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Sur Indictment for Murder.

(Filed August 22, 1930.)

APRIL 22ND, 1930. 10

AT A COURT OF OYER & TERMINER, holden at the Court House in Morristown, in and for the County of Morris, on Tuesday the 22nd day of April, A. D., Nineteen Hundred and Thirty.

Present HON. ALBERT H. HOLLAND,
Judge, &c.,

THE STATE VS. GUSTAVE AESCHBACH, Defendant	}	20 No. 48 January Term, 1930. Sur Indictment for Murder.
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Motion made to appoint counsel. Joshua R. Salmon appointed with Harry Shuback as Assistant. 30

Trial fixed for April 30th, 1930 at ten o'clock A. M.

Certificate of the Chancellor.

(Filed June 4, 1930.)

IN CHANCERY OF NEW JERSEY.

10	THE STATE OF NEW JERSEY vs. GUSTAVE AESCHBACH.	}	Certificate of the Chancellor.
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On indictment and conviction in the Morris County Oyer and Terminer of the crime of murder in the First Degree without any recommendation.

This is to certify that application has been made to me for the allowance of a writ of error to be
 20 issued out of the New Jersey Supreme Court for the review of the judgment of the Morris County Court of Oyer and Terminer, convicting the said Gustave Aeschbach of the crime of murder in the first degree and for which the Judge sentenced him to death, and I have refused to allow a writ of error out of the New Jersey Supreme Court for the review of said judgment.

Dated at Trenton, New Jersey, this third day of
 30 June, A. D., 1930.

E. R. WALKER
 Chancellor.

A True Copy
 FERD GARRETSON
 Clerk.

Writ of Error.

(Filed June 4, 1930.)

NEW JERSEY, ss:

The State of New Jersey to the Honorable
 Albert H. Holland, President Judge of the
 Court of Common Pleas of the County of
 Morris, Judge of the Court of Quarter
 Sessions of the County of Morris and
 (SEAL) Judge of a Court of Oyer and Terminer, 10
 sitting as said Judge last named in the
 matter of The State of New Jersey *vs.*
 Gustave Aeschbach, in the January term,
 in the year of our Lord, One Thousand
 Nine Hundred and Thirty:

Because in the indictment, record, proceedings
 and process and in giving judgment upon a certain
 indictment against said Gustave Aeschbach, lately 20
 of the Town of Morristown, in said County of Mor-
 ris, on the Thirty-first day of March, in the year
 of our Lord, One Thousand Nine Hundred and
 Thirty, and from thence hitherto, with force and
 arms, at the Borough of Morris Plains, in the
 County aforesaid, and within the jurisdiction of
 this Court, did wilfully, feloniously and of his
 malice aforethought, kill and murder Louise Aesch-
 bach, contrary to the form of the Statute in such
 case made and provided, and against the peace of 30
 this State, Government and dignity of the same.

Which said indictment was found by the Grand
 Jury of the County of Morris at the January term
 of the Court of Oyer and Terminer in said County,
 in the year Nineteen Hundred and Thirty, where-
 fore before you he has been indicted and thereof
 convicted by a certain Jury of the County taken
 between The State of New Jersey and the said Gus-
 tave Aeschbach, as it is said, manifest error has 40

Writ of Error.

intervened to the great damage of the said Gustave Aeschbach as from his complaint we have received information as well as in said indictment, record, trial, judgment and proceedings; we being willing in his behalf to correct the error in due manner, if any there be, and that speedy justice may be done to him, the said Gustave Aeschbach, command you
10 that if said judgment be thereon given then that you distinctly and openly send, under your seal, the records and proceedings aforesaid with all things touching the same to our Judges of our Court of Errors and Appeals in the last resort and all causes at Trenton on the twenty third day of June inst. together with this writ, that the record and proceedings aforesaid being inspected, we
20 may cause to be further done thereupon, for correcting that error, what of right, and according to the law 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, the third day of June, A. D., 1930.

JOSEPH F. S. FITZPATRICK
Clerk.

JOSHUA R. SALMON
30 Attorney.

Indictment for Murder.

(Filed August 9, 1930.)

STATE OF NEW JERSEY, }
 County of Morris, to wit: }

BE IT REMEMBERED, That at a Court of Oyer and Terminer and General Jail Delivery holden at Morristown, and in said County of Morris, on the second Tuesday in January in the year of our Lord nineteen hundred and thirty, by the Honorable Charles 10
 W. Parker one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Albert H. Holland, Esquires, Judges of the Inferior Court of Common Pleas, in and for the said County of Morris, by the oath of Frank B. Gibney, Mrs. Elvie Tillotson, Harry Curran, Mrs. Mary V. King, Silas Chamberlain, Mrs. Elizabeth Aitkens, Samuel Nesbitt, William Sutherland, Oscar B. Smith, George E. Mattox, Mrs. Margaret Carpenter, Frederick B. Schott, Herbert Davis, Sr., Miss Grace 20
 Douglass, Thomas L. Minion, Michael Hickey, Mrs. Catherine Wiggins, Mrs. Mary Drake, Mrs. Hetty Curry, Mrs. Lena Earp, Mrs. Elizabeth Davenport, Henry R. Brook, Mrs. Leonora Natkins, good and lawful men of the said County of Morris, duly summoned, and then and there duly sworn, and charged to enquire in behalf of the State of New Jersey, in and for said County of Morris, it is presented in manner and form following, to wit: 30

MORRIS OYER AND TERMINER

January Term, 1930.

MORRIS COUNTY, to-wit:

The grand inquest for the State of New Jersey, and for the body of the County of Morris upon their oaths Present: That Gustave Aeschbach lately of 40

Judgment.

the Borough of Morris Plains, in the said County of Morris, on the thirty-first, day of March, in the year of our Lord One thousand nine hundred and thirty, and from thence hitherto, with force and arms, at the Borough aforesaid, in the County aforesaid, and within the jurisdiction of this Court, did wilfully, feloniously and of his malice aforethought, kill and murder Louise Aeschbach, 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.

10

ORVILLE V. MESLAR
Prosecutor of the Pleas for
Morris County.

Judgment.

20

(Filed May 5, 1930.)

On the Ninth day of April, A. D., Nineteen Hundred and Thirty, on which day the said Indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, and delivered to the Clerk of the said Court of Oyer and Terminer in and for the County of Morris, and then and there the said Indictment was duly delivered and duly filed by the Clerk of said Court and an entry made in the minutes of said Court at the same time pursuant to the statute in such case made and provided.

30

And afterwards, that is to say, at a Court of Oyer and Terminer, holden at Morristown, in and for the County of Morris aforesaid, on the Twelfth day of April, A. D., Nineteen Hundred and Thirty, before Honorable Albert H. Holland, sitting as Judge of said Court of Oyer and Terminer, the said Gustave Aeschbach, being publicly called, cometh in

40

Judgment.

his own proper person and forthwith being demanded of and concerning the premises in said Indictment above specified and charged upon him, and being asked in what manner he will acquit himself thereof, he says that he is Not Guilty thereof and of this he puts himself upon the Country, and Orville V. Meslar, Prosecutor for the said County of Morris, who prosecutes for the State in this behalf doth the like. 10

Therefore let a Jury thereupon here come on the Thirtieth day of April, A. D., Nineteen Hundred and Thirty, before the said Court of Oyer and Terminer above mentioned, of free and lawful men of the County of Morris aforesaid, by whom the truth of the matter may be better known, and who are not of kin to the said Gustave Aeschbach, to recognize upon their oath whether the said Gustave Aeschbach be guilty in manner and form as he stands charged in the Indictment above specified, or not guilty, because as well the said Orville V. Meslar, Prosecutor as aforesaid, and who prosecutes for the State of New Jersey in this behalf as the said Gustave Aeschbach has put himself upon the said Jury, at which said Court of Oyer and Terminer, to wit: 20

At a Court of Oyer and Terminer holden at Morristown, in and for the County of Morris, on the Thirtieth day of April in the year of our Lord One thousand nine hundred and thirty, before the Hon. Albert H. Holland, sitting as Judge of the said Court of Oyer and Terminer, according to the form of the statute in such case made and provided, come as well the said Gustave Aeschbach, as Orville V. Meslar, who prosecuted as aforesaid, and the Jurors of the said Jury by the Sheriff of the County of Morris aforesaid for this purpose duly empanelled and returned, to wit: after the follow- 40

Judgment.

ing challenges, by the State 4, by the Court 2; Charles Jones, Amos J. Chapman, Frances Dickerson, Frederick J. Mosher, Annabel Hillman, Anna Raynor, Joseph Murray, Alex J. McCabe, James Morgan, Ruth Decker, Clinton Firstbrook, and Edward H. Hobbie, who were elected, tried and sworn to speak the truth of and concerning the premises.

10 And the trial of the said Indictment against said Gustave Aeschbach, having proceeded, the said Jurors upon their oath say; that they find the said Gustave Aeschbach Guilty in the First Degree, in manner and form as he stands charged in the Indictment, and so say they all.

And afterwards at the same term of said Court of Oyer and Terminer, to wit, on the Fifth day of May, in the year of our Lord, one thousand nine
 20 hundred and thirty, (to which time the said Court had been regularly adjourned) came as well the said Gustave Aeschbach, as the said Orville V. Meslar, who prosecutes as aforesaid, whereupon it is demanded of the said Gustave Aeschbach, if he hath or knoweth anything to say whereof the said Court here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him, who nothing further saith unless as he before
 30 hath said. Whereupon all and singular, the premises being fully understood by the Court, it is considered and adjudged by the Court here that the said Gustave Aeschbach suffer the punishment of Death, in the manner prescribed by law, during the week beginning on Sunday, June 15th, 1930.

Judgment signed the Fifth day of May, A. D., Nineteen Hundred and Thirty.

ALBERT H. HOLLAND,
 Judge &c.

Clerk's Certificate.

(Filed June 16, 1930.)

STATE OF NEW JERSEY }
 County of Morris } ss.

I, E. BERTRAM MOTT, Clerk of the County of Morris, and also Clerk of the Court of Oyer and Terminer, holden in and for said County, Do Hereby Certify, that the foregoing is a true, full and correct copy of the entire record and proceedings in the case of *The State vs. Gustave Aeschbach*,¹⁰ as fully and entirely as the same remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court and County, at Morristown, this 16th day of June, A. D., Nineteen Hundred and Thirty.

E. BERTRAM MOTT
 Clerk.

20

Return of Record and Proceedings to Court of Errors and Appeals.

(Filed June 16, 1930.)

TO THE HONORABLE JUSTICES OF THE SUPREME COURT [COURT OF ERRORS AND APPEALS] OF JUDICATURE AT TRENTON, NEW JERSEY:—

I return herewith as herein I am commanded the 30 entire record of proceedings in the case of *The State vs. Gustave Aeschbach* for Murder, January Term, 1930, with all things touching the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County at Morristown, this 16th day of June, A. D., Nineteen Hundred and Thirty.

ALBERT H. HOLLAND
 Judge, &c. 40

Writ of Supersedeas.

(Filed June 7, 1930.)

COURT OF OYER AND TERMINER OF THE
COUNTY OF MORRIS.

10	THE STATE OF NEW JERSEY, VS. GUSTAVE AESCHBACH.	}	Writ of Supersedeas.
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It appearing that a Writ of Error has issued out of the New Jersey Court of Errors and Appeals in the above matter between The State of New Jersey and Gustave Aeschbach, said Writ being directed to me, it is hereby Ordered that all
 20 proceedings heretofore ordered be stayed on the judgment between the said State of New Jersey and Gustave Aeschbach until the said Writ of Error now depending between said parties be determined.

ALBERT H. HOLLAND
 Judge of the Court of Oyer
 and Terminer of the
 County of Morris.

30

40

**Acknowledgment of Request for
Transcript of Evidence.**

(Filed July 22, 1930.)

MORRIS COUNTY COURT OF OYER AND
TERMINER

10

<p style="text-align: center;">THE STATE OF NEW JERSEY</p>	}	On Conviction
vs.		Acknowledgment by
GUSTAVE AESCHBACH Defendant		Court Stenogra- pher of Request for Transcript of Evidence

This is to acknowledge that Harry A. Shuback, ²⁰ one of the Attorneys for the above named defendant, has requested of me, a transcript of the testimony in the above cause tried before Honorable Albert H. Holland in which a conviction was had against said defendant, on April 30th, 1930.

Dated May 6th, 1930

ARTHUR L. ROBINSON

Official Stenographer. 30

Case.MORRIS COUNTY COURT OF OYER AND
TERMINER.

10

THE STATE vs. GUSTAVE AESCHBACH, Defendant.
--

MORRISTOWN, NEW JERSEY,
April 30, 1930.

Before:

HONORABLE ALBERT H. HOLLAND,
Judge,
and a Jury.

20

Appearances:

For the State,
ORVILLE V. MESLAR, Esq.,
Prosecutor of the Pleas.

For the Defendant,
JOSHUA R. SALMON, Esq.,
ARTHUR G. BAKER, Esq.

30

Mr. Meslar: If the Court please, I move an indictment in the Court of Oyer and Terminer.

The Court: We will now resolve into a Court of Oyer and Terminer.

Mr. Meslar: I now move the indictment against Gustave Aeschbach for murder.

The Court: Is the defendant ready?

Mr. Salmon: Ready.

The Court: The Sheriff may return a panel.

40 (A Jury was empanelled, accepted and sworn).

Stephen L. Chapman—Direct.

STEPHEN L. CHAPMAN, a witness called on behalf of the Prosecution, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. MESLAR:

Q. Mr. Chapman, you are Coroner of the County of Morris? A. I am.

Q. Were you called in on the death of Louise Aeschbach? A. I was.

Q. Did you know Louise Aeschbach? A. I did 10
not.

Q. Did you learn that was Louise Aeschbach's body? A. Yes, I did.

Q. Who identified her to you? A. I cannot say that anyone identified her except through some of the statements that Mr. Aeschbach made to Captain Roff.

Q. Where did you see the body? A. On the ground.

Q. Where? A. In the drive of the Byrnes resi- 20
dence near the back, or side back door.

Q. And when you got there was the defendant there by the door? A. No, he was in the house.

Q. You did ascertain that was the body of Louise Aeschbach? A. I did.

Q. Was she dead? A. She was.

Q. From what cause? 30

The Court: When was this that you found her?

The Witness: It was on Monday, March 31st, the time, I would say, about between—at about quarter of eight.

Q. Do you say you found her dead? A. She was dead.

Q. From what cause? A. From a bullet wound. 40

Foster Flagg Vogt—Direct.

Q. Inflicted by whom to your knowledge? A. Gustave Aeschbach.

Q. Did he state he had shot his wife? A. He did.

The Court: What was done with the body?

The Witness: The body was taken to Memorial Hospital and from Memorial Hospital to Hughson's Morgue.

10 Q. Was there an autopsy performed? A. In Hughson's Morgue.

Q. By whom? A. Dr. Christian, State Hospital, and Dr. R. Austin Reed, of Morristown.

Mr. Salmon: No questions.

(Witness excused).

20

FOSTER FLAGG VOGT, called as a witness on behalf of the Prosecution, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. MESLAR:

Mr. Meslar: If the Court please, the qualifications of Mr. Vogt as a Civil Engineer are admitted.

30

Q. Mr. Vogt, at the request of the Prosecutor's Office did you make a survey and maps of the location of the Byrnes home on Jaqui avenue? A. Yes.

Q. Have you those maps with you? A. I have.

Q. Will you show them.

The Court: Is it understood on the record that Mr. Vogt is a duly qualified engineer whose qualifications are admitted?

40

Mr. Salmon: That is true.

Foster Flagg Vogt—Direct.

Q. What are the scales of these maps?

The Court: Suppose he describes the maps first and then give us the scale.

Q. Just explain what the maps show? A. The map on the right is the general lay-out showing the dwellings in Jaqui avenue in Morris Plains. This shaded portion of the road on the easterly side of the map is the concrete highway running from Jaqui avenue towards Morristown. This line (indicating on map) represents a continuation of Speedwell avenue. This is Speedwell avenue and this is to the State Hospital; and the westerly end of Jaqui avenue is another road that leads on out, northerly. These black dots on either side of Jaqui avenue represent rows of trees, and this dashed line of Jaqui avenue represents the hard surface of Jaqui avenue, and these hatched squares represent dwellings along Jaqui avenue. The home of Mr. Byrnes is the first dwelling on the left hand side of Jaqui avenue coming in from Speedwell avenue, and that is on a scale of twenty feet per inch. The map of the left—

The Court: Just a moment; you say that is the first dwelling, what are the designations before that?

The Witness: On the corner of Jaqui avenue and Speedwell avenue there is a "Good-Luck Food Store;" the next building on the left is a frame building, I think used for a garage of some sort, and Byrnes's is the next frame building, and the next dwelling on the left of Jaqui avenue—

The Court: That map is designated "Map S-A"; and, consequently, the second one would be, "Map S-B," on the part of the State.

Foster Flagg Vogt—Cross-Redirect.

10 The Witness: Map S-B is an enlarged scale map of four feet per inch, showing Mr. Byrnes's house in detail. Jaqui avenue on the north of the map, with a driveway running southerly passes the easterly side of the Byrnes house to a garage in the rear; on the southeasterly corner of Byrnes's house is a little back porch with the steps leading off of it southerly, and about opposite one corner of the back porch is a stone on the side of the driveway pointed out to me by Captain Roff, and, under the middle window on the easterly side of the house I have designated here a cross; there is a mark on the third weather-board above the foundation, pointed out by Captain Roff to me, which I have so marked; these large dots represent large trees along the roadside.

20 Mr. Meslar: I offer the maps.

The Court: Any objection?

Mr. Salmon: No objection.

The Court: The Maps will be admitted and marked Exhibit S-A and Exhibit S-B.

CROSS-EXAMINATION BY MR. SALMON:

30 Q. The building on the corner of Jaqui way—Speedwell avenue, I would say, probably the southerly corner, is that what was known as the Cash and Carry Store heretofore? A. That I don't know. I have marked it "Good-Luck Food Store," which is the sign on the store at the present time; it is a grocery store, I believe.

REDIRECT-EXAMINATION BY MR. MESLAR:

40 Q. Mr. Vogt, did you measure approximately the distance on your speedometer on your car from the Byrnes's home to the Aeschbach home? A. Yes.

Lydia Pruden—Direct.

Q. How far was that? A. We drove in Captain Roff's car from in front of Byrnes's garage on Jaqui avenue easterly on Jaqui avenue above the road to the State Hospital up to Morristown Heights, I believe it was called where Captain Roff said Aeschbach lived, and it was one and three-tenth miles on the speedometer, and we checked it going back and it registered the same distance.

Q. Was that along the most customary, shortest route? A. For automobiles, I believe, yes.

(Witness excused).

LYDIA PRUDEN, a witness called on behalf of the Prosecution, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. MESLAR:

Q. Where do you live, Mrs. Pruden? A. Morristown Heights.

Q. Do you know Gustave Aeschbach? A. Yes.

Q. Do you know Louise Aeschbach? A. Yes.

Q. How long have you known them? A. Eight years.

Q. Did you know they had any children? A. Yes.

Q. How many? A. Two.

Q. What were their names? A. Alice and Freddy.

Q. Did they board, these two children, with you? A. One, the little boy, and the little girl with my brother.

Q. Were you paid for boarding them? A. When she was working.

Lydia Pruden—Direct.

Q. She paid you? A. Yes.

Q. And she was at work when the child was with you? A. Yes.

Q. Do you remember the day of March 29th, Saturday? A. Yes.

Q. What happened on that day between the two Aeschbach's? A. I was after groceries and she
10 was at the store for him, and asked me if I had seen him, and I said no; and she said she wanted to see him to take the groceries home, and I said I didn't see him at all that day, and I went on and got my groceries and my husband came on the train, and he came up and I loaded the groceries on the car, and she said, "I can't find him anywhere, will you take a note to him?" I said I didn't like to, he doesn't speak to me, and she said,
20 "Give it to Alice to give to him." Well, I could do that so I took the note, or letter, whatever it was—it wasn't addressed but it was sealed.

Q. Did you call Mr. Aeschbach for Mrs. Aeschbach? A. For the little girl; he sent the little girl down.

Q. When was this? A. About ten minutes after.

Q. On the same day? A. Yes.

Q. March 29th? A. Yes.

Q. Do you know what day of the week it was?
30 A. Saturday, and she asked me if I would call her mother, and I said, "Why can't your daddy call her?" I was so busy. She said their phone is out of order. I hunted the number up and called, and said he wanted to see her, and she said "I will see him tomorrow because I can't get away now."

Q. Did you receive any other phone calls between these parties? A. Not until Monday night.

Q. On Monday night did you receive a phone
40 call? A. She called and couldn't get him; then

Lydia Pruden—Cross.

she called me and I was on my way to the hospital, and she asked me if I knew where he was, and I said I didn't. She said, "Will you find out if he is home, I want to speak to him." I said "I haven't time because they are here to take me to the hospital, ring hard, he may be asleep," and I hung up the receiver and went on out, because they were waiting to take me to the hospital.

The Court: What time Monday night was that? 10

The Witness: Just seven o'clock, because that is when we always went, at seven o'clock.

CROSS-EXAMINATION BY MR. SALMON:

Q. How long had you this child with you, Mrs. Pruden? A. We had him ever since he was a baby almost all the time. He used to come live with us, they always let him, he would go home to go to school Monday mornings, and Fridays he always came back and stayed over Sunday, because we had him, the mother went to work when he was a baby, my daughter was in the hospital the same time, and they left him with us, and we always had him whenever he wanted to come for the most of the time because we thought lots of him, and those people, too. 20

Q. Was he always there under boarding arrangement? A. No, only when they—if she worked they always paid me when they were working in the Hospital, the two of them, they always came and paid board, I didn't want it but they always did pay it whenever they were working. 30

Q. During any of these times did Gustave Aeschbach pay you board for the child? A. I think they paid together they always came together to see him and pay the board. 40

Lydia Pruden—Cross.

Q. When they came to pay they came together, you say? A. Yes, they always came together, and they always paid the board.

Q. You said something to the effect you did not want to take a note because Gus didn't speak to you? A. He hasn't been speaking to me, and I said I didn't like to go out and give him a note.

10 Q. Was there any cause for that as far as you know?

Mr. Meslar: Object.

The Witness: I don't know of any at all except the children, a little trouble over the little boy.

The Court: I will allow it.

20 The Witness: He whipped him, and I thought he oughtn't whip him so hard, that's what caused it all; he didn't speak to me no more.

Q. When was that? A. It was when he worked at Memorial Hospital yet, but I don't know just when it was.

Q. Was the boy there at your home at the time? A. Yes, I didn't think he ought to whip him so hard.

80 Q. Something about what the boy had done, or apparently he had done? A. He was making faces eating an orange and his daddy didn't want him to make them.

Q. So he chastised the boy? A. Yes.

Q. And you took the boy's part and that caused trouble? A. Yes, I said he oughtn't to whip him so hard, over the face and head. He didn't answer back but he never spoke to me no more.

40 Q. When, how long ago? A. May be three weeks; he worked at the hospital.

Lydia Pruden—Cross.

Q. Three weeks before the trouble? A. Yes, it was easy that, may be more.

Q. Well, you did take the note in question, didn't you? A. I took it home and the little girl came in for it.

Q. Would you recognize the container, namely, the envelope, if you saw it? A. I think I would the envelope; there was no writing. 10

Q. I show you an envelope apparently open and ask you if that is the container? A. At least that is about like the one.

Q. Would you say that is the envelope? A. I couldn't swear, there is no mark; it looks about the size of it, I know it was a small envelope it was she gave me.

Q. You could not identify it positively? A. I could not, no sir. 20

Q. Now, that was on Saturday afternoon between about four and five? A. About three and four.

Q. And it was on that afternoon that you did phone to Louise, the wife, and she responded that she would be up tomorrow? A. Yes.

Q. And did she say that that message should be taken to Gus? A. No, she just asked me to give it to the little girl that day, didn't ask me if I had 30 given it to him even.

Q. And you told the little girl what Louise had said? A. The little girl stood beside me; I kept her there so she could hear what her mother said.

Q. During those eight years of the boy's life, and that is the age is it not, eight? A. Yes.

Q. How much of that time have you had the boy? A. He must have been there five or six years; he never was home very much, he hardly ever was 40

Lydia Pruden—Cross.

home, only just when he had to be; he stayed with us most of the time.

Q. During that time Gus and Louise, his wife, did keep house in Morristown? A. They worked in the State Hospital, I think, Overbrook and Morris Plains they worked together.

10 Q. Part of that time you had the boy they lived here with the Grandmother? A. Yes, they kept house.

Q. And during part of the time, latterly, last year, they lived in this house where Gus did live at the time of the trouble? A. Yes.

Q. So far as chastising the boy is concerned, did Gus other than that one time ever do it unduly? A. No, he was very good to his children.

20 Q. Now, you saw Gus, did you not, on Monday, which was the day of this trouble? A. Saw him going in the road, he has to pass my house.

Q. And was he then on his way to his home? A. Yes.

Q. About what time was it exactly he came in? A. About one, and then he went out again, and he came in about five.

The Court: One in the afternoon?

The Witness: Yes.

30

Q. When he came in about five was there anything special about him to call your attention to him? A. He was just hurrying, that's all, going quite fast.

Q. How fast, was he walking or running? A. He was walking, I suppose you call it; but he was going awful fast.

40 Q. Nothing unusual about it at one o'clock when he came home, about the way he was going? A. No.

Lydia Pruden—Cross.

Q. Did you see Gus leaving the house that night?

A. No, I didn't.

The Court: What time that night? There is already testimony you saw him leave at five.

The Witness: No, he came home at five.

Q. He came home first at one and again at five? Later, thereafter you know nothing of his leaving the house in the neighborhood of seven o'clock or so? A. I do not, I didn't seen him no more. 10

Q. You were a close friend of Louise, were you not? A. Of both of them, always good friends.

Q. And the treatment of Louise by Gus, as far as you know it and saw it, what have you to say about that?

Mr. Meslar: Object to that.

The Court: I will allow it.

The Witness: They were always very nice together; I have been out with them in the car and they were always very nice to one another. 20

Q. Did Gus show other than his regard and love for Louise in your presence? A. Never when I saw them, they were very nice to one another always.

Q. Have you been in the home there, the new home here at Morristown Heights since they lived there, last June or May? A. Yes; they weren't there much, they both worked, they weren't hardly ever home, they both worked. 30

Q. What do you know of the manner in which Gus has lived there prior to this trouble and since the wife went to the Byrnes in December? A. Nothing, I thought they were just happy, I never expected a thing.

Q. The question is, how was he living there, alone or otherwise during December, or after March last?

A. Must have been, I can't tell you how long he 40

Lydia Pruden—Redirect.

Lizzie Hulbert—Direct.

was there; he was at the hospital and stayed nights at the Memorial Hospital; after he was home nights the little girl used to go and see him; he was home nights alone.

Q. The little girl lived with your brother nearby?

A. Yes.

Q. Mr. Lindabury? A. Yes.

10 Mr. Salmon: The witness is under subpœnae for the defense, and, so far as cross-examination is concerned, I am finished.

REDIRECT-EXAMINATION BY MR. MESLAR:

Q. How old was this little boy? A. Eight.

Q. How old was the little girl? A. I think ten.

Q. Do you live at Morristown Heights? A. Yes.

20 Q. The road from Morristown Heights to Speedwell avenue or the State Hospital is very thinly populated? A. Yes.

Q. Long stretch where no one lives along the road? A. A few people.

Q. It is quite a distance, isn't it? A. Yes.

The Court: Step down, Mrs. Pruden. None of the witnesses are excused until they are excused by Counsel or the Court.

30

LIZZIE HULBERT, called as a witness on behalf of the Prosecution, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. MESLAR:

Q. Where do you live, Mrs. Hulbert? A. Morris Plains.

40 Q. Whereabouts? A. I am housekeeper for Mr. Michael Byrnes on Jaqui avenue.

Lizzie Hulbert—Direct.

Q. Were you housekeeper there on March 31, 1930? A. Yes, sir.

Q. And did you know Louise Aeschbach? A. Yes, sir.

Q. And was she working there at this time? A. Yes.

Q. When did she start to work for Mr. Byrnes?

A. Sixth of December, I think. 10

Q. And what was she there for, what capacity?

A. She was employed as a nurse.

Q. And Mr. Byrnes was sick. A. Mr. Byrnes is an invalid.

Q. How old is Mr. Byrnes? A. I think he is 76.

Q. In what way is he an invalid? A. He has had a stroke, a second stroke.

Q. And Louise Aeschbach was there as a nurse? A. Yes.

Q. Do you know Gustave Aeschbach? A. I know 20
him when I see him.

Q. I show you the map here, Mrs. Hulbert, a map labelled "S-B", this is the Byrnes homestead, this is Jaqui avenue and driveway going in, and this is the porch on the side? A. Just a small porch.

Q. What way do the steps come down from this porch? A. When you come out the kitchen door they go down this way (indicating). 30

Q. Out towards the back or front? A. Back.

Q. On the night of March 31st or during the day, or otherwise, did Mr. Aeschbach receive a phone call from Mr. Aeschbach? A. Not during the day.

Q. Not during the day or at night? A. She called up, I think it was twenty to seven.

Q. She called who? A. Well, I didn't answer the phone.

Q. Some one called her? A. No, someone called 40

Lizzie Hulbert—Direct.

up, I don't know who that was, who called up twenty to seven, but I didn't answer the phone.

Q. Who did answer it? A. Mr. Joseph Byrnes.

Q. And on the night of March 31st, that is Monday night, just tell what happened? A. How will I tell it, any way?

Q. Tell it as best you can, start it your own way.

A. We were in the livingroom, Mr. Byrnes, Mrs.
10 Aeschbach and I, we were sitting in the living room——

The Court: What time was that?

The Witness: It was just twenty past seven, and there was a table in the center like and Mr. Byrnes was sitting on the end of the couch, and I sat in the chair and she sat in a big chair, like this, and the radio was going, we couldn't hear very well——

20 The Court: Couldn't hear the radio very well?

The Witness: Couldn't hear what was going on outside. But, anyway, there was a knock on the door, and I went to the door and Mr. Aeschbach stood there——

The Court: Which door?

The Witness: The back door, the kitchen door.

30 The Court: Is that the one on the back stoop?

The Witness: Yes. Mr. Aeschbach says, "Is Mrs. Aeschbach in?" I said, "Yes, come on in, nobody here is going to hurt you." And he stepped in the kitchen and he walked from about here to there, and by that time Mrs. Aeschbach came out of the livingroom and met him right in the center of the kitchen and they both turned around and went out.

40

Lizzie Hulbert—Direct.

The Court: Out where?

The Witness: Out in the back yard, they both went out together.

Q. By the kitchen door? A. Yes, they went out the kitchen door, closed the door, and it wasn't more than about, I don't believe, three minutes before, bang, bang, something went, and I wasn't paying any attention to that. I thought it was a blow-out somewheres, and Mr. Byrnes jumped up and said, "What is he doing shooting her?" And he went out the front door as quick as he could. I run out the back kitchen door, and before I got to the kitchen door the one shot went off, I didn't hear the one only, and I opened the door and Mr. Aeschbach he stood right plumb in front of me, he stood right in front of me. I said, "Mr. Aeschbach what have you done?" I said "Is she dead?" "Oh," he says, "I am crazy;" he says "Mrs. Hulbert you don't know the trouble she is making for me. You send for the police and I will stay here." That's what Mr. Aeschbach said to me.

Q. What happened then? Did he have a gun in his hand? A. Yes, he walked up a little ways and just when he said that, Joe came in from the front door right straight through the hall, and the light was showing and Mr. Aeschbach stood on the path, and then he walked back and threw the revolver on the stoop right in front of my feet, and Joe picked it up.

Q. What did he say then? A. He said nothing.

Q. Say anything about calling the police? A. Well, I just said he said, "Call the police." Then he said, "Mrs. Hulbert, you don't know the trouble she is making for me; I haven't seen her since last Thursday. You send for the police, and I will stay

Lizzie Hulbert—Cross.

here." And with that he kind of walked back and Joe came through the front door and ran to the kitchen door, and he threw the revolver right at my feet and Joe stooped down and picked it up.

CROSS-EXAMINATION BY MR. SALMON:

Q. Had you seen Gus there before that night,
10 Mrs. Hulbert? A. Yes, sir.

Q. And on how many occasions? A. Well, when Mrs. Aeschbach first came there he used to come there in the morning and buy the groceries and put them in the car, and at night when she got through she would take them up home, I knew him that way.

Q. Well, so far as coming to this house is concerned, had he been there more than twice before, to your knowledge? A. He come there to see Mrs.
20 Aeschbach, but outside, he talked to her outside.

Q. But that was more than twice when he would talk to her outside; but, did you ever see him in the house before? A. Only once.

Q. And on the occasions when you saw him outside which would seem to be he would have to take care of the groceries for the house for the home? A. I didn't pay any attention.

Q. But you knew he was there taking care of the grocery requirements? A. Yes.

80 Q. Do you recollect he suggested by either word or action that they go out from the kitchen where you say they were? Which one suggested that they go out, or wasn't there any suggestion made? A. No, there wasn't any thing that I know of.

Q. Do you remember which one went out of the kitchen first? A. He did, he went out first, Mr. Aeschbach.

Q. She was dressed as though she had either
40 just returned from outside or going out, had she

Lizzie Hulbert—Cross.

not, that is, with her coat and hat on? A. She went out and said she was going to the drugstore, and she was gone, I should think about ten minutes and then she came in and sat down in this chair with her hat and coat on, and, then, meantime the knock came at the door.

Q. And the chair in which she sat was in the room where Mr. Byrnes was? A. Mr. Joseph Byrnes.

Q. Joseph Byrnes, who is he? A. One of the sons.

Q. And the name of the invalid is what? A. Michael Byrnes.

Q. This room where Mrs. Aeschbach sat, isn't that the room where Mr. Byrnes was lying? A. No, he is an invalid.

Q. Was this room the one in which the couch was located where she sat? A. Yes, she sat in the chair; Joseph sat on the couch.

The Court: Where did you sit?

The Witness: I sat at the table.

Q. Was that the couch used by Mrs. Aeschbach during the time she was there? A. Yes.

Q. And all of these particular rooms are on the first floor, are they not? A. Yes.

Q. When the defendant here, and his wife met, was there anything that he said or did that showed to you that he was about to take this action of shooting? A. No, sir.

Q. Were you with Mrs. Aeschbach and one or both of the Byrnes boys down to Joseph Roebucks near New Brunswick? A. No, sir, I knew nothing about it.

Q. Did you state you had been with her in company with the boys down to Joseph Roebucks? A. No, sir, I did not.

Lizzie Hulbert—Redirect.
Joseph Byrnes—Direct.

REDIRECT-EXAMINATION BY MR. MESLAR:

Q. Do you know who Joseph Roebuck is? A. Her brother.

Q. That is her brother. That's all.

(Witness excused).

10

JOSEPH BYRNES, called as a witness on behalf of the Prosecution, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. MESLAR:

Q. Where do you live, Mr. Byrnes? A. Jaqui avenue.

20 Q. Is it your father owns the home? A. Yes.

Q. I call your attention to Exhibit S-B and ask you does that outline generally your home? A. That is about right.

Q. You lived there with your father? A. Yes.

Q. Are you married? A. No sir.

Q. And Louise Aeschbach was employed in your household as nurse for your father? A. Yes.

30 Q. Do you know Gustave Aeschbach? A. I never saw the man in my life until the night he came down there.

Q. Tell us what happened on this night, March 31st? A. Got through supper about 6:47, the Literary Digest hour starts at 6:45, and it was only going about two minutes when the phone rang. I answered the phone, and Aeschbach was on the phone, I supposed it was him, and asked for Mrs. Aeschbach. I turned it right off and
40 called her downstairs. She came downstairs

Joseph Byrnes—Direct.

and I went out in the kitchen, and heard her say, "I mean just what I said," and slammed the phone up. So just about towards the end or near the end of the Literary Digest hour when she came downstairs and put her hat and coat on, and asked me if I had any change, she said she was going to the drugstore. I said, "How much do you want?" She said, "Twenty cents." And I gave her two dimes and she went out and came back it was just about the end of Amos and Andy, and I told her she missed a good program, and she sat down and listened to that, and the next program started 7:15 was a girl from Massachusetts, was a singer on there. She said she was from Massachusetts, and I began to kid her about girls from Massachusetts coming down to Jersey, and it was only a short time after that when Aeschbach came to the door, and I heard Mrs. Hulbert say, "Come in, Mr. Aeschbach," and as soon as she said that why Mrs. Aeschbach got up and walked outside. Then I heard the shots. The first shot I didn't recognize as a shot, because the first shot hit the house causing like an echo between the buildings, but I thought it was fired from the front of the building and the next two shots came from the back of the house and below the window, and I realized they were gun shots, and it come to me like that, he was shooting—didn't know at the time and I went to the front stoop and I got around just as he fired the fourth shot at her.

Q. Did you see the gun in his hand? A. I saw him fire right at her face.

Q. How far away was he from her? A. Right over her.

Q. Was she laying prone on the ground? A. She never made a move, she was dead when he fired

Joseph Byrnes—Direct.

the last shot; he just did like that (illustrating) and fired down in her face as if he was shooting at a target.

Q. And fired right in her face? A. Yes.

Q. What did you do? A. That's when everything seemed to come to me. The first thing I thought about was getting a gun and killing him. As I
10 come in I saw Mrs. Hulbert, she started for the back; I went for the back door and she got in front of me and said, don't go out there; so she let me open the door—she opened the door gradually, I pulled the door open and I went out.

Q. What did Aeschbach say or do? A. I said to Aeschbach, "Why did you do that?"—I made it a little stronger than that, probably, and he threw the gun on the stoop. I was all upset, worked up
20 so for two weeks after, I guess it was an awful shock to me.

Q. What else happened, did you pick up the gun? A. Yes.

Q. Did he say anything? A. Yes, "Call the State police."

Q. Did you call the State Police? A. I called the State Police, called Dr. Reed and the doctor reached the house and called the coroner.

Q. Who came then, do you know? A. The first
30 one come was the officer, Callahan, and Leon was there first. Nobody came around, there was shots fired there and everybody heard them around the neighborhood and they knew there was trouble, they didn't come around; I was alone with him, I didn't know what to do.

Q. Did he stand there? A. Yes.

Q. Was he cool and collected? A. I told him—
Mrs. Hulbert said to him, "Why did you do that?"
40 He said, "I must be crazy." I said, "Hell, you

Joseph Byrnes—Cross.

aren't crazy, I am the one crazy; you got a peanut brain or something like that, I guess." He recollects that, too.

CROSS-EXAMINATION BY MR. SALMON:

Q. How long had you known Louise Aeschbach? A. Only since she came to the house.

Q. And that was on what date? A. Sometime around the first of December, after the first of December, just before Christmas. ¹⁰

Q. Now, you have stated to the effect that she stepped from the phone with "I meant just what I said?" A. I think that is what she mentioned.

Q. That is what she said as near as you remember it? A. She slammed the phone up; I didn't know who she was talking to; I suspected it was Aeschbach, though.

Q. Are you an unmarried man, that is to say, never been married, or are you a widower? ²⁰
A. Never married.

Q. Now, this family there consisted of your father, yourself and brother? A. Yes, sir.

Q. Mrs. Hulbert? A. Mrs. Hulbert is housekeeper.

Q. And Mrs. Aeschbach, the nurse? A. She just took care of my father; understand, my father is a cripple; he has to be helped, can't walk. ³⁰

Q. Needs more or less constant attention? A. All the time he has to be taken care of.

Q. What was the fact about where Mrs. Aeschbach had her room, was it downstairs in the living room where she slept? A. She slept on that couch, yes, we didn't have any extra beds there; only had four beds; my brother had one, father had one, Mrs. Hulbert had one and I had one. That is a kind of sleeping couch, you know. ⁴⁰

Joseph Byrnes—Cross.

Q. Now, when you saw Gus the first time on coming out there, he seemed to you to be entirely normal, did he?

Mr. Meslar: Object to being entirely normal; he can describe just how he was.

The Court: I don't understand he saw him the first time, perhaps we better definitely point the question as to what time he has in mind.

10

Mr. Salmon: Withdraw the question.

Q. Going to the time when you spoke to him after he said that "I am crazy," or, "I must be crazy," or words to that effect— A. "I must have been crazy," is what he said.

Q. And you said, "I am the one," referring to yourself? A. Yes.

Q. And "You have a peanut brain." Was he
20 normal then? A. He appeared to be.

Q. Entirely normal. A. Of course it is true out there outside he was walking up and down. I, in fact, saw him, I don't believe he ever saw me.

Q. You saw him well enough to testify here that while you were, or when you got there he had been shooting this woman, that is to say, he continued to shoot her? A. That was before when I went out front, I was on the front stoop when I saw
30 him fire that shot, it wasn't on the back stoop.

Q. It was light enough for you to see from the front to the back? A. I could see the flash of the gun; it showed her face from the flash of the gun.

Q. Then you did not see him as to how his face appeared at that time? A. No, I didn't say that.

Q. Did you go out to him through the house or around the house? A. Through the house.

Q. Why didn't you run right out straight around
40 on the outside? A. I don't know; may be some

Joseph Byrnes—Cross.

people have a little weakening or something like that when a man has a gun in his hand.

Q. Is that the reason you were fearful? A. I didn't think anything about it, he could a shot me, I didn't know what he was going to do.

Q. You went out the front, but when you went out the rear you had come through the house? A. Yes, both doors open. 10

Q. You didn't go out of the house at all until you heard a shot, is that it? A. The two shots together is when I went out. The first shot I didn't recognize as a shot, it hit in the house, I didn't know what it was.

Q. When was this that you had the re-action to the effect that the first thing was in your mind that you would go get a gun and shoot him? A. As soon as I saw him fire that shot at her face. 20

Q. You had never seen Gus before that night?
A. Never seen him at all.

By the Court:

Q. What made you feel as though you wanted to shoot him? A. I don't know, it is just like if you kill a mad dog. I think the first thing I would do would be, get a gun and kill somebody in the condition I was in that night—felt that way, anyway, 30
I was all excited.

Q. You said to him, "You are not crazy, I am crazy." Did you mean you were crazy, or did you mean that you were highy excited? A. Highly excited, yes.

Q. When you said, "crazy", did you mean that you were crazy? A. Excited.

Q. That isn't what I asked. When you said to him you were crazy, did you mean you were crazy? 40

Joseph Byrnes—Redirect-Recross.

A. I didn't mean that. He says, "I must have been crazy." I said, "You aren't the one crazy, I am the one is crazy."

REDIRECT-EXAMINATION BY MR. MESLAR:

Q. Who did you hand the gun to? A. Detective Leon, of the State Police; Mr. Roff was there.

10 RECROSS-EXAMINATION BY MR. SALMON:

Q. You made a trip down with Louise to the brother, Joe Roebuck? A. Peter Roebuck.

Q. And Mrs. Hulbert on one occasion at least, or more than that, Mr. Byrnes? A. No, that is the only occasion I ever had Mrs. Aeschbach in the car. I will tell you how that happened.

20 Q. I will lead up to it. Now, was Mrs. Hulbert with you or wasn't she? A. She was not, my brother and I.

Q. Did Mrs. Hulbert declare in your presence that she was with you at the time down there? A. Never heard her, not in my presence.

Q. This wife, Louise Aeschbach, had an automobile of her own? A. She had a Ford, yes.

30 Q. And, so far as you know, it was in running order at the time you went down in another car, in your own car, wasn't it? A. I believe it was running, yes sir.

Q. What month was that, Mr. Byrnes? A. That day was Monday, March 31st, that was the afternoon.

Q. Was it that day you went down to Roebuck's? A. Yes. She got a letter or something from her sister, she told me, and that was in the middle of the week that her brother was down in Jersey.

40 Q. She evidently had time off that afternoon? A. Yes.

Joseph Byrnes—Recross.

Q. And then went down with you? A. Went down with my brother and I. I told her I would take her down, it would only take an hour or so; she hadn't seen him in ten years.

Q. Did she say anything why she did not take Gus as she had frequently taken him in her car and gone down there? A. I don't know about that, she never told me nothing. 10

Q. Now, is there any explanation for Louise, who was acting as nurse sleeping downstairs, other than the lack of room upstairs? A. That's all.

Q. And it was not feasible to have her sleep in the room where the patient lay, your father, who is a cripple, wasn't feasible to have that done? A. I wouldn't hardly think there was room in there for a bed.

Q. She was on more or less twenty-four hour duty? A. Yes. 20

Q. And in order for your father, if he needed her, what method did he use,—call her, ring a bell or what? A. He had a bell.

Q. Was there any other method of getting upstairs at least from the kitchen, other than through this room where the couch was? A. That is the only one.

Q. What is your occupation? A. Train dispatcher. 30

Q. And some of your work was night work bringing you home late? A. No, day-work, eight to four.

Q. Every day? A. Except Monday, I got the 5:07 express.

Q. And was that the occasion when you would come home late, or not? A. No, I always come home on the 5:07 every day Morris Plains.

Q. During the period of time of December to 40

W. H. Kleindinst—Direct.

March 31st, your shift was just in the heart of the day and no other time? A. No sir.

Q. Where is your brother employed? A. Same place I am.

Q. Lackawanna Railroad? A. Lackawanna Railroad Company.

(Witness excused).

10

W. H. KLEINDINST, called as a witness on behalf of the Prosecution, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. MESLAR:

20 Mr. Meslar: The qualifications of Mr. Kleindinst as a photographer are admitted by Judge Salmon.

The Court: It will be noted on the record, that the qualifications of Mr. Kleindinst as a photographer are admitted.

Q. Mr. Kleindinst, I show you three photographs and ask you if you took those photographs?
A. I did.

Q. When? A. March 31st, in the evening.

30 Q. What time, do you remember A. Somewhere around nine o'clock, I won't be sure.

Q. Whereabouts were they taken? A. In the rear of the house Jaqui avenue, taken by artificial light.

Mr. Meslar: I offer these three photographs, your Honor.

The Court: Is there any objection?

40 Mr. Salmon: It seems to me that there is a factor in each of these pictures that can only

W. H. Kleindinst—Direct.

serve not to continue the proof of the fact of the death of the subject, the wife, and that, on its face, on the face of the pictures, that it can only tend to unduly inject into the matter, perhaps the element of horror and the like.

The Court: No, I think the State would be entitled to show the condition, the position in which the decedent was found and the location 10 of the house, unless you object on some more substantial ground.

Mr. Salmon: I object on the ground that they show the subject of the act in question, namely the deceased, and that it is not an essential element for the proof, because with the subject of the act to be an exhibit which this pretends to produce is an element in the case which is altogether unanswerable so far as 20 it relates to the phase of the horror involved, or a killing under any circumstances, and especially under these circumstances, and I am inclined also to suggest that the effect upon the mind of the Jury, that there are among us at times jurors who would be subject to the inflammatory re-actions and feelings because of depicting the subject of the shooting in the circumstances, in the position, as indicated in these proffered exhibits; I object to their entry 30 in this case as no part, no essential part, no contributing part of the proof.

The Court: The objection will be noted on the record. It seems to the Court very proper proof; the fact they may incidentally disclose horror, which is not at all admitted by the State, is not incident to the crime. An exception will be granted and they will be admitted in evidence and marked Exhibits S-1, S-2 and 40

W. H. Kleindinst—Direct.

S-3, respectively. As I understand it, you make no objection to their manner of taking, the qualifications of the photographer were admitted.

(Exception allowed and sealed).

ALBERT H. HOLLAND

Judge.

10

Mr. Salmon: On the mechanics of the matter I make no objection. The Prosecutor points out to me the position of the body adds an element.

The Court: You say the Prosecutor points out to you, he, the Prosecutor, deems the body of the party an element?

Mr. Meslar: And also, in addition, there was no struggle, or, so far as it appears.

20

Q. I now show you eleven photographs and ask you if you took those? A. I did.

Q. And when did you take those? A. Next morning, April first.

Q. Do they show conditions in and about the home of Michael Byrnes on Jaqui avenue? A. They do.

Q. And the position of one bullet lodged in a weatherboard of the side of the house? A. Yes.

Mr. Meslar: I offer these.

The Court: Any objection?

Mr. Salmon: I want to examine him on the hour of the taking.

The Court: Yes, you may.

By Mr. Salmon:

Q. Have you stated that these were flash lights or were they taken in daylight? A. These were

40

W. H. Kleindinst—Cross.

taken in daylight; the ones before these was taken by artificial light or flash light.

Mr. Salmon: No objection.

The Court: They will be admitted and marked Exhibits S-4, S-5, S-6, S-7, S-8, S-9, S-10, S-11, S-12, S-13 and S-14, respectively.

CROSS-EXAMINATION BY MR. SALMON: 10

Q. Who communicated with you to take the pictures on the night of this trouble? A. The Coroner called me up.

Q. Mr. Chapman? A. Mr. Chapman.

Q. And you got to the premises around nine o'clock, did you say? A. As near as I can judge, I didn't take notice of the time, I think it was around nine o'clock; it may have been a little after that. 20

Q. Who was there when you arrived? A. It was Captain Roff and the State Police, and there were a number of others there, I couldn't recognize them all; those are some of the ones I did recognize. Mr. Chapman was there.

Q. Were you in the house that evening? A. No, sir.

Q. Do you know whether or not this body had been in the house? A. I do not. 30

Q. Do you know where the body was taken to, what happened after you visited the property? A. No, sir.

Q. Had you any way of telling whether or not the body had been moved after it had rested after the shooting? A. No, there is no way, except I judge, of course, the body had not been moved.

Q. Were there any indications to you that the death, or the final passing out, occurred within an 40

W. H. Kleindinst—Redirect.
Max Rosof—Direct.

hour of the time you had been there? A. I couldn't say.

Q. No evidence of life in this body as you viewed it? A. I couldn't see any.

Q. You had a history of the matter given to you at the time by the parties present, or the Coroner, or somebody told you about the matter at the time, 10 any details of it? A. No, none whatever.

Q. The Coroner just asked you to come there? A. And make the photographs.

Q. And it was he and no one else? A. After I got there Captain Roff took me in charge.

Q. So Mr. Chapman, the Coroner, asked you to come there to take pictures, and after that Mr. Roff took you in charge? A. Yes.

20 REDIRECT-EXAMINATION BY MR. MESLAR:

Q. Weren't there clots of blood right immediately next to the head where it lay? A. Yes, the photographs shows that.

Q. On the ground? A. Yes, photograph plainly shows them.

(Witness excused).

30

MAX ROSOF, a witness called on behalf of the Prosecution, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. MESLAR:

Q. Are you in business, Mr. Rosof? A. Yes, 76 Speedwell avenue.

Q. Do you sell bullets for revolvers and guns?
40 A. Yes.

Max Rosof—Direct.

Q. Do you recognize Gustave Aeschbach here?

A. Yes, sir, I do.

Q. Did he come to your store? A. Twice.

Q. On what day? A. The day I can't remember, it was the day before the murder was committed.

Q. The day before or day of the murder? A. It isn't very plain to me, I can't recollect whether it was the day before or day of the murder. 10

Q. What did he come to your store for? A. First he came and purchased some twenty-two cartridges.

Q. Twenty-two calibre? A. Twenty-two calibre, box of 22 calibre cartridges. A few hours afterward he came again and exchanged them for 32, saying they didn't fit his gun.

Q. And he purchased thirty-two calibre bullets? A. Yes.

Q. How many? A. They come in a box, fifty in a box. 20

Q. I show you a box containing some 32 calibre bullets with about five missing and ask you if you recognize that as the box of bullets you sold to this man? A. I do, and this is imported cartridges, I am the only one handles them.

Q. And that you say would be the box you sold to this man? A. Yes.

Q. And did some one visit you on Tuesday, April 1st, concerning these bullets? A. Yes. 30

Q. Who? A. Captain Roff, and I guess State Police.

Q. And did they say, do you recollect now when you sold them relative to that date when they came? A. Yes, when the sale is made. It slipped my mind, but if I happen to recollect it was sold the same day.

Q. Not the same day Captain Roff came there? A. No. 40

Max Rosof—Cross.

Q. That day must have been Monday? A. Yes.

Q. Do you remember what time he came for the twenty-twos? A. In the afternoon.

Q. And later he came back for the thirty-twos?

A. It must have been an hour later he came back and exchanged those cartridges.

10 CROSS-EXAMINATION BY MR. SALMON:

Q. You conduct the Army and Navy store? A. Yes sir.

Q. Are you entirely sure that the defendant did procure 22 calibre bullets first? A. Well, I am not entirely sure, twenty-two, twenty-five calibre, but one thing I am sure, he came back second time and exchanged them.

Q. Then, he had to exchange them? A. Yes.

20 Q. And you gave him these thirty-twos, is that it? A. Yes.

Q. When he was there getting the first order, they were 22 or 25's, he had no revolver with him, did he? A. That I cannot remember.

Q. What have you to say whether he had any revolver or part of a revolver when he came back?

A. I can't recollect.

Mr. Meslar: I offer the box and bullets for Identification.

30 The Court: Any objection.

Mr. Salmon: No objection.

(Received and marked for Identification S-15).

(Witness excused).

Trooper Samuel Joseph Leon—Direct.

TROOPER SAMUEL JOSEPH LEON, a witness produced on behalf of the Prosecution, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. MESLAR:

Q. You are a detective connected with the New Jersey State Police? A. Yes.

Q. Assigned to Troop B? A. Yes. 10

Q. Did you receive instructions to go to Morris Plains that someone had been killed? A. Yes.

Q. When was that, do you remember? A. We received the call 7:40 p. m. on March 31st.

Q. And who did you take with you? A. Trooper Callahan.

Q. And yourself? A. Yes.

Q. Where did you go? A. To Jaqui avenue, Morris Plains. 20

Q. What did you find when you got there? A. The way we got the instructions, it was the first house in on the right, but we stopped at the first house on the right and as Trooper Callahan hopped out of the car, I was driving, he ran up on the porch, and as I was getting out by the driver's seat, somebody hollered over, "State Police?" He said, "Yes." He said, "I guess you are looking for me."

Q. Do you know who called to you? A. Aeschbach. 30

Q. He called to you and said he guessed you were looking for him? A. Yes.

Q. What did you do? A. I walked over and he walked towards me. I asked him what was the matter. He said, "I just shot my wife."

Q. Did he seem excited? A. No.

Q. Was he cool and collected? A. Yes.

Q. Go on, what happened? A. I said, "Where is she at?" He said, "Laying down here." We 40

Trooper Samuel Joseph Leon—Direct.

went back and he showed her to me. I looked at her with a flash-light.

Q. Who was with you now? A. Trooper Callahan.

Q. I now show you Exhibits marked Exhibits S-1, S-2 and S-3, and ask you if you recognize those pictures as the position the body was laying in when you got there? A. Yes sir, that is the position of the body, but the clothing might be mussed up a bit.

Q. Was it windy, that day? A. No; because the doctor had examined the body.

Q. But he had not moved it? A. No, the body is exactly the same, just the same as it was when I first seen it.

Q. What did you do? What else did you find there?

20 The Court: Let him tell his story. You got there, then he showed you his wife; continue on from there.

The Witness: I went inside Callahan was following me and as we got into the door the phone rang and it was one of the Troopers and Callahan went to answer the phone and Captain Roff came in.

30 Q. Then what did you do? A. We took a statement from Aeschbach and he told us why shot his wife and that he shot her and why.

Q. Did you go inside to take this statement? A. Yes sir in by a kitchen table.

Q. And you obtained a statement from him? A. Yes.

Q. Did he give the statement voluntarily? A. Yes, he did.

40 Q. And before you had gone in did you see any-

Trooper Samuel Joseph Leon—Direct.

thing of a revolver? A. I asked him for it he said Byrnes had it.

Q. Did Byrnes later give you a revolver? A. Yes.

Q. I show you a revolver and ask you if that is the revolver he gave to you? A. Yes sir, it is.

Q. And up until this day have you had that in your possession? A. Yes sir.

10

Mr. Meslar: I now offer this revolver.

The Court: Any objection.

Mr. Salmon: There is a missing link—

Mr. Meslar: Mr. Byrnes said he picked it up when Aeschbach threw it at his feet.

Mr. Salmon: No objection.

(Received in evidence and marked Exhibit S-16).

Q. Did you take the number of this revolver? A. I did.

20

Q. What is the number? A. 79,854.

Q. Where did you find the number on here? A. On the trigger guard.

Q. 79,854, that is the number? A. Yes.

Q. When you got there did you say that the body was not moved? A. Yes sir.

Q. Who was assigned to watch the body? A. Trooper Callahan.

Q. And he was there to watch this body from the time you got there up until the time it was turned over to the Coroner and sent to the hospital? A. Yes, Dr. Reed got there a very few minutes after we got there.

30

Q. Aeschbach made a statement to you? A. He did.

Q. There at the Byrnes home on Jaqui Avenue? A. Yes.

Q. Did he seem cool and collected at that time, 40

Trooper Samuel Joseph Leon—Direct.

or was he excited? A. He seemed cool, he was cool; he wasn't a bit excited.

Q. I show you two pieces of paper and ask you if that is the statement he gave at that time? A. Yes, sir, it is.

Q. Do you know who wrote that? A. Captain Roff.

Q. At whose dictation? A. He gave it to us of his own free will; he gave the story, and, as he did, Captain Roff wrote it down.

Q. You witnessed this statement? A. I did.

Q. Did you see Aeschbach sign it? A. Yes.

Q. In the presence of the Coroner, Trooper? A. Yes.

Mr. Meslar: I offer it.

20 Mr. Salmon: I think until Captain Roff testifies that is the handwriting taken down from the lips of the man that it is objectionable at this stage, unless this witness looked upon the writing as it progressed and knows upon that paper were placed the words of the defendant.

The Court: No objection, you can have it marked for identification and when Captain Roff is on the stand it can be offered.

30 (Received and marked for Identification S-17.)

Q. I show you another statement and ask you where that was obtained? A. State Police Headquarters.

Q. From whom? A. The defendant, Aeschbach.

Q. In whose presence? A. Trooper Callahan, Captain Roff, and, you know, that Department Clerk.

40

Trooper Samuel Joseph Leon—Direct.

Q. Was this statement read back to Aeschbach?

A. Yes.

The Court: When was the statement taken?

The Witness: The same night up our Headquarters.

The Court: At what time?

The Witness: Somewheres between ten and eleven o'clock, I just don't know the time. 10

Mr. Meslar: Offer this statement in evidence.

Mr. Salmon: May I examine on it?

The Court: Yes.

By Mr. Salmon:

Q. How can you tell Officer Leon that this writing has in it the statement that you heard him give? A. I was there at the time, from the time it was taken down, the Clerk took it down. 20

Q. When the Clerk took it down, by that you mean, transcribed on a typewriter in your presence, is that it? A. Yes sir; from the time the defendant, Aeschbach was arrested until the time he was committed to the County Jail he was in my presence at all times.

Q. When the statement was being taken down there was somebody whom you call a Clerk wrote it on a typewriter? A. Yes. 30

Q. And you have had the paper since it was written or when written, or where has it been? A. That was the original copy, that was given to the Prosecutor, I have a carbon copy of the same thing.

Q. Now, are you depending upon your memory from having read this today and thereby know it was the statement that he made then, or do you identify the paper in the same way and watched the transcriber of the statement, say that you saw 40

Trooper Samuel Joseph Leon—Direct.

that he put down what the man said? How do you know this as it? A. It has my signature on there.

Q. Is that the only way you know? A. I have a carbon copy right here, exactly the same as that.

10 Q. Do you know that is a carbon copy? A. I know it is a carbon copy and exactly the same as that.

Q. How do you know this paper has the statement or statements of the defendant unless perhaps you may have seen the typewriter write them and saw the words written there as he took them? A. Yes, I was looking standing right over the clerk as he was writing it down. Captain Roff was standing there, he was giving a statement of his own
20 free will.

Q. Who formed the language? A. He did himself.

Q. Is this statement in his language entirely, or is it, what he said in thought or idea, and transformed by somebody into words, are these his words? A. I don't know anything about this—these are his words; once in a while it might be a question asked in there, but Captain Roff and myself
30 told him to give us a statement in his own words as to what took place, and as he was saying it the Clerk was typing it.

Q. Haven't you gone as far as to say that you observed what the Clerk was typing and found the Clerk was typing what was said by the defendant? A. I am looking at the typewriter and listening to him.

Q. Who asked questions, you or Captain Roff?
40 A. Captain Roff.

Trooper Samuel Joseph Leon—Direct.

Q. You didn't ask any? A. No, there wasn't any for me to ask.

The Court: Didn't you say he read it before he signed it?

The Witness: Yes.

The Court: It seems to me, Judge Salmon, that would cover a multitude of sins.

Mr. Salmon: I don't think we have any objection to it; I wanted to know how it was created. 10

Q. The Clerk, you say, of the Department took down this statement on the machine? A. No.

Q. Wasn't it taken in stenography as this Court proceeding is being taken? A. No.

Q. How was it? A. I don't just recollect, but I am—

Q. It may have been? A. Whether it was taken down in shorthand or not—he asked me whether we wanted to take it right down on the typewriter or in shorthand. I am pretty sure taken down on the typewriter. 20

By Mr. Meslar:

Q. Trooper Leon, Aeschbach read this statement over in your presence? A. Yes.

Q. Did he state that statement was true or not? A. Yes. 30

Q. And you witnessed his signature? A. I did.

The Court: It might be you gentlemen could agree that it be admitted subject to being stricken out if Captain Roff does not tie it up; that will permit you to use them as first statement and second statement. The difficulty with it now is, you cannot examine, Judge Salmon, on it, unless it is admitted. 40

Trooper Samuel Joseph Leon—Direct.

Q. Did you take a box of bullets from Aeschbach? A. I did.

Q. And where did he get them from?

The Court: No, where did he have them?

The Witness: He had them in his left rear pants pocket.

Q. And is that the box of bullets he had there?

10 A. Yes sir.

Q. Have you them marked? A. Yes, I put on there, "Bought 3/31/30."

Mr. Meslar: Offer them as evidence.

By Mr. Salmon:

Q. As a matter of fact, he proffered or brought these bullets to you? A. I asked him if he had any bullets on him, any of the rest.

20 Q. Didn't he offer them to you without your asking him? A. No, he did not.

The Court: What difference does that make on the offer; that is proper cross examination, but not on the offer. Any objection to the offer?

Mr. Salmon: No objection on the offer.

The Court: They will be admitted and now marked Exhibit S-15.

30 Mr. Salmon: And there is no objection to the offer here marked for Identification S-17.

The Court: Then S-17, statement No. One will be admitted and marked Exhibit S-17, in evidence, without objection.

By Mr. Meslar:

Q. I show you his revolver which you said you obtained from Mr. Byrnes, and ask you did you
40 show this revolver to Aeschbach? A. I did.

Trooper Samuel Joseph Leon—Direct.

Q. What did he say? A. He said that was the gun he used.

Q. Did he say it in those words? A. He said, "This is the gun I shot her with."

Q. I show you a pencil and knife and flash-light, and ask you if you obtained those from Aeschbach?

A. Yes.

10

Mr. Meslar: Offer these in evidence.

The Court: Any objection.

Mr. Salmon: No objection.

(Received in evidence and marked Exhibits S-19, S-20 and S-21, respectively.)

The Court: They are admitted without objection; I can see no materiality in the pencil.

Q. I show you a glove and ask you where you obtained that glove? A. Hughson's Morgue, from Dr. Christian.

Q. I show you two bullets and ask you from whom you obtained those? A. This here was given to me by Dr. Christian; this is the bullet that was lodged in the brain.

Mr. Salmon: Dr. Christian gave it to him.

The Court: He is merely describing the bullets because of its varied shape.

30

The Witness: This bullet was given to me by Captain Roff.

Mr. Meslar: The smooth one by Captain Roff, and the one sort of jagged, by Dr. Christian, and the glove was given to him by Dr. Christian. Offer them for identification.

(Received and marked for Identification, S-22, the glove; S-23, jagged bullet; S-24, smooth bullet.)

40

Trooper Samuel Joseph Leon—Cross-Redirect.

CROSS-EXAMINATION BY MR. SALMON:

Q. What time did you get to the Byrnes house?

A. About 7:45 or 7:50.

Q. Was the Coroner there when you go there?

A. No sir, he was not.

Q. Do you know whether or not he had been there and gone away? A. Yes sir, we were the first
10 ones there.

Q. And were you there when those pitcures were taken that night? A. They were being taken just before I left.

Q. What time did you leave? A. I don't know just what time I left.

The Court: About what time; you don't have to give the exact minutes?

The Witness: Close to nine o'clock.

20

REDIRECT-EXAMINATION BY MR. MESLAR:

Q. You say the body was the same except for the clothing being moved. Whereabouts? Would the clothing be moved for the Doctor? A. Well, it could, the Doctor would have to move the clothing to examine.

Q. To use the stethoscope? A. Yes; but the body was at that side; of course the leg or arm
30 might have been thrown over.

Q. But the main part of the body lay in the same position? A. Exactly; the head was the same and the feet was pointing off to the northeast.

(Witness excused.)

40

Trooper John P. Callahan—Direct.

TROOPER JOHN P. CALLAHAN, called as a witness on behalf of the Prosecution, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. MESLAR:

Q. Trooper Callahan, you are connected with the New Jersey State Police? A. Yes.

Q. Did you accompany Detective Leon on this call to Morris Plains? A. Yes sir. 10

Q. When you got there what did you do? Where did you go first, to Morris Plains? A. We went to Morris Plains.

Q. Whereabouts? A. Stopped at Larry's Garage to find out the exact street or location of Jaqui avenue. We had the information that it was the first house on the right. I jumped out of the car and ran up on the porch of the first house on the right, and as I was waiting for someone to answer the door Trooper Leon got out of the car and someone called him, and finally he called me, "Here it is, over here." I ran over to the other house and I ran in the front of the house knowing that he had taken Aeschbach in custody, ran through the house to the back porch and Detective Leon was coming in with Aeschbach, the defendant, coming in the kitchen. 20

Q. Did you take a statement from him there? A. Yes. 30

Q. Were you assigned to watch the body? A. I did.

Q. Did you watch the body from the time you got there until turned over to the Coroner? A. Yes.

Q. Taken to Memorial Hospital for autopsy? A. Yes.

Q. Didn't move it? A. No.

Q. No one did? A. No. 40

Trooper John P. Callahan—Cross-Redirect.

Q. Were there photographs taken? A. Yes.

Q. Were you there when they were taken? A. Yes.

Q. Had the body been moved from the time you got there until the photographs were taken? A. No sir.

CROSS-EXAMINATION BY MR. SALMON:

10 Q. What time was the body turned over to the Coroner? A. I imagine around 25 minues after we got there.

Q. What time did you get there? A. About seven or eight minutes after we got the call at our Headquarters, 7:40.

Q. You got the call at your Headquarters at 7:40? A. Yes sir.

Q. So you arrived over there something like 7:47-7:48? A. Something like that.

20 Q. And the Coroner came how soon? A. About twenty-five minutes after we got there.

Q. Which would make it about 8:12 to 8:15? A. Something like that.

Q. When were these photos taken? A. About less than an hour after the Coroner got there.

Q. You were in and out of the house, were you not? A. After the Coroner got there, yes sir.

30 Q. So whatever transpired outside you would not be informed about, necessarily, would you, you were inside? A. Not after the Coroner got there.

REDIRECT-EXAMINATION BY MR. MESLAR:

Q. Up until the time the Coroner got there you watched the body? A. Yes.

Q. Wasn't Constable Underhill there after the Coroner got there? A. Yes.

40 Q. And he watched the body after that? A. Yes, he was left in charge by the Coroner.

Trooper John P. Callahan—Recross.
Fred Roff—Direct.

Q. The Coroner pronounced Louise Aeschbach dead? A. Yes.

Q. Did you call the Coroner? A. That I am not sure I did not call the Coroner, someone did.

RE-CROSS-EXAMINATION BY MR. SALMON:

Q. How much time elapsed, and who was the Doctor? A. Dr. Reed, I believe. 10

Q. How much time after Dr. Reed believed the woman dead were those photos taken? A. That I couldn't say.

Q. What is your best estimate, you were there? A. About an hour.

Mr. Meslar: With Judge Salmon's consent, it is stipulated that Dr. R. Ralston Reed got there about 8:15, when he examined the body of Louise Aeschbach and found her dead. 20

The Court: It is so stipulated on the record by consent of both parties.

FRED ROFF, called as a witness on behalf of the Prosecution, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. MESLAR:

Q. You are connected with the Morris County Prosecutor's Office? A. I am. 30

Q. Did you get a call someone had been murdered in Morris Plains, and did you respond to that call? A. I did.

Q. Where did you go? A. Jaqui avenue, to the home of Michael Byrnes.

Q. And what time did you get there? A. 7:50. 40

Fred Roff—Direct.

Q. What did you find when you got there? A. I went inside the house, and I saw—

Q. Before that, do you know Gustave Aeschbach?
A. I do.

Q. Have you known him for a number of years?
A. A good many years.

Q. Did you know Louise Aeschbach, his wife?
A. By sight, yes.

10 Q. Tell what you saw when you got there? A. As I pulled up in front of the Byrnes home I saw Joseph Byrnes running along the street. He called to me, "Are you a doctor?" I said, "No, I am a detective". He pulled up and said, "Someone has been shot." At first I thought he had been in some difficulty with someone, he was so upset. I ran into the alleyway in the back. He pointed there,
20 and I saw the body of a woman laying near the rear of the house.

Q. Did you indentify who this woman was? A. Shortly after.

Q. Who was she? A. Louise Aeschbach.

Q. Yes. A. I went into the house and Gustave Aeschbach was standing there with Trooper Leon and Callahan was going out of the door. At that time Gustave Aeschbach told me, "It is me, Fred, I killed my wife." I did not believe him at first,
30 he seemed so cool and collected, until I went out and looked at the body and I recognized it as the woman who lived a couple of doors from me, that is, the grandmother did. I then asked him why he did it. He started to relate she had lost her affection for him, was losing it. He said on the Thursday previous to the shooting they had been to Morristown to the moving pictures he and his two youngsters. That his wife came for him in a car
40 she owned; that after leaving the pictures she

Fred Roff—Direct.

bought him an overcoat and hat, purchased a radio and then drove back to the home where he lived, and where the children stayed with Mrs. Pruden and Mrs. Lindabury; that his wife kissed both children good-bye, and failing to kiss him, he asked her if she wasn't going to kiss him good-bye, and she said, "What is the use of kissing someone that you hate." That was on Thursday. He said that continued on until Saturday he received a letter that was sent through Mrs. Pruden in which she said she was through with him, and was going to get a separation from him; that he tried to get in touch with her; that Mrs. Pruden called her, and that she promised to come up and see him on Sunday to try and straighten things out; so she called him sometime Sunday and said there was no use of her coming up, she wanted no more to do with him. He stated on the Monday before this that if he couldn't have her love that he would kill her. On Monday he went to Morristown—

Q. Did he say when he formed that intention?

A. On Saturday was the first he thought of the gun he had, that someone in Worcester, Massachusetts, had given him. He said on Monday he went to Morristown, Max Rosof's Army and Navy store and purchased some bullets. He came back to the house and loaded the revolver with four cartridges, the fifth wouldn't enter due to a defect in the chamber. He put the gun and the extra bullets back where he kept it, then he went and called his wife and she hung up in his face. He then decided, he said, to go down and if she would't return the love to him he would kill her. He put the gun in his right overcoat pocket, and the box of bullets in the right rear pants pocket and walked to the home of Byrnes where his wife was employed. He said up

Fred Roff—Direct.

until Thursday they never had any difference, she was always a good wife and never had any difficulty whatsoever.

Q. He did not intimate that she was doing anything wrong? A. He said there wasn't a better woman living, as far as he knew, than his wife.

Q. What else did he tell you? A. After that I
10 told him that he did not need to make a statement, that if he made one it would be used against him, and he made a statement, and as he dictated it to me I wrote it down, word for word.

Q. I show you Exhibit S-17, is that in your handwriting? A. Yes.

Q. Is that written down as he gave it to you? A. Word for word.

Q. In his language or your language? A. His
20 language.

Q. Did he sign that statement? A. Yes.

Q. In your presence and who else? A. Detective Leon, Trooper Callahan and Coroner Chapman.

Q. Did you later on take him to State Trooper Headquarters? A. Trooper Leon took him.

Q. Did you obtain another statement there? A. Yes, and this statement was made in the presence of Trooper Callahan, Leon and myself and Detective Kleindinst, of our office. It was taken by the
30 Clerk, stenographically at first, then reduced to writing on a typewriter and given to Aeschbach to read. He read it all through, and after reading it they had another statement asking him if he had read the foregoing statement, and, if it was true, and he resigned it as it is underneath.

Q. Did you say anything to him on this night? A. I did, I asked him—after asking him why he did it, and he answered as I have told, I said to
40 him, "Gus, why didn't you save one of them and

Dr. Thomas B. Christian—Direct.
Fred Roff—Direct.

shoot yourself with it and save us all the trouble, think how hard it is for me after knowing you all my life having to arrest you for murder.” He said, “I didn’t want to, I want the State—the State won’t shoot me, I know, they will put me in a chair and burn me.” I said “This could have been avoided, why didn’t you come to see me, maybe I could have straightened out the little trouble you had between you and your wife?” He said “I didn’t think¹⁰ about that.” He said “If I didn’t have her I didn’t want to live, anyway, if I couldn’t have her love. I thought too much of her to live without her.”

Mr. Salmon: No cross-examination.

(Witness excused).

20

DR. THOMAS B. CHRISTIAN, called as a witness on behalf of the Prosecution, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. MESLAR:

Mr. Meslar: Are Doctor Christian’s qualifications as a pathologist and diagnostician admitted?
30

Mr. Salmon: Yes.

The Court: The Doctor’s qualifications as a pathologist and practicing physician are well known and admitted by Judge Salmon.

Mr. Salmon: Yes.

Mr. Meslar: There is one more question I want to ask Captain Roff.

The Court: Let Captain Roff resume the stand.
40

By Mr. Meslar:

Q. I show you S-24 for Identification and ask you if you have seen that bullet before? A. Yes, I took it out of a weatherboard on the side of the Byrnes home.

Q. And did you give it to Trooper Leon? A. I did.

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The Court: Is that indicated on the map?

The Witness: Right here, a stoop here, window there, window there; it is on the third weatherboard from the foundation up in the middle on a diagonal slant coming from the front, in other words, as if in this direction from the front toward the rear.

Q. And this glove, did you see this glove before?

20 A. Yes, I removed those gloves from Mrs. Aeschbach's hands; one I gave to Dr. Christian, having the right and little finger what looked like a burn of some kind; directly under the burn on Mrs. Aeschbach there was a wound, and I asked Dr. Christian to analyze it to see if it was a burn.

Mr. Meslar: I offer them.

Mr. Salmon: No objection.

30 The Court: They will be admitted and marked in evidence Exhibits S-22—S-24.

CROSS-EXAMINATION BY MR. SALMON:

Q. Have you since learned what the wound was on the hand? A. I have since learned it was made by a bullet wound.

Q. May that be the one that was in the house?

A. It may have been, that I couldn't say.

40 Q. In the chamber of this revolver, how many exploded shells were there? A. Four, it holds four,

Dr. Thomas B. Christian—Direct.

but I tried the fifth one and Gustave Aeschbach told me the fifth wouldn't go in; I tried it and found out it would not, it was slightly smaller.

The Court: Is that the gun now introduced in evidence the bullet will not go in the fifth chamber?

The Witness: Yes.

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By Mr. Meslar:

Q. Those four exploded shells are the identical exploded shells handed to Trooper Leon by Byrnes?

A. Yes.

The Court: Mr. Vogt said in explaining the map, S-3, there was a stone indicated which had been indicated by you, what significance has that?

The Witness: Louise Aeschbach lay here, and the head, was directly, partly over the stone, the head—her feet out this way (indicating). I asked him to place that stone which lay there, I say, directly under her head that night, to prove the position of the body on the map.

20

The Court: You mean, to indicate the stone on the map?

The Witness: Yes.

30

(Witness excused).

(Dr. Christian resumes the stand).

DIRECT-EXAMINATION BY MR. MESLAR:

Q. Dr. Christian, did you perform an autopsy on the body of Louise Aeschbach? A. I did.

Q. What did you find? A. I found a white woman, around thirty-five years old, she had good

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Dr. Thomas B. Christian—Direct.

physical development, a fair amount of fat development; examined the body externally before making incisions and I find only the following signs of bruises—

The Court: Explain them, Doctor?

10 The Witness: In other words, the points of injuries I am going to relate are the only ones I found; it won't be in technical terms and you will probably understand it better. The first, right in this neighborhood, (indicating), was a hole—

The Court: Indicating left side of face.

The Witness: This was a round hole, and around this hole was a burn and powder marks. The second place was on this side of the face—

20 The Court: Indicating right side of the face.

The Witness: There was another hole which showed powder marks but not very much burn, which means that the gun was held closer at this location than this one—

The Court: Use the words, right, and, left, Doctor.

30 The Witness: Yes. The other hole was approximately,—I might not have it exact, it is sometime since I did the post-mortem,—approximately the center line of the neck just about where the Adams apple is, that was a round hole; then, examining the back of the body, turning the body over I found, on the left shoulder just back of the wing, as we call it, of the scapula, another hole,—it was not round,—jagged, blood coming out, which indicated the exit of a bullet. Then, on the back of the head, about this neighborhood, (indicating) on the right, just above the ear, which

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Dr. Thomas B. Christian—Direct.

also was a jagged hole, which indicated an exit hole of a bullet. In other words, the left side of the face, right side of the face and center of the neck were entrance holes of bullets, and these in back were exit holes of bullets; the other injury was on the right hand, second joint of the little finger, was a cut which was determined later, on examination later was determined it was due to a bullet from the powder marks on the glove and cut. It resembled what would be made by a bullet. We opened the skull and found that the bullet that went through the left side of the face right at the wing of the nose was the bullet that probably did the most damage and was the one, you may say, that was ninety per cent the cause of death. This bullet went right straight in, curving a little upward and lodged in the center of the brain and fractured the bone in the middle part of the skull, or what we call the sphenoid bone, and as it fractured this bone it lacerated several blood vessels causing cerebral hemorrhage. This bullet was found lodged in that portion of the bone right in the center portion of the skull, right part of the sphenoid bone, lodged in the bone. I removed this bullet and immediately gave it to Trooper Leon to keep so it would not get lost.

Q. I would like to identify this bullet. Is that the bullet you gave to Trooper Leon? A. Yes, looks very much like it, because it was bloody and distorted.

Mr. Meslar: I offer the bullet in evidence.

The Court: It is S-23 for Identification. Any objection?

Mr. Salmon: No objection.

Dr. Thomas B. Christian—Direct.

The Court: It will be admitted and marked Exhibit S-23 in evidence.

10 The Witness: The other laceration the bullet had gone this way, (indicating) it had glanced and fractured the inside of the jaw bone, lower right jaw bone; had gone in an angle upward and back, and fractured the internal part of the temporal bone, which we call the petrous
20 portion of the temporal bone, and it worked its way out through the back of the head; then it was determined by probing—the probe went through fairly easy—the bullet went right through a ring, because if it struck a bone it would deviate from a direct course, normal line. The third bullet hole in the neck was more interesting rather than pathological, did not have much to do with the cause of death;
30 struck the neck straight and hit a bone and circled around—followed it with a probe right around the neck, through the tissues and came right out the back, which did not cause much damage. The bullet wound on the finger did not cause any damage to speak of. Now, from this examination we determined then that the cause of death was due to gunshot wound and cerebral hemorrhage, cerebral hemorrhage is caused—

The Court: You say, "we," who is "we?"

40 The Witness: Dr. Reed and myself. In order to eliminate any other pathology that might exist and also in a case of this kind eliminate any technical cross-examination from the other attorney, we did a complete post-mortem, in other words, we examined the lungs and heart and all other organs of the body, to make sure she had no other disease that would cause

Dr. Thomas B. Christian—Cross.

her death, and everything in the internal part of the body was absolutely negative, no signs of any pathology, no disease present.

Q. Perfectly normal? A. Perfectly normal except for the ruptured blood vessel in the internal part of the brain from gunshot wound. 10

Q. Any bruises on the head or neck as if struck by a rock or anything? A. Didn't see any bruises or any signs of trauma except the ones made by the bullets.

CROSS-EXAMINATION BY MR. SALMON:

Q. Appeared to be a woman in very good, robust health, Doctor? A. She looked to me like she was in very good health; my opinion was she was in very good health. 20

(Witness excused.)

The Court: Ladies and Gentlemen of the Jury, you will be turned over to the care and charge of the Sheriff and his officers, and will be taken for lunch in a group. During the progress of this trial do not permit any outsider of any kind or description to discuss the case with you or any part of it. You may discuss the case among yourselves, I do not restrict that, but my counsel is you do not go too violently into your discussions until you have heard the entire case; so reserve your own counsels and get along as best you can and return promptly at two o'clock. The Sheriff will now take charge of the Jury. 30

Dr. Thomas B. Christian—Cross.

(Court convened pursuant to adjournment).

Mr. Meslar: I would like to recall Dr. Christian at this time.

The Court: Dr. Christian may be recalled; take the stand.

10 By Mr. Meslar:

Q. Dr. Christian, I neglected to ask you about that glove, the mate to this glove on Mrs. Aeschbach's body, have you that? A. Yes.

Q. Will you produce it please? A. (Witness does so).

Q. Is that the glove that was on Mrs. Aeschbach's hand? A. This glove I took off her right hand. This is the one with the burn on.

20 Q. Did you determine what the burn was from? A. Yes, I found out it was human blood through the microscope.

Mr. Meslar: I now offer this.

Mr. Salmon: No objection.

The Court: It will be admitted and marked in evidence Exhibit S-25, and as glove of right hand.

30 Mr. Salmon: No questions.

(Witness excused).

Mr. Meslar: I would like permission to read these two statements to the Jury.

The Court: You may proceed.

(Prosecutor Meslar reads said statements).

Mr. Meslar: The State rests, your Honor.

Mr. Salmon: The defense waives any opening.

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Mervin Lewis Lindabury—Direct.

MERVIN LEWIS LINDABURY, called as a witness on behalf of the Defense, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SALMON:

Q. Mr. Lindabury, did you know this defendant? You know Gus Aeschbach? A. I do.

Q. And it is in your home that one of the 10 children is stopping, am I right? A. Yes.

Q. And which is it, the boy or girl? A. The girl.

Q. The girl's name is what? A. Alice.

Q. How long has she been with you? A. January, I think, the first or second.

Q. This year? A. Of this year.

Q. From where did she come to you? A. From the house, Mr. Aeschbach's.

Q. You have heard of this trouble, of course? You know of this trouble in which Gus finds himself? A. I know. I know nothing about Aeschbach or his wife. 20

Q. Do you remember of going to his home the Sunday before this trouble? A. I do.

Q. And on that Sunday who was present when you were there with him? A. My step-daughter.

Q. Do you know where Gus Aeschbach stayed that entire Sunday afternoon? A. Down in his own home, I presume. 30

Q. And on that occasion of your visit, did you and he speak about the subject of himself and his wife? A. Nothing more only about selling the house.

Q. Did you on that occasion convey to him any information that you had received directly, or indirectly, from his wife? A. No, he told me he would sell furniture and all if I seen the man who wanted to buy the house. And I asked him the 40

Mervin Lewis Lindabury—Direct.

trouble, and he says his wife was going to leave him, and I thought he was fooling me.

Q. Did he appear to be in earnest about it? A. Well, I don't know much about the man, we were all fooling.

Q. Did you and he have a conversation about the daughter, Alice, that day? A. Yes.

Q. You talked to him about the subject of the
10 girl, Alice, did you not? If you did, what did you say to him? A. I talked to him about his wife, said she didn't want the little girl to go down there.

Q. By "down there," where did you mean? A. To his home and stay over night, because I had company.

Q. What is the name of your step-daughter to whom you referred? Did you refer to your step-
20 daughter? A. Yes.

Q. She was with you at the time? A. She went there to telephone at the time, that's what brought me down.

Q. What is her name? A. Isabelle Storey.

Q. And did you in that conversation when you told him that his wife didn't want the girl, Alice, to go down there to him, and to the house, did you tell him from whence you got that information? A.
30 No, I didn't.

Q. Well, what effect did you observe on him of that information, that you gave him about the child not being wanted by the mother to go down to his house? A. I was stopping in Morris Plains of a Saturday night—

The Court: That isn't the question.

The Witness: The mother. I didn't want the child to go down there? His wife didn't
40 want the child to go down there.

Isaac Pruden—Direct.

The Court: What effect did you observe that had on the defendant, if any?

The Witness: No effect at all.

Q. Did he make any comment upon it? A. No, he did not.

Q. Had you ever before conveyed similar information or anything like it to him to the effect that the wife did not want the child, Alice, to go down to his house? A. No sir.

Mr. Meslar: No questions.

(Witness excused).

ISAAC PRUDEN, a witness called on behalf of the Defense, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SALMON:

Q. You are the husband of the witness, Mr. Pruden, on the stand, today? A. Yes, sir.

Q. You know this defendant and his wife in her lifetime? A. Yes sir.

Q. And the boy is living at your home, am I right? A. Yes sir. 80

Q. Now, he has lived there to your knowledge and memory how long? A. Well, I should judge about five years on and off.

Q. Now, on the Saturday—have you been in Court all day? A. Yes.

Q. On the Saturday here in question to which reference has been made, you were, were you not, taking your wife home from Morris Plains, or how was that? A. I stopped there, she was down there, 40

Isaac Pruden—Direct.

and I stopped there to get her groceries; come in off the railroad.

Q. You took her home? A. Yes.

Q. On your way did you see this defendant? A. I did.

Q. Who was with him? A. His little girl, Alice.

Q. Which way were they going? They were going towards home.

Q. Did you have any words with him that day, talk to him? A. I did not—now, let me see; I did after I got home when my wife had this letter for Aeschbach, and I called the little girl myself and told her the letter was in the house, Mrs. Pruden had a letter for her, and she went in and got it.

Q. Before that had you not spoken or called after Gus as he walked along? A. Not that I know if, I might have said, "Hello, Gus," or something like that, but not to my recollection.

Q. You don't recollect that you had to holler at him to have him stop? A. Only when I told him about the letter.

Q. Who did you tell about the letter? A. I hollered to him and told him to send Alice in for it.

Q. And you told him from whom the letter came? A. I did not, I just said there was a letter there for him.

Q. You did not see him on the Sunday following? Or did you? A. I saw him up around his place several times, but I didn't see him to speak to him.

Q. How about the Monday following? A. The Monday following I didn't see him at all.

Q. Do you know where this letter came from? A. I do not.

Q. The only information you had was from your wife, that there was such a letter? A. For Mr. Aeschbach.

Isaac Pruden—Direct.

Q. And you are the man that gave that letter to the child, are you not? A. No.

Q. Who gave it to her? A. My wife.

Q. Did you see her give her the letter? A. I did not. I was by the garage.

Q. Have you lived a close neighbor to Gus here in the last eight or nine months? A. About 500 feet.

Q. Have you ever visited his home? A. Never was into it since he lived there to my knowledge.

Q. Have you ever seen him and his wife together? A. Yes sir.

Q. Have you been with them anywhere together or not? A. Why they always seemed to be very pleasant with one another.

The Court: Have you ever been anywhere with them together?

The Witness: No, I have not.

Q. When they were together, tell the Court and Jury how they acted toward one another? A. I should say they acted very affectionate; seemed to go out together and come in together, seemed to be all right. Hard thing for me to explain, knowing them, knowing the way they was, I always thought they were getting along fine.

Q. Now, latterly, had you noticed anything unusual in Gus?

Mr. Meslar: I object.

Q. In his actions?

The Court: I suppose that might be limited,—“latterly”?

Mr. Salmon: Yes; withdraw the question.

Leonard Fioroni—Direct.

Q. During the last several days prior to March 31st and including it, did you notice anything of a change in Gus, or not? A. Well, I did somewhat.

Q. What was your observation? A. Well, at sometimes when you spoke to him he go right on, other times, stop, simply talk together, have a little conversation; but lately he didn't do that. For
10 what reason I don't know.

Mr. Meslar: No questions.

(Witness excused.)

LEONARD FIORONI, called as a witness on behalf of the Defense, having been duly sworn, testified as follows:

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DIRECT-EXAMINATION BY MR. SALMON:

Q. Mr. Fioroni, where do you live? A. 10 Cleveland street.

The Court: Cleveland street, Morristown.

Q. Where do you work? A. Hobson Dairy, Morristown.

Q. Do you know this defendant? A. Knew him
30 since he was twelve years old.

Q. On the last day of March, the 31st last, was he or not under your employ? A. Yes sir.

Q. Where did he work on that day? A. Hobson Dairy Company.

Q. Under whom did he work, or with whom did he work there? A. We had Mr. Hutchin sort of foreman over there.

Q. Were you in close touch in your work with
40 him that day? A. Yes sir.

Leonard Fioroni—Direct.

Q. And how long prior to that had you continuously been in daily contact with Gus in the work with the Hobson Dairy? A. Well, after two weeks, he started there previous.

Q. Do you know from where he came, as to employment, where did he work before? A. Memorial Hospital.

The Court: That can only be hearsay. 10

Q. Had he ever worked at Hobson's before? A. Yes.

Q. How long ago? A. Probably I should say about a year and a half, may be less.

Q. And at that time were you and he in close daily contact in work, or weren't you with him? A. Yes, with him.

Q. Yes. A. Yes.

The Court: That is a year and a half or two²⁰ years ago?

The Witness: Probably, I couldn't say.

The Court: How long did he work then?

The Witness: About ten months.

Q. Do you know why he left then? A. He got sick.

Mr. Meslar: Objected to. 30

The Court: He got sick.

Mr. Salmon: That is part of our history.

Q. As a matter of fact, did you get him this job at Hobson's? A. He asked me, I asked my boss, and they put him on.

Q. I call your attention to Friday morning before this shooting and ask you whether you saw him early on that day? A. I was the first one saw him down there. 40

Leonard Fioroni—Direct.

Q. What time was that, do you remember? A. Well, I would say about ten to six, may be a little earlier.

Q. At that time did you observe any change in his actions or manners from what they had been before?

10 Mr. Meslar: Object, I don't see how that is material.

The Witness: Well he was a little quiet.

The Court: I will allow it; this is on the day of Monday, the 31st?

Mr. Salmon: This is the Friday following the Thursday night in question of the automobile incident.

The Court: All right.

20 Q. You have said that he was, what? A. Quiet.

Q. Other than that did you observe anything about him specially that day? A. He wasn't as lively as he used to be the previous four or five days.

Q. How was he on Friday, if you observed him? A. I was only there.

Q. Pardon me, how was he on Saturday, if he was at work there? A. Yes.

30 Q. How was he then? A. About the same.

Q. What if anything especially occurred between you and him after that?

Mr. Meslar: I object; when?

The Court: Just limit it.

Mr. Meslar: Relative to this case on Tuesday.

Mr. Salmon: To this case? Withdraw the question.

40

Leonard Fioroni—Direct.

Q. I direct your attention to Sunday morning and ask you whether he came to work? A. Sunday morning?

Q. Yes. A. Yes, he came to work.

Q. As to the time he came, was it the same time?

A. No; he came probably an hour earlier.

By the Court:

10

Q. What were his duties at Hobson's? A. He was supposed to work around, wash bottles; he was really hired as extra man for summer vacation.

Q. What are your duties? A. I am checker.

Q. Check up the milk that goes out? A. Yes.

Q. And he was working as handy man? A. Yes, just the Fall.

By Mr. Salmon:

20

Q. You say he came an hour earlier than you did? A. Yes, three-quarters to an hour.

Q. What if anything did you and he have by way of conversation as to his wife at that time? A. Sunday morning?

Q. Yes. A. First thing I heard about it he said she left him. I said, "Who left you?" He said, "My wife." I said, "You are fooling." He said then, "I have a letter from her."

30

Q. What further, if anything? A. Well, we talked a little about that, and then a couple of the men come in and we didn't say any more. I guess he didn't want nobody else to know it at the time.

Q. How did he act as to his composure, as to whether he was at ease? A. No, he wasn't at ease, he filled up when he was telling me.

Q. What do you mean, "filled up?" A. If he talked much longer he might have cried, or might

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Leonard Fioroni—Direct.

have been crying before he got through; just filled up, didn't feel like talking a whole lot.

Q. And did you again talk about it that Sunday morning? A. No. I never mentioned it unless he mentioned it.

Q. Did he mention it again that Sunday morning? A. No.

Q. Was he at work on the following day? A.
10 Monday?

Q. Yes. A. Yes, he went to work Monday.

Q. What was his conduct them about the place as to that which it had been a week before? A. He was down in the dumps, like, as if he was disgusted; previous to Saturday he was jolly; talked, spring jokes, felt contented, you know, everything looked like as if it was rosy, and Friday I noticed he was down-hearted, quiet, didn't say much.

20 The Court: This question related to Monday not Friday?

The Witness: That is how I am telling you he acted Monday, down in the dumps.

The Court: In other words, you say he acted the same on Monday as on Friday?

The Witness: Yes.

Q. Did you have any conversation with him that
30 Monday about his wife? A. Where, down the shop?

Q. Yes, at the shop? A. No, I think I just asked him if she come back, and he said, no.

Q. Later that day did you see him at the job, or elsewhere? A. No, I didn't see him only when I left at half past nine. I went home and he come in the house around quarter after three.

Q. That was on Monday he came to your house
40 quarter after three? A. Yes.

Leonard Fioroni—Direct.

Q. Did you talk with him then? A. Yes.

Q. And did he seem to have some errand, or some reason for going there? A. The only reason he says was my wife there, and only impression I had he wanted to see my wife, see if she knew anything about it.

Q. Was she there? A. No she was not home at all. 10

Q. Do you know whether he saw your wife that day? A. No.

Q. Did he say what his errand was with your wife, what the reason was he came? A. No, he didn't tell me.

Q. But did he appear to be in the same condition he had been a week before, or not? A. He was quiet.

Mr. Meslar: Let him explain how he was, 20
let the Jury draw their own inferences.

The Court: Yes.

Mr. Salmon: Withdraw the question.

Q. How did he appear that afternoon around three o'clock or quarter of three at your home?

The Court: Before you answer that question; when he came at quarter to three how long did he stay? 30

The Witness: Until about five, after four—maybe four.

The Court: During that time your wife didn't come home?

The Witness: She didn't come home.

The Court: Answer Judge Salmon's question. How did he appear during that time?

The Witness: He appeared just the same as he was during Sunday, all during the day, quiet, didn't have much to say. 40

Leonard Fioroni—Direct.

Q. What did he talk about that day? A. Didn't really ask me nothing; asked me what he should do; I said "I couldn't advise you what you ought to do, I couldn't tell you."

Q. Was there any other subject you and he talked upon beside that of his wife?

10 Mr. Meslar: Object unless it relates to this case. I don't see how what they talked about on other subjects possibly can be related to this case.

The Court: I think I will allow it. It might help the jury to a determination how his mind was functioning on that day; this is immediately before the shooting, within two or three hours?

Mr. Salmon: Yes.

20 Q. Did he speak on any other subject that day than the wife, as far as you remember? A. No, I don't remember what he said.

Q. And how long would you say he was there in the matter of time? A. Probably three-quarters of an hour, may be less, I didn't look at the time.

30 Q. I wish you would tell the Court and Jury the substance—more of it—of the conversation you did have with Gus on Sunday morning when he came down at that early hour, the extra early hour, tell the substance of the conversation you had about when he spoke about the wife and you and he discussed her? A. Well, when he told me about the letter he asked me what he could do about it. I said, "Why don't you wait a while till she gets through her case and maybe she will come back; maybe it will all blow over, and then if she don't come back in a couple of months go and see a
40 lawyer and see what you can do about it."

Leonard Fioroni—Direct.

Q. Anything else about it you suggested that something might be moving her, and if so—what was it you suggested? A. Moving her?

Q. That is something that might be the cause of her attitude according to his idea. Did you suggest a cause of her treatment of him, and, if you did, what was it? A. No, the only thing I thought may be the money she was making got the best of 10 her, felt a little independent, that's all.

Q. Did you speak about anything else? A. No.

Q. Anything that you did speak about, did he resent it; did he say that wasn't so, whatever it was, that he did not believe that of her? A. Well, I did ask him, "Do you think she might be going with somebody?" "No," he says, "I trust her with a million men," something like that. I don't just remember words, but he trusted her.

Q. Did he say anything further at all? A. What 20 is this, Sunday, yet?

Q. This is Sunday morning? A. Just about that time a couple of the men came in so we didn't want to talk any more about it.

Q. Do you have any explanation why he came down there three-quarters of an hour early, if that was correct? A. Unless on account of my being his only friend asking for a little advice.

Q. He didn't have to go down early on that ac- 30 count? A. Maybe to get there before the rest of the men got there, see.

Q. Now, you knew them as neighbors, did you not, Gus and Louise? A. Yes.

Q. And did you visit at his home, see them both there? A. Several times.

Q. Did they visit your home together? A. That is when they lived on Sussex avenue.

Q. Did they visit you? A. Oh, yes, sure. 40

Leonard Fioroni—Cross-Redirect.

Q. And between the two families how often would you get together? A. Maybe once or twice a week.

Q. What was the family condition from the viewpoint of apparent affection or lack of it between this man and his wife? A. Always affectionate I thought.

10 Q. Did you ever see him act otherwise toward her? A. No.

Q. Or talk otherwise to her? A. No, never had a wrong word for her; he always thought good of her.

CROSS-EXAMINATION BY MR. MESLAR:

Q. He didn't tell you he had purchased bullets on Monday afternoon to shoot his wife? A. Didn't
20 say a word.

Q. Did he say he had formed an intent to kill her? A. Not a word.

REDIRECT-EXAMINATION BY MR. SALMON:

Q. At that time you had no information that he had purchased any, nor you don't know yet that he had at that time, do you? A. Never knew until I heard of the murder that night; my brother told
30 me.

Q. Now, did you observe Gus when he left you on that Monday afternoon? A. Yes.

Q. What was your observation of his actions? A. I thought it was funny the way he went.

Mr. Meslar: Object to the characterization unless he describes what his actions were.

The Court: Yes.

The Witness: As a rule when he used to go
40 away always have a saying, "I will be down,

Mrs. Nellie Fioroni—Direct.

see you again," or "See you at work in the morning." This time he just said "Good-bye."

Q. What further if anything did you observe about his going away? A. He just went right out, I think out the diningroom, through the kitchen and right downstairs.

Q. Did you observe him on the street after he had reached it? A. Yes, I think he had his two hands in his overcoat pockets, walked kind of slow and head down. 10

Q. Slow? A. Yes.

Q. Was that usual with him when you saw him depart before? A. I didn't take no particular notice them times, I did this time on account of his being so quiet going out.

(Witness excused).

20

MRS. NELLIE FIORONI, called as a witness on behalf of the Defense, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SALMON:

Q. Mrs. Fioroni, you knew this defendant and his wife in her life time, didn't you? A. Yes. 30

Q. Neighbors were you? A. Yes.

Q. You did not see Gus on Monday of this shooting, did you? A. No, I didn't see Gus for two weeks before.

Q. Had you seen the wife during that time? A. I saw her on Friday afternoon.

Q. She called at your home, did she; or how did you see her? A. She called me on the phone to ask what I was doing that afternoon, and I said noth- 40

Mrs. Nellie Fioroni—Direct.

ing special. She said, "I will come down, will you go out with me?" I said, "Sure."

Q. Did she come down? A. Yes.

Q. Did you go out with her? A. Yes.

Q. You mean by that you went out in an automobile? A. Riding, yes.

Q. And during your ride was anything said by her to you about this defendant, Gus, her husband?
10 A. Yes.

Q. What did she say about him? A. She said that she was going to leave Gus.

Q. Did she give any reason as to why she was going to do it? A. She said she did not like him any more.

Q. Did you make any response to that, or comment, to her? A. Yes I did, I said I thought it was queer, that they were getting along so nicely,
20 now, that she should want to leave him seemed strange.

Q. How long had you known these parties or either of them? A. Very well for nearly four years.

Q. And you knew them about the same length of time, each of them? A. Oh, yes.

Q. You visited back and forth, did you? A. Yes.

Q. At any time during the period of your visits, at all times during those periods and occasions,
30 what did you observe as to their conduct toward one another? A. Why it was all right, I think they thought a lot of each other.

Q. Did the wife say anything more as to her present employment at the Byrnes home, whether it would continue or not? A. Yes, she thought that she would not be there very much longer.

Q. Did she tell you where she was going? A. No, of course she wouldn't know where she was going;
40 she would have to wait for another case.

Mrs. Nellie Fioroni—Direct.

Q. Was she a trained nurse or not? A. No sir, a practical nurse.

Q. You had not seen Gus in the last two weeks, you said, prior to this trouble? A. About two weeks.

Q. Did Mrs. Aeschbach speak about having gone to any performance, any show, moving pictures?

A. Yes, she told me that Gus and the children and 10 herself were to the pictures the night before.

Q. Did she tell you how that came about, or didn't she say? A. No, I didn't think anything of it for they always went to the show together.

Q. That had been their custom? A. Yes.

Q. Did she say that anything unusual happened between her and Gus at that time? A. No, she never mentioned anything at all.

Mr. Meslar: No questions.

20

(Witness excused).

Mr. Salmon: I will call Alice Louise Aeschbach.

By the Court:

Q. How old are you, Alice? A. Ten.

Q. Do you go to school? A. Yes.

Q. What class are you in? A. Fifth.

Q. Do you know what it is to tell the truth? 30
A. Yes.

Q. What will happen to you if you do not? A. I won't go to Heaven when I die.

The Court: You may administer the oath.

Alice Louise Aeschbach—Direct.

ALICE LOUISE AESCHBACH, called as a witness on behalf of the Defense, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SALMON:

Q. Alice, you are the daughter of the defendant, are you? A. Yes.

10 Q. And do you remember about a letter or envelope that seemed to contain a letter on Saturday just ahead of this trouble that you saw, at any rate, you saw the envelope, did you? A. Yes.

Q. Did you have it in your hands? A. Yes.

Q. Where did you get it? A. I got it from Mrs. Pruden.

Q. And would you be able to say whether that is the envelope that you received from Mrs. Pruden, after you look it over? A. It looks something like
20 it.

Q. As far as you can tell that is it? A. Yes.

Q. And what did you do with it? A. I gave it to my father.

Q. Where was your father at the time? A. He was up in the house.

Q. Who was with him, if anybody? A. Nobody was with him.

Q. And what did he do with the envelope you
30 gave him? A. He opened it and read it.

Q. Did you read it yourself? A. No.

Q. What if anything did he do or say after he opened it and read it? A. Well, he acted awful funny, and he says, "Oh, Alice." And I asked him what was the matter, and he said Mother was going to leave him, or something like that.

Q. And what time of the day was that? A. That was towards night, I guess, around four or five
40 o'clock.

Alice Louise Aeschbach—Direct.

Q. Now you lived at that time with Mr. Lindabury, did you? A. Yes.

Q. And, by the way, do you go to school ordinarily when you are up home here? A. Yes.

Q. And that Saturday you had no school, is that it? A. No.

Q. Where did you spend that Saturday if you remember in the morning? A. Why I spent it in Mrs. Lindabury's. 10

Q. When was the first you came down to the house where your father was? A. When he came home, I think it was.

Q. And where was your father when you first saw him that Saturday? A. I can't remember that, I think he was in the house.

Q. And do you remember about what time you came to the house that Saturday? A. No.

Q. Did you stay over-night there that night? A. 20
That Saturday—yes, I think it was that Saturday—
one Saturday

Q. You stayed over-night, did you? A. Yes.

Q. And the next day when did you first see your father? A. When he come home.

Q. Can you recollect about what time he came home? A. I guess around one o'clock or half past.

Q. Had he had his lunch or dinner? A. I don't know whether he eat it up home or eat it uptown.

Q. Where did you get your dinner that day? A. 30
At Mrs. Lindabury's.

Q. Do you know whether your father was up there to get something to eat, whether he did or whether he did not, was he up there to get something to eat? A. Yes, I think he was up there to get some dinner.

Q. Now, how did he come to go up there? A. Mr. Lindabury come down and I went up, and then there was a man at Mrs. Lindabury's house, and he 40

Alice Louise Aeschbach—Direct.

come up and says Mrs. Lindabury was bringing my father up to dinner.

Q. Was that usual or was that unusual for him to be up there for dinner? A. That was unusual, he didn't very often come up to dinner there.

Q. Who got his meals there at the house if he ate there? A. He got them himself.

10 Q. Have you since last Christmas, have you stayed overnight at the house there? A. No, that was the only time.

Q. Do you remember anybody being in the house beside your father and you on Saturday, and, if so, who was it? A. No, I don't remember him being in the house.

20 Q. You don't recollect; withdraw that. When did you last see your uncle, Herman, before this trouble? A. I think it was a Saturday he got the letter, I am not sure when I saw him.

Q. Now, the next day, in the afternoon, you saw your father around one o'clock you said? A. Yes.

Q. And did you see him as soon as he came back home? A. I am not sure if I did or not.

Q. During that afternoon how did your father act around the place? A. He acted kind of funny ever since he got the letter.

30 Q. After your gave your father the letter you speak of, what did he ask you, if anything, about it? A. Why, he asked me if I would go down to Mrs. Pruden and ask her to call up mother, and ask her if she would come up to see him, and I did.

Q. Did Mrs. Pruden phone there while you were there? A. Yes, but I was standing near the telephone, I didn't hear what my mother said.

Q. What was the message you got back? A. Mrs. Pruden said mother said she would be up Sunday.

40 Q. Did she come up Sunday? A. No.

Alice Louise Aeschbach—Direct.

Q. Do you know whether she telephoned again after that or not? A. Yes.

Q. Where did she telephone to, which house? A. To my father's.

Q. Were you there? A. Yes.

Q. Who answered the telephone? A. I don't know if it was my father or me, I think it was my father.

Q. What time was that, do you remember? A. 10 Well, I guess around eight o'clock, or something around that time.

Q. Was that Saturday night? A. Yes.

Q. Now, did you stay until Sunday night at the house with your father? A. No, I stayed until Sunday morning.

Q. By that you mean you went back to Lindabury's Sunday morning? A. Yes.

Q. Where did you see your father next? A. At 20 the house.

Q. When you came back there? A. Yes, in the afternoon.

Q. Sunday afternoon you and he were there together, weren't you, at the house? A. Yes.

Q. And did you stay on there and have your supper there, or not? A. I don't think I had my supper there, I think I had it in Lindabury's.

Q. After that Sunday afternoon or evening, after you saw your father, when did you see him again 30 until after the trouble? A. I don't know when I saw him again.

Q. I asked you about the time you went to the moving pictures, if you did, on Thursday night, do you remember it? A. Yes.

Q. And how did you come to go to the moving pictures? A. My mother called up and asked me if I wanted to go and I said, yes, and I went with them. 40

Alice Louise Aeschbach—Direct.

Q. And did your mother call you at your father's house? A. Yes.

Q. And before that had there been any arrangement for your mother to go to the moving pictures or not? A. Yes, she was going to go with my father, and then she called and said I could go.

Q. And thereafter you did go with them, and did anybody else? A. My brother went, too.

Q. What is your brother's name? A. Frederick.

Q. You came back from the moving pictures, do you remember? A. Yes.

Q. Do you know about what time it was you got home? A. No.

Q. Do you remember what happened, if anything, after you got home from the moving pictures? A. My mother kissed me and I got out of the car, and she didn't kiss my father.

20 Q. And did that make any disturbance, or not? A. Well, I heard her say that she was going to go home after she finished the case. I didn't know if she was going to go home to her father's or to our house.

Q. Go home to where? A. I heard her say she was going home, and I says, I didn't know if she was going to her father's house or coming back to live with us again.

30 Q. Is that what she told your father, that she was going home, is that it? A. Yes, that is what I heard her tell him.

Q. That night? A. Yes.

Q. You don't know where she referred to? A. No.

The Court: You heard her say that on Thursday night, the night you were to the pictures?

40 The Witness: Yes.

Alice Louise Aeschbach—Direct.

Q. What else did you hear her say, if anything, to your father that night when she kissed you good night? A. I didn't hear her say anything else, I was outside of the car.

Q. Had the little boy gotten out yet, or hadn't he? A. No, he got off by Mrs. Pruden's house.

Q. First, is that it? A. No, I got off first, and then he went back, he usually stopped at Mrs. Pruden's and let me off there. 10

Q. So your mother left off the little boy after you and your father had gotten out? A. Yes.

Q. And when your mother kissed you good-night you got out, and did your father get out? A. Yes, he got out and then he went back in.

Q. In the car? A. Yes.

Q. Was there anything then said about your mother kissing your father good-night or not? A. Well, she wouldn't kiss him. 20

Q. Did she kiss anyone beside you? A. And my brother.

Q. So when the car moved up your mother was driving it your father was in it? A. No, my father was out, and I was out.

Q. When your mother went away from you and your father she had the little boy, you saw her let the little boy out? A. I didn't see her let him out, but I heard her say she was going to.

Q. And you went into the Lindabury house, did you Alice? A. Yes. 30

Q. What did your father say to you, if anything, with reference to your mother, after you and he got out of the car that time? A. I can't remember him saying anything, only the dog was loose and he went in to tie him up.

Q. Did you and he speak about what had happened there with the mother? A. Not that I remember. 40

Alice Louise Aeschbach—Direct.

Q. Did you say anything to your mother about her not kissing your father, or to anyone? A. No.

Q. Anyone say anything? A. No.

Q. Do you know why your mother in the first place made the arrangement to go to the movies just with your father? A. No.

Q. When did your mother get this automobile, do you remember? A. I think it was the time before we moved, I am not quite sure.

Q. By moving, you mean, moved into this property, where your father was staying? A. Yes.

Q. Do you recall what month it was you moved into the property up there? A. I think it was in May.

Q. Of last year? A. Yes.

Q. During that time did your mother take you riding in the automobile? A. Yes.

Q. How often? A. Well, when my father used to go to work she would take us for a ride.

Q. And would she take your father to work? A. Yes, down to the station.

Q. And he was working down below, he took the train, did he? A. Yes, he was working at Newark.

Q. And she would take you when she took him to work? A. Yes, sometimes.

Q. On any other occasion did she take you? A. Sometimes at night she used to take us for a ride with Mrs. Pruden.

Q. How often did your mother come up since Christmas we will say, up to the house, as far as you know? A. I know when my father was working at the hospital she used to go up Tuesdays and sometimes Saturdays and Fridays.

Q. And would they go up together? A. Yes, most always.

Q. Now, where did your father work when your

Herman Aeschbach—Direct.

mother worked at the hospital? Withdraw that. You said when your father left the hospital, is that it? A. Yes.

Q. Where was your mother working then? A. At Mr. Byrnes.

Q. That hospital is the Memorial Hospital, Morristown? A. Yes.

Q. And she would go up and bring your father, did you see her bring your father up or not? A. 10 Yes, I used to see him get out of the car sometimes.

Mr. Meslar: No questions.

(Witness excused).

HERMAN AESCHBACH, called as a witness on behalf of the Defense, having been duly sworn, testified as follows: 20

DIRECT-EXAMINATION BY MR. SALMON:

Q. Herman, are you a brother to the defendant, Gustave Aeschbach? A. Yes sir.

Q. Did you visit him at his home recently before this trouble? A. Yes sir.

Q. When was the last time? A. It was on Saturday.

Q. What time of day were you there on the Saturday prior to this trouble? A. It was just towards evening.

Q. Who was there? A. It was him and his daughter, Alice.

Q. And what was the occasion of your going up there? A. More about work, about different work that we were talking about, to put tar paper on the roof and finish painting the house up and talked about putting in a pipeless furnace. 40

Herman Aeschbach—Direct.

Q. Had you put in a pipeless furnace? A. No, I was to dig out the cellar and put one in.

Q. How long did you stay? A. About an hour.

Q. Did you talk with your brother, Gus? A. Was talking to him about the job and asked him how he felt, &c.

Q. Did you notice anything about your brother,
10 Gus, that time that was unusual to you? A. Well, in a way, yes sir.

Q. What did you notice? A. Well, by the actions, that he asked me to have a cup of coffee, and I told him I didn't care for it, because I just after having my supper. So he kept asking me, so then finally I made up my mind to satisfy him I would take a cup of coffee off him. Then he told
20 me there were rolls on the table. I told him I had my supper, and afterwards he asked me why I didn't take any rolls.

Q. What else, if anything? A. Then he went in to the sun-parlor there and the victrola was there, and from there he went right on over to the radio and played the radio for a few minutes and shut it off; then he looked in the bedroom and shut the bedroom door.

Q. Did he say anything during this time or not?
A. The way I heard he said he couldn't stand it.

30 Q. Stand what, and what did he refer to? A. Couldn't stand the way he was.

Q. Are you a married man or not? A. No sir I am not married.

Q. You live with your mother? A. Yes sir.

Q. And you are younger or older than Gus? A. I am older, he is the youngest.

Q. What is your business? A. I do anything; I am working for Frank Miller, taking odd jobs.

40 Q. What do you know of Gus acquiring this

Russell Eichlin—Direct.

property up there, if he acquired it? Do you know anything about the facts of his getting this house where they lived?

The Court: How is that material to the murder of March 31st?

Mr. Salmon: Withdraw the question.

Mr. Meslar: No questions. 10

(Witness excused).

RUSSELL EICHLIN, called as a witness on behalf of the Defense, having been duly sworn, testified as follows:

20

DIRECT-EXAMINATION BY MR. SALMON:

Q. Mr. Eichlin, do you know this defendant, Gus Aeschbach? A. About I would say twenty years.

Q. And have you seen him recently? A. Well, not within the last two months, I would say.

Q. And have you seen him to be able to form a judgment from his actions as to the difference, if anything, in his conduct when you knew him before, as against the present time? A. I passed him a couple of times on the street. He either didn't see me or didn't speak; that is the only thing that I can remember. I hadn't seen him in quite a long time before that. 30

Q. Before that? A. Yes.

Q. You knew him when he was a youngster? A. Yes.

Q. Went to school with him? A. I did that.

Q. From your observation of seeing him latterly 40

Russell Eichlin—Direct.

as against the long time before, what is your opinion as to his mental condition?

Mr. Meslar: Object to that.

The Court: Yes, that is objectionable and will be ruled out. How can this man who hasn't seen him for a long time, and only saw
10 him a couple of months ago, form an opinion.

(Counsel for Defendant prays an exception, and requests that it be sealed and allowed.)

ALBERT H. HOLLAND
Judge.

Q. Have you seen him since this trouble of March 31st to talk with him?

20 The Court: Except in the Courtroom?
The Witness: Not until this morning.

Q. How much before March 31st did you see him? A. I really couldn't say, probably couple of months I met him on the street.

Q. When you first knew him was it as a school-boy friend? A. Yes, we were neighbors.

Q. From the viewpoint of his mental make-up,
30 what kind of a boy was he?

Mr. Meslar: I object.

The Court: I think that is objectionable; how can this witness prove his mental condition?

Mr. Salmon: Only from his actions.

The Court: He can tell what he knows of his actions, but he cannot give an opinion as to his mental make-up; can tell whether like any
40 other boy, played ball, went to school or played

Mrs. Tillie Friedel—Direct.

hookey, the same as the rest of us did. This man cannot qualify to tell us whether he was sane or insane.

(Counsel for Defendant prays an exception, and requests that it be allowed and sealed.)

ALBERT H. HOLLAND
Judge. 10

Mr. Meslar: No questions.

(Witness excused.)

MRS. TILLIE FRIEDEL, called as a witness on behalf of the Defense, having been duly sworn, testified as follows:

20

DIRECT-EXAMINATION BY MR. SALMON:

Q. Mrs. Friedel, what is your relation, if any, to this defendant? A. I am his mother.

Q. How old is he? A. I can't exactly tell myself.

Q. And where was he born? A. He was born in Hoboken.

Q. Is his father living? A. No sir.

Q. When did he die? A. I don't know, a good many years ago. 30

Q. What was the occasion of his death, how did it occur? A. He committed suicide.

Q. How? A. He took poison, carbolic, at his mother's home.

Q. Where did he live with her? A. He lived with his second wife, and then he committed suicide at his mother's house.

Q. What town or city or place was it? A. Hoboken. 40

Mrs. Tillie Friedel—Direct.

Q. Now, what was his name, the father of this boy, Gus? A. Herman Aeschbach.

Q. And was he your first husband? A. Yes sir.

Q. Thereafter you married again, did you? A. Yes sir.

Q. How many children were there of the marriage to Herman Aeschbach? A. Six children and
10 a miss.

Q. How old were you when you were married to him? A. Fifteen years old.

Q. Is your oldest child living today? A. Yes sir.

Q. Is the next eldest child living? A. No sir.

Q. The third one living? A. No sir.

Q. Well, of the six how many are living? A. There is three living.

Q. Now, after you were married again what children, if any, did you have? A. I had one.
20

Q. One child? A. Yes.

Q. Is he living? A. He committed suicide.

Q. How? A. His shot his brains out.

Q. Where? A. In New York.

A. Is that the only child to the second marriage?
A. Yes sir.

Q. With whom do you live, if anybody? A. I live with myself and Herman is living with me, I have got a home and Herman is living with me.

30 Q. Here in Morristown? A. Yes sir.

Q. Where do you live here? A. McCullough avenue.

Q. How long have you lived there? A. I live there since, I think it is February.

Q. This year? A. Yes.

Q. Who is your landlord? A. Mr. Lawless.

Q. Now, Gustave is your fourth child, or not?
A. No, Gustave is my last child with my first husband.
40 band.

Mrs. Tillie Friedel—Direct.

Q. Now, when he was born were you living with your husband? A. No, sir, I was living with my parents.

Q. Prior to that how long had it been since your husband was around? A. I don't know.

The Court: Judge Salmon, upon what theory is this evidence being offered?

Mr. Salmon: I want to show the parenthood¹⁰ of this man, not only of the father and mother but that from which she suffered prior to his birth.

The Court: For what purpose?

Mr. Salmon: I want to show of what product he is, his mentality. Now, our theory is that in this family history is to be found the very weakness from which this man suffers and on which is based his plea in this case.

The Court: He hasn't made any plea to the²⁰ Jury; on what ground is it offered?

Mr. Salmon: On the ground of a deficient mentality, to the end that he would be a fit subject, or which resulted in his being unable at that time to know what he was about.

The Court: What theory of law does that encompass; if it is a plea other than insanity that may be one thing, but if it is a plea of weak mentality, where do you get the law that³⁰ permits you to offer this? I have in my hand the case of *State vs. James*, decided 1921, in which this very line of interrogation was ruled out, in which the Court said: "It is argued on behalf of the prisoner that it was error for the Judge to refuse to take evidence of the prisoner's family history, which it was plain would show a taint of insanity, which the prisoner must have inherited. This was not offered as⁴⁰

Mrs. Tillie Friedel—Direct.

an absolute defense on insanity, but only that the jury could take into consideration." On the question of error to recommend imprisonment for life under the amendment of the Crimes Act, the Court goes on to say, "And it was perfectly proper to rule it out." I do not want to sit here and let this evidence go in
10 unless it goes in on a proper basis. That is in the James case, 96 Law, Court of Errors and Appeals case.

Mr. Salmon: We are depending on this case, 58 Law, 482, wherein there was a condition of emotional insanity.

The Court: I am familiar with that case; there the question was that the man was emotionally insane. But as I understand the de-
20 fense, up to this moment there is no such plea made in behalf of defendant that he is insane.

Mr. Salmon: We have had no chance to say.

The Court: I meant to say, no evidence until now.

Mr. Salmon: That is to say, our case is on now and not finished.

The Court: Of course if you tell me and the jury that your defense is insanity, I will per-
30 mit you to go ahead; if you tell me that is not your defense, I do not see how I can permit you to, or allow this.

Mr. Salmon: It amounts to that, that we do say at the time he was so temporarily deranged that he did not know the difference between right and wrong, and that is the best we have to produce.

The Court: You are going to do that by pro-
40 duction of family history?

Mrs. Tillie Friedel—Direct.

Mr. Salmon: It is related to that subject in part to show the source of his parenthood and heritage, which is very much tainted.

The Court: In other words, you say that the defense for his act is the defendant's insanity at that time.

Mr. Salmon: Amounting to that, exactly.

The Court: All right. 10

Mr. Meslar: Of course I don't want something amounting to that. I think any mental presumption let the Jury draw their inference from the witnesses on the stand of what took place. I thought he was going to have the evidence to follow.

The Court: The Prosecutor is well within his rights to await the outcome of testimony. But the Court must exercise some control. Judge Salmon, I suppose, his defense is insanity, and on that basis I will permit you to attack. On that basis I overrule one of your preliminary objections. 20

The Witness: That husband was dead a good many years ago.

The Court: The question was, How long before this defendant was born was this, your husband, around?

The Witness: I was just pregnant one month when he left me, and all the other eight months I did nothing but cry, cry, because I loved my husband just like he loves his wife. 30

Q. Now, Mrs. Friedel, who was your mother?

A. Mrs. Bepler.

Q. Where does she live? A. In Sussex avenue.

Q. Is she living? A. She is dead, she committed suicide. 40

Mrs. Tillie Friedel—Direct.

Q. In what way? A. With gas.

Q. When was that? A. About a year ago, or two years ago, I forget.

Q. Here in Morristown? A. Yes sir.

Q. Your son, Gustave, in his youth, was he or was he not afflicted with any disease, trouble? A. He was always sickly.

10 Q. Did he have any special disease when he was a small boy? A. Yes, he had St. Vitus dance, that he was just like a new born baby.

Q. And how old was he then? A. I just can't tell you any more, I forget; and we had to carry him to the bathroom, had to feed him; he couldn't speak, he lost his speech; he was a terrible sight.

Q. Was he as much as ten or twelve years old? A. About that.

20 Q. Don't you remember about how big he was? A. No, I forget.

Q. Had he been to school or hadn't he? A. Oh, yes, he had been to school, he had to leave school.

Q. Where were you living then? A. I was living in Westchester, I was living at my mother, and my mother had him in her care.

30 Q. Where did your mother live then? A. In Morristown and she let me know, and told me how sick my boy was, and so I come up, and when I come up it nearly killed me when I seen him.

Q. When did you last see Gus and his wife, Louise together? A. That was about a month ago.

Q. How long before this trouble happened? A. A month ago, they were in the car and waved like that, and I said, "Oh, ain't they happy."

Q. Where did you see them? A. They came through Maple avenue in the car.

40 Q. Now, did this boy have any other disease besides St. Vitus dance when he was young? A. Yes.

Mrs. Tillie Friedel—Direct.

Q. What was it? A. He was operated for a tubercular gland, and the Doctor says he would have to leave school for a year, couldn't go back to school, and when the year was up, then—when the year was up then he wouldn't go back to school, then he went to work, and he has been working ever since; and then he had appendicitis, appendix was busted and he almost lost his life at that time, and then last year, I think it was, when he was 10 under the doctor's care for the "T B" of the bowels.

Q. What doctor? A. I forget, I don't know the doctor's name; Morris Plains, Willoughby, I think, and I think another doctor, and still he kept on working and with that sickness he was even digging ditches.

Q. And the only children you have now are Gus, the defendant, and Herman? A. Sir?

Q. Have you any other children besides Gus and Herman? A. Yes, Adolph, my eldest boy, he is 20 here.

Q. Herman lives with you? A. Yes.

Q. What has been his history of illness, if any?

The Court: Whose?

Mr. Salmon: Herman's.

Mr. Meslar: I object.

The Witness: He had fits, he had falling sickness.

The Court: That is objectionable, how can 30 you show what Herman suffered with?

Mr. Salmon: It is part of this depleted family condition, want of mental stamina, and physical, as well. He is a brother of this family, child born just ahead of this boy.

The Court: Suppose they all had fits, would that in any way affect what this man did on that day, unless he, too, had one at that time. I will allow you to ask it. 40

Mrs. Tillie Friedel—Direct.

The Witness: He had kidney trouble and he was expelled from Morristown school.

Mr. Meslar: Allow it as to Herman?

The Court: Yes.

10 The Witness: He had kidney trouble and was expelled from school, that is why this boy hasn't an education, that's why he has to be everybody's drudge up in Morristown and they pay him whatever they feel like paying him.

The Court: How is that material?

Q. As to Herman and his actions at the time your mother died, when he went away, do you know what his actions were with respect to you when Herman went away after his grandmother's death? After he got the money?

20 Mr. Meslar: Object, this is Herman, don't see that has any bearing on the murder.

The Court: What about his actions, how can his actions be material. Objection will be sustained, what his actions were cannot affect this issue.

30 Mr. Salmon: I don't want to take any advantage of course, the Court's rulings and the Prosecutor's view of the matter; this inquiry as to Herman is to a collateral part of the family and goes to the question what he did of an extreme nature.

The Court: Suppose he did a lot of things of an extreme nature, suppose Herman committed murder; how does it help this man, unless you prove a taint of insanity in Herman; just that he threw fits or his kidneys did not function.

40 Mr. Salmon: If the Court will caution the witness I want to propound a question which I

Mrs. Tillie Friedel—Direct.

believe is legitimate, otherwise I wouldn't ask it.

The Court: You may proceed.

Q. What if anything did Herman, your son, do by way of threatening to you as to himself?

Mr. Meslar: Object.

The Witness: He said he would commit suicide. 10

The Court: Please do not answer when there is an objection. The answer is in, let it stand.

The Court: He didn't did he?

The Witness: No, he wrote me two letters if I didn't take him back home the only thing for him to do would be to commit suicide, and I would do the same if I didn't believe in God. God is only keeping me up. 20

The Court: Do not answer any more unless you are asked questions.

Mr. Meslar: No cross-examination.

By the Court:

Q. When did you get married to the second husband? A. That was about a year after I divorced my husband.

Q. And did you say you left your husband? A. 30
The second one, he left me first, you know because he was too lazy to work, and then he went over to his mother to live.

Q. You are speaking now of Mr. Aeschbach? A. No, I ain't.

Q. Were not talking about Mr. Aeschbach, you left him? A. No sir—oh, yes, he left me one time—

Q. Did you not say on your examination— A. 40

Peter P. Roebuck—Direct.

I left one when I was carrying the defendant one month.

Q. But you left him? A. Yes, I left him.

By Mr. Salmon:

Q. Why did you leave him at that time?

Mr. Meslar: Object.

10 The Court: No, I think I will allow it; she left him, whether for some reason or no reason, she left him, she is here to testify about it.

Q. Why did you leave the husband that time?
A. Because I couldn't stand it any more, my people couldn't support me and him and the children and everything.

20 Q. Was your husband a sober man? A. He was a drunkard and he abused me terrible, I had him in this very courtroom, he was in this very courtroom where he could have been sent to States prison if I would have left him go, but I pleaded for him, and he got left free but he had to leave this town; he beat me.

The Court: That is all, Mrs. Aeschbach.

(Witness excused.)

30

PETER P. ROEBUCK, called as a witness on behalf of the Defense, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SALMON:

Q. You are a brother, or half brother of Louise Aeschbach? A. I am a full brother.

40 Q. A full brother; you are her brother? A. Yes.

Peter P. Roebuck—Cross.

Q. Did you know her and this man in Worcester, Massachusetts? A. I did, for about five months.

Q. Was that in their early married life, or since then? A. Sir?

Q. Is that when they were first married, or since? A. That was about a year after they were married, something like that. 10

Q. How did they get along up there at Worcester? A. They got along pretty nice.

Q. Do you recall Louise coming down to the arsenal where you are stationed, here in New Brunswick? A. Yes, she came down there March 31st, at noon.

Q. That was the day of the trouble that you understand occurred that day? A. Yes sir.

Q. Was Mrs. Hulbert with her? A. No sir, just two Byrnes brothers. 20

Q. And was that just a social visit? A. Well, she hadn't seen me for ten years, and she wanted to come down there and tell me her troubles.

Q. Did she say about leaving this man at that time? A. She did, she said she was going to get a divorce. I told her not to do that thing because we are Catholics and don't allow a divorce.

Q. The little girl now living with you, Alice? A. Yes, both of the children. 30

Q. Both the boy and girl are living with you? A. Yes.

CROSS-EXAMINATION BY MR. MESLAR:

Q. Did your sister tell you why she was going to leave this man, Aeschbach? A. Yes.

Q. Why? A. She said there was too many women. 40

Peter P. Roebuck—Redirect-Recross.

Q. And what else? A. And that he had a sickness.

Q. Venereal affair? A. That's what she said.

REDIRECT-EXAMINATION BY MR. SALMON:

Q. Did she say anything? A. That is about all she said; of course, talked about lots of other things.

10 Q. And still you cautioned her not to leave him? A. I said no divorce, I said if she did only tell me where they lived I would go up and straighten that out, but she didn't tell me that.

Q. So that when she told you this trouble had risen if she had told you where she lived you would go up and straighten it out? A. Yes, but the only address I had was a post office box number.

20 Q. Had she been down to see you in that ten years before that? A. Ten years since I saw her last.

Q. Where had you been? A. In the service all that time.

Q. You hadn't been stationed at New Brunswick for ten years? A. No; she used to write to me in Arizona; there is the letter she wrote me telling why she didn't write to me before.

30 RECROSS-EXAMINATION BY MR. MESLAR:

Q. You visited the defendant, Aeschbach, down in jail? A. Yes.

Q. Did you not then tell him that your sister had been down to see you? A. Yes.

Q. That was after the shooting? A. Yes.

Q. And that was the first time that Aeschbach knew that your sister had been down to see you? A. It was.

40 Q. After the shooting? A. Yes.

Peter P. Roebuck—Recross.

By Mr. Salmon :

Q. Did she tell you that day that he, Gus, knew that she was down there? A. She did not.

Q. She came down as you say for advice with the two friends, is that it? A. Yes, she came down and told me about the trouble; she said I can't just live with him. 10

By the Court :

Q. At the time she was telling you about the trouble and her husband having affairs with other women and having a venereal disease, were the two Byrnes brothers there? A. They heard, too many women, but then she called me in the other room and told me about disease, but I am not sure, I believe she heard it, my wife heard it, and she was sitting between those two Byrnes brothers. 20

By Mr. Salmon :

Q. Did she tell you when this women condition existed whether it was now or some other time? A. Didn't tell me nothing.

Q. Did she specify when this diseased condition existed? A. She didn't say just lately, but since the marriage. 30

Q. She didn't say it was recent? A. No, didn't say it was recent.

Q. Did she say anything about her own condition at all in relation to his condition? A. No, she didn't, that is, in the way I got what she said.

(Witness excused).

Paul Rooney—Direct.
Robert Rooney—Direct.

PAUL ROONEY, called as a witness on behalf of the Defense, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SALMON:

Q. Mr. Rooney, do you know the defendant, Gus
10 Aeschbach? A. Yes sir.

Q. How long have you known him? A. About
twenty-five years I guess.

Q. And do you or not know about this alleged St.
Vitus Dance condition he suffered from when he
was young? A. Yes, I distinctly remember him
having that.

Q. You do? A. Yes.

Q. How many years back was it? I don't recol-
20 lect, we were all boys together, and I remember it
during that time.

Q. Was it mild or was it otherwise? A. It
seemed to me quite bad, didn't seem to recognize
the rest of us during the time hardly, if I remember
correctly.

Mr. Meslar: No questions.

(Witness excused).

30

ROBERT ROONEY, called as a witness on behalf of the Defense, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SALMON:

Q. Mr. Rooney, do you know the defendant,
Aeschbach, for how long? A. Twenty-five years
40 about may be.

Stephen Chapman—Cross.

Q. Have you any knowledge about the alleged fact that he suffered from St. Vitus Dance? A. Yes sir.

Q. And was it a mild condition or otherwise? A. I should say it was severe case.

The Court: You are not a physician, are 10
you, Mr. Rooney?

The Witness: No, but judging from the actions he didn't know anybody, wouldn't speak to you when you passed by, didn't seem to know you at all.

Mr. Meslar: No questions.

(Witness excused).

STEPHEN CHAPMAN, Recalled.

20

By Mr. Salmon:

Q. Mr. Chapman, did you know this young man for a period of time or not? A. Yes, I have known him, went to school with him.

Q. Do you have any recollection of his ever having been afflicted with this alleged condition of St. Vitus Dance? A. I know that he was out of school for practically a year, and didn't play with 30
us.

Q. Did you see him during that time at all? A. Yes, I had seen him, or saw him.

Q. Was his condition one to you of serious moment, or just a mild situation?

The Court: If the Prosecutor will object to that I will rule it out,—

Mr. Meslar: I haven't objected, I don't object if he will tell how it acted upon him. 40

Stephen Chapman—Cross.

Q. How did it act upon him? A. Well, he was very shaky, mopey, and didn't notice anyone.

10 Q. Did you, Mr. Chapman, see this man after Thursday prior to this trouble and the night of the trouble, or March 31st, or didn't you? A. Between Thursday and the night of the 31st?

Q. Yes. A. I did not.

By the Court:

Q. Was he any different than anybody else who has St. Vitus Dance? A. That I couldn't tell you,
20 I never saw anybody before.

Q. Do you know whether St. Vitus Dance is a form of insanity or not? A. I do not.

Mr. Salmon: Other than the defendant and Herman N. Cohen, we have no witnesses to offer at present. The defendant it seems to me will be under long examination and the question is whether the Court wants to hear him or not tonight.

30 The Court: I don't see any reason why we can not go on, if it is to be prolonged we could save sometime by putting on part of it now. I am going to ask the Jury afterwards, since they must stay together all night if they would rather continue to hear this trial while in custody of the Court's officers or adjourn till tomorrow morning; they can have from now till then to cogitate on it.

40 Mr. Salmon: I will call the defendant.

Gustave Aeschbach—Direct.

GUSTAVE AESCHBACH, called as a witness in his own Defense, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SALMON:

Q. You are the defendant in this case, are you?

A. Yes sir.

Q. How old are you? A. Thirty-five.

Q. Where were you born? A. Hoboken, New 10
Jersey.

Q. How long did you live there? A. That I cannot tell you.

Q. Do you know how old you were when you ceased living there? A. About six or seven years old.

Q. Where did you go to live? A. Lived with my grandmother, Morristown, New Jersey.

Q. Your grandmother's name was what? A. 20
Sophia Bepler.

Q. Had you started to school in Hoboken before you left there? A. Yes, I had.

Q. Did you continue at school in Morristown? A. Yes sir.

Q. How long did you live with your grandmother here? A. Well, I lived with my grandmother until I was about seventeen years old.

Q. At all times in Morristown, is that right? A. 30
Yes.

Q. And you were at school up to what age? A. Until about fifteen.

Q. And what grade in school did you reach? A. Seventh grade.

Q. Did you go through and complete the Seventh grade? A. No, I had the sickness and I had to leave school.

Q. Was that prior to attaining fifteen years? A. 40
Somewhere around that time.

Gustave Aeschbach—Direct.

Q. Was that the occasion of your leaving school, your sickness? A. Yes.

Q. What was your sickness? A. St. Vitus Dance.

Q. How did that affect you? A. Well, I lost the use of my limbs, I lost the use of my voice; they had to carry me around and feed me with a spoon like a baby.

Q. How long did that continue? A. About a
10 year.

Q. Did you have medical attention? A. What we had in Morristown. Dr. Baker gave me up and said he had no remedy to cure it. My grandmother was working for Dr. Humphrey, and Mrs. Humphrey had been to a hospital where a girl had St. Vitus Dance, and she asked the people what was the cure, and they told her a patent medicine called "St. Vitus Dance." Grandmother asked the doctor was it all right to use that—
20

The Court: How is that material?

Q. Is Dr. Baker living? A. No.

The Court: Isn't it sufficient to say he had some kind of "dance" and finally became well again.

Q. Was there any return of that trouble, or St. Vitus Dance, or not? A. Well, about three or four
30 years after that I got a little nervous again, and grandmother got another bottle of that medicine.

Q. Did you go to school after that time? A. Yes. Then I went to Staten Island where my mother was, and I started at school in Staten Island, and I had tubercular gland, and I had to leave school on account of that.

Q. What was this tubercular gland trouble, as to what? A. I had to be operated on, had to get out
40 in the fresh air, the doctor said.

Gustave Aeschbach—Direct.

Q. Thereafter, how long did you stay there in Staten Island? A. I guess about a year, then I came back to Morristown again.

Q. Thereafter were you sick, or not? A. Then I had appendicitis, was operated on for appendicitis.

Q. And where was that? A. Staten Island.

Q. During the years you speak of or some other time? A. The same years I was operated on for a tubercular gland. 10

Q. Now, after that Staten Island residence, did you go to school again? A. No sir.

Q. How old were you when you left Staten Island? About seventeen years old, I guess.

Q. Where did you go? A. Then I went up to Vermont with my mother. I stayed up there about six months, then I came back to New York; then I was shipped out to Worcester, Massachusetts, where I met my wife. 20

Q. When did you marry Louise? A. Well, the day, the year of the Armistice, I think, 1917, 1918, October 26th.

Q. One or the other of those years? A. The year the Armistice was signed.

Q. What year was that? A. 1917, 1918, I really couldn't tell you.

Q. Did you live with the mother after she lived with Freidel? A. I did for a while. 30

Q. Where? A. At Morristown, and I lived in Hoboken a while.

Q. And you lived with the mother and step-father, is that it? A. Yes sir.

Q. Now, what do you know of the children of the marriage of your mother to Mr. Freidel, how many there are? A. One boy.

Mr. Meslar: I object.

The Court: It is immaterial. 40

Gustave Aeschbach—Direct.

Q. What was his first name? A. William.

Q. Is he living? A. No sir, dead.

Mr. Meslar: Object, that has all been gone over before by the mother.

The Court: Everybody knows he is dead.

Q. You were married in October the year of the Armistice? A. Yes.

10 Q. What did you do, go keeping house? A. No, went keeping light housekeeping.

Q. There in Worcester? A. Yes.

Q. How long did you continue light housekeeping in Worcester? A. About three months.

Q. Were you employed at that time? A. Yes sir.

Q. In what kind of work? A. Machine work, Boston Pressed Metal stamped out different things out of metal.

20 Q. Then, from that after three months what did you do? A. We had a deposit on some furniture and we started housekeeping.

Q. Where? A. Worcester, Massachusetts.

Q. How long did you remain housekeeping? A. Until the wife sold all the furniture and I had to go to New York.

30 Q. Did you go together? A. I had to go together because she had all the money after selling all the furniture, the furniture people would go for me and put me in jail.

Q. You came to New York? A. Yes.

Q. Now, how long had you been married when you came to New York? A. Well, the little girl was six months old when we came to New York, married close on to two years.

Q. What did you do then in New York, keep house, or not? A. No, went light housekeeping.

40 Q. In what, an apartment? A. No furnished room, ate and slept in the same room.

Gustave Aeschbach—Direct.

Q. How long did you remain there? A. About two months then we came to Morristown.

The Court: We will take an adjournment now for five minutes.

Ladies and Gentlemen of the Jury, during this very short recess, let us make it just five minutes, you members of the Jury can decide on the course of action you would like to take. I have no objection whatever in sitting late in order to shorten your labors and even do it in 10 the one day if possible. If you feel that that cannot be conveniently done, bearing in mind that the Court is unable to excuse you but must keep you together, why, then, we will thereafter at the proper time take an adjournment until ten in the morning, but I want to consult the convenience of the Jury, I want to give them that question to decide. You will have the free and uninterrupted use of the 20 corridor, and the ladies the free and uninterrupted use of the Rest-room, and we will return again in five minutes.

(Court convened pursuant to adjournment; Gustave Aeschbach resumed the stand).

The Court: Mr. Foreman, what has the Jury decided? I will ask you for your judgment, bearing in mind that the Court may not feel 30 that it can abide by it, it depends entirely on the case as we go along. What has the Jury decided, whether they would rather sit or take an adjournment until tomorrow?

The Foreman: Judge, I think they decided to continue as long as they can.

The Court: That isn't definite, Ladies and Gentlemen of the Jury, that depends entirely on the progress the case makes. Proceed. 40

Gustave Aeschbach—Direct.

By Mr. Salmon:

Q. Where did you go to live in Morristown? A. With my Grandmother, on Sussex avenue.

Q. At that time you had but the one child? A. Yes sir.

Q. Do you know what year that was? A. The only way I could tell you what year it was, it was
10 the year they built the rubber plant down in Cedar Knolls, whatever year that was.

By the Court:

Q. How old was your daughter? A. Well, she was about nine months old then.

Q. If she is ten years old now, it was a little over nine years? A. Yes.

20 By Mr. Salmon:

Q. How long did you live with your grandmother? A. We lived there all the time since I have been in Morristown until my grandmother died.

Q. When did she die?

Mr. Meslar: I don't think that is material.

The Court: No, I don't think there is any materiality to it.

Mr. Salmon: Withdraw it.

30

Q. What time did you move out of there? A. A year ago, the seventh of this month, May, a year ago the 7th of May.

Q. Then you moved up to the house where you have been living? A. Yes.

Q. Now, these children have lived a long period of time away from you and the wife, is that right? A. Yes.

Q. You and your wife were working at times in
40 hospitals? A. We worked several places, Morris

Gustave Aeschbach—Direct.

Plains, Overbrook, worked down Morristown school.

Q. Worked together did you, that is, the same place? A. Yes, the same place together.

Q. Now, when you went into this home up here did you have employment then? A. No sir, I didn't get employment until July first.

Q. This home you speak of, did you rent it or how did you get it? A. We took it, we were going¹⁰ to buy it off the people by paying them so much down and \$25 a month.

Q. You as a matter of fact, inherited some money from your Grandmother when she died? A. Yes.

Q. What did you do with it? A. Put it all in the home.

Q. Likewise your wife got a bequest? A. Yes.

Q. Some of that went in the home? A. Yes, some went into the home and some of it went, one-half²⁰ for herself and to buy an automobile.

Q. Now, from the time in May last year, up to December, when it appears your wife went to the Byrne's home, where was your wife? A. Up at the house, living home.

Q. And who were in the family? A. Myself, my boy and daughter.

Q. And the wife? A. Yes.

Q. Did you get along all right there? A. Yes³⁰ sir.

Q. You and your wife have any trouble during that time? A. Not to speak of, I don't think there is any married couples that don't have any arguments.

Q. Where were you working during that time? A. During what time.

Q. From May until December? A. Well, from May until July I wasn't working at all—well, I worked odd jobs down Morristown; worked for the⁴⁰

Gustave Aeschbach—Direct.

cement block company for a couple of weeks; then got a good job, what I mean, regular, steady job, first of July, I worked Eisler Electrical Company of Newark, at nights; I worked nights for them.

Q. How long did you work there? A. I worked with them about until a week before Thanksgiving.

10 Q. Now, during that time, from May to that week before Thanksgiving, where, if anywhere did your wife work? A. She didn't work at all.

Q. You supported her in that time? A. Yes.

Q. You left then, you said, a week before Thanksgiving you left the Eisler Works? A. I got laid off, they closed down the plant.

Q. What did you do next? A. I didn't do nothing, I was looking for work until I got a job down Memorial Hospital first of January.

20 Q. And when did your wife go to the Byrnes house, what date? A. Third of December, as far as I can remember.

Q. And at that time can you give the number of days, or the days you were not working just ahead of that time? A. Ahead of what time.

Q. Ahead of December 3d, how long were you out of work in days? A. About two weeks.

30 Q. And is that all you were out of work between that time and the time you moved in this house in May? A. No, I wasn't working when we moved up there?

Q. You were not working between the time in July? A. From May until July I wasn't working, just doing odd jobs.

Q. During that time your wife wasn't working either? A. No.

Q. In December you weren't working before she took work in Byrnes's house? A. Yes.

Gustave Aeschbach—Direct.

Q. Early in January you took work at the Memorial Hospital? A. Yes.

Q. How long did you work, about, at the Memorial Hospital? A. Until the 15th of March.

Q. Then what did you do? A. Then got a job down Hobson's, went to work in Hobson's.

Q. Had you worked there before? A. Yes.

Q. Prior to December 3d last when your wife 10 went to the Byrnes house how long had it been in months since she had worked outside of her own home? A. Well, she worked a couple of days, she worked about two weeks altogether from the time we moved up there until the 3d of December, two weeks altogether.

Q. What kind of work, and where was it? A. She had a case down in Olifant Park, a lady by the name of Carpenter, and another case on Mill street, 20 I don't know the name of the family.

Q. After December 3d where did you continue to live? A. I still stayed up to my house while she stayed down the Byrnes house.

Q. After you got the job at Memorial, where did you continue to stay over night? A. Down Memorial Hospital.

Q. How long was that? A. From the first of December, I mean from the first of January until 30 the 15th of March.

Q. And was your house closed? A. Yes sir.

Q. When you got work at Hobson's, you opened the house? A. Yes.

Q. Who was ever there with you, if anyone? A. When I went to work at Hobson's?

Q. Yes. A. I slept up there all alone, but my daughter used to come down every afternoon to keep me company. My wife used to come up maybe once or twice during the week. 40

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Q. During the month of December, what have you to say as to your association with your wife, were you with her or weren't you? A. As far as I can say I was not with her.

Q. Did you and she go anywhere together in December? A. We went out for automobile rides for a couple of hours, &c.

10 Q. How often? A. Well, maybe two or three times a week, maybe four times a week for a couple of hours, because she only had a few hours off every day.

Q. At whose suggestion would that be that she would go out riding? A. She would come up to the house and she would say she was in the house all day working, she would like to go out and get some fresh air.

20 Q. Did that happen in December? A. Yes.

Q. Did you go alone with her on those occasions? A. When the children weren't to school we took the children along with us.

Q. You haven't any automobile? A. No sir.

Q. When did your wife buy that automobile?

A. May, just before we moved up there, up to Morristown Heights.

Q. During the month of January you were at the Memorial Hospital? A. Yes.

30 Q. You and your wife go out in the auto together? A. Oh, yes.

Q. Did you spend any time together otherwise?

A. Well, sometimes we went to moving pictures.

Q. Whose suggestion was that, if you remember?

A. She liked the moving pictures and she would all the time want to go to moving pictures if she had evenings off.

40 Q. How would you know she wanted to go? A. She asked me.

Gustave Aeschbach—Direct.

Q. How. A. She would say a good picture at the Jersey or Palace, would like to see it.

By the Court:

Q. Did she telephone you or tell you by personal contact? A. Down Memorial?

Q. Any time? A. Sometimes she come down Memorial with the car.

Q. Come to see you? A. Yes. 10

Q. Not necessarily by telephone? A. No.

By Mr. Salmon:

Q. How often did you go during January to the moving pictures? A. Well, may be twice a week.

Q. Now, in February you were still at the hospital? A. Yes.

Q. Did you go automobile riding during that month with her? A. Yes sir. 20

Q. Did you go to the movies? A. Yes sir.

Q. And in March what have you to say about the same? A. What do you mean?

Q. Did you go to moving pictures? A. Yes, went to moving pictures and went automobile riding with her.

Q. It appears from the evidence so far that on Thursday before this trouble, Thursday night you did go to the movies with your wife, is that correct? 30
A. Yes sir.

Q. Will you tell us how it happened? A. What do you mean?

Q. How did you come to go with her that night?
A. That night she called me up at about six o'clock. She said she would be off that evening, would I go to the moving pictures. I said all right. She said I will be honking the horn you can come down and I won't have to stop the car or wait. At 6:30 she

Gustave Aeschbach—Direct.

telephoned again and I sent my daughter in to answer it, and she went in and said her mother said she could come along to the pictures, too. So she went up and told Mrs. Lindabury she was going to the pictures with her mother and she would be home late. A little while after that, ten minutes after her horn honked and I locked up the house
10 and went down and the wife was there with the car. We got in the car, turned around, and as we started to go out the road the little boy came running out of Pruden's house and wanted to know where we were going. The wife said the moving pictures. The boy said, "Can I go along, too?" I said, "Certainly." He got in the car after the wife give him money to give to Mrs. Pruden to pay his board. As we were going out the road the wife turned to me
20 and said, "you know I can't get off any hours of the day I want to, because you know the case is pretty near finished. Sometimes I won't be able to get off at all. If the housekeeper wants a day off I have to work the 24 hours without getting any time off." I said, "All right, any time you want to go to the moving pictures or go for a ride, you know I am up to the house half past one, you can call me up." She said, "All right." No more was said. We went to the pictures, came home from the
30 pictures and the wife turned around, I wasn't sitting in the front, it was a two-door sedan, I had to get out of the car to help the little girl get out, she was sitting in the back, the little girl kissed the mother; I stepped back in the car wanted to kiss her, as I stepped in she turned her face away, like that (illustrating). I said, "Why don't you want to kiss me?" She said, "Why should I kiss anybody I hate?" Well, then I got out of the car. I
40 didn't feel so good. The little girl turned around

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and said, "What is the matter, daddy, why won't mother kiss you?" I said "I guess she don't love your daddy any more." So she turned the car around, took the boy up to Prudens and I went on up to the house, sent the daughter on up home up to Lindabury's, where she was boarding. I unlocked the door, went in the house, walked around for a while, and went to bed. I got up about four o'clock because I used to always walk in from where I lived, it is about three miles, maybe four, to Hobsons. I got up about four, made myself some coffee and couple of slices of bread, locked up the house and went to work. When I got through my work—we only work from six in the morning until around twelve or one, we never got through no later than one o'clock. When I got through my work at one o'clock I walked over to the bus line there by the park, waited for the bus—generally I was always watching out for her, because sometimes she used to come and meet me down along the road and pick me up in the car and bring me home. So that day I didn't see her along the road at all. I got in the bus and went home; went to Morris Plains and I got up to Morris Plains about 1:30; stopped in the post office because we have a box there; and there was no mail. So going up home I used to always have to pass Jaqui avenue and I could look down the street where she was working. I passed and looked down and I didn't see her car there, her car had gone. So I thought may be she had been downtown trying to meet me and missed me and was up to the house.

The Court: What day was this, on Friday?

The Witness: No, that was—yes, that was Friday.

The Court: You are talking about Friday?

A. Friday, yes.

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The Court: Continue.

The Witness: Well, when I got home there
there was no automobile there at all. I didn't
know what to do. So the little girl she used
to come down and listen to Amos and Andy
on the radio, so I put the radio on for Amos
and Andy, and after that I shut it off. The
10 little girl said, "Why don't you play some
more?" I said, "I don't feel like playing it."
Anyway I played it. Then she said, "Mrs. Linda-
bury's stepdaughter would like to hear the true
story." I said "All right, I will put the true
story on." Anyway, Lindabury's daughter
came down and we had the true story, and then
we got the fights, Madison Square Garden—
that's why the wife bought the radio for me,
so I could get the sports and all that stuff.
20 After they went home, they went home about
eleven, I shut off the radio and went to bed.
I got up Saturday morning about the same
time, did the same thing Saturday as I did
Friday, and when I passed the house the
automobile was gone again. When I got home
Saturday up to the house the little daughter
come down, and I says "I got to go to the
Plains and get some groceries want to walk
30 down?" She said, "Certainly." I got dressed,
went to the Plains, got some groceries. When
I went down I had to pass the street where the
house was and the automobile was still gone.
When I come back home the same way the auto-
mobile was still left, it was not there. I went
home with the groceries. As we were walking
up the hill to the house Pruden and his wife
and the boy passed in their car with their
40 groceries, and when I got up by Prudens, where

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his garage was, he was coming out the back door, he said to me, "My wife has a letter for you in the house." I sent Alice in the house to get the letter and I went on up to the house, and Alice came running out of the house saying, "Oh, Daddy, its a letter from Mother." I hurried up home and opened the letter and read the letter, and everything went black, I didn't know what to do. The little girl said "What is the matter, Daddy?" I said "Your mother don't care for your Daddy no more, she she is going to leave him." So then after I got all right I sent the daughter down to Mrs. Pruden to have her call up my wife. I figured if I called her up she wouldn't talk to me. So Alice went down to Mrs. Pruden and Mrs. Pruden called up, and she told Alice that my wife said she would be up Sunday. So about ten minutes after that my wife called me up and said what did I want to see her for? I said "I would like to have you come up Sunday, see if we can make some arrangement, some understanding." She said, "All right I will be up Sunday." That was about five o'clock. About half past eight she called me up again and she says "Its no use, I don't want to have nothing more to do with you any more, I don't want to see you. If you try to see me anyway I will have you locked up." So then I didn't do nothing Saturday night. Sunday when I come home I had to pass the house again, and this time the automobile was in front of the Byrnes house. I thought may be she will have the afternoon hours off and she might change her mind and come up and see me. So I no more than got home, I passed Lindabury as I was coming up the road, and

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he gave me a ride in his car all the way home. So then I went up to the house and started to make my dinner, and about two o'clock, I think, Mr. Lindabury came down and said, "What is the matter?" He came down to telephone or something like that, and we got talking, and he said, "What is the matter?" I said "My wife sent me a letter and said she was going to leave me." "Well," he says "I was downtown last night"—that means Saturday night,—"and I seen your wife, and my step-daughter, Belle, told your wife that Alice was going to stay down with you to night, that being Saturday night, and your wife jumped right up on her and said as soon as she got home she was to go down and get Alice and bring her up to the house," I was no fit man for her to stay with. "What do you think about it," I said. "I told Belle that you were Alice's father, that you had more right to have Alice down there than she has to be at my house," he said; "Cheer up, she will come back again." I said, "I don't know, you don't know my wife," I says. He said, "Come up to the house and have something to eat." So I went up their house and had my dinner, and then I came down home and sat around again, and about seven o'clock I think, Mr. Lindabury came in because he had been out to look at a house his daughter wanted to rent. He said, "What is the matter? How do you feel?" I said, "I am downhearted." He said, "Cheer up, better days are coming; well, if your wife leaves you, there is always another woman." I told him there is plenty of women but not another like that woman; I said, "I would do anything for that woman." So Sunday morning when I went to

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work I spoke to Mr. Fioroni and I told him, "Well, I got a letter from the wife yesterday, and I guess she is going to leave me and everything." He says, "Don't be that way, she won't leave you." He says, "I kind of thought when she got this job, the money went to her head," because she was making \$42 a week and I was making \$20 a week. I said, "I suppose 10 that is it, she is making twice as much money as I am. I suppose she don't want to have somebody tagging on her now." He said, "You don't care if I tell my wife about it?" I said, "No, I don't care, because your wife will find out anyhow." So Monday morning when I went to work I got down a little earlier, because I wanted to speak to Fioroni. I said, "How did your wife, what did your wife say when you told her my wife was going to leave me." He 20 said, "She seemed first off if she knew it, because she had been down and took Mrs. Fioroni out for a ride, and seemed like she told Mrs. Fioroni she was going to leave me already." So I worked, worked around, and when I got through work, when I left the plant I didn't know what to do. Well, in the first place when I started for home I stopped into Glicks—instead of getting 22 bullets or 32 as the Pro- 30 secutor has said, I bought 38 bullets.

The Court: When was this?

The Witness: Monday afternoon about one o'clock. Then after I bought the 38 bullets, my insurance was due and I stopped in the insurance office, paid my insurance. As I come out of the office I passed Mr. Shupak in the park square there, he thought I was up to his office, I guess. He said, "Did you see your 40

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brother?" I said, "No." So when I got outside I met my brother, Herman, and he was up Saturday, that night, Saturday evening. He brought Alice up a pair of roller skates he found, and I was talking to him about getting tar paper on the roof, and asked him prices, and then he said he would tell me prices. I told him next week or the week after I will have you come up and put some more tar paper on. So I went over to—

The Court: That was Saturday night you said that to your brother?

The Witness: What?

The Court: About the tar paper?

The Witness: No, Monday afternoon when I met him. So I got on the bus and went to Morris Plains and I passed the house where the Byrnes live, and the wife's car was out front, so I went on home.

The Court: What time was that?

The Witness: About half past one I got that quarter after one bus from the park, and got in Morris Plains about half past one. The wife's car was in front of the house and I thought she was on duty, working. So when I come home and tried to have something to eat; I couldn't eat. Well, I went and got the gun, which was in the dresser, I had it for about nine years, I got it up in Massachusetts. I started to put the cartridges in and I found they were too big, they wouldn't fit. Well, then I put my hat on and took the barrel of the gun, put it in my back pocket, took the bus and come to Morristown. I went in to the Army and Navy store and asked for a box of bullets to fit this barrel. So the man he

gave me a box of bullets. I said I want to see if they fit. He tried one in. I told him I had already bought a box of 38 at Glick's and paid \$1.25 for them. He said, "If you bring in that box of 38 you bought from Glick's I will give you the money, and I will allow you that in money or you can take it out in trade. You can buy socks or something like 10 that for the box of 38." I said, all right, I might stop in tomorrow with it. After I bought the 32's I stopped in Fioronis. I went upon to Fioroni's house to see if his wife was there, because I wanted to find out really what my wife did tell her about leaving me or anything like that. I got there about three o'clock and I asked Fioroni where his wife was and he said she had been down and went to the library. I asked him, "When do you expect 20 her back?" He said, "Any minute." So I stayed there about an hour and she didn't come up. I said, "I better hurry up home because the kids want to hear Amos and Andy." Well, we talked there, talked about what he would do in my case. He said, "Well, my wife says you can never mix up in family affairs because husband and wife is liable to turn on you." I said, "I would do anything to have 30 her come home and live with me, not even as a wife, as housekeeper, to make people think we were getting along all right." I even offered to leave her have a room by herself and have the girl sleep with her and me take a room by myself. So I went home and arrived home about five o'clock. The little girl asked me where I had been. I said I was down to Fioroni's. When I went up them three times 40

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her automobile was still in front of the house. So I tried to eat something but I couldn't eat, so about twenty to seven I called her on the phone, and Byrnes answered the phone, one of the Byrnes boys, I couldn't tell who it was, and I said I would like to speak to Mrs. Aeschbach. He said, "She is upstairs, I will call her down." I said, "All right." He called her down and she answered the phone, she said, "Hello, what do you want?" I said, "Can't you come up tonight, or can't I see you tomorrow and lets get some arrangement together." She said "I am on duty now." I said, "You were on duty this afternoon, because I seen your car there." And she said "It is my business where I was this afternoon, I am through with you." And hung up the receiver. Then I stayed around the house. About seven o'clock I put my hat and coat on and walked from my house to the Byrnes house. As I was going out the road past Pruden's house she came out on the back piazza and threw some tin cans in the dump. I walked to the Byrnes house knocked on the door and Mrs. Hulbert came to the door. She says to me—I says I would like to see my wife. She says, "All right, won't you come in?" I said, "No, I will wait for her outside here." So she went in the other room and called my wife, and my wife she no more than come in the other room my wife came walking out with her hat and coat on. I backed out the door and she come out and closed the door, and she no more than stepped off the piazza and she said, "What did you come down here for, do you want me to lose my job? If I do who will help you to support the kids.

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I seen a lawyer today and I am going to get a separation from you." I didn't say a word, with that, I pulled out the gun and shot her.

Q. Had you been in the kitchen before this shooting? A. I was down to that house twice before this, once before the first of January, and once
10 around the first of March.

Q. So that the number of times you had been to that house was three? A. Three times.

Q. Do you include such times as you may have gone there to the door of the house and not gone in? A. I have been to the front piazza once, and three times to the back, but I used to put the groceries in the car standing out in the road.

Q. What would you do when you put them in there? A. I would walk home; if she had a couple
20 of hours off she would run them home.

Q. In calling this night March 31st, how many times had you been in the house or to the door of the house? A. There only four times.

Q. When was the first time? A. The first time was the last of December just before I went to Memorial Hospital.

Q. When was the next time? A. About the 3d
of March. 30

Q. When was the next? A. Thursday before the shooting at the front door.

Q. Then the night of the shooting, the night of the shooting did you go inside the house at all? A. No, I didn't enter the house.

Q. Where did you stop, how far did you get toward the house? A. I stopped right on the porch, I didn't step inside the house, only when the detectives come up and brought me in.
40

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Q. How many times were you at the Army and Navy store that day? A. Once.

Q. Did you recognize the witness today who appeared here? A. Yes, I did.

Q. And you made a purchase of only the 32 calibre? A. At the Army and Navy I bought a box of 38 at Glick's, Park Square.

10 Q. Who did you buy them there from, do you recall? A. I couldn't tell, some salesman there.

Q. Prior to this Saturday when this letter was received when the letter was received had the wife said she was going to leave you? A. Yes, about the 3d of March we had a falling out once before that is when I went up the 3d of March, and she seemed to have everything settled, everything would be all right.

20 Q. What did you tell her on that occasion, if anything, that would happen if she left you? A. I didn't tell her. I never threatened my wife; as long as I lived I didn't threaten her that time because she didn't know she was going to come up.

Q. What did you tell her on that occasion, or any other occasion, you said you were going to leave her? A. One time in March, 3d of March, when she was going to leave me, I said, "Well, if 30 you leave me I don't know what to do, I will do away with myself." She said, "You ought to do it and save me a lot of trouble."

Q. I show you a paper which appears written on four sides? A. Yes sir.

Q. And I ask you in whose handwriting that appears, if you know? A. That appears in my wife's handwriting.

Q. Is that true of the complete writing? A. Yes 40 sir.

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Q. And this paper? A. That is the envelope it came in as far as I know.

Q. And both of these papers were received by you were they, or not received by you? A. Received by me through the hands of my daughter.

Q. What day? A. Saturday before the shooting.

Mr. Salmon: I offer the letter and envelope.

Mr. Meslar: No objection.

(Received in evidence and marked Exhibit¹⁰ D-1, the envelope; and Exhibit D-2, the letter.)

Q. There is a part of this letter on page 2, as indicated at the top, which appears blurred, do you know anything about that? A. Yes sir, I marked that out myself.

Q. And can you tell the Court and Jury the words that were under this blotted part?

Mr. Meslar: Object, we have no means of²⁰ contradicting it, the writer is dead.

Mr. Salmon: Withdraw the question.

The Court: Let me see if it can be read.

By the Court:

Q. Why did you cross it out? A. Because that is some family history I wouldn't want to get out, but as long as it got to come out I suppose it will have to. 30

The Court: It can be read, I think the Jury will be able to decipher it, it is in evidence.

Mr. Salmon: Yes.

Q. When was your last sexual relation with your wife?

Mr. Meslar: Object.

The Court: I will allow it.

The Witness: About March 13th. 40

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Q. And where? A. Up at the house.

Q. And what was the occasion of her coming up there, was it at your behest or not, March 13th?

A. It was my day off, she used to come up there when I had my day off.

Q. As a matter of fact she came up frequently?

10 A. On my day off when I was working at the hospital.

Q. Is that true from the time, 1st of January of this year, on? A. No, she used to only come up there. I used to work at the hospital, and I went up there on Tuesday afternoon on my day off, and she used to drive me up so I could see the kids.

Q. She would drive you up? A. Yes, she would drive me from the hospital up to the house.

20 Q. Well, you stayed at the Byrnes house after the shooting? A. Yes, I stayed after the shooting, I stayed there all the time, I didn't run away.

Q. It is said by one of the witnesses to the effect—

The Court: Which witness?

Q. By the witness, Roff, to the effect that you had declared your intention of doing this thing that you had that intention from Saturday, what have
30 you to say about that? A. I had no intention from Saturday on I had no intention of killing my wife at any time.

Q. Did you tell Mr. Roff that you had intentions of killing her from Saturday on? A. No sir, because Saturday when she called me up the last time I figured she might come up Sunday; never in my mind to kill her from Saturday on.

40 Q. When was it in your mind to kill her? A. More in my mind when she shut me off the wire.

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By the Court:

Q. When was that? A. Monday night.

Q. That is when you left the house? A. Yes.

Q. With the gun in your clothes? A. Yes.

Q. Did you have it in mind to kill her? A. I didn't know what to do, I didn't have it in my mind to kill her, I thought I would talk to her and see if she would come to any understanding, and I¹⁰ wouldn't have done it.

Q. Done what? A. Shot her.

Q. Why did you take a gun and bullets? A. You can take gun and bullets without having intention in your mind.

Q. Why did you take them? A. That I couldn't tell you why I took them.

By Mr. Salmon:

20

Q. Why did you tell your wife on March 3d that if she left you you would do away with yourself?

A. Because I thought there was nothing else to live for, because I am not afraid to give my life now, I have got nothing to live for; just as leave have it all over with now and take the "chair."

The Court: There was a suggestion, apropos of what you say, there was a suggestion made to you by Captain Roff? 30

The Witness: Yes.

The Court: That you might have done well to save one of those bullets for yourself?

The Witness: Yes, and what did I tell him? I told him, "A minute in the Electric Chair and it will all be over."

Q. What have you to say as to the nights of Thursday, Friday and Saturday and Sunday, did 40

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you sleep or didn't you sleep? A. I slept a little, I couldn't say I slept good.

Q. What did you do? A. Got up three or four times and smoked cigarettes.

Q. What time did you get up on Monday morning? A. Same time as usual, four o'clock.

Q. Did you go to work unduly early, or didn't you? A. About 5:30.

10 Q. What time were you due there? A. Six o'clock.

Q. Didn't usually get down half an hour too early? A. No, sometimes I used to stop and get my breakfast in the lunchwagon on Speedwell avenue, this morning I didn't stop.

Q. Where had you had breakfast? A. Sometimes I used to have coffee and a couple of slices of bread when I left the house, and had breakfast down the
20 lunchwagon.

Q. Where did you get breakfast Monday morning? A. Had coffee and bread up at the house Monday morning.

Q. The little girl did stay over-night with you Saturday night, didn't she? A. Yes.

Q. And when you left Sunday morning you left her at the home? A. Yes sir.

Q. How much of the time of the boy's life, he is said to be eight years of age, has he been separated
30 from your wife and his mother? A. Well, I should judge about six years.

Q. How much of the time of the last ten years has the girl been separated from the mother? A. About five.

Q. Was that entirely and all due to the fact your wife had to work during this period those several years? A. In one way it was, because I couldn't get no work to make enough money myself, so we
40 both went to work in the State hospital.

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Q. Your wife was a robust woman? A. Yes sir, as far as I know.

Q. She was not a trained nurse, you say? A. No sir.

Q. You have stated that on Friday the situation that you did not know what to do, what did you mean by that with respect to the wife, or what? 10

A. What Friday?

Q. Yes, didn't know what to do? A. I didn't know she was going to leave me Friday, I didn't know she was going to leave me until Saturday when I got the letter.

Q. Do you remember your brother, Herman, being there Saturday night? A. Yes sir, he brought a pair of roller-skates up for my daughter, Alice, which he found where he was working some place. 20

Q. Do you remember about what you did while he was there, as to your going about the place? A. Well, he came up just after I got the last message from the wife that she was to be up to see me Sunday, next to the last message and I felt a kind of happy that everything would be quieted all right, so I started to play the radio, there was no good music on, and I shut it off. I asked him to take a cup of coffee three or four times. He refused at first, and after, he took a cup and he left about seven o'clock. 30

Q. And thereafter you had the message from the wife at 8:30 or so? A. Yes sir.

Q. That she would not be up next day? A. Yes sir.

Mr. Salmon: Subject to having omitted something inadvertently, I would like to rest here.

Gustave Aeschbach—Cross.

CROSS-EXAMINATION BY MR. MESLAR:

Q. You stated you never had any intention of killing your wife at any time? A. Yes sir.

Q. Why did you buy these 38 calibre bullets at Glick's? A. At one time when I was working out at nights my wife took the revolver and put it under
10 her pillow and said she was afraid somebody might come in, I said, "You got a gun without any bullets."

Q. And you were afraid? A. I was afraid, it was my wife.

Q. Your wife had told you she wasn't going back to you? A. What?

Q. Your wife told you before this Monday? A. She didn't tell me, she never told me nothing face
20 to face, only through the telephone and letter.

Q. She told you she wasn't coming back? A. Yes.

Q. Then you didn't need them for your wife? A. What did I know whether she would change her mind.

Q. Why didn't you ask her whether or not she wanted you to buy bullets? A. Because I didn't see her.

30 Q. Why didn't you wait until you did see her? A. It might be too late then.

Q. To buy bullets? A. No, to ask her that question.

The Court: How could it be too late? What do you mean it would be too late? How could it be too late whether she wanted you to buy bullets?

40 The Witness: Well, it is too late now, ain't it? Sure, it is too late now.

Gustave Aeschbach—Cross.

Q. As a matter of fact on Saturday when you received this letter you made up your mind you would go and kill her if she didn't come back? A. No, not Saturday.

Q. When, Monday? A. Monday when she refused to see me.

Q. Over the phone? A. Yes.

Q. Then you went down with the deliberate intention of killing her? A. After I went down to see if we could come to any understanding.

Q. If you couldn't, what did you intend to do? A. I don't know; she threatened me if I ever came down around her I would get myself in trouble.

Q. You took a gun for your protection? A. Yes.

Q. And bought these bullets for your own protection? A. I don't know whether for her or my protection.

Q. You were going down to protect her? A. I don't know whether her or not.

Q. As a matter of fact you went down with the express intention of killing her if she did not come back? A. No, not a word, I never said a word to her.

Q. Isn't that what made up in your mind? A. What?

Q. Intention, if she didn't come back you were going to kill her? A. No.

The Court: You did kill her?

The Witness: Yes.

The Court: Why?

The Witness: Because I loved her, that's all.

The Court: Assuming that you did love her, why did you kill her?

The Witness: I thought if I couldn't have her nobody else would.

Gustave Aeschbach—Redirect.

The Court: Why did you kill her?

The Witness: Because I loved her.

10 The Court: Is that the way love is demonstrated?

The Witness: Yes, my love.

Q. If you loved her so much why didn't you join her in Eternity by taking your own life? A. Because I wanted to straighten everything out for my children before I go.

20 Q. You didn't want to gloat over her dead body, did you? A. No, I wanted to straighten everything out for the children before I go.

REDIRECT-EXAMINATION BY MR. SALMON:

Q. Have you ever had any trouble with your wife prior to this difficulty? A. Only one time about March 3d.

Q. This year? A. Yes, March 3d of this year.

30 Q. You went to the Fioroni house with her in her company? A. Yes.

Q. And they came to your house? A. Yes.

Q. Did you have any other social contacts, mutual visitors? A. No.

Q. Did you ever threaten your wife in any way?

Mr. Meslar: Objected to, mere repetition, it has all been gone over.

The Court: Re-direct, you asked him that before.

40 (Witness excused).

Charles Byrnes—Direct.

CHARLES BYRNES, called as a witness on behalf of the Defense, having been duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. SALMON:

Mr. Meslar: There is one more question I¹⁰ would like to ask Mr. Aeschbach.

The Court: Just step down, Mr. Byrnes.

(Mr. Aeschbach resumes the stand):

By Mr. Meslar:

Q. The first you knew of the visit of your wife to her brother, Mr. Roebuck, was after you had shot your wife? A. Yes sir.

Mr. Meslar: That's all.

20

(Witness excused).

(Charles Byrnes resumes the stand).

DIRECT-EXAMINATION BY MR. SALMON:

Q. Mr. Byrnes, are you the other brother who lives with your father, Michael Byrnes? A. Yes sir.

Q. And the house is a house of how many bed- 30 rooms? A. There is three bedrooms with a small room upstairs that isn't used—for clothes baskets and stuff.

Q. And your father occupied one and you another? A. My brother and I another and the housekeeper.

Q. The third one? A. The other one.

Q. Mrs. Aeschbach slept downstairs? A. She did.

Q. And was it necessary for anyone going up- 40

Dr. Thomas P. Prout—Direct.

stairs to go through that room where she slept? A.
When she went to bed there would be nobody down-
stairs.

The Court: What is the purpose of the question?

Mr. Salmon: I want to know if he knows why this nurse slept downstairs?

10

The Witness: On account of lack of room.

The Court: What difference does it make whether he knows or not, when this defendant didn't know it? There is nothing whatever in his testimony concerning that, is there?

Mr. Salmon: There may not be.

Mr. Meslar: No questions.

(Witness excused).

20

Mr. Salmon: Defendant rests.

The Court: Any rebuttal?

Mr. Meslar: Call Dr. Prout.

DR. THOMAS P. PROUT, a witness called on behalf of the Prosecution, in rebuttal, having been duly sworn, testified as follows:

30

DIRECT-EXAMINATION BY MR. MESLAR:

Mr. Meslar: I am calling Dr. Prout as an alienist.

The Court: All right. You may proceed in the regular course of the examination; ask what branch of the profession he belongs to.

Mr. Meslar: I think Judge Salmon admits them.

Mr. Salmon: Yes.

40

Dr. Thomas P. Prout—Cross.

Q. At the request of the Court, Dr. Prout, did you make an examination of Gustave Aeschbach?

A. I did.

Q. And your analysis of his case is that he is a man of limited mentality who knew perfectly well what he was doing at the time of the murder, he knew it was wrong? A. That was my conclusion.

Q. And that was based on examination of this 10 man, in this prisoner's immediate family there had been three suicides, father, grandmother and a half brother, you took that into consideration in making your report? A. I considered that.

Q. And also during his mother's pregnancy she relates a story she was under very serious mental strain throughout the entire period, also was in your mind? A. Yes.

Q. And also, that he was sickly as a child, and 20 at the age of 13 or 14 seems to have suffered from chorea, St. Vitus Dance, which kept him ill some months and the severity of his illness is probably reflected in his physical condition today and in the existence of a heart lesion and some other physical defects, you had that in mind? A. Yes.

Q. Having in mind all these facts you still think this man knew what he was doing at the time of the murder and knew that it was wrong? A. I do. 30

CROSS-EXAMINATION BY MR. SALMON:

Q. What is chorea, Doctor? A. Chorea is commonly known as St. Vitus Dance.

Q. What do you say as to the matter of St. Vitus Dance in relation to the condition you find this man, in other words, is that some infection, chorea? A. It is an infectious disease that invades the brain tissue. 40

Dr. Thomas P. Prout—Cross.

Q. And we as laymen know that disease as St. Vitus Dance, and the profession designate it as, chorea? A. Yes.

Q. And because of that infection there are the results which we find in what we ordinarily call as, fits, is that it? A. Well, I cannot say, fits, no; it renders—if it is sufficiently severe in itself, very
 10 severe infection, as seems to have been the case in this particular instance, it would be an element, it would make an element of instability, it would furnish an element of instability in a case, it might do that.

Q. That element of instability would not be limited to the mechanical operation of the subject, but rather as to mental operation?

The Court: Just a minute: Doctor, I might
 20 ask you to sort of explain that question. If I cannot understand it, the Jury cannot, and you, Doctor, may be, do not.

Mr. Salmon: Withdraw it.

Q. The element of stability, is that in a case of St. Vitus Dance, or Choreia, limited only to the mechanical or physical operation of the person? A. It has to do with the mentality, of course.

Q. What would you say of a case where the sub-
 30 ject was unable to recognize his playmates or friends, as to the degree of that case in a person afflicted with chorea? A. It would be a severe case.

Q. Such a case would be an extremely severe case would it not, Doctor, indicating an inability to recognize ones friends? A. It would be a severe case.

Q. Now you have stated in your report, to which the State has referred, an element of poor
 40 judgment exhibited in this defendant's inability to

Dr. Thomas P. Prout—Cross.

weigh the facts and see some of the consequences incident to this trouble, what do you mean by poor judgment in that relation? A. I mean exactly what I have stated, that facts do not really mean the same thing, exactly, to him, that they might mean to a man with a perfectly well-rounded mentality.

Q. He has, has he not, Doctor, a superficial and childlike reasoning about this matter as reflected in his conversation with you? A. That is the way I look upon it, yes.

Q. And by "childlike" you mean a person of very, very tender years, do you not? A. Well, childlike, yes; let's not go beyond the tenth year, let's say.

Q. You think he reflects as intelligent a mentality as his ten year child has indicated to this Court and Jury today in his treatment with you of this case? A. About that level, let us say.

Q. You think he is as bright as she was today about this matter? A. Yes, I would say so.

Q. You would count her a reasonably bright girl, to-day? A. Yes.

Q. And you would not ordinarily expect a girl of ten years to exhibit any greater degree of intelligence than she showed before the Court and Jury? A. I don't think so.

Q. Have you any way, or manner, or method of telling the Court and Jury that this defendant on the night of this shooting and at the time of the shooting was fully aware of his action, as to whether it was right or wrong in the immediate circumstances? A. I believe that he knew that what he was doing, and it is my opinion that he knew it was wrong, but all of that was strained through an unstable mechanism. That is what a psychiatrist has to recognize.

Q. Doctor, as a result of your test, made nearly

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one month subsequent to the happening, under conditions which you will say, will you not, were most restful and relaxing and recuperative here in this jail— A. We might so regard them, yes.

Q. Can you conceive, Doctor, of a greater asylum or refuge for one who had gone through the agitation of extreme trouble such as this, a greater refuge even a hospital, a jail where he is protected from all outside influences and would have greater opportunity to recover—

The Court: And you might add to that question, and where he was standing charged as in this case; is it not a place where he could more quickly gain his equilibrium.

Q. The Witness: I think he would have a fairly good opportunity to regain it, yes; that is, to regain what would be to him normal equilibrium.

Q. So that a process of repair and recuperation perhaps here in the jail are perhaps better facilitated than even in a hospital, because of the protective condition here? A. That depends upon the hospital.

Q. Now, you have said that the defendant has psychopathic tendencies—withdraw that. In view of what you find here that the ideas of this defendant fail to show any gross abnormalities such as delusions, hallucinations or illusions, did you find he is suffering at all from any other psychopathic tendency? A. I take it, you are asking me for a diagnosis?

Q. I want the result of your examination? A. If I were to classify him I would state that he was a psychopathic personality, merely a psychopathic personality.

Dr. Thomas P. Prout—Cross.

Q. Now, by a psychopathic personality, please inform me and the Jury what does that mean in our every-day language? A. It would be very difficult to characterize it because it includes a tremendous number of people who are——

The Court: Just a little bit clearer.

The Witness: Yes, clearer; they do not react properly in the presence of reality, and you always mean by that, that a person is not a mental case, that is, a worth while state from normal mentality, a worth while state, yes, but not a case for an asylum. 10

Mr. Salmon: No.

The Court: Doctor, having in mind all these various elements, having in mind the fact that the crime was committed a month ago, and that you examined him only just lately after 20 this month of rest, so-called, with all these facts in his previous family history, that your opinion is that he was sane at the time he committed the crime and knew the difference between right and wrong?

The Witness: That is my opinion.

Q. Did you find any expression of regret in this individual? A. Rather controlled regret, yes; he showed emotion, he showed rather normal emotion 30 as he recited his story to me, that is, there was variation of the emotional tone, as he related facts.

Q. And in your report you indicate there is no expression of regret, is that right? A. That is true, no expression of regret, I say, speaking of the emotional tone.

Q. You found him depressed? A. Yes.

Q. And emotional? A. Emotional.

Dr. Thomas P. Prout—Redirect.

Q. During the recitation of his trouble? A. Yes.

Q. And you found also, did you, that he had a childlike absence of consideration for the feelings of his relatives, or the position in which his children are placed in this event? A. Yes.

Q. That is not normal, is it, Doctor? A. No.

Q. Very unusual, isn't it, Doctor? A. It is unusual.

10 Q. It is very unusual in a person who is being tried as this individual is being tried here, as a normal person, or at least as a person that should be subject to legal trial, isn't that right? A. Correct, yes.

Q. Very unusual? A. Yes.

Q. Now, he also impresses you that he had no understanding of the consequences of this trouble, this situation as concerns his children, didn't he?

20 A. No, he had no appreciation of the position in which his children—well, are evidently placed by this event.

Q. That, to you, is a very abnormal symptom, isn't it, Doctor? A. It isn't normal, no.

REDIRECT-EXAMINATION BY MR. MESLAR:

30 Q. These symptoms are not due to any mental defect, are they, Doctor? A. They are due to a simplicity of mind, let us say, a lessening of degree of mentality, of falling down of the general level.

Q. Couldn't a man have a depravity of heart and have all his mental faculties and still feel the same, have no remorse for the act? A. I don't get that.

40 Q. No co-ordination between the heart and mind; feel remorse for something that is done, yet have all their mental faculties present? A. If we react normally to a condition of this kind I should naturally expect to find a person full of remorse as a result of the act.

Dr. Thomas P. Prout—Redirect.

Q. You have listened to his story here leading up to the crime, in your opinion do you think this man was sane? A. Sane in the eyes of the law, yes.

By the Court:

Q. Doctor, you mentioned something about an age of ten years in answer to Judge Salmon's question? A. That is known an intelligence equation, yes; I shouldn't have mentioned that because I didn't do psychoelectric tests. ¹⁰

Q. That is the reason I want to stop you speaking on the record, so that in reading the record there will be no defect in your testimony? A. Exactly.

Q. When you compared that age of ten, so-called, and compared it with his daughter, the normal person is not between ten and 40 or 50, like you and me, but between 10, and 12, 13, something like that? A. Yes. ²⁰

Q. In other words, none of these psychoelectric tests have value of a person more than 13 years of age, do they? A. That depends upon the system.

Q. Beyond thirteen they are not conclusive of character? A. Very varied.

Q. Up to 12 or 13 they are fairly accurate? A. Fairly accurate, yes.

By Mr. Meslar:

30

Q. Isn't it true all murderers are more or less psychopathic? A. I wouldn't say that, but a very large percentage.

Q. What percentage, 80 or 90%? A. Not as high as that.

Q. How high? A. I think about two out of three.

Q. As a matter of fact, isn't every one more or less psychopathic? A. With personality defects, everyone? ⁴⁰

Dr. Thomas P. Prout—Redirect.

Q. Yes. A. Depends on—if you were asking a normal person perhaps you might be able to say something about that.

The Court: You have to have a standard gauge.

10 The Witness: Yes; I do not agree there is a little insanity in everybody.

Q. Aren't there personality defects? A. Yes.

Q. Isn't it psychosis? A. No, not psychosis, just a personality defect.

Q. Isn't that psychopathic? A. I wouldn't want to put "pathic" at the end of it; it is just a personal matter.

Q. Many of those witnesses who sat in the witness-chair during this trial, other than the family of this man, aren't they psychopathic? A. That would depend on what we regard as normal.

20

Q. I am asking you for your personal observation of hearing them on the witness-stand, other than the family of this man, aren't they psychopathic? A. I don't want to pick out anybody.

Q. I don't want you to, I am asking you, were they or were they not?

30 The Court: That is rather a difficult thing to do, characterize an entire group.

By the Court:

Q. Doctor, your objection to adding the word "pathic" is because in medical language as a rule that is associated with some sort of disease? A. Yes.

Q. You want to leave the disease end out? A. 40 Yes.

Dr. Thomas P. Prout—Recross.

RECROSS-EXAMINATION BY MR. SALMON:

Q. Doctor, you found this man, as you said, legally sane, you didn't find him medically and psychopathically that, did you? A. If you are asking my opinion about that, and if it is a proper thing to answer it here, I did not find him, he is legally sane, but, from the standpoint of a psychiatrist he should have some consideration, that 10 is my opinion.

Mr. Salmon: That is all.

(Witness excused).

Mr. Meslar: That's all.

The Court: Does the case stand closed?

Mr. Meslar: Yes, your Honor.

Mr. Salmon: We close.

The Court: Still, of course, the Court is 20 confronted with the serious question of continuing. If Counsel advise me that they are going to consume two or three hours in commenting to the Jury I shall not go on with it to night. If counsel feel that their case can be properly and adequately covered within a reasonable time, I feel certain I would be willing to go on and so would the jury. The only question is whether the Jury undertakes 30 to deliberate this case late in the night, or whether they are going to deliberate it sometime within reason. I would like to be advised by Counsel what they think.

Mr. Salmon: Personally, I will do what I can to facilitate a very early delivery of the case to the Jury.

The Court: It is all right to go on?

Mr. Salmon: From my point of view, yes. 40

Court's Charge.

10 The Court: Ladies and Gentlemen of the Jury, you will positively continue now, but you will not be excused for your meal-time until after the Court stands adjourned and then the Sheriff will see that you are first provided with something to eat, and then you will undertake the consideration of the case. If that is satisfactory to you Ladies and Gentlemen of the Jury, we will continue it.

 We will take a recess at this time of five minutes.

 (Court convened pursuant to adjournment.)

20 (Mr. Salmon, on behalf of the defendant, and Mr. Meslar, on behalf of the State, summed up to the Jury. The Court charged the Jury as follows:)

Court's Charge.

 The Court charged the Jury as follows:

30 LADIES AND GENTLEMEN OF THE JURY:

 After a close investigation of this cause, after a long day, we have reached that point where the labors and the responsibilities of Counsel have terminated, and where it becomes my duty to explain to you the rules and principles of the law, so far as the guilt or innocence of the prisoner is connected with, or dependent upon those rules and principles.

40

Court's Charge.

I have been requested by the Defendant to make certain charges of the law to you, and I shall charge you those first.

1. The finding of the indictment is no presumption of guilt.

2. Any one of five verdicts may be found under an indictment for murder,— 10

Not guilty.

Guilty of murder in the first degree.

Guilty of murder in the first degree with the recommendation of imprisonment at hard labor for life.

Guilty of murder in the second degree.

Guilty of manslaughter.

3. In order for the defendant to be convicted by the Jury of murder in the first degree, the three statutory elements must be present, to-wit:—willfulness, deliberation and premeditation. 20

4. Every person convicted of murder in the first degree, his aiders, abettors, counsellors and procurers, shall suffer death unless the jury shall by their verdict, and as a part thereof, upon and after consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed. 30
The Jury is charged that in case of finding the defendant guilty of murder in the first degree without a recommendation, the punishment will be death, but if the Jury determines that he be punished by imprisonment at hard labor for life, the form of your verdict should not be merely that the Jury recommends mercy, but that the Jury finds 40

Court's Charge.

the defendant guilty of murder in the first degree as charged, and recommends imprisonment at hard labor for life.

5. If the homicide be one which is willful, but the elements either of deliberation or premeditation, or both of them, are not present, then defendant cannot be convicted of murder in the first degree, but murder in the second degree.

6. Murder in the second degree consists of an intentional or wilful killing by a sane person of a human being, the elements, however, of deliberation and premeditation, or either of said elements of deliberation or premeditation being absent.

7. Manslaughter is where a person kills another upon a sudden transport of passion or heat of blood, upon a reasonable provocation and without malice.

8. The mere fact that the defendant had a gun on his person just prior to the shooting, does not in and of itself necessarily prove that the defendant had formed an intention to use it on his wife.

Number nine I refuse to charge other or further than I have or will charge.

10. It is not required that the plea of insanity be proved by the defence beyond a reasonable doubt; it is sufficient if the defense establishes insanity of the defendant, by the preponderance of proof.

11. If you find that the defendant, at the time of the shooting, had no capacity to distinguish between right and wrong with respect to the act, then your verdict should be not guilty.

Court's Charge.

12. If you find from all the evidence produced that the defendant had no capacity to distinguish between right and wrong with respect to the act, at the time of the shooting, even though you find him to be sane at the present time, then your verdict should be not guilty.

13. If you find from all the evidence produced¹ that the defendant was insane, not having the capacity to distinguish between right and wrong, at the time of the shooting, even though you find him to be sane at the present time, then your verdict should be not guilty.

14. The testimony of non-professional witnesses, as to the insanity of the defendant, are competent evidence to go to the Jury is grounded on facts and circumstances within their personal knowledge.²

Number fifteen I decline to charge other or further than I have or will charge.

And soon the fate of the prisoner will be committed to your hands, and upon your verdict hangs the issue of life and death. His mortal, and so far as human actions can influence our future condition, it may be, his immortal and eternal destinies are to be irrevocably fixed by your decision. Not, ladies and gentlemen, that either you or the Court³⁰ have any power, except incidentally, over the life or death of the prisoner. You and I are delegated with not such authority. You have been selected to perform a specific, though it must be admitted, a solemn duty, namely: to ascertain the guilt or innocence of the prisoner, and there our duties and your powers terminate so far as you are responsible. The law makes no appeal to our judgment on the expediency of the punishment it annexes to⁴⁰

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the crime; nor to our religious views or feelings, on the moral fitness or legality of that punishment. What follows your decision, whether it be innocent or guilty, is the act and the judgment of the law, not yours.

10 The solemn method of your selection, the confinement that you have so patiently endured, the fixed and untiring attention that you have paid to the evidence and to the arguments of Counsel, are, I am sure, a sufficient pledge to the country and to the prisoner that your verdict whatever it may be, will be the result of your cool and deliberate judgment—the honest convictions of your minds; the true answer of your consciences in the sight of God, and not the expression of prejudice or excitement, on the one hand, or of the unrestrained and
20 controlling indulgence of sympathy and compassion, on the other.

There is danger, ladies and gentlemen, that the claims of justice may be overlooked and left to suffer, amidst the conflict of contending passions, alike honorable to our natures, and yet alike dangerous to our reason. The cry of murder, the death struggles of the expiring victim, the smoking revolver, the garments be-spotted with blood, are well
30 calculated to rouse our feelings and fill our souls with a holy indignation against the perpetrator. Instinctively, almost, we wish to see the glittering sword of justice strike the avenging blow, and vindicate her cause. It is right we should feel thus, and men we should not be if we could look, unmoved, on crime like that with which the defendant stands charged. But we must guard against these emotions when we enter the sanctuary of justice, whether in the character of judges or jurors. We
40 are not, indeed, to banish them from us, but we

Court's Charge.

must take care that we do not transfer our righteous indignation of the crime to the accused, and thus deny to him the benefit of our sober reason and our powers of discrimination. So, on the other hand, sympathy for the accused, tender and compassionate feelings toward a wretched, perhaps an innocent, or at least an unfortunate, man, standing in the attitude of the prisoner at this Bar, is a laudable, yes, an honorable attribute of our nature. ¹⁰ But here again we must take care that we do not suffer our humanity to degenerate into weakness and deny to justice and the majesty of the law their just claims.

If, however, ladies and gentlemen, you err at all let it be, I pray you, under the influence of the latter feelings, for it is the benignant spirit as well as the language of our law, that many guilty had ²⁰ better escape than one innocent man be punished.

The prisoner stands before us charged with the crime of murder, murder committed on the person of Louise Aeschbach, his wife.

The crime of murder is committed, when a reasonable being kills with malice aforethought another reasonable being, in the peace of God and of the State.

Your inquiries therefore will be in the order as follows: ³⁰

1. Was Louise Aeschbach killed?
2. Was it done by the prisoner?
3. Was it done with malice aforethought?

The first two interrogatives involve nothing but pure and unmixed matters of fact, and to them the jury must respond; and that answer must, unhappily in this case, be in the affirmative. Louise ⁴⁰

Court's Charge.

Aeschbach was killed; and she was killed by the hand of this defendant.

I would, ladies and gentlemen, that you and all of us had room to doubt on this point, but we have all had exhibited to our view and to our ears, too certain and too painful evidence of the fact. She was killed on the 31st day of March, 1930, at the house of her employer by the hand of this defendant. It is not denied by him nor by his Counsel. It is admitted. Nothing then remains to be answered but the third interrogative: "Did he do it with malice aforethought?" Upon your answer to this question must depend the fate of this defendant, and God grant that I may be enabled rightly to understand and so to explain the law to you that is involved in or connected with this question, that I may not be instrumental in doing injustice to the prisoner.

What then is meant by malice aforethought? It is a wicked and unlawful design or intention to do a wrong or injury to another; and whether that design or intention has its origin in a spirit of hatred and revenge to the person, or in the gratification of any other passion of the human mind, it is malice aforethought. Nor is it necessary that there should have been a previous deliberate and fixed purpose to do the act; for malice is sometimes express, or positively proved; and sometimes implied, that is, inferred or deduced from the circumstances attending the commission of the offense. Malice is express, where a previous and deadly quarrel existed, and hatred ensued between the parties; or where threats were made or previous arrangements concerted, or the deceased waylaid. In the absence of such proof it may be implied, from a variety of circumstances, and even from the deadly nature of

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the weapon made use of; and such was the instrument in this case, it being a revolver. But then, the very fact, that malice aforethought must exist to constitute the crime, implies that the perpetrator must be a moral agent, a reasonable and accountable being.

Here probably lie the hopes of the prisoner and his Counsel; and whether he was or was not such a moral agent, and such an accountable being at the conception and execution of this dreadful tragedy, is for you to determine.

It would seem indeed, as if no one but a madman could have perpetrated such a deed as we have here exhibited in evidence in this case. Who, but a maniac, or an insane person, or a deranged man could have imbued his hands in the blood of such a victim, could have pulled the trigger and shot to death the person that he loved, and let out the stream of blood of her very life, of that person in whose life and happiness his own was bound up in unconquerable affection. It is almost incredible. Yet, ladies and gentlemen, it is entitled to your consideration—let it have its weight; but it is my duty to add, it is not conclusive evidence of that sort of insanity which exculpates from accountability and guilt. Frenzy and passion are nearly allied to, yes they are partial insanity; but it is sometimes such an insanity as increases rather than diminishes moral turpitude, as proves its existence rather than its absence.

Such is the repravity of human nature that disappointed love as well as disappointed avarice or ambition sometimes urges on its victims to crimes of deepest dye, to murder, and even to suicide itself. But such aberration may be only the actings out of a selfish, depraved and wicked heart, the gratifica-

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tion of a malignant and vindictive spirit that has not moral courage or virtuous sensibility enough to survive or overcome a defeat, or the humiliating refusal of proffered love; it may be malice in its deepest, darkest colors, and its most resentful, malignant, and deadliest form.

Such is the strange and mysterious composition
10 of our nature; so closely allied are our virtues and our vices; so easily do our virtues degenerate into our vices, or the latter assimilate themselves to and assume the garb of the former, it is often difficult to determine where the one terminates or the other commences. Such is the passion of love; it may be pure and virtuous, chaste in its conception, holy in its motives, honorable and disinterested in its object; it may seek exclusively and supremely the
20 happiness of the person on whom it is fixed, regardless, in a measure, of its own welfare, except so far as it stands connected with the welfare of that person; it is then a noble and enobling passion. But it is sometimes a vicious love; it is rather the burning lust of unhallowed and undisciplined passions, than the ardent flame of virtuous and sentimental affection; and when such is its character, it is not surprising, if unrequited and ungratified, it should turn to hatred and seek revenge.

30 I do not mean to intimate that such was the nature and character of this defendant's attachment for the deceased. It may have been as pure and holy as ever glowed in the bosom of a mortal being. It may have burned and blazed too strong for the physical powers of his mind to endure, and the lamp of reason itself may have gone out, or glimmered in its socket under the influence of its all-absorbing power; and if by such, or any other
40 cause, the defendant's mind had become unsettled

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or deranged, if reason had been driven from its throne, he was a wretched, miserable, crazy man, but not a guilty one.

And here perhaps I ought to be more specific as to what amounts to, or constitutes such a derangement as exculpates from imputation of guilt, and saves from infliction of punishment.

It is a general rule that all homicides, that is, 10 every killing of a person, is presumed to be malicious and of course, murder, unless the contrary appears from the circumstances of alleviation, excuse or justification—and that it is incumbent on the prisoner to make out such circumstances to the satisfaction of the Court and Jury, unless they sufficiently appear from the evidence and the case made out on the part of the prosecution—or perhaps, at most, it is necessary for the State to show 20 a homicide committed by the defendant *prima facie*, clear of any alleviating, excusing or justifying cause.

In the case now before the Court, as I have already remarked, the homicide is proved. It is not denied. The prisoner then is obnoxious to the charge and liable to the dreadful consequence of murder, unless he can alleviate, excuse or justify his conduct. It is not necessary for me to enter into a specification of what constitutes an allevia- 30 tion, excuse or justification. The defendant has not attempted to alleviate or to justify, but his defense is bottomed on the fact, which, if it is true, is an excuse. That fact is a state of mental alienation; and if such alienation did exist, it is an excuse. It does then rescue him from the charge of crime, and shield him from the punishment due to guilt.

But then it must be satisfactorily shown to the 40

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jury that he was in that insane condition, and at this point the difficulty meets us and presents two questions,—

First: What state or degree of alienation of the mind, in other words, insanity, constitutes an excusing insanity? and

Second: Did such an insanity exist?

10 The first it is my duty to ascertain and declare; the second, it is your province to determine.

In ascertaining what degree of insanity will excuse, we may derive some assistance from the reason of the thing; from analogy to other cases, and, from settled rules. Reason and good sense teaches us at once, that it is not every weakness, it is not every imperfection or fallacy of the human mind, that puts an end to our free moral agency, and exonerates us from accountability; for, in the
20 true philosophy of mind in reference to moral actions, every departure from truth and virtue, is but an act of insanity; the manifestation of a disordered mind as well as a depraved heart.

In the case of children of tender years—of nine or ten years of age—who have been indicted and convicted for crime, the inquiry has not been whether by premature maturity of intellect, they were capable of understanding and judging cor-
30 rectly, of the moral law, in all its bearings and relations upon themselves and others; but whether they had intelligence enough to know right from wrong, good from evil, or that they were committing a crime for which they deserved or were liable to punishment.

But without pursuing these remarks any farther, it is enough for me to say, that the ablest and most humane judges that ever adorned the judgment
40 seat, have repeatedly decided that it is not neces-

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sary to render an act criminal and the perpetrator punishable, that every spark of reason should be extinct; that though it may glimmer in its socket and give but an unsteady and doubtful light, yet if enough remains to show it was susceptible of feeling its legal and moral obligation, though not sufficiently strong and steady to discover them in all the bearings and obligations, yet he is responsible and punishable. But if there is an absence and destruction of the reasoning powers, and a mind is incapable of feeling the restraints of law or to discriminate between right and wrong, or fitful and illusory phantoms of the brain that present things in a false light, or imposes upon the disordered intellect as realities, what has no existence in nature; such a mind, thus in ruins, has ceased to be accountable for its acts. 10 20

I do not mean to say that there must be a total and absolute extinction of the light of reason. If the prevailing character of the mind is insane; if only now and then it is pierced by a lucid ray; but its general character is disordered and chaotic, it would be dangerous, if not cruel to convict and punish for a crime an individual thus already miserable and pitiable.

With these remarks on the extent and degree of 30 derangement necessary to exculpate a defendant, I will dismiss this branch of the subject, and here you will refer yourselves to the evidence.

The defense set up is that the defendant was irresponsible for the act of killing this woman by reason of his insane condition. It is to be remarked, ladies and gentlemen, that this defense for an act which would otherwise be a crime is one which should be scanned with the closest scrutiny. This defense of irresponsibility is one which requires the 40

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highest degree of care and exercise of great judgment on the part of the Courts and juries. It is a defense seldom interposed to any except indictments for the highest crime, unless the type of insanity is so manifest that there is no difficulty in determining its character. Therefore, conflicting interests, on the one hand the desire that no man who by mental
10 derangement is not amenable shall be punished, and, on the other hand, that gross violations of the law shall not go unpunished, on account of what may be a real derangement, but not a derangement in that degree which brings irresponsibility—I say that these conflicting interests demand the most careful and conscientious consideration of all the facts that surround the case, that justice may be done to the State and to the accused.

20 In entering upon the consideration of the defendant's insanity, it is first to be observed that the burden of proving his irresponsibility by reason of his diseased mental condition is upon the defendant. Every man is presumed to be sane until the contrary is shown and therefore the burden rests upon the defense to prove by a preponderance of the testimony that the mind of the defendant was deranged; and so deranged as to make him irresponsible for his act. Again, in entering upon a
30 consideration of the mental condition of the defendant in connection with his otherwise criminal act, you must keep in mind that it is not every disorder of the intellect which affords immunity from punishment for the crime. The test of insanity applied by the English trial courts before the celebrated McNaughton case has varied, and particular attention was called to the absence of a certain standard of insanity in the year 1843 by
40 reason of the acquittal on the ground of insanity

Court's Charge.

of one McNaughton for the shooting of a Mr. Drummond. In view of the sensation caused by reason of the acquittal, the House of Lords propounded certain questions to the Bench of English Judges. One of the questions was: On what premise ought the question of insanity to be left to the jury as to the prisoner's state of mind, at the time the act was committed? In the answer of the Judges they said, and it was laid down as the law, that if the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the laws of the land, he is punishable; and the usual course has been to leave to the jury whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong.

Three years later at the trial of Spencer in this State, Chief Justice Hornblower laid down the law in conformity with the English rule, and this standard has been recognized in recent cases in our court of last resort. The rule is, that where insanity is set up as a defense to an indictment for murder, unless it appears that the person was not conscious at the time of the killing, that the act which he was committing was morally wrong, he is responsible even if it be shown that he was impelled to its commission by an impulse that he was not able to resist.

So you may perceive, ladies and gentlemen, that while a man may be in a degree insane, and under the influence of an insane impulse may commit a criminal act, yet, if at the time he knew he was doing an act in violation of the law, which was wrong, he is under our law responsible for the result of it.

So again a man who at one time may be so men- 40

Court's Charge.

tally deranged as to be unconscious that the act he proposed to commit is wrong, may at another time be conscious that in performing the same act he is violating the law of the land, if his lunacy, his insane condition, is relieved by periods of lucid intervals, he may be entirely irresponsible for an act committed during the period of his mania, and
10 entirely responsible for an act committed by him during one of his lucid intervals.

In considering the peculiar feature of insanity relied upon in this case, it is important then, that you keep in mind these two rules:

First: That it requires a particular type of insanity to afford immunity to a defendant, and that type is a degree of insanity which renders the defendant unconscious that the act committed by him
20 is wrong; and

Second: That while that type of insanity may exist in a person, yet the same person may have lucid intervals during which his responsibility for crime may be complete.

And so in the consideration of this case you will want to bear in mind the recital of some of the testimony that you heard; How he came to the porch; how his wife came out; how she uttered the remark that she had seen or was going to see a
30 lawyer, you will recall the testimony of the defendant wherein he said, and, in that connection, ladies and gentlemen of the jury, you are the sole judges of the evidence, and not me, and it is not my recollection but yours that must govern, you may recall where he said: "I didn't say anything to her; I took out my gun and I shot her." And you will recall that almost immediately thereafter he threw
40 up a State Trooper, or, call the State Police. Had

Court's Charge.

a fixed and settled purpose been formed in his mind to destroy this woman that he loved, this gem that he could not make his own? or was he the miserable victim of his ardent but perhaps misplaced affection?

These, ladies and gentlemen, are the questions to which you must respond; and if anything in the absence of full and satisfactory evidence of insanity 10 can save the prisoner, it may be found in the eloquence and in the untiring efforts of his counsel. They have done their duty. And if the unhappy prisoner must pay to injured justice the forfeit of his life, his blood will not be found on any part of their professional garments.

And now let me beseech you, ladies and gentlemen of the jury, that nothing that I have said be understood by you as intimating an opinion un- 20 favorable to the prisoner. I have not intended, in reference to the great and material facts in the cause, to express any opinion either for or against him. My object has been, however unsuccessful the effort, so to conduct this trial, that if the prisoner is acquitted, public justice shall be satisfied; if condemned, he may die in peace with me, and have no occasion to occupy his last lingering reflection with the thought that the Court has done him an in- 30 justice.

If you find this defendant to be guilty of murder in the first degree, from all the evidence in the case, it must be beyond a reasonable doubt. A reasonable doubt has been defined by our Court to be,—not a mere possible doubt, but that state of the case which, after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they 40

Court's Charge.

feel an abiding conviction to a moral certainty of the truth of the charge.

Ladies and gentlemen of the Jury, I recommend you to the guidance of your Maker; go to your jury chamber, and there in the fear of God and as you expect to answer for the transactions of this day at his Bar, discharge your duty to your country and
 10 to the prisoner, and may the spirit of unerring wisdom, the God of Mercy and of Truth preside over your deliberations and conduct you to such results that neither justice nor mercy shall have occasion to mourn or be offended.

Let an officer be sworn.

Ladies and Gentlemen of the Jury, I have been requested to inform the Jury that Dr. Prout was not sworn as a witness for the defense, he was
 20 sworn as a witness for the State. He was designated by this Court, acting at the suggestion and consent of both parties.

Let the Jury retire, let the exhibits be afforded to the Jury together with the indictment, and let the Sheriff provide the Jury with something in the nature of food and sustenance.

(The Jury retired at 7:45 P. M.).

Mr. Salmon: If the Court please, I take exception to such parts of the defendant's requests to charge as were not charged specifically by the Court, and to such thereof as were omitted by the Court; and a general exception to the Charge.
 30

The Court: Exception allowed.

ALBERT H. HOLLAND

(Defendant's requests to charge follow here-
 40 with):

Defendant's Requests to Charge.

(Defendant's requests to charge as originally submitted were as follows) :

"1. The finding of the indictment is no presumption of guilt.

"2. Any one of five verdicts may be found in this case :

Not guilty. 10

Guilty of murder in the first degree.

Guilty of murder in the first degree with the recommendation of imprisonment at hard labor for life.

Guilty of murder in the second degree.

Guilty of manslaughter.

"3. In order for the defendant to be convicted by the Jury of murder in the first degree, the three statutory elements must be present, to-wit:—willfulness, deliberation and premeditation. 20

"4. Every person convicted of murder in the first degree, his aiders, abettors, counsellors and procurers, shall suffer death unless the jury shall by their verdict, and as a part thereof, upon and after consideration of all the evidence, recommend imprisonment at hard labor for life, in which case ³⁰ this and no greater punishment shall be imposed. The Jury is charged that in case of finding the defendant guilty of murder in the first degree, but if the Jury desires him to be punished by imprisonment at hard labor for life, the form of your verdict should not be merely that the Jury recommends mercy, but that the Jury finds the defendant guilty of murder in the first degree as charged, and recommends imprisonment at hard labor for life. 40

Defendant's Requests to Charge.

“5. If the homicide be one which is willful, but the elements either of deliberation or premeditation, or both of them, are not present, then defendant cannot be convicted of murder in the first degree, but murder in the second degree.

10 “6. Murder in the second degree consists of an intention or willful killing by a sane person of a human being, the elements, however, of deliberation and premeditation, or either of said elements of deliberation or premeditation being absent.

“7. Manslaughter is where a person kills another upon a sudden transport of passion or heat of blood, upon a reasonable provocation and without malice.
20

“8. The mere fact that the defendant had a gun on his person just prior to the shooting, does not in and of itself necessarily prove that the defendant had formed an intention to use it on his wife.

“9. In this case wherein mental defect or disease is pleaded as a defense, the question is whether the accused be guilty or not guilty, and in this fact of
30 guilt is involved the fact of the evil mind, and in this relation it is a fundamental maxim that ‘the act itself does not make a man guilty, unless his intention were so.’

“10. It is not required that the plea of insanity be proved by the defence beyond a reasonable doubt; it is sufficient if the defence establishes insanity of the defendant, by the preponderance of
40 proof.

Defendant's Requests to Charge.

"11. If you find that the defendant, at the time of the shooting, had no capacity to distinguish between right and wrong with respect to the act, then your verdict should be not guilty. 10

"12. If you find from all the evidence produced that the defendant had no capacity to distinguish between right and wrong with respect to the act, at the time of the shooting, even though you find him to be sane at the present time, then your verdict should be not guilty.

"13. If you find from all the evidence produced that the defendant was temporarily insane, not having the capacity to distinguish between right and wrong, at the time of the shooting, even though you find him to be sane at the present time, then your verdict should be not guilty. 20

"14. The opinion of non-professional witnesses, as to the insanity of the defendant, are competent evidence to go to the Jury if grounded on facts and circumstances within their personal knowledge. 30

"15. If you find that at the time of the shooting, the defendant was emotionally insane, and by emotional insanity is meant such insanity that depends upon the mere emotions of the time arising from some defective or perverted moral sense, which begins on the eve of the act in question and ends when it is finished, then your verdict should be not guilty." 40

Certificate of Stenographer.

I hereby certify that the foregoing is a true and accurate transcript of the testimony and the proceedings had in the trial of the case of the State versus Gustave Aeschbach, Defendant, before Honorable Albert H. Holland, Judge of a Court of Oyer and Terminer, at Morristown, Morris County, New Jersey, April 30, 1930.

GEORGE SMITH,
Stenographer.

10

Certification by Judge.

MORRIS COUNTY COURT OF OYER AND
TERMINER.

20

THE STATE,

vs.

GUSTAVE AESCHBACH,
Defendant.

On Indictment
for Murder.

JUDGE'S CERTIFICATE.

I, Albert H. Holland, Judge of a Court of Oyer and Terminer in and for the County of Morris, before whom the above stated indictment was tried, do hereby certify that the foregoing is the entire record of the proceedings including the testimony of the witnesses had and taken upon the trial of the indictment in the above stated case of the State *vs.* Gustave Aeschbach.

30

Dated: July 11, 1930.

ALBERT H. HOLLAND,
Judge, &c.

40

Assignments of Error.

(Filed July 18, 1930.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY, Defendant-in-Error. VS. GUSTAVE AESCHBACH, Plaintiff-in-Error.	}	In Error to Morris County Court 10 of Oyer and Terminer. On Writ of Error. Assignments of Error.
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Afterwards, to-wit, etc., in the Morris County Court of Oyer and Terminer, of New Jersey, comes the said Gustave Aeschbach, by his Attorneys, and says that in the record and proceedings aforesaid, and also in the giving of the verdict and judgment aforesaid, there is manifest error, in this, to-wit: 20

1. Because at the close of the direct-examination of W. H. Kleindinst the Prosecutor offered in evidence three photographs, to which Joshua R. Salmon, one of Defendant's Attorneys, objected, and the Court over-ruled the objection and allowed an exception to the Defendant, permitting said three photographs in evidence; the offer, comments and ruling by the Court and objection by Counsel being as follows: 30

"Q. Mr. Kleindinst, I show you three photographs and ask you if you took these photographs? A. I did.

Q. When? A. March 31st, in the evening.

Q. What time, do you remember? A. Somewhere around nine o'clock, I won't be sure. 40

Assignments of Error.

Q. Whereabouts were they taken? A. In the rear of the house Jaqui avenue, taken by artificial light.

Mr. Meslar: I offer these three photographs, your Honor.

The Court: Is there any objection?

10 Mr. Salmon: It seems to me that there is a factor in each of these pictures that can only serve not to continue the proof of the fact of the death of the subject, the wife, and that, on its face, on the face of the pictures, that it can only tend to unduly inject into the matter, perhaps the element of horror and the like.

20 The Court: No, I think the State would be entitled to show the condition, the position in which the decedent was found and the location of the house, unless you object on some more substantial ground.

30 Mr. Salmon: I object on the ground that they show the subject of the act in question, namely the deceased, and that it is not an essential element for the proof, because with the subject of the act to be an exhibit which this pretends to produce is an element in the case which is altogether unanswerable so far as it relates to the phase of the horror involved, or a killing under any circumstances, and especially under these circumstances, and I am inclined also to suggest that the effect upon the mind of the Jury, that there are among us at times jurors who would be subject to the inflammatory reactions and feelings because of depicting the subject of the shooting in the circumstances, in the position, as indicated in these prof-
40

Assignments of Error.

ferred exhibits; I object to their entry in this case as no part, no essential part, no contributing part of the proof.

The Court: The objection will be noted on the record. It seems to the Court very proper proof; the fact they may incidentally disclose horror, which is not at all admitted¹⁰ by the State, is not incident to the crime. An exception will be granted and they will be admitted in evidence and marked Exhibits S-1, S-2 and S-3, respectively. As I understand it, you make no objection to their manner of taking, the qualifications of the photographer were admitted."

2. Because the Court refused to permit the witness, Russell Eichlin, on direct-examination by Mr. Salmon, to answer the question "From your observation of seeing him latterly as against the long time before, what is your opinion as to his mental condition?" to which the Prosecutor objected and the Court sustained the objection and allowed an exception to the Defendant.

3. Because the Court refused to permit the witness, Russel Eichlin, on direct-examination by Mr. Salmon, to answer the question "From the viewpoint of his mental make-up, what kind of boy was he?" to which the Prosecutor objected and the Court sustained the objection and allowed an exception to the Defendant, the questions and answers immediately prior to said objected question and counsel's comment and the Court's ruling being as follows:

Assignments of Error.

“Q. Have you seen him since this trouble of March 31st to talk with him?

The Court: Except in the Courtroom?

The Witness: Not until this morning.

10 Q. How much before March 31st did you see him? A. I really couldn't say, probably couple of months I met him on the street.

Q. When you first knew him was it as a school-boy friend? A. Yes, we were neighbors.

Q. From the viewpoint of his mental make-up, what kind of boy was he?

Mr. Meslar: Object.

The Court: I think that is objectionable; how can this witness prove his mental condition?

20 Mr. Salmon: Only from his actions.

The Court: He can tell what he knows of his actions, but he cannot give an opinion as to his mental make-up; can tell whether like any other boy, played ball, went to school or played hookey, the same as the rest of us did. This man cannot qualify to tell us whether he was sane or insane.

30 (Counsel for Defendant prays an exception, and requests that it be allowed and sealed).”

4. Because the Court, on ruling on the question of Mr. Salmon set forth in the above mentioned third Assignment of Error, stated as follows:—
 THE COURT: “He can tell what he knows of his actions, but he cannot give an opinion as to his mental make-up; can tell whether like any other
 40 boy, played ball, went to school or played hookey,

Assignments of Error.

the same as the rest of us did. This man cannot qualify to tell us whether he was sane or insane." to which Counsel for Defendant prayed an exception and the Court allowed it to Defendant.

5. Because the Court refused to charge Defendant's ninth request to charge, which ninth request reads as follows:

10

"9. In this case wherein mental defect or disease is pleaded as a defense, the question is whether the accused be guilty or not guilty, and in this fact of guilt is involved the fact of the evil mind, and in this relation it is a fundamental maxim that 'the act itself does not make a man guilty, unless his intention were so.'"

20

to which, when the Jury retired after the charge by the Court, Mr. Salmon took exception to such parts of the Defendant's requests to charge as were not charged specifically by the Court, and to such thereof as were omitted by the Court; the Court allowed the exception.

6. Because the Court read the Defendant's thirteenth request to charge as follows: "13. If you find from all the evidence produced that the defendant was insane, not having the capacity to distinguish between right and wrong, at the time of the shooting, even though you find him to be sane at the present time, then your verdict should be not guilty." whereas Defendant's request to charge read as follows: "13. If you find from all the evidence produced that the defendant was temporarily insane, not having the capacity to distinguish be-

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Assignments of Error.

tween right and wrong, at the time of the shooting, even though you find him to be sane at the present time, then your verdict should be not guilty." to which defendant's Counsel, Mr. Salmon, took an exception after the Jury retired and the Court allowed an exception to Defendant.

10 7. Because the Court read to the Jury Defendant's fourteenth request to charge as follows: "14. The testimony of non-professional witnesses, as to the insanity of the defendant, are competent evidence to go to the Jury if grounded on facts and circumstances within their personal knowledge." whereas Defendant's fourteenth request to charge
 20 read as follows: "14. The opinion of non-professional witnesses, as to the insanity of the defendant, are competent evidence to go to the Jury if grounded on facts and circumstances within their personal knowledge." to which Defendant's Counsel, Mr. Salmon, took exception after the Jury retired and the Court allowed an exception to Defendant.

8. Because the Court declined to charge Defendant's fifteenth request to charge, which fifteenth request to charge reads as follows: "15. If you
 30 find that at the time of the shooting, the defendant was emotionally insane, and by emotional insanity is meant such insanity that depends upon the mere emotions of the time arising from some defective or perverted moral sense, which begins on the eve of the act in question and ends when it is finished, then your verdict should be not guilty." to which after the Jury retired Defendant's Counsel, Mr. Salmon, took an exception and the same was al-
 40 lowed by the Court to the Defendant.

Assignments of Error.

9. Because the verdict was against the weight of evidence.

10. Because the verdict was against the weight of evidence in favor of Defendant's insanity, including the medical testimony.

11. Because the Jury rendered a verdict in favor of the State and against the Defendant when it should have been in favor of the Defendant.

JOSHUA R. SALMON

HARRY A. SHUBACK

Attorneys of Plaintiff-in-Error.

(Endorsed)—NEW JERSEY COURT OF ERRORS AND APPEALS—STATE OF NEW JERSEY, Defendant-in-Error, *vs.* GUSTAVE AESCHBACH, Plaintiff-in-Error.—In Error to Morris County Court of Oyer and Terminer.—On Writ of Error.—Assignments of Error.—Service of the within acknowledged this 16th day of July 1930—ORVILLE V. MESLAR, Prosecutor of Morris County.

Joinder-in-Error.

(Filed July 22, 1930.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	<p style="text-align: center;">THE STATE OF NEW JERSEY, Defendant-in-Error,</p> <p style="text-align: center;">VS.</p> <p style="text-align: center;">GUSTAVE AESCHBACH, Plaintiff-in-Error.</p>	<p>In Error Joinder-in-Error</p>
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And thereupon, afterwards, the said State of New Jersey, by Orville V. Meslar, Prosecutor of the Pleas of the County of Morris, comes into Court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and prays that the Court may proceed to examine as well the record and proceedings aforesaid, as also the several causes before assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed.

ORVILLE V. MESLAR
Prosecutor of the Pleas for
Morris County.

30 (Endorsed)—NEW JERSEY COURT OF ERRORS & APPEALS—THE STATE OF NEW JERSEY, Defendant-in-Error, vs. GUSTAVE AESCHBACH, Plaintiff-in-Error. — In Error — Joinder-in-Error.—ORVILLE V. MESLAR, Esq., Prosecutor of the Pleas, Morristown, New Jersey.—Service of the within Joinder-in-Error acknowledged this Twenty-first day of July, 1930.—JOSHUA R. SALMON, HARRY A. SHUBACK, Attorneys of

40 Plaintiff-in-Error.

Specifications of Causes for Reversal.

(Filed July 18, 1930.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

STATE OF NEW JERSEY, Defendant-in-Error, vs. GUSTAVE AESCHBACH, Plaintiff-in-Error.	}	In Error to Morris County Court of Oyer and Terminer. On Writ of Error. Specifications of Causes for Reversal.	 10
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Gustave Aeschbach, the Plaintiff-in-Error, by Joshua R. Salmon and Harry A. Shuback, his Attorneys, hereby specifies the causes in the record relied upon for relief or versal in the aforesaid cause as follows:

20

1. Because at the close of the direct-examination of W. H. Kleindinst the Prosecutor offered in evidence three photographs, to which Mr. Joshua R. Salmon, one of Defendant's Attorneys, objected, and the Court erroneously over-ruled the objection; the offer, comments and ruling by the Court and objection by counsel being as follows:

"Q. Mr. Kleindinst, I show you three photographs and ask you if you took those photographs? A. I did.

Q. When? A. March 31st, in the evening.

Q. What time, do you remember? A. Somewhere around nine o'clock, I won't be sure.

Q. Whereabouts were they taken? A. In the rear of the house Jaqui avenue, taken by artificial light.

Mr. Meslar: I offer these three photographs, your Honor.

40

Specifications of Causes for Reversal.

The Court: Is there any objection?

10 Mr. Salmon: It seems to me that there is a factor in each of these pictures that can only serve not to continue the proof of the fact of the death of the subject, the wife, and that, on its face, on the face of the pictures, that it can only tend to unduly inject into the matter, perhaps the element of horror and the like.

The Court: No, I think the State would be entitled to show the condition, the position in which the decedent was found and the location of the house, unless you object on some more substantial ground.

20 Mr. Salmon: I object on the ground that they show the subject of the act in question, namely the deceased, and that it is not an essential element for the proof, because with the subject of the act to be an exhibit which this pretends to produce is an element in the case which is altogether unanswerable so far as it relates to the phase of the horror involved, or a killing under any circumstances, and especially under these circumstances, and I am inclined also to suggest that the effect upon the mind of the Jury, that there are
80 among us at times jurors who would be subject to the inflammatory re-actions and feelings because of depicting the subject of the shooting in the circumstances, in the position, as indicated in these proffered exhibits; I object to their entry in this case as no part, no essential part, no contributing part of the proof.

40 The Court: The objection will be noted on the record. It seems to the Court very

Specifications of Causes for Reversal.

proper proof; the fact they may incidentally disclose horror, which is not at all admitted by the State, is not incident to the crime. An exception will be granted and they will be admitted in evidence and marked Exhibits S-1, S-2 and S-3, respectively. As I understand it, you make no objection to their manner of taking, the qualifications of the 10 photographer were admitted."

2. Because the Court erroneously refused to permit the witness, Russell Eichlin, on direct-examination by Mr. Salmon, to answer the question "From your observation of seeing him latterly as against the long time before, what is your opinion as to his mental condition?" to which the Prosecutor objected and the Court erroneously sustained the objection. 20

3. Because the Court erroneously refused to permit the witness, Russell Eichlin, on direct-examination by Mr. Salmon, to answer the question "From the viewpoint of his mental make-up, what kind of boy was he?" to which the Prosecutor objected and the Court erroneously sustained the objection; the questions and answers immediately prior to said objected question and Counsel's com- 30 ment and the Court's ruling being as follows:

"Q. Have you seen him since this trouble of March 31st to talk with him?

The Court: Except in the Courtroom?

The Witness: Not until this morning.

Q. How much before March 31st did you see him? A. I really couldn't say, probably couple of months I met him on the street. 40

Specifications of Causes for Reversal.

Q. When you first knew him was it as a school-boy friend? A. Yes, we were neighbors.

Q. From the viewpoint of his mental make-up, what kind of boy was he?

Mr. Meslar: Object.

The Court: I think that is objectionable; how can this witness prove his mental condition?

Mr. Salmon: Only from his actions.

The Court: He can tell what he knows of his actions, but he cannot give an opinion as to his mental make-up; can tell whether like any other boy, played ball, went to school or played hookey, the same as the rest of us did. This man cannot qualify to tell us whether he was sane or insane.

(Counsel for Defendant prays an exception, and requests that it be allowed and sealed)."

4. Because the Court, on ruling on the question of Mr. Salmon mentioned in the above mentioned third Specification of Causes for Reversal, stated erroneously as follows: THE COURT: "He can tell what he knows of his actions, but he cannot give an opinion as to his mental make-up; can tell whether like any other boy, played ball, went to school or played hookey, the same as the rest of us did. This man cannot qualify to tell us whether he was sane or insane."

5. Because the Court erroneously refused to charge Defendant's ninth request to charge, which ninth request reads as follows:—

"9. In this case wherein mental defect or disease is pleaded as a defense, the question is

Specifications of Causes for Reversal.

whether the accused be guilty or not guilty, and in this fact of guilt is involved the fact of the evil mind, and in this relation it is a fundamental maxim that 'the act itself does not make a man guilty, unless his intention were so.' "

6. Because the Court erroneously read the Defendant's thirteenth request to charge as follows: "13. If you find from all the evidence produced ¹⁰ that the defendant was insane, not having the capacity to distinguish between right and wrong, at the time of the shooting, even though you find him to be sane at the present time, then your verdict should be not guilty." whereas Defendant's request to charge read as follows: "13. If you find from all the evidence produced that the defendant was temporarily insane, not having the capacity to distinguish between right and wrong, at the time of the ²⁰ shooting, even though you find him to be sane at the present time, then your verdict should be not guilty."

7. Because the Court erroneously read to the Jury Defendant's fourteenth request to charge as follows: "14. The testimony of non-professional witnesses, as to the insanity of the defendant, are competent evidence to go to the Jury if grounded ³⁰ on facts and circumstances within their personal knowledge." whereas Defendant's fourteenth request to charge read as follows: "14. The opinion of non-professional witnesses, as to the insanity of the defendant, are competent evidence to go to the Jury if grounded on facts and circumstances within their personal knowledge."

8. Because the Court erroneously declined to charge Defendant's fifteenth request to charge, ⁴⁰

Specifications of Causes for Reversal.

which fifteenth request to charge reads as follows:
 "15. If you find that at the time of the shooting,
 the defendant was emotionally insane, and by emo-
 10 tional insanity is meant such insanity that depends
 upon the mere emotions of the time arising from
 some defective or perverted moral sense, which be-
 gins on the eve of the act in question and ends
 when it is finished, then your verdict should be not
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9. Because the verdict was against the weight of
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10. Because the verdict was against the weight
 20 of evidence in favor of Defendant's insanity, in-
 cluding the medical testimony.

11. Because the Jury rendered a verdict in favor
 of the State and against the Defendant, when it
 should have been in favor of the Defendant.

JOSHUA R. SALMON

HARRY A. SHUBACK

Attorneys of Plaintiff-in-Error.

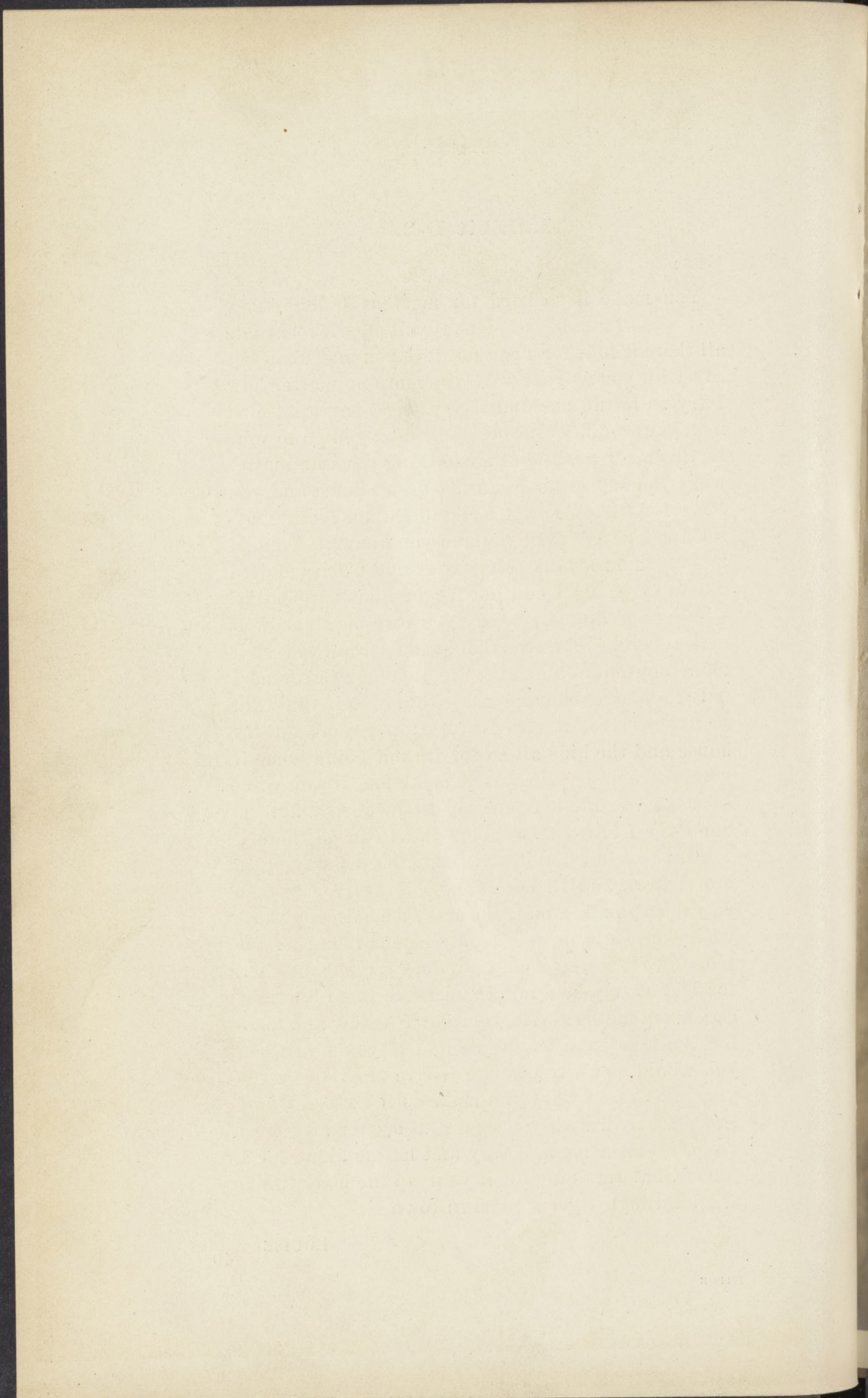
30 (Endorsed)—NEW JERSEY COURT OF ERRORS AND
 APPEALS—STATE OF NEW JERSEY, Defendant-
 in-Error, *vs.* GUSTAVE AESCHBACH, Plaintiff-in-
 Error.—In Error to Morris County Court of
 Oyer and Terminer.—On Writ of Error.—
 Specifications of Causes for Reversal.—Service
 of the within acknowledged this 16th day of
 July 1930. ORVILLE V. MESLAR, Prosecutor of
 40 Morris County.

Exhibit D-2.

GUS:

You make it so hard for me that I dont know just what Im doing but Gus its all off with us thats all there is to it for I can not love you and I can not live with you as your wife any more no matter how I try so its no use and if you were any kind of a man you would let me be. why dont you go to your Mother's for a while or some thing Gus no matter what you say or do I can not go up home and you 10 there for I know how I feel and Im not fooling myself for I never loved you and you know it Ive had lots of time to think things over and when [blotted out in original] I can not forget what happened 2 winters ago and if you say you love me so show it by leaving me alone for thats what I want to be left alone and dont think there is anyone eles for no I only loved one man and thats Jimmy so if you want to live somewhere eles Ill keep up paying for the 20 house and the kids all so for Im not going home if your there and you can not make me if you want to make trowble here for me Ill just leave and go home for I heard from home and I can go there if I want to. but I think Ill make better staying in Morristown and Ill not ask any thing from you so why dont you be a man and meet me half way thats what you could do for it only makes it harder for you and for me so it best we dont see one another. for I know my own mind and there is no law that 30 can make me live with you and I dont want to so for the kids sake let me be and if you love them you would go away you can live in Morristown for you can live on what you make so it no use Gus I can never live with you again no matter how hard I try. so meet me half way and let me alone for I know what Im doing for if your up the house when I get through I get a room in town

LOUISE 40



New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

GUSTAVE AESCHBACH,
Plaintiff-in-Error.

On Writ of Error.

Brief of
Defendant-in-Error.

ORVILLE V. MESLAR,
Prosecutor of the Pleas,
Attorney of Defendant-in-Error.

The Plaintiff-in-Error was indicted by the January, 1930 term of the Morris County Grand Jury for the murder of his wife, Louise Aeschbach. He was tried for this charge on April 30th, 1930 and the jury returned a verdict of guilty of murder in the first degree and he was afterwards on the 5th day of May, 1930, sentenced to suffer the punishment of death in the manner prescribed by law, during the week beginning on Sunday, June 15th, 1930.

The facts and circumstances concerning the commission of the offense are in brief as follows:

The Defendant is a married man thirty-five years of age. He was married to the deceased, Louise Aeschbach, in October, 1918. They lived in Morristown, New Jersey, for some years and in May, 1929, together with his wife purchased a home at Morristown Heights nearby. They and their two children, a girl of ten years of age and a boy eight years of age, resided together at that place until about December 3rd, 1929. On that date Louise Aeschbach took a position as a nurse in the home of one

Byrnes nearby at Morris Plains, where she remained until March 31st, 1930 when the killing took place.

So far as the records show the relationship between the two parties was friendly with the exception of a few minor quarrels up until a few days before the shooting. That they used to go out evenings together riding and to the moving pictures. That on the Friday preceding the shooting she informed him that she would not go out with him any more. That the next day the Defendant came to Morristown and purchased bullets for a revolver which he had and through an error purchased 38 caliber bullets instead of 32. That on Monday afternoon finding out that the bullets were not satisfactory he returned to Morristown and purchased bullets which would fit his revolver. That he called her on the phone that evening and asked her to meet him and after some discussion she said she was through with him. That on the evening of that day at about 7.20 o'clock he appeared at the back door of the Byrnes' house and asked to see the deceased. That she went outside of the door to talk to him and that as she did so he shot her four times killing her, after which time he gave himself up.

The Defense was as follows:

An attempt to show that the Defendant was insane at the time of the commission of the crime because of the fact that there had been three suicides in his family and that he had had St. Vitus dance at the age of thirteen or fourteen and that there were other physical defects which rendered him insane. Dr. Thomas P. Prout, an alienist, was called on behalf of the State and testified that he had examined the Defendant mentally and having in mind all of the above facts was of the opinion that the Defendant at the commission of the crime was capable of discerning the difference between right and wrong.

A R G U M E N T .

POINT 1.

Under this portion of his argument the Plaintiff-in-Error complains that the Court erred in admitting in evidence three photographs offered by the State (S-1, 2 and 3) which are reprinted in the State of the Case. These photographs which were taken a very short time after the killing showed the condition of the body and also its position. The Plaintiff-in-Error does not object to the method of offer of these photographs or that they were not properly proven but insists that they were offered to sway the Jury's mind. It is respectfully submitted that an examination of these photographs will show the position of the body, the location of the body after the shooting and the condition of the body. While the photographs are revolting to the sight the Defendant-in-Error insists that they are evidential for the above stated reasons and are very properly a part of the State's case and the horror created by their appearance is not of the State's making. It is, therefore, respectfully submitted that no error was committed by the Court in the admission of these photographs.

POINT 2.

In this portion of his argument the Plaintiff-in-Error complains that the Court erred in refusing to permit the witness, Eichlin, to give his opinion as to the mental condition of the Defendant. In order to properly present this point it is necessary

to repeat the entire testimony of the witness Eichlin, which is as follows:

“Q. Mr. Eichlin, do you know this defendant, Gus Aeschbach? A. About I would say twenty years.

Q. And have you seen him recently? A. Well, not within the last two months, I would say.

Q. And have you seen him to be able to form a judgment from his actions as to the difference, if anything, in his conduct when you knew him before, as against the present time? A. I passed him a couple of times on the street. He either didn't see me or didn't speak; that is the only thing that I can remember. I hadn't seen him in quite a long time before that.

Q. Before that? A. Yes.

Q. You knew him when he was a youngster? A. Yes.

Q. Went to school with him? A. I did that.

Q. From your observation of seeing him latterly as against the long time before, what is your opinion as to his mental condition?

Mr. Meslar: Object to that.

The Court: Yes, that is objectionable and will be ruled out. How can this man who hasn't seen him for a long time, and only saw him a couple of months ago, form an opinion.

(Counsel for Defendant prays an exception, and requests that it be sealed and allowed.)

ALBERT H. HOLLAND,
Judge.

Q. Have you seen him since this trouble of March 31st to talk with him?

The Court: Except in the Courtroom?

The Witness: Not until this morning.

Q. How much before March 31st did you see him? A. I really couldn't say, probably couple of months I met him on the street.

Q. When you first knew him was it as a school boy friend? A. Yes, we were neighbors.

Q. From the viewpoint of his mental make-up, what kind of a boy was he?

Mr. Meslar: I object.

The Court: I think that is objectionable; how can this witness prove his mental condition?

Mr. Salmon: Only from his actions.

The Court: He can tell what he knows of his actions, but he cannot give an opinion as to his mental make-up; can tell whether like any other boy, played ball, went to school or played hookey, the same as the rest of us did. This man cannot qualify to tell us whether he was sane or insane."

The Plaintiff-in-Error uses the *State vs. Genz*, 58 New Jersey Law 482, to support his argument in this respect and also the *State vs. Morehous*, 97 New Jersey Law 285. It is respectfully submitted that the Court of Errors and Appeals in the *Morehous* case state as follows:

"Lay witnesses on insanity may give their opinion of a person's sanity or insanity provided such opinions are based on facts within the knowledge of the witness and stated. *Genz v. State*, 58 N. J. L. 482. Where, however, it is disclosed that the witness knows no facts upon which to base an opinion, it is perfectly within the discretion of the trial judge to over-rule a question which seeks to obtain an opinion from a lay witness which is not based upon stated facts."

The examination of the testimony of Eichlin will show that he had not seen the defendant within two months and at that time he had only met him on the street and did not speak to him. That he had not associated with him since they were school children together. He was, therefore, in no position to be able to give an intelligent opinion as to

the sanity of the defendant on March 31st, 1930, the day of the commission of the crime. It is, therefore, respectfully submitted that the Court committed no error with respect to this portion of the case.

POINT 3.

In this portion of his argument the Plaintiff-in-Error claims that the Court committed error in stating in the presence of the Jury with reference to the testimony of the witness Eichlin, hereinbefore set forth under Point 2, the following remarks, "He can tell what he knows of his actions, but he cannot give an opinion as to his mental make-up; can tell whether like any other boy, played ball, went to school or played hookey, the same as the rest of us did. This man cannot qualify to tell us whether he was sane or insane." It is respectfully submitted that these remarks were perfectly proper in view of all of the testimony of the witness, Eichlin. So far as his evidence shows, the witness had no foundation upon which he could render a competent opinion as to the mental make-up of the Defendant and, therefore, in line with the case of the *State vs. Morehous*, he could not give an opinion. It is, therefore, respectfully submitted that no error was committed thereby.

POINT 4.

The Plaintiff-in-Error complains of the Court's refusal to charge his request No. 9 which was in the following language:

"In this case wherein mental defect or disease is pleaded as a defense, the question is whether the accused be guilty or not guilty, and in this fact of guilt is involved the fact

of the evil mind, and in this relation it is a fundamental maxim that 'the act itself does not make a man guilty, unless his intention were so.'"

And also with respect to request No. 15 which is as follows:

"If you find that at the time of the shooting, the defendant was emotionally insane, and by emotional insanity is meant such insanity that depends upon the mere emotions of the time arising from some defective or perverted moral sense, which begins on the eve of the act in question and ends when it is finished, then your verdict should be not guilty."

It is therefore respectfully submitted that the Court on Page 160 of the Stated Case charged as follows:

"Did he do it with malice aforethought? Upon your answer to this question must depend the fate of this defendant, and God grant that I may be enabled rightly to understand and so to explain the law to you that is involved in or connected with this question, that I may not be instrumental in doing injustice to the prisoner.

What then is meant by malice aforethought? It is a wicked and unlawful design or intention to do a wrong or injury to another; and whether that design or intention has its origin in a spirit of hatred and revenge to the person, or in the gratification of any other passion of the human mind, it is malice aforethought. Nor is it necessary that there should have been a previous deliberate and fixed purpose to do the act; for malice is sometimes express, or positively proved; and sometimes implied, that is, inferred or deduced from the circumstances attending the commission of the offense. Malice is express, where a previous and deadly quarrel existed, and hatred ensued between the parties; or where threats were made or previous arrangements concerted, or the deceased

waylaid. In the absence of such proof it may be implied, from a variety of circumstances, and even from the deadly nature of the weapon made use of; and such was the instrument in this case, it being a revolver. But then, the very fact, that malice aforethought must exist to constitute the crime, implies that the perpetrator must be a moral agent, a reasonable and accountable being.

Here probably lie the hopes of the prisoner and his Counsel; and whether he was or was not such a moral agent, and such an accountable being at the conception and execution of this dreadful tragedy, is for you to determine."

It is respectfully submitted that the above quoted portion of the charge completely covers the language of the requests and that the Court under the cases of the *State vs. Dedge*, 125 A. T. L. 316; *State vs. Rombolo*, 91 N. J. L. 560; *State vs. Fischer*, 97 N. J. L. 34, and was not required to charge in the exact languages of the request.

POINT 5.

In this portion of his argument the Plaintiff-in-Error charges that the Court committed error in refusing to charge requests Nos. 13 and 14 which are as follows:

"13. If you find from all the evidence produced that the defendant was insane, not having the capacity to distinguish between right and wrong, at the time of the shooting, even though you find him to be sane at the present time, then your verdict should be not guilty."

"14. The opinion of non-professional witnesses, as to the insanity of the defendant, are competent evidence to go to the Jury is (if grounded on facts and circumstances within their personal knowledge."

In charging request No. 13 the Court omitted the word "temporarily" and charging request No. 14 the Court substituted the word "testimony" in the place of "opinion". It is respectfully submitted that even with the omission of the word "temporarily" that the Jury could not have been misled by rendering a verdict of not guilty if they believed that the defendant was insane whether temporarily or permanently. It is further submitted that under the rule laid down in the cases in the preceding point of the Defendant-in-Error's Brief that the law was charged correctly and that the Court was not obliged to charge in the exact language of the request to charge. It is, therefore, respectfully submitted that no error was committed thereby.

POINTS 6 and 7.

Under these two points in his brief the Plaintiff-in-Error complains of the Court's failure to charge his requests with respect to temporary insanity and emotional insanity, respectively, and submits his points under the arguments under points 5 and 4 respectively. The State wishing also to save the Court from the burden of repetition, respectfully asks that reference be made to the same points under its brief.

POINT 8.

Under this portion of his brief the Plaintiff-in-Error complains of certain questions asked by the Court of the defendant, which questions and answers are as follows:

S. C. p. 137, line 1:

"By the Court:

Q. When was that? A. Monday night.

Q. That is when you left the house? A. Yes.

Q. With the gun in your clothes? A. Yes.

Q. Did you have it in mind to kill her? A. I didn't know what to do, I didn't have it in mind to kill her, I thought I would talk to her and see if she would come to an understanding, and I wouldn't have done it.

Q. Done what? A. Shot her.

Q. Why did you take a gun and bullets? A. You can take gun and bullets without having any intention in your mind.

Q. Why did you take them? A. That I couldn't tell you why I took them."

S. C. p. 137, line 28:

"The Court: There was a suggestion, apropos of what did you say, there was a suggestion made to you by Captain Roff?

The Witness: yes.

The Court: That you might have done well to save one of the bullets for yourself?

The Witness: Yes, and what did I tell him? I told him "A minute in the electric chair and it will all be over."

S. C. p. 140, line 33:

"The Court: You did kill her?

The Witness: yes.

The Court: Why?

The Witness: Because I loved her, that's all.

The Court: Assuming that you did love her, why did you kill her?

The Witness: I thought that if I couldn't have her nobody else could.

The Court: Why did you kill her?

The Witness: Because I loved her.

The Court: Is that the way love is demonstrated?

The Witness: Yes, my love."

It is respectfully submitted that a full and complete reading of the defendant's testimony will show that the questions were necessary to explain the motives of the defendant and the workings of

his mind prior to and at the time of the killing, and that there was nothing, either as to the form and substance of the questions or as to the manner of the Court in the propounding the same that could be taken as an attempt to prejudice the jury in its findings, and that therefore the Court had a perfect right to ask these questions.

Objection is also made to a question propounded to Dr. Prout which is as follows (S. C., p. 149, line 17) :

“The Court: Doctor, having in mind all these various elements, having in mind the fact that the crime was committed a month ago, and that you examined him only just lately after this month of rest, so called, with all these facts in his previous family history, that your opinion is that he was sane at the time he committed the crime and knew the difference between right and wrong?”

The Witness: That is my opinion.”

This question was asked, the testimony will show, to explain the former testimony of the Doctor and was therefore not only proper but also necessary.

POINTS 9 AND 10.

The Plaintiff-in-Error under this portion of his argument insists that the verdict was against the weight of evidence in favor of the defendant's insanity, and that the verdict of the jury was against the weight of the evidence.

The Defendant-in-Error respectfully submits that it proved the following elements:

1. The fact that Louise Aeschbach was killed, by the testimony of Coroner Chapman, the testimony of Lizzie Hulbert, Joseph Byrnes, the admission of the defendant himself, the photographs, and fur-

ther that the cause of her death was from the bullet wounds from the testimony of Dr. Christian.

2. That the killing was done by the defendant by the admission of the defendant, and the testimony of the witnesses Byrnes and Hulbert.

3. That it was done with malice aforethought is proven by the fact that he went to the Byrnes home on the night of the killing armed with a loaded revolver, the bullets for which he had purchased in a store at Morristown and for which he had had to make a second visit, having procured the wrong sized bullets on his first visit, and that he called her from the Byrnes house and shot her.

Against which is set up by the defendant the defense of insanity, which he attempts to prove by the following testimony:

The testimony of the witness Fioroni who said that the defendant was down hearted when telling him of his domestic difficulties (S. C., pp. 78 to 83). By the testimony of the defendant's brother, Herman Aeschbach, on page 94, that he seemed, in effect, to have something on his mind the night before the killing; the testimony of the witness Eichlin, who had not associated with the defendant for a number of years, and whose only observation was that the defendant had passed him on the street a couple of months before without speaking; the testimony of the mother of the defendant, Mrs. Tillie Friedel, who testified that several members of the family had committed suicide, and that the defendant had been afflicted in his youth with St. Vitus dance; the testimony of the witnesses Paul Rooney and Robert Rooney that the defendant had been afflicted with St. Vitus dance and had been out of school practically a year from the effects of it.

Against which is the testimony of Dr. Prout, a competent alienist, who testified that taking everything into consideration, even the fact that in some things the defendant had the mind of a ten year old child, that at the time he committed the crime, he was sane and knew the difference between right and wrong. The testimony of Dr. Prout is not in any way contradicted.

The State therefore contends that the verdict was not against the weight of the evidence and comes within the rule laid down in the case of the *State vs. Maioni*, 78 N. J. L. 339, which is as follows:

“In the case of *Mackin v. State*, 30 *Id.* 495, we held that insanity is a defence to crime only when the diseased condition of the mind was such that the defendant did not know the nature and quality of the act he was doing, or, if he did know it, did not know that what he was doing was wrong. Insanity being an affirmative defence, and that defence being made out only when the mental aberration is shown to be of the character defined in *Macklin v. State*, the failure of the defendant to prove the existence of such a mental condition at the time of committing the act charged against him, leaves the case before the jury in the same situation as if the defence had not been set up at all, that is, with the presumption existing that the defendant knew the nature and quality of the act he was doing and the wrongfulness of it. A person who has such knowledge stands upon the same plane so far as accountability to the criminal law is concerned as one who is entirely normal in his mental make-up.”

It is a well settled principle of law that insanity is an affirmative defence and must be shown by a clear preponderance of the evidence, and the Courts have so held in a long line of cases from the leading case of *State vs. Spencer*, 21 N. J. L. 202, down to the present time in the case of *State vs. Kudzinowski*, 147 Atl. 453.

It is therefore respectfully submitted, that in view of the foregoing points, and a consideration of the evidence as a whole, that there was no error committed and that the judgment should be affirmed.

Respectfully submitted,

ORVILLE V. MESLAR,
Prosecutor of the Pleas,
Attorney for Defendant-in-Error.

New Jersey Court of Errors and Appeals.

STATE OF NEW JERSEY,
Defendant-in-Error,

VS.

GUSTAVE AESCHBACH,
Plaintiff-in-Error.

On Writ of Error.

BRIEF OF PLAINTIFF-IN-ERROR.

Preliminary Statement.

Plaintiff-in-Error was, by the verdict of the Jury (S. C. p. 8, line 10), convicted of murder in the first degree without the recommendation of imprisonment at hard labor for life.

He was sentenced to suffer the punishment of death, in the manner prescribed by law, during the week beginning on Sunday, June 15th, 1930 (S. C. p. 8, line 33).

Application for a Writ of Error out of the Supreme Court was thereafter made to the Chancellor, which was refused (S. C. p. 2).

A Writ of Error was issued out of this Court (S. C. p. 3).

Facts.

The Plaintiff-in-Error was a married man thirty-five years of age (S. C. p. 113, line 9).

His father, Herman Aeschbach, committed suicide by the taking of poison (S. C. p. 97, line 31). His maternal grandmother also committed suicide (S. C. p. 101, line 39). His half brother, who was

younger, took his life by shooting himself (S. C. p. 98, line 22).

The Plaintiff-in-Error was a sickly child from birth (S. C. p. 102, line 9). He suffered from St. Vitus dance (S. C. p. 102, line 11). This disease rendered him as helpless as a new born baby (S. C. p. 102, line 12). This was at a time when he was ten, twelve or fifteen years of age (S. C. p. 102, line 17; also, S. C. p. 113, line 39). The disease Chorea, commonly known as St. Vitus dance, is defined by the State's witness, Dr. Prout (S. C. p. 145, line 39), as "It is an infectious disease that invades the brain tissue".

The Plaintiff-in-Error for several years resided in Morristown, New Jersey, and in May of 1929, together with his wife, purchased a home at Morristown Heights nearby (S. C. p. 119, line 10). They, with their two children, a girl of ten years of age and a boy eight years old, resided together there to about December 3, 1929. On that day the wife took a position as practical nurse in the home of one Byrnes nearby, in the Borough of Morris Plains, where she remained to the night of March 31, 1930, the date of the shooting.

The Plaintiff-in-Error was married to Louise Aeschbach in October, 1918 (S. C. p. 116, line 8). So far as appears the relation was congenial up to Thursday night prior to the Monday night of the shooting, which would be March 27th, 1930 (S. C. p. 123, line 28), on which occasion the wife stated to the effect that she hated the Plaintiff-in-Error (S. C. p. 124, line 38). This was followed by the receipt of a letter on Saturday (S. C. p. 127, line 8) written by the wife to the Plaintiff-in-Error in which, among other things, the wife stated to the husband "I only loved one man and that's Jimmy", referring to some other individual (S. C. Exhibit D-2, p. 189, line 18). In said letter the wife stated further that she could never live with the Plaintiff-in-Error again (S. C. p. 189, line 34).

Thereafter, the Plaintiff-in-Error spoke with his wife over the telephone, the latter stating that she wanted nothing more to do with her husband nor did she want to see him and if he tried to see her she would have him locked up (S. C. p. 127, line 28). On the day of the shooting after a telephone conversation in which, among other things, the wife stated "I am through with you", referring to the Plaintiff-in-Error, and thereupon hung up the receiver (S. C. p. 132, line 19), the Plaintiff-in-Error sought out the wife at the house of her employment, and being chided for his visit (S. C. p. 132, line 37) and being told by the wife that she had seen a lawyer and was going to get a separation from the husband, the latter thereupon, without saying a word, shot her (S. C. p. 133, line 1). The shooting resulted in the wife's death.

Points for Discussion.

1. The Court committed error in admitting over objection certain photographs of the body of deceased.
2. The Court committed error in refusing to permit the admission of the opinions of non-professional witnesses as to the insanity of the Defendant where such opinions are grounded on facts and circumstances within their personal knowledge.
3. The Court committed error in stating in the presence of the Jury, referring to a non-professional witness, that "He can tell what he knows of his actions, but he cannot give an opinion as to his mental make-up; can tell whether like any other boy, played ball, went to School or played hookey, the same as the rest of us did. This man cannot qualify to tell us whether he was sane or insane."

4. The Court committed error in refusing to charge certain requests.

5. The Court committed error in refusing to charge certain requests in the language or the substance of the language as requested.

6. The Court committed error in failing to charge as requested with respect to temporary insanity.

7. The Court committed error in failing to charge as requested with respect to emotional insanity.

8. The Court committed error in unduly entering into the cross-examination of the Defendant with questions propounded which tended to prejudice the Defendant.

9. Because the verdict of the Jury was against the weight of the evidence in favor of the Defendant's insanity.

10. The verdict of the Jury was contrary to and against the weight of the evidence.

ARGUMENT.**I.****The Court committed error in admitting over objection certain photographs of the body of deceased.**

The State produced W. H. Kleindinst whose qualifications as a Photographer were admitted and who was questioned by the State, with the offer by the State, question and statements of the Court, and objections of Counsel for the Defendant, as follows:

“Q. Mr. Kleindinst, I show you three photographs and ask you if you took those photographs? A. I did.

Q. When? A. March 31st, in the evening.

Q. What time, do you remember? A. Somewhere around nine o'clock, I won't be sure.

Q. Whereabouts were they taken? A. In the rear of the house Jaqui avenue, taken by artificial light.

Mr. Meslar: I offer these three photographs, you Honor.

The Court: Is there any objection?

Mr. Salmon: It seems to me that there is a factor in each of these pictures that can only serve not to continue the proof of the fact of the death of the subject, the wife, and that, on its face, on the face of the pictures, that it can only tend to unduly inject into the matter, perhaps the element of horror and the like.

The Court: No, I think the State would be entitled to show the condition, the position in which the decedent was found and the location of the house, unless you object on some more substantial ground.

Mr. Salmon: I object on the ground that they show the subject of the act in question,

namely the deceased, and that it is not an essential element for the proof, because with the subject of the act to be an exhibit which this pretends to produce is an element in the case which is altogether unanswerable so far as it relates to the phase of the horror involved, or a killing under any circumstances, and especially under these circumstances, and I am inclined also to suggest that the effect upon the mind of the Jury, that there are among us at times jurors who would be subject to the inflammatory reactions and feelings because of depicting the subject of the shooting in the circumstances, in the position, as indicated in these proffered exhibits; I object to their entry in this case as no part, no essential part, no contributing part of the proof.

The Court: The objection will be noted on the record. It seems to the Court very proper proof; the fact they may incidentally disclose horror, which is not at all admitted by the State, is not incident to the crime. An exception will be granted and they will be admitted in evidence and marked Exhibits S-1, S-2 and S-3, respectively. As I understand it, you make no objection to their manner of taking, the qualifications of the photographer were admitted.

(Exception allowed and sealed.)

ALBERT H. HOLLAND

Judge."

The three photographs referred to in the question are Exhibits S-1, S-2 and S-3. The pictures in question showed the condition of the body, but did not show any specific wounds inflicted thereon. They did present, however, a ghastly appearance of the deceased which was likely to sway the minds of the Jury. Whatever opinion the Jury may have formed regarding the commission of the act, the photographs must have had a decided bearing upon their verdict. The duty of the Jury is a calm and

dispassionate function. The admission of evidence, such as these photographs, cannot be justified excepting upon the bases of the victim's identity or showing the physical circumstances surrounding the shooting. Neither identity nor physical circumstances were in the slightest question at this juncture of the main case, nor at any time for that matter. The admission of the photographs could only excite, embitter and inflame the Jury against the Defendant. Their admission, under the circumstances of this case, could have no probative value whatever, and have no effect excepting to warp the judgment of the Jury and inject the elements of passion and prejudice in the case. Previous witnesses, to-wit, Lizzie Hulbert (S. C. p. 27, line 8) and Joseph Byrnes (S. C. p. 31, line 23), had directly testified to the shooting and the physical surroundings and this was the best evidence of the *Corpus Delicti*, the best proof of which was the finding and inspection of the dead body (30 C. J. p. 150, Sec. 2 under *Corpus Delicti*). The proffered photographs were secondary and circumstantial evidence of the act to be proved.

We find no case in our reports upon this precise question. However, in the case of *Willis v. State*, 90 S. W. 1100, the Court of Criminal Appeals of Texas, observes and finds that "but we believe it is conceded by all that, where the photograph is not necessary to illustrate or make clear any question, but, on the other hand would be calculated to prejudice or inflame the minds of the Jury, such evidence is not admissible."

We submit that the three exhibits in question formed no contributing part of the proof and that they depicted a situation that was at once gruesome, shocking and sickening and could only serve to arouse the indignation of the Jury to the great prejudice of the Defendant.

II.

The Court committed error in refusing to permit the admission of the opinions of non-professional witnesses as to the insanity of the Defendant where such opinions are grounded on facts and circumstances within their personal knowledge.

The Defendant called the witness Russell Eichlin (S. C. p. 95) and he was questioned, with the objections, statements of the Court and rulings as follows:

“Q. From your observation of seeing him latterly as against the long time before, what is your opinion as to his mental condition?”

Mr. Meslar: Object to that.

The Court: Yes, that is objectionable and will be ruled out. How can this man who hasn't seen him for a long time, and only saw him a couple of months ago, form an opinion.

(Counsel for Defendant prays an exception, and requests that it be sealed and allowed.)

ALBERT H. HOLLAND

Judge.

Q. Have you seen him since this trouble of March 31st to talk with him?

The Court: Except in the Courtroom?

The Witness: Not until this morning.

Q. How much before March 31st did you see him? A. I really couldn't say, probably couple of months I met him on the street.

Q. When you first knew him was it as a school-boy friend? A. Yes, we were neighbors.

Q. From the viewpoint of his mental make-up, what kind of a boy was he?

Mr. Meslar: I object.

The Court: I think that is objectionable; how can this witness prove his mental condition?

Mr. Salmon: Only from his actions.

The Court: He can tell what he knows of his actions, but he cannot give an opinion as to his mental make-up; can tell whether like any other boy, played ball, went to school or played hookey, the same as the rest of us did. This man cannot qualify to tell us whether he was sane or insane.

(Counsel for Defendant prays an exception, and requests that it be allowed and sealed.)

ALBERT H. HOLLAND
Judge.

Mr. Meslar: No questions.

(Witness excused.)”

The exclusion of this evidence did manifest injury to the Defendant. It precluded him from the benefit of the evidence of non-professional witnesses as to his mental condition. Counsel for Defendant in this case were assigned by the Court (S. C. p. 1). Therefore, the case is one in *forma pauperis*. Thus, the Defendant was dependent solely upon the production of non-professional witnesses to furnish evidence concerning his mentality. It is true that the only medical testimony produced was upon designation by the Court and as to the identity of the doctor the Court followed the suggestion and consent of both State and defense.

The law is settled in this State that the opinions of non-professional witnesses as to the insanity of the prisoner, grounded on facts and circumstances stated to be within their personal knowledge, are competent and should go to the Jury (*Genz v. State*, 58 Law, 482). This Court in State

v. Morehous, 97 Law, 285, at page 294, clearly held that "Lay witnesses on insanity may give their opinion of a person's sanity or insanity provided such opinions are based on facts within the knowledge of the witness and stated." Previously, in the Supreme Court in *Boesch v. Kick*, 97 Law, at page 94, it is stated—"The plaintiff called several witnesses—ten or eleven—who testified to conversations with her, extending over a number of years, tending to show her mental condition which seemed to them to be normal. This testimony was competent." Still previously, the doctrine was announced in the Supreme Court to the effect that "It is conceded that a non-expert witness may state facts and express an opinion in respect to the sanity of a defendant" (*Clifford v. State*, 60 Law, at p. 289) following the cases of *Vanaukens' case*, 10 Equity, at page 192, and *Koccis v. State*, 56 Law, at page 46.

The witness Eichlin had testified to the effect that he had known the Defendant twenty years (S. C. p. 95, line 23), had seen him^M as recently as the last two months (S. C. p. 95, line 25), had passed the Defendant a couple of times on the Street (S. C. p. 95, line 30), that the Defendant either didn't see him or didn't speak (S. C. p. 95, line 31), that he had gone to school with him (S. C. p. 95, line 38) and that he and the Defendant had been neighbors (S. C. p. 96, line 26), and it was upon this basis that the witness was questioned to elicit the opinion of the witness as to the mental condition of the Defendant. The State objected to this question and the Court sustained the objection with the query—"How can this man who hasn't seen him for a long time, and only saw him a couple of months ago, form an opinion." The Court further states (S. C. p. 96, line 37)—"He can tell what he knows of his actions, but he cannot give an opinion as to his mental make-up; can tell whether like any other boy, played ball, went to school or played

hookey, the same as the rest of us did. This man cannot qualify to tell us whether he was sane or insane." To this holding, Counsel for the Defendant prayed an exception which was allowed.

Obviously, here was a man who had known the Defendant over a period of twenty years and had recently, within two months, met the Defendant upon the Street. Counsel for defense sought to have the witness reveal to the Jury the conduct of the Defendant at this latter time and also endeavored to have the witness testify as to the mental condition of the Defendant with respect to the facts of the association of the witness with the Defendant, his observations and circumstances within his personal knowledge. When this was refused, the Defendant was deprived of the benefit which the law gives to him, namely, that the opinions of non-professional witnesses in circumstances such as here are competent to go to the Jury. The injury the Defendant suffered was irreparable and there was no way in which he could be saved from the damaging effect of the exclusion of the evidence offered.

III.

The Court committed error in stating in the presence of the Jury, referring to a non-professional witness, that "He can tell what he knows of his actions, but he cannot give an opinion as to his mental make-up; can tell whether like any other boy, played ball, went to School or played hookey, the same as the rest of us did. This man cannot qualify to tell us whether he was sane or insane."

The Court erred in stating, referring to the witness, "he cannot give an opinion as to his mental make-up". The Court further erred in stating "This man cannot qualify to tell us whether he was sane or insane". Both of these announcements, which amount to a direction to Counsel for the defense, were to the effect that no such evidence should be offered. Counsel submit that both pronouncements are in direct conflict with the positive rule of law that permits exactly those two things to be done, namely, that a non-professional witness may give an opinion as to Defendant's mental make-up and that a non-professional witness may qualify to tell whether Defendant was sane or insane. These statements by the Court were made after ruling against the following question (S. C. p. 95, line 40). "From your observation of seeing him latterly as against the long time before, what is your opinion as to his mental condition?", to which the State objected and was sustained. Some examination had intervened (S. C. p. 96, line 18), followed by the enunciations by the Court above set forth. These holdings on the part of the Court were emphatically prejudicial to the rights of the Defendant as the cases under Point II clearly demonstrate.

IV.

The Court committed error in refusing to charge certain requests.

Request to charge No. 9 was in the following language (S. C. p. 172, line 27) :

“9. In this case wherein mental defect or disease is pleaded as a defense, the question is whether the accused be guilty or not guilty, and in this fact of guilt is involved the fact of the evil mind, and in this relation it is a fundamental maxim that ‘the act itself does not make a man guilty, unless his intention were so.’”

We submit that the element of “intention” is of the very essence of a criminal act; that without the “intention” to do the thing prohibited by law, there can be no guilt. This is the very crux of the deficiency when a person of unsound mind is charged with the breach of the criminal law. It is an ancient doctrine under the common law, which still prevails in our State, to the effect that “A madman is punished by his madness alone.” The Latin maxim as given by Blackstone under the general caption “of the persons capable of committing crimes”, Blackstone—Book IV, Chapter II, Subdivision II, is “*furiosus furore solum punitur.*” It is fundamental law that idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities. In the case at bar mental defect or disease was pleaded as a defense and the question was “whether the accused be guilty or not guilty”. We submit that in this fact of guilt is involved the fact of the evil mind, for although the criminal law takes cognizance only of the exterior act and not of the mere interior intention, yet it is a fundamental maxim that “the act does not make a man guilty, unless his intention were so.” This

was the doctrine laid down in the case of Daniel McNaghten and referred to by the author Mr. Louis E. Binsse under the caption "On the Relations of Mental Defect and Disease to Criminal Responsibility", Vol. II of a System of Legal Medicine by Allan McLane Hamilton And Others, at page 218. It is but the old doctrine stated by Blackstone, aforesaid, as being inherent in the common law. In this case is involved a crime of *mala in se* and also *mala prohibita* as well. Notwithstanding the wrongfulness in itself and as involved in the prohibition of law, before one can be chargeable and held to a criminal responsibility, he must of necessity have been at the time the act was committed in a state of rational ability to the extent of being able to choose between the right and the wrong.

In *State v. Woodward*, 99 Law, at page 50, it is held that—"Where an act becomes criminal only by reason of the intent with which it is done, such intent must be proved." And further,—“The maxim *actus non facit reum nisi mens sit rea* is not without application in the situation presented here.”

Request to charge No. 15 was in the following language (S. C. p. 173, line 31) :

“15. If you find that at the time of the shooting, the defendant was emotionally insane, and by emotional insanity is meant such insanity that depends upon the mere emotions of the time arising from some defective or perverted moral sense, which begins on the eve of the act in question and ends when it is finished, then your verdict should be not guilty.”

Counsel for the Defendant contend that the authority justifying this request is found in the case of *Genz v. State*, 58 Law, at page 484. In that case the Plaintiff-in-Error challenged the ruling of the Court upon the subject of emotional insanity, and insanity which, and we now use the language of the Court,—“as the learned Justice well stated

in his charge 'depends upon the mere emotions of the time, arising from some defective or perverted moral sense, which begins on the eve of the act in question and ends when it is finished.' There is no error in this holding. It is difficult to comprehend how such holding could in any way injure the peculiar line of defence, which in this case is based on psychic epilepsy." ~~In~~ The Court's refusal to charge request 15 in the form submitted, or in any other form with its substance included, and the complete silence of the Court as to the effect of emotional insanity in the subjection of the power of the will, with reference to the control of the action of one so afflicted, resulted in manifest injury to the Defendant in this case. The Court failed to give to the Defendant the benefit of those three principles that must be present in such a case, namely, that there must be willfulness, premeditation and deliberation.

The Defendant was entitled to a direction to the Jury that was secured to him (*State v. De Geralmo*, 83 Law, 135).

V.

The Court committed error in refusing to charge certain requests in the language or the substance of the language as requested.

Request to charge No. 13 was in the following language (S. C. p. 173, line 20) :

"13. If you find from all the evidence produced that the defendant was temporarily insane, not having the capacity to distinguish between right and wrong, at the time of the shooting, even though you find him to be sane at the present time, then your verdict should be not guilty."

The Court charged (S. C. p. 157, line 10) as follows :

“13. If you find from all the evidence produced that the defendant was insane, not having the capacity to distinguish between right and wrong, at the time of the shooting, even though you find him to be sane at the present time, then your verdict should be not guilty.”

The omission of the word “temporarily” is significant. It is more, for the reason that Counsel (S. C. p. 99, line 23 and S. C. p. 101, line 4) made clear to the Court that it was the deficient mentality of the Defendant amounting to insanity at the time of the shooting upon which rested his defense. It is true that such defense of insanity must be proved to the satisfaction of the Jury (*Genz v. State*, 58 Law, 482). The crucial point involved in the case at bar is whether the Defendant had sufficient mentality at the very time of the shooting to form in his mind any intent to take life, or to deliberate and determine to execute that intent by a premeditated act. He was, therefore, entitled to the benefit of the charge which dealt with the question of temporary insanity (*State v. Schilling*, 95 Law, 145).

The Court, apparently, with intention, omitted the word “temporarily” in its qualification of the word “insane”. We say that such omission destroyed the entire purpose of the request.

Request to charge No. 14 was in the following language (S. C. p. 173, line 27) :

“14. The opinion of non-professional witnesses, as to the insanity of the defendant, are competent evidence to go to the Jury ~~is~~ (if) grounded on facts and circumstances within their personal knowledge.”

The Court charged (S. C. p. 157, line 17) as follows:

“14. The testimony of non-professional witnesses, as to the insanity of the defendant, are competent evidence to go to the jury is (if) grounded on facts and circumstances within their personal knowledge.”

The substitution of the word “testimony” for the word “opinion” as requested, we contend, was to the manifest injury of the Defendant in that said words are not synonymous. Testimony in a Court of law is the sworn statement or affirmation of a fact, and it is true that there may be much testimony which does not amount to proof. On the other hand, an “opinion” is a conclusion or a settled judgment or conviction.

The law is clear as before stated in the case of *State v. Morehous*, 97 Law, at page 294, where this Court held that lay witnesses may give their *opinion* of a person's sanity or insanity.

The Defendant was entitled to have requests to charge Nos. 13 and 14 in the language as requested or with the substance thereof included and with the use, as to request No. 13, of the word “temporarily”, and as to request No. 14, of the word “opinion”, for the reason that these two elements were urged on behalf of the Defendant as being especially applicable to his case. It was specifically contended that at the time of the shooting the Defendant was temporarily deranged, and, further, it was contended in effect that by the opinions of non-professional witnesses, based on facts, it could be shown that the Defendant was of defective and deficient mentality to that degree that he was unable to distinguish between right and wrong (S. C. p. 100, line 33). Under the decision of *State v. De Germalmo*, 83 Law, 135, it is held that “Where a request to charge calls for the application of a correct legal

principle, is applicable to the testimony, and clearly material to defendant's case, he is entitled to have it distinctly charged in such way as not to leave room for misapprehension or mistake by the jury." This case was followed by that of *State v. Tanzarello*, N. J. Mis. Rep. 1, p. 375, wherein the Supreme Court reiterated literally the same doctrine and rule.

VI.

The Court committed error in failing to charge as requested with respect to temporary insanity.

Wishing to save the Court from the burden of repetition, Counsel submit this point upon the argument under Point V.

VII.

The Court committed error in failing to charge as requested with respect to emotional insanity.

Again, with the same desire to relieve the Court from repetitious argument, Counsel submit this point upon the argument under Point IV.

VIII.

The Court committed error in unduly entering into the cross-examination of the Defendant with questions propounded which tended to prejudice the Defendant.

The Trial Court in several instances propounded questions which tended to prejudice Plaintiff-in-Error and obviously endeavored to strengthen the State's case relative to the question whether or not the Defendant was possessed of an intention to take life.

(S. C. p. 137, line 1) :

“By the Court :

Q. When was that? A. Monday night.

Q. That is when you left the house? A. Yes.

Q. With the gun in your clothes? A. Yes.

Q. Did you have it in mind to kill her?

A. I didn't know what to do, I didn't have it in my mind to kill her, I thought I would talk to her and see if she would come to any understanding, and I wouldn't have done it.

Q. Done what? A. Shot her.

Q. Why did you take a gun and bullets?

A. You can take gun and bullets without having intention in your mind.

Q. Why did you take them? A. That I couldn't tell you why I took them.”

(S. C. p. 137, line 28) :

“The Court : There was a suggestion, apropos of what you say, there was a suggestion made to you by Captain Roff?

The Witness : Yes.

The Court : That you might have done well to save one of those bullets for yourself?

The Witness : Yes, and what did I tell him? I told him, ‘A minute in the Electric Chair and it will all be over.’”

(S. C. p. 140, line 33) :

“The Court: How could it be too late? What do you mean it would be too late? How could it be too late whether she wanted you to buy bullets?”

The Witness: Well, it is too late now, ain't it? Sure, it is too late now.”

(S. C. p. 141, line 32) :

“The Court: You did kill her?”

The Witness: Yes.

The Court: Why?

The Witness: Because I loved her, that's all.

The Court: Assuming that you did love her, why did you kill her?

The Witness: I thought if I couldn't have her nobody else would.

The Court: Why did you kill her?

The Witness: Because I loved her.

The Court: Is that the way love is demonstrated?

The Witness: Yes, my love.”

This error was carried further when the Court propounded a question to the only doctor produced on this phase of the case, in which question the answer was suggested and tended to impress the Jury that the Defendant was of sound mind and knew at the time of the shooting the difference between right and wrong (S. C. p. 149, line 17).

“The Court: Doctor, having in mind all these various elements, having in mind the fact that the crime was committed a month ago, and that you examined him only just lately after this month of rest, so-called, with all these facts in his previous family history, that your opinion is that he was sane at the time he committed the crime and knew the difference between right and wrong?”

The Witness: That is my opinion.”

It is common knowledge that Jurors give great weight to the remarks of the trial court, watch

closely the judicial conduct, giving attention to the Court's language, to the end that the Jury may ascertain the leaning, if any, of the Court to one side or the other in the course of the trial. Therefore, to avoid the possibility of influence that might be exercised upon the Jury mind, it is clear that the trial court cannot be too careful and guarded in both language and conduct in the presence of the Jury to avoid prejudice to either side.

While it is proper for the Court to put questions to a witness whether on his examination in chief or on his cross-examination, where anything material has been omitted and sometimes his duty to examine a witness, he must conduct such examination in such a manner as to impress the Jury with the idea that he is entirely impartial and must not in any way indicate his opinion on the merits of the case, and in no circumstances should he ask a question which is based upon the assumption of Defendant's guilt of the offense charged (16 C. J. p. 831, par. 2100)—(21 Enc. Pl. & Pr. pp. 994, 995, and notes).

IX.

Because the verdict of the Jury was against the weight of the evidence in favor of the Defendant's insanity.

We find this Defendant thirty-five years of age with a superficial and childlike reasoning, and by "childlike", according to the medical testimony produced by the State, is meant a person not beyond the tenth year (S. C. p. 147, line 9). Thus, at the outset, we contend that the mentality of the person with which we are concerned, namely, a ten year old child mind, is the mentality of a person that universally requires custodial care. This Defend-

ant comes from very tainted origin. His father, a suicide, his maternal grandmother and his half brother likewise. Defendant was a sickly child from birth suffering from St. Vitus dance, making him, at the age of ten or upwards, helpless as a new born baby. He suffered from other maladies, such as tuberculosis of the bowels, being operated on for tubercular gland, &c.

Defendant himself had threatened to take his own life, which was at a time less than one month prior to the tragedy in the case (S. C. p. 134, line 28). His life history reveals a married life with very indifferent success as to employment, as shown by the many changes from job to job and place to place. Notwithstanding this disjointed experience reflected in his employment, the Defendant and his wife carried on in a very even tenor of their ways until the last employment of the wife; and the parties had motored together, likewise attended the movies and in other ways associated on mutually agreeable terms. There came a positive change in the wife on the evening of the fourth day prior to the shooting, at which time she gave expression to that most extreme of all emotions or feelings and this in the presence of both of their young children. These parties were about to separate for the evening after having attended moving pictures with their children, and as the Defendant sought to bid farewell and desired to kiss his wife, who repulsed his offer with the turning away of her face, Defendant said "Why don't you want to kiss me?" The wife replied—"Why should I kiss anybody I hate?" The effect of this experience upon the Defendant can only be conjectured, but it is quite clear that from that moment to the time of the tragedy his hopes were prostrated and his fears given play. A day and a night followed when the wife wrote the Defendant and therein, among other things, declared to her husband as follows: "I only

loved one man and that's Jimmy". Again it may only be imagined as to what were really the reactions of this Defendant to this changed condition between himself and wife. Was it a new association of the wife that accounted for it or was it the revival of an old relation alluded to in the wife's letter? Whatever accounted for this feeling of hate and reference to another love, the only result upon the immature mentality of this Defendant could be, that such mind as he had became unhinged and thus accounting for his own declaration at trial that he killed his wife because he loved her (S. C. p. 141, line 35). The entire case is without the slightest intimation that the Defendant ever threatened his wife's life or safety. On the contrary, he had within the month decided to do away with himself if she left him (S. C. p. 137, line 23). This decision accounts for the procuring of the bullets, the carrying of the revolver and it was only upon the revelation by the wife that she had taken refuge to the law (S. C. p. 133, line 2) and proposed to get a separation from the Defendant that the latter instantly used the weapon upon the wife. As recently as the day before, Defendant observed to a friend, confidant and fellow employee that he would trust his wife with a million men (S. C. p. 81, line 17). At no time did he hold malice against her. He sought to hold her; this had failed. He endeavored to regain her and this effort never ceased, for at the moment of shooting the mission of the Defendant was, though prevented by the wife from making it known, to "talk to her and see if she would come to any understanding" (S. C. p. 137, line 9).

It is here contended that at the moment of this shooting, this Defendant had no appreciation of his legal or moral duty; that he was irrational, temporarily deranged and that during those last previous four days the processes of mental disinte-

gration were constantly at work and that a complete annihilation of reason could alone follow the declaration of the wife that she had actually taken recourse to the law looking toward the legal separation of the parties. At that time, Defendant did not know the difference between right and wrong. There is nothing in the case to indicate that he exercised the slightest faculty of reasoning, nor that the power of will operated at all. Defendant repeatedly says in his examination (S. C. p. 141, line 35; S. C. p. 142, line 9) that he killed his wife because he loved her, and if this be so, namely, that Defendant's mental faculties thus operated as a fact, it is positively conclusive that he did not know the difference between right and wrong. Connected with this phase of the Defendant's condition is the present mental attitude of the Defendant which reflects more than a stoical frame of mind. It is fatalistic to the last degree. This Defendant craves death (S. C. 137, line 23; S. C. p. 137, line 35; S. C. p. 140, line 39). According to the medical evidence, upon his examination nearly one month subsequent to the shooting (S. C. p. 147, line 40), this Defendant was found both depressed and emotional (S. C. p. 149, line 39) and with a childlike absence of consideration for the feelings of his relatives, notably his children, and the situation as concerns them (S. C. p. 150, line 4), and with no appreciation of the position in which his children are placed by this event (S. C. p. 150, line 20); all of which, together with other matters, the doctor considers very unusual and not normal.

The Doctor classifies the Defendant as a psychopathic personality (S. C. p. 148, line 38). Further, the doctor qualifies his opinion of the Defendant's sanity, and being questioned as to whether in his opinion he thinks the man was sane, replies with the following answer—"Sane in the eyes of the law, yes" (S. C. p. 151, line 4). The doctor undertakes

to determine that which may be termed "legal sanity" and holds that the Defendant was found by him to be legally sane. However, the doctor seems also to distinguish between his finding of the Defendant "legally sane" and his opinion as to whether he found the Defendant "medically and psychopathically" sane, stating that from the standpoint of a psychiatrist, the Defendant "should have some consideration". Moreover, we contend that a fair interpretation of the doctor's response is that he stated in substance that he did not find the Defendant medically and psychopathically sane (S. C. p. 153, line 2).

Were this person as an individual a person in fact of his mental age of ten years, the rule that between the age of seven and the age of fourteen years the infant shall be presumed to be incapable of committing crime would apply, and it would be incumbent upon the State to overcome this presumption. Therefore, the question is whether, at the age of thirty-five with a mind of ten years, he had sufficient mentality to distinguish between right and wrong and whether the Defendant had sufficient mentality to determine that it was wrong to kill his wife. We submit that in this connection there was no design at any time on the part of the Defendant to take his wife's life. His act was done instantaneously. There was no interval whatever, humanly perceptible, at least, between the declaration of the wife and the firing of the first shot. This Court has said in *State v. Bonofiglio*, 67 Law, at 243, that "It is enough that the design to kill be fully conceived and purposely executed. The law is that wherever there is, in committing homicide, a specific intention to take life, there is, in the language of the statute, a willful, deliberate and premeditated killing, and the offense in that case is murder in the first degree."

In the case at bar nothing is shown to indicate "a design" nor a "specific intention" on the part of the Defendant to act as he did. (S. C. p. 133, line 3). The word "instantly" has been held to preclude the idea of deliberation (*State v. Mangano*, 77 Law, 544).

X.

The verdict of the Jury was contrary to and against the weight of the evidence.

In the case of *State v. Turco*, 98 Law, at page 64, it is held that "The killing must have been not only willful, but also deliberate and premeditated, in order to render it murder in the first degree." The Supreme Court in that case cites this Court in the case of *State v. Deliso*, 75 Law, page 808. The latter case analyzes the statutory definition of murder in the first degree, and comments that while the Statute places the words in the following order, to-wit, "willful", "deliberate" and "premeditated", these mental states normally succeed each other in the inverse order. Therefore, there must have been premeditation, deliberation and willfulness on the part of the Defendant respecting the act. This Court, subsequently, in *State v. Clayton*, 83 Law, at 674, approves the doctrine of the case of *State v. Deliso* and holds that the premeditation, deliberation and willfulness (*i. e.*, intention) are not only distinct mental acts, but also that one succeeds another, as was pointed out in *State v. Deliso*, *supra*.

It is further held in *State v. Clayton supra*, as was said by Chancellor Magie in *State v. Zdanicz*, 69 Law, 619, at page 627, that each element requires "some appreciable time."

We submit that the Jury by its verdict disregarded the requisite elements of premeditation, deliberation and willfulness as involved in this case.

We further submit that the Jury by its verdict ignored the test of insanity in criminal cases, which is whether the accused, at the commission of the crime, was conscious that he was doing what he ought not to do; this being the test in the case of *State v. Spencer*, 21 Law, 196, which test has been re-affirmed by this Court in the case of *State v. Noel*, 102 Law, 659.

Request We submit further that the improper admission of the photographs, referred to in Point I, the questions propounded by the Court, referred to in ~~Point~~ XIII, and the hope-abandoned attitude of the Defendant involved in his examination at trial could have had no other effect than to instill in the minds of the Jury a prejudice against the Defendant to his manifest injury, and that this Court is justified in the inference that the verdict in this case was the result of mistake, passion, prejudice or partiality (*State v. Karpowitz*, 98 Law, 546; *State v. Treficanto*, N. J. Ad. Rep. Vol. 7, No. 21, p. 752 (not officially reported); *State v. Von Der Linden*, 105 Law, 618).

Counsel for the Defendant contend that the evidence in this case finds this Defendant a person, mentally speaking, of not over ten years of age; that this proof is found, not only in the general facts developed, but most specifically in the medical testimony produced by the State. (S. C. p. 147, line 14). Therefore, the Jury had before them in trial a person with a mentality of not over ten years and there was no evidence whatever offered by the State to meet the test, as laid down in *State v. Aaron*, 4 Law, 231, which was embodied in *State v. Schilling*, 95 Law, at 147, to have it "appear by strong and irresistible proof that he has sufficient discern-

ment to distinguish good from evil", and to "apprehend the nature and consequences of his act."

We further contend that the Defendant was mentally irresponsible; in part, basing this upon the very fact of his depriving himself of the one whom he loved and toward whom he had never shown the slightest malice and with whom he never quarrelled. We contend that no sane man ever sought to kill his wife unless he hated her. This Defendant at no time showed even the slightest antipathy toward his spouse. He was, obviously, mentally weak and deficient and we contend demented at the time of the shooting. It is true he heard something prior to that act, namely, her ultimatum, with respect to her taking recourse to the law, and this on the occasion of his active effort toward reconciliation. He said nothing. He did nothing but shoot. He was a man with all hope blasted; to his mind, robbed of his only real joy, his wife, and driven mad in the desperation of that circumstance with a consequent flight of all reason and with a mind utterly blank. If it be conceded, which we strongly challenge and deny, that there is involved in the circumstance of this shooting a willfulness on the part of the Defendant, we insist that the elements either of deliberation or premeditation, and in fact both of them, are not present in this case, and, therefore, at most, conceding for the purpose of argument the presence of willfulness, which again we refuse to admit, the case would fall within the class of murder in the second degree.

We advert to the conduct of the Defendant at the time of the tragedy, when he replied in answer to the question, "Mr. Aeschbach what have you done?" with the question in turn "Is she dead?" and then stated "Oh" "I am crazy" (S. C. p. 27, line 20; also S. C. p. 34, line 13). In the darkness of night this Defendant had every opportunity to escape; no one detained him. He directs that the police be sent for and says "I will stay here" (S. C.

p. 27, line 23; S. C. p. 32, line 24). These statements and these actions reflect no guilty mind, but only reflect the return of consciousness of which, during the act of the shooting, he had been entirely deprived.

We submit that there is every reason to judge the Defendant as one who feigns nothing, nor is he other than entirely frank in his testimony when he seems to do all he can to cultivate on the part of his Judges (Court and Jury), a result which might terminate in the forfeiture of his life. It is not too much to say that the verdict in this case is in part based upon the accommodation of that desire. Our law is on a much higher plane and the rules controlling its administration alone must prevail.

Counsel submit that under all the facts and circumstances of this case, wherein the horror of scene and the harrowing of feelings are involved, the law takes hold of the facts and circumstances as a whole and stays the consequences of error, as we have undertaken to show obtain here, and prevents even at the hands of a Jury the repetition of an act which the State and the law condemn, under the circumstances of this case, namely, the forfeiture of a human life.

For the foregoing reasons and considerations the Plaintiff-in-Error respectfully submits that the verdict of guilty of murder in the first degree without the recommendation of imprisonment at hard labor for life should be reversed and the cause remanded to the Morris Oyer and Terminer for a new trial.

Respectfully submitted,

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J. R. Salmon
,
of Counsel.

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