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## STATE EXHIBITS:

- 1—Map, marked in evidence at page 13.
- 2—Photograph of School Entrance, marked in evidence at page 14.
- 3—Photograph, marked in evidence at page 15.
- 4—Photograph, marked in evidence at page 15.

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5—Photograph, marked in evidence at page 15.	
6—Photograph, marked in evidence at page 16.	
7—Revolver and shells, marked in evidence at page 63.	
8—Packet, marked in evidence at page 75.	
9—Revolver, marked in evidence at page 77.	
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11—Letters taken from Cortese, marked in evidence at page 78.	
12—Letters to Father D'Aquila, marked in evidence at page 78.	
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17—Bullet taken from the body of Falzano, marked in evidence at page 83.	

## DEFENDANTS' EXHIBITS:

- 1—Letter and envelope, marked in evidence at page 135.
- 2—1925 Pistol Permit, marked in evidence at page 162.
- 3—Letter, marked in evidence at folio 191.

**Writ of Error.**

State of New Jersey,  
County of Essex—ss.:

The State of New Jersey to the Judges of the Court of Oyer and Terminer, constituting the Court of General Quarter Sessions in and for the County of Essex, GREETINGS: 10

Because in the record and proceedings and also, in the giving of judgment upon a certain indictment in the name of the State of New Jersey against Michael Cortez, for knowingly sending or delivering certain letter or letters demanding money or other valuable things under threat to maim, wound or kill, heard and determined, by our said Court of Oyer and Terminer, constituting the Court of Quarter Sessions in and for the County of Essex, manifest error hath intervened to the great damage of the said Michael Cortez, as from his complaint we have received information; we being willing in this behalf to correct the error in due manner, if any shall be, and that speedy justice be done to him, the said Michael Cortez, do command you that if judgment thereon be given, then that you do distinctly and openly send under your seal the record and proceedings aforesaid with all things touching the same, to our Supreme Court to be held at Trenton, on the 23rd day of May, nineteen hundred and twenty-five, and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error that of right and according to the laws and customs of New Jersey, ought to be done. 20 30 40

*Writ of Error.*

WITNESS, William S. Gummere, Chief Justice of our Supreme Court, at Trenton, the 4th day of May, in the year nineteen hundred and twenty-five.

EDWARD J. KELLEHER,  
Clerk.

10

JOHN A. BERNHARD,  
Attorney.

Presented in open court this 4th day of May, 1925.

EDWIN C. CAFFREY,  
Judge.

20

State of New Jersey,  
County of Essex—ss.:

I, EDWIN C. CAFFREY, Judge of the Court of Quarter Sessions, Essex County, New Jersey, Do Hereby Certify and return to the Supreme Court of Judicature of the State of New Jersey, the Indictment, Verdict of the Jury and this Judgment of the Court and all other things touching and concerning the same together with the entire record of the proceedings had at the trial as by the within Writ to me described I am Commanded.

30

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Court at Newark, New Jersey, this      day of May, A. D. 1925.

(L. S.)

Judge of the Court of Quarter Sessions, Essex County, New Jersey.

40

**Indictment.**

State of New Jersey,  
County of Essex—ss.:

BE IT REMEMBERED, that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex on the second Tuesday in December, in the year of Our Lord, One thousand nine hundred and twenty-four, by the Honorable William S. Gummere, Chief Justice of the Supreme Court of Judicature, of the State of New Jersey, and holding the said Court of Oyer and Terminer, in and for the County of Essex, New Jersey, by the oath of John A. MacArthur, Charles T. Moog, Richard Pfeiffer, George J. Zisch, George V. Goehring, John C. Krueger, James F. Collins, Percy B. Menagh, Ott Kuhn, Wallace Zeliff, Charles D. Brady, George Garrabrant, Arthur A. Blaicher, John B. Wright, John L. Becker, Michael J. Blessington, Walter M. Aikman, Jr., Platt Adams, James A. Whelan, Clarence O. Hurd, Robert Baunach, Frank Schwartzwalder, Milton O. Weingarten, good and lawful men of the said County of Essex, duly commissioned 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 Essex, it is presented in manner and form following, to wit:

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Essex County, to wit:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that Frank Rizzo, Michael Cortese and Frank Amistardi on the twenty-seventh day of January, in the year of our Lord one thousand nine hun-

40

*Indictment.*

dred and twenty-five at the City of Newark in the County of Essex aforesaid did knowingly send to one Ernest D'Aquila a letter, demanding of him, the said Ernest D'Aquila, money, to wit: the sum of ten thousand dollars and threatening to maim, wound, kill and murder the said Ernest D'Aquila 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 the Grand Jurors aforesaid, upon their oath do further present that the said Frank Rizzo, Michael Cortese and Frank Amistardi on the thirtieth day of January, in the year of our Lord, one thousand nine hundred and twenty-five, at the City of Newark in the County of Essex aforesaid, did knowingly send to one Ernest D'Aquila a letter, demanding of him, the said Ernest D'Aquila, money, to wit: the sum of ten thousand dollars and threatening to maim, wound, kill and murder the said Ernest D'Aquila 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.

J. O. BIGELOW,  
Prosecutor of the Pleas.

On the fifth day of March, A. D. Nineteen hundred and twenty-five, on which day the said Indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, and the said Justice did then and there order the said indictment to be handed down to the Court of Quarter Sessions, and to be delivered to the Clerk of the Court of Quarter Sessions, in and for said

*Indictment.*

County of Essex, and then and there the said indictment was duly delivered and duly filed by the Clerk of the said Court and an entry of such order and delivery and filing was then and there made in the minutes of said Court at the same time pursuant to the statute in such case made and provided.

And afterwards, that is to say, on the twelfth day of March, A. D. Nineteen hundred and twenty-five at a Court of Quarter Sessions, holden at Newark, in and for the County of Essex, before the Honorable Edwin C. Caffrey, Presiding Judge of the Court of Common Pleas, Michael Cortese, impleaded, in the custody of Harry B. O'Connell, Sheriff of the County of Essex aforesaid, and the said Michael Cortese, impleaded being brought before the bar in his own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon him, how he would acquit himself thereof, says that he is Not Guilty thereof, and therefore for good and evil he puts himself upon the country, &c. and John O. Bigelow, Prosecutor of the Pleas of said State, for said County of Essex in this behalf doth the like.

Therefore, let a Jury thereupon come before the Court of Quarter Sessions to be holden at Newark in and for the County of Essex, on the twenty-fifth day of March, A. D. Nineteen hundred and twenty-five, then next ensuing, twelve free and lawful men, each of whom shall be a citizen of this State and resident within the County of Essex aforesaid, above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known and who are not of kin to the said Michael Cortese, im-

*Indictment.*

pleaded, to recognize upon their oath whether the said Michael Cortese, impleaded is Guilty of the premises in the said indictment specified or Not Guilty because the said John O. Bigelow, Esquire, Prosecutor, &c., as the said Michael Cortese, impleaded puts himself upon the jury and the same time is given to the parties aforesaid at the same place.

10 And afterwards, that is to say, the twenty-fifth day of March, A. D. Nineteen hundred and twenty-five, at the same Court of Quarter Sessions, holden before the Honorable Edwin C. Caffrey, Judge of the Court of Common Pleas, comes the said John O. Bigelow, who prosecutes as aforesaid, and the said Michael Cortese, impleaded, and the jury  
20 of whom mention is before made, and by Harry B. O'Connell, Sheriff of the County of Essex, for this purpose empanelled and returned, to wit, after the following challenges, by the State 1, by the Defendant 2, Authur Beach, Albert Ehlers, Marion C. Quinn, Albert W. Schopp, Frank W. Miller, Charles J. Riedel, Isaac B. Jennings, Edward E. Gilroy, Fred W. Kough, Conrad Metz, Albert A. Johnson, William V. Hanna, being  
30 called were sworn upon that jury who to speak the truth of and concerning the premises and thereupon the trial of said issue was commenced and continued until the twenty-seventh day of March, A. D. Nineteen hundred and twenty-five, when the jury returned into Court in charge of the officer sworn to attend then, and then and there in the presence of the Prosecutor, defendant and Court do say upon their oath, "We find the defendant, Michael Cortese, Guilty in the manner and form as is set forth in the indictment"  
40 and so they say all.

*Indictment.*

And afterwards, that is to say on the Fourth day of May, A. D. Nineteen hundred and twenty-five when this defendant was called for sentence, Peter A. Cavicchia, Esq., of counsel for defendant, moved in Arrest of Judgment, which motion was denied by the Court. 10

Whereupon all and singular, the premises being seen and by the Court now here fully understood, it is on this fourth day of May, A. D. Nineteen hundred and twenty-five, the Court, Hon. Edwin C. Caffrey, ordered and adjudged that defendant be imprisoned in the State Prison of this State for a minimum term of Two years and for a maximum term of three years at hard labor upon this conviction; that he pay the costs of this prosecution and that he stand committed until said costs be  
20 paid, which said costs are taxed by the Clerk at the sum of thirty-seven dollars and fifty-nine cents and the said defendant be in Mercy, etc.

Judgment signed May 4th, 1925.

EDWIN C. CAFFREY,  
Judge.

30

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**Testimony.**

ESSEX COUNTY COURT OF GENERAL  
QUARTER SESSIONS.

On Indictment No. 549,  
December Term, 1924.  
For Threat to Take Life.

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STATE OF NEW JERSEY

vs.

FRANK RIZZO, MICHAEL CORTESE and FRANK  
AMISTARDI.

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Wednesday, March 25th, 1925.

20

Before—HON. EDWIN C. CAFFREY, *J.*, and a jury.

J. VICTOR D'ALOIA, First Assistant Prosecutor of  
the Pleas of Essex County, for the State.

PETER CAVICCHIA for Michael Cortese; John A.  
Bernhard, of counsel.

CARL ABRUZZESE for defendants Frank Rizzo and  
Frank Amistardi.

30 (A jury is called and sworn.)

Mr. D'Aloia opens for the State.

EDWARD H. SCHWARTZ sworn in behalf of the  
State.

*Direct examination by Mr. D'Aloia:*

40 Q. In January and February, this year, were  
you connected with the Newark Police Depart-  
ment? A. Yes.

*Edward H. Schwartz—for People—Direct.*

Q. With the Bertillion Division? A. Yes,  
superintendent of the Bureau of Records.

Q. You are also a civil engineer? A. Yes.

Mr. Bernhard: On the part of the de-  
fendant, Cortese, I concede Mr. Schwartz's  
qualifications. 10

Mr. Abruzzese: The same.

Q. You drew that diagram on the board? A.  
Yes.

Q. Will you kindly tell the jury what it repre-  
sents? A. The map represents and shows a por-  
tion of Lafayette Street, at the intersection of  
Congress Street, Prospect Street and Union Street.  
It shows between Prospect and Congress Street  
the fire house, the two buildings adjacent to the  
northwest corner, also the Lafayette Street school,  
or a portion of it, a lot to the northeast of that,  
and the building adjacent to the lot. It shows  
the trees, the telegraph poles, street lights, fire  
hydrants, and the building on the opposite side,  
or, we will call it the east side of Congress Street.  
Drawn to a scale of one inch equals twenty feet. 20

Q. One inch equals how many feet? A. Twenty  
feet.

30 Q. Will you tell us on the easterly side of the  
school, that is, the part fronting on Congress  
Street, the distance between the northernmost  
corner of that school and the first door to the  
south? A. Twelve feet.

Q. Now, from that northernmost corner of that  
building, as shown on your map, directly north,  
to the next building north, what is that distance?  
A. 115 feet.

40 Q. Now, are there any buildings on that part of

*Edward H. Schwartz—for People—Direct.*

the street? A. There is to the north of No. 93, which is a two-story brick.

Q. Well, I say between the school and that building at No. 93, is that built up? A. No, that is a vacant lot, directly through to Prospect Street.

10 Q. Right through to Prospect Street? A. Yes.

Q. What street does the school front on? A. Lafayette Street.

Q. And the rear of that school fronts on what? A. A vacant lot.

Q. All the way through, the whole length of the lot? A. Yes.

20 Q. Do you know what the distance is on Prospect Street, which is the street west of Congress Street, between the school building and the next building north? A. I made a survey there yesterday. I cannot say by the map, but I can give you an idea.

Q. Well, give us an idea. Is it the same distance between the northerly end of the school on Prospect Street and the next building north as there is on Congress Street? A. 121 feet, 6 inches.

Q. A trifle larger on Prospect Street? A. Yes.

30 Q. Are there any trees in that vacant lot? A. Yes, there are three or four. There are two large trees standing here and two small ones here (indicating).

Q. On the street line? A. No, sir, about the center of the lot. Yes, there are trees on the street line.

Q. What is the length of the block between Congress Street and Prospect Street? A. 214 feet.

Q. What is the width of Congress Street? A. 36 feet.

40 Q. And the width of Lafayette Street? Counsel

*Edward H. Schwartz—for People—Cross.*

for the defendant suggests that you put those distances right down there in lead pencil figures so the jury can have a memorandum of it when they take the map in the jury room. Now, directly opposite the school. The school is on the northwest corner of Lafayette and Congress Street. 10 Now, directly opposite the school on the southwest corner, what is that building? A. You have No. 4 fire truck house.

Q. What is the width of Lafayette Street there? A. 36 feet.

Q. And on what street does the fire house front? A. On Lafayette Street.

20 Q. What is the distance from the corner of Prospect Street, the school corner, to the vacant lot—from the northeast corner of Prospect Street to the end of the school building north on Prospect Street? A. 147 feet.

Q. How many feet? A. 147 feet.

*Cross examination by Mr. Bernhard:*

Q. Congress Street runs generally in what direction? A. Congress Street practically runs north and south. It runs northeast and northwest.

30 Q. The same is true of Prospect Street? A. Yes.

Q. Lafayette Street, generally east and west? A. Yes.

Q. And what is the street south of Lafayette Street, parallel to it; is it on your map? A. No, but I have my notes here.

Q. Well, don't you know generally it is Elm? A. No, I don't know.

40 Q. Union Street also crosses Prospect, does it not?

*Edward H. Schwartz—for People—Re-direct.*

Mr. D'Aloia: Union cannot cross Prospect, because it runs parallel.

Q. Lafayette. You are right and I am wrong.  
A. Lafayette, yes.

10 Q. How many blocks is that away? A. Now, Elm Street is the street directly south of Lafayette Street.

Q. That is what I thought. I asked you that, that is true? A. Yes. And Union Street runs parallel with Prospect Street.

Mr. D'Aloia: The next street west of Prospect Street.

The Witness: Yes, sir.

20 Q. The lot which you have described, is there a fence on Prospect Street or a fence on Congress Street in front of the lot? A. No, there is no fence on either street.

*Re-direct examination by Mr. D'Aloia:*

Q. You have the street west of Prospect Street marked on the map to be Union Street? A. Yes.

30 Q. Do you know the street west of Union Street which crosses Lafayette?

Mr. Bernhard: We admit it is McWhorter Street.

A. No, sir.

Q. Don't you know it is McWhorter? A. Yes, but I don't know that section very well.

40 Q. Do you know the church corner, East Mechanic and Ferry Streets? A. Yes, I know that.

JOHN L. DAY, sworn in behalf of the State.

*Direct examination by Mr. D'Aloia:*

Q. Are you the official photographer connected with the Police Department of the City of Newark? A. I am.

10 Q. And did you take certain photographs in and about the locality of the Lafayette Street school? A. I did.

Q. For the purpose of this trial? A. Yes.

Q. I show you a photograph and ask you if you took that and what it represents? A. Yes, I took this photograph and it represents the entrance on the Congress Street side of the Lafayette Street school nearest to the vacant lot and also the vacant lot.

20 Q. Will you please mark that entrance with a D on the diagram on the map? Will you also please put on the map a point indicating where your camera was and also an arrow indicating in which way it was facing when that photograph was taken? A. The camera was on the east side of Congress Street, opposite the entrance at the curb, facing in a westerly direction.

Q. Will you please mark that arrow CS2? (Witness marks map.)

(Map offered in evidence and marked Exhibit S-1.)

Mr. D'Aloia: I offer this photograph as S-2.

Mr. Bernhard: I think there will be no objection to that if you will ask when he took that.

*John L. Day—for People—Direct.*

Q. When did you take that? A. Yesterday, in the morning?

Mr. Bernhard: Is it the same then as it was?

10 The Witness: All but the snow.

Q. All but the snow on the ground? A. Yes.

(Photograph marked Exhibit S-2.)

Q. I show you another photograph and ask you when you took this? A. This photograph was made on February 2nd of this year.

20 Q. And will you kindly indicate upon the map where your camera was placed and in what direction it was facing when this photograph was taken? A. It was looking west on Lafayette Street, about fifty feet east of Congress Street, at a point about the center of the street, facing in a westerly direction.

Q. Now, will you please mark that arrow CS-3, where the camera was when Exhibit S-3 was taken? Now, looking at this photograph, will you tell us what the two buildings are on the two westerly corners of Lafayette Street and Congress Street?

30 A. The building in the lefthand corner of the photograph is Truck No. 4, so marked on the map, and on the righthand side of the photograph is a building marked Lafayette Street school.

Mr. D'Aloia: I offer this in evidence.

Mr. Bernhard: There is no objection.

Mr. Abruzzese: There is no objection.

Mr. D'Aloia: Is there any objection to

*John L. Day—for People—Direct.*

that little typewritten slip, which indicates what this photograph represents?

Mr. Bernhard: No.

(Photograph marked Exhibit S-3.)

10 Q. I show you another photograph and ask you if you took this and when? A. I took this and this was taken on the 2nd day of February of this year.

Q. Now, will you please put another arrow on the map showing where your camera was and which way it was facing when that photograph was taken? A. This is looking east from Prospect Street to Congress Street at the lot adjoining the school. The camera was about the center of the lot on Prospect Street, just off the sidewalk, and it was facing in an easterly direction, so marked CS-4. 20

(Photograph marked Exhibit S-4.)

Q. I show you another photograph and ask you if you took this and when? A. I took this on the second day of February, this year, and it is looking south on Congress Street, midway between the block.

30 Q. Now, will you please put a mark on the map showing where your camera was? A. The camera was about in front of No. 92, or a little beyond, and it was facing in a southerly direction, taking in the street and school and both sides of the street.

Q. Now, will you please mark that CS-5? A. CS-5.

(Photograph marked Exhibit S-5.)

*John L. Day—for People—Cross.*

10 Q. I show you the lefthand side of this photograph and ask you what those buildings are shown therein and where they correspond with the buildings on the map? A. The first building with the street light pole on it, is No. 92. The next one in front of the tree is 94, 96 and 98, and so on down. On the opposite side the building to the right is No. 94. It is a brick building.

Q. It shows the school building in the distance on your right? A. Yes, the school building and the lot.

Q. Now, I show you another photograph and ask you if you took that and when? A. I did. It was taken on February 2nd.

20 Q. Now, will you please put the same kind of a mark, showing the place the camera stood and the direction it was facing when this photograph was taken? A. That was looking north on Prospect street, from a point about fifty feet south of Lafayette street, and so marked CS-6.

Q. Now, does that photograph show the northerly or the westerly side of the school on Prospect Street? A. Yes.

30 Q. And does it also show back of that on that same side of Prospect Street a vacant lot? A. Yes.

(Photograph marked Ex. S-6.)

*Cross examination by Mr. Bernhard:*

Q. You have not told us what time of day you took these photographs? A. It was in the morning.

Q. Do you happen to know the day of the week? A. Monday.

40 Q. And there was some considerable snow on

*Ernest A. D'Aquila—for People—Direct.*

the ground, as indicated by the photograph at that time? A. Oh, yes.

Q. On that map is No. 93 Congress Street indicated by the figure 93? A. Yes.

Q. It is there? A. Yes.

Q. It is marked on the map? A. Yes.

10

*Cross examination waived by Mr. Abruzzi.*

ERNEST A. D'AQUILLA, sworn in behalf of the State.

*Direct examination by Mr. D'Aloia:*

20 Q. Were you in charge of the Church of our Lady of Mt. Carmel at the corner of McWhorter and East Mechanic Streets, this city, during the month of January, 1925? A. Yes.

Q. And with reference to the church itself, where did you reside? A. 22 East Mechanic Street.

Q. And where is that with reference to the church building? A. Alongside, east on Mechanic Street.

30 Q. Alongside of the church? A. Yes, alongside of the church.

Q. Now, across from the church, on Mechanic Street, is there any building? A. No building.

Q. Does the church practically front on Ferry Street? A. On Ferry Street.

Q. East Mechanic Street runs into Ferry Street there at that point, at an angle, does it? A. Yes.

40 Q. From the window of your residence and

40

*Ernest A. D'Aquila—for People—Direct.*

from the upper door step of your residence can you see towards Ferry Street? A. Absolutely, yes.

10 Q. And likewise a person standing across Ferry Street, on the northerly side of Ferry Street, can look across at your door step and your door and your window? A. I can see both sides, east and west.

Q. Now, on or about the 27th of January, did you receive this envelope addressed as you see it here containing this letter? A. Yes, I seen this letter.

Q. Will you please tell us what you did with this letter and envelope after you received it? Did you read it? A. Yes.

20 Q. Just what did you do with it?

The Court: Did you give it to anybody?

The Witness: Well, I kept it for one day, until one of the trustees stopped to see me, and I told him that it was——

Q. Never mind what you told him. Was it communicated to the police? A. That is what I wanted to tell you.

30 Q. You saw to it that the police got this letter? A. Well, I gave the letter to the trustee.

Q. Who is the trustee? A. Joseph Alvi.

Q. Did you read this letter? A. Yes.

Q. What did it say? A. Well,——

Mr. Bernhard: I object. I think that the letter speaks for itself and is the best evidence.

Mr. D'Aloia: Well, we will offer it in a few moments.

40

*Ernest A. D'Aquila—for People—Direct.*

Q. Well, after you had given this first letter to the trustee of the church, did you or did you not receive another? A. Yes.

Q. And I show you this envelope and ask you if that is the envelope that you received and was that the letter in it? A. That is the letter.

Q. Now, will you please tell the court and jury 10—did you read this letter? A. Yes.

Q. And what did you do with it? A. Well——

The Court: Did you give it to anybody?

The Witness: Yes. The first letter I advised the officer——

Q. Now, wait. Did you give this second letter to the police? A. Yes, I did.

Q. Now, subsequent to the receipt of the two 20 letters and subsequent to your giving them to the police—after you received the two letters and after you had given both of them to the police, was there or was there not an arrangement made whereby you were to deposit a packet at some school? A. Yes.

Q. Was the packet prepared? A. Yes.

Q. Did you go to deliver the packet? A. No, I sent my assistant.

Q. What is his name? A. Gaetano Fserrazza. 30

Q. Now, were you present when your assistant, Father Fserrazza, left the rectory? A. Yes.

Q. Will you tell what time in the morning that was? A. Just a few minutes before twelve.

Q. What day of the week? A. A few minutes before one o'clock.

Q. What night of the week, or what morning? A. I think the first Sunday in February.

Q. And how did Father Fserrazza leave?

Mr. Bernhard: I object.

40

*Ernest A. D'Aquila—for People—Direct.*

Q. In what way did he go, on foot or automobile?

10 Mr. Bernhard: I object to that (argument) for this reason, that it does not yet appear that the defendant whom I represent, or the other defendants, are in any way connected with the sending of these letters, and until that does appear it is not material to this issue.

The Court: Overrule the objection.

Defendant Cortese's counsel prays an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

20

Q. How did Father Fserrazza leave, on foot or automobile? A. We called a taxi.

Q. A taxi? A. Yes.

Q. Before the taxi was called did you prepare a packet in imitation of money with any one?

30 Mr. Bernhard: I object to that for the reason I have already submitted, and for the purpose of the record it is not pertinent to the issue and it is not binding on the defendants. There is no proof up to this time connecting the defendants with this case and no offer to, and for that reason it is immaterial. They are all objectionable for the same reason that this evidence is not material.

Mr. D'Aloia: I will now state I will connect it later on.

The Court: I will admit that on the

40

*Ernest A. D'Aquila—for People—Direct.*

theory that these matters will form part of the issue.

Mr. Bernhard: I assume they do, but I must protect the interest of my client. May I ask this, that in the event that in my opinion there is no testimony between this testimony and the defendant will you entertain a motion? 10

The Court: I will entertain any motion you desire to make.

Mr. Abruzzese: I desire to make a motion on the same line on behalf of the defendants Amistardi and Rizzo.

The Court: The same ruling.

Defendants' counsel pray an exception to this ruling of the Court. 20

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

Q. (Question read.) What is the answer? A. Yes, I did, in the afternoon.

Q. I show you a packet and show you some binding to it, contents, paper, and some dollar bills. Is that the packet prepared by you? A. Yes. 30

Q. What did you do with this packet at or about one o'clock on this Sunday morning when the taxicab came and in which Father Fserrazza left? A. I gave it to my assistant.

Q. Father Fserrazza? A. Father Fserrazza, yes.

Q. Were you close to this packet after you gave it to Father Fserrazza and when— A. I don't understand.

Q. Where did you see this after you gave it 40

*Ernest A. D'Aquila—for People—Direct.*

to Father Fserrazza and he got into the taxicab with it? Where did you next see it? A. I saw it in the hands of the policeman.

Q. When? A. On the same morning.

Q. What time? A. Well, it was about half-  
10 past one; not much later.

Q. Where was the policemen who had this? A. They were in my house.

Q. In your house next to the church on East Mechanic Street? A. Yes.

Q. And this is the package you recognize now that you had before and after which you prepared? A. Yes, sir.

Q. Before parting with this packet, and before it left your possession, did you know the numbers  
20 of these dollar bills? A. Yes.

Q. And did you put them down on a slip of paper? A. Yes.

Q. You have them? A. I think I must have them.

Q. Look for them, please. A. (Witness hands counsel paper.)

The Court: There is no objection to the identity of the bills.

30 Mr. Bernhard: No, not as far as Cortese is concerned.

Q. Now, did you call that cab of your own initiative, or did you do it under instructions from any one? A. Well, it was between myself and friends in the afternoon and an officer.

Q. What kind of an officer, was he connected with the police department? A. A detective.

Q. So it was planned in the afternoon with  
40 your friends and the detective that this cab was

*Gaetano Fserrazza—for People—Direct.*

to come at one o'clock in the morning and your assistant was to take this package to the Lafayette Street school? A. Yes.

(Cross examination waived.)

10

GAETANO FSERRAZZA, sworn in behalf of the State.

*Direct examination by Mr. D'Aloia:*

Q. On the morning of Sunday, the 1st of February, were you the assistant to Father D'Aquila at the Lady of Mt. Carmel Church?  
20 A. Yes.

Q. And at one o'clock that morning did you leave the rectory in a taxicab? A. Yes.

Q. And at that time did you have in your possession this package? A. Yes, I think this is it.

Q. Now, look at it. Do not think. Is that it? A. It is.

Q. Where did you go with that taxicab and this package? A. Supposed to go down to Prospect Street.

Q. Where did you go? A. I went down to  
30 Congress Street.

Q. Where, to what particular institution or building? A. There is a Public School near Lafayette Street and Congress Street.

Q. Where did the taxicab stop? A. It stopped at Congress Street.

Q. If I show you a photograph can you show the part of the building in front of which you stopped? A. Yes, right here.  
40

*Gaetano Fszerrazza—for People—Direct.*

Mr. D'Aloia: Indicating on Exhibit S-2 the doorway entering the school building on the Congress Street side near the northernmost end of the school.

10 Q. When the taxicab stopped there what did you do, if anything? A. I just got out of the taxi and I had my package in my pocket.

Q. You mean this package? A. That package.

Q. What did you do with it? A. I just laid it down on the sidewalk near the building.

Q. Will you please put a mark showing on this photograph where you laid the package? Did you go down there alone in that cab or did you have anyone with you? A. I had a policeman with me, a detective.

20 Q. Was he sitting so he could be seen outside or otherwise? A. No, sir; he was lying down in the bottom of the taxi.

Q. Who got out at the school, you or the detective? A. I got out alone.

Q. And after you deposited the package there at this point you have indicated on the photograph what did you do? A. I returned back to the taxicab again and went back to the rectory.

30 Q. You went back to the rectory? A. Yes.

Q. How long after that was it that you saw this package again? A. This is the first time I seen it.

Q. Didn't you see it at the rectory? A. No, sir.

Q. You were not there when the detectives came in? A. I was, but I don't remember seeing it.

Q. Now, I show you a photograph, Father, which is marked S-5, and it shows that side of the school? A. Yes.

40

*Gaetano Fszerrazza—for People—Cross.*

Q. And it shows that doorway that you have pointed out on the other picture? A. Yes.

Q. And it shows a telegraph pole? A. Yes.

Q. Can you tell this jury where you placed the package near that door with reference to the shadow of that pole? A. Yes.

Q. Where did you put it? A. Near the door, where that building is there.

Q. Well, I mean with reference to the shadow that was cast by the pole? A. It was in the shadow.

Q. Did you put it in the shadow? A. Yes. I did that purposely, because I knew if anybody passed by there that didn't know anything about it—

Mr. Bernhard: I object.

Mr. D'Aloia: He put it in the shadow.

The Court: The rest will be stricken out.

Mr. D'Aloia: The telegraph pole which he indicates is shown on S-5.

*Cross examination by Mr. Bernhard:*

Q. The sidewalk, I notice, on the picture which you just had in your hand, the photograph you just had in your hand—I refer to S-2—is free of snow. It appears so to you, doesn't it? A. Yes.

Q. Was there any snow on the ground that night, do you recall, on the sidewalk? A. Yes, there was some.

Q. Can you tell us how you went from your home or your house down to the spot where you say you put the package on the sidewalk, what course you took? A. Well, the course was from the rectory to McWhorter Street, then to Lafayette and from Lafayette turned into Congress.

40

*Gaetano Fserrazza—for People—Cross.*

Q. Let us see. Let us go a little slower. The rectory faces on Mechanic Street or on McWhorter? A. On Mechanic.

Q. And then right around the corner you go to McWhorter? A. Yes.

10 Q. So when you left the rectory you went and turned to your right? A. Yes.

Q. And you went down McWhorter? A. One straight block to Lafayette and then turned to my left and then straight in Lafayette Street, and then turned in my left again.

Q. One block? A. I think three blocks.

Q. Then turned in your left again? A. Yes.

Q. Then your cab came to a stop, didn't it? A. Yes.

20 Q. Did you direct its driver to stop? A. No, sir.

Q. Did the cab stop on the same side of Congress Street where you placed the package, or was it on the opposite side? A. No, where I put the package.

Q. On that side of the street? A. Yes.

Q. And you got out? A. I got out.

30 Q. Now, then, as you left, or after you left the rectory on Mechanic Street and proceeded down McWhorter and on through Lafayette to Congress, did you see any other taxi close by you following in the same direction, or the same course? A. No, I don't remember whether there was any or not.

Q. Did you look to see? A. While I was there I looked around to see if I could see anybody, but I couldn't see anybody.

40 Q. Are you still located here in Newark, or are you located in New York? A. I am located in New York at the present time.

*Patrick M. Quinlan—for People—Direct.*

Mr. Bernhard: I would like to have the witness remain.

The Court: Yes.

Mr. D'Aloia: Father, will you please stay in court and not go away?

The Witness: I will stay here. 10

PATRICK M. QUINLAN, sworn in behalf of State.

*Direct examination by Mr. D'Aloia:*

Q. Were you connected with the Newark Detective Bureau on the morning of February 1st, 1925? A. Yes.

Q. And also on the afternoon of the day before, which was a Saturday, January 31st? A. Yes. 20

Q. And did you go down to the rectory of Our Lady of Mt. Carmel Church on East Mechanic Street on Sunday morning about one o'clock? A. Yes.

Q. In what? A. A taxicab.

Q. What part of the cab did you occupy? A. The floor.

Q. And who entered the cab at the rectory? A. The priest. 30

Q. Which one? A. Father Fserrazza.

Q. The last one that was on the stand? A. Yes.

Q. And where did you go after he came into the cab from the rectory? A. Went down towards the school.

Q. Well, where did the cab stop? A. On Congress Street, alongside of the school.

Q. What did your fellow passenger do, Father Fserrazza? A. He had a package in his pocket 40

*Patrick M. Quinlan—for People—Cross.*

and he took the package out of his pocket and got out of the taxicab and walked over into a dark spot and came back without the package.

Q. Did he get into the cab again? A. He got into the cab again.

10 Q. Did you notice the cab drive away from there? A. The cab drove away, back to the rectory.

Q. What street was that particular spot where the package was left by him? A. Congress Street.

Q. How far is that particular school building from the church edifice on East Mechanic Street? A. How far?

Q. Yes. A. I should judge about seven blocks; 20 six or seven blocks.

Q. Now, how did the taxicab proceed from the rectory of the church to the school? A. I could not tell you.

Q. You were down on the floor. That is all.

*Cross examination by Mr. Bernhard:*

Q. And when you came back after having deposited the package, or the Father having deposited the package, were you still on the floor? 30 A. Yes.

Q. So you don't know what course the taxi took then? A. No.

Q. Were you in the taxi when it arrived on the trip out to the rectory; did you engage the taxi? A. No.

Q. Where did you board it? A. At Police Headquarters.

Q. What taxi was it? A. A Yellow taxicab.

40 Q. Was it pretty good? A. Well, it was all right.

HUMBERT BERARDI, sworn in behalf of the State.

*Direct examination by Mr. D'Aloia:*

Q. In January of this year, were you attached to the Newark Detective Bureau? A. I was.

Q. And still are? A. I am.

Q. Do you remember being assigned to a case where Father D'Aquila, rector of the Church of Our Lady of Mt. Carmel, had received two letters? A. I do.

Q. And did you get the letters? A. I did.

Q. Are these the letters that were given to you by people connected with the church for the purpose of investigating? A. They are.

Q. Now, do you read Italian or English? A. I do, both languages.

Q. These letters are in English or Italian? A. In English, broken English.

Q. I want to call your attention to this expression, right here toward the end, "Next Sunday, if you don't come to we take your skin first"—

Mr. Bernhard: I object to this question for the reason that the letter from which the Prosecutor reads is not in evidence.

The Court: Sustain the objection.

Mr. D'Aloia: I will withdraw the letter for the time being—withdraw the question.

Q. Now, what did you do after you got the letter? A. I got the letter on January 29, assigned to me from Lieutenant Kuhn, and on January 31, I called at the rectory of Father D'Aquila.

*Humbert Berardi—for People—Direct.*

Q. Did you make plans about going anywhere?

A. I didn't on the first letter.

Q. Did you afterwards? A. I did.

Q. Do you remember the morning of the Sunday of February 1? A. I do.

10 Q. Where were you placed, or where did you stay? A. In the alleyway of 96 Congress Street.

Q. Now, how is that place situated with reference to the school, the Lafayette Street school; point it out on the map? A. It faces the empty lot in the rear of the school, about the center.

Q. It faces the empty lots in the rear of the school which run out to Prospect Street? A. Yes, about the center.

20 Q. I show you a photograph, which is Exhibit S4. Will you point out the building there, or the buildings, on each side of the alley where you were stationed? A. Yes, the largest building, three-story building.

Q. Which one, the first one? Will you please describe that building? Where is the alley, between that building and the next one? A. Yes.

30 Q. Put a letter "B" there above that alley, which is your initial. Now, as you were in that alley, will you kindly tell the jury what you saw first and then what you did about one o'clock? A. The time was about 1:06 A. M.

Q. What did you see? A. I saw three men approaching the lots from the Prospect Street side.

Q. Now, will you please take this pointer? You have marked on the photograph the alley wherein you were stationed. Now, will you please mark on that diagram? A. This is the alley.

40 Q. Mark that "B" to correspond with the photo-

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graph. Now, take your pointer as you are telling the jury what you saw, the men and the direction they came from. A. While I was standing there I had the alley door open and I saw three men come from the point where I am pointing.

The Court: Where is that? 10

Q. Where is that? A. That is Congress Street.

Q. Is that the northwest corner of the lots? A. The northwest corner of the lots.

Q. As you have your pointer there, I show you this photograph S2. Can you see that point you are pointing at on the map on that photograph? A. I can.

20 Q. Where is it? Just mark it with a pencil. Is that it? A. Yes. There is a small fence there, leading into a small house.

Q. Now, what did you see the three men that came around that corner into those lots do, if anything? A. Three men came traveling south on Prospect Street and they crossed over to the lots and they reached as far as the fence in the rear of the center of the school.

Q. Is that a fence? A. It is a frame fence.

30 Q. What happened there? A. They stopped there for about ten or fifteen seconds.

Q. Yes. A. Then a man, whom later I knew, that is, Falzano—

40 Q. One of the men did what? A. One of the men left the two others and he started down east along the wall in a creeping like manner, creeping up against the wall. At the same time the other two men proceeded in the same direction, but breaking away from the building and going out

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into the lots. They were walking at a distance of about three or four feet apart. The man that I later knew was Falzano, when he reached this corner—

10 Q. You mean the man who was creeping along the building? A. Yes.

Q. When he got to that corner what did he do? A. When he reached the northeast corner of the school he turned south on Congress Street. At the same time the other two men were about twenty-five feet away from the westerly sidewalk of Congress Street.

Q. They were in the lots? A. Yes. Falzano went here to the entrance.

20 Q. You mean the man who crept along the building went to the school entrance? A. Yes.

Q. Then what happened? A. He picked up a package.

Q. Did you see that package left there? A. I did.

Q. By whom was the package left there? A. By Father Fserrazza.

Q. Did you see him get out of the taxicab? A. I did.

30 Q. And did you see him deposit a package there? A. I did.

Q. Now, when you saw the man who crept along the wall of the school and then along on Congress Street and come to the point where the packet was and picked the packet up, what did you do? A. At that time I had already left the alley. I left the alley when the man who was creeping along the wall had turned the corner, and I ran into the lots and I ordered the two men to hold up their hands.

40

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Q. The two men in the lots? A. The two men in the lots, which they did.

Q. Then what happened? A. Well, I grabbed Rizzo and the other man broke away from me.

Q. You grabbed Rizzo, one of the two men in the lots? A. Yes, and the other man broke away 10 from me, running north on Congress Street.

Q. The other man broke away running north on Congress Street toward Ferry Street? A. Yes.

Q. What did you do next? A. I grabbed Rizzo by the back of his collar and I dragged him out to the sidewalk.

Q. Is Rizzo the man on trial? A. He is.

Q. The fourth man from the first? A. He is. As I got to the sidewalk Falzano was coming back walking north on Congress Street. 20

Q. What did he have, if anything, in his hand? A. Under his left arm he had a package.

Q. What did you do then? A. I ordered him to throw his hands up. As I said, "Hands up," he said, "I have my hands up".

Q. Then what? A. I said, "Put your hands up, I am a police officer". He said, "I have my hands up". I said, "If you don't put your hands up I will shoot you".

Q. Then what? A. Then he shot me in the 30 right side.

Q. What did you do? A. I returned the fire. As I returned the fire I heard Falzano remark, "Oh", and then he dropped the package.

Q. What did you do? A. I continued firing three more shots and Falzano dropped the package and ran out in the street.

Q. What did you do in the meantime? A. Rizzo was trying to break away from me and 40

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he fell over the snow bank. While lying there in the street scuffling with Rizzo, Falzano fired two more shots at me and I returned the shots.

Q. Then what? A. Rizzo got up and then grabbed my finger in his mouth.

10 Q. Rizzo did? A. Rizzo did.

Q. Which finger? A. My right thumb.

Q. What happened then? A. We got back to the sidewalk. In the meantime Tortoriello and Fletcher had got there and Tortoriello and Fletcher—and Tortoriello started firing at Falzano and Falzano kept on running to a distance up in front of 92 Congress Street.

Q. Which is the house immediately north of the school next to the lots? A. It is the last  
20 house shown on the map.

Q. On the downtown side? A. Yes.

Q. What happened then? A. Here is where Falzano stopped. (Illustrating.) He dropped in front of this house, and Tortoriello jumped on him and took the revolver.

Q. Who took Rizzo? A. Rizzo and I had finally got about twenty-five feet in the lots and Detective Fletcher came running up to me and seeing that I had the gun up against Rizzo's face he  
30 struck Rizzo on the head with a blackjack.

Q. And he took Rizzo? A. No, he didn't take Rizzo.

Q. What did you do? A. He let go of my hand.

Q. Who? A. Rizzo. And I struck Rizzo on the head six or seven times.

Q. Rizzo had your right thumb in his mouth? A. Yes.

40 Q. And the gun was up against his face? A. Yes.

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Q. And Fletcher had hit him with a blackjack to make him let go of your thumb? A. Yes.

Q. What happened after that? A. Well, Rizzo was lying unconscious on the sidewalk, and I left him there on the scene and I went to the fire house and I told the firemen I was shot. 10

Q. Where did you go then? A. To the City Hospital.

Q. How long were you there? A. Twelve days.

Q. Did you know Falzano before this night? A. I did.

Q. Did he know you? A. He did.

Q. Up at the hospital did you see Falzano after you were taken there? A. I did.

Q. Did you speak to him? A. No. I was un-  
20 dressing at the time and they brought Falzano right after that, and as Falzano got in the receiving room he said to me—

Mr. Bernhard: I object.

The Court: Sustain the objection.

Q. Do you know what Falzano's condition was at that time? A. He was shot.

Q. You don't know anything else? You do  
30 not know whether he was mortally shot, or anything of that kind? A. Mortally shot?

Mr. Bernhard: I object to that.

Mr. D'Aloia: I will not press it. It is immaterial.

Mr. Bernhard: Then will you move it be stricken out?

Mr. D'Aloia: Yes.

*Humbert Berardi—for People—Cross.*

Q. How long were you confined to the hospital? A. Twelve days.

Q. What happened to Falzano? A. He died.

Q. What was extracted from your body, if anything? A. A .38 calibre bullet.

10 Q. From what part of your body? A. Under my right breast.

*Cross examination by Mr. Abruzzi:*

Q. How long a time was it from the time Father Fserrazza deposited the package until you saw the three men coming from the corner of Prospect Street? A. No more than ten minutes.

20 Q. And during the whole ten minutes you were in the alleyway? A. I was not.

Q. Were you not in the alleyway when Father Fserrazza deposited the package? A. I was not.

Q. Where were you then? A. In the fire house, No. 4, corner Congress Street and Lafayette Street.

Q. And when did you go to the alley? A. About two minutes before the three men got on the scene.

30 Q. Could you distinguish their features as they came across the lots? A. I did.

Q. Now, when you got into the alleyway did the door open inwards or outwards towards the street? A. Inwards.

Q. And you crossed the street and you did go to Falzano, did you? A. I didn't.

Q. You went to the two men in the lot? A. Yes.

40 Q. So that you practically passed Falzano on your left? A. I didn't pass Falzano at all.

*Humbert Berardi—for People—Cross.*

Q. Well, wasn't Falzano on the sidewalk at the time? A. Yes, but he was away from me.

Q. Yes, to your left, as you went into the lots, isn't that true? A. Yes. The reason for me doing that—

10 Q. I don't want to know your reason. Now, as you passed him, Falzano was on your left and you were facing west? A. I was.

Q. How far was Falzano to your left when you passed him to enter the lots? A. Twenty feet.

Q. And at that time you had already seen him pick up the package? A. I had.

20 Q. Were the two men standing in the lots during all the time that you were approaching? A. They were.

Q. They did not move as they saw you approaching? A. They did not move.

Q. And the first thing when you got to them was to say, "Hands up", and up went their hands, is that right? A. Yes.

Q. And you did not tell these two men who you were? A. I didn't.

30 Q. And isn't it a fact, officer, that Rizzo got your thumb in his mouth after you had pressed your gun up against his face? A. It is not a fact.

Q. When did you first press your gun up against Rizzo's face? A. At no time.

Q. I thought you testified your gun was up against his face. A. Rizzo grabbed my thumb in his mouth. That is how the gun happened to be up against his face.

40 Q. I understand you got ahold of Rizzo. A. I did, with my left hand.

*Humbert Berardi—for People—Cross.*

Q. And did you walk twenty-five feet from inside of the lots on Congress Street? A. I ran out with him.

Q. And he ran with you? A. Yes.

Q. Towards Falzano? A. Towards Falzano.

10 Q. And as you were running you were pushing him ahead of you, were you? A. I was.

Q. So that when Falzano fired the shot Rizzo was practically between you and him? A. He was.

Q. And when the shots were first fired, Rizzo fell? A. He did not fall.

Q. Did you push him down? A. I didn't. He tried to break away on me and we fell in a struggle.

20 Q. Tell us what you did. Did you duck when you heard the first shot fired? A. I didn't duck.

Q. Well, did you stand? A. I stood there and fired three times.

Q. And Rizzo stood there with you? A. He did. That was the time Rizzo was trying to break away from me when he saw the fire.

Q. And at that time he was between you and Falzano? A. He was.

30 Q. You held him, I suppose, with your left hand? A. I did.

Q. And with your right hand you pushed your gun ahead of his body and fired? A. I did.

Q. Is that right? A. Not ahead of his body. I didn't have his body ahead of me. I had it on the left of me.

Q. I thought you said he was between you and Falzano? A. Yes, he was, but I had him to the left of me.

40 Q. Didn't you put him between you and Falzano? A. I didn't.

*Humbert Berardi—for People—Cross.*

Q. And that is when he tried to break away? A. When the firing began he tried to break away from me and we fell over the snow bank.

Q. And you both fell? A. We both fell. It was very icy there that night.

Q. When he fell you had already done your firing? A. I had. 10

Q. And how many shots did you fire? A. Six shots.

Q. And it was after all of the six shots were fired that both you and he fell, is that right? A. Right.

Q. You had already heard Falzano say, "Oh"! A. I had heard.

Q. Did he drop? A. He did not drop. He ran out into the street and, while we were lying out in the street, he fired two shots at me. 20

Q. He fired in your general direction? A. In my general direction.

Q. And how did he fire those shots, as he was running? A. He was standing there.

Q. At what distance from you? A. Four or five feet.

Q. I thought you said he ran into the street? A. Well, we were both out in the street at the time. 30

Q. Both you and Falzano and Rizzo? A. Rizzo and myself were lying on the ground and Falzano was standing up.

Q. When you hit him on the head with your gun— A. The first shot.

Q. When did you hit Rizzo on the head? A. Oh, after Fletcher had struck him.

Q. After Fletcher had hit him with his black-jack five or six times? A. One or two times. 40

*Humbert Berardi—for People—Cross.*

Q. And Rizzo was on the ground with you?

A. No, he was standing up at the time.

Q. I thought you said you both fell. A. Yes, but we got up and went back to the sidewalk.

Q. And it was then he got hit? A. Yes.

10 Q. And after that you hit him, is that right?

A. I did.

*Cross examination by Mr. Bernhard:*

Q. Did I understand you to say—did you say, rather, in answer to one of Mr. Abruzzi's questions, that you distinguished the three men when you first saw them coming across the lots? Did you mean to make such an answer as that? A.

20 Well, in a way I did.

Q. But you didn't know who they were at that time? A. Oh, no, no.

Q. But you were not in uniform? A. I was not.

Q. You had an overcoat on? A. I did.

Q. Do you recall whether or not you wore a cap that night? A. I wore a hat.

Q. Sort of a felt hat, is that right? A. Yes.

30 Q. And these two officers, of whom you speak, they were not in uniform, either, were they? A. They were not.

Q. Will you tell us again just at what stage of the proceedings that you said for the first time, "I am a police officer"? A. The second time I called to him to put his hands up.

The Court: That is Falzano?

The Witness: Falzano. I called to Falzano to put his hands up.

*Humbert Berardi—for People—Re-direct.*

Q. Now, up to that point had Tortoriello and Fletcher reached the scene? A. They were running down at the time. They were coming down north on Congress Street from the fire house.

Q. Had they passed the line of the building? A. They had not.

10 Q. They did after that pass the line of the building so they would be observable from the open lots? A. At no time until after Falzano was shot.

Q. Then they did pass the vacant lot? A. Yes.

Q. So that anyone in the vacant lot would be able to see them? A. Yes.

Q. And they were not in uniform? A. No, they were not in uniform.

10

20

*Re-direct examination by Mr. D'Aloia:*

Q. Did you take a good look at the second man, the man who was with Rizzo? The first two men, you say, you met in the lots when you walked across the street, to whom you called, "Put up your hands". One proved to be Rizzo? A. Yes.

Q. Who was the other one? A. I didn't know the other one.

30 Q. Well, did you see his face? A. I didn't.

Q. Do you know whether he was tall or short? A. He was about the size of Rizzo.

Q. Both men were about the same size? A. Both about the same size.

Q. Did you look at his face to see whether he had a mustache or was clean shaven? A. I did not.

30

VICTOR A. TORTORIELLO, sworn in behalf of the State.

*Direct examination by Mr. D'Aloia:*

10 Q. Were you attached to the Newark Police Department in January, 1925? A. I was.

Q. Also of the Detective Bureau? A. Yes.

Q. Were you on this investigation of these letters received by Father D'Aquila with Detective Berardi? A. Yes.

Q. On the morning of February 1, at about one o'clock, where were you stationed? A. In the fire house, corner Prospect Street and Lafayette Street.

20 Q. Prospect or Congress? A. Lafayette and Congress.

Q. Now, will you tell the jury what happened about one o'clock that you saw? A. At about five minutes after one—after the taxicab with Father Fserrazza had gone to the school building and the lots, while in the fire house, after the taxicab had left, I saw Detective Berardi, who was in hiding in the middle of the block, between the end of the lot and the corner of Lafayette Street, I saw him rush out and, as he did, Fletcher and I rushed out of the fire house.

30 Q. And which way did you run? A. Run north on Congress Street.

Q. On which side of the street, on the school side? A. On the school side.

Q. Now, as you approached the end of the school building—now, look at this diagram. You came out of the fire house here? A. Yes.

Q. And ran across Lafayette Street? A. Yes.

40 Q. And you ran along this sidewalk where the school building is? A. Yes.

*Victor A. Tortoriello—for People—Direct.*

Q. As you approached the end of the school building, what did you notice, if anything? A. Well, as I approached the end of the school building—

10 Q. You mean before you reached it? A. Before I recalled the end of the school building I heard a shot. That was where the girls' entrance is. I heard a shot.

Q. Now, what else did you notice? A. And I saw Berardi and the man who was identified now as Rizzo wrestling.

Q. You mean they were clinched? A. Yes, at the end of the school building, about fifteen feet away from the corner of the school building.

20 Q. Did you see anybody else there? A. I saw a man in the street who was firing toward Berardi. I took my gun out. I had the gun in my hand and I started firing at him in the street.

Q. You fired at the man who was firing at Berardi? A. Firing at Berardi, and he stopped firing at Berardi and fired three shots at me. I went toward him. He fell before I got there, still firing.

30 Q. Where was he when he fell? A. He fell about seventy-five feet away from the corner of the building.

Q. Out on the street or on the sidewalk? A. Out on the street, about ten feet away from the curbstone—about fifteen feet away from the curbstone.

Q. In the middle of Congress Street? A. Yes.

Q. After that what happened? A. While he was still firing I went right after him. I took—while he went down I took the gun off him and I asked him, I said, "What are you doing here?"

40 Q. The dead man? A. The dead man.

*Victor A. Tortoriello—for People—Direct.*

Q. Well, you said something to him and he said something to you? A. Yes.

Q. What did you do after you talked to him?  
A. I sent him to the hospital.

Q. Did you take anything from him? A. Yes.

10 Q. What? A. I took the gun away from him.

Q. What else did you do? A. I sent the man to the hospital and then went toward the building. I picked up a package which had been placed there by the priest.

Q. You knew it was going to be placed there?  
A. I don't remember—I had. I knew the package was going to be placed there.

Q. Now, did you pick up this package? A. Yes, with Fletcher.

20 Q. Fletcher was with you? A. Yes.

Q. That was after Falzano had been sent to the hospital? A. Yes.

Q. Now, will you please tell us, looking at this photograph, where that package was when you picked it up? A. Right here, on the side of this last window.

30 Q. Will you put a mark there? You put a mark there, where you say you picked it up. Was it on the sidewalk. A. Right close to the building, on the sidewalk, or about the middle of the sidewalk. I better make it with a pen, because there is no mark there with a pencil.

Q. Put a little square there indicating package. Is this the package? A. That is the package I picked up.

Q. Where did you go with it after this episode?  
A. Why, after this we went to Mechanic Street to Father D'Aquila's place.

40 Q. Where has it been all this time? A. Where who has been?

*Victor A. Tortoriello—for People—Cross.*

Q. Where has this been? A. In my possession.

Q. Until when? A. Until about five o'clock that same morning, when I handed it over to Detective Giuliano.

Q. Of the Prosecutor's office? A. Prosecutor's office.

10 Q. What did you do with the revolver that you took from Falzano? A. Why, I put it in my pocket until I got to headquarters and then I marked the bullet and the gun for identification.

Q. How many shells? A. There was five empty shells and one unloaded shell.

Q. You mean five or four? A. Well, four or five. I know there was one shell which was not exploded.

20 Q. Is that the pistol? A. Yes.

Q. Did you mark it? A. Yes.

Q. Did you mark the shells? A. Yes, I did.

Q. Look at those shells. Are those the shells?  
A. Yes.

Q. What did you do with the empty shells and the loaded shells which you marked with the pistol? A. I also handed them over to Detective Giuliano of the Prosecutor's office.

*Cross examination by Mr. Abruzzi:*

30

Q. What time did you get to the fire house, Mr. Tortoriello? A. About five minutes to one.

Q. And who was with you? A. Detective Fletcher.

Q. Just the two of you? A. Yes.

Q. And you remained in the fire house? A. Detective Fletcher and I remained in the fire house until we saw Berardi move. Then we moved.

40 Q. Wasn't Berardi at the fire house when you got there? A. First he was, yes.

*Victor A. Tortoriello—for People—Cross.*

Q. He was there? A. First he was, when we got there.

Q. How long did he remain in the fire house? A. He remained there about two minutes.

Q. And then you saw him walk away? A. No, I didn't see him walk away.

Q. What were you doing in the fire house when Berardi left? A. What were we doing in the fire house?

Q. Yes. A. Why, we were—to see whether the package—

Q. Well, didn't you see where Berardi walked to? A. Certainly I did.

Q. Well, that is what I asked you. A. Certainly.

Q. And were you there when Father Fserrazza left the package, were you at the fire house? A. No, I wasn't at the fire house at the time.

Q. So that you did not see Father Fserrazza leave any package anywhere? A. I seen the taxicab come there with Father Fserrazza, turn the corner, and he came right back again.

Q. I thought you said you didn't see Father Fserrazza. A. I said I saw Father Fserrazza in a taxicab going over towards Congress Street. I was not in the fire house at the time.

Q. What is that? A. I was not in the fire house at the time.

Q. All right. Now, where were you? A. I was at the corner of Prospect Street and Lafayette Street.

Q. That is the block west of Congress Street? A. Yes.

Q. And what corner of Prospect Street and Lafayette Street were you at? A. In the southwest corner.

*Victor A. Tortoriello—for People—Cross.*

Q. Southwest corner of Prospect Street and Lafayette Street? A. Yes.

Q. And were you alone or with Officer Fletcher? A. I was with Detective Fletcher.

Q. Detective Fletcher? A. Yes.

Q. Were you right on the corner or in hiding? A. We were hiding.

Q. And as the taxicab bearing Father Fserrazza came down east on Lafayette Street— A. Yes.

Q. —you saw it make the turn north on Congress Street— A. Yes.

Q. That is right? A. Yes.

Q. And did you start from the place where you were hiding at the corner of Prospect Street and Lafayette Street after the taxicab made the turn on Congress Street? A. No, immediately after.

Q. Immediately after that? A. After the taxicab turned.

Q. On Congress Street? A. Yes.

Q. Then you and Officer Fletcher started to walk east on Lafayette Street, is that right? A. Yes.

Q. On the southerly side of Lafayette Street? A. Yes.

Q. And you got to the fire house and you walked in there? A. Yes.

Q. And you remained in the fire house? A. We remained in the fire house.

Q. Did you see the taxicab come back? A. Yes.

Q. But you didn't see Father Fserrazza leave any package anywhere? A. No.

Q. Now, you say you started from the fire

*Victor A. Tortoriello—for People—Cross.*

house as you saw Detective Berardi leave the alleyway, is that right? A. Yes.

Q. How far had he gotten into Congress Street when you left the fire house? A. Well, I could not say. He had started and I went right out. I knew there was something doing and I went  
10 right out. I didn't take notice where Berardi would be, but I seen him go out and I knew there was something doing then.

Q. So he had practically crossed the street when you left the fire house? A. No, he had not crossed the street yet.

Q. Where were you when you heard the shots fired? A. I was pretty near where the boys' entrance is on Congress Street. I could not tell  
20 you just where I was, because I was running, but I was about there.

Q. How far is that boys' entrance from the girls' entrance? A. Oh, I imagine fifteen, twenty or twenty-five feet. I don't know. I couldn't tell you.

Q. You do not remember? A. I do not know.

Q. Did you see the flash of the gun of that first shot? A. I certainly did.

Q. And that first shot was fired by Detective Berardi? A. It was fired towards Berardi.  
30

Q. You saw the flash? A. I certainly did see the flash.

Q. And how many shots did you see fired towards Berardi? A. I don't know.

Q. Before you got out to the street? A. I don't know how many shots he fired towards Berardi. I know—

Q. Can't you tell us whether there were one, two or three? A. I don't know. There were  
40

*Victor A. Tortoriello—for People—Cross.*

quite a few shots fired there, and I started to fire myself.

Q. Where was that man that you saw firing? A. I saw him in the street.

Q. That was the first place you seen him? A. That was the first time I seen the man.  
10

Q. So that from the time you were running from the fire house to where Detective Berardi was you did not see that man on the sidewalk at any time? A. No, I didn't.

Q. When you got to where Detective Berardi was he was in the snow bank? A. I didn't get anywhere near Detective Berardi. I was fifteen, twenty or twenty-five feet from where Berardi was.

Q. In the street, were you? A. No, I was on  
20 the sidewalk at the time.

Q. Well, fifteen, twenty or twenty-five feet that you say you were away from Detective Berardi, that was in a southerly direction toward the fire house, isn't that true? You were about fifteen or twenty feet in Congress Street in a southerly direction from where Officer Berardi was? A. Yes, I was running toward Berardi.

Q. Now, at that point you were on the sidewalk? A. I was.  
30

Q. And so was Officer Fletcher? A. Fletcher was right behind me.

Q. Right behind you? A. Yes.

Q. And then did you leave the sidewalk to go into the street? A. Yes. When the man started to fire at me I started to fire at him and followed him in the street.

Q. In the street? A. Yes.

Q. How many shots did you fire? A. Three  
40 shots.

*Victor A. Tortoriello—for People—Cross.*

Q. What distance were you from him? A. Well, I must have been fifteen or twenty feet distant from him when he fired at me.

Q. And then you saw him fall? A. I saw him fall. I was about five feet away from him when he fell. 10

Q. When he fell? A. Yes.

Q. And after he fell, how many shots did he fire? A. Who?

Q. Falzano? A. He didn't fire any shots after he went down, because I got my knees on top of his neck and grabbed the gun.

Q. All right. Up to that time you had not said a word, from the time you started from the fire house? A. No.

Q. The first time you said anything to him was you took the gun away from him and he was down? A. Yes. 20

Q. You were not in uniform? A. No.

Q. Did you have an overcoat on? A. Yes.

Q. Did you have a cap or felt hat on? A. I had a felt hat.

(At this point the Court takes a recess for one hour.)

30

AFTER RECESS.

2 P. M.

*Cross examination by Mr. Bernhard:*

Q. Mr. Tortoriello, as you left the engine house and went down towards the far end of the school 40

*Victor A. Tortoriello—for People—Cross.*

building, did you pass the girls' entrance before you passed the boys' entrance? A. No, you have got to pass the boys' entrance before you pass the girls'.

Q. Then the girls' entrance was last? A. Yes.

Q. Then it was near the girls' entrance that this package was placed? A. Well, so I understand. 10

Q. But you didn't see it? A. I didn't see where the package was left.

Q. Where did you pick it up? A. I picked it up by the last window.

Q. But within the lines of the building? A. Well, within a few feet, about two feet of the building.

Q. You mean from the side of the building? A. Yes. 20

Q. Was that as you were running along to help Mr. Berardi? A. No, that was after I picked the package, after I had sent Falzano to the hospital.

Q. That answers the question. A. I want to explain to you.

Q. Go ahead. A. Just as soon as people began to come around there I told the officer not to allow anyone to come there, so the package was there, it remained there. 30

Q. So that was where you picked it up? A. Yes.

Q. You were at the engine house here, were you not? A. I was.

Q. And if I remember right—

Mr. D'Aloia: There is a "B" between the house.

Mr. Bernhard: Oh, yes, thank you. 40

*Victor A. Tortoriello—for People—Re-direct.*

Q. And Mr. Berardi was here? A. Well, he was in one of those houses.

Q. Well, somewhere there. You saw him go outside? A. I did. I saw Berardi when he come out on the sidewalk.

10 Q. You think he came out on a walk? A. Yes, he came across.

Q. But you came on a run? A. Yes.

Q. Did he start to run as you were running down the street? A. I don't know whether he was walking or running. I couldn't say. I know this, just as soon as Berardi was seen Fletcher and I started on a run toward where he was.

Q. Side by side, you and Fletcher? A. I think Mr. Fletcher was behind me.

20 *Re-direct examination by Mr. D'Aloia:*

Q. As you came running up, what was said?

Mr. Bernhard: I object, because it does not yet appear that he was there, and he has not been identified.

30 The Court: Well, if this answer will bring testimony as to the statements of anyone of the defendants, I will permit it, subject—I will tell the jury that it does not bind any other man than the man against whose statement it would affect.

A. I heard Detective Berardi say, "Hands up, I am a police officer".

Q. Then you heard a shot? A. And then a shot came.

40 Q. And you fired some shots? A. I fired three shots.

*Victor A. Tortoriello—for People—Re-direct.*

Q. And then you went to one man who was falling down? A. Well, I was running toward him. He was firing at me and I was firing at him.

Q. Before he fell down and before you had him removed to the hospital, what was said then? A. I asked him what he was doing there and he said, "I came here to get ten thousand dollars with Cortese". 10

Mr. Bernhard: I move that the answer be stricken out.

The Court: Who said that?

The Witness: The dying man.

The Court: I will say to the jury at this time that so far as that having any effect on Cortese as not—you will disregard 20 it so far as it affects Cortese.

Mr. Abruzzi: I think that same ruling applies to the other two defendants.

The Court: The same ruling.

Q. Shortly after that did you go to Cortese's house? A. I did.

Q. How long after? A. Well, it must have been an hour after. Detective Giuliano came down from headquarters and he and I and Fletcher and 30 Colgary and several other officers went down and surrounded the house and went in the house. We had learned he was in there.

Q. Did you talk to Cortese? A. No, I didn't have much to say to Cortese. I searched the third floor in his bureau drawer and I got the revolver out.

Q. Cortese was there? A. Yes, he was in the house and he had his trousers on and his socks and his shirt, no hat and no coat, or anything else. 40

*Victor A. Tortoriello—for People—Re-cross.*

Q. What time was it? A. Well, it must have been about three o'clock in the morning.

Q. I show you a pistol and ask you if you found it down in Cortese's house, holster and all?

10 Mr. Bernhard: I object to that. It is not pertinent to this issue. There is no evidence that Cortese was there or had the revolver there at that time.

The Court: Sustain the objection.

Mr. D'Aloia: I will say I will consent to all of this being stricken out if I do not connect it up.

The Court: Why not connect it first?

20 Mr. D'Aloia: Because I do not care to call this witness back. Of course, if there is an objection I will do it the other way.

Q. Did you talk to Cortese after finding the pistol? A. I did.

Q. Did you ask him if it was his? A. I did.

Mr. Bernhard: I object until I have an opportunity to examine him.

30 *Cross examination by Mr. Bernhard:*

Q. When did you talk to him? A. It was about three o'clock. I imagine about that time.

Q. You mean in the morning? A. In the early morning.

Q. And where did you talk to him? A. At his own home.

40 Q. Did you warn him that anything he might say might be used against him? A. No, I didn't. It was in a general conversation.

*James J. Fletcher—for People—Direct.*

*Direct examination (continued) by Mr. D'Aloia:*

Q. Did he tell you that the pistol you found there, the leather holster and bullets which were in it, were his? A. He did.

Q. Where was he taken from there? A. To 10 police headquarters.

Q. And what did you do with this pistol and the leather holster and the shells which were in the pistol? A. I turned it over to Detective Giuliano right down there at 47 Perry Street.

Q. Now, at headquarters were you present when Cortese made a statement? A. I was.

Q. Who took that statement from him? A. Detective Giuliano.

*Cross examination by Mr. Abruzzi:*

Q. Were you present during the entire time? A. Yes, I was.

Q. Did you take part in the conversation? A. Oh, yes.

JAMES J. FLETCHER, sworn in behalf of the State.

30

*Direct examination by Mr. D'Aloia:*

Q. Do you remember the morning of February 1st about one o'clock? A. Yes.

Q. Were you with Detective Tortoriello? A. I was.

Q. And where were you stationed at one o'clock that morning? A. In the fire house, the truck house, corner of Congress Street.

40

*James J. Fletcher—for People—Direct.*

Q. Before that where had you been? A. A block below that.

Q. You mean a block up? A. Yes.

Q. While you were in the fire house what was the first thing you noticed? A. The first thing I noticed in the fire house was when Berardi started  
10 to run across the street.

Q. At that time you were attached to police headquarters? A. Yes.

Q. And you were stationed there under instructions? A. Yes.

Q. When you saw Berardi come out and run across the lots, what did you do? A. I ran out of the fire house.

Q. Did you precede Tortoriello or did Tortor-  
20 iello precede you? A. Tortoriello.

Q. Now, when you got near enough, what did you see, if anything? A. I was running toward the crossing of the school house, toward the lots there, and I saw this man out in the street shooting. Tortoriello was in front of me. I fired a couple of shots running and then this fellow shortly after—the fellow down in the street and Tortoriello got on top of him. I then turned to Berardi, who was in the lots, wrestling with a  
30 young fellow.

Q. Will you tell us particularly what you saw?  
A. They were fighting with a gun between their hands.

Q. Where was Berardi's right hand, if anywhere, with reference to the other fellow's face?  
A. I could not see. Both hands were wrestling at the time.

Q. What did you do? A. I struck him on the  
40 back of the head with the butt of my gun.

*James J. Fletcher—for People—Cross.*

Q. The other fellow? A. Yes, and then I pulled him away and I held him until the wagon came.

Q. Do you recognize the man here in court who was tustling with Berardi? A. Yes.

Q. Which? A. The young man. 10

Q. Which one, Rizzo? A. Yes.

*Cross examination by Mr. Abruzzi:*

Q. How long had you been stationed at the corner of Prospect Street and Lafayette Street before you came down that block? A. Probably ten or fifteen minutes, I guess.

Q. You were in hiding? A. I was up in a doorway. 20

Q. Could you see the northeast corner of Lafayette Street and Prospect Street, the corner where the school was located, from where you were hiding? A. Yes.

Q. You were looking that way while you were hiding? A. Yes.

Q. So that when the taxi cab came down Lafayette Street and did not stop at the corner that you were watching, but went down another block to Congress Street and turned north on Congress  
30 Street, then you started down Lafayette Street towards Congress Street? A. I did when I was called. I didn't see no taxi cab.

Q. I thought you said you were looking towards the school. A. I was.

Q. Well, then, didn't you see a taxi cab go by?  
A. I saw lots of vehicles go by. I was not paying any attention to what taxi cabs or vehicles went by. I was watching the school. 40

*James J. Fletcher—for People—Cross.*

Q. So it was only after you were called that you started going down Lafayette Street towards the fire house, is that right? A. Yes.

Q. When had you last seen Berardi that night before you left the fire house? A. About fifteen  
10 minutes before that.

Q. And where? A. I left him on the street corner.

Q. What street corner? A. At the school, Lafayette Street, and what is that street, Prospect? I am not acquainted.

Q. You mean the block you were standing originally? A. Yes.

Q. Well, that is Prospect Street? A. Yes.

Q. You saw Berardi continue down Lafayette  
20 Street? A. That is right.

Q. And so when you were called you and Tortoriello went down towards the fire house? A. Yes.

Q. And you went in the fire house? A. Yes.

Q. And you remained there how long before Berardi left? A. Before Berardi left?

Q. Well, was Berardi there when you got to the fire house? A. Yes, he was there.

Q. In the fire house? A. Yes.

Q. How long did you and Tortoriello and Berardi remain in the fire house before Berardi left?  
30 A. Probably five minutes.

Q. And when he left you did not see where he left? A. No, he said——

Q. Don't tell us what he said. You did not see him? A. No.

Q. After he left what did you and Tortoriello do in the fire house? A. We stood looking out the window toward the Congress Street side of the  
40 school.

*James J. Fletcher—for People—Cross.*

Q. Well, didn't you look toward the Prospect Street side which you were originally looking at?

The Court: Who do you mean, this man?  
Mr. Abruzzi: Yes, sir.

A. I was looking down Congress Street. 10

Q. And when you saw Detective Berardi run across Congress Street, you and Tortoriello started to run? A. Yes.

Q. And Tortoriello was ahead of you? A. Probably five feet.

Q. You had no uniform on? A. No, sir.

Q. Did you have a hat or cap? A. I had a hat.

Q. And an overcoat? A. Yes, an overcoat.

Q. And both yourself and Detective Tortoriello  
20 ran north on Congress Street on the sidewalk, is that true? A. Yes.

Q. Alongside of the school? A. Yes.

Q. Now, I understood you to say that you saw a man in the street firing? A. Yes.

Q. Is that right? A. That is right.

Q. Now, during the time—from the time you saw Detective Berardi start to run across Congress Street, had you seen anybody on the same sidewalk, or the same side of that sidewalk that you  
30 were running on? A. No.

Q. For the first time you saw the man at that time in the street was when you saw him firing from the street? A. Oh, I had saw some forms previous to that coming around the corner.

Q. I thought you said you did not see anybody on the sidewalk. A. When I was running down?

Q. Yes. A. No, there was not anybody there then. 40

*James J. Fletcher—for People—Cross.*

Q. And you did not see the man in the street on the sidewalk? A. No.

Q. Did you fire any shots? A. I fired two shots.

10 Q. Did you run towards the man who was out in the street? A. I was running up towards him at that time. I was about fifteen or twenty feet away from him.

Q. You were in the street? A. On the walk.

Q. Had you passed the school while you were running at any time? A. You mean going toward—

Q. Going towards Ferry Street, right here? A. Oh, yes.

Q. Did you get at any point past the school building? A. Yes.

20 Q. How far did you go? A. To here.

Q. Well, then, you had not passed the school building? A. Yes, that is right.

Q. So you were at no time opposite the vacant lot? A. No, no.

Q. And that is the furthest toward Ferry Street you ever got that night? A. No, I got in the lot afterwards when Berardi—when I went to Berardi's assistance.

30 Q. I mean after the shooting was all over. A. Yes.

Q. Did you see Rizzo that night? A. Yes.

Q. When you saw him wasn't he on the ground? A. Not first he wasn't, no.

Q. Not first? A. No.

Q. Well, then, did you see him on the ground at any time? A. I saw him on the ground then waiting for the wagon to come.

40 Q. Well, before you hit him did you see Rizzo or Berardi on the ground or on the snow? A. No.

*James J. Fletcher—for People—Cross.*

Q. You did not see that? A. No.

Q. Did you see whether or not Berardi had a hold of Rizzo by the collar? A. No, they were wrestling for possession of the weapon.

Q. Did you see him have Rizzo by the collar? A. No. 10

Q. You didn't see that? A. No.

Q. Did you see Berardi's gun close up against Rizzo's face? A. I seen the gun in between them. I don't know whether it was up to his face or not.

Q. Did you see the marks on his face? A. No.

Q. You did not pay any particular attention to Rizzo's face that night? A. I didn't have any reason to that night.

Q. And you did not say a word from the time you started to run from the fire house until the firing began? A. No. 20

*Cross examination by Mr. Bernhard:*

Q. When you reached the point just beyond the line, rear line of the school, you saw Mr. Berardi and Rizzo together? A. At the extreme end of the school, near the lot.

Q. And down the street a short ways did you see another man who was firing a revolver? A. 30 Yes, out in the street.

Q. Now, then, except for Mr. Berardi and Rizzo and the man further on down the street, did you see any other persons there at all? A. I didn't.

ANTHONY F. COLGARY, sworn in behalf of the State.

*Direct examination by Mr. D'Aloia:*

10 Q. Were you attached to the Newark Detective Bureau on February 1? A. Yes.

Q. And on the morning of that day, which was a Sunday, did you have occasion to go to the hospital? A. Yes.

Q. What hospital did you go to? A. City Hospital.

Q. Did you see Rizzo, one of these defendants there? A. Well, they brought Rizzo in the Third Precinct patrol.

20 Q. You took him up in the Third Precinct patrol? A. Yes, they did.

Q. Well, at the hospital, after he was received at the hospital, did you search him? A. Well, no—yes, I did search him.

Q. In searching him did you find anything?

Mr. Bernhard: I object.

A. Yes, automatic revolver.

30 Mr. Bernhard: I have no objection to the answer yes.

Q. What did you find when you searched him?

Mr. Bernhard: I object so far as Cortese is involved.

The Court: Yes, this will only affect Rizzo.

40 Q. Did you find this automatic on Rizzo? A. Yes.

*Joseph Giuliano—for People—Direct.*

Q. And did you take it apart? A. No, I didn't take it apart there.

Q. Where did you take it apart? A. At headquarters.

Q. Was it loaded or was it unloaded when you took it from him? A. It was loaded. 10

Q. Was the magazine loaded? A. Yes.

Q. Did you put a mark on it? A. Yes.

Q. Did you recognize it as the automatic gun you took from him? A. Yes.

Q. Is this the magazine that goes with it? A. Yes.

Q. Are these the shells you took from the magazine? A. Yes.

Mr. D'Aloia: I offer this automatic, this magazine, and these shells in evidence as 20 against Rizzo for the time being.

(Marked Exhibit S-7.)

*Cross examination by Mr. Abruzzi:*

Q. There was no exploded shell in that gun? A. No, sir. 30

JOSEPH GIULIANO, sworn in behalf of the State.

*Direct examination by Mr. D'Aloia:*

Q. On Sunday morning, February 1, after this episode down at the Lafayette Street school, were you together with the police officers who went to the house of Cortese? A. I did.

Q. The defendant in this case? A. I did. 40

*Joseph Giuliano—for People—Direct.*

Q. And there at his house did you have a conversation with Cortese? A. I did.

Q. Did you ask him if he had been in the neighborhood of the Lafayette Street school, Congress Street and Lafayette Street and Prospect Street, during that night? A. I did.

Q. What did he say? A. I asked him if he had been out that night. He said no. I said, "Were you anywhere near the Lafayette Street school?" He said, "No". "Do you know of any shooting at the Lafayette Street school?" He said, "No".

Q. That was at the house? A. That was at the house.

Q. Now, subsequent to that conversation at the house, where was he taken? A. Well, before we went to headquarters I went back upstairs to his wife.

Q. And you had a talk with her? A. I had a talk with her.

Q. And you got some information? A. I got some information from the wife and went downstairs to where Cortese was in the butcher shop.

Q. Now, after you got this information you had the second talk with Cortese? A. Yes.

Q. What was the conversation? A. I said, "Where was the blackhand letters you received?" He said, "I have them in my pocket". I said, "Let me see them". He took the pocketbook from his pocket and handed me two letters, which he claimed he had received.

Q. When did he make the claim he had received them? A. After I went upstairs.

Q. The first question you put to him after you went upstairs to his wife, you said, "Where are the blackhand letters you have received?" and he

*Joseph Giuliano—for People—Direct.*

said, "I have them", and he took his right hand and pulled them from his pocket? A. That is right.

Q. Now, I show you an envelope and one sheet of paper with English written on it. Is that one of the papers he gave you? A. Yes. I had him write his name on it in headquarters.

Q. The Cortese was put on there for the purpose of having him identify this letter as the one you asked him for when you came downstairs after having seen his wife? A. Yes.

Q. I show you another envelope and that yellow sheet of paper and ask you if that was the other letter he handed you in the conversation after you had been upstairs to talk to his wife? A. Yes.

Q. That name on the top? A. I had him write that at headquarters.

Q. So as to identify the two letters as the ones given to you by him? A. Yes.

Q. Now, after he produced the letters as the result of the questions you put to him after the information got upstairs from his wife, what, if anything, did he say about the shooting at the Lafayette Street school?

Mr. Abruzzi: I object to this as far as the other two defendants are concerned.

The Court: This only applies as against Cortese.

A. He said he knew nothing about it.

Q. Now, when you got him to headquarters about nine o'clock in the morning did he make a statement in full? A. It was not nine o'clock in the morning. It was about four o'clock.

*Joseph Giuliano—for People—Direct.*

Q. Did he make a statement there? A. He did.

Q. In that statement—did you take it down in writing? A. I did.

Q. Did he tell you that he had seen Falzano, Rizzo and Amistardi?

10 Mr. Bernhard: I object, if you are through with your question.

Mr. D'Aloia: No.

Q. What did he tell you with reference to the Lafayette Street school and the shooting there the preceding night?

20 Mr. Bernhard: I object. I think the statement, if there is a written statement, which he says he took down, is the best evidence of what he said.

The Court: That is right.

Mr. D'Aloia: I am asking about a conversation.

Mr. Bernhard: A conversation independent of the statement? Then I cannot object to it.

The Court: Is this independently?

30 Mr. D'Aloia: It was independently, which was later taken down, but I am talking about a verbal conversation first.

Mr. Bernhard: I did not so understand it.

Mr. D'Aloia: I am limiting myself to the verbal conversation.

Mr. Bernhard: Then, of course, I cannot object.

40 Q. At police headquarters, later in the morning, what did he say to you, if anything, about having

*Joseph Giuliano—for People—Direct.*

any knowledge of an episode at the Lafayette Street school? A. He said that Falzano and a friend of his, whom he did not know, came to his butcher shop about ten o'clock.

10 Q. The night before? A. The night before, Saturday night, and at that time he showed the letters to Falzano. Falzano could not read them and he read them for him. He said, "What do you think, they want ten thousand dollars from me, and they want me to deposit ten thousand dollars at Prospect Street and Lafayette Street?" Falzano then said, "I didn't report it to the police, because I wanted to go down myself and see who they were and then I would report it to Capadanno at police headquarters".

20 Q. He told you he had said that to Falzano the evening before about ten o'clock? A. Yes.

Q. What else happened? A. He said Falzano said to him, "Let me go down to the school and let me see who these people are. Don't you go down, because if you do they will recognize you", and that Falzano and Rizzo left. Then a short time later I took a statement from him.

30 Q. In writing? A. In writing, and then afterwards I got some more information and I went back to him and had another conversation with him.

Q. What was that? A. I told him that I had received information that he had given an envelope with a piece of paper in it to Amistardi and he had not mentioned it to me before, and I asked him if that was true and he said it was, and he had sent Amistardi to Lafayette Street and Prospect Street.

40 Q. What did he say about his own movements, if any? A. He said that he closed the store after

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Falzano and Rizzo left; that he had a loaded revolver and the holster in his possession and that he walked down Ferry Street to Prospect Street; that he looked up Prospect Street and he did not see anyone; he then returned home, and, as he reached home, he heard five or six shots and that he went upstairs and went to bed.

10 Q. What time was it when he made that statement to you? A. I should judge about six o'clock in the morning.

Q. Did you take that down in writing? A. I did not. I took another statement but I did not take the part about him sending Amistardi down with the envelope and paper in it, because he failed to tell me at the time I took the written statement.

20 Q. When you took his statement what language did he speak? A. He spoke Italian.

Q. Was it read to him at the time? A. It was.

Q. And did he understand it? A. He did.

Q. And did he affix his name to it? A. He did.

Q. And was it subsequently translated into English? A. It was.

Q. Now, did you have a conversation with Rizzo? A. I did.

30 Q. When? A. That morning and several other times after that.

Q. Now, will you tell us what Rizzo said to you and what you said to Rizzo in reference to this episode at the Lafayette Street school? A. I asked Rizzo about this shooting match and he said that Falzano and he went down to Cortese, that he failed to see Cortese and that they went in the saloon.

40 Mr. Bernhard: I was reading this statement. I object to anything this witness—I

*Joseph Giuliano—for People—Direct.*

want to be sure it is subject to the Court's charge—

Q. Go ahead. A. That he went to Cortese's place and before he went there that Falzano had given him a revolver.

10 Q. Falzano had given who a revolver? A. Rizzo, and that then they went to Cortese to look for him and they did not find him, and that Falzano and he remained in the saloon for some time and that about one o'clock Falzano said, "Let's go home", and instead of—he was under the impression he was going home—and instead of that they went down Ferry Street, over Prospect, through the lots, and that when they got to Congress Street someone come from somewhere and said, "Hands up", and that Falzano shot the fellow who said "Hands up", and he was beaten up and later taken to the hospital. That was the first conversation.

20 Q. How long after that was it you had another conversation with Rizzo? A. Rizzo wrote a letter to some prisoner up in the Newark Street jail.

Q. And after you had seen that letter did you have another talk with him? A. I did.

30 Q. Will you tell the second conversation you had with Rizzo subsequently to your having seen the letter which was sent out from the jail?

Mr. Abruzzi: May we have the time?

Q. How many days elapsed? A. The day that that statement was taken is on the statement and Mr. Carl Abruzzi was up at the jail between that time and I allowed him to see the prisoner.

40 Q. Well, was it on the 6th of March? A. I cannot say unless I look at the statement.

*Joseph Giuliano—for People—Direct.*

Q. Was it a long time after the first statement?

A. Yes, it was over a month after the first statement.

10 Q. I show you the statement you took on that occasion when counsel was up at the jail. Look at the date. A. The 6th of March, it was, taken by myself, Berardi and Tortoriello.

Q. And did he sign it? A. He did.

Q. Now, tell us what the conversation was between you and Rizzo at the time you took this statement?

20 Mr. Abruzzi: I object. If the conversation had between Giuliano and Rizzo was put down as he gave it, I think the statement is the best evidence.

Mr. D'Aloia: You are going to get both.

Q. Now, please tell us what he said to you and what you said to him up at the jail? A. Rizzo sent for me.

30 Q. You are up at the jail? A. I am up at the jail and I said to him, "I understand you want to tell the truth"? He said, "Yes. They want me to get a lawyer, but I don't want any lawyer, because I want to tell the truth".

Mr. Bernhard: I object so far as Cortese is concerned.

The Court: It is not binding upon anybody except the man who made it.

40 Mr. Bernhard: The jury will have heard it and it is bound to be prejudicial to the defendant Cortese, so the only thing I can do under the law is to make my objection.

*Joseph Giuliano—for People—Direct.*

The Court: It may be given for one purpose and cannot be rejected for another.

Defendant's counsel prays an exception to this ruling of the Court in behalf of defendant Cortese.

10 Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

Q. What was said to you and what was said by you? A. I asked him to tell us the story.

Q. What did he say? A. He said that in the morning he was downstairs in the cellar sawing wood with Falzano.

20 Q. On the morning of Saturday? A. Saturday morning, January 31, and while he was there Falzano had been home there and someone wanted Falzano on the telephone; that Falzano went to a telephone and returned and said, "Cortese just called me up and he wants to see me". They later both went down—

30 Mr. Bernhard: I object to that for the further reason, if I understand Mr. Giuliano correctly, he is not only repeating what Mr. Rizzo said, but he is repeating what someone else said to Rizzo about a telephone message, and in that telephone message which was repeated to Rizzo, Cortese's name appears. Now, I submit that that is absolutely improper evidence.

40 The Court: The reference to Cortese by this witness is not binding on him, but I cannot exclude the conversation between this witness and Rizzo for that reason, but

*Joseph Giuliano—for People—Direct.*

the jury will be instructed that the statements concerning Cortese by Rizzo as given by this witness is not binding on Cortese.

- 10 A. (Continuing) After the telephone call came in and they went down to Cortese's butcher shop.
- Q. He and Falzano? A. He and Falzano, and that they remained there for some time and then they went to a saloon owned by the godfather of Cortese; that they remained there for some time and that Cortese sent Rizzo back to the butcher shop and told him to wait there until they returned and that Falzano and Cortese later returned; after they returned someone from Marzano's bank came there and asked Cortese if he
- 20 was kind enough to allow this truck to take a baby carriage to his home and that Falzano and Rizzo took the baby carriage to this man's home, and when they returned this man gave them a dollar; that they had something to eat upstairs in Cortese's house and that while they were eating the brother-in-law of Cortese was there and that Cortese came upstairs and then the brother-in-law, Cortese and Falzano went into a bedroom and closed the door, and for some time they had a
- 30 conversation; that they later came out of the bedroom and went downstairs and that Falzano and Rizzo left and went home and when they left, Cortese said, "Are you coming back"? and Falzano only nodded his head saying yes; that they went home and had something to eat and returned to Cortese's house and from there they went to a moving picture on Market Street; after the moving picture they returned to Cortese's
- 40 butcher shop and from there they went into the saloon right in back of Cortese's butcher shop,

*Joseph Giuliano—for People—Direct.*

and that they remained there for some time, for Cortese and Falzano were talking very low in one corner, and that Cortese then left and when he went back—when he came back they asked him where he had been, and that was about 12:30, and he said that he had gone out to get shaved, and that Falzano left, and that before Falzano left they called Amistardi from downstairs and Cortese gave an envelope with a piece of paper to Falzano and told Falzano to give it to Amistardi, because Amistardi would not go anywheres for him and that Amistardi left and then a few minutes later Falzano left, and then Cortese went upstairs, and that Cortese came downstairs with an automatic revolver and he opened the revolver first and that he gave it to Rizzo; he told Rizzo to put it in his pocket, and Rizzo says, "What am I going to do with it"? and he said, "Never mind"; that they later closed the door and walked down the street, one on one side of the street and the other on the other side and they reached near the school and there they met Falzano and from that corner they went into the lots near the school building and there there was a conversation. Cortese told me—

Q. Told who? A. Told Rizzo. You go down to the corner of the building and there a man will come to you and give you a package. You take that package and then you will give it back to me. I will take care of it, and that Falzano crept along the side of the building toward Congress Street and then Rizzo and Cortese walked down toward Congress Street. When they reached near the sidewalk Rizzo said that Cortese told him—no, Rizzo said to Cortese, "Suppose this man wants

*Joseph Giuliano—for People—Direct.*

to harm me"? Cortese told me, "You take your gun out and shoot him. I will watch you from the back. You need not be afraid", and that at that time he saw a man coming across the street. He said I thought that was the man that was going  
10 to bring me the package. I heard him say, "Hands up", and I put my hands up and I saw Falzano coming from the school building. He said to Falzano, "Put your hands up". Falzano put one up and with the other hand he shot this man that was holding him.

Q. Was it the man that was coming across the street? A. He grabbed a hold of him first and then he said he shot the man that had taken a hold of him, and then other people came and  
20 there was more shots and I was struck on the head and I don't remember what happened after that.

Q. You put that in writing? A. Well, after we had the conversation it was put down in writing.

Q. And he signed it? A. He signed it.

Q. In your presence? A. In my presence.

Q. Up at the jail? A. Yes.

Q. Any other witness? A. Berardi signed it as a witness.

30 Q. Berardi was out of the hospital then? A. Yes.

Q. And you wrote it in Italian? A. Yes.

Q. And who translated it? A. Berardi.

Q. Did you take a statement from Amistardi? A. He told me that he was an Austrian and I asked him if he could speak Italian and I said, "Can you write, too", and he said, "Yes", and I said, "Write this statement", and I was present  
40 when he wrote his own statement.

*Joseph Giuliano—for People—Direct.*

Q. Did you speak Italian to him? A. Yes.

Q. Did you ask him who sent him to Prospect Street? A. I asked him who sent him to Prospect Street and in the first conversation he said Cortese, and when I took the statement he said it was one of the three men. 10

Q. And he wrote his own statement? A. Yes.

Mr. D'Aloia: Now, if your Honor please, I want to ask this witness categorically about these exhibits which have been identified up to this point.

Q. Have you had charge of this packet until today? A. I have. 20

(Packet offered in evidence and marked Exhibit S-8.)

Q. Have you had charge of the letters which were received by Father D'Aquila and letters which you got from Cortese after the request made by you, after the information received from his wife? A. Yes.

Mr. D'Aloia: I offer the four letters in evidence. 30

Mr. Bernhard: I object. We have not seen them, and, in the second place—

Q. That first part of the letter that Cortese gave you on the yellow sheet, is that in English or Italian? A. That is Italian.

Q. And have you translated that paragraph? A. I have.

Q. And then the whole letter follows in English? A. Yes. 40

*Joseph Giuliano—for People—Cross.*

Mr. D'Aloia: I offer all the letters, the two received by Father D'Aquila and two received by Cortese.

10 Mr. Bernhard: I feel as though I ought to read them, but I do not think I ought to ask the Court and jury to wait.

Mr. D'Aloia: We will pass on to other exhibits.

Q. Did you have in your possession since this episode, this holster and pistol and shells which Cortese admitted were his? A. Yes.

Q. And which he said he put on during the night and went out to Prospect Street with? A. Yes.

20 Mr. D'Aloia: I offer them.

Mr. Bernhard: I object until I cross examine.

*Cross examination by Mr. Bernhard:*

30 Q. Did he actually say that was the one he had with him that night? A. I asked him at headquarters if that was his revolver and the holster he had that night and he said yes.

40 Mr. Bernhard: I object to that for a further reason. This revolver was illegally seized. The officer had no right to enter that place. There was no evidence that a crime had been committed there or a crime was committed there. He not only entered the place, but he went upstairs and pulled out a revolver. It was illegally received and illegally taken in his possession.

*Joseph Giuliano—for People—Re-direct.*

The Court: I will admit the pistol.

Defendant's counsel prays an exception to this ruling of the Court in behalf of defendant Cortese.

Exception allowed; let it be sealed, and it is signed and sealed accordingly. 10

Judge.

(Pistol marked Exhibit S-9.)

*Direct examination (continued) by Mr. D'Aloia:*

Q. Did you have in your possession since this episode on February 1st this revolver and the four empty shells and the loaded shell which was taken from Falzano? A. Yes. 20

Mr. D'Aloia: I offer this nickel plated pistol and these shells in evidence as part of the *res gestae*.

(Marked Exhibit S-10.)

Mr. Bernhard: I object to the last two letters for the reason that I do not believe they come within the statute. 30

The Court: I am inclined to rule admitting those letters on the theory that they form part of the act; in other words, it just like an utterance. I am going to treat these letters as an utterance as forming a part of the entire transaction. As to their value and as to their connection with the defendant, that is purely a jury question. 40

*Joseph Giuliano—for People—Re-direct.*

Defendant Cortese's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

10

(Letters taken from Cortese marked Exhibit S-11.)

Mr. D'Aloia: There is no objection to this translation?

Mr. Bernhard: No, that is all right.

(Letters to Father D'Aquila marked Exhibit S-12.)

20

Mr. D'Aloia: I would like to read from the entire letter sent to Father D'Aquila that particular portion I consider comes within the purview of that section.

The Court: Of course, the jury will have it, anyhow.

30

Q. Now, Mr. Giuliano, I understood you to say that Cortese signed his statement in your presence voluntarily after making it? A. He did.

Q. I understood you to say, also, that Rizzo, the statement I have handed over to his counsel, signed that voluntarily in the presence of yourself, Detective Tortoriello and Detective Berardi, who at that time was out of the hospital? A. He did.

Q. I understood you to say that Amistardi signed his statement, made it out himself, and

40

*Joseph Giuliano—for People—Re-cross.*

signed it himself, and that was translated? A. It was.

Mr. D'Aloia: I offer those three statements in evidence.

*Cross examination by Mr. Bernhard:*

10

Q. I do not believe you told us—if you have—where was this statement made? A. Police headquarters.

Q. I know that. A. In one of the side rooms.

Q. In whose presence was it made? A. Myself and I think Tortoriello was there.

Q. About three or four o'clock in the morning? A. About four o'clock in the morning.

20

Q. And just you two men with Cortese? A. Yes.

Q. And the conversation was carried on in what language? A. In Italian.

Q. And written in Italian, wasn't the original statement? A. Yes.

Q. By you? A. Yes.

Q. Then read by you to Cortese? A. Yes, and I asked him to read it.

Q. Well, he said he could not read it? A. Cortese?

30

Q. Yes. A. No, not Cortese. Cortese told me that Falzano could not read.

Q. Did Cortese read this Italian? A. He looked at it. I cannot say whether he read it. I asked him to read it. He did not read it out loud.

Q. You don't know whether he reads or not? A. I know he writes.

Q. He writes his name? A. Yes.

40

*Joseph Giuliano—for People—Re-cross.*

Mr. D'Aloia: I offer that statement in evidence and the translation.

(Marked Exhibit S-13, Cortese statement).

10 *Cross examination by Mr. Abruzzi:*

Q. Mr. Giuliano, this is the first statement you took from—no, pardon me. The first conversation you had with Rizzo, was that there at the same morning at police headquarters? A. It was.

Q. Did you take that down in writing? A. Not at that time.

Q. Did you take that down in writing at any time? A. I did later on.

20 Q. How long after? A. I think it was during the afternoon of the same day.

Q. The afternoon of the same day? A. That would be on a Sunday afternoon, yes.

Q. Where did you take that statement? A. At police headquarters.

Q. You removed Rizzo from the City Hospital to headquarters? A. He was at headquarters at the time.

30 Q. Well, then, you had a written statement he made the Sunday afternoon, is that correct? A. Yes.

Q. How many times did you see Rizzo between that Sunday afternoon and March 6? A. Once before.

Q. Only once? A. Yes, only once.

Q. And when you went there on March 6 there was Detective Berardi and Detective Tortoriello with you? A. Yes.

40 Q. You are quite sure that he said to you that

*Joseph Giuliano—for People—Re-cross.*

he saw Falzano take the package? A. At that time?

Q. On March 6? A. He said he went towards the door. I did not say he took a package.

Q. He did not mention anything about a package? A. I don't recall. Probably he did. He went toward the package. 10

Q. And isn't it a fact that he did not mention anything about a package on March— A. I don't think he did. He said he walked toward the door. He turned the corner of the building to his right.

Q. Did he also tell you that he did not know anything about what they were all there for? A. He did.

Q. Did you put that in the statement? A. I put down exactly what he told me. 20

Q. Then if those words of Rizzo do not appear in the statement it must be an oversight? A. It is not an oversight. I put down what he told me.

The Court: I understand there was a conversation first and then there was another one and it was reduced to writing?

Mr. Abruzzi: No. I understand the conversation he had was reduced to writing. 30

Mr. D'Aloia: No, that is not the contention of the State at all. They first had a talk. Rizzo sent for him.

The Court: And then later it was put in writing.

Q. During the latter conversation did he say to you, "I don't know anything about what we were all there for"? A. He didn't.

*Joseph Jacobson—for People—Direct.*

Q. He didn't say that? A. I didn't ask him. Berardi took the story as he told it.

(Rizzo's statement offered in evidence and marked Exhibit S-14.)

10 (Amistardi's statement offered in evidence and marked Exhibit S-15.)

JOSEPH JACOBSON, sworn in behalf of the State.

*Direct examination by Mr. D'Aloia:*

20 Q. Now, did you attend to Detective Berardi on the morning of February 1st, 1925? A. Yes.

Q. Did you also attend to Falzano, a man by the name of Falzona? A. Yes.

Q. Did you remove a bullet from the body of Berardi?

Mr. Bernhard: I object. It is not pertinent to the issue so far as Cortese is concerned, and there is no connection of Cortese with the offense alleged in the indictment.

30 The Court: It will go in without binding Cortese. I will admit it as being a part of the happening at that time.

Mr. D'Aloia: Part of the *res gestae*.

Mr. Bernhard: Yes, but the rule of *res gestae* only applies where there is a connection between the man on trial.

40 The Court: I have ruled it will not apply to Cortese. I am not taking the Prosecutor's contention at all.

*Joseph Jacobson—for People—Direct.*

Defendant Cortese's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge. 10

Q. Is that the bullet you removed from the body of Berardi?

Mr. Abruzzese: I suppose those objections of Mr. Bernhard will apply to the other two defendants. I object.

The Court: The testimony concerning the injury to Berardi, as testified to by Berardi, and it is being limited to precisely what he said, he does not contend that Rizzo shot him or Cortese. 20

Mr. D'Aloia: But I do contend that this tends to show—

The Court: I am admitting the testimony.

Q. Is that the bullet? A. From Berardi.

Q. Did you remove a bullet from the body of one Falzano? A. Yes. 30

Q. I show you this other bullet and ask you if that is it? A. That is it.

Mr. D'Aloia: Now, I offer these bullets in evidence, one removed from the body of Berardi and the other from the body of Falzano.

(Bullets marked S-16 and S-17.)

40

*Humbert Berardi—for People—Recalled—Direct.*

Q. Did you treat Berardi for any wound to his thumb? A. Yes. He had a slight wound to his thumb.

Q. Which thumb? A. I don't recall. I think it was his right thumb.

10

HUMBERT BERARDI, recalled in behalf of the State.

*Direct examination by Mr. D'Aloia:*

Q. Show the jury the mark on the thumb. Is that the mark left? A. That is the one.

20

CROSS EXAMINATION WAIVED.

Mr. D'Aloia: Now, is there any dispute on the part of the defense that Falzano died as the result of a wound he received that night?

Mr. Bernhard: Not at all. If it is evidential you need not prove it, because it will be conceded that he did, but my objection goes to the question of whether or not it is legally admissible in evidence. I will say to the State that I know that Dr. Warren said that he died as the result of wounds received that night, but my point is it is not evidential in this case.

30

Mr. D'Aloia: I offer to prove that Falzano—the autopsy made by the County Physician—will show that he died as the result of a bullet wound, and which, according to the testimony, was received that

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*Colloquy of Counsel.*

night on Congress Street at the Lafayette School. Now, I want to save time. I contend that that is evidential of the general condition surrounding that episode.

Mr. Bernhard: So far as saving time is concerned, I will concede that the Prosecutor will be able to prove the facts which he made in his statement. I will concede that that is so, but, having conceded it is so, I still insist that it is not legally admissible in evidence for any purpose.

10

The Court: Well, if you agree that those are the facts, I will hold that that is evidence.

Mr. Bernhard: As against all of the defendants?

20

The Court: As against anybody.

Mr. Bernhard: I am raising the contention, in the first place, that it is not legally admissible in evidence for any purpose, and, if it is, there is no evidence in the case which can hold Cortese responsible for this man's death.

The Court: I will admit it as being part of the happening that night connected with this affair.

30

Defendants' counsel pray an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

Mr. D'Aloia: I want to say, at this point, if counsel intend making any mo-

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*Colloquy of Counsel.*

tion, is it going to take any length of time?

10 Mr. Abruzzieze: It is. I think both of us would like time not only to make the motion, but to meet the motion to be made. It is a quarter of four, and it arose during the course of the trial—I am just wondering this, without waiving our rights, Father Fserrazza, the clerical gentleman who came from Brooklyn, may not come tomorrow. Do you want me to use him as a character witness.

The Court: If you feel you just want to use him as a character witness——

20 Mr. D'Aloia: The State will admit that he has known Cortese and has known him a certain length of time and has not heard anything bad about him.

Mr. Abruzzieze: So far as he knows his reputation is good.

The Court: Is that all you want?

Mr. Abruzzieze: Yes.

Adjourned until tomorrow, Thursday, March 26th, 1925, at ten o'clock A. M.

30 SECOND DAY.

Thursday, March 26, 1925.

Trial continued pursuant to adjournment.

Present, counsel as before stated (in the absence of the jury).

40 Counsel for defendant Cortese moves (1) to strike out the testimony of Mr. Tortoriello, the testimony of Mr. Berardi

*Colloquy of Counsel.*

and the testimony of Mr. Fletcher, for the reason that there is no evidence, now that the State has proved its case, by which Mr. Cortese, the defendant, is connected with the case; (2) to strike out the testimony of Mr. Guilano, or Mr. Tortoriello, 10 with reference to the finding of the revolver, on the ground that no officer is permitted, without a search warrant, to enter premises where he has no search warrant and make a search, and where there is no warrant for arrest, and where a crime has not been committed in the premises in his presence; (3) that the conversation Mr. Guilano had with the defendant Rizzo at the jail early in March, which 20 included something Falzano told Rizzo, is inadmissible and not binding on Cortese, and, without it, there is no evidence to go before a jury, and, (4) that there being no evidence implicating Cortese he should be discharged.

Motion denied.

Defendant Cortese's counsel prays an exception to this ruling of the Court.

30 Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

Counsel for the defendants Rizzo and Amistardi offers the first, third and fourth motions above stated in behalf of his clients, and also that there is no evidence to connect his clients with the crime 40

*Frank Amistardi—for Defendants—Direct.*

charged in the indictment, and that there should be a direction of a verdict. Motions denied.

Defendants Amistardi and Rizzo's counsel prays an exception to this ruling of the Court.

10

Exceptions allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

Mr. Bernhard: I understood that the Prosecutor had conceded that the indictment was drawn under section No. 39, but I didn't know whether it had reached the record.

20

The Court: Section 39.

Mr. Bernhard: Now, I would like to have permission, when the jury comes in, to recall Mr. Guilano, Mr. Tortoriello, Mr. Berardi and Mr. Fletcher and ask them one question, whether or not they had a warrant for the arrest of Cortese.

Mr. D'Aloia: That is conceded, that they had no warrant.

30

FRANK AMISTARDI, defendant, sworn in his own behalf (through interpreter).

*Direct examination by Mr. Abruzzese:*

Q. Where do you live? A. 47 Ferry Street.

Q. And are you a married man? A. No.

Q. On January 31, Saturday, do you remember where you were that night? A. Yes.

40

*Frank Amistardi—for Defendants—Direct.*

Q. Where? A. In the butcher shop.

Q. Whose butcher shop? A. Mike Cortese.

Q. Where is that butcher shop? A. Ferry Street.

Q. What number? A. 47.

Q. And what were you doing that night? A. I was doing a little work in the store until about half-past eight to ten o'clock.

10

Q. How long have you known Mike Cortese? A. About fourteen months.

Q. And you live in the same house where he lives? A. Yes.

Q. And on that Saturday night did you talk to Cortese? A. No.

Q. Didn't you talk at all to him? A. No.

Q. Are you sure? A. Yes.

20

Q. What did you do? A. He don't speak to me.

Q. What were you doing there? A. I was coming in the butcher shop—in the saloon, and I was seated about ten feet from those three fellows.

Q. Who were those three men? A. Around the corner of the saloon as you go out.

Q. Who were the three men you just mentioned? A. Falzano and Rizzo and Mike Cortese.

30

Q. Was Cortese's brother-in-law there? A. Not in the saloon.

Q. Did you go to the butcher shop from the saloon? A. No. Before they closed the butcher shop I go in the saloon.

Q. Then what did you do? A. I go in the saloon there and was sitting there about a half an hour and I see three fellows was talking and

40

*Frank Amistardi—for Defendants—Direct.*

I went down in the cellar and put a couple of shovels of coal on the steam and stayed there about ten minutes and came up again.

Q. What happened there? A. Them three fellows were still there yet.

10 Q. What happened after you came back from the cellar, what did you do? A. Nothing. Falzano was calling me, but I left twenty-five after twelve. He called me, "Come here, Frank". He gave me a piece of paper and he said, "Go around so and so and stay ten minutes and if you don't see anybody come back".

Q. What did he give you? A. A piece of paper in an envelope.

Q. Did he tell you where to go? A. Yes.

20 Q. Where? A. Corner Prospect Street and Lafayette Street.

Q. And what were you to do there? A. He told me if somebody come around there give him this letter and come back.

Q. Did you go there? A. Yes.

Q. Now, who left the saloon first, you or Falzano? A. Me.

Q. You left first? A. Yes.

30 Q. What time was it when you left? A. It was twenty-five after twelve; about half-past twelve.

Q. How far is that butcher shop of Cortese's from the corner of Lafayette Street and Prospect Street, about how many blocks? A. You have got to go to Lafayette Street—there is only about two blocks.

Q. Did you walk there? A. Yes.

Q. And did you stand on that corner? A. Yes.

40 Q. Did you see anybody come up to you?  
A. No.

*Frank Amistardi—for Defendants—Cross.*

Q. Did you have the envelope in your hand?

A. Yes.

Q. How long did you stand on the corner? A. About ten minutes.

Q. You stood on the corner of Lafayette Street and Prospect Street? A. Yes.

Q. Then you went away? A. I seen Mike Cortese come.

Q. Did you go away then? A. No. He asked me, "Did you see anybody"? I said, "No"; he said, "Come on".

Q. Did you start to go away from the corner then? A. Yes. He said, "Come on".

Q. Did you hear anything while you were walking away? A. When I was walking away, about ten or fifteen feet, they started to shoot on the next block.

Q. And then you went home? A. Yes, me and Mike.

*Cross examination by Mr. D'Aloia:*

Q. Now, Amistardi, how long have you known Cortese? A. About fourteen, fifteen months.

Q. Did you do any work for him in the saloon? A. No.

Q. What? A. No.

Q. Didn't you say you did a little work around there? A. Only I take care of the house and take care of the steam.

Q. Well, do you work for him? A. No, only in the winter time, in the summer time I work outside.

Q. I don't care when it was, did you do any work for Cortese? A. Yes, I do work in the cellar and in the butcher shop, too.

*Frank Amistardi—for Defendants—Cross.*

Q. And did he pay you? A. No.

Q. You just did it for what, for drinks in the saloon? A. He didn't pay me.

Q. Well, did you get drinks in the saloon in exchange for your work? A. Well, I drink a  
10 glass of beer.

Q. You remember the 31st of January was a Saturday? A. Yes, sir.

Q. And you didn't do any work in any factory or shop? A. No, I work all day carrying meat, you can ask his brother-in-law.

Q. I won't ask anybody. I am asking you. That day you did not do any work in any shop or factory, did you? A. No, sir.

Q. And you were around the saloon until about  
20 twelve o'clock midnight? A. I got to stay every day in the saloon.

Q. Were you around the saloon all afternoon on that Saturday, and all evening until it got to be nearly twelve o'clock? A. Yes, sir.

Q. Half-past twelve, is that right? A. Yes.

Q. During that afternoon did you see Cortese and Rizzo and Falzano together very often? A. He never talked to me nothing about it.

Q. I am not asking you whether they told you  
30 anything—

The Court: Listen to the question. Do you understand the question?

The Witness: Yes, sir.

The Court: Just answer the questions and do not volunteer.

Q. I am not asking you whether they told you  
40 anything. During that afternoon of this Satur-

*Frank Amistardi—for Defendants—Cross.*

day, Cortese, Falzano and Rizzo were together in the saloon? A. Yes, sir.

Q. Did they talk together? A. Yes, sir.

Q. How many times during the afternoon did you see Cortese, Falzano and Rizzo talking together, during the afternoon, how many times? 10

A. I only see about half-past ten when I was through with the butcher shop.

Q. In the evening? A. Yes, sir.

Q. They went over in a corner of the saloon and they talked in a low tone? A. Yes, sir.

Q. You did not hear what they said, did you, is that right? A. No.

Q. At half-past ten at night you saw them over in a corner of a saloon, all three talking together very low? A. Yes. 20

Q. What were you doing from half-past ten to half-past twelve when you were given this piece of paper by Falzano? A. I was sitting in a chair.

Q. How long did they talk from half-past ten?

A. From about half-past ten, twenty-five after twelve.

Q. Two hours? A. Yes, sir.

Q. And then, after they were talking until  
30 about half-past twelve, who gave you the letter? A. Falzano.

Q. He said, "Now, Frank, I want you to go down to the corner of Prospect Street and Lafayette and stand there with this letter in your hand. Now, this is the letter, stand there like this and if anybody comes up you give it to them and then come back", is that right? A. Yes, they told me to come back.

Q. Is that right? A. Yes, sir. 40

*Frank Amistardi—for Defendants—Cross.*

Q. He also told you if you are there about ten or fifteen minutes and nobody comes up to come back anyhow and to go to sleep, is that right? A. Yes, sir.

10 Q. Now, you left the place about 12:30 with that letter? A. Yes, sir.

Q. And you went to the corner of Prospect Street and Lafayette Street? A. Yes.

Q. How did you come from the saloon to the corner of Prospect Street and Congress? A. Through the alley there.

Q. Well, what street did you come over, Union? A. No.

Q. Prospect Street? A. Yes, sir.

20 Q. Where is the saloon on Ferry Street? A. 33 Union Street.

Q. That is up here. Now, you came through the alley to Prospect Street and then you came south to Prospect Street to the corner of where the school is? A. No, the other corner.

Q. Which corner? A. Up near Union Street.

Q. Were you on the school corner? A. No, the other corner.

Q. The corner up near Union Street across the street from the school? A. That is the corner.

30 Q. How long were you there alone before Cortese came along? A. About ten minutes.

Q. Now, you are sure that it was not Cortese that gave you that letter in the saloon with instructions to stand there holding it, it was Falzano? A. Yes, sir.

40 Q. Falzano gave you the letter and gave you the instructions to go and stand on that corner and then after you had been there for some time Cortese came along, is that right? A. Yes, sir.

*Frank Amistardi—for Defendants—Cross.*

Q. And the first question that Cortese asked you was this, "Did you see anybody, Frank"? Is that right? A. Yes, sir.

Q. And you said no? A. He asked me if I saw anybody.

10 Q. Which way did Cortese come when he came to this corner? A. From Prospect Street.

Q. From the direction of the saloon? A. From Prospect Street he come.

Q. From Ferry Street or from Elm Street? A. I see him before in the saloon.

Q. Did he come from the direction of the saloon when he met you at the corner and asked you the question, "Frank, did you see anybody"? A. His saloon is on Union Street, 33.

20 Q. Now, listen, try to understand me. You are at the corner, you have this letter in your hand, you have been there for some time and then Cortese comes along? A. Yes, sir.

Q. Where did he come from, which way did he come, did he come from Ferry Street from the saloon? A. From Ferry Street.

Q. That is it. He came from the direction of the saloon, didn't he? A. Yes, sir.

30 Q. And the first question he put to you was, "Frank, did you see anybody"? A. Yes, sir.

Q. What did you say? A. I say no.

Q. What did he say then? A. He said, "Come on".

Q. What did you do? A. I go home and go to sleep.

Q. Where did you go, what did you do, did Cortese and you walk along Prospect Street? A. Go back on the same road, Prospect Street?

40 Q. Now, listen. When Cortese said, "Come on,

*Frank Amistardi—for Defendants—Cross.*

let us go home", did you walk with Cortese down on Prospect Street afterwards towards the saloon? A. Yes, sir.

Q. Did you go home? A. Yes.

10 Q. Did Cortese stay with you when you got home? A. Yes, he went upstairs and opened the door.

Q. Did Cortese come along Prospect Street and at Prospect Street, opposite the lot, meet Rizzo and walk down here to Congress Street in the lots, yes or no? A. You can't see in the night time.

20 Q. Did Cortese stay with you and walk from the corner of Prospect Street and Lafayette back to the saloon or did he get to the point opposite the lot and meet Rizzo and Falzano at the corner and then he walked through the lots to Congress Street? A. I don't know if he seen the other fellow on Congress Street because they don't tell me of any letter for blackmail—

The Court: Never mind that.

30 Q. You were on the corner of Prospect Street and Lafayette and you had this letter in your hand because you had been instructed by Falzano to stand there? A. Yes, sir.

Q. Cortese comes up and says, "Frank have you seen anybody?" and you say say, "No". A. Yes.

Q. Then Cortese comes up and says, "Come on", and you both start to walk away from the corner? A. Yes, sir.

Q. Now, did you both go home? A. Yes.

40 Q. How did Cortese get opposite the lots back of the school and cross over and meet Falzano

*Frank Amistardi—for Defendants—Cross.*

and Rizzo and then go through the lots to Congress Street? A. He told me—

Q. No, listen. Did Cortese do that or not? A. No. He only said, "Frank, come on, we will go home".

Q. Did he go home with you? A. Yes. 10

Q. You are sure about that? A. Yes.

Q. You are sure he did not go through the lots and meet Falzano and Rizzo? A. About twenty feet from me I didn't see Rizzo.

Q. All I want to know is this, did you and Cortese leave the corner of Prospect Street and Lafayette Street and walk together back to Cortese's house? A. Yes.

20 Q. And you say Cortese never crossed over the lots and never met Rizzo and never met Falzano and never walked through the lots to Congress Street? A. I didn't say that.

Q. You went home and went to bed? A. I went home about a quarter after one.

Q. You went to bed? A. Yes.

Q. You did not see Rizzo any more that night? A. No.

Q. You did not see Falzano any more that night? A. No.

30 Q. When was it you first heard there was a shooting around the school and Falzano was shot? A. About a quarter to one.

Q. Supposing I told you the shooting did not take place until one o'clock. A. I didn't have no watch to know the time.

Q. Did you get home with Cortese? A. Yes.

Q. And walked slowly from the corner of Prospect Street and Lafayette Street and nothing happened until you got home? A. No. 40

*Frank Amistardi—for Defendants—Re-cross.*

*Re-direct examination by Mr. Abruzzese:*

Q. Did you not say that while you were walking toward your home you heard shooting on the next block?

10 Mr. D'Aloia: I object to that as leading.  
The Court: I will allow it. He did say that.

Q. Now, you mentioned a saloon, 32 Union Street, and there is a butcher shop at 47 Ferry Street? A. Yes.

Q. Is the butcher shop and saloon in the same building? A. Yes, it is the one house.

20 Q. So you said you were standing this way when Cortese came up to you and asked did you see anybody? A. Yes.

Q. And you did not see Cortese coming towards you, you did not see where he came from? A. No, he was about twenty feet away from me and he asked me, "Did you see anybody, Frank?" and I said, "No".

Q. He was about twenty feet away from you? A. About twenty or twenty-five.

30 Q. And you were still on the same corner? A. Yes.

*Re-cross examination by Mr. D'Aloia:*

Q. Do you remember about four o'clock that morning seeing this man at your house? A. Yes.

40 Q. Do you remember his asking you if you knew anything about any shooting, did you hear any shooting down at Lafayette Street and you said, "No, I don't understand Italian, I don't un-

*Frank Amistardi—for Defendants—Re-cross.*

derstand English, I don't understand anything. I only speak Austrian". A. He don't say that. He told me, "Did you say anything about that letter?" and I said, "No", if he asked me about the piece of paper I would have said yes.

Q. You just told your lawyer that you heard some shooting? A. Yes, I heard some shooting and I started to bend over. 10

Q. At the time you heard the shooting you were walking along Prospect Street from Lafayette Street going toward Ferry Street, is that right? A. Yes.

Q. And at that time Cortese was with you, is that right? A. Yes.

Q. You were asked by this man at four o'clock that morning, a couple of hours afterwards, if you had heard any shooting and if you knew about any shooting at that school at the corner of Prospect Street and Lafayette Street, or Congress and Lafayette Street, and you said no. A. No. 20

Q. Did you say no? A. No, I said—

Q. Did you say no? A. Yes.

Q. Now, this saloon, Cortese was the owner? A. That saloon belonged to Mike Cortese.

*Cross examination by Mr. Bernhard:* 30

Q. What did you do with the package which had been given to you when Cortese said, "Let's go home"? A. I gave it back to Mike.

The Court: When you say Mike, you mean Cortese?

The Witness: Cortese. 40

*Frank Rizzo—for Defendants—Direct.*

*Re-direct examination by Mr. Abruzzi:*

Q. Did you go to sleep at all between half-past ten and half-past twelve? A. No.

Q. You remained in the saloon? A. Yes.

10

FRANK RIZZO, sworn in his own behalf, through interpreter.

*Direct examination by Mr. Abruzzi (through interpreter):*

Q. How old are you, Frank? A. Seventeen.

Q. You knew Salvatore Falzano, did you not?  
20 A. Yes.

Q. How long had you known him? A. Four months.

Q. And did you know Mr. Michael Cortese? A. Yes, I saw him twice.

Q. And were you with—who were you with when you saw him twice? A. I was alone. The first time I went there I went for——

Q. How did you meet Cortese? A. The first  
30 time?

Q. Yes, the first time through whom? A. I went there with Sam.

Q. By Sam do you mean Salvatore Falzano?  
A. Yes, the dead man.

Q. Now, when about was the first time you went to Cortese's with Sam? A. About three months after I was at 14th Avenue.

Q. And at 14th Avenue do you mean where Falzano lived? A. Yes. I lived below him. He was the owner of the house.  
40

*Frank Rizzo—for Defendants—Direct.*

Q. Now, when was the second time you saw Cortese? A. Saturday, that Saturday.

Q. Now, when did you first meet Salvatore or Sam on Saturday? A. I was with Sam in the afternoon. I was sawing wood in the cellar.

Q. Now, by that Saturday, do you mean January 31, this year? A. I don't know anything about the 31st. It was on Saturday. 10

Q. Well, do you mean the day when there was some shooting down at the Lafayette Street school? A. Yes.

Q. So that was the second time you saw Cortese? A. That was the second time.

Q. All right. You said that you were sawing wood. Where were you sawing wood? A. Under the cellar. 20

Q. Of what house? A. Under where I was living.

Q. Up on 14th Avenue? A. Yes.

Q. And that was about noontime, wasn't it? A. In the afternoon.

Q. Well, about what time was it? A. About a quarter past twelve.

Q. Well, after you got through sawing wood did you go anywheres with Sam? A. No. Sam's little girl came down. 30

Q. And she said something to Sam, is that right? A. She called her father. That was his daughter.

Q. After that did you go anywheres with Sam? No, don't tell us what he said. Did you go anywheres with Sam? A. I went to Cortese's.

Q. With who? A. With Sam.

Q. And did you go to the butcher shop or the saloon? A. I went in the butcher shop and from the butcher shop we went in the saloon. 40

*Frank Rizzo—for Defendants—Direct.*

Q. What time was it when you got down there?

A. About two o'clock.

Q. And how long did you remain there? A. Not quite ten minutes.

10 Q. Did you go anywheres else? A. We went to another saloon.

Q. Well, what time did you—did you go back to Cortese's place from that saloon? A. Yes, I went away.

Q. Where did you go? A. In Cortese's butcher shop.

Q. And what did you do? Tell us what you did. A. I stayed there.

20 Q. How long did you stay there? A. A quarter of an hour, and then Sam came. He came with a truck.

Q. And what did you do? A. About a half an hour later Cortese came.

Q. And what happened? Where did you go, if anywhere? A. A few minutes later, not even ten minutes later, the man who worked in the bank came there, Marzano, the man who works in the bank.

30 Q. Did you do anything after he came? A. No. Marzano said to Cortese, "I have got to take a carriage home. Have you anyone——"

Q. Yes, and did you go anywhere with that carriage? A. I went for it. Sam, Marzano and myself.

Q. Did you come back for Cortese after you went to Marzano's house? A. Yes. I went to Marzano's house and took the carriage and took it upstairs and then I came down again.

40 Q. Where did you go from there? A. To Cortese's again.

*Frank Rizzo—for Defendants—Direct.*

Q. Did you go home? A. No.

Q. Well, how did you spend the evening after you got back to Cortese's? A. I said to Sam, "Let's go, it is late". Then Cortese said to Sam, "Go upstairs and get something to eat".

10 Q. And did you go upstairs to eat? A. Yes, I went also.

Q. Now, did you see Amistardi that night? A. I saw him there during the day.

Q. Did you see him there during the night? A. Yes, I saw him that night.

Q. Did you see him there about half-past twelve? A. Yes.

Q. Where did you see him? A. In the saloon.

20 Q. What time was it when you last saw Amistardi in the saloon? A. I think it was 12:45, quarter to one; 12:30, I don't know.

Q. Who else was in the saloon? A. I was there, Cortese and Sam.

Q. Did you talk to Cortese? A. I did not talk to him.

Q. Did Sam talk to Cortese? A. No.

Q. Did you see Sam and Cortese together in the saloon? A. All three of us.

30 Q. Well, weren't you all talking together? A. No, they were talking, I did not talk with them, I was seated.

Q. By "they" do you mean Cortese and Falzano? A. Yes.

Q. And after they got through talking what did you see Falzano do? A. Nothing.

Q. Did Falzano remain all night in the saloon or did he go away? A. Cortese went out first.

Q. Where did he go, do you know, did you see where he went? A. He went out to get shaved.

40 Q. Did he come back? A. Yes.

*Frank Rizzo—for Defendants—Direct.*

Q. And were you and Falzano and Amistardi still in the saloon when Cortese came back? A. Sam and I, but he was in the cellar.

Q. Oh, he had gone down the cellar? A. Frank—what is his name—Frank, he was in the cellar.

10 Q. Did he come upstairs from the cellar after that? A. Yes, sir.

Q. Then again you were all four in the saloon, Cortese, yourself, Falzano and Amistardi? A. Yes, sir.

Q. And you remained there until about half-past twelve, did you not? A. Yes, sir.

Q. Now, did you leave the saloon, did you go out, did you go anywhere? A. I did not go out at first, I remained in the saloon.

20 Q. Now, who went out first? A. That man over there went out first, Frank.

Mr. D'Aloia: Indicating Amistardi.

Q. Did Frank go out? A. Yes, sir.

Q. Did Frank talk to Falzano before he went out? A. Yes.

Q. Did you see Falzano give Frank an envelope? A. He put a piece of paper in it first, Cortese gave it to Falzano.

30 Q. Then what did Falzano do with it? A. He gave it to Frank.

Q. And then Frank went out, is that right? A. Yes.

Q. Who was the next person to go out? A. Sam went out, Sam said, "I will be right back".

Q. And then you and Cortese were left in the saloon, is that right? A. Yes, sir.

40

*Frank Rizzo—for Defendants—Direct.*

Q. What happened after that? A. Cortese went upstairs again, he was away one minute.

Q. Yes, and he came back, isn't that true? A. Yes, sir.

Q. Then what did he say to you when he came back? A. He says, "You take this and put it in your pocket and a block away from here you give it to me".

Q. Is that all he said? A. That's all he said, nothing else.

Q. Are you sure that's all he said? A. That's all he told me, I would have told you.

Q. Did you ask him why you should put that gun in your pocket? A. I asked him why did he give it to me, I never carried any, he says, "A block away from here you give it back to me".

Q. Then did you put the gun in your pocket? A. I was afraid because he did this (indicating).

Q. Did you go with him then? A. Yes, sir.

Q. Which way did you go? A. The other street, the next street.

Q. Do you know what street it is? A. I know the street but I can't recall it.

Q. About what time was it when you left the saloon? A. One o'clock.

Q. Did you see a school building when you went out? A. I seen some walls, but I don't know whether it was the school.

Q. Did you go through any lots? A. Yes, I did this (indicating).

Q. From then on, please tell us just what you did and what happened? A. As I got to the street I saw Sam there and I started to run away because I did not recognize anybody then. Sam went away and he stood over there (indicating).

40.

*Frank Rizzo—for Defendants—Direct.*

Q. Towards where? A. On this corner, that man was standing on this corner, and Sam was standing—

The Court: Which man does he mean?

Mr. Abruzzi: He means Amistardi.

10 The Witness: Sam was in this corner watching him, the man with the mustache.

Q. What did you do? A. I said to him, "Take your gun, I want to go away".

Q. Then what happened? A. He made me go away over the same ground and I said to him, "Take your gun, I have got to go away", I was standing this way (indicating) and Cortese was  
20 three paces behind me, then I heard someone opening a door.

Q. How far away from you was that door? A. I don't know, it was right opposite like that.

Mr. D'Aloia: Mr. Interpreter, didn't he say over about where the wall is? Ask him.

A. Yes, something like that, I can't tell exactly because it was dark.

30 Q. Yes, and then what? A. Then after that I saw a man come out and he said to me, "Hands up", and I raised my hands.

Q. Go ahead, tell us what happened. A. I raised my hands and he ran up to me and grabbed me by the back.

Q. When you say "he" do you mean this officer Berardi, the second gentleman? A. Yes, that man there (indicating Officer Berardi). I was not in  
40 the street.

*Frank Rizzo—for Defendants—Direct.*

Q. Could you see Sam then? A. I could not see him because he was over that way.

Q. After Officer Berardi got you by the coat collar what happened? A. When he grabbed me by the collar he said again "Hands up".

Q. To whom did he say that? A. I heard him  
10 say that and then I saw Sam.

Q. In which way were you facing then? A. I was on the school lot.

Q. Tell us what happened? A. He grabbed me then and I heard him say "Hands up", then Sam came up and he had one up and with the other hand he shoot.

Q. How many shots did you hear? A. I see one then he fall down.

Q. Who fell down? A. I and the man that  
20 grabbed me.

Q. Did you hear any other shots? A. I heard a few shots.

Q. How many shots did you hear? A. I didn't count them.

Q. How many did you hear? A. I heard a few.

Q. Did you see where Sam went? A. How could I see him? I was on the ground.

Q. How long did you remain on the ground?  
A. Then the shooting was over.  
30

Q. Yes, and what happened to you? A. They lifted me up.

Q. And what else? A. I saw more than four men and they broke my head.

Q. Did you have Berardi's finger in your mouth while this tussel was going on? A. No, I had the cap on. He grabbed me, and after he had grabbed me then the others hit me on the head with the revolver butts.  
40

*Frank Rizzo—for Defendants—Cross.*

Q. And did you faint? A. I was dying.

Q. Did you feel any revolver butts—did you feel the barrel of any revolver up against your face at any time during this struggle? A. He put it there.

10 Q. Then you were taken to the City Hospital, is that right? A. I found myself in the City Hospital.

Q. Did you know why Falzano had gone to the school that night? A. I don't know.

Q. Did you know why Amistardi had gone there? A. No.

*Cross examination by Mr. D'Aloia:*

20 Q. Is this the gun that Cortese gave you that night? A. Yes. He did this and then he gave it to me.

Q. He showed you it was loaded when he did that? A. I saw him put one in.

Q. You mean you saw him put the magazine in? A. One in.

Q. That went in here? A. He put a thing in there.

30 Q. That is one thing he put in there. Let me show you that thing and see if you recognize it. That is it, isn't it? That is what he put in there, like that? A. Yes.

Q. That is the one thing you saw him put in there? A. That is it.

Q. Now, didn't you ask him anything about why he should give you a little plaything like that and you were to walk a block and give it back to him? Did you ask him that? A. Yes; I asked him why.

40

*Frank Rizzo—for Defendants—Cross.*

Q. Why? A. He said to me, "One block away from here I will take it and you can go".

Q. And you were satisfied with that explanation? A. And I said, "Why?"

Q. And what did he say when you asked him why the second time? A. He said, "I am going 10 to give it to someone else".

Q. And you were satisfied with that and you took that thing and you went out with him, is that right? A. He made me walk ahead.

Q. Did he say anything to you about going out with you and Sam and himself to help catch somebody who was giving him trouble and bothering him? A. He said nothing.

Q. And you had dinner with him that night upstairs, didn't you, about three or four hours 20 before you got this gun from him? A. It was four o'clock.

Q. In the afternoon? A. Yes.

Q. And you ate with him, didn't you? A. Yes.

Q. Now, let's see who was at this dinner in the afternoon, Cortese was the host. Was this man Amistardi there? A. No.

Q. Falzano was there? A. Yes.

Q. And Cortese, you and Falzano and Cortese's brother-in-law Laborio? A. Yes. 30

Q. You all had this dinner at four o'clock? A. Yes.

Q. You had never been at Cortese's house before? A. No. This is the second time I saw Cortese.

Q. And you left after you had that dinner at four o'clock, you and Falzano, didn't you? A. We went downstairs.

Q. Now, before you went downstairs do you 40

*Frank Rizzo—for Defendants—Cross.*

remember Falzano and Cortese and the brother-in-law going into a bedroom? A. Yes, when we went upstairs Cortese wasn't there.

10 Q. Now, I am talking about before going downstairs and after you had eaten and you had the meal, do you remember Cortese and Falzano and Cortese's brother-in-law going from the room in which you had eaten into a bedroom and stayed there for an hour? A. Yes. I saw that. More than that.

Q. You were not allowed in that bedroom, were you? A. They left me in the kitchen.

20 Q. And when they got through with this conference in the bedroom you all went downstairs and Sam called you and said, "Come on, Rizzo," and you went down in the saloon and had some drinks, didn't you? A. Yes. Laborio went to cut meat.

Q. Now, after you had been downstairs in the saloon for some time you heard Sam say to Cortese, "Well, we are going, now"? A. It was half-past seven Falzano said to Cortese, "I am going home".

Q. Didn't he say we are going? A. No, he said, "I am going".

30 Q. And then Cortese asked you, "Will you come back?" A. Cortese said to Sam, "Come again tonight".

Q. And Falzano and Cortese, when Cortese asked him that, Falzano said, "Yes", didn't he? A. Yes.

Q. And you went up Fourteenth Avenue, you and Falzano, from down there at Cortese's place, didn't you? A. Yes, we went home.

40 Q. And nine o'clock you left your home again

*Frank Rizzo—for Defendants—Cross.*

and came downtown? A. I finished eating and I went in the store.

Q. Now, didn't you and Falzano leave Fourteenth Avenue, or that section up there, about nine o'clock to go downtown to Cortese's that night? A. Yes, we went there. 10

Q. And when you got to Cortese's about half-past nine?

Mr. Abruzzese: I think the witness said yes, we had gone.

Q. I will straighten it out. Did you leave Fourteenth Avenue after you got up there after leaving Cortese's place and then going back to Cortese's place that night, you and Falzano? A. 20 Yes, we went there.

Q. What time was it when you got back to Cortese's? A. When I left the store it was a quarter past nine and we got on a trolley car and went to Cortese's place.

Q. Where was this store you left at a quarter past nine? A. Fourteenth Avenue and 17th Street.

Q. Now, you left the candy store at the corner of Fourteenth Avenue and 17th Street, together 30 with Falzano, and took a trolley car and went down to Cortese's place about fifteen minutes after nine, is that right? A. Yes.

Q. Now, you went up to Cortese's room, didn't you, in the home? A. No, I didn't.

Q. Did Falzano go up there? A. No.

Q. Where did you go, to the butcher shop or the saloon? A. We entered in the butcher shop and then went to the saloon. 40

*Frank Rizzo—for Defendants—Cross.*

Q. And which one of the two, Falzano or Cortese, said it was a little too early, and then Falzano said, in answer to that, "Let's go to the moving pictures"?

10 Mr. Abruzzese: There is no testimony of any such conversation.

Q. Did anybody there say anything about going to the moving picture because it was too early?

Mr. Abruzzese: I object to the Prosecutor's asking that question.

The Court: The first question was improper. The second is proper.

20 Mr. Abruzzese: I object to the first.

Q. Did anybody say it was too early, let's go to the moving pictures? A. When we got back to Cortese's, Cortese gave us a drink and he looked at the watch and said, "I am going to the pictures".

Q. Who said that? A. The dead man, Falzano.

Q. Did you go with him? A. I went with him.

30 Q. Now, can you tell these gentlemen here why you and Falzano went back to Cortese's place that night, leaving Fourteenth Avenue and 17th Street about fifteen minutes after nine? A. I didn't say anything to him. We didn't do any talking on the car.

40 Q. Can you tell us now why after having been at Cortese's all the afternoon, after having had dinner with him at four o'clock, after being there for an hour after dinner, going up to Fourteenth Avenue, you and Falzano, why you and Falzano should leave Fourteenth Avenue and 17th Street

*Frank Rizzo—for Defendants—Cross.*

at a quarter after nine and go back to Cortese's place? A. For nothing. I went there many nights with Sam. Not to Cortese's. Sam and I walked out.

10 Q. I am asking about going to Cortese that night, can you give us any reason outside of saying you don't know? A. I don't know, I said nothing to him and he said nothing to me.

Q. Now, you don't know why Falzano, after being there some time and getting a couple of drinks at Cortese's saloon, Falzano should look at his watch and say, "Well, let's go to the moving pictures"?

20 Mr. Abruzzese: I object to the form of the question. How can this man speculate as to what is passing through Falzano's mind.

Mr. D'Aloia: I asked him if he knows any reason for it.

(Question read.)

Q. You don't know anything about why he did that. Then, you did go to the moving pictures with Falzano? A. I went many times.

30 Q. This night, never mind many times, did you go to the moving pictures? A. Yes, sir.

Q. And how long were you in the moving pictures? A. I went to the Market Street moving pictures and the pictures were over.

Q. The Market Street moving picture house is up this way, near the railroad, isn't it? A. Not where the shows are, here.

Q. You know where Cortese's place is on the corner of Union Street? A. Yes, sir.

40 Q. Now, from that place, in order to get to

*Frank Rizzo—for Defendants—Cross.*

10 this moving picture place that you and Falzano went to this night, did you cross the railroad, the Pennsylvania Railroad, Market Street station, and you came up one block opposite Ward Street, didn't you, the first street, the second street up from the railroad? A. Yes, where the bridge is, then you go this way and this is Market Street.

Q. Did you go into the moving picture place at all? A. Yes, sir.

Q. How long did you stay there? A. I don't know, the picture was over.

Q. You waited until the picture was over? A. Yes, sir.

20 Q. Now, when you came out you and Falzano, why didn't you go up to Fourteenth Avenue, tell us if you can why you turned around and went back to Cortese's place after the moving pictures were over? A. I said to Sam, "Sam, let's go", and he said, "Well, wait, let us go down and have one more drink and we will go".

Q. And you went down with him? A. Yes, sir.

Q. And you went down into the saloon again and saw Cortese there, didn't you? A. I saw Cortese and Laborio.

30 Q. When you got into the saloon after leaving the moving pictures didn't you and Cortese and Falzano go into a corner of the saloon and sit around a table about fifteen or twenty minutes while Amistardi was working near the bar, sitting at a table in the saloon, after coming from the moving pictures, you and Falzano and Cortese? A. In the saloon?

40 Q. Yes, that is what I am talking about, in the saloon about half-past eleven after coming back from the moving pictures, you and Falzano and

*Frank Rizzo—for Defendants—Cross.*

Cortese at a table in a corner of the saloon? A. Yes, sir.

Q. And didn't you talk there for an hour about going to Lafayette Street and the school? A. Who did the talking?

Q. You and Falzano and Cortese? A. No; 10 Cortese said, "Now, I am going out", when he was talking to Falzano.

Q. How long were you sitting at this table? A. Not even a quarter of an hour.

Q. But you stayed there in the saloon, didn't you? A. Yes, sir.

Q. Now, about one o'clock or half-past twelve, do you remember Cortese picking up an envelope and putting a piece of blank paper in it and calling Amistardi over and then he giving the envelope, Cortese did, to Falzano and Falzano gave 20 it to Amistardi? A. Yes, I remember it, but it was not half-past twelve, it was a quarter of one.

Q. And do you remember Falzano and Cortese saying at that time that he was to stand at the corner to see who was around there and if anybody came up to give him the letter? A. Yes, sir.

Q. And wasn't it said there at that table that that was a scheme to find out if the police were wise and the purpose of sending Amistardi there 30 was to see if any police officers were there? A. Which table?

Q. The table in the corner of the saloon when you came back from the moving pictures, you and Falzano and Cortese, wasn't it discussed there that it would be the best thing to do to send Amistardi to the corner with an envelope and stand there and find out if there were any police around there? A. Who said that? 40

*Frank Rizzo—for Defendants—Cross.*

Q. Falzano or Cortese or both? A. I didn't hear that.

Q. You didn't hear that, but you saw him go out with the letter? A. I saw him go out with the letter.

10 Q. How long after he went out did Falzano go out? A. Five or six minutes.

Q. How long after Falzano went out was it that Cortese went upstairs and came down with the gun and gave it to you? A. Two minutes.

Q. And how long after you got this gun from Cortese was it that Cortese put out the lights and you and he went out of the saloon and walked down towards this corner? A. Not even three minutes. Just time to say, "Put it in your pocket". It was about one o'clock.

20 Q. You and Cortese walked along and when you got to the corner of the lots, didn't you meet Falzano there? A. Yes, sir; I saw Falzano.

Q. Now, Falzano was right at the Prospect Street corner of the lot, wasn't he, where there was a little bit of a gate, and no fence? A. There is a door there.

Q. But no fence, alongside of the door, just a door standing up, nothing behind it and no fence alongside of it. A. There is a school yard there.

30 Q. No fence, you can go into the lots. You remember the place where you went into the lots? A. Yes, sir.

Q. Wasn't it right there at that point that you and Cortese met Falzano? A. I saw Falzano there.

Q. On that corner which is the first corner of the lot coming from Cortese's saloon, coming from Ferry Street.

40 Q. (Question withdrawn.) You and Cortese

*Frank Rizzo—for Defendants—Cross.*

left Falzano's saloon and when you walked along until you got to the vacant lot and at the corner of the next lot you met Falzano, isn't that so? A. We came out of the saloon and went down the block and then we started to cross.

Q. And you met Falzano at the lots, didn't you? A. I saw him. 10

Q. And you were with Cortese when you saw Falzano? A. Yes, because we both went out of the saloon.

Q. You and Cortese? A. Yes.

Q. Now, do you remember standing at that corner of the lots, you three, and do you remember Falzano looking up Ferry Street to see if anybody was following you? A. Falzano left here and then he went along the wall of the school, he was looking at him. 20

Q. Looking at Amistardi. He was at the corner of the school, wasn't he, Amistardi was at the school corner? A. Not the school yard, but on the corner.

Q. On the school corner, not in the school yard. Do you know where Lafayette Street is, don't you, the next street to the lots? A. I cannot call the street.

Q. After you met Falzano you and Cortese followed Falzano and Falzano went up against the wall of the school building, didn't he? A. Yes, sir. 30

Q. And you and Cortese were walking through the lots toward the next street, weren't you? A. Going through the lots to the next street? What do you mean, the yard where he said "Put up your Hands"?

Q. That is the yard, yes, where he came out 40

*Frank Rizzo—for Defendants—Cross.*

of the lots and came over to the yard. That is the yard? A. Yes, that is the way we went.

Q. Now, you went through that yard back of the school, you and Cortese, isn't that so? A. I didn't pass it. We stood right there.

10 Q. Well, you were in the middle of the yard. You had left the sidewalk of the street you had been walking on before you met Falzano and you were in the middle of the yard between the two streets? A. This is the yard and I was here (illustrating).

Q. And Cortese was with you? A. He was behind me. He had his hand here.

Q. And you could see Falzano up against the school wall, couldn't you? A. Yes.

20 Q. And you saw him come to the corner and saw him turn the corner, didn't you? You saw him crawl along the wall and come to the corner and turn the corner? A. Yes, I saw him.

Q. And while Falzano was coming along the wall do you remember Cortese speaking to you? A. I spoke to Cortese.

30 Q. And didn't Cortese speak to you and didn't he say this to you, "You go along and stop at the corner of the school, because there is a man coming there with something that you are to take. You take it and then give it to me and I will take care of it after"?

40 Mr. Bernhard: I object on what it seems to me is obvious grounds. I appreciate this is cross examination, but even that has its limitations, unless the Prosecutor is prepared to prove that Cortese did use these words he has used and now before the jury. It is not proper cross

*Frank Rizzo—for Defendants—Cross.*

examination and it is prejudicial. The Prosecutor cannot put words in his mouth that he did not testify on direct examination unless he can prove Cortese did make that statement, because it gets before the jury facts that cannot be before the jury in any other way. 10

The Court: Overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

20 Q. (Question read.) A. Where did he say that to me?

Q. In the yard of the school, after Falzano had gone along the wall and gotten to the corner of the school, when you were in the yard with Cortese's hand on your shoulder? A. When he had his hand on my shoulder he took it away. I took the revolver out and wanted to give it to him and then the police came there.

30 Q. Now, listen. Do you understand me? When Falzano was going along the wall of the school, toward the end of the wall on Congress Street and you were standing in the lots with Cortese, what did Cortese say to you when Cortese got to the corner?

40 Mr. Bernhard: I object to that for the same reason I stated before. It does not yet appear that Cortese said anything to him.

*Frank Rizzo—for Defendants—Cross.*

The Court: I think this last question is manifestly proper. It is asking for a statement of a party in interest.

Mr. Bernhard: That is not the ground of my objection. It does not appear that the party in interest made any statement.

10

The Court: He asked now what did he say, if anything.

Mr. Bernhard: That is the point of my objection. It leaves the inference to the jury that he said something, and there is not anything upon which that inference can be drawn.

The Court: Reframe the question.

Mr. D'Aloia: I will reframe it.

20

Q. Did Cortese say anything to you when you were in the middle of the lots going from one street to the other; if so, what was it? A. He didn't say anything.

Q. What did you say to him? A. I said to him, "Take your revolver".

Q. What did he say to you when you said to him, "Take the revolver", if anything? A. He said, "I will take it right away", and then the police came.

30

Q. Now, don't you remember that he said to you, "You go to the corner and you are going to get a package and give that to me and I will take care of it"?

Mr. Bernhard: I object.

The Court: Sustain the objection. Are you prepared to follow this?

Mr. D'Aloia: I am prepared to contradict this witness.

40

*Frank Rizzo—for Defendants—Cross.*

The Court: All right. I will allow you to ask the question.

Mr. D'Aloia: I am not prepared to state Cortese said it, but I am prepared to contradict this witness.

Mr. Bernhard: I do not represent this particular defendant. I am only interposing an objection on behalf of Cortese as to what he said about Cortese. If the statement relates to Cortese, then I object to it, for the reason I have already stated. There are three defendants here and I must object to it a step at a time. It is quite true that the Prosecutor, and I believe him when he says he will be able to contradict this witness; that was made in good faith—while it is true he may be able to contradict this witness, that does not save the prejudice against Cortese by reason of the answer.

10

20

The Court: I assume that the jury will decide this case on the evidence.

Mr. Bernhard: I know they will, but why, when you are obliged to by the rule and this is an exception to the rule, permit this question to be asked, because it is so damaging?

30

The Court: Well, under direct examination, facts relating to the happening at this school lot were brought out on direct examination. The Prosecutor is privileged to go over that again. Now, if this man has made a statement and it does nothing more than to affect his credibility, I will allow him to answer that question.

40

*Frank Rizzo—for Defendants—Cross.*

10 Mr. Bernhard: I am not trying to avoid or escape the rule that the Prosecutor has the perfect right to go to extreme limits on matters on cross examination on matters brought out on direct examination. I didn't conduct the direct examination of this witness. He is not my witness. The object of the Prosecutor is to bring out some damaging testimony pertaining to the defendant Cortese, and that is what I object to.

20 The Court: It is not any different from where an agent cannot bind his principal. The courts have said that still questions can be asked on cross examination that merely affect his credibility, and on that theory I will allow the question.

Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

30 Q. Now, didn't you make that statement on the 6th of March? Didn't you tell Mr. Giuliano up at the jail that this defendant Cortese said to you on this morning of February 1st when you two were in the middle of those lots and you had met Falzano and Falzano was crawling along the wall?

40 Mr. Bernhard: I object, because the other question was not answered. In order to preserve my objection I ask your Honor to rule upon my objection.

*Frank Rizzo—for Defendants—Cross.*

The Court: The same ruling.

Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

10

Judge.

A. I didn't say it.

Q. What did you say to him Cortese said? What did you say to Giuliano that Cortese said to you in the middle of the lots after Falzano began to crawl along the wall?

Mr. Bernhard: For Cortese I object.

The Court: The same exception.

20

Q. Did you sign a statement on the 6th of March? A. Yes, I signed it, but I didn't say about a package.

Q. Well, did he say to you the man is going to give you something and you give that to me?

Mr. Bernhard: I object to that. I think it is not a proper method of cross examination about a statement. He is entitled to have the statement before him.

30

The Court: Yes. This examination is on that statement and he is privileged.

Mr. D'Aloia: Yes. Tell him to look at the signature on it. This is in Italian. He writes his last name in the middle of the bottom of each page, and ask him if that is his signature, and the passage I want you to call his attention to is what

40

*Frank Rizzo—for Defendants—Cross.*

I included in my question, didn't Cortese say to you as follows: I will first ask him this.

10 Q. Is this the statement you signed up at the jail; is this your name? A. I signed it. I told him I didn't remember about a package.

Q. Is this the paper that you signed? A. Yes, this is the paper I signed.

20 Q. Now, didn't you tell the man who was writing this paper—this is in Italian—Cortese said to me—this is in Italian—you go to the corner of the school, because a man is coming there with something, and you take that and you give it to me and I will take care of it, and I said to Cortese, "Well, supposing this person kills me?" and Cortese says to me, "Don't be afraid, I will take care of that. I will be right behind you, and if this person will do any harm or pulls a revolver I will shoot him". A. I didn't say package.

30 Q. The word package is not there. Read it again. Didn't you say as follows in Italian to Mr. Giuliano or Mr. Berardi up at the jail when you made that statement, as set forth in that statement? A. No.

Q. What is that? A. No.

Q. Do you know this man? Stand up. A. Yes, I know him. He is with me.

Q. He is in jail with you? A. Yes, he is with me.

Q. Do you remember when you made that statement he was there? A. Yes.

40 Q. Was he there when you made the statement? A. Yes, he was there.

*Frank Rizzo—for Defendants—Cross.*

Q. Did you see him this morning before you came to court? A. At the jail I saw him.

Q. Did you talk to him this morning at the jail before you came to court? Yes or no. Did you talk to him up at the jail this morning? A. Yes, I talked to him. 10

Q. And didn't you say to him that you were going to come down to court today and were going to change the statement that you made on the 6th of March up at the jail? Yes or no. A. I told him in another way.

Q. Now, did you tell him you were going to change the statement you made? Yes or no? A. I didn't say that.

20 Q. What did you say to him this morning? A. I told him that I was going to court this morning and yesterday I had heard something about a package and I never said anything about a package, and we had gone with Cortese to catch some blackhanders.

30 Q. You told him this morning that you were going to change your story and you were not going to say anything about a package, or something you were to get there with Cortese, but that you were going there with Cortese to catch some blackhanders; is that what you told him this morning? A. He told me when I was in the Court House that we were to catch some blackhanders. I didn't know anything about it.

Q. He told you that? A. Cortese.

(At this point the Court takes a recess from 1:05 until 2:15 o'clock P. M.)

## AFTERNOON SESSION.

FRANK RIZZO resumes the stand:

*Cross examination by Mr. D'Aloia (continued):*

10 Q. Just before we adjourned, Rizzo, you told me that you came down to the Court House yesterday and you found out for the first time that you were down there with Cortese to get blackhanders, is that right? A. That's what he told me but I don't know.

Q. Who told you? A. Cortese told me.

Q. Here at the Court House? A. Yes, when they caught us.

20 The Court: There seems to be confusion.

Q. Did he tell you that at the Court House that when they caught you you were down there getting blackhanders? A. When they arrested me Mike came there and I asked Mike why I had been arrested, and he told me for the blackhand, but I don't know.

30 Q. He simply told you for the blackhand, but before we adjourned you told me that here at the Court House you were told that you were there to catch blackhanders. A. I said Cortese told me that they caught us for blackhand, but I don't know.

Q. You knew that, you knew that you were charged with being a blackhand, you knew that Falzano and yourself and Cortese were charged with being blackhanders, don't you? A. I don't know.

40

*Frank Rizzo—for Defendants—Cross.*

Q. You don't know it yet, do you? A. What?

Q. What the charge against you is? A. I am guilty of having the revolver because I had the revolver. I am afraid if they send me to jail.

Q. Now, I am going to show you a picture. (Showing the witness Exhibit S-2.) Do you see the school yard there in the picture? A. Yes, sir. 10

Q. Do you see it? A. Yes.

Q. Do you see the yard of the school? A. Yes.

Q. Do you see the wall there? A. Yes.

Q. Do you see the door? A. Yes, sir.

Q. Do you see the backyard? A. Yes, sir.

Q. Do you see the fence here and the door where you met Falzano and Cortese on Prospect Street, on that corner? A. Yes, sir.

Q. Do you see the yard that you and Cortese came through as you walked through that door, through the lots here? A. Yes, sir. 20

Q. Do you see the point in the yard where you and Cortese had reached when the man came from across the street and said, "Hands up"?

Mr. Abruzzese: This witness is simply saying yes, but I don't know whether he understands the question.

The Court: Neither do I. 30

(The witness is asked the last few questions in Italian by the Interpreter and answers.)

The Witness: Yes, when I reached here (indicating sidewalk), I did not see Falzano any more.

Q. Put a mark on this picture showing the point where you and Cortese reached when the 40

*Frank Rizzo—for Defendants—Cross.*

man came from across the street and said, "Hands up". Here is a pencil, put the mark there, where you and Cortese had reached when the man came from across the street and said, "Hands up". A. I was here and he was here three paces behind me.

10 Q. You were here? A. Yes, sir.

Q. He was three paces behind you, that is, Cortese? A. Yes, sir.

Q. Where was Falzano? A. I did not see him, he came from here over to here.

(Indicating on Exhibit S-2 from the doorway leading into the school from the corner of the building.)

20 Q. Did you see Falzano come from the door of the school to the corner of the building when you got to this point that you have marked with your own initial? A. Yes, I saw him.

Q. Is that the time when the man came from across the street and said, "Hands up", and grabbed you by the back of the neck? A. Before that, Cortese spoke to me.

30 Q. Yes, and what did Cortese say to you when he spoke to you? A. What did he say? He told me that somebody was to come there.

Q. He told you what you said before one o'clock he did not tell you, is that so?

Mr. Abruzzese: May it please the Court, he said before one o'clock nothing of the sort. He said somebody was to come there. (Question read.)

40 Mr. Abruzzese: I object to the question, if the Court please, it calls for a conclu-

*Frank Rizzo—for Defendants—Cross.*

sion. We cannot tell what is in the Prosecutor's mind as to all these things that this man said in the morning's questioning.

The Court: You can reframe your question.

10 Mr. D'Aloia: If the Court please, Counsellor Abruzzese understood his client's answer, he told him, when he said, "In there" and he pointed to the paper that was the statement—

Mr. Abruzzese: I don't remember him saying anything of the kind.

20 Q. When you answered a moment ago and I asked you what Cortese said when he spoke to you, did you point to this paper and say, "He told me what is in there", is that so? Yes or no? A. What is written is the truth. I am afraid to go to jail.

30 Q. Now, is this the truth, that when you got to this place that you have marked on this photograph with Cortese three paces behind you he spoke to you and he said this to you, "Go around the corner and there will be a man there who will give you something. Get it and give it to me and I will take care of it", and did you say to him, "Well, suppose he shoots me?" Did he then say to you, "If he shoots you you shoot him with your revolver. I will take care of that"? A. Yes.

Q. Now, when the man came across the street and said, "Hands up", did Cortese run away or stay there? A. I didn't see him, because I fell down. I was watching the police officer.

40 Q. Then it is true that the last time you saw Cortese was when he was right behind you when

*Frank Rizzo—for Defendants—Cross.*

he told you what you just said he told you? A. He had his hand in his pocket.

Q. And that is the last you saw Cortese? A. After the police came.

Q. Yes, but that is the last you saw of Cortese that night? A. Yes. I saw him in the morning at the Court House.

Q. But you didn't see him any more down there at the Lafayette Street School? A. I didn't see him any more.

Q. How soon after Cortese told you about receiving this something from a man around the corner of that building and to bring it to him was it that this man came from across the street and said "Hands up"? A. Two or three minutes.

Q. You mean by two or three minutes right away, don't you? A. Yes, when he made me stop.

Q. Yes, the policeman made you stop when he said "Hands up"? A. I was standing, he didn't make me stop.

Q. Who fired the shot first? A. Sam, the dead man.

Q. Falzano? A. Yes, Falzano.

*Cross examination by Mr. Bernhard:*

Q. How old are you? A. Seventeen.

Q. When were you seventeen? A. I am not seventeen yet.

Q. When will you be seventeen. A. Next month.

Q. Were you born in this country? A. I am in this country sixteen months.

Q. So that in January of this year you had been in this country about a year, had you? A. I am here sixteen months.

40

*Frank Rizzo—for Defendants—Cross.*

Q. After you came to this country did you go to school? A. No, I went to work. I didn't go to school.

Q. Where did you go to work? A. I was a lathsman.

Q. You went to school in Italy, though, didn't you? A. No, I didn't go to school in Italy.

Q. Can you read Italian? A. No.

Q. Can you write Italian? A. I cannot write.

Q. Can you write your name? A. I can do it, but I cannot do it well.

Q. Can you read English? A. No, I cannot even speak it.

Q. I think you told Mr. D'Aloia this morning that you signed this statement, didn't you; you signed those four sheets? A. Yes, I said that.

Q. And you did sign them? A. That is my signature. I signed them.

Q. Where did you sign them? A. In the jail.

Q. Were you in the hospital after this trouble on that night? A. They took me to the hospital.

Q. And how long did you remain at the hospital? A. I was there less than an hour. The priest came there and he said something to me.

Q. Then they took you to jail right away from the hospital? A. Yes, they took me to the jail.

Q. How long had you been in jail at the time you signed this statement? A. I don't know how long I had been in jail.

Q. No, at the time you signed this statement? A. About a month and ten days.

Q. When you signed this statement who was present? A. I was there. That man there.

Mr. D'Aloia: Mr. Berardi.

A. (Continuing) This one here.

40

*Frank Rizzo—for Defendants—Cross.*

Mr. Bernhard: Mr. Giuliano.

A. And that one.

Mr. Bernhard: Tortoriello.

10 A. And another one, that one over there.

Mr. D'Aloia: And that man who was identified this morning.

Q. And what is his name?

Mr. D'Aloia: I don't know.

Mr. Giuliano: Genevivo.

20 Q. Now, while you were in jail and before you signed this statement, did you have some one in the same cell with you? A. He was in the hall where I was.

Q. You didn't understand the question. Were you in the cell alone during all the time you were in jail or was there some other man there with you? A. I was alone.

30 Q. This man Genevivo over here, how close was his cell to yours in the jail? A. About seven cells.

Q. Did you talk to him after you were sent to jail and before he was present at the time you signed this statement? A. Yes, I talked to him.

Q. You did not read the statement, did you, because you cannot read? A. I cannot read; I cannot read.

Q. Did anyone read it to you before you signed your name to it? A. Yes, they read it to me.

40 Q. Who do you mean by "they"? A. The policeman read it to me.

*Frank Rizzo—for Defendants—Cross.*

Q. Which one, this gentleman here, Mr. Giuliano? A. Yes.

Q. Have you seen Mr. Cortese from the night when this trouble happened until you saw him yesterday in the courtroom? A. No, I did not see him any more. 10

Q. Rizzo, what did you mean when you said, as you have said, "I am afraid to go to jail". What did you mean by that? A. I did not want to say that because I was afraid.

Q. Afraid of what? A. If I did not tell the truth.

Q. Have you told the truth? A. That which is in there is the truth.

Q. Did you tell the truth when you were on the witness-stand this morning in answer to Mr. D'Aloia's questions? A. Yes, that which he said and what is in there is the truth. 20

Q. Is what you said the truth this morning? A. It is the truth.

Q. I understood you to say this morning that Mr. Cortese had not said anything to you except "I will take the revolver when you walk a block"? A. Yes, I said that.

Q. And you said at one time that that is all he said to you, is that true? A. Because I was afraid to tell. 30

Q. You were afraid to tell this morning what you have told this afternoon, is that what you mean? A. Yes, sir.

Q. Well, you knew this morning that if you did not tell the truth you might be sent to jail, didn't you? A. That is why I am afraid, but I want to tell the truth now.

Q. This morning I understood you to say that Mr. Cortese handed the package to Falzano and 40

*Frank Rizzo—for Defendants—Cross.*

Falzano handed it to this man with the mustache, is that right? A. He gave him a letter.

Q. Did you see anything more of the letter after Falzano handed it to this other man, did you see it again that night? A. I did not see it any more.

10 Q. The last time you saw it was when Falzano handed it to this other man, is that it? A. You mean the letter?

Q. Yes. Q. Yes.

Q. You said this morning, I think, that Falzano said, after the moving picture, "Let's go down and have one more drink before we go home", and that is the reason you went down, is that correct? A. Yes, I said that.

20 Q. And up to that time when you did go back after the moving picture, up until that time Cortese did not say anything to you about a revolver or ask you to do anything, did he? A. No, he had not said anything.

Q. You understood my question, did you? A. Yes, he gave me the revolver after that.

Q. So there may be no misunderstanding about it, up to the time he gave you the revolver, after the moving picture show, he had not said anything about what he wanted you to do that night, had he? A. No.

30 Q. I show you a paper and a signature, and ask you whether or not that is your signature, whether or not you signed it? A. Yes, sir.

Q. And you sent that letter in that envelope to Mr. Cortese, didn't you? A. I sent word to him that I didn't know anything.

40 Mr. Bernhard: I desire to have the envelope and the letter marked for identification.

*Frank Rizzo—for Defendants—Cross.*

(The same is marked D-1 for identification.)

*Re-cross examination by Mr. D'Aloia:*

Q. You were just shown that letter which you say you signed. Who read that letter for you? 10  
A. Genevio.

Q. Did you write that letter to Cortese or have it written before or after you received some money from Cortese?

Mr. Bernhard: Objected to.

The Court: Sustained.

Q. Did you receive anything from Cortese while you were up in jail? 20

Mr. Bernhard: I object.

The Court: The objection at this time will be sustained.

Q. Did you have any communication of any kind from Cortese before you wrote that letter?

Mr. Bernhard: I object to that, if the Court please, the letter is not in evidence.

The Court: That is the difficulty, the rule is where something is offered for proof 30 of signature no cross examination is permitted on it, except in so far as the signature is concerned.

Mr. D'Aloia: I would like to find out if, before he wrote that letter, he had a letter from Cortese or received any word from Cortese.

Mr. Bernhard: I object.

The Court: Sustained. 40

*Frank Rizzo—for Defendants—Re-direct.*

*Re direct examination by Mr. Abruzzese:*

Q. Rizzo, did you know that being before—

10           Mr. Bernhard: I object to that. The difficulty is I have not read the letter. The witness is in custody and he can be recalled at any time.

(Question withdrawn.)

Mr. Abruzzese: I rest in behalf of the defendants Amistardi and Rizzo.

20           LABORIA SICILIANO, sworn in behalf of defendant Cortese.

*Direct examination by Mr. Bernhard:*

Q. Where do you live? A. 47 Ferry Street.

Q. How old are you? A. 33.

Q. What is your business? A. Butcher.

Q. How long have you been in the butcher business? A. About eight or nine years.

30           Q. Are you in business for yourself or do you work for somebody? A. I work for Michael Cortese.

Q. The defendant? A. Yes.

Q. You are related? A. That is my brother-in-law.

Q. And his business is located where? A. 47 Ferry Street.

40           Q. How long, to your personal knowledge, has he been in business at that address? A. Well, about two years and two months; about two years, something like that.

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Q. Before that time? A. Before that time he used to have business number two Railroad Place, south of Canal.

Q. And is it a retail or wholesale business? A. Wholesale and retail business.

10           Q. And just what is your business, just what do you do down there? A. I work and I do everything.

Q. You do what? A. Work for my brother-in-law, cut.

Q. Any other people working for him? A. My niece and sister, cousin and some friends once in a while.

20           Q. And were you working for him in January of this year? A. Yes, I was working 47 Ferry Street.

30           Q. I show you an envelope which has been introduced in evidence bearing a postmark—S-11, being one of the two envelopes in S-11—and ask you whether or not you have ever seen it before? A. I have it in my hands for the first time.

Mr. D'Aloia: Do you mean now?

The Witness: No, the first time I had it in my hands.

30           Q. When did you have it in your hands for the first time? A. You know.

Q. I don't. I am asking you. A. I suppose it was Wednesday, January 27; I do not know if it is Wednesday or Thursday.

Q. What time of day did you first see it? A. Around nine o'clock in the morning.

Q. Who opened the envelope, if you know? A. I opened the envelope.

40           Q. What did you do after you opened the en-

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velope? A. Well, I just give it to my sister and read them about it.

Q. My question was, what did you do with it? You said you handed it to your niece and your sister. A. And sister.

10 Q. Before you did that, did you read it? A. I read it.

Q. What language is it? A. It is in American, broken English.

Q. And after you read it you gave it to your niece and sister? A. To my niece and sister.

Q. Did you see it after you handed it to them? A. The letter?

Mr. D'Aloia: To whom?

20 Mr. Bernhard: The sister.

Q. Did you see it again after that day? A. The letter, sure.

Q. Now, then, it is not addressed to you? A. No, addressed to my brother-in-law.

Q. And by your brother-in-law you mean Cortese? A. Cortese.

Q. Before you gave it to your sister or to your niece did you show it to Cortese? A. No, I showed it afterwards.

30 Q. Did you show it to him the same day? A. The same day.

Q. What did he do with it after you showed it to him? A. When he saw the letter he said, "Open it up and read it to me".

Q. Do not tell the conversation. You showed it to him? A. Yes.

Q. Did you read it to him? A. I read it.

40 Q. And after you read the letter to him did you hand it to him or did you keep it yourself

*Laboria Siciliano—for Defendants—Direct.*

or give it back to your sister? A. No, I gave it to him.

Q. Do you know personally what he did with it? Did you see what he did with it? A. He put it in a pocketbook.

Q. Now, from that time on did he have any conversation with you about the contents of that letter? Did he, yes or no? A. No.

Q. Did you receive any other letter after that day? A. One more.

Q. I show you the other envelope and letter in S-11 and ask you whether or not you ever saw that envelope—look inside—and the letter inside before today; did you ever see that letter before? A. Yes.

Q. How long after you saw the first letter did you see the second letter? A. Oh, about three or four days; I cannot remember very well.

Q. What time of day? A. The last letter?

Q. Yes. A. Nine o'clock in the morning, Saturday morning.

Q. Was the envelope opened when you saw it or not? A. No, the envelope was closed.

Q. And who opened the envelope? A. I did.

Q. It was not addressed to you? A. No, addressed to Michael Cortese.

Q. And after you opened it did you read the letter? A. I did.

Q. And after you read it what did you do with the letter? A. Well, I keep it until my brother-in-law come home.

Q. What time did he come home? A. Around twelve o'clock.

Q. Now, between the time you received the first letter—twelve o'clock noon or night? A. In the morning; at noon.

*Laboria Siciliano—for Defendants—Direct.*

Q. Between the time you received the first letter and the time you received the second letter, did you have any talk with your brother or your brother with you about the first letter? Yes or no. A. Yes.

10 Q. When? A. The same day; in the night time.

Q. Now, then, when you received the second letter did you have any talk with your brother-in-law about the second letter? Just yes or no. A. Yes, just told him.

Q. Did you or did you not read to him what was in the second letter? A. Yes, I did.

Q. What time did you stop working that night? A. Around a quarter after ten.

20 Q. Where did you go after you stopped working? A. I went upstairs to my sister, I had supper and I went right to bed.

Q. In the same house? A. On the top floor, the same house.

Q. And when you went upstairs at a quarter after ten, did you have to go through the saloon or did you go directly from the butcher shop upstairs? A. I go through the saloon.

30 Q. And when you went through the saloon did you see anybody in it? A. No, I only saw my brother-in-law there, Michael Cortese.

Q. Did you see Rizzo there? A. No.

Q. Did you see him standing there? A. No, sir; I think he was down the cellar.

Q. Was he there? A. No.

Q. Did you see Rizzo again that night? A. No.

Q. And you went to bed about what time? A. Well, around quarter of eleven.

*Laboria Siciliano—for Defendants—Cross.*

Q. On what floor of the house? A. On the third floor.

Q. On what floor does Mr. Cortese sleep on? A. The second floor.

Q. Were you awakened by anything that night? A. Not a bit. 10

Q. Do you know whether or not the police came to your house that night? A. Well, I don't know, I was surprised why they come.

Q. Well, do you know? A. I don't know.

*Cross examination by Mr. D'Aloia:*

Q. Why, weren't you awakened at half-past three or four o'clock, and didn't you get up and talk to the police? A. No. 20

Q. Didn't you make a statement? A. Yes, I do.

Q. What time was it? A. In the morning around four or five o'clock.

Q. Well, then, if I asked you if you was not awakened at four o'clock why do you say no? A. I don't understand.

Q. How long have you been a butcher down there in your brother-in-law's place? A. Eight years.

Q. And you lived down there with your father and your sister's and your sister's husband? A. Yes, sir. 30

Q. You got this first letter and you opened it? A. Yes.

Q. It was not addressed to you but you opened it? A. I opened every mail.

Q. It was not addressed to you and you opened it, that is right, isn't it? A. Yes, sir.

Q. That is right, isn't it? A. Yes, sir. 40

*Laboria Siciliano—for Defendants—Cross.*

Q. And you read it to your brother-in-law?

A. Yes.

Q. You read it to your sister? A. Yes.

Q. Did you read it to your father? A. No.

Q. And when you got the second one you read  
10 it to your brother-in-law, didn't you? A. Yes, sir.

Q. You read it to your sister? A. Yes, sir.

Q. That was Saturday, wasn't it? A. Satur-  
day morning, yes.

Q. Did you join that Saturday morning or  
afternoon in any plan of action to be taken by  
your brother-in-law, Michael Cortese, with refer-  
ence to the contents of the two letters that you  
had received addressed to him? A. No.

Q. Did you go upstairs about four o'clock and  
20 go into a room off the dining room when Falzano,  
the dead man, and Rizzo were there, having some-  
thing to eat, with you and Cortese? A. No.

Q. Did you go into a room, you and Falzano  
and your brother-in-law and Cortese and remain  
for an hour some time after four o'clock? A.  
After four o'clock, no.

Q. About half-past ten that night were you in  
the saloon when Falzano and Rizzo were confer-  
ring with your brother-in-law, Michael Cortese?  
30 A. I attend my business.

Q. I am asking you were you in the saloon?  
A. No.

Q. Did you see Falzano that day at all? A. I  
see him in the morning.

Q. Did you see him in the afternoon? A. No.

Q. Did you see Rizzo that day at all? A. No.

Q. You went to bed and you closed up the place  
at half-past ten? A. Around that time.

Q. And the next morning around four o'clock  
40 you were awakened, weren't you? A. Yes, sir.

*Laboria Siciliano—for Defendants—Cross.*

Q. And you were asked by Mr. Giuliano one  
question, "Did you know that your brother-in-law  
had been out to Lafayette Street school about  
some blackhand letters that had been sent to  
Father D'Aquila"? A. Yes.

Q. What did you say to that? A. I said I  
10 don't know nothing about it.

Q. Here is the statement, it is only five lines:  
"My brother-in-law is the proprietor of the store  
at 37 Ferry street and I work for him. Satur-  
day, January 31st, the day before, I was in the  
store with my father and my sister, the wife  
of Michael Cortese, about 10:20 o'clock. I closed  
the store, and at that time Michael Cortese was  
in the saloon at the corner of the same building.  
My father and sister and myself went upstairs.  
20 In the store I did not see Salvatore Falzano or  
his friend talking with Mike Cortese on Saturday,  
January 31st, 1925." You signed your name to  
it and it is written in Italian here? A. Yes, sir.

Q. Did you know at that time when you were  
signing that statement that you had received on  
the date of the 27th of January a letter which  
you had opened yourself, although it was ad-  
dressed to your brother-in-law and you read it  
to your sister and your brother-in-law? A. I  
30 didn't know anything at that time.

Q. You had forgotten at four o'clock on the  
morning of this Sunday that three days before  
you had opened the blackhand letter addressed to  
your brother-in-law, you had forgotten that from  
the morning of the day before that you had  
opened the blackhand letter addressed to your  
brother-in-law and you had forgotten the con-  
tents of it? A. I don't know what is the mat-  
40 ter—

*Laboria Siciliano—for Defendants—Re-direct.*

Q. I want to know what was the matter with you that Sunday morning at four o'clock when you told them you didn't know anything about it, why you didn't put it in the statement?

10 Mr. Bernhard: It doesn't appear that he was asked about it.

Q. Were you asked about your brother-in-law's business the day before? A. I don't understand.

20 Q. You understood Mr. Bernhard very easily, didn't you? Try to understand me. You want to tell these men in this box that you got both letters, opened both of them two days apart, read them to your brother-in-law and sister, and you don't know anything about any attempt made by your brother-in-law on the night of this Saturday to go and get the writers of these letters, did you? A. I don't know anything about it.

*Redirect examination by Mr. Bernhard:*

Q. But you do know about receiving these two letters? A. I know it, sure.

30 Q. The reason that you did not put that in your statement was, as I understood it, because you were not asked about it?

Mr. D'Aloia: He did not say that.

The Court: He did not say it, you suggested that as the reason why.

Mr. Bernhard: No, Mr. D'Aloia raised the question on his direct examination and after the question is raised I have a right to go into it.

40

*Laboria Siciliano—for Defendants—Re-direct.*

The Court: The question was not pressed, it was reframed.

Mr. Bernhard: The difficulty is that while it was not pressed it was produced before the jury.

The Court: Your question seems to assume that the witness answered the question, and in this case the Prosecutor objects and I sustain it. 10

Q. Were you asked about any letters having been received by you at the time you made this statement at four o'clock in the morning of January 31st, were you asked about any letters? A. I don't understand.

Q. Mr. Giuliano asked you some questions? A. 20 Yes.

Q. You understand that? A. Yes.

Q. (Translated in Italian.) The question is whether or not you were asked by Mr. Giuliano at the time you made your statement, whether or not you had received any letters prior to that date. That is all there is to the question. A. He did not ask me anything about letters. He did not say anything about letters.

Q. When Mr. Giuliano came there where were you? A. Up in bed. 30

Q. And how did he come into your room? A. Well, he knocked at the door.

Q. Well, he knocked at the door? A. Yes.

Q. And did you get up? A. Sure, right away.

Q. And when you got up, where did you go, anywhere? A. No place.

Q. Where were you at the time Mr. Giuliano asked you these questions standing at the door? A. In the Court House—I mean the City Hall. 40

*Laboria Siciliano—for Defendants—Re-cross.*

Q. Didn't you just tell us a while ago that Mr. Giuliano asked you more questions in the house—withdraw the question? Mr. Giuliano knocked on the door, is that correct? A. Sure.

Q. You opened the door? A. Sure.

10 Q. Did you say anything to Mr. Giuliano or did Mr. Giuliano say anything to you when you opened the door? A. No, he don't tell me anything; he don't say anything.

Q. Did you say anything to him? A. I just asked him why he come and get me.

Q. Then he took you to the police station, is that right? A. Yes.

*Cross examination by Mr. D'Aloia:*

20 Q. And the next morning, about three or four hours after you had been at the police station, you made a statement? A. Yes.

Q. And you signed it? A. Yes.

Q. You knew after being up at the police station three or four hours why your brother-in-law and you and other people were detained at headquarters? A. No, I don't know nothing.

Q. You didn't know anything? A. No.

30 Q. What time in the morning was it when you signed your name here, Laboria Siciliano, in a very fine hand? A. About seven o'clock, or six o'clock.

Q. You didn't know then your brother-in-law was in custody? A. I didn't know nothing about it; I didn't know why.

Q. And when you were asked these questions down at police headquarters at seven o'clock in the morning you simply told them very, very

40

*Laboria Siciliano—for Defendants—Re-cross.*

briefly who your brother-in-law was and where you had been on the 31st of January, and that you did not see Salvatore Falzano and you did not see Rizzo? A. No.

Q. All day Saturday? A. No.

Q. And you didn't know why they were arrested or where they were, and you didn't know that Mike had been arrested? A. Yes, I knew he was arrested, but I didn't know why.

Q. You didn't know why? A. I didn't know why.

Q. And didn't you know when you were being asked questions, that it was with reference to blackhand attempts? A. I know then when I come out.

Q. When you made this statement? A. They don't ask me anything. 20

Q. Didn't you tell the police anything about your brother-in-law's two letters you had opened at any time? A. I don't know nothing about the letter.

Q. Let's see! Saturday afternoon you worked all day? A. Yes.

Q. You worked all day in the morning and afternoon? A. Yes.

Q. You were not sick, were you? A. No. 30

Q. There is nothing the matter with you? A. No.

Q. Stand up. You are in good shape? A. Yes.

Q. You were in good shape that Saturday? A. Yes.

Q. You can use both hands and both feet? A. Yes, for work.

40

*Laboria Siciliano—for Defendants—Re-re-cross.*

*Re-direct examination by Mr. Bernhard:*

10 Q. Did the police permit you to see anyone or talk to anyone from the time they took you to the police station up to the time you made out this statement? A. They permitted nothing.

*Re-cross examination by Mr. D'Aloia:*

Q. You said the letters were written in American? A. Yes.

Q. In broken English? A. Broken English.

Q. You read them? A. Yes.

Q. You understood them? A. Well, some, anyway.

20 Q. You explained them to your brother-in-law? A. Well, the daughter.

Q. The daughter and you both? A. Yes.

Q. But you read Italian? A. Sure.

Q. Do you speak any particular dialect? A. No, sir; just Italian.

Q. What part of Italy did you come from? A. Sicily.

Q. What part does Cortese come from? A. The same place, Sicily.

30 Q. What part does Rizzo come from? A. I don't know.

Q. Did you hear him speak on the stand while you were in the Court room? A. Well, from Sicily.

Q. What part did Falzano come from? A. From Sicily, the same place.

*Cross examination by Mr. Abruzzi:*

40 Q. What part of Italy does Amistardi come from? A. From Triest.

MICHAEL CORTESE, defendant, sworn in his own behalf.

*Direct examination by Mr. Cavicchia:*

Q. What is your full name? A. Cortese.

Q. Your first name? A. Michael.

Q. Where do you live? A. 47 Ferry Street.

Q. What is your business? A. Butch.

Q. How long have you been a butcher? A. About twelve years.

Q. How long at the present address; how long at Union and Prospect Streets? A. I think two years and a couple of months.

Q. Ferry and Union. I am mistaken. How long? A. Two years and a couple of months.

Q. How old are you? A. Forty-three.

Q. Is your business wholesale and retail? A. Yes.

Q. In January of this year how many people worked for you; how many were in your shop?

The Court: Who worked for you?

A. My brother-in-law.

Q. Only your brother-in-law? A. My brother-in-law, my wife and my daughter.

Q. You worked yourself, didn't you? A. I didn't go out all the time with the truck. I buy meats. I bring meat for my store.

Q. Who opened your mail? Who opened your letters? A. My brother-in-law.

Q. On a morning in January of this year did your brother-in-law show you or read to you a letter? A. Yes.

Q. Do you think that you would recognize the

*Michael Cortese—for Defendants—Direct.*

letter again if you saw it? A. I don't understand.

Q. Look at the papers which I hand you, an envelope and letter, and tell us whether or not you ever saw them before. A. I don't understand.

10 Q. Mr. M. Cortese. A. Wait a minute. I know my sign.

Q. You did see that on that day? A. Yes.

Q. Now, did you read it yourself or was it read to you? A. I cannot read.

Q. Who read it to you? A. My brother-in-law.

Q. Do you remember what it says? A. Well, I don't remember all. At the time my memory wasn't—it was too long.

20 Q. Do you remember any part of what it says? A. Well, I remember about the last one.

Q. I am not speaking about the last one now. I am speaking about this one. A. The first one.

Q. The first one, yes. A. Well, send me ten thousand dollars. He called me a lot of bad words.

Q. (Through interpreter) Now, then, did you talk to anybody about that letter? A. Yes.

30 Q. To whom did you talk? A. I spoke to a man named Parillo.

Q. Did you talk to anyone else about the first letter? A. I also spoke with Bentelli.

Q. After the first letter did you receive another one? A. Yes.

Q. How did you get it? A. My brother-in-law get it, when I come back he get it.

Q. The same brother-in-law that handed you the first letter? A. Yes.

40 Q. Is this the envelope and the letter? A. Yes.

*Michael Cortese—for Defendants—Direct.*

Q. Did you read that? A. My brother-in-law and my daughter.

Q. Your daughter read it? A. Yes.

Q. Do you remember the day of the week you received this letter? A. Saturday.

Q. Do you remember about the time of day on which you received it? A. To tell you the truth, I don't remember.

Q. Well, was it morning, noon time or afternoon? A. Well, I think about eleven or twelve o'clock.

Q. Except for talking to the two men whose names you have told us about the first letter, did you do anything else about the first letter? A. No.

Q. (Through interpreter) After you received the first letter, what, if anything, did you do about that? A. When I got the letter about twelve or one o'clock I went to see Patsy Bentelli.

Q. Now, up to that time had you said anything to anybody except to Patsy about these letters, or either of them? A. No. Then afterwards I spoke with Sam.

Q. By Sam you mean Falzano, do you not? A. Yes.

Q. And what time of day did you speak to Sam about it? A. I talked to him about two o'clock.

Q. And where were you when you talked to Sam about it at two o'clock? A. In my home.

Q. You mean in your living room? A. Yes, sir.

Q. Was there anyone else present except you and Sam? A. No, just Sam and myself.

Q. Did you and Sam arrange some plan as to what you intended to do about those letters? A. Yes.

Q. What did you determine to do? 40

*Michael Cortese—for Defendants—Direct.*

Mr. D'Aloia: I object to that.

Mr. Bernhard: That is our defense.

The Court: I will allow it.

10 Mr. D'Aloia: What did they determine to do, how can the State be bound by what two men determined to do? He can tell us what he did and what Falzano did.

The Court: I suppose that is what Mr. Bernhard wants him to tell, what they did eventually.

Mr. Bernhard: We have gotten along very well in this case so far and I will withdraw the question.

Q. How long did you and Sam talk together?

20 A. The first time just a little while, I told him I had received another letter.

Q. Did you see him again the second time on that Saturday afternoon? A. Ten o'clock at night.

Q. So, between two o'clock and ten o'clock you did not see Sam, is that correct? A. No, no see him.

30 Q. Did you see or talk to anybody else between two o'clock in the afternoon and ten o'clock at night about these letters? A. No.

Q. And where at ten o'clock at night did you see Sam again? A. In my place.

Q. And by your place you mean your living rooms, Mr. Cortese? A. No, downstairs in the saloon.

40 Q. And was anybody else present except Sam and you at ten o'clock at night, was there? A. This boy was with Sam. Frank Amistardi was there part of the time in the saloon, and part of the time down in the cellar watching the steam.

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Q. At ten o'clock at night where did you have these two letters, Mr. Cortese, where were these two letters at ten o'clock at night? A. In my wallet.

Q. In the clothes that you were then wearing? A. Yes, sir. 10

Q. What next did you do after ten o'clock at night? A. I went to get a shave.

Q. When you went to get a shave where did you leave Rizzo and Amistardi and Sam? A. Left Rizzo and Sam in the saloon. I did not watch Amistardi.

Q. What time did you get back from the barber shop? A. It must have been about eleven o'clock, something like that.

Q. What is the next thing you did? A. At 20 eleven o'clock or about that time I called Sam alone into the butcher shop.

Q. And there did you and Sam talk? A. Yes, sir.

Q. And was the talk about these letters or something else? A. About the letters.

Q. Did you go out of your shop that night? A. When I went out it was 1:02, 1:03 or 1:05.

Q. When you went out were you alone or was there some person with you? A. Nobody. 30

Q. Where was Sam Falzano? A. He had gone out after Amistardi with Frank Rizzo.

Q. What time had they gone? A. Frank went out at first at seven or eight minutes of one.

Q. Then who followed? A. Then Falzano and Rizzo went out together.

Q. How long after they went out did you go out? A. I think five or six minutes.

Q. Before any of these men left to go out that 40

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night did you do anything yourself? A. I went upstairs to get an envelope, put a little piece of paper in it and gave it to Sam.

Q. What was the size of the envelope you got upstairs? A. About the same size of the letters that I received. 10

Q. Was there any writing on the envelope or any printing on the outside of it? A. Nothing.

Q. And what did you say you put inside of the envelope? A. Newspaper.

Q. In what language was the newspaper printed, do you know? A. I don't know, because I can't read.

Q. Where did you get the newspaper? A. In the butcher shop.

Q. How much of the newspaper did you put in the envelope, what size, show the Court and jury if you can? 20

Mr. D'Aloia: He is exhibiting his handkerchief which means about four inches.

Q. Why did you do that, Mr. Cortese, put the paper in the envelope? A. Because Sam told me, "Let's put a little paper in that, no money, then we will send Frank and I will follow him and then we will see who goes there." 30

Mr. D'Aloia: I object to that, if the Court please.

The Court: Sustained.

Q. To whom did you hand the envelope with the paper inside? A. Sam.

Q. Did you not tell Sam what to do with it? A. Yes, sure. 40

*Michael Cortese—for Defendants—Direct.*

Q. Did you know where Sam was going with that envelope? A. Sure.

Q. What did Sam do with the envelope, if you know? A. He gave it to Frank.

Q. How do you know that he gave it to Frank? A. I saw him, I was there. 10

Q. And where did Sam hand the envelope to Frank? A. In the back room.

Q. At the time that Sam handed the envelope to Frank did Sam say anything to Frank? A. Yes, sir.

Q. Did you hear what Sam said to Frank? A. Yes, sir.

Q. From what you heard Sam say to Frank do you know what Frank was told to do with the envelope, yes or no? A. Sure. 20

Q. Then Frank went out, did he? A. Yes, sir.

Q. Now, after Frank had gone out, did you see him again that night? A. Sure, when he came back.

Q. Where did you next see Frank when he went out of your house with the envelope? A. I saw him on Prospect Street.

Q. When you left your place did you leave by the Ferry Street entrance or the Union Street entrance—exit I mean? A. I went out the door at 33 Union Street and went to Prospect Street. 30

Q. Tell us, please, how you went to 33 Union Street, what spot you saw Frank on on Prospect Street? A. Why, through the alley.

Q. The alley leading from what street to what street? A. From Union to Prospect.

Q. Tell the Court and jury just how you went from Union Street to the place where you met Frank on Prospect Street. You went out of your 40

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store on Union Street, did you? A. I went out on Union Street.

Q. And then you came to an alley, did you?

A. It is opposite.

Q. And after you had gone through the alley  
10 then you found yourself on Prospect Street, is that correct? A. Yes.

Q. Now, when you found yourself on Prospect Street was it between Lafayette Street and Elm? A. Between Ferry Street and Elm Street—no, Lafayette; between Ferry and Lafayette Street.

Q. And when you came to Prospect Street in which direction did you walk? Did you walk toward the Lafayette Street School or did you walk away from it? A. I went on this sidewalk,  
20 the right hand side toward the school.

Q. And before you reached the school did you stop anywhere? A. I stopped at the fire house, opposite the fire house; the fire house was on the left and I was on the right.

Q. Now, from the time you came to a stop had you seen Frank or Rizzo or the other man or Sam; had you seen any of them? A. I saw Frank. I was only watching Frank. I think the boy and Sam were hiding.

Q. And where did you see Frank? A. He was  
30 arriving at Lafayette Street. He had not reached there yet. He was arriving there.

Q. And is this Frank that you speak of now the Frank that had the envelope?

The Court: That is Amistardi?

Q. Is that Frank Amistardi? A. Yes.

Q. And he is the man who had the envelope,  
40 is he? A. Yes.

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Q. And how far away from you was he at the time you saw him at the Lafayette Street corner?

A. I didn't know. If I had known you were going to put that question I would have measured it.

Q. What was Frank to do with the envelope? 10

A. He was to stand there, in the street, walk along and whoever came up to him hand it to him.

Q. Now, where was he walking or standing at the time you were outside the fire house?

Mr. D'Aloia: Now, Mr. Bernhard, in justice to your client and yourself, the fire house he is speaking of is not the fire house on the map. The one he is talking about is on Prospect Street, near Ferry, three  
20 doors away from Ferry Street.

Q. On what street is the fire house about which you are speaking? A. Prospect.

Q. Then there is another fire house across the street from the Lafayette Street School, isn't there? A. Yes.

Q. And the time you saw the man with the envelope, the man Frank, was he walking then or was he standing on the corner of Lafayette Street  
30 and Prospect Street? A. He was walking this way. His orders were not to stop, to keep on moving on the corner.

Q. And when he was moving on the corner was he moving back and forth along Lafayette Street, or was he moving back and forth along Prospect Street? A. He was not on Lafayette Street. He was always on Prospect Street.

Adjourned until tomorrow morning, Fri- 40  
day, March 27, 1925, at 9:45 o'clock A. M.

*Michael Cortese—for Defendants—Direct.*

THIRD DAY.

Friday, March 27, 1925.

(Trial continued pursuant to adjournment.)

10 (Present, counsel as before stated.)

MICHAEL CORTESE, recalled.

*Direct examination by Mr. Bernhard:*

Q. The last question asked you yesterday, Mr. Cortese, was where Frank was walking back and forth, and you said he was walking back and forth in Prospect Street, is that right? A. Yes.

20 Q. After he had walked back and forth on Prospect Street a while, what did you do? A. I went about two hundred feet towards him and I beckoned to him like this when I saw nobody around.

Q. And did he come towards you? A. Yes.

Q. And then where did you and he go? A. I said to him, "Let's go home", and we started for home.

30 Q. And which way did you start for home? A. The same way.

Q. Now, then, while you were there did you see any taxicab come along that street and stop in front of the school or near the school? A. No.

40 Q. What became of the envelope—as you and Frank started towards home what became of the envelope that he had in his hand? A. About a minute or a minute and a half later he joined me and gave me the envelope and said, "I didn't see anybody".

*Michael Cortese—for Defendants—Direct.*

Q. And as you were going towards your home did you hear any shots? A. Yes.

Q. You spoke of an alley, of going through an alley when you left your butcher shop to go down Prospect Street; did you go through the alley on your way home? A. Yes. 10

Q. Where were you on your way home when you heard the shots? A. When I heard five or six shots I was opposite Bentelli's garage.

Q. On what street? A. About 200 feet from the alley.

Q. From the alley leading into Union Street, is that right? A. Yes.

Q. That is the alley through which you went to this place? A. Yes.

Q. And was there any person with you at that time when you heard the shots at the alley? A. No. 20

Q. Where was Frank? A. Frank was with me.

Q. Where was Sam? A. I don't see Sam and I don't see Frank.

The Court: Is there not some confusion? He speaks of Frank. There are two Franks.

Mr. Bernhard: Frank was the man with the letter. 30

Mr. D'Aloia: Frank Amistardi.

Mr. Bernhard: Frank Amistardi.

Q. Where was Rizzo? A. I didn't see him.

Q. Now, if you were down there on the corner and Frank, the man with the letter, was walking up and down, did you see Sam Falzano there? A. No.

Q. Did you see Frank Rizzo there? A. No.

Q. When you reached home, what did you do? 40

*Michael Cortese—for Defendants—Direct.*

Mr. D'Aloia: Is this a conversation between Amistardi and this witness when he got home, what he said to Amistardi and what Amistardi said to him? I don't think we ought to have that. I think it is immaterial.

10

Mr. Bernhard: That is not what I asked him.

Q. I merely asked you did you go to bed or did you stay up or did you have a talk, or what did you do? That is all I want to know now.

A. I went to bed and Frank went to the cellar to sleep also.

Q. Went to the cellar? A. Yes.

20

Q. From the time you left your house, as you said, one, two, three, or four, and came back and went to bed, how long were you gone? A. I went to bed about a quarter to two.

Q. And how long after you had been in bed was it before someone came and aroused you out?

A. I didn't look at the clock when the police came. I don't know whether it was four o'clock or three-thirty.

Q. And when they came where did you go with them? A. They took me downstairs and took me in an automobile and took me to headquarters.

30

Q. And were you dressed at the time? A. I dressed in their presence.

Q. And when you reached headquarters were you searched? A. They searched me home after I got dressed and then searched me again at headquarters.

Q. Did they take anything from you at home?

A. They took a revolver from a drawer and a shot gun.

40

*Michael Cortese—for Defendants—Direct.*

Q. Where was the shot gun? A. In the house.

Q. Now, had you had that revolver with you the night just before when you had gone out?

A. Yes.

Q. Why?

Mr. D'Aloia: I object to that. He answered that he had it with him. Now, why? His reason is not going to bind us.

10

Mr. Bernhard: He has a permit and I have no objection to stating the fact before the Court at this time. The permit was legally issued.

The Court: It does not seem to me as to why he had it is material.

Mr. Bernhard: No, not according to our theory of the case. There are two views the jury may take of this, either that his explanation is true or it is not true.

20

The Court: In other words, the purpose of carrying the revolver is in furtherance of what the State contends and the question you asked is to offset that?

Mr. Bernhard: Yes.

A. Because I have always been threatened. I have been robbed. My machine was stolen. When Adubato was alive I received letters then. He robbed my store.

30

Q. What kind of letters? A. Blackhand.

Q. Did you have a permit? Was this paper taken from your pocket by the police the night you were searched? A. Sure.

Mr. Bernhard: I offer it in evidence.

The Court: Is that a 1925 permit?

40

*Michael Cortese—for Defendants—Direct.*

Mr. Bernhard: No, it is not.

Mr. D'Aloia: Counsel will admit it had expired at the time this thing occurred?

Mr. Bernhard: I will not admit it had expired.

10 The Court: It speaks for itself.

Mr. Bernhard: That and the law—that and the new law speaks for itself.

The Court: Anyhow, this man is not being tried for carrying concealed weapons.

Mr. Bernhard: No.

(Paper marked Exhibit D-2.)

20 Q. Now, then, in addition to that, they found on you two letters, did they not? A. Yes.

Q. And these were the letters that you identified yesterday? They found those letters on you? A. Yes.

Q. Did you write these letters? A. No, I wrote my name on them.

Q. Did you ask anybody to write these letters for you? A. No.

Q. Do you know who did write these letters? A. No, I wish I did know.

30 Q. I show you two other letters which have been introduced in evidence, and which Father D'Aquilla testified he received. They are both under Exhibit S-12 and I ask you whether or not you wrote either one or both of these letters, did you write any of them? A. How could I write them, I can't write.

Q. I want to know did you or didn't you? A. No, sir.

40 Q. Did you ask anybody to write them to Father D'Aquilla for you? A. No.

*Michael Cortese—for Defendants—Cross.*

Q. Did you know they had been written to Father D'Aquilla? A. No, how could I know?

Q. Did you have anything to do with writing those letters or causing them to be written or know that they had been written? A. No, I don't know anything, I know I received two letters. 10

Q. And when you received your two letters or the first letter, Mr. Cortese, why didn't you take it to the police? A. I did not take it to the police because I had been robbed several times on the part of it, and it never brought me anything.

Q. Well, when you received the second letter why didn't you then take them to the police with the first letter? A. I did not get any attention from them and I was going out to find out for myself and if I could find out from one of those 20 people, then I could go to Capadona and have them arrested.

Q. Mr. Capadona is who? A. A policeman.

Q. A member of the Police Department, is he not? A. Yes, in headquarters.

*Cross examination by Mr. D'Aloia:*

Q. Where were you living in 1922? A. On Railroad Place. 30

Q. What city? A. Newark, on the corner of Canal Street.

Q. How long had you been living in Newark in 1922? A. I came here in 1905.

Q. Came where 1905? A. Newark.

Q. Did you live in Newark continuously from 1905 to 1922? A. Yes, sir.

Q. Where did you become a citizen, where were you naturalized? A. Hackensack.

Q. Why, if you lived in Newark? A. Because 40

*Michael Cortese—for Defendants—Cross.*

in the summer time I had property there and I sold it last year.

Q. Now, you told your counsel that you cannot write. Here is your name at the bottom of this application which is dated February 5, 1925. Did you write that? A. Yes, sir.

Q. Is this address in your handwriting, "48 Ferry Street, Newark"? A. No.

Q. Is your name in your handwriting? A. Just the name.

Q. How about the rest of it? A. I did not write that.

Q. I am going to ask you again. This address is not written by you, the same as you wrote the name? A. No.

Q. Who wrote that? A. I don't remember now.

Q. Who wrote the body of this paper? A. The man that was there.

Q. The man that was there wrote the paper itself but you signed your name and wrote your address, isn't that so? A. No.

Q. Now, seven years ago, and before you were ever robbed by anybody, before you made any report to the police without getting any results, as you say, did you report to the police that you had received letters seven years ago; yes or no? A. I reported to Adubatto, I gave them to Adubatto.

Q. Are you telling us that you reported it to Adubatto because you know he died about six years ago? A. No, because he was an intimate friend of mine.

Q. Your brother-in-law Laborio Sciliano, the man who was on the stand yesterday, did he receive these letters and open them and then read them to you? A. If they are mine, yes, sir.

*Michael Cortese—for Defendants—Cross.*

Q. These are yours, yes, because there is your name at the top of them? A. Yes, that's right.

Q. Did the first letter, when he read it to you, contain any reference to Lafayette Street school?

A. No, somewhere else.

Q. Where else? A. Broad Street and Lafayette, under the bridge.

Q. Here is the second letter, does that say anything about the Lafayette Street school, as you recall it, read to you by your brother-in-law when he received it and opened it? A. It said Prospect Street, it did not say Lafayette school.

Q. Did you send anybody or did you go near this bridge at Lafayette and Broad where the first letter told you to go? A. No, the first letter, no.

Q. Now, on this Saturday, which was the 31st day of January, didn't you tell your brother-in-law Sciliano that you intended to go out that night and try to catch the people who had sent these letters—

Mr. Bernhard: May I ask the stenographer if he got the entire answer of the witness—

(Answer read as follows: The first letter, no.)

Mr. Bernhard: What was the rest of the answer?

The Interpreter: I thought they were playing.

Q. Now, when the second letter was read to you you say by your brother-in-law Saturday morning, did you ever take up with him the subject of trying to catch these people who were sending these letters to you, Saturday night? A. No, sir.

*Michael Cortese—for Defendants—Cross.*

Q. Never said a word to him, although he had received your letters and had read one of them to you? A. That's all.

Q. What time was it that Saturday when you met Falzano? A. In the morning I made two loads with the truck, it was about nine o'clock.

Q. You made two loads with the truck? A. No.

Q. Where did you see Falzano that day? A. I telephoned to him.

Q. And what time was it when you telephoned him? A. Nine o'clock, something like that.

Q. Did you speak to him on the telephone? A. Yes.

Q. And you told him to come down and see you and do what? A. To make a load, Pentelle's nephew says that a friend of his, a townsman of his wanted to move a trunk and a stove.

Q. Subsequent to the telephone message what time was it when you saw Falzano? A. I don't remember the exact time, but he came after an hour or something like that.

Q. When did you first see Rizzo that day? A. He was with Falzano.

Q. So that when you saw Falzano an hour after you telephoned to Falzano you saw Rizzo, too, is that right? A. Yes, both together.

Q. Now, did they stay down at your place for an hour after that nine o'clock telephone in the morning until about four o'clock in the afternoon? A. They made that load then, they went to Pentelle and then I went out and I returned about two o'clock.

Q. But it is true that Falzano and Rizzo hung around your place for an hour after the time you telephoned for Falzano all day until evening,

40

*Michael Cortese—for Defendants—Cross.*

isn't that true? A. Yes, but they went to the moving pictures—

Q. Wait, before you go to the moving pictures—

Mr. Abruzzese: May it please the Court, I think we are entitled to the whole answer. 10

The Court: No, you are only entitled to responsive answers.

Mr. Abruzzese: How can we tell if it is responsive until the whole answer is given?

The Court: I heard the question and I understand part of what he said, and I don't think it is responsive.

Mr. Abruzzese prays an exception to this ruling of the Court. 20

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

Q. Now, before you get to the time they went to the moving pictures at four o'clock, did you take them upstairs to your room, both Falzano and Rizzo, and did you eat with them? A. No, sir; I didn't eat at all at my home that day. 30

Q. Later on, when you were answering that question where counsel interrupted, were you there when they went to the moving pictures? A. They told me when they returned about ten or ten-thirty.

Q. Let's see. You owned this saloon down there next to the butcher shop? A. The house and everything, but I had a bartender there.

Q. The saloon, yes or no? A. Yes. 40

*Michael Cortese—for Defendants—Cross.*

Q. And some time ago you had some trouble there at the saloon, didn't you? A. No.

Q. Wasn't there a raid there?

Mr. Bernhard: I object.

10 The Court: Sustain the objection.

Mr. D'Aloia: I will withdraw the word "raid".

Q. Wasn't there trouble at the saloon?

Mr. D'Aloia: I will connect it.

20 A. The only trouble I had was they cut the window and they put their hand inside of the door, went in the door, and went into the butcher shop and robbed me.

Q. Now, forget all about the butcher shop and confine yourself to the saloon. Isn't it a fact while you were in control of that saloon some six or seven months ago you had some trouble with the authorities and you blamed the trouble you had on the priest at the church nearby? A. I didn't have any trouble.

30 Mr. Bernhard: I did not object to Mr. D'Aloia's question, but I do say to your Honor now that unless Mr. D'Aloia is able to substantiate the inference that he raises in his question that is prejudicial and there ought to be a mistrial. Now, nothing more detrimental could happen to this man in the court room than to leave the inference made by Mr. D'Aloia's question that he had sent these letters to Father D'Aquila because six or seven months ago he blamed it on Father D'Aquila.

40

*Michael Cortese—for Defendants—Cross.*

The Court: The question is proper and your motion for a mistrial is denied.

Defendant Cortese's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly. 10

Judge.

Q. Whose gun is this? A. I don't know.

Q. You did not give it to Rizzo just before you closed up your saloon and went out that night? A. No, sir. I only have one revolver.

Q. What time was it when you strapped this gun on you yourself? A. I had it every day from the time I received the first letter. 20

Q. That night did you go upstairs before you closed the saloon? Yes or no. A. I went up, not for the revolver.

Q. And when you came down did you give this automatic pistol to Rizzo? A. No, sir; if I had given it to him I would say it.

Q. You prepared an envelope with a piece of newspaper in it and gave it to Amistardi just before you closed up, didn't you? A. No, I gave it to Falzano. 30

Q. And you told Falzano to give it to Amistardi? A. I gave it to Falzano.

Q. And didn't you say that was to be given to Amistardi and Amistardi was to go down to the corner of Prospect Street and just hold it in his hand and give it to the first person who came up? A. Yes. I said to him, "Anybody that comes, give it to him".

Q. Did you know that that envelope containing 40

*Michael Cortese—for Defendants—Cross.*

that piece of paper. when you gave it to Falzano, was to be given to Amistardi and he was to stand with it on the corner of Prospect Street and give it to anybody that came there for it? A. I knew that, but not on the corner; on Prospect Street I told him.

10 Q. Did you see Amistardi go out? A. Yes.

Q. How long after Amistardi went out did you see Falzano go out? A. About five minutes.

Q. How long after Falzano got out did Rizzo go out? A. All together.

Q. How long after Rizzo went out did you go out? A. About four minutes; something like that.

Q. You went through the alley to Prospect Street? A. Four to five minutes.

20 Q. You went through the alley from Union to Prospect Street and got to Prospect Street, didn't you? A. Yes.

Q. You knew where Falzano and Rizzo had gone, didn't you? A. To look at Frank, watch Frank.

Q. And Frank was there with the envelope to give to the people who sent you the letters, isn't that so? A. Sure.

30 Q. Now, when you went out four minutes or three minutes after Rizzo went out and you got to Prospect Street, which way did you walk? A. Towards Lafayette.

Q. Now, as you came along Prospect toward Lafayette, you did not see Falzano, did you? A. No.

Q. And you did not see Rizzo, did you? A. No.

Q. But you did see Frank? A. Yes.

Q. And Frank said to you when you asked him, "Did you see anybody?" he said "No", is that right? A. I saw nobody.

40 Q. And then you and Frank began to walk back

*Michael Cortese—for Defendants—Cross.*

over Prospect Street to your place? A. Yes, on the right hand side; as you go down on the left hand side.

Q. You were on the side of Prospect Street opposite the lots; that is what you are trying to say. opposite the school yard? A. No, sir.

10 Q. The same side where the lots are? A. No, this side.

Q. Now, where were you when you heard the shots? A. I had arrived at Bentelli's garage.

Q. Now, where is Bentelli's garage with reference to the school? A. Down here; down further.

Q. A little nearer Ferry Street? A. Yes, nearer Ferry Street.

20 Q. Now, there is where you were at Bentelli's garage with Frank Amistardi when you heard shots coming from the school, is that true? A. I didn't hear any shots at the school. I had beckoned to Frank to come about a minute or a minute and a half later.

30 Q. I know you didn't hear any shots as you were at the school, but as you and Frank Amistardi started to walk along Prospect Street and you got to Bentelli's garage, you heard shots coming from the direction of the school. Now, get that right. Yes or no. A. I heard them from there, but I didn't know whether it was the school or not.

Q. Well, did you hear them from that direction, yes or no? A. Yes, five or six shots.

Q. And you had this thing with you, didn't you? (Showing revolver.) A. Yes.

40 Q. And you knew that you had sent Falzano and Rizzo there to catch the blackhanders who

*Michael Cortese—for Defendants—Re-direct.*

had written these letters to you? Yes or no. Did you know that? A. I didn't know it was them.

Q. But the shots were coming from the direction of the school, weren't they? A. I don't know that they were at the school exactly, I heard them  
10 from across the street.

Q. You kept right on going home and going to bed? A. Yes.

Q. Without seeing Falzano and without seeing Rizzo? A. No, I didn't see anybody.

Q. And you want to tell us that you went out that night to catch the blackhanders who were writing the letters to you? A. Yes.

*Re-direct examination by Mr. Bernhard:*

20 Q. Mr. Cortese, you said that you thought the first letter was only fooling, which you received? A. Yes, sir.

Q. What was there in the second letter that made you think they were not fooling? A. They said, "You send \$10,000 and if you are afraid to come, send that with the Genovese; the Genovese is Frank.

30 Q. And if you do not? A. If not we will take your hide and we will steal your daughter and take her with us and we won't let her marry the man that has \$11,000.

40 Mr. D'Aloia: (Addressing the Interpreter.) Just ask him to use that expression in Italian which you translated to mean, "We will take your hide". Ask him what that means so that we can understand it when used in his particular dialect.

*Joseph Linarducci—for Defendants—Direct.*

The Witness: My brother-in-law told me they want to kill me.

Mr. D'Aloia: That expression, "We will take your hide", in your dialect, as translated by your brother-in-law, means, "We will kill you". Is that right? 10

The Witness: Yes.

JOSEPH LINARDUCCI, JR., sworn in behalf of defendant Cortese:

*Direct examination by Mr. Bernhard:*

Q. What does the word "pella" mean, generally, in the Italian language without regard to dialect? A. "Pella" in Italian means skin. 20

Q. It means "Take your skin", does it not, without taking into account any dialect? A. Yes, Yes, "I take your skin".

Q. Generally in Italian, in the Italian language, it means "Take your skin" without regard to dialect? A. I don't agree with you there, Mr. Bernhard.

Q. I am asking you if it is not so? A. The expression as generally used and as understood is a threat to take life; it is parallel to the expression in English, "I will take your hide". 30

Q. Perhaps my question is not clear. There are numerous dialects in the Italian language? A. Yes, any number.

Q. But the expression means the same in all of the dialects? A. Yes.

(Cross examination waived.)

MICHAEL CORTESE sworn in behalf of defendant Cortese:

*Direct examination by Mr. Bernhard:*

Q. How old are you? A. Nineteen.

10 Q. Where do you work? A. 47 Ferry Street, my father's business.

Q. Your father is Michael Cortese, the defendant here? A. Yes, sir.

Q. Where do you live? A. 47 Ferry Street.

Q. And you work in the butcher shop for him, do you? A. Yes, sir.

Q. You have an uncle, Mr. Sciliano? A. Yes, sir.

20 Q. In January of this year did your uncle show you any letters? A. Yes.

Q. Do you remember whether he showed you one or two or both? A. He told me what was in one, but he showed me one.

Q. Do you think you would recognize the one which he showed you if you saw it? A. Sure.

Q. What was the color of the paper, do you know? A. Yellow.

30 Q. Do you recall the day of the week on which he showed you the one with yellow paper? A. The 31st of January.

Q. Do you remember the day of the week? A. Saturday.

Q. Do you remember the time of the day? A. It was about half-past nine when he showed it to me the first time.

40 Q. Look at paper S-12 and see whether or not you identify that as the paper which you say your uncle showed you on Saturday? A. Yes, that is the one.

*Pasquale Vennetilli—for Defendants—Direct.*

Q. And he told you about another one earlier in the week, did he? A. Yes, he told me he had received one Wednesday.

(Cross examination waived.)

10

PASQUALE VENNETILLI sworn in behalf of defendant Cortese:

*Direct examination by Mr. Bernhard:*

Q. Where do you live? A. I am live in Long Branch.

20 Q. What is your business? A. I ain't got no business, I am retire.

Q. Have you retired, sir? A. Yes, sir.

Q. What was your business? A. I have a saloon before Prohibition.

Q. Do you know Mr. Michael Cortese, the defendant in this case? A. I know Cortese, yes.

Q. How long have you known him? A. About twenty years.

30 Q. In January of this year did you see Mr. Cortese or did he see you? A. Yes.

Q. Did he speak to you? A. Yes. When, I want to know when?

Q. In January, I said? A. Oh, yes.

Q. Did the subject of the conversation relate to some letters?

Mr. D'Aloia: I object to that.

Mr. Bernhard: I know it is a leading question.

40 Mr. D'Aloia: Even if it were not lead-

*Pasquale Vennetilli—for Defendants—Cross.*

ing, the conversation with this man has no bearing whatever on this case.

Mr. Bernhard: I am not trying to get in the conversation.

The Court: It is just a question whether or not it related to a letter. 10

Mr. D'Aolia: Then I want the time fixed exactly, the letters which we charge here is one of January 27th and one of January 31st.

Q. Do you recall the date on which he spoke to you about some letters? A. Yes, sir.

Q. What was the date? A. It was a Saturday.

Q. That is the day, do you remember what day of the month it was? A. I don't remember what day of the month, no. 20

Q. It was Saturday, yes, sir.

Q. About what time? A. In the afternoon; I can't tell you exactly what time it was.

Q. And where? A. Right in back of his store, his butcher shop.

Q. And for how long a time did he and you talk about it? A. Oh, about ten minutes, something like that. 30

*Cross examination by Mr. D'Aolia:*

Q. Do you remember what Saturday that was, do you? A. Well, I can't tell you exactly the Saturday it was.

Q. You don't remember whether he told you that he had sent letters to a priest and that they were trying to get some money from him? A. I don't know anything about that. 40

*Pasquale Vennetilli—for Defendants—Re-cross.*

*Re-direct examination by Mr. Bernhard:*

Q. Did anything occur, so far as you know on the Saturday night of the Saturday or when Cortese talked to you about these letters—do you understand my question? A. I can no understand the question. I want you to repeat it for me. 10

The Court: Just listen and maybe you will understand.

Q. On the night of the Saturday afternoon when you and Mr. Cortese were talking together about a letter in the back of his butcher shop, did or did not something occur that night? A. No, because I leave four o'clock to go home, I don't know anything about it, because I live in Long Branch. 20

Q. When next after that Saturday afternoon, did you see Mr. Cortese? A. Oh, three or four days after, because he had trouble.

Q. What trouble? A. I don't know about it, he had some trouble, some kind of trouble; I don't know.

Q. When did the trouble occur? A. On the same Saturday. 30

Q. On the same Saturday you say he talked to you? A. Yes, sir.

*Re-cross examination by Mr. D'Aolia:*

Q. How long have you known Cortese? A. Twenty years.

Q. You did not say anything about going to the police that Saturday afternoon, did you? A. No. 40

GERARDO PARRILLO sworn in behalf of defendant Cortese:

*Direct examination by Mr. Bernhard:*

10 Q. Where do you live? A. 20 East Mechanic Street.

Q. What is your business? A. I am in the hair goods business.

Q. Do you know Mr. Cortese, the defendant in this case? A. Yes.

Q. How long have you known him? A. Well, maybe twelve or thirteen years.

Q. In January of this year, the month of January, did you see Mr. Cortese, if you recall? A. Not that day.

20 Q. I am not speaking of a day, sir; I am speaking of the month, the month of January; did you see Mr. Cortese during the month of January? A. More or less, I see him every day.

Q. Upon any of the occasions which you saw Mr. Cortese during the month of January did he have a conversation with you about a letter?

Mr. D'Aloia: I object to that.

The Court: Sustained.

30 Q. I show you two letters, S-12, and ask you whether or not you ever saw any of those papers in S-12 4? A. I saw an envelope with the letter in.

Q. What color was the letter in the envelope which you saw? A. Well, it was a white envelope.

Q. Who showed it to you? A. Mike Cortese.

40 Q. And where did he show it to you? A. On Ferry Street.

*Gerardo Parrillo—for Defendants—Cross.*

Q. Where did he show it to you? A. At his home.

Q. Did you and he have a talk about it? A. Yes, sir.

Q. How long were you and he talking about the letter which he showed you? A. About five or ten minutes. 10

Q. Did you that afternoon on Thursday, did you see him again that month? A. No, sir.

Q. When did you next see him? A. About a week after he got out on bail.

Q. From the time that you saw him on Ferry Street until he was admitted to bail did anything happen, so far as you know, or heard? A. Yes.

Q. When did something happen? A. It happened on Sunday night. 20

Q. Early Sunday morning? A. Yes, sir.

Q. How many days after the Thursday on which you saw him? A. It was about four days, I should say.

*Cross examination by Mr. D'Aloia:*

Q. You live at what number East Mechanic Street? A. 20. 30

Q. How long have you known Cortese? A. Twelve, thirteen years.

Q. You are a very good friend of his? A. More or less, I am a friend of anybody's.

Q. Yes or no? A. Yes.

Q. How far is your house away from the priest's rectory? A. Right next door.

Q. Now, the morning of that Sunday at one o'clock did you see a taxicab come around there? A. No, sir. 40

*Gerardo Parrillo—for Defendants—Re-direct.*

Q. Where were you that Sunday morning at one o'clock? A. Asleep.

Q. Where? A. In my house.

Q. You are sure that you did not see that taxicab come around there at one o'clock that morning and that you did not tell someone that you saw a taxicab go off? A. No, sir.

Q. Have you a telephone? A. Yes.

Q. You are supposed to be a private detective? A. No, sir.

Q. You have posed as one?

Mr. Bernhard: I object to that.

The Court: The first question is probably objectionable.

Mr. D'Aloia: I will withdraw the second one—I will withdraw them both.

Q. Isn't it a fact that because you have had the reputation in that neighborhood of investigating and being a quasi-detective Cortese started this conversation with you?

Mr. Bernhard: Objected to as immaterial.

A. Yes, sir.

Q. During the conversation did you suggest to Cortese that he go and see the police? A. No, sir.

*Re-direct examination by Mr. Bernhard:*

Q. What did you say your business was? A. I am in the hairgoods business.

Q. How long have you been in that business?

A. About ten years.

*Gerardo Parrillo—for Defendants—Re-cross.*

*Re-cross examination by Mr. D'Aloia:*

Q. Has your wife been visiting the jail since this thing happened? A. Yes.

Mr. Bernhard: I object to that.

The Court: Sustained.

Mr. D'Aloia: Now, if the Court please, I am going to try to bring out, to show the bias of this particular witness and his friendliness for the defendant Cortese. I am going to prove that it was his wife who paid visits to the jail and saw Rizzo with a message from Cortese and with some money from Cortese and I think I have a right to show that when this witness is offered as a witness in behalf of the defendant Cortese. He just answered yes he knows that his wife paid visits to the jail, and I think I ought to bring that out.

Mr. Bernhard: If counsel will produce the testimony in support of his offer, which he says that he will produce, in effect that Cortese asked this witness's wife to carry a message to the jail to Rizzo for him, which will affect the credibility and the bias of this witness, I have no objection to it, that is, his flat-footed statement, and if he does not, I renew my motion for a mistrial because, of course, it is prejudicial to this defendant. What he has offered to your Honor to prove is this, not by inference, not by insinuation and not by suggestion or conclusion, but by word of mouth, from the testimony, that Cortese asked this witness's wife to carry a message to the jail

*Gerardo Parrillo—for Defendants—Re-cross.*

to Rizzo, not Rizzo's statement, but the line of proof which he so said in a solemn way in this Court, he will produce, otherwise it is prejudicial to this defendant.

10 The Court: Suppose this witness meets the requirements?

Mr. Bernhard: In what way?

The Court: Suppose he answers yes.

Mr. Bernhard: That is prejudicial.

The Court: No.

Mr. D'Aloia: That he knows of this particular message.

Mr. Bernhard: That is hearsay, sir.

The Court: I would not say that, suppose he heard Cortese.

20 Mr. Bernhard: How can a message be anything else but hearsay unless Cortese corroborated it, and if he did, then, my objection does not stand.

The Court: Suppose he heard Cortese or anybody else make a statement?

Mr. Bernhard: But unless Cortese made the statement, isn't it hearsay?

The Court: Absolutely.

30 Mr. Bernhard: If Cortese made the statement, then, of course, he can testify to it, but that is not what the Prosecutor offered to do.

(Argument.)

Mr. D'Aloia: I will limit myself to one question.

40 Q. Do you know that your wife carried messages to the jail upon her visits there from Cortese to Rizzo? A. No, sir.

*Gerardo Parrillo—for Defendants—Re-cross.*

Mr. Bernhard: I object to that.

The Court: His answer is no.

Mr. Bernhard: Well, I didn't hear his answer.

Q. You understand English pretty well? A. 10  
Yes.

Q. You understood this argument as it took place? A. Yes.

Q. Now, you told me a few minutes ago that you were never an investigator and that you never acted as a detective. Now, do you want to change that testimony? Yes or no. A. If I did that it was years ago.

Q. I don't care when it was. Were you ever a private detective? A. Yes, ten years ago. 20

Q. Now, you want to change your testimony? A. No.

Q. Did you know Cortese when you were a private detective? A. No, sir.

Q. You said it was ten years ago? A. Well, all right. When I say I know I know everybody by sight.

Q. Now, isn't it a fact that you were called in by Cortese to discuss these particular missives because you had given Cortese to understand for 30  
the last ten years that you knew something about detective work? A. No, sir.

Q. He just called you in as a friend of his? A. Not called me in as a friend. If you will give me time I will explain it.

Q. We will give you time later. A. All right.

Q. You want us to believe that you went in there and the first thing he did was to—what is your first name? A. Girard. 40

*Gerardo Parrillo—for Defendants—Re-cross.*

Q. Girard, and say I have a letter here, and you looked at it and it was in a white envelope. His brother-in-law wasn't around at the time? A. No.

10 Q. And he took this letter out and said, "Look here, I have a letter calling on me to bring some money"; is that how it started? A. No, it didn't.

Q. How did it start, who brought the letter out? A. Cortese brought it out.

Q. And he told you what was in it? A. Yes.

Q. Did you see him read it? A. No, sir.

Q. He told you what was in it and what did you say? A. I said, "Don't do any harm, don't be scared, what do you care"?

20 Q. You didn't say, "Go and see the police about that"? A. No.

Q. Then you went away? A. I went away.

Q. That is all you know? A. Yes.

Q. Now, after that occasion and after he got out on bail, how many times did you and your wife go and visit him? A. My wife don't visit him.

Q. How many times did you visit him? A. I may have visited him once, two, three or four; I don't know.

30 Q. How many times have you visited Cortese since the time you got out on bail? A. About three times.

Q. That is all? A. Yes.

EDWARD F. REILLY, sworn in behalf of defendant Cortese.

*Direct examination by Mr. Bernhard:*

Q. Where do you live? A. Maplewood.

Q. Where do you work? A. Ironbound Trust Company. 10

Q. That is the branch or main building? A. Main office.

Q. On the corner of Ferry and Market Streets? A. Yes.

Q. Do you know Michael Cortese, the defendant in this case? A. Yes.

Q. You know where he lives? A. Well, it is on a corner near there, corner of Union and Ferry, I believe. 20

Q. About how far from your bank is it? A. Two blocks.

Q. And how long have you been associated with the Ironbound Trust Company at that location? A. Eighteen years.

Q. How long have you known Cortese? A. Well, about eight or nine years.

Q. I understand he is a depositor in your bank, is he not? A. Yes.

Q. Are there other depositors from that neighborhood in your bank, so far as you know? A. Yes. 30

Q. Many? A. Oh, yes.

Q. Do you know the reputation of Cortese for peaceableness and being a law abiding citizen in the community in which he lives? Do you know? A. I know him to be all right.

The Court: No.

*Edward F. Reilly—for Defendants—Re-re-direct.*

Q. No. The first question is do you know, from your association with these people, and being down there; do you know what it is? A. What his reputation is?

Q. Yes. Yes or no to that. A. Why, yes.

10 Q. And what is his reputation for peacefulness, good or bad? A. Good.

*Cross examination by Mr. D'Aloia:*

Q. You don't meet him at any time outside of banking hours? A. No.

Q. You didn't visit him socially? A. No.

Q. He does not visit you? A. No.

Q. You know that he has an account in your bank? A. Yes.

20 Q. And it is not overdrawn and he meets his obligations there? A. Yes.

Q. And you know that about other depositors of your bank who do the same thing? A. Yes.

Q. That is all you know? A. Yes.

Q. Now, you don't know whether he carries a revolver, do you? A. No.

*Re-direct examination by Mr. Bernhard:*

30 Q. You know depositors who know him, do you not? A. Yes.

*Re-cross examination by Mr. D'Aloia:*

Q. But you do not discuss him with them at any time, do you? A. No.

*Re-re-direct examination by Mr. Bernhard:*

40 Q. Have you ever heard from them or from anyone else anything derogatory to his character as

*Edward A. Hirsch—for Defendants—Direct.*

a law-abiding citizen in the community in which he lives? A. No.

*Re-re-cross examination by Mr. D'Aloia:*

Q. Did you ever ask any of them about it? A. 10  
No.

EDWARD A. HIRSCH, sworn in behalf of the defendant Cortese.

*Direct examination by Mr. Bernhard:*

Q. Where do you live? A. 142 North 13th 20  
Street.

Q. And are you in business at the present time? A. No.

Q. Within what time have you been in business? A. Since the 15th of October I am out of business.

Q. And where was your business located? Last October you went out of business? A. The 15th of October.

Q. And where was your business located? A. 46 Ferry Street.

Q. What was your business? A. Sea food. 30

Q. And do you know Michael Cortese, the defendant in this case? A. Yes.

Q. How long have you known him? A. Two years.

Q. And where has he had his business and resided during that period of two years? A. Across the street from me.

Q. Do you know what his reputation is for peaceableness and as a law-abiding citizen for the 40

*Vito Marzano—for Defendants—Direct.*

period of time which you knew him? Do you know? A. I don't know anything except what I saw of him, an industrious business man.

Q. Do you know other people who know him?

A. Some, yes, in the neighborhood.

10 Q. Have you heard anything derogatory to his character or reputation as a law-abiding citizen?

A. Never did.

*Cross examination by Mr. D'Aloia:*

Q. You never visited him socially? A. No, sir.

Q. You do not know where he went in the evening? A. No, sir.

Q. You did not meet the same people he met in the evening? A. No, sir.

20 Q. Were you ever aware of the fact he carried a revolver? A. No, sir.

*Re-direct examination by Mr. Bernhard:*

Q. Were you ever aware of the fact that he had a permit to carry a revolver? A. No, sir.

*Re-cross examination by Mr. D'Aloia:*

Q. He kept a saloon opposite the butcher shop?

30 A. I believe he had.

Q. You believe it was a saloon? A. Yes.

VITO MARZANO, sworn in behalf of the defendant Cortese.

*Direct examination by Mr. Bernhard:*

Q. Where do you reside? A. 229 Broad Street.

40 Q. Where is your business located, if you are in business? A. 15 Ferry Street.

*Vito Marzano—for Defendants—Cross.*

Q. And what business are you in? A. Banker.

Q. How long have you been in business as a banker? A. Thirty-five years.

Q. And how long in that locality where you are now situated? A. Seven years.

Q. Do you know Peter Cortese, the defendant 10 in this case?

The Court: Not Peter, Michael.

Q. Michael. Do you know Michael Cortese, the defendant in this case? A. Yes.

Q. How long have you known him? A. Oh, about fifteen or sixteen years.

Q. Do you know what his reputation is as a peaceable and law-abiding citizen in the community in which he lives? Do you know? A. I 20 do.

Q. What is it, good or bad? A. Good.

*Cross examination by Mr. D'Aloia:*

Q. Did you have any occasion to discuss his reputation? A. I never had.

Q. What? A. No, not before.

Q. You are sure that somebody did not come into your bank and tell you that Michael Cortese was a pretty hard fellow to get along with, and pretty tough, and you said he was not? A. Not before this happened. 30

Q. But since this happened has anybody discussed this situation in your place? A. Well, everybody, but not before.

Q. Well, what is his reputation now?

Mr. Bernhard: I object. While the objection may draw a wrong inference—will you withdraw your question? 40

Mr. D'Aloia: Yes.

*Vito Marzano—for Defendants—Cross.*

Q. You mean to say now that you never had occasion to talk to anybody about his reputation?

A. Not before this.

Q. I am talking about before this. Now, you never talked to anybody, nobody ever talked to you about him at any time? A. After this happened?

Q. No. Before this happened you never had occasion to discuss him at all? A. No.

Mr. Bernhard: I now offer the letter which was shown to Rizzo yesterday and identified by him as being his signature.

Mr. D'Aloia: This permit at the time of this occurrence was of no value whatsoever. Now, if counsel will admit that it will preclude our taking the law and going through a technical discussion of the situation with regard to concealed weapons at that time. Counsel can admit that this had expired by operation of law. Counsel will admit that his client was aware of that fact, because his client had made an application prior to this occurrence for a permit under the new law. Now, that is a matter that counsel can ascertain by asking his client.

Mr. Bernhard: I cannot admit it. I will concede—

Mr. D'Aloia: Here is the date of the application, February 5, 1925, after this thing happened. In fact, that permit had expired prior to this occurrence.

Mr. Bernhard: This permit was supposed to expire on February 11, 1925. The Legislature of 1924 passed a new concealed

*Frank Amistardi—for Defts.—Recalled—Direct.*

weapon act in which they said that all permits under the act of 1924 should automatically expire as of December 31, 1924, regardless of the fact that some of them extended over beyond that time, and, from that view of it, of course, this permit had expired by the gracious act of the Legislature.

Mr. D'Aloia: There is no objection to this letter.

(Letter marked Exhibit D-3.)

(Mr. Bernhard reads the letter to the jury.)

DEFENDANT CORTESE RESTS.

STATE RESTS.

Mr. Abruzzese: I would like to have the opportunity to reopen the case for the defense merely to deny the writing and sending of those letters. I do not know whether or not Amistardi distinctly denied it.

The Court: Call them back.

FRANK AMISTARDI, recalled.

*Direct examination by Mr. Abruzzese:*

Q. Mr. Amistardi, I show you a letter post-dated January 27, addressed to Mr. Patricacolo

*Frank Rizzo—for Defts.—Recalled—Direct.*

and ask you if you ever saw this letter before?  
Did you ever see that letter? A. No.

Q. Did you ever see that envelope? A. No.

Q. Did you ever mail this letter to anybody?

A. No.

10 Q. Did you ever see anybody write it? A. No.

Q. Now, I show you letter post-dated January 30, addressed to Mr. Patriacolo and ask you if you ever saw that letter before. Did you ever see that letter? A. No.

Q. Did you ever see that envelope? A. No.

Q. Did you ever see anybody write it? A. No.

Q. Did you ever mail it to anybody? A. No.

Q. Did you ever see anybody mail it? A. No.

20 (Cross examination waived.)

FRANK RIZZO recalled.

*Direct examination by Mr. Abruzzese:*

Q. Did you ever see this letter post-dated January 27? A. I did not.

30 Q. Did you ever see this letter at all before?  
A. No.

Q. Did you ever see anybody write that letter?  
A. No.

Q. Did you ever see anybody mail the letter?  
A. No, I wasn't there.

Q. And did you ever see this letter post-dated January 30; did you ever see it? A. No.

Q. Did you ever see anybody write that letter?  
A. No.

40

*Charge.*

Q. Did you ever see anybody mail it? A. I don't know; I don't know anything.

Q. And you don't know how to write yourself?

A. I don't; I cannot write.

(Cross examination waived.)

10

TESTIMONY CLOSED.

Mr. Abruzzese sums up for defendants Amistardi and Rizzo.

Mr. Bernhard sums up for defendant Cortese.

RECESS.

Mr. D'Aloia sums for the State.

20

**Charge.**

CAFFREY, J.:

Gentlemen of the Jury: These three defendants have been indicted, in the language of the indictment, in that they did knowingly send to Ernest D'Aquilla a letter, demanding of him, the said Ernest D'Aquilla, the sum of \$10,000, and threatening to maim, wound, kill and murder the said Ernest D'Aquilla. One count relates to the 27th day of January and the other speaks as of the 30th day of January.

I will read the statute under which this indictment has been found, in so far as it is pertinent to this issue:

"Any person who shall knowingly send or deliver any letter or writing with or

40

*Charge.*

without a name subscribed thereto, or sign, with a fictitious name, any letter or letters \* \* \*, with intent to extort from any person any money or other valuable thing; or demanding money or other valuable thing, or threatening to maim, wound, kill or murder any person, \* \* \* shall be guilty of a misdemeanor." 10

The State has elected to try these men on the theory that they violated this statute.

Under the law, these defendants, as all persons charged with crime, are presumed to be innocent, and the burden of establishing guilt as to every element rests upon the State. It must satisfy you beyond a reasonable doubt. 20

When we speak of reasonable doubt, we do not mean beyond all possible doubt, because there is hardly anything in human affairs beyond possible doubt; nor do we mean a fanciful doubt; but, if, after the consideration of all of the evidence, it leaves the minds of the jurors in that condition that they cannot say they have an abiding conviction to a moral certainty of the truth of the charge, you ought to acquit. On the other hand, if you are satisfied to a moral certainty, in keeping with my definition, you ought to convict. 30

Under the form of this indictment, while they are charged jointly with the commission of this offense, if the evidence warrants it, you may convict all, you may acquit all, or you may convict one, two or, as I said before, the three. That is entirely within your keeping, according to your understanding of the evidence. 40

*Charge.*

The precise charge is based upon the statute, and, while there is no direct proof as to a violation of the statute, in the sense that nobody has been brought by the State to testify that they saw these defendants, or any one of them, send or deliver or write or commit a violation as set forth in the statute, the State contends from the circumstances that these defendants are guilty. 10

Your duty, if the circumstances are drawn from the evidence before you and you are satisfied beyond a reasonable doubt as to the guilt of these defendants, or any of them, is to convict. You may convict on circumstances.

Considerable testimony has been offered with relation to the happening prior to the going out on this Saturday night or early Sunday morning, the association of these defendants together, the conversation over the telephone, their meeting at Cortese's, the subsequent actions of all, culminating in the going out to this school, which resulted in the arrest. While they may seem collateral in a sense, you have a right to consider every circumstance, because it is in the evidence. You have a right to consider everything that has been offered and allowed by the court as legal evidence. You have a right to draw such inferences as you see fit from the evidence that is in the case. 20 30

The basis for admitting testimony seemingly collateral to the occurrence as of that time—I am speaking as of at that time—is not of itself conclusive, but it is permitted on the basis that it might aid you in determining the issue as raised under this indictment. Therefore, you have a right to consider, not merely the question 40

*Charge.*

of the moment, that is, the question as to what transpired at one o'clock or a quarter of one, but you have a right to consider what happened from the time the letters were first received. You have a right to consider conversations between  
 10 these parties touching upon the concert of action, if there were one, later at the Congress Street or Lafayette Street school.

There has been presented to you not only oral testimony in the sense of the witnesses who testified before you, but, then, too, evidence has been offered in the nature of written statements. You have a right to consider those statements. You have a right to consider them in relation to what you have heard on the witness-stand. Make  
 20 your deductions. Draw your own conclusions and determine the value of any one's testimony according to the credit you see fit to give it. Then, too, in arriving at the value of the testimony, you have a right to consider the interest that any one has in the outcome of this case. What interest has Father D'Aquila? What interest have the police at this time? What interest has any witness in the outcome of this case as it will be represented by your verdict? Of course, you  
 30 have a right to consider the interest that the defendants have. Their interest is manifest. Your verdict is going to say whether they are going to be stigmatized with a conviction, or whether they leave this courtroom freed of this charge. That is a very proper consideration for you when you go to the jury-room.

I am relieved of a very extended discussion of the testimony. Counsel for the State and defense  
 40 have very ably summarized this, but it seems

*Charge.*

from the evidence there are some facts which are not contradicted, or, rather, there is no controversy over them. That is, on the night in question Falzano was killed—was shot, and died as the result of that shooting. There seems to be  
 10 no dispute, that I can recall, that he crawled along the side of the building, and, I think, the police officers have testified that he picked up this exhibit which was left there by the assistant rector of the church of Mt. Carmel. You have a right to consider that in relation to the testimony of the defendants, or any of them, as bearing upon their explanation or reason for being there. I think it has been testified to that Amistardi went out with an envelope, or package, with instructions to deliver it to some one who might  
 20 ask for it. The contention of the State is that Falzano went out to receive something that had been placed there. Falzano is dead and he is not on trial, but that testimony is in this case and it is part of the evidence. You have a right to consider it in relation to the charge as laid against the defendants who are now on trial.

As I said before, I am not going to go into an extended discussion of the testimony. I will  
 30 say this, that the determination of the facts in this case is purely your function. It is not the purpose nor the duty of this Court to mold the verdict. If I have emphasized a part of any testimony, I do not want you to consider that I am placing greater importance on that than anything else. Your duty is to rely on your recollection, as you have heard the witnesses, or as you have observed the testimony in the nature of exhibits, and, if the Court has failed to express the evidence  
 40

*Requests to Charge—Exceptions.*

more clearly, to understand it is in no wise a limitation upon your function or your privilege.

This case is important. It is important to the State and it is important to the defendants. It is important to the State because it is contended  
10 that one of the State's laws has been violated. It is important to the defendants because they have been charged with this crime.

Your duty, under your oaths, is to view the evidence in the light of your understanding and make your deductions, and, I might say, coming here, as you do, for a short period from your daily occupations, it in no wise should change your manner of thinking. Your transition from your walks in life should not change your method  
20 of reasoning. Apply your common sense and your reasoned experience to this problem in hand with the light that you would administer to an affair of your own. The case, as I said before, is important and it is deserving of your earnest consideration.

I have some requests to charge. I will take the requests to charge relating to Rizzo and Amistardi first.

The first one, "That if Amistardi and Rizzo did  
30 not send the two letters in question to Father D'Aquila you must bring in a verdict of 'not guilty'". I so charge you.

Second: "That if these two defendants did not know that the above letters had been sent, but were apprised of such a fact subsequent to their sending, and were at the scene of the shooting at the solicitation of some one else, they are not guilty of the crime charged in the indictment".  
40 I so charge you.

*Requests to Charge—Exceptions.*

Third: "That even though these defendants may have been at the scene of the shooting for the purpose of receiving a package from Father D'Aquila containing money, if the jury does not believe that these defendants had any part in the actual sending of the letters in question they are  
10 not guilty". I so charge you.

The fourth I deny.

The fifth I deny, because it is already charged.

Now, with relation to the defendant Cortese:

First: "If the defendants, or any of them did not knowingly send or deliver the letters or either of them, which Father D'Aquila testified he received, then the defendants should be acquitted".  
I so charge you.

The second I deny, because I have already  
20 touched on that.

The third I deny because I have already charged it.

Fourth: "Evidence of good character of any of them as to peace, quietness and law-abiding citizens is competent evidence and should be considered together with all the other evidence in the case". I so charge you.

The supplemental requests to charge for the defendant Cortese:  
30

I deny the first supplemental request.

The second: "That the jury must not take into consideration any evidence offered during the trial which the Court stated when such testimony was introduced, was not binding on Cortese". I so charge you.

You may take the case, with the exhibits.

(The jury retires.)

Counsel for defendants Rizzo and Amistardi prays an exception to the refusal of the Court to  
40

*Requests to Charge—Exceptions.*

charge the fourth and fifth requests.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

10

Judge.

Counsel for defendants Rizzo and Amistardi prays a general exception to the charge of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

20

Counsel for defendant Cortese pray an exception to the request which the Court did not charge; that is, the first supplemental.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

30

Counsel for defendant Cortese pray a general exception to the charge of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

40

Counsel for defendant Cortese pray an exception to that part of the Court's charge in which the Court charged evidence of good character might be considered by the jury for the reason

*Requests to Charge—Exceptions.*

that while the requests to charge are restricted to the words used, nevertheless, if the Court should charge on any principle of law it should charge the general principle of law.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

10

Judge.

Counsel for defendant Cortese pray an exception to the failure of the Court to charge the entire principle of law relating to the testimony of character witnesses and the consideration thereof by the jury.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

20

Judge.

30

40

**Court's Certification of Record.**

ESSEX COUNTY COURT OF GENERAL  
QUARTER SESSIONS.

On Indictment No. 549, Dec. T., 1924,  
for Threat to Take Life.

10

STATE OF NEW JERSEY

v.

MICHAEL CORTESE, *et al.*

I, EDWIN C. CAFFREY, Presiding Judge of the  
20 Essex County Court of General Quarter Sessions  
and the Judge who presided over the aforesaid  
cause, certify that the above printed book con-  
tains the entire record of the proceedings had  
upon the trial of the said cause and that the same  
is returned by the plaintiff in error therein with  
the writ of error bringing up the bill of excep-  
tions signed and sealed in this cause.

Dated, .....

30

.....,  
Presiding Judge of the Essex County  
Court of General Quarter Sessions.

40

**Stenographer's Certificate.**

ESSEX COUNTY COURT OF GENERAL  
QUARTER SESSIONS.

On Indictment No. 549, Dec. T., 1924,  
for Threat to Take Life.

10

STATE OF NEW JERSEY

v.

MICHAEL CORTESE, *et al.*

We, HAROLD T. COOK and JOSEPH S. FISHKIND,  
20 official stenographers of the Essex County Court  
of General Quarter Sessions, do hereby certify  
that the foregoing transcript contains the entire  
record of the proceedings and testimony taken by  
us at the trial of the case of the *State of New  
Jersey v. Michael Cortese, et al.*, which trial was  
held before the Honorable Edwin C. Caffrey, Pre-  
siding Judge of the Essex County Court of Gen-  
eral Quarter Sessions Court in and for the County  
of Essex, and a jury, on Wednesday, March 25,  
1925, Thursday, March 26, 1925, and Friday, 30  
March 27, 1925, at Newark, New Jersey.

Dated, May 12, 1925.

HAROLD T. COOK,  
JOSEPH S. FISHKIND.

40

### Defendant's Requests to Charge.

The defendant, Cortese, respectfully requests the Court to charge:

1. If the defendants, or any of them did not knowingly send or deliver the letters or either of them, which Father D'Aquila testified he received, then the defendants should be acquitted. 10

2. There is no direct evidence that the defendants or any of them either knowingly sent or delivered the letters.

3. The burden of proof is upon the State to sustain the allegations in the indictment beyond a reasonable doubt. 20

4. Evidence of good character of any of them as to peace, quietness and law-abiding citizens is competent evidence and should be considered together with all the other evidence in the case.

#### SUPPLEMENTAL REQUESTS.

1. That the defendant Cortese should be acquitted unless he actually wrote or delivered the two letters received by Father D'Aquila. 30

2. That the jury must not take into consideration any evidence offered during the trial which the Court stated when such testimony was introduced—was not binding on Cortese.

The defendants Frank Rizzo and Frank Amistardi respectfully request your Honor to charge the jury as follows: 40

### Defendant's Requests to Charge.

1. That if they did not send the two letters in question to Father D'Aquila they must bring in a verdict of "not guilty".

2. That if these two defendants did not know that the above letters had been sent, but were apprised of such a fact subsequent to their sending, and were at the scene of the shooting at the solicitation of some one else they are not guilty of the crime charged in the indictment. 10

3. That even though these defendants may have been at the scene of the shooting for the purpose of receiving a package from Father D'Aquila containing money, if the jury does not believe that these defendants had any part in the actual sending of the letters in question they are not guilty. 20

4. That the jury must disregard the shooting, the alleged assault upon Detective Berardi by Frank Rizzo, and the death of Salvatore Falzone, and must confine their inquiry merely as to who was the person who sent the letters in question, and that such person or persons alone are guilty of the crime charged in the indictment. 30

5. That mere knowledge on the part of these defendants that the above letters to Father D'Aquila may have been sent by some other person, and their subsequent participation in the effort to collect the money from Father D'Aquila are not sufficient facts from which to draw the inference of guilt as to these two defendants. 40

**Motion in Arrest of Judgment.**

ESSEX COUNTY COURT OF GENERAL  
QUARTER SESSIONS.

Monday, May 4, 1925.

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STATE OF NEW JERSEY

vs.

MICHAEL CORTESE, *et al.*

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Before:—HON. EDWIN C. CAFFREY, *Judge.*

Appearances as before stated.

20 Mr. Cavicchia: The defendant moves an arrest of judgment before sentence upon the following grounds:

1. The verdict was against the weight of evidence.

2. The verdict was contrary to the charge of the Court.

30 3. Section 39 of the Crimes Act, upon which the indictment was based, was by operation of law, repealed by subsequent statute.

The Court: Overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

40

Judge.

**Assignments of Error.**

NEW JERSEY SUPREME COURT.

In Error.

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THE STATE OF NEW JERSEY, 10  
Defendant-in-Error,

vs.

MICHAEL CORTESE, *et als.*,  
Plaintiffs-in-Error.

---

New Jersey—ss.:

AFTERWARDS, that is to say, on the first day 20 of July, 1925, before our said Supreme Court of the State of New Jersey comes the said Michael Cortese by Harold Simandl, his attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in said bill of exceptions and also in giving the judgment aforesaid, there is manifest error in this, to wit:

1. That the said Court before whom, &c., at 30 and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously permitted the witness, Ernest A. D'Aquila, to answer and refused to strike out the said answer, as follows:

Q. "And how did Father Fzurzza leave?"  
Mr. Bernhard: I object.

2. That the said Court before whom, &c., at 40 and upon the trial of the said issue so joined be-

*Assignments of Error.*

tween the State of New Jersey and the said Michael Cortese aforesaid, erroneously permitted the witness, Ernest A. D'Aquilla, to answer and refused to strike out the said answer, as follows:

10 Q. "In what way did he go, on foot or automobile?"

Mr. Bernhard: I object to that—(Argument.) Exception sealed.

3. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously permitted the witness, Ernest A. D'Aquilla, to answer and refused to strike out the said answer, as follows:

20 Q. "Before the taxi was called did you prepare a packet in imitation of money with any one?"

Mr. Bernhard: I object to that. (Argument.) Exception sealed.

4. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously permitted the witness, Joseph Guiliano, to answer and refused to strike out the answer to the following question:

30 Q. "You are up at the jail?" A. "I am up at the jail and I said to him, 'I understand you want to tell the truth'. He said, 'Yes, they want me to get a lawyer, but I don't want any lawyer, because I want to tell the truth'."

40

*Assignments of Error.*

Mr. Bernhard: I object. (Argument.) Exception sealed.

5. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously permitted the witness, Joseph Guiliano, to answer and refused to strike out the said answer, as follows:

A. "Saturday morning, January 31, and while he was there Falzeno had been home there and someone wanted Falzano on the telephone; that Falzano went to a telephone and returned and said 'Cortese just called me up and he wants to see me'. They later both went down——"

20 Mr. Bernhard: I object. (Argument.)

6. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously allowed in evidence a pistol which was marked Exhibit S-9.

7. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously allowed in evidence the two letters received by Cortese and offered by the State with the letters received by Father D'Aquilla and marked Exhibit S-11.

8. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously permitted

40

*Assignments of Error.*

the witness, Joseph Jacobson, to be asked and to answer the following question:

Q. "Did you remove a bullet from the body of Berardi?"

10 Mr. Bernhard: I object. (Argument.)  
Exception allowed and sealed.

9. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously permitted the State to introduce into evidence the fact of the death of Falzano from a bullet wound.

20 10. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously denied the motion of the defendant to strike out the testimony of Mr. Tortoriello, the testimony of Mr. Berardi and the testimony of Mr. Fletcher, by which the defendant, Michael Cortese, is connected with the case.

30 11. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously denied the motion of the defendant to strike out the testimony of Mr. Guiliano and Mr. Tortoriello with reference to the finding of the revolver.

40 12. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously denied the

*Assignments of Error.*

motion of the defendant to direct a verdict of acquittal at the close of the State's case.

13. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously allowed the witness, Frank Rizzo, on cross examination to be asked and answer the following question: 10

Q. "And didn't Cortese speak to you and didn't he say this to you, 'You go along and stop at the corner of the school, because there is a man coming there with something that you are to take. You take it and then give it to me and I will take care of it after'." 20

Mr. Bernhard: I object. (Argument.)  
Exception sealed.

14. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously permitted the witness, Frank Rizzo, on cross examination to be asked and answer the following question: 30

Q. "Now, don't you remember that he said to you, 'You go to the corner and you are going to get a package and give that to me and I will take care of it'." 30

Mr. Bernhard: I object. (Argument.)  
Exception sealed.

15. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said 40

*Assignments of Error.*

Michael Cortese aforesaid, erroneously permitted the witness, Frank Rizzo on cross examination, to be asked and answer the following question:

10 Q. "Now, didn't you make that statement on the 6th of March? Didn't you tell Mr. Guiliano up at the jail that this defendant, Cortese, said to you on this morning of February 1st when you two were in the middle of those lots and you had met Falzano and Falzano was crawling along the wall?"

Mr. Bernhard: I object. (Argument.)  
Exception sealed.

20 16. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously permitted the witness, Frank Rizzo, on cross examination to be asked and answer the following question:

30 Q. "What did you say to him Cortese said? What did you say to Guiliano that Cortese said to you in the middle of the lots after Falzano began to crawl along the wall?"

Mr. Bernhard: I object. (Argument.)  
Exception sealed.

40 17. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously denied the motion of the defendant for a mistrial.

*Assignments of Error.*

18. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously permitted the witness, Gerarro Parrillo, on cross examination, to be asked and answer the following question: 10

Q. "Isn't it a fact that because you have had the reputation in that neighborhood of investigating and being a quasi-detective, Cortese started this conversation with you?"  
Objected to.

19. That the said Court before whom, &c., at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese aforesaid, erroneously permitted the witness, Gerarro Parrillo, on cross examination, to be asked and answer the following question: 20

Q. "Do you know that your wife carried messages to the jail upon her visits there from Cortese to Rizzo?"  
Mr. Bernhard: I object.

20. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows: 30

"The precise charge is based upon the statute, and, while there is no direct proof as to a violation of the statute, in the sense that nobody has been brought by the state to testify that they saw these defendants, or any one of them, send or deliver, or write or commit a violation as set forth in 40

*Assignments of Error.*

the statute, the state contends from the circumstances that these defendants are guilty."

- 10 21. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

"Your duty, if the circumstances are drawn from the evidence before you and you are satisfied beyond a reasonable doubt as to the guilt of these defendants, or any of them is to convict. You may convict on circumstances."

- 20 22. That the said Court before whom, &c., and upon the trial of the said issue so joined, erroneously charged the jury as follows:

"You have a right to consider everything that has been offered and allowed by the Court as legal evidence. You have a right to draw such inferences as you see fit from the evidence that is in the case."

- 30 23. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

40 "Therefore, you have a right to consider, not merely the question of the moment, that is, the question as to what transpired at one o'clock or a quarter of one, but you have a right to consider what happened from the time the letters were first received. You have a right to consider conversations between these parties touching upon the concert of action, if there were

*Assignments of Error.*

one, later at the Congress Street or Lafayette Street school."

24. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows: 10

"Then, too, in arriving at the value of the testimony, you have a right to consider the interest that any one has in the outcome of this case."

25. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

20 "What interest has Father D'Aquila? What interest have the police at this time? What interest has any witness in the outcome of this case as it will be represented by your verdict? Of course, you have a right to consider the interest that the defendants have. Their interest is manifest. Your verdict is going to say whether they are going to be stigmatized with a conviction, or whether they leave this courtroom freed of this charge. That is a very proper consideration for you when you go to the juryroom." 30

26. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

"I am relieved of a very extended discussion of the testimony. Counsel for the State and Defense have very ably summarized this, but it seems from the evidence 40

*Assignments of Error.*

10 there are some facts which are not contradicted, or, rather, there is no controversy over them. That is, on the night in question Falzano was killed—was shot, and died as the result of that shooting. There seems to be no dispute, that I can recall, that he crawled along the side of the building, and, I think, the police officers have testified that he picked up this exhibit which was left there by the assistant rector of the church of Mt. Carmel.”

27. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

20 “Falzano is dead and he is not on trial, but that testimony is in the case and it is part of the evidence. You have a right to consider it in relation to the charge as laid against the defendants who are now on trial.

28. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury as follows:

30 “Your duty is to rely on your recollection, as you have heard the witnesses, or as you have observed the testimony in the nature of exhibits, and, if the Court has failed to express the evidence more clearly, to understand it is in no wise a limitation upon your function or your privilege.”

40 29. That the said Court before whom, &c., at and upon the trial of the said issue so joined,

*Assignments of Error.*

erroneously refused to charge the jury the following request to charge of the defendant:

“There is no direct evidence that the defendants or any of them either knowingly sent or delivered the letters.”

30. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury the following request to charge of the defendant:

“The burden of proof is upon the State to sustain the allegations in the indictment beyond a reasonable doubt.”

31. That the said Court before whom, &c., at and upon the trial of the said issue so joined erroneously charged the jury as follows:

“Evidence of good character of any of them as to peace, quietness and law-abiding citizens, is competent evidence and should be considered together with all the other evidence in the case.”

32. That the said Court before whom, &c., at and upon the trial of the said issue so joined erroneously failed to charge the jury the correct principal of law relating to the testimony of character witnesses and the consideration thereof by the jury.

33. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously refused to charge the jury the following request to charge of the defendant:

“That the defendant, Cortese, should be acquitted unless he actually wrote or de-

*Assignments of Error.*

livered the two letters received by Father D'Aquila."

10 34. That the said Court before whom, &c., at and upon the trial of the said issue so joined, erroneously charged the jury in terms more favorable to the State and to the prejudice of the defendant.

There are divers other errors in the record and proceedings aforesaid, and in the giving of judgment and passing of sentence aforesaid, by reason of which the said judgment and sentence should be reversed and set aside.

20 WHEREFORE, the said Michael Cortese prays that the said judgment and sentence may be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion thereof.

HAROLD SIMANDL,  
Of Counsel for Plaintiff-in-Error.

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**Reasons for Reversal.**

## NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY,  
Defendant-in-Error,

vs.

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MICHAEL CORTESE, *et als.*,  
Plaintiffs-in-Error.

And now comes the said Michael Cortese by Harold Simandl, his attorney, and says that in the record and proceedings aforesaid and also in the matter recited and contained in the said writ of exceptions and also in giving the verdict and judgment aforesaid, there is manifest error and the said Michael Cortese says that said judgment should be reversed and assigns the following reasons or causes:

1. Because the Trial Court permitted the witness, Ernest A. D'Aquila, to answer and refused to strike out the said answer, as follows:

Q. "And how did Father Fzurzza leave?" 30

Mr. Bernhard: I object.

2. Because the Trial Court permitted the witness, Ernest A. D'Aquilla, to answer and refused to strike out the said answer, as follows:

Q. "In what way did he go, on foot or automobile?"

Mr. Bernhard: I object to that—(Argument).

Exception sealed. 40

*Reasons for Reversal.*

3. Because the Trial Court permitted the witness, Ernest A. D'Aquila, to answer and refused to strike out the said answer, as follows:

10 Q. "Before the taxi was called did you prepare a packet in imitation of money with any one?"

Mr. Bernhard: I object to that (Argument). Exception sealed.

4. Because the Trial Court permitted the witness, Joseph Guiliano, to answer and refused to strike out the answer to the following question:

20 Q. "You are up at the jail? A. I am up at the jail and I said to him, 'I understand you want to tell the truth', he said, 'Yes, they want me to get a lawyer, but I don't want any lawyer, because I want to tell the truth.'"

Mr. Bernhard: I object (Argument).

5. Because the Trial Court permitted the witness, Joseph Guiliano, to answer and refused to strike out the said answer as follows:

30 A. "Saturday morning, January 31, and while he was there Falzano had been home there and someone wanted Falzano on the telephone; that Falzano went to a telephone and returned and said 'Cortese just called me up and he wants to see me.' They later both went down——"

Mr. Bernhard: I object (Argument)

40 6. Because the Trial Court allowed in evidence a pistol which was marked Exhibit S-9.

*Reasons for Reversal.*

7. Because the Trial Court allowed in evidence the two letters received by Cortese and offered by the State with the letters received by Father D'Aquila and marked Exhibit S-11.

8. Because the Trial Court permitted the witness, Joseph Jacobson, to be asked and to answer the following question: 10

Q. "Did you remove a bullet from the body of Berardi?"

Mr. Bernhard: I object (Argument). Exception allowed and sealed.

9. Because the Trial Court permitted the State to introduce into evidence the fact of the death of Falzano from a bullet wound. 20

10. Because the Trial Court denied the motion of the defendant to strike out the testimony of Mr. Tortoriello, the testimony of Mr. Berardi and the testimony of Mr. Fletcher, by which the defendant, Michael Cortese, is connected with the case.

11. Because the Trial Court denied the motion of the defendant to strike out the testimony of Mr. Guiliano and Mr. Tortoriello with reference to the finding of the revolver. 30

12. Because the Trial Court denied the motion of the defendant to direct a verdict of acquittal at the close of the State's case.

13. Because the Trial Court allowed the witness, Frank Rizzo, on cross examination to be asked and answer the following question:

Q. "And didn't Cortese speak to you and didn't he say this to you, 'You go along 40

*Reasons for Reversal.*

and stop at the corner of the school, because there is a man coming there with something that you are to take. You take it and then give it to me and I will take care of it after."

10 Mr. Bernhard: I object (Argument)  
Exception sealed.

14. Because the Trial Court permitted the witness, Frank Rizzo, on cross examination to be asked and answer the following question:

Q. "Now, don't you remember that he said to you, 'You go to the corner and you are going to get a package and give that to me and I will take care of it.'"

20 Mr. Bernhard: I object (Argument)  
Exception sealed.

15. Because the Trial Court permitted the witness, Frank Rizzo, on cross examination, to be asked and answer the following question:

Q. "Now, didn't you make that statement on the 6th of March? Didn't you tell Mr. Guiliano up at the jail that this defendant, Cortese, said to you on this morning of February 1st when you two were in the middle of those lots and you had met Falzano and Falzano was crawling along the wall?"

30 Mr. Bernhard: I object—(Argument)  
Exception sealed.

16. Because the Trial Court permitted the witness, Frank Rizzo, on cross examination to be  
40 asked and answer the following question:

*Reasons for Reversal.*

Q. "What did you say to him Cortese said? What did you say to Guiliano that Cortese said to you in the middle of the lots after Falzano began to crawl along the wall?"

Mr. Bernhard: I object—(Argument) 10  
Exception sealed.

17. Because the Trial Court denied the motion of the defendant for a mistrial.

18. Because the Trial Court permitted the witness, Gerarro Parillo, on cross examination, to be asked and answer the following question:

Q. "Isn't it a fact that because you have had the reputation in that neighborhood of investigating and being a quasi-detective, Cortese started this conversation with you?"  
Objected to.

19. Because the Trial Court permitted the witness, Gerarro Parillo, on cross examination, to be asked and answer the following question:

Q. "Do you know that your wife carried messages to the jail upon her visits there from Cortese to Rizzo?"  
Mr. Bernhard: I object.

20. Because the Trial Court charged the jury as follows:

"The precise charge is based upon the Statute, and while there is no direct proof as to a violation of the statute, in the sense that nobody has been brought by the state to testify that they saw these defendants or 40

*Reasons for Reversal.*

any one of them, send or deliver, or write or commit a violation as set forth in the statute, the State contends from the circumstances that these defendants are guilty."

10 21. Because the Trial Court charged the jury as follows:

"Your duty, if the circumstances are drawn from the evidence before you and you are satisfied beyond a reasonable doubt as to the guilt of these defendants, or any of them is to convict. You may convict on circumstances."

20 22. Because the Trial Court charged the jury as follows:

"You have a right to consider everything that has been offered and allowed by the court as legal evidence. You have a right to draw such inferences as you see fit from the evidence that is in the case."

30 23. Because the Trial Court charged the jury as follows:

"Therefore, you have a right to consider, not merely the question of the moment, that is, the question as to what transpired at one o'clock or a quarter of one, but you have a right to consider what happened from the time the letters were first received. You have a right to consider conversations between these parties touching upon the concert of action, if there were one, later

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*Reasons for Reversal.*

at the Congress Street or Lafayette Street school."

24. Because the Trial Court charged the jury as follows:

"Then, too, in arriving at the value of 10 the testimony, you have a right to consider the interest that any one has in the outcome of this case."

25. Because the Trial Court charged the jury as follows:

"What interest has Father D'Aquila? 20 What interest have the police at this time? What interest has any witness in the outcome of this case, as it will be represented by your verdict? Of course, you have a right to consider the interest that the defendants have. Their interest is manifest. Your verdict is going to say whether they are going to be stigmatized with a conviction, or whether they leave this courtroom freed of this charge. That is a very proper consideration for you when you go to the juryroom." 30

26. Because the Trial Court charged the jury as follows:

"I am relieved of a very extended discussion of the testimony. Counsel for the State and defense have very ably summarized this, but it seems from the evidence there are some facts which are not contradicted, or, rather, there is no con-

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*Reasons for Reversal.*

10       troversy over them. That is, on the night in question Falzano was killed—was shot, and died as the result of that shooting. There seems to be no dispute, that I can recall, that he crawled along the side of the building, and, I think, the police officers have testified that he picked up this exhibit which was left there by the assistant rector of the church of Mt. Carmel.”

27. Because the Trial Court charged the jury as follows:

20       “Falzano is dead and he is not on trial, but that testimony is in the case and it is part of the evidence. You have a right to consider it in relation to the charge as laid against the defendants who are now on trial.”

28. Because the Trial Court charged the jury as follows:

30       “Your duty is to rely on your recollection, as you have heard the witnesses, or as you have observed the testimony in the nature of exhibits, and, if the court has failed to express the evidence more clearly, to understand it is in no wise a limitation upon your function or your privilege.”

29. Because the Trial Court refused to charge the jury the following request to charge of the defendant:

40       “There is no direct evidence that the defendants or any of them either knowingly sent or delivered the letters.”

*Reasons for Reversal.*

30. Because the Trial Court refused to charge the jury the following request to charge of the defendant:

“The burden of proof is upon the State to sustain the allegations in the indictment beyond a reasonable doubt.” 10

31. Because the Trial Court charged the jury as follows:

“Evidence of good character of any of them as to peace, quietness and law-abiding citizens, is competent evidence and should be considered together with all the other evidence in the case.” 20

32. Because the Trial Court failed to charge the jury the correct principle of law relating to the testimony of character witnesses and the consideration thereof by the jury.

33. Because the Trial Court refused to charge the jury the following request to charge of the defendant:

“That the defendant, Cortese, should be acquitted unless he actually wrote or delivered the two letters received by Father D’Aquila.” 30

34. Because the Trial Court charged the jury in terms more favorable to the State and to the prejudice of the defendant.

35. Because the verdict rendered by the jury was against the weight of the evidence. 40

*Reasons for Reversal.*

WHEREFORE, because the aforesaid reasons or some of them constitute error prejudicial to the said plaintiff-in-error, he, the said Michael Cortese, prays that the said judgment and sentence be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion thereof.

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HAROLD SIMANDL,  
Of Counsel for Plaintiff-in-Error.

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New Jersey Supreme Court

STATE OF NEW JERSEY,  
*Defendant-in-Error,*  
—vs—  
MICHAEL CORTESE,  
*Plaintiff-in-Error.*

*Opinion.*

(Supreme Court of New Jersey, August 2, 1926.)

Argued January term, 1926 before GUMMERE, C. J. and KALISCH and CAMPBELL, J. J.

Harold Simandl of Newark, for plaintiff-in-error.

John O. Bigelow, Prosecutor of the Pleas, of Newark for the State.

PER CURIAM: The plaintiff in error and two others were indicted upon a charge of sending to one Father D'Aquilla a letter demanding from him the sum of \$10,000 and containing a threat to maim, wound and kill him if he did not comply with the demand. The trial of the indictment resulted in the conviction of all three. Cortese alone seeks a review thereof.

1. The first ground of reversal argued upon us is that the trial court erred in refusing to direct a verdict in favor of the plaintiff. The theory upon which his counsel bases this contention is that, as there was no direct evidence of his client's complicity in the sending of the letter, the conviction is without a legal basis upon which to rest. This theory clearly is unsound. It is elementary law that a conviction based exclusively upon circumstantial evidence, which is of such a character as to satisfy the mind

of the jurors, beyond a reasonable doubt, of the defendant's guilt, is valid, although there was no direct evidence thereof. There was circumstantial evidence in the present case sufficient to make the question of the guilt or innocence of Cortese one for the determination of the jury, and the trial court therefore properly refused to direct a verdict upon the ground indicated.

2. Next, it is argued that a reversal should be had because the trial court assumed in its charge to the jury that there was no direct evidence of Cortese's guilt, and that the state depended wholly upon circumstantial evidence, and that, as a result of this assumption, the court erroneously charged the jury that they might convict solely upon such circumstantial evidence. Accepting as true the statement that the court inferentially told the jury that there was no direct evidence of the guilt of the plaintiff in error (which, as we have stated, was the basis upon which counsel rested his motion to direct a verdict of acquittal), although there was such evidence in fact, the misstatement of the court was a benefit rather than an injury to the plaintiff in error; for it took away from the jury the consideration of what might have been a determining factor in reaching a conclusion as to the latter's guilt.

3. It is further argued as a ground for reversal that the court improperly admitted in evidence a revolver belonging to the plaintiff-in-error, taken by the police from his house without a search warrant having been issued therefor. The ground or the objection to the admission of the revolver was that its taking was an illegal and unconstitutional invasion of the rights of the defendant, and that therefore, it could not be used as a factor in determining the question of his guilt or innocence. This contention, however, is contrary to the doctrine

of *State v. MacQueen*, 69 N. J. Law, 528, 55 A. 1006 where we declared that papers of a defendant unlawfully secured, even by means of an unjustifiable search or seizure, are, nevertheless, admissible in evidence against him, if material to the issue then being tried.

4-5. The next ground for reversal argued that testimony relating to a conversation had between a witness of the state and Rizzo, who was one of the defendants, was improperly admitted as it was not held in the presence of the plaintiff-in-error, and that its admission was harmful error, so far as he was concerned. Proof of the conversation was competent, so far as the defendant Rizzo was concerned.

Not having been had in the presence of Cortese, it was not competent as against him. But the objection to the admission of the testimony was that it was incompetent as to all of the defendants, and the objection itself, being unsond, was, therefore, properly overruled. If counsel for the plaintiff in error had desired to protect his client against the effect of this testimony, he should have requested the court to instruct the jury that, although it was evidential as against Rizzo, it was not evidential as against his client.

6. The next ground urged for a reversal is that the trial court improperly refused to strike out certain questions that had been asked by the prosecutor of the pleas and the answers thereto. The questions were asked and the answers were given before a recess was taken by the court. No application was made to strike them out until after the court reconvened. In this situation, the refusal of the court was proper, and this objection is without merit.

7-8. The next ground for reversal is that the

True Copy.  
L. S.

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

NEW JERSEY, ss:

THE STATE OF NEW JERSEY TO OUR  
SUPREME COURT.

GREETING:—

Because in the record and proceedings and also in giving of judgment in a certain plaint which was in our Supreme Court before you, between State of New Jersey defendant-in-error, and Michael Cortese, plaintiff-in-error in error to the Essex County Quarter Sessions Court, manifest error hath intervened to the great damage of the said defendant as by his complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice be done to the party aforesaid, do command you that if judgment be thereupon given, then you distinctly and openly send, under your seal, the record and proceedings and plaint aforesaid with all things touching and concerning the same, to our Court of Errors and Appeals in the last resort in all causes at Trenton, on the 8th day of July next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be done thereupon for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done.

WITNESS our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the 18th day of June, Nineteen hundred and twenty-seven.

JOSEPH B. FITZPATRICK  
*Clerk.*

HAROLD SIMANDL,  
*Attorney.*

A true copy.

JOSEPH B. FITZPATRICK,  
*Secretary of State.*

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, <i>Defendant-in-Error,</i> —vs— MICHAEL CORTESE, <i>Plaintiff-in-Error.</i>	}
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*Return of Writ  
of Error.*

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is 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.

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

STATE OF NEW JERSEY, <i>Defendant-in-Error,</i> —vs— MICHAEL CORTESE, <i>Plaintiff-in-Error.</i>	}
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*In Error  
Assignments  
of Error*

AFTERWARDS, to wit on the 8th day of August, 1927, before our said Court of Errors and Appeals in the last resort in all causes comes the said Michael Cortese by Harold Simandl, his attorney, and says that in the record and proceedings aforesaid and also in the matters recited and contained in said bill of exceptions and also in giving the judgment aforesaid, there is manifest error in this, to wit:

1. That the Supreme Court erred in giving judgment for the State of New Jersey, defendant-in-error, instead of for Michael Cortese, the plaintiff-in-error.
2. The Supreme Court erred in affirming the judgment of the Court of Quarter Sessions of the Peace of Essex County instead of for one or more of the assignments of error reversing the same.

WHEREFORE, the said Michael Cortese prays that the said judgment and sentence may be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion thereof.

HAROLD SIMANDL,  
*Of Counsel for Plaintiff-in-Error.*

## New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,  
*Defendan-in-Error,*

—vs—

MICHAEL CORTESE, et als,  
*Plaintiff-in-Error.*

In Error to the  
Supreme Court.

BRIEF OF  
PLAINTIFF-  
IN-ERROR.

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### STATEMENT UNDER THE RULES

The plaintiff-in-error, Michael Cortese, was indicted, tried and convicted with Frank Amistardi and Frank Rizzo in the Essex County Court of Quarter Sessions for knowingly sending threatening letters, demanding money with menaces, to Ernest D'Aquila. He was sentenced to a minimum term of two years and a maximum term of three years in New Jersey State Prison, which judgment upon review, the Supreme Court affirmed. The opinion of the Supreme Court is printed on page 229 of the case. The plaintiff-in-error thereupon sued out a writ of error in this Court to review the judgment of the Supreme Court.

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### ABSTRACT OF INDICTMENT

The indictment in two counts charged Cortese, Amistardi and Rizzo on the 27th and 30th days of January 1925, "that they did *knowingly send* to one Ernest D'Aquila a letter demanding of him, the said Ernest D'Aquila money to wit, the sum of ten thousand dollars, and threatening to maim, wound, and

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kill the said Ernest D'Aquila, etc." The indictment is set out at length on page 3 of the case.

THE STATUTE

10 The indictment was laid under section 39 of the Crimes Act 1898 and that portion which is pertinent provides:

"Any person who shall knowingly send or deliver any letter or writing, with or without name subscribed thereto \* \* \* \* \* demanding money or other valuable things, or threatening to maim wound, kill or murder any person,\* \* \* \* \* shall be guilty of a misdemeanor".

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QUESTION INVOLVED

30 This case is reviewed under sections 136-137 of the Criminal Procedure Act, under assignments of error and reasons for reversal properly laid in accordance with those sections. The argument is divided into three distinct phases. The *first phase*, brings up for review the refusal of the Trial Court to direct a verdict at the close of the case of the State, and also that the verdict was against the weight of the evidence. The *second phase* brings up for review assignments of error and reasons for reversal addressed to alleged errors of the Trial Court in its charge to the jury. The *third phase* of the argument will be addressed to errors of the Trial Court in its admission and rejection of evidence at the trial.

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PROOF AT THE TRIAL

The evidence will be carefully discussed under the first phase of the argument, and hence a more detailed statement thereof at this point in the Brief is not deemed necessary.

POINT I

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THE TRIAL COURT ERRED IN REFUSING TO DIRECT A VERDICT AT HE CLOSE OF THE CASE OF THE STATE.

The motion to direct a verdict, is found on page 87 of the case. The defendant has elected to review these porceedings under section 136 of the Criminal Procedure Act, 2 Comp. Statutes, Section 1019, page 1863.

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In the case of State vs. Bachellor 89 N. J. Law 433, 98 Atlantic 829, the Court said:

"There is no such thing as a non-suit in a criminal case and *at the close of the State's case there must be evidence from which an inference of guilt may be drawn or the defendant is entitled to an acquittal as a matter of law* that legal right must not be presumed to be waived because he proceeds with his defense." (Italics mine).

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To the same effect is the case of State vs. Contarino 92 N. J. Law 381.

It must be conceded at the outset, that there is no direct evidence which in anywise tends to prove the guilt of the defendant, or from which an inference

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of the defendant's guilt may be drawn. The state depended wholly upon circumstantial evidence, in its endeavor to prove the guilt of the defendant. It is conceded that within well established rules and restrictions, circumstantial evidence may be the proper foundation of a conviction or a sufficient basis from which an inference of guilt may be drawn. But, it is contended that there was no evi-  
 10 dence, circumstantial or direct, when the State closed its case, from which it could be reasonably inferred that the defendant was guilty of *knowingly sending* the letters in question.

When the statement is made that there is no evi-  
 20 dence from which guilt of the defendant may be inferred, it is not intended to convey the meaning, that there was literally none, but what is meant thereby is, that there was not sufficient evidence in the eyes of the law to warrant any such inference.

In the case of *People vs. Galbo*, 218 N. Y. page 283 112 N. E. 1041, the Court said:

"Insufficient evidence is in the eyes of the law no evidence." *Matter of Case* 214 N. Y. 199, 203, 108 N. E. 408.

and in the *Matter of Case* 214, N. Y. 199, 108 N. E.  
 30 409 Cardozo, C. J. quoting from *Maule, J. in Jewel vs. Parr* 13 C. B. 916, stated the rule thus:

"When we say that there is *no evidence to go to the jury, we do not mean literally none*; but that there is none that ought reasonably to satisfy a jury that the fact ought to be proved is established." (Italics mine).

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As was said at the outset of this argument, there are certain well established principles of law which govern and restrict the Courts in their consideration of a conviction, based wholly upon circumstantial evidence.

In the case of *People vs. Harris* 136 N. Y. 423 33 N. E. Rep. 65—67, Gray, J. speaking of the rules with respect to circumstantial evidence says: 10

"All that we should require of circumstantial evidence is that there shall be *positive proof of the facts from which the inference of guilt is to be drawn, and that that inference is the only one which can reasonably be drawn from those facts.*" (Italics mine).

8 R. C. L. at page 255 reads as follows: 20

"Again, if the circumstances, no matter how strong, can be reasonably reconciled with the theory that some other person may have done the act, the defendant should not be convicted, and a verdict of guilty will be set aside as contrary to law."

16 *Corpus Juris*, page 766, Sec. 1570. 30

"While absolute certainty is not essential, yet the evidence must be of such a character as to satisfy the jury of the defendant's guilt, and to exclude every other hypothesis to a moral certainty beyond a reasonable doubt; evidence creating a mere probability of guilt is not sufficient; much less is evidence which give rise to a mere suspicion or conjecture of guilt." 40

Gardner vs. State 196 Pacific, 750, 15 A. L. R. 1043.

"Mere suspicion or probabilities, however strong, are not sufficient basis for a conviction."

Gardner vs. the State, supra

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"To summarize these decisions, it would appear that the law of circumstantial evidence in criminal cases—in order to convict on circumstantial evidence, it is held necessary, not only that the circumstances all concur to show that the prisoner committed the crime but they all be inconsistent with any other rational conclusion."

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Thus it appears that it is the law that an inference of guilt is insufficient, unless it is *the only one which can fairly and reasonably be drawn from the facts proved.*

The inference of guilt is not sufficient if the circumstances can be reconciled with innocence, or if the presumption of the defendant's innocence is as reasonable as the inference of his guilt.

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In the case of People vs. Scharf, 217 New York 204 111 N. E. 759, 760, Collin J. speaking for the Court said:

"But is such inference a 'scintilla' of evidence as against the direct and unequivocal testimony of Spievack and the other witnesses in behalf of the people? It is not, *unless it is the only inference which can fairly and reasonably be drawn from those acts.*" (Italics mine).

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There must be *not only positive proof* of the facts which create or permit the inference invoked, but the inference must be *the only one which can reasonably be drawn from those facts.*" (Italics mine)

And in the case of State vs. Galbo, supra, the Court said:

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"A conviction upon circumstantial evidence is not sustained unless the *circumstances are inconsistent with innocence.*" (Italics mine)

People vs. Lamb, Ct. of App. 2. Abb. Pr. N. S. 148-165, holds:

"If the circumstances make *one inference just as reasonable as the other, we must give the defendant the benefit of the conclusion that would mitigate his guilt.*" (Italics mine)

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People vs. Scharf, supra:

"*It is to choose one inference out of several.* Such might be or might not be the fact. A possibility or a bare probability under the evidence that the original transaction was a sale is not sufficient. *It is not enough to creat a conjecture or suspicion, nor should the jury be permitted to guess at the truth.*"

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And again in the same case the Court said:

"He does not show it by proving facts permitting different inferences, some of which are consistent with the evidence of the peo-

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ple. *An inference which will avail him must be contradictory of the people's proof, and the only one reasonably to be drawn from its supporting facts. A mere choice of possible or conjectural theories will not suffice,* citing Jaeger v. Kelly, 52 N. Y. 274; Smith v. Lawrence 98 Ne. 92, 56 Atl. 455."

10 "A mere surmise or conjecture does not raise a conflict of proof or a question of fact. Baulec v. N. Y. & H. R. R. Co. 59 N. Y. 356, 17 Am. Rep. 325; Bond v. Smith, 113 N. Y. 378, 21 N. E. 128 Pollock v. Pollock, 71 N. Y. 137, 153; Pauley v. Steam, G. & L. Co. 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194."

In Bond vs. Smith 113 New York, 378, 21 N. E. Rep. 128, the Court held:

20 "At most the evidence gives food for speculation, but this is insufficient."

In O'Neal vs. The State 126 So. Eastern, 863 the Court said:

30 "The evidence is voluminous and creates a strong suspicion of guilt, but it is wholly circumstantial and does not exclude every other reasonable hypothesis."

It is therefore urged in light of the decisions, that the inference of the defendant's guilt, drawn wholly from circumstantial evidence must be (1) *the only inference which may be fairly and reasonably drawn from the facts.* (2) That it must be inconsistent with the presumption of innocence. (3) That if the facts give rise to several inferences, some of which are consistent with the presumption

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of innocence, and others inconsistent thereto, that the jury cannot be required to guess at the probabilities or choose the correct inference, but the Court must acquit for insufficiency of the evidence. (4) If the facts give rise to mere suspicion, probability, speculation or food for thought, it is insufficient to raise an inference of guilt, and the Court must acquit.

10

Before entering upon a discussion of the evidence, a general observation of the principles of law, which define the crime of which the defendant is accused is deemed advisable.

The gist of the offense denounced by the Statute of which the defendant stood indicted was "knowingly sending a letter" of the character in question.

State vs. Venzio, 84 N. J. Law 418, 87 Atl. 126. 20

In the case of State vs. McBarren, 66 N. J. Law 680, Mr. Justice Voorhees speaking for this Court defined the term "knowing" and its force when used in a criminal statute:

"The significant word of the statute is 'knowing' which means knowledge of mental assurance, or scienter. It is positive, most negative. *Such knowledge must be clearly proved or shown by such circumstances as leave no reasonable doubt on a fair mind.*" (Italics mine). 30

This crime is not a new one to the law.

Mr. East in his Pleas of the Crown, 2 East C. (Am Edition) devotes a considerable portion of his text to reports of cases which arose under the

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statutes 9 Geo. 1, C. 22; 27 Geo. 2, C. 15; 30 Geo. 2, C. 24; and a reading of those statutes discloses that the offense denounced by section 36 of the Crimes Act is substantially the same as that denounced by those old English Statutes. His report of the case of John and Mary Hammond, 2 E. Pleas of the Crown, Am. Edition page 1119 may assist this Court in deciding what evidence is required to sustain a conviction under an indictment for "knowingly sending threatening letters." In that case, the defendants were indicted for *sending threatening letters*. The evidence disclosed that the prisoners were husband and wife and lived as servants with prosecutor the wife had *written the letter in question and that it was delivered to the prosecutor by John Hammond*, who said he had found it in the prosecutor's garden. There was no evidence that he had any knowledge of its contents. It was urged in behalf of the prisoners that there was no proof that the defendants had *knowingly sent* a threatening letter, but that the evidence only proved that the wife had *written* the letter and that the husband had *delivered* it. The Court observed:

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"That the mere *writing* of a threatening letter would not constitute the offense \* \* \*."  
"That it was impossible to conceive that *carrying* a letter could by any construction be comprehended under the words '*send any letter* \* \* \* \* \*.'" "It was clear therefore that the act of *delivering* a threatening letter was not the offense described in the Statute \* \* \* \* \*."

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The Court instructed the jury that "though Mary Hammond were the wife of the other prisoner, yet if the jury were of the opinion that *she wrote the*

*letter herself without any interference of the husband and sent it by him, without knowing anything of the contents, to the prosecutor, she alone might be found guilty, but otherwise both prisoners must be acquitted, and under this direction the prisoners were acquitted.*

A review of the decisions on this subject sustain the views expressed by the Court in that case.

In this State in the case of State vs. Venzio, supra, it was held that the *writing of a letter* was some evidence which connected the accused with the letter and was cogent evidence of knowledge.

In the case of O'Neal vs. the State 126 S. E. 863, the Statute under which the defendant stood indicted was substantially the same as Section 36 of the Crimes Act and in that case the court said:

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"The offense being to '*knowingly send or deliver*' a letter of the character in question, it is not, of course, essential to the state's case to show that the letter was *written* either by or at the instance of the accused; but such fact, if proved would constitute a very strong circumstance against him, tending to connect him with the *sending or delivery of the letter* \* \* \* \* \*. Without the inference that would naturally flow from proved authorship, and in the absence of any evidence that the accused mailed the letter or caused it to be mailed, or ever had it in his possession or control, he is not sufficiently connected with the *sending or delivery of the letter to authorize his conviction.*"  
(Italics mine)

That case is in many respects similar to the case subjudice. An extended report of the Court's opinion in that case is herein set forth, with the thought that it might be of some value to this Court in arriving at a conclusion in this case.

(O'Neal vs. The State, supra) :

10 "From the brief of evidence brought to this court it appears that the particular letter resulting in the defendant's conviction was found by a rural carrier in a rural mail box, after which it went the usual and regular course until it was delivered to the prosecutor, *without any evidence to connect the accused, either directly or indirectly, with the writing of it, or with the mailing of it, and without any evidence conclusively showing that he even had an opportunity to mail the letter where it was mailed.* While the state's counsel contend that the accused both wrote and posted the letter, yet no witness testified that it was in his handwriting, *or that he was seen to write it or cause it to be written, or that he was even in possession of it, or that he admitted having written it or having had any connection whatever with the writing of it, nor was any of his handwriting proved and introduced in evidence for the purpose of comparison with the handwriting of the letter in question.* Consequently, the contention that the accused is the author of the letter is without any evidence to support it. Cocroft v. Cocroft, 159 Ga.—(1) 124 S. E. 346."

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In the case of Sims v. State 158 S. W. 287, accused

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was prosecuted for delivering an anonymous letter to a young lady teacher, reflecting upon her virtue and chastity. The proof disclosed that she boarded at home of defendant and as she was proceeding to school, she saw accused as was his custom, get mail from the box wherein the prosecuting witness usually got her mail.. He handed her a letter stamped and sealed. It was damp. She opened and read it. There was no proof of handwriting or that he knew contents when he delivered it. Harper J.

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"The above being all the testimony other than letter, we barely think this is sufficient to support the verdict under the law. There should have been some evidence introduced tending to show that the letter was in his handwriting or that he knew its contents."

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In case of Rex v. Howe 7 Carrington & Payne 267 the prisoner was indicted on the Stat. 4 Geo. 54 C. 54 for sending a threatening letter to his master, the prosecutor.

The only evidence against him was his own statement made to a fellow labourer, who selpt with him that he should never have written the letter, but for William Goodes. The Court said:

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"Upon this evidence, Goodes may have taken the letter, or he may have sent it himself, having made the prisoner write it. There is no evidence of the prisoner having directed Goodes to take the letter. There is no proof of the sending. I am decidedly of the opinion that the evidence is not sufficient. The prisoner must be acquitted."

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In the case of Freeman vs. U. S. 20 Fed. 2d (3 Circuit) 748 the defendant was charged with using the mails in a scheme to defraud. There was proof that the statements were received through the mails and the defendant's signature appeared on the statements. That on one occasion he had been asked for a statement.

10 Wooley, J. speaking for the Court said:

"The peculiar element of the offense is the placing of a letter in the United States Mail for the purpose of executing such a scheme. That is what makes it a Federal Offense \* \* \* \* \* ."

The Court continuing said:

20 "In the case at bar, there is ample evidence of the receipt of the three letters through the mail, but the only circumstance that connects Freeman with mailing them, or any of them, is that the enclosure bore his signature and that a month or more before the letters were received, Freeman had in one instance been asked for a statement of his company. The date of the request is too remote from the date of the receipt of the letter to connect the two. More over, we think that the fact that Freeman signed the statement is not proof that he mailed it."

30 These decisions emphasize the distinction which the Courts have drawn between the act of sending a letter, the act of delivering a letter and the act of writing a letter. Since Section 36 of the Crimes Act denounces all three acts, there appears a clear

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legislative intent to create these distinct offenses, proof of one of which would not be deemed proof of the other.

Our consideration of the testimony therefore will be light of that part of the statute of which the defendant stands indicted, ie. 'knowingly sending a threatening letter' etc. Unless the Court can decide that the only reasonable inference to be drawn from the testimony is that the defendant sent the letter or aided, abetted or procured the sending of the letter, the Trial Court erred in his refusal to direct a verdict of acquittal.

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A complete resume of the evidence produced before the jury by the State before the close of its case is as follows. The first witness was

Edward H. Schwartz

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He testified with respect to a diagram.

John L. Dey

testified with respect to certain photographs market in evidence. These photographs were of the buildings and streets surrounding the spot where the alleged affray took place.

Father Ernest D'Aquila

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is the rector of the Church of Our Lady of Mt. Carmel. His testimony is found on page 17-23 inclusive. He testifies that he received certain letters, and that he read them and after the receipt of the second letter, he communicated with the Police. That after the letters were turned over to the Police an arrangement was

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made to deposit a package at the Lafayette Street School, the place stated in the later letter. That such a package was prepared and that Father Fserrazza, an assistant rector left the rectory a few minutes after one o'clock on the first Sunday in February by taxi. He identified the package which is in evidence. Father Fserrazzi testified that on Sunday morning February 1st, he left the rectory of the church and in his possession he had the package which had been identified by Father D'Aquila, the previous witness. He went by taxi cab to Congress Street and alighted from the taxi and deposited the package on the sidewalk near the school building. A detective was lying in the bottom of the cab. He then returned to the rectory in the taxi cab.

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#### 20 Quinlan

is a detective connected with the Newark Police Department. He left the rectory in the same taxicab that contained Father Fserrazza. He was lying on the floor. He said that Father Fserrazza had the package in his pocket and that when the cab arrived on Congress Street, Father Fserrazza alighted from the cab, walked over to a spot on Congress Street and deposited the package and returned to the cab and that they both returned to the rectory.

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#### Berardi

is a detective. He received the letters from Father D'Aquila after being assigned to the case by his superiors.

On February 1st, he hid in an alley-way at

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96 Congress Street. This alley faces certain empty lots in the rear of the school building. He was not dressed in uniform.

At about 1.06 A. M. on February 1st he saw three men approaching the lots from Prospect Street. They traveled south on Prospect Street and had crossed over the lots until they reached as far as the fence in the rear of the center of the school and there they stopped for about ten or fifteen seconds. Then a man whom the witness later knew as Falzano started East along the wall in a creeping like manner while the other two men proceeded in the same direction, but kept away from the building. Falzano who had been creeping along the building went to the school entrance and picked up the package left there by Father Fserrazza, who the witness had seen get out of the taxicab and deposit the package. He left the alley, ran into the lots and ordered the two men to hold up their hands. He grabbed one of the men and the other one broke away and ran north on Congress Street. The man he grabbed was Rizzo. He says that Falzano was walking on Congress Street when he ordered him to hold up his hands and that thereupon a shooting occurred. That the witness was shot and that Falzano apparently was shot and that he had a scuffle with Rizzo and finally subdued him. That other detectives came to his assistance. That Falzano was taken to the hospital and he went to a near by fire house and informed them that he was shot and from there went to the City Hospital. That Falzano died. That a bullet had been extracted from his own body

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under his right breast. One page 36 he testified:

Q. Could you distinguish their features as they came across the lots? A. I did.

On page 40 he was asked:

10 Q. Did I understand you to say—did you say, rather in answer to one of Mr. Abruzzi's questions, that you distinguished the three men when you first saw them coming across the lots? Did you mean to make such an answer as that? A. Well, in a way, I did.

Q. But you didn't know who they were at that time?

20 A. Oh, no, no.

and on page 41, he identifies Rizzo.

Q. Who was the other one? A. I didn't know the other one.

Q. Well, did you see his face? A. I didn't.

30 Q. Do you know whether he was tall or short?

A. He was about the size of Rizzo.

Q. Both men were about the same size. A. Both about the same size.

Q. Did you look at his face to see whether he had a mustache or was clean shaven? A.

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I did not.

**Victor A. Tortoriello**

He had been assigned to investigate the receipt of these letters by Father D'Aquila with Detective Berardi. He wore no uniform. He was stationed in the fire-house at the Corner of Lafayette and Congress Street. He testified that after the taxi cab containing Father Fserazza had gone to the school building and had left, he saw Detective Berardi rush out and as he did, Detective Fletcher and himself rushed out of the fire-house. When he reached the end of the school building, he heard a shot and he saw Berardi and Rizzo wrestling. He pulled out his gun and started to fire at the man who was firing at Berardi and he fired shots at that man. The man fell. The man was Falzano. He sent Falzano to the hospital and picked up the package which had been previously placed there by the Priest. He saw only Rizzo and Falzano.

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**James J. Fletcher**

is a detective assigned to the case. He was with Tortoriello in the fire house. When he saw Berardi run across the lots, he ran out of the fire-house. He shot at Falzano and then assisted Berardi in subduing Rizzo. He was not in uniform. The only ones he saw were Rizzo and Falzano.

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**Anthony F. Colgary**

is a detective attached to the Newark Police Force. After Rizzo, one of the defendants had

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been arrested and brought to the Third Precinct, he was taken to the hospital where he was searched and an automatic revolver was found on him. Marked Exhibit S-1.

**Joseph Giuliano**

10 testified that after this episode, he went to Cortese's house and had a conversation with the defendant, Cortese. He asked him whether he had been out that night. He asked him if he was any where near the Lafayette Street School and Cortese answered "no" and he asked Cortese if he knew of any shooting at the Lafayette Street School and Cortese said "no." That was in the house. Subsequently he went upstairs to talk to Cortese's wife and after he received some information from the wife, he went down-  
20 stairs to where Cortese was in the butcher shop. He asked Cortese "where the blackhand letters were he had received." Cortese said he had them in his pocket. The witness said "let me see them" and he (Cortese) took a pocketbook from his pocket and handed over two letters which he claimed he had received.

Q. When did he make the claim he had received them. A. After I went upstairs.

30 Q. The first question you put to him after you went upstairs to his wife, you said, "where are the blackhand letters you have received?" and he said "I have them" and he took his right hand and pulled them from his pocket? A. That is right.

Q. Now, I show you an envelope and one sheet  
40 of paper with English written on it. Is that

one of the papers he gave you? A. Yes, I had him write his name on it in headquarters.

**The defendant denied he knew anything about the shooting.**

Q. At Police Headquarters later in the morning, what did he say to you, if anything, about hav-  
10 ing any knowledge of an episode at the Lafayette Street School?

A. He said that Falzano and a friend of his whom he did not know, came to his butcher shop about ten o'clock.

Q. The night before? A. The night before, Sat-  
20 urday night, and at that time he showed the letters to Falzano, Falzano could not read them and he read them for him. He said, "What do you think they want ten thousand dollars from me and they want me to deposit ten thousand dollars at Prospect Street and Lafayette Street," Falzano then said I didn't report it to the police, because I wanted to go down myself and see who they were and then I would report it to Capadanno at police headquarters."

Q. He told you he had said that to Falzano the  
30 evening before about ten o'clock. A. Yes.

Q. What else happened? A. He said Falzano  
40 said to him, "Let me go down to the school and let me see who these people are. Don't you go down, because if you do they will recognize you," and that Falzano and Rizzo left. Then a short time later I took a statement from him.

Q. In writing? A. In writing and then afterwards I got some more information and I went back to him and had another conversation with him.

10 Q. What was that? A. I told him that I had received information that he had given an envelope with a piece of paper in it to Amistradi and he had not mentioned it to me before, and I asked him if that was true and he said it was, and he had sent Amistardi to Lafayette Street and Prospect Street.

Cortese's written statement was substantially the same as this testimony.

20 He took certain statements from Rizzo which the court permitted him to testify to and it is contended that these statements were not made in the presence of the defendant and therefor it is contended that they are not evidence against this defendant.

30 The defendant was not charged with conspiracy. A certain revolver which Cortese admitted was his revolver was placed in evidence and marked Exhibit S-9. The letters which Father D'Aquilla had received were placed in evidence and marked S-12. A written statement by Cortese was placed in evidence marked Exhibit S-13 as were statements by Rizzo and Amistardi. These statements are in effect similar what the witness, Guiliano, had testified to. This was all of the evidence that had been placed before the jury, when the state closed its case.

40 It must first be determined what facts the State contends have been proved. The most it could contend for is: (1) that Cortese was present at the spot mentioned in the letters, receiving the money

himself, or that he was there with others receiving the money demanded in the letter. It is not conceded that the evidence disclosed these facts. The only witness who in anywise pretended to identify those present (Berardi) mentioned only three men, two of whom he identified as Rizzo and Falzano. Amistardi was admittedly on the scene, and his presence would account for the number of persons whom this witness testified were present. No witness identified Cortese or declared he was present. His presence would require testimony to the effect that four were present at the scene. This would be wholly inconsistent with the testimony in the case. Neither in his written or oral statements does he admit his presence at the scene. *Therefore, there is no proof which establishes the fact of his being present at the spot to receive the money.* There is no evidence establishing the fact that Cortese had sent Falzano and Rizzo to the scene to receive the money. Cortese in his statement both written and oral, which was in evidence, said that Falzano and Rizzo offered to go to see who would come for the package which he had sent by Amistardi. The fact that Falzano seized the package which had been deposited by the Priest does not create as the only reasonable and fair inference to be drawn therefrom the conclusion that Cortese had in fact sent them to obtain the package. This is so for several reasons. Did Falzona desire only to satisfy his curiosity? Did he volunteer to go because he knew of the letters to the Priest and required some subterfuge, in order to be present if the Priest deposited the money? Does this not reasonably explain his reason for not standing at the spot and watching who would approach Amistardi? Did he violate Cortese's instructions to wait and see who would come for Amistardi's package? An answer to all of these questions in the

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negative is required before we can reasonably conclude that Cortese had sent these men to the spot to receive the money, and that can be done only in the face of the express denial and plausible explanation of Cortese, which was a part of the State's case, and all the facts should be considered in light thereof. If we are to choose the inference which would mitigate the guilt of the accused, we must conclude that Cortese did not send Falzano to the scene to receive the money, and we must further conclude that he was not present, and we must further conclude that he was not present at the scene to personally receive the same.

No inference can be drawn from facts which have not themselves been proved. No inference can be drawn from an inference.

20 "Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not themselves presume. No presumption can be drawn from a presumption. Lewis vs. Louisville E. & St. L. R. R. 13 Kentucky Law Report, 144 Bube vs. Wetherly Borough, 27 Pa. Superior Court 88."

30 2 Wharton's Criminal Evidence, 10th Edition, Section 874, page 1636 is as follows:

"Hence, where circumstantial evidence consists in reasoning from the minor fact to establish the main fact, *the process is fatually vicious if the circumstances from which we seek to deduce the conclusion depend themselves upon conjecture.* In a case depending upon circumstantial evidence, the

finding of one fact inconsistent with the guilt of the accused is sufficient to create a reasonable doubt of his guilt.

See Hobs vs. George W. Blanchard & Sons, Co., 75 N. H. page 73, 70 Atl. Rep. 1084, the court citing Cole v. Boardman, 63 N. H. 581-4 Atl. 572-575, says:

10 "This would be an inference from an unauthorized inference—one presumption resting on another that rests on nothing. The law of evidence requires an open visible connection between the principal and evidenciary facts and the deduction from them, and does not permit a decision to be made on groundless inferences."

20 But let us assume that the State has proven it to be a fact that Cortese was present or did send Falzano and Rizzo to the scene to receive the money, are these facts sufficient from which to draw as the only reasonable inference, an inference that Cortese was guilty of *knowingly sending* the letters in question? Is this inference the only one which can reasonably be drawn from these facts, or is it one inference out of several, anyone of which is consistent with his innocence?

30 It is contended that the evidence, at most, gives rise to suspicion, or at most an inference that he in some way, at some stage became acquainted with the contents of the letter. But the question remains, in what way and at what stage? Which is the true inference?

Even if he knew the contents of the letters or had been acquainted with their contents after they were

sent, he would not be guilty. If subsequent to the sending of the letters, he joined in a plot to receive the money demanded in the letters, he could not under this indictment be found guilty. If his written statement in evidence and his oral statement are true, he is not guilty, and even if they were not true, the jury is still left to indulge in surmise and guess as to *whether or not he knowingly sent the letter*. He could have been there, because of the letters he had received which were offered in evidence by the State. He could have been there to receive the money which the Priest deposited and still could have learned of the contents of the letters after they had been *sent*. He could have been there to receive the money, and yet another without his knowledge could have sent them.

There was no evidence, direct or circumstantial, that the actual writer or sender of the letter was assisted by anyone. There was nothing to show where the crime was committed. There was nothing to prove it was sent in his presence. He might have even seen the letter written, or seen it in advance of sending or heard of it afterwards and had not participated in the actual sending of the letter.

Adopting the reasoning of the Learned Judge Luke in his opinion in the case of O'Neal vs. State, supra, I will undertake to point out what the evidence fails to show. It fails to show that the letter was written by the accused or at his instance. This fact under the case of State vs. Venzio, supra in this state, and the case of O'Neal vs. the State, would be a very strong circumstance against the defendant, tending to connect him with the sending of the letter. The evidence distinctly shows that the State procured samples of the accused handwriting and no witness

was produced to show that the handwriting was in any respects similar. This fact alone precludes any inference that the letter was written by Cortese. The proof fails to show anything which occurred prior to the actual receipt of the letter by the Priest. The evidence fails to prove that Cortese mailed it, or sent anyone to mail it. The evidence does not disclose where the letter was written, by whom it was written or at whose direction it was written. It fails to disclose that the accused was in Newark, the place where the letter apparently was mailed (See Post Mark) on the date which the post mark bears. It fails to show that the accused had an opportunity to mail a letter in Newark on the day it was mailed. There is no proof that he knew the Priest, or that he knew that there was a Priest by the name of Father D'Aquilla or that he knew where Father D'Aquilla lived, or that he had ever met or heard of the person to whom the letter was addressed. There was no proof of threats or animus. There was no proof that he had any motive for sending a letter such as this. One of the letters discloses the fact that the writer heard the Priest deliver a sermon in his church on the Sunday previous to the writing of the letter. There is no proof that Cortese ever attended that sermon or ever knew what it was about, or was ever in the church, or in fact ever attended any church.

No one saw him at the scene. There was no proof by anyone that they had seen him write the letter or cause it be written, or that he ever had possession of it. There was no proof that he admitted writing the letter or that he had ever seen it, or asked anyone to write it for him, or send it for him. In the face of this lack of evidence, how can it be said that this proof standing alone was a sufficient circum-

stance from which could be drawn as the sole conclusion the inference that the defendant was guilty of knowingly sending the letters. Nor can the explanation of Cortese which is a part of the evidence of the state be lightly disregarded. The letters which are the foundation of the explanation preclude any such lack of consideration. If it is to be inferred that Cortese procured someone to write these letters to him in order that they could be used as an explanation for his presence, should the crime be detected, an inspection and comparison of the letters destroys any such conclusion.

There are two sets of letters. The first and second letters both to the Priest and to Cortese bear identical post marks, apparently being mailed at the same time and date. That the letters are all in the same handwriting, requires no expert testimony to substantiate. A mere inspection suffices. The expressions "thak your skin" in both letters post marked the 27th and the other peculiarities in expression, which appear identically in both letters, stamp the writer in each of the letters the same person. If Cortese, before the sending of the letter on the 27th evolved the idea, that a letter to himself would be a medium of alibi or explanation how can we account for the fact, that in the letter to the priest, the demand is to place the money at the Lafayette Street School at 3 A. M. and in the letter to Cortese, a spot is designated for the placing of the money which is at least one-half mile from that designated in the priest's letter? A reading of the letters and the thoughts expressed therein precludes any notion that Cortese was the author of these letters. The first letter, (dated January 27th) to the Priest is a bitter denunciation of the Priest, and complains that millionaires do not attend the church,

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and therefore do not contribute to its welfare, and concludes with a demand for money. The letter of January 27th to Cortese is vile. The second letters (Jan. 30th) are written by the same hand. A comparison shows that to be a fact, beyond peradventure of doubt. The letter to Cortese speaks of threats against his daughter and accuses him of such unethical acts in his business as to repel any belief that they were the natural creation of himself.

It is contended that there was not sufficient proof from which the Court could as the only reasonable and fair inference conclude that the defendant had knowingly sent the letters.

It is therefore submitted that the Trial Court erred in refusing to direct a verdict of acquittal at the close of the State's case.

POINT II

THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

A resume of the State's testimony is contained under Point I and requires no repetition

The evidence of the State was of doubtful nature. It did not overcome the presumption of innocence, and as has been herein urged was insufficient to prove the guilt of the defendant.

The defendant produced testimony, which further supported and strengthened the presumption of innocence. He produced evidence of his good reputation in the community, for peacefulness and observation of law. This evidence was not contradicted by the State. It was held in this State in the case of State vs. Well, 1 N. J. L. 424:

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"In case of doubt, good character should turn the scale in favor of the defendant \* \* \* \* \*."

He emphatically denied the sending of the letters in question, or any complicity therewith.

10 He explained his conduct on the night of February 1st, in a manner which was wholly consistent with innocence. His explanation is corroborated to a great degree, by the contents of the letters which served as a basis of the explanation. The contents of these letters, refute any inference that they were the creation of the defendant. Such an inference is further repelled by the evidence of disinterested witnesses who testified to the great concern their receipt created, upon the defendant. He denied writing any of the letters, and there was no proof tending to show that he was their author. Thus the presumption of innocence was strengthened to such a degree, that it could in nowise be deemed to have been overcome, beyond a reasonable doubt.

The jury in the discharge of their lawful duty, would have been duty bound to acquit.

30 The verdict in this case however, was the result of prejudice and passion, engendered by the gruesome and horrifying details of the death of Falzano; coupled with the testimony detailing the extent and severity of the wounds of the police officers. In fact all of the evidence of shooting, in the affair on the night of February 1st, was introduced to create prejudice and passion in the minds of the jury. The question of whether or not Cortese was carrying a revolver, without legal permit, was permitted to enter into the jury's deliberations.

40 All of these collateral matters, which had no

tendency to prove the main issue, served definitely to create in the minds of the jury a prejudice, born in horror. Immaterial as they were, to the main issue, they no doubt received the greatest consideration from the jury, whose passion and prejudice had thereby been aroused. How would the fact that Falzano had been shot assist the State in proving that Cortese had knowingly sent the letter? How would the answer to the question as to whether or not the police officers were justified in shooting him shed any light on the main issue? How would the answer to the question as to whether the police officers had been shot by one of their number, or by defendants, serve to prove the indictment? How could the answer to the question as to whether or not Cortese was legally entitled to carry a revolver, assist the jury in arriving at a just verdict? These and other questions, however, were regarded of grave importance, by the jury in their deliberations. The Trial Court in its charge to the jury to a great degree emphasized the importance of these events.

It said:

"Therefore, you have a right to consider not merely the question of moment, that is the question as to what transpired at one o'clock or a quarter to one \* \* \* \* \*."

30 The evidence tending to prove the guilt of the defendant in this case is so meagre, that this Court is entirely justified in concluding that a jury in the discharge of their legal duty, should have acquitted the defendant, and that their failure to perform their legal duty, passion and prejudice was occasioned by aroused and engendered by the tragic occurrences, referred to herein.

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The verdict is contrary to the weight of the evidence and should be reversed.

POINT III

The following assignments and reasons for reversal are addressed to errors of the Trial Court in his charge to the jury.

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ASSIGNMENT AND REASON FOR REVERSAL  
21 IN COURT BELOW

This instruction will be attacked on two grounds:

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1. The trial court knew that there was no direct evidence tending to prove the charge as laid in the indictment. In fact the trial court stated so in its charge. A resume of the record will convince the court that no direct evidence was offered tending to prove the defendant did knowingly *send the letter*. The case depended *wholly* on circumstantial evidence. In this state of the case the trial court stated to the jury "*You may convict on circumstances.*" It is contended that the jury should have been informed under what restrictions circumstantial evidence may convict an accused. The mere fact that the trial court informed the jury that they had to be satisfied beyond a reasonable doubt would not satisfy this requirement. While the trial court is not required to instruct on a principle of law where no request is made by the defendat, if he does instruct on a principle of law or touches on a certain subject, it is contended that the full and correct charge on the subject must be laid down to the jury and if the trial court fails to fulfill that duty, it is contended that there is legal error.

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2. The court confined the jury to circumstances drawn from the evidence before them. It is contended that the jury should have been permitted to consider circumstances which could be drawn from *evidence not before them*; that is, the failure of the state to bring any direct evidence and the lack of evidence tending to prove the charge of the state.

The authorities quoted under Point 1 dealing with the subject of circumstantial evidence, declare the settled doctrine applicable to that subject.

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There are certain well defined rules of law which guide and restrict a jury in their consideration of a case depending wholly upon circumstantial evidence.

The inference of guilt must be the only one which can be fairly and reasonably be drawn from the proof before a jury can convict. That inference must be inconsistent with any theory of innocence. If consistent with innocence they are required to acquit. They must not indulge in surmise. The proof of the circumstance from which they desire to draw an inference of guilt must be positive. These few requirements, are sufficient to illustrate the point. The Trial Court informed the jury "they could convict on circumstances." He did not attempt to restrict the jury. He left them in a state where they were required to guess, under what circumstances they could convict.

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A full annotation of the duty of the Trial Court under the circumstances is contained in 15 A. L. R. at page 1049, from which it appears by the great weight of authority, that an omission by the Trial Court to give correct instructions on the probative

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value of circumstantial evidence in a criminal case, where the case depends wholly on circumstantial evidence is a sufficient ground for a new trial, *even in the absence of a request.*

See *Allen v. State*, 80 S. E. Rep. 215 Syllabus by the Court.

10        “Where, in a criminal case, the evidence  
relied upon for conviction of the accused is  
wholly circumstantial, it is error requiring  
the granting of a new trial to omit to charge  
the jury upon the law of circumstantial evi-  
dence even though no request so to do be  
made by the accused: *Riley vs. State*, 1 Ga.  
App. 61, 57 S. E. 1031; *Harvey v. State*, 8  
Ga. App. 660, 70 S. E. 141; *Weaver v. State*,  
135 Ga. 317, 69 S. E. 488. *State v. Salmon*,  
20        115 S. W. 1106 on page 1125.

          “*It is sufficient to say of the complaint con-  
cerning the instruction upon circumstantial  
evidence that the rules of law applicable to  
that subject are well settled by this court.  
If the case is one in which the testimony con-  
sists alone of circumstantial evidence, then it  
is the duty of the court to give an appropriate  
instruction covering that subject; but if it  
30        be one in which there is positive or direct  
evidence as to some of the essential elements  
necessary to constitute the offense, then it is  
not error to refer an instruction upon cir-  
cumstantial evidence. (Citing cases). How-  
ever, it is not out of place to say that, in any  
case where the court undertakes to declare  
the law upon the subject of circumstantial  
evidence, it should cover the subject fully*

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*and give such an instruction as has frequently met with approval by this court.”*

As to what is considered a correct instruction on the matter of circumstantial evidence the rule laid down in the case of *Smith vs. State*, 57, South. 913 is convincing.

          “*One of the instructions granted in the* 10  
*court below, as the request of the state is as*  
*follows: ‘The court instructs the jury, for*  
*the state, that a person may be proved to be*  
*a common prostitute by circumstances and*  
*if the jury believe from the evidence in the*  
*case, beyond every reasonable doubt, that the*  
*defendant is a common prostitute, then it is*  
*their duty to find the defendant guilty as*  
*charged, although there may be no direct*  
*evidence of sexual intercourse. The grant-* 20  
*ing of this instruction was fatal error, for*  
*the reason that it omits the necessary quali-*  
*fications, that circumstantial evidence, in or-*  
*der to prove guilt beyond a reasonable doubt,*  
*must exclude every other reasonable hypo-*  
*thesis than that of guilt.’”*

To this same effect see *William v. State*, 95 Miss, 671, 49 South 949; *Irving v. State*, 56 South. 377. For the general accepted rule see *Bouvier’s Law* 30  
*Dictionary*, volume 1, page 1093.

          “*Circumstantial evidence warrants a con-  
viction in a criminal case, provided it is such  
as to exclude every reasonable hypothesis but  
that of guilt of the offense charged to the  
defendant, but it must always rise to that  
degree of convincing power which satisfies*

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10 the mind beyond a reasonable doubt of guilt. This can never be the case when the evidence, as produced, is entirely consistent with innocent in a given transaction. *Hayes v. United States*, 169 Fed. 107 94, Cca, 449. When the evidence can be reconciled either with the theory of innocence or of guilt, the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted. 'It is not a question of the weakest link of a chain, but the weakest strand of a rope cable.' *Ex. Parte Hayes*, 6 Okl. Cr. 321, 118 Pac. 609."

What our court considers the correct rule of law to be may be gleaned from the case of *State v. Burke*, 81 N. J. Law, 93, 79 Atl. 882.

20 "The first contention requiring consideration is that the learned trial judge erroneously instructed the jury as follows: "It is not essential to overcome the presumption of innocence that there must be direct evidence indicating the guilt of the defendant. If the circumstances incident to the situation admit of drawing an inference excluding any notion than that of guilt, it must be such to maintain the contention of the state that the presumption of innocence had been overcome.' That instruction was erroneous. According to it, "If the circumstances admit of drawing an inference of drawing to inferences ,one, 'Excluding any notion but that of guilt,' and the other leaving the question of guilt in doubt, the fact that the circumstances admit of drawing an inference excluding any notion than that of guilt is suf-

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10 ficient to overcome the presumption of innocence. Such is not the true rule.

"The presumption of the defendant's innocence continues until overcome by proofs establishing his guilt beyond a reasonable doubt. The instruction being erroneous and prejudicial to the defendant in maintaining his defense on the merits must be set aside." 10

See *Boylan ads Meeker*, 28 N. J. Law, 274 page 281:

"Unless proof of a negative (circumstantial evidence) be complete, it is no proof; unless every link is complete the conclusion does not follow. There is a great show of demonstration without any certainty. Every lawyer of experience in his profession can 20 recollect cases where he himself has been almost confounded by the apparent strength of imperfect negative proof, although well knowing the truth to be otherwise. Five units make almost six, but fall short just one unit."

If the court should doubt whether the rule laid down in the case of *Smith v. State*, supra is a recognized one, reference to *Wharton's Criminal Evidence* may throw some light as to what is the generally recognized rule in all jurisdictions. Volume 2, 10th Ed. page 1643. 30

"However, circumstantial evidenc is limited by, or rather should be tested by, the following rules, which, while they may be differently phrased ,are fundamental rules in all jurisdiction; First, it should be acted

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upon with caution; second, all the essential facts must be consistent with the hypothesis of guilt, as that is to be compared with all the facts proved; third, the facts must exclude every other theory but that of guilt; fourth, the facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense."

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It is not sufficient that the court merely charge the jury that they must find that the facts must establish such a certainty of guilt of the accused as to convince their judgment beyond a reasonable doubt that the accused is the one who committed the offense, but the jury must also take into consideration, and it is also the duty of the court to instruct the jury that they must do so, the other three elements as set forth above. See also Wharton's Criminal 10th Ed. page 1839.

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"The measure of proof can be established as well through circumstances as by theoretically direct evidence. Thus, if the circumstantial evidence satisfied the mind, then it is equal to positive evidence because it produces the same effect, and hence it is not error in a criminal case, to refuse to instruct that circumstantial evidence is inferior to direct evidence. The *limitation applied is that where the criminal charge rests upon circumstantial evidence, the proof must not only be consistent with the guilt of the accused, but it must be inconsistent with every other reasonable hypothesis.* Hence, with reasonable doubt as the measure of the suf-

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ficiency of the proof, limited by the qualification that the conclusion must not only be consistent with the guilt of the accused, but inconsistent with any other reasonable conclusion, and the *further requirement that each independent fact must be proved to the same degree as if the whole issue rested upon the proof of the whole independent fact, then the law has safeguarded life and liberty to the highest degree that can be devised by human intelligence.*"

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State v. Brazzell, 150 N. W. Rep. 638 on page 688.

"Speaking of the same point raised in State v Blydenburg, 135 Iowa, 279, 112 N. W. 640, 14 Ann. Cas. 443, where it was held error for the court to refuse an instruction substantially the same as appellant's request No. 4, and gave an instruction like paragraph 33 above quoted, we said:

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"We think the jury should have been distinctly informed that the State's case rested entirely upon circumstantial evidence, and that in such connection the established and approved rules governing the cases of this class should have been clearly set forth." See also 90 S. E. 370.

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The court charged the jury that they may convict on circumstances. Under what circumstances? Surely, not under any circumstances. The qualifying language is the *sine qua non* of such an instruction. The defendant no longer had the benefit of that reasonable doubt which the law so zealously

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guards for him. Any reasonable hypothesis upon which the jury might find a reasonable doubt was eradicated from their minds. They were told that any circumstances tending to convict was sufficient to find him guilty beyond a reasonable doubt.

10 Taking up the second ground, and assuming for the purpose of argument that this portion of the charges must be read in connection with that which the court charges and defines reasonable doubt, yet it is the contention of this defendant that there is manifest and prejudicial error in the charge. See State v. Andrews, 77 N. J. Law, 108, 71 Atl. Rep. 109

20 "In this posture of the case, the defendant submitted to the trial judge the twelfth request to charge as follows: 'If the jury have a reasonable doubt as to whether the defendant altered or indorsed the paper, or as to whether it was done before or after handing it to Heston, there must be an acquittal.' To this request the court responded: 'I so charge you you with the following remark that your reasonable doubt as to whether there it was before or after must be founded upon some evidence that was presented in this cause, if there is a reasonable doubt.' To this an exception was duly taken and sealed, and error assigned thereon.

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"We are constrained to think that this response of the court did not declare the rule of law which under the circumstances the defendant was entitled to have charged to the jury. The accused was entitled to be acquitted if the jury, because of the state

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of the proofs as to any fact necessary to conviction, had a reasonable doubt of the defendant's guilt. A *doubt, to be reasonable, must arise out of the evidence, or want of evidence, after a full consideration by the jury of all the evidence in the case.* 23 Amer. & Eng. Enc. of L. (2d Ed.) 966. As already shown, one fact necessary to be found was that the alleged acts were done before the paper was signed by Heston, and the jury may lawfully have considered that there was no evidence to establish that fact. *Under these circumstances, the instruction that a reasonable doubt must be one founded upon some evidence that was presented in the case was erroneous, at it excluded all reasonable doubt that may have arisen from the lack of want of evidence.* Mackey v. People, 2 Colo. 13; McElven v. State, 30 Ga. 869; Brown v. State, 105 Ind. 385; 5 N. E. 900; Wright v. State, 69 Ind. 163, 33 Am. Rep. 212! Densmore v. State, 67 Ind. 306, 33 Am. Rep. 96; State v. Case, 96 Iowa, 264, 65 N. W. 149; Hale v. State, 72 Miss. 140, 16 South 387; Bray v. State 31 Tex. 560; Bland v. State 4 Tex. App. 15."

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Considering this instruction of the court and reading this paragraph in connection with the general charge of the court, it certainly does not appear that the court has left any impression upon the minds of the jury as to what qualification they must take into consideration in order to determine whether the defendant was guilty beyond a reasonable doubt, but, to the contrary, when the court did instruct the jury that they may convict on circumstances, they opened the gate to the jury and gave

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them much greater altitude than that which the authorities are all agreed, they have a right to consider.

10 The error is not made apparent by merely extracting a portion of the charge read apart from its connection with the rest, but is apparent by its own effect. Although it may be an unnecessary qualification in the charge of the court and as given is plainly harmful and erroneous. It is not an error which is merely worked out by the ingenuity of counsel at leisure, but is self-evident from the entire context of the charge.

See *State v. Lang*, 87 N. J. Law, 508, 94 Atl. 631, where the Court of Errors and Appeals lays down the rule thus.

20 "Certainly, when sentences, that is to say, parts of a charge, are erroneous and no proper qualification of them is to be found in the context or in the entire charge, then there is error; and this is so when, as in this case, the part of the charge pointed out as erroneous is not in and of itself a particular qualification and limitation of language which, without such qualification and limitation, is unobjectionable."

30 Therefore, although if the court had not mentioned anything concerning the fact that the case depended upon circumstantial evidence, the defendant may not have been harmed, yet when he undertook to do so and charging as he is alleged to have done by this assignment, he committed error which worked to the prejudice of the defendant, and such

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prejudice as is pointed out in no uncertain terms by the authorities. See *Supra*

*Allen v. State*  
*Smith v. State*  
*Bouvier's Law Dictionary*  
*State v. Burke*  
*State v. Lang.*

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On the other hand, the court having given the jury free rein on the question of circumstantial evidence, suddenly drew the line taut in their consideration of the evidence by stating that if they were satisfied beyond a reasonable doubt as to the guilt of the defendants, or any of them, from the circumstances drawn from the *evidence before them*, they were to convict. That this is manifest error prejudicial to this defendant is beyond doubt, for our own authorities have denounced this limitation upon the jury. See *State v. Andrews, supra.*

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"Under these circumstances, the instructions that a reasonable doubt must be one founded upon some evidence that was presented in the case was erroneous, as it excluded all reasonable doubt that may have arisen from the lack or want of evidence."  
(Citing cases)

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#### ASSIGNMENT OF ERROR AND REASON FOR REVERSAL No. 22 IN COURT BELOW

This instruction, it is contended by this defendant, is fallacious on the same ground as is urged in the second argument of the previous assignment, that is, the court restricts the jury in determining the guilt of the defendant, to the evidence "that has

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been offered and allowed by the court as legal evidence" and again "the evidence that is in the case." This instruction on the part of the court is merely a continuation of the thought in the charge set out in assignment 21, and therefore may be looked upon as a qualification of that first instruction as pointed out. The jury for the second time is told that they have the right to consider merely that which has been offered and allowed by the court as legal evidence, and also that evidence in the case. This manifestly is erroneous. See *State v. Andrews*, supra.

"Under these circumstances, the instruction that a reasonable doubt must be one founded upon some evidence that was presented in the case was erroneous as it excluded all reasonable doubt that may have arisen from the lack or want of evidence."

The vice of this charge becomes more apparent even when read in connection with the rest of the charge, for in the case of *State v. Andrews*, supra, the court instructed properly on the question of reasonable doubt when the Court added to its instruction that part which is almost identical with that portion of the charge alleged as error in this assignment, the reviewing courts held that there was manifest and prejudicial error, which required a reversal. The defendant was deprived of the consideration by the jury of matters lacking in the evidence which may have given rise to a reasonable doubt which necessarily follows the presumption of innocence in the minds of the jury and therefore for this reason, the error was such as requires a reversal of the conviction.

There is another serious error in this portion of

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the charge of the jury, namely, the court allowed the jury to draw such inferences that they saw fit from the evidence that is in the case. Here again, the court having first limited the jury in a consideration as to what evidence they may consider, and as to where they may draw their inferences from, turns and gives them free reins to do with that evidence as they saw fit, namely, to draw any inferences that they saw fit to draw from the limited scope of vision as has already been pointed out.

We must not forget that this case depended wholly upon circumstantial evidence—admitted so by the court and for the purpose of argument admitted to be so by this defendant. Just what consideration the jury may give to this type of evidence is enunciated in 2 Wharton's *Criminal Evidence*, 10th Ed. Sec. 871 on page 1632.

"Circumstantial evidence is more clearly defined from its results than by a definition of the phrase itself. It is that evidence that tends to prove the facts in issue, by proof to the facts or circumstances that, according to the common experience of mankind, usually attend the facts in issue, affording basis for a *reasonable inference* by the court on the jury that the facts actually occur."

See also 2 Wharton's *Criminal Evidence*, 10th Ed. Sec. 874, on page 1636.

"Hence, where circumstantial evidence consistent in reasoning from the minor facts to establish the main fact, the process is *fataly vicious*, if the circumstances from which we seek to deduce the conclusions de-

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pend themselves upon *conjecture*. In a case depending upon circumstantial evidence, the finding of one fact inconsistent with the guilt of the accused is such to create a reasonable doubt of his guilt."

10 Coming back to the charge of the court, let us consider just what this instruction left open for the jury to consider. The court allowed them to draw *such inferences they saw fit*—unreasonable inferences, groundless inferences, illogical inferences, and to say the least, inferences based merely on *conjecture*. As to what is the correct charge had been considered in North Chicago Street Railroad Co. v. Rodert, 67 N. E. 812 on page 813.

20 "Giving this meaning to the word 'think,' it is clear, the instruction restricts the inferences to be drawn by the jury to such as *'may be rightfully and reasonably inferred from the evidence'*; that is, to such inferences as the jury, in view of the evidence, consider or believe rightfully and reasonably arise from the evidence. *What inferences as to the truth of a fact affirmed are logically and reasonably to be drawn from other facts which have been proven must be committed to the judgment of discretion of the jury.* The law has no rule by which such inferences may be declared, but the jury must, by the exercise of the mental process commonly called 'thinking,' or 'considering,' determine *what inferences reasonably and rationally arise from facts and circumstances which have been proven.*"

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In this case objection was made to the use of the

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word 'think' but the court held that where the instruction enunciated the rule as to what inferences are proper, it was natural that the jury should determine these inferences by the process of thinking, and, therefore, the decision was affirmed. But in the following case, the court failed to properly instruct the jury as to what inferences they might draw from the facts in the case and the judgment of the lower court was reversed.

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State v. Hembrie, 103 Pacific 1008 on 1012.  
Chicago & Erie R. Co. v. Thomas 103 N. C. 861 on 866 State v. Atkinson & Whitfield, 93 N. C. Rep. 516 on 523.

People v. Adrogna, 124 N. Y. Supp. 68 U. S. v. Green, 220 Fed. 974 on 975. U. S. v. Wilson, 176 Fed. 806 on 810.

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In the case of Hobbs v. George W. Blanchard & Sons, Co., (N. H.) 70 Atl. Rep. page 702, on 1084, the court citing Cole v. Boardman, 63 N. H. 580, 581, 4 Atl. 572, 575 says:

"This would be an inference from an unauthorized inference—one presumption resting on another that rests on nothing.' The law of evidence requires an open, visible connection between the principle and evidentiary facts and the deduction from them, and does not permit a decision to be made on *groundless inferences.*"

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It is contended that by this instruction to the jury they were able to draw such inferences as were denounced by the authorities and decision, namely, one presumption that rests upon another because they could draw any inference they saw fit.

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The case last cited was a civil case and when such an instruction is found to be erroneous in a civil case, it surely is more harmful in a criminal case. In the case of *State v. Lang*, 87 N. J. Law, 508, 94 Atl. 631 our Court of Errors and Appeals says:

10 "In *Hubner, Admr. v. Erie R. R. Co.* 68 N. J. Law 468, 53 Atl. 545, where the court instructed the jury as requested upon a certain question be so modified that request by another instruction as to likely mislead the jury and thereby harm the defendant, a new trial was granted. *This was a civil suit. The rule applied with equal, if not with greater liberality, in a criminal court.*"

20 Having thus left the jury's mind in such a state where they could only consider certain matters and then to which of those matters as they saw fit, surely there was no room left for the operation of the doctrine of reasonable doubt, but permitted the jury, upon a review of the evidence, without considering the question of reasonable doubt or without considering the presumption of innocence, free to draw any inferences whatsoever and if upon such a consideration they thought the defendant guilty, to convict him. Surely such an instruction is not in consonance with the well founded doctrines of law, as laid down in our own courts, but on the other hand fall directly into that category which is repeatedly denounced as erroneous and vicious.

30 **ASSIGNMENT OF ERROR AND REASON FOR REVERSAL No. 23 IN COURT BELOW**

The error urged in this instruction to the jury is that the court erroneously confined the issue in the

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minds of the jury to certain events, viz:

"Therefore, you have a right to consider not merely the question of the moment, that is, the question as to what transpired at one o'clock or a quarter of one, but you have a right to consider what happened from the time the letters were first received."

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It is contended that this instruction is analogous to that in the case of *State v. Tischler*, 119 Atl. 372 affirmed in 119 Atl. 197. In charging the jury, the court used this language:

"If you believe the states' witnesses, the crime of assault and battery with intent to abuse is abundantly made out. On the other hand, if you believe the defense, the defendant is not guilty. Who is telling the truth? *Which is the more logical, the more probable story? That, after all, is the real question, the question which is peculiarly within your province.*"

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"The effect of this language seems plainly to make the logical and probable character of the story told by one or the other of the parties concerned the test of a verdict of guilt or innocence. But there are other considerations besides mere logic and probability which may legitimately influence the conclusion of a jury, notably, for example, the appearance and demeanor of the witnesses and the manner in which they testify. The credibility of the witnesses and the verdict of the jury should not be depended exclusively on rules of logic and estimate of

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probability. The language used by the trial judge, in our estimation, constituted harmful error, for which there must be a reversal."

10 The question of the moment in this case was not what transpired subsequent to the time that Father D'Aquila received the letters nor was the question of moment what transpired on February 1st on Congress Street, although the jury must have gained the belief from this instruction that if Cortese participated in anywise in the episode on February 1st, 1925, he was unquestionably guilty. This charge of the court permitted no other belief or inference, although the fact that Cortese was present on February 1st on Congress Street, could on his explanation of the case be reconcilable with innocence. And even without an explanation on his part, would be reconcilable with innocence on the theory that he might have learned of the sending of the letter subsequent to the time that it was actually sent and thereupon under the form of the indictment he could not be convicted.

As to what is considered the vital issue under the statute as laid in this indictment is set forth by our Court of Errors and Appeals in the case of *State v. Venzio*, 84 Law, 418, 87 Atl. 126.

30 "The first five assignments of error challenged different portions of the charge of the court to the jury. The first is that the court charged as follows. 'The main question is was that letter written by the defendant?' and the point made is that under the statute the question is, not who wrote the letter, but who sent or mailed the letter. But a reading of the whole charge shows that the jury was

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instructed that the mailing was an essential part of the offense. *The case disclosed that the defendant denied the writing of the letter, and testified that it was written by another person, so, of course, it was a principal question for the jury to decide whether the defendant did write the letter.*"

10 For this reason it is respectfully submitted to the court that there was harmful error, prejudicial to the defendant and therefore the judgment of the lower court should be reversed.

#### CONCLUSION POINT III.

20 In Conclusion, it might not be amiss to add in refutation of any argument that may be raised on the ground that the errors were cured. It is evident that each of the instructions alleged as error are nothing more than a qualification of the general rule. Nowhere in the court's charge is there any exposition of any general rule except that in which the court charges and defines "reasonable doubt."

30 Manifestly, the errors pointed out in each assignment makes it impossible for one to offset the prejudice in the other. The charge as to reasonable doubt does not cure them. See *State v. Andrews supra*

40 These are not merely sentences extracted at random but full coherent portions of the charge, read together. And even, if they may be looked upon as mere sentences, it is contended they were harmful.

*State v. Lang, supra.*

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“Certainly, when sentences, that is to say parts of a charge, are erroneous and no proper qualification of them is to be found in the context or in the entire charge, then there is error; and this is so when, as in this case, the part of the charge pointed out as erroneous is, in and of itself, a particular qualification and limitation of language which, without such qualification and limitation, is unobjectionable.”

If the court should find itself constrained to disagree that the alleged erroneous instructions were qualifications, then this defendant urges the rule laid down in the case of *State v. Parks*, 115 Atl. 395, as governing:

“It is suggested for the state that other parts of the charge should be considered as curing any such error as we have just discussed. But at the best this would merely make a case of contradictory instruction; and, unless the erroneous instruction is withdrawn, the error is not cured.” *Burnett v. State*, 60 N. J. Law, 255, 37 Atl. 622; *State v. Tapack*, 78 N. J. Law 208, 211, 72 Atl. 962; *Metropolitan Co. v. Brazos*, 81 N. J. Law, 649, 654, 80 Atl. 552; *State v. Clayton* 83 N. J. Law, 673, 675, 676, 85 Atl. 173 *State v. Diamond* 84 N. J. Law 17, 86, Atl. 57; *State v. Mausert*, 85 N. J. Law, 498, 501, 89 Atl. 1011; *Collins v. Central R. R. Co.*, 90 N. J. Law, 593, 101 Atl. 287.”

#### POINT IV

The following assignments and reasons for re-

versal are addressed to errors of the Trial Court in the admission and rejection of the evidence.

#### ASSIGNMENT 5—REASON 5 IN COURT BELOW

The testimony with respect to this assignment and reason is found on page 71.

If Rizzo were called as a witness for the State, he would be unable to testify as to Falzano's conversation with Cortese over the telephone, because he derived his information of that conversation from Falzano and therefore it would be hearsay.

It is therefore difficult to perceive how Guiliano can testify to what Rizzo told him of a hearsay conversation which Falzano had with Rizzo.

The Court erred in permitting this evidence which was harmful to the defendant in his defense on the merits.

#### ASSIGNMENTS 8 AND 9—REASON 8 AND 9 IN COURT BELOW

These assignments and reasons are argued together.

Assignment 8 tended to prove that bullet had been extracted from the body of Berardi.

The evidence in assignment 9 was with respect to the death of Falzano. This evidence in no wise tended to corroborate any matter pertinent to the issue. It was wholly collateral in its operation, had no materiality to the issue and its only effect was to bring before the jury the gruesome details of the death of Falzano and injuries sustained by Berardi

and prejudiced the minds of the jury against this defendant because the witness, Berardi, had been seriously wounded and Falzano had suffered death. It was not offered for any other purpose. It is contended that the Court erred in permitting the State to introduce these matters into evidence which error was prejudicial and harmful to the defendant in his defense on the merits.

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#### ASSIGNMENTS 13 AND 14 IN COURT BELOW

Testimony with respect to these assignments is found on pages 118, 119, 120, 121 and 122.

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The witness had not in his direct testimony testified to any such conversation. The question implies that such a conversation did take place. It is not a proper foundation for a contradiction because the only way there could be a contradiction, is by proving that the conversation took place, either by Cortese, or by a person who heard it. No person alleged to be present overhearing this conversation was mentioned in the question. The prosecutor on page 121 said:

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Mr. D'Aloia: "I am prepared to state Cortese said it, but I am prepared to contradict this witness."

The obvious intent of the Prosecutor was to get the conversation before the jury as if it had actually taken place. It is contended that the court erred in permitting the question.

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#### ASSIGNMENTS 15 AND 16—REASON 14 AND 16 IN COURT BELOW

Assignments and Reasons 15 and 16 are argued together. The testimony respecting these assignment is found on pages 122 and 123 of the case.

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It will be noted by a reading of the testimony that the witness had not answered the previous question. Thereupon the prosecutor in order to impeach the witness, asked him whether he had not told a third person not in the presence of accused, that Cortese had such a conversation with him. The prosecutor had previously admitted he was in no position to prove such a conversation did take place. The witness had neither affirmed or denied that such a conversation did take place. The question was therefore wholly irrelevant and tended only to bring prejudicial matter before the jury. The Court erred in permitting the question, which prejudiced the defendant in his defense on the merits.

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#### ASSIGNMENT 19—REASON 19 IN COURT BELOW

The testimony with respect to this assignment is found on page 182. The objection was made timely. Apparently the answer came so promptly that no opportunity for objection was afforded. The question is palpably prejudicial and while the answer was "no sir" the question itself contains a direct charge of a fact which has no basis in the evidence. The prosecutor apparently did not intend to produce any evidence tending to prove that it was a fact.

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In Wharton's Criminal Evidence, Vol. 1, 10th Edition on page 57:

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10 “While the law regards as relevant all facts touching the credibility of the accusee, or that can aid a jury to determine the weight of testimony; and while the question of relevancy must rest largely in the discretion of the trial judge, to be exercised by him with regard to the particular facts of each case, there is a marked distinction drawn between such facts and those sought to be brought out that merely tend to degrade the accused, or, by innuendo, to place irrelevant testimony before the jury. Such question, ‘Is it not true that you have served a term in the penitentiary?’ or ‘Have you not been arrested for felony?’ —Where not propounded in good faith, or asked concerning facts that in themselves are irrelevant, constitute reversible error, entitling the accused to a new trial. 20 *And this is true, even though such questions are objected to at the time on the ground of irrelevancy, and the answer excluded by the court. The reason is, the irrelevant facts have been placed before the jury by innuendo, the sinister influence remains, nor is it destroyed by the exclusion.* It rationally follows therefore, that the jury has been prejudiced against the accused, as fully as though the irrelevant facts themselves had been admitted, and nothing that the court can say 30 entirely obliterates the effect.” Citing *Leo v. State*, 63 Neb. 723, 89 N. W. 303. *State vs. Fournier*, 108 Minn. 402, 403, *People v. Wells*, 100 Cal. 439, 34 Pac. 1078.

The state offered no evidence in rebuttal. This was a very harmful accusation. It imputes to Cor-

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tese a desire to suppress evidence, to conceal facts. From these act, inferences of guilt may legally be drawn. There was however no testimony offered to substantiate the accusation made. It is contended that the question was improper and was harmful to the defendant in his defense on the merits.

For the divers errors herein urged it is respectfully submitted that the judgment of the Supreme Court be reversed and a new trial ordered. 10

HAROLD SIMANDL,  
*Of Counsel with*  
*Plaintiff-in-Error.*

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# New Jersey Court of Errors & Appeals

STATE OF NEW JERSEY

Case No. 52

53 OCT. T. 1927

STATE vs. CORTESE, No. 53—OCTOBER TERM

ERRATA IN BRIEF OF PLAINTIFF-IN-ERROR.

Page 22 of brief commencing with line 19 should read:

He took certain statements from Rizzo which the Court permitted him to testify to, over objection with the understanding that the Court would instruct the jury, "that the statements concerning Cortese by Rizzo as given by this witness are not binding upon Cortese."

(See case 71-72)

It is contended that these statements were not made in the presence of the defendant, and therefore are not evidence against this defendant.

Page 31 of brief, commencing with line 37 should read:

An that their failure to perform their legal duty was occasioned by passion and prejudice aroused and engendered by the tragic occurrences referred to herein.

vested in such *presiding officer*.

## New Jersey Court of Errors & Appeals

STATE OF NEW JERSEY,  
*Defendant-in-Error*

vs.

MICHAEL CORTESE,  
*Plaintiff-in-Error.*

Case No. 52  
October Term

On Indictment for  
Concealed Weapons.

REPLY BRIEF FOR  
PLAINTIFF-IN-ERROR.

### Point I

The first proposition not argued in the main brief of plaintiff-in-error is the contention of the State that the provisions of Act of 1922 contemplated the issuance of the permit, solely by the Chief of Police, if there be one in the municipality in which the applicant resides. This contention is unsound. The act distinctly authorizes a permit from the *Chief of Police* or the *Mayor* or the *Judge of the Court of Common Pleas of the County*, and provides that where there is no Chief of Police thereby clearly indicating small municipalities, the Mayor "*or other presiding officer*" of the governing body of such municipality is given authority to issue permits. At no other place in the text are the words "*or other presiding officer*" used, except with reference to municipalities having *no* Chief of Police.

By this language, the Legislature intended to provide for these smaller municipalities which had "Borough Presidents," "Council Chairman" etc., but no Chief of Police or Mayor, and the power to issue a permit was by these provisions intended to be vested in such *presiding officer*.

## POINT II

In the brief of the State, Section 37, C. J. 214 is quoted as authority for the proposition, that where there is a repeal of the Statute, all protection given by a license although yet unexpired is generally revoked *by the law which authorized its grant*. The grant was authorized under the Crimes Act which was not repealed.

There is a Statute in this state however, which provides for the effect of repeal on rights accrued, pending actions etc. 4 Comp. Statute pg. 4971, Section 3.

“The repeal of any statutory provision by this act, or by any act of the legislature heretofore or hereafter passed, shall not affect or impair *any act done* or right of limitation vested or accrued, or any proceeding, suit or prosecution had or commenced, *shall remain in full force* and effect to all intents and purposes as if such statutory provision so repealed had remained in force, except that where the course of practice or procedure for the enforcement of a right, or the prosecution of a suit shall be changed, actions now pending, or hereafter commenced, shall be conducted as near as may be in accordance with such altered practice or procedure.”

This statute by its terms clearly indicates that a license granted under the Statute of 1922 was not impaired by the subsequent legislation. The State having granted the defendant immunity under the

provisions of the Act of 1922; clear and positive terms withdrawing this grant should appear in the Act of 1924 before it can be said that the Legislature (in the face of the statute quoted herein) intended to impair or effect the grant of immunity extended the defendant under the 1922 Act.

Respectfully submitted,

HAROLD SIMANDL,  
*Counsel for Plaintiff-in-Error.*

## New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,  
Defendant-in-Error,  
*vs.*  
MICHAEL CORTESE,  
Plaintiff-in-Error.

*On Error.*  
**THREAT-  
ENING  
LETTERS.**

### BRIEF FOR THE STATE.

Michael Cortese, Frank Amistardi and Frank Rizzo were convicted in the Essex Sessions on an indictment charging, first, that on January 27, 1925, they did knowingly send to Reverend Ernest D'Aquila a letter demanding \$10,000 and threatening to kill him. The second count was the same as the first except that the date laid was January 30, 1925.

The indictment was drawn under Section 39 of the Criminal Procedure Act.

Cortese sued out a writ of error and the Supreme Court affirmed the conviction. He now seeks a review in this Court.

#### I.

The weight of the evidence and the motion to direct an acquittal.

*Specification No. 35 and Assignment No. 12.*

The fact that Father D'Aquila received two letters postmarked the days mentioned in the indictment, was not seriously questioned. They were written in broken English and demanded with dire threats, \$10,000. The first letter named as the place where he should bring the money, the

school at the corner of Lafayette street at 3 A. M. the next Sunday—February 1st. The second specified the corner of Prospect street at 1 A. M. (Exhibits S. 12-1 and S. 12-2.) Photostatic copies appear in the supplement to the State of Case.

Lafayette street runs east and west and Prospect and Congress streets run north and south, one block apart. The school is on the north side of Lafayette street and occupies the entire block from Congress on the east to Prospect street on the west.

The State did not attempt to prove that any of the defendants personally wrote the letters or mailed them but relied on circumstantial evidence to establish that the defendants caused the letters to be sent or were partners with persons unknown in the enterprise. As the offense charged was not a felony, all criminally concerned in it were principals.

Father D'Aquila promptly turned the letters over to the police and pursuant to an arrangement made with them, prepared a package containing a few dollar bills and much paper cut to the size of bills, to be deposited at the school. This he gave to his assistant, Father Fserrazza (Case, pp. 18 and 19). A taxicab was called and at one o'clock Sunday morning Fserrazza got in it, drove to the school and laid the package on the sidewalk. The priest re-entered the taxi and drove back to the rectory (Case, pp. 23 and 24).

Meantime Detectives Humbert Berardi, Victor Tortoriello and James Fletcher were hidden about the school. In the rear of the school, that is, north of it, are vacant lots running from Congress street to Prospect. Berardi was in an alleyway at 96 Congress street, opposite these vacant lots (Case, p. 30, l. 10). At 1:06 A. M.

he saw three men coming south on Prospect street. They stopped opposite the vacant lots and one of them who was found later to be Salvatore Falzano, left the other two.

“He started down east along the wall (that is, of the school) in a creeping-like manner, creeping up against the wall. At the same time, the other two men proceeded in the same direction but breaking away from the building and going out into the lots. They were walking at a distance of about three or four feet apart” (Case, p. 31, l. 35).

When Falanzo reached the northeast corner of the school, he turned south on Congress street as far as the entrance to the school, where he picked up the package left by Father Fserrazza. At that moment, Detective Berardi dashed out into the lots and ordered the two men there to hold up their hands, (Case, p. 32). He seized one man—the defendant Rizzo—and the other man broke away and ran north on Congress street. As the detective got to the sidewalk with Rizzo, he met Falzano coming north on Congress street with the package under his left arm. Berardi commanded “Put your hands up, I am a police officer.” Falzano then shot at Berardi, wounding him, and Berardi returned the fire. Falzano dropped the package and ran out in the street, where he fell (Case, p. 33). Falzano's wound proved mortal.

Rizzo meanwhile tried unsuccessfully to break away (Case, p. 34). When he was searched later, an automatic pistol was found on him.

Tortoriello and Fletcher were watching from the firehouse at the southwest corner of Lafayette and Congress streets. When they saw Berardi run across the street, they rushed out

of the firehouse (Case, pp. 42 and 43). Tor-toriello reached Falzano lying on the pavement and asked what he was doing there and the latter replied,

“I came here to get \$10,000 with Cortese” (Case, p. 53, l. 10).

The Court ordered the jury to disregard this evidence so far as it affected Cortese.

The police immediately—about 3 A. M., went to Cortese’s house and found him dressed in his trousers, shirt and socks, but without hat or coat (Case, p. 53, l. 38).

In answer to questions by County Detective Joseph Giuliano who arrived after the shooting and went with the other officers to Cortese’s house, Cortese denied that he had been out of the house that night or that he had been anywhere near the Lafayette street school or that he knew of any shooting at the school. A few minutes later, as a result of information received from Mrs. Cortese, Detective Giuliano asked Cortese, “Where are the blackhand letters you received?” He replied, “I have them in my pocket” and handed two letters to the detective (Case, p. 64, Exhibits S. 11-1 and S. 11-2). They were addressed to Cortese, and were to the same effect as the D’Aquila letters and the envelopes were postmarked the same dates but the place mentioned in the first Cortese letter was the Central Railroad Station between Lafayette and Broad street, and the second letter named one o’clock at the corner of Prospect street.

Giuliano again asked Cortese what he knew about the shooting at the school and he again replied that he knew nothing about it (Case, p. 65, l. 30). He was then taken to Police Headquarters where about 4 A. M., he made a state-

ment which was taken down in writing (Exhibit S. 13). This statement was as follows:

“Wednesday, January 28th I received a Black Hand letter and Saturday, January 31st I received another Black Hand letter stating that I had to bring \$10,000 at Prospect street at one o’clock. I did not go to the police with the two letters because I wanted to go and see myself who these people were, and then I would go to the police. Yesterday Saturday night about 10 P. M. Salvatore Falzone and another man came to my store. A few minutes later I talked to Salvatore Falzone alone and told him, look at these letters that I have received I would like to go to Officer Capodanno. He Salvatore dont read I then told him that the Black hand wants me to go this night to Prospect Street with \$10,000. S. Falzone replied, “Wait a while to-night I will go and see if I recognize any of them and then we will go to the police.” About 1 o’clock Sunday morning February 1st S. Falzone said “I will go now with my friend, dont you go out because they know you.” Then S. Falzone and his friend went out and I remained in the store.

“Short time later I went out, at that time I had my revolver in a holster on my person because I was afraid. I walked and reached the corner of Prospect Street and Ferry I looked up Prospect Street towards the school but did not see anyone. I then came back, when I reached near my house I heard shooting, at least five or six revolver shots. I then went upstairs, put my revolver in the bureau drawer and went to bed. Later the police came and took me to Police Headquarters, and made this voluntary statement.

“The person that I saw at Headquarters is the man who was with Falzone this morning” (Exhibit S. 13).

All the defendants testified in their own behalf. Cortese’s evidence was substantially the same as his written statement. Rizzo testified

that he was at Cortese's saloon about 12:30 A. M. with Falzone and Amistardi (Case, p. 104); that Cortese gave an envelope to Falzano who handed it to Amistardi and that Amistardi first and then Falzano left. A few minutes later, Cortese gave Rizzo a pistol, saying, "You take this and put it in your pocket and a block away from here you give it to me." Rizzo and Cortese then walked over to the school house (Case, p. 105). He saw Amistardi on the corner and Falzano watching him. Rizzo then said to Cortese, "Take your gun, I want to go away."

"Then after then, I saw a man coming out and he said to me 'Hands up' and I raised my hands" (Case, p. 106).

On cross examination, he was confronted with a statement which he had made to the police and admitted the truth of it, and especially that when they reached the school Cortese said to him,

"Go around the corner and there will be a man there who will give you something. Get it and give it to me and I will take care of it. \* \* \* If he shoots you, you shoot him with your revolver" (Case, p. 129, l 28).

That someone committed the crime charged in the indictment, was undisputed. The only question before the jury was whether the defendants were the guilty parties. The jury could properly infer from the evidence that the three men who arrived at the scene were the guilty ones. The manner of their approach—in skirmish formation—their readiness to shoot, the picking up of the package by Falzano, all indicated guilt.

The jury could also properly infer that Cortese was one of the three men—from his denial, when first questioned, that he had been out of the house that night, and his subsequent admission that he had gone part of the way to the school.

It was a question for the jury whether Cortese's explanation was believable. They might readily find that he had mailed to himself the threatening letters which he produced, merely as an "alibi." If Cortese was, in fact, being blackmailed, why did he not notify the police and why were he and his colleagues so ready to give battle? If they had merely desired to find out who were the blackmailers, they could have concealed themselves near the school without running any risk.

Lastly, if Cortese's statement to the police had been true, Falzano would not have been on the lookout for the package of money which the priest had just left at the school.

The motion to direct a verdict was properly denied.

When to the evidence adduced by the State, is added Rizzo's testimony, the case against Cortese becomes most convincing. The verdict was supported by the evidence.

## II.

### Rulings on Evidence.

#### *Assignments Nos 1, 2 and 10.*

These assignments relate to the overruling by the Court of objections to two questions asked Father D'Aquila by the Prosecutor (Case, p. 19, l. 40 and p. 20, l. 1) and the denial of a motion at the close of the State's case to strike out the testimony of the witnesses Tortoriello, Berardi and Fletcher (Case, p. 86, l. 39). The only ground urged in support of these assignments is that there was no evidence connecting Cortese with the offense charged in the indictment. If this is the fact, then clearly the verdict was against the

weight of the evidence, a matter which has already been considered.

*Assignment No. 5.*

The State called to the stand County Detective Joseph Giuliano to testify to admissions made by the defendant Rizzo. Mr. Giuliano's testimony was, in part, as follows:

"Q What did he say? A He said that in the morning he was downstairs in the cellar sawing wood with Falzano.

Q On the morning of Saturday? A Saturday morning, January 31st, and while he was there Falzano had been home there and someone wanted Falzano on the telephone; that Falzano went to the telephone and returned and said 'Cortese called me up and he wants to see me.' They later both went down—" (Case, p. 71, l. 15).

Cortese's counsel then objected on the ground that this evidence was hearsay as to Cortese. The Court properly overruled this objection, saying:

"The reference to Cortese by this witness is not binding on him but I cannot exclude the conversation between this witness and Rizzo for that reason, but the jury will be instructed that the statement concerning Cortese by Rizzo as given by this witness, is not binding on Cortese."

Furthermore, the Court charged at the request of Cortese's counsel:

"That the jury must not take into consideration any evidence offered during the trial which the Court stated, when such testimony was introduced, was not binding on Cortese" (Case, p. 199, l. 32).

There was no error in this regard.

*Assignment No. 6.*

This assignment brings up for review the action of the trial court in admitting in evidence over the objection of defendants, a revolver (Case, p. 76, l. 20 to p. 77, l. 15).

The only ground for the objection was that the revolver had been illegally seized. This ground was insufficient. *State v. Merra*, 137 Atl. 575.

*Assignments Nos. 13, 14, 15 and 16.*

These assignments all relate to the cross examination of the defendant Rizzo. Three of the questions were not answered and hence the defendant was not harmed by the ruling of the Court (Case, p. 118, l. 27, to p. 119, l. 21; p. 120, l. 31 to p. 122, l. 26 and p. 123, ll. 15 to 20).

Assignment No. 15 brings up the following testimony:

"Q Now, didn't you make that statement on the sixth of March? Didn't you tell Mr. Giuliano up at the jail that this defendant Cortese said to you on this morning of February 1st, when you two were in the middle of those lots and you had met Falzano and Falzano was crawling along the wall? (Objection made and overruled.) A I didn't say it" (Case, p. 122, l. 30 to p. 123, l. 12).

This question apparently related to the previous question in which Rizzo had been asked if Cortese had not said to him, "You go to the corner and you are going to get a package and give that to me and I will take care of it" (Case, p. 120, l. 32).

Rizzo had testified on direct examination that just before leaving the saloon, Cortese had given him a revolver and had told him to put it in his

pocket and to return it to Cortese when they had gone one block; that they then started and got as far as the school when Rizzo became frightened and said to Cortese, "Take your gun, I have got to go away." Then Officer Berardi came up and arrested him.

This direct examination certainly opened the door to cross examination on this conversation with Cortese (Case, pp. 105 and 106).

That the Prosecutor had ample reason to ask these questions is apparent from the written statement of Rizzo which was put in evidence as Exhibit S. 14, wherein he stated that Cortese said to him,

"You stop on the corner of the school because there is a man coming there with something and you take it and then give it to me and I will take care of you after" (Exhibits, p. 10).

On further cross examination by the Prosecutor, Rizzo admitted the truth of the above statement (Case, p. 129, ll. 18 to 35) and on examination by Cortese's counsel, Rizzo still maintained that it was true (Case, p. 133).

The cross examination of Rizzo by the Prosecutor was proper.

### III.

#### The Charge.

*Assignments Nos. 21, 22 and 23.*

*"Your duty, if the circumstances are drawn from the evidence before you and you are satisfied beyond a reasonable doubt as to the guilt of these defendants or any of them, is to convict. You may convict on circumstances"* (Case, p. 195, l. 13). \* \* \*

*"You have a right to consider everything that has been offered and allowed by the Court as legal evidence. You have a right to draw such inferences as you see fit from the evidence that is in the case.*

*"The basis for admitting testimony seemingly collateral to the occurrence as of that time—I am speaking as of at that time—is not of itself conclusive, but it is permitted on the basis that it might aid you in determining the issue as raised under this indictment. Therefore, you have a right to consider, not merely the question of the moment, that is, the question as to what transpired at one o'clock or a quarter of one, but you have a right to consider what happened from the time the letters were first received. You have a right to consider conversations between these parties touching upon the concert of action, if there were one, later at the Congress street or Lafayette street school"* (Case, p. 195, l. 28 to p. 196, l. 13).

Error is assigned on the portions of the charge italicized above.

Counsel for the defendants apparently does not contend that the charge is erroneous but rather that the Court should have amplified its instructions. Counsel concedes that a jury may base their verdict on circumstantial evidence but urges that the Court having informed the jury that this was their right, should have gone further and instructed them that if the circumstances could be reconciled with the innocence of the defendants, the jury should so reconcile them. Likewise, counsel admits that the jury should consider all the evidence but he says that the Court, when so instructing them, should have added that they might also consider the weak-

nesses of the State's case, that is, the failure of the State to present stronger evidence.

If defendant desired such additional instructions, he should have requested them, and having failed to do so, cannot complain that the Court's charge was not fuller.

*State v. Geltzeiler*, 101 N. J. L. 415, 127 Atl. 322, 128 Atl. 240.

The judgment of the Supreme Court should be affirmed.

JOSEPH L. SMITH,  
Prosecutor of the Pleas.

J. O. BIGELOW,  
Of Counsel.

## New Jersey Supreme Court

ESSEX COUNTY COURT OF SPECIAL SESSIONS.

---

STATE OF NEW JERSEY,		Plaintiff,
	VS.	
MICHAEL CORTEZ,		Defendant.

### WRIT OF ERROR.

STATE OF NEW JERSEY		}
COUNTY OF ESSEX		ss.

The State of New Jersey to the Judges of the Court of Oyer and Terminer, constituting the Court of General Sessions in and for the County of Essex: *Greetings:*

Because in the record and proceedings and also in the giving of judgment upon a certain indictment in the name of the State of New Jersey against Michael Cortez for carrying concealed weapons, heard and determined by our said Court of Oyer and Terminer, constituting the Court of Quarter Sessions in and for the County of Essex, manifest error hath intervened to the great damage of the said Michael Cortez, as from his complaint we have received information; we being willing in his behalf to correct the error in due manner, if any shall be, and that speedy justice be done to him, the said Michael Cortez, do command

*Writ of Error.*

you that if judgment thereon be given, then that you do distinctly and openly send under your seal the record and proceedings aforesaid with all things touching the same, to our Supreme Court to be held at Trenton on the 25th day of May, Nineteen Hundred and Twenty-five, and this writ that the recording and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error what of right and according to the laws and customs of New Jersey, ought to be done.

WITNESS, William S. Gummere, Chief Justice of our Supreme Court, at Trenton, the fifth day of May, in the year Nineteen Hundred and Twenty-five.

EDWARD J. KELLEHER,  
Clerk.

JOHN A. BERNHARD,  
Attorney.

Presented in open Court this 5th day of May,  
1925.

EDWIN C. CAFFREY,  
Judge.

**REMITUTOR.**

STATE OF NEW JERSEY }  
COUNTY OF ESSEX } ss.

I, Edwin C. Caffrey, Judge of the Court of Quarter Sessions and Special Sessions, do hereby certify and return to the Supreme Court of Judicature of the State of New Jersey, the Indictment, waiver of Trial by a Jury, report of Prosecutor and order of the Court and all other things touching and concerning the same together with the entire record of the proceedings had at the and the Judgment of the Court as by the Writ to me directed, I am Commanded.

(L.S.)

IN WITNESS WHEREOF, I have here  
to set my hand and the official seal of the  
Court at Newark, New Jersey, this  
day of May, A. D. 1925.

Judge of the Quarter Sessions  
and Special Sessions of the  
Court, Essex Co., N. J.

## INDICTMENT.

STATE OF NEW JERSEY  
 COUNTY OF ESSEX                    ss.

BE IT REMEMBERED, that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex on the second Tuesday in December, in the year of our Lord, one thousand nine hundred and twenty-four, by the Honorable William S. Gummere, Chief Justice of the Supreme Court of Judicature, of the State of New Jersey, and holding the said Court of Oyer and Terminer, in and for the County of Essex, New Jersey, by the oath of John A. MacArthur, Charles T. Moog, Richard Pfeiffer, George J. Zisch, Geo. V. Goehring, John C. Krueger, James F. Collins, Percy B. Menagh, Otto Kuhn, Wallace Zelif, Charles D. Brady, George Garrabrant, Arthur A. Blaicher, John B. Wright, John L. Becker, Michael J. Blessington, Walter M. Aikman, Jr., Platt Adams, James A. Whelan, Clarence P. Hurd, Robert Baunach, Frank Schwartzwalder, Milton O. Weingarten, good and lawful men of the said County of Essex, duly commissioned 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 Essex, it is presented in manner and form following, to wit:

Essex County, to wit: The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that Michael Cortese on the first day of February, in the year of our Lord, one thousand nine hundred and twenty-five at the City of Newark, in the County of Essex aforesaid

*Indictment.*

unlawfully did carry a pistol in and about his person, 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.

J. O. BIGELOW,  
 Prosecutor of the Pleas.

**WAIVER.**

To John O. Bigelow,

Prosecutor of the Pleas in and for the County of Essex, and State of New Jersey; I, Michael Cortese lately charged by indictment (being No. 5 April Term, 1925) with the offense of—said offense being triable before the Court of Quarter Sessions in and for the County of Essex, hereby waive trial by jury, of and under the said indictment, and request to be tried before the Court of Special Sessions in and for the County of Essex, in which county said indictment has been found, in the manner and form provided by an Act entitled, "A supplement to an Act entitled, 'An Act relating to courts having criminal jurisdiction and regulating proceedings in criminal cases,' (Revision of one thousand eight hundred and ninety eight) approved June fourteenth, one thousand eight hundred and ninety-eight," and which supplement was approved March twenty second, eighteen hundred and ninety nine.

Dated April 23, 1925.

(Signature) MICHELE CORTESE.

To the Honorable Edwin C. Caffrey:

Judges of the Court of Special Sessions of the County of Essex:

Report is hereby made of the above request, and application is made for the trial of Michael Cortese, the person making same, and according to the provisions of the act specified therein, unless you are of the opinion that the public interests will be benefited by denying said request.

Yours respectfully,

J. O. BIGELOW,  
Prosecutor of the Pleas,  
County of Essex.

**ORDER.**

Essex County,

I, Edwin C. Caffrey, a Judge of the Court of Special Sessions and a Judge of the Court of Quarter Sessions in and for said County of Essex, do not think the public interest will be benefited by denying the foregoing request of Michael Cortese and I hereby grant same, and the application now made on the above report of said request by the Prosecutor of the Pleas of said County for the immediate trial of Michael Cortese, the person who has made said request, and a Session of the Court of Special Sessions in and for the County of Essex to be held at the Court House, in said County on Thursday the 23rd day of April, A. D. at ten o'clock in the forenoon, is hereby appointed to try said Michael Cortese for the offense with which he is charged, under the said indictment, and the said indictment is ordered to be filed in the said Court of Special Sessions for that purpose.

Let a capias issue for the said—and process for witness. Witness my hand, this 23rd day of April, A. D. 1925.

EDWIN C. CAFFREY,  
Judge of the Court of Special Sessions and  
Judge of the Court of Quarter Sessions in  
and for the County of Essex.

On the fifth day of March, A. D., Nineteen hundred and twenty five, on which day the said Indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, and the said Justice did then and there order the said

## CASE.

ESSEX COUNTY COURT OF SPECIAL SESSIONS  
Tuesday, April 28, 1925.

STATE OF NEW JERSEY	}	On Accusation No. 28,788,
vs.		Apr. T., 1925, for
MICHAEL CORTESE.		Carrying Concealed Weapons.

Before Hon. Edwin C. Caffrey, Judge.

For the state appears J. Victor D'Aloia,  
Assistant Prosecutor of the Pleas for Essex County.

For the defendant appears Peter A. Cavichia; John A. Bernhard, of counsel.

MR. D'ALOIA. The State reads into the record the testimony given by Cortese on his trial. Mr. Bernhard stipulates that this testimony was given as I read it and properly transcribed by the official stenographer at the trial of the case of the State of New Jersey against Michael Cortese, Frank Rizzo and Frank Amistardi. The testimony to be read in is as follows:

It is consented to that these questions indicate that the defendant was in front of Bentelli's garage on Prospect street.

MR. BERNHARD. All right.

MR. D'ALOIA. And that at that point he was asked—this happened in Cortese's testimony: "Well, did you hear them"—meaning shots—"from that direction, yes or no?"

## Case.

*Answer:* Yes, five or six shots." The next question: "And you had this thing with you (showing a revolver)?" The answer to that question is: "Yes."

THE COURT. Where was this supposed to be?

MR. D'ALOIA. On Prospect street, in front of Bentelli's garage.

MR. BERNHARD. You said you would put in the permit.

MR. D'ALOIA. You put in the permit; I have it in my files.

MR. BERNHARD. All right.

"Ex. D2- HTC.

## No. 5415 PERMIT TO CARRY WEAPON

APPLICATION having been made for permission to carry a weapon in compliance with a supplement to an Act, entitled "An Act for the punishment of crimes (Revision of 1908), approved March 28th, 1912,"

PERMISSION IS HEREBY GRANTED to Michael Cortese Residing at 47 Ferry st., Newark, Essex County, N. J., to carry a revolver concealed about his person in any part of the State of New Jersey, for a period of one year, (unless sooner revoked) for the purpose of protecting himself.

Newark, N. J. . . . . 192. . . Fred Briedenbach. .  
Mayor.

Case

To be recorded in the County Clerk's office within ten days after granting, otherwise it is of no effect. Fee \$1:00

John H. Scott

Signature x Michael Cortese.

FINGER PRINTS

Picture of Michael Cortese.

R. Thumb R. Index R. Middle. [Reverse side of permit.]

Part 3 Permit to carry weapon No. 530

DEPARTMENT OF PUBLIC SAFETY.

The City of Newark, N. J. SS.

Feb. 11, 1924.

To all persons to whom these presents shall come, Greeting:

Know ye that... Michael Cortese.....

(whose photo, finger prints and signature are here attached)

Of 47 Ferry st. Newark, N J.

having complied with all of the provisions and requirements set forth in an ordinance entitled "An Ordinance to License and Regulate the Purchase, Sale, Ownership and Carrying of Fire Arms, Dangerous and Deadly Weapons and Ammunition for Fire Arms." (Adopted by the Board of Commissioners of the City of Newark, N. J., February 19, 1920), is hereby granted permission to have in his possession a revolver while in the City of Newark, N. J., during the period this permit is in force.

Case

Weapon.....Revolver Maker....Spain No. 170517 Style BK open Calibre 32 New or second hand.

This permit is given under my hand and seal this 11th day of Feb. 1924.

Approved by Michael T. Long

Chief of police.

M. P. Duffy,

License Commissioner

William J. Brennan

Director Department of Public Safety."

STATE RESTS.

MICHAEL CORTESE, defendant, sworn. DIRECT EXAMINATION by Mr. Bernhard.

Q. When the police officers, Mr. Giuliano and others, came to your house on the night of February 1st, about midnight or shortly after, and found a revolver in the drawer in your house, you had a conversation with Mr. Guiliano about that revolver, did you not? A. No, sir.

Q. Did you have a permit to carry a revolver? A. Sure.

Q. There was a revolver here on the day of your trial, wasn't there? A. Yes.

Q. And was this the permit you had to carry that revolver? A. Yes, sure.

Q. Did you know that the legislature had passed a law revoking that permit?

MR. D'ALOIA. I object to that.

THE COURT. I will allow it.

A. No, sir.

Q. Did you receive notice from the sheriff, or any other person, that your permit had been revoked? A. No, sir.

*Case*

CROSS EXAMINATION by Mr. D'Aloia.

Q. Well, you went out that night with the revolver, didn't you? A. Yes.

THE COURT. Where did you go?

WITNESS. Prospect street.

DEFENDANT RESTS.

MR. D'ALLOIA. Well, with the exception of reading into the record the permit, as Mr. Bernhard requests, we rest.

THE COURT: Is that the revolver?

MR. D'ALLOIA. Yes, sir. It is offered in evidence, holster and all.

[Marked Ex. S1.]

MR. BERNHARD. I move now, just for the sake of the record, that the act under which Mr. Cortese carried this revolver permitted him to carry it and that the superseding act to the original act under which the permit was given to Mr. Cortese to carry this revolver is unconstitutional.

THE COURT: You may have your exception. Defendants' counsel prays an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

Judge.

NOTE:—THIS APPLICATION MUST BE  
MADE IN DUPLICATE

*Case*

Newark, N. J., February 5th, 1925.

To the Chief of Police of the City of Newark:

I hereby make application for permission to carry a revolver concealed upon my person, pursuant to the provisions of Section 2 of Chapter 137, Laws of 1924, entitled "A further supplement to an act entitled, 'An act for the punishment of crimes' (Revision of 1898), approved June fourteenth, one thousand eight hundred and ninety-eight."

The reason for such application for a permit is I am a director of the Caseta Loan Association and I carry large sums of money.

Place and Date of Birth November 18th, 1882—Italy. White? If not native born, give date and place of naturalization Hackensack, Bergen Co., N. J., 1922. Occupation Wholesale butcher. Name and address of present employer 47 Ferry street, Newark, N. J.

Have you ever been charged with the commission of a criminal offense? No.

If so, state place, time, nature and disposition of the charge. Have you ever been an inmate of any public or private hospital or other institution maintained for the care and treatment of mental disease or disorders? No. If so, state time, place and circumstances.

Have you ever had a license to carry a revolver or other firearm refused or revoked? No.

Where have you resided for the past five years?  
47 Ferry st and 3 Railroad Pl

Michele Cortese

Applicant.

47 Ferry street, Newark.

Address.

## ASSIGNMENTS OF ERROR.

NEW JERSEY SUPREME COURT

STATE OF NEW JERSEY, Defendant-in-Error	}	In Error.
VS		
MICHAEL CORTESE, Plaintiff-in-Error		

## NEW JERSEY—SS:

Afterwards, that is to say, on the first day July, 1925, before our said Supreme Court of the State of New Jersey comes the said Michael Cortese by Harold Simandl, his attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in said bill of exceptions and also in giving the judgment aforesaid, there is manifest error in this to wit:

1. That the said Court before whom &c. at and upon the trial of the said issue so joined, between the State of New Jersey and the said Michael Cortese erroneously rendered a judgment for the State, because there was no evidence that the defendant did intentionally carry a pistol in and about his person, contrary to the form of the Statute in such case made and provided.

2. That the said Court before whom &c. at and upon the trial of the said issue so joined, between the State of New Jersey and the said Michael Cortese erroneously rendered a judgment for the State and against this defendant, because the Act of the Legislature under which the indictment was laid and for which crime the defendant was convicted is unconstitutional.

3. That the said Court before whom &c. stand upon the trial of the said issue so joined, between

*Assignments of Error.*

the State of New Jersey and the said Michael Cortese erred in finding a verdict for the State and against the defendant, because there was no evidence that the defendant did knowingly carry a pistol in and about his person, contrary to the form of the statute in such case made and provided.

4. That the said Court before whom &c. at and upon the trial of the said issue so joined between the State of New Jersey and the said Michael Cortese erred in finding a verdict for the State and against the defendant, because there was no evidence that the defendant did wilfully carry a pistol in and about his person, contrary to the form of the statute in such case made and provided.

There are divers other errors in the record and proceedings aforesaid, and in the giving of judgment and passing of sentence aforesaid, by reason of which the said judgment and sentence should be reversed and set aside.

Wherefore the said Michael Cortese prays that the said judgment and sentence may be reversed and annulled and altogether held for nothing and that he may be restored to all things which he has lost by occasion thereof.

HAROLD SIMANDL,  
Of Counsel for Plaintiff-in-Error.

## REASONS FOR REVERSAL

NEW JERSEY SUPREME COURT

STATE OF NEW JERSEY, Defendant-in-Error	}	In Error.
vs		
MICHAEL CORTESE, Plaintiff-in-Error		

And now comes the said Michael Cortese by Harold Simandl, his attorney and says that in the record and proceedings aforesaid and also in the matter recited and contained in the said writ of exceptions and also in giving the verdict and judgment aforesaid, there is manifest error and the said Michael Cortese says that said judgment should be reversed and assigns the following reasons or causes:

1. Because the Trial Court rendered a judgment for the State, because there was no evidence that the defendant did intentionally carry a pistol in and about his person, contrary to the form of the Statute in such case made and provided.

2. Because the Trial Court rendered a judgment for the State and against this defendant, because the Act of the Legislature under which the indictment was laid and for which crime the defendant was convicted is unconstitutional.

3. Because the Trial Court erred in finding a verdict for the State and against the defendant, because there was no evidence that the defendant did knowingly carry a pistol in and about his person, contrary to the form of the statute in such case made and provided.

*Reasons for Reversal.*

4. Because the Trial Court erred in finding a verdict for the State and against the defendant, because there was no evidence that the defendant did wilfully carry a pistol in and about his person, contrary to the form of the statute in such case made and provided.

5. Because the verdict was against the weight of the evidence.

Wherefore, because the aforesaid reasons or some of them constitute error prejudicial to the said plaintiff-in-error, he the said Michael Cortese prays that the said judgment and sentence be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion thereof.

HAROLD SIMANDL,  
Of Counsel for Plaintiff-in-Error.

Filed July 26, 1926.

*Opinion*

## New Jersey Supreme Court

No. 21, Jany. T., 1926.

STATE OF NEW JERSEY,

—vs—

MICHAEL CORTESE,

Error to Essex Special Sessions.

Argued before Gummere, C. J., and Justices Kalisch and Campbell.

For the plaintiff-in-error, Harold Simandl.

For the State, John O. Bigelow, Prosecutor of the Pleas.

### PER CURIAM:

The defendant was convicted upon an indictment charging him with carrying a pistol concealed upon his person, in violation of the statute of 1924. The only ground upon which that conviction is sought to be reversed is that the proofs conclusively showed that the defendant had not violated the statute in question, but that, on the contrary, he had at the time of his arrest a valid permit to carry a pistol, which was then in force. He produced in evidence at the trial in support of this contention a permit which was undated, but which, as he testified, was issued to him on February 11, 1924, pursuant to the authority conferred by the statute of 1922, and which was signed by the Mayor of the City of Newark; and he asserts that this permit was not only



True copy.  
L. S.

NEW JERSEY COURT OF ERRORS  
AND APPEALS

NEW JERSEY, ss:

THE STATE OF NEW JERSEY TO OUR  
SUPREME COURT

GREETING:—

Because in the record and proceedings and also in giving of judgment in a certain plaint which was in our Supreme Court before you, between State of New Jersey defendant-in-error and Michael Cortese, plaintiff-in-error, in error to the Essex County Court of Special Sessions, manifest error hath intervened to the great damage of the said defendant as by his complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice be done to the party aforesaid, do command you that if judgment be thereupon given, then you distinctly and openly send, under your seal, the record and proceedings and plaint aforesaid with all things touching and concerning the same, to our Court of Errors and Appeals in the last resort in all causes at Trenton, on the 8th day of July next (together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be done thereupon for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done.

WITNESS our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the 18th day of June, nineteen hundred and twenty-seven.

JOSEPH B. FITZPATRICK.  
*Clerk.*

HAROLD SIMANDL,  
*Attorney.*

A true copy.

JOSEPH B. FITZPATRICK,  
*Secretary of State.*

#  
No. 5.4.15

APPLICATION  
a supplement to an  
proved March 28th, 19  
PERMISSION IS

Residing at... 47  
to carry a revolver  
period of one year,  
Newark, N. J.,.....

To be recorded in  
of no effect. Fee, \$1  
Signature X. *[Signature]*



PART 3

To all persons to  
Know Ye that.....

having complied with  
"An Ordinance to L  
Arms, Dangerous an  
of Commissioners of  
to have in his poss  
period this permit is

Weapon ... *[Signature]*  
No. 1.7.0.5.1.7

This permit giv  
Approved by. *[Signature]*

M. P. DUFFY,  
License Commiss

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EXHIBIT D

#  
No. 5415 PERMIT TO CARRY WEAPON *Ev Dr 11/1*

APPLICATION having been made for permission to carry a weapon in compliance with a supplement to an Act entitled "An Act for the punishment of crimes (Revision of 1908), approved March 28th, 1912,"

PERMISSION IS HEREBY GRANTED TO *Michael Cortese*  
Residing at *47 Cherry St* Newark, Essex County, N. J.,  
to carry a revolver concealed about his person in any part of the State of New Jersey, for a period of one year, (unless sooner revoked) for the purpose of protecting himself.  
Newark, N. J., 192

To be recorded in the County Clerk's office within ten days after granting, otherwise it is of no effect. Fee, \$1.00.

Signature *Michael Cortese* Mayor  
*John A. Scott* County Clerk



FINGER PRINTS		
R. THUMB	R. INDEX	R. MIDDLE

REVERSE SIDE

PART 3 PERMIT TO CARRY WEAPON No. 530

DEPARTMENT OF PUBLIC SAFETY  
THE CITY OF NEWARK, N. J. SS.

To all persons to whom these presents shall come, Greeting: *Oct 11 1924*

Know Ye that *Michael Cortese*  
(Whose Photo, Finger Prints and Signature Are Here Attached)  
of *47 Cherry St* Newark, N. J.

having complied with all of the provisions and requirements as set forth in an ordinance entitled "An Ordinance to License and Regulate the Purchase and Sale, Ownership and Carrying of Fire Arms, Dangerous and Deadly Weapons and Ammunition for Fire Arms." (Adopted by the Board of Commissioners of the City of Newark, N. J., February 19, 1920), is hereby granted permission to have in his possession a *Revolver* while in the City of Newark, N. J., during the period this permit is in force.

Weapon *Revolver* Maker *Spain*  
No. *170517* Style *W. O. Pease* Calibre *32* No. or second hand.

This permit given under my hand and seal this *11th* day of *Feb* 192*4*

Approved by *Michael P. Duffy* Chief of Police

M. P. DUFFY, License Commissioner  
WILLIAM J. BRENNAN, Director Department of Public Safety (over)

53  
**New Jersey Court of Errors and Appeals**

STATE OF NEW JERSEY, <i>Defendant-in-Error,</i>	} In Error to Supreme Court. Sur Indictment Carrying a Weapon. Brief of Plaintiff- in-Error.
—vs—	
MICHAEL CORTESE, <i>Plaintiff-in-Error,</i>	

STATEMENT UNDER RULES

The defendant was indicted "that on the first day of February in the year of Our Lord One Thousand Nine Hundred and Twenty-Five, at the City of Newark, in the County of Essex aforesaid, he unlawfully, did carry a pistol in and about his person contrary to the form of the Statute, etc." He signed a waiver of trial by jury and the matter was tried in the Court of Special Sessions. At the trial certain testimony of another trial was read into the record wherein it appeared that the defendant did have with him on Prospect Street on said first day of February a revolver. The defendant, however, placed in evidence a valid written permit to carry the weapon, issued to him on February 11th, 1924, in accordance with the provisions of Chapter 138, Pamphlet of Laws 1922, page 238, granting him permission to carry a weapon "for a period of one year from date of issue, unless sooner revoked by the officer granting same."

It appears that subsequent to the issuance of the permit aforesaid, under Chapter 138 of Laws of 1922, the legislature enacted Chapter 138 of the Laws of 1924, effective July 1, 1924, which among other things provided:

"That all permits issued pursuant to the provisions of this act shall expire on the 31st day of December subsequently to the date of issue and may thereafter be renewed for a period of five years."

Upon conviction the Trial Court sentenced the defendant to State's Prison for a minimum term of one and one-half years and a maximum term of three years at hard labor. Upon review the Supreme Court affirmed the judgment (opinion Case, P. 22). From this judgment the defendant sued out this writ.

#### QUESTIONS INVOLVED

There are three questions involved.

(1) Did the later statute of 1924 render the permit invalid?

(2) Was there a sufficiency of evidence tending to prove that the permit had been recorded in the County Clerk's office, in compliance with the terms of the Statute?

(3) Was the verdict contrary to the weight of evidence?

The second question will be argued as Point I in this Brief.

The first and third questions will be argued under one heading, Point II in this Brief.

#### THE SUPREME COURT OPINION

The Supreme Court decided the first question in favor of the Plaintiff-in-Error. In answer thereto it decided: "*It may be conceded that, if the permit was valid when issued it was not rendered void by the later Statute.*"

With respects to the second question the Court was of the opinion that there was no proof offered tending to show that the permit had been recorded in the County Clerk's office, in compliance with the statute.

#### ARGUMENT

##### POINT I

THERE WAS SUFFICIENT PROOF TO SUPPORT A FINDING THAT THE PERMIT HAD BEEN RECORDED IN COMPLIANCE WITH THE TERMS OF THE STATUTE.

The Trial Court, sitting in Special Sessions, was judge of both law and fact.

The permit was admitted in evidence *without objection*. (See case, P. 11).

*The permit had been in the files of the State until it was offered in evidence.*

Case P. 11.

Mr. D'Aloia: "You put in the permit; I have it in my files."

The State offered no evidence tending to show that the permit *had not been recorded within ten days of its issuance.*

The Trial Court, as judge of the facts, was permitted under the law to arrive at a finding of fact by drawing any fair and reasonable inferences, arising out of the evidence or lack of evidence. He had a right to indulge in such reasonable presumptions as the facts before him, taken together with the statute under which the permit was issued, would justify.

A photostatic copy of the permit placed in evidence can be found on the last page of the State of the Case.

An inspection discloses that it is a printed form bearing the caption: "Permit to Carry Weapon."

A reading of the Statute P. L. 1922, Chap. 138, page 238, discloses the procedure necessary to obtain a valid permit.

The statute provides for a *written permit* from the *MAYOR* of the City, etc., in which the applicant is a *resident*. Its provisions further contemplate that after the *written permit* has been *granted by* the *MAYOR* of the City, etc., in which the applicant *County Clerk's Office* within ten (10) days thereafter; otherwise, it is deemed revoked and cancelled.

Turning again to the form of permit, it is apparent that it has been prepared and printed with the statute in mind, for provision is made therein for each step of the procedure outlined in the statute.

Blank spaces are provided for the *NAME* and the *RESIDENCE* of the permittee, and for the *CITY* and *DATE* of the granting of the *MAYOR* and the *COUNTY CLERK*. A space is likewise provided wherein the *PERMIT NUMBER* assigned by the County Clerk may be written.

The Trial Court had a right to fairly and reasonably infer from an inspection of the form and a comparison with the Statute, that the Mayor, having regard for the proper fulfillment of his duty under this statute, which required his grant to be writing, provided this writing in order to comply with the terms of the Statute, and also clearly indicate the *TIME, DATE* and *NATURE* of his action, to those, who also had a duty with respect thereto, under the statute. In other words, the Trial Court had a right to infer that this permit had been prepared by an official who desired to comply with, and expedite the procedure outlined under the statute. Having fairly and reasonably drawn the inference that the permit in evidence was an official form, drawn to comply with the Statute, the Trial Court could further reasonably infer that the *signature* of the County Clerk appearing upon the exhibit was *authentic* and *genuine* and presumed to have been placed thereon by him in the regular performance of his *official* duty under the statute, and in due and proper execution of that duty. This requires the Court to again compare the statute with the official form.

An examination of the statute discloses that no certificate is required by the County Clerk. An examination of the official form discloses that the sole provision made therein to evidence the County Clerk's action is the *blank space* above the words,

"County Clerk." The form does not provide any space for a certificate of the County Clerk, other than that which has been hereinbefore referred to. From this fact, the Trial Court could reasonably infer that it was intended that the County Clerk's *signature* would be the sole evidence of his full and valid compliance with the terms of the statute. To infer otherwise would require the Court to conclude that notwithstanding the fact that this form was prepared by an official with a view to expediting and complying with a procedure laid down in the statute, yet no provision was made therein to evidence one of its most necessary requirements; and that in lieu thereof, provision had only been made for a mere notice or warning. The Court should not presume that an official did not fully and correctly perform his duty.

Having fairly and reasonably inferred that it was intended that the only evidence of the County Clerk's action with respect to the grant in writing of the Mayor, was his signing of the same, in the blank space provided therein for his signature; the Trial Court, which is by statute a court of record, of which the County Clerk is clerk, could take judicial notice of the fact that the signature thereon was the *genuine and authentic signature* of the duly elected *County Clerk of the County of Essex*.

In the case of *Mahnken v. Meltz*, 116 Atl. 794, this Court held:

"\* \* \* \* \* the affidavit is endorsed in 'District Court of the City of East Orange' and that the Court will take *official cognizance* of the fact that Mr. Conroy was the

legally appointed clerk of that tribunal."

This Court in the same case held:

"\* \* \* \* \* The District Courts are courts of record and this court will take *official cognizance* of the names and *signatures* of their clerks."

No evidence was offered disputing the authenticity or genuineness of his signature. Having arrived at the only logical and legal conclusion, i. e., that the signature of the County Clerk appearing on the exhibit was the authentic signature of the County Clerk of the County of Essex, placed thereon in performance of his official duty, the Court had the right to presume, a fortiori, the due and legal execution of his duty, or in other words, what when the "form" was presented at his office for record, he placed his name thereon in performance of, and in due execution of, his duty under the statute.

The statute making it the duty of the County Clerk to place his name thereon, *after* the Mayor had *granted in writing* the permit, it would be illogical and unreasonable to presume he had attached his name thereto *before* the Mayor had granted the permit. Only such an unreasonable inference can support the opinion of the Supreme Court wherein it said "the statement itself is a mere notification to the holder of the permit as to what he must do in order to have it continue to be valid."

The statute does not require the County Clerk to notify the recipient of the grant of the Mayor, of his duty. True there is a notice printed on the form, but this notice, as we will later observe, is just as

effective, without signature, as with a signature. The signature would be superfluous, and if it is kept in mind that this form was prepared with a view of compliance with the statute, why should we presume that such superfluous and unrequired provisions had been placed therein, when by reasonable and logical reasoning, it can be determined that only provision was made for *proper* compliance with the statute?

The established law prohibits any such illogical presumption. The Trial Court in the absence of evidence to the contrary, was bound to presume that the County Clerk, who was acting in his official capacity properly and legally executed his duty under the statute.

This Court in the case of *Mayor, etc., ads State Batten et al. Pros. 32 N. J. L. at 458, held:*

“Every reasonable intendment is to be made in favor of the conduct of those who are clothed with a public trust, and are acting the line of their duty \* \* \* \* \*”.

“\* \* \* \* \* Where acts are of an *official nature* or require the concurrence of official persons a resumption arises in favor of their due execution; it is said on such occasions.”

In light of what has been herein argued, let us assume we are an applicant for a permit under the provisions of the statute. By adopting this method of reasoning, the correctness and reasonableness of the argument becomes startling apparent.

Application having been made for a permit, and the Mayor, having granted the application, what

would be required to be done in order that the favored applicant might receive a valid permit?

The Mayor, required to evidence his grant in writing, would take the form officially provided, and therein insert the name and residence of the applicant and sign and date the same in the space provided on the form for that purpose. The Mayor, having *performed* his duty would turn the form over to the applicant. In the form would still remain the *blank spaces*; viz: *Permit No.* and “\_\_\_\_\_”

County Clerk

It has not as yet become a valid permit. Any one examining it in this uncompleted state could readily perceive that fact. The statute provides that it has to be recorded in the County Clerk's office within ten days. While the applicant is presumed to know the law, the official form, attempts to safeguard the applicant. Thereon is printed the warning, “To be recorded in the County Clerk's office within ten days after granting; otherwise, it is of no effect. Fee \$1.00.” No signature is required to make this notice effective. The applicant thereafter presents the same to the County Clerk's office for record and thereupon that official, by looking at the *grant in writing* of the Mayor can upon its face see the *date* of the *grant* and determine the *validity* of the *recording*. If ten days has not elapsed, he records the same in his records, and thereupon *places* his signature in the space provided therefor and assigns to it a *Permit No.* *He attaches no certificate thereon, first, because the statute does not require a certificate, and second, because there is no provision for it on the form...* Thus we perceive that if the permittee had taken every essential step required by the statute, and the official had duly performed their statutory duty, *we would be possessed of a document*

*in all respects the same as the one which this defendant offered in evidence at the trial.*

On the other hand, if the assumed applicant had presented the grant after the elapse of the ten days at the office of the County Clerk, that official would *properly refuse to record it and would not place his signature in the blank space above his name*, and thus anyone examining the form could readily perceive that the law had not been complied with the grant of the Mayor deemed revoked.

The reasonableness of the inferences which the plaintiff-in-error urges upon the Court, it is contended have by this discussion been made to fully appear.

The fact that the Mayor or County Clerk did not *date* the permit as was his duty, cannot affect the rights of the plaintiff-in-error.

This Court said in *Mahnken vs. Meltz supra* :

“Of course, the clerk’s failure in indorse a minute of the filing upon the paper lodged with him cannot operate to destroy the rights of the party lodging it for filing. Any such doctrine would be intolerable.”

As was pointed out at the beginning of the argument the permit was *taken from the files of the State*.

The permit was offered in evidence without objection, and *no evidence was offered by the State to prove it was invalid*.

The State, who had it in their possession had full

opportunity to determine whether it had been recorded within ten days as the statute required.

If any evidence of its invalidity existed, it was offered ample opportunity to produce such evidence. From the state’s failure to produce any evidence of the invalidity having had possession of the permit, the Court had a right to presume it had none to offer.

It is contended, therefore, in the absence of any evidence to the contrary, that the Court had sufficient evidence to find that the permit had been recorded in the County Clerk’s office in full compliance with the terms of the Statute.

#### POINT II

#### THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

With respect to the argument which follows, the Supreme Court decided :

“It may be conceded that, if the permit was valid when issued, it was not rendered void by the later statute.”

With respect to this finding, plaintiff-in-error has no complaint.

It is however, deemed prudent, to include in this brief substantially the argument made in the Supreme Court on this phase of the issue.

(A.) The act of 1924 was prospective and not retrospective in its operation.

(B.) The defendant came within the exception of the operation of the statute under which he was convicted and sentenced.

(C.) The necessary intent and wilfulness to violate a statute was not proved.

The defendant is charged with an offense on February 1st, 1925. He placed in evidence a valid written permit issued February 11th, 1924. It was issued prior to the enactment of Chapter 137 of the Laws of 1924, which act did not become effective until July 1st, 1924. The permit was issued under the supplement to provisions of the Crimes Act 1890, Chapter 138 of the Laws of 1922. Chapter 138, Laws of 1922 among other things provides:

"Nor shall this act apply to any person having a written permit to carry a black-jack-revolver, pistol, or other fire-arms obtained from the Chief of Police of the City, Town or Municipality in which such licensee is resident, or is engaged in business or employment or from the Mayor of such City, Town or Municipality or from the judge of the Court of Common Pleas of the county in which such applicant resides, or where such licensee does not reside in a city, town or other municipality in which there is a chief of police, then from the mayor or other presiding officer of the governing body of such municipality. Such permits shall be issued for good cause shown at the place of residence of the person obtaining the same or at the place where he is engaged in business or employment and when issued shall be in force in all parts of the State *for a period of one*

(1) *year from date of issue*, unless sooner revoked by the officer or officers granting the same, and said permit shall be dated and recorded in the office of the clerk of the county where granted within ten (10) days after the granting thereof, and in the event of the recipient thereof failing to record the same, as herein provided, said permit shall be deemed and taken to be revoked and canceled."

Under Chapter 138 of the Laws of 1922 this permit would not expire until February 11th, 1925.

Chapter 137 of the Laws of 1924 which became effective July 1st, 1924, provides among other things:

"All permits issued pursuant to the provisions of this act shall expire on the 31st day of December subsequent to the date of issue and may thereafter be renewed for a period of five years."

It is not contended that the defendant had a permit under Chapter 137 of the Laws of 1924, but it is contended that Chapter 137 of the Laws of 1924 was *prospective in its operation* and not retrospective and that thereby the permit which he had obtained on February 11th, 1924 was still effective and in operation and fully excepted the defendant from the operation of the Crimes Act on February 1st, 1925.

In the case of Baur vs. Court of Common Pleas in and for the County of Essex, 88 N. J. Law 128, the Court lays down the principle:

"The well recognized and established rule is that a statute shall have prospective effect only."

It is noted that the Legislature does not use the words "all permits *heretofore issued* or issued pursuant to the provisions of this Act, shall expire etc." There is no express provision which takes away the right of license already vested in the defendant, and it is submitted that the Act of 1924 does not revoke by implication any permits issued under the 1922 Legislation.

State, Baker et als vs. Scudder, Col. of Princeton, 32 N. J. Law 203 on page 207:

"The Courts will not construe law as retrospective unless such claim appears to have been the intention of the Legislation."

State, Alden, Pros. vs. Newark, 40 N. J. Law 92 on page 96 where the Court in attempting to determine the construction of the phrase "shall have been" lays down the rule as follows:

"The court will not assume that the draughtsman of the act was a bad grammarian, in order to make the law retroactive when there is no other expression in it which indicates such a purpose. *There will be no intendment in favor of a retroactive construction.* The rule is to construe all legislative acts *prospectively*, unless there be a *clearly expressed purpose* to make them retrospective, and the language used must be *so clear and imperative as not to admit of*

*doubt. This intent must appear by express words or by necessary implication.* Belvidere vs. Warren R. R. Co. 5 Vroom 200; Baldwin v. Newark, 9 Vroom 158; Deegan v. Morrow, 2 Vroom 136; Sedwick on Stat. and Const. Law 188 etc." (Italics mine.)

The court of Errors and Appeals discussing the same question in the case of Ditizens' Gas Light Company vs. Alden, 44 N. J. Law, 648 on page 653 says:

"Laws, generally, are enacted for the regulation of future affairs and conduct, and to establish the basis on which rights may thereafter under them be rested, and are not usually designed to alter or affect the quality or legal relations of *past acts and concluded transactions, much less to disturb rights which have arisen under laws running concurrently with their birth.* Hence we do not look for or expect in any enactment that it shall be operative as of time prior to its own existence; and before we are permitted to ascribe to it such purpose, there must be found in the law such clear and indubitable expression of the legislative design as precludes any other reasonable interpretation of the words used. The rule of the courts is, that retroactive effect will not be given to a statute *when the words in it can be construed as designed to make it prospective only.* Williamson v. N. J. S. R. R. Co. 2 Stew Eq. 311. All legislation is framed or presumed so to be, in view of this conspicuous canon of construction governing in courts where the duty

of interpretation is reposed. *And when the legislature intend to give to law of their enactment operation upon the past, they will and must do it with such choice of words as places it beyond the realm of doubt.* I have not examined this statute in view of the question whether if retrospective effect were given to it, it would disturb or imparivested rights. It is needless to say that it would be ineffective in that, on rules more cogent than those of mere construction." (Italics mine.)

It is urged that the permit in this case can be placed on the same basis as "transactions" alluded to in the decisions hereinabove cited.

In the case of Hunt vs. The State, 48 N. J. Law, 613, 9 Atl. Rep. 199 on page 200, the Court goes so far as to say that words having even a dubious meaning as gained from the context of the statute, will not give the statute a retrospective effect.

"This sale was made under a special and local law, to wit, the charter of the city of Rayway, and is, in this respect, within the terms of the statute. But the important question is whether the whole act is intended to be retrospective or prospective only. Its terms are prospective, and apply to all cases where, in the future, any sale has been had or made for the recovery of taxes. The fact of such sale is made the point on which the limitation shall begin to act, and the writ can only be granted or allowed within six years thereafter. It is true that the words, '*has been had*' or '*has been made*' might apply to a sale that had been made before the law

enacted, but the construction already given, that it may indicate a sale in the future, is sufficient to decide which shall be adopted, *for the rule of construction of statutes is that every reasonable endeavor shall be made so to interpret the statutory text as to give the law a prospective and not a retroactive effect.* Proprietors v. Jones, 36 N. J. Law 206; State v. Newark 40 N. J. Law, 92; McGovern vs. Connell, 43 N. J. Law, 106; Citizens' Gas-Light Co. vs. Alden, 44 N. J. Law, 648, Boylin v. Kelly 36 N. J. Eq. 331." (Italics mine.)

The rule substantiating the contention of this defendant is expressly laid down in the case of Dem x Dem, Berdan vs. Van Riper, 16 N. J. Law page 7 on page 14:

"Whenever a statute is susceptible, without doing violence to its terms, or subverting some established rule of construction, as being understood either as exclusively prospective, or as both prospective and retrospective in its enactments, courts of justice will always adopt the former construction, *especially if a retrospective operation would work injustice to any one.*" (Italics Mine.)

And again in Williamson vs. N. J. Southern R. R. Co. 29 N. J. Equity, 311 on page 333:

"*The rule ought especially to be adhered to when such a construction will alter the pre-existing situation of the parties or will affect their antecedent rights, services*

or remuneration, which is so obviously improper that nothing ought to uphold and vindicate the interpretation but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature. *United States v. Heth*, 3 Cranch 399, 413. This rule of construction has been repeatedly enunciated and enforced by the courts of this state. *Den v. Van Riper*, 1 Harr. 7; *Jones v. Morris Aqueduct Co.* 7 Vr. 206; *City of Elizabeth v. Hill* Vr. 556." (Italics mine.)

See also *Town of Belvidere v. Warren R. R. Co.* 34 N. J. Law, 193 on page 200.

These decisions were in force when the legislature saw fit to enact the statute under review. Hence it is presumed they were considered by the Legislature when the statute was enacted, and the statute must be constructed in light of their express determinations.

A review of the statute, in light of these decisions, clearly discloses that the statute in nowise revoked the permit issued under the earlier statute.

Both the statute of 1922 and the statute of 1924 are supplements to the Crimes Act of 1898. They are therefore under the law a *part of that act*.

The statute in question is divided into several sections, each dealing with a separate subject. Section (1) defines the crime. Section (2) provides for permits to carry weapons. Section (3) regulate sale, etc.

Section (1) denounces the carrying of a revolver,

etc., and by express provision, excepts from its provisions, any person *holding a permit* "when such permit has been obtained pursuant to the provisions of *this Act*."

It was urged in the Supreme Court and may be argued here by the State, that this language disclosed an intention on the part of the Legislature to give immunity from prosecution only to those who held a permit under the 1924 Act.

The full answer to that contention is that this Statute is a supplement to the Crimes Act, a *part of the Crimes Act*, and when Section (1) defined the crime, and excepted persons from its provisions it referred to persons holding valid permits *which had been procured under the provisions of the Crimes Act*. It is contended that the words "this Act" in this Section (which defines the crime) refer to the Crimes Act, and not merely the Supplement thereof.

Thus any person *holding* a valid permit pursuant to the provisions of the Crimes Act are expressly excepted from the provisions of the statute. The Statute of 1922 under which the permit was obtained, was also a supplement of the Crimes Act. The Legislature not desiring to affect existing valid permits issued before the 1924 Act became effective, by this language made it clear that persons holding valid permits issued under the Crimes Act were not affected by the enactment.

Section 2 of the Act provides the procedure to be followed in obtaining permits.

It outlined a new mode of procedure. By its provision a new form of permit is devised, i. e. *a permit issued by the Supreme Court Justice, etc., after an investigation by him.* In speaking of such newly created permits Section 2 concludes by providing: "All permits issued pursuant to the provisions of *this Act* shall expire of the thirty-first of December, subsequent to the date of issue, and may *thereafter* be renewed for a period of five years."

This language cannot be interpreted to mean that permits issued under the Laws of 1922 will expire December 31, and *may thereafter be renewed for five years.* It gives no right of renewal of permits in existence before the act became operative. This provision is intended to operate in favor only of such permittees as have undergone the investigation of the Justice of the Supreme Court as provided in this section of the Statute.

At first thought it may appear to the Court that by reason of the fact that all permits issued under the 1924 Act were to expire on the 31st day of December, subsequent to the date of issue, the permits issued under the 1922 Act, a fortiori, would also expire at the same time, but that brings up the main argument that there was no intention of the Legislature when passing the 1924 Act to effect any valid permits in existence at the time. This is evident from the fact that whenever the Legislature intended that the force and effect of a statute should relate to any matters or things already in existence, they usually have shown this intention by some express language in the latter statute, for instance, "all permits now issued or to be issued (pursuant to the provisions of this act) or any valid permits (now

existing or hereafter to be issued) or "*any permits issued under the act to which this is an amendment or a supplement,*" in other words, some definite expression in the statute to show that it was the intention of the Legislature to revoke permits which the previous Legislature had expressly declared could only be revoked by the officers granting the same.

Taking into consideration the fact that the provision respecting renewals is part of, and refers to all permits, which by the Statute it was intended would expire December 31st and conceding that the right of renewal does not apply to permits issued under the 1922 Act and further considering the lack of clear and express language tending to revoke the 1922 permit, the Court must conclude that this provision refers only to such permits as had been issued under the provisions of this Act, after July 1, 1924, but does not have any effect whatsoever upon any permits that had been valid and subsisting at the time the act went into effect.

It is manifest from the foregoing argument that the verdict in this case is predicated upon a mistaken application of the law to the facts and that upon the evidence in the case and a proper construction of the law, the verdict is against the weight of the evidence.

It is respectfully submitted for the reasons herein argued that the judgment should be reversed.

Respectfully submitted.

HAROLD SIMANDL,  
*Of Counsel for Plaintiff-in-Error.*

## New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,  
*Defendant-in-Error,*

vs.

MICHAEL CORTESE,  
*Plaintiff-in-Error.*

*On Error.*

ON INDICTMENT FOR  
CONCEALED WEAPONS.

### BRIEF FOR THE STATE.

The defendant, Michael Cortese, was convicted in the Essex Special Sessions for carrying, on February 1, 1925, a pistol concealed in violation of the statute. The Supreme Court affirmed the conviction.

The only assignment of error urged is that the verdict was against the weight of the evidence. This assignment, however, is not based on the contention that the defendant was not carrying a weapon concealed as charged, but rather on the ground, first, that the defendant had a valid permit for carrying a pistol, and, second, that he did not intend unlawfully to carry a pistol.

#### I.

##### The Permit.

The indictment was drawn under Chapter 137 of the Laws of 1924, which enacts:

1. "Any person who shall carry any revolver \* \* \* in or about his clothes or person \* \* \* shall be guilty of a high misdemeanor \* \* \* provided further,

nothing in this act contained shall be construed to apply to any person holding a permit to carry any revolver, pistol or other firearm, when such permit has been obtained pursuant to the provisions of this act."

Defendant put in evidence as Exhibit D. 2 (Case, p. 11) the following permit:

"APPLICATION having been made for permission to carry a weapon in compliance with a supplement to an Act, entitled 'An Act for the punishment of crimes (Revision of 1908), approved March 28th, 1912,'

"PERMISSION IS HEREBY GRANTED to Michael Cortese, Residing at 47 Ferry st., Newark, Essex County, N. J., to carry a revolver concealed about his person in any part of the State of New Jersey, for a period of one year, (unless sooner revoked) for the purpose of protecting himself.

Newark, N. J.....192..

Fred Briedenbach  
Mayor.

"To be recorded in the County Clerk's office within ten days after granting, otherwise it is of no effect. Fee \$1:00

John H. Scott

Signature X Michaele Cortese.

FINGER PRINTS.

Picture of Michael Cortese.

R. Thumb R. Index R. Middle."

On the reverse side of the same sheet of paper was a permit dated February 11, 1924, issued by the Director of Public Safety of the City of Newark under a City Ordinance.

The act of March 28, 1912, referred to in the permit, is Chapter 225 of that year. It denounced as a misdemeanor the carrying of certain concealed weapons, including a revolver, but excepted from its operation any person having a written permit issued by one of certain officers including the Mayor of any city. This act further provided:

"Such permits shall be issued at the place of residence of the person obtaining the same, and when issued, shall be in force in all parts of the State for a period of one year from date of issue unless sooner revoked by the officer granting the same, and said permit shall be dated and shall be recorded in the office of the Clerk of the County where granted within ten days after the granting of same and in the event of the recipient failing to record the same as herein provided, said permit shall be deemed and taken to be revoked and canceled."

This act was impliedly repealed by Chapter 138 of the Laws of 1922 which likewise denounced as a misdemeanor the carrying of a pistol, and contained the following provision:

"Nor shall this act apply to any person having a written permit to carry a blackjack, revolver, pistol or other firearm, obtained from the chief of police of the city, town or other municipality in which such licensee is resident or is engaged in business or employment, or from the mayor of such city, town or other municipality, or from any judge of the Court of Common Pleas of the county in which such applicant resides, or *where such licensee does not reside in a city, town or other municipality in which there is a chief of police*, then from the mayor or other presiding officer of the governing body of such municipality. Such permits shall be issued for good cause shown at the place of residence of the person obtaining the same or at the place where he is engaged in business

or employment, and when issued shall be in force in all parts of the State for a period of one (1) year from date of issue, unless sooner revoked by the officer or officers granting the same, and said permit shall be dated and recorded in the office of the clerk of the county where granted within ten (10) days after the granting thereof, and in the event of the recipient thereof failing to record the same, as herein provided, said permit shall be deemed and taken to be revoked and canceled." (Italics ours.)

While the provision above quoted is not clear, it seems to require that the permit shall be issued by the Chief of Police, if there be one in the municipality in which the applicant resides, and that the Mayor may issue the permit only when there is no Chief of Police in such municipality. This construction appears necessary to give effect to the clause in italics.

This act in turn was impliedly repealed by the statute of 1924 under which the indictment was found. The latter act required a license issued by a Justice of the Supreme Court.

As the Supreme Court in its *per curiam* points out, the permit offered in evidence by the defendant was ineffective because it did not appear in the evidence that it was recorded in the Office of the County Clerk. We are loath to rest on that point, however, for an examination of the County Clerk's records made since the decision of the Supreme Court has disclosed the fact which was not proved, namely, that this permit was actually recorded within ten days after February 11, 1924, the date on which defendant asserts it was issued to him.

The permit is not dated, and from its reference to the act of 1912 it might be assumed that it was issued before March 11, 1922, when Chapter 138

of that year superseded the statute of 1912. If so, the period of one year which the permit purported to cover, expired long before the date charged in the indictment.

But assuming that the permit was actually issued under the act of 1922 on an old form, still it was ineffective because issued by the Mayor and not the Chief of Police.

Assuming lastly, that the permit was issued February 11, 1924, and that it was valid when issued, we still contend it had been terminated by the statute of 1924. This act was approved March 11, 1924, but did not take effect until July 1. The Legislature in this manner gave citizens ample opportunity to become familiar with its provisions and to comply with them. It denounces in general terms the carrying of a revolver and by a proviso excepts from its provisions any person holding a permit which "*has been obtained pursuant to the provisions of this act.*" It does not except persons holding permits under prior acts.

The Legislature could not have been more emphatic in refuting the claim of defendant that a permit under the act of 1922 gave immunity from prosecution under the act of 1924.

A permit to carry a weapon does not grant a vested right which may not be revoked by the State. It is a mere police measure and the State may, at any time, avoid such permit.

37 *C. J.* 168. "A license is merely a permit or privilege to do what otherwise would be unlawful and it is not a contract between the authority, federal, state or municipal, granting it and the person to whom it is granted; neither is it property or a property right, nor does it create a vested right, nor is it taxation."

37 *C. J.* 214. "All the privileges permitted by the license and all the protection given thereby, although yet unexpired, are generally canceled and revoked by the repeal of the law which authorized its grant unless the license, although obtained under the repealed law, is such a license as is required by the new law."

#### INTENT.

The second and last contention of the defense is that the verdict was against the weight of the evidence in that it did not appear that the defendant intended to carry a pistol unlawfully.

Defendant did intentionally carry a revolver on his person, not having any permit under the act of 1924 and well knowing that he did not have such permit. Such a carrying was unlawful.

The presumption that the defendant knew the law is irrefutable.

*State v. Halsted*, 39 N. J. L. 402, 413.

40 *Cyc.* 855. "The requisite intent, however, is not one to violate the law but to do the prohibited act, as every person is presumed to know the law."

The judgment of the Supreme Court should be affirmed.

Respectfully submitted,

JOSEPH L. SMITH,  
Prosecutor of the Pleas.

J. O. BIGELOW,  
Of Counsel.