

Crim 3 205 VA277 Med. J.

Record No. 5736

In the
Supreme Court of Appeals of Virginia
at Richmond

WARREN HOWARD CALDWELL
v.
COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ESSEX 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. 5738

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 9th day of October, 1963.

WARREN HOWARD CALDWELL, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Circuit Court of Essex County
Daniel Weymouth, Judge

Upon the petition of Warren Howard Caldwell a writ of error and supersedeas is awarded him to a judgment rendered by the Circuit Court of Essex County on the 25th day of June, 1963, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor; but said supersedeas, however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

page 1]

Amended Warrant

STATE OF VIRGINIA } To-Wit:
COUNTY OF ESSEX }

No. _____

TO ANY SHERIFF OR POLICE OFFICER:

Whereas, P. R. Jeffrey, Jr., S.P. has this day made complaint and information on oath before me, Arthur E. Bareford Justice of the Peace of the said County, that Warren Howard Caldwell in the said County did on the 1 day of April, 1963: Unlawfully drive and operate a motor vehicle on the highways of the State of Virginia while under the influence of intoxicating beverages. This being the second offense within a period of ten years. He the said Warren Howard Caldwell having been previously convicted of unlawfully operating a motor vehicle under the influence of intoxicating beverages on November 10, 1959, in Municipal Court Buena Vista, Virginia, in Violation of 18.1-54 of the code.

(2) Unlawfully drive and operate a motor vehicle on the State highway recklessly, at a speed, and in a manner endangering life, limb and property of other persons, in that he the said Caldwell did then and there drive said motor vehicle by weaving from lane to lane in violation of Section 46.1-189 of the Code.

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:

We, the jury upon the issue joined find the defendant Warren Howard Caldwell guilty of operating a motor vehicle on the public highway while under the influence of intoxicating beverages, being a subsequent offense within ten years, and we fix his punishment at confinement in jail for one month and that he pay a fine of two hundred dollars.

J. R. CLANTON
Foreman

Given under my hand and seal, this 2 day of April, 1963.

ARTHUR E. BAREFORD (Seal)
(Title of Issuing Officer)
Justice of the Peace

(Reverse side)

Additional Bond

STATE OF VIRGINIA—COUNTY OF ESSEX, to-wit:

I, Elizabeth M. Hardwick a Clerk of the County Court in and for the County aforesaid, State of Virginia, do certify that Warren Howard Caldwell and Cash, as his surety, have this day each acknowledged themselves indebted to the Commonwealth of Virginia in the sum of three hundred fifty and 00 100 Dollars (\$350.00), to be made and levied of their respective goods and chattels, lands, and tenements to the use of the Commonwealth to be rendered, yet upon this condition: That the said Warren Howard Caldwell, shall appear before the County Court of Essex County, on the 6th day of June, 1963, at 10:00 A. M., at Tappahannock, Virginia, and at any time or times to which the proceedings may be continued or further heard, and before any court thereafter having or holding any proceedings in connection with the charge in this warrant, to answer for the offense with which he is charged, and shall not depart thence without the leave of said court, the said obligation to remain in full force and effect until the charge is finally disposed of or until it is declared void by order of a competent court; and upon the further condition that the said _____ shall keep the peace and be of good behavior for a period of _____ days from the date hereof. Nonappearance shall be deemed to constitute a waiver of trial by jury.

Given under my hand, this 23rd day of May, 1963.

WARREN H. CALDWELL
ELIZABETH M. HARDWICK, Clerk
Essex County Court

5/16/63
6/6/63
Com. Atty.

Supreme Court of Appeals of Virginia

DOCKET NO. A10272

COMMONWEALTH

(WARRANT OF ARREST
vs.) WARREN HOWARD CALDWELL

Executed this, the 2 day of April, 1963.

Tpr. P. R. JEFFREY, JR.

Upon the examination of the within charge, I find the accused guilty on the first charge, fine him \$250.00, sentence him to one month in jail and order him to pay costs of court:

Judgment on 2nd charge withheld.

Appealed noted on 1st charge.

C. VINCENT HARDWICK, Judge

Essex County Court

6/6/63

Filed in the Clerk's Office of Essex County, Va., Circuit Court The 14th day of June, 1963.

A. MOTLEY, Clerk

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STATE OF VIRGINIA) To-Wit: No. _____
COUNTY OF ESSEX)

TO ANY SHERIFF OR POLICE OFFICER:

Whereas, P. R. Jeffrey, Jr. S.P. has this day made complaint and information on oath before me, Arthur E. Bareford Justice of the Peace of the said County, that Warren Howard Caldwell in the said County did on the 1 day of April, 1963: (1) Unlawfully drive and operate a motor vehicle on the highways of Virginia while under the influence of intoxicating beverages in violation of section 18.1-64 of the Code.

(2) Unlawfully drive and operate a motor vehicle on the State highway recklessly, at a speed, and in a manner en-

dangering life, limb and property of other persons, in violation of section 46.1-189 of the Code.

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 _____	<input type="checkbox"/>
_____ color _____	Address _____	<input type="checkbox"/>
_____ color _____	Address _____	<input type="checkbox"/>
_____ color _____	Address _____	<input type="checkbox"/>
_____ color _____	Address _____	<input type="checkbox"/>

as witnesses.

Given under my hand and seal, this 1 day of April, 1963.

ARTHUR E. BAREFORD (Seal)
(Title of Issuing Officer)
Justice of the Peace

(Reverse side)

STATE OF VIRGINIA—COUNTY OF ESSEX, to-wit:

I, Arthur E. Bareford a Justice of the Peace in and for the County aforesaid, State of Virginia, do certify that Warren Howard Caldwell and Cash, as his surety, have this day each acknowledged themselves indebted to the Commonwealth of Virginia in the sum of Five hundred 00/100 Dollars (\$500.00), to be made and levied of their respective goods and chattels, lands, and tenements to the use of the Commonwealth to be rendered, yet upon this condition: That the said Warren Howard Caldwell, shall appear before the County Court of Essex County, on the 2 day of May, 1963, at 10 A.M., at Tappahannock, Virginia, and at any time or times to which the proceedings may be continued or further heard, and before any court thereafter having or holding any proceedings in connection with the charge in this warrant, to answer for the offense with which he is charged, and shall not depart thence without the leave of said court, the said obligation to remain in full force and effect until the charge is finally disposed of or until it is declared void by order of a competent court; and upon the further condition that the said _____ shall keep the peace and be of good behavior for a period of _____

days from the date hereof. Nonappearance shall be deemed to constitute a waiver of trial by jury.

Given under my hand, this 2 day of April, 1963.

ARTHUR E. BAREFORD, J. P.

Commented A.E.B. 208.25

DOCKET NO. _____

COMMONWEALTH

(WARRANT OF ARREST
vs. } WARREN HOWARD CALDWELL

Executed this, the 1 day of April, 1963.

Tpr. P. R. JEFFREY, JR.

Upon the examination of the within charge, I find the accused

Filed in the Clerk's Office of Essex County, Va., Circuit Court The 14th day of June, 1963.

A. MOTLEY, Clerk

page 3] Telephone: *Hillcrest* 3-6000

to JOSEPH W. CHINN, M. D.
D. E. Andrews, M. D.

Tappahannock, Va., April 2, 1963

M Warren Howard Caldwell
R. F. D. 1, Lexington, Virginia

For Professional Services:

4-1-63 Blood Alcohol \$5.00

page 4] APA—104 JP—100M—5.62

OFFICIAL RECEIPT FOR CASH DEPOSIT IN LIEU
OF RECOGNIZANCE
WITH SURETY

County of Essex Virginia No. 49264 R

Warren Howard Caldwell v. Commonwealth of Virginia 7

Received of Warren Howard Caldwell for the appearance of Warren Howard Caldwell before the County Court of Essex County on the 2 day of May 1963 at 10 A.M. to answer charge made against him-her under oath by P. R. Jeffrey, Jr. on the 1 day of April 1963 Five hundred —00 Dollars \$500.00 which includes fee of the Justice for taking this recognizance.

April 2 1963

Section 19-107, 1950 Code of Virginia

ARTHUR E. BAREFORD
Justice of the Peace

Duplicate-To Court

page 5] S. P. 82 Rev. 7-21-58

DEPARTMENT OF STATE POLICE

D 62393

County of Essex Date April 1, 1963

Mr. Warren Howard Caldwell you are hereby summoned to appear in the Essex County Court at Tappahannock on May 2, 1963 at 10 AM, to answer for violating the motor vehicle laws of Virginia, to wit:

Reckless Driving x Speeding ——— MPH in a ———

MPH Zone ☐ Chauffeurs No Operators License ☐
Illegal ☐

Other Opr. Motor Veh. under influence of intoxicated bev. x

I hereby promise to appear at the time and place specified above

Defendant's Signature _____

Summons issued under Title 46.1—Section 178, Code of Virginia. Failure to comply with this summons constitutes a separate offense.

Trooper P. R. Jeffrey, Jr. Shield No. 268

All traffic fines for State violations are paid into the Literary Fund for Educational purposes.

**COMMONWEALTH OF VIRGINIA DIVISION
OF MOTOR VEHICLES RICHMOND**

If this abstract relates to a conviction of exceeding a speed limit, the Court is requested to state rate of speed and zone.

Defendant Warren Howard Caldwell
Address RFD 1
City Lexington, Va.

Race W, Sex M, Weight 220, Height 6 ft. 1 in. Code
Eyes Blu, Hair Bro, Month Born FEB, Year Born 1928,
Oper. or Chauff. License No. 6B528463, State Va., Vehicle
Year 58, Make Ford, Type Pick-up, Vehicle License No. T64-
611, Year 62, State Va., Occupation Well Driller.

Jurisdiction, County. City or Town,
Name of Court
Offense Date
Plea Guilty ☐ Not Guilty ☐
Convicted of
Date
Penalty Imposed
License Suspended? Yes ☐ No ☐
Period Suspended
License Surrendered? Yes ☐ No ☐
Signature of Judge or Clerk
Name of Arresting Officer P. R. Jeffrey, Jr.
Title of Court Official
Date

This abstract is filed by the Judge or Clerk of the Court having jurisdiction of this case as required by Section 46.1-413, of the Code of Virginia, as amended.

D 62393

Com. vs. Caldwell
Com. Ex. "3"
6/6/63 C. V. Hardwick, Judge
Essex Co. Ct.

page 6] To

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF FINANCE
DIVISION OF MOTOR VEHICLES

2B 541044 Rec'd 11-30-59 S

ABSTRACT OF CONVICTION

Of Warren H. Caldwell 434 White or Colored
Address of Defendant Rt # 1 Street and Number, If Any
Lexington, Va.

Defendant's Operator's or Chauffeur's License Number
541044, Give Name of State, Vehicle License Number _____
Give Name of State

Offense Charged in Warrant Drunk Driving

Date of Conviction Nov. 10-1959 Plea of Guilty or Not Guilty
Defendant Convicted of above offense

Penalty Imposed 100.00 + 10.25 Appeal Taken No

If Defendant was Convicted of Reckless Driving, Was License
Suspended _____ Period of Suspension from Date
of Conviction 1 yr.

Name of Officer Making Arrest Lavhorn — Stinnett, Was
License Card Surrendered Yes.

Jurisdiction, County, City, Town of Buena Vista, Name of
Court Municipal

Signature of the Judge or Clerk of the Court Rita Mans
Title Clerk

Recommendation of the Court as Provided by Chapter 389,
Acts of 1934 Coded Nov 3

Date of Report Nov 25, 1959

This Abstract is filed by the Judge or the Clerk of the
Court having jurisdiction of this case as required by Chapter
384, Acts of 1944.

Nov 27 1959

Nov 27 1959

Nov 30 1959

* * * * *

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The Commonwealth of Virginia,

To the Sheriff of the County of Rockbridge, Greeting:

We Command You, That you summon Warren Howard Caldwell, R.F.D. #1, Lexington, Virginia, to appear before the Judge of our County Court for the County of Essex, at the Courthouse thereof, on the 16th day of May, 1963, to show cause, if any he can, why he should not forfeit cash bond in the amount of \$500.00 for his appearance in the Essex County Court on May 2, 1963, having been charged with (1) operating a motor vehicle on the State Highway under the influence of intoxicating beverages and (2) reckless driving on the State Highway.

And have then there this writ.

Witness, Elizabeth M. Hardwick, Clerk of our said Court, at the Courthouse, this 3rd day of May, 1963, and in the _____ year of the Commonwealth.

ELIZABETH M. HARDWICK, Clerk.
Essex County Court

(Reverse side)

DOCKET No. A 10272

Form No. 232

COMMONWEALTH OF VIRGINIA

vs.) RULE VS.
) WARREN HOWARD CALDWELL
R.F.D. #1
Lexington, Virginia

To May 16, 1963 Term, Essex County Court.

Executed by delivering a true copy in writing to Warren Howard Caldwell.

This 13th day of May, 1963

W. B. CHITTUM
Sheriff of Rockbridge Co.

Judgment in favor of the Commonwealth of Virginia against Warren Howard Caldwell for the sum of One Hundred Dollars (\$100.00) for failure to appear before Essex County Court in compliance with the term of his bond executed on April 2, 63, before Arthur E. Bareford. C. V. Hardwick, Judge

page 8] Form TJ 8—2-19-62—50M

COMMONWEALTH OF VIRGINIA

Essex County Court June 14 1963
To Mr. Arnold Motley, Clerk
Circuit Court, Tappahannock, Va.

I Hand you Herewith my Check No. 1309 In settlement of my account as follows:

Date	Descriptions	Amount
6/6/63	Commonwealth of Va.	
	vs.	
	Warren Howard Caldwell	
	Docket # A 10272	
	Case appealed	
K11496	Cash Bond #49264 R	\$498.00 AEB
	Court ordered forfeiture	-100.00
G314859	Additional Bond	350.00 E.M.H.
		<hr/>
		\$748.00
		<hr/>
		\$748.00

C. VINCENT HARDWICK
per ELIZ. M. HARDWICK, Clerk

page 9] OFFICIAL RECEIPT

OFFICE OF THE CLERK OF THE COURT
Essex County

Tappahannock, Va. June 14 1963
Received of C. Vincent Hardwick, Judge
Essex County Court Dollars
For the account of _____

Writ Tax and Deposit in the Following Chancery Cause
or Action at Law

Plaintiff Commonwealth of Virginia

vs.

Defendant Warren Howard Caldwell

	Account	Amount	
T A X	103 Chy.		No. 1835
	104 Law		
D E P.	6 Chy.		Docket No. _____
	7 Law		
F E E	303 Chy.		
	304 Law		
O T H E R		748.00	Appeal.
			A. MOTLEY,
			Clerk
	Total		Deputy Clerk

page 10] Received from Essex County Court the sum of
 \$748.00 as cash bail bond in the appeal cause of
Commonwealth of Virginia vs. Warren Howard Caldwell.
Given under my hand this 14th day of June, 1963

ARNOLD MOTLEY, Clerk
Essex County Circuit Court

page 11] EMORY L. CARLTON
 Attorney At Law
 Tappahannock, Va.

June 18, 1963

Commonwealth's Attorney
Essex County

Warren Howard Caldwell v. Commonwealth of Virginia 13

Mr. Arnold Motley, Clerk
Circuit Court of Essex County
Tappahannock, Virginia

Re: Commonwealth vs: Warren Howard
Caldwell — Appealed Misdemeanor

Dear Arnold:

Will you please summon the following named witnesses for the Commonwealth in captioned case, to appear in the Circuit Court of Essex County on Tuesday, June 25, 1963, at 10 a.m.:

DR. DOUGLAS E. ANDREWS
Tappahannock, Va.

TROOPER P. R. JEFFREY
Tappahannock, Va.

Yours very truly,

EMORY A. CARLTON

Summons 6-19-63 CO

page 12] The Commonwealth of Virginia,

To the Sheriff of the County of Essex, Greeting:

We Command You, That you summon Dr. Douglas E. Andrews, Tappahannock, Va. to appear before the Judge of our Circuit Court of Essex at the Courthouse thereof, on the 25th day of June, 1963, at 10 o'clock A.M., to testify and the truth to say in behalf of the Plaintiff in a certain matter of controversy in our said Court before said Judge, pending and undetermined, between Commonwealth of Virginia, Plaintiff, and Warren Howard Caldwell, Defendant. And have then there this writ.

Witness, Arnold Motley, Clerk of our said Court, at the Courthouse, this 19th day of June, 1963, and in the 187th year of the Commonwealth.

ARNOLD MOTLEY, Clerk.

If you claim pay for attendance and mileage fill up the certificate below before leaving Court and make oath before the Clerk.

Number of miles travelled first day by the most direct route in coming to and returning from Court.

_____miles
10

Deduct 10 miles each day for which no pay is allowed

Total No. Days Attendance _____ \$_____

Total No. Miles _____ \$_____

Total _____ \$_____

I claim and make oath that I attended Court under the within summons and the above account for attendance and mileage is correct and unpaid.

Signature

Postoffice

Sworn to before me, Arnold Motley, Clerk. _____19____

_____, Clerk

G. H. Parent — Legal Forms, Ashland, Va.

(Reverse side)

Executed in Essex County, Va., on the 21 day of June, 1963,
by summoning the within named party.

L. T. BRUTON, Sheriff.

page 13] The Commonwealth of Virginia.

To the Sheriff of the County of Essex, Greeting:

We Command You, That you summon Trooper P. R. Jeffrey, Tappahannock, Va. to appear before the Judge of our Circuit Court of Essex at the Courthouse thereof, on the 25th day of June, 1963, at 10 o'clock A.M., to testify and

the truth to say in behalf of the Plaintiff in a certain matter of controversy in our said Court before the said Judge, pending and undetermined, between Commonwealth of Virginia, Plaintiff, and Warren Howard Caldwell, Defendant. And have then there this writ.

Witness, Arnold Motley, Clerk of our said Court, at the Courthouse, this 19th day of June, 1963, and in the 187th year of the Commonwealth.

ARNOLD MOTLEY, *Clerk.*

If you claim pay for attendance and mileage fill up the certificate below before leaving Court and make oath before the Clerk.

Number of miles travelled first day by the most direct route in coming to and returning from Court.

_____miles
10

Deduct 10 miles each day for which no pay is allowed

Total No. Days Attendance _____ \$ _____

Total No. Miles _____ \$ _____

Total _____ \$ _____

I claim and make oath that I attended Court under the within summons and the above account for attendance and mileage is correct and unpaid.

Signature

Postoffice

Sworn to before me, Arnold Motley, Clerk, _____ 19____.

_____, *Clerk.*

G. H. Parent — Legal Forms, Ashland, Va.

(Reverse side)

Executed in Essex County, Va., on the 20 day of June, 1963,
by summoning the within named party.

L. T. BRUTON, Sheriff.

★ ★ ★ ★ ★

page 19]

INSTRUCTION NO. 1

The Court instructs the jury that if they believe beyond a reasonable doubt that the defendant was theretofore convicted of unlawfully operating a motor vehicle while under the influence of intoxicating beverages within a period of ten years of April 1, 1963, and was fined and sentenced therefor, and after the conviction the defendant unlawfully drove or operated a motor vehicle upon the public highways in Essex County, Virginia, on April 1, 1963 while under the influence of intoxicating beverages, the jury should find the defendant guilty as charged and fix his punishment by a fine of not less than Two Hundred Dollars nor more than One Thousand Dollars, and by confinement in jail for not less than one month nor more than one year.

D. W.—Judge

page 20]

INSTRUCTION NO. 2

The Court instructs the jury that in law the amount of alcohol in the blood of an accused person at the time of the alleged offense as indicated by a chemical analysis of the accused blood gives rise to the following presumption:

If there was at that time 0.15 per cent or more by weight of alcohol in the accused blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants.

D. W.—Judge

page 21]

INSTRUCTION NO. 3

The Court instructs the jury that any person who has drunk enough alcoholic beverages to so affect his manner, disposition, speech, muscular movement, general appearance or behavior, as to be apparent to observation is deemed in law to be intoxicated.

D. W.—Judge

page 22]

INSTRUCTION NO. 4

The Court instructs the jury that as a matter of law, in considering this case the jury must not entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be a reasonable doubt, and it must arise from a candid, and impartial investigation of all the evidence in the case, and unless it is such a doubt, that were the same kind of a doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty, if, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

D. W.—Judge

page 23]

INSTRUCTION NO. 5

The Court instructs the jury that the law presumes the defendant innocent until the Commonwealth has established his guilt by evidence so strong, so clear and so conclusive that there is left upon the minds of the jury no reasonable doubt of his guilt. This is an abiding presumption and goes with the defendant throughout the entire trial and applies at every stage thereof, until a verdict is reached. If possible, the jury should reconcile the evidence with this presumption. Mere suspicion or probability of guilt, however strong, is never sufficient to convict; nor is it sufficient that, by the greater weight or preponderance of the evidence, the guilt of the defendant is more probable than his innocence; for until his guilt has been proven so clearly that there is no reasonable theory upon which he can be innocent, the presumption of innocence still applies and the jury must acquit him; for a verdict of "Not Guilty" means nothing more than that the defendant's guilt has not been proven beyond a reasonable doubt.

D. W.—Judge

page 24]

INSTRUCTION NO. 6

The Court instructs the jury that a reasonable doubt is that state of mind in which the jury cannot say that they have an abiding conviction to a moral certainty, from all the evidence in the case, that the defendant is guilty of the

crime charged in the warrant. An abiding conviction is one which does not change or shift, but remains upon the mind and satisfies the conscience. If, after considering all the evidence, the jury does not have such an abiding conviction of the guilt of the defendant, to moral certainty, they must acquit.

D. W.—Judge

page 25]

INSTRUCTION NO. 7

The Court instructs the jury that, although the results of the blood analysis here involved give rise to certain presumptions, yet this does not shift the burden of proof in this case, and, the Court tells you that this presumption is one of the circumstances to be considered and weighed by the jury, along with all the other evidence in the case, in determining the ultimate proposition, whether the evidence, as a whole, raises a reasonable doubt in their minds as to the guilt of the accused. If there is such reasonable doubt, then the jury shall find the defendant not guilty.

D. W.—Judge

page 26]

INSTRUCTION NO. 8

The Court instructs the jury that if they find there is a conflict in the evidence in this case on any fact or circumstance tending to establish the guilt or innocence of the defendant, a part of which is in favor of the theory of the state and a part is in favor of the theory of the defendant, and the jury should entertain a reasonable doubt as to which is true, then it is the duty of the jury in arriving at their verdict to adopt the evidence, theory and conclusion most favorable to the defendant.

D. W.—Judge

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INSTRUCTION NO. 9

The Court instructs the jury that, upon a charge of driving while intoxicated, only a physician, registered professional nurse or graduate laboratory technician, using some type of a cleanser or sterilizer for the instruments used and for the part of the body from which the blood is taken, other than alcohol or other substance which might in any way affect

the accuracy of the test, shall withdraw blood for the purpose of determining the alcoholic content therein; where practicable, the physician of such person's choice shall withdraw said blood. The blood sample shall be placed in each of two sealed containers provided by the Chief Medical Examiner. Upon completion of taking of the sample, the containers shall be resealed in the presence of the accused after calling the fact to his attention. The containers shall be especially equipped with a sealing device, sealed so as not to allow tampering, labelled and identified showing the person making the test, the name of the accused, the date and time of taking. One sample shall then be delivered by the person who withdrew it to the police officer for transporting or mailing to the Chief Medical Examiner; and the other sample shall be delivered to the person accused, or if he is unable by reason of physical or mental disability to receive it, to the accused or the attorney for the accused within a twenty-four hour period following the withdrawal of the blood, and the accused, or the attorney for the accused, shall deliver by transporting or by mailing the same to a laboratory supervised by a pathologist or a laboratory approved by the State Health Commissioner as one having sufficient equipment and personnel com-
page 28] petent to make such test for testing in the same manner as hereinafter set forth as procedure to be followed by the Chief Medical Examiner, and provided further that all procedures established herein for use in transmittal, testing and admission of results in trial of the case for the sample sent to the Chief Medical Examiner shall apply to sample sent by or on behalf of the accused to an approved testing laboratory. Upon receipt of the blood sample, the Chief Medical Examiner shall cause it to be examined for alcoholic content by the State Toxicologist or by an Assistant State Toxicologist, who, upon the completion of such examination shall execute a certificate which certificate shall indicate the name of the accused, the date, time and by whom the same was received and examined, a statement that the container seal had not been broken or otherwise tampered with, that the container was one provided by the Chief Medical Examiner and a statement of the alcoholic content of the sample. The certificate attached to the container shall be returned to either the police officer making the arrest, the department from which it came, or to the clerk of the court in which the matter will be heard; and the certificate attached to the container forwarded by or on behalf of the accused shall be returned to the clerk of the court in which the matter will be heard, and such certificate shall be admissible

in evidence when attested by the pathologist or by the supervisor of the laboratory approved by the State Health Commissioner.

And the Court further instructs the jury that when the person arrested within two hours of the time of his arrest requests or consents to the taking of a blood sample for chemical analysis, if the result of such chemical analysis of the blood sample taken is not received in evidence at the trial for any reason whatever, including but not limited to the failure on the part of any person, except the person arrested, to comply strictly with every provision of this section, then the rights of the person arrested shall be deemed to have been prejudiced, and he shall be found not guilty of any offense under Section 18.1-54, or of any similar ordinance of any county, city or town, and his license shall not be revoked under any provision of this section.

In the event that the Commonwealth fails to comply with any of the requirements of this section, then this failure shall be deemed a reasonable doubt of defendant's guilt.

Offered by Defendant Refused Excepted to by Def.

D. W.—Judge

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* * * * *

ORDER

This day came the Attorney for the Commonwealth and the accused, Warren Howard Caldwell, in person and represented by his attorneys, Blake T. Newton and Dabney Overton, pursuant to a cash recognizance; and being arraigned in person on a warrant wherein the accused is charged with operating a motor vehicle on the public highway while under the influence of intoxicating beverages, being a second or subsequent offense within ten (10) years, appealed from a decision of the Essex County Court, tendered a plea of not guilty and put himself upon the country for trial; the Commonwealth doth likewise and issue is joined thereupon.

Then came a panel of eleven jurors, selected according to law, who were examined by the Court and found free of all legal causes of exception and qualified in all respects to serve as jurors for the trial of this case, and the Commonwealth

and the accused having each erased three names from said panel, beginning with the Commonwealth and acting alternately, the remaining five (5) against whom there was no exception, to-wit, Ernest A. Gaines, J. R. Clanton, William R. Hammond, Robert A. Pitts, Jr., and George B. Elliott, were sworn to well and truly try and a true deliverance
page 31] make between the Commonwealth and the accused and a true verdict render according to the law and the evidence.

Upon the hearing of all of the evidence for the Commonwealth, counsel for the accused moved the Court to strike the evidence as being insufficient in law to sustain a verdict, which said motion was overruled by the Court and to which said ruling the accused, by counsel, noted his exception. Thereupon the remainder of the evidence was heard and counsel for the accused again moved the Court to strike all of the evidence, both of the Commonwealth and the accused, as the same was insufficient in law to sustain a verdict, which said motion was overruled by the Court and to which said ruling counsel for the accused again noted his exception.

Whereupon the jury, having received the instructions of the Court and heard argument of counsel, withdrew to their room to consider of their verdict and after sometime returned into Court, having found the following verdict, to-wit:

“We, the jury, upon the issue joined find the defendant Warren Howard Caldwell guilty of operating a motor vehicle on the public highway while under the influence of intoxicating beverages, being a subsequent offense within ten years, and we fix his punishment at confinement in jail for one month and that he pay a fine of two hundred dollars.

J. R. CLANTON
Foreman”

Thereupon counsel for the accused moved the Court to set aside the verdict as being contrary to the law and evidence, and to set aside said verdict and dismiss the prosecution and enter up judgment for the defendant, both of which said motions were overruled by the Court and to which said ruling the accused, by counsel, noted his exception.

page 32] In consideration whereof, and in accordance with the verdict of said jury, the Court doth ADJUDGE and ORDER that the said Warren Howard Caldwell pay a fine of TWO HUNDRED DOLLARS (\$200.00) and the costs of this prosecution, and that he be sentenced

to confinement in jail for a period of one (1) month. Thereupon counsel for the accused expressed his intention to apply to the Supreme Court of Appeals for a writ of error. Therefore, the Court doth suspend the execution of such sentence for a period of sixty (60) days from this day for the purpose of giving the accused time to apply for said writ of error and, if said writ of error is granted, then to such time as the case is disposed of by the said Supreme Court of Appeals.

The accused having deposited Seven Hundred and Forty-eight Dollars (\$748.00) cash bond with the Clerk of this Court, no further bond is required.

The accused is ORDERED released on the terms aforesaid.

ENTER — LAW
June 25, 1963
DANIEL WEYMOUTH
Judge

page 33] Virginia:

In the Circuit Court of Essex County

Commonwealth of Virginia

V. (Statement of Costs)

Warren Howard Caldwell

Fine	\$200.00
Attorney — Commonwealth	5.00
Clerk	5.00
Sheriff	_____
Sergeant	_____
Exhibits	_____
Depositions	_____
Order of Publication	_____
Commissioners Report	_____
Guardian ad Litem	_____
Witnesses	_____
Jury	56.96
Essex County Court costs (6-6-63)	14.50
.....	_____

.....	_____
.....	_____
.....	_____
Total	\$281.46

Attest:

ARNOLD MOTLEY, Clerk.

6-14-63 Appeal bond \$748.00.

page 34]

* * * * *

NOTICE OF APPEAL
and
ASSIGNMENTS OF ERROR
NOTICE OF APPEAL

To: Hon. Arnold Motley, Clerk, Circuit Court of Essex County, Tappahannock, Virginia.

The defendant, Warren Howard Caldwell, hereby gives notice of his appeal in this case, and that he will apply to the Supreme Court of Appeals of Virginia for an Appeal and Supersedeas.

ASSIGNMENT OF ERRORS

The said defendant, Warren Howard Caldwell assigns as error the action of the Court in admitting the results of the blood test, in evidence and in refusing to strike the evidence and dismiss the prosecution, for the following reasons:

1. The Commonwealth failed to comply with Title 18.1, Section 55, of the Code of Virginia, 1950, as amended; and,
2. The defendant was deprived of his right not to give evidence against himself, as guaranteed to him under the Constitutions of Virginia and the United States.

WARREN HOWARD CALDWELL
By Counsel

Supreme Court of Appeals of Virginia

Filed in the Clerk's Office of Essex County, Va., Circuit Court the 23rd day of Aug. 1963.

A. MOTLEY, Clerk

* * * * *

page 35] I hereby certify that a true copy of the foregoing was this 23rd day of August, 1963, delivered to Emory L. Carlton, Esquire, of Tappanhanock, Virginia, before the original was filed in the Clerk's Office.

DABNEY OVERTON
of counsel

* * * * *

page 37] OVERTON AND OVERTON
Attorney At Law
Warsaw, Virginia

September 3, 1963 Telephone
Edgewater 3-7622

Mr. Arnold Motley, Clerk
Circuit Court of Essex County
Tappahannock, Virginia

In Re: Warren Howard Caldwell vs.
Commonwealth of Virginia

Dear Arnold:

Will you please transmit the record in the above-entitled case. I filed the petition for appeal in the Clerk's Office of the Supreme Court of Appeals, so the record should also be transmitted there.

I understand that Mr. Carlton has indicated that he does not desire to designate any further part of the record for printing, so that it would seem that, under the rule, the record could now be transmitted at any time.

With best wishes, I am

Very cordially yours,

OVERTON & OVERTON
DABNEY OVERTON

cc.

Honorable Emory L. Carlton
Attorney for the Commonwealth
Tappahannock, Virginia

Honorable Blake T. Newton
Attorney at Law
Hague, Virginia

DO/aer

Filed in the Clerk's Office of Essex County, Va., Circuit
Court the 4th day of Sept. 1963.

A. MOTLEY, Clerk

page 1]

A transcript of the evidence and other incidents of the
above when heard on June 25, 1963, before the Honorable
Daniel Weymouth, Judge, and a jury.

APPEARANCES

Mr. Emory L. Carlton, Commonwealth's Attorney;
Mr. Dabney Overton, Sr., and Mr. Blake T. Newton, counsel
for the defendant.

* * * * *

page 3] Note: Court is convened at 10:00 o'clock A.M.
Thereupon, after the court reporter is duly sworn,
the prospective jurors are excluded from the courtroom, and
the hearing begins, viz:

* * * * *

page 24]

* * * * *

Note: The prospective jurors are brought back into the
courtroom at this point. Thereupon, the defendant is ar-
raigned as follows:

The Clerk: You are Mr. Warren Howard Caldwell? How

P. R. Jeffrey, Jr.

do you plead to this charge against you of driving under the influence?

The Defendant: Not guilty.

The Clerk: His plea is not guilty.

page 25] Note: At this point a jury is impaneled and sworn to try the issue.

The Court: Any motion to exclude the witnesses?

Mr. Overton: Yes, Your Honor.

The Court: All witnesses who are going to testify in this case come forward and be sworn; on both sides.

Note: At this point witnesses are sworn and excluded from the court room.

The Court: Opening statement?

Mr. Carlton: No, Your Honor.

Mr. Overton: No, Your Honor.

The Court: Call your first witness.

P. R. JEFFREY, JR.,

upon being called on behalf of the Commonwealth, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Carlton:

Q. Are you Trooper P. R. Jeffrey?

A. Yes, sir.

page 26] Q. And are you assigned to duty here in Essex County as a member of the Virginia State Police Force?

A. Yes, I am.

Q. Do you recognize the accused in this case?

A. Yes, sir.

Q. Who is he?

A. Warren Howard Caldwell.

Q. Were you the arresting officer on April 1, 1963?

A. Yes, sir.

Q. Did you arrest the accused on that day?

A. Yes, sir. I did.

Q. Give the place of the alleged offense?

A. In Essex County on the Brays Fork.

P. R. Jeffrey, Jr.

Q. What was the offense for which he was arrested and for which he is being tried today?

A. I charged him with operating a motor vehicle under the influence of intoxicating beverages.

Q. Tell the Court the circumstances of that charge and when you first saw him, and tell the Court and the jury about that.

A. At approximately 7:45 P. M. on April the 1st, 1963, I was proceeding north on U. S. Route 17. At this time I was approximately a half to a fourth of a mile south of Brays

Fork on Route 17. I was behind a Rambler
page 27] station wagon with a car trailer on it. I was

attempting to clock the vehicle. At this time the Rambler slowed down to approximately thirty-five or forty miles-per-hour, and I could see in looking past the Rambler a vehicle veer south into the southbound lane of Route 17, and come back in. And the Rambler continued at this slow speed and I observed the pick-up truck veer out again. It was a blue and white pick-up truck. I recognized the truck from the lights on the Rambler as the truck pulled out and it would go half way into the southbound lane and then veer back into the northbound lane. I was unable to pass at this time and so I waited until the truck had got into Brays Fork where I was going to stop the truck and the operator. Upon arriving at Brays Fork the truck took a right at Brays Esso station and then made another left running up on a curb. He went into the driveway and then cut back out again and run up on the curb. I ran up — As he ran up on the curb I pulled my car to the right and beside him and got out. And after he went up on the curb he rolled back down off of it. And he did this the second time and I yelled for him to stop and shined my light on myself and on the truck. And he went up on the curb the third time; as he was rolling back off of it I opened the door and stated that I would like to see his operators license. At this time he stopped the truck and I
went around to the driver's side and I looked at
page 28] his operator's license and found him to be —

The Court: Suppose we stop right there one moment.

Note: At this point the jurors who were not selected to serve in this particular case are excused, the colloquy relative to the same being recorded, but not incorporated in this

P. R. Jeffrey, Jr.

record in the interest of brevity. Thereupon, the hearing continues, viz:

The Court: All right, proceed, Mr. Carlton.

Mr. Carlton: Yes, sir.

By Mr. Carlton: (continuing)

Q. Mr. Jeffrey, continue your narrative of what happened.

By The Court:

Q. What time of day was this?

A. This occurred at 7:45 P.M.

Q. Anybody in the car with him?

A. No, sir.

The Court: 7:45 P.M. All right.

A. (continuing) He was in a truck, he was alone in the truck. At this time I observe his operator's license and found him to be the defendant, Warren Howard
page 29] Caldwell. I asked — I then — Upon observing Mr. Caldwell, he appeared unsteady on his feet. He was unsteady on his feet, his eyes were glassy, and he had thick speech. I asked Mr. *Caldwell* how well he could walk and he said he could walk all right. And I asked him to walk a couple of steps and come back, and he was unsteady while he was walking.

I detected a faint odor of alcohol on his breath. I asked Mr. Caldwell how much he had had to drink, and he said he had a couple of drinks with a war buddy of his.

At this time I advised Mr. Caldwell I was placing him under arrest and charging him with operating a motor vehicle under the influence of alcohol, and that a new Virginia law required you to submit to a blood test. And I asked him would he like to take one; he said, yes, let's go and get it over with now. I then parked Mr. Caldwell's truck at Brays, getting it off the driveway, and when I got into the truck I noticed on the seat — Could I get the bottle?

Q. Yes.

A. (producing bag and bottle) I found on the seat a fifth of vodka.

Mr. Carlton: Your Honor, the Commonwealth offers in evidence this bottle marked R-e-l-s-k-a Vodka.

P. R. Jeffrey, Jr.

page 30] (bottle exhibited to the jury)

The Court: All right, admitted without objection Commonwealth's Exhibit No. 1.

A. (continuing) I found this in the seat on top of the defendant's coat in the paper bag, which is right here.

Mr. Carlton: The paper bag is offered in evidence, Your Honor.

A. (continuing) It was in the bag at the time. I then put Mr. Caldwell in my car and proceeded to a Justice of the Peace, where I had a warrant written out charging him with driving under the influence. And as Mr. Caldwell stated he would take a blood test, I proceeded to Dr. Andrews' office to let the defendant have a blood test.

We arrived at Dr. Andrews' office, which was approximately a little after 8:00 o'clock. At this time I took two vials, one in blue, vial, the other in brown, into the doctor's office with the defendant, and advised Dr. Andrews that the defendant wanted a blood test taken.

I opened up the box in the defendant's presence and the instructions. Dr. Andrews then — I asked Dr. Andrews if he wanted me to open up the box; he said, go ahead, open it up. And then I asked him if I should break the seal — the blood tests come in a vial that is closed in cellophane seal.

He advised me to break the seal. And at
page 31] this time Dr. Andrews withdrew the blood, and

while he was withdrawing the blood he put some writing on the tube. He withdrew the blood and then he shook the vial, and then gave the vial to me. He just shook it lightly, and gave the vial to me, and asked me to finish shaking the blood vial. I shook the blood vials until he advised me they were shaken enough, and put them in the box. At this time I put the blood vials in the box, and I called the defendant's attention to this fact; and I sealed the blood vials in his presence after calling the defendant's attention to it. I then proceeded to the Sheriff's office and gave — or prior to proceeding to the Sheriff's office I gave the defendant his blood sample, and then I proceeded to the Sheriff's office. I gave the warrant and the defendant to Deputy Sheriff Saunders, with the fifth of vodka. At this time I left.

Q. Now, was the —

P. R. Jeffrey, Jr.

By The Court:

Q. Gave the blood to the Sheriff?

A. No, sir. I gave the blood test to the defendant, and I gave — He had the blood test, his blood test, when I gave him — turned him over to the Deputy Sheriff for incarceration, and I gave the fifth of vodka to the Deputy Sheriff.

By Mr. Carlton: (continuing)

Q. Did you give him the sheet showing the page 32] names of persons authorized to make this test for him?

A. Yes, sir.

Q. Now, was this blood sample taken within two hours after the offense — the alleged offense?

A. Yes, sir.

Q. Within two hours? I believe you said that you arrested him about 7:45 P.M. and that the blood was taken at about 8:00 P.M.?

A. 8:00 P.M. 8:15, approximately.

Q. 8:00 or 8:15 P.M. After you arrested him I believe you stated that you took him right straight to the doctor?

A. I took him to a Justice of the Peace first to have the warrant written.

Q. And then to the doctor?

A. And then to the doctor.

Q. Now, you said you have these two containers. Who provided those containers?

A. They were provided by the Chief Medical Examiner's office.

Q. Of what state?

A. Of Virginia.

Q. Was this container equipped with a specially-equipped sealing device so as not to allow tampering with?

Mr. Overton: If you Honor please, I object page 33] to that. I don't want to object to these questions, but on each one of them he is leading the witness as completely as he can. He doesn't ask the witness how it was equipped. Was it equipped so and so.

The Court: I believe that is what he can do. I overrule your objection.

A. Yes, sir. And two flaps coming down glued to the container on the bottom which seals it.

P. R. Jeffrey, Jr.

Q. Now, when the blood was taken were these two vials labeled and identified, if so, how were they labeled and identified?

A. The vials, or the cartons?

Q. The cartons.

A. The *carton* on my carton I put a return address to me. That is, it has a set address. It is addressed to the Chief Medical Examiner. I have to put my own return address on it. And on the defendant's there is a return address, I put to the Clerk of the Court, Essex County Court, Tappahannock, Virginia.

Q. Was the name of the accused placed on it?

A. Not on the container, on the vial; yes.

Q. The vial? And was the date placed on the vial?

A. Yes, sir. This was all done by Dr. Andrews.

Q. Was the time of the taking of the sample
page 34] placed on the vial?

A. Yes, sir.

Q. Now, the container including the vial you said that that was delivered to you. What did you do with it?

A. When I took the *continaer* I put it in my glove compartment over night, as the post office is not open. I locked my glove compartment, and the next morning I went down to the post office and put it into the mail, put it in first class mail.

Q. Who did you mail it to?

A. It is self-addressed to the Chief Medical Examiner in Richmond, Virginia.

Q. Did you mail it to the Chief Medical Examiner in Richmond, Virginia?

A. Yes, sir.

Q. Do you have a copy of the instructions and names of approved persons that you have testified that you delivered to the accused at that time with his sample?

A. With his sample?

Q. Yes, sir.

A. Yes, sir. I gave him one.

Q. Do you have a copy of it?

A. No, I don't.

Q. Could you get one?

A. I have one out in my car, but I don't have
page 35] one with me now.

Q. But you say you gave him those instructions with the names of approved persons?

P. R. Jeffrey, Jr.

A. Yes, sir. Who could test his blood.

Mr. Overton: Do I understand he is going to get it, or not, Mr. Carlton? You asked that he produce it. I don't know if that means he is going to or not.

Mr. Carlton: I think it's well to produce that thing for information.

Excuse me one minute. May I see those papers? It's not in here.

Note: Someone is sent to get the above-mentioned paper-writing, during which the hearing continues, viz:

Q. Now, do you have this container and the vial that you — Did you receive a report from the Chief Medical Examiner's Office in Richmond?

A. Yes, sir. I did. The report is over here.

Q. Will you present that?

The Court: Let's bring all these things to Court the next time. The Clerk of the Court has them. Go ahead.

page 36] Q. Now, you have testified that this blood was taken and that the container and the vial was delivered to you for transmittal to the Chief Medical Examiner, and that you mailed it to him. Now, did you receive the vial and the container back together with a report?

A. Yes, sir. This is the vial that I received. This is the container I received.

Mr. Carlton: Your Honor, this vial and container and report is offered in evidence.

Mr. Overton: If Your Honor please, we object to the introduction of these in evidence at this time, because the statute, the requirements of the statute have not been fully met. He testified to some of the requirements of the statute, but not all, by no means. And we object to the introduction at this time. It may be the Commonwealth will later introduce evidence that the other requirements were met, but at this time certainly they have not been met.

Mr. Carlton: Your Honor, in view of the evidence I offer in evidence the vial and the container received in the mail from the Chief Medical Examiner's office. The officer said he mailed it and received it.

P. R. Jeffrey, Jr.

Do you have any objection to that?
page 37] Mr. Overton: Yes. We have the same objection because according to the evidence at this point the statute has not been complied with in the drawing of the sample.

Mr. Carlont: In view of the objection by the defendant, I will not offer the vial and the container and the report in evidence at this time, but I would like to recall Trooper Jeffrey to the stand after I have put Dr. Andrews on.

The Court: Don't leave.

The Witness: Sir?

The Court: I say don't leave.

The Witness: Yes, sir.

Q. Trooper Jeffrey, you said you would get a copy of the paper that you delivered to the accused with his vial on the date of the arrest?

A. (tendering paperwriting to Mr. Carlton)

Q. Is this a copy of the instructions you gave him with the vial?

A. This is the standard form we give people when charged with operating under the influence.

Q. Is this a copy of the paper you gave him with the vial?

A. Yes, sir. Same form. A copy.

Q. I ask you whether it's a copy.

page 38] A. Yes, sir.

Mr. Carlton: This is offered in evidence.

The Court: Commonwealth's Exhibit No. 2 admitted without objection.

Q. Now, just checking the record, Mr. Jeffrey, did you testify that this offense — alleged offense took place on April 1, 1963, in Essex County, Virginia?

A. Yes, sir.

Q. Now, you testified that the defendant drove up on a curb. Is that what you called it?

A. Yes, sir.

Q. Could you describe the curb a little more in detail?

A. The curb was approximately eight to twelve inches in height. It's the type of curb they put around a service station to keep people off the middle of the lot. And he went up on this, and then he rolled back off and he had hit it again. He did this a total of three times.

Q. Where was that particular curb?

P. R. Jeffrey, Jr.

A. This is at the Esso Station at Brays Fork.

Q. Who operates that station?

A. I couldn't think of the gentleman's name at this time.

Q. How far did you observe him driving — the defendant?

page 39] A. The total distance I would say was approximately four tenths of a mile, if not, maybe a little more.

Q. Did he drive in his proper lane?

A. No, sir. He would go into the other lane.

Q. Would you describe to the jury just how he drove with reference to his lane?

A. Well, sir, the only time I could see him actually was when he was in the other lane.

Q. When you say in the other lane, what do you mean by that?

A. Which was the southbound lane. He was proceeding north in the same direction I was, at the time. And he would come over into the southbound lane, go into the middle of the lane and then come back.

Q. In what manner did he go into the southbound lane and then come back?

A. He would just drift over and then just pull himself back. Drift over again and cut back.

Q. Did you call that weaving?

Mr. Overton: If Your Honor please, I object, that is a most leading question.

The Court: That is leading.

Mr. Carlton: I will withdraw that question, Your Honor. You may cross examine.

page 40]

CROSS EXAMINATION

By Mr. Overton:

Q. Mr. Jeffrey, you have testified once before with respect to this matter, haven't you?

A. Yes, sir.

Q. You have changed your testimony quite considerably this morning, haven't you?

Mr. Carlton: Your Honor, I object to that question. If

P. R. Jeffrey, Jr.

the defense has anything that he has changed, alleged that he changed, this morning, I would like for him to call his attention to the time place and the alleged change.

Mr. Overton: If Your Honor please, I think I have a right to ask him if he changed his testimony.

The Court: You have a right to ask him if he has changed every bit of it.

Mr. Carlton: That was what my objection was. Has he changed every bit of it, or in what particular, so the witness can —

The Court: I overrule you.

Q. You have changed your testimony quite considerably since the last time you have testified?

A. I don't believe I have stated anything that I didn't state the last time.

Q. Didn't you state before when you were
page 41] testifying that when you were asked what class
mail you sent this thing by you said I don't know
anything about mail classes?

A. Yes, sir.

Q. You testified to that?

A. I went and found out about mail classes.

Q. How did you find out you mailed this by first class mail?

A. I knew I had paid a dime for the stamp to put on container, and I went and asked the postmaster —

Q. So you found out from the postmaster —

Mr. Carlton: Your Honor, I ask that the witness be allowed to finish. He said postmaster right in the middle of his answer, and he cut in. So I ask that the witness be permitted to finish his answer.

Mr. Overton: I object to his testifying what the postmaster told him, that was the reason. I don't think he has a right to testify to that.

Q. You did testify before that you didn't know anything about classes of mail?

A. I did not know at the time.

Q. And this morning you can simply flatly say you mailed it first class?

A. Yes, sir.

Q. Didn't you testify before that when you
page 42] went into the doctor's office that you broke open
the two containers and took the sheet of instruc-

P. R. Jeffrey, Jr.

tions out of one and gave it to the doctor and asked him then if he didn't want you to break the cellophane covers on the tube?

A. I believe I did, sir.

Q. You didn't testify to that this morning, did you?

A. I don't have everything written down that I testified to.

Q. You changed your testimony quite materially —

Mr. Carlton: Your Honor, I suggest that the record be read and see if he changed it.

The Court: He has the witness, he has a right to cross examine him.

Q. That is in fact what happened, isn't it, Mr. Jeffrey? When you went into his office this sheet of instructions, which you have referred to as having been given to Dr. Andrews, was inside one of these containers wasn't it?

A. Yes, sir.

Q. When you went in there you didn't give him the two containers until you broke open the two containers and took the tubes out yourself?

A. At his request; yes, sir.

Q. You didn't say that before, though, did you?
page 43] A. I don't specifically recall what I said before.

Q. Didn't you testify before that when you went in there you broke open the two containers and took the — broke open the two packages and took out the two tubes and then asked Dr. Andrews if he wanted to break the cellophane wrapper on them, isn't that what you testified to before, sir?

A. Yes, sir.

Q. And that is what happened?

A. As far as I know; yes, sir.

Q. Now, you testified with respect to a sheet of instructions that you gave Dr. Andrews. Is there a copy of that available?

A. It was with the evidence.

Mr. Carlton: Your Honor, I ask for what purpose does counsel offer this paper in evidence.

Mr. Overton: If Your Honor please, I don't know that the Commonwealth's Attorney has the right to ask me that question, but the fact is he has brought out from the Trooper on direct examination that some form of a sheet of instructions was given to the doctor, and I want it produced in evidence.

P. R. Jeffrey, Jr.

Mr. Carlton: I don't think I asked any such question. I don't have any knowledge of asking any question about the instructions given to the doctor. I asked him about page 44] the instructions given to the accused, and I asked him to get a copy. I never examined anything about any instructions given to the doctor. The law is the best evidence, and the law must be followed. And that is what is being presented.

The Court: Well, he would still have a right to offer it in evidence regardless.

Mr. Carlton: I object to the offering of any papers in evidence that doesn't contain the law, on the ground it's *ir-relevant*.

Mr. Overton: You object to my offering any papers I want to offer, except what you want to offer.

Mr. Carlton: I wouldn't say that.

Q. Is this a copy of the sheet of instructions you say you gave to the doctor?

A. This is a sheet of the instruction that comes in every tube, every vial.

Q. Can you answer my question, Mr. Jeffrey, or can't you?

A. As I say, I gave it to the doctor.

Q. Yes, sir?

A. This? I would say it was given to the doctor.

Q. Why are you so reluctant to answer questions like that? It's yes or no, either it is or it isn't.

Mr. Carlton: I object to counsel exasperating page 45] the witness like that. He is doing the best he can.

The Court: Commonwealth's Exhibit No. 3 admitted — No, defendant's Exhibit 1.

Q. Now, Mr. Jeffrey, you went into Dr. Andrews' office —

A. Yes, sir.

Q. — and, as I understand it now, what happened there was that you took out these two containers and you broke them open and gave Dr. Andrews a sheet of instructions, which is similar to the one that is here in evidence, just admitted, and then you asked Dr. Andrews if he wanted you to break the cellophane slips on the containers, is that right?

A. When I went into the doctor's office — Want me to give it to you?

P. R. Jeffrey, Jr.

Q. I want you to answer my question. I asked you if that isn't what happened and you said it is.

A. Well, let me —

The Court: Do you want this paper?

A. I don't think so. Yes, that is mostly what happened. I did not take the tubes out, though. I left them in the box. I just opened up the top of the containers and put the top underneath and set both of the containers down.

Q. How did you take the cellophane wrappers
page 46] off without taking the tubes out of the box?

A. I asked Dr. Andrews did he want me to take the cellophane wrappers off, and I think I did take the tubes out of the box —

Q. And he took the cellophane wrapper off in the presence of the accused?

A. Yes, sir.

Q. He did do that?

A. Yes, sir.

Q. And opened the bottle?

A. Opened the vial?

Q. Yes.

A. I am not positive of who did that.

Q. You are positive about that? If Dr. Andrews said you opened it you wouldn't deny it?

A. If he said I opened it I probably would have.

Q. You just don't know who opened those vials?

A. They were opened while I was there; yes, sir.

Q. Now, Dr. Andrews took a sample of this gentleman's blood, you didn't do that, did you?

A. No, sir, I did not. The doctor did.

Q. You were doing most of everything that was done there.

Mr. Carlton: That is an assertion. Mr. Overton wasn't there, he can't assert that. I'm objecting.
page 47] He can't assert that this man did most everything. That is an assertion. That isn't a question.

Q. In response to that, what did you say, Mr. Jeffrey?

The Court: You can say conclusions as to what happened.

Mr. Overton: He made some statement in response to that question. I don't know what he said.

P. R. Jeffrey, Jr.

A. I said whatever I did was under the instructions of the *docotr*, the request of the doctor.

Q. The doctor told you to do everything you did?

A. He certainly did. I asked him if he wanted me to, because he had a number of things to do.

Q. He had a number of things to do so you broke the containers open for him instead of the doctor breaking them open?

A. I asked him if he would like for me to break the containers open.

Q. Break the containers that the vials were in open, the boxes?

A. The boxes.

Q. Yes.

A. The box there isn't broken, you just have to undo the little knob.

Q. You didn't ask anybody about doing that, page 48] though, did you?

A. No, sir. The doctor was in the room.

Q. And you did it?

A. I just tried to help him; yes, sir.

Q. After he had taken the sample, who held the vial while the blood was put in it?

A. I held the vial.

Q. You held the vial?

A. Yes, sir.

Q. And then you put the corks in them?

A. The doctor put the corks in the vials.

Q. Are you sure of that?

A. I said the doctor put them in.

Q. I say are you sure of that? You seem unsure.

A. I am trying to remember who did it. And that is the best of my knowledge, the doctor put the corks in the vial.

Q. You really don't know who put them in there, do you?

A. The doctor did.

Q. To the best of your knowledge?

A. Yes, sir.

Q. You had them in your hand, then what did you do with them? After he stuck the corks in them you had them in your hand?

page 49] A. He took them and shook them once or twice, then he gave them to me and I shook them up.

Q. He told you to shake them?

A. Yes, sir.

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Q. You are sure of that?

A. Yes, sir.

Q. Then you shook them up and you never gave them back to the doctor at all, did you?

A. No, sir.

Q. You put them in the containers and sealed them yourself?

A. Yes, sir.

Q. And then you say you gave one of them to the accused?

A. Yes, sir.

Q. Mr. Jeffrey, pinpoint a little more closely for the jury where this incident occurred. Was it just there at Brays Fork there about where a road pulls off to the left where radar is set up sometimes?

A. Approximately in that location. Right around there.

Q. Do you know where Mr. Jeffrey's vehicle came from, do you have — Mr. Caldwell, I mean.

A. Mr. Caldwell made some statement to me.

Q. I don't mean what he told you. Did *you know* page 50] where it came from yourself, the first you saw of it was right there?

A. No, sir.

Q. I mean at this time.

A. At this time; yes, sir.

Mr. Carlton: I think the witness ought to be able to state the answers of the accused to him. He was cut off. When he answers a question — He doesn't want that, what he did say, don't want that, stop. I don't think that is proper.

Mr. Overton: If Your Honor please, I was trying to get a response to the specific question. He was answering with respect to something else.

The Court: He has a right to answer his question.

Q. And that was, you say, between a quarter and a half mile from this service station where you finally wound up?

A. Yes, sir. Below Brays Fork.

Q. You followed him from there to the service station and pulled in beside him?

A. Yes, sir.

Q. Now, that is the little frame service station which is on the left side of 17, opposite the mouth of 360, coming into it, isn't that right?

A. It's straight across from 360 coming into it.

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page 51] Q. Yes. Isn't the one a little further up the road?

A. No, sir. You are thinking of the bigger one. It is not the bigger one.

Q. The one on the left going down?

A. Yes, sir.

Q. Now, that service station has a dirt driveway, doesn't it?

A. Yes, sir.

Q. And in front of it there are some three of these concrete circles or ellipses, and that is the curb of which you are speaking, isn't it?

A. Yes, sir.

Q. It has a concrete edge around those borders there so often you see flowers in them at service stations; that is the same kind of thing?

A. Yes, sir.

Q. Now, which one of those three things was it that Mr. Caldwell rolled up on?

A. The one closest to town.

Q. The one closest to Tappahannock?

A. Right at the end. Right at the end.

Q. Then when you got the door open of the car you asked him for his driver's permit?

A. Yes, sir.

page 52] Q. And he showed you that?

A. Yes, sir.

Q. Where did he have his driving permit, do you remember?

A. In his wallet, sir.

Q. He pulled it out and showed it to you?

A. Yes, sir.

Q. After you had seen his driving permit you asked him to get out and walk?

A. He was already out, sir.

Q. Already out?

A. Yes, sir. He got out.

Q. In other words, when he handed you the driving permit he was standing on the ground?

A. Yes, sir.

Q. And then you asked him to walk?

A. I observed him at this time and then maybe a couple of minutes later I asked him to walk.

Q. Now, where did you ask him to walk to, Mr. Jeffrey?

A. Down along side the pick-up truck.

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Q. Back behind his pick-up and back?

A. Yes, sir.

Q. Did he walk when you asked him to?

A. Yes, sir.

page 53] Q. And you asked him that for the purpose of determining whether or not he was under the influence, isn't that right?

A. Not just that alone.

Q. What other reason did you have for asking him to walk?

A. I asked him, I said, how well can you walk? As I could see from his eyes and so forth how he appeared, and he had other signs. And I said, how well can you walk? He said, I can walk pretty well. I said, let's see how well you can walk.

Q. And that was a part of *you* examination of him to determine whether or not he was under the influence?

A. Yes, sir.

Q. Then after he walked you told him that the law of Virginia required him to take a blood test.

A. I said the —

Q. A new law, I believe? A new law of Virginia required him to take a blood test?

A. Yes, sir.

Q. And he said let's get it over with?

A. I said would you like to take it? He said, yes, let's go get it over with.

Q. Let me ask you this, Mr. Jeffrey: When you testified in this case before I want to ask you if you weren't asked several times about this very point and if each time you didn't testify that all that took place there was this: That you told him that under the law of Virginia, a new law of Virginia, he was required — No, that is wrong. That a new law of Virginia required him to submit to a blood test, and he said, let's get it over with. I want to know if you didn't reiterate this several times in your former testimony?

A. I then asked him, do you want to take it.

Q. Did you testify before that you asked him if he wanted to take it?

A. I testified before the first time in Court when we testified.

Mr. Carlton: Counsel just admitted he was wrong on the thing.

Mr. Overton: Wrong in stating the question, yes.

P. R. Jeffrey, Jr.

Q. He said let's get it over with?

A. Yes, sir.

Q. And then you took him on to Dr. Andrews' office?

A. No, sir.

Q. To the Justice, first?

A. Yes, sir.

Q. And then to the doctor?

page 55] A. Yes, sir.

Q. And then after that you took him on to the Sheriff's office?

A. Yes, sir.

Q. And you gave him the vial containing his own blood?

A. Yes, sir.

Q. And as far as — Now after that you don't know what happened to it; in other words, you gave it to him and that was it?

A. No, sir.

Q. Mr. Jeffrey, when you testified before didn't you testify about a conversation that you had with this gentleman between the time of his arrest at Brays Fork and the time you got to the Justice's office?

A. Yes, sir.

Q. And you omitted that this morning?

A. Yes, sir.

Q. Why?

A. No particular reason.

Q. Were you instructed to omit it?

A. No, sir.

Q. Didn't you testify before that on the way to Tappahannock he asked you to — if you couldn't charge him with reckless driving and you told him, no, that you had placed your charge, and he then asked you, well, all that can save me now is a blood test, and you said, yes, sir?

A. Would you like for me to go into a little detail about the conversation?

Q. Well, did that happen? I am asking a question.

A. That is approximately what happened; but while we were going en route from the Justice of the Peace's office to the doctor's office, I talked to the defendant at this time; and part of what you said was brought in, only the blood test can save me now. He stated that at that time. He did not state it at the time we left Brays Fork, just going from the Justice of the Peace's office.

P. R. Jeffrey, Jr.

Q. Then your answer to him at that time was yes, sir, as I understood it?

A. I didn't say yes, sir. I said, well, that is about right.

Q. The fact is that you did charge him with reckless driving, didn't you?

A. Yes, sir. He just wanted me to charge him with reckless driving without driving under the influence.

Q. You told him you couldn't charge him with reckless driving but then you did?

A. I said I was not going to just charge him with reckless driving.

Mr. Carlton: Your Honor, counsel is bringing page 57] in something about a reckless driving charge.

The accused is not being tried here for it, and I request the Court to instruct the jury that this trial has not anything to do with a reckless driving charge, so that it might not be confused.

The Court: I think they understand he's being tried today for driving under the influence.

Mr. Carlton: And the Court has ruled he cannot be tried for reckless driving.

Mr. Overton: I don't know what the jury has to do with that. We except to —

Mr. Carlton: You are bringing in something about a reckless driving charge.

The Court: He has a right to ask him, Mr. Carlton. He has a right to ask him about that, but I don't think the jury ought to be misled on some other charge. The way it is now there is no charge, no charge.

Mr. Overton: If Your Honor please, we object to the statement by the Commonwealth's Attorney as being prejudicial to the defendant, and move the Court for a mistrial.

The Court: Gentlemen of the jury, the trial here today is for operating a motor vehicle on a public highway page 58] while under the influence of intoxicants, and further charging that this is a subsequent offense; that he was convicted of doing the same thing on November 10, 1959. Now, that is the charge that he is faced here with today, not trying him on the reckless driving charge.

I will have to overrule your motion for a new trial.

Mr. Overton: Let the record show our exception to the action of the Court, sir.

That is all, Your Honor.

Tpr. P. R. Jeffrey, Jr.

RE-DIRECT EXAMINATION

By Mr. Carlton:

Q. Mr. Jeffrey, just for the record, did I understand you to say that you observed the accused driving the automobile — this truck at the time and place as alleged in the warrant?

A. Yes, sir.

Q. And you recognized the accused as the one who drove it?

A. Yes, sir.

Mr. Carlton: Your Honor, as I stated before I will ask Mr. Jeffrey be recalled as a witness later on.

Witness stood aside

page 59] Note: A recess is had at this point. There-upon, the hearing continues in Chambers as follows:

page 75] Note: At this point, Court and counsel return to the courtroom where the hearing continues in the presence of the jury as follows:

Mr. Overton: If Your Honor please, we overlooked one question of the Trooper.

Mr. Carlton: I am going to recall him, Your Honor.

The Court: Was he the last witness on the stand?

Mr. Carlton: Yes, sir.

The Court: Well, call him back and let him finish his cross examination.

TPR. P. R. JEFFREY, JR.,
resuming his testimony, testified further as follows:

RE-CROSS EXAMINATION

By Mr. Carlton:

Q. Mr. Jeffrey, you testified that — You introduced a bottle of vodka in evidence?

A. Yes, sir.

Q. Did you testify that was vodka?

A. Yes, sir.

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Q. How did you find out it was vodka?

A. I looked at the label, sir.

page 76] Q. Where did you say you found that?

A. On the front seat of the truck on top of the man's coat. He had a coat in the truck.

Q. And you found it when you got in the car?

A. Yes, sir. To move the truck out of the driveway.

Q. Did you take the cap off the bottle at that time?

A. No, sir. I did not.

Q. Did you ever take the cap off the bottle?

A. Yes.

Q. When?

A. When I was at the jail. When I incarcerated the gentleman, and gave the warrant and presented Mr. Caldwell to Deputy Sheriff Saunders. I then looked it over.

Mr. Overton: That is all, Your Honor.

RE-DIRECT EXAMINATION

By Mr. Carlton:

Q. Had the blood test been taken and the tube sealed when you took the cap off the bottle?

A. Yes, sir.

Mr. Carlton: That is all.

Witness stood aside

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DR. D. E. ANDREWS,
a witness called on behalf of the Commonwealth,
first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Carlton:

Q. Are you Dr. Douglas Andrews?

A. I am.

Q. Are you a Doctor of Medicine?

A. I am.

Q. What training have you had in medicine, Dr. Andrews?

A. I attended the Medical College of Virginia, and graduated as a Doctor of Medicine in 1958. I interned for one year

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at Stuart Circle Hospital. I have been in general practice since 1959 in Essex County, and the Town of Tappahannock.

Q. Now, on April 1 of this year was the accused brought to your office?

A. May I look at my notes?

Q. Yes.

A. Yes, he was.

Q. About what time of the daytime or nighttime was he brought there?

A. This was in the evening during office hours.

Q. What are your office hours?

page 78] A. From 7:00 until 9:00 P.M.

Q. Did an officer bring the accused there?

A. Yes, sir. He did.

Q. What officer was that?

A. Trooper Jeffrey.

Q. For what purpose was the accused brought to you office?

A. The patient was brought to my office in order that I might draw a blood sample.

Q. Did you draw such a sample?

A. Yes, sir. I did.

Q. Will you describe to the jury how you drew that sample?

A. The patient was asked to sit down, his arm was tied with a rubber tourniquet to make the veins stand out, then I took an antiseptic surgical soap and washed off a place on his arm. A sterile syringe and sterile needle was being used, the needle being inserted into the vein and twenty CC's of blood being withdrawn from the patient's vein.

Q. What did you do with those twenty CC's of blood?

A. Ten CC's were put in each two containers. The containers were the ones that were given to me by Trooper Jeffrey. The test tubes that the blood was put in were sealed in cellophane. The seal was broken in my presence, the blood was placed in the containers, the stopper was inserted in the tube, and the blood was shaken several times.

Q. I hand you a vial or tube and ask you can you identify that tube?

A. Yes, sir. This is the tube in which I placed ten CC's of the accused's blood.

Q. What did you do with that after you put the ten CC's of blood in it?

A. I replaced the stopper. I turned it a couple of times to mix the blood, handed it to the trooper and asked him if he

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would continue shaking it. It was then placed in the container that came—was supplied with the tube and the container was sealed.

Q. Now, this indication on this container is Douglas E. Andrews, M.D.?

A. That's correct.

Q. Did you place that on there?

A. Yes, I did.

Q. And the date 4/1/63, 8:20 P.M., did you place those items on there, the name of the accused and his address?

A. I did, sir.

Q. All this writing on there that you placed on this vial, and you identified it?

A. That's correct.

Mr. Carlton: Your Honor, this vial is offered
page 80] in evidence.

The Court: Want to offer the whole business, container and all?

Mr. Carlton: The vial and container Trooper Jeffrey testified to. If counsel has an objection to my offering it at this time I will withhold the offering of it temporarily.

Mr. Overton: I am going to object to it.

The Court: What is the ground of your objection?

Mr. Overton: That the statute has not been complied with, if Your Honor please.

Mr. Carlton: I have some other questions to ask the doctor now. I think they are pertinent.

Q. Now, Doctor, you have stated that the instruments used to take the blood were sterile. What type of method was used to sterilize the instruments you put on the arm taking the test?

A. A surgical soap was used to clean the arm prior to withdrawing the blood. A detergent, a chemical detergent was used to clean the syringe after they are washed in water several times.

Q. Was this substance alcohol?

A. It was not.

Q. You have described the substance, would that substance you have described, might it in any way affect the
page 81] accuracy of the blood test?

A. It would not.

Q. The testing of the blood for alcohol?

A. It would not.

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Q. And your testimony is to that effect?

A. Yes, sir.

Q. Was there another vial other than the one delivered to the officer?

A. Yes, sir. There was another vial in which ten CC's of blood was placed. This was taken at the same time in the same syringe. This was placed in the other vial, the stopper was replaced on the vial, the vial was shaken a couple of times, given to the officer to shake some more. It was placed in the blue container, sealed, and given to the patient.

By the Court:

Q. Did you fill out the certificate on that, too?

A. Yes, sir.

By Mr. Carlton: (continuing)

Q. Was all of this done in the presence of the accused?

A. Yes, sir. It was.

Q. When the containers were resealed after breaking the seal putting the blood in it, and resealed, what was done then with reference to the accused, if anything?

page 82] A. What was done at that time?

Q. Yes. Was anything said to the accused when that was done?

A. He was given the blue container and explained that that contained his blood sample, and that it could be sent to an independent laboratory for analysis, and at the same time he was presented with a list, which identified these laboratories as approved.

Q. When these two tubes were resealed was the accused's attention called to this fact?

A. Yes, it was.

Q. Now, did the police officer in your presence — I believe you testified the police officer, Mr. Jeffrey, in your presence delivered this tube to the accused?

A. That's correct.

Q. Did you actually hand the tube to the accused, or was it handed by the trooper at your request?

A. It was handed by the trooper at my request.

Mr. Carlton: Your Honor, at this time the Commonwealth introduces in evidence the vial, the box that the vial was in,

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and the certificate that Trooper Jeffrey testified that he received from the Chief Medical Examiner.

Mr. Overton: If Your Honor please, we object to the introduction of this in evidence at this time because
page 83] we do not feel that the law has been complied with.

The Court: In what respects?

Mr. Overton: There are a number of respects, if your Honor please. I feel I should have a right to cross examine this testimony upon which this thing is based before it's offered. He's given a certificate here, Mr. Carlton feels it's material. I feel we ought to have that right before this thing is accepted in evidence.

The Court: I think that is all right. I don't see any objection to that.

Mr. Carlton: You may cross examine.

CROSS EXAMINATION

By Mr. Overton:

Q. Dr. Andrews, you have stated throughout your testimony that these things were done, but you haven't said who did them except with respect to drawing the blood sample. Now, I ask you if this isn't correct: Were you in your office at the time that this gentleman was brought in?

A. I was; yes, sir.

Q. And how were you contacted?

A. The trooper brought the patient in and asked the nurse if I could do—draw a blood specimen—yes. And
page 84] the reply was, yes. She asked me, and I said, yes, certainly. And he brought the patient into my office.

Q. Now, at that time, Dr. Andrews, were you provided with, or you were shown at least, these two containers, were you not?

A. I was provided by the police officer the two containers.

Q. Were they ever given to you in your own hand?

A. Yes, they were.

Q. Did you break open those containers yourself?

A. I opened the containers, I believe, and he broke the seal, the cellophane on the vials.

Q. You opened the containers yourself?

A. I opened the containers, and he broke the seal, the cellophane on the vials at my request.

Q. Did he give you a sheet of instructions at that time?

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A. A sheet of instructions is contained in each container.

Q. Did you read those instructions?

A. I did.

Q. Are you sure about that, Doctor?

A. Yes, sir.

Q. I ask you, sir, if you haven't testified before
page 85] in this case?

A. I have.

Q. Well, didn't you testify at that time, Dr. Andrews, that you didn't know whether you read the instructions on this particular occasion or not?

A. I do not recall, but I have read the directions in there, and I am sure I read them this time.

Q. You don't recall whether you testified to that or not?

A. I do not recall.

Q. Now, when the trooper broke open the two vials, removed the cellophane covers from them, who pulled the corks out?

A. This I do not know.

Q. Did the trooper pull them out?

A. As I remember it the trooper pulled them out, because the corks stayed in the bottle until I withdrew the blood. I did not have a syringe in my hand and I am unable to do it myself, so I asked him at my direction to remove the corks so I could put the blood in the vials.

Q. Now, he removed the corks from the vial?

A. I believe this is correct.

Q. And from that time on he had them in his hands?

A. No, sir. The corks were replaced in the vials by the trooper. I laid my syringe down and took the vials,
page 86] turned them over several times, handed them back to him so I would be free to separate the syringe so that it would not stick with the blood remaining in it, and asked him to shake them several times after that.

Q. After that, what did he do with them?

A. They were given back into my hands, I filled the labels out. I then placed them in the box.

Q. What did you do with them then, did you give them to the trooper?

A. I sealed the box.

Q. You sealed the box yourself?

A. And gave it to the trooper.

Q. Did you seal both boxes?

A. I'm trying to think. Yes, I did.

Q. You yourself sealed both boxes?

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A. Yes, I did.

Q. And after they were sealed you gave them to the trooper?

A. Yes.

Q. You yourself gave both boxes to the trooper?

A. That's correct.

Q. At the time that they were being sealed you say that the attention of the accused was called to that fact. Who called that fact to his attention?

A. I did.

page 87] Q. You did?

A. I did. The trooper may have, also, because several times during each — When we were drawing the blood we asked him to watch, when the seals were broken, to observe that the vials were in an unbroken cellophane container, and that the seal was being broken.

Q. After you sealed both of them up did you give them both to the trooper?

A. I gave them both to the trooper and asked him to give one, the blue vial, to the accused—the patient, along with the instructions.

Q. You asked the trooper to do that?

A. Yes, sir.

Q. Now, Dr. Andrews, how did you know which one he was to give the accused?

A. Well, the blue one has always been given to the accused. I handed him both boxes and asked him to give the accused his blood.

Q. You didn't ask him to give him the blue box?

A. No, sir.

Q. Because — You said the blue box a moment ago.

A. Yes, sir.

Q. When you withdrew the blood sample, just how did you do that?

page 88] A. The patient was seated in a chair, his arm was resting on our examining table, and a tourniquet, a stretchable rubber strip, was placed around his upper arm. This makes the veins stand out so I can better find the vein, and cause less pain. The accused's arm was then wiped off and washed off thoroughly with a surgical soap. The syringe was taken from its sterile container. It was a sterile needle. It was placed on the syringe—the needle was—then inserted into the vein, and twenty CC's of blood were withdrawn from the patient's vein.

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Q. Was anything else placed on his arm at the time the syringe was inserted?

A. No, sir. There was not.

Q. Nothing at all?

A. Nothing at all.

Q. In other words, his arm was washed off before the needle was inserted and nothing was placed on his arm at the time the needle was inserted?

A. Nothing was placed on his arm at the time the needle was inserted.

Q. I ask you, Dr. Andrews, if you didn't testify on this other occasion that when you inserted the *neddle* you placed a pad over the needle on his arm?

A. When I withdrew the needle I placed a pad containing septic salts over the needle and withdrew the needle, because, of course, with the tourniquet still on there it will
page 89] bleed quite freely. If you apply pressure to the bleeding the hole will quickly close.

Q. Didn't you explain at that time that was the way you cleaned his arm off with the pad?

A. The septic salts?

Q. On the pad.

A. Yes.

Q. And the way that was done, the needle was inserted and the pad was put over the needle, then the needle was withdrawn?

A. I explained then that I cleaned his arm off with the first pad of septic salts, washing his arm with soap to get a germ-free surface for his protection. I then placed the needle in the vein. When I was ready to withdraw the needle I placed a pad containing septic salts, which is a germicide, it will kill germs, over the place where the needle was inserted. I withdrew the needle and applied pressure to that pad at the same time. I then asked the patient to double his arm to continue applying pressure.

Q. Dr. Andrews, I ask you if you can say of your own knowledge the instruments you used were sterilized?

A. The instruments that I used were in a sterile container where sterile instruments are kept.

Q. I ask you again, sir, can you say of your own knowledge that those instruments were sterilized?
page 90] A. I cannot say of my own knowledge they were sterilized. They were in a container where the sterilized instruments are kept.

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Mr. Overton: I think that is all, Your Honor.

By the Court:

Q. Was the apparatus working you stuck it in?

A. They are sterilized in a steam—a large steam apparatus, under pressure. They are then taken out and placed with transfer forceps again in a sterile container, which contains several syringes and several needles and all.

Q. Was the apparatus working, was it on this day?

A. Yes, sir.

Q. And you put them in the apparatus provided for this?

A. They were in this container, in this sterile container, and I took them from the sterile container.

Q. Did you have any reason to believe that they weren't all right?

A. No, sir. I did not.

The Court: All right.

By Mr. Overton:

Q. I want to ask you this question to clarify what the Court has asked you, Dr. Andrews. You did not put the instruments yourself in this apparatus that the —

A. I did not. I took them from the sterile container. page 91]

Q. So from your own knowledge you don't know whether they were ever put in there or not?

A. They were in there.

Q. In the glass cabinet, you are talking about?

A. They were in a stainless steel sterile container.

Q. That is a cabinet in your office where you keep them?

A. It's a little bowl that is about—oh, this deep, and approximately this wide.

Q. In other words, it's a stainless steel bowl, from your description, about three inches deep, and about four inches wide?

A. That's right.

Q. It's open at the top?

A. With a top on it.

Q. What sort of top is it?

A. A lift-off top.

Q. A lid-type top?

A. That's correct.

Q. That is the thing they were in when you found them?

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A. That is where they were when I got them.

Q. Now, the steam apparatus that the Court has referred to, that is a different thing?

page 92] A. It is a different apparatus. That is where they are sterilized.

Q. You can't say of your own knowledge that these had ever been in there or not?

A. I cannot.

Mr. Overton: That is all.

By Mr. Carlton:

Q. Who was on duty?

A. The nurse, Mrs. Flanagan.

Q. What is the office routine?

A. The routine is that when a syringe has been used that it is placed in the cleaning solution in a separate container, a wet container. Mrs. *Glanagan* takes this container, takes the syringes out, washes them in water, and places them in our pressure apparatus for sterilizing. It's called an autoclave.

Q. What substance is used in cleaning and sterilizing those instruments previous to putting them in the sterile container?

A. Soap is used to clean them, and then they are cleaned further with water. They are washed several times with water, then they are placed in the steam apparatus and sterilized by live steam under pressure.

Q. This substance you used on the arm, what did you call that?

page 93] A. Septic salts, a surgical soap. It is a soap.

Q. Does Mrs. Flanagan use that?

A. No, she uses a separate detergent to clean them. It's a separate soap.

Q. Are you familiar with the detergent she uses?

A. Yes, I am.

Q. May that substance in any way affect the accuracy of a blood test to determine the alcoholic content in the blood?

A. It cannot.

Mr. Carlton: I have no further questions.

By Mr. Overton:

Q. Doctor, what is the substance we have been referring to as that substance?

A. Soap.

Dr. D. E. Andrews

Q. It's a detergent?

A. A detergent.

Q. What is that?

A. It's a type of soap that is simply used to remove the traces of blood.

Q. What kind of cleaner is it?

A. It's soap.

Q. Where do you procure it?

A. From Richmond Surgical Supply. It's made by Becton-Dixon.

Q. Do you know what it contains?

page 94] A. It contains only a detergent.

Q. What is a detergent, what do you mean?

A. A detergent is a soap that is used to clean.

Q. What detergent does this contain?

A. What detergent —

Q. How are you in a position to say, Doctor, in all fairness, how are you in a position to say that that detergent contains that detergent and is not capable of influencing this test?

A. Because there is a general group of them capable of being used.

Q. As a general group?

A. Yes, sir.

Q. But you can't say that with respect a specific one?

A. There is a general group, I don't know of any exceptions.

Q. Can you say positively there are no exceptions?

A. No, sir. I have not tested them all.

Q. And you do not know what this one is?

A. It is a surgical detergent in that cleaning class.

Q. But you don't know what detergent it is?

A. It's a detergent and all it does is what any of the rest of the cleaners do.

page 95] Q. But there are many many kinds of detergents?

A. Many many many. None containing alcohol.

Q. It's a highly complex chemical organic substance, isn't it?

A. Yes, sir.

Q. Which is very difficult to break down?

A. Very difficult to break down.

The Court: Says it doesn't contain alcohol.

Mr. Overton: If Your Honor please, that isn't the test provided by the statute, though. That is not the test provided by the statute, whether they contain alcohol or not.

Dr. D. E. Andrews

The Court: It is not?

Mr. Overton: No, sir.

The Court: Well, what does it say?

Gentlemen, go out, we will call you.

Note: At this point the jury is excluded from the courtroom. Thereupon, the hearing continues, viz:

JURY OUT

The Court: He has testified as I understand, that this substance does not contain alcohol or anything else that could in any way affect the blood test. Is that right?

page 96]

The Witness: That's correct.

Mr. Overton: He testified that he doesn't know whether that is true or not, with respect to this. He thinks it's a general proposition, his answers will disclose that.

The Court: You are taking so much time, address your remarks to these two things.

Mr. Overton: If Your Honor please, the answers he provided to my last questions —

The Court: Says he used some type of cleanser and sterilizer for the instruments used, and for the part of the body from which the blood was taken, other than alcohol. Now, he says this soap does not contain alcohol, or any other substance which may in any way affect the accuracy of the test. Now, he says that it doesn't contain anything else that affects the accuracy of the test. He testified to that many minutes ago. You keep arguing with him about this. I don't think that is proper.

Mr. Overton: I think if you will read back his own answers just before —

The Court: You are asking him does it contain this, that, and the other.

Mr. Overton: He admits he doesn't know what

page 97] it contains.

The Court: Says it doesn't contain anything that affects the outcome of this test.

Mr. Overton: His answer was he doesn't know that, if Your Honor please, with respect to this specific substance.

Dr. D. E. Andrews

By the Court:

Q. Does the soap, or whatever it is you use, have alcohol in it?

A. It does not.

Q. To your best knowledge and belief, does it have anything in it in any way, shape, or form that would affect the outcome of this test?

A. It does not.

The Court: That is the way I understand his testimony.

By Mr. Carlton:

Q. Let me ask you this, Dr. Andrews.

The Court: Therefore —

Mr. Overton: Let me clarify my position.

Q. When I asked you just now, you said you didn't know whether this particular substance is capable or not, you didn't know what the substance was?

A. I answered that it was a detergent that is in a general group without exception—I know of no exception

page 98] —that these will not affect in any way the blood alcohol test which is run.

Q. Now, is that a supposition on your part, or knowledge on your part?

A. This is knowledge on my part.

Mr. Overton: I think that is all.

The Court: All right, call the jury back.

Note: At this point the jury is returned to the courtroom. The Court charges the jury relative to discussing the case, after which a luncheon recess is had. Thereupon, the hearing continues, viz:

Mr. Carlton: Your Honor, I would like to recall *Mr. Andrews* for one question.

JURY IN

By Mr. Carlton:

Q. Dr. Andrews, I am not certain from the record as to

Mrs. Louis Flanagan

whether or not I asked you this question. When you observed the accused the first time when he came to your office, and the time he was in there, what was his condition?

A. He was quite talkative, and he was not real
page 99] steady on his feet.

Q. You observed that when he was in your office?

A. Yes, sir.

Mr. Carlton: That was the only question I wanted to ask.

By Mr. Overton:

Q. Did he co-operate with you when you asked him?

A. Fully.

Q. I believe you said he was seated at one point. Did you ask him to sit down?

A. Yes, sir.

Q. And he did so?

A. He did so.

Q. Then you put a tourniquet around his arm?

A. Yes, sir.

Q. Did he roll up his sleeve so you could do that?

A. Yes, sir.

Q. When you called his attention to these various things, did he pay attention?

A. He paid attention. He was co-operative throughout.

Mr. Overton: That is all.

The Court: Are you through with the Doctor,
page 100] gentlemen?

Mr. Carlton: Yes, sir.

Witness stood aside.

MRS. LOUIS FLANAGAN,
a witness introduced on behalf of the Commonwealth, first
being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Carlton:

Q. You are Mrs. Louis Flanagan, is that correct?

A. Uh huh.

Mrs. Louis Flanagan

Q. You are a resident of the Town of Tappahannock, are you not?

A. I am.

Q. Were you on April 1, 1963, employed by Doctors Chinn and Andrews in the Town of Tappahannock?

A. I was.

Q. What is your position with them?

A. It's hard to say. I do—I assist them in their work by taking care of instruments, sterilizing the instruments, and just act as a general office nurse.

Q. Now, with reference to sterilizing the instruments, what is your routine with reference to that procedure?
page 101] A. Well—

Mr. Overton: If Your Honor please, I object to what her routine is, because I think we have to bring it down to this specific instance, if Your Honor please.

The Court: Well, I am not prepared to say just how you would go about that.

Mr. Carlton: I think it's proper as to what she does with the instruments.

Mr. Overton: We would except to the Court's action —

By the Court:

Q. What do you do with the instruments he uses to draw blood from people's arteries?

A. When the syringes are used they are put in a solution, BD Syringe Cleaner—solution. And when—every morning I take those trays and wash them out with that BD Syringe Cleaner, and then I separate the syringes and wash them under running tap water, and then put them in a tray and in the autoclave, and autoclave them under twenty pounds of pressure for fifteen minutes.

By Mr. Carlton:

Q. What do you do with the tray?

A. The tray is covered and each office has one of these covered sterile trays.

Q. Is that routine?

page 102] A. That is done every morning.

Q. Every morning?

Mrs. Louis Flanagan

By the Court:

Q. Did you do that on April 1st?

A. I do it every morning.

By Mr. Carlton:

Q. Was it done on April 1st, 1963?

A. Yes, I did.

Q. You said yes?

A. (nodding head)

Mr. Carlton: Thank you. You may cross examine.

Mr. Overton: If Your Honor please, without cross examining the witness, if that is the sum and substance of her testimony, we would move to strike her testimony from the record, sir, because we don't think it bears upon this particular case.

By the Court:

Q. When you talk about syringes, are those the syringes he uses to draw blood from the arms of these people accused of driving under the influence of liquor?

A. Yes, sir.

Q. Were those particular syringes sterilized as you have indicated there, did you have that process to go through on April 1st?

A. Yes, sir.

page 103] The Court: All right. Overruled.

Mr. Overton: We accept, and let the record show our exception.

CROSS EXAMINATION

By Mr. Overton:

Q. Mrs. Flanagan, what day was April 1st?

A. I can't hear you.

Q. What day of the week was April 1st?

A. I couldn't tell you.

Q. Do you know that you were even in the office on April the 1st?

A. I know I am in the office every day it's open.

Q. Can you say whether you were in there on April 1st, the morning of April the 1st, or not?

A. If it was a week day I was in there.

Mrs. Louis Flanagan

Q. Well, do you know whether it was or not?

A. No, I do not.

Q. Don't you take off some days?

A. I haven't taken off a day for a long time.

Q. Well, April the 1st is a right good while ago, now. Have you taken off a day since the 30th of March?

A. Yes, took off a week.

Q. Do you know when that was?

A. It was the last of May, because I went after
page 104] my son when he was through college.

Q. Do you know whether you have taken off any other days or not?

A. No, sir.

Q. You do not?

A. I did not take off any.

Q. Have you been sick any days?

A. Yes, sir.

Q. Do you know whether you were sick on April 1st or not?

A. No, I haven't been sick for a year.

Q. Can you tell us whether you were in the office on April 1st or not?

A. I can tell you if it was a weekday I was in there.

Q. Now, do you work six days a week?

A. Yes, sir.

Q. Can you be sure that you sterilized any instruments on the morning of April 1st?

A. I can be sure that if any of them had been used I sterilized them on that morning.

Q. You don't know whether any had been used or not?

A. Whether they had been used or not, unless they were already sterile I sterilized them on that morning.

page 105] Q. Were you there on the evening of April 1st?

A. I was.

Q. The night of April 1st?

A. Yes.

Q. Were you there when Mr. Caldwell came in?

A. I think I was, but — I was bound to have been if it was during office hours. I don't remember his name. I don't remember everyone's name that comes in.

Q. Do you remember ever having seen him before?

A. I don't always see all the patients.

Q. Then you don't know if you saw him or not, even if he came there?

A. No.

Tpr. P. R. Jeffrey, Jr.

Q. Well, if that be true, and assuming Dr. Andrews did use a syringe and a needle to draw blood from that man's arm, you couldn't possibly testify that that syringe had been cleaned by you if you didn't see it done?

A. I can testify that all the syringes in the office are cleaned and sterilized by me.

Q. Every morning?

A. Every morning.

Q. And that is all you can testify to?

A. Yes.

The Court: Are you through with this witness?

Mr. Carlton: Yes, sir.

page 106] Witness Stood Aside

Mr. Carlton: Recall Trooper Jeffrey.

Mr. Overton: If Your Honor please, we would at this time renew our motion to strike her testimony.

The Court: All right. Motion overruled.

TPR. P. R. JEFFREY, JR.,

upon being recalled by Mr. Carlton, testified further as follows:

DIRECT EXAMINATION

By Mr. Carlton:

Q. Trooper Jeffrey, I believe you testified this morning that you received in the mail these items from the Chief Medical Examiner of the State of Virginia. Would you look at those items and identify all three of those items, if you can?

A. Yes, sir. These are the three items I did receive in the mail.

Q. Is this tube and container the one that you —

A. Don't let it slip out.

Q. No, I won't let it slip out. Is this the tube containing the blood, and the container that Dr. Andrews filled with blood as you testified this morning?

A. Yes, sir.

page 107] Q. And this is the exact tube and bottle that you mailed to the Chief Medical Examiner's office in Richmond?

A. Yes, sir.

Tpr. P. R. Jeffrey, Jr.

Q. Is this the exact bottle and container that you received from him?

A. Yes, sir.

Q. Now, with reference to this report, is this the report you received that was with the tube and container from the Chief Medical Examiner's office through the mail?

A. Yes, sir. I did.

By the Court:

Q. How was it fastened to the bottle? Wrapped around it, or how?

A. Wrapped around the bottle in this position, inside.

Mr. Carlton: Your Honor, the Commonwealth offers the tube or vial and the container and the report from the Chief Medical Examiner, in evidence.

Mr. Overton: If Your Honor please, we object to the introduction of those in evidence and would like to be heard on it.

The Court: All right, gentlemen. Step outside, we will call you when we're ready for you.

page 108]

JURY OUT

Note: At this point Mr. Overton argues the law to the Court with respect to the above-offered exhibits and moves that they be rejected, which motion the Court overrules, and Mr. Overton notes an exception. Thereupon, the Court states, viz:

The Court: I don't think he misstated the law to him when you come to that. I think he told him about what the law was. Under the law he is deemed to have consented to this. Whether he said the proper thing or not, I really don't know; but I don't think he prejudiced this man's rights any by making a bold statement of the law that was not correct. Maybe it's not correct in every last single regard, but substantially that is true. However, the man is faced with taking a blood test, that is the sum and substance of it; kind of fenced in. So, the other thing, I feel like they do not mean that the doctor has to personally do every single one of these things. I think that when he handed the box to somebody, and then, the man was right in his presence, just passing it on to him. There is nothing in the statute that says nobody else cannot touch these things or that every last single thing

page 109] has to be done by the person. While it is very

Tpr. P. R. Jeffrey, Jr.

technical, all of these things, I will agree with you they are very technical, but I don't believe the legislature by this language declares it's impossible to do these things. The instruments, nobody is going to stand and watch some instruments all the time. Here's the lady that sterilizes the instruments and then she puts them in this container. You could argue that somebody could have come in the side door, or come through the window while she wasn't looking, and gotten that and used it for some purpose, then put it back in there. There will always be situations like that, just like there would be about the question about the soap there. I was sitting here thinking about Ivory soap. Somebody asked me what kind of soap it was. I said Ivory. How do you know it's Ivory soap? I said it had Ivory printed on it, it looked like all the other Ivory soap. How do you know somebody hasn't gotten it and tampered with it? You can keep on and on, and never would know firsthand. There is always a possibility of a mistake. I believe they intended to

preclude all those things. I think those things have
page 110] to do with the weight of the evidence. On the other hand, this lady says — She was not going to be tricked, because offhand she didn't know about April 1st. She was not going to have you pull the *calendar* on her and say April 1st was on a Sunday. But she did say that she was there every weekday, and April the 1st — I don't know what day it was. Maybe Mr. — You could get a calendar and show that.

Mr. Carlton: It was Monday.

The Court: That should be in evidence. It was on Monday. She says she wasn't there on Sundays. Unless you gentlemen agree to it —

Mr. Carlton: Let the record show a 1963 calendar was presented to counsel for the defendant, and the calendar shows that April 1st was on a Monday, but they refused to stipulate that fact.

Mr. Overton: If Your Honor please, I object.

Mr. Carlton: Therefore, Your Honor, in view of that fact —

The Court: Did you stipulate it or not?

Mr. Overton: No, sir.

Mr. Carlton: Now, I ask that this calendar be admitted in evidence. I hate to part with it, but I think I will have to. I ask that this calendar be admitted in evidence.

The Court: Commonwealth's Exhibit 4.

page 111] Now, that is the Court's idea about it. I am

Tpr. P. R. Jeffrey, Jr.

very sorry we can't guarantee anything up here. Maybe we might be wrong.

Mr. Carlton: The items offered, are they admitted?

The Court: Yes.

Mr. Overton: If Your Honor please, it possibly would be well to let me address the Court on this before we do.

The Court: Don't let us forget that this has been admitted in evidence, because they were not present when it was done. I will hold it out here so we will not forget it.

Mr. Carlton: Also the calendar.

Mr. Overton: If Your Honor please, we object to that. It is a certificate from the Division of Motor Vehicles setting forth the fact that a conviction in the Corporation Court at Buena Vista is on record there. We object to that because we feel the proper way to prove that is by the record of the court itself, not the certificate itself. We object to that, and we except to the ruling of the Court in admitting it, if the Court does.

The Court: Get the statute.

page 112] Note: At this point the law is argued relative to Section 46.1-34.1 of the Code of Virginia, after which the Court overrules Mr. Overton's motion. Thereupon, Mr. Overton notes an exception, and the hearing continues, viz:

The Court: Call the jury in. That will be Commonwealth's Exhibit 5.

Note: The jury is returned to the courtroom at this point, and the hearing continues in the presence of the jury as follows:

JURY IN

The Court: Mr. Commonwealth's Attorney, the Court is in the presence of the jury now, and on your motion I admit in evidence this vial, the container, and the certificate. You may read it to the jury, or pass it to them and let them read it.

Mr. Carlton: This certificate reads as follows: The Commonwealth of Virginia, Department of Health, Office of the Chief Medical Examiner, 404 North 12th Street, Richmond 19, Virginia, Blood Alcohol Report. Date of report,

Tpr. P. R. Jeffrey, Jr.

page 113] April 3, 1963, No. 632083. Accused, Warren Howard Caldwell, C-a-l-d-w-e-l-l (spelling). The name of the officer, P. R. Jeffrey, Jr., address, P. O. Box 191, Tappahannock, Virginia. Examined by Eleanor L. Gordon. Date, April 3, 1963. Time, 3:30 P. M. Received at the office of the Chief Medical Examiner 4/3/63. Time, 9:00 A.M. The container was sealed when received, had not been broken or otherwise tampered with. The container was *proved* by the Chief Medical Examiner. Results, blood, 0.18 percent alcohol by weight. A copy teste, Geoffrey T. Mann, Chief Medical Examiner. Signed, Geoffrey T. Mann, Chief Medical Examiner, and Eleanor L. Gordon, Assistant State Toxicologist. CME Form, BR, revised 4/62.

The Court: Gentlemen, the Court has also admitted this abstract of convictions, of driving under the influence within the last ten years. Please bear in mind that the sole purpose of the admission of this testimony is to prove that the man has been convicted of driving under the influence within the past ten years, and is not evidence to show that he was driving under the influence on this particular occasion.

Mr. Carlton: This certificate, reads as follows:
page 114] Division of Motor Vehicles, Richmond, I, G. T. Riffin, Director of the Bureau of Safety Responsibility of the Division of Motor Vehicles, Commonwealth of Virginia, being duly designated by the Commissioner for the purpose of attesting and certifying pursuant to Section 46.1-34.1 of the Code of Virginia, as Amended, Chapter 368, Acts of the Assembly, 1962, do hereby certify the attached is a true copy of Abstract of Conviction received from the Municipal Court of the City of Buena Vista, Virginia, certifying that Warren H. Caldwell, Route No. 1, Lexington, Virginia, was convicted in that Court on November 10, 1959, of drunk driving, the original of which is on file and of record in this office. Given under my hand and under the Seal of the Division of Motor Vehicles this 24th day of June, 1963. Signed, G. T. Riffin, Director of the Bureau of Safety Responsibility of the Division of Motor Vehicles, Commonwealth of Virginia; with the seal attached. The record of the Abstract of Conviction attached, Warren H. Caldwell, Route No. 1, Lexington, Virginia. No. 5014, drunk driving on November 10. 1959. Above offense, one hundred dollars plus ten dollars and twenty-five cents. Appeal taken, No.

Period of suspension, one year. Signed by the
page 115] clerk. Report dated, November 25, 1949. The

Warren Howard Caldwell

other printed matter on here you can examine yourself.

The Court: All right, they are both admitted. Proceed.

Note: At this point questioning of Trooper Jeffrey continues, viz:

By Mr. Carlton:

Q. Mr. Jeffrey, it has been indicated by counsel for the accused that you handled this bottle over here, the vodka.

A. Yes.

Q. And you said you didn't open it until after the blood test was made?

A. Yes.

Q. At the time you handled this tube and were taking this blood test were your hands clear of any alcohol whatsoever?

A. Yes, sir.

Q. And you testified that positively?

A. I just testified to it.

Mr. Carlton: That is all the questions I have.

The Court: Are you through with this witness?

Mr. Overton: Yes, sir.

Witness stood aside

page 116] Mr. Carlton: The Commonwealth rests.

Mr. Overton: If Your Honor please, I believe for the purpose of the record I would be required to make a motion to strike on the grounds I have heretofore assigned.

The Court: I overrule you.

Mr. Overton: Note our exception.

WARREN HOWARD CALDWELL,
the defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Overton:

Q. You are Warren Howard Caldwell, are you not?

A. Yes, sir.

Q. Mr. Caldwell, how old a man are you?

A. Thirty-five.

Q. Thirty-five? Where do you reside?

Warren Howard Caldwell

A. I live in Lexington, three miles west on 60.

Q. Lexington, Virginia?

A. Yes, sir.

Q. What is your occupation, Mr. Caldwell?

A. I drill wells—well driller.

Q. What sort of wells?

A. Wells for water.

page 117] Q. Wells for water?

A. Yes, sir.

Q. Where do you do that occupation?

A. Botetourt, Rockbridge, and Bath Counties.

Q. Over a three-county area?

A. Yes, sir.

Q. Are you a married man?

A. Yes, sir.

Q. Have any children?

The Court: I don't think that has anything to do with it.

Q. Mr. Caldwell, you were in Essex County and were arrested on April 1st of this year?

A. Yes, sir.

Q. Where were you going to and from?

A. Well, I came down to Warsaw down to Welford's Wharf to see a friend I was in the service with.

Q. Where did you come from?

A. Lexington.

Q. What time did you go down there?

A. I went down there between 1:30 and 2:00 o'clock.

Q. In the afternoon?

A. Yes, sir.

Q. Who did you go to see?

A. Talmadge Saunders.

page 118] Q. How did you happen to be going to see him?

A. Oh, we was just friends, and it was raining that morning at home and I just decided to come down. I just come down to get some fish, you know, and then —

Q. To get some fish?

A. Yes, sir.

Q. You went to Welford's Wharf to see him?

A. Yes, sir.

Q. You all were in the service together, is that how you happened to know him?

Warren Howard Caldwell

A. Yes, sir.

Q. Mr. Caldwell, you said you got there about 1:30?

A. Between 1:30 and 2:00. 1:30 and 2:00 o'clock.

Q. How long did you stay over there?

A. I left over there about 7:30, 7:20, 7:15. About 7:15.

Q. Now, while you were there did you have something to drink?

A. Yes, sir. When I was going down I bought a fifth of vodka at Warsaw. We had several drinks, had three small drinks apiece.

Q. Three small drinks apiece out of the bottle?

A. Yes, sir.

Q. Is that the same bottle that was introduced page 119] in evidence?

A. The bottle was like that, I guess it is the same one.

Q. You think it's the same one?

A. Yes, sir.

Q. And you say that you left there you think about 7:00 o'clock?

A. 7:00, 7:30, somewhere along there. I didn't look at my watch.

Q. When you left there where were you going?

A. I was going home.

Q. Back to Lexington?

A. Yes, sir.

Q. Did you come through Tappahannock?

A. Yes, sir. I come through Tappahannock.

Q. Now, how did you get where you were when the trooper first saw you?

A. I missed the road up there.

Q. Which road is that?

A. Going — Was it 360 going to Richmond?

Q. You mean you went on past that road?

A. Yes, sir. I went on past and turned around and I was headed back up the road. I turned around in kind of a wide place on down below there along about three or four tenths of a mile, something like that. So I turned page 120] around and come back, and I was looking at the signs, all the signs said keep right, and I wanted to turn left to go on 360.

Q. Wait a minute, I didn't understand you there. You said that — What about turning left?

A. I was coming through there looking for a left-hand turn

Warren Howard Caldwell

to get on 360, because I missed it. And I was pulling off on the right at the service station to get some information — I mean get my bearings.

Q. You said all the signs said keep right. Do you mean coming back from beyond 360?

A. Yes, sir.

Q. And you were looking for a left-hand turn to go to Richmond, is that what you mean?

A. Yes, sir.

Q. Now, how fast were you driving along there looking for this road?

A. About twenty-five or thirty.

Q. It was dark, was it not?

A. Yes, sir. Getting dark.

Q. The trooper says that you went over the center of the road, is that correct or not?

A. I probably did. I was looking for them signs, looking for signs and all seven or eight signs there said keep to the right, keep to the right. I was looking for one page 121] to turn off to the left, and I didn't see the car right behind me, too.

Q. There was a car right behind you?

A. Yes.

Q. Mr. Caldwell, you say you pulled off in a service station?

A. Yes, sir.

Q. For what?

A. To get my bearings, get information and check my route to get back on 360.

Q. To find out how to get back on 360?

A. Yes.

Q. What happened there then?

A. That is when the trooper pulled up beside me.

Q. Pulled up beside you?

A. Yes.

Q. He says you bumped a curb there.

A. I bumped the curb once going in. It's kind of a gravel driveway. In other words, I couldn't stop like I could on blacktop, so I bumped the curb and the truck came back a little bit. I pulled back up against the curb after he shown his light on his uniform.

Q. This amount that is gone out of this bottle here, is that all that you and this other man had to drink together?

Warren Howard Caldwell

page 122] A. Yes, sir. I got that when I went through Warsaw. We was drinking it.

Q. What did the trooper tell you when he stopped you?

A. Oh, when he first stopped me he asked me for my license, and registration. Let's see, I don't remember whether he asked me for my registration card or not. I don't think he did. I showed him my license. He asked me how I could walk. I told him I could walk all right. So I just took off, walked to the back of the truck, and come back, and he said you are under arrest.

Q. He said you are under arrest?

A. Yes.

Q. Did you take a blood test?

A. Yes, sir.

Q. How did you happen to do that?

A. He told me it was a new state law that you had to take it.

Q. Was that the reason you took it?

A. Yes, sir. I figured it was the law, I had to take it.

Q. Would you have taken it if he hadn't told you that?

A. No, sir.

Q. Now, he says that he observed you walk and
page 123] that was one reason he felt you were intoxicated.
Do you have any difficulty walking?

A. Yes. I have had a couple of operations on my leg.

Q. What is the trouble with your leg?

A. I had varicose veins operations.

Mr. Overton: If Your Honor please, I would like for him to show his leg to the jury, show them those scars.

The Court: Go ahead.

Q. Did you show them all of them?

A. I didn't show them. No lady in here now?

Q. Show them those scars up there.

A. (responding)

Q. What affect does this condition with your leg have upon you?

A. Well, when I sit in a certain position very long my legs get, you know, kind of like they are going asleep or something. Get kind of numb. And usually after I get up and try to walk it feels like pins sticking in my leg.

Q. How long have you had that difficulty?

A. Ever since I come out of the service.

Warren Howard Caldwell

Q. What kind of service?

A. I was in the Air Force.

page 124] Q. And does it affect your ability to walk?

A. Yes, sir. I don't think I walk as good as I did before the operation, before I had them.

Q. You say when you have been sitting down, you say when you have been sitting down something felt like something.

A. Oh, when I sit down or cross my leg or something it goes to sleep on me. Poor circulation in my leg is what it is.

Q. Were you intoxicated on this occasion?

A. No, sir.

Q. Now, after you went to the doctor's office — You were taken to the doctor's office and given a blood test?

A. Yes, sir.

Q. Did someone give you one of those samples?

A. Yes, sir. The trooper give me one.

Q. What became of that sample?

A. I beg your pardon.

Q. What became of that sample?

A. Oh, when I was locked up they took it from me.

Q. Where was that now?

A. That was in Tappahannock.

Q. Who took it from you?

A. The jailer there. I believe it was Mr. Saunders.
page 125]

Q. Did they give you that certificate with it?

A. I got it.

Q. I don't mean certificate.

A. Yes. I had the certificate.

Q. The instructions the trooper said he gave you, did he give you one of those?

A. Yes, sir.

Q. How long did you stay here in the jail at Tappahannock?

A. Locked up until a little after 4:00 the next evening. A little after 4:00, around 4:00, little after.

Q. Where was that blood sample as far as you know during that time?

A. I couldn't tell you. I mean it was in the Sheriff's office, I guess. In jail.

Q. In other words, when was it taken from you?

A. Taken from me when I was locked up.

Q. Just as soon as you were locked up?

A. Yes, sir.

Warren Howard Caldwell

Q. Did you ever send it to any of those laboratories?

A. No, sir. It said on those instructions that it had to be done immediately, right now, so seventeen or eighteen hours after I didn't figure it was worth sending in, so I threw it away.

page 126] Q. The instructions he gave you said it should be sent right away and you thought that was too long a time?

A. Yes, sir.

Q. So you did not *sent* it to anyone?

A. No, sir.

Mr. Overton: Mr. Carlton, may have some questions he wants to ask you.

CROSS EXAMINATION

By Mr. Carlton:

Q. Did the jailer ever give the tube back to you?

A. When was that?

Q. When you were released from jail.

A. Yes, sir. He gave it back to me; yes, sir.

Q. You say he had it in safe keeping while you were in jail.

A. I got it back; yes, sir.

Q. Did you ask anyone to mail it for you?

A. No, sir.

Q. You didn't ask anyone, didn't make any attempt to mail it?

A. I didn't mail it, no.

Q. Didn't ask to keep it in the cell with you?

A. Well, they took it from me.

Q. You didn't ask them to let you take it in the page 127] cell?

A. No.

Q. You said no? Is that your answer?

A. That is my answer.

Q. Then when you were released from jail they handed it back to you with the instructions, that's right, isn't it?

A. It was handed back to me; yes, sir.

Q. You made the determination that it was too late to send it, you didn't go to a doctor and ask him — Did you ask Dr. Andrews?

A. No, sir. I didn't ask no doctor.

Q. You didn't ask Dr. Andrews if it was too late to send this in?

Warren Howard Caldwell

A. No, sir.

Q. Have you had experience in these matters before?

A. No, sir.

Q. When you were arrested and convicted of drunk driving in 1959 in Buena Vista, did you have any experience then?

A. I took a blood test, if that is what you mean.

Q. You did take a blood test in Buena Vista?

A. Yes, sir.

Q. So you had experience in these matters?

A. At that time you didn't get no sample your-
page 128] self.

Q. But you had experience in this blood test business, that's right, isn't it?

A. I have had blood tests before if that is what you mean.

Q. That's right. So you are not telling this jury that this thing was taken from you and you couldn't send it off, and that is the reason you don't have your blood test, you are not telling them that, are you?

A. That was the first time I had ever seen a sheet of instructions.

Q. And you asked nobody at all about it, although you had experience in this? What is the proof of the vodka? What is the proof of the vodka you have there?

A. Eighty or eighty-six proof.

Q. Eighty or eighty-six?

A. I think. I am not sure.

Q. Isn't it eighty?

A. I say I am not sure.

Q. Since you have had experience in the blood tests, taking a blood test, do you know how much alcohol it takes to run it up to point one eight?

A. No, sir.

Q. You don't know how much?

A. No, sir.

Q. Do you have any idea?

page 129] A. No, sir.

Q. Have you been told and do you know that point one eight, that the law in the State of Virginia, that you are intoxicated when you have had over point one five, do you know that?

Mr. Overton: If Your Honor please, I object to that, because it isn't a correct statement of the law. He says the law says you are intoxicated.

Warren Howard Caldwell

Mr. Carlton: Presumed to be intoxicated.

Q. I will restate it with presumed. Do you know that you are presumed to be intoxicated if you have over point one five under the law in the State of Virginia? Didn't you know that?

A. I didn't know.

Q. Hadn't your counsel told you that?

A. I don't get what you mean, the phrase of it.

Q. Do you know that the law in Virginia — Did you know and do you know that the law in Virginia provides that a person is presumed to be under the influence of intoxicating beverages if the blood test is point one five or above?

Mr. Overton: If Your Honor please, I object. This man's knowledge of the law hasn't got anything to do with his testimony in this case. He's asking him if he knew what the law provided.

page 130] The Court: I think the question is properly put, did he know. I think if you are going to ask him it at all, make it a question at the time. But what difference does it make whether he knew it or not?

Mr. Carlton: The only thing, he testified he had three small drinks of eighty proof. I was just cross examining him on that item. That item.

Q. Now, Mr. Caldwell, isn't it a matter of fact that you took a number of drinks out of that bottle or other bottles?

A. No, sir.

Q. How can you account for your test being as high as point one eight?

A. I don't know.

Q. Now, you have testified the reason you drove your automobile — weaved your automobile from lane to lane was because you were looking for signs?

A. Yes, sir. I was looking for the left-hand turn to get back on 360 going to Richmond.

Q. Did you do that every time you looked for signs? Of course, we have to keep watch all the time, but you were weaving from lane to lane all the time.

The Court: You are arguing with the witness.

Mr. Carlton: Yes, sir.

Warren Howard Caldwell

page 131] Q. Do you ordinarily weave from lane to lane when you are looking for signs?

The Court: I don't think that is a proper question.

Q. What signs were you looking for when you were weaving from lane to lane?

A. I told you, I was looking for a left-hand — left turn going to Richmond. 360.

Q. How many times did you weave from lane to lane?

A. I didn't weave from lane to lane. I might have went over the line a little bit when I was looking for signs.

Q. Didn't weave as Mr. Jeffrey described?

A. I don't think I got clear over in the wrong lane; no, sir.

Q. Did you run up on this curbing three times as Mr. Jeffrey has testified?

A. I run up on the curbing twice.

Q. Didn't count the third time?

A. I run up on the curb once, the truck backed up. About that time he shown the light on me and I pulled the truck up against it again.

Q. Why did you run up on this curb twice, as you said?

A. I didn't understand you.

page 132] Q. Why was it that you ran up on the curbing twice?

A. Well, the first time I was coming in there and there was gravel on the dirt driveway.

Q. Go ahead.

A. The driveway is made of gravel and dirt. Well, a pick-up truck naturally on gravel and dirt won't stop as quick as it would on a hard surface. That is why I run up on it the first time.

Q. The second time?

A. The second time, I pulled back up against it and stopped the truck after I saw him.

Q. Did what now?

A. I pulled back up against it. See, it bounced back and I pulled back up against it when I saw the trooper — Jeffrey.

Q. Why did you do that?

A. To park it.

Q. You had to run it on the curbing to park it?

A. I just runned up against the curb.

Q. The first time you ran up and bumped back, bumped you back. You hit it right hard to bump you back?

Warren Howard Caldwell

A. I didn't hit it that hard.

Q. How far did it come back when you hit it the first time?

page 133] A. I would say two or three feet.

Q. Two or three feet?

A. Oh, the truck just rolled back, kind of up on the thing; just kind of rolled back.

Q. Level ground, wasn't it?

A. Kind of level, but when you get a wheel up on a hump, generally — see, the front end is higher than the back, and naturally it will roll downhill.

Q. Were you convicted in the Buena Vista Court in 1959 in accord with the report that was introduced in evidence?

A. Yes, sir.

Q. Of drunk driving?

A. Yes, sir.

Q. That was in 1959?

A. Yes, sir.

Q. Well, since you were convicted in 1959 of drunk driving why do you drink while driving again?

A. I didn't think I had too much to drink.

Mr. Carlton: I have no further questions, Your Honor.

Witness stood aside.

Mr. Overton: If Your Honor please, that is page 134] the case for the defendant.

The Court: Defense rests.

Mr. Carlton: The Commonwealth has no rebuttal.

Note: At this point the jury is excluded from the court-room, whereupon the following motion is made, viz:

Mr. Overton: If Your Honor please, we wish to renew our motion to strike out the evidence, to strike out all the evidence, this time upon the grounds originally assigned, and with this further, if Your Honor please: The defendant testified that he would not have taken this blood test if he had not been told that he had to, under the law that he was required to. Further, if Your Honor please, the law provides this very law, that if he is capable of receiving the sample it shall be given to him and he shall have the opportunity of having it examined.

Note: At this point the motion is argued, after which the Court overrules the motion, and Mr. Overton notes an exception.

At this point Court and counsel consider the instructions. Thereupon, the Court reads the written page 135] instructions to the jury, and the case is then argued by counsel. Thereupon, the jury retires and returns with the following verdict:

A Juror: We find the defendant guilty and recommend minimum sentence and fine, sir. That I believe was a two-hundred dollar fine, and thirty days in jail, according to your sheet.

Note: At this point the Court amends the jury verdict as to form, and reads it to the jury as follows:

The Court: We the jury upon the issue joined find the defendant Warren Howard Caldwell guilty of operating a motor vehicle on the public highway while under the influence of intoxicating beverages, being a subsequent offense within ten years, and we fix his punishment at confinement in jail for one month, and that he pay a fine of two hundred dollars.

So say each and everyone of you?

Note: The jury replies in the affirmative. Thereupon, there being no motion before the jury retired, the jury page 136] is dismissed, and the following motion is made:

Mr. Overton: If Your Honor please, the defendant moves the Court to set aside the verdict of the jury and enter up judgment dismissing the charge for error on the part of the Court in admitting the blood test, and as being contrary to the law and the evidence, and in the alternative, to set aside the verdict of the jury and grant a new trial.

The Court: Well, the Court feels like it was a jury question and properly submitted to them. I will have to overrule your motion.

Mr. Overton: The defendant, of course, excepts to the ruling of the Court.

Now, if Your Honor please, we move the Court to suspend execution of the sentence in order to permit the filing of a Writ of Error in the Supreme Court of Appeals.

Note: After a discussion on the above motion, the Court states as follows:

The Court: All right. Stand up (defendant responding).
It is the judgment of the Court that you be found
page 137] guilty as charged and that you be sentenced to
thirty days in jail, and that you pay a fine of two
hundred dollars and the costs of court; but your counsel hav-
ing noted for you the intention to apply for a Writ of Error
before the Supreme Court of Appeals, the execution of said
sentence is suspended for a period of sixty days from this
date, and the Court considers the bond is sufficient.

Note: After a brief discussion, which the reporter records
but does not incorporate in this transcript in the interest of
brevity, Court is adjourned for the day.

HEARING CONCLUDED

Tendered August 23, 1963

DANIEL WEYMOUTH, Judge

Signed — Daniel Weymouth, Judge
August 28, 1963.

A Copy—Teste:

H. G. TURNER, Clerk.

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APPROVED AND FORWARDED:
 CLERK OF THE DISTRICT COURT
 James H. Smith, Clerk