

INDEX

	Page
Order for Writ of Error	1
Writ of Error	2
Return to Writ	3
Testimony	4
Plea of Autrefois Acquit	14
Motions to Quash	23, 26
Challeges to the Array	28
Examination of Juror John Sharp	38
Examination of Juror Harry J. Willis	39
Examination of Juror John I. B. Knight ..	40
Examination of Juror John D. Williams ..	43
Examination of Juror Thomas Hilton	49
Examination of Juror Frederick Terwilliger	51
Examination of Juror Robert P. Longcore	52
Examination of Juror Louis Sliker	53
Objection to Method of Drawing Jury	54
Motion for Mistrial	55
Opening for State	55
Motion for Direction of Verdict	162
Charge of the Court	165
Motion in Arrest of Judgment	190
Motion for New Trial	191
Certificate	193
Assignments of Error and Causes for Re- versal	194
Joinder of Error	202

WITNESSES FOR STATE

Earl D. Toy,	
Direct	60
Cross	64

	Page
Daniel R. Steele,	
Direct	64
Cross	66
Clifford C. Rounds,	
Direct	69
Cross	75
Herbert Bentley,	
Direct	75
Cross	78
Stanley Decker,	
Direct	79
Cross	80
Sidney Dunlap,	
Direct	81
Claude J. Resh,	
Direct	82
Cross	94
Re-direct	97
Charles W. Mains,	
Direct	98
Cross	104
Re-direct	109
Virgil A. Haddon,	
Direct	110
John Iliff,	
Direct	111
Cross	112
Dr. Blase Cole,	
Direct	113
Cross	115
Anna C. Koster,	
Direct	117
John Merlo,	
Direct	118
Cross	133
Re-direct	138
Re-cross	139

	Page
Joseph Circelli,	
Direct	139
Cross	150
Alfonso Del Solo,	
Direct	156

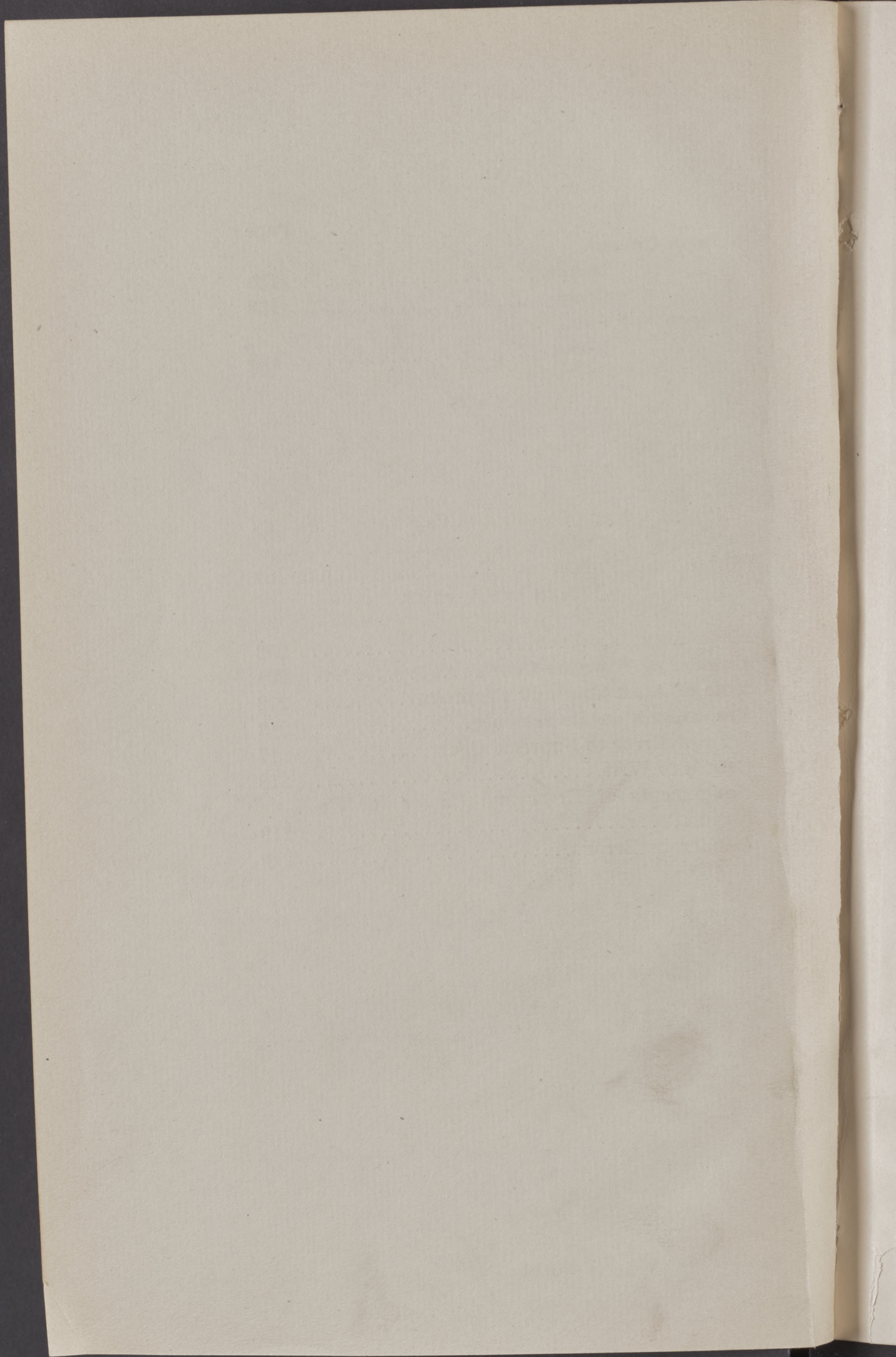
EXHIBITS

State's:

	Offered Page.
Exhibit 1—Map of road at Cat's Swamp....	68

ADDITIONAL PAPERS TO NEW JERSEY COURT OF ERRORS AND APPEALS.

Stipulation	203
Opinion of Supreme Court.....	204
Rule of Affirmance and Remittitur.....	212
Proceedings on Re-Sentence.....	213
Writ of Error to Supreme Court.....	217
Return to Writ.....	218
Assignments of Error and Causes for Re- versal	219
Joinder in Error.....	220



New Jersey Supreme Court

Order for Writ of Error

STATE OF NEW JERSEY, Defendant in Error, vs. ANGELO CARLINO, Plaintiff in Error.	}	New Jersey Supreme Court On Indictment for Murder
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Application having been made to me by Egbert Rosecrans, counsel for the above Plaintiff in Error, for a Writ of Error as hereinafter mentioned, and it appearing that said application should be granted; 20

It is hereby ordered, that a Writ of Error do issue out of the Supreme Court, directed to the Court of Oyer and Terminer of the County of Sussex, to review the conviction of murder in the first degree and judgment of death thereupon pronounced against the said Angelo Carlino in the said Court of Oyer and Terminer. 30

Dated March sixth, 1922.

E. R. WALKER,
Chancellor.

Entered March sixth, 1922.

On motion of
Egbert Rosecrans,
Attorney of Angelo Carlino.

Writ of Error

New Jersey: ss:

The State of New Jersey to the Honorable
James F. Minturn and the Honorable
10 (Seal of Allen R. Shay, constituting the Court
Supreme of Oyer and Terminer, holden at New-
Court) ton in and for the County of Sussex
and State of New Jersey of the Term
of December 1921, GREETING:

Because in the record and proceedings and also
in the giving of the judgment upon a certain
indictment against Angelo Carlino, late of the
County of Sussex, for murder (*pro ut* the said
20 indictment) whereof before you he has been
indicted, and is thereof convicted by a certain
jury of the County of Sussex, taken between the
State of New Jersey and the said Angelo Carlino,
as it is said manifest error hath intervened to the
great damage of the said Angelo Carlino as from
his complaint we have received information, we
being willing, in his behalf, to correct the error
in due manner if any there shall be, and that
speedy justice be done to him, the said Angelo
30 Carlino, commands you, that if judgment be
thereon given, then that you distinctly, and
openly, send under your seal the record and pro-
ceedings aforesaid, with all things touching the
same to our Justices of our New Jersey Supreme
Court, at Trenton, on the twenty-fifth day of
March, next, and this writ, that the record and
proceedings aforesaid, being inspected, we may
further cause to be done thereupon for correcting
that error, what of right and according to the
40 laws and customs of New Jersey ought to be done.
Witness Honorable William S. Gummere, Chief

Return to Writ

Justice of our New Jersey Supreme Court, at
Trenton, this sixth day of March, 1922.

ENOCH W. JOHNSON,
Clerk.

Egbert Rosecrans,
Leonard A. Sweeney,
Attorneys.

10

Return to Writ

SUSSEX COURT OF OYER AND TERMINER

December Term, 1921

State of New Jersey, County of Sussex, to wit:

20

BE IT REMEMBERED, That at a Court of Oyer and Terminer and General Jail Delivery holden at Newton, in and for the said County of Sussex, on the Ninth day of January, in the year of our Lord nineteen hundred and twenty-two, being the day on which the Grand Jury heretofore summoned to come before the Court of Oyer and Terminer, and now sitting in and for the said County, desires to present bills, by the Honorable James F. Minturn, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and the Honorable Allen R. Shay, Esquire, Judge of the Inferior Court of Common Pleas in and for the said County of Sussex, by the oath of

30

Return to Writ

- | | |
|--------------------------------|----------------------------|
| 1. Victor M. Robbins, Foreman, | 13. Ira D. Case, |
| 2. Arthur A. Edwards, | 14. John W. Johnson, |
| 3. Frank T. Snook, | 15. E. G. Smith, |
| 4. Loren T. Cole, | 16. George H. Dierker, |
| 5. Frank E. Hagaman, | 17. Jacob C. Losey, |
| 10 6. John M. Bevans, | 18. Marcus L. Bond, |
| 7. Dexter S. Goble, | 19. Ralph W. Dye, |
| 8. Benjamin F. Rosenkrans, | 20. William J. Hardin, |
| 9. Frank Demarest, | 21. Frederick J. Lawrence, |
| 10. Walter F. Evans, | 22. Frank Simpson, |
| 11. Hiram C. Snook, | 23. Frank Kerr, |
| 12. William A. Roy, | |

20 good and lawful men of the said County of Sussex, duly summoned, and then and there duly sworn and charged to enquire in behalf of the State of New Jersey, in and for the said County of Sussex, it is presented in manner and form following, to wit:

The Bills presented herewith are true bills.

COURT OF OYER AND TERMINER IN AND
FOR THE COUNTY OF SUSSEX

30 December Term, A. D. Nineteen Hundred and
Twenty-one

Sussex County, ss:

The Grand Jurors of the State of New Jersey, in and for the body of the County of Sussex, upon their oath present that Antonio Turco, Ottario Sparacio, Angelo Carlino, James Montana, Francesco Lamantia, John Merlo, Joseph Cirreli, John Scharzella, Angelo Scharzella, David Saba, John Saba, Joseph Messina, Palmerino Cirroni, Joseph
40 Parrello and Eduardo Sole, late of the Township

Return to Writ

of Byram, in the County of Sussex aforesaid, on the fourteenth day of June, in the year of our Lord one thousand nine hundred and twenty-one, with force and arms, at the Township aforesaid, in the County aforesaid and within the jurisdiction of this Court, did willfully, feloniously and 10 of their malice aforethought, kill and murder Albert Koster, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

And afterwards, that is to say, at the same Court of Oyer and Terminer, holden at the Court House, in the Town of Newton, in and for the said County of Sussex, on the Ninth day of January, in the year of our Lord one thousand nine hundred and twenty-two, being yet of the Term of December, in the year of our Lord one thousand nine hundred and twenty-one, before the Honorable James F. Minturn, one of the Justices of the Supreme Court of the State of New Jersey, and Honorable Allen R. Shay, Judge of the Court of Common Pleas of said County of Sussex, constituting a Court of Oyer and Terminer in and for the County of Sussex aforesaid, according to the form of the statute in such case made and provided, cometh the said Angelo Carlino, in his own proper person, and having heard the indictment above specified read, and forthwith being demanded of and concerning the premises in the said indictment above specified and charged upon him how he will acquit himself thereof, the said Angelo Carlino protesting that he is not guilty of the premises charged in the said indictment, and of this he puts himself upon the country, and Lewis Van Blarcom, Prosecutor of the Pleas of 40

Return to Writ

the County of Sussex, who prosecutes for the State of New Jersey, doth the like.

Therefore let a jury come, to wit, on Monday, the Twenty-seventh day of February, in the year of our Lord one thousand nine hundred and twenty-two, before the Honorable James F. Minturn, one of the Justices of the Supreme Court of the State of New Jersey, and Honorable Allen R. Shay, Judge of the Court of Common Pleas of the County of Sussex, of good and lawful men of the said County of Sussex, by whom the truth of the matter may be better known and who are not of kin to the said Angelo Carlino, to recognize upon their oaths whether the said Angelo Carlino be guilty of the premises aforesaid or not, because
 10 as well the said Lewis Van Blarcom, Prosecutor of the Pleas of the said County of Sussex, who prosecutes for the State of New Jersey in this behalf, as the said Angelo Carlino have put themselves upon the said jury, and the same day is given as well to the said Lewis Van Blarcom, Prosecutor of the Pleas of said County of Sussex, who prosecutes for the State of New Jersey in this behalf, as to the said Angelo Carlino.
 20

At which time, to wit, on Monday, the Twenty-seventh day of February, in the year of our Lord one thousand nine hundred and twenty-two, at the said Court of Oyer and Terminer, before the Honorable James F. Minturn, one of the Justices of the Supreme Court of the State of New Jersey, and Honorable Allen R. Shay, Judge of the Court of Common Pleas of the said County of Sussex, cometh as well the said Lewis Van Blarcom, Prosecutor of the Pleas of said County of Sussex, who prosecutes for the State of New Jersey in this behalf, as the said Angelo Carlino; and the
 30 jurors of the said jury, by Linus B. Littell, Es-
 40

Return to Writ

quire, Sheriff of said County of Sussex, for this purpose empanelled and returned, to wit:

- | | | |
|---------------------|-----------------------------|----|
| 1. John Sharp, | 7. George W. Lewis, | |
| 2. Ernest Wilson, | 8. Gottlieb S. Katzenstein, | |
| 3. Ralph N. Bull, | 9. E. Watson Labar, | |
| 4. Wilbur Masker, | 10. Richard Bolitho, | 10 |
| 5. Frank A. Meeker, | 11. Robert P. Longcor, | |
| 6. Fred M. Headley, | 12. Lewis Sliker, | |

being called, also came, who being chosen, tried and sworn to speak the truth of and concerning the premises in the indictment above specified, do say, upon their oath, that the said Angelo Carlino is guilty of the murder aforesaid on him above charged in the manner and form aforesaid, as in and by the said indictment is alleged against him, and that they designate and find that the degree of the said murder is murder of the first degree, and that he is guilty thereof. 20

And afterwards, to wit, on Thursday, the Second day of March, in the year of our Lord one thousand nine hundred and twenty-two, at the said Court of Oyer and Terminer, before the Honorable James F. Minturn, one of the Justices of the Supreme Court of the State of New Jersey, and Honorable Allen R. Shay, Judge of the Court of Common Pleas of said County of Sussex, cometh as well the said Lewis Van Blarcom, Prosecutor of the Pleas of said County of Sussex, who prosecutes for the State of New Jersey in this behalf, as the said Angelo Carlino, in his own proper person, and it is forthwith demanded of the said Angelo Carlino if he hath or knoweth of anything to say wherefore the Court here ought not, upon the premises and verdict aforesaid, to proceed to judgment against him, who nothing further saith, unless he before hath said: 30 40

Return to Writ

Whereupon, all and singular the premises being seen and by the Court as aforesaid fully understood, the said Court doth order and adjudge as follows: "The penalty fixed by law for the crime of which you have been convicted is death. You
 10 will be remanded to the custody of the Sheriff and the Court will prepare a warrant and deliver it to the Sheriff directing him to take you and deliver you to the Principal Keeper of the State Prison; there you are to be kept until execution of the sentence, and the sentence will be executed upon you in the week beginning April twenty-fourth next."

JAMES F. MINTURN,
 J. S. C.

20 ALLEN R. SHAY,
 Judge.

State of New Jersey,
 Sussex County Clerk's Office, } ss:

I, Harvey S. Hopkins, Clerk of the County of Sussex, and also Clerk of the Court of Oyer and Terminer and the several other Courts of Record in and for said County, Do Hereby Certify, that
 30 of the record and proceedings of said Court of Oyer and Terminer in the case of Angelo Carlino, indicted and convicted of murder therein, as taken from and compared with the original thereof now remaining of record in my said office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, at Newton, this Seventeenth day of March, in the year of our Lord one thousand nine hundred and twenty-two.

40 (Official Seal)

HARVEY S. HOPKINS,
 Clerk.

Testimony

SUSSEX COUNTY OYER AND TERMINER

THE STATE

vs.

ANGELO CARLINO

Sur Indict-
ment for Mur- 10
der.

Newton, N. J., February 27, 1922.

Present: HON. JAMES F. MINTURN,

Justice, presiding,

HON. ALLEN R. SHAY, C. P. J.

Of Counsel:

Lewis Van Blarcom, Esq., Prosecutor, 20

Sylvester C. Smith, Jr., Esq., Assistant,

Michael Dunn, Esq., Assistant.

For the State.

Egbert Rosecrans, Esq.,

Leonard A. Sweeney, Esq.

William A. Dolan, Esq.

For the Defendant.

Mr. Van Blarcom: If the Court please, the State moves the indictment against Angelo Car- 30
lino for murder.

Mr. Rosecrans: We would like now to make the formal objection to the service of the list on the defendant, in that it was not served pursuant to law, in that the list bears no certificate that it is an authentic list, and that the occupations of the jurors are not shown upon the list, and therefore, we will make the formal objection—

The Court: I do not understand the applica- 40
tion.

Argument

Mr. Rosecrans: That the list of jurors and the copy of the indictment served upon the defendant do not show the occupations of the jurors, and the list is not properly authenticated, and bears no marks of authentication.

10 The Court: That will be overruled.

JAMES F. MINTURN,
J. S. C.
(Seal)

The defendant excepts.

Mr. Rosecrans: I would like to ask the Prosecutor, for the purpose of saving the time of the Court, as to a few of the details which I think are undisputed. I want to ask him, first which indictment he moves, that is, does he move the indictment filed January 9th?

20 Mr. Van Blarcom: We move the indictment filed January 9th for murder, I stated that I move that indictment when I moved the case.

Mr. Rosecrans: Then we ask if he *nolle prosses* the other indictment for murder, does he agree to that?

Mr. Van Blarcom: No, we do not agree to that.

30 Mr. Rosecrans: Then we move that they be quashed, that is, the indictments previously found for murder against this defendant upon the same facts.

Mr. Van Blarcom: Those indictments are not before the Court, and this man can only be tried once for the same offense.

The Court: I suppose if he is tried on this indictment, that the other indictment would be useless. I overrule that motion.

JAMES F. MINTURN,
J. S. C.
(Seal)

Argument

Defendant excepts.

Mr. Rosecrans: I want to ask if the State will agree, as it did in the Turco trial, to these facts as in the nature of a bill of particulars, that Angelo Carlino was not the actual killer but engaged with the killer, Turco, in committing a robbery of a silk truck, the property of the Sussex Print Works, on June 14th, 1921, and that the murder charge is based on the participation of Carlino in that robbery. 10

The Court: In other words, it is a statutory offense of murder?

Mr. Van Blarcom: The State in its opening will state what the proof will be, what we intend to prove, and the evidence will show that. I don't think we should be agreeing to anything previous to the opening. 20

The Court: The State makes no admission at this time?

Mr. Van Blarcom: No, I don't think we should be called upon to do so.

Mr. Rosecrans: This is in the nature of a bill of particulars to save the time of all of us, and I ask them to give us that admission, based upon the facts in the Turco trial, I don't think that it will be disputed that the murder sprung out of the robbery. 30

The Court: I will allow the State to open the case to the jury, and in the statement of the case they will disclose what they intend to prove, and if that statement is not sufficiently specific in detail to give you what you are now asking for, then I shall ask the State to give you what you are asking for.

Mr. Rosecrans: We ask that now, because we want to base a motion upon it. 40

The Court: You want the State to give it now?

Argument

Mr. Rosecrans: We only want to know in the nature of the bill of particulars what we are going to meet here today.

Mr. Van Blarcom: You will be apprised of that when the State opens its case.

10 The Court: I will deny the motion except as I have already ordered.

JAMES F. MINTURN.
(Seal)

Defendant excepts.

Mr. Rosecrans: I want to ask the State that they agree that Turco was the actual killer, and was heretofore convicted and sentenced to die.

Mr. Van Blarcom: We admit that, that is a part of the record.

20 Mr. Rosecrans: We ask the State to agree that there was found at the December term opening December 20th, 1921, of the Sussex Oyer, an indictment against Carlino, two indictments, one for murder and one for robbery, both indictments being founded upon a common question of fact, both springing from the robbery committed on June 14th, 1921.

Mr. Van Blarcom: We won't admit anything further, if the Court please.

30 The Court: You decline to admit it?

Mr. Van Blarcom: Yes, sir.

Mr. Rosecrans: I ask then to prove it by the Clerk of the Court.

The Court: You can prove it when the time comes.

Mr. Rosecrans: I ask to prove it at this time for the purpose of making a motion.

The Court: You may assume that it is proved and make your motion.

40 Mr. Rosecrans: If the Court will take judicial notice, that there was an indictment found for

Argument

robbery for the same facts based upon the same question of facts—

The Court: You can make your motion assuming the Court's knowledge of that fact.

Mr. Rosecrans: Then I ask the State whether they elect to proceed upon this murder indictment. 10

Mr. Van Blarcom: We have moved the indictment for murder.

Mr. Rosecrans: Then the Court takes judicial notice of the fact that they elect to move the indictment for murder and not the indictment for robbery.

The Court: They have moved the indictment of January 9th for trial.

Mr. Rosecrans: That is in effect an election, all I want to get is the facts. 20

Mr. Van Blarcom: We have not moved the robbery indictment.

Mr. Rosecrans: You elect to proceed upon the murder indictment?

Mr. Van Blarcom: We have already proceeded to move the case.

The Court: I understood that the indictment was moved, and we have not got any motion pending, and I don't see why we don't proceed. 30

Mr. Rosecrans: We will come to those things in a moment. I assume that the Court has knowledge that they elect to proceed with the murder indictment. Then, if the Court please, I ask to withdraw the plea of not guilty, previously entered, for the purpose of entering a plea in bar.

The Court: Does the State object?

Mr. Dunn: How can you enter a plea in bar?

Mr. Rosecrans: We want to enter another plea. I ask the Court, formally, to allow me to with- 40

Plea of *Autrefois Acquit*

draw my plea for the purpose of entering another plea.

The Court: You want to add an additional plea?

10 Mr. Rosecrans: No, we want to put in a plea in bar.

The Court: What is it you offer?

Mr. Rosecrans: We wish to offer a plea of *autrefois acquit*. I will ask, then, that the Court allow me to withdraw my plea of not guilty.

The Court: Yes, I will permit that to be done for the purpose of making this argument.

20 Mr. Rosecrans: Now, we desire to enter this plea of *autrefois acquit*, which is in writing pursuant to law, and signed by counsel. I think it is in the usual form, I will present it to the State's counsel, and ask to have that entered upon the record.

(The plea is as follows):

“SUSSEX COUNTY COURT OF OYER AND
TERMINER

30 THE STATE OF NEW JERSEY, vs. ANGELO CARLINO.	}	Sur Indict- ment for Mur- der Plea of <i>Autre- fois Acquit</i> .
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40 Now comes the said Angelo Carlino, defendant in the above indictment and says that the State of New Jersey should not further prosecute the indictment for murder against him for which he is now placed upon trial because he has been heretofore lawfully acquitted of the same offense charged in said indictment in that he stands acquitted of the robbery charged in another indict-

Argument

ment as having been committed on June 14, 1921, and out of which robbery the above indictment and charge of murder spring, as both charges and indictments arise out of the same transaction and are based upon common facts. And the defendant is ready to verify the same. 10

Whereby he prays judgment and that the Court may dismiss and discharge him from said premises in the present indictment.

(Signed) ANGELO CARLINO,

By

(Signed) EGBERT ROSECRANS,

(Signed) LEONARD A. SWEENEY,

His Attorneys." 20

Mr. Rosecrans: The argument is that since the State has elected to proceed upon the murder indictment instead of the robbery indictment that that is equivalent to an acquittal upon the robbery indictment, and since the robbery indictment springs out of the same facts, that that is equivalent to an acquittal upon the robbery indictment, and an acquittal of the robbery indictment must be assumed, and it must be assumed that this defendant was previously acquitted upon the same question of fact, and that therefore this plea is properly entered. 30

The Court: Why do you say that it must follow that he was acquitted?

Mr. Rosecrans: I have authorities on that.

The Court: I will hear your authorities.

Mr. Rosecrans: In 22 Cyc., it was held that in the case of *State against McNiell*, 93 N. C., that an acquittal on an indictment of robbery resulted from the election of the State in just a similar situation. 40

Argument

The Court: Was that when the robbery indictment was being tried?

Mr. Rosecrans: These were cases in which there were two indictments or two counts, one for robbery and one other for a higher crime.

10 The Court: What I want to get at is whether that pronouncement by the Court was made when the indictment for robbery was being tried. Have you got the case, have you examined it?

Mr. Rosecrans: Not from that angle, no, sir.

The Court: As I understand the facts, you are now asking the State to ignore the robbery indictment, and elect to proceed with the homicide indictment, and then you say that that constitutes an election not to proceed with the former indictment for robbery and homicide, and that that
20 would lead to a presumption of acquittal on the former indictment. That is the reason I ask you whether the other indictment in the case you cited was being tried when that pronouncement was made, as that would lead to a different situation.

Mr. Rosecrans: That was used in the trial of the greater crime, in the trial of the greater offense, and they held that the election of the State to proceed with the greater offense, springing out of the same transaction, was in effect, an acquittal upon the lesser offense. We press our plea
30 of *autrefois acquit*, and ask judgment upon it.

The Court: You offer that plea of *autrefois acquit* under the state of facts that you have mentioned. Now you ask leave to enter it.

Mr. Rosecrans: And upon the state of facts within the knowledge of the Court, and if they are not sufficiently before the Court, we ask to prove them as set forth in the plea. I think there
40 is no question that the Court knows the fact to be that there was a robbery indictment and a mur-

Argument

der indictment found at the December term of this court, and that they both arose upon a common question of fact.

The Court: I will hear the State.

Mr. Smith: My understanding of the plea of *autrefois acquit* is that there must be an actual acquittal, or there must be some ground where a direction or a verdict of acquittal must be ordered. We may have four or five indictments, and the State may choose to proceed upon one indictment. This man is only going to be tried upon one indictment and I think there is nothing before the Court for this plea to be entered in any way. He has not even been called upon to plead to the robbery indictment. It has been withheld.

The Court: The question is whether that plea should be accepted either alone or in conjunction with the plea of not guilty.

Mr. Smith: We feel that it should not be accepted.

Mr. Dunn: It should not be accepted on the record.

The Court: How is it inconsistent with the plea of not guilty?

Mr. Dunn: He says he has been acquitted upon the indictment which we are now moving.

The Court: That is a technical claim of acquittal which he stands on.

Mr. Dunn: An acquittal on the robbery would not be an acquittal on the murder. The acquittal on the charge of murder would be a protection against the robbery.

The Court: What I am asking is, if I allow that plea to be entered on the record together with the plea of not guilty, how is the State injured?

Mr. Dunn: It is inconsistent. He claims to have been once before acquitted of the crime with

Argument

which we are now charging him. He has withdrawn his plea of not guilty for the purpose of presenting this plea to your Honor, and we contend that if it is accepted, we cannot call upon him again to re-plead to the indictment now
10 pending, and therefore the plea should be rejected. They are asking that it be received and accepted on the discretion of the Court after withdrawing the other plea, and there are not facts before the Court that would warrant the Court in recognizing the plea.

The Court: He offers to establish the facts.

Mr. Van Blarcom: If the Court please, the defense has already stated that they offer this plea as a plea in bar, and if it is accepted it must be
20 accepted as a plea in bar on their own say-so.

Mr. Rosecrans: That is the effect of such a plea.

Mr. Van Blarcom: That is the intention of asking the Court to accept this plea as a plea in bar, and if that is so, how could we proceed under a plea of not guilty?

Mr. Rosecrans: It is the correct procedure, and I can show that in the Supreme Court opinion, in the *State against Ackerman*, in which the same
30 kind of plea was entered, the Court says the plea of *autrefois acquit* was entered after the withdrawal of the plea of not guilty, that such procedure was proper, and it was with that view that I took the precaution to put it in writing and I also followed the language of the decisions as to the procedure.

The Court: Is the State ready to meet this situation now?

Mr. Smith: Yes. We don't even contend, and
40 I don't think the State is entitled to say that it is in the proper form.

Argument

The Court: Leaving out the form, it assumes that there was a previous acquittal on the charge of robbery. That assumption is based on the technical condition that exists, that by prosecuting this indictment, you do so on a situation that involves the robbery, and since the indictment for robbery has fallen through, this indictment must fall. As I understand that is the contention of the other side. 10

Mr. Dunn: The answer to that is this: In the first place, he has never been arraigned on the robbery indictment and has not been called before the Court on the robbery indictment, and therefore he cannot be acquitted on it until he is arraigned on it.

The Court: Has he ever been called on to plead? 20

Mr. Dunn: No, sir, and consequently, the Court's record stands clear that this man is before it charged with the murder resulting out of the situation that has been disclosed; and therefore this plea ought not to be accepted.

The Court: Mr. Rosecrans, have you any authority that goes so far as to hold that a defendant charged with murder, or a criminal offense, without ever being arraigned or ever being called upon to plead in a case, that the trial on another indictment is equivalent to acquittal if the murder charge be proceeded with? Have you anything among your authorities that will go so far? Unless you have I don't think we need to discuss it further. 30

Mr. Rosecrans: I can quote 22 Cyc., *State against McNiell*, where the State elected to proceed upon the one indictment springing out of the same transaction, and it was said that that was equivalent to an acquittal on the other, where 40

Argument

there was an indictment for robbery springing out of the same transaction.

The Court: And there was no arraignment and no plea?

10 Mr. Rosecrans: They say there has been no arraignment, but he is in a position where he can be called up now to plead to the robbery indictment. There is no statute of limitations against it. If, for instance, we were indicted for a robbery, could it be said that has no effect because we were never called upon to plead?

The Court: Yes, but if you were indicted on a homicide charge which occurred during a robbery, the charge of robbery would fall on the trial of the homicide so that you would not have anything
20 to do there more than merely plead your previous acquittal.

Mr. Rosecrans: But if anybody was indicted for a robbery and were not called upon to plead before the Court, is not the effect of the indictment by the Grand Jury being handed in to the Court, and the acceptance of the indictment, the same as charging him with the crime whether he is called upon technically to plead now or later?

The Court: You mean that there would be some
30 disposition of the case, either guilty or not guilty, but the plea would not dispose of the robbery indictment?

Mr. Dunn: If he was charged on this murder indictment and tried, that would dispose of the robbery.

The Court: In other words, is not the smaller locked up in the greater?

Mr. Rosecrans: Yes, that is exactly my point.

The Court: No, you are reversing it.

40 Mr. Rosecrans: It can be taken both ways. If

Argument

he is convicted of murder today, he cannot be tried for robbery.

The Court: You are not complaining of that?

Mr. Rosecrans: No, but I say that by the election, and I am citing authorities—by the election to proceed upon the greater charge, that he stands acquitted of the lesser charge. Now, it so happens in this case that they both spring out of the same transaction, therefore, an acquittal upon the robbery is an acquittal upon the murder, because the murder charge is based upon the robbery charge of which he stands acquitted. 10

The Court: I understand your position. That is all you have to say regarding it?

Mr. Rosecrans: Yes, sir, we ask for judgment upon the plea. 20

The Court: I will overrule this plea and reject it.

Mr. Rosecrans: Do I understand that your Honor enters judgment upon this plea as—

The Court: I decline to accept it; I do not enter judgment upon it, because it is not before me for consideration. I decline to accept it as a plea in bar, because it is not a plea in bar.

Mr. Rosecrans: I contend that the plea is in proper form, and was in proper form, that it follows the words of the statute, and decision in *State against Ackerman*, 64 N. J. Law. 30

The Court: I am not quarrelling with the form of your plea; I simply say it is based upon a state of facts that does not inhere in this case.

Mr. Rosecrans: Have we then not the situation that the Court declines to enter judgment upon the plea of *autrefois acquit* the Court rules against the defendant on that and is allowed to plead over and have his trial, and produces his defense against this charge? 40

Argument

The Court: No, I do not pass judgment upon it at all. I decline to accept it.

Mr. Rosecrans: It is before your Honor.

10 The Court: It is before me because you presented it here. Of course, I can take hold of it and handle it, but I decline to accept it because it is not a proper plea under the circumstances, because on your own state of facts it is not a proper plea, on the Court's knowledge of the facts it is not a proper plea.

Mr. Rosecrans: We offered to prove any of the facts we were allowed.

The Court: You said you would rest on the Court's knowledge of the facts.

20 Mr. Rosecrans: If the Court's knowledge does not correspond with what I have stated, I offer to prove the facts.

The Court: The Court's knowledge of the facts corresponds exactly with what you have stated, but the Court does not put the same construction on those facts as you do?

Mr. Rosecrans: As a matter of law?

The Court: As a matter of fact and as a matter of law.

30 Mr. Rosecrans: I desire to take an exception to your Honor's ruling upon that point, and also an exception to your Honor's refusal to enter judgment upon the plea.

JAMES F. MINTURN,
J. S. C. (Seal)

Mr. Dunn: Now, we ask that the defendant be called upon to plead upon the indictment, and that the clerk take his renewed plea.

40 Mr. Rosecrans: I am coming to that. I now ask that we reenter the plea of not guilty.

Mr. Dunn: Let the Clerk take the plea.

Argument

The Court: The defendant's counsel requests that the plea of not guilty be entered in behalf of his client, and that will be ordered.

Mr. Rosecrans: We would like again to withdraw the pleas of not guilty, for the purpose of making a formal motion addressed to the indictment, and a motion to quash the indictment, on practically the same grounds of the former motion, that since the charge of murder is based upon the statutory form of indictment, and the robbery springs out of the murder, that the indictment is bad for that reason, and for the reasons urged in support of the application made in the plea in bar. 10

The Court: You move to withdraw the plea?

Mr. Rosecrans: Yes, for the purpose of moving to quash the indictment. 20

The Court: You ask to have the plea withdrawn for the purpose of making this motion to quash?

Mr. Rosecrans: Yes, a motion to quash based on the facts already stated in the plea offered.

The Court: I will deny the motion to quash.

JAMES F. MINTURN,
J. S. C. (Seal)

Defendant excepts. 30

Mr. Rosecrans: I next make a motion to quash the indictment on the ground that it is drawn pursuant to statutory form, and does not set forth in words that this defendant was engaged in a robbery and that the murder grew out of the robbery and for the reason that Section 106 of the Crimes Act provides that any person, in the singular—any person who shall commit a robbery, and in the commission of that robbery shall kill another—in other words, that the statutory charge of murder must be directed against the 40

Argument

person doing the killing. Only the killer who was engaged in the robbery can be charged under the statute with murder. If the Court please, the argument is that this section of the Crimes Act was changed immediately after the *Russell* case, which was the first pronouncement of the Supreme Court upon this question.

The Court: Your argument is, that the indictment must recite the robbery and that incidental to the robbery this murder took place.

Mr. Rosecrans: Yes, and further, that Carlino is not the actual killer and the murder springs out of the robbery and that Carlino, who was not the actual killer, cannot be charged with murder, because the statute provides that only the person engaged in the robbery, who did the actual killing, is the murderer under the statute.

The Court: You are assuming all these facts and the motion appears to be premature.

Mr. Rosecrans: We offer to prove them, and I assume from your Honor's statement before, and your Honor's agreement with me upon it, that your Honor's view of these facts are the same as mine.

The Court: Yes, I know all the facts, and I know them to be substantially as you state them.

Mr. Rosecrans: And it was shown also that Turco was the actual killer, by agreement with the other side.

The Court: I think that is the fact. Now, you want me on the mere assumption that the Court knows these things, to quash this indictment?

Mr. Rosecrans: And on the fact that it appears in this case that the defendant is not the actual killer.

The Court: How does that appear in the case?

Mr. Rosecrans: They have admitted it, and the

Argument

Court already has said that it takes judicial notice of certain facts, this included.

The Court: I may know it, but it ought to come in regular proof in the case before the jury rather than anticipate what the Court may know and base a motion on it.

Mr. Rosecrans: The State agrees to those facts. I asked them to agree to it, that Turco was the actual killer, and was heretofore convicted and sentenced to die. 10

Mr. Dunn: We never agreed to that, we never used those words at all.

Mr. Rosecrans: We may be charged with misrepresenting it then.

Mr. Dunn: When you state we agreed to things which we did not.

Mr. Van Blarcom: We agree to anything which appears on the record. 20

Mr. Dunn: I think that will simplify the matter very much.

Mr. Rosecrans: If you don't argue the facts which everybody knows, it will be simplified.

Mr. Dunn: The statute has a statutory form for the indictment for murder, and the indictment here is framed upon that statute, and we are not obliged to state in that indictment the matters which counsel is talking about. He is simply wasting time and getting nowhere. 30

Mr. Rosecrans: Will the Court rule upon that motion?

The Court: What is the motion?

Mr. Rosecrans: The motion is to quash the indictment upon the grounds stated, that under the indictment only the actual killer can be charged with murder when it springs out of the commission of a robbery or similar felonious offense.

The Court: I deny that motion. 40

JAMES F. MINTURN,
J. S. C. (Seal)

Argument

Defendant excepts.

10 Mr. Rosecrans: I now move to quash the indictment because the indictment does not charge that the murder sprang out of the commission of a robbery. I am basing that on the case of the *State*
 20 *against Titus*, which was tried in the Warren Oyer, and reported in 49 Law of New Jersey, in which the Supreme Court held that the statute charging murder was sufficient, but in that very case the person who committed the rape—it was a rape case and murder springing out of rape—in that particular case, the killer was the same person who committed the other felonious act; in this case the facts are different, and I ask that the indictment be quashed, because the defendant
 20 has been denied the constitutional right to be apprised of the charge against him.

The Court: The motion is denied.

JAMES F. MINTURN,
 J. S. C. (Seal)

Defendant excepts.

Mr. Rosecrans: We desire to reenter the plea of not guilty, which was heretofore withdrawn, for the purpose of making a motion to quash.

30 The Court: The plea of not guilty may be entered on behalf of the defendant.

Mr. Smith: We ask that a jury be called.

Mr. Van Blarcom: We again renew the motion and move the case of the State against Angelo Carlino, charged with murder.

Mr. Rosecrans: I understood that these motions to quash were made after the State moved the case.

The Court: The State did move the case.

40 Mr. Dunn: The State moved the case, and you

Argument

withdrew the plea, and it has now been re-entered and the State now moves the case again.

The Court: Yes, I suppose so.

Mr. Rosecrans: Does the Court order that a jury be impaneled?

The Court: Yes.

Mr. Rosecrans: We desire to interpose a challenge to the array, upon the formal grounds which were raised in the application for the writ of certiorari, which I do not desire to spread upon the record in full, because it is within the knowledge of the Court, and the Court will take judicial notice of it.

The Court: You say on the writ of certiorari?

Mr. Rosecrans: On the application for the writ of certiorari and the return of the rule to show cause.

The Court: Was such an application made?

Mr. Rosecrans: Your Honor allowed the rule.

Mr. Van Blarcom: If the Court please, they made an application for a writ of certiorari to remove the indictment to the Supreme Court, and have a foreign jury.

The Court: Oh, I see; that application, and your motion is what?

Mr. Rosecrans: I say that we interposed a challenge to the array on the same grounds as they appear on the record in the Supreme Court on the other motion.

Mr. Van Blarcom: State that to the Court, what that ground is?

Mr. Rosecrans: They are matters of record, and it is not necessary to state them. They are on file in the Supreme Court Clerk's office, and the Court will take judicial notice of them.

The Court: I have been taking notice of so many things so far this morning that I think I

Argument

can take notice of that. I sat in the case in the Supreme Court, and of course I will deny this motion.

JAMES F. MINTURN,
J. S. C. (Seal)

10

Defendant excepts.

Mr. Rosecrans: We now interpose a challenge to the array on the ground that the Commissioners of Juries for the County of Sussex failed and refused to select any women in making up the petty jury list, and in drawing the 48 trial jurors no women were included.

After argument.

20 The Court: I will overrule that motion.

JAMES F. MINTURN,
J. S. C. (Seal)

Defendant excepts.

Mr. Rosecrans: Does your Honor overrule the offer to show that there was some premeditation or deliberation in not calling women as jurors?

30 In the case of the State against James, the Sheriff and the Jury Commissioner were called to testify.

The Court: You want to prove that, do you?

Mr. Rosecrans: Yes.

The Court: All right, proceed.

Linus B. Littel—Direct

LINUS B. LITTEL, being duly sworn, testifies as follows:

Direct-examination by Mr. Rosecrans:

Q. You are acquainted with the law of 1921, I presume, which provides that women as well as men are qualified for jurors? A. Yes, sir. 10

Q. You are the Sheriff of the County of Sussex? A. Yes, sir.

Q. And also a Jury Commissioner? A. Yes, sir.

Q. In the drawing of the general list, the Chancellor-Sheriff Act, before the opening of the Term, why didn't you draw women as well as men?

Mr. Van Blarcom: Objected to as leading.

A. Well, I believe the Jury Commissioner told me he wrote to Mr. Chief Justice here, and he said the court room was not adapted for lady jurors. 20

Q. You drew the 48 names that you drew on which list? You drew the 48 names for the trial jurors, didn't you? A. Yes, sir.

Q. In drawing those 48 names, did you have any thought of the defendant in not drawing women to serve as jurors? A. No, sir. 30

Q. Pursuant to an order of this Court, you drew additional talesmen, I think,—24 additional talesmen, and also drew an additional talesman, John Sharp, to fill up the vacancy in the list of 48? A. Yes, sir.

Q. At that time why didn't you draw women as jurors in addition to men? A. I don't know, I did not actually do the drawing.

Q. Who did the drawing? A. The Jury Commissioner does that. 40

Linus B. Littel—Direct

Q. Where was the drawing held? A. In the Sheriff's office.

Q. When was it held, what date? A. I guess I would have to go downstairs to find that out.

Q. What day of the week? A. Wednesday,
10 the 10th, I think.

Q. On a Wednesday? A. I think it was on a Wednesday.

Q. What hour of the day was it held? A. At 10 o'clock in the morning.

Q. Was the Prosecutor present?

Mr. Van Blarcom: He was not.

A. I don't think he was; there was quite a few in there.

Q. But you were not actually present in the
20 room? A. Yes.

Q. You were? A. I was there.

Q. Do you know whether or not the Prosecutor was present? A. I do not.

Q. In drawing the original 48, for the traverse jurors, trial jurors from the large list, how was that done, either you or the jury Commissioner drew the names? A. Yes, he draws the names.

Q. Was that drawing held in the presence of the Court? A. Yes, sir.

30 Q. Was a member of the Court now sitting, present when you drew the additional 24 talesmen? A. Yes, sir.

Q. Was that his Honor, Judge Shay? A. Yes, sir.

Q. As Commissioner of Juries, under the Statute, have you ever filed an oath as such? A. I don't know.

Q. You have filed an oath as Sheriff? A. Yes, sir.

40 Q. That is the statutory oath? A. Yes, sir.

Linus B. Littel—Direct

Q. Did you ever file any other oath as Commissioner of Juries? A. Not to my knowledge.

By Mr. Dunn: Q. The name that was drawn to fill out the vacancy in the general panel was drawn from the prepared list of the jury commissioners for this term? A. Yes, sir.

10

Q. And then the 24 talesmen selected were also drawn from that list which the jury commissioners were under the law required to prepare and have for this term? A. Yes, sir.

By the Court: Q. The letter that you received from a member of this Court referring to the selection of women as jurors, was based on the fact that there is not in the court house of the County of Sussex, any accommodations for the convenience of women? A. That is what the Jury Commissioner told me.

20

Q. And that if the Jury Commissioner desired to not call women for that reason, it was within his discretion? A. Yes, sir.

By Mr. Rosecrans: Q. In what manner were the 24 additional talesmen under the last order of the Court, drawn? A. The same as the regular panel.

Q. You mean by metal tags? A. Yes, sir.

Q. Were the metal tags corresponding with the names of all the names on the general jury list in that box when the drawing took place? A. Yes, sir.

30

Alfred B. Snook—Direct

ALFRED B. SNOOK, sworn:

Direct-examination by Mr. Rosecrans:

Q. You are the other Commissioner of Juries, together with the Sheriff of the County of Sussex?

10 A. Yes, sir.

Q. When were you reappointed? A. The 15th of February, 1922.

Q. By law your Commission is signed by the Chancellor? A. Yes, sir.

Q. By what method did you receive the actual commission? A. From the County Clerk's office.

Q. It did not come to you directly? A. I did not receive notice of the Vice-Chancellor to appear at the County Clerk's office and be sworn
20 in.

Q. You never received the commission yourself? A. I have what the Vice-Chancellor sent me.

Q. Did that letter contain enclosed the actual commission? A. I would take it that that was the commission.

Q. Did that include an order of the Chancellor appointing you? A. Yes, sir.

Q. That letter? A. Yes, sir.

30 Q. When did you receive the letter? A. A day or two before the 15th.

Q. Do you mean now that this letter which you received enclosed an order of the Vice-Chancellor appointed you, or simply a direction to go to the County Clerk's office, which was it? A. The letter contained the whole thing; it was his letter of appointment.

Mr. Rosecrans: Let me see it.

Mr. Dunn: What?

40 Mr. Rosecrans: The order.

Mr. Dunn: What order?

Alfred B. Snook—Direct

Mr. Rosecrans: The order of February 15th appointing this man. Do you have charge of those things in Sussex County?

Mr. Dunn: No, sir, I happened to have that in my hand when you asked for it.

Q. I show you this paper and ask you whether 10
or not that is the order which was enclosed in the letter from the Vice-Chancellor? A. It was not enclosed.

Q. Did you have any talk with any officers of the law other than the Court as to the election of men only as jurors? A. No, sir.

Q. Were you notified by the County Clerk to appear in his office? A. Yes, sir.

The oath was introduced as taken by Mr. Snook and it appeared that the word "just- 20
ly" was not included.

By Mr. Dunn: Q. Do you remember when you went to the County Clerk's office to sign this oath which has been shown to you here, that you signed your name over there in a book of oaths? A. Yes, sir.

Q. And do you remember the County Clerk calling your attention to one or two words that were in that oath in reference to the facts that were in the oath over in the County Clerk's office but 30
were not in the printed form? A. Yes, sir.

Q. What were they, do you remember? A. I don't just remember now.

Q. You signed that oath and swore to it?

The Court: I am wondering what you want all this in the case for.

Mr. Dunn: Only the fact.

The Court: Is it something you anticipate?

Mr. Dunn: To show the court that this 40
is the most unwarranted attempt ever made

Argument

in a court in a case of this kind to gain a point, and that there is nothing in it.

Mr. Rosecrans: I have good authority for this motion in the case of the *State against James*.

10 The Court: We don't want to attack this man's credentials.

The Witness: I have the letter from the Vice-Chancellor which he wrote me if the Court wants to see it.

20 Mr. Dunn: There is the original certificate by Vice-Chancellor Walker that he swore to. Now, I ask him if he swore to that, if he didn't go to the County Clerk's office, and there sign the official oath which had one or two words in addition to what is in the affidavit.

The Court: It has been sufficiently proved that he qualified as Commissioner of jurors, the defendant has proceeded along the line that he is the Commissioner of Jury, so what is the use of taking time to qualify him now. He has been recognized as such. Nobody can attack him but the State.

30 Mr. Rosecrans: If the Court please, I desire, on the evidence produced, to renew my challenge to the array on that ground, and I wish to include other grounds which have a bearing upon the same testimony and the same facts, and I will read them into the record.

40 Secondly, because there is no certificate of appointment by the Sheriff, as Commissioner of Jury filed in the County Clerk's office pursuant to law.

Argument

Third, because there was no oath filed by the sheriff as commissioner of Jury pursuant to law.

Fourth, because the specially appointed commissioner of juries was not qualified at the time the second drawing took place, that is, the drawing under the special order of the Court. In that he was not then appointed and had not qualified, in that his oath could not possibly have been taken upon the same day he was appointed. 10

Fifth, the drawing of the trial jurors, pursuant to the last order of the Court was not at a time fixed by the Chancellor-Sheriff Act, and because no legal authority existed for drawing as described by the order for the additional talesman as jurors. 20

Sixth, because there was no drawing of 48 names from the original talesman, or trial jurors drawn at the beginning of the term, pursuant to the act and the additional talesmen, in other words, that the 48 were not drawn from the whole number.

Furthermore, that the form of the oath of the Commissioner of Juries is not in conformity with the statute in that first, it in no way follows the provision of an act concerning oaths passed in 1920, and next because the word "justly" in other words, that he performed his duty justly, the word "justly" does not appear in any place in the oath as filed by Mr. Snook, and as provided in the Chancellor-Sheriff Act, amendment of 1919, page 314, and by the Statute 30 40

Argument

of 1920, prescribing a uniform oath in particular form.

After argument.

The Court: I will overrule the motion.

JAMES F. MINTURN,

10

J. S. C.

(Seal)

Mr. Rosecrans: Defendant excepts.

Mr. Rosecrans: I understand the Court now overruled my challenge to the array on all the grounds stated?

The Court: Yes.

Mr. Rosecrans: I pray an exception on the several grounds.

20

JAMES F. MINTURN,

J. S. C.

(Seal)

It appeared that the same jurors who served upon the Turco jury were included in the panel of 48 for this trial and this was known to the Sheriff and Clerk before the trial.

30

Mr. Rosecrans: I now desire to interpose a challenge to the array on the ground that no drawing of 48 jurors was ever had, as provided by the statute, Section 82 of the Criminal Procedure Act, because the drawing was made, according to the testimony of the Sheriff, and the Commissioner of Juries alone, and in both cases in drawing the 48 names from the entire panel of the original 48 and that the additional talesmen were summoned by special order of the Court. Because there were never 48 names at any time for the reason that first a juror

40

Argument

by the name of, I think, Francis W. Hyde, has been disqualified in having moved from the County, consequently that this panel of 48 which are now to be used in the box, according to Your Honor's order to draw this jury, and out of which the jury will be selected, 12 of those 48 in addition to the man Hyde, were disqualified as they sat upon the trial of the indictment against Turco, a prior case, and also because it includes the name of one John Sharp, who was never upon the general panel of jurors, drawn at the beginning of this term. Also upon the ground that because the 48 juror's names, served upon the defendant, never actually included qualified jurors, and therefore the defendant never had a proper list served upon him pursuant to law. 10 20

The Court: You are moving now for the discharge of those jurors, who sat in the Turco case. Is that the application?

Mr. Rosecrans: No, that is not the application now. The application is that I challenged the array on the ground that there never were 48 qualified jurors. 30

After argument.

The Court: I will overrule that motion.

JAMES F. MINTURN,

J. S. C.

(Seal)

Defendant excepts.

Mr. Rosecrans: Upon the authority of the cases cited in the Turco trial; *State against Lapp*, 84 N. J. Law, and *State against Rombolla*, 89 N. J. Law, I also urge 40

John Sharp—Direct

the challenge to the array and pray an exception to the denial.

JAMES F. MINTURN,
J. S. C.
(Seal)

10

The Court: Is that all?

Mr. Rosecrans: Yes, sir.

Mr. Smith: We ask that a jury be called.

A jury was then called and empanelled as follows. (Immaterial examination excluded).

JOHN SHARP, called as a talesman, the State
20 being content, was examined by the defense as follows:

30

By Mr. Rosecrans: If the Court please, I desire now to interpose a challenge for cause on the ground that this gentleman is the one according to the records and the statement just now made to the Court, who was substituted for the Juror Hyde, who has removed from the County, and he is not a member of the general panel of 48, but was drawn subsequently, and added to the 48.

The Court: What is he, a talesman?

Mr. Dunn: No, sir, under the order which Your Honor made on the 6th of February, he was drawn to fill out the vacancy in the general calendar.

The Court: I will overrule that challenge and allow an exception.

40

JAMES F. MINTURN,
J. S. C.
(Seal)

Harry J. Willis—Direct

Mr. Rosecrans: Before we go into that, Mr. Dolan suggests, I think quite properly so, that we know from the Sheriff what names he has in the box. In other words, is he drawing now from the list of 48 jurors and not from the list of the additional 10
talesmen?

The Sheriff: From the list of the 48 names.

Mr. Rosecrans: That is all in the box?

The Sheriff: Yes.

Mr. Rosecrans: May that appear in the record?

The Court: That the 48 names are now being drawn by the Sheriff from the general panel? 20

Mr. Rosecrans: Yes.

The Court: Yes.

HARRY J. WILLIS, called as a talesman being challenged by the defense to the favor, was sworn and examined as follows:

By Mr. Rosecrans: Q. Is your first name Henry 30
or Harry? A. They have got my name mixed up there.

Q. What is your name? A. My first name is Joseph, my middle name is Henry.

Mr. Rosecrans: Since we are just learning of this, we ask that this challenge for the favor be withdrawn, and we desire to impose a challenge for cause on the ground that the juror's name was not properly

John I. B. Knight—Direct

served on the defendant in that it appears that Harry J. Willis, when as a matter of fact, his name is Joseph Henry Willis.

The Court: You ask that he be allowed to step aside for a while?

10 Mr. Rosecrans: I interpose a challenge for cause but I will change that to a request that he be allowed to stand aside.

The Court: I will allow him to stand aside.

Mr. Rosecrans: I again renew my objection to the drawing because there never were 48 jurors, for the reason stated in the previous motion.

20 The Court: Is this man one of the 48 drawn?

Mr. Rosecrans: Yes, sir.

The Court: The objection is overruled.

JAMES F. MINTURN,

J. S. C. (Seal)

Defendant excepts.

30 JOHN I. B. KNIGHT, called as a talesman being satisfactory to the State, is challenged to the favor by the defense, and sworn and examined as follows:

By Mr. Rosecrans: Q. You live in Walpack?

A. Yes, sir.

Q. Do you hold office there or have you held office there? A. I held very little.

Q. What office did you hold; were you ever constable? A. No.

40 Q. Not now? A. No, sir.

John I. B. Knight—Direct

Q. Have you read about this case? A. Yes, sir.

Q. Have you formed any opinion as to the guilt or innocence of this man Carlino? A. Well, no permanent opinion, no.

Q. Did you read about the Turco trial and the conviction of Turco? A. I certainly did. 10

Q. Did you form any opinion as to the guilt of the other men charged as accomplices or confederates in that crime? A. Well—

Q. Especially this man Carlino? A. I thought he must be somewhat connected with it.

Q. Did you see the New Jersey Herald? A. Yes, sir.

Q. Did you see the pictures of all these defendants including Carlino on the front page? A. Yes, sir. 20

Q. And Carlino was described as the man who bound Resh and Mains up in the woods? A. Yes, sir.

Q. Did you form any opinion from that? A. Well, I formed the opinion that he was guilty to a certain extent.

Q. You did feel that? A. Yes, sir.

Q. Suppose you sat upon this jury, and the Court charged you that you should either find this man guilty of first degree murder, or that you should acquit him. Now, since you have in your mind an idea that he is guilty to some extent, would that necessarily mean that you would have to convict him because you felt that he was guilty to some extent? 30

Mr. Van Blarcom: Why don't you ask the juror whether he would be governed by the evidence or not.

Mr. Rosecrans: I am coming to that, let me ask it in my own way. 40

John I. B. Knight—Direct

Mr. Dolan: You don't have to ask the question as the State directs. If they have an objection let them make it to the Court.

10 Mr. Van Blarcom: This juror is a layman and is not familiar with legal terms, and should be asked the question intelligently.

Mr. Dolan: If the State has any objection they should object to the Court.

Q. What is your answer?

Mr. Dunn: Repeat the question so that he gets it.

20 Mr. Rosecrans: There is no request on my part to repeat the question. Won't you sit down and not object to my method of asking questions? It seems that I have taken the place of Mr. Ward.

Mr. Dunn: It would be all right if they were in keeping with the rules, but they are not.

Mr. Rosecrans: Let us get at it in this way.

Q. You saw that in the paper about this man?

A. Yes, sir.

Q. And you say you think that he is guilty to some extent? A. Yes, sir.

30 Q. If you had to find that he was guilty of first degree murder, or acquit him, if you had to say one or the other and could not go half way, would you feel that you would have to say guilty? A. I would feel that there would be something there, but that would be according to the evidence, I suppose.

Mr. Van Blarcom: That is my point that we would ask the juror whether he would determine from the evidence.

40 Mr. Rosecrans: You can ask him that afterwards.

John D. Williams—Direct

Mr. Van Blarcom: Why mislead him?

Mr. Rosecrans: If you cannot understand it, he can.

Mr. Rosecrans: We press the challenge for cause on the ground that the juror has formed an opinion which is an abiding one. 10

The Court: You challenge him?

Mr. Rosecrans: Yes, sir.

The Court: He will be excused on your challenge.

Mr. Rosecrans: We interposed a challenge for cause.

The Court: Didn't you challenge him peremptorily?

Mr. Rosecrans: We challenged peremptorily, and withdrew the challenge and 20 pressed the challenge for cause.

The Court: I will decline to excuse him, if you want to challenge him peremptorily, you will have to do so.

JAMES F. MINTURN,
J. S. C. (Seal)

Defendant excepts.

The taleman is challenged peremptorily by the defense. 30

JOHN D. WILLIAMS, called as a talesman, being satisfactory to the State, challenged to the favor by the Defense, was sworn and interrogated as follows:

By Mr. Rosecrans: Q. Where do you live? A. Hamburg. 40

Q. Did you know Albert Koster? A. No.

John D. Williams—Direct

Q. Are you in any way connected with the Sussex Print Works? A. No.

Q. Are you a constable in your township? A. No.

Q. Did you assist in any way in the apprehension of these defendants? A. No.

Q. Have you any prejudice against Italians? A. No, not any.

Q. Do you belong to any society which is supposed to be against men of foreign birth? A. Well, I belong to them who won't accept them. But there is nothing to interfere.

Q. Have you formed an opinion as to the guilt of Angelo Carlino? A. I couldn't help but form some opinion, sure.

20 Q. Could you dismiss it from your mind when you enter the jury box? A. Well, I will have to be guided by the evidence.

Q. I know you would be guided by the evidence, but you know, under the law, a man is presumed to be innocent until he is found guilty. A. Well, he has been proven guilty.

Q. He has been proven guilty? A. By the Grand Jury.

Q. And in your mind? A. Well, I wouldn't
30 say that.

Q. You believe that because the Grand Jury found him guilty, he is guilty? A. I believe the Grand Jury—

Q. I do not mean to question the Grand Jury, but do you believe in your mind the same as they do? A. Well, of course, we are guided by the evidence.

Q. Don't go back to that, because we have heard that, but you have an opinion that the man
40 is guilty, have you? A. Well, we can't feel but have a certain opinion, can't you see?

John D. Williams—Direct

Q. Could you sit in the jury box there, and start in with the idea that he was innocent and forget all about it if you were sworn the next minute? A. You couldn't forget all about it, but I will be guided by the evidence.

Q. But suppose the evidence, to some extent 10 showed he was innocent—I mean to some extent—would you have to have pretty strong evidence to overcome that opinion of yours that he was guilty? A. Well, I think so.

Q. You mean, in other words, the opinion of his guilt which you have now would have to be changed by the evidence; in other words, you could not forget your opinion until you heard the evidence?

A. Well, I would have to have the evidence, of course.

Q. But suppose you were sworn to sit up there 20 in the jury box and had that opinion of his guilt, and there was no evidence presented whatsoever, what would you do? A. I would have to enter a verdict of guilty.

Q. Then that is your settled opinion, is it, that he is guilty? A. Well, no—to a certain extent.

Q. You mean it would have to be changed by the evidence? A. Yes, it would. He is indicted 30 by 25 men now.

Mr. Rosecrans: I press a challenge for cause, and I want to state to the Court, that when a man says he has formed an opinion that must be changed by the evidence, it means in effect that he can't go into the jury box with an open mind, that can be changed by law; in other words, he means when he says that he has that opinion, and the evidence could change it, he means the evidence would have to change 40 it.

Argument

The Court: Do you mean every man is presumed to be innocent until he is found guilty?

The Witness: Well, this man has been proved guilty.

The Court: By what?

10 The Witness: By the Grand Jury.

The Court: Suppose the Court tells you that what the Grand Jury has done in this case amounted to nothing, that you would have to decide this case without any regard to the Grand Jury or what the Grand Jury did, and you have to decide it according to the evidence; that you have to start off believing every man is innocent until he has been proved guilty, do you believe you could give a verdict according to the evidence?

20 The Witness: Oh, yes.

The Court: That is the sort of man we are looking for.

Mr. Rosecrans: If your Honor please, he has still that opinion.

The Court: We can't get rid of our opinions altogether.

Mr. Rosecrans: But it has to be got rid of by the evidence.

30 The Court: Every man is presumed to be innocent until he has been proved guilty by evidence.

Mr. Rosecrans: Does your Honor presume he can go into the jury box with an open mind?

The Court: He looks to me like an intelligent man.

Mr. Rosecrans: I don't doubt that, but I suppose because he is intelligent he has formed an opinion.

40 The Court: You do not want any but intelligent men on this jury; I do not suppose

Argument

the law intends that we shall go out to lunatic asylums and get a lot of idiots to come in here and sit as jurors.

Mr. Rosecrans: But the law does not intend that a man to be tried for his life should be tried by a man who believes he is guilty at the start. 10

The Court: Of course, you can stand here by the hour, Mr. Rosecrans, and convince every man called as a juror, or try to convince him, that he cannot try this man because he has not got an open mind; in other words, he does not understand your questions, because they are put in a legal way, in words which these men do not understand. 20

Mr. Rosecrans: But I want to give this defendant a fair trial, which it is my duty as an officer of the Court to do.

The Court: And this man says he can do it. Do you think you can give this man a fair trial on the evidence?

The Witness: I think so.

The Court: And do you think that he is not guilty until he is proven guilty?

The Witness: Yes. 30

The Court: If the Court tells you you could not find him guilty unless he is proved guilty beyond a reasonable doubt, would you so find?

The Witness: Sure.

The Court: I deny the motion in regard to the jurymen.

JAMES F. MINTURN,
J. S. C. (Seal).

Mr. Rosecrans: I pray an exception and challenge peremptorily. 40

Challenged peremptorily by the defense.

Argument

(The Clerk informs the Court that that exhausts the 48 names which were placed in the box as a regular panel.)

10 The Court: Now it will be necessary to call the tales, I suppose the Defendant objects.

Mr. Rosecrans: They were not in the lot drawn before.

The Court: No.

Mr. Rosecrans: We object on the grounds previously raised in interposing challenges to the array.

The Court: On the grounds that you gave which apply now.

20 Mr. Rosecrans: Yes, sir, and particularly because the 48 names were not drawn from the whole number here, that the drawing was not done in accordance with the act of the Legislature, and for the reasons raised in the challenge to the array. And furthermore, that all jurors which were drawn their names should have been in the box at the beginning of the drawing; that is, in other words, that the names of all jurors, including the names of these jurors, should
30 have been in the box at the beginning of the drawing so that the opportunity of drawing this, that or the other name which might be favorable to the defense could be had.

The Court: That objection will be overruled.

JAMES F. MINTURN,
J. S. C. (Seal).

40

The defendant excepts.

Thomas Hilton—Direct

THOMAS HILTON, called as a talesman, being satisfactory to the State, challenged to the favor by the Defense, was sworn and interrogated as follows:

By Mr. Sweeney: Q. Where do you live? A. 10
Montague.

Q. And your name? A. Thomas Hilton.

Q. Did you know Albert Koster in his lifetime?

A. No, sir.

Q. Have you any connection with the Sussex Print Works? A. No, sir.

Q. Or the prosecution in this case? A. No, sir.

Q. Have you formed any opinion as to the guilt or innocence of this defendant? A. To a certain extent.

20

Q. What is your opinion? A. You would have to show me that he is not guilty.

Mr. Sweeney: Talesman challenged peremptorily—I withdraw my peremptory challenge, and challenge for cause. This talesman said “you would have to show me that the defendant is not guilty.”

The Court: That may be said of any juror.

By the Court: Q. Would you be satisfied if the 30
evidence and direction of the Court of the guilt or innocence of this lad? A. Yes, sir.

Q. And if he was not found guilty you would find him innocent? A. Yes, sir.

By Mr. Sweeney: Q. Do you believe you could enter the jury box, Mr. Hilton, with the presumption of this man’s innocence? Or with the presumption that this defendant is not guilty?

Mr. Dunn: That isn’t a fair way to put the question.

40

The Court: We will allow it to go.

Thomas Hilton—Direct

10 Mr. Dunn: It isn't the legal way to put the question. We all have opinions, and if we are to be selected as judges of things can we go in that box and listen to the evidence and then with the charge of the Court, can we arrive at a verdict according to the evidence?

By Mr. Sweeney: Q. I ask you if you could disregard that opinion? A. If the evidence is strong enough I could change my opinion.

Mr. Sweeney: He is going in the box with the opinion of this man's guilt and we have to produce evidence of this man's innocence.

20 The Court: I want this man to understand this question.

By the Court: Q. Mr. Hilton, if you go in that jury box and before you go in it take an oath that you would try him according to the evidence, and if you are sworn to do that, could you render your verdict according to the evidence as to this man's guilt or innocence? A. Yes, sir.

Q. Could you give him the benefit of any doubt as to his guilt?

30 Mr. Sweeney: I challenge peremptorily, and I pray an exception as to the other question.

JAMES F. MINTURN,
J. S. C. (Seal)

Frederick Terwilliger—Direct

FREDERICK TERWILLIGER, called as a talesman, challenged to the favor by the Defense, was sworn and interrogated as follows:

By Mr. Sweeney: Q. Where do you live? A. Franklin. 10

Q. What is your business? A. Garage.

Q. Did you know Albert Koster in his lifetime? A. No.

Q. Any connection with the Sussex Print Works? A. No.

Q. Ever do any work for them? A. No.

Q. Have you formed any opinion as to the guilt or innocence of this man, Angelo Carlino? A. Well, yes.

Q. What is your opinion? A. Well, that is 20 pretty hard to tell what that opinion is.

Q. Is that an opinion of innocence or guilt? A. It is an opinion of guilt.

Q. Do you know Mr. Irons? A. Yes, yes.

Q. Have you ever talked to him about it? A. I have talked more or less with him.

Q. Have you ever talked to the Prosecutor? A. No.

Mr. Sweeney: I ask that he be challenged for cause. He says he has formed an opin- 30 ion, and that he has talked with Mr. Irons about the case.

By Mr. Van Blarcom: Q. Did you discuss this matter with Mr. Irons before or after you were summoned as a talesman? A. Before; I have not seen him since.

Mr. Sweeney: We press our challenge.

The Court: I deny it.

Mr. Sweeney: I pray an exception and challenge peremptorily. 40

JAMES F. MINTURN,
J. S. C. (Seal).

Robert P. Longcore—Direct

ROBERT P. LONGCORE, called as a talesman, being satisfactory to the State, challenged to the favor by the Defense, was sworn and interrogated as follows:

10 By Mr. Sweeney: Q. Where do you live? A. Sussex.

Q. Did you know Albert Koster in his lifetime? A. No, sir.

Q. Are you connected in any way with the Sussex Print Works? A. No, sir.

Q. Do you know Mr. Irons? A. I know him when I see him.

Q. Have you discussed this case with him in any way? A. No, sir.

20 Q. Have you formed any opinion in this case? A. Only what I read in the newspapers.

Q. Can that be changed in any way? A. Yes, sir.

Q. Can you go in the jury box and presume this man to be innocent? A. I think I could, yes, sir.

Q. The Court will instruct you after hearing the evidence and you should be convinced in your mind and beyond a reasonable doubt, if this man
30 is guilty, that you may find a verdict of guilty of murder in the first degree without any recommendation, or you may recommend a sentence of life imprisonment, would you consider that? A. That would be up to the Court.

Mr. Sweeney: Have we exhausted our challenges?

The Court: You had twenty.

The Defense having exhausted its challenges and the State expressing itself satisfied, the talesman was sworn as a Juror.
40

Louis Sliker—Direct

LOUIS SLIKER, called as a talesman, being satisfactory to the State, challenged to the favor by the Defense, was sworn and interrogated as follows:

By Mr. Sweeney: Q. Mr. Sliker, where do you live? A. Sussex. 10

Q. What is your occupation? A. Track foreman.

Q. For whom? A. Lehigh & New England.

Q. Did you know Albert Koster in his lifetime? A. No, sir.

Q. Or connected in any way with the Sussex Print Works? A. No, sir.

Q. Do you know Mr. Irons? A. Yes, sir.

Q. Have you discussed this case with him in any way? A. No, sir. 20

Q. Have you formed any opinion as to the guilt or innocence of this defendant? A. Yes, sir.

Q. What is your opinion? A. It looks by the papers there must be some guilt there somewhere.

Q. Do you believe you could enter the jury box and form an opinion without any regard of the opinion you have now and the opinion you may find, would be in strict accordance with the evidence adduced here? A. If the Court can show that he is not guilty. 30

Q. Can you go in the jury box with the presumption of this man's innocence and that presumption abide by you until the evidence is heard and you could find him guilty beyond a reasonable doubt? A. Yes, that is what I said before.

Q. Then you believe you could try this case strictly by the evidence adduced here and not be affected by any opinion you have already formed? A. Yes, sir. 40

Louis Sliker—Direct

Q. Have you any reason to be against a verdict of life imprisonment in any case? A. Not particularly.

Q. If you are sworn as a juror and you came to the conclusion that this man is guilty and the
10 Court has instructed you that this man can be sent to the electric chair or may be imprisoned for life, do you believe you could say all these things according to the evidence adduced here at this trial? A. Yes, sir.

Q. When did you last serve as a juror? A. Never served.

Q. Never served as a juror before? A. No, sir.

20 The Defense challenges being exhausted and the State expressing itself satisfied, the talesman was sworn as a juror.

Mr. Rosecrans: At this time we renew on all the grounds raised in the several challenges to the array our motion, and show to the Court that the twenty challenges allowed us by law have been exhausted.

30 The Court: You mean that they have been or have not been?

Mr. Rosecrans: Show that they have been.

The Court: What is the objection to that?

Mr. Rosecrans: We again raise all the objections raised in the challenge to the array for the grounds already set forth, because it is manifest for the reason already stated that the overruling of these objections and challenges to the array have been
40 prejudicial to the defendant.

The Court: In what way prejudicial?

Argument

Mr. Rosecrans: For the reason already set forth, for the various reasons, I don't believe the Court would care to have me rehearse them for the reasons raised in all the challenges to the array that there were only 48 drawn etc. 10

The Court: You renew your motions on the same ground?

Mr. Rosecrans: We renew our motions on the same ground we want to do that formally, and ask that a juror be withdrawn, and a mistrial granted.

The Court: After we have taken all this trouble to draw the jury?

Mr. Rosecrans: Just because I understand I must raise it now again to protect the defendant's rights. 20

The Court: Well, if you think so, there is no objection to your raising it, of course.

Mr. Rosecrans: I suppose that your Honor overrules the exception and the motion is denied.

The Court: Yes, I think I will do that.

JAMES F. MINTURN,

J. S. C.

(Seal) 30

Defendant excepts.

Mr. Van Balcom opened for the State as follows:

If the Court please, and gentlemen of the jury, in opening the case for State, I do not want to take too much of your time, but want to give you first, a very brief outline of what the State will contend that it will prove to you in this case. 40

Argument

10

The situation is this; that on the 14th day of June last, that is, the year 1921, at a point on the road leading from Newton to Stanhope, which point in the road is known as the Cat's swamp section, there was a robbery committed, and, in the perpetration of that robbery, a murder was committed.

20

The Court will instruct you as to the law in regard to this defendant, but I will state this, on the part of the State, there is no contention made that Angelo Carlino, this defendant, really committed the murder. As to that I do not feel that it is within my province to discuss the law with you, the Court will give you instructions on that.

30

On this morning, June 14th, about the hour of 6:30 in the morning, and when I say that I mean 6:30 daylight saving time, which will make it 5:30 by standard time, a motor truck, belonging to the Sussex Print Works was on the road. The Sussex Print Works, by the way, is a manufacturing concern in Newton, engaged in finishing printing and dyeing silk, and they make their shipments of silk from their mill to Passaic by motor truck, and that was the destination of this truck on the morning referred to. As this truck proceeded along the road, between Newton and Stanhope, it arrived at a point near Cat's Swamp and right here I want to give you a very brief description of the country there. As you approach the point where this holdup took place, there is that known as the Cat's Swamp Mountain.

40

On the north side is a road going from Newton towards Stanhope at quite a perceptible

Argument

grade, quite a heavy grade, as you come to the top the road flattens out for probably a quarter of a mile, and goes along practically level, and then comes to a sharp turn, and goes down what they call a winding hill, on the further side of the mountain. 10
When this truck rode down the North side of the hill, on the righthand side, the bank slopes away and on the left it goes up very steep, and at that time in the month of June, it was covered with underbrush, when suddenly six men jumped out of the underbrush on the righthand side, and seized the driver and helper of the truck, and four of them rushed the men up into the woods. One of those men who took the 20 driver and the helper into the woods was this defendant, Angelo Carlino. The other two men then took charge of the truck and drove it down.

At this point an interruption was occasioned by the discharge of the other jurors, and the prosecutor was interrupted in his opening. After the interruption he continued as follows:

Mr. Van Blarcom: I believe we left off at 30 the point where the truck had been seized and the two men took the truck and started down the road at the point which I have already mentioned to you above the hill, what is known as Winding Hill, that is about as I have described, a quarter of a mile from the actual place where the holdup took place. When they reached this point, and an open space probably 40 or 50 feet wide, and probably 30 feet deep, they took 40

Argument

the truck into this open space and backed it, and attempted to turn it around. And at that time the back of the truck was in this open space, and the front of it pointed out into the road. And while that situation existed, Albert Koster came along with a motorcycle. Albert Koster was a laboring man who lived in the borough of Andover with his wife and child and worked in Stanhope, or Netcong, as a stationary engineer. As he came down the road, one of the men who has been as a matter of record, tried and convicted, Antonio Turco, stepped out in the road, and called to him to stop. And when he attempted to stop, Turco shot him, and killed him.

Now the contention of the State is, as the Court will instruct you is the law, that anyone taking part in a robbery is equally guilty with the man who actually did the murder. And that is what the State will show you these men committed that they indeed came up here to perpetrate a robbery, and in the perpetration of that robbery this murder was committed.

Now we will go back to the driver and his helper and the four men in the woods.

After they had taken possession of this truck and apparently by the way, the value of the truck and its contents we will show you was about \$11,000.

The four men rushed Mr. Mains and Mr. Rush, the driver and his helper, up into the woods, and up this steep bank, and there kept them captives from the time the hold-up took place until along early in the after-

Argument

noon, probably a period of six or seven hours. And we will show to you by Mr. Mains and Mr. Rush who have identified this defendant, the treatment which they received from these men, and how they were left tied hand and foot, concealed from all observers and away from any help while these men made their escape. 10

We will show you after that, that these men went back to Easton, Pennsylvania, and there the following September, when their whereabouts were discovered, and an effort made to arrest them on the farm of Mr. Mills, below Easton, that this defendant, in his effort to escape, attempted to shoot his way out, and actually did shoot one Easton police officer, and attempted to shoot Herbert C. Irons, and in that fight was shot by Mr. Irons. We will show you that as evidence of his guilt. 20

I think that covers the situation, I don't want to go too much into detail, we have already taken up a great deal of time, in drawing a jury; but on that statement of the facts, we will show you by evidence beyond a reasonable doubt that this man was there took part in this holdup, was one of these co-conspirators, and for that reason, guilty of murder in the first degree, as well as Antonio Turco, the man who shot Albert Koster. 30

Earl D. Toy—Direct

EARL D. TOY, sworn as a witness for the State:

Direct-examination by Mr. Van Blarcom:

10 Mr. Rosecrans: If the Court please, I should like to make a request at this point, that a copy of the testimony be furnished to the defendant Angelo Carlino, on the grounds that he has not the means to pay for the same. I understand that your Honor has already ordered that.

20 The Court: I understand there is some difficulty about having the County pay for this testimony. If there is any difficulty of that kind, I shall have to consult with a representative of the County, before I impose that burden on the stenographer who is entitled to be paid for his work by somebody and while I am inclined to grant your quest, I won't grant it at this time, until Senator Kays, the Prosecutor, or somebody makes the necessary arrangements.

30 Mr. Rosecrans: The only difficulty is that we shall have to use it during the trial of this defendant, and he is without the means to pay for it.

The Court: If Counsel will agree to pay for it, pending the consent of the County, it might be furnished.

Mr. Rosecrans: The statute covers the case of the defendant who is not able to pay and without means, and it is on that ground that I make the request.

40 The Court: Not for the notes of testimony.

Mr. Rosecrans: For a transcript of the testimony and printing the testimony.

Earl D. Toy—Direct

The Court: That is after the case is over. I want to do whatever is the proper thing under the circumstances, but I understand there is some difficulty about the county paying for some testimony the Court has already ordered, and I do not want to sub- 10
ject the Stenographer to the trouble and expense of copying this testimony and then have the bill remain unpaid. Somebody ought to pay it.

Mr. Rosecrans: I would be glad to obligate myself if it was a different case.

The Court: I will look at the statute on the subject, and while I think you are right, I think this is an opportune time to have the county understand its obligations. 20

Mr. Rosecrans: The difficulty is that Senator Kays is engaged in the legislature and probably will not be back here in time.

The Court: When will he be here?

Mr. Rosecrans: I cannot just say when. He will be here probably Tuesday or Wednesday morning. We won't press it until we can show your Honor the Statute.

The Court: The Prosecutor will be here and the Court will take it up when you 30
show me the statute. I don't want to have the stenographer going around looking for someone to pay his bill, when he is undergoing great expense in the operation. If the matter can be legally done, I will do it. If it cannot be done, it shall have to remain without.

By Mr. Van Blarcom: Q. Where do you live?

A. Spring Street, Newton.

Q. How old are you? A. 22.

Earl D. Toy—Direct

Q. What is your business? A. Draftsman and transit man in the county engineer's office, of the County of Sussex.

Q. How much experience have you had in drafting? A. Three years.

10 Q. I call your attention to the map which has been put up behind you and ask you if you made the draft of that map? A. I did.

Q. Will you state from whom you got your measurements? A. From Daniel Steele.

Q. And from his notebook? A. Yes, sir.

Q. Who made the actual survey and measurements, if you know. A. Daniel Steele.

Q. Will you indicate what scale the map is drawn to? A. It is drawn to a horizontal scale
20 of 50 feet to the inch, and a vertical scale of 50 feet to the inch.

Q. How far is between the numbers on the map? A. 100 feet.

Q. 100 feet, between each one? A. Two inches on the map is 100 feet.

Q. The rest of the map is drawn to the same proportion? A. It is.

Q. Just indicate to the jury what you mean by the horizontal and the vertical scale. A. The hori-
30 zontal scale in this case is the distance along this center line and this represents the road Newton to Stanhope, the vertical scale is from this point, along this line here, and between these different lines which indicate the grade of the road.

Q. By the horizontal you mean the actual road surface? And by the vertical you mean the profile of the road? A. The profile of the road; the horizontal distance is not along the surface of the
40 road.

Q. I understand; the upper indicates a bird's eye view of the road? A. Yes.

Earl D. Toy.—Direct

Q. That is what you term the horizontal scale?
A. Yes, sir.

Q. Of course those measurements were made flat? A. Yes, sir.

Q. The vertical scale is the measurement on the road indicating the grade? A. Yes, sir.

Q. What road is that indicated on the map? A. 10
That is road from Newton to Stanhope.
The road known as the Cat's Swamp section.

Q. Where does that road lead to and from? A.
It starts incidentally at Newton, and leads to
Stanhope, and on through down to Dover, etc.

Q. It is the main outlet into the lower counties
of the state? A. Yes, sir.

Q. Do you know what township that is in? A.
It is in Byran Township.

Q. Of what county? A. The County of Sussex. 20

Q. Will you indicate on the map, the direction
of Stanhope and the direction of Newton? A.
Stanhope is in this direction, and Newton in this
direction (indicating).

Q. In what direction is Andover from that sec-
tion of the road? A. Andover is down at this
end. This section is the other side of Andover
towards Stanhope.

Q. This section of the road, to be more accurate, 30
is between Andover and Stanhope. A. It is, yes.
I think the Stanhope is the end of it up there, but
that road also runs into Newton, and it is known as
the Newton Stanhope road.

Q. And this map was accurately drawn by you
from measurements furnished you by Mr. Steele?
A. It was.

Q. And the curves and other features of that
road indicated there are taken from actual meas-
urements given to you by Mr. Steele. A. They 40
were.

Daniel R. Steele—Direct

Q. Do you know how wide the road is? A. The road between the gutter lines is 31 feet.

Q. How wide is the pavement? A. Eighteen feet.

Q. What is the pavement? A. It is a bituminous macadam.

CROSS-EXAMINATION by Mr. Rosecrans:

Q. You don't know anything about these markings that appear on that map, do you? A. All I know about the marks is what I took from the notebook furnished me by Mr. Steele.

Q. You don't know anything about their accuracy, do you? A. I do not.

Q. You are satisfied that the map which is shown there represents the physical characteristics of that road? A. That map represents the physical characteristics handed to me in November by Mr. Steele. That is as far as I can tell you.

Q. Have you the note books which I believe Mr. Steele handed you? A. Mr. Steele has it, I think. I have not got it with me. I think Mr. Steele has it with him.

Mr. Van Blarcom: We will call Mr. Steele and show that he took the measurements.

30

DANIEL R. STEELE, sworn as a witness for the State:

Direct-examination by Mr. Van Blarcom:

Q. Where do you live? A. Newton, New Jersey.

Q. How old are you? A. Twenty-four years old.

40

Daniel R. Steele—Direct

Q. What is your business? A. Civil engineer.

Q. Where are you employed? A. By the County of Sussex.

Q. In whose office are you working? A. In the county engineer's office.

Q. I call your attention to the map on the wall 10
back of you and ask you if you made the measurements for that map? A. Yes, I superintended it.

Q. Were those measurements actually made on the ground? A. Yes, sir.

Q. What part did you take in making the measurements? A. I kept the notes and saw that the measurements were accurate.

Q. Do you remember the day when the measurements were taken for the map? A. The 7th of November. 20

Q. The figures set down in your notebooks were accurately taken—the measurements accurately taken at that place, on the road? A. Yes, sir.

Q. And then you heard Mr. Toy testify you turned the notebook over to him? A. Yes, I did.

Q. Have you examined the map? A. Yes, sir.

Q. And that is an accurate map of the section of the road at Cat's Swamp? A. It is.

Q. I call your attention to one marking on the map, indicating the approximate location of the 30
holdup and ask you who indicated that place to you? A. Merlo.

Q. No. The approximate location of the holdup? A. Station 15.

Q. Don't state unless you remember; state if you remember; if you do not remember say so; who showed you the point where the holdup took place, or supposed to have taken place, do you remember who told you that? A. While Chief Irons and Mr.— 40

Daniel R. Steele—Cross

Q. There was a party there? A. Yes; there was a party, do you want to know who was down in the party?

Q. Yes, state who was present there if you remember at the time you were making the measurements? A. The Prosecutor, Chief Irons, County
10 Engineer Snook, and Merlo. And Mr. Merlo pointed out the place where the holdup took place, and where the silk truck was turned around.

Q. Do you remember who else was there? A. My two helpers, Rush and Linder, and Butler, the chauffeur.

Q. I don't want to lead you, I don't think it is material, particularly, it is not going to injure anybody. Do you know Claude Roesch? A. Yes,
20 sir.

Q. Do you remember whether he was there? A. Yes, Mr. Roesch was there.

Q. Did Mr. Roesch indicate anything to you? A. Why, yes, the place where they were taken up in the woods.

Q. He showed you the place where they were taken up in the woods? A. Yes, sir.

Q. And the place where they were taken up in the woods, was approximately the place of the
30 holdup? A. Yes, it is nearly at right angles. The place where the holdup is, is approximately the place where they were taken in the woods.

CROSS-EXAMINATION by Mr. Rosecrans:

Q. When you say Mr. Merlo, do you refer to one of the co-defendants in this indictment? A. Mr. Merlo, yes.

Q. He is one of the defendants, or one of the men who were in the supposed holdup? A. Yes.

40 Q. He was the one who testified for the state

Daniel R. Steele—Cross

on the previous trial at which you were present?
A. Yes.

Q. As to these markings, first the place that is marked on that map where the holdup took place, are you sure that is within a few feet of the place where it was pointed out to you where the holdup 10 took place? A. Yes, sir.

Q. You took the rough field notes, didn't you?
A. Yes, sir.

Q. Did you mark on those field notes at the time where this place was? A. Yes, I made a note of it.

Q. And those field notes are the same as were given to Mr. Toy? A. Absolutely.

Q. And did you compare your notes with the map that he made, this map, afterwards? A. Yes, 20 sir.

Q. To satisfy yourself that it was correct? A. To verify it, yes.

Q. Is it physically possible for a person to stand in the road about at the place where the holdup took place and see another person or see that part of the road where you have marked the place where the body was found? A. No, sir.

Q. It is not physically possible? A. Not from standing in the road. 30

Q. What is the nature of the land on the east side—is that the east side?

Mr. Van Blarcom: The road runs almost north and south. It is indicated there by the arrow.

Mr. Rosecrans: The upper side of the map would be east then?

Mr. Van Blarcom: Yes.

Daniel R. Steele—Cross

Q. You know the contour of the land on the upper side of the road, the east side of the road? A. Yes, sir.

Q. What is that? A. Very mountainous and woodland.

10 Q. Is it woodland and mountainous between the point that you have marked the place where the holdup took place, and the point that you have marked where the body was found? A. Yes, sir.

Q. And a continuous sort of a precipice? A. Yes, sir. Except on the west side, there is a little clearing.

Mr. Dunn: Indicate with your ruler, where you refer to.

The Witness: Here. There is sort of a space
20 five foot from the road back to here.

Q. There are weeds all around that space? A. Yes, sir.

Q. So that it would not be possible for a man standing back at the point where the holdup took place, to see to the point indicated where that space is? A. No, sir.

Mr. Van Blarcom: If there is no objection we will offer the map in evidence as a guide for the jury and the court.

30 Admitted and marked State's Exhibit No. 1 of this date.

By Mr. Rosecrans: Q. Tell me approximately how far it is that you have marked where the holdup took place to the point where the body was found. A. A quarter of a mile.

Clifford C. Rounds—Direct

CLIFFORD C. ROUNDS, sworn as a witness for the State:

Direct-examination by Mr. Van Blarcom:

Q. How old are you? A. 38.

Q. Where is your residence? A. Linwood Avenue, Newton, New Jersey. 10

Q. By whom are you employed? A. By the Sussex Print Works.

Q. How long have you been employed by the Sussex Print works? A. Four years last September.

Q. Will you state what the business of the Sussex Print Works is? A. Dyers, printers and finishers of silk.

Q. Where is their factory located? A. Sparta Avenue, Newton. 20

Q. Were you employed by the Sussex Print Works during the month of June, last year? A. Yes, sir.

Q. What are your duties with the Sussex Print Works? A. Superintendent.

Q. In what sense are you superintendent? A. In the position that might be covered by that plant.

Q. State if you know the means whereby the silk was shipped from those works? A. The silk was shipped by truck every day except Sunday. 30

Q. And to what points were the shipments made? A. To Passaic, New Jersey.

Q. And you have stated that the shipments were made every day except Sunday? A. Yes, sir.

Q. Did you have any supervision over the running of those trucks? A. Yes, sir.

Q. What was that? A. To see that they went out each morning on schedule; I was advised the following day of what was on the truck that day. 40

Clifford C. Rounds—Direct

Q. Have you any record of the contents of the truck? A. Yes, sir.

Q. As they were loaded? A. Yes, sir.

Q. It is part of your duty to keep track of that? A. Yes, sir.

10 Q. Will you state, if you know, what was loaded on the truck on the morning of June 14th last year? A. There were 137 pieces of silk; 15 boxes containing 15 copper rollers.

Q. Were you present when they were loaded on the truck? A. No, sir.

Q. Are you taking that from the records you have in your possession? A. Yes, sir.

Q. That was given to you by whom? A. By the shipping clerk.

20 Q. When was it given to you? A. The next morning.

Q. Will you state who packed the trucks and loaded them? A. Sidney E. Dunlap and Stanley Decker.

Q. Are they employees of the Sussex Print Works? A. Yes, sir.

Q. State, if you know, the value of the silk shipped that morning? A. \$6,790.46.

30 Q. State the value, if you know, of the copper rollers? A. Approximately \$900.

Q. Who was the driver of the truck? A. Claude Roesch.

Q. Did he have an assistant with him? A. Yes, sir.

Q. Who was the assistant? A. Charlie Mains.

Q. Were both of those men employed by the Sussex Print Works on that day? A. Yes, sir.

40 Q. State, if you know, what time the truck left the Sussex Print Works on the morning of June 14th? A. About six o'clock daylight time.

Clifford C. Rounds—Direct

Q. Was that the regular schedule time? A. Yes, sir.

Q. Were you present when it left that morning? A. No, sir.

Q. State, if you know, the destination? A. Passaic, New Jersey.

Q. From the town of Newton to the City of Passaic? A. Yes, sir. 10

Q. And during the day of June 14th, was there anything out of the ordinary happened at the mill? A. Not until about two o'clock in the afternoon.

Q. Don't tell what was said to you at that time, but just tell what happened at that time? A. We had a 'phone message from the men.

Q. You say you had a 'phone message? A. Yes, sir. 20

Q. Don't state what the message was, but as a result of that 'phone message what did you do? A. I reported it to Mr. Bentley.

Q. What did you do after that? A. Mr. Bentley and I went down the Andover road.

Q. How did you go down the road? A. By auto.

Q. By Mr. Bentley, you mean Mr. Herbert Bentley, one of the firm of the Sussex Print Works? A. Yes, sir. 30

Q. Where did you go on the Andover road? A. We went down in the Cat's Swamp.

Q. What did you observe after you got to the Cat's swamp. A. By that time we had picked up Claude Roesch and his helper.

Q. Mr. Mains? A. Yes.

Q. Where did you pick them up? A. In Andover.

Q. From Andover where did you go? A. We continued on the road toward Netcong. 40

Clifford C. Rounds—Direct

Q. How far did you go? A. I would say perhaps a mile out of Andover.

Q. Where was the first place that you stopped, if you did stop? A. We were stopped at a point in the road, where Claude Roesch told us he had
10 been held up.

Q. Don't state what was told you. Just state what you did. Just turn and look at the map and state whether you can indicate on that map about the point where you first stopped? Do you understand the map that the single line indicates the hill and profile of the road, and the upper part there represents what you might call a bird's eye view of the road? A. I would say long in here somewhere (indicating) I cannot state just
20 exactly.

Q. Just state what the condition of the country and the road at that point is. A. On the lefthand side, going this way it is mountainous. On the righthand side it is a little lower perhaps.

Q. What is the condition of the ground about that point, is it open or wooded? A. It is wooded.

Q. What kind of a road is it, leading through Cat's Swamp? A. I would say it was a good road, I don't know how it is made, I could not tell
30 you. A regular Macadam road I should call it.

Q. After you stopped at this point, where did you go, if you went anywheres, where did you go from there? A. We went in this direction (indicating).

Q. Pointing towards Stanhope? A. I believe that is it.

Q. You understand the map? A. Yes, I understand this is Stanhope—Netcong.

Q. How far did you go in that direction? A.
40 We went down to a point in the road where we saw a motorcycle.

Clifford C. Rounds—Direct

Q. What kind of a motorcycle was it, if you remember? A. A motorcycle with a side car.

Q. Can you show on the map about where you saw that motorcycle? A. It was on the first turn of the road to the left, I would call it in here.

Q. What else did you see, if anything? A. We 10
looked a little further and found the body of a man.

Q. Where was that body lying, or where was the body? A. Further in off the road in a little brook.

Q. What was the position of the body when you saw it? A. The body was face downward.

Q. Face downward in the brook? A. Yes, sir.

Q. Where was the motorcycle situated with reference to the body of the man? A. The motor- 20
cycle was pointed in towards the body, just off the road.

Q. About what distance from the body? A. I would say about 30 feet, I did not take any particular notice.

Q. Who was with you at this time? A. Claude Roesch, the driver, Charlie Mains, his helper and Mr. Bentley.

Q. Are you familiar with the truck of the Sussex Print Works? A. Yes, sir. 30

Q. What kind of tires were on that truck? A. They were known as Overman Cushion Tires.

Q. Solid tires? A. Yes, sir.

Q. That is the body of the tire is solid? A. Yes, sir.

Q. Did you observe anything there to indicate to you that that truck might have been there? A. Yes, sir.

Q. What did you see? A. We thought we could determine the tracks of those tires. 40

Clifford C. Rounds—Direct

Q. Where were the tracks? A. To the right of the road at that point.

Q. The place that you indicate on the map, is that about the point where you saw the tracks?

A. Yes, sir.

10 Q. Is that an open space you indicate there, that part of the road? A. I would say not.

Q. Is that macadamized as the surface of the road is? A. No, sir.

Q. Do you know whose body you saw lying there in the brook? A. Yes, sir.

Q. How long did you stay there? A. Perhaps five minutes.

Q. Where did you go from there? A. I took Claude Roesch on to Netcong, to get something
20 to eat.

Q. And did you see anybody at this point on the road, when you were there, besides the ones you have mentioned? A. What is that again?

Q. Did you see anybody else at this point on road? A. A machine came along going towards Netcong.

Q. Did you stop the machine? A. Mr. Bentley stopped the machine.

Q. When did you see this truck, previous to
30 June 14th, you stated that you were not present at the mill when it left on the 14th? A. On the night of the 13th.

Q. When did you see it the next time? A. I think it was either two or three days after the robbery, I cannot state positively.

Q. Where did you see it? A. In the works.

Q. Did you inspect it at that time? A. I just looked it over casually.

Q. What did you notice, if anything, about it?
40 A. Nothing excepting that it was very dirty outside.

Herbert Bentley—Direct

Q. You did not make any particular examination of it? A. No, sir.

CROSS-EXAMINATION by Mr. Rosecrans:

Q. You say you met Mr. Roesch, Mr. Mains the morning of the 14th of June? A. Yes, sir. 10

Q. What time? A. I did not say in the morning, on the 14th of June about 2:30 in the afternoon.

Q. Where were they when you met them? A. In Andover.

HERBERT BENTLEY, called as a witness for the State:

20

Direct-examination by Mr. Van Blarcom:

Q. Where do you live? A. On Linwood Avenue, to Newton, New Jersey.

Q. What is your business? A. Converter of silk goods.

Q. Are you a member of the firm of the Sussex Print Works? A. Yes, sir.

Q. Were you connected with that firm on June 14th last? A. Yes, sir. 30

Q. You heard Mr. Rounds sworn? A. Yes, sir.

Q. And you heard him testify? A. Yes, sir.

Q. Do you remember going with Mr. Rounds on that day to Cat's Swamp as he has stated? A. Yes, sir.

Q. Will you state what you found when you got there, what you saw when you got there, no conversation that took place, but just tell the jury what you saw when you and Mr. Rounds got to Cat's Swamp? A. I found a lot of men working in the road about that place and we also saw a 40

Herbert Bentley—Direct

motorcycle by the side of the road and we saw a dead body in the brook right off the road.

Q. What was the position of the body when you saw it? A. The body was lying face downward with the face in the brook.

10 Q. Did you know whose body that was? A. I did not.

Q. You did not know at the time? A. No, sir.

Q. Will you tell us what the condition of the underbrush and trees were at that point on June 14th? A. Well, they were all out in foliage at that time, and there was a lot of growth there, both trees and underbrush on both sides of the road?

Q. This truck was the property of the Sussex
20 Print Works? A. Yes, sir.

Q. What was the value of the truck, what value do you place on the truck? A. It cost about \$5000.

Q. What was the value of the truck on June 14th last, what was your estimate of the value of the truck, what was the book value of the firm placed upon it? A. I could not tell you the value on our books at that time, but we kept the truck up in good repair.

Q. What was the estimated value of the truck
30 at that time? A. Well, estimated, you mean the book value?

Q. No. You have had experience with automobiles bought and sold and owned automobiles, what was the value of that truck.

Mr. Sweeney: Objected to on the ground that the witness has not been shown to be an expert on the value of trucks.

The Court: Every man nowadays is an expert on that or knows something about
40 it.

Herbert Bentley—Direct

Q. Did your truck at that time have any value?
A. Yes, sir.

Q. It was a valuable truck, you may state that without stating the value? A. It was just as valuable to us as the day we bought it.

Q. And you paid \$5000 for it? A. Yes, sir. 10

The Court: Q. It was worth more than \$1000, I suppose, on that date?

The Witness: Yes, sir.

Q. Where did you see your truck following the 14th of June? A. In Frenchtown, N. J.

Q. And there you identified it as yours? A. Yes, sir.

Q. Where was that in Frenchtown? A. About the center of the town, a little alley, I think, next to the Prosecutor's office, but I am not sure. 20

Q. Did you make an examination of the truck at that time? A. I looked it over on the outside.

Q. What was the condition of the truck then?
A. It looked to be pretty dirty, it was hard to tell whether there was anything the matter with it at that time or not.

Q. Was the truck in the same condition as when it left the mill? A. Not after we examined it thoroughly, we found it was not.

Q. After you examined it, state the results of your examination? A. After it was brought back in Newton we had it examined by the makers, and found it to be in pretty bad condition, so that it had to be overhauled pretty thoroughly. 30

Q. What kind of a body did this truck have?
A. A closed body.

Q. What material was it made from? A. It was made of wood.

Q. Was it possible to lock the truck? A. Yes, sir. There were doors on the back and side. 40

Herbert Bentley—Cross

Q. And were those doors locked? A. There was a padlock on each of the doors.

Q. When you saw the truck in Frenchtown, were those doors intact? A. As I remember, the tail-board was broken and thrown in the truck, and the
10 other two doors were open.

Q. How was the silk if you found it? A. The silk was taken out of the trunks on cases.

Q. How did you send out the silk? A. In trunks or cases.

Q. Do you know how this shipment itself was made, whether in trunks or cases? A. This shipment was made in trunks.

Q. Did you find any trunks in the truck at Frenchtown? A. Yes, sir.

20 Q. Was there any silk in the trunks? A. No, sir.

Q. Describe the position of the body as you observed it in the brook at Cat's Swamp on June 14th? A. Well, it was lying with the feet toward the road, and the head face down in this brook, so that over half of the head was under water.

The Court: Did you ever receive any of the silk or these rollers back again?

The Witness: We received the rollers.

30 The Court: Not the silk.

The Witness: Not the silk.

The Court: What was the value of the silk?

The Witness: Somewhere around \$7000.

CROSS-EXAMINATION by Mr. Rosecrans:

Q. Were there revolvers in the truck? A. Yes, sir.

Q. Before it left? A. Yes, sir.

Q. You mean by that, weapons, guns? A. Yes,
40 sir.

Q. Were they always carried in the truck? A. That was the order.

Stanley Decker—Direct

- Q. How many? A. Two.
 Q. Automatics? A. Yes, sir.
 Q. They were gone when you found the truck?
 A. Yes, sir.

10

STANLEY DECKER, sworn for the State,
 testifies as follows:

Direct-examination by Mr. Van Blarcom:

- Q. Where do you live? A. In Newton, N. J.
 Q. How long have you lived in Newton? A.
 About 11 years.
 Q. Where are you employed? A. In the Sus-
 sex Print Works.
 Q. What is your business? A. Receiving clerk. 20
 Q. Were you employed at the Sussex Print
 Works on June 14th last? A. I was.
 Q. What were then your duties at the print
 works? A. Well, I received all the goods came in
 and I helped the shipping clerk pack.
 Q. Were you present at the packing and load-
 ing of goods on the truck on the 14th of June, or
 when they were loaded? A. I was, when they
 were packed in trunks, but not in the truck; I was 30
 there to pack them in trunks, but not on the truck.
 Q. What did you pack in the trunks? A. Silks.
 Q. Did you see the copper rollers placed in the
 truck? A. Ten of them.
 Q. Were three trunks loaded in the truck in
 your presence? A. No, sir.
 Q. When did you next see the rollers and the
 trunks? A. I should judge from three to four
 days afterwards.
 Q. Where did you see them then? A. In the 40
 Sussex Print Works, garage.

Stanley Decker—Cross

Q. That is, before they had been removed from the truck ? A. That is before the rollers had been removed.

Q. They were still in the truck at that time? A. Yes, sir.

10 Q. Did you make an examination of the truck at that time? A. Yes, sir; Mr. Dunlap and I looked at them.

Q. What condition did you find them to be in? A. The rollers were practically all right; the trunks were capsized and had some kind of powder over them.

Q. I refer to the truck, what condition did you find the truck in? A. Well, as far as the truck was concerned, it was dirty, but whether it was
20 hurt or not, I could not say; I don't know much about a car.

CROSS-EXAMINATION by Mr. Rosecrans:

Q. Mr. Mains and Mr. Resh were in charge of the truck when it left on the morning of June 14th? A. When they left on the morning? I could not say; I was not there.

Mr. Van Blarcom: All he knows is, that he packed the silk in the truck.

30 Mr. Rosecrans: That morning?

Mr. Van Blarcom: No, the night before.

The Witness: The 13th.

Q. Did the silk you packed go into that truck? A. I could not tell you, I was not there.

Q. Do you know whether the truck which went down that morning with silk in it had that silk in? A. Do I know that they usually go?

Q. Yes? A. They are supposed to go; yes, sir.

Q. Were the men on that truck armed? A. I
40 could not tell you.

Sidney Dunlap—Direct

Q. You testified to that previously, that they were armed? A. That they were armed?

Q. Yes? Question by State: "What means were taken to protect the contents of the truck on the road? A. Two armed men, chauffeur and helper." A. Well, they were supposed to be armed, I could not swear they were armed. 10

SIDNEY DUNLAP, sworn for the State:

Direct-examination by Mr. Van Blarcom:

Q. Where do you live? A. Newton, N. J.

Q. Where do you work? A. In the Sussex Print Works. 20

Q. How long have you worked in the Sussex Print Works? A. A little over two years.

Q. Were you employed by the Sussex Print Works on June 14th last? A. Yes, sir.

Q. What are your duties in the employment at the Sussex Print Works? A. Shipping clerk.

Q. Did you have any duties to perform in the packing of silk or the loading of it in a truck which you have heard the other witnesses speak of? A. I superintended the packing. 30

Q. You mean by that in the trunks? A. Yes, sir.

Q. Did you close the trunks? A. I don't remember of actually closing them.

Q. Was that a part of your duties? A. It was a part of my duties.

Q Sometimes you did it? A. Yes, sir.

Q. Then what did you do with the trunks? A. They are taken out.

Q. Did you assist or were you present at the loading of the truck on the morning of June 14th? A. Yes, sir. 40

Claude J. Resh—Direct

Q. Do you know how much silk was placed in the trunks? A. 137 pieces.

Q. Were there any other trunks packed and ready for shipment? A. At that time?

Q. Yes? A. No.

10

No cross-examination.

CLAUDE J. RESH, called and sworn as a witness for the State, testifies as follows:

Direct-examination by Mr. Van Blarcom:

Q. State your name and residence, Mr. Resh?

20 A. Newton; forty years.

Q. Are you married? A. Yes, sir.

Q. Where are you employed? A. Sussex Print Works.

Q. How long have you been employed by the Sussex Print Works? A. Four years.

Q. Were you in their employ on the 14th of June last? A. I was.

Q. What was the nature of your employment at that time? A. Chauffeur.

30 Q. And chauffeur, in what capacity? A. Of a truck.

Q. Of one of the trucks owned by the Sussex Print Works? A. Yes, sir.

Q. Were you at the mill on the morning of the 14th of June? A. Yes, sir.

Q. What time did you get there? A. Half past five.

Q. What did you do after you got there? A. Started my motor, which was in the garage. I pulled around to the front, where I loaded.

40

Q. Did you load or assist in loading anything

Claude J. Resh—Direct

on the truck that morning? A. I loaded and had an assistant.

Q. What did you load on the truck? A. A balance of five rollers, three trunks and one package.

Q. Were there any rollers on the truck when you got there? A. Yes, sir; I loaded ten the night before. 10

Q. You heard Mr. Becker and Mr. Dunlap testify? A. Yes, sir.

Q. Were those the rollers that were loaded in the truck? A. Yes, sir.

Q. Were those trunks locked when you loaded them on? A. Yes.

Q. Do you know what was in the trunks? A. Well, yes; silk I suppose.

Q. What day of the week was that 14th of June? A. Tuesday. 20

Q. Give a description of the truck? A. It was a two ton Pierce Arrow.

Q. A left hand or a right hand drive? A. right hand drive.

Q. What kind of body did it have? A. A wood paneled body.

Q. And will you describe a wood panel body as an enclosed body? A. Yes, sir.

Q. How was the body enclosed? A. It was paneled all the way around. 30

Q. How was access to and from the truck made? A. It was just a cap.

Q. I mean the body of the truck? A. A back door and a side door.

Q. How were the doors secured? A. I had a padlock.

Q. Were they secured when you left the mill on the morning of the 14th of June? A. Yes, sir. 40

Claude J. Resh—Direct

Q. What time did you leave the mill that morning? A. Ten minutes to six.

Q. Where were you going? A. Passaic N. J.

Q. Who was with you? A. Charles Mains.

Q. Where did you sit? A. The right hand side.

10 Q. You were driving the truck? A. Yes, sir.

Q. Where did Mr. Mains sit? A. The left hand.

Q. Did you know Albert Koster during his life time? A. I did.

Q. Did you see him that morning? A. I did.

Q. Where did you see him? A. Cranberry Lake.

Q. What was he doing? A. Working on his motor cycle.

20 Q. At what point near Cranberry Lake did you see him? A. This side of the railroad track, on the road.

Q. Do you know what kind of a motor cycle he had? A. I did.

Q. What? A. Harley-Davidson.

Q. Any attachment to it? A. A side car.

Q. What side of the road was he on? A. On the right side.

Q. Did you speak to him? A. I did not.

30 Q. Did you make any indication that you knew him? A. I waved to him.

Q. Did he reply to you? A. I don't remember, he may have.

Q. Where did you go after you passed him? A. On the road to Passaic.

Q. How far had you gone towards Passaic before something happened? A. At Cat's Swamp.

Q. What happened then? A. I was held up by six men.

40 Q. Do you understand that map (Exhibit 1)? A. I think so.

Claude J. Resh—Direct

Q. Will you indicate to the jury the point where you were stopped?

(Witness indicates on map.)

Q. Just indicate how far down? Show the point on the map; the single line indicates the profile of the hill, the grade; if you drop down you can show about the point on the hill where you were held up? A. I was held up about here (indicates on map). 10

Q. State to the Court and jury what you saw first when you reached this point? A. That is, on the hill?

Q. Yes; what did you first observe when you got there? A. We were driving along, and I was just making my last shift into low speed, and I had just made the shift when six men ran up from the side of the road and held us up at the point of guns. 20

Q. From which side of the road did they run? A. The right side.

Q. How does the ground on the right hand side point there? A. It is an embankment.

Q. And on the left hand side? A. On the left hand side, it goes up.

Q. What was said, if anything? A. When we were held up? 30

Q. Yes. A. "Make no noise and there will be no hurt."

Q. Did they lay hands on you? A. They did.

Q. Where did they take you? A. Up the mountain, up the side of the hill.

Q. How many took you up the hill? A. Two of them had me, and two had Charles Mains.

Q. In what manner were those men armed? A. With revolvers.

Q. Were their faces covered? A. Yes, sir.

Q. How far did they take you up into the 40

Claude J. Resh—Direct

woods? A. Say, 150 feet or yards; I can't just exactly tell.

Q. When they stopped, were you out of sight of the road, or in sight of the road? A. Out of sight.

10 Q. And from the time you were taken from the truck until you reached the point of the hill you mentioned, did you stop at all? A. I slipped back once, kind of fell, but they held me up quickly, and kept me going.

Q. What kind of a day was June 14th? A. It was a windy, raw morning.

Q. And what time of the day was this hold up? A. About half past six.

Q. And what was that time, standard or daylight savings? A. Daylight savings.

Q. How fast were you going when you were held up? A. Three miles an hour.

Q. You say you had just made your last shift into low speed, so the truck was running pretty slow? A. Yes.

Q. Do you remember showing Daniel Steele a point on the map that you pointed out as where you were held up? A. I did.

Q. Now, after these four men took you and
30 Mr. Mains, as you have stated, up into the woods, and away from the road, what did they do, if anything? A. They told us to sit down.

Q. And you sat down? A. We did.

Q. What did they do? A. Sat around there.

Q. At that time, did they uncover their faces? Take off their masks? A. Yes, sir.

Q. Do you know who these men were? A. I do now.

Q. Was this defendant, Angelo Carlino, one of
40 the men? A. Yes, sir.

Claude J. Resh—Direct

Q. You are positive he was one of the men?
A. Absolutely.

Q. Have you ever talked to him since he has been here? A. I don't know as I have, only the night he was brought in.

Q. There is no question but that he was one of the men who held you up in the woods that night? A. None whatever. 10

Q. How long were you there? A. From about half past six in the morning to two o'clock in the afternoon, or half past, as near as I can remember.

Q. Did you have any conversation with Carlino at that time? A. Not one word.

Q. Where was he? A. Stood away to the left of us. 20

Q. Who else was there? A. Three others.

Q. Have you seen any of the others since that time? A. I did.

Q. Which? A. Montana.

Q. Jerry Montana? A. Yes.

Q. Do you know where he is? A. In the jail.

Q. Do you know the other two? A. Yes.

Q. Who were they? A. Joseph Cirroni and Joe Cirelli.

Q. What was said or done between you and this defendant, or the other man there during the time they held you captive? A. Well, they searched me to see whether I had a gun on me, but I did not have it in my possession; I had it in a little pocket I have in the truck, in the cap, so I took my keys— 30

Mr. Sweeney: I object to what some other defendants could have done there.

Mr. Van Blarcom: They were all present, and the Court has allowed that at the previous trial. 40

Claude J. Resh—Direct

The Court: With the understanding that the State will connect this by other testimony to show they were all there at that time, I will admit it.

Mr. Sweeney: I except.

10

JAMES F. MINTURN,
J. S. C. (Seal)

Q. How were these men armed, what kind of pistols did they have? A. 45 automatic.

Q. Did you see what kind of a pistol Carlino, this defendant had? A. I did.

Q. What was it? A. 45.

Q. 45 what? A. Army automatic.

Q. Colt army automatic? A. Yes.

20 Q. It was a regular army automatic? A. Yes.

Q. You are familiar with it? A. Yes.

Q. Did all these men stay together about you during the time you were there? A. Some time, yes.

Q. What finally happened? A. Then Montana left us for a little while, and after a while longer Carlino left us, then they both came back and Montana went away again, and then he came back.

30 Q. What time, about, was this? A. Oh, sometime close to noontime, I should judge.

Q. And how long from noon on did he still stay there with you? A. Then Montana left us again, and then when he came back he said, "We will take a walk in the woods farther."

Q. And that was in the presence of Carlino? A. Yes, sir; Montana and Cirrelli took me and Carlino and Cirroni took Mr. Mains.

40 Q. What did they do with you? A. They got us to a stop which I suppose suited them, and they asked us to sit down, which I did; they tied

Claude J. Resh—Direct

my hands to my back and threw me over, face down in the bush, and tied my legs.

Q. Did you see what they did with Mr. Mains?

A. I did not.

Q. And after they had tied you this way where did they go or what did they do? A. After they 10
had me tied, Joe Cirelli said, "I want your license," so he put his hand in my hip pocket and took out my pocketbook, and then put it back again; that was after I was tied, and meantime Joe Cirrelli and Montana had some words in Italian, which I could not understand, and then Montana put his hand in my hip pocket.

Q. That was Jim Montana? A. Yes, but he did not take my pocketbook out; so they left, and after about 15 minutes I said, "Charley—" 20

Q. Don't tell us what was said after they left; have you stated all the conversation that took place between you and this defendant, or the other defendants while you were there? A. I meant to tell you. When Cirrelli took my pocketbook out and after I was untied, I put my hand in my pocket, and found I was relieved of \$42, but not the license.

Q. What was said, if anything, during this long time you stayed there in the woods, from nearly 30
half past six in the morning to two o'clock in the afternoon, was there no conversation between you? A. Yes some; mostly "keep quiet, make no noise;" and they asked us whether we were married, and we said yes. Mr. Mains said he was married and had a little boy and girl, so Mr. Cirrelli put his hand in his pocket and gave him a dollar bill, and said he should buy his girl a pair of stockings; and they said if we had thirty or forty thousand dollars' worth of silk on the 40

Claude J. Resh—Direct

truck they would have given us three or four hundred dollars.

Q. Where do you say Carlino stayed during the time you were in the woods? A. We sat down facing the road, that left him on my left side; 10 he said nothing but stood back in the brush, and every time I looked at him he always put his hands to his face; he smoked a pipe with a turned stem with one of these brass flaps on the top of it.

Q. How long was it from the time they tied you and went away into the woods that you managed to get loose? A. I should say not longer than twenty minutes to half an hour.

Q. What did you do when you got loose; don't tell us what was said, but what you did? A. I 20 groped the rope and walked over to Mr. Mains and untied him while I had still the rope on my hands and legs; I untied his rope.

Q. How did they tie you? A. They had my hands tied to my back and my legs drawn up like this (indicating).

Q. Were you on the ground? A. Yes.

Q. In what position? A. Lying sideways.

Q. You finally broke your feet and hands 30 apart? A. I stretched my legs out and broke the rope running from my hands to my legs.

Q. And then you untied Mr. Mains? A. Yes.

Q. Then what did you do? A. We started for the road, and with my hands still tied to my back; Mr. Mains was free and I said—

Q. Don't say what was said, only just what happened? A. I said, "Charley"—

Q. Don't say what was said. A. I asked him to look for a few small stones so we could break 40 the rope.

Q. Well, you got the rope untied? A. He dis-

Claude J. Resh—Direct

covered a pair of pliers in his pocket and broke the rope.

Q. Where did you come out after that? A. We struck the main highway just a little away from where we were held up.

Q. At the foot of the grade? A. Yes.

Q. Where did you go then? A. We were there a few minutes and then along came a Standard Oil man. 10

Q. He was in a truck, a Stanhope, he said? A. Yes.

Q. Where did you go then—don't go into all the details of seeing automobiles, etc., but just state what you did? A. Then along came a fellow with a Cadillac.

Q. Going in the direction of where? A. Andover. 20

Q. He was going in the direction of Andover? A. Yes; and we asked him for a ride, and while we were with him he asked me if I knew the road to Demons, and I said yes. So I said when we got to Andover, I said, "Will you let us out?"

Q. Just say what you did, don't tell us what you said? A. When we got to Andover we stopped.

Q. What did you do? A. I went into Thompson's store to telephone. 30

Q. Did you telephone? A. I tried to.

Q. Were you successful? A. No, sir; I left Thompson's store and going next door to telephone, as I got there I saw Mr. Bentley and Mr. Rounds coming.

Q. What did you do? A. I got in his machine, in a sedan he had.

Q. What did you do? A. We went back to the scene of the holdup.

Q. And when you got back to the scene of the 40

Claude J. Resh—Direct

holdup, what did you do then? A. I showed Mr. Bentley where I was held up; and just as we got there Amos Bunker and another man whose name I can't recall, ran towards us, and Mr. Bunker had a shovel in his hand.

10 Q. Where did you go after that? A. Then we went up to where the open space is on the top of the hill.

Q. What did you find there? A. A motorcycle.

Q. Did you identify that motorcycle? A. Not then.

Q. What kind of a motorcycle was it? A. A Harley-Davidson.

Q. Any attachment on it? A. A sidecar.

Q. What else did you see? A. We saw a body
20 lying in the brook.

Q. Did you examine the body? A. I did not.

Q. Just describe; you saw the body, you say?
A. Yes.

Q. Just describe in what position it was lying?

A. He laid in the brook, face down.

Q. How deep was the body sunk in the brook?
A. About half its face.

Q. Do you remember being down on the swamp with Dan Steele? A. Yes, sir.

30 Q. Did you indicate to him at that time the position of the body in the brook? A. I did.

Q. And do you know whose body that was? A. I do now, yes, sir.

Q. Whose body was it? A. Albert Koster.

Q. He was the same man you saw at Cranberry Lake that morning? A. Yes, sir.

Q. How long had you known Mr. Koster? A. Never personally; only from driving along the road.

40 Q. Did you see him often? A. Mostly every morning.

Claude J. Resh—Direct

Q Did you see what happened to the truck after you were held up in the road? A. I did not.

Q. Did you state how many men were present at the holdup that you saw? A. Six.

Q. And four of them took you in the woods? A. Yes, sir.

10

Q. Did you see what became of the other men? A. No, sir, I did not.

Q. When these men left you tied in the woods, what was the last thing, if anything, that was said to you by them? A. In the first place, Montana says—

Mr. Sweeney: Objected to, what Montana says.

Q. Was Carlino present at that time? A. Yes, sir.

20

Mr. Van Blarcom: It was said in the presence of the defendant.

Mr. Sweeney: I still press my objection.

The Court: Overruled.

Exception to defendant.

JAMES F. MINTURN,

J. S. C.

Q. Go ahead? A. He says, "We will leave one man here to watch." He then said, "I won't tie Charley too tight, so he can get loose and let you loose."

30

Q. That is what Montana said? A. Yes, sir.

Q. Did this defendant say anything? A. No, sir.

Q. And that was the last that was said before they left you? A. Yes, sir.

Mr. Van Blarcom: That is all. You can cross-examine.

Claude J. Resh—Cross

CROSS-EXAMINATION by Mr. Rosecrans:

Q. You say Carlino was present when Montana told one of you he would not tie you so tight? A. Yes, sir.

Q. When did you first recognize Carlino that morning? A. Well, after they had us in the woods.

Q. Was that the first stop that you made? A. Yes, sir.

Q. Did you recognize him at that first stop? A. That morning?

Q. Yes. A. Well, I could not help it, that was the first time I ever saw the man.

Q. Did he let down his mask at the first stop? A. Yes, when they first had us in the woods.

Q. Didn't he have his hands over his face at that time? A. Only when I looked at him.

Q. And every time you looked at him did he have his hands over his face? A. Yes, only the few times I looked at him and caught him when he couldn't do that.

Q. When you were first taken up in the woods, at the first stop, how far was that from the road?

A. Well, as I said before 100 to 150 feet, or something like that; I could not exactly tell; maybe 200 feet.

30 Q. Your testimony at the former trial was about 200 feet; is that correct? A. As near as I can remember.

Q. How long did you stay there? A. From half-past six in the morning till about two in the afternoon.

Q. I mean the first place? A. There was not more than half an hour difference.

Q. What do you mean? Do you mean you only stopped about half an hour at the second place?

40 A. Yes.

Q. At the first place you stopped in the woods,

Claude J. Resh—Cross

about 200 feet from the road, was only a rest stop then? A. They had us there from half-past six in the morning till about two or half-past two in the afternoon.

Q. Then you did not move on from the first stop to the afternoon? A. Not until they were about 10
ready to leave us.

Q. Well, during the time you made this first stop, that was from about seven in the morning?

A. From about half-past six.

Q. Was Carlino there all the time? A. Well, as I said before, most of the time.

Q. Well, did you recognize him then when you made the first stop? A. Yes.

Q. Was that man Carlino there then? A. Yes, absolutely.

Q. During the first stop? A. Yes, sir. 20

Q. In all the time? A. Absolutely.

Q. Did you hear any shots that morning? A. I did not.

Q. Could you see from where you were stationed in the woods, at the first stop, could you see the road from that point? A. Well, if I stood up from where they were on the look out.

Q. You mean you could see the road? A. From where they stood, one or two of them during the 30
time, that is, I could see part of the road, not much.

Q. I mean, your attention was confined to that part of the road about where your truck stopped, is that right? A. No, to the left.

Q. You could not see the full road, could you? A. No.

Q. But you could see a portion of the road through the woods? A. Just about enough to see an automobile go by or so.

Q. That was near the holdup? A. Yes. 40

Claude J. Resh—Cross

Q. Something like 100 or 200 feet? A. Yes, or about a little less.

Q. That was the only portion of the road you could see from the woods? A. That was from their lookout.

10 Q. Were you tied when you made the first stop? A. No, sir.

Q. How long did you stay at the second stop?

A. Fifteen to twenty minutes to half an hour.

Q. And that was the last stop? A. Yes, sir.

Q. When were you first tied after you reached the second stop? A. We were tied an hour the second stop.

Q. Soon after you stopped? A. Right then and there.

20 Q. And how far was the second stop from the first? A. Oh, a couple hundred feet, I should say, as near as I can remember.

Q. You usually took the truck on its journey down to Paterson, or some other place? A. Every morning, when I was able.

Q. And you were armed every morning? A. Well, we had our guns with us on the trip every morning.

30 Q. And you had them with you on the morning of the 14th of June? A. Yes, sir.

Q. Did you know Mr. Albert Koster? A. Just as I have stated before, by passing one another.

Q. Was he connected in any way with the Sussex Print Works? A. No, not that I know of.

Q. Well, you state he was not—the State agrees to that?

The State admits that Albert Koster, deceased, was in no way connected with the Sussex Print Works.

40 Q. Do you know whether Mr. Koster was an officer of the law of the State? A. I do not.

Claude J. Resh—Cross

Mr. Rosecrans: Will the State admit that?

Mr. Van Blarcom: I don't know whether he was or not.

Q. After you were tied—first tied at the second stop and after this man left about how long did you say it took you to get untied? A. From the time they left us and we got untied, I would say it was about 20 minutes. 10

Q. It didn't take you any great length of time to break the band? A. After I tried, I broke them.

Q. Then they broke when you first tried them? A. No.

Q. How long did it take, half a minute? A. No, it took quite some time. I had to pull quite hard.

Mr. Rosecrans: That is all. 20

By Mr. Van Blarcom: Q. Were your hands injured by the bands? A. Yes. By tying my legs I threw the cord around my wrists and cut them, in trying to break the cords.

Q. Can you tell us whether this looks like the type of gun Mr. Carlino had?

Mr. Rosecrans: Objected to.

The Court: I will allow it.

Mr. Rosecrans: I pray an exception.

JAMES F. MINTURN, 30

J. S. C.

(Seal)

A. That looks like the gun. It was an army Colt.

By Mr. Van Blarcom: That is all.

Charles W. Mains—Direct

CHARLES W. MAINS, sworn as witness for the State:

Direct-examination by Mr. Van Blarcom:

Q. Where do you live, Mr. Mains? A. Newton.

10 Q. And where were you employed during the month of June, 1921? A. Sussex Print Works.

Q. And what were your duties at that time? A. I was a helper on the truck.

Q. And what did you do as a helper on the truck? A. I helped load the truck and unload the truck.

Q. And were you at the Sussex Print Works on the morning of the 14th of June, 1921? A. I was.

20 Q. What time did you get there? A. About half-past five.

Q. And what did you do after you got there? A. Got the machine in order to start out.

Q. Who was with you at that time? A. Mr. Edward Roesch.

Q. Did you help load the truck at that time? A. I did.

Q. What did you put on the truck that morning? A. Three trunks and two cases, and five trunks with brass rollers in.

30 Q. And after the truck was loaded what did you do? A. We started out for Passaic.

Q. And what was in the trunks which were loaded on the truck? A. Silk.

Q. And after you loaded the truck—you spoke of these rollers, how many rollers were in the truck all together? A. Fifteen.

Q. And did you assist to load the rollers in the truck? A. Yes, sir.

40 Q. And when was that done? A. The night before.

Charles W. Mains—Direct

Q. And when did you leave for Passaic that morning? A. About six o'clock.

Q. Yes, and what road did you take? A. The Andover and Netcong.

Q. The road leading from Andover to Netcong?

A. Yes, sir.

Q. Did you know Albert Koster in his lifetime?

A. Yes, sir.

Q. Did you see him on the road that morning?

A. No.

Q. What happened to you or the truck or Mr. Roesch that morning? A. After we got to Cat's Swamp, we were held up by these men.

Q. And about what point on the road was this holdup? What point on the road? A. Just ascending the hill.

Q. And what hill do you refer to? Just point out on the map, if you understand the map? A. Somewhere about here (indicating).

Q. And what happened? A. We were stopped by these six men.

Q. Yes, and just describe the condition of the ground on each side of the road at this point. A. On the left side that was very rough, and trees and bushes, and on the lower side, it was a sort of a ditch, where you come up.

Q. And these men were concealed in the brush on the left-hand side of the road? A. Yes, sir.

Q. And what did they first say or do? A. Why, they came right up on us, in a very short time. And within two minutes they had us.

Q. Were these men on? A. Yes, sir.

Q. And did they direct you to get off the truck, or did they seize you and pull you off? A. I got off the truck and they seized me.

Q. The four men were all on? A. Yes, sir.

Q. And after they took hold of you, what did

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Charles W. Mains—Direct

they say or do, if anything? A. One man took my arm, and pulled them back on my back, and the other one went through my pockets. And as soon as they found out we didn't have any gun, they rushed us up the hill.

10 Q. And where did they take you, about how far? A. They took us up the hill, 100 feet, or possibly more, 150 feet.

Q. Were these men's faces masked when they held you up? A. Yes, sir.

Q. And then they rushed you up the hill about 100 feet or 150 feet? A. Yes, sir.

Q. And what was said when you reached that point? A. They told us to sit down and keep quiet.

Q. Did you sit down? A. Yes, sir.

20 Q. And did you keep quiet? A. I did, yes, sir.

Q. And did they search you again after they took you up the hill? A. Yes, sir.

Q. And did they take anything from you at that time? A. They took my pocket book and glasses out.

Q. What did these men do with reference to these masks on their faces after they got up in the woods, if anything? A. For a short time after we were landed they had the masks on, and afterwards they dropped the masks down.

30 Q. Have you seen any of the men since? A. Yes, sir.

Q. Have you seen this Angelo Carlino since that time? A. Yes, sir.

Q. Was he one of the men that was there and held you up? A. Yes, sir.

Q. Are you positive of that? A. Yes, sir.

Q. Have you seen any other of the men? A. Yes, sir.

40 Q. Who did you see? A. James Montana.

Q. Where did you see him? A. In the jail here.

Charles W. Mains—Direct

Q. How long did you stay in this first place, Mr. Mains, how long did you continue to stay there?

A. Until about half-past 11 or 12 o'clock.

Q. Could you see the road from that point? A. Not the main road.

Q. What conversation took place between you 10 and this man? A. As I told you before, there was a little pine tree there—

Q. Just tell what happened? A. I asked this one man if it was all right if I could pick some of the pine cones that were there, and he said I could. And that gentleman was right there.

By the Court: Q. Do you mean Mr. Rosecrans? A. No, sir, it was Carlino, and I said, "Do you know what I am going to do with these?" And he said no. And I said, "I have a little girl home 20 twelve years old, and I am going to give her these to remember this day by."

Q. And then he gave you this dollar? A. Yes, sir.

Q. Do you know what kind of a gun he was armed with this day? A. Yes, sir.

Q. Was it the same kind of a gun as this? A. Yes, sir, it was a Colt 42.

Mr. Rosecrans: I object to the answer and ask that it be stricken out. It is a con- 30 clusion.

The Court: I will allow it.

JAMES F. MINTURN,

J. S. C.

(Seal)

Exception.

Q. Was that all that took place there that day?

A. Well, I will say this much: After we were started up in the woods Mr. Carlino hit me in the side 40 with his gun, and I was sore for two or three days

Charles W. Mains—Direct

afterwards, and we were rushed up in the woods as fast as possible.

Q. Did he say anything when he struck you; was anything said to you? A. No, sir, only "hurry on, hurry on."

10 Q. Was that the only thing that Carlino said while you were there? A. That was the only thing that I remember.

Q. And what finally happened, Mr. Mains—how long did you continue in this first place? A. Until about half-past eleven or twelve o'clock.

Q. And where did you go after that? A. They told us they wanted us to take a walk and they took us about a hundred feet or more up the hill.

Q. And what was done there? A. They told us
20 to sit down.

Q. Did you sit down? A. Yes, sir.

Q. And where was Mr. Resh at this time? A. He was some distance from me.

Q. And what did they say or do after you sat down? A. Two men tied my hands.

Q. What two men tied your hands? A. Joseph Messino and Joseph Carlino.

Q. Did this man take any part in the tying of your hands? A. Yes, sir.

30 Q. Where was Spirello and Montana at that time? A. They were over tying Mr. Resh.

Q. And how far were you and Mr. Resh apart? A. Thirty feet maybe, or more; 40 feet.

Q. And after they tied you what did they say or do? A. Merlo said when they left that they would come back in half an hour and untie us.

Q. How long did you wait before you got loose? A. Perhaps half an hour.

Q. Who got loose first? A. Mr. Resh.

40 Q. And then he came over and assisted you in getting loose? A. He did.

Charles W. Mains—Direct

Q. And then what did you do? A. We started back towards the road.

Q. And what direction did you take to get to the road? A. We went east from where we were.

Q. And did you get out finally on the road again? A. Yes, sir.

Q. And then what did you do after you got out on the road? A. We met a couple of men in an automobile. 10

Q. And then what did you do? A. We started for Andover.

Q. Did you get to Andover? A. Yes, we did.

Q. And when you got there what did you do? A. When we got there Mr. Resh was going to telephone, and then Mr. Rounds and Mr. Bentley came along.

Q. How did Mr. Rounds and Mr. Bentley come along? A. In a Ford. 20

Q. Did you go in the Ford with them? A. Yes, sir.

Q. Then where did you go? A. Back to Cat Swamp.

Q. Did you point out the place to them of the holdup? A. Yes, sir.

Q. Then where did you go? A. We stopped at the place we were held up.

Q. Did you continue to stay there? A. No. There was a couple of men up above, and they motioned us to come up that way. 30

Q. Did you go up? A. Yes, sir.

Q. What did you find when you got up there? A. We found a man's body.

Q. Where was the man's body? A. Over in the ditch in a stream of water.

Q. What was the position of the body when you found it? A. Face downwards.

Q. And was it in the water? A. Yes, sir. 40

Charles W. Mains—Cross

Q. And did you identify that body? A. Not at that time.

Q. And do you know whose body that was? A. I do now.

Q. Whose body was it? A. Albert Koster's.

10 Q. And did I understand you to say that you saw a motorcycle there too? A. Yes, sir.

Q. Did you know Albert Koster? A. Yes, sir.

Q. And how long have you known him? A. I can't say how long.

Q. How long have you been helping Mr. Resh on the truck? A. One year.

Q. And during that time did you frequently see Mr. Koster? A. Occasionally, yes.

By Mr. Van Blarcom: Take the witness.

20

CROSS-EXAMINATION by Mr. Rosecrans:

Q. You know what business Koster was in, don't you? A. I don't, no, sir.

Q. You knew him for about a year? A. Yes, sir.

Q. You live in Newton? A. Yes, sir.

Q. Did you live in Newton the same length of time Mr. Koster lived in Newton? A. I don't know he lived in Newton; I saw him at Andover.

Q. You have met him on the road occasionally?

30 A. I met him occasionally, and we belonged to the same lodge together.

Q. And won't you tell us what business he was engaged in? A. I didn't know at that time.

Q. Do you know now? A. Yes.

Q. Then what was it? A. He was working at Stanhope, as an engineer.

Q. As an engineer? Yes, sir.

Q. On the railroad? A. No.

Q. In some plant? A. In some plant.

40 Q. When you made this first stop it was about

Charles W. Mains—Cross

200 feet off from the road, wasn't it? A. One hundred or one hundred and fifty feet, yes, sir.

Q. The other gentleman says 300 feet; will you agree with him? A. Well, yes.

Q. Immediately after you were taken from the truck by certain men—you say the defendant was one of them—were you immediately taken up in the woods to this first stopping place? A. Yes, sir. 10

Q. How did you recognize Carlino that morning on the road immediately after you were held up? A. I recognized him after we were up in the woods.

Q. Four of them held you up? A. Yes, sir.

Q. And yet you say Carlino dug you with a gun after he held you up? A. Yes, sir.

Q. How do you know it was him? A. Because he had me. 20

Q. Who else had you? A. Joseph Messina.

Q. Did they have you all the time? A. After we were up in the woods.

Q. How tall was Messina? A. Somewhere about five feet.

Q. Something about the same as this man? A. Yes, sir.

Q. They were both masked at the time? A. Yes, sir. 30

Q. It was quite steep up this hill? A. Yes, sir.

Q. Did you stop at any time to get breath or anything before you came to the meeting place? A. No, sir.

Q. Then if they were masked all the time, how do you know it was Carlino that punched you? A. Because he was on the right side of me.

Q. When did he first take his mask down? A. After we made the first landing.

Q. How long after that was it before he took his mask down? A. Probably half an hour. 40

Charles W. Mains—Cross

Q. Then all these four men that held you up walked around and talked and did little things, you didn't stay in the one fixed position? A. No; there wasn't much walking.

Q. You mean they stayed in a fixed place? A. Yes.

10 Q. You mean he stayed on the right side of you all the time? A. Yes.

Q. For the whole half an hour? A. They walked around, and he was called away twice.

Q. They all walked around at various times in that half an hour? A. Yes.

Q. Then Carlino wasn't always on your right side then? A. Not all the time; but I knew where he was.

20 Q. And didn't take his mask down right away? A. No, sir.

Q. And then, why do you say he punched you? A. Because I kept my eye on him all the time.

Q. Then why didn't you say that at the previous trial?

Mr. Van Blarcom: He wasn't asked that.

A. You didn't ask me that.

Q. Did you see Carlino all the time you were up in the woods? A. Pretty much, yes.

30 Q. He was directly in your immediate presence for several hours after the hold up? A. Yes.

Q. Up in the woods? A. Yes.

Q. Was it rather a dense road? A. Yes.

Q. Could you see the road? A. No, sir, not the main road.

Q. Did you hear any shot? A. No, sir.

Q. At any time? A. The wind blew, and it was a raw cold morning.

40 Q. Now, when you made the second stop, that was sometime in the early afternoon, I take it, and then you made this second stop, and they

Charles W. Mains—Cross

tied you and they left; how long was it before you were untied? A. I will say 20 minutes.

Q. A very short time? A. About 20 minutes.

Q. You heard the other gentleman testify? A. Or half an hour.

Q. You heard the other gentleman testify? A. Yes, sir. 10

Q. My recollection is that after they left he started to get himself free and got loose within a minute or half a minute? A. Something like that.

Q. Then it didn't take very long for you to get loose? A. It took quite sometime for him to untie me. And if he hadn't untied me, I would have been there yet today.

Mr. Rosecrans: I move to strike that out. 20

The Court: Strike it out.

Q. Now, I draw your attention again to the time you were held up on the road; how long did you stay with these men on the road after you were taken off the truck? A. Just a few minutes.

Q. And were you taken off the truck immediately after the truck was held up? A. Yes, sir.

Q. And then in a few minutes you were on your way up in the woods? A. Yes, sir. 30

Q. And Carlino was with you all the time? A. Yes, sir.

Q. Where was the truck after you were taken up in the woods; do you know where the truck was? A. No, sir, I didn't see it.

Q. Then you left the truck was it still standing in the road where you left it? A. Yes, sir.

Q. When you left the road to go up in the woods, was the truck still standing in the same position? A. Yes, sir. 40

Charles W. Mains—Cross

Q. Was any other representative of the Sussex Print Works there at the time? A. No, sir.

Q. You and Mr. Resh were the only two persons in charge of the truck that morning? A. Yes, sir.

10 Q. You were on the truck at that time? A. Yes, sir.

Q. Did you hear the truck move away at that time? A. After we were up in the woods, I heard the truck move off.

Q. And how long were you up in the woods when you heard the truck move off? A. I would say possibly—I will say five minutes to eight or ten, not longer than that; a very short time.

20 Q. Now, just tell us what kind of revolver—have you a revolver, or automatic? Will you tell us exactly what kind of a revolver or automatic it was that Carlino had that morning? A. One something like that.

Q. Of what caliber? A. It looked like a 42.

Q. You testified before this that it was a 42?

Mr. Smith: No, he did not.

Q. Was it black? A. Yes, sir.

Q. Was it a United States army gun? A. I couldn't say.

30 Q. Have a partly wooden handle? A. I couldn't say as to that.

Q. But you say it was a 42 and black? A. Something similar to that, yes, sir.

Q. What kind of a gun did you have on the truck? A. An automatic, not quite as large as that.

Q. Have you a gun of your own? A. No, sir.

Q. You have no automatic of your own? A. No, sir.

40 Q. You are not very well acquainted with guns or automatics, are you? A. No, sir.

Charles W. Mains—Re-direct

Q. Where was this gun on Carlino's person when you were going up the hill? Where was it, on his person? A. They had them in their hands.

Q. All the while? A. I couldn't say that they had them all the time, while they were with us.

Q. Didn't you tell me Carlino smoked? A. 10 Yes, he did.

Q. Did he have it in his hand then? A. I am not sure whether he had it in the right or left hand.

Q. And you say that is the gun Carlino had? A. It was a gun similar to that.

Q. You are positive it was a 42 automatic black? A. Yes, sir.

Q. Yet you don't know much about guns and never had one of your own? A. It was a large 20 gun.

Mr. Rosecrans: That is all.

RE-DIRECT-EXAMINATION by Mr. Van Blarcom:

Q. What kind of a mask did these men have over their faces? A. They were handkerchiefs of some kind.

Q. On cross-examination Mr. Rosecrans asked you if you were armed; what do you mean by 30 that, did you have a gun on your person? A. No, sir.

Q. Where was your gun? A. Right by the side where I sit.

Q. Then you did not intend to say you were armed personally? A. No, in my truck, and I had a gun right by the side of me.

Q. But you had no opportunity to get to it? A. No, sir, not that morning.

Mr. Van Blarcom: That is all.

Virgil A. Haddon—Direct

VIRGIL A. HADDON, sworn for the State:

Direct-examination by Mr. Van Blarcom:

Q. Mr. Haddon, where do you live? A. Newton.

10 Q. And where were you employed during June of last year? A. County of Sussex.

Q. And what was your work? A. Repairing macadam roads.

Q. And where were you working on June 14th? A. Near the top of what is called Cat Swamp.

Q. Yes, and what time of day were you there? A. Around half past seven, standard time.

Q. Standard time in the morning? A. Yes, sir.

20 Q. And how long did you work in the afternoon? A. Four thirty.

Q. And during that time did you discover or see anything on or near the road? A. Yes, sir.

Q. And what was that? A. A dead body.

Q. And what time was that about? A. Ten minutes to two.

Q. Was that the first thing you saw, the dead body? A. No, sir.

Q. What did you see? A. The motorcycle.

30 Q. Where did you see the motorcycle? A. Right hand side going towards Stanhope.

Q. And where was the body with reference to the motorcycle? A. About 10 or 15 feet towards Stanhope.

Q. And where was the body? A. Laying in a wet spot, face down.

Q. Who was with you when you first saw this body? A. Lindell Howell.

Q. Did you know whose body it was? A. I
40 didn't.

John Iliff—Direct

Q. How long did you continue to stay in that vicinity? A. What was that question.

Q. How long did you stay there? A. Not over five minutes.

Q. Did you see anybody else there while you were there? A. Not at that time.

Q. Did you afterwards? A. Yes, sir.

10

Q. Do you know John Iliff, the undertaker? A. Yes, sir.

Q. Did you see him there that day? A. I didn't.

Q. Did you move the body? A. No, sir.

Q. Had the body been moved from the time you saw it until Mr. Rounds and Mr. Bentley came there? A. Not to my knowledge.

Mr. Van Blarcom: That is all.

20

No cross-examination.

JOHN ILIFF, sworn for the State:

Direct-examination by Mr. Van Blarcom:

Q. Where do you live, Mr. Iliff? A. Newton.

Q. What is your business? A. Undertaker.

Q. Did you know Albert Koster in his lifetime? A. I did.

30

Q. Did you take charge of the body of Albert Koster on the 14th day of June? A. Yes, sir.

Q. What time was that? A. Late in the afternoon.

Q. Where did you find the body? A. At Cat Swamp.

Q. And did you bring the body to your place of business in Newton? A. Yes, sir.

40

John Iliff—Cross

Q. How long had you known Albert Koster?
A. About six years.

Q. Did you examine the body? A. I did.

Q. What did you first do? A. I took the clothes off and embalmed the body.

10 Q. What did you find when you removed the clothes? A. I found a hole in the body where I point here on my body, and two holes on the chin.

Q. Did you know what the holes were? A. They looked like bullet holes.

Q. Was there an autopsy performed on the body? A. Yes, sir.

Q. Who did that? A. Dr. Cole.

Q. When was that? A. The next morning.

20 Q. Were you present when the autopsy was performed? A. Yes, sir.

Q. Did you remove the body to the Franklin Hospital the next morning? A. Yes, sir.

Q. For what purpose? A. To have some X-ray pictures taken.

Q. Were you present? A. Yes, sir, and turned the body for them.

Mr. Van Blarcom: That is all.

30 CROSS-EXAMINATION by Mr. Rosecrans:

Q. Do you generally embalm a body where there are marks of violence on it without the consent of some authority in the county? A. I don't.

Q. You did this time? A. I had the consent of Dr. Cole.

Mr. Van Blarcom: I might say that I gave him permission to embalm the body.

Mr. Rosecrans: Then I withdraw all of my cross-examination.

40

Mr. Rosecrans: That is all.

Doctor Blase Cole—Direct

DOCTOR BLASE COLE, sworn for the State:

Direct-examination by Mr. Van Blarcom:

Q. Dr. Cole, you are a practicing physician and surgeon in the town of Newton? A. Yes, sir.

Q. And a graduate of what institute? A. Institute of Pennsylvania.

Q. And how long have you been practicing? A. Since 1907.

Mr. Rosecrans: We will admit the doctor's qualifications.

Q. Were you called upon to examine the body of Albert Koster, at Cat Swamp? A. Yes, sir.

Q. And did you know Albert Koster at that time? A. Yes, sir.

Q. Where did you first examine the body? A. In Iliff's undertaker's establishment.

Q. And what wounds did you find on the body? A. I found three wounds on the body.

Q. Gunshot wounds? A. Gunshot wounds.

Q. Just describe to the Court and jury the nature of those wounds? A. I will describe the first one—I don't know whether it was the first one or not; I know the man had a double chin, and the bullet entered here and came out here, and then lodged itself in what we call the fourth vertebrae of the cerebral vertebrae, which was the brace of the spine joint, and the other bullet entered between the 2nd and 3rd ribs on the nipple line, about four inches—three or four inches above the nipple, which is what we call the second interspace, being the space between these two ribs, and went down and pierced the lung, and then to the heart, causing a furrow right into the strong muscular fiber of the heart, into the cavity inside, and went on through the lung

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Doctor Blase Cole—Direct

and through the diaphragm, which is the dividing line between the organs of the chest and the organs of the abdomen into the stomach, and into the intestines, and then I was unable to trace the bullet until an X-ray was taken.

10 Q. Did you find both bullets? A. Yes, I found both bullets. Do you want me to go on?

Q. Yes? A. Then this bullet took a course to the left and was found almost where it went in, between the fifth and sixth ribs.

Q. Doctor, state whether in your opinion, that went in the throat, would have been sufficient to cause death? A. Not immediately.

Q. And state whether the one in the chest, as you have described, would cause death? A. Instantly.

20 Q. And that in your opinion is what caused the death of Albert Koster? A. Yes, sir.

Q. And will you state whether these wounds were produced before or after death? A. Before death.

Q. You have had a great deal of experience in gunshot wounds? A. Quite a good deal.

Q. You served time in France during the war? A. Yes, sir.

30 Q. Doctor, from your examination could you state the position Mr. Koster's body was in at the time of the shooting? A. Well, the first shot, the one I described first, as if this was the plan of his body I would say it went in perpendicular to his chin; the other one must have gone—I don't know. Stand up here, will you—in the direction of about this way (indicating).

40 Q. Supposing that a man riding a motorcycle and bent somewhat over the handlebars like that (indicating) state whether the position of the second bullet—would the bullet take the course as

Doctor Blase Cole—Cross

the course shown in this case? A. I don't know of any other reason why it would take that course.

Q. Would a man bent over a motorcycle, would the muscles be contracted so that it would take a course of that kind? A. I think it would.

10

Mr. Rosecrans: I object to the question.

JAMES F. MINTURN,

J. S. C. (Seal)

Q. I ask you to examine those bullets, and I ask you if those are the bullets taken from the body of Albert Koster? A. They are.

Mr. Van Blarcom: I offer them in evidence.

The Court: Are they the same bullets?

Mr. Van Blarcom: They are.

20

Mr. Rosecrans: Will the State state the calibre of those bullets?

Mr. Van Blarcom: The State will admit that they are 32-calibre.

Mr. Rosecrans: If the Court please, I have been waiting for the State to connect this killing and the body and the robbery, and I move that the testimony be stricken out, because it has not been connected with the robbery, but if the Court will allow me to present my objection again—

30

Mr. Van Blarcom: If Mr. Rosecrans will be patient, we will show that.

The Court: You may make your motion when the State rests.

CROSS-EXAMINATION by Mr. Rosecrans:

Q. Doctor, isn't it difficult to make an autopsy after the body is embalmed? A. No, sir.

Q. Don't you usually make an autopsy before the body is embalmed? A. Yes, sir.

40

Doctor Blase Cole—Cross

Q. Isn't it better, then? A. It doesn't make much difference.

Q. Why do you usually do it before? A. Because we like to do it before the organs are disturbed.

10 Q. Will you say from the wounds you saw there, can you definitely say they were bullet wounds? A. After I got the bullets I would say so.

Q. Doctor, did you ever hear of bullets being in bodies a long number of years? A. I have heard that.

Q. And why do you say the body must have been shot two days before? A. When I can trace the holes, I think that is sufficient.

20 Q. You can say that the wounds were the bullet wounds? A. Yes, they were.

Q. You think the bullet in the vertebrae didn't cause death? A. I don't think so.

Q. Where was it. A. In the fifth vertebrae.

Q. Where was it lodged? A. It had buried itself.

Q. Isn't that in the spinal cord? A. No.

Q. Where is it located? A. It is not located in the bony structure, but in the canal.

30 Q. I might say that I am the son of a doctor, and the grandson of a doctor, and I know something about it, and you won't say that the spinal cord isn't encased in a bony tissue? A. It is.

Q. You say that the second bullet is the one that caused death? A. Yes, sir.

Q. What makes you say that? A. Because it punctured the heart.

Q. Did it cut the aorta? A. No, sir.

Q. Did it cut the coronary arteries? A. No,
40 sir.

Q. Then why do you say instant death resulted

Anna C. Koster—Direct

if the vital veins and arteries were not injured?

A. Because the whole was carved right into the right ventricle and left no place for the blood to come out.

Q. Don't you know that a person has often been injured like this and has lived? A. I mean, 10
an injury like this, where the valve has been opened up like this.

Q. You say it caused instant death? A. I believe it did. There was a hole in that ventricle an inch and a half long.

(The Court thereupon cautioned the jury and ordered a recess until 7:30 o'clock p. m.)

20

ANNA C. KOSTER, sworn for the State:

Direct-examination by Mr. Smith:

Q. Mrs. Koster, you are the widow of Albert Koster? A. Yes, sir.

Q. Where do you live? A. Andover.

Q. Were you living in Andover in June of last year? 30

Mr. Sweeney: What do you propose to prove by her?

Mr. Smith: I want to prove by her what time her husband left that morning.

Mr. Sweeney: Isn't there enough corroboration?

The Court: I do not think that is necessary, Mr. Prosecutor.

Mr. Sweeney: Not a bit.

Mr. Smith: We are simply corroborating her testimony. 40

John Merlo—Direct

Mr. Sweeney: If you will state what you intend to prove by her, very likely, we can admit it.

10 Mr. Smith: That this man was accustomed to work on his motorcycle and left that time in the morning.

The Court: Three or four witnesses have testified to it.

Mr. Sweeney: We are willing to admit. I do not think women should be subjected to going through this ordeal.

Mr. Smith: The defense has indicated that the killing might have taken place as something apart from the robbery.

20 The Court: If they attempt to prove that, you can hold her in reserve, in rebuttal.

Mr. Smith: Very well. John Merlo.

JOHN MERLO, sworn as a witness for the State:

Direct-examination by Mr. Smith:

30 Mr. Smith: This man testified in English before, and that is perfectly satisfactory to the State if he does so now.

Mr. Rosecrans: Certainly, if the man can testify in English, all right, although Mr. Romano is here, and he might stand by.

The Court: He can be sworn in case of emergency

Frank Romano was sworn as interpreter.

40 The Court: Mr. Romano, unless you are called upon to explain, you need not trouble the witness.

John Merlo—Direct

Q. John, where did you live in June, 14th last year? A. 211 Pine Street, Easton, Pa.

Q. Do you mean Easton, Pa? A. Yes, sir.

Q. How long have you lived in Easton? A. Since 1913.

Q. What were you doing in June of last year? 10
A. I wasn't working at that time, but I was working before June for Frank Recco.

Q. Did you know Tony Turco at that time? A. I did.

Q. When did you first know Turco? A. About a year last Christmas.

Q. And did you meet Turco some time last May or June? A. I met him some time between the first and second.

Q. Did you have a conversation with him at that time? A. Yes, sir he asked me if I was at 20
work, and I said, "No, I ain't working," and he said, "I have a job for you"; I said, "All right, what is it?" He said, "Driving a truck," I said, "All right, I will take anything that makes an honest dollar."

Q. Did you meet him after that? A. After he told me that the job began Monday—this was on the 4th, and it was Monday afternoon.

Q. The 4th of June? A. On Monday, it was.

Q. Did you meet him that night? A. Yes, I 30
did.

Q. Where? A. Up in Fourth Street, and Lehigh, Easton, Pa.

Q. Just tell us what happened then? A. Then he took me back in the alley between Fourth and Lehigh, the alley there, and he stood alongside of a machine with other men, and he put me there.

Q. Who were the other men there? A. There were Tom Speraccio and a big tall man.

Q. I may suggest Cirroni? A. Cirroni, me, 40

John Merlo—Direct

Jimmy Montana, Joe Massina, and Lamantia and Sole. There were seven.

Q. Did you say Lamantia? A. Yes.

Q. Where did you go, if anywhere, that night?

A. Then I asked where I was going.

10 Q. Where did you go? A. Then we went across up to the hill.

Q. I just want you to tell me where you finally went that night? A. Then I went across Fourth, and Washington, and when I got to Washington, I asked Lamantia, where I was going.

Q. You finally went where? A. To Newton.

Q. Did you return from Newton that night or the next morning?

Mr. Sweeney: What time was this?

20

Mr. Smith: This was the first time.

Mr. Sweeney: Carlino wasn't there?

Mr. Smith: No, he was not there.

Mr. Sweeney: I do not think, if the Court please, that should be brought out at this time.

Mr. Smith: This was one of the circumstances that are part of the case.

The Court: If Carlino was not there, how does it interest him?

30

Mr. Smith: We intend to show he was there the second time.

The Court: Get down to it, then.

Mr. Sweeney: I move to strike out the testimony then, your Honor.

The Court: Yes.

Q. Did you meet Turco after this first time?

A. Yes.

Q. Where? A. Down on Lehigh Street.

40 Q. When was that? A. That was the following week. He told me to be up Monday at the same place on 4th Street.

John Merlo—Direct

Q. That was the Monday following? A. That was the Monday following.

Q. Do you remember what day of the month?

A. That was the 13th.

Q. What month? A. The month of June.

Q. Did you go there at that time? A. I went 10
down there, and I saw him and Jimmy Montana
standing at the corner of 4th and Lehigh, and he
told me to go—

Mr. Sweeney: Not what he told you.

Mr. Smith: That is perfectly proper.

Mr. Dunn: That is at the inception of the
whole thing, within five minutes after the
defendant became part of the game.

The Court: Do you mean to bring the
defendant into it? 20

Mr. Smith: Yes.

The Court: He is leading up to the intro-
duction then of it; I will allow that.

Mr. Sweeney: Exception to defendant.

JAMES F. MINTURN,

J. S. C.

(Seal)

Q. Go on. A. And he told me to go with
Jimmy Montana, and he and Montana took a 30
course to the top of the hill, and we stopped there,
where the machine was supposed to come, and we
stayed there a while, and Carlino, Tom Speraccio
and Tony Turco were there,—there were five.

Q. In whose machine were they? A. Tom
Speraccio.

Q. How had you gone to Phillipsburg with Tom
Speraccio? A. Walked.

Q. Did any machine go by? A. Yes.

Q. Tell us about that? A. A machine went by, 40
and there were five men on the machine.

John Merlo—Direct

The Court: Who were on what machine?

The Witness: Thomas Sperracio and Carlino.

Q. Tony Turco? A. Tony Turco.

Q. Do you recall anybody else? A. There were five of them.

10 Q. Just tell us what happened from there then on? A. There was five of the men, I can't remember the names, there was five on the machine.

Q. Tell us what was done then? A. Then the machine went by and it stopped further ahead, and then another machine came with Joe Cirrelli on the machine, then the other machine stopped and he went down and told me to go on the machine. I went on the machine and Tony Turco and Palmerio Cirroni was talking to Turco—I
20 don't know what he said—and that is when we pulled out from there to Andover.

Q. In whose machine? A. Joe Cirrelli.

Q. Where did you go in that machine? A. From there to Andover.

Q. What became of the other machines? A. They were ahead of us all the time.

Q. You say you went toward Andover, tell us how you went? A. When we went to Washington, we wanted some oil, and he bought some oil,
30 and then we started out, and when we got farther away, and a tire blew out, and I said to him "Do you want me to fix the tire?" and I helped fix the tire, and I said after that, "Do you want me to drive the car?" And he said, "Go ahead" and I did; and Thomas Speraccio was ahead, and he hollered to us to stop, and I stopped right after him.

Q. Where were you, in what part of the road were you when you stopped and Speraccio's machine stopped? A. I was right back of it, in an
40 empty space.

John Merlo—Direct

Q. Was that in the curve of the road? A. Near the curve, not quite the curve.

Q. Can you indicate on the map where you were when you stopped? A. Yes. (indicates on map) Speraccio's machine was in about there.

Q. That is where you stopped? A. Yes, sir. 10

Q. Now, tell us what happened, after you stopped at that point? A. When we stopped, some of the men got off Speraccio's machine and came down to get some bread, and after a while they were arguing about some whiskey but I don't think they ever found any whiskey, I think they stole the whiskey away from them, from our machine, and after a while the men went.

Q. Can you tell us the names of the men who were there at that time? A. Not now. 20

Q. Just tell us the names of the men there? A. Thomas Sperraccio, Tony Turco, Sole, Lamantia, Joe Massina, and Carlino.

Q. Do you mean Carlino, the defendant? A. Yes, sir; Carlino and Joe Cirrelli. Palmerior Cirroni, Joe Parrello, Joe Massina and Laman-tia.

Q. How many men were there altogether? A. Eleven.

Q. You were saying that some of the men went away; tell us what happened from that time on. 30
A. Then the machine I was in, and Joe Cirrelli, Palmerio Cirroni, Jimmy Montana, and Parrello, we five left, and six were in the other machine. Then we stayed there about half an hour or so, and then I said to Joe Parrello, "Let us get down and hunt him up, and try and get a drink." We went down there in the road, and never found anybody. We met two guys, Palmerio Cirroni and Joe Cirrelli, a little further down the road, about a mile, and then we came right back, and 40

John Merlo—Direct

we stopped on the curve an empty space, and Palmerio told me to get into the empty space there, which I did do, for a while.

Q. Can you indicate where that empty space was on the map? A. Yes, sir, right here (indicating). And after we stay a while, I was thirsty and thought I would like to have something to drink, and I told Joe Cirrelli to look for some water down there, and I asked him if there was any further down, and they said Yes, and we started down the road, the way we came, and down a little way we found a spring of running water, and we had a drink, and coming back, about half way to the machine, there was some noise, screeching like, and I said, "Joe, have you got any gun?" He said, "No, I haven't." And he said, "Have you?" "No," I said, "I haven't got any;" and we got in the machine, and when we got to the machine, we stood there, and stayed there until the morning, and then when it was just about getting daylight, Sperracio's machine came up with the six fellows in it, and they went by, and Jimmy Montana and Joe Parrello walked away towards Tom Speraccio's machine, and after a while Tony Turco came and called me and he said, "John, come on," and I did, and I followed him up, and he showed me where to stop. He says "Stay here till I call you," and I did.

Q. Where did he tell you to stay. A. Right on top of the hill, where the truck was.

Q. In the road? A. No, it was off the road. Then I stayed a while there, and pretty soon Tony Turco comes, and called me, and he told me "Oh, John," and I was all scared, nervous, and I got off, and as I got off, I fell, and when I got up he said, "hurry, hurry up, God damn John;" and I got more nervous, and when I got on to the

John Merlo—Direct

road, there was the truck, and he told me to get on the truck; I got on the truck, and tried to shift the gears, and I didn't know how to shift the gears, I had never shifted the gears on a truck; and before I found the low, I must have stalled the engine a couple of times, and Tony 10
Turco came along and he had a gun in his hand, and he said, "What is wrong with that truck?" And when he said that I was nervous, and I got off and started up the hill, and when I started up the hill, he got on the running board, and then we went down to the point where we stopped the night.

Q. That is the first place you pointed out on the map? A. Yes.

Q. Go on.

Mr. Sweeney: We object to anything that transpired after this time, on the ground that the robbery was complete, according to the evidence of this witness.

The Court: Do you admit now that the robbery is now complete?

Mr. Sweeney: That there was a robbery completed at that time.

The Court: What do you say to that, Mr. Prosecutor?

Mr. Dunn: The robbery had not been completed because our men were still on the scene, the men that had been taken off the truck were still within five minutes' run of where this truck was, and the truck was simply taken up there to be turned around and taken back then toward Easton, and our men were still there as prisoners, waiting for a chance to go and recover their property. They had not yet 40

John Merlo—Direct

got control of this property. I refer to the State against Grady in Connecticut—

The Court: Whom do you mean by “our men?”

10 Mr. Dunn: I mean the men in charge of the truck, from whom it was taken, Resh and Mains, who were taken out on the hillside.

The Court: I will allow this testimony as far as it has gone.

20 Mr. Sweeney: Our objection is to the testimony from now on, on the ground that our men were away from the truck and the truck was in possession, as that witness testifies, of himself and Turco, and no one from the Print Works had any connection with the truck at that time.

The Court: I will allow this testimony as a part of it.

30 Mr. Sweeney: We simply want to have it noted that we object to any testimony subsequent to this, after the time the truck was held up, as testified to by this witness, and Resh and Mains went up in the woods, we object to any testimony of what transpired from that time. I do not want to take objections to each part of the evidence.

The Court: I will allow you an exception.

JAMES F. MINTURN,

J. S. C.

(Seal)

40 Mr. Sweeney: I understand my objection applies to any evidence that comes after that.

John Merlo—Direct

The Court: To all further evidence in that line?

Mr. Sweeney: And your Honor will allow me an exception to the rule.

JAMES F. MINTURN,

J. S. C. 10
(Seal)

Q. Go on from where you stopped. You got up to the place where you first pointed? A. Yes; when I got out, then Tony Turco got off to the machine, and then when I turned around, Joe Cirrelli's machine came round the curve, and then Joe Cirrelli stopped there. And then I looked forward and I saw a motorcycle coming up, and Tony Turco was on the road, and he had his gun in his hand, and one of his hands out like that (indicating with left hand forward) motioning for the motorcycle to stop; and he tried to stop, and trying to stop he raised one of his hands up like that (raising his hand), and when he was quite close I could hear him say, by his mouth, "I will give anything I got" and when I turned around to look from fixing my gears, he was leaning forward like that (bending his head forward). And Tony Turco was pointing his gun, one toward his head, and one toward his body, and firing, and then he told me to keep on going; he was following me, I was all nervous, I did my business in my pants. 20 30

Q. Just tell me now what happened from then on? A. Then I started down towards Andover, down toward Easton, and going towards Easton I saw two men that ran up the hill, there was Sole and Lamantia. Then I didn't stop, I keep on going, and near Cranberry Lake, Joe Cirrelli's machine passed me, and I kept on going my way, 40

John Merlo—Direct

and when I struck Andover I was turning around that corner and there was a woman hanging clothes, and I kept on running and down further I passed a farm with some cows, and I slowed as I went by; a little further, when I was near the
10 road pointing to Columbia and towards Easton—

Mr. Sweeney: Now, if the Court please, we are down to Easton.

The Court: Are we down to Easton now?

Mr. Smith: No, we are toward that way.

The Court: I suppose the robbery is about complete.

Mr. Smith: No, I don't think so, not until that machine gets back to Tony Turco's barn in Pennsylvania. It is the purpose to bring it down there, and we will show the defendant was at that place.
20

The Court: This man brought the machine to Easton, did he?

Mr. Smith: He brought it to a place which is near Easton.

Q. Where did you finally take the machine? A. To a farm.

Q. Whose farm? A. Tony Turco's farm.

Q. Where is that? A. Near Raubsville, Pa.

30 Q. What time did you get there, about? A. About 12 o'clock.

The Court: Twelve o'clock at night?

The Witness: The same day.

Q. Who else was there at the farm, or came to the farm right after you brought the truck there?

Mr. Sweeney: I object.

The Court: I will allow that.

Mr. Sweeney: Defendant excepts.

John Merlo—Direct

A. After we had the truck on the farm, you mean, the same day?

Q. Yes, right away. A. Jimmy Montana,—no, I beg your pardon, there was Lamantia and Sole, them too.

Q. How did they get there? A. By Thomas Speraccio's machine. 10

Q. Did that machine come to the farm ahead of you? A. They were back and forth when I was at the farm, they were ahead of me.

Q. When did you next see Carlino? A. Right on the second day, the 15th.

Q. Where? A. Right on the farm.

Q. You mean Tony Turco's farm? A. Yes.

Q. And was that where you had taken the truck? A. Yes, sir. 20

Q. Was the truck there at that time? A. Yes; and then in the afternoon when Carlino was again to the farm—

Mr. Sweeney: Are we to go on indefinitely on this?

The Court: No; I think we are bringing it down to Carlino now. I will take that.

Mr. Sweeney: I want to object on the same ground that we did before, that the robbery is complete. 30

Q. Go ahead? A. Then on the 15th, in the afternoon, Carlino and Jimmy Montana, Sole and another man, and Jimmy Montana asked me—

Q. Was Mr. Carlino present? A. Yes, Carlino was present; Jimmy Montana told me there were two guns on the truck. I said, "If that is so, here is the truck." He said, "Where is it?" and I showed him, and he took one gun, and he wanted to give it to Lamantia, and then after a while when they sat there and they had a little talk, they began to talk about being in jail, and Carlino 40

John Merlo—Direct

said, "I was in jail five years in Trenton," and I said, "Gee, that's a place I don't want to be," and he said,—

The Court: Whom is he speaking about?

Mr. Smith: Carlino.

10

The Court: When?

Mr. Smith: On the 15th, on the afternoon, on the farm of Turco.

The Court: How long after the robbery?

Mr. Smith: The following day.

The Court: What do you expect to prove?

Mr. Smith: It is news to me. I suppose we want to show what became of the truck.

20

The Court: I suppose we wanted to know what became of the silk.

Mr. Sweeney: I move to strike out all this testimony.

The Court: I will allow that to stand for what it is worth.

Q. On that afternoon, what was the condition of the truck?

The Court: It is already in evidence that the truck came back. I do not think it is in evidence. What became of the silk?

30

Q. On the afternoon of the 15th, what was the condition of the truck? A. The truck was away, I brought it on the farm.

Q. What did you notice about it? A. I did not notice anything, I didn't look for anything. Carlino asked me if I was on the truck, and I said, "No." At the same time, he asked me to keep ahead of the trip they had from Easton, that they walked all the way from Cat's Swamp, they said they walked all the way from the woods.

40

Q. Do you know what was on the truck? A. No, sir, I did not, no.

John Merlo—Direct

Q. And you took the truck to the barn? A. Yes.

Q. What was the condition of the truck then?
A. What do you mean by condition?

Q. How did it look? A. Well, that was a big truck?

Q. Were there locks on the doors? A. Yes, there was locks on the doors. 10

Q. Did you see that truck after that first day?
A. Then I left on the 15th, and I went down on the 16th, in the morning about two o'clock, and took the truck away.

Q. Where did you take the truck?

Mr. Sweeney: Objected to.

The Court: I will allow that.

Mr. Sweeney: Defendant excepts. 20

JAMES F. MINTURN,

J. S. C.

(Seal)

A. I took the truck down about five miles away from where the farm was; that was about ten miles from Easton.

Q. Who went with you? A. Tony, Turco and Joe Parrello.

Mr. Sweeney: I move to strike that out. 30

The Court: I will let that stand.

Mr. Sweeney: Defendant excepts.

JAMES F. MINTURN,

J. S. C.

(Seal)

Mr. Smith: I think all these acts are related, your Honor.

Q. When you took the truck down on this dirt road, how did the truck look that day? A. It had the backboard busted. 40

John Merlo—Direct

Q. The back door busted? A. Yes, it was open.

Q. Were the locks on the truck then? A. I did not look for the locks. It was dark when I took the truck; they left the door and threw it on the truck.

10 The Court: Was there anything in the truck?

The Witness: Yes. A box about that big (indicating). And about that long; there was some rolls.

Q. What kind of rolls? A. Copper rolls.

Q. Was there any silk in the truck? A. I didn't see any.

Q. You did not see any? A. No; there was some empty trunks laying there.

Q. How many? A. Well, I don't know, maybe
20 two or three.

Q. What was the color of this truck? A. It was green.

Q. Was there a name on it? A. Yes, sir.

Q. You know what name it was? A. It was Newton and Sussex printing works.

Q. What was finally done with the truck? A. I left it there.

Q. What did you finally do with the truck?

The Court: He left it there.

30 Q. Where did you leave it? A. About ten miles from Easton.

Q. On the road? A. Yes. On the road that went down under the bridge, there was a road there, I don't know the name of it, that had dirt, and I left the truck there.

Q. Where did you go then, from there? A. Then we expected Tom Speraccio's machine to be there to take us back, but he never showed up, and we walked.

40

Mr. Smith: You can cross-examine.

John Merlo—Cross

CROSS-EXAMINATION by Mr. Rosecrans:

Q. After you took the truck from the place of the holdup to Easton, you left it at the Turco farm? A. Yes.

Q. You did not leave it at the place where Carlino lived? A. I don't know whether he lives on the farm or not, but I left it on Turco's farm. 10

Q. Turco's farm? A. That is the only name I know, it is supposed to be his farm.

Q. Do you recall the farm—when the truck was held up on the road, as you have testified, did you see it held up? A. No, I did not see the truck held up.

Q. Then I don't get your position; were you near there when it was held up? A. I was maybe one hundred yards away from where the truck was held up. 20

Q. And when the truck was held up, you were called up to the truck? A. No; it was Tony Turco called me up.

Q. Yes. He told you to come to the truck and drive it? A. Yes.

Q. And you were 100 yards away when the truck was held up? A. Yes.

Q. I mean at the time of the holdup you were 100 yards away from the truck? A. Yes. 30

Q. And you did not act quick enough for Turco, and he told you to hurry along? A. Yes, because I was scared, and I didn't want to do the job.

Q. So he hurried you up, did he? A. Yes, he came to me.

Q. He came from the truck to you? A. I don't know where he was when he came.

Q. But he came walking down the road towards you from that direction? A. Yes.

Q. For quite a distance, didn't he? A. Well, 40

John Merlo—Cross

there was some bushes in front of me, and I couldn't see far.

Q. Then you walked this 100 yards from where you were to where the truck was, didn't you? A. Walked fast and ran.

10 Q. Then you got on the truck? A. Yes.

Q. Did you stand near the truck before you jumped on it for a little while and looked it over? A. No, sir.

Q. Did you jump right on the truck? A. Jumped right on the truck, they told me to.

Q. Did you see Carlino at the time you came this 100 yards down the road and jumped on the truck? A. Before I jumped on the truck, I saw him going up the hill.

20 Q. Not before you jumped on the truck? A. Yes.

Q. Well, you came down the 100 yards? A. Yes.

Q. You walked fast 100 yards? A. Yes.

Q. Did you see Carlino when you got on the truck? A. When I got on the truck?

Q. Yes. A. When I got on the truck?

Q. When you got on the truck, did you see Carlino? A. When I got on the truck, I couldn't see
30 him while I was looking at the truck.

Q. Was Carlino on the road? A. No, he was off the road.

Q. At the time you got off the truck, you did not see Carlino, did you? A. How did you expect me to see backwards.

Q. Did you run backwards when you ran those 100 yards? A. Of course, not.

Q. Now, the fact is you did not see Carlino at the time you jumped on the truck. A. I saw
40 him before I got on the truck when he went up the hill.

John Merlo—Cross

Q. Turco was there? A. Yes, Turco was there in front of me.

Q. Then you started the truck? A. Yes.

Q. Did you start the motor when you jumped on? A. Not until after a few minutes, because I didn't know the shifts.

Q. Did you start the motor when you got on? 10
A. No; the motor was running.

Q. Then it took you a few minutes learning the shifts is that right? A. Yes.

Q. Then you made a few false moves, and stalled the motor, did you? A. No, I did not, but almost.

Q. Then you started to drive the truck down the road, is that right? A. Yes, sir.

Q. To the place that you indicated on the map? 20
A. Yes, sir. While Tony Turco was on the running board.

Q. Show me on the map there where you drove the truck? A. All right (showing).

Q. Where was the truck when you first got on it? A. Right by here (showing).

Q. Where were you, in the woods? A. There's the point, hill, and I was standing about here, on the side here.

Q. About there? A. Yes, about here.

Q. What are those distances, that is about 300 30
feet, that is about your 100 yards? A. I don't know what it was.

Q. You were standing about here? A. I was standing about here.

Q. You started to drive the truck from where? A. From up here, from here somewhere.

Q. In what direction did you drive? A. Down this way.

Q. How far did you drive? A. Well, I got down here, and Tony Turco got off. 40

John Merlo—Cross

Q. How far did you drive it down? A. Right this space here, I got here and I started to turn around, and when I was about half turned around then Joe Cirrelli come from this direction down here and started his machine up here, and then I
10 see.

Q. Just a moment. Was your truck standing still at the time Cirrelli came down the road?

A. It was turning around, I was turning around.

Q. And did Cirrelli get out of his car then?

A. No, he was right on the car, he stayed on his car all the while, and then when I was turned around towards Andover there was a motorcycle—

Q. Before you get to that, it did take you a
20 little time to turn around there on account of being unacquainted with this truck or the shift. A. No, sir; when I was in low, I know the way to reverse with any truck, any driver can catch it, when they find out the low.

Q. You turned around on that big space indicated on the map? A. Yes, sir.

Q. That is indicated as where the body was found? A. I don't know; that is where I turned around.

Q. How far did you go up the road again towards the top of the hill when you saw the motorcycle? A. I was standing still right here and
30 when I was standing still I saw the motorcycle standing here I stood still, and I saw the motorcycle come up, and at the same time Tony Turco was right in the middle of the road with a gun in his hand, and one hand was up in the air like that, and he motioned to the motorcycle to stop, and the motorcycle stopped but it was coming quite
40 fast—

Q. And then he held him up there? A. No,

John Merlo—Cross

he didn't let him go, he said to him to stop, and then I saw him—

Q. How far was the motorcycle away when you first saw him? A. It was right by here (indicating), somewhere around here.

Q. About a hundred yards? A. It was quite a distance, well, I cannot judge, about a hundred yards, something like that. 10

Q. When you first saw the motorcycle? A. When I first saw the motorcycle, right as soon as he came right on the curve.

Q. And then you stopped the truck to let it go by? A. I was already stopping. I was trying to put it in low gear to go forward towards Andover, when I saw the motorcycle I stand still to let the motorcycle go by.

Q. Then you were standing still when the motorcycle came down the road towards the truck, is that right? A. Yes, sir, I was standing still. 20

Q. You were standing still all the time the motorcycle was coming down the road towards you? A. Yes, sir, I was standing still, I give the man a chance to go by to the right.

Q. How fast did this truck run? A. Well, I don't know. I could not measure, no more than 15 miles an hour, if you coast down the hill you can make 25 or 30. 30

Q. You took charge of the truck when it was on the upgrade, didn't you? A. Yes, sir, I had to take charge of the truck otherwise there would be a dead one.

Q. When you took charge of the truck it was on the upgrade was it, it was going up the hill? A. Yes, it was like that, it was standing here and the machine was standing still and I got on.

Q. And I suppose you went in low up to the top of the hill? A. Yes, sir. 40

John Merlo—Re-direct

Q. Then you went, what, about a mile an hour, or a mile and a half an hour? A. About two miles an hour, I should judge, not more than two miles an hour.

10 Q. Did you get into high at any time until you got to this place to turn around? A. No, sir.

Q. What were you in, second? A. I was in low all the while till I got to this place to turn around.

Q. When you did turn around at this open space down the road, do you know what I mean? A. Yes, sir.

Q. Point it out? A. I mean at this place (indicating).

20 Q. Yes, that is right; when you turned around there, when you saw the motorcycle coming towards you, was Carlino anywheres near? A. No, Carlino was not, he went up to the woods; he was going up the hill.

Q. You mean you left him somewheres near where you started up the truck? A. No, sir, when I got on I seen he was going up the hill, he was about in the middle of the hill going up the hill.

30 Q. You didn't see Mr. Carlino after you got on the truck and started to drive, did you? A. Not after I got on the truck, I saw him the 15th, in the afternoon, on the following day.

Q. When you saw this motorcycle, coming down the road towards you, was Carlino there? A. Why, no, sir, of course not.

RE-DIRECT-EXAMINATION by Mr. Smith:

Q. As you were going down toward there then Tony Turco called you, did you see Carlino? A. Not till I got close to the truck.

40 Q. Where did you see him? A. He was going up the hill.

Joseph Circelli—Direct

Q. Was any one with him? A. Yes, there were six men right close with him.

RE-CROSS-EXAMINATION by Mr. Rosecrans:

Q. When the shooting took place by Turco, was Carlino anywheres near? A. No, sir, I didn't see him; I only saw me and Tony Turco and Joe Circelli. 10

JOSEPH CIRCELLI sworn for the State:

Direct-examination by Mr. Smith:

Q. Where did you live in May and June of last year? A. Kiernan Street, Allentown, Pa. 20

Q. Did you know Tony Turco at that time? A. Yes, sir.

Q. Did you see him somewhere around May and June of last year? A. I saw him about the first of May.

Q. Did you have a conversation with him? A. Yes, sir.

Q. Did you see him after that time? A. Yes, sir.

Q. When? A. It was the second week of June. 30

Q. Where did you see him? A. In Bethlehem.

Q. Where? A. Walking on Hope Street.

Q. Was any one with him at that time? A. Yes, sir, there was a man but I didn't know who he was.

Q. Do you remember what date it was that you saw him?

Mr. Dolan: Objected to as the defendant was apparently not there.

Joseph Circelli—Direct

Mr. Smith: We are laying the foundation to prove the conspiracy.

The Court: I will allow it.

JAMES F. MINTURN,

J. S. C.

(Seal)

10

Defendant excepts.

A. Not the date, but I remember it was Friday, between Friday and Thursday.

Q. Did you have a conversation with Turco that day? A. Yes, sir.

Q. What was the conversation?

Mr. Dolan: Objected to, unless it appears that Carlino was there?

20

The Court: Does the State expect to connect Carlino with this?

Mr. Smith: I do; I think this is simply preliminary to covering the conspiracy.

The Court: I will allow it, with that view.

Mr. Dolan: If Mr. Carmlino was there, he certainly ought not to be bound by any conversation between these two men.

The Court: The State proposes to connect Carlino with this?

30

Mr. Dolan: Assume they show that Cirrelli and Turco did plan a robbery and afterwards Carlino was brought in, certainly they ought not to bind Carlino by anything that took place up to the time that he became one of the party. As I understand now, the offer of the State is to prove something which took place between Turco and Cirrelli alone.

40

Mr. Smith: The offer of the State is to show how this conspiracy was formed, to

Joseph Circelli—Direct

show how all these men came to go to this place.

Mr. Dolan: Unless Carlino assented to it personally, he certainly ought not to be charged with anything that occurred.

Mr. Smith: I think it will be plainly 10
shown as it goes along that he was a party,
and we certainly have a right to show all
the events.

The Court: What is your proposition,
to show a conversation between Turco and
this witness?

Mr. Smith: To show how this man hap-
pened to go that night, when Carlino went.

Mr. Dolan: We are not interested in
that. 20

The Court: You want to bring this man
together with Carlino under certain cir-
cumstances.

Mr. Smith: This was a conversation with
Turco, and as a result of this conversation
this man went to Easton, and there found
among other men, Carlino, as a result of
which they went out to commit this rob-
bery.

The Court: I will allow that. 30
JAMES F. MINTURN,

J. S. C.
(Seal)

Defendant's Counsel excepts.

Q. What was the conversation? A. Turco
told me that I shall be ready between Sunday and
Monday, that he would send Joe Perrelli, who was
the first man with him down to my place, and an-
other man with him, or somebody else. And that 40
was all. Then he left. And on Monday, June the

Joseph Circelli—Direct

13th, Angelo Carlino and Joe Parrelli came down to my place and told me to get ready, that we were going to a wedding.

10 Mr. Dolan: We object to what was told him not in the presence of Carlino. Who said this?

Mr. Smith Joe Parrelli and Angelo Carlino.

Mr. Sweeney: When did he come down?

Mr. Smith: Monday the 13th.

Q. Then tell us what happened? A. Then Angelo Carlino had dinner there and after dinner we started about between six and half past six from my place and went down to Easton, and as soon as we got down to Easton Carlino got off
20 my machine.

Q. What happened down there at that time?

A. Well, then, while I was standing there I was told to drive in and out of there which I know now was Lehigh Street, I did not know at that time what it was, and while I was standing there Joe Messina came down with some bundle, and Edward Sole, and a few of them came down and put something in my machine, and they put a rope of some kind of a rope in the machine, and
30 I was told to start, and I started toward Phillipsburg, I and Joe Parrelli. And when we got down to 22nd or 23rd Street there somewhere in Easton, a few more men got on and we drove up a hill as far as Little Washington, and we got up to there and I was told by Joe Parrelli to stop, and I stopped, and two men came near us, Jimmy Montana and John Merlo, and they got on the machine, and I was told to stay there and so there was another man standing up above, about 300 feet
40 away, and this Tony Turco came down and he told me to drive away, Palmerio told me too that

Joseph Circelli—Direct

he was going over with the other machine, I should not be afraid, that he knew the road where to go to. So the machine started and we followed them right along till we got somewhere on the road, and my tire went flat, and John Merlo got on my machine and he drove my machine till we got to the Cat swamp. 10

Q. Merlo was driving your machine at the time when you got to Cat Swamp? A. Yes, sir.

Q. What about the other machine? A. The other machine came to a stop before we got there and stopped about 50 feet away from where we were standing, I don't think it was that far.

Q. Who was driving that machine? A. I don't know; Tommy Speraccio, I guess, I saw him in it, I didn't know who he was.

Q. Where did you stop the first time when you got to the Cat Swamp? A. We first stopped right on the side of the road in a little space that was there, I hardly saw where it was, but it was space enough, it was far up the road. 20

Q. Tell us what you did from that time on?

The Court: What time did you get to Cat Swamp?

Q. What time did you get to Cat Swamp? A. I judge between 11 and 12 o'clock but I did not have the time. 30

The Court: At night?

The Witness: At night; we were standing there and after that we had something to eat. And then they took the rope out of my machine and they took some paper, and I heard one fellow say, that they were to save some paper, if anybody gets shot, or gets hurt, they might need it, but I did not pay much attention to it, and they were talking, and after that they got done eating, and then they talked about something to 40

Joseph Circelli—Direct

drink, and after a little while they talked about some kind of liquor or something to drink, and they could not find it, and some of them said they would go and find something to drink, and they started down the hill, and they went away with
10 the other machine, and I turned around and sat in my machine, and I looked after them and they were all gone, except Joe Messino, and I says that we could go for something to drink too, that I saw a brook down there, and if we want we could go down and look them, I told him, and he said we could go down, and I told him if he felt dry he could go, so he went down the hill and I went with him, so we looked all around, and we could not find any one, and we went about two or three
20 miles down the road, and we could not find any one so we came back, and then Palmerio got on our machine, and then they went down he said they went down the road for some water and he was in the road, and then when we came up the road we took him up, and he told us and we and John Merlo where to stop, so we stopped there and we stayed there till morning.

Q. Where did you stop when you came back?

A. We stopped at the same place—not at the
30 same place, on the right hand side, I mean here, on the right hand side.

Q. Just point out if you can where it was. A. It was right in here, where we stopped on the right hand side.

Q. That was the first place? A. The first place, when we came up, was over here, and then after we stopped on the right hand side.

Q. Who was with you in the car? A. There was I, John Merlo and Joe Parrelli, Palmerio
40 Cirone, Jimmy Montana, five of them.

Q. Who was in the other car? A. The other

Joseph Circelli—Direct

car, I don't know who, I know Joe Messina was in the machine and went in the other machine and Tommy Sperraccio, and Tony Turco, all I know, but afterwards I know in the morning when they come Carlino was in there too, and there was Solo and Lamantia, I don't know all who was in the other machine. 10

Q. When you came back to this place and when you got to the right hand side going towards Andover, tell us what happened from that point on? A. Well, I stood there, I and John Marrello, they were supposed to find out where the water was, and we went down and had a drink, and when we came up we went to sleep, we all went to sleep till morning, and it was daylight when I woke up and I started to repair the tire that I had flat, and I had no spare tire, and I couldn't repair it, and I did the best I could; I found out I didn't have any tools to repair it, and no patch or anything, so while I was standing there I heard a machine coming up, and it was Sperraccio's machine with Tony Turco in and Angelo Carlino and Joe Messina. I know there was six altogether, the other two men I didn't know at that time, and they came up and they went on and I seen this machine went by and as soon as it went by Jimmy Montana and Joe Parrelli started walking up the hill, and I was alone there, I and Joe Parrelli, and John Merlo, and a few minutes later Tony Turco came back from back there, he probably got off the other machine somewhere, and he came walking down toward us, and about 25 feet from my machine he called John Merlo to go with him, so they started talking and Palmerio was there, and he was by him, too, and I was standing there all alone, and all at once I saw Tommy Sperraccio's 20 30 40

Joseph Circelli—Direct

machine go down the hill at about 35 or 40 miles an hour—

Q. From what direction did that machine come?

10 A. It came from the direction where we came in the night, and after that it went up the hill, and then they came down the hill and it was going pretty fast, and he was kind of like excited, and I didn't know what happened, and of course, I had my machine and I saw him drive so fast down, and I saw that he was kind of scared, and I got on my machine, and I started to go up the hill, and I turned around and I go up the hill to the same place where we stayed all night, when we first stopped, and then I saw a truck right in that space there.

20 Q. What truck? A. Well, this is the Sussex Print Works truck, but I didn't know what truck it was or what was on the truck till I got nearer, and when I got nearer I saw Tony Turco standing in the road, and I stopped right across from him, and while I was watching, John Merlo turned around the truck, and Tony was standing in the road; I was facing towards the place where we come from first, and the first thing I see a motorcycle was coming along—

30 Mr. Dolan: If the Court please, we object to any testimony of what occurred after that time, on the same grounds as those stated in the Merlo testimony.

The Court: I will admit it.

JAMES F. MINTURN,
J. S. C.
(Seal)

Defendant excepts.

40 Q. Proceed. A. A motorcycle came around the curve and when I saw that come, I saw Tony

Joseph Circelli—Direct

Turco as soon as he saw the motorcycle, he did not know what he was going to do, he started to get all excited, and then the motorcycle came nearer to us about 300 feet or 400 feet away, around 150 feet away he reached in his pocket and pulled out a gun, right out in the middle of the road, and he ordered him to stop; well, this fellow was pretty—a little ways from him, and he stopped, but he didn't stop altogether, he came right around near to him, so he had to go back a few steps and in the time he was stepping back the motorcycle was coming to him and he lifted his hand and he fired a shot, and as soon as he fired the shot, this fellow just about fell, but before he fell over the handle bar he placed one of his hands on his right shoulder—he didn't let him fall, and while he was holding him there, all at once, it didn't take more than a few seconds, he fired two more shots—one I see here (indicating), and one around the head somewhere, and two more shots, and after he fired that John Merlo, the one was driving the truck, he beat it away—

Q. You mean he drove the truck away? A. Yes, he drove the truck away, and I was standing there, and he was looking around, and didn't know what to do, Tony Turco was looking, probably he wanted to know what he want to do, and I didn't wait any longer, I started the machine as soon as I could put it in gear, and I left, and I got it down where I first saw the motorcycle, I met two more men, each one of them with a handkerchief on his face, and the man pointed at me, and I slowed down, and he asked me "what are you doing, what are you running away," and I say, "go back there, Tony Turco shot somebody" —

Q. Who was this man, do you know? A. No,

Joseph Circelli—Direct

one was Lamantia, and the other was Charley Solo.

Q. Were they men who had come with you that night? A. No, they were in Sperraccio's car.

Q. They were in the other car? A. Yes, sir.
 10 I told them to get back there. Tony Turco shot somebody, and they started to run back pretty fast, and when they started to run I was down the hill, I left the brake loose on my machine and started down the hill again and I got a little ways down, about a thousand feet below I met another man, and he had his gun in his hand, but he recognized me too quick, and lowered the gun down and said, "Where are you going?" I said, "Tony
 20 Turco shot a fellow on a motorcycle there"; I said, "and he left it standing in the road," he was hurt, and he said to me, "What did he shoot him for"—

Mr. Dolan: Who is this you are talking about now?

The Witness: Palmerio Cirone,—I told him that I did not know what he shot him for, and he says, "Well, I am going with you," I says, "If you want to go with me, better come on," and without stopping he jumped in the machine, he
 30 didn't even open the door, he crawled inside and I rode on, and I didn't use the brake or stop until I got about 20 miles down, and my tire went flat again, and I had to repair it, because I did not have a spare tire, and that is the time the truck drove up again, and by the truck was Tommy Sperraccio's machine, after the truck, and then there was Jimmy Lamantia, and another man who was in the machine, and there was Tony Turco, too, there was four of them.

40 Q. Who drove the machine? A. Tommy Sperraccio was by the wheel and he drove the machine,

Joseph Circelli—Direct

and Tony Turco was sitting in the back and each one of them had a handkerchief on their face, not tied, but just had them in their hands holding them up like that (indicating).

Mr. Dolan: I don't like to be objecting continually and renewing our objection, 10
but I would like to have it appear on the record that we object to any testimony of what transpired after the holdup, including the testimony now being related.

The Court: I will allow it.

JAMES F. MINTURN,
J. S. C.
(Seal)

Defendant excepts.

Q. Go on? A. Well, this machine stopped, and 20
Tony Turco came back, and the truck kept going on, and he told me that—he told me, “What did you run away for?” Well, I says, I was not going to stand there if anybody happened to come along, who is going to get blamed for it? “You can hide yourself in the woods and I am standing there.” He said to me, “Nobody is going to find out,” and I told him I saw a couple machines pass there, and if they saw me standing there with a machine 30
they would find me.” He said, “You don't need to be afraid. How do you like it if the other fellow would get you and us and then we would not get back to Easton?”

Mr. Dolan: Was this defendant there at that time?

The Court: I don't think this is hardly material evidence, what he and Turco were talking about.

Mr. Smith: No, I really don't think it 40
is necessary to follow any further.

Joseph Circelli—Cross

Mr. Dunn: It just shows the plan and the arrangement and the completion of it.

The Court: This is a matter between Turco and this witness, as to how they escaped. I don't know that it affects this defendant.

Mr. Smith: I think that is true, and that the objection is well taken, and there is no use covering the record with it any further.

CROSS-EXAMINATION by Mr. Dolan:

Q. Did you see Carlino at all after he left you, a little after 12 o'clock that night? A. Yes, sir.

Q. Where? A. In the morning, when he came up with Sperraccio's machine.

20 Q. When he came along with Sperraccio's machine, that was when after you had gotten about a mile away from the scene of the holdup? A. I saw him in the morning before the holdup again.

Q. You say you got to Cat swamp about 12 o'clock at night? A. Between 11 and 12 o'clock.

Q. And there you all had something to eat? A. Yes, sir.

Q. And then the Sperraccio car went the other way down towards Stanhope? A. Well, towards 30 the same way where we were going; I don't know Stanhope, I never was there before.

Q. Going to where you come back to Easton, or in the opposite direction? A. In the same direction we went down the hill, the same direction I came.

Q. At the time you brought the car there and came to a stop, were you not near the middle of the night? A. Yes, we stopped on the hill.

Q. And then he left you? A. And he went 40 down this way.

Q. Did you run from Andover to the point

Joseph Circelli—Cross

where you have indicated? A. I don't know where it was, I was not driving the machine, I was in the back, I know that we stopped here, that is what I can remember.

Q. Which way did you come from? A. We came towards here (indicating).

10

Q. Up the hill? A. Up the hill.

Q. The same way the motorcycle came from? A. Yes, sir, the same way the motorcycle came from.

Q. And you stopped your car? A. Yes, we stopped our car.

Q. And then how long were you eating your supper? A. We was no more than about a half an hour.

Q. Then the Sperraccio car went on down the road? A. Yes, sir. 20

Q. Who went with it? A. There was John Messina, Tony Turco, Carlino, Lamantia, and Solo.

Q. They went down the road in the same direction in which they were facing? A. Yes, sir.

Q. They did not turn around and go back in the opposite way? A. No, sir.

Q. And they were gone till daylight? A. They were gone till daylight.

30

Q. There was nobody left there but you and Merlo? A. I and Merlo and Palmerio Cirone and Jimmy Montana and Joe Parrelli.

Q. The others left you sometime during the night, didn't they? A. Yes, they went down looking for some water.

Q. You went down for them looking for water too, didn't you? A. No, we went down looking for the Sperraccio machine.

Q. Did you walk down? A. No, we drove down with the machine. 40

Joseph Circelli—Cross

Q. Did you go down alone looking for the Speraccio machine? A. No, John Merlo drove down with my machine.

Q. Did Merlo tell you to go? A. No, he was talking, and I told him he could go, and he told
10 me if I cared, if he drove down looking for them, and I said go ahead.

Q. You went with him? A. Yes, sir.

Q. And you went down the road two or three miles? A. Yes, sir.

Q. And you didn't find him? A. No, sir.

Q. And you turned around and came right back? A. Yes, sir.

Q. When you came back where did you stop?

A. Right here on the right hand side.

20 Q. Just a few hundred feet below here you had stopped the first time? A. I don't know how far it was, but it was around there.

Q. Were any of the other men there at that time? A. Yes, sir. When we came up the hill we picked up this man who went down with Turco, it was Palmerio Cirone, and Jimmy Montana, and Angelo Carlino and I and John Merlo.

Q. When you got back it was about daylight?

A. We came back in about three quarters of an
30 hour the same night.

Q. And you all went to sleep in the car there?

A. Some of them got out and laid alongside, around, I don't know where.

Q. Then when you woke up it was daylight?

A. Yes, sir.

Q. There was nobody there then except you and Merlo? A. Yes, there was the other men laying on the grass there just getting awake.

Q. Who was it? A. There was Cirone, and
40 Joe Parrelli and Messina.

Joseph Circelli—Cross

Q. And was Parrelli there? A. Yes, Joe Parrelli and Jimmy Montana.

Q. And shortly after that you heard the Sperracci car come up the hill? A. Yes, sir.

Q. And it went right on it did not stop? A. No, it did not stop.

Q. How long after it went by was it Turco came back and called for Merlo? A. I don't think it was more than three minutes.

Q. Do you know where the Sperraccio car stopped, about? A. No, sir.

Q. Merlo left and then you were left there, were you? A. Before Merlo left, Joe Parrelli and Jimmy Montana went out.

Q. So that left you alone? A. I and John Merlo and Palmerio Cirone.

Q. After Turco came and got Merlo? A. Yes, it left I and Palmerio Cirone.

Q. Did Cirone stay with you? A. He stayed till they got up the hill, and then he started to go after them.

Q. So that you were finally left all alone there? A. Yes, sir.

Q. Then how soon was it that you started your car back? A. Between 20 and 25 minutes, somewhere around that, not more than half an hour.

Q. You said 15 minutes on the former trial, didn't you? A. I don't think it was more than 25 minutes.

Q. Was it as much as that? A. I did not have the time, I can judge it was about 25 minutes, 20 or 25 minutes.

Q. Was anybody in the Sperraccio car when it went by? A. No, sir.

Q. How soon after the car went by was it that you started up the hill in your car? A. As soon as I could get on the car and start it.

Joseph Circelli—Cross

Q. Almost immediately? A. Yes, sir.

Q. And when you got up to the turn it was just up 100 feet, you saw the truck there in the turn? A. Yes, sir.

10 Q. And Turco was standing in the road? A. Well; he was standing alongside the truck in the road.

Q. Had the motorcycle shown up over the hill at that time? A. No, just a few minutes, a minute or so later.

Q. You stopped your car there? A. Yes, sir.

Q. When the motorcycle did come along, you say Turco pulled a gun out of his pocket? A. Yes, sir.

20 Q. And he got very much excited? A. The way I could see, he was very much excited.

Q. Did he say anything? A. I didn't hear him say anything, only say "stop" when he got in the middle of the road, he ordered him to stop.

Q. Did you hear the man on the motorcycle say anything? A. No, I didn't hear anything.

Q. Did you keep the motor running on your car all the time? A. Yes, sir.

Q. Did you stay in your car? A. Yes, sir, all the time.

30 Q. After the shooting took place, Merlo started up with the truck? A. Yes, sir.

Q. You had not gotten out of your car at that time? A. No, sir.

40 Q. Do you know whether the engine on the truck was running or not when the motorcycle came down the road? A. Well, I could not hear, my machine was making an awful noise, and he was quite a few feet away from me, about 15 or 20 feet, I did not pay any attention, but it must have been running the way he was shifting the gear.

Joseph Circelli—Cross

Q. How long did you stay there after the shooting? A. Well, as soon as I could get my machine in gear.

Q. Where did you pass the truck? A. Well, down the hill, about half a mile away, something like that, a mile or half a mile.

Q. Did you get out then? A. Get out?

10

Q. Get out of your machine? A. No, I blew my horn, and as soon as I got room enough to pass, I passed him and went by.

Q. Who else was there at the scene of the shooting except you and Merlo and Turco? A. No one that I could see.

Q. Nobody else? A. No, sir.

Q. Had you seen Carlino after he went past in Sperraccio's car? A. No, sir.

20

Q. You did not see him again until Sperraccio's car came up alongside of your car, when you were fixing the tire, about 20 miles away? A. He was not in Sperraccio's car at that time. At that time there was Sperraccio and Tony Turco—

Mr. Dunn: He was back in the woods.

Mr. Dolan: Yes, that is right.

Q. You didn't see Carlino again then after he went by just before the shooting in Sperraccio's car at all, did you? A. I did not see him, no, sir.

30

Q. You never saw him after that, did you? A. I saw him in jail here.

Q. You never saw him after that until you saw him in jail here? A. No, sir.

Q. You say the truck came by you about 20 miles down the road from the scene of the hold-up? A. Yes, sir.

Q. You never saw the truck again after that, did you? A. No, sir.

Q. When the truck went by you did you get out of your car at all? A. I was out of my car.

40

Alfonso Del Solo—Direct

Q. Did you go near the truck at any time? A. No, the truck passed by.

Q. The truck went right on past you? A. Yes, sir.

Q. It did not stop at all? A. No, sir.

10 Q. And you never saw it at any time after that?
A. Never after that, no, sir.

ALFONSO DEL SOLO, sworn for the State:

Direct-examination by Mr. Smith:

Q. Where do you live? A. Robbinsville.

Q. Where, there? A. Williams Township,
20 Northampton County.

Q. What is your business? A. Farmer.

Q. How long have you lived on a farm in Williams Township, near Robbinsville, Pennsylvania?

A. It is going on five years now.

Q. Do you know the defendant, Angelo Carlino?
A. Yes, sir.

Q. Did you see him during the last year, last summer? A. Oh, yes.

Q. Where? A. On the farm.

30 Q. Do you know Tony Turco? A. Yes, I know.

Q. Do you know Tony Turco coming to the farm sometime last fall with some other men.

Mr. Rosecrans: We object to this line of questioning, for the reason that it relates to the summer and fall after June 14th, and that is too long a time after the commission of the offense.

The Court: I understand this homicide took place on the 14th of June.

40 Mr. Smith: Yes, but this is in reference to the escape.

Argument

The Court: In reference to what?

Mr. Smith: This is the events at the time of the escape, on the part of these people.

The Court: Escaped what?

Mr. Smith: The flight from the officers 10
who were coming to apprehend them for the crime.

The Court: I don't see how that is material.

Mr. Smith: I think it shows a consciousness of guilt.

The Court: That is not the point. You will have to connect this defendant with this crime in some way, and if you do that, that is the end of the case. He is guilty. 20
Now that he goes into Pennsylvania and some officers took him away from there and brought him here, does not make any difference. You have him here now, and he has been indicted.

Mr. Smith: We want to show that he was there at that time, and was there with some members of this gang, at that time, last September, and some of them escaped, and he happened to be apprehended there, 30
and in doing that this defendant shot an officer.

Mr. Rosecrans: We object to that statement as very prejudicial.

The Court: I don't see how it is material.

Mr. Dolan: I don't think a conversation between the attorneys for the State ought to be carried on in the hearing of the jury.

Mr. Van Blarcom: The jurors did not 40
hear anything I said.

Argument

Mr. Dolan: I could hear it over here.

The Court: I think counsel ought to change sides occasionally.

10 Mr. Smith: It certainly seems to me that this is evidence of this man's guilt and knowledge of this thing, and of all that has taken place on the day when the murder took place, and the robbery was committed, and we should be allowed to show his acts when he was sought by the officers, and to show that he made a desperate attempt to escape being into custody.

The Court: I don't think that is material.

20 Mr. Smith: In Underhill on Criminal Evidence, paragraph 115, anything which will show consciousness of guilt, flight, resistance to arrest, is admissible in a criminal case, tends to show guilt of defendant.

30 The Court: That might be true, if you were trying a case based on circumstantial evidence, but you have a case here on direct evidence under the statute, you have the presence of the defendant on the scene, you have the commission of the murder, and the robbery. If this man is not guilty on that state of facts, it is for the jury to say.

Mr. Smith: If that is your Honor's ruling I will submit to it and withdraw the witness.

The witness is withdrawn.

Mr. Smith: We would like to offer proof of the events at the time this man was arrested, to show that he—

40 Mr. Dolan: Just a minute.

The Court: Of course, if you are go-

Argument

ing to offer evidence it is a matter that ought not to be discussed in the presence of the jury.

Mr. Smith: That is just what I was going to suggest.

The Court: This is some testimony you wish to offer? 10

The counsel gather around the Court and discuss this in low tones as follows:

Mr. Smith: This gun that was found on Carlino, which Carlino used to shoot an officer was a similar gun to the one on Turco.

The Court: You don't claim that Carlino shot this deceased, do you?

Mr. Smith: No, we want to prove that this is the kind of gun he had there. 20

The Court: You already have it in evidence that he had a gun, that he went up the hill with a gun in his hand, two of your witnesses have testified to that fact, one of them testified he even stuck the gun in his side. Now, you intend to go on and testify to a lot of detail which happened after the commission of the act.

Mr. Smith: When he was arrested, we found a gun similar to the one this man describes as his gun. 30

The Court: Where did you find it?

Mr. Smith: In his possession, he used it to shoot the police officer with it, and when he was arrested he fell down and had his hands on the gun.

The Court: Where?

Mr. Smith: On the farm.

The Court: How long after the homicide was this? 40

Alfonso Del Solo—Direct

Mr. Smith: September 22nd, this was when the crime was discovered, and when they found out about it.

The Court: What does Mr. Dolan say to all this?

10 Mr. Dolan: We object to these details three months after this occurrence. That was something in the fall.

The Court: It was in the effort to overtake him and arrest him for the commission of this crime.

Mr. Dolan: How can we know that?

Mr. Van Blarcom: Officers in uniform appeared on the place.

20 Mr. Smith: That night when they came there Turco and these other men were very much excited, and this man who owned the farm wanted to know what was the matter, and they said that everything was all right, that they had got some whiskey, and they had been found with it, and they were making whiskey. The next morning the telephone rang early, and these men started to sneak away, and this defendant went into the barn, and was into the barn, and in the
30 effort to get him out and arrest him, the police officer was shot.

The Court: I don't think I will admit it.

This ends the private conference.

State rests.

Counsel for defendant then asked, owing to the sudden termination of the State's case, for a recess, in order that they may consult as to their future course, which is granted by the Court, and
40 after a recess counsel for the defendants suggest that matters will be greatly facilitated if the trial

Alfonso Del Solo—Direct

can be adjourned until tomorrow morning, and they request the Court to make such adjournment.

The Court grants this request, and after cautioning the jury, adjourns, until 9:30 o'clock, tomorrow morning, Tuesday, February 28th, 1922.

Newton, Feb. 28, 1922. 10

Case resumed.

Met pursuant to adjournment.

Mr. Rosecrans: If the Court please, gentlemen of the jury—

The Court: I understand the defense has no testimony to put in? 20

Mr. Rosecrans: No, sir.

The Court: Then what you are about to proceed with is to sum up?

Mr. Rosecrans: No, sir. I will dispense with the opening if necessary but it was not my purpose to take more than one or two minutes with the opening.

(Mr. Rosecrans opens shortly to the jury.)

Mr. Rosecrans: If the Court please, I now desire to state to the Court that we have all talked 30 to the Defendant, and we think that he can add nothing to the testimony by taking the stand, that he can simply reiterate what the state says, and that it would not be a good thing to put him on the stand. We have agreed that we will not put him on the stand; he has so agreed with us. We furthermore feel that if we put him on the stand, that, by his testimony, he might convict himself—that is, he might tell things which might be used against him in the other indictment for robbery 40 at another time. Therefore he will not take the

Motion for direction of Verdict

stand. We furthermore will not introduce any other evidence. We rest now on the evidence produced by the State; we find no fault with it, and it is undisputed before the Court.

10 Mr. Rosecrans: The defendant rests.

The Court: Under the circumstances, I suppose the State will have no rebuttal.

Mr. Rosecrans: Formally, under the authority of the State vs. Kittredge, I wish again for the same reasons to urge my motions to quash and the challenges interposed to the array which were heretofore raised before the jury was sworn.

The Court: That will be denied.

20 JAMES F. MINTURN,
J. S. C.
(Seal)

Mr. Rosecrans: The same exception.

Mr. Rosecrans: Now if the Court please, at the end of the whole case as it stands now, we move for a direction of a verdict of not guilty, or acquittal in this case on the following grounds:

1. Because the defendant Carlino is not guilty
30 of the murder springing out of the robbery on the evidence presented.

2. Because the defendant Carlino was more than a quarter of a mile away from the scene of the murder; he was not in sight of the killing; not in hearing distance of the shot; was not near enough to render assistance in the killing, if necessary; was not shown to have any intention of killing those in charge of the truck, and had no knowledge of the murder until long afterwards.
40

Motion for direction of Verdict

3. Because the murder was not a probable consequence of the robbery, nor proximate result of the robbery.

4. Because Carlino was not the person who did the killing.

5. Because the deceased, Koster, was not in charge of the truck, nor was he connected with the Sussex Print Works, nor was he in the act of apprehending the robbers, nor was he shown to be an officer of the law, but was a person totally unconcerned in the design to rob. 10

6. Because the murder was the independent act of a confederate of the defendant, and this act of killing was foreign to the common design to rob.

7. Because the robbery was completed at the time of the killing, and the murder was a subsequent distinct act of a person other than the defendant Carlino, and was committed a considerable time after the taking of the truck out of the possession of the Sussex Print Works' employees. 20

8. Because the evidence at best is merely a combination among Carlino and others to rob, and there is no evidence of an agreement to make an escape effectual by violence and killing, if necessary. 30

9. Because upon the most favorable view of the evidence of the state, the killing was an act done by a confederate, after the completion of the robbery, and done in escaping, but not within the scope of the previous joint purpose; and no agreement to make an escape effectual by violence, can be legally inferred from the original wrongful combination. 40

Motion for direction of Verdict

10. Because there was no preconcert among the confederates as to the killing.

11. Because the killing was merely the result of the situation in which Turco found himself, at the time, and proceeded from the impulse of the moment without any previous concert or agreement with Carlino or his other confederates.

Now, shortly, I desire to argue; I have examined every case in New Jersey, and I have them all here before me in court.

After argument.

The Court: I shall deny the motion made by the defence and grant an exception.

JAMES F. MINTURN,

J. S. C.

(Seal)

Mr. Rosecrans: I understand that your Honor grants an exception to the denial of my motion to direct a verdict of acquittal?

The Court: Yes.

JAMES F. MINTURN,

J. S. C.

(Seal)

30 Defendant rests.

State rests.

(Mr. Sweeney then sums up for the Defendant.)

(Mr. Rosecrans and Mr. Dolan also sum up for the Defense.)

(Mr. Dunn sums up for the State.)

The Court then charged the Jury as follows:

40

Charge

The Court: Gentlemen of the Jury: The Legislature of this State enacted an act which is part of our Crimes Act, and which reads in this way:

“Any person who, in committing or attempting to commit arson, burglary, rape, robbery, sodomy, 10
or any unlawful act against the peace of this State, of which the probable consequence may be bloodshed, shall kill another; or if the death of any one shall ensue from the committing or attempting to commit any such crime or act as aforesaid; * * * then such person or persons so killing as aforesaid shall be guilty of murder.”

The indictment in this case against this defendant is framed upon the provisions of that statute, and the defendant is charged by the Grand Jury 20
of this county with the commission of the crime of murder. The murder, as you have heard stated in the testimony, resulted from the attempt to perpetrate a robbery on one of the main traveled highways of this county, and the State contends that this defendant, being one of the parties engaged in that robbery, from which robbery this murder of Mr. Koster resulted, he is guilty of murder in the first degree.

You have noticed before you were selected as 30
jurors and during the process of your selection as jurors, the desire upon the part of the State and the part of the defense, to select only men who could testify under oath taken at this table, that they were in a frame of mind and in a position of fairness to determine this case according to the evidence, and not according to any other standard of proof. A great deal of time was occupied, as you have observed, by the State and by the defense, in selecting twelve men for that purpose; and the fear always in the minds of both 40

Charge

- the State and the defendant in a case of this kind, is that there may be taken into the jury box some man or some men who are so constituted that they cannot divest themselves of prejudices, that they cannot fling away even under the pressure and
- 10 the sanctity of an oath, those atmospheric impressions that every man in a community, rich or poor, high or low, educated or uneducated, necessarily absorbs as a part of the constituency in which he resides. And when the State and the defendant had selected the 12 men on this jury and said, "We are content," they simply intended to say that they now had in the jury box 12 men upon whom they could rely, and depend, to decide the guilt or the innocence of this de-
- 20 fendant, not from motives of patriotism, not from motives of local pride or sentiment, not from prejudices imbibed in the respective sections of the community in which they live; but, according to the evidence, according to the testimony. As each man swore to that promise he had his hand on the sacred book; he stated, "So help me God." You have therefore called upon the Lord to witness that you are intent upon deciding this case according to the evidence.
- 30 And when you made that promise in open court yesterday morning before your God, you made the promise not required by the State or by the defendant, because they wanted it, but because the law wants it from you, and the law exacts it from you as a condition upon which you may serve the County of Sussex and the State of New Jersey, as moral, high minded, law abiding, intelligent, honest men.

- This defendant may be all that the State says
- 40 he is, and still he is entitled to a fair trial. Mary Magdalene was the worst woman in Jerusalem,

Charge

but the Saviour of humanity lifted her up and put her on a pedestal equal to the best of society, "because He was just; because He was honest." And so the law asks of you not an expression of your sympathy, not an expression of your prejudices or your sentiments, but simply an expression of your honest view, as intelligent men, according to the testimony that you have heard here, in the eye of God and in the eye of the law, witnessing the result of that activity of yours. 10

We are not here, gentlemen, to vindicate society. We are not here to uphold patriotism. There are places for that, and the law provides them when men themselves do not provide them. We are not here to uphold and vindicate local and community prejudices. There are places for that. The public hall is erected for that purpose. 20

We are here today, both you and I, for one purpose and one purpose only, and that is to vindicate the highest mandate that can be consigned to any honest man—the effectuation of justice between man and man.

The question, therefore, before you is not "what does my neighbor think of this man"; not "what do I think of him", or "what did I think of him when I read the newspapers"; not "what did I think of him when he came into this court", but, the simple inquiry is, "Is he or is he not guilty of the charge laid against him, according to the evidence presented here in court against him?" 30

And when you got outside of that, gentlemen of the jury, and undertake to try a man for his life according to sentiment, according to prejudice, according to newspaper comments, instead of according to the evidence, and the oath that you have taken, to say the least you have violated 40

Charge

your oaths, and you have violated your duty between your God and your fellow man and between the State and the honest, fair, enforcement of the law.

10 What would you think of me, as a Judge presiding here, if yesterday morning I came here with the fixed, tight sentiment in my mind that no matter what was said in this court in behalf of this defendant, no matter what evidence was produced, he was guilty—nothing could change my mind? You would say I had no business to preside as Judge in any court of the State of New Jersey.

20 And, gentlemen, my function is no greater, no more sanctified or sacred in law then is yours to determine the case according to the evidence and, upon my part, to decide the questions of law presented to me by learned counsel for the State and for the defense, not according to law as I would have it, but according to the law as it is written.

30 So your duty is plain, to decide this case not as you would have it decided, not as prejudice and sentiment in the community would have it, but according to the evidence as it has been given to you here in court. And when Courts and juries cannot live up to that rule of law and that rule of procedure, then it is time for us to abolish our system of legal procedure and tear down our court houses.

This man is an Italian. He cannot disguise that. But that, of course, should not weigh against him, nor the fact that he came from Italy, nor the fact that he came from Sicily, which is a part of Italy. That fact has no bearing at all
40 upon this case. You were asked the question when you were called to this table, whether or not

Charge

the fact that a man is an Italian would at all weigh with you in the consideration of the testimony in this case, and you said that it would not and you said that under oath, and it should not. We invite Italians to this country. An Italian discovered this country. If it had not been for an Italian you and I would not be here today, a man named Columbus. Why should we be prejudiced against Italians? 10

Gentlemen, we are not prejudiced in a court of justice against any man of any creed, of any nationality, or of any social environment. That is the only honest, upright, legal and constitutional American doctrine for you and me to be guided by, particularly if we wish to administer justice. 20

Now, having stated in a preliminary way this general outline which should guide you and me in the performance of our respective duties, we come to the question involved in this case, to determine and decide it according to law and the evidence.

The facts in this case are practically admitted; you are relieved, therefore, of what ordinarily confronts the every day jurymen in settling disputes as to facts, whether you believe this witness or the other witness, this combination of witnesses or the other combination of witnesses, whether you believe the plaintiff or the defendant. There is no issue of that kind in this case. The defendant himself says so. He has put in no defense except the legal defense that you have heard here argued before you, and which was for me and not for you to decide. 30

The fact that the defendant has not taken the stand should not weigh against him excepting to this extent, that under our law, where a defend- 40

Charge

ant in a criminal case does not take the witness stand to repel the charge against him, he presumably admits it; where he is charged with the commission of an offense and is in court and in a position to deny it and he does not take the
10 witness stand, the presumption is that he admits it, that is, he admits the facts as the State has proved them.

He does not admit his guilt, but he admits the facts, as the State has proved them.

Now, what has the State proved here under this statute which I have read to you?

It has proved that Carlino, this defendant, and a number of other men in Easton, whose names it is unnecessary to mention, two of whom were
20 on the witness stand here, formed an arrangement or agreement in the City of Easton, Pennsylvania, to come over in the neighborhood of New Jersey, to commit a robbery by holding up on the public highway between Andover and Netcong, the truck of this silk mill early in the morning as it proceeded on its way from Newton to the City of Passaic.

There is no dispute about that, that this combination was formed in Easton, that they proceeded from Easton in the night to Cat swamp,
30 a wilderness between Andover and Netcong, that the men who formed this conspiracy or agreement, not only came intent upon perpetrating the robbery, but they came prepared with revolvers, or guns, as it has been called here, to do whatever was necessary to successfully carry out that robbery.

When a man takes a revolver and puts it in his pocket, the natural presumption of the ordinary
40 man on the street is that he takes the revolver with the intention of using it, if it is necessary

Charge

to use it. When you go out of your home at night to walk along a lonely road, and provide yourself with a revolver, you do it not for the purpose of entertaining any innocent pride regarding the carrying of a revolver, but for the purpose of using it, either for your own protection or for doing some damage to somebody. That is the natural presumption that men draw from that fact. 10

And the testimony in this case will warrant you in drawing that inference from the facts that when these men left Easton on that night with the revolvers in their possession, intent upon committing this robbery, they intended to take human life, if necessary, in order to perpetrate successfully this robbery. That is a fair inference. And this defendant was one of those men. 20

They arrived at Cat Swamp late in the night, located there over night in various parties, and in the morning when the silk mill truck came along unsuspectingly on its way to Passaic, these men came out of that wilderness, each with a revolver in his hand, and held up this truck. So careful were they and so premeditated in their arrangements that their faces were covered for the purpose of disguising themselves or protecting themselves from identification. They compelled the two men who were guiding that truck to get down from it, and some of the men, I think four in all, took the two drivers up the mountain-side, or hillside, and tied them hand and foot, so that they could not get away, and those men remained there tied until one of them, being able to disentangle himself from the binding, freed the other sometime in the afternoon. And one of the men who held up that truck and who took these two men up the hillside, or up the mountain- 30 40

Charge

side, as you will, and bound them hand and foot, and stayed with them there until it was safe for them to retire, and then left them there tied hand and foot, was this defendant.

10 There you have the robbery. There you have the truck in the possession of these conspirators, one of whom was this defendant.

Now, if in doing that act one of those conspirators had killed one of those truckmen, had done to one of those truckmen what was done to Koster, the argument of the defense in this case would not apply, because there they were doing it clearly and undoubtedly and unequivocally in the act of robbing the truck. But the differentiation of the defense, which the defense seeks to inject into
20 the case, is this: That while this defendant came there intent upon robbing the truck and committing an act of robbery, he was no party to what subsequently happened after he and the others with him had gone up the hillside and bound these two prisoners and remained there with them.

Now, what happened? While they were up the hillside, holding these two men in custody, preventing their escape, which, of course, was part of the act of robbery, Turco and the others were
30 down on the road, and among the others were these two young men whom you have heard testify on the witness stand yesterday, both of them confederates. They were on the road endeavoring to get the truck away, because it would not be the wise thing nor the prudent thing, under any circumstances, to let the truck stay where it was, and the object was to get the truck started, take it from Cat Swamp where it was held up, down to Easton, where it subsequently was delivered.
40 And Turco and the others, including these two men who were on the witness stand, were on the

Charge

road for that purpose, and one of those men—Merlo, I think—succeeded in getting the truck started after doing a great deal of shifting of gears, etc. He got the truck started and succeeded finally in delivering the truck at Turco's farm in the State of Pennsylvania.

10

What was this defendant doing all of that time? Why, he was holding these two men who had charge of that truck, upon the hillside.

Why was he doing that? To prevent them from getting away. Getting away from what? To give an alarm to the police or the nearby authorities, and he was armed, and they were all armed for that purpose.

Now, in the endeavor to get away with the truck, and while Merlo was endeavoring to start down the hill, in the early morning there came this unfortunate man Koster, as was his custom, I understand coming in the morning on his motorcycle to work, and when he reached the neighborhood of the truck—you will remember the distance from it—he was held up by Turco, and when he did not come to a standstill fast enough to satisfy the desires of Turco, he was killed by two or three bullets discharged at him from a revolver held by Turco.

20

30

After that the truck was taken away and reached Turco's place in Pennsylvania.

Now, gentlemen, that is my view of the facts as they are in evidence. I don't think there is any dispute as to those facts. The only question for you to determine is, what construction will you put upon those facts? Do you believe that under the law which the legislature has passed, and which I have read to you, that this defendant Carlino was engaged at the time of the commission of this murder of Koster in the commission

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Charge

of the crime of robbery on the public highway?
And that he was a party to the act of Turco which
killed Koster?

If you believe that he was then you may find
him guilty of murder in the first degree. If
10 you believe that he was not a party to that act,
that he was in no way responsible for it, that he
was in no way identified with that robbery and
with that murder by reason of the fact that he
was identified with the robbery, then you may ac-
quit him.

The contention of the defendant, as I under-
stand it is, that because he was not down on the
road at the time, assisting Turco in operating
this truck, in doing the very act of robbery that
20 they came there to perpetrate and because he was
not there when Turco fired these shots, he was
not a party to Turco's crime of murder, for Turco
has been convicted of murder, Turco is the man
who fired the shots; this defendant didn't fire the
shots—he was upon the hillside quite far away
when the shots were fired, and according to the
testimony of the two drivers of the truck, they
did not hear the truck go away, and there is no
evidence in the case that they heard any shots, so
30 if they did not hear any shots the fair inference
is that this defendant Carlino did not hear either
the truck get away or the shots being fired by
Turco.

Now, I charge you, gentlemen of the jury, for
the purposes of this case, that when this defend-
ant left Easton with this combination of men to
rob this silk truck on the highway of this county,
and assisted in robbing that truck to the extent
of taking the drivers of the truck up the hill-
side and there detaining them until Turco got
40 away with the truck, that he is commonly respon-

Charge

sible under this law with Turco, and is guilty of murder in the first degree if you believe those facts. He is a party to the whole proceeding. Why did he go there? He went there to rob, there is no dispute about that. Why did he take the pistol or the gun with him? He took it there to use it that is the fair inference, if you believe those facts. Why did he hold these two men up on the hillside, tied and bound, hand and foot? Evidently, for the purpose of letting Turco get away. And Turco got away. But, unfortunately, he got away after taking a human life. 10

Now, for that deed of taking that human life, Turco and every man identified with him in the robbery, is guilty of murder in the first degree if you believe those facts. 20

Of course gentlemen of the jury, there is in this case, and it becomes your province, providentially for me, to deal with the situation from another point of view. There was a time in the history of our law, when, if murder in the first degree was found by a jury, the disagreeable duty was forced upon the Judge to sentence the defendant to the gallows or the electric chair. That day is past, and the duty is now cast by law upon the jury, if they find murder in the first degree and they find the circumstances are such as to warrant them in coming to the conclusion that mercy should be shown to the defendant under the peculiar circumstances of the case of recommending to the Court with their verdict, when they bring in a verdict of murder in the first degree, that the defendant be confined to State's prison for life. That is your province. You may exercise it or not, as you please, but the law gives you the right, if you reach the conclusion in this case, that this defendant is guilty 30 40

Charge

of murder in the first degree, to recommend to the Court that he be imprisoned for life.

It is a charitable view to take of this case, it may be said to be a just view to take of the case, because, while this defendant under this statute
10 that I have read to you, is guilty of murder in the first degree, if you conceive the facts to be as I have stated them, and as you may infer them, because you must deal with the facts—I deal only with the law; if you conceive the facts to be as I have stated them, and this defendant is guilty of murder in the first degree, he is guilty only under the provisions of this act. In other words he is constructively guilty, and not actually guilty, of the crime. Mr. Turco was actually guilty of the
20 crime, because he was the man who fired the shots, he was the man who took human life, he was the man who took this unfortunate Koster away from his family. This defendant did not. He was up in the woods. He was doing his part in the execution of the conspiracy, but say what you will regarding his attitude in this case, under the facts and the proof, he is not guilty of taking the life of Koster excepting as the statute provides that legally he is guilty. or as we law-
30 yers say, constructively he is guilty.

And this statute which gives you the power to bring in with your verdict of guilty of murder in the first degree, a recommendation that the defendant be confined in State's prison for life was enacted for the purpose of enabling you to administer justice combined with charity. Under the circumstances in this case you may think it wise, in the interests of justice, in the interests of charity, if you find a verdict of murder in the
40 first degree, to conclude that the ends of the law will be served just as well by keeping this man

Charge

for his entire life in the State's prison at Trenton as by sending him to the electric chair, because, unless you bring in a recommendation the Court will inevitably be obliged to send him to the electric chair.

I have been requested by the defense in this case to define the degrees of murder. I cannot see what practical purpose will be accomplished by doing that. Probably no harm will be done if I enlighten you on the various situations that bring about the various characters of crime designated in law as murder in the first degree, murder in the second degree and manslaughter, for an act which results in killing may be one of those three. 10

Murder in the first degree is where a man lies in wait for another to come along, makes preparation, has premeditation and intent, and malice aforethought to take a life. That is murder in the first degree, or to take any life that happens to come along. 20

If he intends to take it, that is murder in the first degree. The statute makes a crime of that character murder in the first degree.

Murder in the second degree is where a man has not that wilful premeditation, that intent to take that life or any particular life, but through recklessness and disregard for law and without any intent to take any life, actually takes a life. That may be murder in the second degree. You see the distinction is between the intent formed beforehand, the premeditation, as our statute calls it, the lying in wait, the desire to take life, and the man who does not entertain that premeditation and intent and that lying in wait. 30

Manslaughter results from a death or a killing of a human being at the hands of another with- 40

Charge

out any intent whatever to take life or any desire to take life, but merely by accident, through passion and only the desire, probably, to harm or to get the best of an adversary, but in a melee or a struggle accidentally kills his companion. That
 10 is manslaughter. Manslaughter may also result here on the highway, if a man is running his automobile recklessly or in a drunken condition, as he may be, upon the highway, caring for nobody and runs into somebody and kills someone, or kills some occupant of the automobile. The law characterizes that act as manslaughter. That man had no intent to take life. He was simply indifferently reckless to the lives of others, and in that recklessness accidentally took human life.

20 Now, you have heard the three degrees of murder defined, which the defense has requested me to define to you.

I charge you in this case, however, gentlemen of the jury, if the defendant is guilty at all, he is guilty of murder in the first degree; and if, on the facts in this case, you find him guilty, you must return a verdict of murder in the first degree, or you must acquit him. There is no alternative. He is either guilty or he is not guilty. The law
 30 allows no middle course in a case of this character. And of course, when you bring in your verdict of guilty, if you find him guilty, you may add to it this recommendation for life imprisonment, if you see fit to do so.

The Court: I have a number of requests here from the defendant's attorneys, the most of which I shall charge, some of which I shall not charge.

1. The jury in considering the evidence must
 40 start with the legal presumption of the defendant's innocence, which presumption must continue throughout all their deliberations, unless

Charge

the evidence establishes beyond a reasonable doubt the defendant's guilt.

The Court: The reading of that request gentlemen, reminds me that I omitted to state to you two propositions of law which probably may be stated in connection with this request. I charge 10
you that request as I read it.

The defendant is presumed to stand before you until the state has convinced you by a preponderance of testimony that satisfies you beyond a reasonable doubt as to his guilt, that he is innocent. He came into this court yesterday with the mantle of innocence thrown about him. He stands before you and me today presumably innocent. The law, in its charity throws that mantle and that atmosphere about every man in the community. 20
That, until he is proven guilty by the state beyond a reasonable doubt, the presumption enshrouds and protects him. Now the question upon which you must satisfy yourselves on this testimony is, has the State proven the defendant guilty beyond a reasonable doubt. In civil cases you are not required to do that. If you have served on juries in civil cases, you will remember that the Court has charged you that you are to decide the case according to the weight of the testimony one way 30
or the other, whether it preponderated for the plaintiff or for the defendant, but in these criminal cases, where the State is prosecuting a man, and the result of the prosecution is the taking of life, as a result of your verdict, then the law compels the State to prove its case, not according to the weight of the evidence, but according to the preponderance of the evidence beyond a reasonable doubt.

If you have a reasonable doubt you cannot con- 40
vict this defendant. If you have a reasonable

Charge

doubt of his guilt, you should give him the benefit of that reasonable doubt and acquit him. But if you have no reasonable doubt, then, and then only can you convict him.

10 The second proposition of law which the defendant asks me to charge is:

2. The law presumes the defendant to be innocent until that presumption of innocence is overcome beyond all reasonable doubt by the evidence in the case.

The Court: I charge you that as I have charged you.

20 3. The presumption of innocence attaches to the defendant from the very beginning and such presumption of innocence must be carried by the jury into their final deliberations.

The Court: I charge you that.

4. A reasonable doubt in law is that state of mind which, after fairly considering all the evidence leaves the mind of the juror in such a condition that he cannot say that he feels an abiding conviction of the defendant's guilt or charge.

30 The Court: I think that has been improved in this State by a recent decision, "Abiding conviction to a moral certainty," if you have no objection I will add that to it. I think one of our most recent decisions has that in it, and I will add that to your request.

40 4. A reasonable doubt in law is that state of mind which, after fairly considering all the evidence leaves the mind of the juror in such a condition that he cannot say that he feels an abiding conviction to a moral certainty of the defendant's guilt or charge.

Charge

5. The defendant is not required to satisfy the jury of his innocence but the burden is always upon the state and the state must prove beyond all reasonable doubt that the defendant is guilty of the crime charged.

The Court: I charge you that.

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6. The burden of proof never shifts from the state in a criminal trial, but throughout the whole trial. The burden of the proof is always upon the state, to prove the defendant's guilt of the crime charged beyond a reasonable doubt.

The Court: I charge you that.

7. If there is in the mind of any juror a reasonable doubt of the defendant's guilt, fairly arising from the evidence in the case, the juror has no right to consent to a verdict of guilty in deference to or from respect to any other juror's belief or opinion. Such juror must stand by and abide by his own belief formed in his own mind, from the whole evidence in the case.

20

The Court: I charge you that.

8. Each juror must reach a conclusion. Eleven jurors are not competent to reach a verdict in the case. All must reach that conclusion. No juror is relieved from responsibility by letting any number of that body agree upon a verdict and then by consenting to it because it is the judgment of others.

30

The Court: I charge that.

9. If there is in the minds of the jurors one or any number of theories consistent with the defendant's guilt fairly springing from the evidence in the case which the jury believe, and but one theory consistent with the defendant's innocence, fairly arising from the evidence in the

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Charge

case, the jury must disregard and put aside all those theories of his guilt and adopt that one theory of his innocence and render a verdict of not guilty. For, in such condition of the case there would be a reasonable doubt of the defendant's guilt and the defendant should be acquitted.

10

The Court: I charge that.

10. A presumption of good character always exists as to the defendant and may, of itself, be sufficient to raise a reasonable doubt as to the defendant's guilt.

The Court: I charge that.

11. If there is in the mind of the jury a reasonable doubt as to the truth of any testimony on the part of the state such doubt must be received in favor of the defendant by the rejection of the testimony.

20

The Court: I charge that.

12. The court is requested to charge as to the different degrees of murder.

The Court: I have done that.

13. There is no evidence in the case to justify a conviction of murder.

30

The Court: I decline to charge that. I have already charged you if you believe the testimony you may find the defendant guilty of murder in the first degree. If you do not believe the testimony, you may acquit him. Or if you believe under the construction of the law which I have attempted to outline to you, that he was not a party to this general scheme of robbery on the public highway, then of course, you may acquit him.

40

I charge you 14, with a qualification.

Charge

14. Under the evidence in this case the crime of robbery has been completed at the time of the death of Albert Koster and the killing therefore, did not take place in perpetrating or attempting to perpetrate the crime of robbery.

The Court: I have already referred to that, gentlemen of the jury, and the qualification which I add to that request is, it is a question for the jury whether or not it was completed at that time. 10

15. Under the evidence in this case the crime of robbery was completed when Turco and Merlo or some others mentioned in the indictment forcibly took possession of the truck by putting the drivers in fear and immediately after Resh and Mains had relinquished possession of the truck. 20

The Court: That is a question for you, gentlemen of the jury, whether the robbery was then completed, under all the facts and circumstances of the case. Of course, if this was an independent act of Turco and had no relation to this robbery, was committed by him independently of the general scheme of robbery which they all undertook to perpetrate, then of course, this defendant is not guilty. He cannot be held for Turco's independent act. The theory upon which he is being held by the state and the theory of this law which I have read to you is that he was one of a party that undertook to rob upon the public highway, and in the perpetration of that robbery, this crime of murder was committed as an incident of the robbery, and as a part of the general perpetration of the robbery act. 30

16. If the deceased met his death at the hands of some other person than those actually in possession of the truck such death did not arise in 40

Charge

the perpetration or the attempt to perpetrate a robbery.

The Court: I decline to charge that.

17. If the defendant Carlino did not shoot the deceased or aid or abet others to do so, he cannot
10 be guilty of murder and should be acquitted.

The Court: I charge you that.

18. If the jury find that a robbery took place of the truck mentioned in this case by putting the drivers in fear in removing them therefrom, then taking possession of the truck, and driving away with the same and immediately thereafter deceased came along on his motorcycle and was shot and killed by some person other than the defendant, then such killing was not in an attempt
20 to perpetrate a robbery, or in the commission of a robbery as the crime of robbery was complete before the killing. It is a question for the jury whether or not it was.

The Court: That comes back to the same question I have already presented to you in the main charge and under these other requests that I have read. It is a question whether or not this was an independent act of Turco, committed outside
30 of this general scheme of robbery. Of course, if it was Turco's independent act, perpetrated as no part of the general scheme into which all of these people entered, this defendant included, this defendant cannot be held responsible criminally for the independent act of Turco.

19. If the evidence does not show that the shooting occurred while the robbery was taking place but was after it, was over, then the jury cannot find the defendant guilty as charged in this
40 indictment.

The Court: I charge that.

Charge

20. If the shooting occurred not in the commission of the robbery but upon the public highway after the robbery had been completed then the defendant Carlino could not have been guilty of murder unless Turco shot with premeditation and deliberation to effect the death of Koster and that Carlino was aware of this premeditated and deliberated plan. 10

The Court: I decline to charge 21, excepting as I have already charged you.

21. To make Carlino liable for the act of Turco in killing Koster it must be shown from the evidence that Carlino not only aided and assisted in the commission of the robbery but that Carlino and Turco also actually agreed to mutually aid each other in effecting an escape by violence. 20

The Court: I decline to charge 20, excepting as I have already charged you.

22. You cannot infer that by reason of the joint plan to rob that there was also a joint agreement between Carlino and Turco to kill any one interfering a considerable time after the robbery was complete.

The Court: I decline to charge 22, excepting as I have already charged you. 30

23. You must believe from the evidence that it was shown beyond reasonable doubt that Carlino and Turco not only agreed to rob but that before their robbery they both agreed to resist capture by violence.

The Court: I decline to charge 23, excepting as I have already charged you.

24. If you believe from the evidence in this case that the defendants had intention to commit a robbery and did attempt so to do and in so doing 40

Charge

killed Albert Koster but that the defendant Carlino had no knowledge of their unlawful intention, if any, to kill said Koster, and was not acting together with them in the commission of said offense, if any, on it you have a reasonable doubt thereof, then the defendant Carlino should be acquitted.

The Court: I decline to charge that.

A-1. Request that the Court read Sec. 106 of the Crimes Act in the particulars applicable to this case.

The Court: I have already done that.

A-2. Section 106 of the Crimes Act provides that only the person who killed another is guilty of murder in the first degree.

The Court: I decline to charge that. That seems to comprise all the request of the Defendant's counsel, and with the reading of those requests, gentlemen of the jury, you may retire to the jury room and consider your verdict, and if you find the defendant guilty, as I have stated, it will be guilty of murder in the first degree, with the recommendation, if you can consistently make it, to life imprisonment. If you do not believe him guilty, of course, it will necessarily result that you acquit him.

You may retire with your officers and consider the matter.

The jury then retired.

Mr. Rosecrans: The defendant enters a general exception to the charge.

And a special exception in that the Court reading Section 106 of the Crime act, neglected to incorporate that when the killing occurs in the course of robbery, it must also appear that the death is a reasonable consequence of the conspir-

Charge

acy in which they were engaged, and that must have been in contemplation of the parties at the time, or their reasonable contemplation.

Mr. Dolan: The idea is that when you charge this the Court said that these men left Easton they had made up their minds to engage in a robbery. 10

The Court: You do not object to my reading of the statute?

Mr. Dolan: Oh, no.

The Court: My construction of it?

Mr. Dolan: Yes.

The Court: I thought I had left something out in my reading of it.

Mr. Dolan: No.

The Court: Those executions may be entered. 20

JAMES F. MINTURN,

J. S. C.

(Seal)

Mr. Rosecrans: The defendant also enters an exception to the refusal of the Court to charges Nos. 16, 20, 21, 22, 23, 24, A-2 and any other requests which were refused and also to the modifications of any requests where they were modified.

The defendant also enters an exception to that part of the Court's charge in which the Court charged the jury that by reason of being identified in that robbery, Turco and the other defendants were guilty of murder in the first degree. 30

The defendant also excepts to that part of the Court's charge in which the Court charged the jury that under the statute the defendant is guilty of murder in the first degree "If you conceive the facts as stated."

The defendant also excepts to that part of the 40

Charge

Court's charge in which the Court charged the jury that if the defendant Carlino was not a party to the general plan of robbery, he should be acquitted. In that the necessary inference is that by being connected with the general charge of robbery he would necessarily be guilty of any murder committed at any time in connection with the robbery, or even the independent act of Turco as the evidence presented it.

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The Court: Exceptions allowed.

JAMES F. MINTURN,

J. S. C.

(Seal)

(The jury retired at 12:02 p. m., and after deliberating until 2:40 o'clock p. m., they announced their agreement. Being ushered into court, in the presence of the prisoner and his counsel, and of the Prosecutor and the Court, they rendered their verdict as follows:)

20

The Jury was polled.

The Clerk: Gentlemen of the jury, have you agreed upon your verdict?

The Jury: We have.

The Clerk: Who speaks for you?

30 The Jury: Our foreman.

The Clerk: What say you, Mr. Foreman, do you find the defendant guilty or not guilty?

The Foreman: Guilty.

The Clerk: In what form?

The Foreman: Guilty of murder in the first degree.

The Court: Do you recommend life imprisonment, or just plainly guilty of murder in the first degree?

40 The Foreman: Guilty of murder in the first degree.

Charge

The Clerk: Gentlemen of the jury, hearken to your verdict as it has been returned by your Foreman, and as the Court has ordered it recorded; you say you find the defendant, Angelo Carlino, guilty of murder in the first degree, and so say you all, do you?

10

The Jury: We do.

The Court then discharged the jury, after making certain recommendations.

Mr. Rosecrans: We move now that sentence be deferred so that we may have an opportunity to move in arrest of judgment.

The Court: Will tomorrow morning suit you?

Mr. Rosecrans: Yes.

The Court: The prisoner may be remanded in the custody of the Sheriff until tomorrow morning at 10 o'clock.

20

Mr. Rosecrans: The defendant now asks that he be supplied with a copy of the transcript pursuant to the provisions of the Criminal Procedure Act, and that he be authorized to have it printed for the purpose of taking a writ of error.

The Court: An order may be made directing the furnishing of a transcript of the entire record of the case to the attorneys for the defendant and also for the printing of the case so as to perfect the same for appeal and writ of error.

30

The Prosecutor and the counsel for defendant agree that if sentence is imposed now it will be impossible to prepare the record for appeal by the time of the meeting of the Court of Errors in March term, and that the appeal may be argued in the June term).

Charge

Newton, N. J. March 2, 1922.

STATE V. CARLINO:

The Court met to take up this matter, this day:

Present:

10 HON. JAMES F. MINTURN, Justice, Presiding,

Of Counsel:

Lewis Van Blarcom, Esq., Sylvester Smith, Jr.,
Esq., Michael Dunn, Esq., For the State.

Egbert Rosecrans, Esq., Leonard Sweeney,
Esq., William A. Dolan, Esq., For the
Defendant.

20 (The Defendant being present in Court in the
custody of the Sheriff).

Mr. Van Blarcom: If the Court please, at this
time I move for judgment in the case of *State v.*
Angelo Carlino, convicted of homicide.

Mr. Rosecrans: If the Court please, I move in
arrest of judgment, first on the same grounds that
I have previously moved to quash the indictments,
secondly on the grounds raised in interposing
challenges to the array, and I ask that those
30 grounds be considered as if spread in full upon
the minutes without stating them in detail here;
Thirdly, because, upon the record of all the evi-
dence in this case the Defendant could not be con-
victed of murder as a matter of law, for the same
reasons advanced in making the motion to direct a
verdict of acquittal.

The Court: The motion will be denied, and the
reasons may be considered as though they were
re-stated here.

40

JAMES F. MINTURN,

J. S. C.
(Seal)

Charge

Defendant excepts.

Mr. Rosecrans: I further move for a new trial on the ground that the verdict is against the clear weight of the evidence, that it is against the instructions of the Court upon the law, and contrary to law and fact as produced in this case. 10
And, as previously stated, that upon the record of all the evidence in this case the defendant could not be convicted of murder as a matter of law, for the same reasons advanced in making the motion to direct a verdict of acquittal.

The Court: The motion will be denied.

JAMES F. MINTURN,

J. S. C.

(Seal)

20

Defendant excepts.

The Court: Have you anything to say now why sentence of law should not be imposed upon the defendant.

Mr. Rosecrans: No, sir, nothing further.

The Defendant was thereupon arraigned before the Court, and Charles Boitano was sworn as an interpreter, and, through the interpreter he was sentenced by the Court as follows:

The Court: You have been convicted for the crime of murder, and, after a long trial, before twelve intelligent and honest men of this County and while you were defended by very eminent counsel the Jury have found you guilty of murder in the first degree. 30

You may not have intended to kill anybody when you left Easton, but according to the testimony you did intend to rob—

The Interpreter: He says "For stealing, that is all." 40

The Court: The man who was killed was killed

Charge

while you were attempting to rob and that under the law makes you guilty of murder—

The Interpreter: He says; "I don't know anything about murder."

10 The Court: The Jury were satisfied that you were engaged in the crime of robbery and that this murder was committed while you were engaged in the robbery, by one of your gang, and the law under those circumstances makes you guilty of the crime of murder in the first degree, and the penalty for that crime is death.

The Interpreter: He says, "Why? I have not done anything?"

The Court: Your friend Turco and others with him.

20 The Interpreter: He says, "I did not kill him."

The Court: The Court regrets that it is obliged to impose this sentence upon you, but the law compels the Court to do so, since the jury have found you guilty of murder in the first degree—

The Interpreter: The prisoner says, "How can they find me guilty when I did not do it.

30 The Court: The penalty of the law for the crime which you have committed is death; you will therefore be remanded to the custody of the Sheriff of this County, and the Court will prepare a warrant and deliver it to the Sheriff directing him to take you and deliver you to the Principal Keeper of the States Prison, and there you will be kept until the execution of the sentence; and the order of the Court is that the sentence will be executed upon you during the week beginning April twenty fourth next.

The prisoner may be remanded to the jail.

The Court then adjourned.

Certificate

NEW JERSEY SUPREME COURT

STATE OF NEW JERSEY, Defendant in Error, vs. ANGELO CARLINO, Plaintiff in Error.	}	Sur Indict- ment for Murder.	10
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I, James F. Minturn, Judge of the Sussex Court
 of Oyer and Terminer before whom the above case
 was tried, do hereby certify that the foregoing is
 the entire record of the proceedings had upon the
 trial of the case of the State of New Jersey vs.
 Angelo Carlino, which may be returned by the
 Plaintiff in Error with the Writ of Error in or-
 der, that on the argument such entire record shall
 be considered and adjudged by the Appellate
 Court, as to whether or not the Plaintiff in Error
 on the trial suffered manifest wrong or injury
 either in admission or rejection of testimony,
 whether objection was made thereto or not, or any
 charge of the Court or any denial of any matter
 by the Court, which was a matter of discussion.

20

30

JAMES F. MINTURN,
 Justice of the Supreme Court.

Assignments of Error and Causes for Reversal

NEW JERSEY SUPREME COURT

10	STATE OF NEW JERSEY, Defendant in Error, vs. ANGELO CARLINO, Plaintiff in Error.	} Sur Indict- ment for Murder.
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20 Afterwards, that is to say, on the return of the writ of error in the above cause, in the Supreme Court of Judicature of the State of New Jersey, comes the said Angelo Carlino, by Egbert Rosecrans and Leonard A. Sweeney, his attorneys, and says that in the record and proceedings aforesaid and also in the matters recited and contained in the bill of exceptions, and also in the giving and judgment aforesaid there is manifest error in this, to wit:

1. The Court erred in refusing a trial and judgment upon the plea of *Autrefois Acquit* entered by defendant.

30 2. The Court erred in refusing to accept the defendant's plea of *Autrefois Acquit* upon the facts presented.

3. The Court erred in refusing to quash the indictment against the defendant in that the indictment did not set forth that the defendant was engaged in a robbery and that the murder sprang out of the robbery, the defendant not being the actual killer.

Assignments of Error and Causes for Reversal

4. The Court erred in overruling the several challenges interposed to the array of jurors upon the grounds stated.

5. The Court erred in overruling the challenge for cause of the juror, John Sharp.

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6. The Court erred in overruling the challenge for cause of the juror, Harry J. Willis.

7. The Court erred in overruling the challenge for cause of the juror, John I. B. Knight.

8. The Court erred in overruling the challenge for cause of the juror, John D. Williams.

9. The Court erred in overruling the challenge for cause of the juror, Thomas Hilton.

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10. The Court erred in overruling the challenge for cause of the juror, Frederick Terwilliger.

11. The Court erred in overruling the objection of the defendant to the method of drawing the jury in that the names of all jurors, including the special talesmen, should have been placed in the box at the beginning of the drawing.

12. The Court erred in refusing to order a mistrial upon the defendant's motion after the jury was drawn.

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13. The Court erred in admitting in evidence over objection testimony with reference to what took place after the silk truck was held up and taken from the possession of the employees of the Sussex Print Works, as the robbery was then complete.

14. The Court erred in admitting in evidence testimony as to conversation between Turco and others not in the presence of the defendant, Car-lino.

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Assignments of Error and Causes for Reversal

15. The Court erred in refusing the motion of the defendant at the end of the whole case to direct a verdict of not guilty upon the several grounds stated.

16. The Court erred in charging the jury:

10 “And the testimony in this case will warrant you in drawing that inference from the facts that when these men left Easton on that night with the revolvers in their possession, intent upon committing this robbery, they intended to take human life, if necessary, in order to perpetrate successfully this robbery. That is a fair inference. And this defendant was one of those men.”

20

17. The Court erred in charging the jury:

 “If you believe that he was, then you may find him guilty of murder in the first degree. If you believe that he was not a party to that act, that he was in no way responsible for it, that he was in no way identified with that robbery and with that murder by reason of the fact that he was identified with the robbery, then you may acquit him.”

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18. The Court erred in charging the jury:

 “Now, I charge you, gentlemen of the jury for the purposes of this case, that when this defendant left Easton with this combination of men to rob this silk truck on the highway of this county, and assisted in robbing that truck to the extent of taking the drivers of the truck up the hillside and there detaining them until Turko got away with the truck, that he is commonly

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Assignments of Error and Causes for Reversal

responsible under this law with Turko, and is guilty of murder in the first degree if you believe these facts. He is a party to the whole proceeding. Why did he go there? He went there to rob, there is no dispute about that. Why did he take the pistol or the gun with him? He took it there to use it, that is the fair inference, if you believe those facts. Why did he hold these two men up on the hillside, tied and bound, hand and foot? Evidently for the purpose of letting Turko get away. And Turko got away. But, unfortunately, he got away after taking a human life. 10

“Now, for that deed of taking that human life, Turko and every man identified with him in the robbery, is guilty of murder in the first degree if you believe the facts.” 20

19. The Court erred in charging the jury:

“This defendant under this statute that I have read to you, is guilty of murder in the first degree, if you conceive the facts to be as I have stated them.”

20. The Court erred in charging the jury: 30

“I charge you in this case, however, gentlemen of the jury, if the defendant is guilty at all, he is guilty of murder in the first degree; and if, on the facts in this case, you find him guilty, you must return a verdict of murder in the first degree, or you must acquit him. There is no alternative. He is either guilty or he is not guilty. The law allows no middle course in a case of this character.” 40

Assignments of Error and Causes for Reversal

21. The Court erred in failing to permit the jury to bring in a verdict of guilty of robbery, and to submit that issue to the jury.

10 22. The Court erred in failing to submit to the jury the question as to whether or not the robbery was complete at the time of the killing.

23. The Court erred in failing to submit to the jury the question as to whether or not the murder was the independent act of Turco.

24. The Court erred in charging the jury:

20 "I decline to charge that. I have already charged you if you believe the testimony, you may find the defendant guilty of murder in the first degree. If you do not believe the testimony, you may acquit him. Or if you believe under the construction of the law which I have attempted to outline to you, that he was not a party to this general scheme of robbery on the public highway, then of course, you may acquit him."

25. The Court erred in refusing to charge the jury:

30 "There is no evidence in the case to justify a conviction of murder."

26. The Court erred in refusing to charge the jury:

"Under the evidence in this case the crime of robbery has been completed at the time of the death of Albert Koster and the killing, therefore, did not take place in perpetrating or attempting to perpetrate the crime of robbery."

40 27. The Court erred in refusing to charge the jury:

Assignments of Error and Causes for Reversal

“Under the evidence in this case the crime of robbery was completed when Turko and Merlo or some others mentioned in the indictment forcibly took possession of the truck by putting the drivers in fear and immediately after Resh and Mains had 10 relinquished possession of the truck.”

28. The Court erred in refusing to charge the jury:

“If the deceased met his death at the hands of some other person than those actually in possession of the truck such death did not arise in the perpetration or the attempt to perpetrate a robbery.”

29. The Court erred in refusing to charge the jury: 20

“If the jury find that a robbery took place of the truck mentioned in this case by putting the drivers in fear and removing them therefrom, then taking possession of the truck, and driving away with the same and immediately thereafter deceased came along on his motorcycle and was shot and killed by some person other than the defendant, then such killing was not in an attempt to perpetrate a robbery, or in the commission of a robbery as the crime of robbery was complete before the killing. It is a question for the jury whether or not it was.” 30

30. The Court erred in refusing to charge the jury:

“If the shooting occurred not in the commission of the robbery but upon the public highway after the robbery had been com- 40

Assignments of Error and Causes for Reversal

10 pleted then the defendant Carlino could not have been guilty of murder unless Turko shot with premeditation and deliberation to effect the death of Koster and that Carlino was aware of this premeditated and deliberated plan."

31. The Court erred in refusing to charge the jury:

20 "To make Carlino liable for the act of Turko in killing Koster it must be shown from the evidence that Carlino not only aided and assisted in the commission of the robbery but that Carlino and Turko also actually agreed to mutually aid each other in effecting an escape by violence."

32. The Court erred in refusing to charge the jury:

 "You cannot infer that by reason of the joint plan to rob that there was also a joint agreement between Carlino and Turko to kill anyone interfering a considerable time after the robbery was complete."

30 33. The Court erred in refusing to charge the jury:

 "You must believe from the evidence that it was shown beyond reasonable doubt that Carlino and Turko not only agreed to rob but that before their robbery they both agreed to resist capture by violence."

34. The Court erred in refusing to charge the jury:

40 "If you believe from the evidence in this case that the defendants had intention to commit a robbery and did attempt so to do and in so doing killed Albert Koster but

Assignments of Error and Causes for Reversal

that the defendant Carlino had no knowledge of their unlawful intention, if any, to kill said Koster, and was not acting together with them in the commission of said offense, if any, or if you have a reasonable doubt thereof, then the defendant Carlino should be acquitted."

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35. The Court erred in refusing to charge the jury:

"Section 106 of the Crimes Act provides that only the person who killed another is guilty of murder in the first degree."

36. The Court erred in denying the motion of the defendant made in arrest of judgment upon the grounds stated. 20

37. The Court erred in denying the motion of the defendant for a new trial upon the grounds stated.

Plaintiff in Error also assigns the foregoing as the Causes for Reversal of the verdict and judgment of conviction.

30

EGBERT ROSECRANS,
LEONARD A. SWEENEY,
Attorneys for Plaintiff in Error.

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Joinder of Error.**NEW JERSEY SUPREME COURT**

THE STATE OF NEW JERSEY,
Defendant in Error,

VS.

ANGELO CARLINO,
Plaintiff in Error.

10

20

And thereupon the State of New Jersey, Defendant in Error in the above stated cause by Theodore E. Dennis and Lewis Van Blarcom, its attorneys, comes into Court and says that there is no error either in the record and proceeding aforesaid or in the giving of judgment aforesaid, and it prays here that the Court here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assign for error and that the judgment aforesaid in the manner aforesaid given, may in all things be affirmed, etc.

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LEWIS VAN BLARCOM,
THEODORE E. DENNIS,
Attorneys for Defendant in Error.

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Stipulation.

NEW JERSEY SUPREME COURT,

SUR INDICTMENT FOR MURDER.

STATE OF NEW JERSEY, Defendant in Error, vs. ANGELO CARLINO, Plaintiff in Error.	}	On Writ of Error to Sussex County Court of Oyer and Terminer.	10
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It is hereby stipulated and agreed by and between the Attorneys for the respective parties that the following paragraph be added to the State of the Case heretofore filed in the above cause and shall be considered as a part thereof: 20

The case of State vs. Antonio Turko was tried in the Sussex County Court of Oyer and Terminer on January 23rd and 24th, 1922, and the case of State vs. Angelo Carlino was tried in the same Court February 27th and 28th, 1922.

Dated, June , 1922.

LEWIS VAN BLARCOM,
Special Prosecutor,
Attorney for the State. 30

EGBERT ROSECRANS,
Attorney for the Plaintiff in Error.

Opinion of Supreme Court.

Filed Nov. 18, 1922.

NEW JERSEY SUPREME COURT,

JUNE TERM—1922.

10

STATE OF NEW JERSEY,
Defendant in Error,

vs.

ANGELO CARLINO,
Plaintiff in Error.

Before:

GUMMERE, Chief Justice and Justices
SWAYZE and TRENCHARD.

20

LEWIS VAN BLARCOM,	)	
MICHAEL DUNN,	)	for Defendant in
SYLVESTER C. SMITH, JR.	)	Error.
THEODORE E. DENNIS,	)	
EGBERT ROSECRANS,	)	for Plaintiff in
W. A. DOLAN,	)	Error.

The opinion of the court was delivered by
SWAYZE, J.:

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The defendant was one of a party who assembled in Pennsylvania and went to what is called the Cat Swamp, between Andover and Stanhope, in Sussex County, under the lead of one Turko. They waylaid a truck laden with silk, and rolls used in silk manufacturing. The chauffeur of the truck and his companion were taken by Carlino and three associates, tied with ropes as prisoners and abandoned a few hours later. While they

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Opinion of Supreme Court.

were there, one Coster came down the road on a motorcycle on his way to work. Turko stopped him and shot him dead that he might not spread news of the robbery. Carlino is said not to have been within sight or hearing of the spot where Coster was killed. Turko was indicted for, and convicted of murder. Carlino was also convicted of murder and his conviction is now before us for a review. 10

When called to plead to the indictment, Carlino pleaded not guilty. When the trial was moved, he was allowed, on his own application, to withdraw the plea of not guilty and then offered to interpose a plea in bar in which he averred that he had been heretofore lawfully acquitted of the same offense charged in the indictment and stands acquitted of the robbery charged in another indictment, out of which robbery the indictment and charge of murder is said to spring. Inasmuch as neither indictment of Carlino had been tried, this plea is most extraordinary. Counsel contend that because there were two indictments, one for robbery, and one for murder, and the State chose to try the indictment for murder first, that election was equivalent to acquittal, on the other indictment, but he does not attempt to explain how a mere election to try one indictment before the other can amount to an acquittal on the indictment not tried. His case lacks the essential element of a verdict. The defendant makes a bold attempt to substitute the supposed opinion of the prosecutor of the pleas for a verdict, and that without even showing cause to believe that it is really an opinion of the prosecutor. It is unnecessary to say more. 20 30 40

Opinion of Supreme Court.

10 The next question arises on the challenge to the array because the sheriff, who acts as a jury commissioner under the act of 1913, took an oath of office as such, and because the oath taken by the jury commissioner was not in the form required by the statute. This objection is sufficiently answered by the reasoning of the Court of Errors and Appeals in *State vs. Zeller*, 83 Law, 666. It would be manifestly illegal to try the title of the sheriff or the jury commissioner to his office in this merely collateral way. Each is, at least de facto, in possession of the office to which he was elected or appointed.

20 Another objection to the array is the manner of the selection of the jurors summoned. The general panel for the term in Sussex County consisted of forty-eight jurors and a list of these jurors was served upon the defendant as required by the statute. It cannot now be claimed that the mere form of drawing forty-eight names from a general panel of forty-eight is necessary when the general panel consists of exactly that number. That is required only when the general panel is composed of more than forty-eight. *State vs. Tomassi*, 75 Law, 739. What happened in the present case was that the jury commissioners 30 either on their own responsibility or the suggestion of the court anticipated that a large number of jurors might be required and therefore drew from the whole list of eligible jurors, required by the act of 1913, a further panel of twenty-four in advance of trial—talesmen in the proper sense. This was proper. *Patterson vs. State*, 48 Law, 381.

Opinion of Supreme Court.

Another objection to the array was because at least twelve of the general panel had participated in the prior trial and conviction of Turko and as the crime charged and facts proved were substantially the same it is urged that the jurors who sat in the Turko case were not competent jurors for the trial of the present case. Stephens vs. State, 53 Law, 245, at 252. It may be that this was good ground for challenge to the polls for favor, but a challenge to the whole array is very different from a challenge even to as many as twelve jurors for favor. The very fact that peremptory challenges are permitted is sufficient to show that the law does not expect a sheriff to secure in every case an impartial juror. No machinery is provided by which the sheriff can be certainly informed what jurors have sat upon a former trial. It is not suggested that the right of a defendant to an impartial jury needs such protection. It is moreover quite certain that if such an objection were allowed as ground of challenge to the array the difficulty of securing a trial in a criminal case would be insuperable. Sufficient protection is afforded by the number of peremptory challenges to the polls.

The defendant also claims that some of the challenges to the polls should have been sustained. All these challenges were based on the previous expression of opinion; most of the jurors said that their opinion was such as would be overcome by evidence. Some admitted that it would take evidence to overcome it. We think these challenges were properly over-ruled. Moschell vs. State, 53 Law, 498. There is no suggestion that there was anything more than the formation and expression of a mere academic opinion.

Opinion of Supreme Court.

Another objection to the array is that no women were selected as jurors. We need add nothing to what has already been said by the Chancellor, speaking for the Court of Errors and Appeals in *State vs. James*, 114 Atl. 553. It is said that this ruling is no longer applicable in view of the act of 1921, P. L. 1921, page 50, but we fail to find anything in that act to affect the reasoning of the Chancellor. This brings us to the more substantial assignments of error.

The fact that Coster's death was caused by shots fired by Turko at a time when Carlino was out of sight and hearing does not free Carlino from criminal liability. It is well settled in this state, following the English Law, that all who are present, aiding and abetting in a felony are principals. *Roesel vs. State*, 62 Law, 216. The question is "what constitutes such a presence as will render a man a principal" and in the *Roesel* case we adopted the rule that if several persons set out together or in small parties upon one common design, be it murder or other felony, or for any other purpose unlawful in itself and each takes the part assigned to him, some to commit the fact, others to watch at proper distances to prevent a surprise or to favor if need be the escape of those who are immediately engaged, they are all, provided the fact be committed, present at it. The illustration given is quite like the present case. "If divers persons come in one company to do any unlawful thing as to kill, rob or beat a man or to commit a riot or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party abetting and

Opinion of Supreme Court.

consenting to the act or ready to aid him, though they did but look on."

A qualification came to be introduced by which the rule was limited to cases where a homicide was the natural and probable result of the crime actually intended. It is enough to refer to the cases cited in 21 Cyc 689. Substantially this limitation is now embodied in section 107 of the Crimes Act. The crimes therein specified are all crimes, the natural and probable consequence of which is a homicide. 10

The question therefore turns on the proper construction of section 106. It is urged that this cannot apply because it professes to legislate as to "any person" in the singular and not "any person" in the plural. We find it difficult to treat seriously an argument that would make the statute define murder by words intentionally inapplicable to two persons engaged together in the actual deed. There could not be a clearer case for the application of the general provision of the act relative to statutes. There is nothing in section 106 to indicate that the Legislature meant to exclude from its operation the time honored principles of the common law. The Court of Errors and Appeals has in effect so decided in State vs. James, 114 Atl. 553, and State vs. Timmerari, 115 Atl. 394. The question does not seem to have been argued and no doubt was suggested in those cases. It is true they do not deal with a situation where the person accused was so far removed from the scene of the fatal blow as Carlino was, and we must still consider whether the rule of the common law is by statute applicable to the present case. We have no difficulty. When 20 30 40

Opinion of Supreme Court.

the Legislature enacted that if the death of anyone shall ensue from the committing or attempting to commit any of the specified crimes, it clearly intended that a man might be held guilty although he was not the actual assailant if he was guilty on the theory of constructive presence.

10 Our legislation in the sections cited does not suggest any intent to change the law. The crime remains the same crime as before and the legislation has merely made a distinction with a view to the difference in the punishment between the most heinous and the least aggravated grades of murder, very much as it has in the recent legislation authorizing the jury to substitute life imprisonment for death. State vs. Graves, 45 Law, 203; Titus vs. State, 49 Law, 36. Under
20 the rule of these cases, anyone guilty of committing or attempting to commit a robbery would be guilty of murder if death results. The guilt of committing or attempting to commit a robbery is to be ascertained by the principles of the common law establishing liability in cases of a common enterprise, or a constructive presence. The defendant is in this category.

One question remains. Was Carlino no longer
30 responsible for Turko's crime because their joint action in the robbery had come to an end? It is not possible to lay down a hard and fast rule in a matter so largely one of fact. It seems clear to us that as long as the four men remained in charge of the chauffeur of the truck and his companion as prisoners, just off the highway on which the robbery was committed and within a very short distance of the point where the shots were fired, and as long as the truck and the silk seized

Opinion of Supreme Court.

by the robbers remained in their control at the scene of the robbery and homicide with the evident intent on their part to return to Pennsylvania—the state from which they came—we think the robbery was not at an end. The robbers themselves must have contemplated further joint action until they had made their escape; holding the chauffeur and his companion as prisoners in bonds was itself an act in pursuance of the concert of action to commit the robbery. The holding of the two men as prisoners was a continuous act and it would be preposterous to attempt to say at what instant of time short of their release or escape, the responsibility of the robbers ceased. 10

Carlino was guilty therefore of murder as defined in section 106 of the Crimes Act. The jury ascertained under section 107 that this was murder in the first degree, as it must have been under our construction of section 106. 20

We think the judge was quite right in telling the jury that their verdict must be either murder in the first degree or an acquittal. We find no other point in the case that it is necessary to consider.

Let the judgment be affirmed. 30

Rule of Affirmance and Remittitur.**NEW JERSEY SUPREME COURT.**

10	STATE OF NEW JERSEY, Defendant in Error, VS. ANGELO CARLINO, Plaintiff in Error. } On Error.
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20 This cause having been heard before the Court at the November Term, 1922, and the Court having considered the reasons for reversing the Judgment removed by the Writ of Error in this cause and duly considered the argument of the attorneys of the respective parties, and being of the opinion that the Judgment removed by the Writ of Error in this cause should be affirmed,

It is Ordered that the Judgment removed by the Writ of Error in this cause be and the same is hereby affirmed and the record remitted to the lower court to be proceeded with according to law.

Entered March 6, 1923, on motion of Lewis Van Blarcom, attorney.

30 A true copy.

EDWARD J. KELLEHER,
Clerk.

Proceedings on Re-Sentence.

STATE

v.

ANGELO CARLINO.

Newton, N. J., January 29, 1923.

10

The Court met pursuant to Notice.

Present:

Hon. JAMES F. MINTURN, *J.*, Presiding.Hon. ALLEN R. SHAY, *C. P. J.*

Of Counsel:

MICHAEL DUNN, Esq.,

LEWIS VAN BLARCOM, Esq.,

SYLVESTER C. SMITH, JR., Esq.,

For the State.

20

EGBERT ROSECRANS, Esq.,

For the Defendant.

Prosecutor Van Blarcom: If the Court please, the State moves the re-sentence of Angelo Carlino, convicted of murder.

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Mr. Rosecrans: If the Court please, it is within the knowledge of the Court that this defendant Angelo Carlino was used as a witness for the State in the trial of the indictment against John Saba and David Saba. Therefore, I move in arrest of judgment, so that he may be in a position to apply to the Court of Pardons for clemency or commutation of his sentence on that

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Proceedings on Re-Sentence.

ground. Of course, the case of State v. Graham, in the Supreme Court, has laid down the rule that a co-defendant who testifies for the State, makes full and fair disclosure, earns the right to the equitable relief of the pardoning power. If this defendant is sentenced to death at this time he may not have an opportunity to lay the case before the Court of Pardons, and there is authority for this course? I move that now, in arrest of judgment.

The Court: Is it proposed that I should sentence the defendant in order to bring the case before the Court of Pardons?

Mr. Rosecrans: He may not have an opportunity to bring it before the Court of Pardons before the sentence is executed.

The Court: That can be overcome by putting the sentence far enough off.

Mr. Rosecrans: I do not think it is within the province of this Court to pass any other sentence than that of death so that I make this motion.

The Court: That motion will be denied.

Mr. Rosecrans: There is one other motion that I would like to make in arrest of judgment, based on Section 221a of the Crimes Act which provides that any person who shall give or aid the prosecution shall be exempt from punishment, and I make the formal motion in arrest of judgment on that ground, that this defendant, Angelo Carlino, assisted and aided the State in the prosecution of the indictment against David Saba and John Saba.

The Court: Does that appear in the case or on the record? How does that appear on the record?

Proceedings on Re-Sentence.

Mr. Rosecrans: Well, it is known to this Court which sat at the former trial.

The Court: Perhaps the Prosecutor will agree to it?

Mr. Van Blarcom: I have no objection to it. It is well known that this man testified in the trial last week for the Prosecution. There is no dispute of that. Of course that was subsequent to the conviction, the Court knows that. 10

Mr. Rosecrans: Yes.

The Court: The motion will be denied.

Exception to defendant.

James F. Minturn,

J. S. C.

The defendant Carlino being then arraigned before the Court, and attended by the Interpreter, Frank Romano, he was sentenced by the Court in the following terms: 20

The Court: Your case was tried and you found guilty on practically the same testimony upon which Tony Turco was convicted. Your case was carried to the Supreme Court by your counsel, and the Supreme Court affirmed that conviction, and you are back here now for sentence.

The Jury found you guilty of murder in the First Degree. Your counsel says that you have been of some service to the State in the prosecution of some other cases. That is something of which this Court can take no notice at this time. The law requires the Court to perform the simple disagreeable duty of sentencing you to death, in accordance with the verdict of the Jury. 30

You, like Tony Turco, came here with a gun in your possession, prepared to rob this silk mill,

Proceedings on Re-Sentence.

and to kill anybody who would interfere with you in the perpetration of that unlawful act. In other words, you came here prepared to kill, with a gun in your possession. If that was not your purpose, to kill if interfered with, there was no need for you to carry a gun.

10 The law makes you guilty, therefore, for the killing of Mr. Koster, by your friend and associate Tony Turco, who was engaged with you in this same unlawful business.

20 The sentence of the law, therefore, is, that of death. You will be remanded to the custody of the Sheriff and the Court will prepare a warrant and deliver it to the Sheriff directing him to take you and deliver you to the Principal Keeper of the State's Prison where you are to be kept until the execution of the sentence imposed upon you. The sentence will be executed upon you in the week beginning March twelfth.

30 The prisoner may be remanded to the jail.

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Writ of Error to Supreme Court.

NEW JERSEY, SS.:

THE STATE OF NEW JERSEY to our Chief
Justice and other Justices of our Su-
preme Court,

(Seal)

GREETING:

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Because in the record and proceedings, and
also in the giving of the judgment upon a certain
indictment which was in our Supreme Court
before you, between the State of New Jer-
sey, Defendant in Error and Angelo Carlino,
Plaintiff in Error, on a writ of error is-
sued out of our Supreme Court to our Judges
of our Court of Oyer and Terminer of the County
of Sussex, as is said, manifest error has inter-
vened, to the great damage of the said Angelo
Carlino, as from his complaint we have received
information, we being willing in this behalf to
correct the error in due form, if any there shall
be, and that speedy justice be done to him, the
said Angelo Carlino, do command you that if
judgment be thereupon given, that you send dis-
tinctly and openly, under your seal, the entire
record, proceedings and indictment aforesaid, with
all things touching and concerning the same, to
our Court of Errors and Appeals, before the
Judges thereof, on the 24th day of March, Nine-
teen hundred and twenty-three, and this writ,
and that the records and proceedings aforesaid
being inspected, we may cause to be doné there-
upon, what, of right and according to the law,
ought to be done.

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WITNESS, EDWIN ROBERT WALKER, our Chancellor, and President Judge of our said Court of Errors and Appeals, at Trenton, aforesaid, the 6th day of March, Nineteen hundred and twenty-three.

THOMAS F. MARTIN,
Clerk.

10 EGBERT ROSECRANS,
Attorney of Plaintiff in Error.

Return to Writ.

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is
20 within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE,
C. J.

A true copy,
E. J. KELLEHER,
Acting Clerk.

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**Assignments of Error and Causes for
Reversal.**

Filed June 26, 1923

**NEW JERSEY COURT OF ERRORS AND
APPEALS**

STATE OF NEW JERSEY,
Defendant in Error,

vs.

ANGELO CARLINO,
Plaintiff in Error

Sur
Indictment
for
Murder

10

Afterwards, that is to say, on the return of the writ of error in the above cause, in the New Jersey Court of Errors and Appeals, comes the said Angelo Carlino, by Egbert Rosecrans and Leonard A. Sweeney, his attorneys, and says that in the record and proceedings aforesaid and also in the matters recited and contained in the bill of exceptions, and also in the giving of judgment aforesaid there is manifest error in this, to wit:

20

1. That the Supreme Court of Judicature of the State of New Jersey, erred in giving judgment for the defendant in error instead of for the plaintiff in error, and that it so erred for one or more of the assignments of error and causes for reversal filed in the Supreme Court and returned with the record.

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2. The Court erred in denying the motion of defendant made in arrest of judgment upon his resentence, for the grounds stated.

EGBERT ROSENCRANS,
LEONARD A. SWEENEY,
Attorneys for Plaintiff in Error.

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Joinder in Error.NEW JERSEY COURT OF ERROR AND
APPEALS

10	STATE OF NEW JERSEY, Defendant in Error, vs. ANGELO CARLINO, Plaintiff in Error	}	Sur Indictment for Murder. Error to Supreme Court.
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20 And thereupon the State of New Jersey, Defendant in Error in the above stated cause by Theodore E. Dennis and Lewis Van Blarcom, its attorneys, comes into Court and says that there is no error either in the record and proceeding aforesaid or in the giving of judgment aforesaid, and it prays here that the Court here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error and that the judgment aforesaid in the manner aforesaid given, may in all things be affirmed, etc.

30 LEWIS VAN BLARCOM,
 THEODORE E. DENNIS,
 Attorneys for Defendant in Error.

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

ANGELINO CARLINO,
Plaintiff-in-Error.

In Error to the
Court of Oyer and
Terminer of the
County of Sussex
in the State of New
Jersey.

On Conviction
for Murder in the
First Degree.

BRIEF FOR THE STATE, DEFENDANT-IN- ERROR.

THEODORE E. DENNIS, Prosecutor of the Pleas;

LEWIS VAN BLARCOM,
MICHAEL DUNN,
SYLVESTER C. SMITH, Jr.,
of Counsel.

Statement of Facts.

The writ of error in this case brings up for review the record and proceedings upon a certain indictment against Angelo Carlino for murder, committed while perpetrating a robbery at Byram Township, in the County of Sussex and State of New Jersey, on June 14, 1921. The charge is made in the statutory form and alleges that the said Angelo Carlino and others named in said indictment did at the time and place above stated wilfully, feloniously

and of their malice aforethought, kill and murder Albert Koster.

The contention of the State is that this defendant, although he did not take an actual part in the murder, was engaged with others in the perpetration of a robbery, and that, while the robbery was in the process of perpetration, a murder was committed by another member of the band, and that this defendant, being one of a number of conspirators engaged in the robbery, from which murder resulted, is equally guilty with the principal in the crime, Antonio Turco. All the co-conspirators are principals.

The State alleged and proved at the trial that the crime of robbery was the result of a conspiracy entered into by the defendant and others at the City of Easton in the State of Pennsylvania, to come into this State for the purpose of robbing a silk truck owned and operated by the Sussex Print Works, a firm doing business in the Town of Newton, Sussex County, New Jersey.

The conspiracy was entered into during the early part of June, 1921, and on the night of June 13, 1921, this defendant, Angelo Carlino, together with ten others jointly indicted with him, came to Byram Township, Sussex County, New Jersey, from the City of Easton with the intention of holding up and robbing the said truck of the Sussex Print Works. This defendant with the other conspirators went to a point on the highway leading from the Town of Newton to the Borough of Stanhope, arriving there some time during the night of June 13th, and there lay in wait until Tuesday morning, June 14, 1921.

The particular point on this road where the robbery and murder took place is known as Cat Swamp, a lonely stretch passing through the mountains and woods, with no inhabited dwellings, for a long distance on either side. The road surface is constructed of bituminous macadam and is about eighteen feet wide. The entire width of the road

from gutter to gutter being about thirty feet. As Cat Swamp is approached from the north side or the side in the direction of Newton, the road leads up the mountain on a steep grade, the distance from bottom to top being approximately eleven hundred feet. At the top of this grade the road runs level for about twelve hundred feet, and then begins to descend the mountain on the south side down what is known as the Winding Hill. At the top of this hill and on the right side of the road is an open space about fifty feet long and thirty feet deep, level but not paved as is the surface of the main highway. On either side of the road as it crosses the mountain is heavy underbrush, at this time of year, in full foliage.

As the hill is approached on the north side of the mountain the trees and underbrush grow close to the road. On the right the ground drops away from the road, and on the left rises up a steep bank.

On the morning of June 14, 1921, the truck of the Sussex Print Works, loaded with silk and other goods, left Newton on its regular trip to the City of Passaic. In was in charge of Claude Resh, driver, and Charles Maines, his assistant. The truck contained three trunks of silk valued at \$6,790.46 and fifteen copper rollers valued at \$1,291.50. The truck itself was worth about \$4,000.

The truck is of two tons capacity of Pierce-Arrow manufacture. The body is entirely closed, with doors on the side and rear. These doors were closed and locked. The driver and his assistant sat in a partly open cab in the front; the driver being on the right side of the seat.

On this morning the truck reached Cat Swamp at about 6.30 A. M., daylight saving time, and was proceeding up the mountain on the north side going in the direction of Stanhope and Passaic at a low rate of speed. It had reached a point about two-thirds of the distance towards the top of the hill, when six armed and masked men rushed from the under-

brush on the lower or right-hand side of the road, and at the points of their pistols compelled the driver, Resh, to stop the truck. They then took both Resh and Maines from the truck, and four of the men, the defendant being one of them, rushed them off the road and up the steep bank on the left and back into the woods. Here this defendant and three others of the band held Resh and Maines captives until after noon, finally taking them deep in the woods and binding them with ropes. The four men then went away. The hold-up took place at about 6.30 in the morning and it was about 3 o'clock in the afternoon when Resh and Maines got their legs and arms released from the ropes and made their escape and gave the alarm.

After Resh and Maines had been removed from the truck, two other members of the band, Antonio Turco and John Merlo, took charge of the truck, and with Merlo driving the same, proceeded along the road, in the direction of Stanhope, until they came to the open space at the top of the Winding Hill. There Merlo backed the truck off the road with the intention of turning it around in order that they might begin their flight back towards Easton.

After he had backed the truck into this open space to turn it, and while it was stationary with the front end pointing towards the public road, one Albert Koster appeared coming along the road from the direction of Andover. He was riding a motorcycle with a side car attachment, and was going from his home in Andover to his work in the Borough of Stanhope. Antonio Turco was at this time standing on the ground near the truck. He stepped out into the road with a pistol in his hand and ordered Koster to stop. Before he could do so, Turco shot and killed him. The body was found later in the day lying face downward in a small brook back of the underbrush in the rear of the open space.

While this murder was being committed the truck remained stationary, and it was not until

Koster was killed that the actual flight from the scene of the crime commenced. At this time all the men engaged in the crime were still in the locality, being stationed along the road, and this defendant with three others were still holding Resh and Maines captives in the woods.

The defendant was indicted and tried in the Sussex Oyer and Terminer, before a jury, on February 27 and 28, 1922, and a verdict of murder in the first degree was rendered against him. No evidence was offered in his defense.

On March 2, 1922, the defendant was sentenced to death. He was removed to the State Prison at Trenton. He then sued out this writ of error, from the Supreme Court and the conviction was affirmed by that court.

The record will show that the defendant had a just and fair trial and that his guilt was proved beyond all doubt.

The plaintiff assigns as error the ruling of the Court in drawing and empanelling the jury, in the admission and rejection of evidence and in the charge. A review of the errors assigned will convince this Court that no error prejudicial or harmful to the defendant in presenting his defense was made at the trial, and that the judgment should be affirmed.

First and Second Assignments.

These assignments have been abandoned by the defendant.

Third Assignment.

The court committed no error in refusing to quash the indictment against the defendant. The indictment was drawn in compliance with the statute (see 1910 C. S., p. 1832, Sec. 36).

Graves v. State, 45 N. J. L., 203 and 347.

Titus, 49 N. J. L., 36.

Fourth Assignment.

This assignment says "The Court erred in overruling the several challenges interposed to the array of jurors upon the grounds stated." What these grounds are is not clear and without searching the record it would be difficult to tell upon what premises the plaintiff in error bases his objection. It is assumed that the motion was based upon the reasons set out in the following six assignments dealing with objections to the Court's ruling upon challenges for cause.

An examination of the record shows that there was nothing brought out in the questioning of these jurors that would entitle the defendant to a challenge for cause and the Court was correct in the exercise of its discretion in refusing to allow the challenges.

Johnson vs. State, 39 N. J. L., 271.

Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Assignments.

These are dealt with under the reply to the fourth assignment.

Eleventh Assignment.

The court properly overruled the objection of the defendant to the method of drawing the jury because the names of all the jurors were not placed in the box at the beginning of the drawing. Section

83 of the Criminal Procedure Act provides that when the panel or list of jurors served on a defendant, in any case in which the defendant shall be entitled to twenty peremptory challenges, shall be exhausted from any cause before a jury for the trial of the indictment shall be obtained, talesmen shall be taken from the general panel of jurors returned, for the term at which such defendant is to be tried, if any remain; and if more talesmen should be required than the number of jurors remaining on the general panel, the sheriff or other proper officer shall forthwith summon from among the bystanders or others such additional number of persons qualified to serve as jurors as may be ordered by the court and make return thereof immediately and place the names of the jurors so returned in the box and draw therefrom until the jury be completed.

The record shows that the general panel in Sussex County for the December Term, 1921, consisted of forty-eight jurors, being the identical panel of jurors that was duly served upon the defendant. This panel of jurors was exhausted before the names of the talesmen were placed in the box to be drawn.

This procedure was proper and in strict compliance with the statute above set forth and the court was correct in overruling the objection interposed thereto by the defendant.

Twelfth Assignment.

This assignment specifies error in the court refusing to order a mistrial upon the defendant's motion after the jury was drawn.

It is assumed that the grounds for this motion were based upon the reasons stated in the previous assignments and have been dealt with therein. There is no merit in the application and it was properly refused.

Thirteenth Assignment.

This assignment specifies error in the admission of testimony as to what took place after the silk truck was held up and taken from the possession of the employees of the Sussex Print Works, alleging that the robbery was then complete.

The State contends that the robbery was the result of a conspiracy entered into by this defendant and ten others to come to this State from the State of Pennsylvania for the purpose of robbing a truck operated by the Sussex Print Works; that the death of Albert Koster ensued from the perpetrating of this robbery, and although it is not alleged that this defendant was the actual murderer, yet it is well established that as a co-conspirator he would be bound by all acts of his fellow conspirators and is equally guilty of murder.

State v. Young, 67 L., 223.

State v. Zeller, 77 L., 619.

Crimes Act, Secs. 106, 107, 108.

The State further contends that the robbery was not complete at the time of the murder. This defendant and three other members of the band were holding the driver, Resh, and his helper, Maines, captives in the woods for the obvious purpose of preventing them from giving an alarm until such time as other members of the band might reach a place of safety with the truck.

At the time of the murder the truck and all of the men engaged in the crime of robbery were still at the scene on the premises. The truck was standing still and had not yet been turned in the road and the flight towards Easton had not started.

It is well established that where several are engaged in a robbery under mutual agreement, the robbery is not complete in its legal significance until the stolen articles are distributed.

II Wharton's Criminal Evidence, p. 1437.

Scott v. State, 38 Ala., 503.

O'Neil v. State, 14 Tex., 582.

Holmes v. State, Okla. Crim. Rep., 119 Pac., 430 (1911).

People v. Kauffman, 152 Cal., 331; 92 P., 861.

State v. Grady, 34 Conn., 131.

There was no error, therefore, in the admission of all testimony as to acts of the conspirators and events following the seizure of the truck to prove the facts of the murder; to show conversations and acts of the conspirators so as to establish matters as part of the *res gestae*.

45 L. R. A., N. S., 55 at 56.

12 Cyc., 436.

Underhill on Crim. Ev., Sec. 492, p. 797.

State v. Kane, 77 L., 244.

Conrad vs. State. Am. & Eng. Anno. Cases Vol. 8, pg. 966, notes pg. 973. 75 Ohio pg. 52.

Fourteenth Assignment.

This assignment deals with the admissions of conversations between Turco and other defendants not in the present of the defendant, Carlino.

"Where there is evidence tending to show community of design between two or more persons for the performance of an unlawful act, the actions and conduct and statements of one of them are admissible in evidence in a prosecution against another of the conspirators for homicide alleged to have resulted from the conspiracy.

And this is the rule though such acts were not done, or though such statements or declarations were not made in the presence of the person against whom they were used."

45 L. R. A. (N. S.), at 56.

12 Cyc., 436.

Underhill on Criminal Evidence, Sec. 492, p. 797.

State v. Kane, 77 L., 244.

And it is not necessary to charge conspiracy in the indictment.

16 C. J., par. 1284, p. 647.

It is contended, therefore, that there was no error prejudicial to defendant in admitting such testimony.

Fifteenth Assignment.

The action of the court in refusing to direct a verdict of acquittal at the close of the case was not error. The action of the trial court upon the application of the defendant to direct his acquittal made at the close of the case is not reviewable on a writ of error when the case comes up on a strict bill of exceptions. Such a motion when made at the close of the State's case is addressed to the discretion of the trial court.

State v. Metzger, 82 N. J. L., 749.

State v. Jagers, 42 Vroom, 283.

A review of the record will show that the only evidence adduced at the trial was that on the part of the State; the defendant having stood mute. Since the evidence offered by the State was not

disputed, the court was bound to consider it as true and we contend that it was sufficient to justify the court in denying the motion and submitting the case to the jury for their verdict.

Sixteenth Assignment.

This assignment deals with an extract from the court's charge in which he says:

"And the testimony in this case will warrant you in drawing that inference from the facts that when these men left Easton on that night, with revolvers in their possession, intent upon committing this robbery, they intended to take human life, if necessary, in order to perpetrate successfully this robbery. That is a fair inference. And this defendant was one of those men."

This was properly charged. It is a natural and legal inference that, if a man goes out with the intention of committing a crime and is armed with a deadly weapon, he intends to use that weapon in furtherance of his purpose.

The defendant might have explained why he was armed, but did not avail himself of this privilege, and, in fact, did not testify in his own defense.

The court properly exercised his right in the charge in drawing the attention of the jury to the facts and the inference that they might draw from them, if they believed them to be true.

State v. Killman, 76 L., 644.

State v. Warady, 77 L., 348.

State v. Schuyler, 75 L., 487.

There was no error by the court in so charging the jury that was prejudicial to the defendant on

the merits of the case.

Seventeenth Assignment.

The court correctly stated the law in the part of the charge to which exception is taken in this assignment:

"If you believe that he was, then you may find him guilty of murder in the first degree. If you believe that he was not a party to that act, that he was in no way responsible for it, that he was in no way identified with that robbery and with that murder, by reason of the fact that he was identified with the robbery, then you may acquit him."

This was not error.

State v. Warady, 77 N. J. L., 348.

Further, this except from the charge was not prejudicial to the defendant but in fact was in his favor.

Eighteenth Assignment.

This was a proper charge under the law as contained in the statutes and interpreted by our courts in the following cases:

State v. Young, 67 L., 223.

State v. Zeller, 77 L., 619.

The comment of the court in this section of his charge was also proper under the following decisions:

State v. Killman, *ibid.*

State v. Warady, *ibid.*

State v. Schuyler, *ibid.*

This is no ground for error.

Nineteenth Assignment.

The court committed no error in the part of the charge to which exception is taken in this assignment. The determination of the facts was left to the jury and the statute quoted was the law applicable to the case.

State v. Zeller, 77 L., 619.

Twentieth Assignment.

The exception taken under this assignment to the charge of the court is without merit. There was no error in the court so charging. Section 107 of the Crimes Act defines murder committed in the perpetration of robbery as murder in the first degree, and it is well established in the cases cited and in many other New Jersey cases that it is proper for the court to so charge. The accused offering no defense, the court could legally charge in no other terms.

State v. Young, *ibid.*

State v. Zeller, *ibid.*

Crimes Act, Sec. 107.

Twenty-first Assignment.

The court committed no error in failing to permit the jury to bring in a verdict of robbery and of submitting that issue to the jury. The only

charge set forth in the indictment upon which defendant was being tried was murder. Although under the statute it was necessary to adduce facts in the proof which showed that a robbery had been committed, still it was not upon this offense that defendant had been arraigned and was on trial.

State v. Cooper, 13 N. J. L., 361.

Twenty-second Assignment.

This assignment claims error in that the court did not submit to the jury the question as to whether or not the robbery was complete at the time of the killing.

This assignment is defective in that it does not set forth that any request was made to the court to so charge, or that any exception was taken to the court's failure to so charge. The assignment should be stricken out.

The State contends, however, that the question as to whether the robbery was complete or not at the time of the murder is purely one of law and could not be properly submitted to the jury.

See authority cited under reply to Assignment 13.

Twenty-third Assignment.

This assignment alleges that the court erred in failing to submit to the jury the question as to whether or not the murder was the independent act of Turco.

The assignment is defective in that it fails to set forth that any request was made to the court to so charge or that any exception was taken to the court's ruling, and for this reason does not comply

with Section 137 of the Criminal Procedure Act and should be stricken out.

See authorities cited under reply to Assignment 4.

The State contends, however, that there is nothing in the record that would justify a conclusion that the murder was an independent act of Turco, but, on the contrary, all the evidence in point shows that the murder was committed during or ensued from the perpetration of the robbery and in furtherance of the common design of all the men engaged in the robbery. There is nothing to support the contention intended to be made in this assignment.

The question as to whether the robbery was complete is treated in the reply to Assignment 13, to which reference is made.

As to whether the robbery was complete or not is a question of law and not properly submitted to the jury.

See reply to Assignments 13 and 22.

There is no error here prejudicial to the defendant.

Twenty-fourth Assignment.

This assignment is objectionable in that it fails to set out the request to charge and does not comply with Section 137 of the Criminal Procedure Act.

See reply to Assignment 4.

There is no error in this part of the court's charge prejudicial to the defendant, but, on the contrary,

an examination of the wording will show that it was favorable to the defendant.

The defendant did not dispute the evidence of the State connecting him with the common design to rob and the proof of the actual carrying out of this design, as an examination of the record will show.

Twenty-fifth Assignment.

Exception is taken here to the refusal of the court to charge: "There is no evidence in the case to justify a conviction of murder."

The court properly refused to so charge, under a proper exercise of judicial discretion. An examination of the record will show that there was an abundance of evidence under the law applicable to this case to justify a conviction of murder, and the court very properly submitted the facts to the jury. It would have been a travesty on justice to have so charged, as the legal effect would have been a direction to acquit.

Twenty-sixth Assignment.

The court properly refused to charge this request for reasons stated in reply to Assignment 13.

The evidence shows that the robbery had not been completed in the legal intent as applied to this case, as is fully answered in reply to Assignment 13.

There is no error here prejudicial to defendant.

Twenty-seventh Assignment.

This assignment is a practical repetition of the same grounds for reversal stated in Assignment 26, and is fully answered in the reply to Assignment

13, to which reply and authorities quoted thereunder reference is made.

There was no prejudicial error on the part of the court in refusing to charge this request.

Twenty-eighth Assignment.

The court very properly refused to charge the request set forth in this assignment. It assumes that the shooting might have been committed by some stranger to those engaged in the robbery of the truck, which assumption absolutely disregards the fact shown by the uncontradicted evidence, namely, that Turco, one of the conspirators with whom the defendant was co-operating, shot Koster. The request, not being in keeping with the evidence in the case, was properly denied.

Twenty-ninth Assignment.

The court properly refused to charge this request for reasons given in reply to Assignment 13 and Assignment 22 above.

The record will show, although the truck had been moved after it was taken from the possession of the driver and his helper, it had not been driven away from the scene and the premises upon which the robbery and murder were committed, but had merely been driven to a more convenient place on the highway in order to turn it around so that it could be driven away. It was stationary at the time of the killing of Koster by Turco and had not yet been headed towards Pennsylvania, the direction in which the robbers intended to escape.

The law has been clearly established, both by statute and decision of the courts, that where death results from the perpetrating or attempt to perpetrate a robbery, the person causing said death shall be guilty of murder in the first degree, and that all

others aiding and abetting the robbery shall be equally guilty of murder in the first degree.

State v. Young, Ibid.

State v. Zeller, Ibid.

There was no error committed by the court in refusing this request to charge.

Thirtieth Assignment.

The court properly refused to charge this request, there being no law or facts to justify such an assumption under the evidence in this case.

It is contended, as already stated in the reply to Assignment 13, that the robbery was not completed, and it is evident, from the refusal of the court to charge that the robbery was complete at the time of the murder, that, as a matter of law, the court did not believe that the robbery was complete, and properly refused so to charge. It may further be said that it is a logical conclusion to draw from the evidence that Turco shot Koster in the furtherance of the common purpose of robbery, and for the benefit of all those engaged in the crime of robbery with him; for this reason, if Turco committed this murder in order to aid the escape of the accused and those associated with him, all would be equally guilty of murder.

It is also fair to infer from the fact that Turco and this defendant, Carlino, came armed with deadly weapons, to commit this robbery, that they had mutually agreed to make use of these weapons in furtherance of the robbery or to aid in their escape.

It may further be said that this defendant refused to avail himself of the privilege of rebutting this inference.

Therefore, there is no error on the part of the

court in refusing this request to charge, as there is no foundation in law or fact that would justify such instructions to the jury.

Thirty-first Assignment.

The court correctly refused to charge the request set forth in this assignment. The facts upon which it is based were inconsistent with the case presented by the evidence adduced at the trial. The record shows that at the time of the shooting, the truck was still on the premises, and that all the conspirators were co-operating in the execution of a preconceived plan, each carrying out the particular duty assigned to him. The defendant, with drawn pistol, was holding the drivers captive to prevent them from spreading the alarm.

For the court to have charged this request, it would have had to find, as a matter of fact, that at the time of the shooting the robbery had been completed—that the co-conspirators were no longer in action. This would have been contrary to the evidence before it and the law as cited under the reply to the Thirteenth Assignment.

Thirty-second Assignment.

The court correctly refused to charge this request. The robbery was not complete.

See reply to Assignment 13 and authorities cited thereunder.

It is not required in law to show that an agreement was actually entered into by the conspirators to kill anyone interfering in the common purpose of committing another crime.

It is clearly established that if a murder is com-

mitted in the perpetration of a robbery, the person committing the murder is guilty of murder in the first degree, as are also his aiders, abettors, counsellors and procurers.

There is no substance in the contention raised in this assignment. There was no error in the refusal of the court to charge this request.

Thirty-third Assignment.

This request completely ignores the fact established by the evidence that the shooting occurred in the perpetration of the robbery and assumes the contrary to be true. The request not being consistent with the evidence in the case, was properly refused.

Thirty-fourth Assignment.

The court properly refused to charge this request, namely:

"If you believe from the evidence in this case that the defendants had intention to commit a robbery and did attempt so to do, and in so doing killed Albert Koster, but that the defendant, Carlino, had no knowledge of their unlawful intention, if any, to kill said Koster, and was not acting together with them in the commission of said offense, if any, or if you have a reasonable doubt thereof, then the defendant, Carlino, should be acquitted."

The only evidence before the court, which was that introduced by the State, conclusively showed that Carlino was armed and was co-operating with the other conspirators in the hold-up and robbery

of the silk truck at the time that Koster was shot and killed.

Under our statute, when a person kills another in the perpetration of a robbery, he and his aiders and abettors are all equally guilty of murder in the first degree.

State v. Yunge, 38 Vr., 223.

The mental attitude of the several conspirators or co-actors with respect to the killing is not an element in the proof under the statute.

We, therefore, contend that the ruling of the court was correct.

State v. Orraye, 84 L., 556.

Thirty-fifth Assignment.

This assignment holds as error that the court refused to charge:

"Section 106 of the Crimes Act provides that only the person who killed another is guilty of murder in the first degree."

This the court properly refused to do. The court could not so charge in law as it has been well established that Sections 106, 107 and 108 of the Crimes Act must be taken as a whole and it would be manifestly improper to select a portion of the law and charge it as such, when its proper interpretation depends so clearly on its relation with other portions of the same act.

State v. Young, Ibid.

State v. Zeller, Ibid.

There was no error in this refusal.

Thirty-sixth and Thirty-seventh Assignments.

These assignments state error: First, that the court denied the motion of the defendant made in arrest of judgment upon the grounds stated. Second, that the court denied the motion of the defendant for a new trial upon the grounds stated.

These assignments are both objectionable because they state no grounds upon which the motions might be predicated, and for this reason are too vague and indefinite to comply with Section 137 of the Criminal Procedure Act and should be stricken out.

State v. Herron, Ibid.

State v. Lavieri, Ibid.

State v. McCormick, Ibid.

CONCLUSION.

We contend that there was abundant evidence in the case to establish the crime charged in the indictment. It was a jury case on the evidence. The defendant was legally convicted. No harmful error occurred prejudicial to the rights of the defendant to maintain his defense upon the merits of the case. We, therefore, submit that the judgment should be affirmed.

THEODORE E. DENNIS,

Prosecutor of the Pleas.

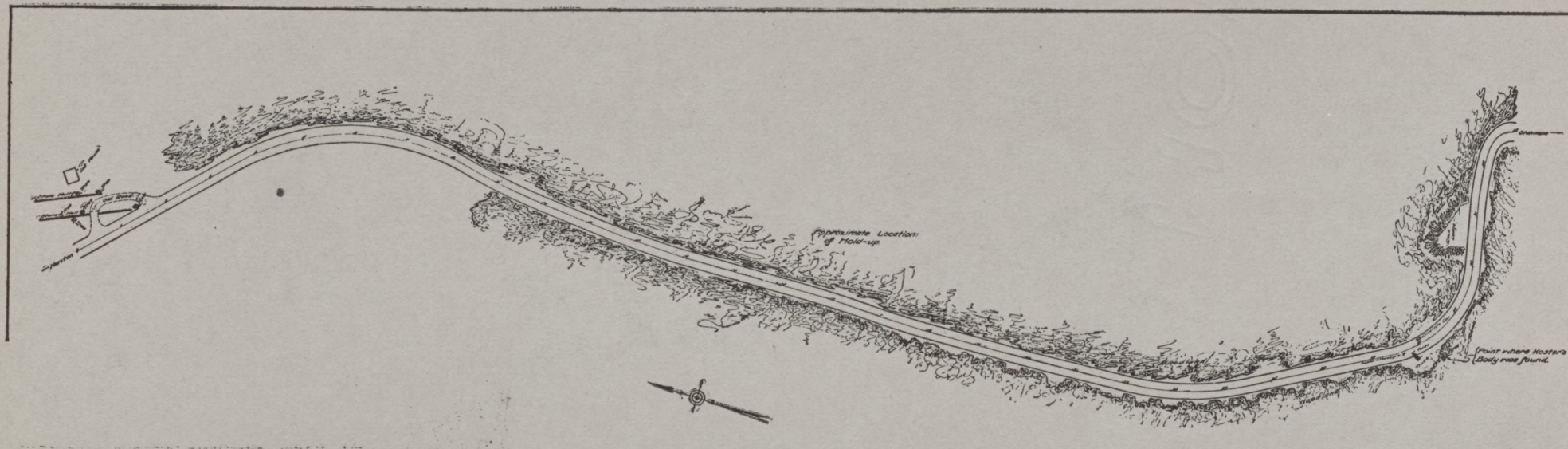
LEWIS VAN BLARCOM,

MICHAEL DUNN,

SYLVESTER C. SMITH, Jr.,

of Counsel for the State,

Defendant in Error.





84

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

ANTONIO TURCO,
Plaintiff-in-Error.

STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

ANGELO CARLINO,
Plaintiff-in-Error.

In Error to the
Court of Oyer and
Terminer of the
County of Sussex
in the State of New
Jersey.

SUPPLEMENTAL BRIEF FOR THE STATE, DEFENDANT-IN-ERROR.

POINT I.

The point raised by the plaintiff in error in the supplemental brief filed with this Court appears to be an attempt to bring up a question which was raised in the Supreme Court on a writ of error sued out by this defendant, Antonio Turco, following a previous trial and conviction in the Sussex Oyer and Terminer wherein the jury returned a general verdict of "GUILTY." The Supreme Court reversed the judgment below and awarded a venire de novo.

State vs. Turco, 118 Atl. Rep. 579.

The State contends that it is now too late to raise this question before this court but that the proper procedure should have been to appeal directly to this court from the decision of the Supreme Court and that the only matters before the court now are such as are contained in the record of the second trial in which no exception was taken to the validity of the verdict of the jury which was "Guilty of murder in the first degree."

However, it is still contended on the part of the State that by reason of the defective verdict returned on the first trial that the proper course for the Court was to award a venire de novo and not to enter judgment as of murder in the second degree. The opinion of the Court is apparently based upon the theory that the verdict not being in compliance with our statute was a nullity and that no judgment could be entered on the verdict. The State holds that supporting this theory the award of a venire de novo was proper.

The indictment was drawn in the statutory form and contained but one count; that of Murder. The proof of the murder was predicated upon the commission of a robbery in which the defendant and ten others were engaged. As the point dealing with the completion of the robbery and the section of our statute relating to murder committed in the perpetration of robbery has been covered in the original brief before this court it is not necessary to repeat the text here.

At both trials the defendant offered nothing that would justify a verdict except that of murder in the first degree provided the jury believed the testimony of the State's witnesses. The State proved that the defendant took part in the robbery and that while it was still in progress one Albert Koster passed the scene on a motorcycle. The defendant ordered him to stop and before he could do so the defendant fired a shot from a revolver striking Koster in the throat. Defendant then placed his left hand on the body of

Koster, who by the testimony of the doctor could not have died immediately from the first wound, and then fired another shot which did not take effect. Turco then fired a third shot which passed through Koster's heart and caused instant death.

In answer to this defendant says "I was not there."

If on the other hand Turco had said that he was there and he did shoot Koster but that he had done it in self defense or that he had done it accidentally or by reason of some other circumstance which might have made a verdict of murder in the second degree tenable his argument might have some merit as standing alone.

But if he shot this man without just cause or provocation firing three shots to complete the deed and while he was in the act of perpetrating a robbery or if the death ensued from the perpetration of this robbery then he was either guilty of murder in the first degree or he was innocent. So the matter adjusts itself as to whether the jury believed the State's witnesses that this man was there and fired the fatal shots or whether they accepted the defendant's story. The verdict answers this.

The authority relied on by the defendant in all cases appears to show that the indictments contained more than one count and that the evidence would support a verdict in a lesser degree than the crime charged in the highest count.

The indictment in this case contained but one count and there is no evidence to justify or support a verdict of any crime less than murder in the first degree.

In other jurisdictions an award of a venire de novo has been made under a defective verdict.

Wharton's Criminal Procedure,
11 Ed. Vol. 1, P. 841 and Sec. 1685.
10 Ed. Vol. 3, P. 2123.

State vs. Jackson, 99 Mo. 60; 12 S. W. Rep.

367; 2nd Syl.

Wharton's Criminal Pleadings, 8th Ed.

Sec. 753.

State vs. Rover, 10 Nev. 388, 21 American Reps.

P. 745.

There being no verdict sufficient to support a judgment then the verdict must be considered a nullity and the defendant placed in statu quo ante there being no conviction in law and a plea of autrefois convict not being founded on the record of a prior conviction was properly refused by the Court.

The administration of law and justice must be founded on merit and should not be reduced to a sporting theory where the inadvertence or ignorance of laymen composing a jury might provide a technical point upon which the basest criminal could escape the consequences of his crime.

The most the defendant could expect is a new trial which was granted by the Supreme Court.

POINT II.

This point in the defendant's brief brings up additional matter in regard to the jury panel. It seems needless to repeat here what is already before this Court in the brief previously filed and at the argument before the Court.

It is conceded by the defense that there is nothing in our jury act authorizing a Supreme Court Justice to add jurymen to the panel drawn previous to the opening of the regular term as provided by law.

The full panel of jurors for the September Term 1922 in Sussex County, being the term at which the defendant was tried, consisted of forty-eight jurors. The term opened on the third Tuesday in September and continued until the third Tuesday in December. The defendant was called for trial on December 4th.

Prior to the opening of the September Term a panel of forty-eight jurors was drawn according to law to serve as jurors at this term of court.

On November 10th an order was made directing the Sheriff to draw twenty-four **Talesmen** to be present at the trial of this defendant. This was done in anticipation that the peremptory challenges and challenges for cause might exhaust the regular panel of forty-eight and there would then be available the talesmen summoned. The names of these talesmen were served upon the defendant more than two days before the trial and plainly headed "TALESMEN" being distinguished on the list served together with the regular panel of forty-eight which were headed "PETIT JURORS." This was the exact procedure followed in the case of the State vs. Paterson cited in the main brief. The procedure followed by the Sheriff in summoning these Talesmen cannot be attacked for there is nothing that might be interpreted as illegal in his methods of drawing the Talesmen. He might have invited a number of his personal friends to be present at the trial for the purpose of serving as talesmen or he had a perfect right to draw from the list of men eligible to serve as was done in this case. The method followed was the most fair one for the defendant. Instead of having the jury filled from the crowd in the court room he had the benefit of having the names drawn from a list of men whose names had been served upon him prior to the trial. Certainly there can be nothing that might be objected to when the procedure reacted solely to the benefit of the accused.

It is too well established to comment on at length here that the drawing of a jury is a procedure of rejection and not selection.

The defendant's argument that the names of the Talesmen should have been put in the box together with the regular panel of jurors is predicated upon the theory that he might select from a larger num-

ber such names as might suit him whereas he has only the right to challenge as provided by law such names as are drawn from the box at random.

It would be interesting to hear the argument of counsel if the whole seventy-two had been placed in the box at the beginning of the drawing.

It is also unnecessary to say that the idle formality of placing the regular panel of forty-eight in the box and drawing the names out before service on the defendant has been passed on by our courts and found to be needless.

In conclusion the State contends that this defendant had a fair and impartial trial before a jury of his peers as our constitution entitles him; that there is nothing in the record that indicates that he was prejudiced in his defense on its merits nor anything in the procedure or verdict that might justify this Court in taking any action other than to affirm the conviction.

POINT III.

Carlino Case.

This point in defendant's brief deals with the objection on the part of the State that the assignments of error were not specific enough.

Although the language is obscure it is conceded that counsel intended to convey that the objection was made to the refusal of the Court to direct a verdict on the grounds stated in previous assignments. We believe that the assignments meant were fully answered in the brief already filed.

Respectfully submitted,

THEODORE E. DENNIS,

Prosecutor of the Pleas.

LEWIS VAN BLARCOM,
MICHAEL DUNN,
SYLVESTER C. SMITH, Jr.
of Counsel for the State.

ANGELO CARLINO

Plaintiff in Error

On Writ of
Error to
Supreme
Court

BRIEF FOR PLAINTIFF IN ERROR

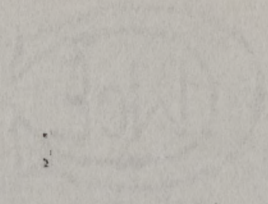
Statement

Angelo Carlino was convicted of murder in the first degree without recommendation in the Circuit Court and sentenced to be executed by the State of New Jersey.

The defendant and fourteen others were indicted jointly at the December 1933 Term for the murder of Albert Koster. The indictment was in the simple statutory form. Separate trials were allowed upon application. The Chancellor entered a Writ of Error, out of the Supreme Court but that Court affirmed the judgment.

The Error reflects that on June 14, 1934, a large number of the defendants joined in the commission of a robbery of a Essex Print Works' truck loaded with silk travelling along the public highway leading from Newark to New Jersey. The defendant, Carlino, and several others worked to leave the truck and several others worked to hold up the truck and several others worked to hold up the truck and several others worked to hold up the truck.

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New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

ANGELO CARLINO,
Plaintiff-in-Error.

Sur-Indict-
ment for
Murder.
On Writ of
Error to
Supreme
Court.

BRIEF FOR PLAINTIFF IN ERROR

Statement

Angelino Carlino was convicted of murder in the first degree without recommendation in the Sussex Oyer and Terminer and sentenced to suffer punishment of death.

This defendant and fourteen others were indicted jointly at the December 1921 Term for the murder of Albert Koster. The indictment was in the simple statutory form. Separate trials were allowed upon application. The Chancellor ordered a Writ of Error out of the Supreme Court but that Court affirmed the judgment.

The State's witness testified that on June 14, 1921, a large number of the co-defendants joined in the commission of a robbery of a Sussex Print Works' truck loaded with silk, travelling along the public highway leading from Newton to Netcong. This defendant, Carlino, and several others jumped out of the underbrush along the road and at the point of weapons held up the truck and took captive the driver and helper who were the only persons in charge of the truck. Carlino and

three other defendants conducted the driver and helper up the wooded mountain side next to the road and stopped when they had gone several hundred feet. Here they were held most of the forenoon and Carlino was continually with them. From this point it was impossible to see the road and no shots were heard.

After the truck driver and helper were started on their journey into the woods the bandit truck driver was summoned from his position about one hundred yards away and he then took charge of the truck, stalled the motor several times in learning the shifts, and then drove it slowly in low gear up hill for a distance of more than one-quarter mile to a wide part in the road where he turned it around. These operations must have taken a quarter hour and more. At this time a lone motorcyclist, Albert Koster, was seen suddenly approaching along the highway on his way to work. Then Antonio Turko, another bandit jumped from the truck, and acted very excitedly. He pulled a gun and ordered the cyclist to stop. This the man could not do quickly enough and Turko shot him dead with three shots. The deceased was not connected with the Sussex Print Works nor with the drivers of the truck and was not a police officer and was not shown to have attempted to apprehend the bandits. He was merely an innocent traveller. The silk truck was then driven to the Turko farm near Easton, Pa. During all this time Carlino was in the woods with his captives and knew nothing of the murder. Finally he was forced to walk to Easton arriving there the next day.

The defense introduced no evidence but rested on the State's case and made a motion for a direction of a verdict of acquittal.

Turko, charged as the only actual killer, was convicted of murder in the first degree and sentenced to death. Carlino, this defendant, was next tried with the same result. Sporacio, another defendant, was then tried and was convicted of murder in the first degree but with a recommendation for life sentence which was imposed. No other trials were had since, but other cases await the determination of the basic questions of law.

POINT I

The defendant was not guilty of murder under the law and facts.

The State's theory of the case was that since Carlino was engaged in the robbery and Turko killed a person, that Carlino and all others were equally guilty of murder under the 106 Section of the Crimes Act regardless of other facts in the case. The learned trial justice also held to this view of the law. That section of the Act reads as follows:

"Any person who, in committing or attempting to commit arson, burglary, rape, robbery, sodomy, or any unlawful act against the peace of this State, of which the *probable consequence may* be bloodshed, shall kill another; or if the death of anyone shall ensue from the committing or attempting to commit any such crime or act as aforesaid; or if any person or persons shall kill any judge, magistrate, sheriff, coroner, constable, or other officer of justice, either civil or criminal, of this state, or the marshal or other officer of justice, either civil or criminal, of the United States, in the execution of his office or duty or shall kill any of his assist-

ants, whether specially called to his aid or not, endeavoring to preserve the peace or apprehend a criminal, knowing the authority of such assistant, or shall kill a private person endeavoring to suppress an affray, or to apprehend a criminal, knowing the intention with which such private person interposes, then such person or persons so killing as aforesaid shall be guilty of murder."

The contention of the defense is set forth in the grounds advanced in support of the motion to direct a verdict of acquittal (C. B. p. 162) as follows:

"1. Because the defendant Carlino is not guilty of the murder springing out of the robbery on the evidence presented.

2. Because the defendant Carlino was more than a quarter of a mile away from the scene of the murder; he was not in sight of the killing; not in hearing distance of the shot; was not near enough to render assistance in the killing, if necessary; was not shown to have any intention of killing those in charge of the truck, and had no knowledge of the murder until long afterwards.

3. Because the murder was not a probable consequence of the robbery, nor proximate result of the robbery.

4. Because Carlino was not the person who did the killing.

5. Because the deceased, Koster, was not in charge of the truck, nor was he connected with the Sussex Print Works, nor was he in the act of apprehending the robbers, nor was he shown to be an officer of the law, but was a person totally unconcerned in the design to rob.

6. Because the murder was the independent act of a confederate of the defendant, and this act of killing was foreign to the common design to rob.

7. Because the robbery was completed at the time of the killing, and the murder was a subsequent distinct act of a person other than the defendant Carlino, and was committed a considerable time after the taking of the truck out of the possession of the Sussex Print Works' employees.

8. Because the evidence at best is merely a combination among Carlino and others to rob and there is no evidence of an agreement to make escape effectual by violence and killing, if necessary.

9. Because upon the most favorable view of the evidence of the State, the killing was an act done by a confederate, after the completion of the robbery, and done in escaping, but not within the scope of the previous joint purpose; and no agreement to make an escape effectual by violence, can be legally inferred from the original wrongful combination.

10. Because there was no preconcert among the confederates as to the killing.

11. Because the killing was merely the result of the situation in which Turko found himself, at the time, and proceeded from the impulse of the moment without any previous concert or agreement with Carlino or his other confederates."

These points were again raised in arrest of judgment.

The questions presented here are of novel impression in this state and in fact there are few reported cases in any state in which the same situation arose. In all the New Jersey cases in which a confederate was charged with murder by reason of another party to the lesser crime having killed a person, the killing took place upon the premises or very close to the premises and all the parties to the original unlawful act were

present or so close that they could have rendered assistance if necessary, and furthermore the person killed was the one against whom the original unlawful act was directed. The killing in those cases was a logical and a probable consequence of the robbery or other unlawful act. The New Jersey cases involving the determination of Section 106 of the Crimes Act are as follows:

Roesel vs. State, 62 N. J. L., 216.

State vs. Young, 67 N. J. L., 223.

State vs. Zeller, 7 N. Y. L., 619.

State vs. Mouser, 91 N. J. L., 395 (facts stated, reversed on other grounds).

State vs. Palmieri, 93 N. J. L., 195.

State vs. James, 96 N. J. L., 132.

State vs. Timmerari, 96 N. J. L., 442.

Mr. Justice Swayze in the *Mouser* case observed that the confederate who did not strike the blow which killed the deceased was "near enough to render assistance when the blow was struck."

In the *James* case, Chancellor Walker stated "if two agree to rob and one strikes a blow that results in the death of the *victim* both are guilty." And further on in the opinion he said, "the statutory enactments are but declaratory of the common law." Chancellor Walker again in the *Timmerari* case when discussing the law applicable to the crime said "obviously all three could not be held responsible for the act of one where he alone slew the deceased unless there was *preconcert* among them."

The Act in question uses the words "probable consequence" in speaking of the killing resulting from a robbery or similar felony.

No one could have foreseen that an innocent traveller would have been killed in the commission of that robbery. The probable consequence of the robbery would have been the killing of one or more of the persons in charge of the silk truck.

At the time when some of the bandits took complete charge of the truck and drove it away from the place where it was first held up, the robbery was complete. The act of killing by a member of the gang committed at a considerable distance from the scene of the holdup and at some time thereafter, cannot be considered as part and parcel of the plan to rob. It is plain that the statute was never intended to cover such a situation and that indeed at common law no such rule applied and to now hold that this defendant is guilty of murder under the facts set forth would be establishing a dangerous precedent.

Since the statutory enactment in question is but declaratory of the common law rule as was stated by Chancellor Walker in the *James* case it is well to consider some of the English decisions.

In *Rex vs. Collison*, 4 Carrington and Payne 565, the Court of King's Bench speaking of a situation similar to the one at bar said:

"If they (the combination) had only the common purpose of committing the felony of stealing apples and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and proceeded from the impulse of the moment without any previous concert, the prisoner would be entitled to an acquittal."

In *King vs. Hodgson, et als.*, 1 Leach's Crown cases 6 there were several concerned in an affray all armed, and a boy who was standing by, who was not connected with the affray, was killed, and the Court said:

"As the boy was found to be unconcerned in the affray, his having been killed by one of the company, could not possibly affect the rest; for the homicide did not happen in the prosecution of the illegal act; and therefore the persons, though constructively present, could not be said to be aiding or abetting the death of one who was totally unconcerned in the design for which the party had assembled."

In *People vs. Knapp*, 26 Mich. 115, considering the common law, the Court said:

"It is undoubtedly possible for parties to combine in order to make an escape effectual, but no such agreement can be lawfully inferred from the combination to do the original wrong." * * * "And the authorities are quite clear and reasonable which deny a liability for acts done in escaping which were not within any joint purpose or combination."

In *Renner vs. State* (Crime Appeals of Texas), 65 S. W. 1102, 1104 (murder case), the Court said:

"If two or more engage in the common design to do an unlawful act and one of them incited by his own particular malice, or even to further the escape of all, without knowledge or concert of the others, does a felony foreign to the common design his felonious act is not imputable to his confederates."

Other cases and authorities bearing upon the subject are as follows:

21 Cyc. 690, etc.

Rex vs. White, Rummel and Ryan, 99.

1 Bishop Criminal Law, Sec. 633.

Lamb vs. People, 96 Ill. 73.

It will be remembered that Circelli, an eye witness of the shooting, said that at the time when the motorcycle came towards him Turko was all excited and waved his gun (C. B. p. 147, l. 3; and p. 154, l. 20). This would indicate that he acted from impulse. Moreover if many of these confederates were scattered along the highway why did only Turko stop and kill Koster if this was a part of the preconceived plan to rob and resist capture?

Upon the argument in the Supreme Court counsel was of the impression that the Court inclined to the view that the *Roessel* and *Young* cases presented similar situations. In the former case one Pitts was killed while Roessel and Manshande were attempting robbery of the home of Pitts himself. It is strongly urged that neither case is authority controlling the case at bar.

In the *Young* case all the confederates went to the house of Hunter intent upon robbing *him*—and *Hunter* was the man killed. Against *him* the original unlawful act of robbery was directed. The defendant Young guided his confederates to the house of Hunter and remained “at some little distance from the house.” In the case under consideration it is true that all the defendants went to rob but their unlawful acts was not directed against the traveler upon the highway who was killed. The victim was unconcerned in the robbery. This was not in contemplation of their joint enterprise but was the impulsive act of one of them. There is not an iota of evidence from which the jury could have determined that there was a preconcert among these defendants to make escape effectual by killing if necessary. Nor is there the least evidence as to the presumption that Turko killed his victim in order to make escape possible. The evidence is all to the con-

trary. The eye witnesses, Merlo and Circelli, were both greatly excited according to their testimony by reason of the shooting. They attributed no reason for Turko's act. It was a surprise to them and they were directly on the scene. Merlo said, "I was all nervous, I did my business in my pants" (C. B. pp. 127, 130).

A statute such as this must be strictly construed and surely it does violence to the ordinary man's common sense to hold this defendant as guilty of murder in the first degree for this act of Turko and have sentence of death imposed. To what length will the Court go in construing this statute? Must this defendant pay the penalty of death because of Turko's cruel act over which this defendant had no control and which he could not have contemplated by any stretch of imagination only for the reason that he was there to rob? This will make dangerous precedent. A similar situation might arise if three persons went to administer a sound beating to a man. After accomplishing their purpose but with no possibility of death resulting to the victim of their assault all three left the house and one was sent for the automobile several blocks away. And while he was gone one of the confederates was confronted by a traveller upon the highway whom he killed in an impulsive moment. Can this statute cover such a situation and charge the man who went for the automobile with murder in the first degree? If the *victim* of their assault had died of course all would be guilty of murder.

If Turko with the stolen truck had run over and killed a traveller on the highway, would this defendant also have been guilty of murder?

There is very little authority for such a situation but every case presenting somewhat similar facts holds that a defendant under such condi-

tions is not guilty of murder. The authorities already cited are well considered and not one case is referred to the Court by the State's counsel in opposition to this theory of defense.

Blackstone in defining principals and accessories to crimes says:

"A man may be principal in an offense in two degrees. A principal, in the first degree, is that he is the actor, or absolute perpetrator of the crime; and in the second degree, he is who is present, aiding, and abetting the fact to be done. Which presence need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance."

Chitty's Blackstone, Chap. 3, Book 4,
*page 34.

That is of course the general proposition.

The following cases are cited in the foot notes with the quotations as follows and they explain the exceptions:

"Persons not present nor sufficiently near to give assistance, are not principals."

Russ. & R. C. C., 363, 421.

"Besides a presence, and aiding and abetting the principal, there must be a participation in the felonious design, or at least the offense must be within the compass of the original intention, to constitute a principal in the second degree."

1 Hale, 446.

Russ. & R. C. C., 99.

"And in order to render persons liable as principals in the second degree, the killing or other act must be in pursuance of some original unlawful purpose, and not collateral to it."

1 East P. C., 358.

The same author at *page 37 in Book 4 under the topic "Public Wrongs" observes:

"It is likewise a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other. And if A commands B to beat C, and B beats him so he dies; B is guilty of murder as principal, and A as accessory. But if A commands B to burn C's house; and he, in so doing, commits a robbery; now A, though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unsequential nature."

In the foot notes at this page are cited other cases and the quotation from one of which is as follows:

"The crime must be of the same complexion, and not on a different object than that to which the agent was instigated. Thus if A commands B to burn a certain house with which he is well acquainted, and he burns another, or to steal a certain horse, and he steals a different one, A will not be liable to be indicted as accessory to the crimes committed, because B acting in contradiction to the commands of A, and that knowingly, it is on his part a mere ineffectual temptation, and the specific crime he planned was never completed."

Plowd, 475.

Hawk., B 2, c. 29, p. 18.

1 Hale, 617, Com. Dig. Justices, T. 1,
Fost. 360.

Lord Chief Justice Denman in an English case with somewhat similar facts said:

"It is proper to say that if two persons set about the common commission of a crime, and one of them, in the execution of their common purpose, uses violence, both may be convicted of the whole offense; but if the violence used by the one takes place after the other has escaped, and is resorted to merely to prevent being captured, then only the one actually using it is within the meaning of the statute."

Queen v. Harvey & Caylor, 1 Cox C. C., 21.

A clear exposition of the test to be applied in such cases as the one under consideration in order to determine whether or not a principal in the second degree is to be held fully accountable with the principal in the first degree for all acts done in pursuance of the common purpose or as a natural or probable consequence thereof is as follows:

"I believe the following criteria will let the most inquisitive reader into the grounds upon which the several cases falling under this head will be found to turn. Did the principal commit the felony he standeth charged with under the influence of the flagitious advice; and was the event, in the ordinary course of things, a probable consequence of that felony? Or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind or *upon a different subject?*"

Foster Crown L., p. 372.

It is contended that this case falls within the latter rule above enunciated.

POINT II

Section 106 of the Crimes Act does not apply to this defendant.

Prior to the year 1898 the present Sec. 106 of the Crimes act read:

“If any person *or persons* in committing or attempting to commit sodomy * * * shall kill another, etc. etc.”

In 1898 (the year following the murder in the Roessel case) the Legislature amended this section so that the present act uses the singular in the first reference to the crime, instead of the plural as was used prior to 1898. The section now reads:

“*Any person* who in committing or attempting to commit arson * * * shall kill another, etc. etc.”

It will be noted that in only that one place is the singular used and in only *that one place* was the statute changed in that respect. After the various semi-colons in the section the words “person or persons” are used in each instance.

It is true that Sec. 9 of the Act concerning statutes provides that wherever any singular is used it shall be held to include the plural except:

“There be something in the subject or context repugnant to such construction.”

It seems to counsel that so clear a change in a criminal statute as the one made by the Legislature in this one particular should be held repugnant to the construction that the plural was

intended. That was the only specific change made there. In defining the other phases of murder both the singular and plural are used. The old Act uses both the singular and plural in the first part. If only the singular was intended to be used by the Legislature then only the person so killing shall be guilty of murder. This question has never before been brought to the attention of the Court in such cases.

This question was brought to the attention of the trial judge upon a motion to quash the indictment, also by a request to charge the jury as set forth in the thirty-fifth assignment of error.

POINT III

The jury panel was not legally selected and drawn nor composed of forty-eight qualified jurors.

The challenges to the array set forth the grounds as to why the special panel was improperly drawn (C. B., p. 27, l. 10; p. 28, l. 10; p. 34, etc.; p. 36, etc.).

Upon the examination of the Sheriff before the drawing of the jury commenced it was shown that he drew a panel of forty-eight jurors and twenty-four additional talesman (p. 29). Included in the list of forty-eight jurors which were first put into the box at the beginning of the trial, were twelve jurors who had sat upon the previous trial of the co-defendant, Turko (p. 36). These jurors were absolutely disqualified by law from service in this case by reason of their having passed upon the same evidence.

Stephens v. State, 53 N. J. L., 252.

The Turko trial was had several weeks before the one under consideration now and the fact that these twelve jurors were disqualified was known in ample time to the sheriff and to the Court (p. 36). Nevertheless over the objections of the defendant, the forty-eight names, including the Turko jurors, were placed in the box and the drawing commenced (p. 39).

An additional list of twenty-four jurors was drawn by the Sheriff but these were kept separate and not placed in the box at the beginning of the drawing and the beginning of the trial, but were placed in the box after the first forty-eight names were exhausted (p. 48). In either case error was committed because the defendant was entitled to forty-eight jurors at least and the placing of the twenty-four additional names in the box after the first list was exhausted was improper.

In this case the defendant exhausted all his challenges (C. B. p. 34 and p. 52).

The Statutes in question are Section 82 of the Criminal Procedure Act and Section 27 of the Jury Act.

Two recent pronouncements by this Court and the Supreme Court on this subject are:

State v. Lapp, 84 N. J. L., 19.

State v. Rombolo, 89 N. J. L., 565.

At page 37 of the casebook a challenge was interposed to the array on the ground that twelve of the forty-eight jurors composing the special panel and whose names were in the box ready to be drawn were disqualified by law as they had sat upon the trial of the indictment against Turko and had passed upon the same evidence. The following colloquy then took place:

"The Court: You are moving now for the discharge of those jurors, who sat in the *Turko* case. Is that the application?

Mr. Rosecrans: No, that is not the application now. The application is that I challenged the array on the ground that there never were 48 qualified jurors."

C. B., page 37, l. 24.

This challenge was overruled and an exception granted and signed and sealed.

This is a statutory procedure which must be strictly followed as was said in the *Lapp* and *Rombolo* cases. The Court's attention is specifically drawn to the following part of Sec. 82 of the Criminal Procedure Act relating to the selection of such a jury:

"If for any reason the number of jurors drawn or summoned shall be reduced below forty-eight, or such larger number as the Court in which such indictment shall be pending shall by special order direct, then the said Sheriff or officer shall add to the number so drawn and summoned as many more persons of the body of his county, *qualified* to serve as jurors, as shall make up the number of forty-eight."

It will be noticed that the duty is cast upon the Sheriff by this Act to fill the list for the special panel with qualified jurors if for any reason the number shall be reduced below forty-eight. This of course applies if the Sheriff knew before the trial that the list had been reduced by the elimination of one or more qualified jurors to a number below forty-eight. There can be no question as to this fact being known to the Sheriff and to the Court (C. B., p. 36) as the *Turko* trial was had Jan. 23, 1922, one month before

the one in question held Feb. 27, 1922. I will not quote the case of *Stephens v. State*, 53 N. J. L., 252, as the very definite statement of the Court in that case as to the disqualification of such jurors is well known. And of course a disqualification by a decision of the Court is as much a disqualification as one made by the Legislature.

Again it is pointed out that Sec. 82 provides that the defendant or his counsel may not waive this drawing or service in trials for murder.

I am of course familiar with the opinion of the Supreme Court delivered by the Chief Justice in the case of *State v. Barker*, 68 N. J. L., 19, in which the question as to whether or not the drawing of disqualified jurors constituted a good ground for challenge to the array was considered but not decided. It is pointed out however that in that case it was not shown that the disqualification was known at the time of the drawing or even before trial. In the case at bar the disqualification of one quarter of this special panel was known to the officer a month before the trial. Surely it is not presumed that the officer shall draw any but qualified jurors. It may well be said that if the disqualification is unknown to him at the time of the drawing that it should not be ground for challenge to the array on the ground of expediency. But the statute above quoted distinctly provides that if this number of forty-eight be reduced for any reason that the Sheriff shall then draw and summon other *qualified* jurors to make up the number of forty-eight. *Can* this plain statutory mandate be brushed aside in a murder case?

In 1903, after the decision in the *Barker* case, Sec. 82 was amended in the particular first quoted above providing for the addition of qualified jurors to make up the number of forty-eight in case of a reduction for any reason.

Our Courts have been careful to demand a strict compliance with the statutory provisions in the selection of the jury as pointed out in the *Lapp* and *Rombollo* cases—both resulting in reversals.

Can it be said that the Sheriff could go further and select twenty or thirty disqualified jurors and by placing them in the box fulfill the statutory obligation due the defendant? And if he did, is the defendant amply protected because the Court refuses to accept the juror when his name is drawn from the box? It is contended that the defendant's statutory right to have 48 qualified jurors was violated when the Sheriff placed among the forty-eight names those of twelve disqualified jurors known to him to be disqualified before the trial and in ample time for him to have complied with the statute and to have drawn others in their place who were qualified to sit in judgment upon the defendant (C. B., p. 36, l. 25).

Blackstone in commenting upon the grounds for challenges to the array and challenges to jurors observes:

“The prodigious multitude of exceptions or challenges allowed to jurors, who are the judges of facts, amount nearly to the same thing as was practiced in the Roman Republic, before she lost her liberty.”

Book 3, Star page, 365.

POINT IV

The indictment was defective in that it should have alleged the commission of the robbery as the basis for the murder charge.

The indictment was in the statutory form and made no reference to the robbery upon which it was based. It is contended that since this defendant was not the actual killer that the indictment should have set forth the commission of a robbery by this defendant and others as a basis of the murder charge. It may be that when the defendant is also the actual killer that no allegations of the lesser crime out of which the murder sprang need be pleaded. *State v. Titus*, 49 N. J. L., 36 seems to hold to this view but it can hardly be said that in a situation like the one at bar that the defendant is apprised of the nature of the accusation against him by a simple indictment for murder without stating the facts upon which the state intends to rely to prove the murder. This point was raised on motion to quash (C. B., p. 26); at end of whole case and again in arrest of judgment.

POINT V

No women were selected as jurors.

The record shows that only men were drawn upon the panel of jurors to try the defendant. In *State v. James*, 114 Atl., 553, it was held that unless there was discrimination shown by the jury commissioners in failing to select women as well as men for jury duty that it would not be sufficient cause for reversal of the judgment of conviction. But the Statute of 1921, page 50, making women eligible as well as men for jury duty, was passed after the *James* case. It is contended that since the passage of that Act that discrimination must be presumed upon the failure to draw women as well as men for jury duty.

POINT VI

Challenges of jurors for cause were improperly refused.

Prior to the trial of this cause an application was made to this Court for a change of venue or a foreign jury upon the principal grounds that the citizens of Sussex County were unduly biased against these defendants and it was impossible to obtain a fair trial in that county. This application was refused because there was insufficient proof. The ground was again raised at the trial upon a challenge to the array but was again denied. Upon the examination of jurors it was shown that practically every juror had formed an

opinion that the defendant was guilty but upon questioning by the Court or Counsel the juror usually said that he would be governed by the evidence. However, several jurors were challenged for cause because they stated that it would take evidence to overcome their opinion of the guilt of the defendant. In other words they would go into the jury box with an opinion of guilt which would preclude their consideration of the case from the standpoint that the defendant was innocent until proven guilty. Such was the case upon the challenge to the juror John I. B. Knight (C. B. p. 40) and Juror John B. Williams (C. B. p. 43) and the Juror Thomas Hilton (C. B. p. 49) and the Juror Henry Terwilleger (C. B. p. 51).

It is contended that the overruling of the challenges for cause and placing upon the defendant the necessity of using his peremptory challenges was prejudicial. This Court has gone far in holding that the examination of jurors and their qualifications are in the discretion of the Trial Court and that the mere previous formation of an opinion against the defendant would not be ground for challenge for cause if the juror stated that he would be controlled by the evidence. But the Court is urged to examine the statement of these jurors in question for it is contended that when jurors state that it is necessary for them to have strong evidence to change their opinions it is not according a fair trial to the defendant.

The defendant exhausted all his peremptory challenges in this case (p. 52 & 54).

POINT VII

Evidence as to what occurred after the robbery was complete should not have been admitted.

At the time that some of the bandits actually took possession of the silk truck and took captive the employees of the Sussex Print Works and drove the truck away from the place where it was first held up, it is contended by the defendant that the robbery was complete and that he could not be charged with any subsequent or other act unless he was a party to it.

Timely objection and exception was taken to such evidence (C. B. p. 125, etc.; p. 149).

POINT VIII

The robbery was completed at the time of the killing and this defendant was therefore not guilty of murder.

The undisputed evidence was that the killing took place more than one quarter hour after, and more than one quarter mile from the hold-up of the silk truck and the removal of the drivers and the taking thereof into the possession of the robbers. The shooting was neither in sight nor hearing of this defendant.

There can be no doubt that the moment that by force or fear, that when the robbers stopped that truck and took possession of it, the robbery was completed. In other words assuming that

in an ordinary robbery case, such facts had been proven, the defendant could not have contended that those facts did not constitute a robbery, the question then is, how far after the completion of a robbery would the defendant be responsible for the acts of his co-defendants? Surely, there would come a time when defendant would be no longer responsible, as in the case at bar, for the acts of his co-defendants, and defendant was entitled to have the Court state when his time would arrive, or charge the requests mentioned, which we contend correctly state the law.

It is respectfully insisted that the moment Merlo, co-defendant, took charge of the truck, and moved it from the scene of the robbery, that the robbery was ended, and if the deceased had then met his death, at the hands of the other defendants, this defendant was not responsible.

We would particularly call attention to the 25th to 30th assignments of error and the charge of the Court.

In applying the law to the facts presented at the trial, it should not be forgotten that the deceased was in nowise connected with the truck, and was not attempting to stop the robbery, nor to give any alarm, so that it could not be said that the shooting of deceased in anywise enabled them to carry out the robbery, or to aid in their escape, after the commission of the crime.

In the case of *People v. Huter*, 184 N. Y. 237; 77 Northeastern, p. 6, the facts as they appear in this case, from Judge Haight's opinion are: That the defendant broke into a bakeshop, located on 3rd Avenue, between 54th and 55th Streets, New York, and had a horse and wagon in front of the premises; he had removed a crate of eggs, and placed it in the wagon and returned to the shop to get another crate when discovered by the

watchman. He then went out of the premises pursued by the watchman, who later was joined by a Police Officer at 55th Street. The defendant turned and fired at the Officer, killing him. The judge charged the jury that if they found these facts to be so, they ought to find the defendant guilty of murder in the first degree, as the killing took place in the commission of felony.

The Court of Appeals of New York, however, held this to be error. They said:

"It is true that he was immediately pursued by the watchman and by Officer Enright, but we incline to the view that this did not operate to continue the burglary after the defendant had abandoned the property that he undertook to carry away and had escaped from the premises burglarized."

The Court cited *People v. Myers*, 162 New York, 357; 57 Northeastern, 758, and pointed out there that the defendant had committed the crime of murder while still on the premises he was burglarizing and "before he had broken out on to the street."

The Court also cited the case of *Dolan v. People*, 64 New York, 485-487, where the Court said:

"That the defendant could be said to be engaged in the commission of the crime UNTIL he leaves the building with his plunder."

Judge Haight said:

"Was the assault in this case upon the Officer a separate and independent felony from that of the homicide, or did it form a part of and become the chief ingredient of that crime?"

In the case of *People v. Marwig*, 227 New York, 382; 125 Northeastern, 535, the principal above enumerated was approved.

The Court said:

"It is evident, that if the criminals had escaped, and were a mile away from the place of the crime, it could not be said that they were then in the commission of a felony. At what distance from the place of the crime would the felony committed in the store end? The rule cannot depend upon some arbitrary measure of distance. It was said in *People v. Huter*, 184 New York, 237, that in all cases to which the attention of this Court had been called in which persons had been convicted of murder in the first degree by reason of the killing of a person while the accused was engaged in the commission of a burglary, the killing took place upon the premises."

In *People v. Marendi*, 213 N. Y. 600, 607, 107 N. E. 1058, 1060, it was said:

"Assuming that the defendant fired the fatal shot at Officer Murtha, the truth undoubtedly is that the shooting of O'Connell, if done by the defendant, was to escape the consequences of the earlier completed crime. On that theory the jury might very well have found that the defendant formed the deliberate and premeditated design to shoot any one who got in the way of his escape; but that did not justify the submission of the case to the jury so as to permit a conviction of murder in the first degree for an unintentional homicide, committed without such a design."

In the *Marwig* case, a request to charge was submitted, which was very similar to the request in this case:

"If this evidence does not show that this shooting occurred while the robbery or the attempt at robbery was being made, but was after it was over and abandoned by the persons charged, that they cannot find the defendant guilty as charged in the indictment."

The Court charged this request with the additional statement, that if the jury were satisfied that a robbery had been made or attempted, that that attempt together with the efforts to escape was all and one a part of a continuance transaction. Said the Appellate Court:

"Here it will be noticed that the Court charged as a matter of law that the escaping upon the public streets was a part of the crime of robbery. The modification therefore, was incorrect."

The opinion in this case is a lengthy one, and there is such a thorough examination of the law on the subject in same, that the attention of the Court is most earnestly called to it.

In the case of *People v. Smith*, 232 New York 239, and 133 Northeastern 574, it appeared from the opinion of Chief Judge Hiscock, that defendant broke into the store of one Johnson. The Proprietor's son found the defendant engaged in the commission of the crime of burglary, arrested him, took from his possession various articles, including a pistol, placed him in a chair and handcuffed him; then the proprietor stepped to a telephone, and the defendant suddenly sprang and seized the gun, which stood near by, and shot causing the death of the son.

The trial judge charged in effect that if the defendant was engaged in the crime of burglary, and this homicide resulted, that he might be convicted of murder in the first degree. Presence upon the premises was made conclusive evidence of the continuance of the crime. The Appellate Court said in substance, that this was not correct, as it appeared as a matter of fact that the crime had been terminated before the homicide was committed.

In *People v. Lamb*, 96 Ill. p. 73, it appeared that Lamb and another had burglarized an establishment and the other while unloading the plunder some place distant from the scene of the burglary, murdered an officer who discovered him. Lamb had abandoned his accomplice after the burglary had been committed, and before the plunder had been removed to the place in question. It was held, that the shooting by his confederate was not murder in the commission of a felony, so as to hold Lamb.

It is respectfully submitted that in view of the above, that there was serious error in not charging the various requests and in the charge as delivered, which errors are summarized as follows:

(1) In not defining a rule to the jury by which they could ascertain at what point the robbery ended.

(2) By not charging that the facts, as recited in the requests pointed out a period when the robbery had ended.

POINT IX

The Trial Court erred in refusing to charge as requested, and in the exposition of the law of the case to the jury in the charge.

As in the previous case of *Turko*, the Court charged the jury that the defendant Carlino by reason of being identified in the robbery, was guilty of murder in the first degree under the statute. A general exception was taken to the charge and specific exceptions were also taken

(C. B. p. 186, etc.). Exceptions were also taken to the refusal to charge as requested (C. B. p. 187).

These questions as raised in the assignments of error and causes for reversal are intended to be urged but since they are covered in this Brief in the general discussion of the law of the case it seems unnecessary to again refer to the argument.

POINT X

The judgment of conviction of the defendant, Carlino, should be reversed and a new trial awarded.

Respectfully submitted,

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