

The State of New Jersey, :
Defendant in Error, :
vs. : On Error to Middlesex
Frank Lavieri and Michael : Oyer and Terminer.
De Palma, :
Plaintiff in Error. :

BRIEF FOR PLAINTIFF IN ERROR.

The entire record is brought here by the writ.

Defendants were jointly indicted with Gerino Palmieri and others but a severance was had. Briefs have been submitted at the present term on a writ of error taken by Palmieri. A detailed statement here of the features of the crime would not be helpful to an understanding of the questions involved.

Pleas of non vult were tendered and refused but exceptions thereon have been rendered valueless by recent decision of this Court.

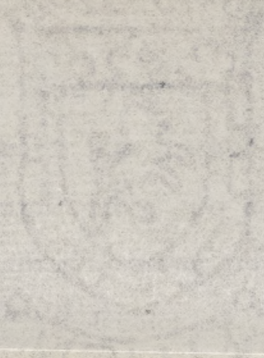
The questions involved were raised in this manner:

1. The Court charged the jury (page 126) that it could find no facts which would justify any verdict of manslaughter. Reason 3, page 135.

2. The Court charged (p. 130) that the verdict must be either of murder in the first degree or acquittal. Reason 4, page 135.

3. The Court refused to charge the jury, as requested by the defendant, that the confession of De Palma introduced in evidence by the State was not evidence against Lavieri. Reason 5, page 136.

4. The Court refused to charge the jury as requested by the defendant, that the confession of Lavieri introduced in evidence by the State, was not evidence against De Palma. Reason 6, page 136.



5. The Court refused to charge the jury as requested by the defendant, that the jury might at the time of rendering their verdict recommend imprisonment at hard labor for life for both or either of the defendants. Reason 7, page 136.

I.

THE COURT ERRED IN CHARGING THE JURY THAT IT COULD FIND NO FACTS WHICH WOULD JUSTIFY ANY VERDICT OF MANSLAUGHTER. Reason 3, page 135.

This was error because De Palma testified (p.110) that he went to the scene of the killing merely for the purpose of getting a drink of milk. It was testified (p/) that the deceased fought for his life. De Palma being there for an innocent purpose was not robbed of his right of defence. In hot blood he may have exceeded the force he was justified in using. This was a jury question and no more onesided than thousands of questions which courts decline to withdraw from juries, in actions merely civil. This is life or death.

II.

THE COURT ERRED IN CHARGING THE JURY THAT THERE COULD BE BUT ONE OF TWO VERDICTS EITHER MURDER IN THE FIRST DEGREE OR OF ACQUITTAL.

The argument under subdivision 1 is apt here.

Reason page .

A verdict of Second Degree murder was properly returnable.

BRITISH

III.

THE COURT ERRED IN REFUSING TO CHARGE DEFENDANTS FIRST REQUEST THAT THE CONFESSION OF DE PALMA INTRODUCED IN EVIDENCE BY THE STATE WAS NOT EVIDENCE AGAINST LAVIERI. Reason 5, page 136.

The Court modified its answer by stating (p. 129) that the testimony of the defendants was "practically identical, almost word for word" &c., with their written admissions. On comparison it will be found that it is quite inaccurate, and that in numerous respects the testimony differed from the admission.

In a general way it may be said that each sought to shift the chief responsibility onto the other. If their respective confessions were evidence against each other either or both of these men by reason thereof may have failed of the recommendation for life imprisonment at hard labor, or perhaps may have failed to obtain an even more favorable verdict than first degree murder.

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

PHYSICS 309

LECTURE 10

THE QUANTUM THEORY OF LIGHT

PHOTONS AND ENERGY

THE PHOTOELECTRIC EFFECT

COMPTON SCATTERING

THE WAVELENGTH OF LIGHT

THE ENERGY OF PHOTONS

THE PHOTOELECTRIC EFFECT

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THE PHOTOELECTRIC EFFECT

COMPTON SCATTERING

THE WAVELENGTH OF LIGHT

THE ENERGY OF PHOTONS

IV.

THE COURT ERRED IN REFUSING TO CHARGE DEFENDANTS SECOND REQUEST THAT THE CONFESSION OF LAVIERI INTRODUCED IN EVIDENCE BY THE STATE WAS NOT EVIDENCE AGAINST DE PALMA. Reason 6, page 136.

The argument under subdivision III applies here.

For instance, Lavieri, in his admission, (p/66) says **nothing** of any duress exerted upon De Palma, and speaks of De Palma as a partner in crime, whereas, De Palma, in his testimony, beginning on page 108, claims that he was forced to join them in New York, and was finally lured to the house by the statement that they would merely purchase milk.

I cannot comply with the Court's order, and at the same time elaborate this Brief sufficiently to point out all the differences between Lavieri's written admission and De Palma's testimony, but they are numerous and radical.

V.

THE COURT ERRED IN REFUSING TO CHARGE THE JURY THAT THEY MIGHT AT THE TIME OF RENDERING THEIR VERDICT RECOMMEND IMPRISONMENT AT HARD LABOR FOR LIFE FOR BOTH OR EITHER OF THE DEFENDANTS. Reason 7, page 136.

See Defendants' third request to charge (pp. 133-134).

A general exception was taken to the entire charge and also to the refusal of the Court to charge each of the several requests to charge in the language requested. (p. 131-132). What the court did say (p. 131) was that the jury could recommend "that the punishment should be imprisonment for life." There was no suggestion that the jury could recommend imprisonment at "hard labor." The jury might well have been willing to spare the men's lives if they thought they were to spend them at hard labor, but might have been utterly unwilling that they pass their time unoccupied or engaged in lighter occupation.

Moreover, the request was that the recommendation might be "for both or either of the defendants". The jury might well have concluded under the circumstances that they were powerless to recommend life imprisonment for only one defendant.

It is submitted that the accused were entitled to have the request charged in its precise language. To say that they jury must be intended to have known that confinement in the State Prison necessarily would be confinement at hard labor, is one of those pleasant fictions which may serve a useful purpose in the trial of civil causes, but which have no place here. Fictions are tolerated for the promotion of justice, and ought not to be given thumbs down force, when a human being is contending for his life. There is no human probability that any one of the jurors knew that imprisonment for life would necessarily be im-

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prisonment at hard labor. I doubt if one Lawyer in ten knows it. The Legislature when it empowered Jurors in their discretion to abolish the death penalty, took a long step in the direction of what is conceived, rightly or wrongly, to be progress. To make the exercise of that discretion more attractive to Jurors, who might naturally balk at so radical a change, they outlined the alternative punishment in the severest language. In fact, many men would rather be promptly executed, than be condemned to a life confinement at hard labor. It is, moreover, quite generally known that it is practically a fiction that a State prisoner is a hard laborer. The popular conception of hard labor is breaking stone, or occupation of similar severity, whereas, prisoners in our State Prison are employed as Book-keepers, Clerks, Etc., and are often transformed into "Trusties." The Legislature, no doubt, had these facts in mind and intended that if the convict's life was spared, the sentence should still fit the crime. The insertion of the words "hard labor" was for a purpose, and the defendant was entitled to have his request charged without modification or change.

But to revert to the request, the prisoners plainly asked that the jury be instructed that they could recommend such imprisonment for both or either. Why were they not entitled to have that instruction given? The Court in failing to give it, in effect said, you may recommend that both be imprisoned for life, but it must be both or neither. The language of the Court was "if your verdict" *et c.*, (p. 131, L. 21), which is singular, and applied to both. They were in effect by the refusal distinctly told that the recommendation must apply to both or neither.

The prisoners requested (in effect) "charge them that they can recommend for both or either one of us

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imprisonment at hard labor for life." A proper instruction. The Court in effect said "I will not do it." A proper instruction thus refused. While these men may have been equally guilty in the eye of the Law, if their testimony is to be believed, they were not morally of equal guilt. It was not legal in equality but moral in equality which might have led the Jury to send one to the Electric Chair, and the other to life confinement.

It is believed that other errors will become apparent upon review of the testimony, and if so, it is urged that the accused be accorded the benefit of them, as may be done, even though error has not been assigned upon them. The convictions of these defendants should be reversed.

THEODORE STRONG,

OF COUNSEL WITH PLAINTIFFS IN ERROR.

MAR 19 1919

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THE COURT'S RECORD

OF COURSE WITH MAINTENANCE IN ERROR.

NEW JERSEY COURT OF ERRORS AND APPEALS

THE STATE OF NEW JERSEY,

vs.

FRANK LAVIERI AND MICHAEL
DE PALMA,

:
: On Application for writ
:
: of error in case punish-
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: able with death.

:
: CERTIFICATE OF REFUSAL.
:

TO THE CLERK OF THE NEW JERSEY COURT OF ERRORS AND APPEALS:

I, EDWIN ROBERT WALKER, Chancellor of the State
of New Jersey, DO HEREBY CERTIFY, that I have on this
thirtieth day of August, nineteen hundred and eighteen, re-
fused to order a writ of error for the review of the judg-
ment on the above entitled indictment rendered by the
Middlesex County Court of Oyer and Terminer.

(S) E. R. Walker,

C.

ENDORSED:

"FILED

Aug 30 1918

Thomas F. Martin
Clerk."

New Jersey

Court of Errors and Appeals

THE STATE OF NEW JERSEY,
Defendant in Error.

vs.

FRANK LAVIERI AND MICHAEL
DE PALMA,
Plaintiffs in Error.

On Error to
Middlesex 10
Oyer and
Terminer.

WRIT OF ERROR.

Returnable September 16th, 1918.

20

THEODORE STRONG, Attorney,
National Bank of New Jersey Building
New Brunswick, N. J.

Presented to me August 31, 1918.
Let a return be made.

J. J. BERGEN,
Judge Supreme Court.

30

NEW JERSEY, ss.

[SEAL]

The State of New Jersey to the
Judges of the Court of Oyer and
Terminer in and for the county of
Middlesex,—Greeting:

Forasmuch as in the record and proceedings and

also in the giving of judgment upon a certain indictment against Frank Lavieri and Michael De Palma, for murder, which was before you in our said Court of Oyer and Terminer, in and for the County of Middlesex, whereof the said Frank Lavieri and Michael De Palma have been committed by a certain jury of the county, taken between the State of New Jersey and the said Frank Lavieri and Michael De Palma, manifest error
 10 hath intervened, to the great damage of the said Frank Lavieri and Michael De Palma as by their complaint we are informed; we being willing that the said error, if any there be, should in due manner be corrected and that full and speedy justice be done to them the said Frank Lavieri and Michael De Palma in this behalf, do command you that if judgment be thereupon given that you do distinctly and openly send under your seal the record and proceedings aforesaid, in-
 20 cluding the entire record of the proceedings had upon the trial of said cause, with all things touching and concerning the same to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the 16th day of September next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to law ought to be done.

30 Witness, EDWIN ROBERT WALKER, Esquire, Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, aforesaid, the 30th day of August, nineteen hundred and eighteen

THOMAS F. MARTIN,
 Clerk.

THEODORE STRONG,
 Attorney for Plaintiff in Error.

The Answer of James J. Bergen and Peter F. Daly, Esquires, Judges of the Court of Oyer and Terminer within named, the record and proceedings of the plaint whereof mention is within named, with all things touching the same. We certify to the Court of Errors and Appeals in the last resort of the State of New Jersey, at Trenton, at the day and year within contained in a certain schedule to this writ annexed, as we are commanded.

10

J. J. BERGEN,
PETER F. DALY,
Judges.

STATE OF NEW JERSEY,
MIDDLESEX COUNTY, to wit:

BE IT REMEMBERED, that at a session of the Court of Oyer and Terminer, held at New Brunswick, in and for the said County of Middlesex on the 20
Second Tuesday of December, in the year of our Lord one thousand nine hundred and seventeen, before the Honorable James J. Bergen, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Peter F. Daly, Judge of the Court of Common Pleas in and for the said County of Middlesex, the same being the December Term of the said Court of Oyer and Terminer in the year aforesaid, according to the form of the statute in that case made and provided, upon the 30
oaths of W. S. Dey, Foreman, William Van Nuis, Abram S. Howell, John B. Herbert, Henry McCullough, William Eversen, Leonard M. Campbell, W. J. Sullivan, John Funk, Sr., Robert Kahrman, John J. Monohan, Herbert Berrien, William M. Emmons, William G. Howell, John Kutcher, James A. McGarry, Howard C. Rule, Alexander Henderson, William P. Moss, Samuel Garis, William F. Randolph, David Serviss, William H. Kuhlthau, good and lawful men of the said County

of Middlesex, duly summoned and then and there empanelled, sworn and charged to inquire in behalf of the State of New Jersey, and for the body of the County of Middlesex, it is presented in manner and form, to wit:

10 MIDDLESEX OYER AND TERMINER OF
DECEMBER TERM, A. D. 1917.

MIDDLESEX COUNTY, to wit:

20 THE GRAND INQUEST for the State of New Jersey and for the body of the County of Middlesex, upon their oath PRESENT, That Frank Lavieri, Michael De Palma, Gerino Palmieri, alias Napolitano, Emanuel Napolitano and Antonio Abbruzzie, late of the Township of East Brunswick in the said County of Middlesex, on the eleventh day of October, in the year of our Lord one thousand nine hundred and seventeen, with force and arms, at the Township of East Brunswick aforesaid, in the County aforesaid, and within the jurisdiction of this Court, wilfully, feloniously and of their malice aforethought, did kill and murder one Roman Smith 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.

30 JOSEPH E. STRICKER,
Prosecutor of the Pleas.

And afterwards, that is to say, at a session of the said Court of Oyer and Terminer, holden at New Brunswick aforesaid in and for the County of Middlesex aforesaid, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, of the Term of April

of the said Court of Oyer and Terminer, before the Honorable James J. Bergen, one of the Justices of the Supreme Court of Judicature of New Jersey, and Peter F. Daly, Judge of the Court of Common Pleas in and for said County of Middlesex, here cometh the said Frank Lavieri, Michael De Palma and Gerino Palmieri, alias Napolitano, under the custody of Charles Anderson, Esquire, Sheriff of the said County of Middlesex (in whose custody in the Jail of the County aforesaid, for the cause aforesaid, they, the said Frank Lavieri, Michael De Palma and Gerino Palmieri, alias Napolitano, have been before committed) being brought to the Bar in their proper persons by the said Sheriff to whom they are here also committed. 10

And the said Frank Lavieri Michael De Palma and Gerino Palmieri, alias Napolitano, now here in their proper persons having heard the said indictment and forthwith being demended concerning the premises in the said indictment above specified and charged upon them, how they will acquit themselves thereof, they sayeth that they are not guilty thereof, and thereof they put themselves upon the country. 20

And Joseph E. Stricker, Esquire, Prosecutor of the Pleas of the State of New Jersey, in and for the County of Middlesex, who prosecutes for the State of New Jersey, in the behalf does the same.

Therefore let a Jury thereupon here come to wit: On Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, as yet of the April Term and at the same aforesaid session of the said Court of Oyer and Terminer, and before the Honorable James J. Bergen, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Peter F. Daly, Judge of the Court of Common Pleas in and for the said County of Middlesex, of good and lawful men of the said County of Middlesex, by whom the truth of the matter may be 30

better known and who are not of kin to the said Frank Lavieri and Michael De Palma, to recognize upon their oath whether the said Frank Lavieri and Michael De Palma be guilty of the murder in the indictment aforesaid above specified or not guilty, because as well the said Joseph E. Stricker, Esquire, who prosecutes for the State of New Jersey, in this behalf, as the said Frank Lavieri and Michael De Palma have put themselves upon the said Jury.

10 And now, to wit, on Wednesday, the third day of April, in the year of our Lord, one thousand nine hundred and eighteen, at the same aforesaid session of the Court of Oyer and Terminer, at New Brunswick aforesaid, in and for the County of Middlesex aforesaid, as yet of the Term of April of said Court of Oyer and Terminer before the said the Honorable James J. Bergen, one of the Justices of the Supreme Court of Judicature of the State
20 of New Jersey, and Peter F. Daly, Esquire, Judge of the Court of Common Pleas in and for the said County of Middlesex, here comes as well the said Joseph E. Stricker, Esquire, who prosecutes for the State of New Jersey, in this behalf, and the said Frank Lavieri and Michael De Palma in their own proper persons under the custody of the Sheriff as aforesaid.

30 And the Jurors of the said Jury by the said Sheriff for the purpose empanelled and returned agreeably to the Statute in such case made and provided, to wit:

Howard W. Kinsey	R. M. Laing
William Hammell	Rasmus Hansen
Hans J. Gade	James S. Warren
Clifford F. Mott	M. J. Sullivan
G. M. Agreen	George Pressler
Oscar Lambertson	William H. Parisen

Being called, came, who being elected, chosen, tried and sworn to speak the truth of and concern-

ing the premises upon their oath say that the said Frank Lavieri and Michael De Palma are guilty of murder in the first degree as above charged in manner and form as in and by said Indictment is above alleged against them.

April 4th, 1918.

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THE STATE

vs.

FRANK LAVIERI, MICHAEL DE
PALMA, GERINO PALMIERI.

Indictment No.
2304, For
Murder.

The Prosecutor of the Pleas moved for sentence; the Prisoners, Frank Lavieri, Michael De Palma and Gerino Palmieri, being placed at the Bar, whereupon all and singular the premises being understood by the Court here fully, the Court doth thereupon order and adjudge as follows: 20

The penalty which the law fixes for the crime of which you, and each of you, have been convicted is death, you will be remanded into the custody of the Sheriff and the Court will prepare a warrant and deliver it to the Sheriff directing him to take you, and each of you, and deliver each of you to the warden of the State Prison there you, and each of you, are to be kept until execution of the sentence, and the sentence will be execution upon you, and each of you, in the week beginning May 20th, 1918. 30

MIDDLESEX COUNTY OYER AND
TERMINER.

DECEMBER TERM, 1917.

STATE OF NEW JERSEY,

vs.

10 FRANK LAVIERI, MICHAEL DE
PALMA, GERINO PALMIERI,
ALIAS NAPOLITANO, EMAN-
UEL NAPOLITANO, ANTONIO
ABBRUZZIE. } Indictment for
Murder.

20 Transcript of stenographer's notes of evidence,
taken in the above entitled matter, before HON.
JAMES J. BERGEN, Justice of the Supreme Court,
and HON. PETER F. DALY, Common Pleas Judge,
and a Jury, in the Middlesex County Court House,
City of New Brunswick, New Jersey, on the
second day of April, A. D. 1918, at 10:25 A. M.

Appearances:

JOSEPH E. STRICKER, Esq.,
Prosecutor of Pleas.

JOHN A. COAN, Esq.,
Asst. Prosecutor of Pleas, Representing the State.

30 THEODORE STRONG, Esq.,
WILLIAM G. KEIR, Esq.,
(N. Y. Bar.)
Representing the Defendants.

MR. STRONG: I move the admission of Mr. Keir
of New York City to act as counsel for the de-
fendant Palmieri in the trial of the indictment that
is now being moved.

THE COURT: He will be admitted pro hac vice.

MR. STRONG: On behalf of each of these de-

fendants a plea of non vult is tendered under the act of 1917.

THE COURT: All in one indictment?

MR. STRONG: I wish a severance. The Prosecutor first suggested all the pleas, and then as to this man I ask for a severance; but the pleas now entered are non vult in the case of each of them.

THE COURT: It is a question whether the Court will accept that plea. If you are going to sever them you had better sever them now and charge 10 each one separately.

MR. STRONG: Then on behalf of Emanuel Napolitano I ask for a separate trial. Of this application I have given the Prosecutor notice and I understand he has no objection.

THE COURT: You ask for a severance?

MR. STRONG: Yes, sir.

THE COURT: You do not object to it?

MR. STRICKER: No, sir.

THE COURT: Let an order be entered for a sev- 20 erance so that this one man may be tried separately.

MR. KEIR: In relation to Gerino Palmieri, with whom the Senator is associated with me in the defense, I also move for a severance. There was no formal notice given to the District Attorney, but I think he will recollect I did say to him that I felt as though this man should be tried separately from the others.

THE COURT: Why?

MR. KEIR: First, Your Honor, in many of our 30 States, in New York and Pennsylvania, it is constitutional that in a capital case it is the right—

THE COURT: I will not argue that. It is not the law here. What reason do you give?

MR. KEIR: For this reason: I think that his interests will be very much affected and be very much prejudiced if he is tried with the others with whom he is jointly indicted.

THE COURT: Why?

MR. KEIR: There are a number of facts in the

case, of course, facts that probably will be offered in his defense, that I might state generally now. Of course, I am going into the defense, if Your Honor wishes to hear to some extent my reasons.

THE COURT: Do you object to it?

MR. STRICKER: Yes, sir; I do object to it.

MR. KEIR: From my consultations with this defendant I understand that the Senator has also had his—

10 THE COURT: Let us dispose of the first case that there has been a severance. That you have agreed to and that there has been an order made. What is the name of that defendant?

MR. STRICKER: That is Emanuel Napolitano.

THE COURT: How does he plead?

MR. STRONG: He pleads non vult.

MR. STRICKER: To murder in the first degree?

MR. STRONG: Yes.

MR. STRICKER: I would not oppose the tender
20 of that plea.

THE COURT: The plea will be accepted as to that defendant. Enter a plea of non vult to this indictment of murder in the first degree.

MR. STRONG: Before Your Honor imposes sentence will Your Honor hear me?

THE COURT: Yes. I am not going to pass sentence.

MR. KEIR: In the defense of this case it will be shown that Palmieri was under the influences of
30 some of those who it is alleged committed this offense. That from the very beginning, if there were any preparations of any kind in reference to the commission of some other offense, that he was urged, and then threatened by certain ones of these jointly indicted parties to enter into this work, or into this alleged crime. That all through, up unto the time they arrived here, and when they arrived here he was under a species of duress, particularly by one or two, probably two of these co-defendants that he has been indicted with, and

there will be considerable testimony from his own lips, and probably from some others, to show the nature of that pressure and duress upon this defendant by those jointly indicted with him. Another thing I wish to call Your Honor's attention to, you have a statute in this State, it may be an old one, but I presume it is still law, that in cases where persons are jointly indicted, that if they wish to call any of the co-defendants the testimony of their co-defendants is needed in their defense, if they make an affidavit to that effect, that the Court will then frequently grant a severance on their application, which is where one of the co-defendants is to be called in their defense. From my conversation with this defendant, I have in mind that I might call one of these co-defendants to support some of the contentions of the defense of Palmieri. That I urge as another reason. Of course I started out, throughout the United States there is a tendency, even where there is not positive law, to grant severances in capital cases where there is to be such a serious result, the actual taking of human life. The statute, Your Honor knows, in our adjoining States—

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THE COURT: Do not argue the statute of another state.

MR. KEIR: If I may call your attention to some cases in some other states. I frankly think, from my conversations and my preparations in this case, Senator Strong and I are together in it, I am inclined to think that it would prejudice his interests very much and the results, the eventual effects in this case, if he is compelled to go to trial with these people with whom he is jointly indicted, and I urge seriously and sincerely that this man should have a separate trial in this case.

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THE COURT: Your only apparent ground is that you want to call one of the co-defendants in his behalf.

MR. KEIR: I want to be sincere with the Court.

I can not say positively to the Court I will do it. I may eventually. A great deal will depend what will come out in the prosecution's case whether or not I will do so. I am inclined to think I will, but of course, I would not ask it on that ground solely, because I may not do that.

THE COURT: What ground do you base it on?

10 MR. KEIR: My intention is to do that, but I can not promise that I will do it. Something might turn up that I may not do it, but my intention is to call one of the defendants, and maybe two, in behalf of this defendant.

THE COURT: Have you any other reason?

MR. KEIR: The general reason—

THE COURT: Any other reason?

MR. KEIR: No, I think I have stated all that I have.

MR. STRICKER: In my examination of this case and in its preparation I find that the defendant for whom counsel is now arguing, started for South
20 River on the day of the commission of this crime—

THE COURT: That is not material. The only point is that he claims he wants a severance because he may want to call some of the co-defendants in behalf of his client. That is the only ground he puts it on.

MR. STRICKER: I fail to see how he is precluded from getting the benefit of their testimony while they are on the stand. He gets the same benefit without a severance, and the statute permits him to
30 call them.

MR. KEIR: I might answer that in saying, of course, when they are on the stand they may be limited according to their counsel sees fit.

THE COURT: Let me see that statute.

MR. KEIR: I might urge I might ask many questions that may not be asked of the defendant by his counsel, even in cross-examination. They may not cover the ground that I wish to urge. They are not bound to testify, they may not be called.

(Sixty-fourth section of the Criminal Procedure Act). (Reading.)

MR. STRICKER: That would be the procedure under which this defendant would be entitled to a severance.

MR. KEIR: We are prepared to make the affidavit.

MR. STRICKER: Regardless of the statute, my examination of this case shows that there was no such duress as counsel contends for. And as I started in to say to the Court, that on the morning of the commission of this crime the defendant, Gerino Palmieri, voluntarily came from an address in New York to the Pennsylvania Railroad Station, took a train for South River and participated in the offense which was planned two or three days before. 10

MR. KEIR: In answer I have this to say: That my defendant is prepared to make such an affidavit, on my advice, as to two of these co-defendants, to wit: Michael De Palma— 20

THE COURT: This statute does not apply, because it only applies to a case where an indictment has been removed to the Supreme Court. That expressly says that. "And such indictment before the trial thereof have been or shall be removed into the Supreme Court by Certiorari or otherwise, and anyone of the said persons, on application to the said Supreme Court on affidavit" (reading).

MR. KEIR: I thought that particular section applied to all cases in whatever court. 30

THE COURT: I have no such affidavit before me.

MR. KEIR: I am prepared now to present to this Court an affidavit by this defendant.

THE COURT: Have you the affidavit?

MR. KEIR: I can get it in about ten or fifteen minutes, in which he will state these defendants he will call to offer evidence in several substantial parts of his defense. On my advice after consultation with me. I will present such an affidavit. And it is substantial.

THE COURT: Anything further, Mr. Prosecutor?

MR. STRICKER: No, sir.

THE COURT: I think I will make the order of severance upon filing the affidavit.

MR. KEIR: Yes, Your Honor, I will do so.

10 THE COURT: I want to have the affidavit set forth what the statute requires. I am inclined to think this ought to be done under the statute, in case the indictment has been removed to the Supreme Court, that is a right which the defendant would be entitled to here.

MR. KEIR: I understand there is another case to be taken up before this for trial.

MR. STRONG: On behalf of three of these defendants we plead non vult to this indictment.

THE COURT: Does the Prosecutor agree to that?

MR. STRICKER: No, sir; I do not.

20 THE COURT: Upon what theory ought the Court to accept a plea of non vult against these three defendants?

MR. STRONG: Well, Your Honor, for one thing, there certainly was no premeditation in this matter.

THE COURT: Then they would not be guilty. If there was no premeditation they would not be guilty of murder in the first degree.

30 MR. STRONG: I mean in a moral sense. They didn't come there for the purpose of killing this man.

THE COURT: This is a plea to an indictment for murder in the first degree, and if there was no premeditation then they ought not to enter any such plea. It ought to be murder in the second degree.

MR. STRONG: We think under the act of 1917, the acceptance of the plea of non vult is compulsory, that is our contention here, and we wish to—

THE COURT: You claim they have a right to enter such a plea, even if the Court should be inclined to refuse the acceptance of it?

MR. STRONG: That is it.

THE COURT: And you base that on the act of 1917?

MR. STRONG: That is all.

THE COURT: I rule against you on that point. I think that the Act of 1917 is precisely like the act that stood since 1893, except that it was amended in 1917 by introducing a different grade of punishment. The words in the Act: "Shall not prevent the entering of such plea," are in the old act. And it never has been pretended, as far as I know, that any Court was bound to accept a plea of non vult in a homicide case. So I will refuse to receive the plea of non vult and you may take an exception to that and review my ruling. 10

Exception allowed and sealed accordingly.

J. J. BERGEN,
Judge.

MR. KEIR: I understand that included all three. 20

THE COURT: Mr. Clerk, you will enter a plea of not guilty as to these three defendants.

MR. STRICKER: May I proceed to move the indictment against the other two defendants, or will Your Honor wait until this motion for severance is disposed of?

THE COURT: There ought to be an affidavit, of course. I am assuming that the—

MR. KEIR: The affidavit will be prepared at once. 30

MR. STRONG: I should think the affidavit better be prepared in the first instance.

THE COURT: Yes.

(Affidavit presented to the Court).

THE COURT: That affidavit seems to be in accordance with the statute. Let it be filed.

MR. STRICKER: Then I move the indictment as far as it relates to Michael De Palma and Frank Lavieri.

THE COURT: Let the Jury be returned.

30. HOWARD W. KINSEY, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER: Challenge on the ground that this talesman has conscientious scruples against capital punishment to a degree which might prevent him from rendering a verdict according to the evidence.

10 THE COURT: Let the Juror be sworn.
(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. Mr. Kinsey, what is your business?

A. Manager of a coal company.

Q. How old are you?

A. Thirty-seven.

Q. Have you any conscientious scruples against capital punishment?

20 A. No, sir.

MR. STRICKER: No challenge

MR. STRONG: No challenge.

THE COURT: Let the Juror be sworn.
(Juror sworn).

21. WILLIAM T. HAMMELL, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

30 MR. STRONG: No challenge.

MR. STRICKER: Challenge on the ground that this Juror is infirm. I understand he is hard of hearing.

BY THE COURT:

Q. Is that so? Can you hear?

A. I can not in one ear.

Q. Can you hear in the other?

A. Very good at times. In a large assembly room I can not understand distinctly always.

Q. You can hear what is said by me, can't you?

A. Now I do, yes.

THE COURT: I would not sustain that challenge.

MR. STRICKER: All right. Then I challenge on the ground that this talesman has conscientious scruples against capital punishment.

THE COURT: Let him be sworn.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

10

Q. How old are you, sir?

A. Fifty-one.

Q. And where do you live?

A. South Amboy.

Q. Have you any conscientious scruples against capital punishment?

A. No.

MR. STRICKER: No challenge

(Juror sworn).

20

24. MARTIN HERMAN, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER: Challenge.

23. CHARLES HERMAN, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

30

MR. STRONG: Challenge.

1. FRED F. ADAMS, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER: Challenge on the ground that the talesman has conscientious scruples against capital punishment.

THE COURT: Let the Juror be sworn.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. Where did you live, sir?

A. Sewaren, New Jersey.

Q. What is your business?

A. Architect.

Q. Have you any conscientious scruples against capital punishment?

A. I haven't formed any conviction. I haven't formed any absolute opinion on that point.

10 Q. Have you any opinion at all on the subject?

A. Yes, in the sense it would be a very serious trial for me, I think.

Q. Well, if the evidence in this case as adduced developed beyond a reasonable doubt that either one or both of these defendants were guilty of murder in the first degree, one of the penalties for which is death, would you hesitate to vote for a conviction?

A. I would try to do my duty.

20 Q. Would you hesitate to vote for a conviction under those circumstances?

A. I think not.

MR. STRICKER: Challenge.

18. BENJAMIN GILMAN, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: Defense challenges.

30

17. HANS J. GADE, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER: Challenge on the ground that the talesman has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. What is your business?

A. Painter.

Q. Have you any conscientious scruples against capital punishment?

A. No.

Q. Do you understand my question, sir?

A. Yes.

Q. Will you kindly answer it?

A. No.

MR. STRICKER: No challenge

MR. STRONG: No challenge.

THE COURT: Let him be sworn.

(Juror sworn).

10

16. HENRY FRISCH, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: I guess we will have to challenge you, Mr. Frisch.

20

35. EDWARD LEMBECK, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER: Challenge on the ground the Juror has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. Mr. Lembeck, have you any conscientious scruples against capital punishment?

A. None. I have formed an opinion in this case, though.

MR. STRONG: That disqualifies him without challenge, I suppose.

THE COURT: Oh, no. He may have formed an opinion that might be very readily changed by evidence.

Q. Would the opinion which you have formed

30

influence you in the rendering of your verdict according to the sworn testimony here?

A. Not necessarily.

Q. What do you mean by not necessarily?

A. Well, if the evidence was so that I thought I was wrong in my opinion—

Q. Well, what did you base your opinion on?

A. Well, I am a newspaper man and I read a little of it and have written some of it.

10 THE COURT: Could you render a verdict here according to the evidence after you were sworn as a Juror?

A. Yes.

THE COURT: Could you?

A. I think so.

MR. STRICKER: No challenge

MR. STRONG: We will have to challenge.

53. JULIUS RODBART, called.

20 THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: No challenge.

MR. STRICKER: Challenge on the ground the talesman has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

30 Q. Mr. Rodbart, have you any conscientious scruples against capital punishment?

A. No, sir.

Q. What is your business?

A. Delicatessen store.

Q. Where?

A. Albany Street, New Brunswick.

MR. STRICKER: Challenge.

46. CLIFFORD G. MOTT, called.

THE CLERK: Juror look upon the prisoners.

Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER: Challenge on the ground that the talesman has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. Mr. Mott, have you any conscientious scruples against capital punishment? 10

A. Not if the evidence proves that way that the man is guilty.

Q. What is your business, sir.

A. I have charge of a store room in the New Brunswick Refrigerating plant.

MR. STRICKER: No challenge

MR. STRONG: No challenge.

(Juror sworn).

47. FRED C. NODINE, called. 20

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: Defense challenges.

36. ALBERT LEU, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER: Challenge on the ground that the talesman has conscientious scruples against capital punishment. 30

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. Mr. Leu, have you any conscientious scruples against capital punishment?

A. I do not approve of it.

Q. Well, if the evidence in this case proved beyond a reasonable doubt to you that these defend-

ants, or either of them, were guilty of murder in the first degree, one of the penalties for which is death, would you hesitate to vote for a verdict?

A. No, if they convinced me they were guilty I would render my verdict in the first degree.

MR. STRICKER: Challenge.

20. JAMES HACKETT, called.

THE CLERK: Juror look upon the prisoners.

10 Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: No challenge.

MR. STRICKER: Challenge.

13. CHARLES H. DAVIDSON, called.

THE CLERK: Juror look upon the prisoners.

Prisoners look upon the Juror. Does the State challenge?

20 MR. STRICKER: Challenge on the ground the Juror has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. Have you any conscientious scruples against capital punishment?

A. I have not, sir.

MR. STRICKER: No challenge.

MR. STRONG: Defense challenges.

30

2. G. M. AGREEN, called.

THE CLERK: Juror look upon the prisoners.

Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: No challenge.

MR. STRICKER: Challenge on the ground that the talesman has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. Mr. Agreen, have you any conscientious scruples against capital punishment?

A. No.

MR. STRICKER: No challenge.

(Juror sworn).

4. JOHN D. BENNETT, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge? 10

MR. STRICKER: Challenge on the ground that the Juror has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. How old are you, sir?

A. Thirty-five.

Q. Where do you live?

20

A. Cranbury.

Q. What is your business?

A. Farmer.

Q. Have you any conscientious scruples against capital punishment?

A. I have not.

MR. STRICKER: No challenge.

MR. STRONG: Challenge.

52. PETER RASMUSSEN, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge? 30

MR. STRONG: No challenge.

MR. STRICKER: Challenge on the ground that the Juror has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. Mr. Rasmussen, have you any conscientious scruples against capital punishment?

A. I have.

Q. Would those scruples preclude you from rendering a verdict according to the evidence in this case?

A. Well, I am against capital punishment.

BY THE COURT:

Q. That is not answering the question. The question is whether, if you were sworn as a Juror,
10 you would not observe your oath, if you were satisfied from all the evidence that the defendant was guilty of murder in the first degree?

A. Well, I suppose I would go according to the evidence.

BY MR. STRICKER:

Q. Well, would you go according to the evidence?

A. I think so.

20 Q. Would the feeling that you have against capital punishment prevent you from going according to the evidence?

A. Well, that is it, because I am not in favor of it.

THE COURT: That is not answering the question.

Q. Would the mere fact that you are against capital punishment make you violate your oath as a Juror? In other words, if you took an oath to decide this case according to the evidence, would
30 you violate that oath for the mere reason that you are against capital punishment?

A. I would vote for manslaughter in the first degree, or something like that.

Q. That is, you would permit your feeling that is against capital punishment to influence you in rendering your verdict, even though you took an oath to decide the trial according to the evidence, is that it?

A. Well, I would not like to take the oath according to that. I would do the best I could, but I don't think I would vote on it.

MR. STRICKER: I submit the State is entitled to a challenge.

BY THE COURT:

Q. Let me ask you a question: If you were sworn as a Juror, took your oath, took your seat, and after you heard all the evidence, you were satisfied that the defendant was guilty of murder in the first degree, would the fact that such a verdict might result in capital punishment prevent you from observing your oath? 10

A. Yes, sir; because I think—

THE COURT: Then you are not fit to serve on this jury or any other jury.

A. Because I think—

THE COURT: The challenge is sustained. You may retire. You are discharged from service for the term. A man who will not observe his oath is hardly fit to be a juror in any case.

20

37. ISRAEL LEVY, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER, Challenge on the ground that the talesman has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

30

Q. Mr. Levy, have you any conscientious scruples against capital punishment?

A. No, sir.

MR. STRICKER: No challenge.

MR. STRONG: Challenge.

39. WILLIAM F. MCGOVERN, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: No challenge.

MR. STRICKER: Challenge on the ground that the talesman has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. Where do you live, Mr. McGovern?

A. New Brunswick.

10 Q. Whereabouts?

A. Hamilton street.

Q. What is your business, sir?

A. In the billiard business.

Q. Have you any conscientious scruples against capital punishment?

A. No.

MR. STRICKER: Challenge.

40. CLARENCE MCMURTREE, called.

20 THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER: Challenge on the ground that the talesman has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. What is your business, sir?

30 A. Machinist.

Q. Where do you live?

A. (No answer).

Q. Can you hear what I am saying to you?

A. No, I don't distinguish you.

Q. Trouble in your ear?

A. I can't hear you.

MR. STRICKER: I submit—

THE COURT: He is hardly fit to serve as a juror for either side if he can not hear the evidence. You may be excused.

34. OSCAR LAMBERTON, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: What is your name?

A. Supervisor of loading explosives for the Johnson—

Q. Where is that located?

A. That is 17 Battery Place, New York.

MR. STRONG: No challenge.

MR. STRICKER: Challenge on the ground that the Juror has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

10

BY MR. STRICKER:

Q. Have you any conscientious scruples against capital punishment?

A. No.

MR. STRICKER: No challenge.

THE COURT: Let the Juror be sworn.

(Juror sworn).

20

3. THOMAS D. APPLGATE, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER: Challenge on the ground that the Juror has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

30

BY MR. STRICKER:

Q. What is your business, sir?

A. I am a laborer.

Q. How old are you?

A. Sixty-one.

Q. Have you any conscientious scruples against capital punishment?

A. No, sir.

MR. STRICKER: No challenge.

MR. STRONG: I will excuse Mr. Applegate.

33. R. M. LAING, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: No challenge.

10 MR. STRICKER: Challenge on the ground the Juror has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. Mr. Laing have you any conscientious scruples against capital punishment?

A. No, sir.

MR. STRICKER: No challenge.

THE COURT: Let the Juror be sworn.

20 (Juror sworn).

22. RASMUS HANSEN, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER: Challenge on the ground the Juror has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

30 BY MR. STRICKER:

Q. Mr. Hansen, where do you live?

A. Perth Amboy.

Q. Whereabouts?

A. Leon Avenue.

Q. Have you any conscientious scruples against capital punishment?

A. No.

MR. STRICKER: No challenge.

MR. STRONG: No challenge.

(Juror sworn).

56. ALEXANDER SEGOINE, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: No challenge.

MR. STRICKER: Challenge on the ground the Juror has conscientious scruples against capital punishment.

THE COURT: This Juror has stated to the Court that he is employed in very important government work in relation to the war. Of course, I have no power really to excuse him and I do not want to in a homicide case unless the counsel agrees to it. 10

MR. STRONG: I will agree to it.

THE COURT: Do you agree to it.

MR. STRICKER: Yes, sir.

THE COURT: You may be excused, then.

42. R. L. MALLORY, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge? 20

MR. STRICKER: Challenge on the ground that the Juror has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. What is your business, sir?

A. Nothing particularly.

Q. Have you any office under the State? 30

A. I am a Justice of the Peace.

MR. STRICKER: I think that disqualifies this talesman.

THE COURT: Why?

MR. STRICKER: He is a Justice of the Peace.

THE COURT: Does the statute include Justices of the Peace?

MR. STRICKER: I think it does.

THE COURT: Then he is disqualified. You are excused.

41. DUNCAN MCNAIR, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: Excused.

60. JAMES S. WARREN, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

10 MR. STRICKER: Challenge on the ground that the talesman has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. Where do you live, sir?

A. Highland Park.

Q. What is your business?

20 A. Electrician.

Q. How old are you?

A. Forty-six.

Q. Have you any conscientious scruples against capital punishment?

A. No, sir.

MR. STRICKER: No challenge.

MR. STRONG: No challenge.

THE COURT: Let the Juror be sworn.

(Juror sworn).

30

55. LOUIS SCHMALHOLTZ, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: No challenge.

MR. STRICKER: Challenge on the ground that the talesman has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. What is your business, sir?

A. Clerk, Wright-Martin.

Q. Where do you live?

A. Highland Park.

Q. Have you any conscientious scruples against capital punishment?

A. I am opposed to it.

Q. Would your feeling against capital punishment preclude you from rendering a verdict according to the evidence? 10

A. No, sir.

Q. Would that influence you in deciding this case if it were made out beyond a reasonable doubt, against either of these defendants or both of them?

A. No, I don't think it would.

MR. STRICKER: Challenge.

59. HARRY THOMAS, called. 20

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER: Challenge on the ground that the talesman has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. What is your business? 30

A. Civil Engineer.

Q. Where do you reside?

A. South Amboy.

Q. How old are you, sir?

A. Forty-two.

Q. Have you any conscientious scruples against capital punishment?

A. Well, if the evidence was circumstantial, or the major portion of it, I couldn't do it, couldn't convict.

Q. Supposing the evidence was direct and conclusive and the State established its case beyond a reasonable doubt?

A. It would have to be mighty strong and direct.

BY THE COURT:

10 Q. That is not answering the question. You are an intelligent man and you know what the Prosecutor wants. If this evidence satisfied you beyond a reasonable doubt that the defendant was guilty of murder in the first degree, would you refuse to convict him?

A. If the evidence was direct and strong and wasn't circumstantial, I believe I could, yes.

Q. You would not then take the law from the Court if the Court told you that you must consider circumstantial evidence, you still would refuse to do it?

20 A. I would have to abide by the decision of the Court.

THE COURT: Proceed.

MR. STRICKER: Challenge.

57. WILLIAM C. STULTS, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: No challenge.

30 MR. STRICKER: Challenge.

58. M. J. SULLIVAN, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER: Challenge on the ground that the talesman has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. Where do you live, sir?

A. South Amboy.

Q. What is your business?

A. Work in a munition plant, Parlin.

Q. What position do you occupy?

A. Time keeper.

Q. Have you any conscientious scruples against capital punishment?

A. I think I have.

10

Q. Well, does the feeling or scruple that you entertain against capital punishment so preclude it that you would be prevented from voting for a verdict according to the evidence?

A. No, I don't think so.

Q. And if the State made out its case beyond a reasonable doubt would you vote for a conviction of murder in the first degree?

A. Yes, sir.

MR. STRICKER: No challenge.

20

MR. STRONG: No challenge.

(Juror sworn).

49. GILBERT PARENT, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: No challenge.

MR. STRICKER: Challenge on the ground that the Juror has conscientious scruples against capital punishment.

30

(Juror sworn on his voire dire).

BY MR. STRICKER:

Q. Where do you live, sir?

A. New Brunswick.

Q. What is your business?

A. Nothing at present.

Q. What was your business?

A. Shoe manufacturer.

Q. Have you any conscientious scruples against capital punishment?

A. I have.

Q. Would the scruples which you entertain against capital punishment preclude you from rendering a verdict according to the evidence?

A. Well, I don't know about that. I don't believe in capital punishment. That is the only answer I can give you in that line.

10 Q. Well, would the belief that you entertain prevent you from rendering a verdict according to the evidence?

A. Well, I had better not answer that question. I would rather not.

Q. Why not?

A. Well, because I don't believe in capital punishment.

20 Q. If you took an oath here to decide this case according to the evidence, would you hesitate to render a verdict according to such evidence and under the instructions of the Court?

A. Would I have to?

Q. If you took an oath to decide this case according to the evidence would you violate that oath because of the feeling that you entertain against capital punishment?

A. Well, I wouldn't want to, no.

Q. Well, would you?

A. I wouldn't like to.

30 Q. Well, would you hesitate about rendering your verdict?

A. I don't think I would, no.

MR. STRICKER: Challenge.

51. GEORGE PRESSLER, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the State challenge?

MR. STRICKER: Challenge on the ground that

the Juror has conscientious scruples against capital punishment.

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. What is your business, sir?

A. Cigar manufacturer.

Q. Where do you live?

A. New Brunswick.

Q. Have you any conscientious scruples against capital punishment? 10

A. None.

MR. STRICKER: No challenge.

BY MR. STRONG:

Q. Where are you employed, Mr. Pressler?

A. I have a place on George street.

Q. That is your own place?

A. Yes, sir.

MR. STRONG: No challenge. 20

(Juror sworn).

50. WILLIAM H. PARISEN, called.

THE CLERK: Juror look upon the prisoners. Prisoners look upon the Juror. Does the defense challenge?

MR. STRONG: No challenge.

MR. STRICKER: Challenge on the ground that the talesman has conscientious scruples against capital punishment. 30

(Juror sworn on his *voire dire*).

BY MR. STRICKER:

Q. What is your business, sir?

A. Real estate broker.

Q. Where?

A. South Amboy.

Q. How old are you?

A. Forty-one.

Q. Have you any conscientious scruples against capital punishment?

A. None at all.

MR. STRICKER: No challenge.

THE COURT: Let the Juror be sworn.

(Juror sworn).

Jury complete.

Mr. Stricker opens the case for the State.

MARY SMITH, produced as a witness, on behalf
10 of the State, being duly sworn on her oath, according to law, saith:

DIRECT EXAMINATION.

BY MR. STRICKER:

Q. Mrs. Smith, where do you live?

A. Why, I live on the road from Tice's Corner through leading to Milltown.

Q. And you are the widow of Roman Smith?

20 A. Yes, sir.

Q. When did you last see him alive?

A. When he came through the lane just that morning.

Q. What morning?

A. That morning when the man asked me for the quart of milk.

Q. What date was that?

A. On Thursday, the eleventh.

Q. What month and what year?

30 A. October, wasn't it?

BY THE COURT:

Q. October of last year? Was it last October, or the year before?

A. This fall, you know.

BY MR. STRICKER:

Q. What time of morning did you see him alive?

A. Between nine and ten o'clock.

Q. When did you see him afterwards?

A. No more alive.

Q. Well, when did you see him dead?

A. After they had brought him in the house.

Q. Well, how soon after you saw him in the field?

A. Well, I saw him when he came from the field by the wagon house.

Q. Where did you see his body next?

A. After they had brought him in the parlor. 10

Q. How soon afterward was that?

A. Well, in the condition I was I couldn't just tell you how soon after.

Q. Well, was it the same morning, or was it later in the day?

A. It was that day, but what time I couldn't say.

Q. Was he dead or alive then?

A. He was dead. He was laid out dead.

Q. How old a man was your husband? 20

A. He was close on seventy.

Q. How old are you?

A. I was sixty in January.

Q. How long have you been married?

A. Why, thirty-eight years I think it was.

Q. Who lived at this house with you?

A. His father and mother. It was grandfather Smith and grandmother Smith's home.

Q. On the eleventh day of October who was living at that house with you?

A. Why, just my two sons and my five daughters were living at home with us. 30

Q. What happened on that day?

A. Why, as I was sitting over in the carriage house there was a man come along and asked for a quart of milk.

Q. Who is that man, do you know?

A. Well—

Q. Do you know who the man was that asked for the quart of milk?

A. I wasn't acquainted with the man.

Q. Is he here now?

A. It looks so, the man just sets before me.

Q. Point at him please.

(Witness indicates).

MR. STRICKER: Pointing to Lavieri.

A. He looks like the man.

Q. You say he asked for a quart of milk?

A. Yes, sir.

10 Q. What did you say?

A. Well, as I stood up I asked him had he something to put it in.

Q. Yes?

A. And he said he wanted to drink it.

Q. Yes?

A. And then my husband came along and he says, Mary, what does the man want? And I says he wants a quart of milk.

20 Q. Was he alone, or was there somebody with him, the man that asked you for the quart of milk?

A. He was alone.

Q. What did you do?

A. I walked over to the walk to the cellar, went right down the cellar, put the quart of milk in the pan, and I had some empty glasses there, and I put four glasses, I see there was three more men sitting there as I got over to the house.

Q. Sitting where?

30 A. Next to the house, along the house, we had some chairs there.

Q. I show you here a picture and ask you whether that is a picture of your house?

A. Yes, sir. Right there is where the men were setting (indicating).

Q. Will you kindly mark that?

BY THE COURT:

Q. They were sitting under the back porch on chairs?

A. Yes, sir. Next to the cellar.

Q. What did you do with the can of milk?

A. Well, I just went in the cellar and I took the quart measure and filled it and set it into an empty pan, put four glasses around it and set it on to a little bench out before the house.

Q. You brought it up out of the cellar?

A. Yes, sir.

Q. And put it near these men?

A. Yes, right near the men.

Q. What did they do?

A. Why, I don't know what they did. The man handed me a dollar then that bought the milk, and as I went in the house to get the change, I locked my door and went in for the change, and when I come out to turn the key to open the door, why, the man was ready to knock me down, and tied my hands. 10

Q. What did he do?

A. He took hold of me and throwed me right down on the floor.

Q. In the house or outside? 20

A. In the house, in the summer kitchen and tied my hands and feet.

BY MR. STRICKER:

Q. What else happened after your hands and feet were tied?

THE COURT: Ask her whether there was any more than one man did that.

MR. STRICKER: I am coming to that, Your Honor. 30

Q. What else happened when you were pushed down or knocked down?

A. Well, they searched about me and beated me.

Q. Who did?

A. Well, I couldn't say who, for I never seen daylight after they knocked me down. I had on a bonnet and they held my eyes and my mouth shut after they knocked me down.

Q. Did you hear anything?

A. I could hear that they run upstairs.

Q. Do you know how many men ran upstairs?

A. That I couldn't say.

Q. Can you say whether or not more than one went upstairs?

A. I couldn't say.

Q. I show you here a picture and ask you whether you recognize what that is?

10 A. Yes. That is the wagon house there.

BY THE COURT:

Q. What is it a picture of, Mrs. Smith?

A. That is the wagon house and that is the other little outbuilding.

BY MR. STRICKER:

Q. Will you kindly mark that for identification?

20 A. There is where my husband was coming along the last time I saw him. Right there. He was leading the horses by the lines.

BY MR. STRICKER:

Q. This you say is the wagon house?

A. Yes, sir.

Q. We will mark that with an arrow. And this you say is a little outbuilding?

A. Yes, sir.

30 Q. We will mark that with an "X". And here is the last place you saw your husband?

A. Right there about.

Q. I will mark that with an "X".

A. Yes, sir.

Q. Do you know what that is a picture of?

A. Yes, sir.

Q. What is that?

A. Why, the house and barn.

Q. Whose house is that?

A. Our house.

Q. Does the carriage house and the little building that I just showed you in the other photograph show on this picture?

A. Well, this is the front part of the wagon house, but the carriage house is back further.

Q. Well, is it in the same building?

A. Yes, sir. All join the same building.

Q. I will mark that with a letter "C". What part of your body was tied?

A. My hands and feet.

10

Q. Were you struck by anybody after your hands and feet were tied?

A. I was struck very badly there (indicating). But I didn't recognize it at the time it was done.

MR. STRONG: I object to that. Their question asked whether she was struck by anybody. It seems to me that is leading and improper for that reason.

(Question repeated by the stenographer).

THE COURT: Do you object to that?

20

A. I was.

MR. STRONG: Yes, I object as leading.

THE COURT: I will overrule the objection.

Proceed.

MR. STRONG: Prays exception.

Exception allowed and sealed accordingly.

J. J. BERGEN,

Judge.

Q. Do you know who you were struck by? 30

A. I don't know who I was struck by, but I was struck. Because I couldn't see.

Q. I show you one more picture, Mrs. Smith, and ask you whether you recognize that?

A. Yes, that is the door.

Q. Door of what?

A. What I unlocked. That is the door that I unlocked.

Q. Door of what?

A. Of the house. There was another kitchen door next to that. I don't see that on it.

Q. Do you know the shed where your husband was found?

A. Well, yes.

Q. Take a look at that and see whether you recognize that as being that shed?

A. Yes, I do, because I see the old rubbish there (indicating). That is the door.

Q. How long were you tied?

A. Well, I couldn't say how long.

10 Q. Who untied you?

A. My son, Joseph.

Q. And what did you do after you were untied?

A. Why, I don't know just really what I did do.

Q. Was there any money gone from your house after you became untied? That is, did you notice any was gone?

A. I couldn't look after that.

Q. Did anybody look after it?

20 A. Yes, my son looked after it and my daughter.

Q. Did you make any inspection of the house after you became free?

A. I didn't. No. I made no inspection. I wasn't able to.

Q. How long were you disabled?

A. Well, I was in bed up until on Sunday, and then I sat up a little in a chair.

Q. Well, are you able to describe the condition of the house on the afternoon of October eleventh after these men had been there.

30 A. No, I couldn't say anything about the looks of the house.

Q. Do you remember being in the Prosecutor's office upstairs here on March twenty-second in my office in this building?

A. I know I was here, but I didn't just remember the date now.

Q. How long ago is that that you were here?

A. Well, I am very forgetful. I couldn't remember.

Q. Well, was it within the last ten days?

A. Yes.

Q. At that time who was in my office? Who was there?

A. Well, Uncle Joe Smith was with me, and Aunt Carrie and my son Joseph, and I saw those men.

Q. What is that?

A. I saw these men.

MR. STRICKER: Stand up, Joe Lombardi. 10

Q. Was this gentleman there?

A. Yes, sir.

Q. Was this gentleman there (indicating Mr. Peltier)?

A. Yes, sir.

Q. Were these two men asked anything in your presence while you were there?

A. I think this one was.

Q. Which one?

A. The one that is sitting right before me. 20

Q. Point at him please.

A. One right here (indicating).

Q. What was he asked?

A. Well, I couldn't just tell you what he was asked.

Q. Well, what did he say?

A. I didn't realize what he replied.

Q. Can you remember one single thing that was said there while you were up there, Mrs. Smith?

A. I took it that he acknowledged it. 30

MR. STRONG: I object.

Q. What did he say? What was said?

MR. STRONG: In the first place she has not identified this man positively, and now to attempt to say that he made a statement like that seems to me is not the proper way to prove it.

THE COURT: What is your motion? What do you ask me to do?

MR. STRONG: Repeat the question, please.

(Question repeated by the stenographer).

MR. STRONG: I do not think he has laid the foundation for that question because they have not identified the man.

THE COURT: She points out this one man as being there.

MR. STRONG: I did not so understand it.

THE COURT: I will allow the question.

MR. STRONG: Prays exception.

Exception allowed, sealed accordingly.

10

J. J. BERGEN,
Judge.

MR. STRONG: She has furthermore answered the question by saying she didn't remember what was said.

A. My memory is poor. You can say something to me to-day and I will hardly know it to-morrow. I can't help it.

THE COURT: Suppose you find out whether she
20 remembers anything.

Q. Do you remember this man saying anything (indicating Mr. Peltier)?

A. I know what I said to Mr. Peltier.

Q. Did you hear Mr. Peltier say anything to anybody? Will you kindly answer the question? I am asking you whether you heard Mr. Peltier say anything to anybody in that room?

A. I can't very well answer it.

Q. Can you answer whether you heard him say
30 anything?

A. I can't remember what was said.

Q. That is not the question. Did you hear him say anything? Just say yes or no. That is all.

MR. STRONG: Or whether she can remember.

THE COURT: She has to remember it if she heard it.

BY THE COURT:

Q. Won't you answer the question?

A. I would like to but I can't just say what I should say.

Q. The question is did you hear him say anything to anybody? Not what he said. Did you hear him speak?

A. I heard him speak but I don't know what he—

THE COURT: That is enough.

BY MR. STRICKER:

Q. Did you hear this man in front of you speak, the man you pointed out as having been there? 10

A. He spoke but I can't say what he said.

Q. Did you see anybody about your place on the ninth of October, two days before the murder?

A. There was three men came that day and asked for a quart of milk.

Q. Would you recognize those men?

A. I couldn't recognize them—those men; no, sir.

MR. STRONG: I move that question and answer be stricken out. 20

THE COURT: It is perfectly proper. She says she does not recognize them.

MR. STRONG: Allow me an exception.

THE COURT: Yes.

Exception allowed and sealed accordingly.

J. J. BERGEN,
Judge.

Q. What time of the day were those three men there on the ninth? 30

A. Why, a little after nine o'clock in the morning, or somewhere about nine o'clock.

Q. Did they stay there long?

A. No, sir; they didn't stay long.

Q. Did they get their milk?

A. I was in a hurry and I just brought their milk up and left them there and they had their milk and walked away and said good-bye.

MR. STRICKER: Cross-examine.

CROSS-EXAMINATION.

BY MR. STRONG:

Q. What is the distance from the house where you were tied to the place—to the shed that you have shown us where your husband's body was found?

MR. STRICKER: I have a chart I am going to introduce which will show you all the distances.

10 Q. You have had a good deal of trouble with your eyesight, have you not, Mrs. Smith?

A. My eyesight is better than my memory.

Q. Your memory is rather poor?

A. Yes, sir.

Q. Do you mean to say positively, Mrs. Smith, that you saw the man next to me, do you identify him as Lavieri, at the Prosecutor's office at the time you spoke of?

A. Yes, sir.

20 Q. And the man next to him, De Palma?

A. Yes, he looks very much like the one that I saw that day.

MR. STRONG: No questions.

THE COURT: Call your next.

FORREST L. SMITH, produced as a witness, on behalf of the State, being duly sworn on his oath, according to law, saith:

30

DIRECT EXAMINATION.

BY MR. STRICKER:

Q. Mr. Smith, you are a civil engineer?

A. Yes, sir.

Q. State whether or not you made the drawing that is now being tacked on the wall?

A. I made those drawings, yes.

Q. And under the directions of the Prosecutor's office?

A. Yes.

Q. Now, will you kindly step down and take a rule—

A. The location of the—

Q. Just a minute. Where is the road from New Brunswick to South River?

A. New Brunswick is in this direction, and South River is off this direction, indicated by the arrow.

Q. I note you have marked on there "Rider's Lane."

10

A. Yes. That is this road here.

Q. That runs East and West?

A. Yes.

Q. Where is the Smith property on that?

A. Right in the centre of this map.

Q. Will you kindly put a ring around it?

A. The barns and houses are colored.

Q. The circle contains the buildings of the Smith property?

A. Correct.

20

Q. How far from the main road is the house located?

A. The house is eighty feet from the road.

Q. And how far is it from the New Brunswick Turnpike?

A. About twenty-five hundred feet.

Q. Now, is the drawing to the left of the big chart, a detail of the Smith buildings?

A. Yes, that is the detail drawing.

Q. Will you kindly explain what those buildings are?

30

A. This in red is the house, and the subdivisions are the principal rooms on the main floor, the lower floor; and next to that building is the garage, next comes the wagon house, carriage house, woodshed, and this in green is the barn and stable, water tank, corn crib; and this in red is the tool house, and the pen in back of that, and the shed in the back of that. And this dotted figure are hot beds fenced in, and there is a hot bed right

here, on this other map at the edge of a woods, that is boarded in.

Q. While you are standing over there will you kindly indicate to us whether there is any woodland in the vicinity of the Smith house, and if so, where?

A. There is a great deal of woodland to the East of the house on both sides of the road, and at a distance of thirteen hundred feet from the house,
10 there is a very heavy woods, known as Fisher's woods.

Q. Will you kindly step over to this side and explain the floor plan of that house?

A. The one to the left is the first floor plan. This is a country house. It has been built in sections, piece by piece added. The first room to the left is the parlor, sitting room in the centre, and dining room on the extreme West. South of the dining room is a small kitchen that the family
20 call the summer kitchen. The kitchen is entered by a door from the West, and one from the South; and the dining room is entered from a door from the West. There is direct communication between all rooms on the lower floor. The upper floor contains six bed rooms and several closets. These small figures are dressers that were supposed to have been ransacked. There are two ways of getting upstairs, one on the extreme Northwest corner—

30 MR. STRONG: I do not want to interpose unnecessary objections, but I suppose you are going to show what he is testifying about now, about those dressers having been ransacked.

MR. STRICKER: Yes.

A. I said supposed to have been.

MR. STRONG: Yes, but they are not supposed to have been as far as any testimony is concerned.

Q. Proceed, Mr. Smith, please.

A. The stairs running up to the bed rooms are in the corner of the building, Northwest corner,

and also between the parlor and sitting room. These small lines here indicate the windows, and these heavy lines placed diagonally are doors.

Q. Is that plan drawn to a scale, Mr. Smith?

A. It is. Scale of one-quarter inch to one foot.

Q. Was it drawn to scale?

A. Yes, sir.

Q. And these drawings were made by you personally?

A. Yes, sir.

10

MR. STRICKER: Cross-examine.

MR. STRONG: I presume you will also show, Mr. Stricker, the barn where Mr. Smith's body was found?

MR. STRICKER: Yes. The body was found in a little building opposite the carriage shed.

A. Here is the carriage shed.

MR. STRICKER: This is the building where the body was found.

A. That is the tool house. That must be right there. Shall I put the "X" here? 20

Q. Yes.

CROSS-EXAMINATION.

BY MR. STRONG:

Q. What is the distance from the house to the tool house?

A. From the house to the tool house?

Q. By the walk? You would not walk through that intermediate building. 30

A. No. It is just ninety-five feet.

Q. And what building is that that is interposed between the house and the tool house, and obscures the view?

A. Do you refer to that (indicating)?

Q. No. That large building in yellow.

A. That is the wagon house. The carriage house is built right into it, and colored red.

Q. And next below that is what?

A. Next below is a wood shed, part of it is a henhouse.

Q. Off to the left of the wagon house, what is that, the garage?

A. That is a garage.

MR. STRONG: That is all.

MR. STRICKER: That is all.

DR. EDGAR J. CARROLL, produced as a witness,
10 on behalf of the State, being duly sworn on his oath, according to law, saith:

DIRECT EXAMINATION.

BY MR. STRICKER:

Q. Doctor Carroll, you were former County Physician of Middlesex County?

A. Yes, sir.

Q. And you have recently surrendered that
20 office?

A. Yes.

Q. As County Physician did you make an autopsy on the body of one Roman Smith?

A. Yes, sir.

Q. Where?

A. Near South River. October eleventh.

Q. And what was the result of that autopsy?

A. The result showed—

THE COURT: Last year, do you mean?

30 A. Yes. He died of internal hemorrhage, due to a gun shot wound of the aorta. The ball entered between the upper border of the scapula and the spinal column, and passed out the second intercostal space to the left of the sternum, the breast bone.

BY THE COURT:

Q. Entered the back of his head and came out of his breast?

A. No. The back between the upper border of the scapula.

Q. The jury do not understand that. Can you say whether it was his back, or shoulder, or neck?

A. I can demonstrate to them if you wish.

Q. Indicate where the bullet went in.

A. It went in, the one that killed him, about that point (indicating), and it emerged in the second intercostal space, to the left of the breast bone, immediately, and in its course it passed through the right lung and the aorta and the muscles of the chest.

10

BY MR. STRICKER:

Q. Where is the aorta, doctor?

A. It is the largest vessel of the body. It leads off from the heart and carries all the blood that passes through the heart to the system at large.

MR. STRICKER: Cross-examine.

MR. STRONG: No questions.

BY MR. STRICKER:

20

Q. How many bullet holes did you find on the body of the deceased?

A. Six. One entered the right side of the neck about an inch below the angle of the right jaw, and two inches or more farther back on the right side of the neck, and it emerged just below the angle of the jaw on the left side. That is the course it took (indicating).

Q. How many bullets do you suppose were fired, doctor?

30

A. Three. That ball made two openings. Each ball made two openings. There were six wounds. Three in front and three behind. There was also a wound about four inches below the lower angle of the shoulder blade on the right side. That ball emerged about two inches below the margin of the ribs on the left side, and about two inches to the left of the middle line of the body.

Q. Any of these wounds fatal?

A. The one that went through the aorta was necessarily fatal.

MR. STRICKER: Cross-examine.

MR. STRONG: That is all.

ISAAC VAN DERVEER, produced as a witness, on behalf of the State, being duly sworn on his oath, according to law, saith:

DIRECT EXAMINATION.

10 BY MR. STRICKER:

Q. Mr. Van Derveer you are a photographer who took the pictures which are marked for identification here?

A. Yes.

Q. Will you kindly tell the Court and Jury what they are and whether they are true reproductions of the building which they depict?

A. This is a shed, an open door that was pointed out to me where the body was found, of Mr.
20 Smith. This photo is a general view of the house and outbuildings.

MR. STRONG: It seems to me these photographs should be marked in some way for identification.

(Photograph marked Exhibit P No. 1 for Identification).

(Photograph marked Exhibit P No. 2 for Identification).

BY THE COURT:

30 Q. What is that?

A. That is a general view of the house and the outbuildings to the place. This is a back view of the house, showing the back entrance door into the house, and also a bench where the men were sitting.

(Photograph marked Exhibit P No. 3 for Identification).

A. This view shows a lane coming in from the field. Also the wagon house and the shed where the body was found.

(Photograph marked Exhibit P No. 4 for Identification).

MR. STRICKER: Anything further, Senator?

MR. STRONG: I think not.

MR. STRICKER: I offer the photographs and the drawings.

(Photographs heretofore marked P 1, P 2, P 3, and P 4, for identification, entered in evidence and marked Exhibit P No. 1, P No. 2, P No. 3, and P No. 4).

(Large drawing entered in evidence and marked Exhibit P No. 5).

(Smaller drawing of buildings entered in evidence and marked Exhibit P No. 6).

(Detail plan of rooms entered in evidence and marked Exhibit P No. 7).

10

JOSEPH J. SMITH, produced as a witness, on behalf of the State, being duly sworn on his oath, according to law, saith:

20

DIRECT EXAMINATION.

BY MR. COAN:

Q. Where do you live?

A. On the road leading from Old Bridge road to Tice's Corner.

Q. Did you know Roman Smith?

A. Yes, sir.

Q. Were you related to him?

A. He is my father.

Q. When did you last see your father alive?

A. Eight o'clock on the morning of October eleventh.

Q. Where did you see him at that time?

A. Going out to the farm.

Q. Where did you next see him?

A. I next found him in the tool shop dead.

Q. What time was that?

A. Why, as near as I can judge it was about half past nine, or quarter to ten.

30

Q. What was it caused you to go to the tool shop?

A. Why, I couldn't find my father when I came back from Milltown with the doctor for my mother.

Q. Speak louder.

A. I say I couldn't find my father when I came back from Milltown with the doctor. He hadn't arrived at the house as yet and I went out to look
10 for him.

Q. Had you seen your mother before that?

A. Yes, sir.

Q. Where did you see your mother?

A. I found my mother when I came in from the field after I saw the men running away from the place.

Q. Where did you see the men running away from the place?

A. Across the field towards Sayre and Fisher's
20 Woods.

Q. What part of the field?

A. Why, I should judge it was about one hundred yards away from the house.

Q. Where were you?

A. I was across in the field, across from the house, plowing.

Q. Will you come down and indicate on this map, if you can, where that field was that you were plowing in?

A. This map here? Yes, sir. The field lies
30 right across the road from the house right here (indicating). Right about there.

Q. Mark it, will you please? Just mark with your initials the field where you were plowing, please.

A. (Witness indicates).

Q. Where was it that you saw the men that you speak about, mark that with "M".

A. (Witness marks).

Q. Which direction were those men going?

A. Going in the direction of Sayre and Fisher's Woods.

Q. How many men were there?

A. Four.

Q. Can you describe any of them or their clothing?

A. I can describe the clothing of one. One was dressed in either a dark blue or black suit. That is all. And the others were lighter dressed.

Q. Did you observe whether or not they carried anything? 10

A. Yes, sir. The one man carried a shot gun over his shoulder.

Q. After you had seen those men what did you do?

A. I ran home. Left the team standing and ran home.

Q. Before you saw those men had you heard anything?

A. No, sir. 20

Q. Well, when you got home where did you enter?

A. I entered the summer kitchen.

Q. What did you find there?

A. I found my mother lying on the floor bound hands and feet, almost out of breath.

Q. What have you to say as to your mother's person?

A. As to her person? Why, she was tied hands and feet, and she had a bad cut on the back of her neck, bleeding very badly, and I released her hands and feet, and set her in the room there and went to the nearest neighbor to get a woman to stay with her while I went for a doctor. 30

Q. After you came back with the doctor, you say you found your father's body?

A. When I came back with the doctor my father hadn't arrived to the house and I went out to look for him, and I found his body lying in this tool shed.

Q. And what was his condition then? Was he alive or dead?

A. He was dead.

Q. Did you examine the house after that?

A. Why, I didn't take—I just went around the house and saw the bureaus and everything all upset. Beds and everything.

Q. When did you get around through the house?

10 A. After I came back with the doctor.

Q. Where did you find the bureaus and dressers upset?

A. In the dining room downstairs the chiffonnier was all throwed open, up in my father's bed room the bureau and beds were all torn apart and my sister's room the dresser was all thrown open. Everything all over the floor.

Q. Do you know whether or not anything had been taken from the house?

20 A. I didn't know anything until my sisters came home until I found out what they had. Sisters lost—

MR. STRONG: I object. Because what he learned was hearsay.

THE COURT: That is not competent. They will have to prove that by the sister.

Q. You haven't any personal knowledge of what was in the house?

A. I know that my sister lost a watch and pin.

30 MR. STRONG: I object. Because he says his knowledge was obtained from his sister's statement.

THE COURT: You did not answer the question. (Question repeated by stenographer).

A. Why, yes, I know what was in the house.

MR. COAN: Cross-examine, Senator.

MR. STRONG: No questions.

THE COURT: Call your next.

VITO DOMINICO MICHISIO, produced as a witness, on behalf of the State, being duly sworn on his oath, according to law, saith:

DIRECT EXAMINATION.

BY MR. STRICKER:

(Through Interpreter Joseph Lombardi).

Q. Where do you live?

A. Boston.

10

Q. Whereabouts in Boston?

A. 121 Salem Street.

Q. Do you know the defendant, Frank Lavieri?

A. Yes, sir.

Q. How long have you known him?

A. About twenty-four or twenty-five years.

Q. During the month of November, 1917, did you meet Frank Lavieri?

A. Yes.

Q. Where?

20

A. Boston, where he was working.

Q. Whereabouts is that? Where was he working?

A. At the Liebensec, Boston.

Q. What is the name of the factory?

A. I don't remember. I have got it in my pocket. I have a check here.

A. The name of the company.

Q. Well, what is the name? Can you read it?

A. No, I can't read it.

30

Q. Well, is it in the City of Boston or the outskirts of Boston, or where?

A. Five cent carfare outside of Boston.

Q. What part of the month of November did you see Lavieri?

A. Boston.

Q. What time in November was it that you met Lavieri?

A. Twenty-sixth or the twenty-seventh of November.

Q. How do you fix that time?

A. Because I went to New York and then I returned and I went to work at Liebensec and I found him there.

Q. I know, but how do you know it was the twenty-sixth of November?

A. I don't remember, but that is how I can place it.

Q. Did you have a conversation with Lavieri?

A. Yes.

10 Q. What did he say to you?

A. I asked him what is the trouble about Salvatore Forillo; and he answered me that he is innocent.

Q. Who is innocent?

A. Forillo.

Q. Well, what else did he say?

A. I am guilty of that case in New York.

Q. Did he say New York or outside of New York?

20 A. Outside of New York.

Q. Subsequent to that conversation state whether or not you had Lavieri arrested in Boston?

A. Yes, I had him arrested because I give him my money and he come up to kill me at my house.

Q. Well, did you at the time subsequent to the arrest have another conversation with him?

A. No.

Q. Did he say anything to you?

30 A. He told me about this case here.

Q. Well, what did he say?

A. He said, I am guilty of that case in New Jersey.

MR. STRICKER: Cross-examine.

CROSS-EXAMINATION.

BY MR. STRONG:

Q. How much money did you get to come here this time?

A. Nothing.

Q. What did you come here for, fun?

MR. STRICKER: I object to that.

A. Because I was called by the law.

Q. Did the law call you out of the City of New York or out of the City of Boston to come here?

A. Yes, from New Brunswick.

Q. Were you ever convicted of a crime?

A. No.

Q. What part of Italy did you come from? 10

A. Provinsio Debarro Goradi.

Q. Were you not convicted of theft, of stealing, when you were in Italy?

A. I got a clear passport. Frank Lavieri came without a passport.

Q. How long did Lavieri work with you in Boston?

A. I don't know. Probably a couple of months.

A. I don't know. Probably about a couple of months. A month or two. He worked in the day 20 shift and I worked on the night shift.

Q. What kind of work did he do?

A. He was working with a shovel.

A. He was a hard worker, wasn't he?

A. I don't know. I was working at night.

Q. He was a good worker, wasn't he?

A. I don't know if he was good or bad, because in my town, in my city he was always known as a thief.

MR. STRONG: One minute. I ask the last part 30 of that answer be stricken out as unresponsive.

THE COURT: It may be stricken out.

MR. STRONG: That is all.

MR. STRICKER: That is all.

ADJOURNED UNTIL TWO P. M.

AFTERNOON SESSION, TWO P. M.

VINCENT SERAFINI, produced as a witness on behalf of the State, being duly sworn on his oath, according to law, saith:

DIRECT EXAMINATION.

10 BY MR. STRICKER:

Q. Mr. Serafini, what is your business?

A. Clergyman, sir, and official Court Interpreter of Trenton.

Q. Of what County?

A. Mercer County.

Q. What languages do you interpret?

A. Italian and English.

Q. On the twenty-second day of February of this year did you see the defendant Frank Lavieri?

20 A. I did.

Q. Where?

A. In the County Jail of Mercer County.

Q. Trenton?

A. Trenton.

Q. And while at that jail did you receive a statement from him concerning this case which is on trial?

A. I did.

Q. Who was present at the time?

30 A. Mr. Lombardi, and County detective, the gentleman who is walking.

Q. Was that statement which you obtained from him in Italian?

A. Yes, sir.

Q. Did you reduce it to writing?

A. I did.

Q. And before taking the statement was there anything said to the defendant?

A. Yes, sir.

Q. What?

A. He was warned that whatever he said—

MR. STRONG: No. What was said? What did you say to him?

A. He was told, whatever you will say may be used against you at the trial which will take place.

Q. Was it after that that he made the statement which you reduced to writing?

A. Yes, sir.

Q. Was that taken down in your own handwriting?

10

A. Yes, sir.

Q. I show this paper to you and ask whether or not this is the statement?

A. Yes, sir.

Q. Did you translate that statement into English?

A. I did.

Q. And what did you do with the translation?

A. I handed the original Italian and the English translation to the County detective of your office. 20

Q. Is this the translation in your handwriting?

A. No, not this. Not my handwriting.

Q. Who took down the English of it?

A. Well, Lombardi took some English, but I made a translation of the statement.

Q. After this statement was taken, who signed it?

A. Mr. Lavieri.

Q. And who signed as subscribing witnesses? 30

A. Mr. Lombardi, the detective, and myself.

Q. Now, will you kindly read that statement?

MR. STRONG: I object.

MR. STRICKER: It is in Italian.

MR. STRONG: I submit it ought to be shown whether that statement was voluntary or not.

THE COURT: You may cross-examine.

MR. STRONG: Yes, I would like to.

SPECIAL CROSS-EXAMINATION.

BY MR. STRONG:

Q. How did you come to get that statement?

A. By what was said in the consulting room of the County Jail in Trenton it seemed as if Mr. Lavieri had sent for the persons who were there in order to make a statement.

Q. Did you hear him send for them?

10 A. By what was said there.

Q. Do you know whether he sent for them?

A. I know by what he said at that time when I was present.

Q. That is all you know?

A. Yes, sir.

Q. How did you first know that a confession or statement was to be taken or made?

A. I did not know except by what Mr. Lavieri said himself.

20 Q. Who called you into it?

A. County detective and Mr. Lombardi.

Q. What county detective, of this county?

A. Of this county.

Q. And Mr. Lombardi is the County Interpreter here was assisting the County detective?

A. I think so.

Q. What did they say to you?

30 A. They said to me that there was a man in the County Jail who wanted to make a statement, and they wanted me to be present and take it.

Q. How much would they pay you for your services?

A. There was nothing said about it.

Q. How much did they pay you for your services?

A. I was paid at the rate of my regular fee, ten dollars a day.

Q. What time of the day was this they told you this statement was to be made?

A. I was in the County Jail several times, three times.

Q. What time in the day I ask you was it that they said that to you?

A. The last time it was about noontime.

Q. What time was the statement taken?

A. Immediately afterwards.

Q. Just about noontime?

A. Yes, a short time afterwards.

Q. Who were present?

A. Mr. Lombardi, the County detective, and myself and the defendant. 10

Q. What did Mr. Lombardi say to this man at the time?

A. Mr. Lombardi did not say anything to the man first.

Q. Yes, but afterward? Told him he would help him—

A. The questions were put through me.

Q. He told him if he would sign that paper he would help him all he could, didn't he?

A. No, sir. 20

Q. What did he tell him?

A. Mr. Lombardi said nothing.

Q. Told him it would be better for him if he signed that paper?

A. No, sir.

Q. He said nothing?

A. No, sir. The County detective asked the questions—

Q. He said nothing and yet you said a moment ago that he said nothing at first. What did he say afterwards? 30

A. Nothing of that kind.

Q. What did he say?

A. Of the kind of which you had reference.

Q. What did he say?

A. When?

Q. Afterwards to this man?

A. Oh, there was so much said.

Q. Tell me some of it.

A. The statement will show that.

Q. No, but what did—

A. It was in the course of the statement, simply asking the questions.

Q. What did Mr. Lombardi say about being—

A. As a preliminary question, do you mean?

Q. At any time?

A. Nothing.

Q. About the advisability of his making this statement?

10 A. He did not say anything of the kind.

Q. Nothing of the kind?

A. No, sir.

Q. Mr. Peltier, what did he say?

A. Mr. Peltier put the questions through me.

Q. What did Mr. Peltier say to him about the advisability of his making that statement?

A. Nothing about advisability.

Q. What did he say to him about making that statement?

20 A. He said to me warn him.

Q. He said to you to warn him?

A. That whatever he says may be used against him at the trial which will take place, and for him, if he does say anything, it must be voluntary.

Q. What did you do?

A. I translated verbally what Mr. Peltier said to me.

Q. Did you not say to him it would be better for him to make that statement?

30 A. No, sir.

Q. And did not Mr. Lombardi say to him that if he would sign that statement he would do all he could for him?

A. Mr. Lombardi did not take any part in that preliminary.

Q. Didn't Mr. Peltier make that statement then?

A. No, sir.

Q. And you didn't either?

A. No, sir.

Q. Just what did you say to him?

A. In Italian or in English?

Q. Well, anyway, as long as he understood it?

A. Well, I told him in Italian what I am telling you now in English, whatever he may say might be used against him at the trial which would take place, and whatever statements he made must be voluntary.

Q. Do you mean to say that man made that statement to you for fun? 10

MR. STRICKER: I object to that question.

THE COURT: He has not said that.

MR. STRONG: I am asking him whether he means to say it. I am just anticipating a little something.

(Question repeated by the stenographer).

A. I did not know, sir.

MR. STRICKER: I object to that question.

THE COURT: He has answered it. I will let it stand. 20

MR. STRONG: That is all.

BY THE COURT:

Q. What did the defendant say?

A. He said, I am making the statement of my own accord, and voluntarily.

THE COURT: Proceed.

A. He also added, I am willing to tell all.

THE COURT: I will admit the statement.

MR. STRONG: Prays exception. 30

Exception allowed and sealed accordingly.

J. J. BERGEN,
Judge.

DIRECT EXAMINATION (Continued).

BY MR. STRICKER:

Q. Will you kindly read that statement in Italian, that is, to yourself, and tell us what it contains in English.

THE COURT: Is that necessary? What good is it to read to the Jury in Italian?

MR. STRICKER: I am asking him to give us in English what that statement says.

MR. STRONG: I think it would be better for an interpreter here of Italian on our side to hold the Italian statement and the witness read the translation and see if they correspond.

MR. STRICKER: Yes, that is perfectly satisfactory
10 to us, Your Honor.

THE COURT: I understand there is no objection to this method.

MR. STRONG: I took the objection to the admission of the statement.

THE COURT: There is no objection to reading it?

MR. STRONG: No. That is my suggestion. Of course, reserving the objection I have already taken.

20 THE COURT: Certainly. You object to its admissibility. That is all. Proceed. Only read what he said. Did he sign the statement?

MR. STRICKER: Yes, sir.

THE COURT: Then read it all.

A. The fifth or sixth of October, 1917, I was
walking up Eighth avenue, New York, about
eight or nine p. m. I met Michael De Palma, and
Pasquale Indici at twenty-eighth street, corner of
Eighth avenue. Michael Pasquale called me
30 saying, come here. Pasquale, now, there is a good
chance; and I answered, what is it, and where?
Pasquale answered, you are always thinking of
where. You ought to think of something good,
sensible; and then asked me did I want to go and
rob a place where there are five or six thousand
dollars. And I answered, go and plow potatoes.
Pasquale answered, the money is there. I an-
swered, how do you know. Pasquale answered,
I know it. I asked, where? Pasquale answered,
I know it. I asked, where? And Pasquale an-

swered, South River, New Jersey. I asked if it was a store and Pasquale said no, it is a farmer. I asked when—

MR. STRICKER: Doesn't it say Pasquale Miele?

A. Pasquale Miele and also known as Pasquale Lo Ludic. I asked when we were to go and Pasquale answered we should go Monday night as at that time there is on one there. I asked Pasquale, are you coming? I can not come because my wife is pregnant, and about to be confined, and if I am away one night she will be scared. I asked who are the persons who are going? Michael De Palma answered, if Tony Abbruzzie, Genaro Napolitano, myself, meaning Frank Lavieri; Mike De Palma stated we would meet we would meet at the New York house, West twenty-ninth street, between tenth and eleventh avenues, Monday, October the eight, 1917, at noon hour; and we separated, each went his way. Monday, October eighth, 1917, a little before noon hour, I went to Mike De Palma's house and found Mike De Palma and Genaro Napolitano, in a little while Tony Abbruzzie came in. About twelve-thirty, noon hour, we four, Michael De Palma, Genaro Napolitano, Tony Abbruzzie and myself, Frank Lavieri, left the house, together and we went towards Eighth avenue and twenty-eighth street and Eighth avenue. We met Emanuel Napolitano and Michael De Palma called to Emanuel and they had a conversation which I could not hear as I was a short distance away, and all went to the pier thirty-one, boarded the ferry-boat over to Jersey City, where we got on a train for Old Bridge, New Jersey. Mike De Palma bought a ticket for Emanuel Napolitano and himself. Tony Abbruzzie bought his own. I, Frank Lavieri, bought my own, and Genaro Napolitano bought his own. About 1:15 p. m. we took the train, Michael De Palma, Genaro Napolitano, Tony Abbruzzie, Emanuel Napolitano, and my-

self, Frank Lavieri, at Jersey City, and arrived at Old Bridge about 2:30 p. m. or three p. m. Got off of the train and walked towards the farm of Roman Smith. We were all walking in a group. When we arrived within about fifty yards from Roman Smith's house, Mike De Palma said to me, Frank Lavieri and Emanuel Napolitano, you two stop here to watch who goes in and out of the Smith house. Mike De Palma, Genaro Napolitano, and Tony Abbruzzie went behind the chicken house in the woods and were watching the house. About six p. m. it started to rain and each one of us went in the corn stalks to keep from getting wet. About seven or eight p. m. it was still raining and we could hear the voices of many people in Smith's house. Then we went away. Genaro Napolitano and Mike De Palma went back to New York, I, Frank Lavieri, Tony Abbruzzie and Emanuel Napolitano went to the house of Frank Testore, Florence street, South River, New Jersey. Then after little time Tony Abbruzzie left for New York, and I, Frank Lavieri and Emanuel Napolitano went to Frank Mentarini's house at South River, New Jersey. Then went back to New York. About four p. m. the same day, October ninth, Mike De Palma, Tony Abbruzzie and myself met at Twenty-seventh street, and Mike De Palma asked us if we were going back to do that job in the daytime, as there will be no one there. We started about 5:15 p. m. and arrived at Runyon, New Jersey, about seven or seven-thirty p. m. In the woods we met Frank Mantarisi, and Sebastian Barti. We spoke with them a little and then Mantarisi and Barti went with their buggy, and De Palma, Abbruzzie and myself walked towards South River, New Jersey.

MR. STRONG: This was what date, if I may interrupt you?

A. October ninth. And went to Mantarisi's

house. About 10:30 Genaro, Tony Abbruzzie, and Mike De Palma returned to New York. I remained and slept at Mantarisi's house. On the morning of Tuesday, October tenth, 1917, about eight a. m. I met Mike De Palma and Tony Abbruzzie. Then we walked to the Smith farm and arrived there about nine-thirty, or ten a. m. Mr. and Mrs. Smith were there and we ordered a quart of milk. We drank it there. Mike De Palma paid for it. Our intention was to rob Smith that morning, but seeing that we saw Mr. and Mrs. Smith in the house, we went away. We three, Mike De Palma, Tony Abbruzzie, and myself, Frank Lavieri, returned to New York. Next morning early at the Pennsylvania station we met, myself, Frank Lavieri, De Palma, Abbruzzie, and Genaro Napolitano. We arrived at New Brunswick about eight a. m. October the eleventh, 1917. We boarded the trolley, rode out to the farm. We four stood in front of Smith's house, and we called to see if anyone was home, and Mrs. Smith came and we ordered a quart of milk. She brought the milk and one of us gave her a dollar bill. While returning from the house with the change, the door was open, Tony Abbruzzie and myself, Frank Lavieri, pushed her back. She fell to the floor. Tony Abbruzzie put his hand on her mouth and holding her I tied her hands with the rope that I had brought with me from New York. Tony Abbruzzie was watching her and I was searching the house for money. I found only seven or eight dollars in a small pocket-book. After being in the house five or six minutes, Mike De Palma came in the house and yelled, Frank, Frank, come on away, hurry; and I asked him why. Mike answered that Genaro Napolitano shot the owner, the old man, and he is dead; and then Genaro Napolitano came in the house and told me that he shot the old man three times. Also hit the old woman over the head with the

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20

30

butt of his gun three times. Then we all ran towards the woods. There we stopped and we divided the money, Genaro claimed he found in the barrel of a shot gun. Also gave the money I found. And we each received thirteen or fourteen dollars apiece from Genaro Napolitano. Then we all went towards New Brunswick, through the woods. Then at New Brunswick Tony Abbruzzie and myself stopped at the barber shop for a shave and a shoeshine. Mike De Palma and Genaro Napolitano went by themselves. Then we took train at New Brunswick, and arrived in New York 2:30 p. m. The morning of the murder of Smith I was wearing the rain coat I saw at the Prosecutor's office at New Brunswick, which I threw away on October the eleventh, 1917; the suitcase I saw at the Prescutor's office is the one Mike De Palma took with him the morning of October eleventh, 1917, from New York, which Mike De Palma left in the woods. I, Frank Lavieri, had a thirty-eight calibre revolver. Mike De Palma had a thirty-eight. Genaro Napolitano had an automatic gun, thirty-two calibre. Tony Abbruzzie had a thirty-two calibre revolver.

THE COURT: Was that signed?

A. The original was signed; yes, sir.

MR. STRONG: I would like to have the original marked for identification.

MR. STRICKER: I offer the original now in evidence.

MR. STRONG: Objected to before. And I understood it was offered and objected to but I do not think it has been marked.

THE COURT: I will admit it.

MR. STRONG: Prays exception.

Exception allowed and sealed accordingly.

J. J. BERGEN,
Judge.

(Statement of Frank Lavieri, consisting of eight pages, entered in evidence and marked Exhibit P. 8).

BY MR. STRICKER:

Q. The following day, February twenty-second, state whether or not you saw the defendant, Michael De Palma?

A. Yes, sir.

Q. Where?

10

A. At the Mercer County Jail, Trenton, New Jersey.

Q. At whose invitation did you go there?

A. At the invitation of the County detective of your office and Mr. Lombardi.

Q. Did you take a statement at that time from Michael De Palma?

A. I did, sir.

Q. A statement in writing?

A. Yes, sir.

20

Q. And before such statement was reduced to writing state whether or not anything was said to De Palma?

A. Yes, sir.

Q. State what was said?

A. Was said, whatever you will say may be used against you in the trial which will take place.

Q. Did, thereupon, you take his statement?

A. Yes, sir.

Q. Is this the statement (handing statement to witness)?

30

A. It is.

Q. Is that in your handwriting?

A. Yes, sir.

BY THE COURT:

Q. Was that statement read to him?

A. Yes, sir. It was taken in Italian and read to him in Italian.

BY MR. STRICKER:

Q. And at the conclusion of the reading who signed it?

A. He signed it, De Palma, and the County detective of your office, and myself, and Mr. Lombardi.

Q. Is this the defendant, De Palma's signature?

A. Yes, sir.

Q. Now, translate it.

10 MR. STRONG: We object to that on the ground it was not voluntary.

THE COURT: You object to the admission of the statement?

MR. STRONG: Yes.

THE COURT: I admit the statement and you take an exception.

Exception allowed and sealed accordingly.

J. J. BERGEN,
Judge.

20 MR. STRONG: Will Your Honor allow me to cross-examine the witness?

THE COURT: If you like, yes. Cross-examine before he translates it. The thing that is admitted in evidence is the original paper which is signed. This is now merely a translation.

MR. STRONG: Yes, I would like, with Your Honor's permission, to cross-examine this witness.

THE COURT: Certainly.

30 SPECIAL CROSS-EXAMINATION.

BY MR. STRONG:

Q. You received the same compensation for taking this confession as you did for taking that of Lavieri?

A. Yes, sir.

Q. Who were there?

A. Mr. Peltier and Mr. Lombardi, myself and the defendant.

Q. What time of day was that?

A. I think that was in the afternoon, early in the afternoon.

Q. You do a good deal of this sort of work, don't you?

A. I do all the work for Mercer County.

Q. You haven't answered my question at that. (Question repeated by stenographer).

A. I do not, with the exception of what I do for Mercer County. ... 10

Q. Even now you haven't answered the question. I don't want to humbug with you. You do a good deal then for Mercer County of this sort of work, is that it?

A. I do it only when there are murder cases of this kind.

Q. And when you are paid for it?

A. I am paid a salary. I am the Official Interpreter.

Q. For this sort of work? 20

A. For all sort of work that requires—in which my services are required.

Q. This being Middlesex, you charged them extra, was that it?

MR. STRICKER: Now, I object to this.

THE COURT: I do not think it is material, but I will allow it. Of course he expected to be paid, I suppose, for what he did.

MR. STRICKER: All interpreters are paid when they do work outside of their own County. 30

THE COURT: Answer the question.

A. Yes, sir; I was paid extra.

Q. You remember distinctly all about this—everything that was said there that day, don't you?

A. Pretty nearly.

Q. Do you remember that Mr. Lombardi, here, the Middlesex Court Interpreter, who was assisting in this case, stated to De Palma, that if he would sign that paper he would do all he could to help him?

A. I remember he did not say that?

Q. How do you remember that?

A. Because Mr. Lombardi had a letter which he had received from Mr. De Palma, in which letter De Palma in his own handwriting had asked Mr. Lombardi to come, that he wanted to make a statement to him.

10 Q. And you still think Mr. Lombardi could not have said after that to Mr. De Palma, that if he signed this statement that he would do all he could to help him?

A. I don't think. I know, sir, that he did not say so.

Q. How did you know it?

A. I was there.

Q. And you recollect everything was said there, do you?

A. I recollect; yes, sir. Any such statement had been made I would have heard it.

20 Q. Start in and tell us then what was said there that day from start to finish? Who spoke first and what did he say?

A. Mr. De Palma.

Q. He said what?

A. I did not say Mr. De Palma spoke first, but De Palma was told—

Q. Wait I ask you who spoke first?

A. Yes.

Q. Who did?

30 A. Mr. Peltier.

Q. What did he say?

A. He said we are here now.

Q. And that is all he said?

A. Yes, sir.

Q. You thought nobody knew that until he said that, was that it?

MR. STRICKER: I object to that question.

THE COURT: I will allow it. Answer the question.

MR. STRICKER: He is asking this witness what Mr. Peltier thought.

MR. STRONG: If the conversation is repeated in an effectual way here I think I have a right to ask this witness about it.

Q. Who spoke then?

A. De Palma said, yes, I sent for you. I want to tell the whole truth of the whole affair.

Q. Then who spoke?

A. Then Mr. Peltier put the question of warning to him through me.

Q. What?

A. Whatever he said might be used against him in the trial which would take place. 10

Q. Then who spoke?

A. And then Mr. De Palma said that he would—whatever statement he made was voluntarily, and without threat, and that—

Q. Just a moment. He used the word “voluntarily,” did he?

A. Voluntarily; yes, sir. And he would tell the truth of the whole affair. 20

Q. You think he knew the meaning of the word “Voluntarily?”

MR. STRICKER: I object.

A. It is a very common word in the Italian language.

THE COURT: Just answer the question. He asked you whether you thought he knew the meaning of it.

A. Yes, sir; I think so.

Q. Why?

A. Because it is a very common word in the Italian language. 30

Q. Then what?

A. Then he was asked to tell the story.

Q. Who asked him?

A. Mr. Peltier through me.

Q. Why should he be asked to tell when you say he came there to tell?

A. Well, in order to start him off, I suppose.

Q. Wasn't he told then and there that if he

would sign that statement that they would help him?

A. No, sir; there was no statement to sign at that time.

Q. But if he would make that statement they would help him?

A. No, sir.

Q. Go ahead. Who spoke then?

A. Then Mr. De Palma started his story.

10 Q. What did he say?

A. He said that he was at his house certain—
on a Sunday when Lavieri—

MR. STRICKER: Now, I submit that the best evidence here is the statement itself which was reduced to writing at the time.

MR. STRONG: He says he remembers all was said there that day.

THE COURT: I suppose that is hardly possible.

MR. STRONG: I think so too, Your Honor, but
20 that is what he swore to.

THE COURT: Well, do you think you will gain anything by this? You are giving him a chance to select instead of requiring the entire statement.

MR. STRONG: I do not know that I am so very strenuous about it; I would just as leave expedite the case. I will make the objection to the statement.

THE COURT: Your objection is that the statement is not voluntary?

30 MR. STRONG: That is the idea.

THE COURT: I overrule the objection and you may take an exception.

MR. STRONG: Prays exception.

Exception allowed and sealed accordingly.

J. J. BERGEN,
Judge.

THE COURT: Now, proceed and translate the statement which the defendant signed.

MR. STRONG: Subject to my objection, it may

be done as before, by my interpreter here holding the original and the witness reading the copy.

THE COURT: He has it. Proceed.

A. I went to live at South River, New Jersey, in the month of July, 1917. Moved from there on twenty-third of September, 1917, to New York City, 514 West twenty-ninth street. On October seventh, 1917, about six p. m. on Sunday, Frank Lavieri and Tony Abbruzzie came to my house on Twenty-ninth street in New York. I was alone. They both came in and sat down in the front room. Frank Lavieri spoke to me and stated, you lived at one of Roman Smith's houses, and I, Lavieri, heard that he, Smith, is a rich man, and said to me that I should show him where this Roman Smith lived. I answered, I don't know the house, I don't want to be mixed in any affair of that kind, as I have children and a wife. Frank Lavieri answered, never mind, we will make it our business to find out ourselves. Frank also saying, it is two months that I have been out of work and lost my head, and in some way those who have money must keep me. Then they went away saying good night. It was seven p. m. when they left. Two days after Frank Lavieri and Tony Abbruzzie came to my house on Tuesday, October ninth, 1917, about six p. m. Frank stated that he and Tony Abbruzzie were at South River, New Jersey, trying to locate the Roman Smith house. It was raining very hard and both got wet. Also stated were looking for a person who knew where Roman Smith lived, but couldn't locate him. Also stated they both stopped at Frank Mantarisi's house to dry their clothes. Frank then said to me, you must come along and show us where Roman Smith lives. I answered I did not want to be mixed up in any affair of that kind. Frank then stated to me that he would get my four suits out of paun that they stole from me about a year ago. Frank then said if I wouldn't

go along he threatened to rob me again. Also stated that he and Tony had robbed one Baroni, and not to be afraid, as nothing would happen, and said he was not afraid of ten men, all you got to do is to show us the house, then you may go away. As long as you threaten and force me, why, all right, I will show you the house from a distance and I will go away. Both Frank and Tony stated to me not to go away from the house, and when we are ready, we will come for you.

10 That was about 6:30 p. m. Tuesday, October ninth, 1917, when they left. The morning of Thursday, October eleventh, 1917, at about one a. m. I and my wife were asleep and I heard a knock on the door, and asked, who is it? And recognized Frank Lavieri's voice, who answered, it is me. And I opened the door and Frank Lavieri said, we are going, we will wait for you at the Pennsylvania Station, Thirty-third street,

20 New York. And I got dressed and went to the Pennsylvania depot and found Frank Lavieri, Tony Abbruzzie, and Genaro Napolitano. Frank Lavieri had tickets for me and himself. The others bought their own tickets. We got on the three a. m. train to New Brunswick, New Jersey. It was still dark. Then we followed the car track to South River, New Jersey. It was about four fifteen a. m. and we arrived at South River about seven a. m. and sat down on the main

30 street near the woods. Frank then said to me, come on and show us. It was about nine a. m. when we went. As we were approaching the house I showed the Roman Smith house to Frank and the rest motion about it. Also said I was going and Frank stopped me saying, wait, don't go away. Frank said, come on, we will go and drink some milk. I answered I had no desire for milk, and he might know me because he came near the house I lived to pick peaches. Frank answered, it is better that he knows you, then he will not

suspect anything. The four of us went to the house to buy milk. I said to Frank, don't do anything now, as I will yell. Wait until I get away. Frank gave me his hand to assure me, and said, we will come tonight or tomorrow. Frank Lavieri took out a dollar bill and offered it to the wife of Roman Smith. While we were drinking milk the wife of Smith went into the house to get change, and then Frank Lavieri placed his hand on her mouth, pushed her into the house, and Tony Abbruzzie followed and closed the door. Genaro Napolitano pulled out an automatic gun and went looking for Roman Smith. I ran towards New Brunswick trolley track. When about fifty paces away I heard three shots but don't know who fired them, as Frank Lavieri, when he entered the house and placed his left hand over the mouth of Mrs. Smith, pushing her in the house with his body, had a revolver in his right hand, as he was carrying the two revolvers. As he had a belt on. One stuck in each side of his stomach. I kept on running and Frank Lavieri, Tony Abbruzzie and Genaro Napolitano got up to me about a mile from Roman Smith's home in about fifteen minutes after I left, and Frank Lavieri said to me—

MR. STRONG: Just a moment. In the original interpretation the calibre of those revolvers is not mentioned.

THE COURT: Let him take the original and read it.

MR. STRONG: If the original and translation do not agree, that is another objection.

A. Frank had a belt and he had two revolvers, one on each side of his stomach. I continued to run and Frank Lavieri, Tony Abbruzzie, Genaro Napolitano they got up to me about a mile away from the house of Roman Smith, in about fifteen minutes after. Frank Lavieri said to me to be careful and not say anything because Mrs. Smith

knows you. Then Frank said also, if you should be arrested do not mention our names.

MR. STRONG: Just a moment. We have gotten beyond the calibre of the revolver and there is nothing said about it in the original confession.

THE COURT: Aren't you reading from the original now?

A. Yes.

10 MR. STRONG: He has got past that portion of the statement where he got past the calibre of the revolver and there is nothing in it. In other words, the translation wasn't a correct translation.

THE COURT: Well, he has corrected it since.

MR. STRONG: If the Prosecutor admits that there is nothing in there about the calibre of the revolvers—

20 MR. STRICKER: Will you kindly go back to where he said he heard three shots but don't know who fired them and see whether there is anything there about calibre?

30 A. Yes, sir. I ran away towards the trolley tracks of the trolleys that go to New Brunswick, and when I was about fifty paces away I heard three shots, but I do not know who fired them. Frank Lavieri when he entered in the house he put his left hand on the mouth of Mrs. Smith, pushing her in the house with his person, and had a revolver in his right hand. Frank had a belt and had two revolvers, one on each side of his stomach.

MR. STRONG: Now you see there is nothing there about the calibre.

MR. STRICKER: That is correct.

THE COURT: Proceed with the balance of it.

MR. STRONG: Now, I would like the witness to hold his translation, and my interpreter have the original to see whether there are any more mistakes.

THE COURT: What do you want corrected in the original statement, something stricken out?

MR. STRONG: I want stricken out of the witness' testimony what was said about the calibre of the revolvers. It is now admitted by the Prosecutor that there is nothing stated there about the calibre of the revolvers.

THE COURT: Mr. Stenographer, turn to that portion of it in the record and strike it out.

THE STENOGRAPHER: Yes, sir.

THE COURT: It is now stricken out. Now proceed.

A. And Frank said if you ever get arrested and mention our names we will kill you. Then Tony Abbruzzie said the same, that he would kill me if I told anyone. Genaro said the same. I then asked the three what happened, and Genaro answered that the old Smith was very angry and I lost my head and shot him three times. I asked Frank, what did he do, and he answered that Tony Abbruzzie held the woman and I, Frank Lavieri, was looking and searching for money. Said he did not find any. Then I said, I will not go with you, and left and went one way and they went another way. I got on a trolley to New Brunswick. From there on the Pennsylvania train to New York. About half-past twelve and one p. m. The suit case I saw at the Prosecutor's office was mine, but it was stolen from me about a year ago. The cap belonged to Tony Abbruzzie, and the raincoat was Frank Lavieri's. He wore it on the morning they killed the farmer, Smith. Last Sunday, February seventeenth, 1918, about three p. m. Frank Lavieri yelled to me from his cell window in Italian that I should not open my mouth, that he had sent for an official and was going to make a statement involving Frank Mantarisi, Sam Batti, and Pasquale Lo Iudici, and Emanuel Napolitano saying, as long as I am in jail, will have them in with me. That is the end of the statement, signed by De Palma and Mr. Lombardi, Serafini, and Peltier as witnesses. And

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also Mr. Darci, the jailer of Trenton Mercer County Jail.

MR. STRICKER: That is all of this witness.

MR. STRONG: No questions.

MR. STRICKER: I would like to have an opportunity to offer the translations of these statements.

THE COURT: Any objection?

MR. STRONG: I shall object to the translations. I do not think they are accurate. I have heard
 10 in one respect they have been shown to be inaccurate in an important respect. And the language of the translation in other respects seemed to me not corresponded with the original.

THE COURT: As I understand it the witness has testified to the translations.

MR. STRICKER: Yes, sir.

THE COURT: The jury understands the contents of those, unless it is contradicted. Now, you offer in evidence the original?

20 MR. STRICKER: Together with the translation; yes, sir.

THE COURT: Why the translation?

MR. STRICKER: That translation has been very slowly and deliberately read, and whilst the interpreter for the defense had the Italian in his hands, and he does not—

THE COURT: I do not have any trouble with the first translation, but with the second there are apparently errors.

30 MR. STRICKER: There is one error in that and that was discovered by the interpreter for the defense, and the only challenge he advances to that document is the fact that it contained the statement of the calibre of the revolvers. That was stricken out.

THE COURT: That is another question.

MR. STRICKER: That we strike out, and with that one portion of it being stricken out, this translation remains unchallenged. Now, the statement itself is absolutely useless to the jury unless they know what it contains.

THE COURT: We will assume that the translations are copies. Now, you still object to them, do you?

MR. STRONG: I still object to them.

THE COURT: I will admit them. You may take an exception.

MR. STRONG: Prays exception.

Exception allowed and sealed accordingly.

J. J. BERGEN,
Judge. 10

(Translation of Exhibit P 8 entered in evidence and marked Exhibit P 9).

(Statement of De Palma, consisting of seven pages entered in evidence and marked Exhibit P 10).

(Translation of this statement entered in evidence and marked Exhibit P 11).

JOSEPH LOMBARDI, produced as a witness on behalf of the State, being duly sworn on his oath, according to law, saith: 20

DIRECT EXAMINATION.

BY MR. STRICKER:

Q. Mr. Lombardi, you are the Official Court Interpreter of Middlesex County, in Italian?

A. Yes, sir; the Italian Court Interpreter.

Q. And you have assisted the Prosecutor's office in the preparation of the case which we are now trying? 30

A. Yes, sir.

Q. Were you present at the Mercer County Jail on the occasion when Frank Lavieri signed the statement which was taken down by Interpreter Serafini?

A. I was.

Q. Were you also present when Michael De Palma made the statement which was prepared by Mr. Serafini?

A. I was.

Q. Did you see Michael De Palma sign that statement?

A. I did.

Q. And before the same was read to him?

A. Yes, sir.

Q. In what language?

A. In Italian.

Q. And did you sign your name as subscribing
10 witness?

A. I did.

Q. Was there anybody else present other than Detective Peltier?

A. The defendant, Frank Lavieri, and at one—
Dr. Serafini and myself.

Q. Was there anybody else who spoke Italian beside you and Dr. Serafini?

A. Only the defendant.

Q. I mean—

20 A. No. Nobody else.

Q. Whilst this statement was being taken down what language was used?

A. Italian.

Q. Directing your attention to the twenty-second day of March of this year, I ask you whether you were present at the Prosecutor's office?

A. I was.

Q. Who were there besides yourself?

30 A. Mike De Palma, Genaro Palmieri, also known as Genaro Napolitano, Frank Lavieri, and Emanuel Napolitano, Mr. Peltier and Mrs. Smith come in.

Q. Was Mrs. Smith brought into the same room where these defendants were?

A. She was.

Q. Together with the other two that you have mentioned?

A. She was.

Q. Did Mrs. Smith say anything in the presence of these defendants?

A. Yes, she did, but I can't recall the exact words.

Q. What was the substance of those words?

MR. STRONG: I object unless he can recall the words.

THE COURT: A man can not always do that. I will allow the question.

MR. STRONG: Prays exception.

Exception allowed and sealed accordingly.

J. J. BERGEN, 10
Judge.

A. He looks like him, but I am not sure.

Q. How did she come to say those words? Was there any question asked her by anybody?

MR. STRONG: I object to that. How can he tell how she came to say anything?

Q. Before she said what you have just testified to was there any question asked her?

A. There was questions asked by Mr. Peltier, 20
and Mr. Peltier directed her attention to the four men standing there and myself. I was standing along side of them, if she could identify any one of those men.

Q. Yes?

A. And her answer to the words as I can recall them, I am not sure but he does look like one of them.

Q. Who looks like one of them? Who did she point to?

A. She pointed to Emanuel Napolitano. And then her attention was drawn when Frank Lavieri said to me not to waste any time, I am the man and that is the woman we tied, Tony Abbruzzie and myself. 30

Q. Who said that to you in Italian?

A. Frank Lavieri.

Q. Did De Palma have anything to say on that occasion?

A. No, not that I can recall.

Q. Did Palmieri say anything?

A. Gerano Palmieri said—

Q. In the presence of these two defendants?

A. In the presence of these two defendants said, I am not sure if that is the woman, but it looks like her, because when I went into the room she was on the floor tied, and I didn't see her face, but I think it is her.

10 Q. Was this dress suit case in the room at the time while all this was going on?

A. Yes, sir.

Q. What, if anything, was said concerning this dress suit case?

A. Mr. Peltier asked Mr. De Palma if this suit case belonged to him; and De Palma answered, yes, it is my suitcase.

Q. Was there anything said about this hat?

A. There was something said about that hat, but I can't recall exactly what it was.

20 Q. Was there anything said about this cap?

A. Yes, there was something said about that cap.

Q. Well, now, who said it, and what was said?

A. Mike De Palma says, I think it belongs to Tony Abbruzzie.

Q. Was this coat produced at that time?

A. Yes, sir; it was.

Q. And what was said about the coat?

30 A. Frank Lavieri was asked if that was his coat and he admitted that it was.

Q. Was this rope in the room at the time?

A. I don't recall it.

Q. Was that rope brought in at all during that conversation?

A. The rope was brought—

MR. STRONG: He says he does not recall.

A. It was brought in.

Q. Did you see that rope on that day?

A. On that day I saw that rope.

Q. Where?

A. In your private office.

Q. Was there anything said about it?

MR. STRONG: Just one minute. Were these men there at the time?

A. Yes, sir.

Q. Was there anything said about that rope in the presence of these men?

A. Yes, sir; Mr. Peltier asked Frank Lavieri if that was the rope that he had on that day.

Q. And what did Mr. Lavieri say?

A. Mr. Lavieri answered, that is the rope that I took with me from New York. 10

THE COURT: Where did that suitcase come from?

A. Originally?

THE COURT: Yes, when you got it.

MR. STRICKER: I will furnish that proof. I will identify these articles.

THE COURT: All right. Proceed.

MR. STRONG: No questions. 20

CHARLES EBERWEIN, produced as a witness on behalf of the State, being duly sworn on his oath, according to law, saith:

DIRECT EXAMINATION.

BY MR. STRICKER:

Q. Mr. Eberwein, you are the Chief of the South River Police Force, I believe? 30

A. Yes, sir.

Q. You have given some attention to this Smith case?

A. Yes, sir.

Q. I show you here a rubber coat and ask you whether you ever saw that before, and if so, where?

A. Yes, sir.

Q. Where did you—

A. I found that in the woods.

Q. Whereabouts in the woods?

A. About a quarter of a mile from the Smith's farm.

Q. Which direction?

A. Going towards Milltown.

Q. On what road?

A. On the back road going to Fisher's clay bank. I could show you. About in here somewhere (indicating).

10 Q. Mark an "X" there.

A. (Witness marks).

Q. When did you find that coat there?

A. Found it about three hours after the murder.

Q. Well, what date?

A. On the eleventh of October, 1917.

Q. And when you say about three hours after, what time of the day do you mean?

A. About one o'clock.

20 Q. What did you do after you found that coat, what did you do with it?

A. We carried it with us and took it down to the police station.

Q. What did you do with it after that?

A. We had it—then we sent it in to the Prosecutor's office.

Q. That is, the Prosecutor's office in this building?

A. Yes, sir.

30 Q. I direct your attention here to a hat and ask you whether you ever saw that before?

A. Yes, sir.

Q. Where?

A. I found that in the woods.

Q. Whereabouts in the woods?

A. Right down from the Smith farm, on the East side of the house.

Q. When?

A. On the eleventh—no, that was found on the seventeenth of October.

Q. And where has it been since?

A. We had it for two days down there and then we sent it in to the Prosecutor's office.

Q. I show you a cap and ask you whether you ever saw that before?

A. Yes, sir. I found this in Smith's house in the kitchen on the eleventh day of October.

Q. I show you here a piece of rope and ask you whether you ever saw that before?

A. Yes, sir.

Q. Where?

A. I found that in the Smith's house in the kitchen.

Q. When?

A. On October eleventh, 1917.

Q. I show you a dress suit case here and ask you whether you ever saw that before?

A. Yes, sir.

Q. Where?

A. I found that in the woods on the seventeenth day of October.

Q. Whereabouts in the woods?

A. Right down from the Smith's farm.

Q. Just indicate it please.

A. Right in the corner of the woods here.

Q. Where has it been since?

A. Why, we had it down there for a couple of days and then we sent it in to the Prosecutor's office, this building.

Q. Chief Eberwein, were you present at the Prosecutor's office on the twenty-second day of 30 March?

A. Yes, sir.

Q. Who was there besides yourself?

A. Why, Mrs. Smith.

Q. Yes.

A. Mr. Joseph Smith, the son, Lombardi, Pel-tier and myself and the four defendants.

Q. Were these two defendants there?

A. Yes, sir.

Q. Were you present when any of these articles were exhibited?

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A. Yes, sir.

Q. Which?

A. I was there when the dress suit case.

Q. Well, what was said about the dress suit case?

A. Why, Mr. Peltier asked De Palma if that belonged to him, and he said yes, he had brought it from New York.

Q. What was said about the coat?

10 A. Lavieri admits that the coat belonged to him.

Q. Was there anything said about the rope?

A. The rope Lavieri claims that he brought from New York.

Q. What do you mean he claimed? What did he say?

A. Well, he brought it from New York.

Q. Did he say what he did with it?

A. He said he tied Mrs. Smith with it.

20 Q. Was there anything said about the hat, or the cap?

A. Yes, the hat and cap belonged to Abbruzzie.

Q. Was anything said by Lavieri, in your presence, concerning Mrs. Smith?

A. Why, he told in my presence that he was the one that tied up Mrs. Smith and hit her.

Q. Do you know who these articles were delivered to in the Prosecutor's office?

A. Mr. Lombardi brought them here.

30 MR. STRICKER: Cross-examine.

CROSS-EXAMINATION.

BY MR. STRONG:

Q. If that hat and cap both belonged to Abbruzzie he was pretty well fixed, wasn't he?

A. Well, yes, he was.

Q. Your idea is that was the only suitcase ever made of that particular model?

A. Well, I suppose there is lots more like it.

- Q. All you know is that it looks like the one?
A. I have got a mark on that I can tell it. The day I found it.
Q. Have you a mark on the coat?
A. There is a mark on the sleeve of the coat, I am pretty sure.
Q. Mark on the hat and the cap?
A. No, there is not.
Q. Have you got a mark on that rope?
A. No, but I am pretty sure that is the rope. 10
Q. What say?
A. I am sure that is the rope.
Q. You swear that is the rope?
A. Yes, sir.
Q. Although you have no mark on it. That is all.

RE-DIRECT EXAMINATION.

- BY MR. STRICKER: 20
Q. Is there any mark on the suitcase?
A. Yes, sir; right on the handle.
Q. Where is it?
A. Right here.
MR. STRICKER: I offer the suitcase, the coat, piece of rope, the hat and cap.
THE COURT: They will be admitted. Proceed. (Articles entered in evidence, but not marked).
MR. STRICKER: State rests.
THE COURT: Proceed with the defense. 30
Mr. Strong opens the case for the defendants.

DEFENDANTS' TESTIMONY.

FRANK LAVIERI, one of the defendants, being duly sworn on his oath, according to law, saith:

DIRECT EXAMINATION.

BY MR. STRONG:

(Through Interpreter Joseph Lombardi.)

10 Q. Now, tell us all about how you happened to get into this case, all you know about the death of Roman Smith.

A. You want me to start from before, or from the eleventh of October?

Q. From the beginning.

A. From the sixth?

Q. From the beginning.

A. On the sixth of October I was walking up
Eighth avenue about nine o'clock in the evening.
20 Mike De Palma and Pasquale Indici called me,
now there is a nice chance, do you want to come.
And I answered, what is it, some prostitute. And
they answered me you are always thinking of
prostitutes, why don't you think of something else.
I said what is it. Do you want to come and do a
job down there. I answered the potatoes you have
to plow. And they answered to me, no, there is
potatoes there, but there is also five or six
thousand dollars. I said to them, how do you
30 know; and they answered, because I do know.
Pasquale Indici asked who are the people that is
going there. Pasquale Indici was saying to me,
where is it. And Pasquale Indici said, it is at
South River. I was asking if it was a store, and
he answered no, it is a farm. I asked, who are the
people that is going. Mike De Palma answered,
you come, Tony Abbruzzie, Genaro Napolitano,
and Mike De Palma, meaning himself. I asked
Pasquale Indici what time are we to go. I
ask Pasquale Indici, are you coming too. No, I

can't come because my wife is in a position she is apt to take sick. And then I asked, when are we all go, and Mike De Palma answered on a Monday. After we got through we went to sleep at our house. On the eighth of October, about eleven o'clock in the morning, I went to the house of Mike De Palma and I found him and Genaro Napolitano there. In a little while Tony Abbruzzie came. Mike De Palma says, well, are we going? And we went towards Eighth avenue. 10
While we were going up Eighth avenue Tony Abbruzzie and Mike De Palma met Emanuel Napolitano. Mike De Palma called Emanuel Napolitano. I was at a distance away. I was at a distance, I didn't know what they were saying. And then the five of us went, myself, Mike De Palma, Tony Abbruzzie, Emanuel Napolitano, and Genaro Napolitano. And we went and got a train at Jersey City for Old Bridge. We arrived there about two-thirty or three o'clock. And we 20
got off there and we walked towards Smith's farm, the five of us. Emanuel Napolitano and myself got on this side to watch the people or anyone that would come or go. Mike De Palma, Genaro Napolitano and Tony Abbruzzie went near the chicken house. About five-thirty, six o'clock in the evening, it started to rain. And then we went and got under the hay stacks, or corn stacks. Mike De Palma was telling us about seven o'clock these people would go out to see the moving pictures. We stayed there until 30
seven thirty and nobody came out and we heard a whole lot of voices inside and plenty of people inside. Then we went away. Myself, Tony Abbruzzie, and Emanuel Napolitano we went to Testore's house at South River. After I was there a little while, about half an hour, I asked if there was any mail, a letter there for me. After a half hour or an hour we went to Mantarisi's house. Tony Abbruzzie by that time went on his way

to New York. Emanuel and myself went to Mantarisi's house. All that was said in Mantarisi's house was things involving everything but this case. We stayed there until about four o'clock the next morning. About four or four-thirty in the morning Emanuel Napolitano and myself left there and I went to a house to get my suitcase. And then from there went to New York. On October ninth, at four o'clock in the afternoon, on Twenty-seventh street, I met Mike De Palma and Tony Abbruzzie. Mike De Palma says are we going over on that job. And I answered, what do you think I am going to go there to get killed. And Mike De Palma answered, no, no, we have got to go there in the daytime, because in the daytime there is nobody home. And we got aboard a train at fifteen minutes to five for Old Bridge, me, Tony Abbruzzie and Mike De Palma. We arrived at Union about 6:30. And we got off there and we went into the woods. And we found Frank Mantarisi and Sebastian Patri in the woods. Frank Mantarisi said, what are you people doing around here. We didn't want to tell him that we went there to do this job, so we told him that we were there looking for a job. And then Frank Mantarisi said to me, well, if that is the case, come to my house tonight. And when night come I went to Mantarisi's house, and where they went, if they went to New York, I don't know. In the morning we went on this farm, Mike De Palma, Tony Abbruzzie and myself. We went there with the intentions of robbing him. We got there and we ordered a quart of milk. We drank it. Mike De Palma paid for it. We didn't do anything then, we went away. About noon hour we went to New York. On the day, the eleventh of October, I don't remember if we left in the night or in the morning, I am not sure. I think we left at night on the Pennsylvania station. I am

not sure, though. I don't remember for sure whether we left at night or in the morning. I am not sure. But I think we left on the first train in the morning. About six or six-thirty. I don't know. We got a train at the Pennsylvania station, and went to New Brunswick. We arrived at New Brunswick, and we boarded the car and we got off the car near the house of Mrs. Smith.

Q. Trolley car?

A. Electric car. Trolley car. Mike De Palma 10
and Genaro Napolitano, were in the station near the chicken house, and myself and Tony Abbruzzie in front of the house. About nine o'clock Mike De Palma called to me from the woods from the point where they found a suitcase, now is the time for us to go. Mike De Palma said, now is the time to go over, because the woman is alone. This was about nine o'clock. Mike De Palma opened the suitcase and gave me this cord here. The rope. We went there. One of us, I 20
don't know which, I didn't have any money, gave her a dollar. And put it in her hand, and we ordered a quart of milk. The woman went inside to get change. When she went inside to get the change, Tony and myself was all ready by that door. As soon as she opened the door we threw ourselves in. She fell to the floor. Tony Abbruzzie clapped—grasped her by the mouth. I tied her hands and also tied her feet. Then I went inside and I found seven or eight dollars. 30
Five or six minutes after Mike De Palma come in yelling, Frank Frank, that Genaro shot three times the boss. I says, why did he soot. Mike De Palma answered that is the way his head told him to do.

Q. What is the meaning of that, that is the way his head told him to do?

MR. STRONG: What do you understand by that, Mr. Interpreter?

THE INTERPRETER: That is the way it come in my head.

THE COURT: Proceed.

A. Mike De Palma said, that is the way his head acted, or it come to his head. I was in the house. I didn't see when he done the shooting. I didn't see. I didn't know. I was in the house. And then I seen that Genaro come in with a gun in his hand, a shot gun. The four of us then run out.

Q. Who had the shot gun?

10 A. Genaro had it.

Q. That is Palmieri?

A. Palmieri. Then I asked him, why did you shoot the boss. Because that is the way it come to my head, and I hit him three times with the butt of the gun. Then we went into the woods. And we reached a point where we couldn't cross over because there was water, and I threw my rain coat down, and we passed the water and when we got into the woods, why then we stopped. I
20 took seven or eight dollars out, what I had in my hand, and he took—he had forty or fifty or sixty dollars in his hand, and to me he gave me thirteen or fourteen dollars. And we went to New Brunswick. And Mike De Palma he was walking ahead of me. We arrived at New Brunswick and they took one street and we took another. Tony Abbruzzie and I went one part, and De Palma and Genaro went another way. I went to the
30 barber shop and got a shave and had my shoes shined. About one-thirty or one-fifteen we went and boarded the train at New Brunswick, and we went to New York, and about three o'clock we arrived at New York.

Q. Where were you working at this time that Pasquale first spoke to you?

A. At Fortieth street.

Q. Doing what?

A. At the dock.

Q. And had been working there how long?

A. I don't remember how long I worked there. A few weeks.

Q. What sort of work?

A. Longshoreman.

Q. How long have you been in this country?

A. It will be five years this coming September.

Q. Have you or not worked steadily since you came to this country?

A. When I arrived here I was out of work five or six months because I couldn't find a job.

Q. And then since that time have you or not worked steadily?

10

A. Yes, I always worked.

Q. At what kind?

A. Longshoreman. I worked for the powder works here.

Q. For how long?

A. Six months.

Q. Who was Pasquale that first spoke to you about doing this job?

A. Because this Pasquale, he was in the habit of walking, visiting these farms and he knew all the points and the positions. This Pasquale also used to bring prostitutes from New York into the woods to do business with these men there. Pasquale, Sebastian Patri would go and call the working men there to go into the woods and they would meet these prostitutes that this Pasquale would bring from New York. And Frank Mantarisi's house was used for the same purpose.

20

Q. When you went there that eleventh of October, did you ever intend at all to kill Mr. Smith?

30

MR. STRICKER: I object to that question.

THE COURT: I will allow it. Why not?

MR. STRICKER: This defendant has admitted that he went to that place for the purpose of robbing that house.

THE COURT: That is an argument. I will allow the question.

A. No.

Q. Where was it in New Brunswick that you got shaved and had your shoes shined?

MR. STRICKER: I object to that question. This is after the commission of the offense.

MR. STRONG: I do not think it is anything wonderful one way or the other, but it is part of his direct examination.

THE COURT: I will allow it, but it is absolutely immaterial.

MR. STRONG: I will withdraw it on Your Honor's view of it.

10 THE COURT: Suppose he did not stop anywhere? That does not amount to anything.

MR. STRONG: It might as showing the attitude of the man's mind. At the same time I will not press the question in view of Your Honor's idea of it.

THE COURT: I will not overrule it.

MR. STRONG: Cross-examine.

BY THE COURT:

20 Q. What are the names of the two men who stayed out near the tool house?

A. Mike De Palma and Genaro Napolitano, also known as Palmieri.

MR. STRICKER: Your Honor must appreciate that Palmieri is also known and has been referred to as Napolitano.

Q. They were at the tool house, is that so?

30 A. Before we were all together. We were all together, and after we went in I don't know. They were outside. They killed him. I don't know anything. I didn't see him shot.

Q. How many were outside? How many remained outside of the house?

A. Two persons.

CROSS-EXAMINATION.

BY MR. STRICKER:

Q. Those two persons were Abbruzzie and Palmieri?

A. What, was outside?

Q. Yes?

A. No, Mike De Palma and Genaro Palmieri.

Q. Were outside?

A. Yes.

BY THE COURT:

Q. Why did they stay outside?

A. I don't know. Maybe they went to watch or looking for the boss. And Mike De Palma 10
come in and said that Genaro Palmieri shot the
boss. I don't know. That I didn't see.

BY MR. STRICKER:

Q. Those two men outside were there for the purpose of stopping anyone that might interfere with you and Abbruzzie?

A. I don't know. I went into the house to look for money.

Q. And the two outside kept watch so that you 20
would not be prevented from carrying out your purpose in getting the money?

A. I don't know what kind of a head they had.

Q. You don't know what those two men were there for at all, do you?

A. They were there in case anyone come in.

Q. To stop them from coming in, wasn't it?

A. They thought the boss was there. I don't know. We went in, Tony Abbruzzie and I.

Q. And the two other men stayed out? 30

A. They stayed outside.

Q. They stayed on watch, didn't they?

A. Yes.

Q. On the first of February of this year you were brought into my presence upstairs here, were you not?

A. Yes.

Q. And you denied at that time of having had anything to do with this affair, is that right?

A. Yes, I deny it.

Q. And during my conference with you you stated to me that you hadn't worked very much during the year 1917, isn't that correct?

A. I worked at the factory.

Q. Didn't you tell me on the first day of February of this year that you hadn't worked very much during the year 1917?

A. No, I didn't say that. I said I didn't work for five or six days. I was sick.

10 Q. How many places did you work during the year 1917?

A. I worked at pier fifty.

Q. How long?

A. About three months.

Q. What months?

A. I don't remember the months.

Q. Where else?

A. And six months at the powder works, South River.

20 Q. What months?

A. From January to August.

Q. Do you mean the powder works near South River?

A. Yes.

Q. Then you knew all about Roman Smith, didn't you?

A. No, I didn't know anything about it.

Q. You knew where he lived?

A. Me? No.

30 Q. Where did you get the idea that there were five or six thousand dollars in that house?

A. Mike De Palma and Pasquale Indici told me.

Q. And that is the only way you knew of it?

A. Yes.

Q. Now, directing your attention to October eleventh, you had two revolvers with you on that day, did you not?

A. No. Only one.

Q. An automatic revolver?

A. No.

Q. What kind of a revolver was it?

A. I had a five chamber revolver. An open chamber revolver.

Q. You didn't come out to kill anybody, did you?

A. No.

Q. And you didn't intend to shoot anybody, did you, when you started out?

A. No.

10

Q. Why did you carry a revolver?

A. Because I was carrying it with me.

Q. Why were you carrying it with you?

A. I was carrying the revolver.

Q. Why?

A. I was carrying it.

Q. Were you always carrying a revolver?

A. No.

Q. Why did you carry a revolver on October eleventh, the day of this murder?

20

A. Because the four of us was carrying it.

Q. Why? If you simply went out to steal and not to hurt any one, why were you carrying revolvers, the four of you?

A. Mike De Palma says, let us take revolvers there.

Q. Is that the only reason that you four carried revolvers because Mike De Palma said so?

A. Yes.

Q. Now, you were at that place two days before, that is correct, isn't it?

30

A. What days before?

Q. On the ninth of October?

A. Yes.

Q. And you saw there was nobody in that house but an old man and an old woman, didn't you?

A. What do you mean, by the ninth?

Q. Yes, I mean the ninth.

A. No. It was on the tenth when the old man and the old woman.

Q. And you selected the following day because you knew that nobody would be there, that is correct, isn't it?

A. Because Mike De Palma knew it and he knew the people when they would go away.

Q. That being the case, and having selected a time when you knew or thought nobody would be there, why was it necessary for you four men to carry revolvers?

10 A. He told me there was nobody there because he knew the people that belonged in the house. When there was nobody there we were to go.

Q. Why did you need four revolvers if you intended to arrive there at a time when there was nobody there but Mr. and Mrs. Smith?

A. We brought them.

Q. You brought them that in case you were interfered with that you would use them, isn't that right?

20 A. There was nobody there.

Q. But if somebody had been there to interfere with you you would have used your revolvers?

A. But there was nobody there.

Q. If they had been there you would have used them, would you not?

MR. STRONG: I don't know why this might not be objected to.

THE COURT: I will allow the question.

MR. STRONG: Prays exception.

30 Exception allowed and sealed accordingly.

J. J. BERGEN,
Judge.

A. We didn't go there with the idea of finding anybody there. We were sure that she was alone and we would find nobody.

Q. If you had found somebody there that day interfering with your robbing that house, you would have used your revolver, would you not?

MR. STRONG: I object to that as entirely im-

material under the circumstances. An improper question. What they would have done under certain circumstances.

MR. STRICKER: I will withdraw that question.

Q. Why did you carry the revolver?

A. Because I was carrying it.

Q. Why? What for?

A. Because the four of us carried them.

Q. Why were the four of you carrying revolvers?

A. I don't know. How should I know? The four of us brought them. 10

Q. Don't you know why you were carrying a revolver?

A. If somebody would shoot at us we would shoot him.

Q. You only went there to rob the house?

A. That is all.

Q. And you expected to find five or six thousand dollars?

A. That is what they told me. 20

BY THE COURT:

Q. Who got the money?

A. I got thirteen or fourteen dollars. He got the money.

Q. Who?

A. Genaro Palmieri.

Q. Who else?

A. He got his portion. 30

Q. That is the other defendant here?

A. The other defendant.

Q. What did you call him, De Palma?

A. De Palma.

BY MR. STRICKER:

Q. Why did you tie up old Mrs. Smith?

A. I tied her so she couldn't go outside and yell.

Q. Who struck Mrs. Smith?

A. I didn't.

Q. You pushed her?

A. Tony Abbruzzie and myself pushed her in.

Q. Knocked her over?

A. Yes. She fell to the floor.

Q. How many shots did you hear?

A. I don't know. I didn't hear any.

Q. After this murder you went to Boston?

MR. STRONG: I object to that. That is what we are trying her. I will withdraw the objection.

10 A. After the killing of Roman Smith you went to Boston, did you not?

A. No. I went to Hartford.

Q. Well, you went to Hartford, Connecticut, and then went to Boston?

A. Yes.

Q. And you have been convicted of crime, isn't that right?

A. What?

Q. Haven't you been convicted of crime?

20 A. Where?

MR. STRONG: Just one moment. For what purpose is this question asked, Mr. Prosecutor?

MR. STRICKER: To affect the defendant's credibility.

MR. STRONG: I object to it anyway on the ground it is incompetent.

30 THE COURT: I overrule the question. I do not think it is material at all. I do not see there is any question of credibility yet. He practically tells the same story that you proved.

MR. STRICKER: Excepting on his motive for carrying the gun.

THE COURT: Well, he has answered that. He says he carried the gun to shoot if anybody shot at him.

MR. STRICKER: I submit I have a right to ask that question to show the character of the crime of which he was convicted, under the evidence act.

THE COURT: I will overrule it. Proceed.

MR. STRICKER: Do you overrule my question?

THE COURT: I have overruled it.

MR. STRICKER: I have no further questions.

THE COURT: Call your next witness.

MR. STRONG: That is all. I want to ask him one question.

BY MR. STRONG:

Q. Did you ever tell an Italian, whose name I forget, who testified, that you worked in or near Boston, that you were guilty of crime in New Jersey, or anywhere else?

10

A. Dominic Michision is his name. No, I didn't. On that day when I was found by that person, he found me at—

MR. STRICKER: I object to this. This witness has answered the question.

THE COURT: It opened the door for your cross-examination now. Proceed. Anything further?

Q. Who is that man? What sort of a man is he?

MR. STRICKER: I object to the question.

20

THE COURT: What man do you refer to?

MR. STRONG: The man said this man confessed to him.

A. He found me at Aberthaw Construction Company, 27 School street, Boston, Massachusetts. And he said to me, are you here, the police are looking for you. I knew that the police was looking for me. I didn't know if this fellow was to New York. I didn't say anything in regards to this case. When this fellow had me arrested in Boston, he didn't know anything in regards to this case. I was in the jail there for eighteen days and they didn't know nothing. They didn't find out anything. Those people are against me stated to him that he should state—

30

MR. STRICKER: I object to this.

THE COURT: How is this competent, Mr. Strong?

MR. STRONG: I do not know that it is very important, except I do not care to shut out anything this man might wish to say.

THE COURT: I do not think it is competent.

Q. What sort of a man is this Dominic?

MR. STRICKER: I object to that.

THE COURT: What Dominic?

MR. STRONG: He is the man says this man confessed to him.

THE COURT: What difference does it make what sort of a man he is? I do not see how that is competent.

10 MR. STRONG: Perhaps he might give us an idea what sort of a man he was, whether he was a criminal or otherwise. He may know of his having been convicted of a crime.

THE COURT: I overrule that question.

MR. STRONG: I will ask him whether he knows whether this man Dominic was ever in jail, convicted of a crime.

THE COURT: Who is Dominic?

MR. STRONG: The man who claims this man
20 confessed to him at or near Boston.

THE COURT: I will allow the question.

MR. STRICKER: I submit if that question is permissible on cross-examination of the witness himself, how can this man testify—

THE COURT: I have allowed the question. Proceed.

Q. Do you know whether this man Dominic was ever convicted of crime?

THE COURT: How is that competent?

30 MR. STRONG: That is the question Your Honor allowed.

THE COURT: No, I did not allow that. It was the other question. You changed it.

MR. STRONG: Your Honor misunderstood me, but I will take the particular question Your Honor will allow.

THE COURT: I allowed the first question. Not the last one.

Q. (Repeated) What sort of a man is this Dominic?

A. He is a man a good man would never testify to what he did. He must be a bad man.

MR. STRICKER: I move that be stricken out.

THE COURT: That is not any answer to the question.

MR. STRONG: Strike out that answer and repeat the question.

A. I don't know him.

MR. STRONG: That is all.

10

BY MR. STRICKER:

Q. You did commit a crime in New Jersey, didn't you?

MR. STRONG: Well, he has admitted that part of it.

THE COURT: That is on trial now, I suppose. But, Mr. Prosecutor, I overruled your question about the conviction because I thought it was absolutely immaterial, but now he has raised a question of credibility by denying the statement of this witness. So you may proceed with that cross-examination. 20

MR. STRICKER: My point in asking this question is the likelihood of him having said so.

Q. You did commit a crime in New Jersey, did you not?

MR. STRONG: I object to that question.

THE COURT: I will overrule that. That was not what I referred to. You asked a question with reference to whether he had been convicted of any crime, for the purpose of affecting the credibility. I overruled it as immaterial because there was not any question of credibility, because he was telling the same story that you had proven. Now, he has denied the testimony of one of your witnesses, which does raise a question of credibility, and if you want to pursue that cross-examination, you may do so. 30

Q. What did you go to Boston for at all?

A. To work.

Q. Didn't you go to Hartford and Boston for the purpose of avoiding the police?

A. Yes.

MR. STRICKER: That is all.

THE COURT: Call your next.

MICHAEL DE PALMA, one of the defendants, being duly sworn on his oath, according to law, saith:

10

DIRECT EXAMINATION.

BY MR. STRONG:

(Through Interpreter Joseph Lombardi).

Q. Tell us how you came to get into this trouble.

A. From the beginning, from the time I lived in the village?

Q. Yes.

20 A. On the fifth of July I moved from New York to South River. Then I went to live on Main street. After a month then I went and lived in the house of Roman Smith. Then on the twenty-third of September I moved from there. My brother-in-law received a ball in his leg. And then from there I went to live on Twenty-ninth street, New York, at 514 West side. On the seventh of October Frank Lavieri and Tony Abbruzzie came to my house about six o'clock in the evening. They sat down in my front room, both
30 of them, and Frank said to me, Mike, I heard that Roman Smith at South River is a rich man.

Q. Which one was it said that?

A. Frank Lavieri.

Q. This man (indicating)?

A. Yes, sir. You that lived in Roman Smith's house come and show us the house. I answered, I have got a wife and two children, in these things I don't want to be mixed up. And Frank Lavieri answered, you don't have to worry. Don't think

of anything. I answered, I will not go. Then he answered, I will go anyhow. I will search and find until I locate this house of Roman Smith. Then I have got a friend of mine who will tell me. And they went away, both of them left about seven o'clock. On the ninth of October they came again, Tony Abbruzzie and Frank Lavieri, about six o'clock at night on Tuesday. They sat down, both of them, and said to me, Mike, we have been there and we couldn't find out anything, because it was raining, and that person I couldn't find anymore. Our clothes were wet and we went and got our clothes dried at the house of Frank Manterisi. No matter what you think or say, you have got to come and show us this house. I answered, I have got a wife and I have got children, I don't want to mix up in anything like this. Frank answered, don't think of anything. I will think of it. I done a job on Baroni, I am not afraid of ten people. It is two months that I am out of work and my head is not at its place. And whoever has got the money has got to give it to me. And Frank said to me, come and show me the house of Roman Smith and I will go and get your four suits that is in pawn. I answered, suits I don't want. I will buy them. Frank said, if you don't come and show us the house, we will play the job again, we will rob you again. Well, then I said, if you are going to do that, ruin me again, then I will come. And he answered and said to me, don't you move from your house until I come. On the eleventh of October, about one o'clock, I don't know, come a knock; Frank Lavieri come and knocked at the door. I said, who is it. He answered it is Frank. I said, what do you want. He said to me, dress yourself and come along to the Pennsylvania station. I arrived at the Pennsylvania station, I found Tony Abbruzzie, Genaro Napolitano, also known as Palmieri, and Frank Lavieri. When they saw me

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20

30

Tony Abbruzzie and Palmieri went and bought their ticket. Frank Lavieri had two tickets in his hand, one for himself and one for me. We got on the three o'clock train in the morning. We got to New Brunswick at 4:15. It was still dark, and the trolley cars was not running. We started to walk, following the trolley track. We got to South River about seven o'clock, and we went to the woods and we sat down, the four of us. About 10 8:30 Mike said to me, Mike, come on, come and show me Mr. Smith's house. And we started, the four of us. We got there about nine o'clock. And I, from a distance, said, there is the house, I said to Frank, I am going; good-bye. Frank said to me, wait; come on and have a glass of milk. I says, milk I don't want, I don't desire, and I won't come, because I don't want to come near there, as they know me, because when I lived in the house they used to come and pick up 20 their peaches, and they used to see me, and they know me. And Frank says, it is better that they know you, then they won't suspect anything. Then the four of us, myself, Frank Lavieri, Palmieri, Tony Abbruzzie, we went to the house. Frank Lavieri ordered the milk. He took a dollar bill from his pocket and gave it to the woman. And the woman went inside then to get him the change, and I said to Frank, if you have any intentions of doing anything, I will start to yell. 30 And he says, don't think of it, he gave me his hand and he said, I won't do it to-day, but I will to-morrow. And as this woman was coming out to give him the change, Frank Lavieri put his hand on her mouth, and this hand, the right hand, the right hand, with the revolver, and on the left side in his belt he had a .38, and he pushes her in. Tony Abbruzzie followed behind him and closed the door. Gerano Napolitano, seeing that, pulls out his automatic, this is the house of Mr. Smith, there was other houses, and he run that

way, and I didn't see him any more. I, seeing that, I runned away. When I got about fifteen or sixteen paces I continued running, and in two or three minutes the three of them come out and they caught up to me about fifteen minutes after. And Frank says to me, Mike, look out, this woman knows you; being that she used to come and gather the peaches near your house, being that she may know you. If you are arrested, don't mention anybody. If you do, we will kill you. The three of them said. Then I asked what happened and Frank Lavieri says, he shot three times. And I says to him, what did you do. 10

BY MR. STRONG:

Q. Did he say Frank Lavieri shot three times?

A. No. Frank Lavieri said to me that Genaro shot Smith three times. And look out, that if you mention us three we will kill you. I asked what happened. I said, what did you do; and Frank answered, I was inside looking for money; and Tony Abbruzzie had the woman tied, holding her to the floor. And I said, didn't youse find anything; and Frank answered, no, we didn't find anything. And I said to the three of them, I don't want to go with them three. They went one way and I went another way. I got on the trolley car for New Brunswick. I arrived at New Brunswick about 12:30. And I got on a train and I went to New York. And while I was in jail at Trenton, Frank Lavieri calls to me and said to me, Mike, I am going to call the District Attorney, I am going to have Sam Batti, Mantarisi, Manuel, and I can't remember the other name, Farillo, I will have them in for other things. 20 30

Q. Now, did you shoot at all at Mr. Smith?

A. No, sir.

Q. When you went there that day did you mean to kill anybody?

A. No, sir. I didn't even go with the intentions of robbing. I went there only to show the house.

CROSS-EXAMINATION.

BY MR. STRICKER:

Q. You had a revolver, did you not?

A. No, sir.

Q. You knew that the house of Roman Smith was going to be robbed?

10 A. Yes, I knew that their intentions was to rob Roman Smith's house.

Q. How much money did you receive after the robbery?

A. I didn't receive any. They told me they didn't get any, didn't find any.

Q. Did you see Lavieri knock down Mrs. Smith?

A. No, because the door was closed. I went away.

20 Q. Did you see Lavieri tie Mrs. Smith?

A. No.

Q. Did you see Mrs. Smith struck?

A. I didn't see her at all.

Q. Did you bring a suit case with you that morning?

A. That suit case was stole from me a year ago.

Q. Is this your suit case?

A. Yes, sir. This fellow stole it from me one year ago.

30 Q. The morning that you started out of New York with this fellow and Abbruzzie and Palmieri, did he have the suit case?

A. Frank had hid it in the woods.

Q. I am asking you whether, on the morning of October 11th, whether that suit case was brought out by Lavieri?

A. I didn't see it. I saw it in the woods.

ADJOURNED UNTIL TO-MORROW,
WEDNESDAY, APRIL 3rd, 1918,
at 9:45 a. m.

MIDDLESEX COUNTY OYER &
TERMINER,
Term, 1917.

STATE OF NEW JERSEY	}	On Indictment for Murder. 10
vs.		
FRANK LAVIERI, MICHAEL DE PALMA, GERANO PALMIERI, ALIAS NAPOLITANO, EMAN- UEL NAPOLITANO, ANTONIO ABBRUZZIE.		

Transcript of stenographer's notes of evidence,
taken in the above entitled matter before HON.
JAMES J. BERGEN, Supreme Court Justice, HON.
PETER F. DALY, Common Pleas Judge, and a Jury,
in the Middlesex County Court House, City of
New Brunswick, New Jersey, on the third day of 20
April, A. D. 1918, at 9:45 a. m.

Appearances:

JOSEPH E. STRICKER, Esq.,
Prosecutor of the Pleas.

JOHN A. COAN, Esq.,
Asst. Prosecutor of Pleas, Representing the State.

THEODORE STRONG, Esq.,
WILLIAM G. KEIR, Esq., 30
(of the New York Bar),
Representing the Defendants.

MICHAEL DE PALMA (Resumed),

CROSS-EXAMINATION.
(Continued.)

BY MR. STRICKER:

(Through Interpreter Joseph Lombardi).

Q. What is your business?

A. I have worked with shovel and at the docks.

Q. Do you understand that map? That plan? There is the road from New Brunswick to South River. And here is the road from the New Brunswick Road down to the Smith house. Do you recognize that on the map?

A. Yes.

Q. You knew that there was no other house in that road other than Roman Smith's, didn't you?

10 A. I passed there once when I was going to do some job in South River.

Q. You knew there was no other house in that road at that point other than Roman Smith's?

A. No, I didn't know.

Q. Why didn't you stop at the New Brunswick road and tell Lavieri where the house was, without going directly to it?

A. Because on account of him. He wanted me to show him the house.

20 Q. Well, couldn't you tell him where the house was without going directly to it?

A. To him?

Q. Yes, to him?

A. He was say to me come and show me the house.

Q. Why didn't you show him the house or direct him to the house from the road?

A. Because he was say to me. I didn't know. He wanted me to show him where the house was.

30 Q. Well, you went right to the house to show it to him, did you not?

A. One hundred paces from the house, and then I showed him there is the house.

Q. And you didn't go to the house, did you?

A. After I went.

Q. Went where?

A. When we went to drink the milk together.

Q. Well, that was the day when Mrs. Smith was tied and knocked down by Lavieri and Abbruzzie?

A. Yes.

Q. Why did you wait around there after you showed Lavieri the house?

A. I stayed outside. I don't know what they were going to do.

Q. Well, you knew they were going to rob the house, didn't you?

A. Yes.

Q. Well, then, if you only went there for the purpose of showing the house, knowing that it was to be robbed, why did you stay around there? 10

A. I went away right away as soon as they closed the door.

Q. Well, you were there long enough to see Lavieri give the old lady a dollar bill, weren't you?

A. Yes, when we went to drink the milk.

Q. And you were there long enough to see Lavieri place his hand on Mrs. Smith's mouth?

A. When the woman was giving him the change, yes, then he put his hands on her mouth. 20

Q. And you saw her pushed into the house?

A. Yes.

Q. And you saw Tony Abbruzzie follow Frank Lavieri in, didn't you?

A. Yes.

MR. STRICKER: Stand up, Palmieri.

Q. Where was this man at the time?

A. He was near me. At the same moment when they closed the door.

Q. Where was Palmieri at that time? 30

A. When Tony closed the door he was near me.

Q. And where did he go?

A. And when they closed the door he pulled out his automatic, and he went that way (indicating), and I didn't see him any more.

Q. Well, what did you do with your pistol?

A. I didn't have any.

Q. Didn't you have a thirty-eight calibre revolver?

A. Frank had one of thirty-eight. He had one of thirty-eight, and he had one of thirty-two.

Q. Is this your valise?

A. Yes.

Q. Did you have that valise on the morning of October the eleventh?

A. That was hid in the woods.

Q. When did you hide it in the woods?

A. When it was in the woods they went and got the arms out of there. I don't know.

Q. Who got the arms out of there?

10 A. Frank.

Q. Lavieri?

A. Yes, sir.

Q. And by arms you mean four revolvers, don't you?

A. I didn't see how many there were.

Q. How many there were in arms in there then?

A. He told me.

Q. Didn't you carry this bag out from New York on the morning of October the eleventh?

20 A. That case was stolen from me it is a year from my house.

Q. Didn't you tell Detective Peltier at the Prosecutor's office in this building, in the presence of Mr. Lombardi, the interpreter, that you carried that bag out from New York on the morning of October the eleventh and that you threw it in the woods after the murder of Roman Smith?

A. No, I didn't say that. I said that it was hid in the woods.

30 Q. You understand some English, don't you?

A. No.

Q. Don't you understand any English at all?

A. A little bit.

Q. You were upstairs on March twenty-second in this building, were you not?

A. In the house.

Q. You were in my office in this building on March twenty-second, is that correct?

A. Yes.

Q. Was Mr. Lombardi there?

A. Yes.

Q. Was Mr. Peltier there?

A. Yes.

Q. Was this man Chief Eberwein there?

A. Yes.

Q. Lavieri was there and Palmieri was there and Emanuel Napolitano was there?

A. Yes.

Q. And the bag was there?

A. Yes, sir.

Q. And didn't Detective Peltier ask you both in English and in Italian, through Mr. Lombardi, whether this was your bag, and you replied yes? 10

A. I said it was mine, but it was stolen from me a year ago.

Q. And didn't you tell him then and there, meaning March twenty-second, at my office, that you carried that bag out from New York on October eleventh and that you threw it away after Mr. Smith had been shot, and the old lady had been tied? 20

A. Me? Did I say that?

Q. Yes, didn't you say that?

A. To who did I say that?

Q. To Detective Peltier and to Mr. Lombardi, the Interpreter, here, in English and Italian?

A. Where did I say this?

Q. On March twenty-second in the Prosecutor's office in this building.

A. I didn't say it like that. I said from the beginning that that suitcase was stolen from me a year ago. 30

Q. Did you see that hat upstairs here?

A. Yes.

Q. Did you see the cap?

A. Yes, sir.

Q. The rope?

A. Yes, sir.

Q. The coat?

A. Yes, sir.

Q. Did you hear Lavieri say that that was his coat?

A. Yes, sir.

Q. Did you hear Lavieri say that that was the rope which he brought out from New York and tied Mrs. Smith?

A. I don't know. I didn't see where he brought it to.

10 Q. Didn't you hear him acknowledge that that was the rope?

A. He said that he tied Mrs. Smith, but I didn't see the rope.

Q. Did you see this hat and cap?

A. Yes, Tony Abbruzzies.

Q. Did you tell Detective Peltier—

A. No.

Q. (continued)—that this was Tony Abbruzzie's hat and cap?

A. Yes.

20 Q. Ustairs in this office on the twenty-second of March?

A. Yes, sir.

Q. You did say that?

A. Yes.

Q. When did you get back to New York on October the eleventh?

A. At that time I arrived?

Q. Yes?

A. About two-thirty.

30 Q. And where did you go?

A. In my house.

Q. And when did you see Lavieri again?

A. I didn't see him any more.

Q. Why not?

A. I saw him on Twenty-eighth street ten days after.

Q. Speak to him?

A. He was near the store of Luigi Bruno and Sam.

Q. Well, he is a friend of yours, isn't he?

A. He is a native from the same town.

Q. Why didn't you speak to him when you met him ten days afterward in New York?

A. I went in to do some shopping in the store.

Q. Why didn't you speak to Lavieri?

A. He was talking to other people.

Q. Well, weren't you anxious to find out what this visit to South River had resulted in?

A. I wasn't seeking anything because after I went to Boston to go to work.

10

Q. You went to Boston to evade the police, didn't you?

A. No. I got the address from Michisio.

Q. You were arrested in Boston, weren't you?

A. Yes.

Q. You were arrested by Mr. Peltier there, weren't you?

A. Yes.

Q. What did you do with the money that Lavieri gave you on October eleventh?

20

MR. STRONG: I object to that as not a proper question. He says he didn't get any money. He has answered that and said he didn't get any money. That is stated if he had confirmed he had received it.

THE COURT: The question is proper enough on cross-examination.

MR. STRONG: Allow me an exception.

THE COURT: I will allow it.

Exception allowed and sealed accordingly.

30

J. J. BERGEN,

Judge.

A. I didn't get anything because they told me they didn't find anything.

Q. Who paid your fare out to South River?

A. Him.

Q. And you went there to point out a house which he and his companions were to rob?

A. Yes, they come to my house for me to go and show him.

Q. And they never gave you any money?

A. No.

Q. Abbruzzie didn't give you any money?

A. No.

Q. And Palmieri didn't give you any money?

A. No.

Q. And you just went out there for the accommodation of Mr. Lavieri?

10 A. He came to me and asked me to show him the house and I went.

Q. And you went out there to point out a house, knowing that they had four revolvers with them?

A. At that moment I didn't know it, but after when they went and got them I knew it.

Q. But before you started from New York, you knew they had them?

A. No, I did not.

Q. When did you find out they had the four revolvers?

20 A. Before we went and drank the milk we went into the woods.

Q. Was it there that the revolvers were shown?

A. When they put them on their person.

Q. And that was before you pointed out the house?

A. Yes.

Q. How did those revolvers get into your suitcase?

30 A. It was a year that they stole it from me and he was using it.

MR. STRICKER: That is all.

RE-DIRECT EXAMINATION.

BY MR. STRONG:

Q. You are married?

A. Yes.

Q. Wife and children?

A. Yes, sir.

Q. How many children?

MR. STRICKER: I object.

A. Two.

THE COURT: I will allow it.

Q. Are they here in Court?

MR. STRICKER: I object.

A. Yes, sir.

MR. STRICKER: One moment. How is that relevant?

MR. STRONG: I am not particular about it.

THE COURT: He has answered it and I will let it stand. But it is not material as I see it. 10

A. My wife is here.

Q. How old are your children?

MR. STRICKER: I object to that.

THE COURT: I will allow that question how many children.

A. Two.

Q. How old are the children?

MR. STRICKER: I object.

THE COURT: I will allow it. 20

A. One twelve and the other one nine.

Q. Boys or girls?

MR. STRICKER: I object to that.

THE COURT: I will allow it.

A. Girls.

MR. STRONG: That is all.

BY THE COURT:

Q. Were you at the Smith house with these men or any of them before this eleventh of October? 30

A. No, sir.

MR. STRONG: That is all.

Defense rests.

STATE'S REBUTTAL TESTIMONY.

RICHARD PELTIER, produced as a witness, on behalf of the State, in rebuttal, being duly sworn on his oath, according to law, saith:

DIRECT EXAMINATION.

BY MR. STRICKER:

Q. Mr. Peltier, you are a county detective connected with the Prosecutor's office?

A. I am.

Q. On the twenty-second day of March were you at the office in this building?

A. I was.

10 Q. At that time was the defendant De Palma present?

A. He was.

Q. Was this suit case shown to him?

A. Yes, sir.

Q. What, if anything, did you ask him concerning this suitcase?

MR. STRONG: I object.

THE COURT: You ought to confine this to what you asked him.

20 MR. STRICKER: I simply want to show the circumstances. That is all.

MR. STRONG: I object.

MR. STRICKER: However, I will take the Court's suggestion. I will withdraw the question.

30 Q. Did, at that time, the defendant say to you that this was his suitcase and that he carried it out from New York on the morning of October eleventh, the time that Roman Smith was shot, and Mrs. Smith tied, and that he had discarded it—had thrown it away, rather, into the woods on the same day?

MR. STRONG: I object on the ground it is not a proper question. It is incompetent, immaterial and irrelevant and it is not rebuttal.

THE COURT: I will allow the question.

MR. STRONG: Prays exception.

Exception allowed and sealed accordingly.

J. J. BERGEN,
Judge.

A. He did.

Q. Who else were present, Mr. Peltier?

A. Chief Eberwein and Lombardi.

CROSS-EXAMINATION.

BY MR. STRONG:

Q. You knew of a reward being offered for the apprehension of these men, did you not?

A. I did. 10

Q. How much was it?

A. Well, I don't know the exact amount.

Q. What did you understand it to be?

A. Something like a thousand dollars.

MR. STRONG: That is all.

CHARLES EBERWEIN, Re-called.

DIRECT EXAMINATION.

20

BY MR. STRICKER:

Q. Chief Eberwein, were you present at my office in this building on the twenty-second day of March?

A. Yes, sir.

Q. Did you see the defendant there, De Palma?

A. Yes, sir.

Q. Who else was present at the time?

A. Mr. Peltier and Lombardi.

Q. Was the suitcase before you shown to 30
Michael De Palma, the defendant?

A. Yes, sir.

Q. State whether or not he said that it belonged to him, that he had carried it out from New York on the morning of October eleventh, the occasion when Roman Smith was shot and Mrs. Smith was tied, and that he had thrown it away in the woods on the same day?

MR. STRONG: I object. On the ground it is immaterial, incompetent, irrelevant and is not rebuttal.

THE COURT: I will allow the question.

MR. STRONG: Prays exception.

Exception allowed and sealed accordingly.

J. J. BERGEN,
Judge.

A. He did, sir.

MR. STRICKER: That is all.

MR. STRONG: No questions.

10 JOSEPH LOMBARDI, Re-called.

DIRECT EXAMINATION.

BY MR. STRICKER:

Q. Mr. Lombardi, you are the official interpreter of Middlesex County?

A. Yes, sir.

Q. Were you present in the Prosecutor's office? on March twenty-second of this year?

20 A. I was.

Q. Was the defendant, De Palma, there?

A. Yes, sir.

Q. Who else was there at the time?

A. County Detective Peltier, Chief Eberwein.

Q. Any of the other defendants?

A. The other defendants.

Q. At that time was this suitcase the suitcase in evidence shown to the defendant De Palma?

A. Yes, sir.

30 Q. And did he at that time say that it belonged to him, that he had carried it out from New York on October eleventh, the occasion when Roman Smith was shot and Mrs. Smith was tied, and that he had thrown it away in the woods on the same day?

MR. STRONG: I object.

THE COURT: I will allow the question.

MR. STRONG: Prays exception.

Exception allowed and sealed accordingly.

J. J. BERGEN,
Judge.

A. Yes, sir; I also asked him on the suitcase if that wasn't his name written with a lead pencil. He admitted that.

MR. STRONG: I ask that be stricken out.

THE COURT: The latter part he was not asked about. That may be stricken out.

MR. STRICKER: That is all.

MR. STRONG: No cross-examination.

MR. STRICKER: That is all.

DEFENDANTS' SUR-REBUTTAL
TESTIMONY.

10

MICHAEL DE PALMA, Re-called.

DIRECT EXAMINATION

BY MR. STRONG:

MR. STRONG: I think he has already stated he never made this statement to these officers, hasn't he? 20

MR. STRICKER: Do you mean on March twenty-second, Senator?

MR. STRONG: Yes.

MR. STRICKER: He has testified to that, if you mean March twenty-second.

THE COURT: Mr. Strong, put your question.

Q. Did you on March twenty-second, or at any other time, state that this was your suitcase and that you had brought it out from New York and thrown it away on the day that Mr. Smith was killed? 30

MR. STRICKER: I object to that question.

THE COURT: That he has testified to.

MR. STRONG: I thought so.

THE COURT: We can not keep on.

MR. STRONG: That is all.

Mr. Strong sums up the case for the Defendants.

Mr. Stricker sums up the case for the State.

MIDDLESEX COUNTY OYER &
TERMINER.

December Term 1917.

	STATE OF NEW JERSEY,	} Indictment for Murder.
	vs.	
10	FRANK LAVIERI, AND MICHAEL DE PALMA.	

Court's charge to the Jury by HON. JAMES J. BERGEN, Justice of the Supreme Court.

Gentlemen of the Jury:—The Grand Inquest of this county presented an indictment against five defendants for the murder of Roman Smith, and two of these defendants are being tried separately. They are the first two named in the indictment, Frank Lavieri and Michael De Palma, so that whatever verdict you render in this case will be limited to those two defendants. Under this indictment you may find these defendants guilty of murder in the first degree, or, if the facts warranted it, under the charge of the Court, of murder in the second degree, but I can find no facts in this case which would justify any verdict of manslaughter. You must take the law from the Court. Whatever rules of law I lay down for your guidance you are bound under your oath to accept and to follow, for if I make any mistake in the law that can be corrected by an appeal to a higher Court; but you are to judge of the facts in the case, and anything that I may say with reference to the facts is merely for the purpose of aiding you, and if I should make any mistake in my recollection of the facts, or misstate any, or omit to state anything, it is your duty to supply that.

You must enter upon the consideration of the testimony with the assumption that the defendants are innocent, until the State has proved their guilt beyond a reasonable doubt, and they are entitled to the benefit of any reasonable doubt you may have of their guilt upon the whole case, or as to any grade of the offense. But a reasonable doubt does not mean that every uncertainty must be dispelled. It is rather that state of mind which, after comparison and consideration of all the evidence, leaves the mind of the juror in such a condition that he can not say he feels an abiding conviction of the truth of the charge made against the defendants, or of their guilt as to a particular grade of the offense charged. 10

This case is in somewhat narrow compass. The rules of law which I will lay down to you are quite well settled, and the particular duty which you will have to perform is to determine the facts and then apply the rules of law to them. 20

What the State claims is this, and claims to have proven it: That these two defendants, with three others, entered into an agreement to come from the City of New York to the County of Middlesex for the express purpose of robbing the house of Roman Smith in this County. That they came armed for that purpose. That two or three of these defendants, not including De Palma, had been out once or twice before looking over the premises, but finding the conditions were not such as to warrant the attempt to commit the crime at that time, postponed it until the eleventh day of October, when they came out, went to the house, asked Mrs. Smith for some milk, and as she went into the house to make the change, or was returning to them, Lavieri, one of these defendants, and another, not on trial, seized her, threw her down, tied her legs and arms, ransacked the house and took what money they could find, and that they afterwards divided that money, al- 30

though De Palma says he did not get any of it. While that was going on, Mr. Smith, who had been in the field, was returning to the house, or some building. It appears, as I recall the testimony, that he was shot in what they call the tool house. Exactly why he went there the evidence does not show. But he was met there, or somewhere in that neighborhood, by one of these parties, a man not on trial, who shot him. If there was a
10 concerted agreement among these people to go out and rob that house, and they were all there present, and some one of the party in the execution of that crime took the life of Mr. Smith, they are all equally responsible. There is no escape under the law from that. I repeat, if divers persons agree to act together in committing a robbery or burglary, and in carrying out that purpose one of the party kills a person, all who are present aiding or abetting in the committing of the robbery
20 are principals, and equally guilty for the acts done by either, whether the death was caused by the act of one or of the other. That is the rule of law which is to guide you and you have no right to set up any other rule of law. You must adopt that rule of law and find the facts and apply them to that rule of law.

The question that comes up for you to determine, I suppose, is, were these two defendants present with two others of these parties, if there
30 was a common agreement, which is a fact that you must find, to rob this house, were these two men present aiding and abetting the carrying out, not of the murder, but of the robbery, because if they were aiding and assisting and giving countenance to one another in the perpetration of the robbery, and one of the party shot Mr. Smith, they are all equally guilty of murder in the first degree, because, under our statute, and that you must accept as the law, a murder perpetrated in attempting to or in committing a robbery, a kill-

ing, rather, is murder in the first degree, under our statute. The wisdom of the law you have nothing to do with. That is the law. So if you find in this case beyond a reasonable doubt that these two defendants combined with others to go there to rob Mr. Smith's house, and that they were present aiding and abetting the others in the commission of the crime of burglary, or robbery, and one of these parties in pursuance of that scheme killed Mr. Smith, they are all guilty as principals, as if each had held the revolver that fired the fatal shot. It is for you to say whether the State has made out its case as I have outlined it. 10

The defendants have asked me to charge,

"1. That the confession of De Palma introduced in evidence by the State is not evidence against Lavieri."

"2. That the confession of Lavieri introduced in evidence by the State is not evidence against De Palma." 20

That is true. But you ought to bear in mind that both of these defendants have been witnesses here, and as I recall their testimony it is practically identical, almost word for word, as near persons would be apt to give it, with their written statement or admission. Lavieri tells the story of their meeting in New York and their coming out there, his going to this house, his tying this woman's legs and arms, and of his going through the house and of robbing it. De Palma also testifies that he went out. He says he did not have any intentions of killing Smith. But that does not make any difference. If he was a member of this band, having agreed to go there to rob this house, and while that agreement was being carried out he was present aiding in its execution, it does not make any difference what his previous intent was, if anyone of the party killed Mr. Smith he is liable because he takes that chance when he en- 30

ters into a conspiracy or combination to commit a robbery or burglary. If you say that the testimony of Lavieri should be applied only to himself, and the testimony of De Palma applied only to himself, even then it is for you to say whether there is any doubt, any reasonable doubt about the fact, according to their own statements, they were both there, that they went there with knowledge that that house was to be robbed, and they
10 were there for the purpose of it being executed, while Mr. Smith was killed. De Palma says that his part of the conspiracy was to go and show them the house. It is for you to say whether you believe that. Whether you believe, in view of the fact that these other men had been out there on two occasions watching the house, and knew just where the house was located, and knew all about it, whether his contradiction of what Lavieri says is worthy of belief. That is for you to say. If
20 he was of that party, if he came out carrying that satchel, with that rope and with the revolvers in it, if he did that, it is for you to say whether his sole purpose was to point out. But even if that was his original purpose, if he went farther afterward and joined in this party, went down there at that house to participate in the robbery, to stand by, aid and assist by his presence, even if he only looked on, he becomes a principal and is guilty of murder.

30 Under this case, as it stands, there can be but one of two verdicts, and that is of murder in the first degree, or an acquittal; because under the law, if these men are guilty at all, and you find them guilty under this evidence, and it is of murder, or a killing committed while in the perpetration of a robbery or burglary, that the law says is murder in the first degree; and as I said at the outset, it is not of any consequence to you or me what the punishment may be, that is fixed by law, beyond your control, except as you may modify it,

as I will tell you in a moment. And so you are not responsible for the penalty. That the law fixes. Your duty is to say whether, under this evidence, this murder was committed while a robbery was being perpetrated at which these defendants were present, aiding and abetting the carrying out of that scheme. And if they were, it does not make any difference which of the conspirators fired the shot.

The Legislature a year or so ago provided by law that a jury in a case of this kind, where they were satisfied that a crime was murder in the first degree, could, if they saw fit, recommend that the punishment should be imprisonment for life. That, of course, you have the right to do, if you think with the circumstances of this case and the facts shown here, you ought under such facts and circumstances to make such a recommendation. It is not for the Court to say, but I do not intend by anything I say to intimate what you should do. You ought to do your duty. If your verdict is murder in the first degree, and nothing more, then the extreme penalty of the law will be inflicted. If you want to modify that and impose a different sentence, then you would have to return with your verdict that you recommend imprisonment for life. You may retire.

DEFENDANTS' EXCEPTIONS.

30

MR. STRONG: Allow me to take a general exception to Your Honor's entire charge?

THE COURT: Yes.

Exception allowed, sealed accordingly.

J. J. BERGEN,

Judge.

MR. STRONG: And an exception to Your Honor's

failure to charge each of the several requests to charge in the language requested.

THE COURT: I did charge them, Senator.

MR. STRONG: There was some modification of them, I think, possibly.

THE COURT: All right.

MR. STRONG: Out of abundant precaution, not without any reasoning.

10 THE COURT: I do not want to allow an exception. That is, I need not sign it after all.

MR. STRONG: To Your Honor's charge there was no right on the part of the jury to set up any other rule of law.

THE COURT: What I said on that subject.

MR. STRONG: Yes.

Exception allowed, sealed accordingly.

J. J. BERGEN,
Judge.

20 MR. STRONG: Also to Your Honor's statement that it made no difference if De Palma did not intend to kill the deceased.

Exception allowed to what I have said on that subject, sealed accordingly.

J. J. BERGEN,
Judge.

MR. STRONG: To Your Honor's charge that it must be murder in the first degree, or acquittal.

30 Exception allowed and sealed accordingly.

J. J. BERGEN,
Judge.

Jury returned to Court Room.

Verdict: Guilty of Murder in the first degree.

MR. STRONG: I ask to have the jury polled, and whether there is any recommendation of mercy.

THE COURT: Just poll the jury.

(Jury polled by the Clerk.)

DEFENDANTS' REQUESTS.

(1)

"That the confession of De Palma introduced in evidence by the State is not evidence against Lavieri."

(2)

"That the confession of Lavieri introduced in evidence by the State is not evidence against De Palma." 10

(3)

"That the jury may at the time of rendering their verdict recommend imprisonment at hard labor for life, for both or either of the defendants."

MIDDLESEX OYER AND TERMINER.

THE STATE OF NEW JERSEY, }

vs. }

FRANK LAVIERI, MICHAEL DE
PALMA, GERANO PALMIERI,
ALIAS NAPOLITANO. }

10

The Court is respectfully requested to charge:

1. That the confession of De Palma introduced in evidence by the State is not evidence against Lavieri.

2. That the confession of Lavieri introduced in evidence by the State is not evidence against De Palma.

20

3. That the jury may at the time of rendering their verdict recommend imprisonment at hard labor for life.

THEODORE STRONG,
Attorney for Defendants.

30 I hereby certify that the above is the entire record of proceedings had upon the trial of the above entitled cause.

J. J. BERGEN,
Judge.

(Served April 7, 1919)

New Jersey Court of Errors and Appeals

State of New Jersey. :
vs. : On Error to Middlesex
Frank Lavieri and Michael : Oyer and Terminer.
De Palma. :

The plaintiffs in error hereby specify the following additional causes upon which they rely for a reversal of said judgment, that is to say:

5. Because the Court refused to charge defendants first request to charge that the confession of De Palma introduced in evidence by the State was not evidence against Lavieri.

6. Because the Court refused to charge defendants second request to charge that the confession of Lavieri introduced in evidence by the State was not evidence against De Palma.

7. Because the Court refused to charge defendants third request to charge that the jury might at the time of rendering their verdict recommend imprisonment at hard labor for life.

THEODORE STRONG,
OF COUNSEL WITH PLAINTIFFS IN ERROR.

West Jersey Court of Appeals

State of New Jersey.

vs. On Error to Middlesex

Frank Lavelle and Michael

De Palma.

The plaintiff in error hereby asserts the following additional reasons upon which they rely for a reversal of said judgment, that is to say:

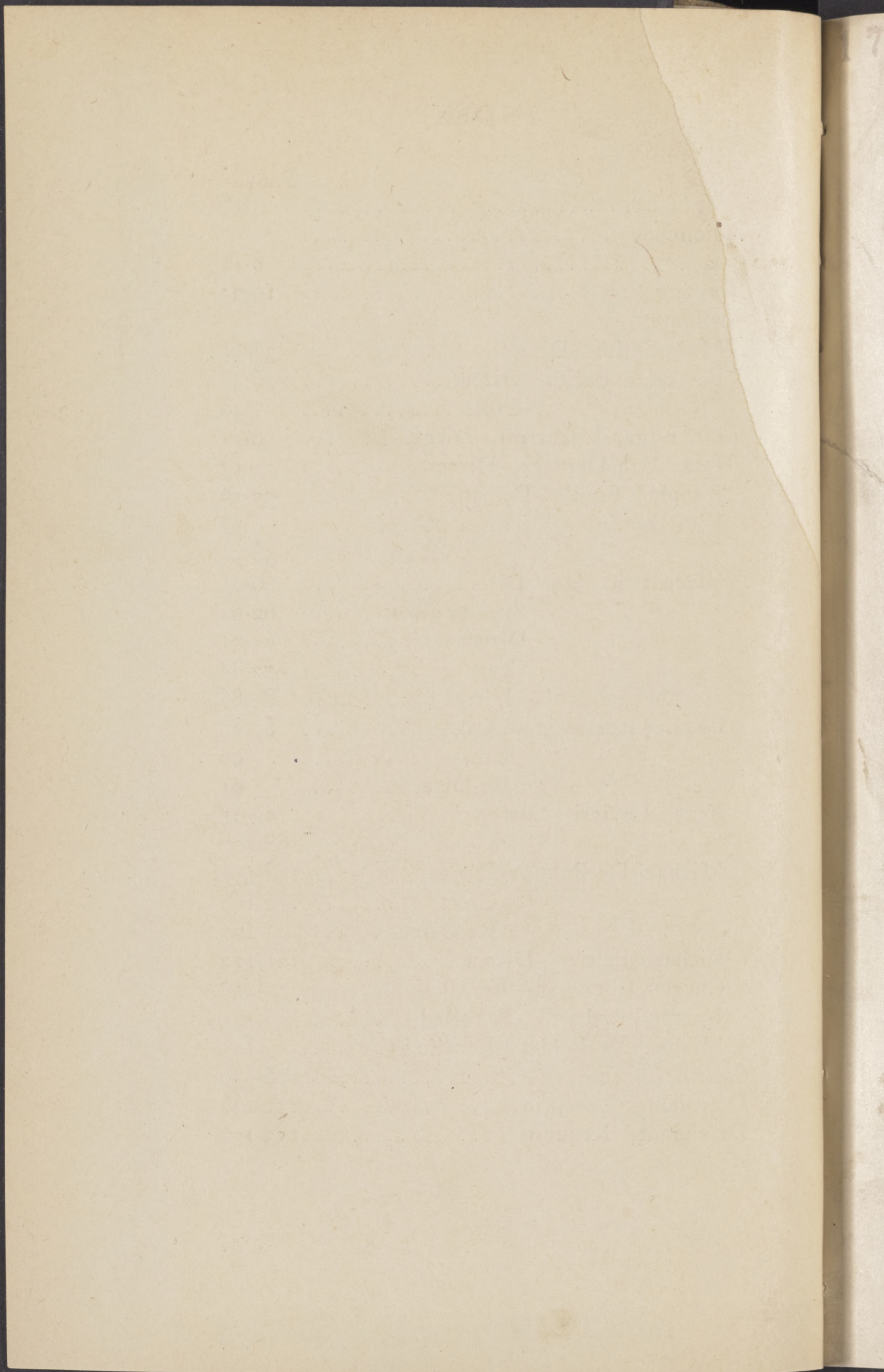
5. Because the Court refused to grant defendant's first request to charge that the confession of De Palma introduced in evidence by the State was not evidence against Lavelle.

6. Because the Court refused to grant defendant's second request to charge that the confession of Lavelle introduced in evidence by the State was not evidence against De Palma.

7. Because the Court refused to charge defendant's third request to charge that the jury might at the time of rendering their verdict recommend imprisonment as hard labor for life.

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New Jersey Court of Errors and Appeals

STATE of NEW JERSEY,
Defendent in Error

VS.

FRANK LAVIERI, and
MICHAEL DE PALMA,
Plaintiffs in Error.

ON INDICTMENT

FOR MURDER.

ERROR.

TO MIDDLESEX OYER

AND TERMINER

BRIEF FOR DEFENDANT IN ERROR.

The facts in the case are tersely put by Mr. Justice Bergen in his statements in his charge as to the States claim—page 127.

These two defendants, with three others, entered into an agreement to come from the city of New York to the County of Middlesex for the express purpose of robbing the house of Roman Smith in this county. They came armed for that purpose. Two or three of these defendants, not including De Palma had been out once or twice before looking over the premises, but finding the conditions were not such as to warrant the attempt to commit the crime at that time, postponed it until the eleventh day of October, when they came out, went to the house, asked Mrs. Smith for some milk, and as she went into the house to make change, or was returning to them, Laveri, one of these defendants, and another, not on trial, seized her, threw her down, tied her legs and arms, ransacked the house

and took what money they could find, and that they afterwards divided that money although De Palma says he did not get any of it. While that was going on, Mr. Smith who had been in the field was returning to the house or some building. It appears * * * that he was shot in what they call the tool house. Exactly why he went there the evidence does not show. But he was met there, or somewhere in that neighborhood, by one of these parties, a man not on trial, who shot him.

If there was a concerted agreement among these people (the defendants and their comrades) to go out and rob that house, and they were all there present, and someone of the party in the execution of that crime took the life of Mr. Smith, they are all equally responsible.

The defendants were convicted of murder in the first degree and to review the consequent judgment the writ of error in this cause was sued out. As stated in the brief in the case of *State vs. Palmieri* (one of the party) now before this Court this was a most heinous crime.

It is true that De Palma claimed that he was coerced. However in his own testimony De Palma admits that he went there with the purpose of robbing the house. *Page 110*. After relating how they had come from New York and waited in the woods, he continued "And we started, the four of us. We got there about nine o'clock. And I, from a distance, said there is the house, I said to Frank, I am going, good bye. Frank said to me wait: come on and have a glass of milk. I says, milk I don't want, I don't desire, and I wont come because I don't want to come near there as they know me because when I lived in the house they used to come and pick up their peaches, and they used to see me and they know

me. And Frank says, it is better that they know you, then they wont suspect anything. Then the four of us, myself, Frank Lavieri, Palmieri, Tony Abbruzzi we went to the house. Frank Lavieri ordered the milk, etc." All of which was in pursuance of the plan formed in New York to rob the home of Roman Smith, at South River, N. J.

POINTS I AND II.

1. The Court, charged the jury that it could find no facts which would justify any verdict of manslaughter.

2. The Court, charged that the verdict must be either of murder in the first degree or acquittal.

These points may well be treated together as if the Court was right in the charge complained of in reason 4, obviously there can be no merit in the point raised in reason 3.

The Crimes Act, 107th section, provides that murder which shall be perpetrated by means of poison, etc., or which shall be committed in perpetrating or attempting to perpetrate any arson, burglary, rape, robbery or sodomy shall be murder in the first degree.

If this killing was done in perpetrating or attempting to perpetrate robbery the result was by virtue of the statute murder in the first degree.

Roesel vs. State, 62 N. J. L. 223.

The Court's charge on this point is found at page 128 of the case. The Court said " If there was a concerted agreement among those people to go out

and rob that house, and they were all there present, and some one in the party in the execution of that crime took the life of Mr. Smith, they are all equally responsible. * * * I repeat, if divers persons agree to act together in committing a robbery or burglary, and in carrying out that purpose one of the party kills a person, all who are present aiding or abetting in the committing of the robbery are principals and equally guilty for the acts done by either, whether the death was caused by the act of one or of the other. * * * The question that comes up for you to determine, I suppose, is, were these two defendants present with two others of these parties, if there was a common agreement, which is a fact that you must find, to rob this house, were these two men present aiding and abetting and giving countenance to one another in the perpetration of the robbery, and one of the party shot Mr. Smith, they are all equally guilty of murder in the first degree because, " etc.

Thus the jury were to determine the facts and if under the facts as found by the jury the murder was committed while perpetrating or attempting to perpetrate a robbery it could be nothing but murder in the first degree. Now what is manslaughter?

Where a person kills another upon a sudden transport of passion or heat of blood upon a reasonable provocation and without malice.

State vs. Zellers, 7 N. J. L. 220.

State vs. Biango, 68 At. Rep. 125.

There are no facts in the case which by any stretch of the imagination could justify a conviction of manslaughter; but defendant was either guilty of murder in the first degree, or not guilty.

POINTS III AND IV.

3. The Court refused to charge the jury as requested by the defendant, that the confession of De Palma introduced in evidence by the State was not evidence against Lavieri.

4. The Court refused to charge the jury as requested by the defendant, that the confession of Lavieri, introduced in evidence by the State, was not evidence against De Palma. If there were a foundation in fact for these specifications or reasons there might be something to answer. A reference to the charge however (*page 129 line 15 25*) will show that the Court unqualifiedly charged the requests in the very language thereof.

Such comment as the Court made following the charge of the requested instruction, is not only competent, but in this case it would seem was clearly the Court's duty.

State vs. Schuyler, 68 At. Rep. 57.

State vs. Donnelly, 26 N. J. L. 463.

State vs. Engle, 50 N. J. L. 272.

State vs. Simon, 71 N. J. L. 142.

State vs. Hunner, 73 N. J. L. 714.

State vs. Valentine, 71 N. J. L. 552.

POINT V.

This point is based on the ground that the Court did not add to his language in charging the jury if the right to render a modified verdict that the imprisonment for life be "*at hard labor.*"

Chief Justice Beasley in *State vs. Gibbs, 45 N. J. L. 388*, said "*hard labor*" is a component part of

confinement in the State Prison, and therefore when the sentence is to subject the prisoner to such a confinement it necessarily follows that he is thereby condemned to hard labor.

This was approved in *State vs. Ford*, 86 N. J. L. 74, and the various acts imposing hard labor as a component part of the penalty cited.

Counsel argues that the presumption that all know the law is a pleasant fiction, having no place in a capital case. He also argues as he knows that the hard labor imposed at the prison is a fiction, and yet while relying in his argument on a claimed fiction that has no recognition in the law, he would cast aside as fiction a principle of law that the wisdom of the ages has recognized as useful and beneficent.

There is no legal rule that compels a Court to adopt Counsel's language as contained in a request to charge. Indeed the rule is and always has been otherwise.

State vs. Gardner, 55 N. J. L. 17 at 25.

The Courts charge in this particular is found at page 131. It substantially states the law on the subject and that is all the defendants could ask.

It is therefore urged that no error appearing in the record the writ of error should be dismissed and the judgment affirmed.

Respectfully submitted,

JOSEPH E. STRICKER,

Prosecutor of the Pleas.

Bond

& Co

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