Honaker, Virginia, and that on February 15, 1966, which was less than one month prior to this—no, it was a little over a year prior to the incident, he sold to

Vol. II 8/29/67 page 20 } William G. and Phyllis B. Belcher, a 1966 yellow corvair automobile. Let me call your attention to that because that is the evidence of the two Bowling boys that it was a yellow car, and that on April 28, 1967, just a little over a month after this that Belcher traded this yellow Corvair in for a new station wagon. Now, then, that was a license number that was called in to the Sheriff of this County before, sometime before 9:00 on the evening of March 4th, when the crime was perpetrated.

Now, then, Floyd Griffith, Jr., the Justice of the Peace, and it was brought out in evidence that Floyd Griffith, Jr. is a relative of the defendant, but it is also clear that he is the man that issued the warrant charging the offenses in his capacity as Justice of the Peace, and he stated that on the evening of March 4th, he was at the police station in the Town of Richlands, and that he was answering the telephone and monitoring the police radio but while he was on duty, Walter Asbury came in with James Dexter Bowling and Donald Peery Bowling, and informed him that a crime had been committed against the Bowling boys; that it is customary and he made an entry on the police log showing the date and time. The entry shows that it was made, that Walter Asbury and the Bowling boys arrived at the police station on March 4, 1967, at 8:45. He goes on to say this, that before making an affidavit, I checked the log book and found the foregoing to be correct. I, also, noted that on the same date there had, also, been entered the name of William P. Belcher and license number 578-439, which is the license number called in here, and the license number of a yellow '66 Corvair.

Vol. II 8/29/67 page 21 } The next affidavit is that of Mr. J. K. McFarlane, one of the Defense Counsel, and he states that "on June 20th of this year, after hearing certain rumors as to the time James Dexter Bowling and his brother came to the police station at the Town of Richlands, I went to the police station and asked the Chief of Police, Covo Gardner, to inspect the police radio log book. He seemed reluctant to let me do so and asked me what I thought the Commonwealth Attorney would say about it, and I stated that I didn't care what the Commonwealth Attorney would say about it, that I desired to look at the log book." Now, then, the police radio log book—here is a man that is representing a defendant charged with two indictments of crime, and the Chief of Police doesn't want him to see the log book so he goes ahead, and he took me into the inner office, removed the log book from the safe, which at the time he removed it from

the safe, it was open to the date of March 4, 1967. Coincidence or planned or suppression of evidence? The Court can draw its own conclusions but here is a radio log book in the safe, not at the radio, and it is open to the date of March 4, 1967.

The Court: What period does that log book cover?

Mr. Harman: I don't know. Mr. McFarlane may know.

Mr. McFarlane: I just saw that one page. It goes back.

Mr. Coates: The daily one is kept out, and then it is put in the log book from time to time.

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Mr. Harman: But your attention is called to this particular part of the affidavit, that it was open when it was taken from the safe, that it was already open to that particular date. The log shows March 4, 1967, 8:45. The log, also, shows the name of William G. Belcher along with License 578-439. This is entered on the log book.

Now, then, we respectfully submit that taking the attitude of Mr. McFarlane found with the Chief of Police there, the suppression, they didn't want the attorney for the defense to see this log book.

The Court: He let him see it.

Mr. Harman: He let him see it but he asked him first what would the Commonwealth Attorney say about it if he let him see the log book. They are trying to cover up. In other words, the Commonwealth has the right to see that justice is done, not that somebody is prosecuted, and we believe this man did not want him to see the log book.

We believe and we submit that all the way through here the action of the law enforcement officers of this County has been such that it is subject to suspicion all the way through as to the enforcement of the laws of this County, other than the fact that they have a man and want to stick him. That is the impression that all this brings out. They cover up. The Commonwealth Attorney has the duty to see that the evidence of the defendant, that he has in his custody, is brought out just the same as evidence against him. He is an officer of the Court. The defense cannot secure all of this. The Commonwealth has the Town of Richlands Police Department, the Sheriff's Department, and Virginia State Police at his beck and call, and apparently, from the evidence in this case every one of them within fifty miles was down there at the Lewis house that night and for the next two or three days. The testimony is that there were radios blaring and lights going and red lights flashing at 11:00 and 12:00 in the evening there at the Lewis house, and that is not denied by the Commonwealth.

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We submit that this evidence as detailed in these affidavits, we could not have secured until after the trial of the case. It is absolutely impossible because we didn't know about it until the case was tried. We submit that error has been committed on the admission of certain evidence in this case and the ruling on certain motions by the defendant as hereinabove set forth, and that the verdict of the jury is incredible.

We respectfully ask that the Court set this verdict aside so that a jury can hear all the evidence, and by that, your Honor, we don't mean just the evidence of these people, but the evidence that the Commonwealth has secured in opposition to our motion. Let them hear the evidence of Mr. and Mrs. Belcher. They have affidavits to that but let a jury hear it. Let them hear the evidence of the officers in contradiction and then let a jury determine—this whole matter was not brought out fully and completely so that a jury could arrive at a fair and impartial verdict. We respectfully submit that the Court set the verdict aside and let it be retried.

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The Court: Gentlemen, we are going to have to take an adjournment at this time. It is after 5:00 P.M. The Court is going to be out of Town tomorrow in Giles County, and on Thursday we have a jury trial so we will reset this case for Friday morning at 9:30 A.M.

(The above-styled matter was adjourned until Friday morning at 9:30 A.M. on September 1, 1967.)

(The above-styled matter was resumed for hearing on Monday Morning, September 11, 1967, at 10:30 A.M., in open Court.)

The Court: All right, Mr. Coates.

Mr. McFarlane: We have one other thing.

The Court: I thought you all exhausted yourself the other afternoon.

Mr. McFarlane: Well, we have one thing. Of course, they haven't started. I think we wouldn't be too late on this.

The Court: Maybe not too late but as I say, I stayed here until after 5:00 P.M. on the 29th of August. Go ahead. Let's see what else you have to say.

Mr. J. K. McFarlane, Attorney for the Defendant: It is with regard to the time element. Of course, as the Court knows, we based our defense entirely on the alibi and time element. Now, this did not come out until the trial. Of course, the Commonwealth Attorney furnished us with a Bill of Par-

ticulars stating that this happened between 8:00 and 9:30. Now, we come back, and we find out that the first report was made at the Town of Richlands Police Department down there at 8:45, according to the record of Floyd Griffith, which is backed up by the affidavit of Clarence Davis, that they called into this Sheriff's Office here at Tazewell around 9:00 o'clock. Now, the Bowling boy states that when they were forced into the car at the Arcade in Cedar Bluff, it wasn't plum dark. Now, the Almanac for March 4, 1967, states that the sun sets at 5:55. Now, this was a rainy, muddy time. They have spoken of wading the mud up there. Now, common knowledge, a fact which this Court will recognize, if the sun sets at 5:55, by 7:00 o'clock that time of year, it would be plum dark. Now, the Bowling Boy says that they went to Brewster's store up there somewhere between 5:00 and 6:00, then caught a ride down to the Arcade. Now, we contend that on this time element, it was nearer 7:00 o'clock than 8:00 o'clock, and the other point—the boys claim that they were let out of the car at Raven Nest Branch after this was over around 9:10 or 9:15, and it is .2 of a mile from where they were let out to Walter Asbury's home, which they had to walk, then tell their story to Walter Asbury, then Walter Asbury gets in his truck and brings these boys to Richlands, which driving from that particular point to Richlands takes around 10 minutes. Now, if they arrived at Richlands before 9:00 o'clock, 8:45 or 9:00, this time element could not have been right under any circumstance. Now, we were completely misled on this by the Bill of Particulars filed by the Commonwealth Attorney, and we contend that since Delbert Lewis was basing his defense on an alibi and there was conclusive evidence that he was at the car lot in Richlands at 8:00 o'clock. Some said a little after. Now, if that were true, he could not have been where he was alleged to have been, and we say that that is a fact that this jury should have had to consider, and I think on that point if the jury had had that fact to have considered, it would have been an entirely different verdict.

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The Court: All right, Mr. Coates.

Mr. James W. Harman, Attorney for the Defendant: If it please the Court, prior to this, I do have a motion that I would like to make at this time before any argument on behalf of the Commonwealth. I think it is appropriate that it come at this time.

The Court: All right.

Mr. Harman: The defendant moves that the answer of the

Commonwealth in opposition to our motion to set aside the verdict be stricken and dismissed from the Record for the following reasons: The first that it is not signed by anyone on behalf of the Commonwealth. It is a pleading, and it is not signed as required by the Rules of Court.

The Court: We will let him sign it now.

Mr. Harman: Secondly, it is clear that the most, that the written matters were prepared by John W. McClintock, Jr., Attorney at Law of Richlands, Virginia. He is not the attorney for the Commonwealth, and he advised me in the Clerk's Office last week that he was employed by Mr. Belcher. Now, there is no dispute so far as we know between Mr. Belcher and Delbert Lewis. This is a matter solely between the Commonwealth of Virginia, on the one hand, and Delbert Lewis, on the other. Now, if the Bowlings had employed Counsel to help prosecute, possibly, that is all right, but these affidavits were prepared, the motion was taken by an attorney, who is employed by a man named Belcher. It so happened that Mr. Belcher's name appeared in certain of the affidavits that the police had taken down his license number. Now, there is no allegation made anywhere, so far as we know, that Mr. Belcher is charged or should be charged with anything. Now, then, we are, also, prepared to prove this—that Mr. Belcher has seen copies of all affidavits filed, and that he has, also, seen copies of certain private information in the hands of the Commonwealth Attorney, which is not even admissible before this Court. We are in position to prove that this morning by witnesses to whom Mr. Belcher told that. In other words, this man cannot—he can face the State, yes, but he is never called upon to face the employed Counsel and the affidavits and motion, which were admittedly prepared by McClintock, by a man who is not a party to it. There is no dispute, and we respectfully submit that that is putting too much of a burden on any defendant. He has his rights, and his rights must be maintained, and when someone else, whose name apparently appears on an affidavit, goes out and employs an attorney, that attorney prepares the affidavits and actually takes the acknowledgment of many of them as a Notary Public. We submit that this should be stricken at this time, and that the only thing that the Court consider is the motion of the defendant, together with the affidavits filed in support thereof. Now, this is a criminal case, and this man's liberty is in jeopardy, and we submit that this is definitely improper, and that the Court should not consider this or even permit—Mr. McClintock was ready to get up and start argu-

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ing. Now, he is not employed by the Commonwealth. The Commonwealth is not interested in employing him. They have their attorney, and we submit that this entire thing is improper. It smacks of a collusion, a conspiracy to see that this man is kept in confinement. We submit that this should be stricken, and that the Court consider only the motion which we filed. Now, there were 56 days to file this, to begin with, and then when they file it, it is filed and prepared by someone who has nothing to do with this case.

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Mr. Wade S. Coates, Attorney for the Commonwealth: Your Honor, please, on behalf of the Commonwealth, it is stated that Mr. John W. McClintock, was employed by Mr. William G. Belcher. This employment resulted from an insinuation, which appears of record in the motion to set aside the verdict, that Mr. Belcher was involved in this matter and that his license number was reported to the police. This brings the matter definitely within an interest of Mr. Belcher. The attorney for the Commonwealth was contacted by Mr. McClintock, asking for his assistance in the matter and associating Mr. McClintock with him. Mr. McClintock did prepare this motion. We consulted on it at the time he actually prepared it. I am perfectly willing to sign the pleading filed by Mr. McClintock, and I think it is immaterial who actually prepared the affidavits.

The Court: As I stated, the Commonwealth's Attorney may sign the pleading now, and he is so advised, and if he does, then it becomes the Commonwealth's pleading.

Mr. Harman: We note our exception to the ruling of the Court.

The Court: I overrule your motion to strike.

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Mr. Harman: We except. What is the ruling of the Court on the argument of the case by Mr. McClintock?

The Court: Let him argue. He may argue. The Commonwealth will have to close it.

Mr. Harman: We again note our exception to the ruling of the Court. Is it the position of the Court that anyone can assist the Commonwealth in prosecution of a case such as this where there is no interest shown?

The Court: Well, there is some interest shown in this, shown by *innuendo*. You have certainly case a reflection upon this fellow, Belcher, claiming it was his car.

Mr. Harman: May it please the Court, the police cast the *innuendo* on him when they secured his license number.

The Court: Mr. Harman, I have ruled on your motion. Now, Mr. McClintock.

By Mr. John W. McClintock,. Jr.: May it please the Court, for the Record, I would like to add a little addition to what Mr. Coates has said with regard to my employment by Mr. Belcher. In the motion to set the verdict aside in this case, under Paragraph No. I, on page 5, and I would like to read that: Affidavit of Floyd Griffith, Justice of the Peace at Richlands, to the effect that James Dexter Bowling and Donald Peery Bowling appeared with Walter Asbury at the Police Department in the Town of Richlands on the evening of March 4, 1967, at 8:45 P.M. Now, there, it doesn't stop and make a new sentence, just puts a comma and continues, and that someone had entered the name of William G. Belcher, License No. 578-439 on the radio log that evening. Now, certainly, that is an insinuation that the Bowling boys or Walter Asbury reported that number to the police department because one leads right into the other; that the Bowling boys were there and that somebody put the name of Belcher, as if the Bowling boys had given the name of Belcher, and given the license number, which certainly was not a fact and was shown to not be a fact by the affidavits filed. Now, of course, Mr. Belcher is a business man in the Town of Richlands. He is married and has a family. He was very incensed at being involved, and he did retain me to assist the prosecution.

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Now, in the opening of Mr. Harman's motion to set aside the verdict, he first says that the evidence of the Commonwealth is such that no reasonable man could convict this defendant, and that the identification of the perpetrator of the crime was not positive. I certainly think that the jury has determined that. It was a jury question. They have been properly instructed, and these boys, apparently were with the defendant for a period of about an hour or 45 minutes to an hour, and certainly could not say that their identification was incredible after being with him for that period of time. Now, an objection was made about the conversation between Leonard Lewis and Floyd Webb. Mr. Harman even admits that Mr. Coates indicated the morning of the trial that Mr. Webb would not be here that afternoon, but he was in Richlands. He merely worked the night before, and if Mr. Harman had wanted to summon him in to testify to that conversation, he certainly would have had the right to do so. Now, with regard to the Corvair being yellow or white, the evidence, itself, shows that there was some conflict in that due to the fact that it was under the street lights, artificial lighting, but so far as Mr. Belcher's automobile was concerned, it is, also, shown by

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affidavit that it is a two door Corvair, and this automobile of Mr. Leonard Lewis was a four door.

Now, there has been a lot said and a lot to do. Apparently, the biggest or main contention of the defendant here to have this motion to set aside the verdict is on this time element, and upon a careful examination of the Record and of these affidavits, it is very obvious as to what happened, and, apparently, has confused the Sheriff of our County as to the time, and, also, as to some of his deputies. The boys testified that they were let out of that car at 9:15. Now, the defendant has consistently tried to put that back to an earlier time. Now, I would doubt that if I would call the Sheriff today and ask him what time that I called him three months ago with regard to a telephone conversation late at night, it would be a guess if he could tell me because there has been nothing referred to as any record or log or entry that he made when that call came in from Richlands. How did he base the time? Apparently, the entire time has been based upon Floyd Griffith's entry upon the log at the Richlands Police Station. Now, when this report first came in that Leonard Lewis's car was involved, I can imagine Mr. Griffith's feelings. He was a relative of these folks, and he just couldn't believe that anybody with regard to the Leonard Lewis family could be involved in such a crime, so he, consequently, did not bother to make an entry of that license number at that time. He didn't do his duty as he should have as Justice of the Peace. If the Court will look at the log there, it is obvious on the face of it that these times, certain entires of 6:58, 8:15, 9:55 and 11:00 o'clock, Floyd Griffith's initials, off duty. Then, what does he do? According to the affidavit filed by Mr. Charles Vencill, another Police Officer, he comes back to the police station after the Lewis boy has been identified and arrested—he comes back to the police station and makes this entry, and it is obvious on the face of the log that is what happened, because the log entry of 8:45 is made after the sign-off time of 11:00 P.M., so he is back there at some time between 11:00 and 12:00, scratching his head, trying to remember what time that call came in on the Lewis boy, and of course, I don't mean to indicate that he was dishonest in his time. He was merely mistaken. He was there several hours later trying to remember what time that call came in, and he put it down at 8:45 instead of 9:15 or 9:30, the time it actually was, and this is, also, shown by the affidavit of the police officer. Of course, one reason for the time elapsing in Mr. Griffith's putting that number of the Lewis car out over the radio, it is obvious what

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happened. The perpetrator of the crime had told these boys, "Now, I have a police car radio here. I can hear you if you call the police." Now, if Griffith had put that out and taken that to be true there, the perpetrator could have heard the police radio and would have gotten the number and known they would have been right on his tail, so, consequently, Mr. Griffith, and it is, also, shown by affidavit, even telephoned Tazewell asking for this information rather than calling it on the radio, but so far as that time element, of course, then when the Sheriff was approached, it is on the Richlands radio log that it was 8:45—now, would you give me your affidavit that it was during that period of time? This would refresh his memory, and no doubt, that is what happened.

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Now, some of these other affidavits that have been filed here about a certain fellow coming out of the Cameo there near the Davis shop, I can see no materiality as to that, whether that man that came out of her store was Delbert Lewis or not. Certainly, it is not relevant, and the affidavit of Don Goodman, about being accosted by another person, there the mode of operation—this affidavit on the part of Don Goodman, is entirely different than what happened to these Bowling boys. In the Dan Goodman affidavit, he says that a fellow drove up by him and said, "Hey, buddy, do you want to make some money?" He attempted to entice the Goodman boy into his car in that manner. Do you want to make some money? Well, in this case, a gun was used, at gun point. It just isn't similar in any respect.

Now, of course, the contention is made here that this evidence has been suppressed on the part of the Commonwealth; that this radio log was suppressed. Mr. McFarlane filed his affidavit in this matter that he goes down after the trial of the case and asks to see the radio log. Well, the chief said, "Do you think it will be all right with the Commonwealth Attorney?" He said, "Well, I don't care what the Commonwealth Attorney thinks. I want to see it." The Chief goes and gets it and lets him see it. An affidavit is filed on the part of or on behalf of Chief Gardner that had he been asked prior to the trial by anyone to see that radio log, he would have certainly showed it to him. He wasn't denying them the right to see it. Merely the fact that the Chief hesitated and asked him what he thought the Commonwealth Attorney would think of it certainly is no indication that he was deprived or would have been deprived at any time prior to that, prior to the trial. The officers, of course, that the defendant has secured affidavits

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from, with regard to setting this verdict aside, could have been summoned at the original trial as easily as now. They would have merely had to have been asked if they knew anything about the Delbert Lewis case. If they had said no, and they had, then that would have been a suppression of evidence. Even in the case that Mr. Harman quotes in support of his motion about the suppression of evidence, the police reported that investigation, and it was denied the defendant. It was a request for it, and it was denied, and, certainly, there was a suppression of evidence when that is true. Of course, the affidavits are in conflict with regard to what time Floyd Webb was at Cliffield but there again, I think so far as time element is concerned, it has all been based upon that entry of 8:45, which was in error, and consequently, the rest of the affidavits would be in error, also.

I am certainly sorry for Delbert Lewis. I am sorry for his family. I know how sincerely they feel his innocence but in our system of jurisprudence, every defendant is entitled to his day in Court. Delbert Lewis has had his day in Court by a jury that was here and was fairly instructed, and they returned a verdict on the two charges, and I submit that the verdict should stand.

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By Mr. Wade S. Coates, Attorney for the Commonwealth:

If the Court please, Mr. McClintock has largely answered the grounds stated by the defendant to set aside the verdict. It seems to me that the jury fairly heard the evidence. They passed upon the evidence. They were twelve good men, well known men in this county. They had the opportunity to see whether they thought the evidence was credible or incredible, and certainly after they considered the evidence, they found the evidence of the Commonwealth to be believable and credible and found the defendant guilty. Attack is made upon the evidence of Mr. Billy Duff. Certainly, a man who has been a dispatcher on a particular division of the railroad, the Clinch Valley Division, for the number of years that Mr. Duff has, who stated to the jury clearly the *proceedures,* the trains passing over the particular points and lighting the Board, and he has stated to the jury clearly that he could determine the position of the train by, at any particular point, and he was subject to cross examination. The defendant didn't shake him on cross examination.

On a question of Floyd Griffith, your Honor, please, I would ask the Court to look at the radio log. I would call the Court's attention to the fact that this is a radio log and nothing more. This is a log that is designed for the

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dispatcher to sit there and record radio calls. I would call the Court's attention to the absence of any radio calls by Floyd Griffith to the jail on the night that has been mentioned in these affidavits, just wasn't recorded. I would call the Court's attention, as Mr. McClintock has, to the fact that Mr. Griffith's notation as to the time that the Bowlings came in was made on the bottom of a radio log after he had signed off, perhaps, two hours after these people came in. This is a matter of a notation made on the log that never should have been made there anyway. This is not a report, not designed to be a report for when something is reported to the police. This is a case of a relative coming in at a later time and making a notation, and that is borne out by the affidavit of Officer Vencill. It appears in evidence in this case, introduced by the defendant, that Floyd Griffith, Jr., is a cousin.

Now, we talk about the other investigation that was made. Trooper Barton was called to this witness stand, and he was cross examined. Mr. Wood, Forrest Wood, sat in the witness room all day long. The defendant had every opportunity in the world to ask the officers anything that he wanted to concerning the investigation. The Counsel passed this up. When Mr. Forrest Wood was not called, they had the opportunity to call him. The defendant had the opportunity to subpoena Floyd Webb if they cared to. Mr. Harman and Mr. McFarlane are well acquainted with the rules of evidence. They could have subpoenaed him if they had thought that his evidence was material to them and had him here in advance.

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Mr. McClintock, I mean Mr. McFarlane, has mentioned an Almanac. Now, I don't recall an Almanac being in evidence. No Almanac has been introduced in evidence, and I would call the Court's attention to the fact that a 1967 Almanac has been printed, and is made up of somebody's projections on what time the sun will rise and what time the sun will set. The only true way to determine it would be to have somebody that made a record of the sunrise and sunset at that time, rather than a projection made a year in advance.

In the case of Mrs. Davis at the Cameo, it was brought out in the preliminary hearing that these boys were picked up at the Cameo. These people would presumably know who operated the Cameo. They had every opportunity to go up there and question her. They didn't do it. I don't know whether the Dan Goodman business is common knowledge in Richlands or not. They found out about it somehow. I didn't.

They could have found out just as well before as after. I believe that the law would be that a party who seeks a new trial on the ground of after discovered evidence must show that he used reasonable diligence to secure such evidence before the trial is not enough to merely say that the evidence could not have been discovered by the use of due diligence. The applicant for a new trial must set forth in affidavit the facts that show that his efforts were made to obtain the evidence and to explain why he didn't obtain it. Surely, in this case, the defendant and his attorneys could have talked to relative, Floyd Griffith. They could have found out about the license number if they had wanted to. They could have found out about the time if they had wanted to. They could have talked to Mrs. Davis. They could have talked to the officers. They could have talked to Chief Gardner. There is no indication here that any of these things were ever done, that anything was ever denied to them. On the contrary, on questions of the tests that were made, it is perfectly apparent that the defendant was informed as to the tests that were made and the results, and that he knew it and if he had wanted to introduce evidence, he could have. Now, again, the Commonwealth contends that there is no duty on the Commonwealth in the prosecution of cases to negative in evidence in the case every lead that they have followed up and run into a blank wall. In this case, the two door Corvair—from the affidavits that have been introduced, Mr. Harman's own statements, this is a two door Corvair. The information given by these boys to the officers that night was that this was a four door car. It had, what they believed to be, a two way radio in it; that it had certain tools in the back seat; that there was a dent on the back door, rather, the back door didn't open; that it had a set of license plates under the seat; and they furnished the license number. Your Honor, please, I believe it would have been highly improper to introduce evidence on behalf of the Commonwealth concerning this other car that did not prove out in the course of the investigation.

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By Mr. J. K. McFarlane, of Counsel for the Defendant:

They mention their affidavits here. I want to call the attention of the Court to the affidavit of Charles Vencill and Boyden Sawyers, which is purely hearsay. It says when the call was made to the jail for a request for a license number 586-705, it was after 9:30 P.M., and we were informed by Floyd Griffith, Jr., that he was going to telephone for the information as he did not want to put the license number on the air

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since the party being looked for had told the Bowling boys that he had a two-way radio, police radio, and could hear if they went to the police, but yet shortly thereafter, by radio, radioed into the Town of Richlands about the car of William G. Belcher. Of course, this motion we have made, is on the basis that the verdict should be set aside and a new trial granted since it is not supported by the evidence. Now, to me, the most important angle of this whole case was this tire test up there in McGuire's Valley. Now, Trooper Barton made that test. There wasn't any question about where the tracks were.

The Court: Didn't you know about that test at the time of the trial?

Mr. McFarlane: Yes, we knew about it, and why we think we should be granted a new trial is that this verdict was not supported by the evidence. Delbert Lewis took the stand here and testified that Trooper Barton told him that the test did not show that it was his car.

The Court: Well, you got that evidence in, then.

Mr. McFarlane: Well, we got it in but Trooper Barton never came back to deny that. Now, we contend that if that was true, the verdict of the jury in convicting this boy would have to be wrong.

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The Court: Well, they considered that fact. They knew from your client's statement that the tracks didn't match.

Mr. McFarlane: Well, if they didn't match, how could it have been this boy?

The Court: I don't know but the jury had that.

Mr. McFarlane: We don't feel that that evidence will support the conviction of this boy. I thank you.

The Court: Are you through, gentlemen?

Mr. McFarlane: Yes sir.

Mr. Coates: Yes sir.

The Court: I think I shall overrule the motion to set the verdict aside and grant the defendant a new trial in each of the cases.

Mr. Harman: We note our exception to the ruling of the Court.

The Court: All right, sir. I am now ready to pass sentence upon the defendant. Come around, Delbert. Delbert, under Indictment No. 1, charging you with the crime against nature, by and with James Dexter Bowling, the jury found you guilty and fixed your punishment at a term of one year in the state penitentiary. You have heard, of course, the discussion here with reference to the motion to set aside the verdict and

grant you a new trial, which the Court has seen fit to deny. I am ready now to pass sentence upon you in conformity with the verdict of the jury. Do you have anything to offer why I should not in conformity with that verdict?

Vol. II 8/29/67 page 41 } The Defendant: Your Honor, my car was not up there and nobody, nobody in this Courtroom can say with a clear conscience that it was my car that was up there, and through this whole thing, I was accused of removing the tires. I was accused of washing my car at 2:00 o'clock in the morning, and all through this, it has been just one thing, to try and convict me no matter what.

The Court: Well, Delbert, of course—

The Defendant: And I say that this Court is the most unfair that they are in the land.

The Court: This Court is the most unfair that there is in the land. Is that what you mean?

The Defendant: Yes.

The Court: Is that all you have to say?

The Defendant: That is all.

The Court: It is the judgment of this Court, in conformity with the verdict of the jury, that you serve the term of one year in the state penitentiary under your conviction under Indictment No. 1 with reference to the crime against nature by and with James Dexter Bowling. Under Indictment No. 2 charging you with the crime against nature by and with Donald Peery Bowling, it is the judgment of the Court that you serve the term of one year in the state penitentiary, as fixed by the jury, and pay the costs of this proceeding. All right, Sheriff, you may take charge.

Mr. Harman: If it please the Court, at this time—I would like my client here.

Vol. II 8/29/67 The Court: All right. You had better get him then because you hadn't made any motion.

page 42 } (The Defendant is brought back into Court by the Sheriff.)

Mr. Harman: If it please the Court, at this time the defendant would like to move for a stay in order that he may apply to the Supreme Court of Appeals for a writ. We, also, move that the Court set bond for Mr. Lewis so that he can be admitted to bond pending the action of the Supreme Court of Appeals.

The Court: Your motion so far as stay of execution is granted, and I am going to deny bond to the defendant until the Supreme Court has acted upon his petition. If the writ is granted, of course, I will fix bond.

Mr. Harman: If it please the Court, the Record of the case has been heretofore filed with the Court papers. Is it agreeable that we can, that the Record can be submitted on the basis of applying for a writ as of today so that action may be taken promptly in this matter?

The Court: You may pursue such course as you may deem advisable.

Mr. Harman: Is it agreeable with the Commonwealth Attorney that the Record can be submitted today for the certification by the Court as of today?

Mr. Coates: Of course, you won't have the complete Record today, Mr. Harman. You will have to complete this before you can submit the complete Record. I am not being arbitrary but I think if you are going to submit the Record, you will have to have the whole thing.

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Mr. Harman: You are right, Mr. Coates.

Mr. Coates: I believe I am right there.

The Court: Is that all, gentlemen?

Mr. Harman: Yes sir.

The Court: You may take the defendant then, Sheriff.

I, Catherine S. Wilson, a Shorthand Reporter, do hereby certify that I did appear at the time and place as specified in the caption hereof for the purpose of taking down in Shorthand Characters and transcribing into the English language the testimony as given by the foregoing; that I was first duly sworn by the Court to accurately and correctly take down and transcribe the said proceedings; that the foregoing is a true and correct transcript of said proceedings; that I am neither Counsel for nor related to any of the parties hereto and have no interest in the matter whatsoever.

CATHERINE S. WILSON
Court Reporter.

Received September 26, 1967.
VINCENT L. SEXTON, JR., Judge

Signed October 2, 1967.
VINCENT L. SEXTON, JR., Judge

Received again this November 3, 1967, and signed again this November 3, 1967 at request of defense counsel.

VINCENT L. SEXTON, JR., Judge

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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