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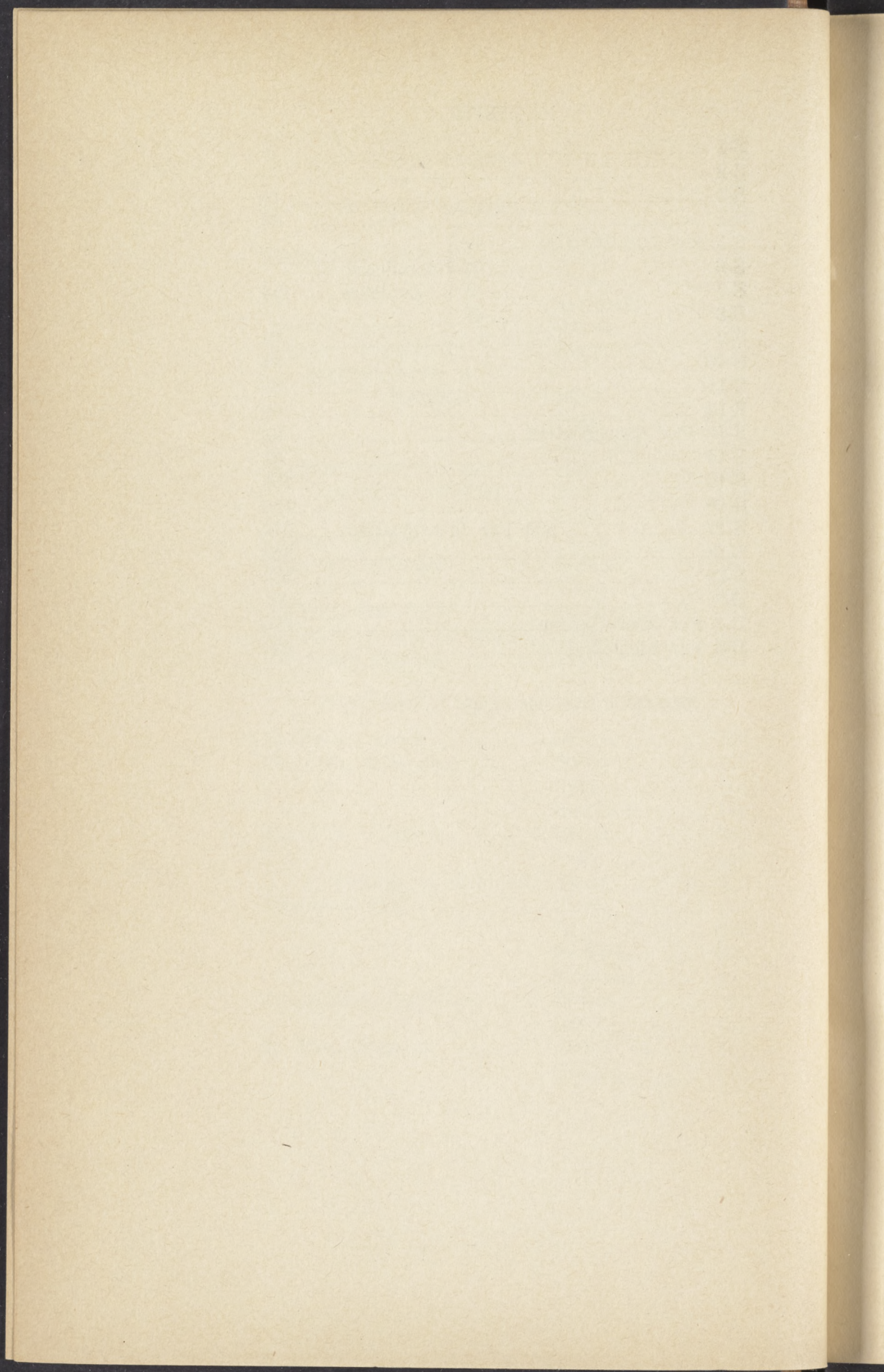
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CERTIFICATE OF CHANCELLOR  
IN CHANCERY OF NEW JERSEY.

STATE OF NEW JERSEY,

—vs—

PAUL CAPPIELLO,

*Defendant.*

CHANCELLOR'S  
CERTIFICATE  
OF REFUSAL.

10

On Indictment and conviction in the Essex County Court of Oyer and Terminer of the Crime of Murder in the First Degree.

This is to certify that application has been made to me for the allowance of a Writ of Error to be issued out of the New Jersey Supreme Court for the review of the judgment of the Essex County Court of Oyer and Terminer convicting the said Paul Cappiello of the crime of murder in the first degree, and that I have refused to allow the Writ of Error out of the New Jersey Supreme Court for the review of said judgment.

20

Dated at Trenton, New Jersey, this 31st day of January, One Thousand Nine Hundred and Thirty.

E. R. WALKER,

*C.*

30

40

## INDICTMENT

STATE OF NEW JERSEY  
 COUNTY OF ESSEX. ss.

10 BE IT REMEMBERED, that at a Court of Oyer  
 and Terminer, holden at Newark, in and for the  
 County of Essex, on the third Tuesday in Septem-  
 ber in the year of Our Lord, One Thousand nine  
 hundred and twenty-nine, by the Honorable Wil-  
 liam S. Gummere, Chief Justice of the Supreme  
 Court of Judicature of the State of New Jersey,  
 and holding the said Court of Oyer and Terminer,  
 in and for the County of Essex, New Jersey, by  
 the oath of Edwin T. B. Penman, George H.  
 Bailey, Fayette Simonson, J. Arthur Carlson,  
 Romeo Effenberger, Louis V. Ennis, Maurice Schot-  
 land, Edward B. Mason, Edward J. Macksey, John  
 V. Green, Felix A. Lunney, Alexander Brunner,  
 20 Frank C. Zuch, Frank L. Quinlan, Ralph B. Smith,  
 Jr., Albert F. Schober, Frank Lee, Charles F.  
 McCord, George L. Suttie, Robert R. Sellers, Arthur  
 W. Pie, Richard F. Damkoehler, Frederick G. Stir-  
 ling, good and lawful men of the said County  
 of Essex, duly summoned and then and there duly  
 sworn and charged to enquire in behalf of the  
 State of New Jersey, in and for the said County  
 of Essex, it is presented in manner and form fol-  
 lowing, to wit: Essex County, to wit:

30 The Grand Jurors of the State of New Jersey,  
 for the County of Essex, upon their oath present  
 that Paul Cappiello on the nineteenth day of Octo-  
 ber, in the year of our Lord one thousand nine  
 hundred and twenty-nine, at the City of Newark,  
 in the County of Essex aforesaid did wilfully,  
 feloniously and of his malice aforethought kill  
 and murder Michael Laccarino contrary to the form  
 of the State in such case made and provided, and  
 against the peace of this State, the government and  
 40 dignity of the same.

JOSEPH L. SMITH,  
*Prosecutor of the Pleas.*

**RECORD OF DELIVERY OF INDICTMENT  
FOR TRIAL**

And on the thirtieth day of October A. D. Nineteen Hundred and twenty-nine, on which day the said indictment was presented by the Grand Jury aforesaid to the said Court of Oyer and Terminer, and the said Justice did then and there order the said Indictment to be delivered to the Clerk of the Court of Oyer and Terminer in and for said Court and then and there the said Indictment was delivered and duly filed by said Clerk, and an entry of such delivery an filing was then an there made in the minutes of said Court, at the same time pursuant to the statute in such case made and provided. 10

**PLEA**

And afterwards, that is to say, at the same session of the Court of Oyer and Terminer holden at Newark on the seventh day of November A. D. Nineteen Hundred and twenty-nine before the Judge aforesaid, comes the said Paul Cappiello in the custody of Harry L. Huelsenbeck, Sheriff of the County of Essex aforesaid, in the above custody in the Jail of the County aforesaid, he has been before committed for the cause aforesaid being brought to the Bar of this Court in his own proper person by the said Sheriff to whom he is also committed and having heard the Indictment and being forthwith demanded of and concerning the premises in the above indictment specified and charged upon him how he would acquit himself thereof, he says that he is Not Guilty thereof, and therefore, for good and evil he puts himself upon the Country, and Joseph L. Smith Prosecutor of the Pleas for the County of Essex aforesaid, who prosecutes for the State of New Jersey in this behalf doth the like. 20  
30  
40

*Plea*

Therefore, let a Jury thereupon come before the Judge aforesaid, at Newark aforesaid, in the County of Essex, at the same session of the Court of Oyer and Terminer aforesaid on the seventeenth day of December, A. D. Nineteen Hundred and Twenty-nine, twelve free and lawful men each of whom shall be a citizen of this State and a resident within the County of Essex aforesaid, above the age of twenty-one years and under the age of sixty-five years by whom the truth of the matter may be better known and who are not of kin to the said Paul Capiello to recognize upon their oath, whether the said Paul Capiello is Guilty of the Murder in the indictment aforesaid specified or Not Guilty, because as well the said Joseph L. Smith, Prosecutor of the Pleas of the County of Essex aforesaid who prosecutes for the State of New Jersey in this behalf as the said Paul Capiello has put himself upon the Jury, and the same day is given to the parties aforesaid, at the same place. At which day, to wit, the seventeenth day of December in the year of our Lord, one thousand nine hundred and twenty-nine, at the same Term of the Court of Oyer and Terminer, holden at Newark, aforesaid, in the County of Essex, before the Honorable Dallas Flannagan, Judge of the Court of Common Pleas, holding the Court of Oyer and Terminer, in and for the said County of Essex, comes as well the said Joseph L. Smith, Prosecutor of the Pleas who prosecutes aforesaid, and the said Paul Capiello in the custody of Harry L. Huelsenbeck, Sheriff of the County aforesaid, being brought to the bar in his own proper person, by the said Sheriff, and the Jurors of the Jury by the said Sheriff for this purpose empannelled and returned, after the following challenges were exhausted, by the State 6, Jurors wre excused by consent 1, Stanley F.

*Plea*

by the defendant 12, the Court excused 8, and 4 Brooks, 2, Joseph E. DeWyngaert, 3, William O. Britton, 4, Edward B. Brown, 5, Howard L. Criger, 6, William H. Cooper, Jr., 7, Charles C. Adams, 8, Harry W. Chenoweth.

After Jurors No. 8 were sworn, the said Special Panel becoming exhausted the Court order the remainder of the Jury drawn from the General Panel of Jurors, whereupon the following named persons were returned from the General Panel and sworn as jurors, 9, Frank S. Bruce, 10, Alfred Bulson, 11, August J. Bauer, 12 George E. Dewick, being called come and were sworn on that Jury who to speak the truth of, and concerning the premises and thereupon the trial of the issue commenced and continued before the said Court and Jury, from day to day, until the eighteenth day of December A. D. Nineteen hundred and twenty-nine, at Newark aforesaid, when Counsel for defendant made a motion for the withdrawal of a juror and that the Court declare a mistrial, which motion was heard by the Court and denied, whereupon the Counsel for defendant again made a motion for the withdrawal of a juror and that the Court declare a mistrial which motion was again heard by the Court and denied.

At the close of the State's case, Counsel for defendant made a motion for the dismissal of the indictment and that the Court direct a verdict for defendant, which motion was denied by the Court.

Counsel for defendant also made motion that the Court withdraw from the consideration of the jury the count of the indictment charging Murder in the first degree, which motion was denied by the Court.

And on the nineteenth day of December A. D. Nineteen Hundred and twenty-nine, at this stage

*Plea*

of the proceedings the Court order the jury to retire in order that counsel might argue the admissibility of evidence after which argument the jury returned into Court and the trial progressed.

10 Whereupon the trial of the issue was continued to the nineteenth day of December, A. D. Nineteen Hundred and Twenty-nine, before the said Court and Jury, and the Jury in the meantime being all that time kept together and in the care of Officers of the said Court, who were selected and duly sworn by said Court for that purpose, at which last mentioned day the said issue after a charge from said court was submitted to the said jury, and the said jury in charge of said Officers of said Court for that purpose were taken to a private room to consider of their verdict, and  
20 afterwards, that is to say, on the day aforesaid, at Newark, the said Jury returned into and before the said Court in charge of said officers of said Court sworn to keep them in charge, and then and there in the presence of the said Prosecutor, Joseph L. Smith and the said Paul Cappiello, say they have agreed upon their verdict and by their foreman say, "We find the prisoner at the bar, Paul Cappiello, Guilty of Murder in the first degree and recommend imprisonment at hard labor for  
30 life."

**ARREST OF JUDGMENT**

And afterwards, that is to say on the seventh day of January A. D. Nineteen Hundred and Thirty, the above case having been set down for sentence, David E. Price, Esq., counsel for defendant made a motion in arrest of judgment and a further motion that the verdict be set aside, which  
40 two motions were heard by the Court and denied.

## JUDGMENT AND SENTENCE

Judgment signed  
 Jan. 7th, 1930.  
 Dallas Flannagan,  
*Judge.*

Whereupon, all and singular, the premises being seen, and by the Court now here fully understood, it is on this seventh day of January, A. D. Nineteen Hundred and Thirty, ORDERED and ADJUDGED that Paul Cappiello, be imprisoned in the State Prison of this State at Hard Labor for life. And the defendant be in Mercy etc.

10

20

30

40

## WRIT OF ERROR

NEW JERSEY COURT OF ERRORS  
AND APPEALS

10	STATE OF NEW JERSEY, <i>Defendant-in-Error,</i>  <i>vs.</i>  PAUL CAPPIELLO, <i>Plaintiff-in-Error.</i>	}	WRIT OF ERROR.
----	---	---	----------------

NEW JERSEY, ss:

To DALLAS FLANNAGAN, Esquire,  
 Judge of the Court of Oyer  
 and Terminer of the County of  
 Essex:

20 (SEAL)

Because in the record and proceedings, and also in giving of judgment upon a certain indictment against PAUL CAPPIELLO, late of the Borough of Brooklyn, in the County of Kings and State of New York, for the crime of murder in the first degree.

30 Pro ut that said indictment whereof, before you, he has been indicted, and is thereof convicted by a certain jury of the County, taken between the State of New Jersey and the said Paul Cappiello, as it is said, manifest error hath intervened to the great damage of the said Paul Cappiello, as from his complaint we have received information, we being willing, in this behalf, to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Paul Cappiello, command you that if judgment be thereon given, then that you distinctly and openly send,  
 40 under your seal, the record and proceedings afore-

*Writ of Error*

said, with all things touching the same to our Court of Errors and Appeals of the State of New Jersey, on the 19th day of February next, and this Writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the law ought to be done. 10

WITNESS, EDWIN ROBERT WALKER, Esquire, our Chancellor and President Judge, at Trenton aforesaid, the thirty-first day of January, A. D. One Thousand Nine Hundred and Thirty.

JOSEPH F. S. FITZPATRICK,  
*Clerk*

WILLIAM M. UNTERMANN,  
*Attorney.* 20

PRESENTED IN OPEN COURT

THIS 3rd DAY OF FEB, 1930.

Dallas Flannagan  
*Judge.*

30

40

## RETURN

STATE OF NEW JERSEY, ss:  
COUNTY OF ESSEX.

10 I, Dallas Flannagan, Judge of the Common Pleas Court holding the Court of Oyer and Terminer in and for the County of Essex, New Jersey, Do Hereby Certify and Return to the Court of Errors and Appeals the Court of last resort in this State the Judgment, the record and proceedings together with the entire record of the proceedings had at the trial and all things touching and concerning the same as by the within Writ to me directed, I am commanded.

20 (SEAL) In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court at Newark, New Jersey, this 13th day of February, A. D. 1930.

DALLAS FLANNAGAN,  
Judge of the Comomn Pleas Court holding the Court of Oyer & Terminer, Essex County, New Jersey.

30

40

ESSEX COUNTY COURT OF OYER  
AND TERMINER.

Tuesday, December 17, 1929.

STATE OF NEW JERSEY,

—vs—

PAUL CAPIELLO,

On Indictment  
No. 2.

Dec. T. 1929  
for

MURDER.

10

Before Hon. Dallas Flannagan, Judge.

For the State appears Joseph E. Conlon,  
Second Assistant Prosecutor of the  
Pleas.

20

For the Defendant appears William Un-  
terman and David F. Price of the New  
York Bar, of counsel.

MR. UNTERMAN: May it please the  
Court, before we proceed with the Paul  
Cappiello case, I wish — I am attorney of  
record, associated with David Butler — at  
this time I want the courtesy of the Court  
to be extended to Mr. Price.

30

THE COURT: I will be glad to have  
Mr. Price. Of course, I can only hear one  
counsel on one side.

Attention of counsel was called to the  
fact that there were only 26 men left of  
the special panel, and counsel for both  
sides state it is agreeable to them to pro-  
ceed with 26 men in the panel.

40

*Drawing of Jury, Joseph A. Bennett.*

JOSEPH A. BENNETT, being duly sworn on his voir dire, testified as follows:

BY MR. CONLON:

10 Q Mr. Bennett, you are in the fire insurance business?

A I am.

Q Where?

A The Phoenix Insurance Company, New York.

Q You live in Millburn?

A Yes.

Q Are you married?

A Yes, sir.

Q Have you any conscientious scruples against capital punishment?

A I have not.

20 Q If the evidence in this case convinces you beyond a reasonable doubt that this defendant is guilty of murder in the first degree, would you vote for such a verdict in spite of the fact that the punishment to be imposed upon him would be death by electrocution?

A I would.

Q Would you be willing, Mr. Bennett, to try this case upon the facts as presented upon the witness stand?

30 A I would.

Q And also on the law as propounded to you by the judge?

A I would.

Q And eliminate from your own mind any theory of law you might subscribe to?

A I would.

Q Have you any thought upon the weight to be given to the so-called unwritten law, or any law that is not part of our regular procedure?

40 A I have not.

*Drawing of Jury, Joseph A. Bennett.*

MR. CONLON: You may inquire, Mr. Price.

BY MR. PRICE:

Q Mr. Bennett, have you ever served as a juror before in a criminal case? 10

A No, sir.

Q Have you ever served in a civil case?

A I am not quite clear on that, what is meant by a civil case.

Q That is where there is an action brought to recover money?

A I have.

Q Have you ever been a member of the Grand Jury?

A No, sir.

Q Have you any prejudice against the Italians? 20

A No, sir.

Q You would give them the same sort of fair trial and square deal, as anybody else?

A I would.

Q This case happened in the City of Newark, in the vicinity, I think it is 9 Grant Street, the Morris Casket Company's place of business. Did you read about that in the newspapers?

A I did not.

Q Do you know anybody connected with the Prosecutor's office? 30

A No, sir.

Q Do you know anybody—

MR. CONLON: Just a minute. Your answer is no to that. You do not know anybody in the Prosecutor's office?

THE TALESMAN: I do not.

MR. CONLON: For the purpose of 40

*Drawing of Jury, Joseph A. Bennett.*

further questioning, I wish to object to that line of questions.

THE COURT: I sustain the objection.

MR. PRICE. I except.

10 Defendant's counsel prays an exception to this ruling of the Court.  
Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge.

Q You are not related to anybody in the Prosecutor's office, are you?

A No, sir.

20 Q Have you ever been a complainant in a criminal case of any kind?

A No, sir.

Q Are you related to any policeman?

A No.

Q How do you believe about policemen's testimony? Would you believe a policeman's testimony as you would anybody else's?

30 THE COURT: Gentlemen, I will not allow such questions. We will never get a jury. I wish you to understand that every question is asked purely by the courtesy of the Court. You have no right to ask any questions at all. I will ask the Prosecutor the same thing. I think he was a little long with his questions.

MR. PRICE: I want to facilitate it.

THE COURT: We must get along.

40 Q Of course, you understand that you are one of the sole judges of the facts?

*Drawing of Jury, Joseph A. Bennett.*

A Yes, sir.

Q Now, does the fact that the defendant has been indicted create a presumption against him in your mind?

A I did not hear it.

Q The fact that the defendant has been indicted, does that create a presumption against him in your mind? 10

A No, sir.

Q You believe abstractly in the law of self-defense; a man has the right to defend himself-

A Yes, sir.

Q Of course, the law of self-defense will be given to you by his Honor, not by me, you understand that?

A Yes.

Q You realize that the defendant at bar is presumed to be innocent until he is given a satisfactory showing to your satisfaction beyond reasonable doubt? 20

A Yes.

Q And before you vote to find him guilty of any degree of crime, you will make the prosecutor show you that he has been proven guilty beyond a reasonable doubt, will you not?

A Yes, sir.

MR. PRICE: Satisfactory. 30

MR. CONLON: The jury is satisfactory to the State.

MR. PRICE: We desire to peremptorily challenge the juror.

*Drawing of Jury, Stanley G. Brooks.*

STANLEY G. BROOKS, being duly sworn on his voir dire, testified as follows:

BY MR. CONLON:

- Q Mr. Brooks, what is your business?  
 10 A Employed by the Western Electric Company.  
 Q You live in Montclair?  
 A No, sir. That was at the time of registration, but now I live in Newark.  
 Q Are you married?  
 A Yes.  
 Q Do you know what is meant by capital punishment?  
 A Yes.  
 Q Have you any scruples against it?  
 A No.  
 20 Q If you were satisfied beyond a reasonable doubt that this defendant was guilty of murder in the first degree, would you vote to find him guilty?  
 A Yes.  
 Q Regardless of the fact that the punishment would be electrocution?  
 A I would.  
 Q If the Judge in his charge told you the so-called unwritten law theory is not the law of this State, would you be able to eliminate from your mind any such theory, if you do subscribe to it?  
 30 A I would.  
 Q In other words, you would be willing to hear this case and decide it upon the facts, upon the law propounded by the Court?  
 A I would.

MR. CONLON: You may examine.

BY MR. PRICE:

- Q Mr. Brooks, did you ever serve on a jury  
 40 in a criminal case before?

*Drawing of Jury, Stanley G. Brooks.*

A No, sir.

Q Have you ever been a member of the Grand Jury?

A No, sir.

Q The fact that the defendant is indicted for murder in the first degree, would that prejudice you in any way against him? 10

A No, sir.

Q Do you believe under certain circumstances in the law of self-defense?

A Yes.

Q Do you realize the defendant, under the law, is presumed to be innocent, and it is up to the Prosecutor to prove him guilty to your satisfaction beyond reasonable doubt?

A Yes, sir.

Q Do you understand that? 20

A Yes.

Q If it should appear in this case that the defendant carried a pistol, would that prejudice you against him?

MR. CONLON: Let me object to that.

THE COURT: Sustained.

MR. PRICE: I except.

Defendant's counsel prays an exception to this ruling of the Court. 30

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

DALLAS FLANNAGAN,  
Judge.

Q I will put it this way: Would the fact that a man carried a dangerous weapon in itself create a prejudice against him in your mind?

MR. CONLON: I object to that. 40

*Drawing of Jury, Stanley G. Brooks.*

THE COURT: Sustained.

MR. PRICE: I respectfully except.

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

10

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

DALLAS FLANNAGAN,

Judge.

20

Q If it is developed as a fact in this case that the defendant came to Newark with a pistol in his pocket, and he explained to you why he had the pistol and how he came to take it, do you feel that the fact that he had a pistol itself would so prejudice him in your mind that you would not give him a fair trial on this charge?

MR. CONLON: I object.

THE COURT: Sustained.

MR. PRICE: I respectfully except.

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

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

30

DALLAS FLANNAGAN,

Judge.

Q Will you try him on this charge and this charge alone?

A Yes, sir.

Q Laying aside every other consideration but this charge?

A Yes, sir.

40

Q Have you any prejudice against the Italians?

*Drawing of Jury, William O. Britton.*

A No.

Q And you will give an Italian the same sort of fair trial and square deal as you would anybody else?

A Yes.

Q Are you related to anybody connected with the Prosecutor's office? 10

A No.

Q Did you read about this case in the newspapers?

A No, sir.

Q Do you know anything about it?

A Never heard of it.

Q You will try this case on the evidence and the evidence alone, will you?

A Yes.

Q And decide it on the testimony and the inferences to be drawn from the testimony? 20

A Yes.

Q Give the defendant on trial a fair trial and a square deal?

A Yes.

MR. CONLON: Satisfactory to the State.

MR. PRICE: Satisfactory to the defense.  
(The juror is sworn).

(After two talesmen have been sworn). 30

WILLIAM O. BRITTON, being duly sworn on his voir dire, testified as follows:

BY MR. PRICE:

Q Mr. Britton, what is your business?

A Taylor Company foreman.

Q Have you ever served as a juror in a criminal case?

A Yes.

*Drawing of Jury, William O. Britton.*

Q Some other case?

A Manslaughter.

Q Other than that have you served?

A No, sir.

10 Q Did you hear the questions I have asked the other jurors?

A Part of them; I have heard practically all of them.

Q How do you feel about them?

MR. CONLON: That is rather general, your Honor.

20 THE COURT: Do you mean to ask him, does he feel he could give the case a fair trial if he heard these questions,—give the defendant a fair trial? Is that what you mean?

MR. PRICE: I will get to it, Judge.

Q Would you answer the questions the same as the two gentlemen in the box now?

A I would not say that, sir, because I do not know how they answered every question.

Q Do you know of any reason why you could not sit in this case and be absolutely fair?

A No, sir, I do not.

30 Q And give the defendant a fair trial and square deal?

A Yes.

Q Did you read about it in the newspapers?

A No. I have never heard anything before.

Q Are you related to anybody in the Prosecutor's office?

A No, sir.

Q Or any policeman?

A No.

40 Q Do you know of any reason why you could not be absolutely fair?

*Drawing of Jury, William O. Britton.*

A No, I do not.

BY MR. CONLON:

Q Have you any scruples against capital punishment, Mr. Britton?

A No, sir, only in following out the law. 10

Q In other words, if you are convinced beyond a reasonable doubt that this defendant was guilty of murder in the first degree, you would vote to so find in spite of the fact that the punishment imposed upon him would be death by electrocution?

A I would be forced to give the prisoner the benefit of every doubt in my mind.

Q Well, in that respect, would you be willing to follow the law of the Court?

A The law of the Court, yes. 20

Q — that the defendant is entitled to a reasonable doubt?

A Yes.

Q And that you should give him the reasonable doubt?

A Yes, sir.

Q Suppcsing after you considered the evidence, you were convinced beyond a reasonable doubt that he was guilty, would you then vote to find him guilty? 30

A I would have to by law, yes, sir. Yes, sir, I would.

Q In spite of the fact that the penalty imposed upon him would be death?

A Yes.

Q Would you be willing to subscribe to the law propounded by the Judge if he should tell you that the so-called unwritten law is not the law of the State? 40

*Drawing of Jury, William O. Britton.*

MR. PRICE: I object to that. That question is improper. Your Honor will tell the juror he will have to follow the law and nothing else.

THE COURT: I will allow the question.

10

MR. PRICE: I respectfully except.

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

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

DALLAS FLANNAGAN,  
Judge.

20

MR. CONLON: I withdraw the question.

Q Suppose the Court in his charge to you at the end of the case—

A Yes.

Q —should tell you the so-called unwritten law is not the law of this State, would you be willing to eliminate from your mind any personal view you have on that subject and go along with the law as propounded by the Court?

30

A Yes, sir, I would try and follow out the law, yes.

Q The law of the Court, and not any idea you might or might not have?

A Yes.

Q Are you married?

A Yes, sir.

Q You do not know of any reason why you could not serve and give a fair and impartial verdict in this case?

A No, I do not.

40

MR. CONLON: You may challenge.

*Drawing of Jury, Wesley D. Clayton.*

MR. PRICE: The defendant is satisfied.

MR. CONLON: Satisfactory to the State.

(The juror is sworn).

(After three talesmen have been sworn).

WESLEY D. CLAYTON, being duly sworn on his voir dire, testified as follows: 10

EXAMINED BY MR. PRICE:

Q What is your business?

A Automobile dealer.

Q Did you hear the questions that were asked the other jurors?

A Not all of them I did.

Q Have you any prejudice against the Italians? 20

A No.

Q Would you give an Italian the same sort of fair trial and square deal you would give anybody else?

A Yes.

Q Have you any prejudice against a man charged with the crime of murder?

A No, not in the beginning, no.

Q You believe, ordinarily, a man has a right to defend himself?

A Defend his own life, yes. 30

Q And if it should appear from the testimony in this case that the deceased attacked the defendant, and the defendant believed at the time he was attacked the deceased intended to take his life and it was such a belief that a reasonable man would have under the circumstances, and his Honor told you that was the law, that the defendant would have a right to protect himself, would you follow that?

40

*Drawing of Jury, Wesley D. Clayton.*

10 MR. CONLON: Just a minute. I object to that question, your Honor. I don't think the question calls for an answer that would follow the law. The question is, would you subscribe to that defense, and of course, the facts have to be within the knowledge of the juror. It has no bearing on his qualifications; a question of that sort must be general as subscribing to the Court's instructions.

THE COURT: Would you follow the law in regard to self-defense as it may be stated by the Court?

THE TALESMAN: Yes, I would.

20 Q So, if his Honor does state to you, when a man is attacked and he believes at the time he is attacked the assailant is going to do him grave bodily harm or take his life, and it was such a belief an ordinary man would have under the same circumstances, an ordinarily prudent man would have under the same circumstances, would you follow that?

MR. CONLON: I object.

30 THE COURT: Sustained.

MR. PRICE: Exception.

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

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

DALLAS FLANNAGAN,  
Judge.

*Drawing of Jury, Wesley D. Clayton.*

Q Do you know of any reason why you could not be absolutely fair and impartial in this case, give the defendant on trial an absolutely fair trial and square deal?

A No, I do not.

BY MR. CONLON:

10

Q Have you any scruples against capital punishment?

A Not if the facts — not if the testimony warrants it conclusively,—if there is no doubt.

Q In other words, supposing you were convinced beyond a reasonable doubt from the testimony that this defendant was guilty of murder in the first degree, would you vote to so find him guilty in spite of the fact that the penalty to be imposed upon him would be electrocution?

20

A Yes.

Q Would you subscribe to the law as propounded by the Judge in respect to the so-called theory of the unwritten law if he should tell you that is not the law of this State?

MR. PRICE: I object to that. I do not know what the unwritten law is. I don't see how the juror can answer what the unwritten law is.

30

MR. CONLON: If the juror does not know what the unwritten law is, he can say so.

THE COURT: I think that is involved in the answer the juror has given. He said he would accept the law propounded by the Court, and not undertake to follow any law he himself should subscribe to, and if he will do that, I think it covers what you are asking.

40

*Drawing of Jury, Samuel C. Baker.*

Q You will do that?

A Yes.

(Excused by the defense).

(After four talesmen have been sworn).

10 SAMUEL C. BAKER, being duly sworn on his voir dire, testified as follows:

EXAMINED BY MR. CONLON:

Q Mr. Baker, you are in the real estate business?

A I am.

Q You live in West Orange?

A In West Orange. I am in the real estate business in Newark.

20 Q Are you married?

A I am.

Q Do you know what is meant by capital punishment?

A I do.

Q And have you any scruples against it?

A No, sir.

30 Q Suppose the evidence in this case convinces you beyond a reasonable doubt that this defendant was guilty of murder in the first degree, would you so vote to find him guilty in spite of the fact that the verdict would carry with it electrocution?

A I do,—yes.

Q Do you know what is meant by the unwritten law, that phrase?

MR. PRICE: I object to it.

THE COURT: I will allow it.

MR. PRICE: I except.

40 Defendant's counsel prays an exception to this ruling of the Court.

*Drawing of Jury, Samuel C. Baker.*

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

DALLAS FLANNAGAN,  
Judge.

Q Do you know what is meant by the phrase  
"the unwritten law"? 10

A I know the phrase of the unwritten law, yes.

Q You understand what is meant by it, do you?

A I do.

Q Suppose the Court in his charge should tell  
you that is not the law of this State, would you  
be able to eliminate from your mind any such  
theory and follow the law as propounded by the  
Court?

A Only by the Court, yes.

Q In other words, you will be able to eliminate 20  
from your own mind any theory you might sub-  
scribe to, on the side, that was not correct. Is  
that right?

A Yes.

BY MR. PRICE:

Q Did you ever serve on a jury in a criminal  
case before?

A No. W

Q Did you read about the case in the news-  
papers? 30

A No.

Q You realize that the defendant is presumed  
to be innocent?

A I beg your pardon?

Q I say, do you realize that the defendant un-  
der our law is presumed to be innocent; that means  
he is innocent as he sits here, of all crime?

A Yes.

Q — Until the case is submitted to you, and  
the charge of the Court, and until you find from 40

*Drawing of Jury, Howard L. Criger.*

the evidence in the case his guilt has been established to your satisfaction beyond reasonable doubt. Is that right?

A Yes.

Q And before you would vote—

10

MR. CONLON: I will excuse this juror. I think we can save time.

(Talesman excused by the State).

(After four talesmen have been sworn).

HOWARD L. CRIGER, being duly sworn on his void dire, testified as follows:

EXAMINED BY MR. PRICE:

Q What is your business, Mr. Criger?

20 A Automobile mechanic.

Q Have you ever served on a jury in a criminal case before?

A No, sir.

Q Have you any prejudice against the Italians?

A No, sir.

Q You would give an Italian the same sort of fair trial and square deal you would anybody else?

A Yes, sir.

30 Q Would the fact that the defendant has been indicted for murder cause you to have any prejudice against him?

A No, sir.

Q You would try the case on the testimony as it develops here. Is that correct?

A Yes.

Q Do you believe in the law of self-defense?

A What was that?

Q I say, do you believe in the law of self-defense?

40 A To a certain extent, yes.

*Drawing of Jury, Howard L. Criger.*

Q That extent his Honor will tell you. If his Honor tells you that it is our law, if a man attacked by another it is his duty to avoid the attack if that won't place him in a position of greater peril, so that if you can't avoid the attack and he believes his life is in danger, and such belief is that a reasonable man would have under the same circumstances, he acts on that belief and kills his assailant, that would be self-defense. Would you follow that? 10

A Yes, sir.

MR. CONLON: Just a minute. I object to that question, your Honor.

THE COURT: I will allow it. Would you follow the instructions of the Court? 20

THE TALESMAN: Yes.

Q You realize under our law that the defendant is presumed to be innocent. That means as he sits at the counsel table he is innocent as a matter of fact.

A Yes.

Q —until you as one of the twelve triers of the facts—

A Yes.

Q — place your finger on credible testimony which convinces you beyond a reasonable doubt his guilt has been established? 30

A Yes, sir.

Q Now, did you read about the case in the newspapers?

A No, sir.

Q Do you know anything about it?

A No.

Q Are you related to anybody in the Prosecutor's office? 40

*Drawing of Jury, Howard L. Criger.*

A No.

Q Or in the Police Department?

A No, sir.

10 Q Mr. Criger, after you go to the jury room and enter upon your deliberations as a juror, it is your duty to discuss the testimony in this case with your brother jurors. You understand that?

A Yes.

Q And it is your duty to discuss it at great length, to have your mind open, without making up your mind one way or the other. You realize that?

A Yes.

MR. CONLON: I object to that.

20 Q After you go into the jury room.

MR. CONLON: I object.

THE COURT: Sustained.

MR. PRICE: I respectfully except.

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

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

DALLAS FLANNAGAN,

30 Judge.

Q After you go into the jury room and listen to all the arguments of your brother jurors, if you conscientiously come to the opinion that the defendant's guilt has not been established will you stick to that conclusion except they can convince you from fair argument of the testimony in the case that you are mistaken?

A Yes, sir.

40 BY MR. CONLON:

*Drawing of Jury, Howard L. Criger.*

Q Are you married?

A Yes, sir.

Q How old are you?

A 24.

Q Do you know of any reason why you could not sit in this case and give us a fair and impartial verdict? 10

A No, sir.

Q Do you know what is meant by capital punishment?

A Yes.

Q Have you any scruples against it?

A No, sir.

Q If you were convinced from the evidence in this case, from the charge of the Court, that this particular defendant is guilty of murder in the first degree, would you vote to so find him? 20

A If the evidence warranted it.

Q Yes. If you were convinced beyond a reasonable doubt as the Court described reasonable doubt to you,—if you were convinced beyond a reasonable doubt that he was guilty, would you vote to so find him?

A Yes.

Q —in spite of the fact that the penalty to be imposed upon him would be electrocution?

A Yes. 30

Q Do you know what is meant by the so-called unwritten law?

A No, I do not.

Q Would you in this case accept the law of the case as propounded by the Judge?

A Yes.

Q —and eliminate from your mind any theory you personally might have which would be in conflict or contrary to the law the Court might tell you? 40

*Drawing of Jury, William H. Cooper, Jr.*

A I don't understand.

Q Would you be willing to follow the law of the case as propounded by the Judge, as he tells you at the end of the case, and eliminate from your own mind any theory you might have which would be contrary to what the Court would tell you?

10

A Yes, sir.

MR. CONLON: You may challenge.

MR. PRICE: The defendant is satisfied.

MR. CONLON: The State is satisfied.

(The juror is sworn).

(After five talesmen are sworn).

WILLIAM H. COOPER, Jr., being duly sworn on his voir dire, testified as follows:

20

EXAMINED BY MR. PRICE:

Q What is your business?

A Bank clerk.

Q Have you ever served as a juror in a criminal case before?

A Yes, sir.

Q Ever in a murder case?

A No, sir.

30 Q Did you read about this case in the papers, that happened on the 19th of October last, in the neighborhood of 11 Grant Street, Newark?

A I don't recall.

Q You have not formed any impression?

A No.

Q —about it, one way or the other. Have you any feeling against Italians as a race?

A No.

Q You would give an Italian the same sort of fair trial and square deal you would anybody else?

40

A Yes.

*Drawing of Jury, William H. Cooper, Jr.*

Q Do you realize the defendant is presumed to be innocent?

A Yes.

Q Do you?

A Yes.

Q — until you, as one of the twelve triers of the facts can place your finger on credible testimony and say that convinces you beyond a reasonable doubt? 10

A Yes.

Q And if the Prosecutor fails to make that kind of proof, you won't hesitate to say so and acquit him, will you?

A No, sir.

Q If you have a reasonable doubt of his guilt, whether that arises from the Prosecutor's case or both, you will resolve that doubt in the defendant's favor, will you? 20

A Yes.

Q Do you believe in self-defense?

A Yes.

Q Mr. Cooper, after you go to the jury room and discuss the testimony with your brother jurors and listen to all the argument from the testimony in the case — of course, you twelve men are the sole and exclusive judges of the facts, you realize that — after you listen to all the argument from the testimony in the case, if you have a conscientious belief that the guilt of the defendant has not been established beyond a reasonable doubt, will you stick to your conclusion and bring in your individual verdict? 30

A Yes, sir.

EXAMINED BY MR. CONLON:

Q Mr. Cooper, where are you employed? 40

*Drawing of Jury, William H. Cooper, Jr.*

A I am employed by the Guaranty Trust Company, New York.

Q Are you married?

A Yes.

Q How long have you lived in this County?

A Thirty years.

10 Q Do you know of any reason why you can't sit in this case and give an impartial verdict upon the facts and the law given to you by the Judge?

A No.

Q You know what is meant by capital punishment?

A Yes.

Q Have you any scruples against it?

A No, sir.

20 Q Supposing at the end of this case you are convinced from the evidence and from the law as you receive it from the Court that this defendant is guilty of murder in the first degree, and if you are convinced of that beyond a reasonable doubt, would you vote to convict him so guilty?

A Yes.

Q Would you do that in spite of the fact that the penalty that would be imposed upon him would be death by electrocution?

30 A That is the law. I believe in upholding the law.

Q Do you know what is meant by the phrase "unwritten law"?

MR. PRICE: I object to that on the ground that it is incompetent, irrelevant and immaterial, and improper.

THE COURT: Overruled.

MR. PRICE: I respectfully except.

40 Defendant's counsel prays an exception to this ruling of the Court.

*Drawing of Jury, George Deisler.*

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

DALLAS FLANNAGAN,  
Judge.

Q Do you, Mr. Cooper?

A There seems to be different phrases of the unwritten law. I would be governed by what the Court told me.

10

Q Do you know what is meant by the phrase?

THE COURT: He says he will be governed by what the Court tells him what the law is.

MR. CONLON: You may challenge.

MR. PRICE: The defendant is satisfied.

20

MR. CONLON: The State is satisfied.

(The juror was sworn).

(After seven talesmen have been sworn).

GEORGE DEISLER, being duly sworn on his voir dire, testified as follows:

EXAMINED BY MR. PRICE:

Q Mr. Deisler, what is your business?

30

A Florist, retired.

Q Retired florist?

A Yes, sir.

Q Have you ever served on a jury in a criminal case before?

A No.

Q Have you any feeling against Italians?

A No.

40

*Drawing of Jury, George Deisler.*

Q You would give an Italian the same sort of fair trial as you would anybody else?

A Yes, sir.

Q Have you any prejudice against a man charged with murder?

10

A No.

Q Do you know of any reason, Mr. Deisler, why you can't sit in this case and be just?

A Yes, sir.

Q Do you believe in self-defense?

A Yes, sir.

Q And if his Honor gives you the law of self-defense and you believe the defendant acted within that law, will you then vote to acquit him?

A Yes.

20

Q If your scruples tell you you must?

A Yes.

Q If you have a reasonable doubt in your mind that he acted in self-defense as defined by the Court, will you give the defendant the benefit of the doubt and acquit him?

A Yes.

Q You will give the defendant on trial a fair trial and square deal?

A Yes.

30

Q Did you read about the case in the newspapers?

A No, sir.

Q Do you know anything about it?

A No, sir.

Q After you go to the jury room and discuss the testimony with your brother jurors at great length and listen to every conceivable argument as to the testimony, and then come to the conscientious opinion that there is a reasonable doubt in the case, will you stick to that conclusion?

40

A Yes.

*Drawing of Jury, George Deisler.*

Q No matter if they are all against you, except they can convince you from the testimony you are wrong. Is that right?

A Yes.

EXAMINED BY MR. CONLON:

Q Have you any scruples against capital punishment? 10

A No, sir.

Q If after hearing the evidence in this case and the law as given you by the Court, you are satisfied beyond a reasonable doubt that this particular defendant is guilty of murder in the first degree, would you vote to so find him?

A Yes, sir.

Q Would you do that in spite of the fact that the penalty to be imposed upon him would be death by electrocution? 20

A Yes.

Q Do you know what is meant by the phrase "unwritten law"?

MR. PRICE: I object to that as irrelevant, incompetent, immaterial, and improper.

THE COURT: Overruled.

MR. PRICE: I respectfully except. 30

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

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

DALLAS FLANNAGAN,  
Judge.

Q Do you know what is meant by that? If the Court in its charge to you at the end of this case should tell you that that theory is not the 40

*Drawing of Jury, David Bender.*

law in this State, would you be able to eliminate from your mind any consideration of it?

A Yes, sir.

Q And you would follow the law?

A Yes.

10 Q — as given to you by the Court?

A Yes.

MR. CONLON: You may challenge.  
(Talesman excused by the defendant).

DAVID BENDER, being duly sworn on is voir dire, testified as follows:

EXAMINED BY MR. CONLON:

Q Mr. Bender, you are on the list as a merchant. What is your business

20 A Clothes and furs.

Q Where?

A On Springfield Avenue.

Q How long have you lived in Newark?

A Sixteen years.

Q Have you any scruples against capital punishment if you are convinced from the evidence in this case that the defendant is guilty beyond a reasonable doubt? If after hearing all the evidence you are satisfied beyond a reasonable doubt he is guilty of murder in the first degree,

30 would you vote to find him so guilty?

A Yes.

Q And would you do that in spite of the fact that the penalty that would be imposed upon him would be death by electrocution?

A Yes.

Q Do you know what is meant by the unwritten law?

MR. PRICE: I object to that as in-

*Drawing of Jury, David Bender.*

competent, irrelevant, immaterial and improper.

THE COURT: Overruled.

MR. PRICE: I respectfully except.

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

10

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

DALLAS FLANNAGAN,  
Judge.

THE COURT: There isn't any use repeating that exception. If there is any merit in it, one exception is as good as one hundred.

MR. PRICE: All right. I will follow your Honor's suggestion.

20

Q Do you know what is meant by that?

A No.

Q In this case would you be willing to take the law as given to you by the Court and eliminate from your consideration any idea of the law you might have that would be contrary to what the Judge tells you?

A Absolutely.

MR. CONLON: You may examine.

30

BY MR. PRICE:

Q Mr. Bender, have you ever served upon a jury in a criminal case before?

A No, sir.

Q Did you read about this case in the newspapers?

A No, sir.

Q Are you related to anybody connected with the Prosecutor's office?

40

*Drawing of Jury, David Bender.*

A No, sir.

Q Or with the Police Department?

A No, sir.

10 Q Do you know of any reason, Mr. Bender, why you cannot be absolutely fair and impartial and give the defendant on trial a fair trial and square deal?

A I will give him a fair—

Q Do you believe in the law of self-defense?

A Yes.

Q And if his Honor gives you the law of self-defense, and you believe the defendant acted within that law, you won't hesitate to say so and acquit him?

A No.

20 Q If you have a reasonable doubt that he acted in self-defense and his Honor tells you that that doubt must be resolved in favor of the defendant, you will follow that.

A Yes.

Q — and give this man on trial a fair trial and square deal?

A Square deal, yes.

(Excused by the State).

(During Mr. Conlon's opening to the jury.)

30

Now, that is this case, gentlemen. There are two features of the case I want to call your attention to now: The first is that there is going to be no doubt in my mind as to what happened. The State is going to prove these facts by the very people who enacted the different scenes, and you are going to have—it is not going to be a case, at least, I do not anticipate it is going to be a case where you are going to be called on to decide as to witness after wit-

40

*Drawing of Jury, David Bender.*

ness whether they are telling the truth or lying. When it gets through, you are going to have the complete picture painted to you, and I think it is going to be about as I have outlined it to you. Therefore, in a way, gentlemen, this is not going to be a trial, it is going to be almost an unfolding to you twelve men of an occurrence. Before we start it, I want to ask you to do this: I want to ask you to listen to this testimony carefully, as I know you will. I want you to decide the case impartially, and I want you to lay aside any personal prejudice you may have against this man, might have against him, or any prejudice you might have for him, against his sister, or against the dead man. This is not a case of one family against another. This is a case of the State of New Jersey vs. this defendant. The State contends that he is guilty of deliberate, premeditated murder, committed with malice aforethought, that he had hours to think this over—

MR. PRICE: I object. This is summation and not opening. I take it that counsel's duty in opening is to tell just what he intends to prove. I submit that it is improper argument.

THE COURT: He says he intends to prove that he had hours to think it over. That is what he says.

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

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

DALLAS FLANNAGAN, Judge.

*State's Witness, John J. Bracken, Direct.*

JOHN J. BRACKEN, sworn in behalf of the State.  
DIRECT EXAMINATION by Mr. Conlon.

Q You are a licensed engineer and surveyor in this city?

10 A Yes.

Q Did you at the request of the Prosecutor's office make the map that is on the wall?

A I did.

Q Will you please explain it to the Court and jury?

20 A The map shows Grant street, a block running east and west from Broad street to Spring street. The scale of the map is one inch on the map is equal to eight feet on the ground. The arrow is pointed to show the direction. The red objects are brick buildings along the north and south side of Grant street. This is the Morris Casket Manufacturing Company, showing the entrance, the kilns in this yard, and the factory building around it. The lines on the side are the curb lines of Grant street. Those colored in gray are the sidewalks along Grant street. The different objects that are along the curb line in the vicinity are shown on the map, such as lights, small trees, and such things of that sort. The width between  
30 the curb lines is 29.60 on Grant street. The different numbers of the different houses are all given, and I have shown them on the map.

Q Do you see the step at 11½ Grant street?

A It is shown here.

Q Will you give me the distance from that step to the entrance of the garage of the Morris Casket Company?

A 64 feet.

Q Will you mark it, Mr. Bracken?

40 A (Witness marks as requested).

*State's Witness, John J. Bracken, Cross.*

Q In the middle of the building of the Morris Casket Company is a gray patch. What is that?

A In here (indicating).

Q In front of that. What is that?

A That is the yard and factory building around it. The pavement there for going in and out, receiving different articles and loading them on the truck, and so forth. 10

Q That part in front of that is what?

A These are kilns here where they store lumber for the building. These are kilns here and these are dryers there. They keep automobiles alongside there (indicating).

Q Does the map show the distance from the street to that open court?

A Which way? You mean from the curb line?

Q Yes, from the curb line to the court there. 20

A No, it does not. Right here, you mean in the front of the building?

Q From here back (indicating).

A It shows from house line, property line,—there is a distance in the center there of 65½ feet; that is shown.

MR. CONLON: I offer the map in evidence if the Court please.

(The map referred to is marked Exhibit S-1.) 30

MR. CONLON: You may cross examine.

*CROSS EXAMINATION* by Mr. Price.

Q How far from the house lines does the stoop extend into the street?

A Right here, you mean (indicating).

Q Yes.

A Five feet.

Q And your map shows that the bay window extends out to part of the stoop, doesn't it? 40

*State's Witness, John L. Day, Direct.*

A It does, yes.

Q How far does that extend out from the house?

A Two feet ten inches, approximately three feet.

10 Q The entrance door to the premises 11½ Grant street is set in right from the building line, is it not?

A Yes.

Q So that the door itself is just behind the building line; is that correct?

A Behind the building line, yes.

Q How many steps are there?

A Just as shown, two steps and a platform.

20 Q When you get on the platform, in order to get to 11½ Grant street you have to step up one step, do you not?

A That is going into the hallway.

Q Going into the hallway, if the front door is open?

A Yes.

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

*DIRECT EXAMINATION* by Mr. Conlon.

Q Mr. Day, what is your occupation?

30 A I am official photographer of the Newark Police Department.

Q Were you such on October 19th of this year?

A I was.

Q Did you on that day take some pictures of the premises in the vicinity of Grant and Broad street, on Grant street, in the City of Newark.

A I did.

Q And what time did you take those pictures, Mr. Day?

40 A I got the call a little after seven in the morning, and I immediately responded.

*State's Witness, John L. Day, Direct.*

Q Did you take pictures as soon as you got to the scene?

A Yes, sir.

Q How long did it take you to get to the scene?

A I do not know, possibly fifteen or twenty minutes.

Q I show you a picture and ask you if you took that.

10

A I did.

Q What does that show?

A That is the south—

MR. PRICE: Wait a minute. I object to that. This picture is not in evidence.

THE COURT. He can't put it in evidence unless we know what it shows. Suppose it shows London, England?

20

MR. PRICE: Let the picture speak for itself.

THE COURT: No, overruled.

MR. PRICE: I ask for an exception. Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,

Judge.

30

WITNESS: It is the south side of Grant street looking west on Grant street.

Q That is looking toward Broad street?

A Yes.

MR. CONLON: I offer that in evidence.

MR. PRICE: I have no objection.

(Picture referred to marked Exhibit S-2.)

Q I show you another photograph and ask you what that represents.

40

*State's Witness, John L. Day, Direct.*

A This is another picture on the south side of Grant street taking in mainly number 7 and 9.

Q That is the property of the Morris Casket Company?

A Yes.

10 MR. CONLON: I offer that in evidence.

MR. PRICE: No objection.

[Picture referred to is marked Exhibit S-3.]

MR. PRICE: If you will let me see them, Mr. Conlon, I might help you.

MR. CONLON: There is only one more.

Q I show you another picture and ask you what that represents.

20 A This is looking through the garage at No. 7 and 9 Grant street, of the Morris Casket Company, from the sidewalk,—

Q That is looking through from the sidewalk—

A North—south, rather.

Q South?

A Yes.

Q In through there (indicating)?

A Yes.

30 MR. CONLON: I offer that in evidence.

MR. PRICE: No objection.

[Picture referred to is marked Exhibit S-4.]

Q I show you another picture and ask you what that represents, I mean, what the local of the picture is.

40 A That is a photograph of the—I will call it a loading yard. It is between the building on the most southerly side of the property, between the garage or the main building of the property and

*State's Witness, John L. Day, Direct.*

the most southerly building which is used for a store house.

MR. CONLON: I would like to have that marked for identification.

[Picture referred to is marked Exhibit S-5 for identification.]

10

Q Will you indicate on the map where your camera was when that picture was taken?

A This photograph is a photograph of this area through here, taken from the window of this building (indicating) of the southerly building on the premises of 7 and 9 Grant street.

Q Will you make a mark on the map C-S-5 there where the camera was and show where it was pointed. Do not make it too large.

A It was in the second story of the building, just about in the center of the building, facing in a northerly direction and toward the mark C-S-5 on the map.

20

Q I show you another picture and ask you what that represents?

A That is a view in the same yard, only taken from the ground about in the same position, looking in a northerly direction.

MR. CONLON: I ask that that be marked for identification.

30

[Picture referred to is marked Exhibit S-6 for identification.]

Q Will you mark a small mark showing where your camera was when that picture was taken?

A About in the same position, marked C S-6.

Q Excepting that this was taken from the ground.

A From the ground. One from the window and one from the ground.

40

*State's Witness, Harrison S. Martland, Direct.*

Q I show you another picture and ask you what that shows?

A That is a view of the same yard only taken from the entrance leading from the garage into the yard, facing in a northerly—in a southerly direction, so marked C-S-7.

10 [Picture referred to marked Exhibit S-7 for identification.]

Q And that (handing picture to witness).

A This is a view of the ground between two automobiles that were parked here, taken from the rear of one of the automobiles.

MR. CONLON: May I ask that that be marked for identification.

20 [Picture referred to marked Exhibit S-8 for identification.]

Q Will you show on the map where your camera was when that picture was taken?

A The camera was in one of the cars, the most easterly car, photographing the area about in the center, or a little off to the north of the center of the yard between the two automobiles shown on the photograph.

Q You mean you were actually in one of the automobiles?

A In the back of one of the automobiles.

30 CROSS EXAMINATION waived.

HARRISON S. MARTLAND, sworn in behalf of the State.

*DIRECT EXAMINATION* by Mr. Conlon.

Q Doctor, you are chief medical examiner of this County?

A I am.

40 Q Do you remember early in the morning of October 19th?

*State's Witness, Harrison S. Martland, Direct.*

A I do. 1929.

Q 1929, yes, sir.

A I do.

Q Were you up at the premises of the Morris Casket Company on that morning?

A I was.

Q What time did you get there, doctor?

10

A I was notified at approximately 6:50 A. M. on the morning of the 19th, by the Second Police Precinct of Newark and by the City Hospital bus the ambulance sergeant on the City Hospital Bus. I arrived at the scene about 7:15 A. M.

Q And what did you find there, doctor?

A I found lying in the courtyard of the Morris Casket Company the body of a man about forty-one years of age, who was dead. The body was still warm. Rigor mortis had not set in yet. The body was lying fully dressed on the right side, with the head pointed toward the back of the casket company. There was a large pool of blood, clotted blood on the cement pavement in front of the face. There was a large pool of clotted blood near the coat tails, overcoat tails.

20

Q Doctor, I show you Exhibits S-5, 6, 7, and 8 for identification, and ask you to look at those pictures and tell me if they truly represent the scene as you saw it when you arrived there.

30

A Yes, that shows the position of the body as I saw it when I arrived. The felt hat on the running board of one of the truck—that is it.

Q They all show the position of the body there when you arrived.

A Yes.

Q What did you do then?

A I searched the man's clothes after seeing, without moving the body, as many bullet wounds as I could find. There were apparently two wounds,

40

*State's Witness, Harrison S. Martland, Direct.*

one in the left of the neck about here (indicating).

MR. PRICE. When you say about here, can you indicate what place?

10 WITNESS. Yes, one of them was situated here, just above the attachment of the sterno cleido-mastoid muscle on the left, about one and one half inches above the super-maxilla of the nose.

Q That is where you are pointing?

A That is where I am pointing. Another one was situated below the lobe on the left ear, on the left side, and possibly one in the back of the head. I did not see whether there was any more at the time, because I thought that I would leave the body there so it could be photographed. Then I searched the body for valuables.

20

Q What did you find in the clothing, doctor?

A I found twelve \$100 clean bills, in the pocket-book and lying loose in one of the pockets, two \$10 bills, a \$10 gold piece, some loose change which amounted to \$1.35, making the total currency \$1,231.35. I found one ring with three diamonds and one lavalier and a ticket from Newark to New York which was dated October 19, 1929.

30 Q What did you do with them, doctor? You say you left the body there and gave instructions for the pictures to be taken.

A I left the body there. The police were there. I left the body there with instructions that photographs should be taken in the position it was in, and my morgue wagon should take it over to O'Mara's morgue on High street.

Q Did you subsequently perform an autopsy on the body?

40 A Yes, I did.

*State's Witness, Harrison S. Martland, Direct.*

Q Will you tell us, doctor, what you found as a result of your autopsy?

A I performed the autopsy on the same day, on October 19, 1929, starting about 12:30 P. M., about six hours after death. I found the body of an Italian white adult about forty-one years of age, five feet four inches tall, and approximately 160 pounds in weight, with black hair and brown eyes. It was fully dressed, so we undressed him. I found evidence of two revolver wounds in the back of the head near the center, both of them being short directly from the back. I found evidence of another wound below the left ear in the neck and being shot from the back or the left side, and I found evidence of another bullet wound in the left neck, being shot from the front. The autopsy showed that wound No. 1, which we will call this wound here (indicating). 10  
20

Q Pardon me. So that there will be no confusion, when you number the wounds, you do not mean the chronological order in which they were evolved?

A No. We just gave them numbers to distinguish them.

Q Identify them.

A Identify them. The one which I will describe as No. 1 was directly in the back of the head about an inch and a quarter to the left of the mid right, and about an inch and a half above the ear line. That would be about there (indicating). This bullet enters directly into the skull, produces a round—the wound itself is about 3/16ths inches in diameter and there is no surrounding powder or burns or brand. The bullet enters directly the skull, passes directly forward and slightly upward, and in that passage it goes through the cerebellum or small brain on the left 30  
40

*State's Witness, Harrison S. Martland, Direct.*

side, left half of the bellum, producing extensive hemorrhage. It then passes forward and upward over the base of the skull and that bullet fractures the base of the skull on the left side. And the bullet passes out through the left nostril and disappears— not found in the autopsy. About  
10 there (indicating). Situated near this wound,  $\frac{3}{4}$ ths of an inch higher and a little more toward the middle, is another bullet wound which enters below number 2, three-sixteenths of an inch in diameter. No lead smudge around the edge, no powder mark, or no brand. This wound passes directly forward and upward and slightly to the right, passing through the left side of the large brain, producing extensive hemorrhage. A .38  
20 calibre jacketed, metal packeted bullet, with its nose badly smashed is found beneath the skin of the forehead about one inch above the root of the nose, at about here (indicating). Wound No. 3 is situated one inch below the lobe of the ear on the left side of the ear. That wound is also  $\frac{3}{16}$ ths inch in diameter, no lead smudges around the free edge, no powder, no brand, and that wound passes forward an to the right, hitting the angle of the jaw and smashing it in four or five pieces. The  
30 bullet then is deflected a little so that it passes downward under the skin of the neck and is found about two and one half inches below the point of entrance in the skin of the neck, not passing through any vital structures, but producing considerable shock by the impact against the bone. Wound No. 4, which was situated in the anterior triangle of the neck, low down about an inch and a half above the super maxilla of the nose, and at the place I have already said was a wound about  
40 one-quarter inch in diameter, no surrounding powder marks or brands, no lead smudges. This wound

*State's Witness, Harrison S. Martland, Direct.*

passes directly backward and downward and very slightly to the right. It passes directly into the top of the left pulmonary cavity, passing over the top of the lung, and producing extensive hemorrhage between the chest walls and the lung, there being over one quart of blood cloths in the left chest cavity. The bullet then passes backward and downward to the right, and beneath the skin and muscles on the left side about an inch to the left of the mid-structure line, out at the left of the fifth dorsal vertebrae is found a No. .32 calibre metal jacketed bullet. In wound No. 3, the calibre of the bullet was also a .32 calibre bullet, the one that hit the angle of the jaw and passed into the neck. There were no other wounds except two small brush abrasions above the left knee, a small laceration of the outer corner of the upper lip on the skin about 1/4th of an inch wide, no surrounding bruises, and a similar cut on the inside of the lip where it was in opposition to a prominent canine tooth as if in the fall he probably struck or hit his lip over the tooth. The rest of the organs were in normal condition and I found no evidence of chronic or accute disease. The stomach was practically empty and had no gross food particles. The brain showed no large amount of alcohol. Both eyes, the upper eye-lids, were black and blue, due to the fracture of the base of the skull from these two head wounds.

Q The cause of death, doctor, I suppose, were these wounds.

A The cause of death was wound No. 1 and No. 2 and No. 4 working in combination, producing hemorrhage in the brain, the vital portions of the brain, the hemorrhage in the left chest.

10

20

30

40

*State's Witness, Harrison S. Martland, Direct.*

Q And what was done with the bullets you extracted?

A I have kept them in my possession ever since.

10 Q May I have them. (Witness produces bullet.)

A This bullet—shall I explain it.

Q They are all 32 steel jackets?

A They are all 32 so called steel jacket bullets.

Q And you have numbered them according to the wounds as you have told them to us?

A Yes. That, for instance, is wound No. 4, found in the back on the left side, and has four marks on the bullet.

20 Q And 3 and 2?

A Yes. One is missing.

Q One is missing. That is the one you say was extracted through the nostril?

A Came out through the nostril, so far as we could tell; it was not in the body.

MR. CONLON. I offer those bullets in evidence.

[Bullets referred to marked Exhibits S-9, S-10 and S-11.]

30 *RE-DIRECT EXAMINATION* by Mr. Conlon.

Q Doctor, before or after the autopsy, did anybody identify the body in your presence?

A Yes, the body was identified while I was doing the autopsy—during the autopsy—by Mary Impagliazzo, of 241 Hoyt street, Brooklyn, as the body of Michael Iaccarino, of 242 Hoyt street before my presence.

*State's Witness, George Jackson, Direct.*

CROSS EXAMINATION waived.

GEORGE JACKSON, sworn in behalf of the State.

*DIRECT EXAMINATION* by Mr. Conlon.

Q You were connected with what hospital in October? 10

A Newark City Hospital.

Q Do you remember the morning of October 19th?

A Yes.

Q Did you go to Grant street that morning?

A Yes.

Q About what time, doctor?

A The call came in about 6:40.

Q And you got there about what time?

A Oh, about five minutes later; 6:45. 20

Q What did you find when you got there?

A I found a man lying in the courtyard or loading yard, as it is called there, I believe. He was dead.

Q He was dead when you got there?

A Yes.

Q And what did you do then, doctor?

A I examined him superficially and made sure he was dead, and called Dr. Martland.

Q And were you there when Dr. Martland got there? 30

A No.

Q You left before he got there?

A I left.

Q I show you Exhibits S-5 to S-8 for identification—9, and ask you if they truly represent the scene as you saw it when you arrived there.

A Yes.

*State's Witness, Thomas J. O'Mara, Direct.*

MR. CONLON. I offer these in evidence.

MR. PRICE. I object as immaterial and not properly proven. No proper foundation laid for them and thereby prejudices the jury against the defendant unduly.

10

MR. CONLON. I will withdraw the offer for the present, your Honor.

CROSS EXAMINATION waived.

THOMAS J. O'MARA, sworn in behalf of the State.

*DIRECT EXAMINATION* by Mr. Conlon.

Q What is your business?

A Funeral director.

20

Q And do you remember the morning of the 19th of October, this year?

A Yes.

Q Did Dr. Martland perform an autopsy in your morgue that day?

A He did, yes.

Q About what time?

A Well, around noon time.

Q And did you see the body of the deceased?

A I did, yes.

30

Q Do you know what became of the clothing that was taken off him?

A Well, the clothes were kept in my possession until about an hour ago. I gave them to Detective Schaffer.

Q And are these the clothes in that bundle?

A Yes.

Q And these clothes are now in the same condition that they were when they were taken from his body that day?

40

A Yes.

*State's Witness, Thomas E. Sullivan, Direct.*

[Clothes offered in evidence and marked Exhibit S-12.]

CROSS EXAMINATION waived.

THOMAS E. SULLIVAN, sworn in behalf of the State.

10

*DIRECT EXAMINATION* by Mr. Conlon.

Q Officer, you are attached to the Second Precinct?

A Yes.

Q And do you remember the morning of the 19th of October, this year?

A Yes.

Q Did you go down to Grant street that morning?

A I did.

20

Q Who went with you?

A Myself.

Q And what time did you get there?

A About eight o'clock, I reported for work about five minutes to eight and I was sent right down there.

Q And were you there when the pictures were taken?

A Yes.

Q How long were you there before the pictures were taken?

30

A Why, I guess I was there about five or ten minutes.

Q Who was there before you were?

A There was another officer. I do not know who he was. Another policeman.

CROSS EXAMINATION waived.

ADJOURNED until tomorrow, Wednesday, December 18, 1929, at ten o'clock A. M.

40

*State's Witness, Mary Impagliazio, Direct.*

Wednesday, Dec. 18, 1929.

**SECOND DAY.**

Continued pursuant to adjournment.

Present: Counsel as before.

10 MARY IMPAGLIAZIO, sworn in behalf of the State.

*DIRECT EXAMINATION* by Mr. Conlon:

Q Where do you live?

A 241 Hoyt Street.

Q Brooklyn?

A Brooklyn.

Q How old are you?

A Thirty.

20 Q Married?

A Yes.

Q What is your husband's name?

A Adolph.

Q Have you any children?

A No.

Q Do you know Michael Iaccarino?

A Yes.

Q How long have you known him?

A About four years.

30 Q How long?

A About four years.

Q Where did he live?

A 242 Hoyt street.

Q Brooklyn?

A Brooklyn.

Q Where is that with reference to where you live?

A Right across the street.

Q Is he married?

40 A Yes.

*State's Witness, Mary Impagliazio, Direct.*

- Q How many children did he have?  
 A Twelve.
- Q And you say you have known him for three years?  
 A About four years.
- Q Was your husband in business? 10  
 A Yes.
- Q What business?  
 A Fruit store and vegetables.
- Q Where?  
 A 241 Hoyt street.
- Q And you helped him in that business?  
 A Yes.
- Q And where did you live with reference to the store?  
 A Right in the back of the store.
- Q And how many rooms did you have there? 20  
 A Four.
- Q Where did your husband sleep, what room with reference to the store?  
 A Well, there is four rooms. You get into the store, it comes like a dining room and kitchen, and then there is a door you go to the back.
- Q And he slept in the back room?  
 A Yes.
- Q How many windows were in that room? 30  
 A One.
- Q Where did you sleep?  
 A I sleep in the same room.
- Q How many beds were in that room?  
 A Two.
- Q Where was the bed that he slept in?  
 A Right in front of my bed.
- Q Where with reference to the window?  
 A Near the window.
- Q His bed was near the window?  
 A Yes. 40

*State's Witness, Mary Impagliazio, Direct.*

Q And your bed was on the other side of the room?

A No. It was in the back.

Q And was there anything between your bed and the rest of the room?

10

A Just a little alcove.

Q And was there a curtain there?

A It didn't amount to much.

Q Was there a curtain there?

A There was, but it didn't amount to much.

Q Do you remember the evening of the 9th of October of this year?

A Yes.

Q What was your name before you were married?

20

A Cappiello.

Q Paul Cappiello is your brother?

A Yes.

Q Do you see him here in court?

A Yes.

Q Will you point him out?

A (Witness points).

MR. CONLON: It is admitted for the purpose of the record that the witness is indicating the defendant?

MR. PRICE: Yes.

30

Q Do you remember the evening of the 9th of October of this year? Strike it out. Do you remember the evening of October 8th of this year?

A Yes.

Q Did you see Michael Iaccarino that night?

A I did, when I was going to bed.

Q What time was that?

A I do not remember. About ten o'clock.

Q Where was he when you saw him?

A In back of some clothes.

40

Q Whereabouts?

*State's Witness, Mary Impagliazio, Direct.*

A My bedroom.

Q Was that the first time you had seen him that day?

A Yes.

Q You had not seen him before?

A Well, I saw him outside in the store talking to my husband. 10

Q And did you talk to him then?

A Yes. I said good evening; and I walked in.

Q And he had been to see you before?

A No, not that night.

Q I mean before that night.

A What do you mean?

Q Had he been to see you before?

A Yes. He was buying some food out in the store. 20

Q But had he ever been to see you?

A Other days?

Q Yes.

A Yes.

Q And when you saw him there in your room what happened then?

A I was going to tell him to go out, but he begged me to not.

Q Then what happened?

A So I thought my husband would go out in the kitchen and stay there for awhile, because he generally did do that, and take some coffee, but that night he went right to bed and when he went to bed he turned his head and he saw Mike was under the bed, and he said, "What are you doing there?" And the fight started, and I begged my husband not to fight, and he went for a knife. 30

Q Who?

A My husband, and Mike put his hand in his back pocket. 40

*State's Witness, Mary Impagliazio, Direct.*

THE COURT: Now, you say you saw Mike go for a knife, you claim? Who was it went?

THE WITNESS: My husband went for a knife, and Mike put his hand in his back pocket.

10

Q Mike put his hand in his back pocket?

A Yes.

Q What did he do after he put his hand in his back pocket?

A I begged him not to do anything to my husband, because my husband was a sick man.

Q You say Mike put his hand in his back pocket?

A Yes.

20

Q Did he take his hand out of his back pocket?

A Well, in fighting he took it back and forth.

Q Did you see Mike take his hand out of his back pocket?

A Well, many times he took it out and put it back.

Q Did you see Mike take anything out of his pocket?

A I seen a black thing, but at the time I didn't realize what it was.

30

Q Do you know now what it was?

A Yes.

Q What was it?

A A black gun.

Q Had you seen that gun before?

A Not before that night.

Q And did Mike take the gun out of there?

A Yes, he did.

Q And what did he do with it then?

A Well, then my husband run upstairs.

40

Q What did Mike do with the gun?

*State's Witness, Mary Impagliazio, Direct.*

- A He put it back in his pocket.
- Q Did you see it again?
- A Yes.
- Q Where?
- A Back in the pocket.
- Q Did you see it after you left that place? 10
- A Yes.
- Q Where?
- A In the hotel.
- Q What hotel?
- A The Majestic.
- Q Where did you see it then?
- A When he went to bed he put it under the pillow.
- Q And did you see it after that?
- A In the morning, when he put it back in his pocket. 20
- Q Did you see it after that?
- A I did, in the Hotel Knickerbocker.
- Q And did you see it after that?
- A I did, every day he had it.
- Q Where did you see it after the Hotel Knickerbocker?
- A Back in his pocket.
- Q What city?
- A Newark.
- Q Whereabouts? 30
- A Right here.
- Q Whereabouts in Newark did you see that gun?
- A In my house.
- Q Grant street?
- A Yes.
- Q Where was it?
- A 11½ Grant street.
- Q Where was the gun?
- A In his pocket. 40

*State's Witness, Mary Impagliazio, Direct.*

- Q You could not see it in his pocket.  
 A Well, when he goes to bed he took it out.  
 Q Where did he put it?  
 A Under his pillow.  
 Q Did he put it under the pillow every night?  
 A Every night.  
 10 Q When did you see the gun last?  
 A The night we left the house.  
 Q Where was it then?  
 A In his pocket. When we left the house he took an overcoat— it was kind of chilly that night—and he put it in his overcoat pocket.  
 Q Do you remember all these circumstances very clearly?  
 A Some of them.  
 20 Q Some of them. Some you do not remember quite so well?  
 A I just remember what I told you, because that is true.  
 Q Just a minute. Some circumstances you don't remember so well?

MR. PRICE: I object to the question as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

- 30 Defendant's counsel prays an exception to this ruling of the Court.  
 Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
 Judge.

- Q Some of the circumstances you don't remember so well?  
 MR. PRICE: I object on the further ground the question is indefinite.  
 40 THE COURT: Overruled.

*State's Witness, Mary Impagliazio, Direct.*

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

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

DALLAS FLANNAGAN,

Judge. 10

Q Do you remember where you were arrested?

A On the 19th.

Q Where were you taken?

A In the alley.

Q Where did the police take you?

A To headquarters.

Q Then, you talked to some of the officers there?

A I did.

Q They asked you to tell them everything that happened with reference to this thing? 20

A They did.

Q This gentleman was there (indicating)?

A Which?

Q This gentleman here (indicating)?

A Yes, sir.

THE COURT: Pointing to Mr. Schaefer.

Q Officer Weckstein, was he down there?

A Yes, sir.

Q Officer Berardi, was that gentleman there? 30

A Yes, sir.

Q They asked you to tell them everything that happened, did they?

A Yes, sir.

Q Did you tell them everything that happened?

A Well, I was like crazy that day.

MR. PRICE: I object as incompetent, irrelevant and immaterial and an improper

40

*State's Witness, Mary Impagliazio, Direct.*

endeavor on the part of the Prosecutor to impeach his own witness.

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

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

DALLAS FLANNAGAN,  
Judge.

A I was like nervous, crazy that day, I didn't know exactly what I was doing.

Q Did you tell them evrything that you remembered about this thing?

A I remember what I told you, sure.

20 Q I didn't ask you if you remembered what you told me, I asked you if you knew on the day you were arrested that you told the police officers—

A I told them how that happened and how I ran out of the house.

Q You told them everything you knew about it?

A Yes, sir.

Q After you told them what you knew about it they wrote down what you said?

A Yes, sir.

30 Q Then they read it to you?

A Yes, sir.

Q Then they asked you if that was correct?

A Yes, sir.

THE COURT: What did you say when they asked you if that was correct?

BY MR. CONLON:

Q Was it correct?

40 A Well, I was crying and I don't know if I remember. I said yes or no.

*State's Witness, Mary Impagliazio, Direct.*

Q Was it read, what they had written down?

A I guess so, I don't know.

Q What do you mean "you guess so"? They read it to you?

A I don't remember if they did or not, I remember them reading something to me.

Q What they read to you was right?

10

A I said it was right, but I didn't hear, I was all like crazy and nervous and I didn't know what I was doing.

Q How long did it take them to do this?

A I don't know, an hour or so, two hours.

Q You say a couple of hours?

A A couple of hours, I don't remember.

Q Did they read what you had told them?

A I don't remember. They were reading something to me, but I was crying and nervous and I don't know whether I was listening or not.

20

Q You tell me whether—

A They were reading something to me, but I don't remember if they were reading what I told them or not.

MR. CONLON: I will ask leave to proceed with the testimony of this witness with the object of neutralizing certain of her testimony, after I get through with her story.

30

THE COURT: You may do that if you plead surprise.

MR. CONLON: Yes.

THE COURT: If you can refresh your recollection in any way by using that memoranda.

MR. CONLON: I do not think I have laid the foundation in any way, because she

40

*State's Witness, Mary Impagliazio, Direct.*

said that she could not remember that being read to her.

10 THE COURT: That doesn't make any difference, whether it was read to her. If it refreshes her recollection it does and if it does not it does not.

Q I show you a paper. Do you remember seeing that before (indicating)?

MR. PRICE: I object to the question as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. PRICE: And on the further ground it is an attempt on the part of the Prosecutor to impeach his own witness.

20 THE COURT: Objection overruled. Defendant's counsel prays an exception to this ruling of the Court.

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

DALLAS FLANNAGAN,  
Judge.

Q Have you ever seen this paper before?

A I don't know.

30 Q Look at it and tell me whether you did or not?

A I did.

Q Is that your signature on the bottom of the first page (indicating)?

A Yes, sir.

Q Is this your signature on the bottom of each page?

A Yes, sir.

Q Is this the statement you gave to the police?

40 MR. PRICE: I object to the question on the ground that she didn't know what it

*State's Witness, Mary Impagliazio, Direct.*

was, because she was crying when she gave the statement.

THE COURT: Objection overruled.  
Defendant's counsel prays an exception to this ruling of the Court.

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

10

DALLAS FLANNAGAN,  
Judge.

Q Is this the statement you made to the police and they wrote out?

A It must be.

Q Look at it and tell me whether it is or not?

A Unless I read it; I don't know how to read.

Q Don't you recognize the paper and signature?

20

MR. PRICE: I object. She said that she was crying and doesn't know and said it was a paper like that.

THE COURT: Objection overruled.  
Defendant's counsel prays an exception to this ruling of the Court.

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

DALLAS FLANNAGAN,  
Judge.

30

Q Is that the paper??

A I am telling you that I was crying and all nervous. It was a paper something like that and when they gave me the paper to sign I signed it.

Q How many other papers did you sign?

A I don't remember, four, five, three, two; I was signing all the time.

40

*State's Witness, Mary Impagliazio, Direct.*

Q You signed the paper only once, didn't you?

A Once.

Q That is your signature (indicating)?

A Yes, sir.

10 Q You cannot tell me whether those are the papers you signed on that occasion or not?

A No, because I was all nervous and crying and when they told me to sign I signed.

MR. CONLON: I suggest that I neutralize the testimony later on.

THE COURT: What has she testified to to neutralize?

MR. CONLON: The possession of the gun.

20 THE COURT: All right. Do you want to do that later on?

MR. CONLON: Yes, because I do not want to interrupt her story.

THE COURT: You say that the testimony in which she states that she saw this gun a number of times surprises you?

MR. CONLON: Yes, your Honor.

30 MR. PRICE: I object to all this in the presence of the jury as highly improper and prejudicial to the defendant.

THE COURT: Overruled.

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

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

DALLAS FLANNAGAN,  
Judge.

*State's Witness, Mary Impagliazio, Direct.*

Q Mary, had Iaccarino ever been to see you before this night when your husband was not home?

A Yes, sir.

Q Many times?

A Many times, almost every day.

Q After your husband discovered Iaccarino under your bed and after this affair with the knife, what did you do? 10

A I was trying to part the two of them.

Q After you tried to part the two of them, what did you do?

A What did I do?

Q Where did you go?

A I was in the house.

Q You went out of the house some time, didn't you?

A I did. 20

Q When?

A After my husband went upstairs.

Q Up to the time your husband went upstairs did either one of these two strike each other, either your husband or Iaccarino?

A Yes, sir.

Q Which?

A Do you mean if they had a fight?

Q Did they strike each other?

A They did, yes, sir. 30

Q But there was no shooting?

A No.

Q And no cutting?

A Well, my husband must have had a couple of scratches on his face, I don't know, because I left the house.

Q Iaccarino was not cut?

A No.

Q You left the house?

A I left the house because Mike said— 40

*State's Witness, Mary Impagliazio, Direct.*

- Q Just a minute. When you left the house who was there in the house, who did you leave behind?
- A There was Mike yet there.
- Q Your husband had gone upstairs?
- 10 A My husband had gone upstairs, yes, sir.
- Q Where did you go?
- A I went out of the house.
- Q When you went out of the house where did you go?
- A Walking around the street.
- Q Did you see Mike after that?
- A He was following me all the time.
- Q Listen to my questions and answer them, Mary, and we will get through quicker.
- A He was with me.
- 20 Q Did you see him after you left the house?
- A Yes, sir.
- Q Where did you meet him?
- A He was following me.
- Q Where did you meet him?
- A He was walking right after me.
- Q Did he go out of the house with you?
- A Yes, sir.
- Q Didn't you say before that you left him in the house?
- 30 A I did not.
- Q You did not say that?
- A No, sir.
- Q You mean that you and Mike both went out together?
- A Yes, sir.
- Q Was he following you or did you go out together?
- A He told me to go out otherwise there would be a murder.

*State's Witness, Mary Impagliazio, Direct.*

Q Was he following you or did you go out together?

A He told me to go out and he was following me.

Q Did you go out together?

A Yes, sir.

10

Q Where did you go?

A We were walking all around the streets.

Q That was what time when you left the house?

A About half past ten or eleven o'clock.

Q How long did you walk around the streets?

A About three or four hours.

Q Then, where did you go?

A Then, I was freezing and I had nothing on but a little spring coat and apron.

Q I asked you where you went.

A To the Majestic Hotel.

20

Q That is in Brooklyn?

A Yes.

Q Near the Borough Hall?

A I guess so.

Q And what did you do at the Majestic Hotel; did you go into the hotel?

A Yes.

Q Did you register?

A He did.

Q How did he register, do you know?

30

A I don't know.

Q You do not know?

A No.

Q Do you know what name he used?

A I do not know the name he gave, but after that he told me, when we came to Newark he told the young lady his name was Rino.

Q You did not know until you got to Newark what name he was using?

A No.

40

*State's Witness, Mary Impagliazio, Direct.*

- Q You did not know he was not using his own name?  
 A No, sir.  
 Q You did not?  
 A No.
10. Q How many rooms did you have in the Majestic Hotel?  
 A One.  
 Q Do you remember the number of the room?  
 A No.  
 Q What floor was it on?  
 A Right soon you go in.  
 Q Did you have any baggage with you?  
 A No.  
 Q What time did you get to the Majestic Hotel?  
 A I do not remember.
20. Q About what time?  
 A I don't remember. It was in the morning, but I do not remember what time.  
 Q Was it daylight?  
 A No, it was dark.  
 Q It was before daylight?  
 A Yes.  
 Q And you stayed in that room how long?  
 A Until the morning.
30. Q And what time did you go out?  
 A About half-past seven.  
 Q And where did you go?  
 A I went to the bank.  
 Q What bank?  
 A Morris Plan Bank.  
 Q And who was with you when you went to the Morris Plan Bank?  
 A Mike.  
 Q What time did you go there?  
 A Well, we got out of the house at half-past
- 40

*State's Witness, Mary Impagliazio, Direct.*

seven, and it was too early, and we had to wait awhile.

Q And what did you go to the bank for?

A To draw some of my money, because I had no clothes.

Q And what did you have with you to draw the money with? 10

A Certificates.

Q And the certificates were worth how much?

A How many certificates I had? I had 13 certificates for \$100, and one for \$50.

Q How much?

A \$50.

Q That was \$1350 altogether?

A \$1350.

Q Where did you get them?

A I had them right in my bag. 20

Q When did you put them in your pocket?

A The Sunday we were going out and I put all my certificates in my bag.

Q How many days before?

A Two days.

Q When you were going out with whom?

A My husband.

Q And when did you go to the Morris Plan Bank—this was on the morning of the 9th, is that correct? 30

A Yes.

Q What happened there?

A I was going to the bank, and outside the bank I saw my brother Paul, and as soon as I saw him I wanted to run away, and he got hold of me and said, "What is the matter now?"

Q Who got hold of you?

A My brother Paul, and I begged him, I said, "Don't do anything." I was afraid there was a

40

*State's Witness, Mary Impagliazio, Direct.*

murder, and he said to Mike, "Don't let her run away."

Q Was there any conversation as to what you were doing at the bank?

A No.

10 Q Did Paul ask you why you were in the bank?

A I told him I was going to draw some money out of the bank.

Q And Paul told Mike to hold you there so you would not go away?

A No.

Q What else did Mike say to Paul?

A Well, I left the two of them and Mike told me to wait for him at some corner, of Borough Hall, he would be back for me, and Mike and Paul went away. I do not know what happened then.

20 Q Did Paul say where he was going?

A Paul was going for his truck and take me and Mike over to his house.

Q While Paul and Mike were talking there, did you see them do anything?

A No. My brother spoke nice to Mike, and said, "Don't let my sister go away," because he know many times I wanted to go away.

Q What did Mike say?

A All right.

30 Q Did they shake hands?

A Yes.

Q Mike said to keep you there?

A Yes.

Q And Paul went away to get his truck?

A Yes.

Q What did he say after Paul left?

A Mike said, "You wait for me on some corner, and I will see what he wants, and then I will come back to you," and I said, "Mike, now see that you do not do nothing to my brother."

40

*State's Witness, Mary Impagliazio, Direct.*

Q Do you remember telling the police officers about what happened there at the bank?

MR. PRICE: I object to that as irrelevant, incompetent and immaterial.

THE COURT: Overruled.

10

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

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

DALLAS FLANNAGAN,

Judge.

MR. PRICE: And further, it is hearsay and not binding on the defendant.

Q Do you remember what you told the police, or did you tell the police what happened at the bank between you and Paul and Mike?

20

A I just told them.

Q You told them what happened?

A Yes.

Q If you read what you told the police do you think you could remember what happened?

MR. PRICE: I submit she has already answered. She told them what she told here.

30

THE COURT: She has not indicated any failure of recollection of what happened at the bank.

Q Do you remember what happened at the bank as well now as you did ten days after?

A I don't get you that time.

Q Do you remember as well what happened at the bank as you did at the time you were arrested?

40

*State's Witness, Mary Impagliazio, Direct.*

A For all the while I was out of the house—  
Q And you say Mike told you to—

MR. PRICE: I object on the ground it has already been answered.

10

THE COURT: Overruled.

Defendant's counsel prays an exception to this ruling of the Court.  
Exception allowed; let it be signed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge.

A (Not answered).

Q Do you think if you read what you told the police there you would have a clear recollection of what you said at the bank?  
20

MR. PRICE: I object on the ground she has already been asked the question and she has answered it.

THE COURT: The point is she has indicated no failure of recollection.

30

MR. CONLON: I reserve the right of being surprised in that respect, and I would like to impeach the witness with regard to that part of her testimony.

MR. PRICE: I submit that is an improper statement, and I ask that your Honor instruct the jury to disregard it.

THE COURT: The Court will handle that situation at the proper time.

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

40

*State's Witness, Mary Impagliazio, Direct.*

Exception allowed. Let it be signed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge.

Q What happened then?

A Then I went back to the bank and tried to get some certificates cashed, and I saw Mike running. 10

Q You mean you walked around the street for awhile?

A Yes.

Q Then went back to the bank?

A Yes.

Q How much later?

A About an hour or an hour and a half.

Q In the meantime, were you with Mike? 20

A No. Mike was with my brother.

Q Did you have an appointment to meet Mike at any particular place?

A He told me to wait at the next corner.

Q Did you wait at the next corner?

A No, I didn't.

Q Then you came back to the bank in about an hour and a half later to get this money?

A Yes, and I saw Mike run into my arms and he said, "Let's get a cab", and I got in the cab with him, and we went back to New York. 30

Q You got in a taxicab?

A Yes.

Q And came to New York?

A Yes.

Q Where did you go in New York?

A He told me that there was another bank in New York that we can cash them certificates, so I think we tried at 24th street, but we could not cash it there, so he told me, "I know another place 40

*State's Witness, Mary Impagliazio, Direct.*

you can cash it at 42nd street," so we went there and cashed it there.

Q That was another Morris Plan Bank?

A Yes.

Q And you cashed the certificates there?

A Yes.

10 Q And after you cashed the certificates you got \$1350 in cash?

A Yes.

Q Then where did you go?

A Then I went and buy some clothes.

Q Did you buy some clothes?

A I did.

Q Did anybody else buy any clothes?

A No, only me that time.

Q Eh?

20 A Only me was buying clothes at that time.

Q Did Mike buy any clothes later on?

A Later on.

Q Who paid for the clothes that he bought?

A I did.

Q And did you do anything else besides buy clothes?

A Well, when I went to work, he went out one morning to buy a box with some tools.

Q Who paid for those tools?

30 A Well, at that time he had my money. I was working.

Q Whose money paid for it?

A He paid with my money.

Q Did you know he was going to buy the tools?

A No.

Q Now, after you got the money from the Morris Plan Bank at 42nd street, where did you go?

A I went to buy some clothes.

Q After you bought the clothes?

40 A It was almost night. It was about five or

*State's Witness, Mary Impagliazio, Direct.*

six o'clock at night, and we did not want to go back to Brooklyn, you see; he was afraid my brother would meet him again, and he told me to go some place in New York.

Q He was afraid of your brother?

MR. PRICE: I object to that and move 10  
to strike it out. I say it is an improper  
statement.

THE COURT: Overruled.

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

Exception allowed. Let it be signed and  
it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge. 20

Q Where did you go—where did you spend  
that night?

A Knickerbocker Hotel.

Q On 42nd street and Broadway?

A Yes.

Q Did you have a bag with you when you went  
to that hotel?

A Yes.

Q Where did you get the bag?

A I don't know. Some place in New York. 30

Q Who bought it?

A He bought it?

Q Were you with him?

A I was.

Q And who paid for it?

A He did.

Q With what money?

A My money.

*State's Witness, Mary Impagliazio, Direct.*

Q And you were with him when he bought the bag?

A Yes, sir.

Q And you were with him when you bought the clothes for yourself?

10 A Yes.

Q Were you with him when he bought the clothes for himself?

A Yes.

Q And that was all paid out of your own money?

A Yes.

Q Is that the bag you bought?

A No, sir. That is the old bag.

Q Do you remember seeing this before?

20 A Yes.

Q What is it?

A That is his box with the tools in.

Q And where did you see that last?

A Up in Newark, 11½ Grant street.

Q Where did he bring it from?

A From his people.

Q When?

A Some night. I do not remember exactly what day.

30 Q Well, did he bring it to Newark the first time he came to Newark?

A No. He called up his son and asked him, he was going down to the house to get the bag.

Q And then you mean one night he came in with the bag?

A It was daytime. I was working when he went down to get the bag.

Q Then he had his bag on Grant Street?

A Yes.

Q Did you ever see this box before?

40 A I did. He bought it in Newark. He told

*State's Witness, Mary Impagliazio, Direct.*

me that his bag was no good and he did not have enough tools and he went out to buy that, and I said, "You are going to take all my money buying things," and he said, "Don't worry; we will make plenty."

[Bags marked S-13 and S-14 for identification]. 10

Q Was that the first time that you objected to his spending money, or had you objected before that?

A All the time.

Q And you stayed the night of October 9th in the Knickerbocker Hotel in New York?

A Yes.

Q How many rooms did you occupy that night?

A One.

Q And the next day where did you go? 20

A We were two days in the Knickerbocker Hotel.

Q When did you first come to Newark?

A On the 12th, I believe.

Q And you came to Newark from where?

A New York.

Q Where had you spent the night before?

A The Knickerbocker Hotel.

Q And when you came to Newark, Mike was with you? 30

A Yes.

Q And how did you come to Newark?

A By train.

Q And when you got to Newark where did you go?

A He told me he was married in New Jersey and that he knew all about it, and he was walking from one street to another.

Q Where did you go?

A Looking for a house. 40

*State's Witness, Mary Impagliazio, Direct.*

- Q Did you find a room?  
 A Yes.  
 Q Where?  
 A 11½ Grant street.  
 Q And you engaged a room there?  
 A Yes.  
 10 Q From whom?  
 A I cannot pronounce the name—Mrs. Kitrich.
- MR. CONLON: Mrs. Kitrich, will you stand up?
- Q Is that the woman you rented the room from?  
 A Yes.  
 Q How many rooms did you rent there?  
 A One room and a kitchenette.  
 20 Q And you paid her how much?  
 A Eight dollars.  
 Q Do you remember what time of week it was you went to rent that room?  
 A I think it was on Thursday.  
 Q And did you move into that room right away?  
 A I believe on Friday.  
 Q Well, where did you spend Thursday night?  
 A Knickerbocker Hotel.  
 30 Q And then on Friday you moved there to 11½ Grant street?  
 A Well, I do not remember if it was Friday or Thursday.  
 Q How many days was it after you had left Brooklyn?  
 A Three days.  
 Q Now, did you work while you were here in Newark?  
 A Yes.  
 40 Q Where?

*State's Witness, Mary Impagliazio, Direct.*

- A In the mill factory.
- Q In Clark's Thread Works?
- A Yes.
- Q When you went over there did they give you anything to fill out, any papers?
- A Yes. 10
- Q And what did you do with that paper?
- A I was supposed to bring it to a Notary Public to have it signed.
- Q Notary public?
- A Yes, sir.
- Q Where did you have the paper?
- A In my bag.
- Q How long did you stay with Mike at 11½ Grant street?
- A One week.
- Q During that week did you go to Brooklyn at all? 20
- A Sometimes.
- Q How many times?
- A I don't remember, two or three, I don't remember.
- Q Where did you go when you went to Brooklyn?
- A He went and called up his people.
- Q Where did you go when you went to Brooklyn? 30
- A No place, with him all the time.
- Q Where did you go?
- A He called his people up, he 'phoned his people; he did not want to call them from Newark, he wanted to go to New York and call them up.
- Q Did you go there in the daytime or the night time?
- A Sometimes in the day and sometimes in the night time. 40

*State's Witness, Mary Impagliazio, Direct.*

Q Did you see any members of your family during that week?

A No, sir.

Q Do you know whether or not Mike saw any members of his family during that week?

10 A He did.

Q Do you know whether he did or not?

A He did.

Q Were you there when he saw any of them?

A Well, he told me when I went to work.

Q You were not there and you did not see them?

A No.

Q When did you go to work?

20 A I don't remember, but I know I only worked a day and a half.

Q At the time you went to work you were looking for work?

A Yes, sir.

Q Mike was looking for work?

A No, he took me all around looking for a job.

Q Was he looking for work?

A Not that I know.

Q Well, do you know?

30 MR. PRICE: I submit that she said "Not that I know".

MR. CONLON: I want to know whether she knows.

THE WITNESS: He never told me that he was looking for work.

Q Did he tell you why he bought the kit of tools?

40 MR. PRICE: The question is objected to as incompetent, irrelevant and immaterial.

*State's Witness, Mary Impagliazio, Direct.*

THE COURT: Sustained.

Q When did he buy the kit of tools?

A One day I was working there.

Q Do you know what Mike worked at before?

A Mechanic.

Q Did you do anything else wehn you went 10  
to Brooklyn with Mike except telephone?

A Telephone.

Q Is that all you did?

A That's all.

Q Did you communicate with any of your  
family?

A No, sir. Many times I wanted to call them  
up but he wouldn't let me.

Q You and Mike were together all the time,  
were you? 20

A All the time.

Q All the time?

A Yes, sir.

Q You worked for a day and a half?

A Yes, sir.

Q Did you call up your family the first day  
that you went to work?

A No, sir. .

Q Mike wasn't with you then?

A Not when I was working. 30

Q That was where you worked, was it?

A Yes, sir.

Q Did he walk with you to work?

A Yes, sir.

Q Was he with you at lunch hour?

A Yes, because I lived near the house, only a  
couple of block away.

Q Did you come home for lunch?

A Yes, sir.

Q Where did you see Mike at lunch hour? 40

*State's Witness, Mary Impagliazio, Direct.*

- A Down at the factory.
- Q And he walked home with you?
- A Yes, sir.
- Q You walked back to the factory with Mike?
- A Yes, sir.
- 10 Q What about when you got through at night?
- A I went home with him.
- Q Who bought the food?
- A Him and I.
- Q You mean all during that week Mike was never out of your sight?
- A No, sir.
- Q Is that correct?
- A Yes, sir.
- Q So, you could not telephone, is that what you mean?
- 20 A Yes, sir.
- Q You wanted to telephone?
- A Yes, sir.
- Q But Mike wouldn't let you?
- A Not that I was afraid of him only he didn't want me to communicate with my people.
- Q He didn't want you to?
- A No.
- Q You mean you could have called up if you had insisted?
- 30 A Well, by calling a policeman I believe I could but I didn't want to do that, I was afraid because many times he told me that he would cut me up.
- Q You were afraid of Mike?
- A I was.
- Q You were afraid of him?
- A I was.
- Q Is that why you came to Newark with him?
- 40 MR. PRICE: Objected to as incompetent, irrelevant and immaterial and improper.

*State's Witness, Mary Impagliazio, Direct.*

THE COURT: I do not see that it has anything to do with the State's case.

MR. CONLON: Withdraw the question.

Q Do you remember the evening of the 18th of October?

A Yes, sir.

10

Q Did you work that day?

A No, sir.

Q Why not?

A Why?

Q Yes.

MR. PRICE: I object to the question as incompetent, irrelevant and immaterial.

(Argument).

MR. PRICE: Withdraw the objection.

20

Q Why didn't you work that day?

A I only worked a day and a half and it was more than a day that I wasn't working.

Q You had given up your job?

A I got sick.

Q What happened on the 18th of October as far as you and Mike were concerned; around 6 o'clock where did you go?

A Come back to Brooklyn.

Q Together?

A Yes, sir.

30

Q What did you go back to Brooklyn for?

A He wanted to go to see his son.

Q Why did you go with him?

A Because I thought that while he was going to talk to his son I could call up.

Q Call up who?

A My people.

Q When you got to Brooklyn did you stay with Mike or leave him?

40

*State's Witness, Mary Impagliazio, Direct.*

A He went in to the son to talk to the son and I went and called up my people.

Q Did you have an appointment to meet Mike alone?

10 A Well, no, as soon as he come out he saw me in the drug store and he followed me.

Q Where did he follow you to?

A He come back to Newark.

Q Did you say anything to him about following you?

A No. We just come back to Newark, that's all.

Q Did you see your brother that night?

A Not that night.

Q When was it you saw your brother?

20 A The night after.

Q I think I confused you on the dates. I am talking about the 18th.

A I didn't call up my brother on the 18th, I called up a day before.

Q Do you remember what day this thing happened?

A It must have been on the 17th, when it happened. I saw my brother.

Q No, when Mike was killed?

A On the 19th.

30 Q What happened the night before that, on the 18th?

A I met my brother at the Borough Hall.

Q You got to Borough Hall and you went over there with Mike?

A Yes, sir.

Q In the subway?

A Yes, sir.

40 Q Did you leave Mike and meet your brother. Did you make an appointment to meet Mike later on?

*State's Witness, Mary Impagliazio, Direct.*

A No, sir.

Q What arrangement did you have with Mike?

A I told him that I was going back to my family and stay there.

Q And not see him again?

A And not see him again.

Q What day of the week was that? 10

A What day of the week?

Q Yes.

A When?

Q When you—

A On a Friday, I believe.

Q When did you make up your mind to go back to your family?

A All the time.

Q On this particular occasion when you went to New York that night did you make up your mind to go back to your family? 20

A Every day I was trying to go back to my family.

Q Why didn't you go back?

A Mike told me his people told him that if I went back his people would have me locked up and all that sort of thing.

Q When you left Newark on the night of the 18th around six o'clock, when you left Newark, did you then mean not to come back to Newark? 30

A Yes, sir.

Q When did you make up your mind on that day that you were going at 6 o'clock to Brooklyn?

A What do you mean?

Q When did you make up your mind that you were going to Brocklyn on the 18th and stay again with your family?

A Because I called up.

Q When?

*State's Witness, Mary Impagliazio, Direct.*

A The day before I called up my brother and told him that I was coming back to him.

Q That was on the 17th?

A Yes, sir.

10 Q You had made up your mind that you were going back to Brooklyn for good then?

A Yes, sir.

Q Did you tell that to Mike?

A Yes, sir.

Q When did you pay the second week's board?

A He paid it the night we left the house.

Q Who paid it?

A Mike paid.

Q How much did he pay

20 MR. PRICE: I object as incompetent, irrelevant and immaterial.

THE COURT: Sustain the objection. I do not think it makes any difference.

MR. CONLON: I think it would to show the period it covered.

THE COURT: To show the period the rent would follow. I allow it on that ground, only in connection with other testimony.

30 MR. PRICE: It might be only for him for the week.

THE WITNESS: That is what he told me.

THE COURT: I will allow it for the present.

Q You say on the 18th you paid a week's room rent?

40 MR. PRICE: She said Mike paid it.  
A Yes, sir.

*State's Witness, Mary Impagliazio, Direct.*

Q That was on the 18th?

A Yes, sir.

Q What time would that be, do you remember?

A The time we left the house?

Q What time was that?

A It must have been about four or five o'clock, 10  
like that.

Q You were then on your way to Brooklyn to  
go back to your family?

A Yes, sir.

Q How much did Mike pay?

A \$8.

Q Was there anything said to Mrs. Kitrich at  
that time about whether or not you were going  
back?

A No, I don't remember.

Q You are sure that Mike paid the rent for 20  
the week?

A Sure, because he had all the money, I had no  
money.

Q Did you say anything about not coming  
back or that you would not pay any more rent  
for the use of the room?

A Yes, he told me that I wasn't making enough  
money, \$15, and we started to fight and I said I  
would go back to my people.

Q Did you say anything to Mrs. Kitrich when 30  
Mike paid the \$8 that you were not coming back  
again?

A No.

Q Why not?

MR. PRICE: Objected to as incompetent,  
irrelevant and immaterial and improper and  
not binding on the defendant.

THE COURT: I think it would be prop- 40  
er if the witness were the defendant's wit-

*State's Witness, Mary Impagliazio, Direct.*

ness, but the witness is your witness, Mr. Prosecutor.

Sustain the objection.

MR. CONLON: This witness was forced on me.

10

MR. PRICE: I object to that remark and I ask that the Court tell the jury to disregard it.

MR. CONLON: Withdraw the remark.

THE COURT: The jury will disregard it.

Q On the 18th, about 4 o'clock, Mike paid Mrs. Kitrich \$8 for the room for another week in advance?

20

A Yes, sir.

MR. PRICE: We have had that answer at least five times.

Q Then, you went to Brooklyn?

A Yes, sir.

Q You went to Brooklyn and had your mind made up not to come back to Newark again?

30

MR. PRICE: I submit that has been already asked and answered, and I would ask your Honor to tell counsel not to repeat the questions.

THE COURT: I will allow it.

Q Have you any distinct recollection of what happened on that occasion?

MR. PRICE: What occasion? There is no time fixed.

Q Do you understand my question?

A No.

40

Q When you left Mrs. Kitrich's house and went

*State's Witness, Mary Impagliazio, Direct.*

to Brooklyn and met your brother, do you remember that all very clearly now?

A Yes, sir.

Q Do you remember that just as clear as the day when you were arrested?

A Yes, sir.

10

MR. CONLON: I ask leave in that respect, your Honor, to neutralize the testimony of this witness, because I plead surprise.

THE COURT: I do not understand in what respect. In what respect are you surprised and in what respect do you ask leave to neutralize the testimony?

MR. CONLON: Do you want me to state it now? 20

THE COURT: If you are going to proceed on it, yes, I wish you would.

MR. CONLON: I expected the witness to testify on previous statements that she went to Brooklyn with Mike to see her brother, that she made an appointment with Mike to meet him again later on in the evening and asked him to follow her to protect her. 30

THE WITNESS: No, I didn't say that.

MR. PRICE: Keep quiet, Mary. I submit that this statement made continuously by the Prosecutor in the presence of the jury is highly improper and tending to influence the jury unduly against the defendant and not binding on the defendant, and I ask your Honor at this time to tell the Prosecutor not to make such statements. 40

*State's Witness, Mary Impagliazio, Direct.*

MR. CONLON: I made the statement in response to your Honor's instruction.

THE COURT: I understand. What definite statements has this witness made that you want to neutralize?

10

MR. CONLON: In effect that she went to Brooklyn for the purpose of staying there and not coming back to Newark. I expected her to say that she went there for a visit and planned to come back to Newark.

20

MR. PRICE: Because of that I ask that your Honor withdraw a juror and declare a mistrial in this case on the ground that the statement of this witness, and what the Prosecutor says he expected her to testify to, are highly improper and prejudicial to the rights of the defendant in giving the defendant a fair trial.

THE COURT: Motion denied.

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

Exception allowed. Let it be signed and it is signed and sealed accordingly.

30

DALLAS FLANNAGAN,  
Judge.

THE COURT: It doesn't seem that is a definite statement material to your case. It more concerns the defendant's case apparently what her intentions were about coming back from Brooklyn. What has that to do with whether this defendant is the man who killed the deceased?

40

*State's Witness, Mary Impagliazio, Direct.*

MR. CONLON: I think it has to do with why the deceased was in Newark later on and why the defendant was in Newark later on.

THE COURT: I cannot see it at this stage. 10

MR. CONLON: Will your Honor reserve it for me?

THE COURT: Yes. If you make it obvious to me at some other time I will allow it.

Q On the night of the 18th you met your brother?

A Yes, sir.

Q Where did you meet him? 20

A Borough Hall.

Q Where was Mike when you met your brother?

A I don't know, he left me.

Q Where did he leave you?

A Near the subway.

Q You made no arrangement to see him again?

A No.

Q Did you expect to see him again?

A No.

Q Where did you go with your brother? 30

A To his house.

Q You talked to him there?

A I did.

Q He asked you some questions?

A He did.

Q About Mike?

A He did.

Q What did you tell him?

A (Witness sobs).

Q Can you answer these questions now? 40

*State's Witness, Mary Impagliazio, Direct.*

A (Witness refuses to answer).

Q Did you go to your brother's house that night?

A I did.

Q What?

10

A I did.

Q Did you talk to your brother?

A I did.

Q Did you tell him where you were living?

A I did.

Q How did he find out?

MR. PRICE: I think she said "I did not".

BY THE COURT:

20

Q Did you say "I did not"?

A Yes, sir.

BY MR. CONLON:

Q Did you tell your brother where you were living?

A Yes, sir.

Q Did he ask you?

A Yes, sir.

Q What did you say?

30

A All over Brooklyn and Philadelphia and all around.

Q And you did not tell him you were living in Newark?

A No.

Q Why not?

MR. PRICE. I object. The same objection as before.

THE COURT: Sustained. This witness is being asked a lot of things that have no

40

*State's Witness, Mary Impagliazio, Direct.*

reference as far as I can see to the State's case.

MR. CONLON: I think it has to the motive.

THE COURT: Of whom?

10

MR. CONLON: The defendant.

Q Did he find out where you were living?

A He did.

Q How?

A By taking the slip where I was working.

Q Where was that slip?

A In my bag.

Q How did he get your bag?

A He got my bag and asked me if I had my money in the bag.

20

Q Did you give him the bag?

A Well, he put out the hand and I said "I have the money here, brother."

Q Did you give him the bag?

A Yes.

Q Or did he take it away from you?

A I gave him the bag.

Q And you gave him the bag before you told him where you lived or after?

A After.

Q You told him where you lived before you gave him the bag?

30

A No, I didn't tell him where I was living, because I didn't know I had the slip of paper in the bag. I forgot all about it.

Q Did you have any money in your bag?

A No.

Q Why did you give him the bag?

A I told him I had the money in the bag and he said, "Let me see it."

40

*State's Witness, Mary Impagliazio, Direct.*

Q Well, did you give him the bag?

A Well, he got the bag.

Q And then the slip was in the bag with your address in Newark?

A Yes.

10 Q What happened then?

A He looked at the address and he said, "Now, I have got the address and I can follow Mike and get him arrested."

Q Did he say anything else?

A No. That was all he was going to get him arrested.

Q What happened after that?

A He left the house and called to my sister-in-law not to let me out.

20 Q And do you know whether or not he took anything with him?

A No.

Q What time was that when he left?

A I do not remember.

Q About what time?

A After twelve, but I do not remember.

Q And you say he told your sister not to let you out?

A Yes.

Q Who else was there?

30 A My mother.

Q And how long after he went, did you go?

A About an hour or two hours after.

Q How did you get out?

MR. PRICE: I object on the ground it is incompetent, irrelevant and immaterial and not binding on the defendant and improper as part of the state's case. The fact is she went.

40 A I opened the door and I went out.

*State's Witness, Mary Impagliazio, Direct.*

Q And when you got out, where did you go?

THE COURT: Let us get this clear. The witness answered the question over your objection. I will strike it out if you wish me to.

MR. PRICE: No, sir, I have no objection. I object to how she got to Newark, because it is incompetent, irrelevant and immaterial. Please do not answer, Mary, when I get up to object.

10

THE COURT: Is there a present question pending?

MR. PRICE: Yes, sir.

MR. CONLON: What she did after she left the house.

20

THE COURT: I will allow that. Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed. Let it be signed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,

Judge.

A I went out and got a taxicab and told him to drive me back to Newark.

30

Q Where did you go in Newark?

A 11½ Grant street.

Q And when you got there, whom did you see?

A Nobody was home and I rang the bell to Mrs. Ketrich.

Q And she came to the door?

A Yes.

Q Was your husband there?

A No.

40

*State's Witness, Mary Impagliazio, Direct.*

Q I mean, was Iaccarino there?

A No.

Q And then what did you do?

A Then she saw me cry—

Q No, what did you do?

10 A I went upstairs and knocked at the door to see if Mike was in and he was not in.

Q And then where did you go?

A Then I came back to Brooklyn.

Q Where did you go in Brooklyn?

MR. PRICE: I object to that as incompetent, irrelevant and immaterial and not binding on the defendant and not part of the state's case.

20 THE COURT: Well, a good part of it is not binding in a sense, and yet it may have a bearing upon the defendant's motives, because it may show that she came in contact with the defendant.

MR. PRICE: Well, I know she did not.

THE COURT: Well, I will allow it so far.

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

30 Exception allowed. Let it be signed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge.

Q Where did you go in Brooklyn in the taxi-cab when you went?

A I just went a little around to see if I could see Mike.

40 THE COURT: Now, she went looking for Mike I do not see that that

*State's Witness, Mary Impagliazio, Direct.*

has anything to do with it. We are not concerned with this woman's motives or purposes, and you are not in a position to impeach her credibility by cross examination, apparently, so the question is how is this testimony proper? What does it amount to?

10

MR. CONLON: I think the movements of these three people all tend to show the motives, the motive behind the defendant's actions and explain how and why he was in Newark at the time of the commission of the crime.

MR. PRICE: Well, this woman's actions do not bind the defendant while the defendant was in Newark and did not know where she was going.

20

MR. CONLON: It substantiates subsequent parts of her story as to why she was at particular places in the city at times. I do not see why it could not be submitted to the jury as part of the story. It all happened within a couple of hours, all by the people who are implicated in this affair.

30

THE COURT: Well, I am not clear it has anything to do with it

MR. CONLON: I will not press it.

Q Well, did you stay in Brooklyn, or did you come back?

A I come back.

Q You mean you came back to Newark?

A Yes.

Q What time was it when you got back to Newark?

40

*State's Witness, Mary Impagliazio, Direct.*

A About six o'clock.

Q And where did you go?

A I did not go no place. I was out in the street.

10 Q And was this the same taxi you had been to Newark in the first time?

A Yes.

Q And did you see anybody on your second arrival in Newark?

A I beg your pardon.

Q Did you see anybody on the street the second time you got back?

A I saw my brother.

Q Where did you see your brother?

A On Grant street.

20 Q And whereabouts on Grant street?

A Grant and Broad.

Q On the corner?

A Grant and Broad street.

Q Was he on the corner?

A Yes.

Q Was he walking or standing still?

A Well, I do not know, I just happened to pass with the cab and I do not know what he was doing.

30 Q You do not know whether he was walking or standing still?

A I saw him right on the corner.

Q You do not know whether he was walking or standing still?

A I passed in the taxicab.

Q I am asking you if you know.

MR. PRICE: I submit she has answered.

THE COURT: I will allow the question. Defendant's counsel prays an exception to this ruling of the Court.

40

*State's Witness, Mary Impagliazio, Direct.*

Exception allowed. Let it be signed and  
it is signed and sealed accordingly.

DALLAS FLANAGAN,  
Judge.

Q Do you know whether he was walking or  
standing still? 10

A I just saw him and closed my eyes.

Q And was he standing on the side of Grant  
street where your house was or the other side?

A On the other side?

Q And after you saw him, what did you do?

A I went a couple of blocks down and I was  
trying to go in the house, and I wanted to know  
if Mike was home. I knew he had a gun and  
I was afraid that there might be a fight.

Q You knew Mike had a gun? 20

A Yes.

Q Do you know where the taxicab went after  
you got out of it?

A Sir?

Q Do you know where the taxicab went after  
you got out of it?

A Where?

Q After you left the taxi?

A Yes.

Q You went a couple of blocks beyond where  
your brother was? 30

A Yes.

Q And then you got out of the taxicab?

A Yes.

Q Do you know where the taxi went?

A Well, I told him to go and talk to my  
brother and bring him back to Brooklyn, but I  
don't see the taxi man after that.

Q You did not see him after that?

A No, sir. 40

*State's Witness, Mary Impagliazio, Direct.*

Q You do not know whether he went to talk to your brother or not?

A No.

Q What time was that?

A That must have been about half-past six.

10 Q And then you say you went to the house at 11 $\frac{1}{2}$  Grant street?

A Yes.

Q And which way did you walk to the house, did you walk down Broad street, or walk down the other way?

A The other way.

Q You mean the back way, Spring street?

A Yes.

Q Did you go to the house?

A Yes.

20 Q Who did you see there?

A The owner.

Q Mrs. Kitrich?

A Yes.

Q And how long was that after you saw your brother standing on the corner?

A Oh, it must have been half an hour or an hour; something like that.

Q And you talked to Mrs. Kitrich?

A Yes.

30 Q And after you talked to her where did you go?

A She told me—

MR. PRICE: I object to that, what she told .

MR. CONLON: Never mind what she told.

Q After you talked to Mrs. Kitrich, where did you go,

*State's Witness, Mary Impagliazio, Direct.*

A You mean in the night time or in the morning?

Q No. At half-past six this morning you are telling us about. You say you saw your brother standing on the corner and you talked to Mrs. Kitrich?

A Yes.

Q After you talked to Mrs. Kitrich where did you go?

A I went out on the stoop and I saw a crowd was going in the alley, and I saw Mike was lying on the ground.

Q Were there any other people there?

A There were a lot of people, but I do not know who they were.

Q And from there you went where?

A They brought me to headquarters.

MR. CONLON: Is Officer Johnson here?

Q Did you see that officer there as you went in the alleyway?

A I think I did. I ain't sure.

MR. CONLON: Officer Quinn.

Q Did you see that gentleman?

A Yes, I saw him.

Q They were there when you got there?

A Yes.

Q You saw Mike lying there?

A I did.

Q I show you Exhibits 5, 6, 7 and 8 for identification, and ask you if they show the scene there as you saw it when you got there that morning?

A I do not remember. When I got there—

THE COURT: You do not remember?

THE WITNESS: No. When I got there, I saw him lying, and I started to cry.

*State's Witness, Mary Impagliazio, Direct.*

Q Do you know who that is there lying on the ground?

A Yes.

Q Who?

A Mike.

10

MR. CONLON: I offer these pictures in evidence, and I make the representation to the Court that I will prove that the scene depicted in the picture is the same as it was at the time of the occurrence. The reason I offer them at this time, I think they would be of some aid to the jury, and I do not think they should be held out until I have to go through all the routine of proving them by the different police officers.

20

MR. PRICE: I object on the ground that at this time no proper foundation for their reception has been laid, and on the further ground that it is an endeavor to influence the jury unduly and arouse their passions against the defendant.

THE COURT: Well, do you want them to go before the jury while this witness is on the stand?

30

MR. CONLON: Not particularly.

THE COURT: In connection with the examination of this witness?

MR. CONLON: No.

40

THE COURT: Then, I think you better wait until you introduce the police officers before you submit them in evidence, that is, your proof showing the condition at the time the photograph were taken was the same at the time and deceased is alleged to have been shot.

*State's Witness, Mary Impagliazio, Cross.*

MR. CONLON: The only reason I suggested the other course, I was not going to put that proof in until the end of my case, and I thought that these pictures would be of some aid to the jurors in the meantime.

THE COURT: Well, it would only take a few minutes, and it would be formal testimony, and if you have other testimony from these witnesses, you can recall them for the other testimony. **10**

MR. CONLON: All right.

Q When did you next see your brother after that?

A I never saw him any more.

CROSS EXAMINATION by Mr. Price:

**20**

Q Mary, I just want to ask you, as far as you know, your brother Paul never hit Mike Iaccarino, did he?

A Hit him?

Q Yes.

A No.

Q Now, you know that your brother Paul did meet Mike in Brooklyn?

A Yes.

Q And you know that your brother Paul did take Mike to Paul's home at 273 Sackett street? **30**

A Yes.

Q And he held him there for awhile?

A Yes.

Q And then Mike came back to where you were?

A Yes.

Q Well, now, at no time while you were living at Newark, did Mike work?

A No.

**40**

*State's Witness, Mary Impagliazio, Cross.*

Q And the money that were spent for the purchasing of the clothing in New York and hotel bills from New York to Brooklyn were all paid out of your money?

A Out of my money.

10 Q Now, when you had this \$1350 in Morris Plan certificates did you intend to cash them all?

A No.

Q Just a part of them?

A Just \$50.

Q How did you come to cash the rest of them?

A Mike forced me. He said you would not be able to come back to New York any more.

Q Now, let us go back to your relationship with Mike. You said, in answer to Mr. Conlon's question, first you said you knew Mike three years?

20 A Three to four years.

Q Now, how long did you know him?

A I said four years. About four years.

Q And did you see him steadily during that time?

A Well, for about a year I did, but for another year or so I didn't. Then he was arrested for ruining his own daughter.

MR. CONLON: I object to that.

THE COURT: Strike it out.

30 Q I didn't ask you that, but you did see him from time to time over a period of three years, is that right?

A I did.

Q Now, Mary, did you ever invite Mike into your house when your husband was not there?

A No.

Q Was it his custom to come in and buy things at your store?

A Just an orange in the night.

40

*State's Witness, Mary Impagliazio, Cross.*

Q And he talked to you if you were in the store?

A Yes.

Q Your husband had a store at 241 Hoyt street, is that correct?

MR. CONLON: I have no objection to this line of examination. 10

MR. PRICE: You brought it all out and I am going to bring out something else.

MR. CONLON: It is the line of cross examination which at different stages was objected to by the defendant.

THE COURT: You said you had no objection to it provided what?

MR. CONLON: Provided I am allowed the same latitude to bring out what I want; in other words, we should not bring out some of it and not all of it. 20

THE COURT: Now, if he wants to bring out these things, then you do not object. Then the question how far you may go thereafter will arise at that time and not now. Do you press your objection to this particular question? 30

MR. CONLON: No, sir, I simply want to tell the Court I am going to ask leave of the Court later on to amplify the examination.

THE COURT: Proceed.

Q Mary, at any time before the night of the 8th of October were you alone with Mike at any place in the building at 241 Hoyt street but the store? 40

*State's Witness, Mary Impagliazio, Cross.*

A At times he used to come in the back.

Q While you were there alone?

A Yes.

Q Did you ask him at any time not to come in the back?

10

A I did.

Q Did your husband ask him to stay away?

A Yes.

Q Do you know whether your mother asked him to stay away?

A I do.

Q When he came there?

A Yes.

20

Q Now, you told Mr. Conlon in answer to his question on the night of the 8th of October that you found Mike in the bedroom when you were undressing and going to bed?

A Yes.

Q And you told him Mike was concealed behind a curtain and some clothes?

A Yes.

Q Hoyt street in Brooklyn runs north and south, is that correct? Do you know the point? Do you know that as you come down where Atlantic Avenue is?

A Yes.

30

Q As you come down going toward the Erie basin, that is south?

A Yes.

Q So as you come down south on Hoyt street, the first street immediately before you get to 241 is Douglas street?

A Yes.

Q No, that is Butler street.

A No, that is Douglas.

Q What is the next street?

40

A DeGraw.

*State's Witness, Mary Impagliazio, Cross.*

Q What?

A The next street is Douglas.

Q Isn't 241 Hoyt street between Butler street and Douglas street?

A Yes.

Q And as you walked from Butler street toward Douglas, 241 Hoyt street is on the left hand side of the street? 10

A Yes.

Q There is a common hallway that leads from the front of the building at 241 Hoyt street right through the building to the back yard, is it not?

A Yes.

Q Now, taking your store, your store—there is a double door in your store, is there not?

A A double door in my store?

Q Yes. 20

A To go in the rooms?

Q No, to go in the store from Hoyt street.

A Double door.

Q Now, when you get into the store, if you want to go into the living rooms,—there is four rooms behind the store, is that correct?

A Yes.

Q And toward the left as you face the back of the building going in from the store, there is a door leading into a dining room? 30

A Yes.

Q Is that correct?

A Yes.

Q And immediately behind the dining room there is a kitchen?

A Yes.

Q The back of the store is divided into three rooms, the dining room and the kitchen and then to the right of the kitchen is the alcove and bedrooms together, is that correct? 40

*State's Witness, Mary Impagliazio, Cross.*

A Yes.

Q So that there is a door leading from the kitchen into the bedroom?

A Yes.

10 Q Now, on the night of October 8th—withdraw that. And then there is a room leading from the alcove bedroom into the common hall, isn't that right?

A Yes.

Q The front hall door is left open?

A Yes.

Q And the rear hall door is left open?

A Yes.

Q Now, did you go out into the yard that night?

20 A I did.

Q Did you speak to your mother?

A I did.

Q Where does your mother live?

A The top floor.

Q And did you leave this door open that leads from the hallway into the alcove bedroom?

A I did.

Q Now, when you went back into the room, did you notice that Mike was there until after you got undressed?

30 A No, after when I was ready to go to bed.

THE COURT: Please do not lead this witness. It is true this witness is hostile to the state. Now, please do not lead her.

40 THE COURT. You may have an objection and I will state to the jury that it is the opinion of the Court that this witness is hostile, to the State, and give you an exception, and also inform the jury that the impressions of the Court are not bind-

*State's Witness, Mary Impagliazio, Cross.*

ing on the jury as they, the jury, are the exclusive judges of the facts.

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

Exception allowed. Let it be signed and it is signed and sealed accordingly.

10

DALLAS FLANNAGAN,  
Judge.

MR. PRICE: And I ask that the Court withdraw a juror because the Court's statement makes it impossible for the jury to give the defendant a fair trial as he is entitled to under the law.

THE COURT: Motion denied.

Q Did you know that Mike was in your bedroom when you came back?

20

A No, sir.

Q Did you invite him to come into your bedroom?

A I did not.

Q Did you go in the bed?

A I did.

Q Before you went in the bed you told Mr. Conlon, did you speak to him before you went to bed or after you went to bed?

30

A No, when I got on the bed I saw him there and I begged him to go out and he say, "Please don't holler. Don't let your husband hear you here", and in the meantime my husband walked in and I didn't say no more. So after my husband go to bed, he must hide himself under the bed and when my husband lays his head on the pillow he sees his foot sticking out.

Q Never mind that. I didn't ask you that. While you were over here in Newark you told

40

*State's Witness, Margaret Hitrick, Direct.*

Mr. Conlon that you were with Mike all the time?

A I did.

Q He went to work with you in the morning and he met you at lunch hour and then he met you when you were through with his day's work, didn't he?

10

A Yes, sir.

Q You worked a day and a half?

A Yes, sir.

Q In the Clark Thread Mills?

A Yes, sir.

Q Why did you quit?

A I got sick and quit and he told me that that wasn't enough, \$15 a week, so I told him "If it ain't enough, then, I won't work."

20

Q Mr. Conlon asked if you went in and saw Mike lying on the ground, did you?

A I did.

Q Did you immediately tell the police he had your money in his possession?

A I did.

Q That he had your jewelry in his possession?

A I did.

Q Did you ever ask Mike before this to give you your money back?

A Yes, sir.

30

Q Did he ever give it to you back?

A Never.

Q Did you ask him for the jewelry?

A I did.

THE COURT: You realize this is not cross-examination?

MR. PRICE: Certainly.

THE COURT: All right, go ahead.

40

Q You told Mr. Conlon also that on the 18th

*State's Witness, Mary Impaglazio, Re-Direct.*

when you went to Brooklyn that you were going back to your family and that you did not intend to come back again?

A Yes, sir.

Q Why were you going back to your family and not intending to come back again?

A Because Mike wanted lots of money off me; he told me that he was going to put me on the street and make lots (witness sobs).

Q Try to calm yourself now.

THE COURT: We will take a recess for one hour.

(RECESS FOR ONE HOUR).

AFTER RECESS.

MARY IMPAGLAZIO, resumed.

BY MR. PRICE (continued):

Q You told Mr. Conlon, in answer to his question, that Mike had a revolver or pistol, did you not?

A Yes.

Q Did you tell your brother the same thing when you were in his home in Brooklyn on October 18th?

A I did.

*RE-DIRECT EXAMINATION* by Mr. Conlon.

Q Did you also tell your brother that Mike had your money and jewelry?

A I told him that.

Q You said that on the night of the 18th of October when you left Grant street and went back to Brooklyn for good, is that right?

A Yes.

Q Did you bring your clothes with you?

*State's Witness, Mary Impagliazio, Re-Direct.*

A No.

MR. CONLON: Now, if your Honor please, I wish permission of the Court to impeach the testimony of this witness in two respects.

10

THE COURT: To impeach it?

MR. CONLON: To neutralize it.  
[Counsel argue. The jury retires. Further argument. The jury returns to the court room].

MR. CONLON: Your Honor, may I ask that we inform the jury of the disposition on the motion?

20

THE COURT: Well, I have denied the Prosecutor's motion. That is all.

*RE-DIRECT EXAMINATION* by Mr. Conlon:

Q You said before, as I understand you, when you and Mike left 11½ Grant street at 4 o'clock in the afternoon of the 18th that he had this gun in his pocket, is that right?

A Yes.

Q And when did you next separate from him?

30

A When I left at Borough Hall.

Q What time was that?

A 6 o'clock.

Q And when did you see him again?

A I never saw him any more.

Q The next time you saw him he was in the alley. You went to the room along about mid-night?

A Yes.

Q And he was not there?

40

A No, sir.

*State's Witness, Margaret Hitrick, Direct.*

MARGARET HITRICK, sworn on the behalf of the State.

DIRECT EXAMINATION by Mr. Conlon:

Q Mrs. Hitrick, where do you live?

A 11½ Grant street.

Q And did you live there in the month of October, this year? 10

A Yes.

Q Do you know Mary Impagliazio, the woman who was just on the stand?

A Yes.

Q When and where did you first meet her?

A She came to my home around October 10th and she asked me if I had a light housekeeping room.

Q You run a housekeeping house there? 20

A Yes.

Q Where you rent out rooms?

A Yes.

Q Was she alone or was there somebody else with her?

A No. There was a man with her, Mr. Rino.

Q Mike Rino?

A Yes.

Q And did you rent a room to them?

A Yes. 30

Q And that was when?

A On that day, on the 10th.

Q Did they occupy the room on that day?

A No.

Q When did they occupy it?

A The next day.

Q And was there any rent paid to you?

A Yes.

Q How much?

A They paid \$8. 40

Q Do you remember who paid it?

A Yes, the man paid it.

*State's Witness, Margaret Hitrick, Direct.*

Q And where was the woman when the man paid the rent?

A She was with him.

Q And you say they moved in on the 11th, is that right?

10 A Yes.

Q And how long did they stay there?

A They stayed there a week.

Q What floor was their room on?

A On the second floor.

Q And did you at anytime hear them in their room?

A Yes.

Q And what did you hear?

A I could hear everything was all right.

20 Q Well, did you hear anything of moment while they were in their room?

A No.

Q Anything unusual about it?

A No.

Q And do you remember the 18th of October?

A The 18th?

Q Yes, the day before this man was killed?

A Yes.

Q Do you remember what time they left the house?

30 A About four o'clock in the afternoon.

Q And did they go out together?

A The two went out together.

Q Before they went out did you see them?

A Yes.

Q Where?

A Right at my front door.

Q And will you tell us what happened?

A Well, the man came down and the lady and she wanted to pay the rent in advance and he

40

*State's Witness, Margaret Hitrick, Direct.*

really did not exactly want to pay the rent, so she said "Yes, we might as well pay it here," and he paid me \$10, and I gave him two bills.

THE COURT: You say she wanted to pay the rent?

THE WITNESS: She wanted to pay the rent and he did not want to part with the money, and she said you might as well pay the rent, and he gave me \$10 and I gave him two dollars back.

Q And then they went out?

A Yes.

Q When did you see either one of them next?

A That night. That night the door bell rang. I was sleeping. It was between 12 and 1 o'clock, and I went to the door and the lady was at the door. And I asked her—

MR. PRICE: No. I object to anything she said as incompetent, irrelevant and immaterial and not binding on the defendant.

THE COURT: All right.

Q Mrs. Kitrick, do not tell us any conversation, but between 12 and 1 the door bell rang?

A Yes, sir.

Q And you were asleep?

A Yes.

Q And who did you find at the door?

A The lady.

Q By the lady you mean Mary Impagliazio?

A Yes.

Q And what did she say?

A She asked me was her husband there.

Q Well, where did she go?

A She went up to the room and the door was locked.

*State's Witness, Margaret Hitrick, Direct.*

- Q And then what?  
A Then she came down.  
Q Was her husband there?  
A No.  
Q And when she came down what did she say?  
A She went out.  
10 Q And when did you see either one of them next?  
A The next morning about 6:30.  
Q Well, did you see Rino after that?  
A No.  
Q Did you see him that night at all?  
A Oh, yes. That night he came.  
Q When?  
A Right after she went out. 15 minutes after  
20 he came.  
Q And how did he come in, do you know?  
A He had a key.  
Q Did you see him?  
A I did.  
Q Where was he when you saw him?  
A In his room.  
Q And how long did he stay there?  
A Well, just long enough to find out that she  
was not there.  
Q Then he went out again?  
30 A Yes.  
Q Now, what time did you get up the next morning?  
A 5:30.  
Q And did anybody come to the house along about 6:30?  
A Yes.  
Q Who?  
A It was a short man came to the house; about 45.  
40 Q And do you see that man here in court?

*State's Witness, Margaret Hitrick, Direct.*

A Yes.

Q Will you point him out?

A That man there, (indicating).

MR. CONLON: Is it admitted for the purpose of the record the witness is indicating the defendant?

10

MR. PRICE: Yes, that is correct.

Q And when you say that he came to the house do you mean that he rang the bell?

A Yes.

Q And you went to the door?

A Yes.

Q And then you had a conversation with him, did you?

A Yes.

Q Will you tell us what he said and what you said?

20

A He rang the door bell and I went to the door and he asked me was a family by the name of Iaccarino there.

Q And what did you say?

A I said well, there is a married couple on this first floor and there is two young fellows upstairs, so he took a book out of his pocket and took a picture out of that book and he showed it to me and he said that is the lady, and I said that is the lady.

30

Q Whose picture was it he showed you?

A That was the lady upstairs, his sister.

Q You mean Mary Impagliazio who was just on the stand?

A Yes.

Q And you told him that was the lady?

A Yes.

Q What else did he say?

A He said that is my sister and that man ran

40

*State's Witness, Margaret Hitrick, Direct.*

away from a wife and twelve children, so with that he went out. He said something arresting or something and he went out. I was so excited I really did not know and he went out into the street.

10 Q What happened then?

A He went over the street. I looked after him and I saw the other man coming along.

Q Well, now, where were you and this man that you just pointed out, you say he was in the street or on the sidewalk?

A He was coming down from my door.

Q And you say you saw the other man coming down the street?

A Outside of my door.

20 Q On which part of the stoop?

A On the second step.

Q And was the door behind you open or closed?

A It was open then.

Q Just tell us what happened from that time on?

A Well, when he told me that he left a wife and 12 children I got awfully excited and I locked myself out and I got on the second step.

30 THE COURT: You mean you had a spring lock on the door and it closed?

THE WITNESS: Yes, sir.

Q And what happened?

A And I saw the other man that lived in my house coming down the street next to the factory and this man was coming up and they walked toward one another and the first man went into the alley and the two went in together.

40 Q You were standing on the second step of your stoop?

*State's Witness, Margaret Hitrick, Direct.*

A Yes.

Q And this man who you pointed out was walking down Grant street toward Broad street?

A Yes.

Q Just tell us what happened from that point on.

A Well, Rino was going toward my house and he was about from here to that gate from the coffin factory while the other man was coming like about here (indicating) and this man went right in the coffin factory and this man went right in with him.

10

THE COURT: This man, you mean the defendant?

THE WITNESS: Yes, sir.

Q When you say they went in how did they go?

20

MR. PRICE: I submit she said they went in together.

THE COURT: I will allow it.

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

Exception allowed. Let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,

30

Judge.

MR. CONLON: Strike out the question.

Q Did they go in the factory together?

A No, first one went in and the other went in after.

Q Who went in first?

A Rino went in first.

Q Was he walking slow or walking fast, or running or what?

40

*State's Witness, Margaret Hitrick, Direct.*

A Well, he was walking naturally. It was not fast or slow.

Q What about the other man?

A Well, the two walked about the same.

10 Q And after they went in there what happened?

A Well, it was about five minutes after, I should judge, and I heard like three shots. They were very dull. I did not know whether they were shots from a gun or what. It was a dull sound.

Q And when you say five minutes what do you mean?

A It seemed like five minutes.

Q Do you recollect now how long it was?

A About five minutes.

20 Q No, I mean can you tell us in the space of time how long it was?

A Yes, I think I could.

Q You have a recollection of how long it was from the time you saw this man go into that factory until the time you heard the shot?

A Yes.

30 Q So that if I give you a signal like that (tapping a pencil on the table) you can start to figure from there when this man went into the factory and tell me to stop when you heard the shots?

A Yes.

Q Now you understand when I knock my pencil like that (tapping pencil) that means the time that this man went into the factory?

A Yes.

Q And you say now when you figure the time has come when these shots were fired?

THE COURT: Well, now, if I am to time it let me do the tapping. Now, I will

*State's Witness, Margaret Hitrick, Direct.*

do the tapping and you tell me when the five minutes is up.

THE WITNESS: Yes.

THE COURT: Wait a second or until I rap. (The Court taps his pencil on the bench). 10

THE WITNESS: That is the five minutes.

THE COURT: 21 seconds according to my time.

MR. CONLON: May we have an agreement on the record the witness indicated the period of time elapsing of 21 seconds.

THE COURT: So far as I am concerned you may, if that is agreeable to the defendant. 20

MR. PRICE: If the Judge says that is it I will take the word of the Judge.

Q Now, Mrs. Kitrick, after you heard these shots what did you do?

A Why, I found I locked myself out. I was so nervous and scared.

Q Where did you go?

A I went around the driveway and into my kitchen. 30

Q Well, after you had gone into your kitchen did anybody else come to the house?

A Yes.

Q Who?

A There was—around ten minutes between the time I was at the front of the house and I went into my kitchen again and I went upstairs to call one of my sons and while I was upstairs I heard 40

*State's Witness, Margaret Hitrick, Cross.*

the front door bell ring and I went downstairs to the door and there was a lady at the door.

Q And who was the lady?

A Mary.

Q And you had a talk with her?

A Yes.

10 Q And after she talked with you where did she go?

A She went right out. I do not know where she went.

Q Oh, before you went through the alley back into your kitchen and after you heard these shots, did you see anybody go out of the casket factory?

A Yes.

Q Who?

A I saw this man.

20 Q And by this man you mean whom?

A Him (indicating).

MR. CONLON: Indicating the defendant?

MR. PRICE: Yes, that is right.

Q Where did he go?

A He walked toward Broad street.

*CROSS EXAMINATION* by Mr. Price.

30 Q Mrs. Hitrick, you saw Mary in the house at different times with this man you knew as Mr. Rino?

A Yes.

Q You saw her crying around there a couple of times?

A Yes, I saw her crying twice.

Q Do you remember the night before the shooting when Mary came back?

A Yes.

40

*State's Witness, Margaret Hitrick, Cross.*

Q She told you that she was not coming back to Newark any more, didn't she?

A Yes.

MR. CONLON: I object to this. I would be glad to bring all of this out, but it was objected to on my direct examination. I do not think it is fair for counsel then to ask hearsay testimony of the witness. 10

THE COURT: No, you are asking for Mary's statement.

MR. PRICE: I just asked her that one question. Mr. Conlon asked Mary when she was on the witness stand whether or not she was going to come back to Newark again and she said no, and before there was any reason for her to make that statement, she already told the same thing to this witness, and that is what I am trying to prove. 20

MR. CONLON: She did not say anything to this witness.

THE COURT: I do not think the statements of Mary are binding on the state, and I will sustain the objection. 30

LEONARD EPP, sworn on behalf of the State.

*DIRECT EXAMINATION* by Mr. Conlon:

Q Where are you employed?

A Morris Casket Company.

Q Where is their place of business?

A 7-11 Grant street.

Q Were you working there on the 19th of October of this year? 40

*State's Witness, Leonard Epp, Direct.*

A Yes, sir.

Q What time did you get to work on that morning?

A About 25 minutes of 7.

Q What work did you do there?

10 A Shipping clerk.

Q You have a desk?

A Not of my own, it is between two of us.

Q You have the use of a desk?

A Yes, sir.

Q Where is that desk?

A Placed up against the window.

Q What does the window overlook?

A The yard.

Q When you say "the yard" what do you mean?

20 A The open court yard.

Q Do you understand that map on the wall?

A Yes, sir.

Q Can you show us where your desk is that is where the window is?

A Here is the window (indicating).

Q Are you on the first floor or the second floor?

A The first floor; ground floor.

Q What is the position of your desk with reference to that window?

30 MR. PRICE: May we have the witness put some kind of an initial or mark there where he says the window is. With an E or P?

MR. CONLON: Mark it "desk".

MR. PRICE: That is the window. Mark it "Wi".

Q That is where your desk is?

A Yes, sir.

40 Q What is the position of your desk in ref-

*State's Witness, Leonard Epp, Direct.*

erence to that window, is it at right angles to it or facing it?

A Square, flush with it.

Q When you are at your desk what direction are you looking at?

A North.

Q I mean with reference to the window. When you are standing at your desk?

10

THE COURT: You mean sitting.

MR. CONLON: No, standing, this is a high desk, isn't it?

THE WITNESS: Yes, sir.

Q Is the window to your right, left, or in front of you?

A Right in front of us, flush straight.

20

Q On this particular occasion was that window open or closed?

A Closed.

Q You say you got to work at 25 minutes to 7.

A About 25 minutes to 7.

Q Tell us what happened from the time you got to your desk, what you saw and what happened?

A From the time I went in?

Q At the time you got to your desk, yes.

30

A Well, I went to my desk to see how many orders was in the desk, which has a drawer on the righthand side. I opened the drawer and found one order for a casket and walked to the other side, the desk where there is a telephone, and placed the order down and was taking the clip which we have duplicate orders of the same thing and I heard this shot and I just raised my head and looked out the window and I seen this man falling.

40

*State's Witness, Leonard Epp, Direct.*

Q From what direction did you hear the shot, where did the sound come from, can you tell?

A It came right from in front of me like.

Q When you looked out what did you see?

A I seen this man falling, turning and falling.

10 Q Then, what happened. What did you see after that?

A Well, all I seen, I seen just a corner of a man's coat as he must have turned and went out the yard.

Q Did you hear anything else besides that one shot?

A I heard possibly two or three shots and this man yelling.

Q Which man?

A The man—

20 MR. PRICE: He cannot tell, I submit. I object.

THE COURT: If he cannot tell, he can say so.

Q Do you know which man was yelling. Can you tell?

A Well, by the sound, yes.

Q From your judgment and where the sound came from what man was it?

A The man that was falling.

30 Q You say that you heard a shot and saw this man fall. Just tell us what happened after that as he was falling and what happened after that? Where was the man when you heard the rest of the shots?

A The man was going down.

Q When he was going down in which direction was he facing?

A He was facing south back towards where I was standing.

*State's Witness, Leonard Epp, Direct.*

Q Were the shots in quick succession or far apart or how?

A Quick succession.

Q What, if anything, did you see the man who was falling do?

A Nothing.

10

Q Did you see his hat?

A I seen his hat go off, yes.

Q When did his hat go off?

A As he was standing his left arm flew up and hit it.

Q Was that before or after the second shot had been fired, or do you know?

A I couldn't say.

Q What was in the court yard there in the vicinity of where this man fell?

A Two trucks.

20

Q Where was the man with reference to those trucks?

A Which man?

Q The man who fell on the ground?

A In between the two front fenders, one of each truck.

Q You say you saw a part of a man's coat?

A Yes, sir.

Q You did not see the man himself?

A No, sir.

30

Q Where was that coat?

A In between the two fenders.

Q How far away from the man who had fallen on the ground?

A About four feet, I should judge about.

Q Let me ask you this. How far north, you seem to understand that, how far towards Grant Street could you see from where you were beyond the point where this man fell to the ground?

A I couldn't see far.

40

*State's Witness, Leonard Epp, Direct.*

Q Well, how far do you think?

A Just about four feet from the ground.

Q Was the person in this coat the whole body you saw, was it in that space or beyond?

A No, it was to the left.

10 Q You mean nearer to Grant street or nearer you?

A They are both about the same.

Q I show you Exhibits 5, 6, 7 and 8 for identification and I ask you if these pictures correctly represent the location of the trucks, the contents of the garage, of the court, the position of the man's body as you saw it immediately when this shooting occurred?

20 MR. PRICE: There is no proof that he did see it immediately. That is something that is not in evidence.

THE COURT: I beg your pardon?

MR. PRICE: There is no proof that he saw it immediately after the shooting.

30 THE COURT: He says that he was looking at the man and saw him fall at the time he was shot and he is asked if that was the position he fell and the position of the truck at that particular moment.

MR. PRICE: Oh, I didn't understand it that way.

THE COURT: Is that what you want?

MR. CONLON: Yes, that is what I want.

A This truck here was slightly moved ahead and then backed up for the photographer.

40 Q It was slightly moved ahead. How far

*State's Witness, Leonard Epp, Direct.*

would you say? You are referring to the automobile on the right of Exhibit S-7 for identification. How far up was it moved, would you say?

A On this picture here it is backed.

Q You mean it is backed?

A It is moved back further than where it was standing. 10

Q Where was it standing?

A It was standing up here further (indicating).

Q How far would you say?

A I couldn't say, exactly, maybe a couple of feet.

Q Otherwise this picture correctly represents the position of the body and the manner in which the man was lying on the ground?

A Yes, sir.

Q (By the Court.) Was anything else changed, there but that one truck between the time the man was shot and the time the photographer came to take the pictures? 20

A I really couldn't say.

Q (By Mr. Conlon.) You were not there all the time?

A Not all the time.

Q As far as you know, nothing else was changed?

A No. 30

Q Do these pictures correctly depict the scene as it was immediately after the shooting?

A Yes, sir.

Q (By the Court.) Who moved the truck, do you know?

A I couldn't say.

MR. CONLON: I have testimony to that effect, your Honor.

Q Do you know where that picture was taken from, S-5 for identification? 40

*State's Witness, Leonard Epp, Direct.*

A Taken from the second floor.

Q From the window of the second floor?

A Yes, sir.

Q That is the window directly above your window, was it?

10 A No, not quite.

Q Or more to the right?

A More to the right.

Q After this happened, what did you do?

A I was excited for a moment and I turned around a couple of times—

MR. PRICE: I object to what he did on the ground it is incompetent, irrelevant and immaterial.

20 THE COURT: I will admit it.

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

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

DALLAS FLANNAGAN,  
Judge.

A (Continuing) And grab a telephone which sat on a desk and called—

30 MR. PRICE: I object.

THE COURT: He took the telephone. Stop there.

Q You made a telephone call?

A Yes, sir.

Q Did you see anybody come there then?

A Within a short time.

Q Who came?

A A couple of officers from City Hall, I guess.

Q You are not sure?

40 A I am not sure.

*State's Witness, Leonard Epp, Cross.*

Q Anybody else besides the officers?

A Not at that moment.

Q Later did anybody come?

A Yes, sir.

Q Who?

A Another officer and a girl came in.

Q Do you know whether or not any others  
came? 10

A The ambulance came.

Q How long was it between the time you made  
the telephone call and the time the first officer got  
there?

A Less than ten minutes.

Q Was there anyone in the courtyard during  
those ten minutes?

MR. PRICE: If he knows.

Q If you know. 20

A Just a couple that ran out there from the  
factory.

Q Do you remember seeing that officer there  
(indicating)?

A I don't recall.

*CROSS EXAMINATION* by Mr. Price.

Q As soon as you heard these shots, you be-  
came very excited, didn't you?

A Yes, sir. 30

Q And did you see what kind of a top coat  
the man who ran out of the alley wore?

A Grey.

Q Was it a top coat?

A I couldn't say.

Q Did you at any time since the happening of  
this event tell anyone at any place that he wore  
a grey top coat?

A I don't think so. 40

*State's Witness, Leonard Epp, Cross.*

Q Well, let us see. You were taken to police headquarters, weren't you?

A Yes, sir.

Q And you made a statement to the police?

A Yes, sir.

10 Q Do you remember what officer you made the statement to?

A I think so.

Q What is his name?

A I couldn't say.

Q Is he in the Courtroom?

A [Witness looks around the courtroom.] No, sir, I do not see him.

Q Did you make a statement to the police in the courtyard while this woman was there that you saw come in?

20 A I don't recall.

MR. PRICE: Stand up Mary Impallazio.

Q Is this the woman that came in?

A Yes, sir.

Q Didn't you make a statement in her presence that you saw a man run out of there with this grey top coat on?

A I don't think so.

Q You are not positive about that, are you?

A No, sir.

30 Q Did the man who ran out have a grey coat on?

A Yes, sir.

Q Are you sure it was grey?

A Yes, sir.

Q Did you see what kind of a hat he had on?

A No, sir.

Q (By the Court.) I want to make sure that I understand you. As I understand, you were standing at your desk?

40 A Yes, sir.

*State's Witness, Leonard Epp, Cross.*

Q You heard a shot?

A Yes, sir.

Q It was the shot that attracted your attention?

A Yes, sir.

Q Then, you say you looked out in the yard?

A Yes, sir.

Q Then, you saw the man turn, throw up his hand and knock off his hat? 10

A Yes, sir.

Q You further say that you heard two other shots beside the first one that attracted your attention, am I right?

A Possibly two or three shots.

Q You cannot say which?

A No.

Q What I want to get at, if you can tell me, is whether or not the subsequent shots, that is, the shots after the first shot was fired, after you saw the man's hand go up and hit his hat or not, can you tell that. Do you understand what I want? 20

A Will you explain that again?

Q You say you saw the man's hand go up and knock his hat off.

A Yes, sir.

Q What I want to find out is whether the two or three or four shots, whatever they were, whether they came after he lifted his hand or before. 30

A They came after he started to turn.

Q They came after he started to turn?

A Yes, sir.

*REDIRECT EXAMINATION* by Mr. Conlon.

Q I understood you to say that that was the man's left hand you saw knock his hat off?

A Yes, sir.

40

*State's Witness, Leonard Epp, Re-Cross.*

RE-CROSS EXAMINATION by Mr. Price.

Q Didn't you telephone the police immediately after the first shot?

A No, sir.

Q Are you sure about that?

10 A Absolutely.

Q Did you make the statement to Mr. Schaffer of the Prosecutor's office?

A No, sir.

Q Didn't you sign a written statement for Mr. Schaffer of the Prosecutor's office?

MR. CONLON: I object. There can be only two purposes to this question.

THE COURT: Sustain the objection.

20

MR. PRICE: Your Honor will not let me ask him if he signed a written statement?

THE COURT: Not to the Prosecutor's office.

MR. PRICE: Mr. Schaffer is a detective.

THE COURT: I know who Mr. Schaffer is.

30

MR. PRICE: May I, for the purpose of the record ask the question?

THE COURT: You have asked it and I have ruled on it, and you haven't excepted.

MR. PRICE: I ask an exception.

Exception allowed. Let it be sealed and it is signed and sealed accordingly.

40

DALLAS FLANNAGAN,  
Judge.

*State's Witness, Richard J. Himmel, Direct.*

RICHARD J. HIMMEL, sworn in behalf of the State.

*DIRECT EXAMINATION* by Mr. Conlon.

Q You are a police officer of Newark?

A Yes.

Q What duty were you attached to in the early morning of October 19th, this year? 10

A Why, I was on the seven to eight reserve.

Q Where?

A The Second Precinct.

Q And did you get a call that morning?

A I got a call that morning.

Q At what time?

A At 6.40, if I remember right.

Q What time did you get to the precinct?

A What time did I get to the precinct? I was relieved— 20

Q No . You said you were on seven to eight. You mean until the night before?

A No. I was sleeping in that night. That was my night on reserve.

Q What do you mean by seven to eight?

A The wagon men that night were through at seven in the morning.

Q And you were on duty there?

A I was on duty from seven to eight, but as a rule we generally helped out, you know, in order in a need like that, we take his place. 30

Q At any rate, you were up in the Second Precinct at 6.40?

A Yes.

Q And you got a call then?

A Yes.

Q And where did you go in response to that call?

A I went down to Grant street. 40

*State's Witness, Richard J. Himmel, Direct.*

Q Who was with you?

A Why, I believe, if I am not mistaken, Officer Keller.

Q And how did you get there?

A In the Second Precinct Patrol.

10 Q And the Second Precinct, for the benefit of the members of the jury who do not know, will you tell us where it is located?

A It is at Seventh avenue and Summer avenue.

Q And about how many blocks is that from Grant and Broad street?

A Why, I judge about five blocks.

Q When you got there what did you find?

A When I got there I saw this man lying between them two trucks.

Q And what did you do then?

20 A I saw that nobody moved anything, and did police duty.

Q How long did you stay there?

A I stayed there until I was relieved, a little after 8 o'clock.

Q And did you see Dr. Martland there that morning?

A Yes.

Q And did you see the photographer there that morning?

30 A Yes.

Q Were you there when the pictures were being taken?

A I was in the vicinity. I was keeping the crowd back.

Q And do you know whether from the time you got there until the time that Dr. Martland got there, if anything in that court-yard was moved?

40 A I could not say. Nothing at the time I was there was moved. That is what I was put there for.

*State's Witness, Richard J. Himmel, Direct.*

Q And from the time you got there until the time Dr. Martland got there, I ask you whether anything was moved?

A I did not see anything moved.

Q Well, you were there all the time?

A I was there all the time.

Q And can you tell us whether or not anything was moved? 10

A Nothing was moved.

Q Was anything moved while Dr. Martland was there?

A Well, both cars were close together, and that man was partly up in the one car and the truck wheels were cut to the right, backed into the court and cut to the right, and in order for anybody to get in there that truck was pushed back about a foot and a half. 20

Q And that was while Dr. Martland was there?

A Dr. Martland was there.

Q And you were there until the photographer came and took the pictures?

A Yes.

Q Will you look at those pictures in front of you, Exhibits S-5, 6, 7 and 8, and tell me whether or not, except with reference to the position of that particular truck, they depict that scene there as it was when you first arrived? 30

A This picture here?

Q All of them.

A Yes.

MR. CONLON: Now, I offer Exhibits S-5, S-6, S-7 and S-8 for identification.

MR. PRICE: I make the same objection I made before on all the grounds stated before.

THE COURT: Very well. Overruled. 40

*State's Witness, Vannzio Calise, Direct.*

(Photographs marked Exhibits S-5, S-6, S-7 and S-8.)

Defendant's counsel prays an exception of this ruling of the Court.

Exception allowed. Let it be signed and it is signed and sealed accordingly.

10

DALLAS FLANNAGAN,  
Judge.

Q Officer, did you have any part in any search of the premises around there?

A No, sir. As soon as I got there, in about a minute or two, why, headquarters got there.

Q And your job was to see—

A My job was to keep the crowd back and left everything to the headquarters men.

20

Q You did not find anything there?

A No, sir.

(Cross-examination waived.)

VANNZIO CALISE, sworn in behalf of the State.

*DIRECT EXAMINATION* by Mr. Conlon.

Q What is your business?

A Taxi driver.

Q Where?

A Brooklyn, N. Y.

30

Q Were you driving a taxi on the 19th of October of this year?

A 19th?

Q Yes, October 19th, this year?

A Yes.

Q Did you see Mary Impagliazio on the stand this morning?

Q Yes, I did.

Q Did you meet her on that morning?

A Yes, from Brooklyn.

40

*State's Witness, Vannzio Calise, Direct.*

- Q Whereabouts in Brooklyn?  
 A Pacific street and Columbus street.  
 Q What time?  
 A About half-past three or a quarter to four.  
 Q In the morning.  
 A Yes. 10  
 Q And where did you drive her?  
 A We drove her—she said to me she wanted  
 me to take her over to Newark.  
 Q Did you drive her to Newark?  
 A Yes.  
 Q Did you get to Newark finally?  
 A Yes.  
 Q And when you got to Newark where did you  
 go?  
 A Some street. What you call it? She directed  
 me. Mary directed me. 20  
 Q She directed you?  
 A Yes.  
 Q Well, did you go to Grant street?  
 A Yes. She directed me to Grant street.  
 Q And did you stop there?  
 A Yes. I stopped in the middle of the street  
 and she go upstairs.  
 Q And then she came back again?  
 A Came back again.  
 Q And got in the cab? 30  
 A Yes.  
 Q And then after she got into the cab where  
 did you drive her then?  
 A She said to drive her to the Majestic Hotel  
 in Brooklyn.  
 Q Did you go to the Majestic Hotel?  
 A Yes.  
 Q What happened after you got there?

MR. PRICE: I object to that as irrele-

*State's Witness, Vannzio Calise, Direct.*

vant, incompetent and immaterial. Nothing to do with this case.

THE COURT: I do not quite see how it does.

10

MR. CONLON: Well, sir, it shows that the defendant had left Brooklyn and was coming over here. This is the very time it is supposed his sister was in the room. The sister testified to all of her actions, except the conversations, and Your Honor has ruled out the conversations.

THE COURT: I will allow it.

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

20

Exception allowed. Let it be signed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge.

Q And when you stopped at the Hotel Majestic what happened, did anybody get out?

A Mary got out and go in the hotel.

Q Who went in the hotel?

A Mary.

30

Q And did she come out again?

A Right away she come out again.

Q Then where did you drive her?

A Montague street.

Q And after Montague street where did you go?

A She said, do you mind to take me to Newark again.

Q Did you drive her back to Newark?

A I drove her back to Newark.

40

Q Now, when you got back to Newark the second time, about what time was it?

*State's Witness, Vannzio Calise, Direct.*

A After six; about half-past six, or some time; a quarter after six; I could not remember the correct time.

Q And you did go back to the vicinity of Grant street?

A Yes, sir. When we reached the corner she said— 10

Q No, you cannot tell us what anybody said, except this man here (indicating the defendant). When you got to the corner of Grant street and Broad street, did you see anybody at the corner?

A Yes.

Q Who was standing on the corner.

A Mary said—

Q No. You cannot tell us what Mary said. Do you now know who that man was?

A Yes. 20

Q Who?

A Right there.

MR. CONLON: Indicating the defendant.

MR. PRICE: Yes.

Q And when you saw him standing on the corner where did you go in your taxi?

A About two or three blocks over.

Q And then what happened there two or three blocks away, did anybody get out of the cab? 30

A No. Mary said—

MR. PRICE: No, do not tell us what Mary said.

Q Did she get out of the cab?

A Yes.

Q And then where did you go?

A She paid me. Mary paid me the fare.

Q But where did you drive? After she got out of the cab, where did you go with the cab? 40

*State's Witness, Vannzio Calise, Direct.*

- A I go down to the man that was on the corner.  
 Q And you went to where he was?  
 A Yes, sir.  
 Q Did you talk to him?  
 A Yes, sir.  
 10 Q What did you say to him?  
 A I said, "Do you want to go to New York?"  
 He said, "No."  
 Q Did you say New York or Brooklyn?  
 A I said—you know New York and Brooklyn is  
 just the same.  
 Q What did he say?  
 A He said no, he cannot go, because he waited  
 for somebody there.  
 Q And what did you say?  
 20 A I asked him—I said, "You want to meet  
 somebody?" And he said he was waiting for his  
 sister and another man to have him arrested.  
 Q Then what did you do?  
 A I turned around to go to Brooklyn.  
 Q Did you see Mary after you talked to him?  
 A No.

*CROSS-EXAMINATION* by Mr. Price.

- 30 Q You mean, do you not, that the defendant  
 told you that a man had gone away with his sis-  
 ter, and he wanted to have that man arrested; is  
 that right?  
 A Yes. He wanted to have that man arrested,  
 have the man with his sister arrested.

*RE-DIRECT EXAMINATION* by Mr. Conlon.

- 40 Q Both of them?  
 A Yes.  
 Q Now, just try to remember after you talked  
 to the defendant, this man sitting here—  
 A Yes.

*State's Witness, Francis W. Johnson, Direct.*

Q Did you see Mary after that, before you went to Brooklyn?

A No.

FRANCIS W. JOHNSON, sworn on behalf of the State.

*DIRECT EXAMINATION* by Mr. Conlon.

10

Q You are a member of the Newark Police Department?

A Yes, sir.

Q And attached to the Detective Bureau at Headquarters on October 19th?

A Yes, sir.

Q Assigned to duty in this case?

A Yes, sir.

Q And what time did you get there?

20

A I received the call about 6:40, and got up there as soon as we could, a matter of a couple of minutes.

Q Who was with you?

A Detective Flynn.

Q How did you get up there?

A In a Bureau car.

Q Police car?

A Yes.

Q Did you search the premises there?

A I looked around, that is, as far as I could see I searched it, but didn't touch the man at all.

30

Q Did you find anything?

A No, sir.

Q There was no gun there you saw?

A No, sir.

CROSS EXAMINATION waived.

40

*State's Witness, Francis E. Flynn, Direct.*

FRANCIS E. FLYNN sworn on behalf of the State.

*DIRECT EXAMINATION* by Mr. Conlon.

10 Q You went up to the scene with Officer Johnson?

A I did.

Q Did you make any search of the premises there?

A I found three—I don't remember whether it was two or three shells on the ground right near the man.

Q What did you do with them?

A I turned them over to Detective Schaefer at Headquarters.

20 Q Would you recognize the shells if you saw them?

A I would.

Q How would you recognize them?

A I marked them for identification.

Q Did you find anything else?

A No, just the shells.

Q You saw no gun there?

A No.

Q Can you pick out the two you found?

A These two (indicating).

30

MR. CONLON: I offer in evidence being two empty shells found by the witness at the scene of the crime.

(Same are marked S-15.)

CROSS EXAMINATION waived.

40

*State's Witness, Samuel Thompson, Direct.*

SAMUEL THOMPSON sworn on behalf of the State.

*DIRECT EXAMINATION* by Mr. Conlon.

Q Where are you employed?

A Morris Casket Company.

Q Were you up there on the morning of October 19th? 10

A Yes, sir.

Q Did you see a man's body lying there in the court yard?

A Yes, sir.

Q Did you find anything there?

A I found a shell from a bullet.

Q What did you do with it?

A Gave it to the detective there.

Q Which one? 20

A Mr. Schaefer.

Q Did you find anything else?

A No, sir.

Q Was any gun around there?

A No, sir.

Q Did you make any mark on the shell?

A Yes, sir.

Q Can you pick it out, whether it is either one of those two?

A It is neither one of them. 30

Q What kind of a mark did you make on it?

A A "T."

MR. PRICE: I will let them both go in and concede that they were both found in the alley near the body of the deceased.

MR. CONLON: All right.

THE COURT: Did you identify them?

*State's Witness, James Afflito, Direct.*

THE WITNESS: I made a "T" on them and I cannot find that.

Q You found nothing else but this shell?

A No, sir.

10 MR. CONLON: I ask that these shells be marked the same as the other found at the scene of the crime.

(Same are marked S-15.)

CROSS EXAMINATION waived.

JAMES AFFLITO sworn on behalf of the State.

*DIRECT EXAMINATION* by Mr Conlon.

Q You are attached to the Prosecutor's Office, Mr. Afflito, as a chauffeur?

20 A I am.

Q You are not a detective?

A Sometimes.

Q Were you at the scene of the crime?

A I was.

Q What time did you get there?

A About 7:15.

Q Who was with you?

A Detective Schaefer.

Q What did you find?

30 A I found a shell and a lead slug.

Q Is that the slug (indicating)?

A Yes, sir.

MR. CONLON: I offer the slug in evidence.

MR. PRICE: I object to the slug. No objection to the shell but there is positively nothing to connect this up with this case.

40 MR. CONLON: Dr. Martland testified that one of the bullets came out of the nostril of the deceased.

*State's Witness, James Afflito, Direct.*

THE COURT: I will admit it.  
(Slug is marked S-16.)  
Defendant's counsel prays an exception  
to this ruling of the Court.  
Exception allowed; let it be sealed and  
it is signed and sealed accordingly.

10

DALLAS FLANAGAN,  
Judge.

Q Did you find anything else there?

A A shell.

Q Besides the shell of the slug?

A Nothing at all.

Q Did you see any gun around there?

A I did not.

Q Did you make a search there?

A We did.

20

Q Did you go up there subsequently?

A We did.

Q When?

A At the time we brought the defendant there.

Q How many days after the 19th was that?

A Either five or six days later.

Q Did you make a search for the gun?

A We did.

Q Where did you search at that time?

A In where they parked the cars, on both sides  
there is a lot of lumber. 30

Q Where did you search in that particular  
spot?

MR. PRICE: I object to that as incom-  
petent, irrelevant and immaterial, and calls  
for the conclusion and the operation of his  
mind.

Q The defendant was present?

A Yes, sir.

Q Did the defendant say anything to you about 40

*State's Witness, James Afflito, Direct.*

the gun on that occasion?

A He did.

Q What did he say?

A He said he threw it in the yard somewhere.

Q Was he there while you searched?

10 A Yes, alongside of me.

Q Did you find the gun?

A No, sir.

BY THE COURT:

Q The defendant pointed out the place for you to search?

A Yes, he said, "I threw it right in the yard."

20 MR. PRICE: May the record show that the witness has his two hands in front and then spreads them apart indicating the way the defendant did it..

THE WITNESS: That is the way the defendant did it. He said, "I threw the gun in the yard."

Q Did you ask him where he threw it?

A Yes, and he said "Exactly where I threw it I don't know."

CROSS EXAMINATION waived.

30 THOMAS E. SULLIVAN, recalled in behalf of the State.

*DIRECT EXAMINATION* by Mr. Conlon.

Q You were up to the scene of the crime on the morning of October 19th?

A Yes, sir.

Q Did you find anything there?

A There was a young man handed me an empty cartridge.

40 Q Did you find anything on the ground?

*State's Witness, Benjamin Schaefer, Direct.*

A I saw the body of a man lying there, yes, sir.

Q Aside from that did you find any gun?

A No, sir.

CROSS EXAMINATION waived.

BENJAMIN SCHAEFER, sworn on behalf of the State. 10

*DIRECT EXAMINATION* by Mr. Conlon.

Q You are a detective attached to the Prosecutor's Office?

A Yes, sir.

Q Were you assigned to work on the Homicide Bureau on October 19th?

A Yes, sir.

Q Did you get a call that morning? 20

A I did.

Q Where?

A At my home about ten minutes to seven.

Q Where did you go?

A I went from there immediately to the scene, 7-11 Grant street.

Q How did you get there?

A By car.

Q Whose car?

A Afflito. 30

BY THE COURT:

Q You mean an automobile?

A Yes, sir.

BY MR. CONLON:

Q When you got there did you make any search of the premises there?

A I did.

Q Who else helped you in the search?

A Afflito.

Q Who else? 40

*State's Witness, Benjamin Schaefer, Direct.*

A I believe just Afflito and I were there. We went up to view the body and when we had gotten there Johnson and Flynn had already taken the witnesses down to Headquarters to take the statements from them.

10 Q Did you make a search of the premises there?

A I did.

Q Describe what kind of a search you made?

A Well, I searched very carefully looking for the gun.

MR. PRICE: I move to strike that out on the ground that it is a conclusion, "very carefully."

20 THE COURT: I don't know whether it is or not. I will let it stand.

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

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

DALLAS FLANAGAN,  
Judge.

Q Tell us what you mean by "Very carefully"?

30 A By very carefully I mean I went behind all the boxes in the lumber piles, looked under the stacks of lumber and there was probably about 20 or 30 caskets there standing on end waiting to be shipped, and I looked behind all of them with a searchlight.

Q Was there any place you did not look?

A No, sir, even outside in the surrounding territory.

Q Did you find any gun?

A I did not.

40 Q Were you up there subsequently?

*State's Witness, Benjamin Schaefer, Direct.*

A I was there the following Friday.

Q And who went with you at that time?

A The defendant, James Afflito, Humbert Berardi and myself.

Q Did you have a conversation with the defendant as to the gun then?

10

A I did.

Q And did you search for the gun in his presence?

A We did.

Q And did you find the gun?

A No.

*CROSS EXAMINATION* by Mr. Price.

Q Were you present when I brought the defendant to Police Headquarters?

A I was.

20

Q Did you hear me instruct the defendant not to make any answers to any questions that we repeat to him?

MR. CONLON: I object.

THE COURT: Sustained.

Q Did you hear the defendant say in my presence he would not make any answers?

MR. CONLON: I object.

30

THE COURT: Sustained.

MR. PRICE: May I not finish my question?

THE COURT: That is enough. You have asked one question.

MR. PRICE: I was interrupted.

THE COURT: Go ahead and ask the rest of it.

40

*State's Witness, Benjamin Schaefer, Direct.*

Q I did bring the defendant to police headquarters.

MR. CONLON: I object.

THE COURT: Sustained.

10 MR. CONLON: Your Honor, I am through with my case with one exception. I desire to recall Dr. Martland to ask him another question which I did not anticipate. He has already testified to the things he found in the clothing of the deceased. I want to ask him if that is all he found. That is the only question.

MR. PRICE: What is the answer?

MR. CONLON: His answer is going to be yes, that all he found was the articles he stated.

20 MR. PRICE: Yes.

THE COURT: In other words, what you mean to show is that Dr. Martland would say he found no gun on the deceased.

MR. CONLON: Exactly.

THE COURT: There is no question about that?

MR. PRICE: I can say that Dr. Martland would say that.

30 THE COURT: Yes, with the same effect as if he did say it.

MR. PRICE: Surely.

THE COURT: All right.

STATE RESTS.

MR. PRICE: Does Your Honor want to dispose of the jury while I make my motion?

40 THE COURT: Yes. Will you gentlemen kindly step into my room?

THE JURY RETIRES.

*State's Witness, Benjamin Schaefer, Direct.*

MR. PRICE: I ask Your Honor to advise—I move to dismiss the indictment and I will ask Your Honor to advise the jury to acquit the defendant on the following grounds:

First, that the evidence is insufficient, as a matter of law, to convict the defendant of any crime. 10

Second, the Prosecution has failed to prove the defendant guilty beyond a reasonable doubt.

Third, the Prosecution has failed to rebut the presumption of innocence that the defendant is entitled to at all times until the jury finds him guilty, and therefore he should be acquitted. 20

Fourth, that the evidence in this case is a matter of law; does not come up to the standard required by the statute that a defendant in a criminal action is presumed to be innocent until the contrary is proven, and in case of reasonable doubt, until his guilt is satisfactorily shown he is entitled to an acquittal. 20

I also move to take away from the jury the charge of murder in the first degree on the ground that there is no evidence to sustain the charge. 30

THE COURT: That completes the motion?

MR. PRICE: Yes, sir.

THE COURT: Motion denied.

MR. PRICE: May I ask Your Honor is my motion in proper form?

THE COURT: Yes, as far as I know, yes. I do not see anything wrong with it.

The motion is denied and an exception 40

*Defendant's Witness, Antoinette Cappiello, Direct.*

granted, a separate exception on each ground.

Let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANAGAN,  
Judge.

10

THE JURY RETURNS TO THE COURTROOM. MR. PRICE opens to the jury in behalf of defendant.

ANTOINETTE CAPPIELLO, sworn on behalf of the defendant. (Through an Interpreter).

*DIRECT EXAMINATION* by Mr. Price.

20

THE COURT: Mr. Interpreter, just tell this to the witness. There will be a number of questions asked of you. Please just answer the questions and do not say any more. Just answer the questions.

Q Where do you live?

A 241 Hoyt street.

Q Borough of Brooklyn, County of Kings, City and State of New York?

A Yes, sir.

Q Mary Impagliazio is your daughter?

A Yes, sir.

30

Q Paul is your son?

A Yes, sir.

Q Have you any other children?

A Another one.

Q Gaspar Cappiello?

A Yes, sir.

Q How old is Paul?

A Forty years.

Q Where does he live?

A 273 Sackett street.

40

Q That is in Brooklyn?

*Defendant's Witness, Antoinette Cappiello, Direct.*

A Yes, sir.

Q Is Paul Married?

A Yes, sir.

Q How long has he been married?

MR. CONLON: I object.

THE COURT: I do not think this makes any difference. What did you want to bring this poor lady here to prove these things for I do not see. 10

MR. PRICE: I will prove a lot of things by this witness.

Q Were you living at 241 Hoyt street on the night of October 8th?

A Yes, sir.

Q Before the night of October 8th how long had you known Mike Iaccarino? 20

A From the time he came out of jail; he went to jail because he dishonored his children.

MR. CONLON: I move to strike that out.

THE COURT: Strike that out.

Q How long have you known Mike Iaccarino in years?

A About three years after he came out of jail.

THE COURT: Strike that out.

Q Did he live at 242 Hoyt street?

A Yes, sir. 30

Q Before the 8th of October did you ever talk to Mike about not coming into the store of Mary?

A Yes, sir.

Q Did you request him not to come into the store and stay away from your daughter?

A Yes, sir.

Q How many times?

A I told him more than once. His wife was in there and I told him that he had a very strong face, in other words he was stubborn. 40

*Defendant's Witness, Antoinette Cappiello, Direct.*

Q After you told him to stay away from the store and leave Mary alone did you see him in the store?

A From the 5th of October for two nights I didn't see him. On the night of the 8th he came into the store.

10 Q Did you learn on the night of the 8th of October what happened between Mike, the son-in-law, and Mary Impagliazio?

A Yes.

Q And after you learned what happened, and on the morning of the 9th of October, did you see your son Paul, the defendant?

A Yes.

Q And where did you see Paul?

20 A I came and called him to my house.

Q And did you see him at your house?

A I seen him at the Morris avenue bank.

Q You mean the Morris Plan Bank?

A Yes.

Q Well, before that didn't you see Paul at 241 Hoyt street in the morning?

A Yes.

Q And then you went with him to the Morris Plan Bank at Montague street and Court street, did you not?

30 A Yes.

Q And who else went to the bank?

A Myself, the wife and he.

Q By the wife, you mean Paul's wife?

A Yes.

Q Well, now, when you got to the Morris Plan Bank, did you go into the bank?

A I went in and I told the Italian in the bank that he should stop the payment.

40 Q Do not tell us what he said. Did you see Mary at the bank that morning?

*Defendant's Witness, Antoinette Cappiello, Direct.*

A No.

Q Did you see Michael Iaccarino at the bank that morning?

A No.

Q Did you go to Paul's house at 273 Sackett street on the 9th of October.

10

A No.

Q Well, did you learn from Paul that Mary and Mike had been near the bank on the morning of October 9th? Yes or no.

MR. CONLON: I object.

THE COURT: Sustained.

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

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

20

DALLAS FLANAGAN,

Judge.

Q Well, now, after the 8th of October, did you ever see Michael Iaccarino again?

A No.

Q What business is your son Paul in?

A Laundry, and when he gets some trips to do, something to do, clothes, and so forth.

Q Now, did you have a pistol?

30

A Yes.

Q Do you remember that Paul had a truck that was stolen?

A Yes.

Q And that he got a black-hand letter after that?

A Yes.

Q When was that?

A About a year back.

Q What did you do with the pistol when you

40

*Defendant's Witness, Antoinette Cappiello, Cross.*

learned that Paul's truck had been stolen and that he received the black-hand letter?

A Paul wanted the revolver and I think for fear they would kill him, gave it to him so that he could defend himself.

10 Q That was about a year ago?

A About a year.

Q And you never saw it after you gave it to Paul, is that correct?

A No.

*CROSS EXAMINATION by Mr. Conlon.*

Q Iaccarino was rather friendly with Mary for quite a while, wasn't he?

A I treated him as my own son; I befriended the family.

20 Q You knew that he was friendly with Mary for several months before this time, didn't you?

A I thought he was a sincere friend, as I treated him and his family.

Q Well, when Mary left the house on the 8th of October, you knew that she was going with Iaccarino?

A No.

30 Q Now, when did you first find that Mary had taken from the house the certificates that she had in the Morris Plan Bank?

A About 10.30 when the husband came up and told me. He was crying and that he had found Iaccarino under the bed.

Q And then you knew that Mary had taken the Morris Plan certificates away with her, didn't you? Answer yes or no.

[Witness is answering in Italian.]

MR. PRICE: I submit the interpreter be instructed to interpret her answer.

40

THE COURT: No, the Court instructed

*Defendant's Witness, Antoinette Cappiello, Cross.*

her to answer yes or no, and I strike out the rest. I will not allow her to answer any more than the Court directed her to answer, and she keeps on talking.

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

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

10

DALLAS FLANAGAN,  
Judge.

THE COURT: Go ahead now. Let us get along. Tell her to answer the questions.

Q On the night of October 8th, when her husband came up crying to you, you then knew Mary had taken the Morris Plan certificates away with her, is that right?

20

A From the husband I found out.

Q And the next morning you went to the bank to stop her from drawing the money?

A Yes.

Q Now, did you find out that she got the money from the Morris Plan Bank in New York?

A When they could not get the money from the bank in Borough Hall, they went to the bank in New York.

30

Q How did you find that out?

A From my nephew. He went to the place there.

Q And did you tell Paul about that?

A No.

Q You knew that Mary had taken her jewelry with her?

A Yes, and I told it to Paul the morning when I went to the bank.

40

*Defendant's Witness, Antoinette Cappiello, Cross.*

Q Now, do you remember the night of October 18th?

A Yes.

10 Q Do you remember the occasion when Paul left the house and said he was going to Newark, is that right?

A He left the house, but he did not tell me where he was going.

Q And isn't it a fact that at that time he left Mary in the room there and asked you and your daughter to keep her there and not let her out?

A Yes.

Q And isn't it a fact that after you had kept her there for an hour or two, she forced her way out by pushing you aside?

20 MR. PRICE: I object on the ground it is irrelevant, incompetent and immaterial and not binding on the defendant and not competent cross examination.

THE COURT: Well, I really do not see that it has anything to do with it. The defense here is self-defense. The question is did this man kill this man in self-defense.

30 MR. CONLON: I will withdraw it.

THE COURT: Now, gentlemen, let us try to get that issue. According to the opening of defendant's counsel, his defense is that this man was killed in self-defense. Now, let us stick right to that issue.

Q Now, isn't it a fact that that night, October 18, when your husband left the house and went out, that he said he was going to find Iaccarino. I said husband. I mean son.

40 A I am his mother, not his wife.

*Defendant's Witness, Antoinette Cappiello, Cross.*

Q Yes. Isn't it a fact that Paul went out and said he was going to find Iaccarino?

A He did not want his sister to get in his hands, and he wanted him to be arrested.

Q Isn't it a fact that when he went out, he said he was going to find Iaccarino?

A He did not say nothing to me. He went out of the house, and did not say anything. 10

Q And isn't it a fact that before he went out of the house that he went to either a trunk or bureau drawer of yours, and that he took out of that drawer a loaded revolver?

MR. PRICE: I object as not proper cross examination.

MR. CONLON: Laying the foundation for rebuttal? 20

THE COURT: I think so. I will allow it.

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

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

DALLAS FLANNAGAN,  
Judge.

A No.

Q Uh? 30

MR. CONLON: Officer Berardi, will you stand up?

Q Do you remember that gentleman? Do you remember him?

A Yes.

Q Did you see that gentleman over in your house in Brooklyn?

A Yes.

Q And do you remember talking to him over there in Italian? 40

*Defendant's Witness, Antoinette Cappiello, Cross.*

A Yes.

Q And did he have a man with him?

A I do not remember. I do not know.

Q Afflito, who was on the stand?

A I do not remember. I was crazy.

10 Q When did he come over to see you?

A Who?

Q Officer Berardi?

A I do not remember. I am crazy since the 8th of October. I do not understand anything.

Q Well, was it before Iaccarino was killed that you talked to Berardi or afterwards?

A I do not remember; I do not remember.

20 Q Isn't it a fact, Mrs. Cappiello, that on a Sunday about—isn't it a fact that on a Sunday about the 21st of October, that you told Officer Berardi and James Afflito of the Prosecutor's office, in Brooklyn that night, the night of the 18th of October, your son Paul took a gun out of either a trunk or bureau drawer belonging to you and went out of the house and said he was going to get Iaccarino. Is that not a fact?

INTERPRETER: Will the stenographer read the question?

30 THE COURT: Where, in Brooklyn?

MR. CONLON: In her house in Brooklyn.

THE COURT: Insert in her house in Brooklyn.

(Question read.)

MR. CONLON: May I withdraw the question?

40 Q Isn't it a fact, Mrs. Cappiello, that on or about the 20th of October, this year, you stated

*Defendant's Witness, Antoinette Cappiello, Cross.*

to Officer Berardi and James Afflitto in your home in Brooklyn that on the evening of the 18th of October, your son Paul went to either a trunk or bureau drawer belonging to you and took out a loaded revolver which you had been keeping there?

A I don't know anything about this. They wanted me to sign a paper. I said that I wouldn't sign.

10

THE COURT: Your second question was quite different from the first.

MR. CONLON: Yes, sir, I am going to cut it in parts.

THE COURT: Now, read the question over again and Mr. Interpreter, please say to her to answer the question yes or no.

(Question read.)

20

A No.

MR. CONLON: I move the answer be stricken out.

MR. PRICE: I consent to it.

Q And isn't it a fact that you told Officer Berardi and Afflitto—

THE COURT: At the same time and place?

MR. CONLON: The same time and place.

Q —that your son said as he went out, "I am going to get Iaccarino, or words to that effect?"

30

A No.

Q Isn't it a fact that at the same time and place you told Officer Berardi and James Afflitto that that particular gun had been left to you by a boarder who had gone to Italy. Yes or no?

A Yes, sir.

Q Isn't it a fact that you told them on that occasion that you had the gun in your possession for 15 years?

40

*Defendant's Witness, Antoinette Cappiello, Cross.*

A No.

Q Isn't it a fact that you told them on that occasion that that boarder did not come back for the gun?

A No.

10

(Adjourned until December 19, 1929, at  
10 a. m.)

20

30

40

*Defendant's Witness, Antoinette Cappiello, Redirect*

ESSEX COUNTY COURT OF OYER  
AND TERMINER.

THIRD DAY

Thursday, December 19, 1929.

STATE OF NEW JERSEY,

vs.

PAUL CAPPIELLO,

On Indictment  
No. 2  
Dec. T. 1929  
for  
MURDER.

10

Continued pursuant to adjournment.  
Present, Counsel as before stated.

20

ANTOINETTE CAPPIELLO, resumes the stand.

*RE-DIRECT EXAMINATION* by Mr. Conlon.

Q Miss Cappiello, do you remember seeing this man here, James Afflito, over at your home on October 20th?

MR. PRICE: I object on the ground it has already been asked all about that answer.

THE COURT: I imagine the Prosecutor is calling her because he did not ask her.

30

MR. CONLON: I did not lay the proper foundation for rebuttal.

THE COURT: Proceed.

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

Exception allowed. Let it be signed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,

Judge.

40

*Defendant's Witness, Antoinette Cappiello, Redirect*

A Yes.

Q He came to see you with Officer Berardi, this man over here (indicating)?

A Yes.

Q And they talked to you in Italian?

10 A Yes.

Q And on that occasion did you say to them that some time a boarder went back to Italy and left a revolver in your home with the understanding that when he returned he would get it back?

MR. PRICE: I object to that as incompetent, irrelevant and immaterial, and not contradiction of anything she testified to here.

20

THE COURT: Well, did not she say just exactly that?

MR. CONLON: Yes, your Honor. This is simply introductory. I asked her whether Paul did not take the gun out of the place it was.

THE COURT: All right, but we do not need the introduction.

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

30

Exception allowed. Let it be signed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,

Judge.

MR. CONLON: Only two questions. It will only take a minute.

THE COURT: Go ahead.

A No.

40 Q And that several days before October 20th, your son Paul was running around the room holler-

*Defendant's Witness, Antoinette Cappiello, Redirect*

ing that he was going out to get Michael Iaccarino?

A No.

Q And that after he left you went to look for the gun and it was not there?

A No.

*RE-DIRECT EXAMINATION* by Mr. Price. 10

Q Now, as a matter of fact, on the night of October 18th, you were at Paul's house, 273 Sackett street, weren't you?

MR. CONLON: I object as not redirect examination.

THE COURT: Sustained.

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

Exception allowed. Let it be signed and it is signed and sealed accordingly. 20

DALLAS FLANNAGAN,  
Judge.

Q Isn't it a fact that you locked your house at 241 Hoyt street, on the night of October 18th, and you had the keys to the house?

A Yes.

Q And you had the keys to the house after you left 241 Hoyt street, and arrived at 273 Sackett street, isn't that so? 30

A Yes.

Q And you were in the premises 273 Sackett street when Paul left the premises?

A Yes.

Q Did you keep the keys in your possession, or did you give the keys to Paul?

A I.

Q And did you keep them up to the time you went back to your home after Paul left? 40

*Defendant, Paul Cappiello, Direct.*

A Yes.

MR. CONLON: I have an authority on the point I raised yesterday on the matter of the neutralization of the testimony.

10 THE COURT: Yes, I would like to see it.

THE COURT: The syllabus seems to sustain what you say. I haven't read the case, but I would like to show it to your opponent.

MR. PRICE: I will read it. Shall I read it now, or shall we proceed?

THE COURT: We had better proceed, because the question won't arise until later.

20 PAUL CAPPIELLO, the defendant, being duly sworn, testified as follows:

*DIRECT EXAMINATION* by Mr. Price:

Q How old are you?

A 41.

Q Where did you live before you surrendered yourself?

A 273 Sackett street.

30 Q Who did you live there with?

MR. CONLON: I object.

THE COURT: I sustain the objection. Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed. Let it be signed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge.

40 Q Are you married?

*Defendant, Paul Cappiello, Direct.*

MR. CONLON: I object.

THE COURT: Objection sustained.

MR. PRICE: I do not think there is any dispute—

THE COURT: It doesn't make a bit of difference whether he is married. The issue seems to be here whether or not this is a case of self defense. If we can get down to that we can get through with this case much quicker. We are not interested in whether he is married. 10

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

Exception allowed. Let it be signed and it is signed and sealed accordingly.

DALLAS FLANNAGAN, 20  
Judge.

Q How long have you lived at 273 Sackett street?

A One year.

Q What is your business?

A Laundry wet wash.

Q By that, do you mean that you collect bundles or wet wash yourself and have some one do the laundry work?

A Yes. 30

Q Then, you re-deliver the bundles after they go through the laundry?

A Yes, sir.

Q Have you a truck?

A Yes, sir.

Q How long have you had the truck?

A I got the truck three years.

Q Do you remember about a year ago your truck was stolen?

A Yes, sir. 40

*Defendant, Paul Cappiello, Direct.*

- Q After your truck was stolen, did you receive any communication through the mail?  
 A Yes, sir.  
 Q In the nature of a Black Hand letter?  
 A Yes, sir.  
 10 Q Did you talk to your mother about that?  
 A Yes, sir.  
 Q After that, did she give you something?  
 A Yes, sir.  
 Q What did she give you?  
 A A gun.  
 Q What did you do with the gun?  
 A Carried it in my pocket all the time.  
 Q After you received the Black Hand letters, is that correct?  
 A Yes, sir.  
 20 Q Did you have the gun on the 9th of October?  
 A Yes, sir.  
 Q Did you have it in your pocket on that day?  
 A Yes, sir.  
 Q You spent the night of the 8th of October at 273 Sackett street, didn't you?  
 A Yes, sir.  
 Q You did not live with your mother in Hoyt street, did you?  
 A No, sir.  
 30 Q 273 Sackett street is about a mile away from your mother's house?  
 A About that.  
 Q Did you go to your mother's house 241 Hoyt street on the morning of the 8th of October?  
 A Yes, sir.  
 Q Did you talk to your mother and brother-in-law Vito Impallazio?  
 A Yes, sir.  
 40 Q On that morning did you learn that Mary had left her home?

*Defendant, Paul Cappiello, Direct.*

A Yes, sir.

Q Did you also learn that Michael Iaccarino had left his home?

A Yes, sir.

Q Were you informed that Michael Iaccarino had been under your sister's bed in her bedroom on the previous night? 10

A Yes, sir.

Q Did you also learn that the certificates of the Morris Plan had been missing?

A Yes, sir.

Q Did you go some place from 241 Hoyt street with your mother and wife?

A Yes, sir.

Q Where did you go to?

A To the bank.

Q Where is the bank? 20

A On Montague street.

Q Was that the Morris Plan bank?

A Yes, sir.

Q Montague near Court street?

A Yes, sir.

Q At Borough Hall, Brooklyn?

A Yes, sir.

Q What time did you go there?

A About a quarter of eight in the morning.

Q How did you go there, if you recall? 30

A My truck.

Q Did you take your mother and your wife on your truck?

A Yes, sir.

Q Do you know where you parked your truck, the name of the street?

A Yes, sir.

Q What street?

A Montague, in front of the bank door. 40

*Defendant, Paul Cappiello, Direct.*

- Q Is Montague street a one-way street going towards the river, west?  
 A To the left, yes, sir.
- Q As you turn left into Montague street from Court street, it is a one-way street?  
 A Yes, sir.
- 10 Q What side of the street is the bank on?  
 A Right there in the middle of the block.  
 Q What side did you go from Court street towards Clinton street, what side of the street is the bank, the right or the left?  
 A The left side.  
 Q Well, now, when you got to the bank, did you see any one when you got there?  
 A Yes, sir.
- 20 Q Who did you see?  
 A Michael Iaccarino and my sister.  
 Q When you first got there?  
 A Yes, sir.  
 Q At that time did you have your gun in your pocket?  
 A Yes, sir.  
 Q Did you talk to Michael and your sister?  
 A Yes, sir.  
 Q Tell the Court and jury what you said to him and what you said to your sister.
- 30 A When we went in the bank, my mother told me, "Watch outside."  
 Q Never mind what your mother told you, I don't want that.  
 A All right.  
 Q When you got to the neighborhood of the bank you parked your car?  
 A Yes, sir.  
 Q Did your mother and wife go into the bank?  
 A Yes, sir.
- 40 Q And did you stay outside?

*Defendant, Paul Cappiello, Direct.*

A Yes, sir.

Q While you were outside you saw your sister and Mike, is that correct?

A Yes, sir.

Q Tell us what you said to Mike and your sister at that time.

A When I meet Mike and my sister, I say to my sister, "What's the matter, what's the trouble?" She says, "Oh, I don't know myself, what happened to me", so I says, "It's all right, come on to the bank and we get Mama and my wife, and walk home", and she says "I am afraid", and my mother, I know my mother, she sometimes hollers on the street. I says, "What are you going to do. You go inside with Mike and I go and get the truck and I will follow you around to the next corner," and Mike says, "All right." I says, "Mike mind my sister, and be a man." He says, "All right." So, I go for to get the truck, and I went up around the block. So when I get to the next corner I look both sides of the corner and I didn't see nobody. So when I looked straight ahead I seen Mike running down to the subway, and I put the brake on my truck and ran over, and when I was about six feet away I hollered, I say, "Mike", and he turned around. I says, "Where is my sister?" And he says, "I don't know, I missed her. She ran away from me, I don't know where she go."

Q When you stopped your truck, you saw Mike, but did not see your sister?

A No, sir.

Q Mike gave you his hand that he would keep your sister there, did he?

A Yes, sir.

Q When Mike said that to you, that she ran

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*Defendant, Paul Cappiello, Direct.*

away, and he didn't know where she went, did you say anything to him?

A I say, "Come over home and we talk it over home," and I take him in the truck and take him to my house.

10 Q Now, when you say you took him on your truck, you mean he got on the truck with you?

A Yes.

Q And he went with you to your house?

A Yes.

Q And did you take him in your house?

A Yes.

Q And you had your gun in your pocket at that time?

A Yes.

20 Q Now, when you got to your house you knew what had happened between Mary and Mike, hadn't you?

A Yes.

Q And you knew about the certificates, didn't you?

A Yes.

Q Did your wife come while you were there with Mike?

A Yes.

Q Did your mother come there?

30 A No.

Q Just your wife?

A Yes.

Q And did you talk to Mike in your own home?

A Yes.

Q This is the morning of October 9th, is it not?

A Yes.

40 Q Now, you tell the Court and jury what you said to Mike and what Mike said to you at that time and go slow, please.

*Defendant, Paul Cappiello, Direct.*

A So when I go up in the house I said "What is the matter, Mike, we are good friends," and I said "Don't be ashamed of yourself, you have got 12 children and you will ruin yourself, and you have so much to do with your sister-in-law," I said "You do a lot of things all around and you want to disgrace my people, too;" I said "Be a good man and do not do a thing like that," and so he said you people think bad. I said if it is a man under the bed you have got to think it bad, because we do not know what you are doing there, because if you want to do something with my sister-in-law I want to know that, and he said—he pushed the table away and he said, "You people think bad all the time", and so I said "Well", after that he said "You think bad all the time." I said "Now, my wife will come," I said to my wife, I said to Josie, my wife, "Where is Mamma," and she said she went to the bank on Columbia street." 10

Q Now, tell us slowly what you said to Mike at that time and what Mike said to you?

A He said "Now, there is nobody to the bank," he said "Why not we go there and look and maybe she come back and collect the money."

Q You say that Mike said that to you?

A Yes.

Q "Let's go over to the bank"?

A Yes.

Q There is nobody near the bank, and maybe she will come back and collect the money?

A Yes.

Q Did you leave your home with Mike then?

A Yes.

Q Now, before you left your home did you talk to Mike about having your sister come back?

A Yes.

Q Did you ask him where your sister was? 40

*Defendant, Paul Cappiello, Direct.*

- A Yes.
- Q What did he tell you?
- A He said she went off.
- Q Did you ask him to help you try and find your sister and have her come back?
- 10 A Yes.
- Q What did he say?
- A He said he don't know where she was.
- Q You did go back to the bank with Mike?
- A Yes.
- Q Did you ride on the truck together?
- A No.
- Q How did you go?
- A In a taxicab.
- Q You had your gun in your pocket at that time?
- 20 A Yes.
- Q When you got to the bank did you look for your sister?
- A Yes.
- Q And by the bank you mean the Morris Plan bank on Montague street, between court street and Clinton street, Brooklyn?
- A Yes.
- Q And did you see your sister?
- A No.
- 30 Q Did Mike go into the bank on Montague street when you went back there with him?
- A Yes, sir.
- Q Did he go in with you?
- A Yes.
- Q And what happened at that time?
- A I was talking to the man at the bank, and when I was talking to the man at the bank he ran away on me.
- 40 Q And after you finished talking to the man in the bank, did you go out?

*Defendant, Paul Cappiello, Direct.*

A I looked and I did not see him no more.

Q Did you go out of the bank?

A Yes.

Q Where did you go to?

A To my mother's home.

Q No, before you got to your mother's home,  
on your way out? 10

A Yes.

Q Did you see your sister or Mike again on  
that day?

A No.

Q So you do not know where Mike went to?

A No.

Q Now, did you ever see Mike on the 9th of  
October before you saw him here in Newark?

A He called me once.

Q No, I am not talking about telephone con- 20  
versations. I mean did you see him face to face?

A No.

Q From the 9th of October until you saw him  
on the 19th of October?

A No.

Q Now, after the 9th of October, did you go  
to Mike's house?

A No, sir.

Q Do you know where Mike lived?

A Yes. 30

Q Did you see his wife?

A Two days after.

Q Where did you see her?

A She came into my sister's store and she was  
talking—

Q No, did you say anything?

A Yes.

Q Did you ask her about her husband—where  
her husband was, yes or no?

A No. 40

*Defendant, Paul Cappiello, Direct.*

Q Did you ask here where your sister was?

A No.

Q Well, did you ask her at any time if she had heard from her husband?

A I don't get you.

10 Q Did you ask Iaccarino's wife whether she had heard or been in communication with Mike?

A Yes.

Q When was that?

A On the 12th.

Q How many times did you ask her all told, about?

A Three times.

Q Now, do you remember an occasion when you spoke to Mike on the telephone?

A Yes.

20 Q When was that?

A That was on the Sunday, the 15th.

Q And were you there in the neighborhood of Douglas street and Hoyt street at that time?

A Yes.

Q How did you come to talk to Mike on the telephone?

50 A I went in the cigar store to buy me a pack of cigarettes, and I saw Mike Iaccarino's wife talking on the 'phone. She was in the telephone booth and she got the telephone booth on this side, and I on the outside of the box so she cannot see me; so when I go in there the candy store man showed me she was inside talking, so I go in here, and hear a couple of times, "Mike, Mike;" so when I heard "Mike, Mike", I think she must know something. I pulled the door and said, "To whom are you talking," and the receiver dropped, and she said, "None of your business who I talk to", and she went. I see the receiver was hanging down,  
40 and I went inside of the box and I took the re-

*Defendant, Paul Cappiello, Direct.*

ceiver and I said, "Hello", and he said, "Hello", and he said, "What?" I said, "This is Mary's brother," I said, "Why don't you be a good man and respectful man," I said, "Why do you let the people around the neighborhood disgrace my sister." I said, "What did we do to you, you want to do something like that to us"? He said, "The time I left the bank I do not see your sister no more." He said, "Well, I will give you a call some other time," and he shut off the wire.

10

Q Did you have a talk with him after that?

A No.

Q Did you know where he was living at that time?

A No.

Q Did you see him in the neighborhood?

A No.

20

Q Now, coming down to the night of the 18th, or the morning of the 19th of October, on the 17th of October, the night before you saw your sister Mary, did you receive a telephone call from Mary?

A Yes.

Q And as a result of the telephone call did you make an appointment to meet Mary on the night of the 18th at Borough Hall?

A Yes.

Q Borough Hall is quite some distance from your home? 30

A Yes.

Q It is about a mile?

A About ten minutes walk.

Q 273 Sackett street is between what streets?

A Between Court and Clinton street.

Q And the Borough Hall is right at Court street, is it not, around Fulton street?

A Yes.

40

*Defendant, Paul Cappiello, Direct.*

Q Well, now, when you got to Borough Hall, did you see your sister Mary?

A Yes.

Q And did you go to Borough Hall alone or did you take your mother with you?

10 A Myself.

Q And did your mother subsequently as the result of the telephone call from you come to Borough Hall?

A I do not understand.

Q You talked to Mary at Borough Hall, didn't you?

A Yes.

Q And then did you telephone to your mother?

A No. After, I sent for my mother.

20 Q What did you do after you met Mary at Borough Hall?

A I told her to come back home.

Q That is, back to your home?

A Yes.

Q Who was in your home when you got there?

A My wife and five children.

Q And when you got to your home did you talk to Mary there?

A Yes.

30 Q And after you talked to Mary did your mother come?

A I sent for her.

Q Did she come?

A Yes.

Q Did Mary tell you in your home that night that she was not going away any more?

A No.

MR. CONLON: I object.

THE COURT: Sustained.

*Defendant, Paul Cappiello, Direct.*

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

Exception allowed. Let it be signed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,

Judge. 10

MR. CONLON: I do not think the witness should be led from this point on.

THE COURT: Do not lead the witness.

Q Your mother did come there?

A What?

Q Your mother did come to your home?

A Yes.

Q And Mary was there?

A Yes.

Q Well, now, what happened when your mother came to your home? 20

A I was talking to my sister and I told her "you were with a man", and she said, "No." Then I said, "Listen, you better tell me the truth, because if you are satisfied to go out and satisfied with the man, you can go out; if you want to come back home and be a nice girl like you used to be before, I will move out of here about fifteen or twenty blocks so nobody knows you in my house", and I said, "Nobody around the neighborhood talking against you and Mike." I said, "I can say I have my sister in my home," and she answered me and she cried and cried, and then after that we keep talking something, and mother and my wife; I was inside smoking a cigarette, and all of a sudden I said to my mother— 30

Q No, I do not want that. I want to interrupt you. Do you remember there being some talk about money and jewelry?

A Yes. 40

*Defendant, Paul Cappiello, Direct.*

Q Tell us about that incident, please. What you said to Mary and what she said to you?

10 A Well, then, after I said, "Listen, have you got money with you?" She said, "Yes, I got the money." I said, "Well, then you know the place where you live?" She said, "I don't know the place I live." "I know the way to go." I said, "Well, can you tell me the way to go?" I said, "I want to investigate it if you are going there with a man." She said, "Oh, I don't know." I said, "Come on with me and show me the place, because I want to investigate if you tell me the truth." So all of a sudden I turned there and she got the black book—you know she wants to hide it—I said, "Let's see that black book there."

20 A Yes.

Q Did you take the pocketbook?

Q Did she tell you before that the money was in that pocketbook?

A Yes, sir.

Q After she told you that you took the pocketbook?

A Yes, sir.

Q Did you open it?

A Yes, sir.

Q What did you find in the pocketbook?

30 A A few dollars and some addresses.

Q When you say "addresses", you mean 11½ Grant street, Newark?

A Yes, sir.

Q Is this part of the paper that you found in Mary's bag?

A Yes, sir.

Q Look at it before you say "Yes".

A I can see it. (Witness looks at paper). Yes.

40 MR. PRICE: I offer this paper in evidence.

*Defendant, Paul Cappiello, Direct.*

MR. CONLON: No objection.  
(Same is marked Exhibit D-1).

MR. PRICE: Shall I read it to the jury or pass it around? It is rather frail.

THE COURT: Maybe you had better read it. 10

MR. PRICE: "Certificate of alien claiming residence in the United States". On the top is "Employer", "The Clark Thread Company, 260 Ogden Street, Newark, N.", I guess it is part of a "J". Written apparently in pencil, "Mrs. Mary Rino, 11½ Grant St., Newark: Compensation \$15."

Q That is the paper you found in your sister's pocketbook? 20

A Yes, sir.

Q After you found that pocketbook did you tell Mary where you were going?

A Yes, sir.

Q What did you tell her?

A She says to me—

Q What did you say to her?

A I say "Listen, I go over there now", I says, "I go and have you locked up", "I go and investigate it and if I find you stayed with the man I have him locked up and then I come back and have you locked up". 30

Q Did you ask Mary at that time where Mike was living?

A Yes, sir.

Q Did you ask Mary whether Mike was living with her at that time?

A Yes, sir.

Q What did she tell you?

A She told me he is living there.

Q She told you he was living there? 40

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A Yes, and he got the gun in his pocket.

Q After you told Mary that you were going over to Newark to find out if she was living there with a man—

A Yes, sir.

10 Q What did she say to you about Mike?

A About Mike?

Q What did she say to you about Mike after you said that you were going over there?

A She says to me, "Please, he is bad man and has a gun in his pocket. Don't go over there, because maybe he will fight".

Q Did you at that time tell her that you were going over to find out if she had been living there with Mike or a man and if she had you were going to have them both arrested?

20 A Yes, sir.

MR. CONLON: I object to the question as leading.

THE COURT: Yes. I do not think you should lead.

Q Now, did you have your gun in your pocket at that time when you left Brooklyn?

A Yes, sir.

30 Q You had been carrying it ever since you got the blackhand letter?

A Yes, sir.

Q Did you go over to Newark?

A Yes, sir.

Q Do you remember what time you got here?

A Quarter to five.

Q Quarter after five or quarter to five?

A Quarter to five.

Q After having some trouble did you locate the premises No. 11½ Grant street?

40 A Yes, sir.

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Q What time did you get to the neighborhood of 11½ Grant street?

A When I come back here it was quarter to five and I keep going a few blocks up and down and I reached on the corner it was 3 or 4 minutes before 6.

Q When you got there around 3 or 4 minutes to 6, did you go there and see whether the house was open or not. Did you? 10

A No.

Q Did you go some other place?

A I met a taxidriver.

Q I am not talking at that time. I mean before that, when you came to Newark did you eat?

A Yes, sir.

Q You had something to eat? 20

A Yes, sir.

Q Why didn't you go direct to the house at 11½ Grant street when you came here?

A Because it was too early, that's why, it was too early in the morning. I say I don't want to bother the people, I say I go after in another hour, after daylight.

Q After it got daylight and you did go there did you ring the bell?

A After I see the taxi driver.

Q The taxi driver is the man who testified, Calise? 30

A I don't know what his name is.

Q The man who testified here.

A Yes, sir.

Q This is the man (indicating)?

A Yes, sir.

Q You spoke to him?

A He called me over.

Q Then, you spoke to him and then you went to 11½ Grant street? 40

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A Yes, sir.

Q When you got there did you see Mrs. Kitrick, the lady who testified here?

A Yes, sir.

Q Did you talk to her?

10 A Yes, sir.

Q Where was she when you were speaking with him?

A At the time I talked with the driver then after I go to her home.

Q Did you ring the bell when you got to 11½ Grant street?

A Yes, sir.

Q Did Mrs. Kitrick come to the door?

A Yes, sir.

20 Q Where did she stand when she spoke with you?

A She was just inside the door to come out to the stoop and I was standing on the stoop to talk to her.

Q As she stood there what did you say to her and what did she say to you?

30 A So, when she come down I says "Good morning", she says "good morning". I says "Don't you know anybody name Mary Rino?" She says "Yes". I says, "Do you know this girl?" She says "Yes", I put my hand in my pocket and showed her the picture.

Q You took out your sister's picture and showed it to Mrs. Kitrick?

40 A Kitrick. So, she say "Yes". I says "Please"; she says to me, she tell me, "Listen, last night she told me she is going to her mother's house"; I told her, "Yes, she is up in my house, because I left her there when I come over here." She says,— I says, "Was she living alone or with a man?" "She is with a man"; I says "My God, isn't it a

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shame, a man with 12 children trying to break up my sister's home", and that's all.

Q Did you at that time say anything about having Mike arrested to Mrs. Kitrick?

A No, sir.

Q Listen to what I say to you. Do you remember you were talking about having Mike arrested? 10

A Yes, sir.

Q Did you say that to Mrs. Kitrick at the boarding house?

MR. CONLON: I object.

THE COURT: He has answered that already.

THE WITNESS: I don't remember.

Q You don't remember, is that it? 20

A Yes, sir.

THE COURT: Just repeat his last question and answer there, will you?

(The stenographer reads as follows):

"Q Do you remember that you were talking about having Mike arrested? A Yes, sir.

"Q Did you say that to Mrs. Kitrick at the boarding house?"

"MR. CONLON: Objected to. 30

"THE COURT: He has already answered that.

"THE WITNESS: I don't remember.

Q You don't remember, is that it?

A Yes, sir."

THE COURT: He said "I don't remember."

THE STENOGRAPHER: Yes, your Honor. 40

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BY MR. PRICE:

Q While you were standing there talking to Mrs. Kitrick in what direction were you facing?

A To Broad street.

10 Q I don't suppose you are very familiar with the map, are you? You wouldn't know the points of the map?

A Maybe. I cannot see so well. I can show anyway. That is Broad street there (indicating).

Q Were you standing on the stoop at that time?

A Yes, sir.

Q Did you see anybody you knew as you were standing there talking to Mrs. Kitrick?

A Yes, sir.

20 Q Who did you see?

A Mike.

Q Where was Mike when you saw him?

A He was about ten feet or 12 feet to Broad street coming down Grant street.

Q 10 or 12 feet from the corner of Broad street coming down Grant street?

A Yes, sir.

Q By that do you mean coming towards where you were?

A Yes, sir.

30 Q What, if anything, did Mike do when he came down the street?

A I was standing on the stoop and when he come down he says "Pfew", he whistled and called me over.

Q At the time he called you he moved his hand beckoning for you to come over?

A Yes, sir, the first time, and I didn't recognize him; the light was in my face and the second time he say it over again.

40 Q When you say "He say it over again", you

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have shown the jury with your hands how Mike beckoned for you to come over?

A Yes, sir.

Q When he did that did you say anything to Mrs. Kitrick?

A I say "Good-bye", and I says, "thank you very much. Good-bye. Pardon me, good-bye," and I went over. 10

Q Now, when you went over did Mike after he beckoned to you walk in the direction that you were standing?

MR. CONLON: I object to the leading question and any further leading questions.

THE COURT: Sustain the objection.

MR. PRICE: I do not see how that is a leading question. 20

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

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

DALLAS FLANNAGAN,  
Judge.

Q You say Mike beckoned with his hand in what direction? (Withdraw that.) As Mike beckoned with his hand a second time was he walking or standing still? 30

A He was coming down.

Q When you say "coming down" was he coming down towards you or away from you?

A I didn't get you.

MR. PRICE: See, that is the difficulty.

MR. CONLON: I object. There is no reason why the witness should not tell his 40

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story and I object to the remarks of counsel, "that is the difficulty."

MR. PRICE: There is no such imputation from me.

10

THE COURT: You go ahead and do not lead. You know how not to lead as well as any other man.

MR. PRICE: I take an exception to your Honor's remark, because the last question is not leading.

THE COURT: Go ahead and ask the question and please stop talking.

MR. PRICE: I respectfully except.

20

THE COURT: To what?

MR. PRICE: To your Honor's statement to the jury to "stop talking".

THE COURT: You are talking, there is no doubt about it. Now, I instruct you to stop talking and ask questions.

MR. PRICE: Very well.

Q Where was Mike when you say you saw him coming down Grant street?

30

A About two feet before the garage.

Q Did you leave the stoop where you were standing at that time or did you still stay there?

A No, I walked over.

Q When you say you "walked over", did you walk slow, fast, or run?

A No, a nice way, the way I walk all the time, not fast and not slow, my walk what I got.

Q What direction did you walk in?

40

A He was on the side of the door of the garage and he was over here when I got over here (in-

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dicating), and we walk inside the garage together. He said "Come inside and we talk".

Q What direction did you walk in, towards the street or towards Broad street?

A That is Broad street and he was over there on the other side and I was there (indicating), and we walked inside together. 10

Q You indicate with your hands that he was walking in one direction and you were walking in the opposite direction, so you were about to meet?

A I face Broad street and he faced coming down Grant street.

Q Did you meet at any time on Grant street?

A No, sir.

Q Do you know what I mean by "meeting". Did you come to the same place on Grant street? 20

A No, sir.

Q Did you go into the garage together, or Mike go in first or you go in first?

A He took me in. I go in first.

Q Did you get to the entrance to the garage before Mike or did Mike get there first?

A I got there first.

Q When you got there did you wait for Mike?

A Yes, we walked in together.

Q When you walked into the garage did he speak to you? 30

A Yes, sir.

Q Now, did you stay in the garage or go back in the court yard?

A We went in the back.

Q Tell the jury in your own way from the time you met at the entrance to the garage up to the time you got in the back, what happened?

A Well, there is some dirty words I have to question. 40

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THE COURT: Go ahead, we can stand them.

10 A After we walk into the garage I said, "Mike, listen, aren't you ashamed of yourself, the father of twelve childs, you try to do this and that", I says, "don't you know you have 12 childs at home", and that we respect for four years like brothers and good friends and promises me— and he promises to mind my sister, I says, "You can be a good father, come back home and we settle this thing now"; he say to me "Well, you know, to talk the whole thing over we go in the back yard where no people go"; I say "Inside the garage," in the back like this, face to the door, and he was facing the back of the garage see, that is 20 the door (indicating). The way we meet in the garage in through this door to go in the garage; when we go in the garage there was two trucks over here and I was on this side of the truck and he was on this side (indicating), and he was facing me in the back and I was facing the door, talking together, and I says "If you don't be a nice man", I say, "and don't listen to me, I am going to have you locked up for white slavery and I will go home and have my sister locked up", so, he says, "you will do that?" I says "Sure", "Bung," he 30 hit me a kick.

Q What did he hit you with?

A On the legs.

Q What did he hit you with?

A Want me to show?

Q No, what did he hit you with?

A Like this in the back.

Q Kicking with the foot?

A Yes, sir.

Q Where did he kick you?

40 A On this leg (indicating).

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Q On the left leg?

A Yes, sir.

Q Just tell us what happened. He gave you the first kick?

A I say "What's the matter, you do that for, come on home and have a nice dinner and forget and be good friends just the same." He says "You look for me up here," and gave me another kick and spit in the face. I say "What do you do that for? Come on home and be nice man and forget the argument"; he says "Remember once I told you if you know I have a kid from my sister-in-law, I ruin my daughters," he says, "Do you remember that I killed the man and threw him overboard. I got your sister's money, the jewelry or money of your sister", and he says "I am going to make a whore out of her." I say "All right, come on home," and he spit in my face and kicked me a couple of times. I pushed him away and he hit me a punch in the mouth and I have marks here I got from the punch in the mouth, and he broke away and he says "I am going to take your brains out now."

Q What did he do when he said "I am going to take your brains out now?"

A He put his hands in his pockets.

Q How was he dressed?

A He got an overcoat.

Q He had an overcoat on, you say?

A Yes, sir.

Q What pockets did he have his hands in?

A Over here (indicating).

Q What did he say when he put his hands in? Indicating the right overcoat pocket.

A He says "I am going to take your brains out of you."

Q At that time did you believe he had a gun? 40

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A Yes, sir.

MR. CONLON: I object.

THE COURT: Why?

10 MR. CONLON: There must be a basis  
for his reason.

THE COURT: The reasons can follow.  
He has a right to state that. I will admit it.

Q Did you believe that Mike had a gun at that  
time in his right overcoat pocket?

A Yes, sir.

Q Why did you believe Mike had a gun?

A Because my sister told me that he had a gun  
in his pocket.

20 Q Did you believe when Mike put his hand in  
his right overcoat pocket that he intended to take  
your life?

A Yes, sir.

Q What did you do then at that moment?

A At that moment I wanted to try and run  
away and I took my gun out and one bullet went  
off.

Q When one bullet went off was Mike facing  
you or was his back to you?

30 A Face to me.

Q Just after the one bullet went off what hap-  
pened?

40 A I was standing on the truck, on the running  
board, you know, at the truck, and I shot the first  
shot and I pushed him back. I tried to run away  
and then I was on the running board of the truck  
and he says "I will take your brains out," and he  
put his hand in his coat pocket. I believe he was  
going to take my life, and I put my hands in my  
pocket and pulled my gun and one shot went off

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and then he stands over there and grabs me and I fell down an he fell down with me and I don't know what happened no more.

Q Did you have the gun in your hand when you fell down?

A Yes, sir.

Q Did you get your gun? 10

A Yes, sir.

Q What did you do with the gun?

A Left it there.

Q Then, what did you do?

A Then, I was crying, getting excited and I went home.

Q You walked out or ran out?

A Walked out.

Q Then, you went home to your house? 20

A Yes, sir.

Q After that did you tell your mother what had happened?

A No, sir.

Q Did you go to your mother's house after you went home?

A After I come to my house first.

Q Then, did you go to your mother's house?

A Yes, sir.

Q Did you tell your mother what had happened? 30

A I told her, I say—

Q Yes or no?

A Yes, sir.

Q Then, after that you came with me back to Newark, didn't you?

A Yes, sir.

Q In my car?

A Yes, sir.

Q And I took you to Police Headquarters and surrendered you? 40

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A Yes, sir.

Q When was that, do you remember the date?

A About five or six days after.

MR. CONLON: I will admit the date, whatever it was.

10

MR. PRICE: The 25th. That is right.

MR. CONLON: It is admitted that he was surrendered on the 25th of October.

MR. PRICE: May we have it this way. I came over on the 23rd and made arrangements to surrender him on the 25th and he was surrendered at Police Headquarters on the 25th.

Q You say Mike kicked you a number of times.  
20 Did he kick you on both legs or only on one leg?

A Yes, both legs.

Q Have you any marks on your legs?

A Yes, sir.

MR. PRICE: May we show the marks to the jury, your Honor?

THE COURT: Yes.

Q Show the marks to the jury you got.

A (Witness steps down from witness-stand and exhibits legs to jury.)  
30

*CROSS-EXAMINATION* by Mr. Conlon.

Q Did you have a permit to carry a gun?

MR. PRICE: I object as incompetent, irrelevant and immaterial and nothing to do with this case.

THE COURT: Well, I am not quite sure. I think you may ask when he received the blackhand letter what he did and lead up to it.  
40

*Defendant, Paul Cappiello, Cross.*

MR. CONLON: He stated the reasons to the garage man.

THE COURT: Yes, he stated the reasons to the garage man and if you will ask him what he did when he got the blackhand letter I will allow that, whether he went to the police and so forth. I will allow it. 10

Q When you got this gun after you got the blackhand letter did you talk to anybody about carrying a gun?

A Yes.

Q Did you go to the police?

A Yes.

Q When?

A The day after I got the letter.

Q Have you got the letter? 20

A Yes.

Q But did you go to them about the gun, about your carrying a gun?

A No. I report my stolen truck, and I got my blackhand letter, and I give to the lieutenant.

Q But did you speak to the police about your carrying a gun?

A I said because Mr. Williams, he knows me, I said, "I am going to have something in my pocket and protect myself," and so asked me—and I went away—and he asked me—and at that time I told him I had a gun right in my pocket. I said, "I want to have something to protect myself." So I went out. 30

Q Did you tell him what you had to protect yourself?

A What?

Q Did you tell him what you were going to carry to protect yourself?

A No. 40

*Defendant, Paul Cappiello, Cross.*

THE COURT: Now, then, you can ask him if he made any application to get a permit to carry a gun.

Q Did you make any application to get a permit to carry a gun?

10 A I told the lieutenant—

Q Will you answer the question?

MR. PRICE: Say yes or no.

MR. CONLON: Now, just a minute, Mr. Price.

Q Did you make any application for permission to carry a gun?

A Yes.

Q To whom?

A I told the lieutenant.

20 Q Is that the only application you made?

A He said I could not have it.

Q The lieutenant said you could not have a permit?

A Yes.

Q Is that the only application you made to get a permit?

A Well, I tried—

Q Listen to the question. You made application to the lieutenant of police to carry a gun?

30 A I just told him like a friend, and he said I could not have it.

Q Now, did you try to get a permit any other way?

A Yes.

Q Did you get a permit?

A No.

Q Have you been convicted of a crime?

A Eh?

Q Have you ever been convicted of crime?

40 A I don't know what you mean.

*Defendant, Paul Cappiello, Cross.*

Q Did you ever serve time?

A Yes.

Q You were convicted on a charge of rape, weren't you?

A Yes.

Q When?

A I do not remember the year. I think it is about 17 or 18 years ago. 10

Q How much time did you serve?

A 18 months.

Q You had known Iaccarino for several years?

A About four years.

Q And you were friendly with him?

A Yes.

Q You had no quarrel with him up to this time in October?

A No, sir. 20

Q And you first heard from your mother, and his wife, or from your mother, that Mike had run away with your sister, is that right?

A Yes.

Q And you then found out that the Morris Plan certificates were taken from the house when Mary left, did you not?

A Yes.

Q And you went to the bank of the Morris plan? 30

A Yes.

Q The very next morning after they left?

A The morning of the 9th, the 9th of October. On the 8th they went away, and on the 9th I went to the bank.

Q On the morning of the 9th you went to the bank?

A Yes.

Q And your mother was with you?

A Yes. 40

*Defendant, Paul Cappiello, Cross.*

Q And you went there to stop Mary from getting that money?

A Yes.

Q And you knew that at that time Mary had her jewelry with her, didn't you?

A Yes.

10 Q And you did stop Mary from getting the money at that time, didn't you?

A Yes.

Q And while you were there at the bank you met Mike and you met Mary?

A Yes.

Q And you asked Mike to come over to your house to talk this thing over, is that right?

A No.

20 Q Well, what did you ask him to do?

A He and my sister—I said to my sister, "What is the matter with you?" And she said to me, "I don't know what happened," and I said, "Come on to the bank and we will get money and go home," and I said, "You wait until the next morning and I will get the truck."

Q And Mike said he would wait there for you?

A Yes.

Q Until you got the truck and met him?

A Yes.

30 Q And you asked him to keep your sister there?

A Yes.

Q And Mike said, "Yes, I will keep her"?

A I shook hands with him.

Q You shook hands with him?

A Yes.

Q Well, you knew that Mike had stayed at the hotel the night before with your sister?

A No.

40 Q Well, you knew they had spent the night together?

*Defendant, Paul Cappiello, Cross.*

A He never told me. I never asked him. I do not know where they went.

Q You know they left home in the evening about 9 o'clock.

A Yes.

Q And that occurred the next morning at the bank? 10

A Well, I never talked anything to him like that.

Q You knew Mary was not home that night?

A Yes.

Q You knew she was with Mike?

A Yes.

Q And you shook hands with him there?

A Yes.

Q And he said, "I will keep Mary here until you get the truck"? 20

A Yes.

Q And you went and got the truck and came back and Mike said Mary ran away?

A No.

Q What did he say?

A When I got around for the truck and I stop, I look around, do not see nobody, and I look straight ahead and I seen Mike running, and I put the brake on the truck and I went over, and I said, "Where is my sister?" And he said, "I don't know," and I said, "Come to my house and we will talk it over." 30

Q Mike said, "I do not know where your sister is. She ran away from me"?

A Yes.

Q And you said, "Come on over to my home and talk it over"?

A Yes.

Q And you knew he was with your sister the night before? 40

*Defendant, Paul Cappiello, Cross.*

A Yes.

Q And you were not angry with Mike?

A What do you mean?

Q You were friendly with him?

A Yes.

10 Q And then you found out that Mary had gone up to the Morris Plan Bank at 42d street and cashed these certificates?

A I found that out on Sunday when he called me.

Q When Mike called you, you found out, and that was on Sunday, the 13th?

A I don't know.

Q Well, the Sunday before the shooting?

A Yes.

20 Q The shooting was on the 19th, and this was the Sunday before, is that right?

A When the Sunday was.

Q And the Sunday before the 19th—

A Yes.

Q —you found out that Mary and Mike had gone up to 42d street, New York City, and cashed these certificates in the Morris Plan Bank there?

A Yes.

Q And did you talk to Mrs. Iaccarino about that, Mike's wife?

30 A No.

Q You did not?

A No, sir.

Q Didn't you see her that Sunday?

A Yes.

Q And didn't you tell her that you had found out that they had cashed the certificates?

A No, I didn't tell her that.

Q You knew it?

A Yes, I knew it, but I did not tell her that.

40 Q You did not mention it to her?

*Defendant, Paul Cappiello, Cross.*

A No.

Q And isn't it a fact that on that Sunday, October 13th, after you found out that Mike and Mary had cashed those certificates, you told Mrs. Iaccarino in the presence of her daughter that you were going to get Mike and shoot him and kill him?

10

A To whom?

Q To Mrs. Iaccarino and her daughter?

A No, sir, never.

Q And isn't that the reason she told you she would not let you know where Mike was telephoning from when you came in the cigar store?

A Don't let me get mixed up.

Q I do not want you to get mixed up. You remember when you went in the cigar store Mrs. Iaccarino was telephoning?

20

A Yes.

Q And you heard her say, "Mike"?

A Yes.

Q And you knew she was telephoning to Mike?

A Yes.

Q And you asked her where Mike was?

A No. I said, "Who are you talking to, to Mike?" And she said, "What do you want to know for?" And she walked out.

Q And she hung up the receiver?

30

A Dropped down.

Q She tried to hang it up?

A Yes.

Q And didn't she tell you then she did not want you to know where Mike was because you were going to kill him?

A No.

THE COURT: Well, that is what she said to him. You asked him before what he said to her.

40

*Defendant, Paul Cappiello, Cross.*

MR. CONLON: Yes, sir.

Q But she told you that she did not know where Mike was on that Sunday in the cigar store?

A No, sir.

Q What did she say?

10 A She told me after that, when I went over to her house two days after, and she had been receiving telephone calls every day, she knew all about it.

Q She knew where Mike was?

A Yes.

Q But she would not tell you?

A Well, I do not know. She would not tell me anything about her husband.

Q Now, you found out about this money from the bank on Sunday?

20 A Yes.

Q When did you see your sister next?

A I see my sister on the 18th.

Q That was in the evening?

A Yes.

Q She telephoned you and told you to meet her at Borough Hall?

A Yes.

Q And she met you at Borough Hall?

A Yes.

30 Q You had no quarrel with her then?

A No.

Q You were friendly with her?

A Yes.

Q Did she tell you then she was going home to stay?

A She told me up in the house.

Q Did she have any clothes with her, any bag?

A I do not think so.

Q Well, do you know?

40 A Well, I do not remember.

*Defendant, Paul Cappiello, Cross.*

Q You do not remember whether she did or not?

A No.

Q But she had her pocketbook with her, didn't she?

A Yes.

Q And when you got home you tried to get Mary to tell you where Mike was, didn't you?

A No; no, sir.

Q Did you ask her about Mike?

A No.

Q Didn't you know then that she was living with Mike some place?

A Well, I think she was living with Mike.

Q And you asked her where she was living?

A Yes.

Q And she told you different places; she would not tell you, is that right?

A Yes.

Q And you asked her where Mike was?

A No.

Q And didn't she tell you Mike is in Philadelphia and then she said Mike is in Boston?

A She told me he was living near there somewhere.

Q Who was?

A Mike.

Q But you wanted to know where Mary lived and she would not tell you; is that right?

A Yes.

Q And she had her pocketbook in her hand?

A Yes.

Q And you asked her if she had her money in the pocketbook?

A Yes.

Q This \$1350?

A Yes.

10

20

30

40

*Defendant, Paul Cappiello, Cross.*

Q And she said yes, "I have it"?

A Yes.

Q And you asked her for the pocketbook and she would not give it to you, is that right?

A Yes.

10 Q So you grabbed it away from her?

A Yes.

Q And you opened the pocketbook and you found there was no money in it?

A Yes.

Q And that was the first time that you knew that Mary did not have the money that was taken out of the bank?

A Yes—no, no. I knew that before that.

20 Q But when you saw Mary's pocketbook without the money in it, that was the first time that you knew that she had given the money to some one else?

A Well, I didn't know what she did with the money.

Q Did you ask her?

A No.

Q You did not ask her?

A No.

30 Q And at the same time you saw there was no money in the pocketbook you found the slip with the address 11½ Grant street?

A Yes.

Q What time was that?

A It was about 11 o'clock.

Q And then you told your mother and your other sister?

A No. Pardon me.

Q Well, it does not make any difference. You told your mother and whoever else was there, to keep Mary in the room and not let her out?

40 A Yes.

*Defendant, Paul Cappiello, Cross.*

Q And you then went to a truck and took a gun out of the truck, didn't you?

A No.

Q You had a gun with you?

A Yes.

Q And you left the house there about 11 o'clock? 10

A No, sir.

Q What time did you leave?

A Why, that is why I don't want to talk before. When I found out at 11 o'clock the address, then I sent for my mother and my mother come up and then when I left the house it was about a quarter to two.

Q And when you left your house where did you go?

A I walked up to Borough Hall. 20

Q Were you in your mother's house that night?

A No.

Q Isn't it a fact that you left your house about 1 o'clock and went to your mother's house?

A No, sir. I go right straight to the Borough Hall.

Q You did not go to your mother's house?

A No.

Q So where did you leave Mary and your mother? 30

A At my house.

Q And you went to ask your mother to see that Mary did not get out of the room?

A Yes.

Q Why did you do that?

A Because I come up here to investigate it and I find him up there and I have him arrest, and then I go back and have her arrest.

Q In other words, you were going to keep Mary 40

*Defendant, Paul Cappiello, Cross.*

in that room until you came over to Newark and found him here and had him arrested?

A Yes.

Q And then you were going back and have her arrested?

10 A Yes. We do not keep her with force.

Q Yes, but you told your mother not to let her out?

A Yes, but no force. We do not try to do nothing.

Q What time did you leave Brooklyn for Newark?

A A quarter to two.

Q What time did you get to Newark?

20 A I left my house a quarter to two, and I went to the Borough Hall, and I had coffee and cake and a piece of apple pie, and then I left there and get the subway, and then I go down to the Hudson Tubes, and the time I left the Hudson Tubes half-past three.

Q You got the 3.30 train?

A Yes.

Q So you were in Newark around 4 o'clock?

A Something like that.

30 Q And why did you come to Newark at that hour of the night? Why didn't you wait until the next morning?

A Well, the next morning I had to go to work.

Q What time did you go to work?

A 8 o'clock in the morning.

Q Now, when you got to Newark at 4 o'clock in the morning did you go to police headquarters?

A To police headquarters.

Q Any place?

A No, sir.

40 Q What did you do between 4 o'clock and 6 o'clock?

*Defendant, Paul Cappiello, Cross.*

A When I come up to the station it was 4 o'clock, and I want a taxicab. I said, "Do you know the place, this street?" And he took the Red Book from his pocket, and he showed me the way to get up, and I asked a couple of fellows on the street which way I get there, and when I get to Grant street it was about a quarter to five, and then I look at my watch, I see the street is correct, I said go to the people's house and bother the people early in the morning, I said I go and wait another hour or so, and go and ask for him, and when I got back to the house it was between three and four minutes to six. 10

Q What time did you get up to Grant street?

A It was a quarter to five at night.

Q In the morning?

A Yes. 20

Q Did you go to a lunch wagon around there any place?

A Where?

Q In Newark.

A Yes.

Q And where was the lunch wagon?

A I do not know.

Q It was somewhere around that vicinity?

A Yes. Somewhere around there.

Q And you asked the man in the lunch wagon where this address was? 30

A No. Yes, the lunch wagon, there was, I think, one fellow there, a fellow with eye glasses on, and I showed him pictures, "Do you know the place." If he was at the right place, because I got John street and Grant street, and he showed me the book and the place was correct.

Q Now, when you came over to Newark, what were you going to do? What did you come over to Newark for? 40

*Defendant, Paul Cappiello, Cross.*

A Investigate if my sister was alone with a man.

Q How were you going to investigate?

A Eh?

Q What did you intend to do?

10 A To lock him up for white slavery.

Q You did not go to the police?

A No.

Q What did you mean to do when you came over?

MR. PRICE: I submit he has already answered that question.

THE COURT: Well, he said he was going to get him locked up. Do you want to know by what means?

20 MR. CONLON: Yes.

Q What did you intend to do when you got to Newark?

A To lock him up for white slavery, and go back home and have my sister locked up.

Q But before you locked him up you were going to the house to talk to him?

A To the landlord to investigate.

Q You were going to talk to Mike?

A No.

Q Oh, you were not going to talk to Mike?

30 A No.

Q You were simply going to find out if he was there?

A Yes.

Q Then, what were you going to do?

A Go to the station house.

Q And have him arrested?

A Yes.

Q Why didn't you bring your sister over with you.

40 A With me?

*Defendant, Paul Cappiello, Cross.*

Q Yes.

A Well, she don't want to come over.

Q Isn't it a fact that you told your sister you were going over to see whether she was living with a decent family or not?

A Yes, sir.

Q And that you were looking for Mike?

A No.

Q Didn't she tell you Mike was not in Newark?

A She said he was around there somewhere.

Q You mean over in Brooklyn?

A Around Newark somewhere.

Q Now, if you intended to go to the house there to talk to the landlord, why did you come over to Newark about three or four o'clock in the morning?

10

20

MR. PRICE: I submit he has already answered that question, and the witness said because he had to go to work the next day.

THE COURT: Please do not answer for him.

MR. PRICE: Isn't that the fact?

THE COURT: Never mind. Your objection will be covered by saying it has already been answered before. I will allow the question.

30

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

Exception allowed. Let it be signed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge.

40

*Defendant, Paul Cappiello, Cross.*

Q If you meant to go to this house and talk to the landlady why did you come over here at three or four o'clock in the morning?

A Well, because she told me you need about three hours to go down here and three hours to go back.

10 Q Your sister told you it would take you three hours to come to Newark?

A Yes.

Q Did you know where Newark was?

A No, I never had been in this place before.

Q And that is the reason you left Brooklyn a quarter to three?

A A Quarter to two.

20 Q And you left there a quarter to two, and you thought it was going to take you three hours to get over here?

A Yes.

Q You knew you could not see this landlady at a quarter to five.

A Well, I figured at the time I get here the regular time I would go there and ask them for him.

Q At any rate, when you got to Newark you walked around the street after you got out of the taxicab?

30 A Yes.

Q And went in a lunch wagon?

A Yes.

Q And all that time you had the gun in your pocket?

A Yes.

Q And it was loaded?

A Yes.

Q Which pocket?

A This pocket, (indicating).

40 Q The right pocket of your coat?

*Defendant, Paul Cappiello, Cross.*

A Yes, my jacket.

Q Did you always carry it there?

A Yes.

Q You always carried that gun in the right pocket of your jacket?

A All the time.

10

Q All the time?

A Yes.

Q Stand up a minute.

A It was not this coat.

Q Was the other coat any different than this?

A The same way.

Q The same kind of a suit?

A Yes.

Q And you always carried that gun in the right pocket?

20

A Yes.

Q And you had been carrying it that way for a year?

A Yes.

Q Now, at six o'clock you went up and rang the bell, and talked to Mrs. Kitrich?

A Yes.

Q And while you were talking to her, you saw Mike coming down the street?

A No. Before I was talking to the landlord, and after I see him.

30

Q You rang the door bell and talked to Mrs. Kitrich?

A Yes.

Q You mean after you got through talking with her, or while you were talking with Mrs. Kitrich?

A While I was talking.

Q You saw Mike coming down the street?

A He whistled for me and he made a sign of the hand to come over.

40

*Defendant, Paul Cappiello, Cross.*

Q You heard a whistle and looked up and saw Mike?

A Yes. He waived his hand. I did not recognize him the first time.

Q You did recognize him later?

10

A Yes.

Q And he went into this garage?

A No. He stopped outside.

Q And you came up?

A Yes.

Q And you went in together?

A Yes.

Q And he started to talk to you?

A I started to talk to him.

Q Now, where were you when you started to talk?

20

A Inside the garage.

Q How far inside the garage?

A He was there, and I was over there like this, (indicating)

Q Were there any automobiles there?

A Two.

Q Well, did you talk at all before you got into the garage?

A What do you mean? I talk what?

Q To Mike?

30

A Yes.

Q While you were walking in the garage?

A Yes.

Q You were talking while you were walking in?

A Yes.

Q And that is quite a distance back there into the garage?

A About 45 or 50 feet; something like that.

40 Q As you were walking in there, you and Mike were talking?

*Defendant, Paul Cappiello, Cross.*

A Yes.

Q Did he touch you while you were walking in there?

A No.

Q Did you touch him?

A No.

Q And when you got back by the automobile, then you had the fight? 10

A When we were in the back of the garage and I was talking to be a good man, and the argument what I said that before.

Q And when he kicked you, you say he was nearer the street than you were, is that right?

A He was—

Q No. Wait a minute. You can say everything you want. 20

A I want to say the truth.

Q When he struck you who was the nearest the street, you or Mike?

A He was back of the door to go out, and I was inside to face the door.

Q Now, will you answer the question? Who was nearest the street?

A He.

Q Mike was nearest the street?

A Yes.

Q So, in order for you to get out you had to go around Mike? 30

A Push him away.

Q And was he between the two automobiles?

A Yes.

Q And you were between the two automobiles?

A Yes.

Q And then he started to kick you?

A Do you mean me to say what I told him?

Q Yes. 40

*Defendant, Paul Cappiello, Cross.*

A When he came in the garage I said in that place?

Q Yes.

10 A I said, "be a good man and be nice and we will forget all this excitement and if you do not want to listen to me", I said, "I arrest you for white slavery," and he kicked me and slapped me in the face.

THE COURT: He slapped you in the face?

WITNESS: Yes.

Q Did you say before he spit in your face?

A After that.

20 Q You did not pull your gun when he kicked you?

A No.

Q You did not pull your gun when he slapped you?

A No.

Q You did not pull your gun when he spit in your face?

A No.

Q You did not pull your gun until he put his hand in his pocket?

A Yes.

30 Q And the only reason you pulled your gun was because you thought he was going to pull a gun and shoot you?

A Yes.

Q Did you have an overcoat on?

A No.

Q He never had a gun in his hand?

A He put his hand in his coat pocket.

Q Did Mike ever have a gun in his hand in that garage?

40 A No.

*Defendant, Paul Cappiello, Cross.*

Q So that when you pulled your gun and you pointed it—

A Yes.

Q At Mike—

A Yes.

Q —did you mean to shoot him?

10

A No.

Q It was an accident?

A Yes.

Q You mean the first shot?

A Yes.

Q You did not mean to fire the gun?

A No.

Q Up to that time you had not seen a gun on him?

A No.

Q But he had his hand in his pocket?

20

A Yes.

Q He had not taken his hand out of his pocket?

A No.

Q And you pointed the gun at him and he was facing you?

A Yes.

Q And the gun went off?

A Yes.

Q And you did not mean it to go off?

30

A Yes.

Q Is that right?

A Yes.

Q So you did not shoot Mike because you were afraid he was going to shoot you?

A No.

Q You shot him by mistake?

A Yes.

Q And then when he was shot, the first time he fell?

A He grabbed and I was standing by the run- 40

*Defendant, Paul Cappiello, Cross.*

ning board of the car and I fell down with him.

Q Where were you on the running board of the car?

A Some steps.

10 Q Were you on the ground or running board of the car?

A Running board.

Q And Mike was in front of you?

A Yes.

Q And when you shot him the first time he fell forward?

A He grabbed me and he fell and I fell over him.

Q Were you on the bottom or where you on the top?

20 A He was on the bottom.

Q You fell on him?

A Yes.

THE COURT: Mike was on the bottom?

WITNESS: Yes, and then I went on top of him.

Q When you saw him fall forward toward you—

A He grabbed me the same time, too.

Q And he fell toward you

30 A And we fell together. He fell down and I fell with him and I do not know what happened. I was so excited I do not know what happened.

Q When you shot him the first time, did he fall forward or did he fall backward?

A He fell face to me.

Q Face toward you?

A Yes.

Q And as he fell he grabbed you?

A Yes.

40 Q And did he go down on the ground?

*Defendant, Paul Cappiello, Cross.*

A Yes.

Q And did you go down on the ground?

A I do not remember what happened.

Q Did you fall down?

A Well, I fall down. I do not know what happened.

Q Well, do you know whether or not you fell down?

A I do not know what happened.

Q Do you know whether or not you fell down?

MR. PRICE. I submit he has already answered that question three times that he did not know what happened.

THE COURT: I will allow it.

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

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

DALLAS FLANNAGAN,  
Judge.

Q Do you know whether or not after Mike fell down whether you fell down?

A We fell together.

Q Well, did you fall together?

A We fell together.

Q Will you answer yes or no?

A Yes.

Q Did you fall down?

A Yes.

Q When you fell, did you fall on the ground or did you fall on top of Mike?

A I do not know, I do not remember nothing.

Q Do you remember firing any more shots except the first one?

10

20

30

40

*Defendant, Paul Cappiello, Cross.*

A I do not remember nothing at all after that. I do not know how many shots I fired.

THE COURT: But you do remember you have already stated Mike was underneath and you were on top.

10

WITNESS: Well, he—

THE COURT: Now, is that correct or not? Were you on top or was Mike on top when you fell to the ground?

WITNESS: I was on top.

Q Didn't Mary tell you that it took two hours to come to Newark?

A She told me it took about three hours.

20

Q If you answer the questions we will get through much quicker. Didn't she tell you it took two hours to come to Newark?

A She told me it took three hours to come here.

Q Do you remember the day that you came back to Newark with Mr. Price?

A When I come back where?

Q To Newark and went to Police Headquarters?

A The 25th?

Q Do you remember that day?

A Yes.

30

MR. CONLON: Officer Berardi, will you stand up, please.

Q Do you remember talking to that man?

A Yes.

MR. CONLON: And Officer LaBaglivia.

Q Do you remember that man?

A Yes.

Q You remember those two men?

A Yes.

40

Q And did they ask you about this thing?

*Defendant, Paul Cappiello, Cross.*

A Uh?

Q Did they ask you what happened?

A He wanted to investigate, yes.

Q You mean they asked you to tell them what you knew about it?

A Yes.

Q And did you tell them?

10

A No.

Q You did not?

A No.

Q Did they talk to you in Italian or English?

A In Italian.

Q And did they ask you questions?

A Yes.

Q And did you answer them?

A No.

Q Did you answer any questions?

20

A Never.

Q No questions at all?

A Never talked.

Q I am talking about down at Headquarters.

A Down at Headquarters I never answered nobody.

Q Never nobody?

A Never nobody.

Q And did you leave headquarters with them in an automobile?

30

A Yes.

Q And then where did you go?

A In the garage?

Q What garage?

A Grant street.

Q And when you got to the Garage, what did you do there?

A Stayed with them.

Q What did you do?

A Stand there.

40

*Defendant, Paul Cappiello, Cross.*

Q Did you do anything besides stand there?

A That is all.

Q Did you talk?

A No.

Q Did you say anything?

10

A No.

Q Did they ask you any questions?

A No. They asked me questions and I never answered them.

Q Do you know why you went there?

A Uh?

Q Do you know why you went there?

A Yes.

Q What for?

A Well, because they claimed there was a charge against me for murder.

20

Q No, I mean why you went to the garage?

A I don't know what they took me down for. Maybe they took me down there—

Q No. I don't ask you that.

MR. PRICE: I object to that as irrelevant, incompetent and immaterial.

THE COURT: I will allow it.

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

30

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

DALLAS FLANNAGAN,

Judge.

Q Do you know why you went there?

A No.

Q Did you ever see this picture before?

A Yes.

Q What is that picture?

40

*Defendant, Paul Cappiello, Cross.*

MR. PRICE: I object on the ground it is incompetent, irrelevant and immaterial.

THE COURT: Overruled.

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

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

DALLAS FLANNAGAN,  
Judge.

Q What is that picture?

MR. PRICE: I submit the picture speaks for itself.

THE COURT: Overruled.

Defendant's counsel prays an exception to this ruling of the Court. 20

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

DALLAS FLANNAGAN,  
Judge.

Q What is that picture?

A My sister.

Q And when did you see that picture last before today?

A I find it in the house. 30

Q What house?

A 241 Hoyt street.

Q When?

A On the 9th in the afternoon.

Q On the 9th of October?

A Yes.

Q And did you take it then?

A Yes.

Q What did you do when you took it?

A Put it in my pocket. 40

*Defendant, Paul Cappiello, Cross.*

Q You kept it in your pocket until when?

A Until I come back home.

Q Did you have it in your pocket when you were surrendered by your counsel in Headquarters?

A Yes, that is the picture I got in Headquarters.

10 Q Did you give that picture to Officer Berardi?

A He took it off my pocket.

Q Did you give it to him?

MR. PRICE: He said he took it out of his pocket.

THE COURT: Overruled.

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

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

DALLAS FLANNAGAN,  
Judge.

Q Did you give him the picture?

A I have the picture I put in my pocket and he say "What have you got there?" and took it out of the pocket.

Q Is that your name on the back of it?

A No, sir.

30 Q Isn't that your cross there (indicating)?

A No, it is not my name at all there.

Q Didn't you ask him to be sure you got the picture back?

A To whom?

Q To Officer Berardi?

A He took it. Since that time I haven't seen it no more. It isn't my writing.

Q Isn't it a fact that on October 25th in Headquarters—

40 A Yes, sir.

*Defendant, Paul Cappiello, Cross.*

Q After you were surrendered—

A Yes, sir.

Q That Officer Berardi said to you, or one of the officers said to you, "Paul, what did you do with the gun when you shot this fellow?"

A Yes, sir.

Q You said "I threw it in the garage?"

A No, sir.

Q What did you say?

A Nothing at all.

Q You said nothing at all?

A Pardon me. One of the officers saying "Where did you throw it? Over here, over there. Where did you throw it, over here?", and I say "I don't know."

Q Isn't it a fact that they questioned you about your actions in connection with this killing and you told them or rather you answered their questions?

A To who?

Q To Officer Berardi and the other officer?

A Never.

Q Isn't it a fact that as you told it to them in Italian—

A Yes, sir.

Q That they wrote it down in Italian?

A To who? to me?

Q On a piece of paper?

A No, sir.

Q Isn't it a fact that that is the piece of paper they wrote in your presence (indicating)?

A I don't know what you have there.

MR. PRICE: I object. The witness says he doesn't have anything there.

THE COURT: He may pursue that. I will allow it.

10

20

30

40

*Defendant, Paul Cappiello, Cross.*

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

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

DALLAS FLANNAGAN,  
Judge.

10

Q Did you ever see that paper before?

A He showed me a paper. I wanted to read it and he refused and I refused to sign and answer questions because I was told by my lawyer to answer no question or sign no papers.

Q Just answer the question.

A Ask me the question?

Q Did you ever see this paper before?

20

A No, sir.

MR. CONLON: I would like to have this paper marked for identification.

(Same marked S-17 for identification).

Q Isn't it a fact that after your surrender you told the police officers what happened?

A No, sir.

Q And they wrote it down on this paper?

A No, sir.

30 Q Referring to S-17 for identification and after you had told the whole story in Italian—

A I told nothing at all.

Q Just a minute.

A All right.

Q After you told the whole story in Italian and they had written it all down on paper they showed you this paper and read it to you in Italian and they asked you if that was correct and that you then stated "Yes, that is the truth"?

A No, sir.

40

Q Did that happen?

*Defendant, Paul Cappiello, Cross.*

A No, sir.

Q Did they then ask you to sign it?

A Wait a minute.

Q You wait a minute.

A All right.

Q Did they then ask you to sign it and you said that you wouldn't sign it because your lawyer instructed you not to? 10

A No; wait a minute.

Q Did they ask you to sign it?

A Yes, sir.

Q You told them you would not sign it?

A Yes, sir.

Q You told them you would not sign because your lawyer instructed you not to?

A No sign, because my lawyer instruct me. 20

Q You did tell them that?

A Yes, sir.

Q On that occasion did you tell the police officers that after you found Mary's address in the bag, did you tell them this in Italian, "To relieve my curiosity". Do you understand what that means?

A (No answer).

MR. CONLON: Maybe I had better have it read in Italian. 30

THE WITNESS: Read it over again.

Q "To relieve my curiosity I took this paper for the purpose of going over to see if Marie was living with a good family." Did you tell that to the police officers?

A No, sir, I no tell anything like it.

Q Did you tell the police officers this in Italian, about one o'clock on the morning of the 19th after you left your home—

A Yes, sir. 40

*Defendant, Paul Cappiello, Cross.*

Q You went to your mother's home?

A Yes, sir.

Q And you took an automatic revolver with you that she kept in a trunk?

A I never say that.

10

Q Did you tell them that?

A No.

Q Did you tell them that you placed the revolver in your coat pocket and left the house and took a trolley to Court street as far as Borough Hall and then came to Newark?

A No, sir. Do you want me to tell you a question, if you don't mind?

MR. PRICE: No.

20

Q In the garage there did Mike grab you by the lapel of the coat?

A To me? When we got to fight in the back?

Q After you told the police the story didn't they ask you to go over to the garage with them and show them where you threw the gun and show them how this happened?

A They took me down there for a ride to go with them, but I no answer no questions or say that. He was asked questions but I no answer.

Q When they got you there didn't they ask you to show them how this happened?

30

A They told me, but I didn't answer.

Q Didn't you then tell them "Mike grabbed the lapel of your coat with one hand and put another hand in your pockets." Did you tell him that?

A No, sir, I no tell them anything before that time I come up to court.

40

Q Isn't it a fact that this is the only way you told them about what Mike did, that he grabbed the lapel of your coat and put his hand in his pocket and you were afraid he would shoot you?

*Defendant, Paul Cappiello, Re-Direct.*

A No, sir.

Q And you said nothing at that time about his hitting you, kicking you or his spitting in your face?

A I said nothing at all, gave no information at all.

10

*RE-DIRECT EXAMINATION* by Mr. Price:

Q This gun you had in your pocket, was that an automatic?

A I don't know what you call that kind of a gun.

Q Did it have a cylinder in it that revolved or was it straight and then down?

A I don't know what you call it. It has things on the side, see? I don't know what you call them.

20

Q Now Mr. Conlon asked you about the first shot.

A Yes, sir.

Q When you pulled your gun out you told him that you feared he had a gun and was going to take your life?

Q Then, you pulled your gun?

A Yes, sir.

Q The first shot went off?

A Yes, sir.

30

MR. CONLON: I object to this as not redirect.

MR. PRICE: It was testified to on direct and cross examination.

THE COURT: It seems to be a repetition of the direct.

MR. PRICE: No, he brought out something—

40

*Defendant, Paul Cappiello, Re-Direct.*

MR. CONLON: Withdraw the objection.

Q Did you mean when you said in answer to Mr. Conlon's question before that it was an accident that the gun went off before you intended it to go off?

10

A Yes, sir.

Q Mr. Conlon asked you on cross examination if you had ever been convicted of a crime, didn't he?

A Yes, sir.

Q You told him that you had been convicted of the crime of rape in the second degree?

A Oh, yes.

Q You told him that was a long time ago?

20

A Yes, sir, about 18 years ago.

Q When you were quite a boy?

A Yes, sir, eighteen years ago.

THE COURT: He didn't say that, you are saying that.

Q Was that a long time ago you were convicted?

A Yes, sir.

MR. CONLON: I object. He already testified that it was about eighteen years ago.

30

MR. PRICE: That is a long time, isn't it?

MR. CONLON: There is no argument about that.

THE COURT: You can state that, but he doesn't have to say so.

Q That was for rape in the second degree, was it?

40

A Yes, sir.

*Defendant, Paul Cappiello, Re-Direct.*

Q That was for having sexual intercourse?

MR. CONLON: I object.

THE COURT: No. You may show anything the record will disclose, but the details you cannot show. Anything the record will disclose you can show.

10

MR. PRICE: I haven't the record.

THE COURT: Have you the record, Mr. Prosecutor?

MR. CONLON: Yes.

THE COURT: Suppose you produce it. Anything that the record will disclose can be shown by either side. Why can't you put the whole thing in evidence?

20

MR. PRICE: The purpose of showing a conviction is to effect the man's credibility.

THE COURT: Yes.

MR. PRICE: I do not want your Honor to think that I am not acting in good faith, but I do not want it to get before the jury directly what I have to say, but I am positive that if you will hear me you will agree with me.

30

THE COURT: No, all I can hear is what the record discloses and I suggest that you take the record the Prosecutor has and put it in evidence so that we will have it.

MR. PRICE: No, that is only a certificate, that is not the whole record.

THE COURT: Sustain the objection.

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*Defendant, Paul Cappiello, Re-Direct.*

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

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

DALLAS FLANNAGAN,  
Judge.

10

Q Was the complainant in the rape case—

MR. CONLON: I object. I do not think counsel has a right to ask a question which will embody facts which your Honor has definitely ruled out.

20

THE COURT: Well, bear that in mind that I ruled on that. Do not embody something in your question that will tend to get before the jury something which the Court has ruled out.

MR. PRICE: I do not see how I can make my record. I am perfectly willing to have the jury excluded and ask the questions. I am confident that what I am doing is absolutely correct.

30

THE COURT: All right, the jury may retire.

(The jury retires).

MR. PRICE: I will propound these questions and have your Honor rule on them. Mr. Witness, do not answer the questions until his Honor rules on them.

BY MR. PRICE:

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Q Isn't it a fact that you were convicted for having sexual intercourse with a girl under the age of 18.

*Defendant, Paul Cappiello, Re-Direct.*

THE COURT: I will allow that question.

MR. PRICE: Isn't it a fact that on that charge you pleaded guilty?

THE COURT: Allowed.

MR. PRICE: Isn't it a fact that you wanted to marry the girl before you pleaded guilty and after you pleaded guilty?

10

THE COURT: Disallowed.

MR. PRICE: Isn't it a fact that you were sentenced to Elmira Reformatory and served a term of 18 months?

THE COURT: Allowed.

MR. PRICE: Isn't it a fact that when you came out of Elmira Reformatory you got your mother and went to the home of the mother of the girl who was the prosecutrix in the case and got her and married the girl?

20

THE COURT: Disallowed.

MR. PRICE: Isn't it a fact that she today is your wife?

THE COURT: Disallowed.

30

MR. PRICE: Those which your Honor disallows I may have an exception to?

THE COURT: Yes.

Let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge.

40

*Defendant, Paul Cappiello, Re-Direct.*

THE COURT: And we shall call the jury in and have the stenographer read the questions to the jury which I have allowed.

10 MR. PRICE: I want to ask one or two more questions.

Q After you pleaded guilty and were sentenced to Elmira Reformatory what did you do in reference to the girl who was the prosecutrix in the case, if anything?

THE COURT: Disallowed.

MR. PRICE. Did you marry the girl who was the prosecutrix in the case after having served eighteen months in jail?

20 THE COURT: Disallowed.

MR. PRICE: Your Honor will allow me an exception.

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

DALLAS FLANNAGAN,  
Judge.

30 THE COURT: Is it satisfactory to have the stenographer read the questions and have the witness answer them before the jury or is it satisfactory to have the stenographer read the questions to the witness in the presence of the jury?

MR. PRICE: The better way I believe would be to have the stenographer read the questions to the witness in the presence of the jury.

(The jury returns into court).

40 (The stenographer reads the questions

*Defendant, Paul Cappiello, Re-Direct.*

which the Court allowed to the jury as follows:

Q Isn't it a fact that you were convicted for having sexual intercourse with a girl under the age of eighteen?

A Yes, sir.

Q Isn't it a fact that on that charge you pleaded guilty?

A Yes, sir.

Q Isn't it a fact that you were sentenced to Elmira Reformatory and served a term of eighteen months?

A Yes, sir.

MR. PRICE: There were other questions propounded in the absence of the jury which your Honor said that I could not ask and to which I have taken an exception.

THE COURT: Correct.

BY MR. PRICE:

Q How old were you when you were convicted, 21?

A 18.

Q Since then you have never been convicted of a crime, have you?

A No, sir.

*RE-CROSS EXAMINATION* by Mr. Conlon:

Q How old are you now?

A 41.

Y You say 18 years ago this happened.

A I was 18 years old when it happened.

Q What did you do with the gun?

A With the gun?

Q Yes.

A I don't know what I did with it.

*Defendant, Paul Cappiello, Re-Cross*

- Q Did you take it out of the garage with you?  
 A No, sir.  
 Q You don't know what you did with it?  
 A No, sir.  
 Q Did you leave it in the garage?  
 10 A Yes, sir.  
 Q Where?  
 A I don't know.  
 Q You don't know where you left it in the garage?  
 A No, sir.  
 Q Do you know whether you threw it away or dropped it?  
 A I don't know anything about it.  
 Q Did you drop it?  
 20 A When I fell down that's all I know. I don't know what happened.  
 Q Did you have the gun when you got up?  
 A No, sir.  
 Q You dropped the gun, did you, where Mike's body was laying?  
 A I don't know. When I got up I had no gun.  
 Q You fell down on top of Mike on the ground with the gun and when you got up you didn't have the gun?  
 A No, sir.  
 30 Q I show you this picture S-6; do you see Mike laying there?  
 A Yes, sir.  
 Q That is the street out there.

MR. PRICE: I submit that this is improper recross examination. There is nothing that I brought out on redirect concerning this.

- 40 MR. CONLON: It is a matter I over-looked.

*Defendant, Paul Cappiello, Re-Cross*

THE COURT: Alright, if you overlooked it you may open up your direct and proceed and Mr. Price may redirect on this point.

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

10

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

DALLAS FLANNAGAN,  
Judge.

Q That is Grant street out there where I am pointing (indicating)?

A To come into the garage?

Q Yes.

A Yes, sir.

Q You were looking out of the garage there on this picture?

20

A Yes, sir.

Q Mike was nearer to the street than you were?

MR. PRICE: I submit that has all been testified to.

A I don't know where he was. In five minutes it was all over.

DOMINICK LaBUA, called in behalf of the defendant, and being duly sworn, testified as follows:

30

*DIRECT EXAMINATION* by Mr. Price:

Q Where do you live?

A 74 Butler street.

Q Brooklyn?

A Yes, sir.

Q Do you know Paul Cappiello?

A Yes, sir.

Q Did you work for him?

A Yes, sir.

40

*Defendant's Witness, Dominick LaBua, Direct.*

- Q Before October 19th?  
 A Yes, sir.  
 Q How long have you been working for him?  
 A Three or four months.  
 Q On the truck?  
 A Yes, sir.  
 10 Q What did you do?  
 A Helped him deliver laundry bags.  
 Q Collecting and delivering laundry bags?  
 A Yes, sir.  
 Q Did you do anything else besides that?  
 A On Saturday he was working for a grocer,  
 for Mr. Gamble, delivering groceries.  
 Q During the time you were working for Cap-  
 piello did you ever see him carry a gun?  
 A Yes, sir.  
 20 Q Do you know where he kept it?  
 A He had it on his right side pocket.  
 Q How many days did you see that?  
 A Almost up to the last time. I don't know  
 now.  
 Q You did not work for him after he was ar-  
 rested, did you?  
 A No, sir.  
 Q After the 19th of October?  
 A No, sir.  
 30 *CROSS EXAMINATION* by Mr. Conlon:  
 Q You saw this gun almost every day?  
 A Yes, sir.  
 Q He carried it in his right pocket of his  
 jacket, did he?  
 A Yes, sir.  
 Q You could see the gun in the pocket?  
 A The first time I seen it on him was when we  
 were walking.

40

*Defendant's Witness, Dominick LaBua, Cross.*

Q I didn't ask you that. You could see the mark of the gun in his pocket?

A Yes, sir.

Q All the time?

A Yes, sir.

Q Did you ever see him use it?

10

A No, sir.

Q Every day you saw the gun in his pocket?

A Yes, sir.

Q You could tell by looking at his pocket that he was carrying a gun?

A Yes, sir.

Q You went to work for him when?

A Around seven or eight months ago.

Q During the summer?

A Yes, sir.

Q During the time you worked for Cappiello did he ever wear an overcoat? 20

A Not during the summer, a jacket.

Q All the time every day you were working for him you could see this gun in his pocket?

A Yes, sir.

Q You could tell by looking at him that there was a gun there?

A Yes, sir.

JOSEPHINE CAPPIELLO, sworn on behalf of the defendant. 30

*DIRECT EXAMINATION* by Mr. Price:

Q You are the wife of the defendant?

A Yes, sir.

Q You lived with him at 273 Sackett street?

A Yes, sir.

Q How long have you known him?

A Ever since I was married.

MR. CONLON: I object to that as immaterial. 40

*Defendant's Witness, Josephine Cappiello, Direct.*

THE COURT: She said she knew him ever since she was married. It is immaterial.

Q Did you know him before you were married?

MR. CONLON: I object.

10 THE COURT: I will allow that.

A No, sir.

Q On the night Cappiello came to Newark, do you remember that night?

A Yes, sir.

Q The night of the 18th of October?

A Yes, sir.

Q Were you home when Mary was there?

A Yes, sir.

Q Did Cappiello go in the bureau drawer and take out a gun?

20 A No, sir.

Q Do you know whether your husband was in the habit of carrying a gun?

A Yes, sir.

Q How long had he been carrying a gun?

A Probably a year.

Q Do you remember the occasion of his carrying a gun?

A Yes, sir.

Q What was it?

30 A He had some letters from the blackhand, saying—

Q Before that had his truck been stolen?

A Yes, sir.

Q He had been carrying a gun since then?

A Yes, sir.

Q Did Paul's mother stay in your house after Paul left?

A Yes, sir.

40 Q Did she give him any key before Paul left the house?

*Defendant's Witness, Josephine Cappiello, Direct.*

A No, sir.

MR. PRICE: I want to confer with your Honor about another question which I want to ask if I may. I want to get it on the record and your Honor's ruling, but I do not want the jury to hear it.

10

THE COURT: Counsel for the defendant has asked permission of the Court to have several questions ruled on which he presents in writing as follows, and the Court has declined to permit counsel to ask these questions of the witness and counsel is granted an exception in each case.

MR. PRICE: Does your Honor sustain the objection to those questions?

20

THE COURT: Yes. I decline to allow you to ask the questions and I will give you an exception separately to each question.

(The questions asked by defendant's counsel submitted in writing to the Court are as follows):

"Were you the complainant and prosecutrix at the time Paul was convicted of rape in the second degree and was sentenced to Elmira?"

30

THE COURT: Disallowed.

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

Exception allowed. Let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge.

BY MR. PRICE:

Q Did Paul come out of Elmira Reformatory and marry you about 18 months later?

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*Defendant's Witness, Josephine Cappiello, Cross.*

THE COURT: Disallowed.

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

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

10

DALLAS FLANNAGAN,

Judge.

BY MR. PRICE:

Q What was your maiden name?

MR. CONLON: I object to that as immaterial.

THE COURT: Sustain the objection.

20

MR. PRICE: That will be subject to connection.

THE COURT: Well, when it is connected, if it is, you may recall her.

MR. PRICE: All right. Subject to that reservation, you may examine.

CROSS EXAMINATION by Mr. Conlon:

Q You say that you saw Paul on the night of the 18th before he came to Newark?

A Yes.

30

Q And how did you know he was coming to Newark?

A He told us.

Q Did he tell you why he was coming?

A He was going to have Mike arrested and then come back and have the sister arrested.

Q What time did he leave?

A I do not remember the time.

Q About what time?

A I could not remember the time.

40

*Defendant's Witness, Josephine Cappiello, Cross.*

Q And he left your sister Mary in the house there?

A Yes.

Q And he asked his mother and you not to let her out?

A Yes.

Q You do not know whether after he left his house he went to his mother's house or not?

A I do not know, but I do not think he could after my mother-in-law had the keys with her.

Q Do you know whether or not Paul went to his mother's house after he left your house?

A I do not know.

Q You do not?

A I do not.

MR. PRICE: That is subject to my reservation.

THE COURT: Yes.

MR. PRICE: May I have a stipulation on the record that the crime of rape in the State of New York is made by a male having intercourse with a female under the age of eighteen, she not being the male person's wife.

MR. CONLON: I know Mr. Price is experienced, and if he knows that is the law in New York, I am agreeable.

THE COURT: I would like to ask this question. Is consent involved?

MR. PRICE: The law of the State of New York calls that a girl under the age of eighteen cannot consent. So that if he has intercourse with her, it makes no difference.

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*Defendant's Witness, Louis Bintinella, Direct.*

THE COURT: It makes no difference whether she consents or not?

MR. PRICE: That is correct, sir.

LOUIS BINTINELLA, sworn in behalf of the defendant.

10 *DIRECT EXAMINATION* by Mr. Price:

MR. PRICE: I did want to ask Mrs. Cappiello one question. I think the Prosecutor knows that the husband of Mary is ill, confined to his bed.

MR. CONLON: I am willing to stipulate that.

THE COURT: Stipulate that.

20 Q What is your business?

A Laundry business.

Q Where is your place of business?

A 322 Hamilton avenue, Brooklyn.

Q Do you know the defendant, Paul Cappiello?

A Yes.

Q Had he been bringing laundry to your laundry for a number of years?

A Nine years.

30 Q Do you know other people who know him in Brooklyn?

A Sure.

Q Before this trouble have you ever heard his reputation for peacefulness and quietness talked about?

A Yes.

Q And is his reputation for peacefulness and quietness good or bad?

MR. CONLON: Wait a minute.

40 Q I say, what is his reputation for being a peaceable and quiet man?

*Defendant's Witness, Salvatore Corigliano, Direct.*

A Good.

Q Did you ever hear anybody say anything against him?

A No.

CROSS EXAMINATION waived.

SALVATORE CORIGLIANO, sworn in behalf of the defendant.

10

*DIRECT EXAMINATION* (Through interpreter)

by Mr. Price:

Q Do you know the defendant Paul Cappiello?

A Yes.

Q How long have you known him?

A Ten years.

Q Do you know other people who know him in the neighborhood where he lives? Just yes or no?

20

A Yes. Other people know him too.

Q Before this trouble did you ever hear his reputation for peacefulness and quietness talked about in the neighborhood?

A He is always well.

Q I didnt' ask you that. Did you hear him talked about? Yes or no.

A No.

Q Did you ever hear anybody say anything against him?

30

A No.

*CROSS EXAMINATION* by Mr. Conlon:

Q You never heard people talk about him at all, did you?

A No.

RECESS.

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*State's Witness, Humbert Berardi, Rebuttal, Direct.*

AFTER RECESS.

THE COURT: Mr. Prosecutor, you have something there you refer to as a record?

10 MR. CONLON: May I have it marked for identification?  
(Paper marked S-18 for identification).

THE COURT: In regard to this so-called record the Prosecutor produces marked S-18, if you wish I will introduce that in evidence.

20 MR. PRICE: No, I do not think it is right. It is an extract of the Clerk's record showing part of the record. I want to put in the original record. I take it if it is an original record we will be able to read it into the record.

THE COURT: Yes. All right.

(Reserving the right to call two character witnesses, a witness with an original record, and the wife of the defendant for one question, the

DEFENDANT RESTS.

30 HUMBERT BERARDI, sworn in behalf of the State in rebuttal, testifies as follows:

*DIRECT EXAMINATION* by Mr. Conlon:

Q You are a detective attached to the Detective Bureau in headquarters in Newark?

A I am.

Q How long have you been connected with the department?

A Nine years.

40 Q Were you assigned to duty in this case?

*Humbert Berardi, Rebuttal, Direct.*

A I was.

Q And did you go to Brooklyn in reference to it?

A I did.

Q When?

A On several occasions.

Q Well, when was the first time?

A On the 19th of October, 1929.

Q And did you go over there on Sunday, I think it was the 20th?

A October 20th, 1929.

Q And did you see Mrs. Capiello at that time?

A I did.

Q I am speaking of Mrs. Capiello, the mother of the defendant?

A The mother.

Q Who was with you?

A Detective Affilito and Detective Schaeffer.

Q And where did you see her?

A In the store of Pietro Impagliazio, 241 Hoyt street, Brooklyn.

Q Do you know where she lived?

A I believed she occupied an apartment above the store.

Q And you had a talk with her there?

A I did.

Q Did you talk to her in English or in Italian?

A In Italian, in the presence of Detective Affilito.

Q Detective Schaeffer does not speak Italian?

A No. Detective Schaeffer was busy, anyway; he went across the street to get some information.

Q Now, on that occasion, did Mrs. Capiello say to you that some time previous there was a boarder at her home who went back to Italy and left a revolver with her, with the understanding

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*Humbert Berardi, Rebuttal, Direct.*

that he would return later to the United States and get the revolver?

10 MR. PRICE: I object on the ground it is irrelevant, incompetent, immaterial, not binding on the defendant, and no proper foundation having been laid for it.

THE COURT: Well, I thought the foundation was laid.

MR. PRICE: No, not proper rebuttal.

THE COURT: Then your objection is, it is not proper rebuttal?

MR. PRICE: On all the grounds.

20 THE COURT: Well, I am asking you what is the trouble of the foundation being laid for it? Did he not ask that lady when she was on the stand whether she said this?

MR. CONLON: I did.

THE COURT: What is the matter with the foundation? You say the foundation was not laid.

30 MR. PRICE: I do not think she was asked the specific question.

THE COURT: I think she was. Exactly that. I will allow it.

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

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

DALLAS FLANNAGAN,  
Judge.

*Humbert Berardi, Rebuttal, Direct.*

A She did.

Q And did she tell you that she kept the revolver at her home?

A She did.

Q That several days before the 20th that her son appeared at her home in a state of excitement? 10

A She did.

Q And took the gun? Pardon me! And that later she went back to look for the gun and it was not there?

A Yes.

Q Is that what she said?

A That is true.

Q Now, do you remember the—

MR. PRICE: May I interrupt? The papers have arrived from the County Court, and I think the messenger would like to get back as quick as possible, and suggest the examination be suspended. 20

MR. CONLON: I think in view of the situation this is in to consider our course, and to consider this in the absence of the jury, and see what disposition of the matter we will make.

THE COURT: Very well. Maybe we had better have the jury retire until we examine the records. 30

MR. PRICE: I think I should offer this record in the presence of the jury.

THE COURT: You may.

MR. PRICE: I am not going to ask any questions and in order to offer the record I will put the clerk on. 40

*Magistrate's Return, County of Kings E. D. 3-4.*

THE COURT: What do you want to do, offer the record?

MR. PRICE: Yes, sir.

10 THE COURT: All right. Produce the record and hand it to the clerk or stenographer.

MR. CONLON: I will not require proof by the clerk of the record. I am not objecting to the evidence itself. I am objecting to its competency, its relevancy.

THE COURT: In other words, the form you are not objecting to?

MR. CONLON: No, sir.

20 THE COURT: Well, we will say that the paper presented by the clerk is marked at the top 15913 in typewriting, and in blue pencil 659. We will use those marks for identification.

MR. PRICE: The blue pencil mark I can show what it is.

30 THE COURT: Well, I do not care what it is, so as not to mark the paper, as it is an original record.

MR. PRICE: The other marks in ink are the Liber and page referring to the court minutes.

THE COURT: Well, they serve to identify it for our purpose.

MR. CONLON: May I ask your Honor if that is all of the record presented here?

40 MR. PRICE: There are two papers there.

*Magistrate's Return, County of Kings E. D. 3-4.*

MR. CONLON: You mean that is the entire record?

MR. PRICE: This is what we know as the Magistrate's return, or the Police Court's return against the defendant.

THE COURT: The whole thing is offered.

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MR. PRICE: Yes, sir.

MR. CONLON: I renew my objection. My contention is that the record should be admitted, but not the original indictment or any papers connected with the case, but the record of the clerk of the court showing the accusation, the date, whether or not there was a trial or plea, the finding of the jury, or the plea of the defendant and the sentence, and I think that record should be the record of the court and not from the files which contain some of the information in the case and do not contain other information in the case, and I wish further to state that the record will contain nothing relevant to this case which has not already been testified and contradict nothing that has not already been testified.

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THE COURT: In other words, your contention is that the record within the purview of our decisions is the clerk's record, that is, what he puts down in his book?

MR. CONLON: Yes, the record of the court.

THE COURT: And not the indictment at all.

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*Magistrate's Return, County of Kings E. D. 3-4.*

MR. CONLON: And further that the record does not contradict any admissions made by the defendant.

10 THE COURT: No, it does not as far as I have noticed, but that is not the point, but the defendant's counsel contends he is entitled to have in all the record. Now, the only question is is this a part of the record which he has handed up here. Now, the only document I have any doubt about is the indictment. He hands up the indictment, a brief and the Magistrate's complaint, at least, papers of the Magistrate's Court. Now, the only question in my mind is whether the indictment is part of the  
20 original.

MR. PRICE: Why, that is our original record. As I tried to explain it to your Honor, when an indictment is filed the Clerk is in possession of the indictment, the defendant is up before the bar and he is told what he is charged with and if he pleads guilty the Clerk makes a notation on the indictment as you see here and on the back he takes his pedigree and the  
30 Clerk puts the decision of the case when the Judge sentences him, so that this is an original entry of the entire transaction.

THE COURT: No, what is bothering me is what is meant by a record within our decisions. Does it mean that the books of the Clerk would set forth the occurrences before the Court, or does it mean documents, such, for instance, as the indictment itself. That is the only thing we are concerned  
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*Magistrate's Return, County of Kings E. D. 3-4.*

about and I do not know whether either of you gentlemen can help me answer that question or not.

MR. PRICE: I know as far as our proceeding it means the document, the actual record in the Clerk's office from which this record is produced. 10

THE COURT: Our procedure has always been in this court to call the Clerk and have him read the record book which sets forth the transaction before the Court and I have never known of an instance where the indictment was produced or read, but, of course, if you liken it with a similar case the indictment takes the place of a complaint and the plea takes the place of an answer and the matter is one of uncertainty in my mind, but I think I will have to solve it by admitting the indictment and excluding the other papers. 20

MR. PRICE: I want to have them separately.

THE COURT: You may.

MR. CONLON: I think the point I make is sound that the defendant has taken the stand and admitted to me that he has been convicted of a crime and the nature of his sentence and everything. 30

THE COURT: Yes.

MR. CONLON: I do not see that that puts me in the position to prove anything except something that will contradict what he is going to say. I do not see any hear- 40

*Magistrate's Return, County of Kings E. D. 3-4.*

ing that this record has on the the admission.

10 THE COURT: I do not quite agree with you there. I think if you put the defendant on the stand and asked him that part of the record which you rely on, he is entitled to put in the entire record. You may prove what you tried to prove either from the mouth of the defendant or you may call the Clerk and prove it by the record itself. You elected to adduce the facts from the mouth of the witness and it seems to me that having done that, produced part of the facts, that the defendant is entitled to produce the entire record and the only question to my mind is whether or not this indictment is part of the record. I have 20 some doubts on the subject but at the same time I am disposed to resolve the doubt in favor of the defendant. I will go further and say that I think on the whole your point is correct, that this indictment is a part of the record, as we understand it in this case, so I am going to admit it.

30 MR. PRICE: May I read it into the record?

THE COURT: Yes.

MR. PRICE: "COUNTY COURT of County of Kings.

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*Magistrate's Return, County of Kings E. D. 3-4.*

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THE PEOPLE OF THE  
STATE OF NEW YORK  
against  
PAOLO CAPPIELLO

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"The Grand Jury of the County of Kings, by  
this indictment, accuse

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PAOLO CAPPIELLO

of the Crime of Rape in the Second Degree, com-  
mitted as follows:

"The said PAOLO CAPPIELLO

late of the Borough of Brooklyn, of the City of  
New York, in the County of Kings aforesaid, on  
or about the fourth day of July, in the year of our  
Lord one thousand nine hundred and eleven, in the  
Borough and County aforesaid, in and upon a cer-  
tain female, to wit, one NUNZIATO BENINO,  
she being then and there not the wife of the said  
PAOLO CAPPIELLO

20

feloniously did make an assault, the said Nunziato  
Nenino being then and there a female under the  
age of eighteen years, to wit, of the age of four-  
teen years, and the said PAOLO CAPPIELLO  
then and there (under circumstances not amount-  
ing to Rape in the first degree) feloniously did  
perpetrate an act of sexual intercourse with her  
the said Nunziato Benino, against the form of the  
Statute in such case made and provided, and  
against the peace of the People of the State of  
New York and their dignity.

30

SECOND COUNT.

"And the Grand Jury aforesaid, by this indict-

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*Magistrate's Return, County of Kings E. D. 3-4.*

ment, further accuse the said PAOLO CAPPIELLO of the Crime of ASSAULT IN THE SECOND DEGREE, committed as follows:

10 "The said PAOLO CAPPIELLO late of the Borough and County aforesaid, afterward, to wit: On or about the day and in the year aforesaid at the Borough and County aforesaid, in and upon a certain female, to wit, her the said NUNZIATO BENINO she being then and there not the wife of the said PAOLO CAPPIELLO feloniously did make an assault, she the said Nunziato Benino being then and there a female under the age of eighteen years, to wit, of the age of fourteen years, with intent then and there (under circumstances not amounting to Rape in the first degree), feloniously  
20 to perpetrate an act of sexual intercourse with her the said NUNZIATO BENINO against the form of the Statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

## "THIRD COUNT.

30 "And the Grand Jury aforesaid, by this indictment, further accuse the said PAOLO CAPPIELLO of the Crime of ABDUCTION, committed as follows:

40 "The said PAOLO CAPPIELLO late of the Borough and County aforesaid, afterward, to wit: On or about the day and in the year aforesaid in the Borough and County aforesaid, did feloniously take, receive, harbor, employ and use her, the said Nunziato Benino she being then and there a female under the age of eighteen years, to wit, of the age of fourteen years, as aforesaid, for the purpose of sexual intercourse, he, the said PAOLO CAPPIELLO not being then and there the husband of

*Magistrate's Return, County of Kings E. D. 3-4.*

the said Nunziato Benino against the form of the Statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

"JOHN F. CLARKE

"District Attorney." 10

"A true bill, William C. Barhn, Foreman.

"Pleads guilty to the crime of Rape, second degree, July 21, 1911."

On the back of the indictment "WITNESSES:  
Nunziato Benino. Katherine Benino. H. C.  
Preston."

The other side, or the back of the indictment,

"Paolo Cappiello.

"Counsel Assigned. Yes.

"Sex. Male.

20

"Age. 21.

"Nativity: Naples, Italy.

"Residence: 34 Degraw Street.

"Occupation: Longshoreman.

"Married: No.

"Read and Write: Yes.

"Religion: Catholic.

"Parents: Living.

"Temperate.

"Previous conviction: No.

30

"Sentence: Elmira Reformatory, July 24,  
1911, Dike, J."

MR. PRICE: That is read into the record and considered in evidence.

(Same is received in evidence and marked Exhibit D-2.)

MR. PRICE: I offer in evidence the Magistrate's return in the same case produced by the Clerk of the County Court,

40

*Magistrate's Return, County of Kings E. D. 3-4.*

entitled PEOPLE OF THE STATE OF  
NEW YORK against PAOLO CAPPIELLO,  
30 Degraw Street, having the numbers  
39/127 on it.

10

THE COURT: That will be excluded.  
Defendant's counsel prays an exception  
to this ruling of the Court.

Exception allowed: let it be sealed and  
it is signed and sealed accordingly.

DALLAS FLANNAGAN,

Judge.

20

THE COURT: You can mark it for  
identification and have a copy made here  
and have a copy marked for identification  
so that you can show what you offered.

MR. PRICE: I offer also in evidence  
a paper entitled "Brief for the People", in  
the same transaction.

THE COURT: That will be excluded.

MR. PRICE: Except to both rulings.  
Exception allowed; let it be sealed and  
it is signed and sealed accordingly.

DALLAS FLANNAGAN,

30

Judge.

THE COURT: I suggest that you have  
a copy made of that and let it be marked  
for identification

(Magistrate's Return is marked D-3 for  
identification).

(Brief for the People is marked D-4 for  
identification).

40

MR. PRICE: May I now recall the wit-  
ness?

*Humbert Berardi, Rebuttal, Direct.*

THE COURT: I think you had better wait. You will have other witnesses, character witnesses, and there is no use starting your case now. The only reason I let this in was to allow the Clerk from New York to get away, but we did not accomplish that. 10

HUMBERT BERARDI, recalled in behalf of the state in rebuttal.

*DIRECT EXAMINATION* by Mr. Conlon:

Q When did you start your investigation in this case?

A October 19, 1929, at 9 a. m.

Q When did you see the defendant for the first time? 20

A October 25, 1929, about 10 a. m.

Q Where?

A In Police Headquarters in Captain Sebold's office.

Q He was brought in there by Mr. Price?

A He was.

Q Did you have any talk with the defendant?

A I did.

MR. PRICE: May I cross examine before he testifies in order to ascertain whether or not what he said was admissible against this defendant; preliminary— 30

THE COURT: I do not quite follow you.

MR. PRICE: I want to show by him that I advised the defendant not to have anything to say and the defendant said he did not have anything to say and I contend that anything the defendant is alleged to 40

*Humbert Berardi, Rebuttal, Direct.*

have said is not his full voluntary statement.

10

THE COURT: All right, you can show whether it was full and voluntary. If it was under any threat or any promise of any kind you may show it.

BY MR. PRICE:

Q When you saw the defendant he was under arrest, wasn't he? Yes or no?

A I don't understand that.

Q You know I brought the defendant to Police Headquarters, do you not?

A Yes, sir.

20

Q You know as soon as I brought him into Police Headquarters he was taken into custody?

A By us.

Q Yes, by the Police Department.

A He was.

Q At that time you knew I stated to the defendant in your presence not to say anything, do you not?

A You did.

Q You know the defendant said he would not say anything at that time, didn't he?

30

A He did.

Q You kept subsequently asking him questions from time to time, though, didn't you?

MR. CONLON: While you were there.

I object. The question isn't clear.

Q After I went away you started to ask the defendant some questions, didn't you?

A I certainly did.

40

Q He told you that he didn't want to answer because his lawyer said not to answer, didn't he?

*Humbert Berardi, Rebuttal, Direct.*

A No.

Q He was under arrest when he said re refused to answer?

A In your presence.

MR. PRICE: I object to anything the defendant said on the ground it is not a full voluntary statement by the defendant. 10

BY THE COURT:

Q Were any threats made?

A They were not.

Q Were any promises of any kind made?

A No, nothing at all.

THE COURT: I will allow it. Defendant's counsel prays an exception to this ruling of the Court. 20  
Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge.

MR. CONLON: State the conversation had in Police Headquarters when Mr. Price was there.

WITNESS: I was called to Captain Sebold's office on information received that Capiello had surrendered. I walked in and met Mr. Price, Captain Sebold, Lieutenant Eugene Hulbert, Detective Weckstein and several others who were in the room. While I was there Mr. Price was speaking to the defendant words to this substance: He said, "Now, listen, Capiello, I brought you here and I don't want you to admit that you were here or were not here,— 30  
40

*Humbert Berardi, Rebuttal, Direct.*

MR. PRICE: I object. I submit that that is improper.

THE COURT: I am afraid I didn't hear that.

10 (Stenographer reads as follows): "He said, 'Now listen Cappiello, I brought you here and I don't want you to admit that you were here or were not here'—"

THE COURT: I will allow it.

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

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

DALLAS FLANNAGAN,

20

Judge.

A He said "Remember a couple of black eyes will wear off, but a signature will never wear off a piece of paper".

BY MR. PRICE:

Q I said that?

A You certainly did.

BY MR. CONLON:

30 Q After Mr. Price left what took place?

A After Mr. Price left Captain Sebold turned the prisoner over to me due to the fact that he was—

MR. PRICE: I object to that as a conclusion.

THE COURT: Sustained.

Q After Captain Sebold turned the prisoner over to you what is the first thing you asked him?

40 A The first thing I asked him if he had used

*Humbert Berardi, Rebuttal, Direct.*

a gun that was kept by his mother and he said "Yes, that's the gun I used".

Q Did you talk to him in English or Italian?

A In Italian in the presence of Detective Afflito.

Q What else did you say to him and he say to you?

A The next question was "What did you do with the gun after you shot the man?" He says "I threw it away in the driveway." I said "Will you show us where you threw it?" He says "Yes".

10

MR. PRICE: I object to this as not proper rebuttal and no proper foundation has been laid for it.

THE COURT: Overruled.

Counsel for defendant prays an exception to this ruling of the Court.

20

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

DALLAS FLANNAGAN,

Judge.

A (Continuing) We took him in the police car, Detective Afflito, Schaffer and myself and brought to the scene of the crime No. 11½ Grant street. The defendant got out first and we followed him in and he brought us to the rear of the place and he said "After I shot the man I threw the gun somewhere around here. I don't know what I done with it, but I threw it out", and we made a thorough search of the place.

30

Q What else did he do, if anything, there?

A He re-enacted the manner that he had shot the deceased.

Q Did he at that time tell you that he had been kicked?

A He did not.

40

*Humbert Berardi, Rebuttal, Direct.*

MR. PRICE: That is objected to on the ground it is improper as to statement,—improper rebuttal and no proper foundation having been laid for it.

10 MR. CONLON: I think I can cure it if I ask the witness to tell us what he did when he re-enacted the crime. The defendant denied he did it.

THE COURT: What?

MR. CONLON: Re-enacted the crime on the scene.

THE COURT: Yes.

20 MR. CONLON: I think a question "What did the defendant do when he re-enacted the crime", is proper.

THE COURT: Strike out that previous answer, "I did not".

BY MR. CONLON:

Q Describe what Cappiello did there when he was re-enacting the crime?

30 A When we reached the rear of the place our presence there brought down seven or eight men from the factory, from the Morris Casket Company to the scene. They were told to stand back and Cappiello showed us how he had followed Iaccarino into the alley.

MR. PRICE: I move to strike that out on the ground that it is a conclusion.

THE COURT: Strike it out.

A It is not. He showed us.

BY THE COURT:

40 Q How. We do not want your conclusions. Tell us what he said.

*Humbert Berardi, Rebuttal, Direct.*

A He said "I followed him as far as here (indicating), then I took out my gun and fired three or four times, I couldn't say how many times. I dropped the gun and ran out. I saw him fall, dropped the gun and ran out". I said "Are you sure? Can you show us the spot?" And he come out and pointed to the spot, just where that had occurred. 10

Q Is that the spot where you had previously seen the body?

A I didn't see the body. Schaefer pointed to the spot.

Q You then took him back to Headquarters?

A Yes, sir.

Q What did you do when you got him back to Headquarters? 20

A I asked him if he was willing to make a statement and he said "Well, I will make a statement, but do not tell my lawyer". We went into the room and sat down and I took down a statement word for word, or the substance of his conversation.

Q Who was in the room?

A Detective LaBolera.

Q I show you S-17 for identification and I ask you if that is the statement you took down in Italian? 30

A That is the statement I took from Paul Cappiello on October 25, 1929, at Police Headquarters.

Q What is the picture attached to that?

A This is a picture here that was found in his possession. He had it in his wallet and I asked him if that was the picture he had shown to the rooming house lady and he said it was and he signed that with his name as a matter of identification. 40

*Humbert Berardi, Rebuttal, Direct.*

Q You wrote out this statement as he talked, I understand it?

A I did.

Q After you had finished taking down the statement what did you do with it?

10 A I read the statement to him in the presence of Detective LaBolera.

Q Did you write it in English or Italian?

A Italian.

Q After you got through reading it what did you say to him?

A I asked him if it was the truth.

Q What did he say?

A He said "It was".

Q Then what did you do?

20 A I asked him if he would sign every page.

Q What did he say?

A He said no. He said he was advised by his counsel to sign no papers.

MR. CONLON: I offer the statement in evidence.

MR. PRICE: Objected to as incompetent, irrelevant and immaterial and improper rebuttal; no foundation for its reception having been laid.

30 THE COURT: Do you wish to examine the witness to see whether or not any threats or promises were made to him?

MR. PRICE: No, I contend that where a man is in custody and where a man takes the stand, that his constitutional rights provide that he doesn't have to say anything and can refuse and subsequently if they pry him for question that this is not a full, voluntary statement of the defendant.

40

*Humbert Berardi, Rebuttal, Direct.*

MR. CONLON: There was no evidence that he was pried with questions.

THE COURT: The witness says he asked him and he used the word "pry."

I will rule that if there is anything to show that this statement was produced by threats or by promises and was voluntary, why, I am going to admit the statement simply as a means of showing that this was read to this defendant, that is all, at that time. The officer says he read him the statement at this time and the defendant says it was read, but he wouldn't sign it because he was advised not to do so by counsel. I will admit the statement because as far as the evidence shows the statement was voluntary and that being so I think it is admissible as indicated and for the purposes I have indicated. 10 20

MR. PRICE: I object to the statement on the ground that it is not in the English language.

THE COURT: Overrule the objection. Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly. 30

DALLAS FLANNAGAN,  
Jugde.

MR. PRICE: And on all the other grounds and except.

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

DALLAS FLANNAGAN, 40  
Judge.

*Humbert Berardi, Rebuttal, Direct.*

MR. CONLON: I offer in evidence S-17 for identification.

(S-17 for identification is marked in evidence.)

10 Q Did you make a translation of this statement?

A I did.

Q Is that a copy of your translation?

A It is.

Q Is that a true translation of the statement (indicating)?

A It is, to the best of my ability.

MR. CONLON: I offer the translation in evidence.

20 MR. PRICE: Same objection.

THE COURT: Do you object on the ground the translation is not correct?

MR. PRICE: I do not know whether it is or not.

THE COURT: Are you content to take this man's translation of it or would you rather have the Court Interpreter make the translation?

30 MR. PRICE: I would rather have the Court Interpreter translate it.

THE COURT: Give it to the Court Interpreter and he can go over it and say whether it is correct or not and testify to the same. He can do that while you are proceeding with this witness.

MR. CONLON: Can I use the English translation a few minutes?

40

*Humbert Berardi, Rebuttal, Direct.*

THE COURT: I do not see how you can.

BY THE COURT:

Q You say you read this statement to the defendant?

10

A Yes, sir.

Q Did you read it to him in Italian?

A Yes, sir.

Q You read it to him just as it appears on that paper you handed me there?

A I did.

BY MR. CONLON.

Q Have you a copy of this statement?

A I haven't, but Detective Weckstein has a copy, I believe.

20

Q On that occasion did Cappiello tell you that on the evening of the 18th of October, the night before the shooting, that he went from his own home to his mother's home; that he had obtained his sister's address from her pocketbook?

A On the 19th about 1 A. M. in the morning.

MR. PRICE: That is objected to as incompetent, irrelevant and immaterial, and not proper.

30

THE COURT: Overruled.

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

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

DALLAS FLANNAGAN,  
Judge.

40

*Humbert Berardi, Rebuttal, Cross.*

Q Did he tell you that left his house and went to his mother's house?

A He did.

Q And there procured a gun from his mother's trunk?

10 A He did.

Q And put the gun in his pocket and came to Newark?

A He did.

*CROSS-EXAMINATION by Mr. Price.*

Q You say that I said a pair of black eyes will wear off but a signature never will?

A You certainly did.

Q In the Captain's office?

20 A You did.

Q How many times did I tell the defendant not to have anything to say, that it was his constitutional right to remain silent?

A Several times.

Q Did he remain silent?

A He did not.

Q While I was there did you make any effort to talk to him?

A I happened to be in there and took care of the prisoner.

30 Q Will you answer the question?

A I did not.

Q When I went you started to ask him questions, didn't you?

A I brought him into the room.

Q When I went you started to ask him questions?

A I did.

Q You continued to ask questions of him all the time, did you not?

40 A Not all the time. For several hours.

*Humbert Berardi, Rebuttal, Cross.*

Q You had him in your custody all the time after I gave him to you, did you not?

A They had him.

Q You had him in your custody the next day, didn't you?

A I did.

Q Did you ask him out to this place—he had to go with you, didn't he? 10

A He did.

Q You search prisoners when you get them, don't you?

A Always.

Q When you searched this defendant you found a picture?

A I did.

Q Did you use a dictionary there when you were taking the statement? 20

A I did.

Q How long did it take you to write the statement out?

A About two hours?

Q Did you put in the words exactly as the defendant told them to you?

A I did.

Q Did you say to the defendant, "Why, your sister told me this, isn't that so," and he said "Put in anything you want"? 30

A Nothing of the kind.

Q Did you tell him what his sister had said?

A Never.

Q Did you tell him what anyone else had said?

A I did.

Q Who did you refer to?

A His mother.

Q He said, "Well, put in anything you want about that," didn't he?

A He did not, he said that is the truth. 40

*Humbert Berardi, Rebuttal, Cross.*

Q He refused to sign it?

A He refused to sign it and we did not force him.

Q I did not ask you that. He refused to sign it?

10 A He refused to sign it.

Q Did he tell you that he wouldn't sign any papers?

A He told us he wouldn't sign any papers on the advice of his counsel.

Q You also know that his counsel advised him, not to talk, don't you?

A I certainly do. I was there.

Q Notwithstanding that you continued to ask him questions for two days, didn't you?

20 MR. CONLON: I object.

THE COURT: If you ask him the question: "Notwithstanding that you continued to ask him questions," and divide that question up into two questions I will admit it.

Q You continued to interrogate the defendant, did you not?

A That is police procedure.

Q You did it, didn't you?

A I did.

30 Q You did it for two days?

A For about two hours, not two days.

Q You took him in and out of his cell there, did you not?

A I did not.

Q Didn't you put him in the detention room that night of the 25th?

A Yes.

Q And isn't it customary to take a man when he surrenders and arraign him before a Judge?

40

*Humbert Berardi, Rebuttal, Cross.*

MR. CONLON: I object.

A We do not do it in all murder cases.

THE COURT: I will allow it.

Q You did not arraign this man before any Judge, did you?

A No. 10

Q You had him in custody in Police Headquarters how many days?

A Several days.

Q How many days?

A Four or five days.

Q You had him in police headquarters up to the time he was arraigned in this court on the indictment, isn't that so?

MR. CONLON: I object. This statement was made on the day of his surrender and anything that happened subsequent makes no difference. 20

THE COURT: No. Sustain the objection.

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

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

DALLAS FLANAGAN, 30  
Judge.

PETER A. LA BAGLIVIA, sworn in behalf of the State in rebuttal.

*DIRECT EXAMINATION* by Mr. Conlon.

Q You are a member of the Newark police force?

A Yes.

Q Attached to the detective bureau at headquarters? 40

*Peter A. La Baglivia, Rebuttal, Direct.*

A Yes.

Q And were you assigned to duty in this case with Officer Berardi?

A Just to witness the statement.

Q Did you witness the statement?

10

A Yes.

Q Were you there when the statement was being taken by Berardi?

A Yes.

Q After Berardi had finished taking the statement what did he do with reference to it?

A He asked the defendant to sign it.

Q Well, before he asked him to sign it, did he do anything about it? Did you hear the statement read?

20

A Oh, yes, he read it to him.

Q He read it?

A Berardi.

Q After he read it what did he say to the defendant?

A He asked the defendant whether it was the truth, and the defendant said yes, but he would not sign it.

THE COURT: Now, before he made the statement, did any one make any promises to the defendant?

30

THE WITNESS: No, sir.

THE COURT: Did they make any threats against him?

THE WITNESS: No.

THE COURT: Did they say anything to him that he would receive any benefit if he made the statement?

40

THE WITNESS: No, sir.

*Peter A. La Baglivia, Rebuttal, Cross.*

*CROSS-EXAMINATION* by Mr. Price.

Q Did you ask any questions?

A No.

Q You did not ask any questions?

A No.

Q You just sat there while Berardi asked all 10  
the questions and wrote the answers thereto?

A Yes.

Q Did he write the statement in question and  
answer form, or did he write it in narrative form?

A Well, Berardi was asking the questions—

Q I did not ask you that. That is simple. An-  
swer it, please.

A May I have that question?

(Question read.)

A He wrote it in narrative form. 20

Q That is, he talked to the defendant and asked  
him questions and the defendant talked back, and  
then Berardi would start to write, is that it?

A —No—

Q No, is that right?

A No.

MR. CONLON: Just a minute. The  
witness is answering the question.

THE COURT: Did you answer it? 30

MR. PRICE: I did not ask for anything  
else. I asked him a very simple question.

THE COURT: Read the question.

(Question read.)

Q Do you mean to say that every time Berardi  
asked the defendant a question and the defendant  
answered Berardi wrote it down just the way the  
defendant gave it to him, is that it?

A He did not. 40

*Peter A. La Baglivia, Rebuttal, Cross.*

Q Did he write down the question that the defendant was asked?

A He did not.

Q Did he write down the answer that the defendant gave to the question?

10 A He did not.

Q What Berardi wrote down was what you and Berardi interpreted as the substance of what the defendant and Berardi had been talking about?

A He didn't.

Q Well, your statement is in narrative form? The statement in evidence, S-17, is in narrative form?

A By that I meant only on one question.

20 Q I didn't ask you that. Is the statement in narrative form?

THE COURT: Do you understand what narrative form is?

Q Don't you understand what narrative form is?

A I know what he means, if he continues on asking.

30 THE COURT: No. He means the form, if the statement is in the form of question and answer, if you put down the question that is asked and the answer that is given, just like the stenographer's record, but if it is in narrative form it is putting down what the witness said, but not in the form of question and answer, but the substance of what he said.

MR. CONLON: I object to it. The statement speaks for itself.

40 MR. PRICE: I am testing his recollection.

*James Afflito, Rebuttal, Direct.*

THE COURT: But he says he did not understand what you were getting at.

Q Do you understand what I mean now?

A I understand what you mean.

Q Well, now, what was the form that Berardi wrote it down in, one continuous story?

A Just what the defendant said. 10

Q None of the questions that were asked?

A No.

Q Just the answers of the defendant?

A Yes.

Q And that is what you understood he was doing?

A That is it.

*RE-DIRECT EXAMINATION* by Mr. Conlon.

Q You, of course, understand Italian? 20

A Yes.

Q You can read Italian?

A Yes.

THE COURT: Did you say the statement was read after it was all written down?

THE WITNESS: Yes, sir.

THE COURT: What did the defendant say? 30

THE WITNESS: He said it was the truth.

JAMES AFFLITO, recalled on behalf of the State in rebuttal.

*DIRECT EXAMINATION* by Mr. Conlon.

Q Did you go over to Brooklyn with Berardi on the 20th of October?

A I did. 40

*James Afflito, Rebuttal, Direct.*

Q And did you see Mrs. Cappiello, the mother of the defendant, at that time?

A I did.

Q Where did you see her?

A In the rear of the store of the Hoyt street address.

10 Q And who spoke to her?

A Berardi and myself.

Q Did you speak in English or Italian?

A Italian.

Q You understand Italian?

A I do.

Q And on that occasion did she say to you that some time ago a boarder had left a revolver at her home and gone back to Italy?

20 MR. PRICE: I object on the ground it is incompetent, irrelevant and immaterial, and not binding on the defendant, and not proper rebuttal.

THE COURT: Overruled.

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

Exception allowed. Let it be signed, and it is signed and sealed accordingly.

30 DALLAS FLANAGAN,  
Judge.

A She did. She said to—

Q Just a minute. She did?

A Yes.

Q Did she say the gun was left there with the understanding that this person would return to the United States and get the gun again?

40 MR. PRICE: I object. The same grounds.

*James Afflito, Rebuttal, Direct.*

THE COURT: Overruled.  
 Defendant's counsel prays an exception  
 to this ruling of the Court.  
 Exception allowed. Let it be signed, and  
 it is signed and sealed accordingly.

DALLAS FLANAGAN, 10  
 Judge.

A She did.

Q And did she say she kept a revolver in her  
 trunk in her room, and that several days ago her  
 son appeared in a state of excitement and holler-  
 ing that he was going to get Michael Iaccarino?

MR. PRICE: I object to that as incom-  
 petent, irrelevant, immaterial, and no foun-  
 dation laid for that, and further that it is  
 hearsay and not binding on the defendant. 20

THE COURT: Overruled.  
 Defendant's counsel prays an exception  
 to this ruling of the Court.  
 Exception allowed. Let it be signed, and  
 it is signed and sealed accordingly.

DALLAS FLANAGAN,  
 Judge.

Q Did she say that? 30

A She did.

Q And did she say that she went to look for  
 the gun and it was gone?

A It was gone. That is what she said.

CROSS EXAMINATION waived.

THE COURT: I might say, gentlemen  
 of the jury, that you understand this testi-  
 mony is not to prove or tend to prove that  
 any of these statements are true, that is, 40

*Harrison S. Martland, Rebuttal, Direct.*

10 what I mean by that is this, the only purpose of this testimony is to impeach the credibility of the defendant's mother who testified here on the stand. She testified that she did not say such things at that time and place. The Prosecutor now calls these witnesses to show that she did say those things at that time and place. The effect of that testimony is to affect her credibility and that only. It does not tend to show that he did take the gun from the drawer, or that the boarder did leave there some time back, or any of those things. It is only offered for the purpose of affecting her credibility. That is all it is for, and that is all you can consider.

20 HARRISON S. MARTLAND, recalled in behalf of the State, in rebuttal, testified as follows:

*DIRECT EXAMINATION* by Mr. Conlon.

Q Doctor, from your experience in making autopsies and your experience of firearms, are you able to determine with some degree of certainty the distance that a gun is from a human body into which the bullet is fired?

30 MR. PRICE: I object.

MR. CONLON: Just a minute. I have not finished the question.

MR. PRICE: Well, you dropped your voice. I am very sorry.

Q By physical evidences on the body or the absence thereof?

MR. PRICE: I object to it on the ground he is not qualified to testify.

40 THE COURT: Do you wish to examine?

*Harrison S. Martland, Rebuttal, Direct.*

MR. PRICE: No, sir. I think it is up to the Prosecutor to qualify him.

THE COURT: Well, I think it is. You can say yes or no.

THE WITNESS: Yes, sir. I am often able to give an opinion. 10

Q And how are you able to determine that?

MR. PRICE: I object. The Doctor is not qualified.

MR. CONLON: I am qualifying him now.

THE COURT: He wants to qualify him. He wants to show what the Doctor bases his opinion on. 20

MR. PRICE: I submit the question is improper.

THE COURT: I will allow it.

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

Exception allowed. Let it be signed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,

Judge. 30

A It is based upon the appearance of the wound or skin as seen at the autopsy. It is also based on an opinion of the clothes and an examination of the body of the deceased.

Q And is the nature of the bullet, calibre of the bullet, and so forth—does that have anything to do with that?

A Oh, yes.

*Harrison S. Martland, Rebuttal, Direct.*

Q And have you made any particular study of that subject, or have you had any particular experience?

10 A Well, in over 6,000 autopsies I have frequently seen the bullet wound, and seen their characteristics on the skin, and having seen the characteristics of the clothes in such cases, I have also during the last war made an extensive study of gun-shot wounds in France, where I did nothing else for several months.

THE COURT: And Doctor, will you kindly state your position at the time you made this study, the position you had in France?

20 WITNESS: I was Major in the Medical Corps attached to the Signal Corps and sent over to France to do duty on gun-shot wounds. I was at one time asked to write a chapter—

MR. PRICE: I object on the ground it is incompetent, irrelevant and immaterial.

THE COURT: All right, never mind, Doctor.

30 Q And from your experience and your study, Doctor—

THE COURT: Excuse me! Do you wish to cross examine the Doctor on his qualifications?

MR. PRICE: No, very well.

MR. CONLON: Are his qualifications admitted?

40 MR. PRICE: I do not admit anything.

*Harrison S. Martland, Rebuttal, Direct.*

Q Doctor, you testified the other day—it seems like a week ago—that you performed an autopsy on the body of Mike Iaccarino?

A Yes, I did.

Q And that you found four bullet wounds?

A I did.

Q Now, have you formed—or did you form any opinion from that examination as to the minimum distance that the gun must have been held which inflicted the wounds in the body of the deceased?

10

MR. PRICE: I object on the ground no proper foundation for this testimony has been laid and not proper rebuttal.

THE COURT: Well, now, the question of rebuttal is a different question from what has been raised heretofore. Why is this not proper rebuttal? Did not the defendant testify that he had the gun in his hand and he fell down on top of this man and that he does not know what happened after that? Therefore, if he fired the shot, must it not have been at close range.

20

MR. PRICE: Not necessarily so. He said after he fired the first shot, he does not know what happened after.

30

THE COURT: I think this is proper rebuttal.

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

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

DALLAS FLANNAGAN,  
Judge.

40

*Harrison S. Martland, Rebuttal, Direct.*

Q Were you able to form such an opinion?

A Yes, I formed an opinion.

Q And will you tell us your opinion?

MR. PRICE: I make the same objection on the same ground.

10

THE COURT: Overruled.

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

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

DALLAS FLANNAGAN,  
Judge.

20

A My opinion was and is that practically all of these shots, or most of them, at least, were fired at fairly close range, but not at close enough range to leave powder marks or a brand on the skin or on the clothes of the deceased.

Q And have you an opinion of the minimum distance the gun could have been?

30

A Yes. It is an opinion that he fired according to various circumstances. My opinion is that the brand or the burning of the skin was the explosive gases of a revolver that came out of the barrel after the bullet left the barrel. After the bullet leaves the barrel the explosive gases in back of it are suddenly released and they frequently burn the skin, usually in a direction opposite to the trigger of the gun. I am speaking of a revolver. So that if the hole is in the neck and the trigger is held down, the recoil slightly upward will throw the burning of the skin up above the wound. There is no evidence in any one of these four wounds of a brand. The brand ordinarily speaking—

40

MR. PRICE: I object to everything that is said.

*Harrison S. Martland, Rebuttal, Direct.*

THE COURT: You have given us the reasons for your opinion?

THE WITNESS: Yes.

THE COURT: But what the Prosecutor asked you for was the minimum distance.

THE WITNESS: My opinion is that these four shots were at fairly close range, but not close enough to produce a burning of the skin, and I believe the minimum distance, from the calibre of the bullet found and the character of the bullet with modern ammunition, that the minimum distance is over a foot, or possibly over two feet, and that the maximum distance that most of the shots in this case ranged somewhere around 5, 6 or 8 feet. 10

THE COURT: From one or two feet, to five or six?

THE WITNESS: Yes, sir.

THE COURT: Then, will you tell us, please, upon what you base your opinion, your reasons? 20

THE WITNESS: The minimum distance is based first on the absence in any of the four wounds of burning of the skin by the brand or of tattooing by powder grains. The maximum distance is based upon the amount of bone that at least two of the wounds go through in the skull showing it was not too great a distance, fairly close. 30

Q And when you say there was no powder brand marks does that apply also to a bullet hole in the clothing?

A Yes, all four wounds. 40

*Harrison S. Martland, Rebuttal, Direct.*

MR. PRICE: I think this has all been gone over in the Doctor's direct examination.

10 THE COURT: No, I do not think the doctor on his direct told us anything about the distance.

MR. PRICE: No, but he did about the powder mark.

20 THE COURT: The Prosecutor is now asking about the distance from which the bullets were fired which made the holes in the clothes and you said you asked permission to recall the doctor for the purpose of asking what he found on the deceased personally.

MR. CONLON: That is admitted on the record, but I would like to call the doctor again.

THE COURT: You said when you closed your case that you wanted to call the doctor.

MR. CONLON: Now that the doctor is here, I would like to ask him that question.

30 THE COURT: I see no objection.

Q Doctor, you told us the other day that you found certain articles in the clothing of the deceased, money and jewelry and so forth.

A Yes.

Q Did you find anything else than what you mentioned?

A No.

Q Was there any gun there?

40 A There was no gun in the vicinity of the deceased.

*Harrison S. Martland, Rebuttal, Cross.*

Q Was there any gun on the deceased?

A I saw no gun.

*CROSS EXAMINATION* by Mr. Price.

Q Did you find any knife, Doctor?

A I do not recall finding a knife.

Q You are not sure that you did not?

10

A I am not sure, no. I think it probably would have been put down if it was.

[The interpreter presents a translation of the statement of the defendant.]

MR. PRICE: The interpreter says that the translation is a correct translation and defendant's counsel states to the Court that if the interpreter were called as a witness he would swear to that effect.

20

THE COURT: In other words, you waive his being sworn.

MR. PRICE: Positively, an official of the court.

THE COURT: And accept his statement?

MR. PRICE: Yes, sir.

MR. CONLON: And I offer in evidence the translation in English.

30

MR. PRICE: And I make the same objection.

THE COURT: The same ruling.

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

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

DALLAS FLANNAGAN,

Judge.

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*Josie Iaccarino, Rebuttal, Direct.*

JOSIE IACCARINO sworn through the interpreter  
in behalf of the state in rebuttal.

*DIRECT EXAMINATION* by Mr. Conlon.

Q You are the widow of Michael Iaccarino?

10 A Yes.

Q And do you remember seeing Paul Cappiello  
in Brooklyn at noone time on Sunday, October  
13th?

A Yes.

Q And who was present when you saw him?

A My daughter.

Q What was your daughter's name?

A Jennie.

20 Q And did Cappiello say at that time that he  
was looking for your husband Michael and that  
he was going to shoot and kill him the first time  
he saw him?

MR. PRICE: I object, on the ground it  
is incompetent, irrelevant and immaterial  
and not proper rebuttal, no proper founda-  
tion, and hearsay.

THE COURT: Well, how about rebut-  
tal?

30 MR. CONLON: I laid the foundation  
for that.

THE COURT: I am talking about re-  
buttal upon this part of your case.

MR. CONLON: I think it might have  
been, your Honor, but I do not think it is  
necessarily so. The foundation was laid  
for it in the cross examination of the de-  
fendant and he was asked if he had that  
conversation and he said that he had not.

40

*Josie Iaccarino, Rebuttal, Direct.*

THE COURT: Well, that is true enough, but it seems to me if he made such a statement as that in advance, it would be a very important part of your case in chief. It seems to me that it is definitely a part of the State's original case. I think the only question is whether your case is to be reopened, because I do not think that that is proper rebuttal. I do not think matters which are really definitely a part of the State's case can be made rebuttal by simply laying a foundation by asking witnesses if statements were made to them.

10

MR. CONLON: Well, I have the other conception of it and being in that position I will ask leave to reopen my case.

20

MR. PRICE: I object to that, it is prejudicial to the case of the defendant. I do not think your Honor should permit the state to reopen his case at this time. He has been here since the beginning of this trial.

THE COURT: Yes, but the Prosecutor says his conception is different from the Court's, so you may reopen your case for the purpose of introducing this testimony and, that of course, means the defendant may have the opportunity to introduce any testimony he may see fit in his case.

30

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

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

DALLAS FLANNAGAN,

Judge.

40

*Josie Iaccarino, Rebuttal, Direct.*

MR. CONLON: I will withdraw the former question.

Q Did you have a conversation with Paul Cappiello on Sunday, October 13th, at noon time in the presence of your daughter Jennie?

10 MR. PRICE: I make the same objection.

THE COURT: Overruled.  
Defendant's counsel prays an exception to this ruling of the Court.  
Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge.

20 MR. PRICE: Yes, or no, I submit.

A Yes.

Q And what, if anything, did Paul Cappiello say to you at that time?

MR. PRICE: I object. It is improper in form, incompetent, irrelevant and immaterial and not binding on the defendant. It is part of the State's case in chief and not proper rebuttal.

30 THE COURT: Overruled.  
Defendant's counsel prays an exception to this ruling of the Court.  
Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge.

THE COURT: Proceed.

A He said that if my husband don't bring back my sister, he was going to shoot my husband.

40

*Jose Iaccarino, Rebuttal, Cross*

MR. PRICE: I move to strike out the answer on the ground it is improper.

THE COURT: Overruled.

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

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

DALLAS FLANNAGAN,  
Judge.

*CROSS EXAMINATION* by Mr. Price.

Q How long was your husband away from home?

MR. CONLON: I object to that as not cross examination.

THE COURT: I do not think it is. I will allow it, though. 20

A Since the night of the 8th of December.

Q Of what?

A October.

Q Since the night of the 8th of October?

A [Not answered.]

THE COURT: Now, Mr. Price, I am going to allow you some latitude, but please remember all this witness testified to is one conversation at one particular time and place, so please confine your cross examination to the examination in chief. While I have reopened the Prosecutor's case, I have only opened it for this one thing, this one conversation. 30

*Jennie Iaccarino, Rebuttal, Direct.*

JENNIE IACCARINO sworn in behalf of the State in rebuttal.

*DIRECT EXAMINATION* by Mr. Conlon.

10 Q You are the daughter of the woman who was just on the stand?

A Yes.

Q Were you present in Brooklyn on Sunday, October 13th, around noon time when your mother talked to Paul Cappiello?

A Yes.

Q And will you tell us what he said on that occasion?

20 A He said that if my father did not bring his sister home, that he would shoot my father, that my mother would not see my father any more, neither would I.

*CROSS EXAMINATION* by Mr. Price.

Q What did you say your name was?

A My name is Jennie Iaccarino.

Q Are you married?

A Yes.

MR. CONLON: I object.

Q What is your married name?

30 MR. CONLON: I object.

THE COURT: I will allow that much. You want to know her married name.

MR. PRICE: Yes.

THE COURT: What is your married name?

WITNESS: My married name is Mrs. Giordiano.

Q Where do you live?

40 A I live with my mother.

*Jennie Iaccarino, Rebuttal, Cross.*

Q Does your husband live there too?

A No, sir.

MR. CONLON: I object.

THE COURT: Sustained.

Defendant's counsel prays an exception  
to this ruling of the Court. 10

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

DALLAS FLANNAGAN,  
Judge.

STATE RESTS.

JOSEPHINE CAPIELLO sworn in behalf of the  
defendant in Rebuttal.

20

*DIRECT EXAMINATION* by Mr. Price.

Q Your first name in Italian is Annunziano?

MR. CONLON: I would like now, in  
view of our discussion, I think your Honor  
will remember our motion to make a ruling  
that there will be no evidence produced  
with reference to the record of the defend-  
ant other than has been produced. The en-  
tire record is in.

30

MR. PRICE: I asked for her first name.

MR. CONLON: I object, and I would  
like to have the argument in the absence  
of the jury.

THE COURT: Wait a minute. Let us  
see. Now, I remember. You said—I re-  
member you were going to recall this wit-  
ness for one question.

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*Josephine Cappiello, Bebuttal, Direct.*

MR. PRICE: Her maiden name and you told me I could.

10

THE COURT: Yes, I told you you could recall her for that purpose. Yes, that is right. You only say what is your maiden name, and Mr. Conlon said, I object, immaterial. Objection sustained, and you said you would connect it. Now, then, you have not connected it, and I sustain the objection.

MR. PRICE: I have not connected it?

THE COURT: No.

MR. PRICE: Why, you told me specifically if I may state it after I put the record in evidence—

20

THE COURT: No, I have seen the record. I have read the record and I sustain the objection.

MR. PRICE: I asked her now what her first name was.

THE COURT: Well, we are not interested when we know her first name.

MR. PRICE: Well, didn't she give it when she took the witness stand?

30

THE COURT: Yes.

MR. PRICE: She said it in Italian. I wanted it in Italian.

THE COURT: If you want to ask her her maiden name, you can ask her that.

MR. CONLON: I object.

THE COURT: Sustained.

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TESTIMONY CLOSED.

## CHARGE

FLANNAGAN, J.

Gentlemen of the Jury. I have a number of requests to charge in behalf of the defendant. They are as follows:

Before the jury can find the defendant guilty, they must first find that he acted with a criminal intent, and if the act charged is susceptible of two constructions, one of criminal intent and the other an innocent intent, the jury must find he acted with innocent intent and acquit him." 10

I so charge you, gentlemen.

Another request. "That it is proper for the jury to consider in connection with the guilt or innocence of the defendant in this case what motive he may have had, if any, to kill the deceased." 20

I so charge you, gentlemen.

Another request: "A disinterested witness is not necessarily entitled to any more credit than an interested witness. The whole subject of the interest of a witness and its effect upon his testimony is for the jury."

I so charge you, gentlemen.

Another request: "A person attacked is not bound to retreat if such would imperil his safety the more, or if a reasonable man, under the circumstances, would be justified in believing that to retreat would add to the danger." 30

I so charge you, gentlemen.

Another request: "That if the defendant was going away, and that then the deceased followed and attacked him, he had the right to defend himself, and if he was then in danger of great bodily 40

*Charge*

harm and there were no safe means of escape and it was necessary for him to slay his assailant, he must be acquitted."

I so charge you, gentlemen.

- 10 I am further requested, gentlemen, to charge you upon the subject of reputation or character. Evidence of good character or reputation for peaceableness, morality, truthfulness, or whatever has a bearing, of an accused is always competent upon the trial of an issue such as this, and is entitled to consideration by the jury in making up their verdict, and if on such consideration there exists a reasonable doubt of guilt, even though that doubt be engendered merely by his previous good
- 20 repute, he is entitled to an acquittal. But, if from the entire evidence, including that relating to good character or reputation, the jury believe the defendant guilty beyond a reasonable doubt, he should be convicted, and the evidence of good character or reputation should not alter the verdict.

Now, gentlemen, there are four instructions which are paramount ones, and my entire charge is to be understood as controlled by and subordinated to them.

- 30 1. The Court is the judge of the law, and as such, it is its function to pass upon all questions of law arising in the trial and to inform the jury of the law governing the case, and it is the duty of the jury to follow the law as it may be stated by the Court.
2. The Court has no power to decide or to instruct the jury how to decide any question of fact, but the jury are the sole and final judges of the
- 40 facts, the weight of testimony and other evidence,

*Charge*

the credibility of witnesses, inferences to be drawn from the evidence, and of all inferences, issues and questions of fact whatever, including the ultimate conclusion of guilty or not guilty, as well as the degree of guilt, if any, to be reached on all the evidence in the case. As judges of the facts, it is their function, responsibility and duty, to recollect what the evidence is, and all of the evidence, the occurrences during the trial, the appearance and conduct of the witnesses, whether evidence is or is not in the case, and whether it is disputed or undisputed, and to be controlled by their own recollection in all such matters. If the Court should at any time make any statement of his recollection, or should even go further and make definite affirmation, no matter how positive, in regard to any of such matters, it is the duty of the jury to disregard such expressions of the Court, except where the same coincide with their own recollection.

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3. The Court has the right to comment on the evidence, but in deciding the case the jury must do so, not only on the evidence referred to by the Court, but all the evidence. The Court has also the right, if he sees fit, to express his opinion on the evidence, pointing out what evidence, situations, or circumstances seem to him salient, controlling or persuasive, and indicating any inferences or conclusions of fact which he would or may draw from the whole, or from part of the evidence, but the jury are not bound thereby and may disregard all or any of such expressions if they see fit.

30

4. The defendant is presumed to be innocent, and he must be proved beyond a reasonable doubt guilty of the crime charged and of each and of all

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*Charge*

of its elements. He cannot be convicted of any crime or degree of crime unless so proven guilty thereof. The burden of proving the defendant guilty beyond a reasonable doubt rests upon the State throughout the whole case and never shifts. This rule is an ultimate one, surviving all others. It is an independent and final protection to the defendant, and notwithstanding all other presumptions and burdens and intermediate issues, if any arise in the case, it remains upon the State until and after all the evidence is in, when the jury must consider upon all the evidence in the case whether or not this burden has been sustained. If the jury are then satisfied upon all the evidence that the defendant is proved guilty beyond a reasonable doubt, the verdict must be guilty of the crime or degree of crime so proven; if not so satisfied, the verdict must be not guilty.

Reasonable doubt, gentlemen, is not a mere possible doubt. It is that stage of the case which after an entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they say they cannot feel an abiding conviction to a moral certainty of the truth of the charge.

These, gentlemen, are paramount instructions. The defendant, gentlemen, has been indicted by the Grand Jury of this County for murder. The finding of an indictment is simply a step in the regular course of legal procedure which must be taken before any person can be put on trial for murder. An indictment is simply an accusation by the Grand Jury. It is of no evidential value against the defendant.

Under the indictment which has been found by the Grand Jury and the law of our State, the de-

*Charge*

defendant may be found guilty (1) of murder in the first degree, or (2) murder in the second degree, or (3) guilty of manslaughter, or of course, he may be acquitted altogether.

Now, the law presumes, and it is your duty to follow the law, and in your deliberations proceed on the presumption that all unlawful homicides are murder in the second degree. 10

The first inquiry, gentlemen, is, was this killing done by the defendant, and the second is, was it unlawful.

As to the killing being done by the defendant, there is no dispute on that subject, as I understand his position, but the defendant contends that the killing was not unlawful. He contends it was done in self-defense, and therefore, was excusable in law, or that it was a misadventure or accidental. 20

Now, gentlemen, if the killing was done in self-defense, as I will explain that defense to you, it was not unlawful. As I said before, the defendant also contends, as I understand it, that the killing was by misadventure or accidental. The question of what is meant by misadventure. Misadventure is where a person, unintentionally kills another in the doing of a lawful act without gross negligence. It is claimed, as I understand it, that the killing was done by misadventure while engaged in self-defense. Self-defense and misadventure are two distinct offences. Either one is complete and perfectly good standing alone, yet they may be available to a defendant together. If a man is engaged in self-defense, acting within the bounds of self-defense as I have explained it to you, and no killing has as yet occurred, and the circumstances are such that the defendant would not be justified in 30 40

*Charge*

10 carrying his defense to the extent of taking human life, and under such circumstances, he unintentionally and accidentally kills a human being without gross negligence, he is innocent, because he was when so engaged in self-defense engaged in a lawful act and an unintentional killing in doing a lawful act without gross negligence is misadventure. Of course, if the circumstances and assault by deceased were of such character that defendant was justified in carrying his defense to the extent of taking the decedent's life, then it is not material whether the killing was intentional or accidental, self-defense being a justification if intentional it is, a priori, a justification if accidental.

20 Now, then, gentlemen, coming to self-defense, I will endeavor to state the law of self-defense to you. Now, there is a rule in the law that the burden of proof in self-defense rests upon the defendant. This rule means from the standpoint of the State, that the State does not have to introduce evidence of the absence of self-defense. As it is presumed that the killing was not justified, namely, that the deceased has not been guilty of anything justifying the taking of his life, the State's prima facie case is complete without proof of absence of self-defense. From the standpoint of the defendant this rule that this burden of proof rests on the defendant means that some evidence from some source must be in the case of a situation and circumstances under which the right of self-defense might be lawfully exercised.

40 Now, where the justification of self-defense springs from the claim that the deceased made an assault upon the defendant, *the first consideration is did the deceased make an assault upon the defendant, and if you are satisfied he did, then the*

*Charge*

*next consideration is whether the defendant himself prepare for and provoked the affray. If you find beyond a reasonable doubt that the defendant prepared for and intentionally provoked the affray, he cannot successfully set up the plea of self-defense, such defense is not open to him. But if you do not so find, then in order to sustain the defense of self-defense, where there appears to have been an assault on the accused, there must be evidence that there was danger to the prisoner of loss of life, or of great bodily harm, real or apprehended, on reasonable grounds, and that the danger was imminent or reasonably appeared to be so, and was such, or reasonably appeared to be such, that the prisoner could not have avoided taking the life of the decedent, and at the same time protect himself from great bodily injury. Even if the circumstances be such as to require the defendant to resort to the use of force to repel the assault, he will be inexcusable if he carried his defense beyond the bounds of reasonable necessity, or reasonable appearance of necessity, to avoid death or great bodily injury, and thereby killed deceased. Furthermore, if in order to avoid the apprehended injury he could have safely escaped by flight, he was bound to resort to that method of defense before he resorted to force of such character and extent as to take the life of the deceased.*

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Now, the accused could not make his own judgment of the necessity of slaying the deceased in order to defend himself a justification of his act. Whether justification for taking life existed, or reasonably appeared to exist, must be determined from the facts, circumstances and situation of the accused at the time, and it is the province and duty of the jury to determine that question.

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*Charge*

10 If there is evidence upon which the defense of self-defense, as explained to you, can be based, and by virtue of that evidence alone, or by virtue of that evidence with all the other evidence in the case, a reasonable doubt remains in the minds of the jury of defendant's guilt he is entitled to the benefit of it by an acquittal.

20 Now, gentlemen, you heard the evidence and I have stated the law on self-defense to you. The question is to be determined by you as to whether or not there was any self-defense. The State maintains that there was none. The State claims that this man was shot down, that he did not have any gun with him and that the defendant had no reasonable grounds to believe he had any gun with him. The State claims that the testimony of the defendant's sister and the testimony of this driver of this truck, who had been employed by the defendant, in regard to the gun, is not to be believed, and the State claims that this deceased had no gun and there was no reasonable ground for the defendant to believe he did have one. The State produces in support of its contention Dr. Martland, who says that he arrived on the scene, that he searched the body of the deceased and he found no gun. The State produces other witnesses here who appeared on the scene and found no gun there. Now, the defendant says that the deceased kicked him on the shin or on the legs, that the deceased then put his hand in his pocket, that the defendant thought the deceased was going to shoot him and that he shot the deceased and fell on top of him and after that he remembers nothing.

30  
40 The State maintains and contends that if the deceased had a gun, under those circumstances it would have been found there on the spot. The

*Charge*

State further shows, in support of its view that there was no self-defense. It further produces testimony of a young man who was an employee of the Casket Company and whose desk was at the window. This young man says he was engaged in his work. He started to use the telephone, heard a shot, looked outside and saw a man lift up his hand, turn and fall; that he then heard more shots, three or four as I recall the testimony. The State maintains that that testimony is entirely inconsistent with the story of the defendant, who says as I have already stated to you that he was kicked by the deceased on the shin, fired a shot and fell on top of the deceased. The young man says that after he saw this man who stood so near these automobiles, heard a shot and saw a man throw up his hand and knock off his hat, he saw the coat of another man and that he was so situated that he could not see the other man but the other man disappeared.

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Now then, as I said before it is for you to consider and decide whether or not there was any self-defense and whether or not there was any fight or affray and if you find that there was a fight, and an affray, then it is for you to decide whether or not that fight was prepared for and provoked by the defendant. The State maintains that if there was a fight it was prepared for and provoked by the defendant and the State says and claims that the defendant went there with a gun for that purpose, in order to kill this man.

30

The facts, of course, as I have said, are for you to decide. Then, another question will arise. If you find the defendant did act in self-defense, then the question will arise, did he carry his defense beyond the point of necessity or reasonable appear-

40

*Charge*

ance of necessity to avoid death or great bodily injury. As I have said to you if he carried his defense beyond the point of necessity, or the reasonable appearance of necessity to avoid great bodily injury, he is inexcusable.

10     The State says then, when it went into self-defense, that the condition of the man's body, with the bullet holes that were found in the back of the head, is sufficient to show that even if this man did act in self-defense in part, he carried his defense beyond the point of necessity or the reasonable appearance thereof. It is for you, gentlemen, to pass upon the facts. It is for you, as judges of the facts, to pass upon them and it is for you to decide these things.

20     Now, the defendant contends that he did not go there to start any affray or attack on the deceased, but he went there to persuade him to let his sister alone. He claims that he knew the deceased had a gun and he claims that he did not provoke any affray or fight, but that the deceased attacked him, kicking him on the legs, putting his hand in his pocket as if to shoot him and that in the belief that he was going to shoot him, he, the defendant, pulled a gun and shot once, fell on top of the  
30     deceased and after that remembers nothing else about it.

Now then it is for you to pass upon this question of self-defense. If, after considering all the testimony in the case you decide that the defense of self-defense fails, if you reject that defense, if you should do so and you also reject the defense of misadventure or accident and you are satisfied beyond a reasonable doubt that the killing was by  
40     the defendant and unlawful, then, the defendant is

*Charge*

guilty and the next question for you to determine is in what degree is he guilty, is he guilty of murder in the first degree, murder in the second degree, or manslaughter? When you come to that point, gentlemen, the answer to the question turns upon the intent with which the defendant did the act which killed the deceased, assuming you find he did and whether the killing was wilful, deliberate and with premeditation. Now, I will present that under three heads: First, if the intent was to do the deceased great or grievous bodily harm or if the intent was to kill the deceased, but the killing was not wilful, deliberate, and with premeditation, then, he is guilty of murder in the second degree. 10

Second, if the intent of the defendant was intent to kill the deceased and the killing was wilful, deliberate and premeditated, then he is guilty of murder in the first degree. 20

Third, if on the other hand the defendant's intent was to do the deceased harm, less than great bodily harm, then he is guilty of manslaughter.

Of course, gentlemen, none of the presumptions that I have referred to about second degree murder or at any time since I mentioned to you my paramount instructions, are conclusive, they are all rebuttable and it is a province of the jury to determine whether or not they have been rebutted. 30

Now, by deliberate and premeditated, the law does not mean any particular length of time need intervene between the formation of design and purpose to kill and its execution, there must not only be an intention to kill, but there must be also a deliberate and premeditated design to kill, such design must precede the killing by some appreciable 40

*Charge*

10 space of time, but the time need not be long; it must be sufficient for some reflection or consideration upon the matter for the choice to kill or not to kill and for the formation of a definite purpose to kill and if the time is sufficient for this it matters not how brief it is. These acts of the mind are mental acts; they may be performed with the degree of rapidity to which the human mind is capable of acting.

The State maintains that this defendant came from Brooklyn, New York, over here to Newark for the purpose of killing this defendant and that he brought a gun with him for that purpose and with that intent and that he executed his purpose and intent.

20 Now, then, gentlemen, the statute in this state requires that the jury, if it find a conviction of murder, shall designate whether they find murder in the first degree or murder in the second degree; so, you will please remember that if you should find the defendant guilty of murder you are to specify in which degree is your verdict.

30 In case your verdict should be murder in the first degree you will also please remember that the law now provides that every person convicted of murder in the first degree shall suffer death, unless the jury shall in their discretion and by their verdict and as part thereof upon and after a consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed.

40 In conclusion, bearing in mind first the four paramount instructions in the beginning of my charge and that they are paramount and, second, also the other portions of the charge, it becomes

*Charge*

your duty to take this case upon the entire charge and upon all the evidence in this case, not only such as may have been referred to by the Court in delivering his charge but upon all the evidence in the case.

Before asking you to retire to your room for your deliberations, the Court wishes to extend to you gentlemen its thanks for your attendance upon this case and for your consideration of it. The court realizes that for you to sit here, give up your business, stay away from your families for a number of days and without any intermission, is a great hardship. On the other hand, you may console yourselves with the fact that you are discharging a public duty. The Court regrets, under the law coming to us from many years back before this country became independent, the jury must be segregated during the progress of a capital case and that the Court has no discretion, consequently it was necessary for me to detain you day and night away from your vocation and home; I am sorry I had to do that but as I said, there is no discretion on the Court. 10

Now, then, you will take this case. You are the judges of the facts. Like the Judge of the Court you have taken an oath to decide this case upon the evidence. Of course, the Judge has not taken an oath to do that, because that is not his province, but you have taken an oath to decide the case on the evidence, which is your province and the Judge has taken an oath to discharge the duties of his office, which include the statement of the law to you. Each of us acts within his own province; each of us acts under his oath of office. We, together, make up the court, so far as decisions are concerned. You must come to a decision 30 40

*Charge*

10 upon the facts and the Judge must come to a decision upon the law. While your tenure of office is limited to the case in which you sit the Judge's tenure of office extends through a longer period, but nevertheless, we each are charged with a solemn duty and we must each discharge it without fear or favor.

So, gentlemen, I will ask you to take this case and bring in your verdict upon all the evidence.

(The jury retires.)

THE COURT: The Court declines to charge except as charged and grants an exception as to each request to charge.

20 Let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,  
Judge.

Defendant's counsel prays an exception to the Court's charge wherein the Court said all unlawful homicides are presumed to be murder in the second degree.

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

DALLAS FLANNAGAN,  
Judge.

Defendant's counsel prays an exception to that part of the Court's charge where the Court said the burden of proving self-defense is on the defendant.

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

DALLAS FLANNAGAN,  
Judge.

*Charge.*

Defendant's counsel prays an exception to that part of the Court's charge wherein the Court states that if the defendant provoked an affray he could not set up the defense of self-defense.

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

DALLAS FLANNAGAN,  
Judge.

Defendant's counsel prays an exception to that part of the Court's charge wherein the Court stated that if the defendant did not act in self-defense, then, the defense of misadventure fails.

Exception allowed; let it be sealed and it is signed and sealed accordingly. **20**

DALLAS FLANNAGAN,  
Judge.

**30**

**40**

### DEFENDANT'S REQUESTS TO CHARGE.

1. The jury are the exclusive judges of all questions of fact, and the defendant in a criminal action is entitled to a determination by the jury on the fact uninfluenced by the opinion the court may have in its own mind.

10 2. The defendant is presumed to be innocent until the contrary is proved. This presumption rests with the accused throughout the case until the moment when the jury are convinced beyond a reasonable doubt from the evidence that he is guilty.

20 3. If there is a doubt raised after due consideration of the evidence, the defendant is entitled to it; if a reasonable doubt is raised, the defendant should have it, and he should be acquitted.

4. The defendant is entitled to the benefit of a reasonable doubt, not only as to the case made by the prosecution, but as to any defense which he has interposed. Therefore, if there is a reasonable doubt in their minds whether or not the defendant has established his defense, they must give him the benefit of that doubt and acquit him.

30 5. A reasonable doubt is not a mere guess or surmise that a man may not be guilty. It is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence, a doubt for which some good reason can be given arising from the evidence.

6. Every person is presumed to be innocent until his guilt is proven beyond a reasonable doubt and this presumption is evidence in his favor, introduced by the law in his behalf.

40

*Defendant's Requests to Charge.*

7. Evidence must be so strong as to not only remove to a moral certainty every hypothesis than the defendant's guilt, but also every reasonable hypothesis of his innocence.

8. Before the jury can find the defendant guilty, they must first find that he acted with a criminal intent. And if the act charged is susceptible of two constructions, one of criminal intent and the other an innocent intent, the jury must find he acted with innocent intent and acquit him. 10

9. That it is proper for the jury to consider in connection with the guilt or innocence of the defendant in this case, what motive he may have had, if any to kill the deceased. 20

10. A disinterested witness is not necessarily entitled to any more credit than an interested witness. The whole subject of the interest of a witness and its effect upon his testimony is for the jury.

11. A person attacked is not bound to retreat if such would imperil his safety the more, or if a reasonable man under the circumstances would be justified in believing that to retreat would add to the danger. 30

12. That if the defendant was going away and that then the decedent, followed and attacked him, he had the right to defend himself and if he was then in danger of great bodily harm and there were no safe means of escape and it was necessary for him to slay his assailant, he must be acquitted.

13. That if the defendant had reasonable grounds to believe that he was in great peril and 40

*Defendant's Requests to Charge.*

10 in imminent danger of great bodily harm and acting on that belief he killed the decedent, and it was such a belief as a reasonable man would entertain from all the surrounding fact and circumstances at that time, though it afterwards appears that the appearances of great bodily harm and imminent danger was false, he must be acquitted.

14. The Court instructs you that reasonable doubt may arise upon the issue as to whether the State has made out its case or not or upon the question as to whether the defendant acted in self-defense or not.

20 15. The jury is instructed that the defendant is entitled to a verdict of acquittal if you find from the evidence that he shot the deceased under an honest belief that he was then in danger of great bodily harm from the deceased: if the evidence creates a reasonable doubt in your minds as to whether the defendant did or did not, from the circumstances and the situation in which he then was, really believe that he was then in danger of great bodily injury from the deceased at the time he shot him then the defendant would be entitled to a verdict of not guilty.

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MOTION TO SET ASIDE VERDICT  
and

ARREST OF JUDGMENT.

ESSEX COUNTY COURT OF OYER  
AND TERMINER.

Tuesday, January 7, 1930.

10

STATE OF NEW JERSEY,

—vs—

PAUL CAPPIELLO,

On Indictment  
No. 2.

Dec. T. 1929  
for

MURDER.

20

Appearances as before stated.

MR. PRICE: I move to set aside the verdict and move for a new trial and in arrest of judgment on the ground the verdict is contrary to the law and against the weight of the evidence and on the ground of all the irregularities of the trial.

THE COURT: Motion denied.

30

40

## CERTIFICATE OF COURT STENOGRAPHER

ESSEX COUNTY COURT OF OYER  
AND TERMINER.

10

STATE OF NEW JERSEY,

*vs.*

PAUL CAPIELLO

On Indictment  
No. 2, Dec. T. 1929  
for  
MURDER.

20

I, Harold T. Cook, an official stenographer of the Essex County Court of Oyer and Terminer, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by myself and other stenographers connected with the Essex County Courts at the trial of the above mentioned case, which trial was held before the Honorable Dallas Flannagan, Presiding Judge of the Essex County Court of Oyer and Terminer in and for the County of Essex, and a jury, beginning on December 17, 1930 and ending on December 19, 1930, at Newark, New Jersey.

HAROLD T. COOK.

30

Dated:  
April 23, 1930.

40

## CERTIFICATE OF JUDGE.

ESSEX COUNTY COURT OF OYER  
AND TERMINER.

---

STATE OF NEW JERSEY,

*vs.*

PAUL CAPIELLO

---

On Indictment  
No. 2, Dec. T. 1929  
for  
MURDER.

10

I, Dallas Flannagan, Presiding Judge of the  
Essex County Court of Oyer and Terminer and the  
Judge who presided over the aforesaid cause,  
certify that the above printed book contains the  
entire record of the proceedings had upon the trial  
of the said cause, and that the same is returned  
by the plaintiff in error therein with the writ of  
error bringing up the bill of exceptions signed and  
sealed in this cause.

20

DALLAS FLANNAGAN,  
Judge.

Dated:  
April 23, 1930

30

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## STIPULATION.

ESSEX COUNTY COURT OF OYER  
AND TERMINER.

10	STATE OF NEW JERSEY,  —vs—  PAUL CAPPIELLO, <i>Defendant.</i>	}	STIPULATION.
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Whereas, the appeal now pending is to be argued on matters of law only, and

20       Whereas, there is no apparent necessity for the introduction of the exhibits before the Court of Errors and Appeals, therefore

It is hereby stipulated by and between William M. Unterman, Attorney for Plaintiff in error, and Joseph L. Smith, for the State, that the exhibits produced at the trial of this issue except Exhibits S-18 and S-19 need not be incorporated in the state of the case that is to be presented to the Court of Errors and Appeals.

30                               WILLIAM M. UNTERMANN,  
   *Attorney for Plaintiff in Error.*  
  
   JOSEPH L. SMITH,  
   *Prosecutor of Essex County.*

Dated: April 23, 1930

## EXHIBIT S-19.

## DEPARTMENT OF PUBLIC SAFETY

Police Division

## DETECTIVE BUREAU

Copy of statement original taken in Italian.

Newark, N. J., October 25, 1929;

10

Voluntary Statement of Paul Cappiello.

Residence 273 Sackett street, Brook-  
klyn, N. Y.

Occupation Laundryman.

Age 40 Years.

Statement made to Dets. Peter La Bagliva  
and Humbert Berardi.

On the day of October 9th, 1929, in the morn-  
ing while passing through Hoyt Street, Brooklyn  
N. Y. I stooped in front of the grocery store of  
my brother-in-law Vito Impagliazza, at 241 Hoyt  
Street, I entered in the grocery store and saw that  
my brother-in-law Vito Impagliazza, my mother  
and my brother Gasper Cappiello were crying, I  
asked them what was the trouble and why were  
they crying and I was informed that my sister  
Mrs. Marie Impagliazza had run away with one  
Michael Iaccarino who lived at #242 Hoyt Street,  
it was agreed that we wait for some news from  
my sister Marie, in the meantime I went to visit  
the wife of Iaccarino several times to see if she  
had received any news from her husband, the  
wife told me that she had received several phone  
calls from her husband, but that he had never  
told her where he was located and that when-  
ever she asked him if Marie was with him he  
would tell her that he was all alone.

20

30

40

*Exhibit S-19.*

10 Then two or three days later I went into the store on the corner of Hoyt Street and Douglass Street, to purchase a pack of cigarettes and when I entered I saw Iaccarino's wife talking on the phone. I heard that she was talking to her husband because She said, "Michael watch yourself that the brother of Maria" after this I went near the telephone booth I opened the door and asked Mrs. Iaccarino with who was she talking and she answered with a friend of mine, at the same time she wanted to close the phone but did not have time because the receiver fell off the hook, so I grabbed the receiver and asked who was it that was talking and he replied "Its Michael Iaccarino". I then said to him, the people are talking it is best for you to return to your home and your family, 20 Iaccarino replied "Now I am working and I cannot come home" and I said, for charity sake the quicker you come home the less the people will talk he closed the phone saying that he would phone me again and that he would let me know something.

30 Two days later my sister phoned me saying not to worry that she was working and that on the following night she would come to visit me, I told her that I was very happy to hear from her and that I would feel glad to see her on the following night and she closed the phone.

40 Friday October 18th, 1929 as per appointment made at about 7.30 P. M. I went to meet my sister Maria at Boro Hall, I waited a few minutes and when Maria came I got a taxi cab and we went to my home at 273 Sackett Street, when we arrived at my home we found my wife and my children there, I asked Maria where she had been all this

*Exhibit S-19.*

time and she told me that she had been working in a factory and that she was earning \$15.00a week, I wanted to know where this factory was located but instead my sister did not want to tell me where this factory was located, I then asked her again for the address but she told me that she did not have it, I grabbed her hand bag from her hand so that I could see if she had an address or a phone number and when I opened the hand bag I found a paper written with the address where Maria was living at 11½ Grant Street, Newark, N. J. to relieve of my curiosity I took this paper with the purpose of going over to see if Maria was living with a good family because when Maria Phoned me I asked her how long would it take to go where she said and she said about two hours, the reason that on the following day I had to go to work I decided to come to Newark on that night, I left Maria at my home in company of my wife and my mother and started for Newark (My mother came during the time that we were talking).

10

20

Continued

## Part Two

At about 1.00 A. M. of Saturday October 19th, 1929. I left my home and went to the home of my mother where I took an automatic revolver that my mother kept in a trunk I placed the revolver in my coat pocket left the house taking a trolley car of the Court Street line as far as the Boro Hall, where I took a subway and arrived at Park Place and at this station I took a train for Newark N. J. I believe that it was about 2.00 A. M. when I reached Newark at about 2.30 A. M. when I got out of the station of the Tubes I asked a man

30

40

*Exhibit S-19.*

for the direction to go to Grant Street, this man directed me by saying to keep right on straight for about six or seven blocks after which I found Grant Street and then I went to look for number 11½ Grant Street, I found the address and kept  
10 on walking circling around several blocks, then I went into a lunch wagon and had a cup of coffee and a piece of cake, while I was in the lunch wagon I asked the man in charge if he knew if there was a factory in that vicinity but being that I was unable to explain myself he did not understand me.

I left the lunch wagon I believe that it was then about 6.30 A. M. Saturday October 19th, 1929. I returned to Grant Street and went direct to 11½ Grant Street, I asked a woman who was standing on the steps in front of this house if she could tell me if there was a woman living there named Maria Rino at this address and she said,  
20 "Yes she lives here with a man" I then showed her a photograph of my sister and asked this lady if she knew her, then this woman called the landlady of the house an old lady the one that I saw here today, and I asked her if this lady was living here showing her a photograph of my sister Maria, as soon as she saw the photograph she said  
30 "Yes she is living here with a man" I then told the landlady of this house that this man was the father of twelve children and that in case he comes; I stopped talking because at the time I heard a whistle I turned around and saw Michael Iaccarino who was walking on the sidewalk and the same side where I was and I saw that he signaled with his finger that he wanted to speak to me, I left the old lady saying Pardon me and went towards Michael because he had called me, we met  
40 face to face with Iaccarino right in front of a

*Exhibit S-19.*

garage and I said to him Good morning and he replied, "Come here that I want to speak to you" we entered the door of the garage and he grabbed me by the lapel of my coat and said "You must not come here anymore do you understand?" at the same time he placed his hand in his pocket, when I saw this I got scared and I pulled out my revolver and fired several shots towards Michael Iaccarino; then seeing myself free I threw the revolver on the ground and ran away going through Grant Street, as far as the corner where I saw a taxi cab which I called to stop and told him that I wanted to be taken to Brooklyn N. Y. I arrived in Brooklyn at 8.30 A. M. I got off the cab at Clinton Street and De Graw Street, I paid the Chauffeur of the taxi cab \$8.00 and went direct to my home where I got two handkerchiefs and without saying anything to my wife of what had happened I went away going about the streets and subways for several days and yesterday I phoned my family that I wanted to give myself up to the Police and my family spoke with a lawyer and I gave myself up.

10

20

Today accompanied with three Detectives we went to the garage near 11½ Grant Street, to see if we could find the revolver where I threw it away the night of the crime but we could not find it, furthermore I showed them how I had shot Iaccarino.

30

This statement has been made of my own free will and without any promise or threats and I did not sign it because I have been advised by my counsel to sign no statement.

Witnessed by

Peter La Bagliva.

Humbert Berardi.

40

## EXHIBIT S-18.

At a term of the County Court, held  
in and for the County of Kings, at  
120 Schermerhorn Street, in the  
Borough of Brooklyn, City of New  
York, on the 24th day of July 1911

10 Present:

Hon. Norman S. Dike,  
County Judge.

THE PEOPLE OF THE  
STATE OF NEW YORK,

*against*

20 PAOLO CAPPIELLO.

Indicted for Rape second degree; Assault second degree; Abduction and convicted of Rape second degree upon his own confession and plea of guilty

30 Being personally present and sworn says:  
My true name is Paola Capiello. I am 21 years of age. I was born in Naples, Italy. I reside at 34 Degraw St. I am a Longshoreman. I am not married; I can read and write; I am a Catholic; my parents are living; I am temperate. I have never previously been convicted of a felony.

Being asked and he having nothing to say why the judgment of the law should not be pronounced against him, the Court pronounced Judgment as follows:

10 Whereupon, it is Ordered and Adjudged, by the Court, that the said Paolo Capiello for the felony

*Exhibit S-18.*

aforesaid whereof he is convicted be imprisoned in the New York State Reformatory at Elmira, there to be dealt with according to law.

STATE OF NEW YORK  
COUNTY OF KINGS ss.

10

I, FRED G. LEMMERMANN, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being a Court of Record) DO HEREBY CERTIFY that I have compared the annexed with the original record of conviction filed in my office July 24, 1911 and that the same is a true transcript thereof and of the whole of the original.

20

In Testimony whereof I have hereunto set my hand and affixed the seal of said County and Court this 5th day of December 1929.

FRED G. LEMMERMANN, *Clerk.*

A TRUE EXTRACT FROM THE MINUTES.

FRED G. LEMMERMANN, *Clerk.* 30

40

## ASSIGNMENTS OF ERROR.

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

10

STATE OF NEW JERSEY,  
*Defendant-in-Error,*  
—vs—

PAUL CAPPIELLO,  
*Plaintiff-in-Error.*

On Error to  
Essex County  
Court of Oyer  
and Terminer

ASSIGNMENTS  
OF ERROR.

20

Afterwards, to wit, on the return day of the Writ of Error issued in this cause, the said Paul Cappiello, by Joseph Kraemer, of counsel with William M. Untermann, his attorney, says that in the record and proceedings aforesaid, and also in the matters recited and contained in the bill of exceptions, and also in giving of the verdict and the judgment aforesaid, there is manifest error in this respect, to wit:

30

1. That the trial court, over objection on the part of the defendant, permitted the State to ask, and the witness, Mary Impagliazio to answer the following question: "And when you got off where did you go?" To which the witness answered and testified that when she got out she got a taxi-cab and told him to drive her back to Newark.

2. That the trial court, over objection on the part of the defendant, permitted the State to ask, and the witness, Mary Impagliazio to answer the following question: "Where did you go in Brooklyn?" To which the witness testified "I just went a little around to see if I could see Mike."

40

3. That the trial court overruled the question by the defendant on cross-examination of the

*Assignments of Error.*

State's witness, Leonard Epp, "But didn't you sign a written statement for Mr. Schaefer, of the Prosecutor's office?"

4. That the trial court permitted the State's witness, Vanzio Calise, to testify over objection on the part of the defendant in answer to the following question: "What happened after you got there?" 10

5. That the trial court overruled the question put to the defendant by his counsel: "Isn't it a fact that you wanted to marry the girl before you pleaded guilty and after you pleaded guilty?"

6. That the trial court overruled the question put to the defendant by his counsel: "Isn't it a fact that when you came out of Elmira Reformatory you got your mother and went to the home of the mother of the girl who was the prosecutrix in the case and got her and married the girl?" 20

7. That the trial court overruled the question put to the defendant by his counsel: "Isn't it a fact that she today is your wife?"

8. That the trial court on rebuttal for the State, over objection by the defendant, admitted in evidence Exhibits S-17, the defendant's alleged confession. 30

9. That the trial court on rebuttal for the State, over objection by the defendant, permitted the State to ask and the witness, Humbert Berardi to answer the following question: "And did she say she kept a revolver in her trunk in her room and that several days ago her son appeared in a state of excitement and hollering that he was going to get Michael Iaccarino?" 40

*Assignments of Error.*

10 That the trial court on rebuttal for the State, and over objection by the defendant, permitted the State to ask and the State's witness, Josie Iaccarino to answer the following question: "And what, if anything, did Paul Cappiello say to you at that time? A. He said that if my husband didn't bring back his sister, he was going to shoot my husband."

20 11. That the trial judge erroneously charged the jury as follows: "Now, where the justification of self-defense springs from the claim that the deceased made an assault upon the defendant, the first consideration is did the deceased make an assault upon the defendant. And if you are satisfied he did then the next consideration is whether the defendant himself prepared for and provoked the affray."

30 WHEREFORE said plaintiff-in-error, Paul Cappiello, prays that the judgment and sentence aforesaid, by reason of the aforesaid errors and all other errors appearing in the record and proceedings aforesaid, and upon the giving of the judgment, and passing of sentence aforesaid, be reversed, cancelled and held for nothing, and that the said Paul Cappiello may be restored to all things by him lost on occasion thereof.

WILLIAM M. UNTERMANN,  
*Attorney for Plaintiff-in-Error.*

JOSEPH KRAEMER,  
*Of Counsel.*

## REASONS FOR REVERSAL.

NEW JERSEY COURT OF ERRORS  
AND APPEALS.STATE OF NEW JERSEY,  
*Defendant-in-Error,**vs.*PAUL CAPPIELLO,  
*Plaintiff-in-Error.*On Error to  
Essex County  
Court of Oyer  
and Terminer

10

REASONS FOR  
REVERSAL.

NOW comes the plaintiff-in-error, Paul Cappiello, by Joseph Kraemer, of counsel with William M. Untermann, his attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error and said plaintiff-in-error says that said judgment should be reversed and assigns the following reasons and causes for reversal:

20

1. That the learned trial court permitted Mary Impagliazio, a witness for the State, to testify to her acts, transactions and conversations with the deceased not in the presence of the defendant, and particularly that after abandoning her husband she eloped with the deceased, spent the night with him at the Knickerbocker Hotel in New York, and thereafter came to Newark, New Jersey, where she and the deceased engaged rooms and lived together as husband and wife. That she then went to Brooklyn, and returned to Newark, (after which the killing ensued), all of which the State introduced for the express purpose of establishing a motive on the part of the defendant for killing the deceased, and all of which acts and conversations and transactions were not in the presence of the defendant, and were not binding upon him, which testimony is too extended to set forth herein in greater detail.

30

40

*Reasons for Reversal.*

10 2. That the trial court, over objection on the part of the defendant, permitted the State to ask, and the witness, Mary Impagliazio to answer the following question: "And when you got off where did you go?" To which the witness answered and testified that when she got out she got a taxi-cab and told him to drive her back to Newark.

3. That the trial court, over objection on the part of the defendant, permitted the State to ask, and the witness, Mary Impagliazio to answer the following question: "Where did you go in Brooklyn?" to which the witness testified, "I just went a little around to see if I could see Mike."

20 4. That the trial court overruled the question by the defendant on cross-examination of the State's witness, Leonard Epp, "But didn't you sign a written statement for Mr. Schaefer, of the Prosecutor's office?"

5. That the trial court permitted the State's witness, Vanzio Calise, to testify over objection on the part of the defendant in answer to the following question: "What happened after you got there?"

30 6. That the trial court overruled the question put to the defendant by his counsel: "Isn't it a fact that you wanted to marry the girl before you pleaded guilty and after you pleaded guilty?"

7. That the trial court overruled the question put to the defendant by his counsel: "Isn't it a fact that when you came out of Elmira Reformatory you got your mother and went to the home of the mother of the girl who was the prosecutrix in the case and got her and married the girl?"

40

*Reasons for Reversal.*

8. That the trial court overruled the question put to the defendant by his counsel: "Isn't it a fact that she today is your wife?"

9. That the trial court on rebuttal for the State, over objection by the defendant, admitted in evidence Exhibit S-17, the defendant's alleged confession. 10

10. That the trial court on rebuttal for the State, over objection by the defendant, permitted the State to ask and the witness, Humbert Berardi to answer the following question: "And did she say she kept a revolver in her trunk in her room and that several days ago her son appeared in a state of excitement and hollering that he was going to get Michael Iaccarino?" 20

11. That the trial court on rebuttal for the State, and over objection by the defendant, permitted the State to ask and the State's witness, Josie Iaccarino to answer the following question: "And what, if anything, did Paul Cappiello say to you at that time? A. He said that if my husband didn't bring back his sister, he was going to shoot my husband." 20

12. That the trial judge erroneously charged the jury as follows: "Now, where the justification of self-defense springs from the claim that the deceased made an assault upon the defendant, the first consideration is did the deceased make an assault upon the defendant. And if you are satisfied he did then the next consideration is whether the defendant himself prepared for and provoked the affray." 30

WILLIAM M. UNTERMANN,  
*Attorney for Plaintiff-in-Error.*

JOSEPH KRAEMER,  
*Of Counsel.* 40

## AFFIDAVIT OF SERVICE.

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

10	STATE OF NEW JERSEY, <i>Defendant-in-Error,</i> —vs— PAUL CAPPIELLO, <i>Plaintiff-in-Error.</i>	On Error to Essex County Court of Oyer and Terminer  <i>AFFIDAVIT          OF SERVICE.</i>
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STATE OF NEW JERSEY      ss.  
 COUNTY OF ESSEX.

20      GEORGE KESSELHAUT, being duly sworn according to law on his oath deposes and says:

1. That I am an attorney at law of the State of New Jersey, associated with William M. Unter-  
 mann, Attorney for the plaintiff-in-error in the  
 above-entitled cause.

30      2. That on Thursday, May 1st, 1930, I did serve upon Joseph L. Smith, Prosecutor of Essex County, a copy of the assignment of error and a copy of the reasons for reversal in this cause, by handing the said copies to Harold Fisher, legal assistant to the prosecutor.

Sworn and subscribed to  
 before me this 1st day of  
 May, 1930.

GEORGE KESSELHAUT

JENNIE MICHELSTEIN,  
*A Notary Public of New Jersey.*

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NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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STATE OF NEW JERSEY,  
*Defendant-in-Error,*

—vs—

*Plaintiff-in-Error.*  
PAUL CAPIELLO,

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On Error to  
Essex County  
Court of Oyer  
and Terminer

MEMORANDUM  
IN BEHALF OF  
PLAINTIFF-  
IN-ERROR.

FACTS.

The defendant was indicted and convicted of murder in the first degree, and the jury recommended life imprisonment. Application was made to the Chancellor for the allowance of a Writ of Error out of the New Jersey Supreme Court which was refused, and a Writ of Error sued out of the Court of Errors.

The State's contention was that the defendant shot and killed one Michael Iaccarino at Newark on October 19th, 1929 to avenge the betrayal of the defendant's sister, Mary Impagliazio, who left her husband in Brooklyn, New York, and came to Newark with the deceased, where she lived with him as man and wife. The defendant's contention was that he came to Newark to persuade the deceased to go back to Brooklyn to his wife and family, so that his sister would go back to her husband, and threatened the deceased that if he did not do so, he would have him arrested for white slavery; that as a result the deceased attacked the defendant several times, then put his hand into his pocket and told him "I am going to take your brains out", and having been informed and believing that the deceased had a gun in his pocket,

he tried to run away, at the same time pulling his own pistol from his pocket, and the pistol went off, after which he did not know what happened. The jury found the defendant guilty and recommended life imprisonment. This appeal is prosecuted under the 136th and 137th sections of the Criminal Procedure Act, and assignments of error and reasons for reversal have been filed presenting the alleged errors in ruling upon the admission of testimony and in the charge to the jury.

The assignments of error and reasons for reversal may be classified, for the purpose of argument, as follows:

1. That the Court permitted Mary Impagliazio, the defendant's sister with whom the deceased eloped to Newark, to testify to acts, transactions and conversations with the deceased not in the presence of the defendant, for the purpose of establishing a motive on the part of the defendant, and particularly that her husband discovered the deceased under her bed in their home in Brooklyn, after which she and the deceased eloped, first withdrawing her money from the Morris Plan Bank, in Brooklyn; that they came to Newark and lived as husband and wife, she working there in a factory; that she then went back to Brooklyn, but returned to the deceased in Newark, immediately after which the defendant came to Newark and the killing resulted, for which the defendant was indicted and convicted. Much of this testimony was admitted without any objection on the part of the defendant, and is made the basis for the first, second and third reasons for reversal, and the first and second assignments of error.

2. That on the cross-examination of Leonard Epp, a witness for the State, who testified that he saw the killing and described how the killing oc-

curred, he was asked for the purpose of contradicting him "Didn't you sign a written statement for Mr. Schaefer of the Prosecutor's office" which question on objection by the State was overruled, and that thereby the defendant was prevented from discrediting said witness by showing that he had made prior contrary statements. This is made the basis of the fourth reasons for reversal and the third assignment of error.

3. The defendant testified in his own behalf and on cross-examination the State showed that he had previously been convicted in New York for statutory rape, and the defendant attempted to explain the conviction by offering to prove that he offered to marry the girl, and in fact that his present wife was the prosecutrix in that case, all of which offers on behalf of the defendant were overruled on objection by the State. This is made the sixth, seventh and eighth reasons for reversal, and the fifth, sixth and seventh assignments of error.

4. That the State was permitted on rebuttal to introduce the defendant's alleged confession, Exhibit S-17, and to prove by the State's witness, Humbert Berardi, that the mother of the defendant had stated to him that she kept a revolver in her trunk and that several days before the killing the defendant appeared in a state of excitement and threatened that he was going to get Michael Iaccarino, the deceased, and by the State's witness, Josie Iaccarino, the deceased wife, that shortly before the killing the defendant had told her that if her husband did not bring back his sister he was going to shoot her husband. This is made the basis of the ninth, tenth and eleventh reasons for reversal and the eighth, ninth and tenth assignments of error.

5. That the learned trial judge erroneously charged the jury: "Now, where the justification of self-defense springs from the claim that the deceased made an assault upon the defendant, the first consideration is did the deceased make an assault upon the defendant. And if you are satisfied he did then the next consideration is whether the defendant himself prepared for and provoked the affray." A general exception was taken to the charge and this part of the charge is made the basis of the twelfth reasons for reversal and the eleventh assignment of error.

#### POINT I.

The element of motive was of determining importance in this case, for if the defendant left his home in Brooklyn for the purpose of avenging the betrayal of his sister by the deceased, then the defendant's contention that the killing was in self-defense and by misadventure was completely destroyed. And so the State proceeded to prove that this was the compelling motive that brought the defendant to Newark on the morning of October 19th, 1929, not merely for the purpose of fixing the degree of murder should the defendant be convicted, but for the purpose of proving that the defendant was the aggressor, and thus to nullify his plea of self-defense and misadventure. The State was entitled to prove this motive, but only by legal evidence. It did prove such a motive, as is manifest by the jury's verdict, by the testimony of Mary Impagliazio, (page 58 State of Case). She is the defendant's sister, and the one with whom the deceased eloped to Newark, and her testimony, direct, cross and redirect, consumes sixty pages, from page 58 to page 118 of the State of Case. Almost all of it details her affair with the deceased both in Brooklyn and in Newark, none

of which was in the presence or in the hearing of the defendant, and not connected with the defendant by any proof of a knowledge brought to the defendant. She was allowed to testify to her relations with the deceased and her liaison with him in her own home; to the fact that the deceased was discovered by her husband under her bed; to the fact that after he was so discovered by her husband, he terrified the husband, who ran upstairs; that under the threat that unless she went out with him there would be a murder, she left her home with the deceased and went to a hotel in New York, and from there left for Newark, where they took rooms at No. 11½ Grant Street, and lived as husband and wife; that before she left New York she drew out Thirteen Hundred Fifty (\$1350.00) Dollars from the Morris Plan Bank; that on the 18th day of October, 1929, she and the deceased left for Brooklyn, the deceased to call up his son, she to return to her people and stay there. (Page 91 State of Case). It is true that on this occasion she met her brother, the defendant, and that he found out where she was living, that he tried to keep her in Brooklyn, and that he then said "Now I have got the address, and I can follow Mike and have him arrested (State of Case P. 100, L. 11). But there is no evidence to show that she told her brother about the occurrences at her home between the deceased and her husband on the night she left, and the fact that she lived with the deceased at the hotel and at the address in Newark. She then testified that she returned to Newark, but went again to Brooklyn to locate the deceased, and came back to Newark on the morning of the 19th of October, 1929, at which time she saw her brother, the defendant, on the street, near the place where she was living; that she instructed the taxi-cab man to talk to her brother, the defendant, and bring him back to Brooklyn

(page 105 State of Case) ; that she returned to the house at No. 11½ Grant Street, spoke to the mistress, and after that found the deceased lying on the ground. This in substance is her testimony on direct, and furnishes as against the defendant the most compelling motive for murder known to man—the dishonoring of the women of one's family. It was introduced for that purpose by the express statement of the assistant prosecutor. (Page 99 State of Case, line 3). It was very important for the State to prove that the defendant had a motive to kill the deceased.

“ Where it is admitted that the defendant killed the deceased, it being claimed that the act was done by accident or in self-defense, the question of motive may be determinative of the case.” HOMICIDE, 13 R. C. L. page 762.

The same rule, in different form, is laid down in the Courts of our State, in the case of STATE vs. EHLERS, 119 Atl. page 15, 98 N. J. Law 236. Judge White, speaking for the Court of Errors and Appeals, on page 241 says:

“ Where, therefore, the fact of a willful, deliberate, and premeditated killing is established in each of its three essential elements, the question of motive as a feature of the prosecution becomes unimportant. It is where there is an absence or uncertainty of proof upon any one or more of these three elements that the proof or absence of proof by the state of motive becomes important, not because it is an essential element of the crime, but because it is often exceedingly helpful in determining whether or not the crime was in fact committed.”

The killing was admitted. The defendant contended that it was in self-defense and by misadventure. The State's insistent was that the defendant came to Newark for the purpose of avenging the outrage that had been perpetrated upon his family by the deceased. To do that it showed that the deceased had wantonly entered the home of the defendant's sister, and there found by her husband under her bed, and under a threat that there would be a murder compelled her to leave with him, and to live with him in New York and in Newark. There was ample proof of facts which would supply a powerful motive for the defendant to kill the deceased, but all of these facts involving the relations between the defendant's sister and the deceased, her movements from the time she left her home and took up living with the deceased, and the movements of the deceased were all out of the presence, hearing and sight of the defendant, and this evidence was undoubtedly hearsay. It requires no argument to this Court to demonstrate that this was hearsay evidence, and proof of motive is no exception to the hearsay rule, which condemns evidence of facts not in the presence and hearing of the person to be charged. On this subject the author of the subject HOMICIDE, in 21 Cyc. page 915, says:

“ Although the State, in a prosecution for murder, is under no obligation to show a motive for the commission of the crime charged, evidence tending to show the existence or non-existence of a motive is admissible. It is essential, however, that the facts upon which the motive is assigned shall be within the knowledge of the party accused.”

And in 30 Corpus Juris, page 181, under the title of HOMICIDE, the rule is repeated with support-

ing citations from different jurisdictions, among which we have selected, PEOPLE v. OSMOND, 138 New York 80, 33 N. E. 739. There the defendant was charged with the murder of his wife, and the defense was insanity or temporary insanity. The defense sought to prove the defendant's state of mind by evidence of the infidelity of his wife. This was not allowed, and the ruling of the trial judge was one of the points argued on the appeal. Judge Peckham wrote the opinion for the New York Court of Appeals sustaining the conviction, and with respect to this point, speaking for the Court, said:

“ Counsel for the defendant claims evidence should have been permitted, even though the defendant was ignorant of it, which tended to show the wife and Burchell were maintaining illicit relations. Everything known by others, and which was communicated to defendant, the court allowed to come in, for the purpose of bearing upon the state and strength of mind of defendant at the time of the killing. Any particular fact of which the defendant was ignorant could have had no effect upon his mind, and was inadmissible. Most of the material facts bearing upon the relation existing between the wife and Burchell, which were known to others, were also shown to have been known to defendant. They were, in reality, not controverted or disputed. The further fact that they had been found in bed together was only known by defendant, and he testified to it without objection. The defendant did, in truth, obtain the benefit of everything that was known as to the relations between his wife and Burchell. In strictness, however, evi-

dence of which he was ignorant was inadmissible on this subject."

The rationale of that case, although the circumstances were different, applies with equal force here. Motive is a state of mind and the facts upon which motive is predicated must be known to the defendant, for if he is ignorant of the facts, they could have had no effect upon his mind, and evidence thereof was inadmissible.

It is true that no objection was made to the entire line of testimony. The defendant objected twice to parts of this general line of testimony. Each of the objections was overruled by the learned trial judge and the answers admitted and exceptions taken. On her direct examination Mary Impagliazio was asked "Where did you go in Brooklyn?" (State of Case P. 102, L. 14). An objection was made in behalf of the defendant and was overruled, and the witness was permitted to testify, "I just went a little around to see if I could see Mike". And again she was asked on direct examination, "And when you got off where did you go?" (page 101 State of Case) to which an objection was made on behalf of the defendant, the objection overruled, and the witness permitted to testify that she got a taxi-cab and told him to drive her back to Newark.

It is true that counsel should have objected to the whole line of this testimony and reserved an exception to the Court's ruling, but we respectfully submit that where the error is so manifest and the harm sustained by the defendant so clear, that the defendant is entitled to the beneficent provision of Section 137 of the Criminal Procedure Act, and although no objection was made and exception allowed, the Court should remedy the wrong and reverse the conviction.

## POINT 2.

*The trial court erred in overruling the question put to the State's witness, Leonard Epp on his cross-examination, "But didn't you sign a written statement for Mr. Schaefer, of the prosecutor's office?"*

Leonard Epp was called by the State. He was an employee of the Morris Casket Company, whose plant is at No. 7 to 11 Grant Street, adjoining the premises of Mrs. Hitrick, where the deceased and the defendant's sister were living. He was at a desk near the window overlooking the yard of the Morris Casket Company premises in which the shooting occurred. He testified that on the morning of October 19th, 1929, while working at his desk he heard a shot. He looked through the window and he saw this man (meaning the deceased) falling, and that after that he saw a corner of a man's coat as he turned and went out of the yard (page 131-132 State of Case); that he heard possibly two or three shots and the man yelling (meaning the deceased), and upon being asked what if anything he saw the man who was falling do, he said:

"A Nothing.

Q Did you see his hat? A I seen his hat go off, yes.

Q When did his hat go off? A As he was standing his left arm flew up and hit it.

Q Was that before or after the second shot had been fired, or do you know? A I couldn't say."

On cross-examination he testified (page 137 State of Case, line 31):

“Q And did you see what kind of a top coat the man who ran out of the alley wore?  
A Grey.

Q Was it a top coat? A I couldn't say.”

Again he is asked, (State of Case, p. 138, L. 30.)

“Q Did the man who ran out have a grey coat on? A Yes, sir.

Q Are you sure it was a grey coat?  
A Yes, sir.”

The testimony of an eye witness to the killing is necessarily of grave importance both to the State and to the defendant. It was very detrimental to the defendant because it presented a state of facts that were contrary to the defendant's version on the witness stand of what occurred. The defendant in his testimony (page 221 State of Case) swears that when he met the deceased he remonstrated with him about his sister; that the deceased kicked him and spit in his face, and then ensued what is best described by his own testimony (page 199 State of Case, line 8) :

“A I say ‘What's the matter, you do that for, come on home and have a nice dinner and forget and be good friends just the same’. He says ‘You look for me up here’, and gave me another kick and spit in the face. I say ‘What do you do that for? Come on home and be nice man and forget the argument’; he says ‘Remember once I told you if you know I have a kid from my sister-in-law, I ruin my daughters’, he says ‘Do you remember that I killed the man and threw him overboard. I got your sister's money, the jewelry or money of your sister’, and he says ‘I am going to

make a whore of her'. I say 'all right, come on home' and he spit in my face and kicked me a couple of times. I pushed him away and he hit me a punch in the mouth and I have marks here I got from the punch in the mouth, and he broke away and he says 'I am going to take your brains out now'."

After which the deceased put his hand in his right-hand overcoat pocket and the defendant, believing that he had a gun, took his own out and a bullet went off, after which the deceased grabbed him, whereupon he fell down and the deceased fell down with him, and he did not know what happened after that.

This of course presents a version of the occurrence entirely different from that testified to by Leonard Epp, and it was therefore important for the defense to destroy the value of Mr. Epp's testimony by discrediting him, if possible, and to that end the defendant sought to show that the witness, Epp, had previously made a statement which was contrary to the testimony at the trial. And so on cross-examination this witness is asked, "Did you make the statement to Mr. Schaefer, of the prosecutor's office?" and he answered "No, sir." And he is again questioned "Didn't you sign a written statement for Mr. Schaefer, of the prosecutor's office?" (page 140 State of Case, line 10,) et seq. Whereupon the prosecutor objects, and the Court sustains the objections, and the following colloquy occurs between the Court and counsel with respect to the question:

"MR. CONLON: I object. There can be only two purposes to this question.

THE COURT: Sustain the objection.

MR. PRICE: Your Honor will not let me ask him if he signed a written statement?

THE COURT: Not to the Prosecutor's Office.

MR. PRICE: Mr. Shaffer is a detective.

THE COURT: I know who Mr. Schaffer is.

MR. PRICE: May I, for the purpose of the record ask the question?

THE COURT: You have asked it and I have ruled on it, and you haven't excepted.

MR. PRICE: I ask an exception.

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

The defendant was thereby deprived of the very important right of discrediting the testimony of this witness by laying a foundation for his contradiction in two material respects—first, in showing that he did make a statement to Mr. Schaefer contrary to his testimony that he did not, and secondly, to show that the statement which was made to Mr. Schaefer was in important particulars contrary to his testimony in court. Had the defendant been allowed the opportunity of discrediting the witness Epp in this way, he would have had the right to request the Court to charge the jury that if they found that Epp had testified falsely in any respect they could disregard his entire testimony on the legal maxim of falsus in uno falsus in omnibus. This right to contradict and to discredit the witness Epp, and to have the jury instructed that they could disregard his entire testimony, the defendant was deprived of merely

because the statement was made to a prosecutor's officer. The ruling of the court was directly contrary to that laid down by the Supreme Court in *STATE v. SILVERMAN*, 100 N. J. Law 249. There the defendant was charged with embezzlement. The complaining witness was one Gulka, and on his cross-examination he was asked whether he remembered appearing before the grand jury on this case, and then the question was propounded: "Do you remember telling the grand jury \* \* \*". The question was interrupted by the trial judge with the statement: "I have ruled that anything that he said before the Grand Jury is not to be divulged here." The conviction was reversed because of this ruling of the Court.

Mr. Justice Kalisch wrote the opinion for the Supreme Court, and it was held:

" The situation presented here is that the plaintiff-in-error was denied the right to cross-examine a witness on an essential matter pertaining to his defense. It was incumbent upon the prosecution, in order to convict the defendant, to prove that he fraudulently converted the money. The defendant was therefore entitled to ask the question of the witness 'Do you remember telling the Grand Jury that the defendant had offered to return to you \$790. but you refused to accept the same'? The witness might have answered that he did or that he did not. If he had answered in the affirmative, the admission would tend to affect his credibility."

Justice Kalisch then goes on to quote the case of *REGINA v. GIBSON*, 1 Carr. & Marsh (41 Eng. C. L. Rep.) 364, and then as follows:

" It is true that in the present case the

question put to the witness was not completed, but its completion was prevented by the learned judge, who declared in the most emphatic manner that he would not allow any questioning for the purpose of laying a foundation for the offer of contradictory testimony coming from the grand jurors. This was error prejudicial to the defendant, which necessitates a reversal of the judgment."

The situation in the present case is almost identical in its legal aspects with that presented in the case of *STATE v. SILVERMAN*. The witness, on cross-examination is asked "Didn't you sign a written statement for Mr. Schaefer of the prosecutor's office?" and before he can answer an objection is made by the prosecutor and the court sustains the objection on the ground that the witness's statement to the prosecutor's office is privileged, and may not be inquired into. We know of no such privilege. Certainly a statement made to the prosecutor's officer does not rise to a greater sanctity than testimony before a Grand Jury, and if a defendant is entitled to discredit a State's witness by proof of contrary testimony before a Grand Jury, then the defendant here was entitled to discredit the witness Epp, by laying the foundation for contradicting his denial that he had made a statement to the prosecutor's officer Mr. Schaefer, and by proof that the statement was contrary to his present testimony.

The case of *STATE v. SILVERMAN* is dispositive of this point, and upon the authority of that case we respectfully submit that this ruling of the trial court was error prejudicial to the defendant, and that it necessitates a reversal of the conviction.

## POINT 3.

This point, consisting of five, six and seven of assignments of error, and six, seven and eight of reasons for reversal is abandoned.

## POINT 4.

This point, consisting of eight, nine and ten of assignments of error, and nine, ten and eleven of the reasons for reversal is abandoned.

## POINT 5.

*The court erred in charging the jury on the question of self-defense.*

The Court on the question of self-defense charged the jury as follows: (page 306 State of Case).

“ Now, where the justification of self-defense springs from the claim that the deceased made an assault upon the defendant, the first consideration is did the deceased make an assault upon the defendant, and if you are satisfied he did, then the next consideration is whether the defendant himself prepared for and provoked the affray.”

The defendant predicated his plea of self-defense on facts set out in his testimony (page 194, et seq). From that testimony it appears that on the morning of October 19th he came to Newark, and called at No. 11½ Grant Street and inquired for his sister; that while he was talking to Mrs. Hitrick, the mistress, he saw the deceased approaching him and beckoning to him near a garage located on the premises of the Morris Casket Company, adjoining Mrs. Hitrick's home; that in response to the beckoning of the deceased he walked over to the deceased and accompanied him

inside of the garage; that in the garage some words were exchanged between them, and the defendant then threatened the deceased that if he did not let go of his sister, he would have the deceased arrested for white slavery; whereupon the deceased kicked him in the leg; that he then remonstrated with the deceased, whereupon the deceased spit in his face and gave him a couple of kicks, and he then pushed the deceased away and received from him a punch in the mouth; that the deceased then broke away and said "I am going to take your brains out", after which he put his hand in his overcoat pocket and again repeated "I am going to take your brains out"; that the defendant, believing that the deceased had a gun in his right-hand overcoat pocket, being led to that belief by information received from his sister, pulled his own pistol out and attempted to run away, and in pulling out the pistol, one bullet went off. The defendant was then standing on the running board of a truck in a position where in order to escape from the deceased in front of him he had to pass the deceased, and it was while attempting to push the deceased away so that he could run from him that the deceased threatened "I will take your brains out" and put his hand in his coat pocket. According to the testimony of the defendant he believed that the deceased intended to take his life, and it is for that reason that he put his hand in his pocket and pulled his gun, and the shot went off. According to the defendant, the deceased then grabbed him and both fell to the ground, and he did not know what happened thereafter. Clearly what prompted the defendant to pull his own pistol from his pocket was not the kick or the several kicks, or the punch in the mouth that he received from the deceased, but the combination of circumstances which followed where we find the defendant on the

running board of a truck, in such a position that he cannot escape from the deceased without pushing by; the threat on the part of the deceased that he would blow the defendant's brains out, coupled with the ominous movement of the deceased's hand to his overcoat pocket where the defendant believed, that the deceased had a pistol. It is then that the defendant pulled his pistol and it went off.

Whether or not this set of circumstances reasonably justified the defendant to resort to his pistol was a question for the jury, coupled with the further question for the jury whether or not the pistol went off unintentionally at that time, or accidentally, as is implied in the defendant's testimony. The legal basis of the defendant's plea of self-defense and misadventure, is that he was placed in such a position that he was at the mercy of the deceased, and that the circumstances of their meeting, the threats of the deceased to kill him, the movement of the deceased's hand to his pocket where the defendant had reason to believe that he had a pistol, justified him in a reasonable apprehension that his life was in danger, and to resort to his pistol.

It is not necessary under the laws of our State that there should be an actual necessity for the exercise of the right of self-defense. It is sufficient if it reasonably appears to be necessary to preserve one's life or to save him from serious bodily harm. *STATE v. JONES*, 71 N. J. Law 543, Court of Errors and Appeals; *STATE v. BONOFILIO*, 67 N. J. Law 239, Court of Errors and Appeals. But the learned trial judge here, apparently overlooked the limitation of this rule in *STATE v. JONES* to the particular facts in that case, and instructed the jury as follows: "The first consideration is, did the deceased make an

assault upon the defendant", and further "If you are satisfied he did, then the next question is whether the defendant himself prepared for and provoked the affray." There can be no doubt as to what is the meaning of this statement. It is clear from that statement that the jury could not approach the consideration of the defendant's plea of self-defense unless and until they first found that there was an actual assault committed upon him, and as a corollary to that, if they found that there was no assault committed upon the defendant, there could be no further consideration of the defense of self-defense. This deprived the defendant of the right to have the jury consider his defense that the killing was in self-defense and by misadventure. For admittedly there was no assault committed upon the defendant, which was made the basis of the defendant's defense that he was justified in pulling his pistol. It is true that the deceased kicked the defendant and punched him in the mouth, but that was not the reason assigned by the defendant for resorting to his pistol. The reason assigned by the defendant in his testimony was that he stood on the step of an automobile truck in the garage in such a way that he could not leave the premises and escape the deceased without passing him; that immediately before that the defendant had threatened to have him arrested on a charge of white slavery, and that thereupon the deceased threatened to blow the defendant's brains out, put his hand in his pocket where the defendant believed, and had a right to believe, that the deceased had a pistol, and that placed in this perilous position he pulled out his gun, impliedly for the purpose of having it available if necessary in his own defense, and that the pistol went off. The jury must have found that there was no assault, and thereupon, pursuant to the judge's instructions, discontinued any further

consideration of the facts and upon which the defendant based his defense of self-defense. This is evidenced by the fact that they found the defendant guilty.

The judge's charge is contrary to the rule laid down by the Court of Errors and Appeals in *STATE v. JONES*, supra. There the facts were that two prisoners engaged in an affray. The deceased had a knife. The defendant pulled it from him, and with it killed the deceased. He was indicted and convicted of murder in the first degree, and on appeal error was predicated upon the Court's charge as follows:

“ This right (that is, the right to take life in self-defense) rests upon necessity, and no one is justified in taking the life of another unless the necessity for so doing is apparent as the only means of preventing his own destruction or of escaping grievous bodily harm.”

Counsel for the appellant argued that the word “apparent” as used there is synonymous with actual or real, so that the judge's charge could be interpreted to mean that no one has a right to take life in self-defense unless the danger was actual or real. Chief Justice Gummere, who wrote the opinion for the Court of Errors and Appeals, says:

“ It may be that, in the collocation in which this word was used by the court, it conveyed to the jury the meaning attributed to it by counsel; but if it did, and so gave them an erroneous idea of an abstract rule of law, it certainly could have done the defendant no harm. The case which was before them did not present for their determination the question of the right of a man to take life under circumstances

where it was seemingly, but not actually, necessary to do so to preserve his own life or to save himself from grave or bodily harm. If the story told by the defendant was true, the necessity of doing what he did for his own protection was absolutely beyond question; and it was with this story that the trial judge was dealing in this part of his instruction to the jury, not with a mere abstraction."

From this clear statement of the law the following deductions may be made:

1. That the charge if interpreted to mean that the right to take life in self-defense rests upon real or actual necessity is erroneous.

2. That the correct rule is that one has the right to take life under circumstances where it was seemingly, but not actually necessary to do so to preserve his own life or to save himself from grievous bodily harm. That if that case had presented such a question the judge's charge would have been not only error, but harmful error.

3. That in that case the judge was dealing with a situation where the defendant based his claim of self-defense upon an actual assault upon him, and that therefore the judge's charge was not of an abstract rule but of one applicable to the peculiar facts existing in that case, and harmless.

We must, however, accept the law laid down by the Court of Errors and Appeals in the above case, and also in the case of *STATE v. BONOFIOLIO*, that one has a right to take life in self-defense even though there be no actual necessity for doing so to prevent his own destruction or escaping grievous bodily harm. He may do so "even to the extent of taking the life of his adversary when

the act is or reasonably appears to be necessary in order to preserve his own life or to protect himself from serious bodily harm."

Chief Justice Gummere, in *STATE v. BONOFIGLIO*, further illustrates the application of this rule as one which occurs where the party killing was justified in believing that such an attempt upon his life was being made, although it is shown subsequently that the fact was otherwise. The defendant may be mistaken in the belief that an attack upon him is imminent and that his life is in danger, but if there is reasonable apprehension for him to believe that such is the fact, he is justified nevertheless to kill in self-defense.

This defendant had a right to have the jury consider whether there was reasonable apprehension that his life was in danger or that he was in danger of grievous bodily harm, and was justified in pulling his pistol, even though it should now appear that there was no real danger.

The jury was entitled to consider the testimony of Mary Igpagliazio that the deceased did have a gun upon his person, and that he had that gun with him when he was discovered in her house under her bed (page 62 State of Case); that he had it with him when they went to the Majestic Hotel, and after that at the Knickerbocker hotel, and it was in his pocket when they came to Newark (page 63 State of Case); that she saw it in the house on Grant Street where they lived together; that he carried it around with him and at night put it under his pillow (page 64 State of Case), and that he had it with him the night that they left the house (meaning the night before the killing), (page 64 State of Case line 15), "He put it into his overcoat"; and further (page 105 State of Case) on the morning of the killing she searched

for the deceased because she knew he had a gun and she was afraid that there might be a fight. And the jury was entitled to consider the further fact that the defendant knew that the deceased carried a gun because of the information he received from his sister Mary Impagliazio, as appears by his testimony, (State of Case, p. 190, L. 14) where he testified that she (meaning his sister) "said to me 'Please, he is a bad man and has a gun in his pocket. Don't go over there, because maybe he will fight'".

It is true that the police officers produced in behalf of the State testified that they searched the locality of the shooting and the person of the deceased and found no pistol that could have been upon his person, but it was not necessary for the defendant in order to sustain his defense, to prove that the deceased did actually have a pistol upon him.

The rule as set forth by Wharton in his treatise on Criminal Law, Volume 1, page 782 is as follows:

" The jury must judge whether the danger was apparent, but it is absurd to say that it is necessary that the danger must have been such as to be apparent to themselves as they deliberate finally on the case. If this were true, an unloaded pistol would cease to be an apparent danger; for the jury, when they come to decide the case, know that the pistol was not loaded, and know that there was no real danger. Hence, what the jury have to decide is not whether the danger is apparent to themselves, but whether it is apparent by some other standard. What, then, is the standard which the jury are thus to apply?"

In this State the standard for the jury is when

the act is or reasonably appears to be necessary in order to preserve his own life or to protect himself from grievous bodily harm. STATE v. BONOFIGLIO, Supra.

In justice to the learned trial judge it is admitted that this instruction to the jury was based upon the declared premise "where the justification of self-defense springs from the claim that the deceased made an assault upon the defendant". The fault lies in the erroneous assumption of the minor premise that this is such a case, and this resulted in the false conclusion and instruction submitted to the jury. This instruction was not a mere abstract principle of law. It was submitted to the jury as the law of this case. By it they were duty bound to disregard all the evidence in favor of the defendant on his plea of self-defense, if they were not satisfied that the deceased made an assault upon the defendant. But they could not be so satisfied, because that was not the basis of the defense. The basis of the defendant's justification that he killed in self-defense was that the conduct of the deceased, and the circumstances and conditions of the occasion were such that he had reasonable apprehension that his life was in danger or that he was in danger of grievous bodily harm, and that it appeared necessary for him to resort to his pistol in self-defense. Whether or not he had reasonable apprehension that his life was in danger or that he was in danger of grievous bodily harm by reason of the conduct of the deceased and the circumstances and condition of the occasion was a question that should have been left to the jury. It was taken from the jury by the judge's instruction. The defendant was deprived of the right to have the jury consider his defense that the killing of the deceased was in his own

self-defense because of this instruction to the jury.

We respectfully submit that for the reasons herein submitted the verdict and judgment of conviction should be reversed.

WILLIAM M. UNTERMANN,  
*Attorney for Plaintiff-in-Error*

JOSEPH KRAEMER,  
*Of Counsel.*

May 5, 1930.



## New Jersey Court of Errors and Appeals

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THE STATE OF NEW JERSEY, <i>Defendant-in-Error,</i>	}	<i>On Error.</i>
<i>vs.</i>		
PAUL CAPPIELLO, <i>Plaintiff-in-Error.</i>		

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### BRIEF FOR THE STATE.

#### Statement of the Case.

The defendant, Paul Cappiello, was indicted by the Essex County Grand Jury for the murder on October 19, 1929, of Michael Iaccarino in the City of Newark.

The defendant was tried in the Essex County Court of Oyer and Terminer on December 17, 1929, the trial continuing to and including December 19, when he was found guilty of Murder in the First Degree, with a recommendation for life imprisonment. Accordingly, on January 7, 1930, the defendant was sentenced to life imprisonment at the State Prison.

The entire record of the case is brought to this court under Sections 136 and 137 of the Criminal Procedure Act.

#### ARGUMENT.

The defendant's assignments of error and reasons for reversal are grouped under five points, of which Points 2 and 3 are abandoned, leaving only three points to be argued before this court. All of these points relate to matters of law, and the defendant does not contend that the verdict

was against the weight of the evidence. We deem it proper, however, to acquaint the Court with the salient facts in the case in order to make the legal arguments better understood.

The defendant, Paul Cappiello, lived in Brooklyn, New York, at 273 Sackett street. The defendant's sister, Mary Impagliazio, lived at 241 Hoyt street, Brooklyn, with her husband. She and her husband conducted a fruit store. The deceased, Michael Iaccarino, lived at 242 Hoyt street, Brooklyn, directly across the street from Mary's house.

For a long time prior to the killing, the deceased had been paying visits to Mary during her husband's absence. In the evening of the 8th of October the deceased was found under the bed in Mary's bedroom, by her husband; a quarrel ensued, during which Mary's husband, being afraid of the deceased, ran upstairs; Mary left the house, went out into the street followed by Iaccarino, the deceased (pp. 71, 72). Mary and Iaccarino walked around the street together for three or four hours and in the evening went to a hotel in Brooklyn (p. 73, l. 20).

The following day Mary and Iaccarino went to the Morris Plan Bank in Brooklyn, where they tried to cash 14 certificates which Mary had, amounting to \$1,350. On the same morning, the morning of October 9, the defendant learned from his mother that Iaccarino had eloped with his sister, and that they had taken the Morris Plan certificates and that Mary had all her jewelry with her (p. 205, l. 20, etc.). Early in the morning of the 9th the defendant went to the Morris Plan Bank with his mother to stop Mary and Iaccarino from cashing the certificates. Defendant met Mary and Iaccarino at the bank

and prevented them from cashing the certificates at that time. He asked Iaccarino to hold his sister Mary until he, the defendant, got his truck and come back to take her (p. 207, l. 3). When he returned with the truck Mary was gone, and Iaccarino claimed not to know where Mary had gone.

Iaccarino and the defendant returned to the accused's home. At that time they were friendly because Iaccarino and Mary had not yet withdrawn the money from the bank (p. 207, l. 35).

But on the following Sunday, the 13th of October, the defendant discovered that Mary and Iaccarino had cashed the certificates at the 42nd street branch of the Morris Plan Bank, and he also knew at the time that Mary and Iaccarino were living together somewhere. Upon learning these facts, the defendant told Mrs. Iaccarino, in the presence of her daughter, that he was going to get Iaccarino and shoot him and kill him (p. 209, l. 9). P 296 - L 38

The defendant met Mrs. Iaccarino in a drug store in Brooklyn while the latter was talking over a telephone: the defendant hearing Mrs. Iaccarino saying "Mike," asked her where Mike was. Mrs. Iaccarino would not give him the information. Mrs. Iaccarino left the receiver off the hook and walked out. The accused then took the receiver and spoke with Iaccarino, and pleaded with him to bring his sister back (p. 185, l. 4, etc.). Two days later he called upon Mrs. Iaccarino and again asked her where her husband was, knowing that her husband, Iaccarino, was somewhere with his sister Mary. Mrs. Iaccarino again refused to give the information.

During all this time Mary and Iaccarino had been living at 11½ Grant street, Newark, as husband and wife, under the name of Rino, and Mary had secured a position at the Clark Thread Mills.

On October 18, Mary telephoned the defendant to meet her at Borough Hall, Brooklyn, and they accordingly met there.

The defendant took Mary to his home, where he interrogated her as to where she had been, where Iaccarino was and what had become of the \$1,350. Mary gave evasive answers and stated that she still had the money, but would not let him see the pocketbook and would not tell where Iaccarino was. Upon her refusal, the defendant grabbed Mary's pocketbook and there found a slip with "11½ Grant street" written thereon.

After securing this address, the defendant told his wife and his mother (his mother being there at the time) to keep Mary at his home, then went to his mother's home, took an automatic revolver which his mother kept in a trunk, placed the revolver in his coat pocket and immediately started for Newark, reached Newark at 2:30 in the morning of October 19 and after locating 11½ Grant street, kept walking around the premises until about 6:30 when he went to 11½ Grant street, rang the bell and asked the lady at the house, Mrs. Hitrick, if Mary Rino (his sister) lived at that address. Defendant showed the landlady a picture of his sister, and the landlady said she was living there with a man. The accused told Mrs. Hitrick that this man was the father of 12 children and was disgracing his sister. While speaking with the landlady the accused saw Iaccarino on the street and went to him. The two met, face to face, in front of a

garage and walked into the garage. About 20 seconds after the accused left the landlady, Mrs. Hitrick, heard three shots (pp. 126 and 127).

The killing occurred not in the garage but in an open paved space directly behind the garage, right in front of the window of the factory of the Morris Casket Company. The witness Epp was working in front of this window when he heard one shot, and, looking out, he saw the deceased, clearly, raising his left hand and striking his head with his left hand; and he also saw the deceased fall to the ground. The deceased was falling between the two fenders of two trucks which were parked near to each other at that spot. The witness saw a part of a man's coat but not the man himself, run away from the premises, about 4 or 5 feet away from where the deceased was falling, and he heard 2 or 3 more shots follow (pp. 132, 133 and 134).

The accused's contention was that the deceased kicked him and put his hand in his pocket; whereupon the accused pulled his gun and *pointed* it at Iaccarino; that he did not intend to shoot him but that the first shot was fired accidentally. According to defendant's story, after the first shot Iaccarino fell, at the same time grabbing the accused, and that the accused fell upon Iaccarino. The accused's contention is, that he does not know how the subsequent shots were fired; that the two fell together, Iaccarino on the bottom and the accused on top. According to the accused's version the shots following the first one were fired at a very close range, while the two were grabbing each other (pp. 223, 224, 225; and pp. 198 and 199). This version of the occurrence was absolutely impossible and irrational, for **Dr. Harrison S. Martland**, who performed the autopsy upon the body of the de-

ceased, showed without dispute that there were four bullet wounds on the body of the deceased; that *none* of these wounds showed any smearing powder marks or brands, and no lead smudges (pp. 151, 152, 153) and that the minimum distance at which these bullets could have been fired from was two feet, and that the maximum distance was from 5 to 8 feet.

The accused was seen running immediately after the first shot (p. 132, l. 10 etc.).

It was clearly established, therefore, that the defendant's contention of the grabbing and falling together and accidental shooting was fabricated, and that these shots were fired anywhere from 2 to 8 feet away from the deceased. Assuming that the deceased put his hand in his pocket, this may possibly explain the first shot but it gives no explanation for the following 3 shots, the defendant himself stating that the deceased fell to the ground upon the first shot.

There is another element which renders the defendant's story of self-defense entirely untenable. The autopsy disclosed that the bullets entered the body of the deceased from the back (pp. 51, 52). That the deceased was shot from the back is again corroborated by the testimony of Leonard Epp, who saw the shooting from his window near the garage and a few feet away from the scene and who stated that he saw the man who was shot throw up his left hand, and turn (p. 139, l. 10) and that he saw a man in a gray coat run away (p. 132, l. 10).

The accused, taking the stand for himself, explained his possession of the gun as a precautionary measure he had taken to protect himself against some unknown person who had sent him a blackhand letter a year previously. He con-

tended that he had been carrying this gun in his coat pocket for the past year; whereas in his statement to the police, made a few hours after his surrender, he stated that he got the gun from a trunk in his mother's house immediately previous to his leaving Brooklyn for Newark. His story of carrying the gun for a year previous to the shooting was attempted to be corroborated by his mother; but she, too, in a statement to the police immediately after the shooting stated that she kept a gun in a trunk in her home, and that after she heard her son in a state of excitement threatening to kill Iaccarino she went to look for the gun and found it was not there (p. 285).

All these questions of fact were left to the jury who, by their verdict, evinced their discredit of the accused's contention of self-defense.

#### POINT I.

It is argued by the accused that the entire line of testimony of Mary Impaglioio, the accused's sister, relative to the relations between herself and the deceased were improperly admitted into evidence, and that such improper admission was manifestly injurious and harmful to the accused.

On the question of admissibility, a reading of Mary's entire testimony shows that this was not hearsay evidence. She was not testifying as to what others said. She was testifying to facts of her own knowledge. If there are one or two instances when she testified as to what her husband said to the deceased or as to what the latter said to her husband, these were again not hearsay testimony, because she was testifying as to what she saw and heard; and the testimony as to what her husband and her paramour said to each other did not tend to disclose, by a repe-

tition of what others said, any facts injurious to the accused.

Counsel for the accused fails to disclose one single instance when Mary testified as to a statement made by others, such statement containing anything injurious or derogatory to the defendant. Mary was not testifying as to what others said about the matter, or about any material fact; she was testifying as to the relations between herself and the deceased; as to the latter's conduct, and as to facts; all of which she knew of her own knowledge, and testified to them under her oath, and did not depend for their truthfulness upon the statement of someone else. Her testimony cannot be discarded as hearsay evidence.

The only way it can be attacked is that her relations with the deceased was not relevant to the issue of defendant's motive, unless the defendant had knowledge of it. The question, therefore, is, did the defendant know of these illicit relations, and how did he react towards the situation?

The record is replete with evidence of defendant's knowledge of his sister's seduction by the deceased, and of the disgrace felt by him, and of his determination to avenge the wrong.

In his statement made to the police (S. 19, Case, p. 323) the accused says:

"On the day of October 9th, 1929, in the morning while passing through Hoyt street, Brooklyn, N. Y., I stopped in front of the grocery store of my brother-in-law Vito Impagliazza, at 241 Hoyt street; I entered in the grocery store and saw that my brother-in-law Vito Impagliazza, my mother and my brother Gasper Cappiello were crying. I asked them what was the trouble and why

were they crying and I was informed that my sister, Mrs. Marie Impagliazza, had run away with one Michael Iaccarino who lived at 242 Hoyt street, it was agreed that we wait for some news from my sister Marie, in the meantime I went to visit the wife of Iaccarino several times to see if she had received any news from her husband, the wife told me that she had received several phone calls from her husband, but that he had never told her where he was located and that whenever she asked him if Marie was with him he would tell her that he was all alone.

Then two or three days later I went into the store on the corner of Hoyt street and Douglass street, to purchase a pack of cigarettes and when I entered I saw Iaccarino's wife talking on the phone. I heard that she was talking to her husband because she said, 'Michael, watch yourself that the brother of Maria' after this I went near the telephone booth I opened the door and asked Mrs. Iaccarino with who was she talking and she answered with a friend of mine, at the same time she wanted to close the phone but did not have time because the receiver fell off the hook, so I grabbed the receiver and asked who was it that was talking and he replied 'It's Michael Iaccarino.' I then said to him, 'the people are talking it is best for you to return to your home and your family,' Iaccarino replied 'Now I am working and I cannot come home' and I said, 'for charity sake the quicker you come home the less the people will talk,' he closed the phone saying that he would phone me again and that he would let me know something.

At about 1:00 A. M. of Saturday, October 19, 1929, I left my home and went to the home of my mother where I took an automatic revolver in my coat pocket, left the house taking a trolley car of the Court street line as far as the Boro Hall, where

I took a subway and arrived at Park place and at this station I took a train for Newark, N. J. I believe that it was about 2:00 A. M. when I reached Newark at about 2:30 A. M. when I got out of the station of the Tubes I asked a man for the direction to go to Grant street, this man directed me by saying to keep right on straight for about six or seven blocks after which I found Grant street and then I went to look for number 11½ Grant street, I found the address and kept on walking circling around several blocks;

\* \* \* \* \*

and I asked her if this lady was living here showing her a photograph of my sister Maria, as soon as she saw the photograph she said 'Yes, she is living here with a man.' *I then told the landlady of this house that this man was the father of twelve children and that in case he comes; \* \* \*"*

The accused knew of Mary's elopement with Iaccarino the very morning after their elopement, that is on October 9, 1929, and he also knew that they had taken the Morris Plan certificate with them.

On his direst testimony he said (p. 176, l. 39):

Q On that morning did you learn that Mary had left her home?

A Yes, sir.

Q Did you also learn that Michael Iaccarino had left his home?

A Yes, sir.

Q Were you informed that Michael Iaccarino had been under your sister's bed in her bedroom on the previous night?

A Yes, sir.

Q Did you also learn that the certificates of the Morris plan had been missing?

A Yes, sir.

Then he went to the bank where he met Iaccarino and his sister and prevented them from

cashing the certificates. While he went to get his truck, his sister again disappeared. He took Mike to his home and had a few words with him, and said to Iaccarino, "You do a lot of things all around and *you disgrace my people, too.*" Then the two together returned to the bank to look for Mary, at which time Iaccarino ran away from him.

On Sunday, the 13<sup>th</sup> of October, the accused heard Mrs. Iaccarino speak over the phone, and wanted to know with whom she was talking. She refused to tell; he took the receiver and continued the conversation, and found it was Iaccarino, and told him not to disgrace the family any longer and pleaded with him to return his sister (p. 184, l. 30, etc.).

He knew Iaccarino and Mary were living together somewhere. He did not know where, and on October 13th he went to Mrs. Iaccarino and inquired of Michael's whereabouts, and upon being refused the information, he said if Michael did not bring back his sister, he would shoot ~~and kill~~ Michael (p. 296, l. 38).

On October 18th, he met his sister Mary in Brooklyn. He accused her of having lived with Iaccarino and wanted to know where her money and jewelry were. She said she still had her money; he did not believe her, and grabbing her pocketbook searched it and found the Newark address where Mary and Michael had been staying. The accused then went to his mother's house, took a gun and departed for Newark.

Mary told the accused that Mike (Iaccarino) had taken her money and jewelry (Case, p. 117, l. 32).

Antoinette Cappiello, defendant's mother, also advised him that Mary had taken her jewelry

and money with her and eloped with Michael (p. 162, l. 19; p. 165, l. 39).

We deem it unnecessary to point out further evidence of accused's knowledge of the illicit relations between Michael and Mary; of the coercion used by Michael upon Mary inducing her to leave her husband, to take \$1,350.00 and all of her jewelry with her; and spending nearly all of her money.

The defendant did not deny knowledge of all these facts testified to by Mary. In fact, knowing all these facts, he claims he came to Newark to have Michael arrested. Now, did he come to Newark to have Michael arrested, or to shoot him? That was the important question, which was properly left to the jury. Immediately after talking with his sister, and by force securing the Newark address, the accused went to his mother's house, took a gun from a trunk and came to Newark, at 2:00 A. M. *He made no report to the police and no effort to arrest Michael.*

The case of *People v. Osmond*, 138 N. Y. 80, quoted by counsel for the accused, by the clearest of implications makes Mary's testimony admissible, for in that case the Court held that everything known by others, and which were communicated to the defendant, were admissible.

It is submitted that all the facts and relations testified to by Mary, having come to the defendant's knowledge, were admissible.

Not only was Mary's testimony admissible, it was also not prejudicial to the accused. It will be noted that not a single objection was raised by the defense to the entire line of testimony. *Such failure to object was not due to any previous ruling of the Court on the testimony, because the*

*defense declined to object from the very beginning.* In fact, not only did the defense not object to the testimony, but they even welcomed it.

In cross examining Mary, the defense did not attempt to disprove what she had testified to on her direct examination. On the contrary, it brought in further detail her relations with the deceased, not with a view to explain anything she had testified to, but clearly to make the picture more complete; to show more perfectly what a cad, what a scoundrel Iaccarino had been. Thus, the defense, during cross examination, showed that Michael did not work while he lived with Mary; that he spent Mary's money (p. 109, l. 39, etc.). That Mary often asked Mike not to come to see her, but he persisted (p. 112, l. 10). That Mike entered her room stealthily and hid himself under the bed while she was undressing; that he was not invited to come (pp. 114, 115). That Mike not only took her money but her jewelry, and made her work for \$15.00 a week and threatened to put her on the street, impliedly for prostitution. All these facts were brought out by the defense of their own initiative and not as cross examination.

Defendant points out an objection made by the defense to the question asked of Mary, "Where did you go in Brooklyn?" This question was admissible because the answer might show she went to her brother, Paul. But, upon argument, the Court overruled it, and the prosecutor withdrew it (p. 103, l. 30).

It is respectfully submitted that the refusal of the defense to object to Mary's line of testimony was not a matter of inadvertence; the testimony was designedly allowed by the defense, and what was left untold, they supplemented

with their cross examination, and by their own witness, Antoinette Cappiello (p. 161, l. 30, etc.). The plain intent of the defense was to show to the jury what a cad and a scoundrel Iaccarino had been, and how morally justified the killing was.

That the defense considered the motive not merely as a mitigating circumstance but as a complete justification, is evident from their second request to charge, as follows; which was given as requested.

“That it is proper for the jury to consider in connection with the guilt or innocence of the defendant in this case what motive he may have had, if any, to kill the deceased” (Case, p. 301).

It is apparent that the defendant, convinced of his moral justification, made no secret of his motive.

It was no doubt by reason of the vile character of the deceased that the jury attached a recommendation of life imprisonment to their verdict. The defendant cannot now come and say that the evidence was prejudicial.

It is further submitted that no objection having been taken to the line of testimony, there was no judicial action which can be the ground of a reversal. In *State v. Mohr*, 2 N. J. Misc. 261, decided by Chief Justice Gummere and Justices Minturn and Black, the Court said,

It is settled that a judgment may be reversed for the erroneous admission or rejection of evidence, where the ruling is not excepted to, applies only where judicial action has been taken upon the question presented and has been excluded or omitted over the objection thus taken. Where the court takes no action upon the question there is neither a judicial rejection or reception of evidence.

*State v. Wardy*, 77 N. J. L. 348; on appeal, 78 *Id.* 687; *State v. Sweet*, 81 *Id.* 250; *State v. Lockman*, 83 *Id.* 168.

It is further submitted that motive in the present case was not an essential element, because the evidence showed that the defendant threatened to kill the deceased; that he took a gun from a trunk in his mother's home and came to Newark at 2 o'clock in the morning and made a search for the defendant, looked for him at 11½ Grant street, met him on the street, followed him into a garage and shot him four times in the back and then *escaped*. Excluding all of Mary's testimony, there was clear and conclusive proof of a deliberate, premediated and willful killing.

#### POINT II.

It is argued that the trial court erred in overruling the question put to the witness Epp on his cross examination,

“But didn't you sign a written statement for Mr. Schaeffer, of the prosecutor's office?”

On this point counsel for defendant has based his argument on the theory that such a question was not improper for attempting to disclose privileged communications with the office of the prosecutor. And under this theory, has quoted at length from the case of *State v. Silverman*, 100 N. J. L. 249, which held that statements made before the grand jury may be inquired into for the purpose of contradiction. The question in the case at bar having been overruled not on the ground of such a privilege, it is needless to argue further on that theory.

The question was properly disallowed, because it did not lay a proper foundation for contradiction; because the same question had been asked

and answered several times before, without counsel even claiming that he had anything with which to contradict the witness; and because, counsel with his line of cross examination, made it apparent to the Court that he was not trying to lay a foundation for contradiction, but was merely attempting to discredit the witness with insinuations rather than with facts or contrary statements; he was attempting to lay a smoke screen.

We give below a part of Epp's testimony on cross examination.

P. 137, l. 36:

Q "Did you at any time since the happening of this event tell any one at any place that he wore a grey top coat? A I don't think so."

P. 138, l. 6:

Q "You made a statement to the police?  
A Yes, sir.

Q Did you make a statement to the police in the court yard while this woman was there that you saw come in? A I don't recall.

Q Didn't you make a statement in her presence that you saw a man run out of there with this grey top coat on? A I don't think so."

P. 140, l. 10:

Q "Did you make the statement to Mr. Schaeffer of the Prosecutor's office? A NO, SIR.

Q Didn't you sign a written statement for Mr. Schaeffer of the prosecutor's office?"

This last question was overruled.

This is not the situation where counsel was prevented from finishing his question. He asked identically the same question, in complete form, and the witness answered, "No, sir." As counsel for the defense says, the witness could have been contradicted in two ways, first, by showing

that he made the statement, and second that such a statement contained matters contradictory to what the witness had testified to. On both of these points, the argument of counsel is purely speculative. He does not claim that the defense had anything with which to contradict the witness; nor did Mr. Price, the trial counsel, ever intimate that he had anything contradictory to witness' testimony.

*First:* The defense claims that they might or could have discredited the witness by showing that he did make a statement to Mr. Schaeffer of the prosecutor's office, contrary to his testimony that he did not. That question was answered in the negative by the witness, immediately preceding the rejected question, and the rejected question was nothing more than a repetition of the question which had been answered in the negative. The sole purpose of the question was to discredit the witness by intimations and insinuations. If counsel wanted to contradict the witness in this respect, the answer was allowed. The witness stated he had made a statement to the police; and he stated he made no statement to Mr. Schaeffer of the prosecutor's office. It is remarkable that the record discloses no effort or attempt on the part of the defense to contradict any of the answers given by the witness to the questions, whether or not he had made a statement to Mr. Schaeffer or whether or not he had made a statement in the presence of Mary; that he saw a man run out of the garage with a grey top coat; or whether or not he had not made a statement at any time to any one at any place that the accused wore a grey top coat. All of these questions were allowed and they were answered in the negative and the defense not even attempted to offer any evidence contradicting these.

It was very apparent that the defense was not attempting to lay the foundation for contradiction, but was merely suggesting things to the jury without *intending to substantiate* them.

*Second:* If counsel's intent was to lay the foundation for subsequent contradiction, he certainly did not frame the question properly for such a purpose. For it is the rule that the proper way to lay the foundation is to direct the witness' attention to the alleged facts stated, and inquire whether he made it.

*State v. Pitman*, 98 N. J. L. 626.

The defendant in this case cannot reasonably claim that he was prevented from asking such a question, because he asked similar questions several times before and was allowed, and his question whether or not the witness made a statement to Mr. Schaeffer was also allowed and *the defense made no attempt to ask the witness whether or not he had made a statement of certain facts*. Neither did he disclose in the argument with the Court that he intended to ask such a question or that he intended to lay any foundation for any contradiction. The situation here is radically different from that of the *Silverman Case*, 100 N. J. L. 249. We quote from the opinion p. 252:

“The overruled questions were as follows: ‘Q You remember the other occasion when you appeared before the grand jury on this case? Q Do you remember testifying before that grand jury? Q Do you remember telling that grand jury—.’ Here the question was abruptly interrupted by the trial judge, who said: ‘I have ruled that anything he said before the grand jury is not to be divulged here.’

“Mr. Braelow: If the Court please, for the purpose of the record, may I state, in

asking these questions my purpose is to show— The Court: A contradiction? Mr. Braelow: —yes, your Honor. The Court: I will anticipate that and rule that anything he said before the grand jury will not be divulged here, because it is a secret proposition. Mr. Braelow: Will your Honor permit me an exception? The Court: Yes.”

There it was clearly disclosed by counsel that his question was unfinished and that he meant to lay a foundation for a contradiction and his question was abruptly cut short by the Court on the theory that a contradiction cannot be accomplished by testimony before the grand jury. In our case counsel did not even intimate that he intended to ask whether or not the witness made statements of certain facts and that he would then contradict the same.

It is respectfully submitted therefore that the defendant was not intending to bring out any inconsistent statements; was not laying the foundation for contradiction in either respect, that is, as to whether or not the witness made a statement; and, whether or not he had stated facts contrary to those given in his testimony.

Where it is attempted to impeach a witness by contradictory writings such writing must be shown to him on his examination, so that he may read or so that it may be read to him. *Underhill on Criminal Evidence*, section 240, p. 438.

In the case at bar, the defense did not claim at the trial nor does he even claim now that they had any such written statement of the witness, nor did they show any; therefore, on that ground alone the rejection of the question was proper.

It is submitted that the question was properly overruled.

### POINT III.

The next contention of the defendant is that the charge of the trial court on the question of self defense was wrong, and the following portion of the charge is assigned for error:

“Now where the justification of self defense springs from the claim that the deceased made an assault upon the defendant, the first consideration is did the deceased make an assault upon the defendant, and if you are satisfied he did, then the next consideration is whether the defendant himself prepared for and provoked the affray.”

The sole contention of counsel is that the Court made the right of self defense dependent upon actual attack or assault and not upon apparent attack or assault. Such a construction of the Court's charge is the result of an attempt to construe a portion of the charge independent of the rest. It is a well established rule of construction that a charge must be taken in its entirety and each clause must be considered in connection with the others, and if taken as a whole, it expresses the law applicable, no ground of complaint exists; and the soundness of a charge is not to be tested by interpretations the ingenuity of counsel can work out.

*State v. Randall*, 95 N. J. L. 452.

*State v. Pitman*, 98 N. J. L. 626.

The portion of the charge assigned for error is not an attempt on the part of the Court to define the law of self-defense. It merely states a correct proposition that where the claim of defense is based upon an alleged assault by the deceased upon the defendant and if such an as-

sault was in fact made, the claim of self-defense would not be tenable if such an assault was invited, intentionally provoked, and prepared for. That is the meaning of the portion of the charge assigned for error.

On the question of self-defense the full charge of the Court is as follows (all italics are ours) (p. 301, ll. 30-35), the Court charged as requested by the accused:

“A person attacked is not bound to retreat if such would imperil his safety the more, or if a *reasonable man*, under the circumstances, would be justified in believing that to retreat would add to the danger.”

Immediately following the portion of the charge assigned for error, the Court said (p. 307, l. 2, etc.):

“If you find beyond a reasonable doubt that the defendant prepared for and intentionally provoked the affray, he cannot successfully set up the plea of self-defense, such defense is not open to him. But if you do not so find, then in order to sustain the defense of self-defense, where there *appears* to have been an assault on the accused, there must be evidence that there was danger to the prisoner of loss of life, or of great bodily harm, *real or apprehended, on reasonable grounds, and that the danger was imminent or reasonably appeared to be so, and was such, or reasonably appeared to be such,* that the prisoner could not have avoided taking the life of the decedent, and at the same time protect himself from great bodily injury. Even if the circumstances be such as to require the defendant to resort to the use of force to repel the assault, he will be inexcusable if he carried his defense beyond the bounds of reasonable necessity, or *reasonable appearance of necessity*, to avoid death or great bodily injury, and thereby killed deceased. Furthermore, if in order to avoid

the *apprehended injury* he could have safely escaped by flight, he was bound to resort to that method of defense before he resorted to force of such character and extent as to take the life of the deceased.

Now, the accused could not make his own judgment of the necessity of slaying the deceased in order to defend himself a justification of his act. Whether justification for taking life existed, or *reasonably appeared to exist*, must be determined from the facts, circumstances and situation of the accused at the time, and it is the province and duty of the jury to determine that question."

The italicized portions of the charge enunciate the very rule of law given by Chief Justice Gummere, *State v. Bonofiglio*, 67 N. J. L. 239, and *State v. Jones*, 71 N. J. L. 543, quoted and relied upon by the defense, which rule of law simply is, that the right to kill in self-defense depends not on actual assault, or actual danger, or actual necessity but on apparent assault, on apprehension of danger and on reasonable appearance of necessity.

In the case at bar the Court was very careful to speak of an *apprehended danger*, of a *danger that was imminent or reasonably appeared to be so*; of a danger that *reasonably appeared to be such that the prisoner could not have avoided taking the life of the deceased*: of a defense that *reasonably appeared necessary* to avoid bodily injury of *apprehended injury*, and of an *appearance of an assault*. In the face of these careful instructions basing the necessity of action in self-defense, not on actual danger but on apparent danger, the Court's charge can <sup>not</sup> justly be criticised. It is respectfully submitted that no error was committed by the Court in this respect.

It is respectfully submitted that the judgment  
of the trial court should be affirmed.

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JOSEPH E. CONLON,  
Assistant Prosecutor of the Pleas.

