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Writ of Error.

Filed November 23, 1937.

New Jersey, to wit: The State of New Jersey, to THOMAS J. BROGAN, ESQ., one of the Justices of the Supreme Court of the State of New Jersey, and to the Judge of the Court of Common Pleas of Gloucester County, constituting the Court of Oyer and Terminer, holden at Woodbury, in and for the County of Gloucester, of the term of May, 1937.

(Seal)

GREETING: Because in the record and proceeding and also in the giving of judgment upon a certain indictment against Smalley Burrell, William Albert Brown and Anna Brown, late of the Borough of Paulsboro, in the County of Gloucester aforesaid:

> "That Smalley Burrell, William Albert Brown and Anna Brown late of the Borough of Paulsboro in the said County of Gloucester, on the sixteenth day of June in the year of our Lord one thousand nine hundred and thirty-seven at the Borough aforesaid, in the County aforesaid and within the jurisdiction of this Court in and upon one William J. Horner, in the peace of God and this state, then and there being, wilfully and feloniously and of malice aforethought, did make an assault, and, him the said William J. Horner then and there wilfully, feloniously and of malice aforethought did mortally wound, of which said mortal wounds the said William J. Horner, thence continually languished until on the eighteenth day of June, one thousand nine hundred and thirty-seven, he died, wherefore the said Smalley Burrell, William Albert Brown and

Anna Brown did wilfully, feloniously and of malice aforethought, kill and murder the said William J. Horner contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same."

Pro ut the said indictment whereof, before you, he, the said William Albert Brown, has been indicted, and is thereof convicted by a certain jury of the county, taken between the State of New Jersey and the said Smalley Burrell, William Albert Brown and Anna Brown, as it is said, manifest error hath intervened to the great damage of the said William Albert Brown, as from his complaint we have received information, we being willing, in his behalf, to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said William Albert Brown, command you that if judgment be thereon given, then that you distinctly and openly send, under your seal, the record and proceedings had upon the trial, to our Court of Errors and Appeals, in the last resort in all causes of law, to be held at Trenton, on the 19th day of October, next, and this writ, that the record and proceedings as aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

Witness, LUTHER A. CAMPBELL, ESQ., our Chancellor and the President Judge of our said Court

of Errors and Appeals, at Trenton, New Jersey, this first day of October, 1937.

THOMAS A. MATHIS,
Clerk.

MINTURN & WEINBERGER,
Attorneys.

SAMUEL ROTHBARD,
ROGER M. YANCEY
LOUIS R. CEREFICE
HARRY H. WEINBERGER,
Of Counsel.

Return to Writ of Error.

GLOUCESTER COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY, vs. SMALLEY BURRELL, WILLIAM ALBERT BROWN, ANNA BROWN, Defendants.	On Indictment for Murder.

The entire record and proceedings whereof mention is within made, with all things touching the same, I certify to the Court of Errors and Appeals in the Last Resort in all causes at the day and year within contained in a certain schedule to this writ annexed, as I am commanded.

ELMER B. WOODS (L.S.)
Judge of Gloucester County Court
of Oyer and Terminer.

Return to Writ of Error.

Indictment.

At a Court of Oyer and Terminer holden at the Court House in the City of Woodbury in and for the County of Gloucester on the Nineteenth day of June A. D. 1937, the Grand Jury for the May Term, 1937, returned again into Court (Hon. Elmer B. Woods) being present and made the following presentment:

(50)

STATE

vs.

SMALLEY BURRELL, WILLIAM ALBERT BROWN, ANNA BROWN,

Indictment
Murder.

GLOUCESTER COUNTY COURT OF OYER AND TERMINER.

May Term 1937.

Gloucester County, to wit:

The Grand Inquest of the State of New Jersey and for the body of the County of Gloucester upon their respective oath and affirmation, those affirming having first alleged themselves to be conscientiously scrupulous of taking an oath Present, that Smalley Burrell, William Albert Brown and Anna Brown, late of the Borough of Paulsboro in the said County of Gloucester, on the sixteenth day of June in the year of our Lord one thousand nine hundred and thirty-seven at the Borough aforesaid, in the County aforesaid and within the jurisdiction of this Court in and upon one William

Return to Writ of Error.

J. Horner, in the peace of God and this State, then and there being, wilfully and feloniously and of malice aforethought, did make an assault, and, him the said William J. Horner then and there wilfully, feloniously and of malice aforethought did mortally wound, of which said mortal wounds the said William J. Horner, thence continually languished until on the eighteenth day of June, one thousand nine hundred and thirty seven, he died, wherefore the said Smalley Burrell, William Albert Brown and Anna Brown did wilfully, feloniously and of malice aforethought, kill and murder the said William J. Horner, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

LYNWOOD LORD,
Prosecutor of the Pleas.

Return to Writ of Error.

Order of Request.

GLOUCESTER COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY, vs. SMALLEY BURRELL, WILLIAM ALBERT BROWN, ANNA BROWN, Defendants.	On Indictment for Murder.

By virtue of the authority reposed in me by law, I hereby request Honorable Elmer B. Woods, Judge of the Court of Common Pleas of Gloucester County, to sit and hold a Court of Oyer and Terminer in said County for the criminal prosecution arising under the indictment of the State of New Jersey vs. Smalley Burrell, William Albert Brown and Anna Brown.

Dated: June 24, 1937.

FRANK T. LLOYD,
Presiding Judge of the Court of Oyer and Terminer of Gloucester County.

Entered: June 28th, 1937.

R. EDWARD KLAISZ,
Clerk.
SMY:5/12

Return to Writ of Error.

Order of Appointment.

GLOUCESTER COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY, vs. SMALLEY BURRELL, WILLIAM ALBERT BROWN, ANNA BROWN, Defendants.	On Indictment for Murder.

It appearing by the petition of Smalley Burrell that he is without means and ability to procure counsel and defend himself upon the trial of the above indictment charging him with Murder;

It is thereupon, on this 24th day of June, 1937, ORDERED that Frank L. Johnson, Esq., be and he is hereby appointed to defend the said Smalley Burrell upon the trial of said indictment.

AND IT IS FURTHER ORDERED that the said Smalley Burrell have the State's Writ of Subpoena for the compulsory attendance of witnesses upon the trial.

FRANK T. LLOYD,
Justice of the Supreme Court and Presiding Judge of the Gloucester County Court of Oyer and Terminer.

Entered: June 28th, 1937.

R. EDWARD KLAISZ,
Clerk.
SMY:5/12

Return to Writ of Error.

Trial Proceedings.

GLOUCESTER COUNTY OYER AND TERMINER COURT.

MAY TERM, 1937.

July 12, 1937.

Hon. ELMER B. WOODS, Presiding.

STATE vs. SMALLEY BURRELL, WILLIAM ALBERT BROWN, ANNA BROWN,	Indictment Murder.

LYNWOOD LORD,
Prosecutor

FRANK L. JOHNSON,
Atty. for Defendant.

The defendants having been arraigned plead Not Guilty to the above indictment and were brought before the Bar of the Court for trial, and the Court instructed the Sheriff to return a Jury from the panel to try the same, whereupon the Sheriff made return and the following persons answered to their names and were duly sworn:

1. Harry J. Blake; 2. Charles Downs; 3. Joseph Jones; 4. Harry Nuttal; 5. Laura L. Ware; 6. Harry Beck; 7. Mary Wilke; 8. John W. Gardner; 9. Nelson Kirk; 10. Hugh Boyle; 11. David W. Carson; 12. John J. Fisher.

Witnesses called for the State were Joseph Boji, Dr. Harry Nelson, Dr. C. C. Sheets, Joseph Boji (recalled) William Wilson, 7/13/37 Witnesses for the State were Mary Hendrickson, Irving C.

Pettit, Emma Horner, Rev. Lewis Morrison, Lewis Koko, Dominick Traveline, Paul First, Stephen B. Atkinson, Lillian Verdier, Walter Zickwolf, Leonard Eckman, W. Clayton Apgar, Alfred W. Denham, 7/14/37 Leon A. Shaffer, Julia Curtis, Charles McGuire, Melvin Nelson, John Sam, Walter C. Thomson, Alexander Bonsack, Mortimer Stevens, Frances Deputy, William H. Flowers, Jr.

Witnesses for the Defendants were Louise Washington, Victor O'Neal, Mary Burrell, James Bowler, Irene Burrell, Albert Falconi, Albert Dilks, Herman Brown, Mrs. Anna Brown, Anna Brown, Clarence Porch, William Albert Brown, Smalley Burrell.

After argument of Counsel and charge by the Court the Jury retired at 5:15 P. M., D. S. T., July 15, 1937 to consider of their verdict, and at 8:05 P. M., D. S. T., same day, they came again into Court and by their foreman say they find the Defendant Smalley Burrell, guilty of Murder in the first degree, and they find the Defendant William Albert Brown guilty of murder in the first degree, and they find the defendant Anna Brown guilty of murder in the first degree with the recommendation of mercy—life imprisonment.

Court Sentence.

GLOUCESTER COUNTY OYER AND TERMINER COURT.

MAY TERM, 1937.

July 15, 1937.

Hon. ELMER B. WOODS, Present.

STATE vs. SMALLEY BURRELL,	Indictment Murder.

The defendant having been found guilty of Murder in the first degree, the Court sentenced the defendant Smalley Burrell to suffer death during the week commencing Sunday the 22nd day of August, 1937, at the time and place and in the manner provided by law.

Clerk's Certificate.

State of New Jersey }
Gloucester County } ss.:

I, R. Edward Klaisz, Clerk of said County and of the various Courts of Record thereof, do hereby certify that the foregoing is a true and correct copy of the above Return of Indictment, Indictment, Order of Request, Order of Appointment, Trial Proceedings, Court Sentence as the same is of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Courts at Woodbury, N. J., in said County, this 22nd day of November, A. D., 1937.

R. EDWARD KLAISZ,
Clerk.

(Seal)

MELVIN D. KIRKBRIDE,
Sp. Deputy Clerk.

Writ of Error.

Filed November 23, 1937.

New Jersey, to wit: The State of New Jersey, to THOMAS J. BROGAN, ESQ., one of the Justices of the Supreme Court of the State of New Jersey, and to the Judge of the Court of Common Pleas of Gloucester County, constituting the Court of Oyer and Terminer, holden at Woodbury, in and for the County of Gloucester, of the term of May, 1937.

(Seal)

GREETING: Because in the record and proceeding and also in the giving of judgment upon a certain indictment against Smalley Burrell, William Albert Brown and Anna Brown, late of the Borough of Paulsboro, in the County of Gloucester aforesaid:

> "That Smalley Burrell, William Albert Brown and Anna Brown, late of the Borough of Paulsboro in the said County of Gloucester, on the sixteenth day of June in the year of our Lord one thousand nine hundred and thirty-seven at the Borough aforesaid, in the County aforesaid and within the jurisdiction of this Court in and upon one William J. Horner, in the peace of God and this state, then and there being, wilfully and feloniously and of malice aforethought, did make an assault, and, him the said William J. Horner then and there wilfully, feloniously and of malice aforethought did mortally wound, of which said mortal wounds the said William J. Horner, thence continually languished until on the eighteenth day of June, one thousand nine hundred and thirty-seven, he died, wherefore the said Smalley Burrell, William Albert Brown and Anna Brown did wilfully, feloniously and of malice aforethought, kill and murder the said William J. Horner contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same."

Writ of Error.

Pro ut the said indictment whereof, before you, he, the said Smalley Burrell, has been indicted, and is thereof convicted by a certain jury of the county, taken between the State of New Jersey and the said Smalley Burrell, William Albert Brown and Anna Brown, as it is said, manifest error hath intervened to the great damage of the said Smalley Burrell, as from his complaint we have received information, we being willing, in his behalf, to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Smalley Burrell, command you that if judgment be thereon given, then that you distinctly and openly send, under your seal, the record and proceedings had upon the trial, to our Court of Errors and Appeals, in the last resort in all causes of law, to be held at Trenton, on the 19th day of October, next, and this writ, that the record and proceedings as aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

Witness, LUTHER A. CAMPBELL, ESQ., our Chancellor and the President Judge of our said Court of Errors and Appeals, at Trenton, New Jersey, this first day of October, 1937.

THOMAS A. MATHIS,
Clerk.

MINTURN & WEINBERGER,
Attorneys.

HARRY H. WEINBERGER,
SAMUEL ROTHBARD,
ROGER M. YANCEY,
LOUIS R. CEREFICE,
Of Counsel.

Return to Writ of Error.

GLOUCESTER COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY, vs. SMALLEY BURRELL, WILLIAM ALBERT BROWN, ANNA BROWN, Defendants.	On Indictment for Murder.

The entire record and proceedings whereof mention is within made, with all things touching the same, I certify to the Court of Errors and Appeals in the Last Resort in all causes at the day and year within contained in a certain schedule to this writ annexed, as I am commanded.

ELMER B. WOODS, (L.S.)
Judge of Gloucester County Court
of Oyer and Terminer.

Indictment.

At a Court of Oyer and Terminer holden at the Court House in the City of Woodbury in and for the County of Gloucester on the Nineteenth day of June A. D. 1937, The Grand Jury for the May Term 1937, returned again into Court (Hon. Elmer B. Woods) being present and made the following presentment:

(50) STATE vs. SMALLEY BURRELL, WILLIAM ALBERT BROWN, ANNA BROWN,	Indictment Murder.

GLOUCESTER COUNTY COURT OF OYER AND TERMINER.

MAY TERM, 1937.

Gloucester County, to wit:

The Grand Inquest of the State of New Jersey and for the body of the County of Gloucester upon their respective oath and affirmation, those affirming having first alleged themselves to be conscientiously scrupulous of taking an oath Present, that Smalley Burrell, William Albert Brown and Anna Brown, late of the Borough of Paulsboro in the said County of Gloucester, on the sixteenth day of June in the year of our Lord one thousand nine hundred and thirty-seven at the Borough aforesaid, in the County aforesaid and within the

jurisdiction of this Court in and upon one William J. Horner, in the peace of God and this state, then and there being, wilfully and feloniously and of malice aforethought, did make an assault, and, him the said William J. Horner then and there wilfully, feloniously and of malice aforethought did mortally wound, of which said mortal wounds the said William J. Horner, thence continually languished until on the eighteenth day of June, one thousand nine hundred and thirty seven, he died, wherefore the said Smalley Burrell, William Albert Brown and Anna Brown did wilfully, feloniously and of malice aforethought, kill and murder the said William J. Horner, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

LYNWOOD LORD,
Prosecutor of the Pleas.

Order of Request.

GLOUCESTER COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY, vs. SMALLEY BURRELL, WILLIAM ALBERT BROWN, ANNA BROWN, Defendants.	On Indictment for Murder.

By virtue of the authority reposed in me by law, I hereby request Honorable Elmer B. Woods, Judge of the Court of Common Pleas of Gloucester County, to sit and hold a Court of Oyer and Terminer in said County for the criminal prosecution arising under the indictment of the State of New Jersey vs. Smalley Burrell, William Albert Brown and Anna Brown.

Dated: June 24, 1937.

FRANK T. LLOYD,
Presiding Judge of the Court of Oyer and Terminer of Gloucester County.

Entered: June 28th, 1937.

R. EDWARD KLAISZ,
Clerk.
SMY:5/12

Return to Writ of Error.

Order of Appointment.

GLOUCESTER COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY, vs. SMALLEY BURRELL, WILLIAM ALBERT BROWN, ANNA BROWN, Defendants.	On Indictment for Murder.

It appearing by the petition of William Albert Brown that he is without means and ability to procure counsel and defend himself upon the trial of the above indictments charging him with Murder;

It is thereupon, on this 24th day of June, 1937, ORDERED that Frank L. Johnson, Esquire, be and he is hereby appointed to defend the said William Albert Brown upon the trial of said indictment.

AND IT IS FURTHER ORDERED that the said William Albert Brown may have the State's Writ of Subpoena for the compulsory attendance of witnesses upon the trial.

FRANK T. LLOYD,
Justice of the Supreme Court and Presiding Judge of the Gloucester County Court of Oyer and Terminer.

Entered: June 28th, 1937.

R. EDWARD KLAISZ.
Clerk.
SMY:5/12

Return to Writ of Error.

Trial Proceedings.

GLOUCESTER COUNTY OYER AND TERMINER COURT.

MAY TERM 1937

July 12, 1937

Hon. ELMER B. WOODS, Presiding.

STATE vs. SMALLEY BURRELL, WILLIAM ALBERT BROWN, ANNA BROWN,	Indictment Murder.

LYNWOOD LORD, Prosecutor

FRANK L. JOHNSON, Atty. for Defendants.

The defendants having been arraigned plead Not Guilty to the above indictment and were brought before the Bar of the Court for trial, and the Court instructed the Sheriff to return a Jury from the Panel to try the same, whereupon the Sheriff made return and the following persons answered to their names and were duly sworn:

1. Harry J. Blake; 2. Charles Downs; 3. Joseph Jones; 4. Harry Nuttal; 5. Laura L. Ware; 6. Harry Beck; 7. Mary Wilke; 8. John W. Gardner; 9. Nelson Kirk; 10. Hugh Boyle; 11. David W. Carson; 12. John J. Fisher.

Witnesses called for the State were Joseph Boji, Dr. Harry Nelson, Dr. C. C. Sheets, Joseph Boji (recalled) William Wilson 7/13/37 Witnesses for the State were Mary Hendrickson, Irving C. Pettit, Emma Horner, Rev. Lewis Morri-

son, Lewis Koko, Dominick Traveline, Paul First, Stephen B. Atkinson, Lillian Verdier, Walter Zickwolf, Leonard Eckman, W. Clayton Apgar, Alfred W. Denham, 7/14/37 Leon A. Shaffer, Julia Curtis, Charles McGuire, Melvin Nelson, John Sam, Walter C. Thomson, Alexander Bonsack, Mortimer Stevens, Frances Deputy, William H. Flowers, Jr.

Witnesses for the Defendants were Louise Washington, Victor O'Neal, Mary Burrell, James Bowler, Irene Burrell, Albert Falconi, Albert Dilks, Herman Brown, Mrs. Anna Brown, Anna Brown, Clarence Porch, William Albert Brown, Smalley Burrell.

After argument of Counsel and charge by the Court the Jury retired at 5:15 P. M., D. S. T., July 15, 1937 to consider of their verdict, and at 8:05 P. M., D. S. T., same day they came again into Court and by their foreman say they find the defendant Smalley Burrell, guilty of Murder in the first degree, and they find the Defendant William Albert Brown guilty of Murder in the first degree, and they find the defendant Anna Brown guilty of murder in the first degree with the recommendation of mercy, life imprisonment.

Writ of Error.

Court Sentence.

GLOUCESTER COUNTY OYER AND TERMINER COURT.

MAY TERM, 1937.

July 15, 1937.

Hon. ELMER B. WOODS, Present.

STATE vs. WILLIAM ALBERT BROWN,	Indictment Murder.

The defendant having been found guilty of Murder in the first degree, by a Jury, the Court sentenced the defendant William Albert Brown to suffer death during the week commencing Sunday the 22nd day of August 1937 at the time and place and in the manner provided by law.

Clerk's Certificate.

State of New Jersey }
Gloucester County } ss.:

I, R. Edward Klaisz, Clerk of said County and of the various Courts of Record thereof, do hereby certify that the foregoing is a true and correct copy of the above Return of Indictment, Indictment, Order of Request, Order of Appointment, Trial Proceedings, Court Sentence as the same is of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Courts at Woodbury, N. J., in said County, this 22nd day of November A. D., 1937.

R. EDWARD KLAISZ,
Clerk.

(Seal)

MELVIN D. KIRKBRIDE,
Sp. Deputy Clerk.

Testimony.

GLOUCESTER COUNTY COURT OF OYER AND TERMINER.

THE STATE vs. SMALLEY BURRELL, WILLIAM ALBERT BROWN, ANNA BROWN.	On Indictment for Murder.

FIRST DAY

July 12, 1937.

Before—WOODS, *J.*. and a Jury,

APPEARANCES:

For the State, Prosecutor LYNWOOD LORD.

For the Defendants, FRANK L. JOHNSON, ESQ.

Woodbury, N. J., July 12, 1937.

Trial of the case resumed at 1:30 o'clock P. M., pursuant to adjournment, in the presence of the fendants and counsel for the respective parties.

THE CASE FOR THE STATE.

JOSEPH BAJI, sworn.

By the Prosecutor:

Q. Mr. Baji, where do you live? A. Paulsboro.

Q. Keep your voice up because of the fan. A. That's right.

Q. How long have you lived at Paulsboro? A. About six years.

Q. What is your business? A. Photographer.

Q. How long have you been in that business? A. Twelve years.

Q. At my request did you take certain photographs? A. I did.

Q. Of the body of Mr. William J. Horner, in the morgue at Paulsboro? A. I did.

Q. Can you tell us what date these photographs were taken in the morgue at Paulsboro? A. They were taken on the 18th day of July—June.

Q. 18th day of June? Now, on the same day did you also take certain photographs at the home of Mr. Horner at 1000—

The Prosecutor: Strike it out.

Q. On the 17th day of June, 1937, did you also take certain photographs inside the home of Mr. Horner at Paulsboro? A. I did.

Q. Do you know where his home is? A. Yes, sir.

Q. On Commerce Street? A. On Commerce Street.

Q. Since that date did you also take other photographs showing the view of Mr. Horner's home from the outside? A. I did.

Q. I show you a photograph and ask you whether that is a photograph of Mr. Horner as taken in the morgue of Mr. Pettit at Paulsboro? A. It was Mr. Adams.

Q. Mr. Adams? A. Yes, sir.

Q. That was taken by you? A. Yes, sir.

The Prosecutor: I offer the photograph in evidence.

The Court: Any objection?

Mr. Johnson: No objection.

(Said photograph marked Exhibit S-1.)

Q. You knew Mr. Horner during his lifetime? A. Yes, I did.

Q. This is the photograph of the man who was killed? A. Yes, sir.

Q. I show you another photograph and ask you whether that was also taken on the 18th day of June of this year? A. Yes, sir.

Q. At the undertaker's establishment of Mr. Adams? A. Yes, sir.

Q. It was? A. Yes, sir.

Q. And is that also a photograph of William J. Horner? A. A photograph of the other side of his head.

Q. Were these photographs taken before or after the autopsy was performed? A. Before.

The Prosecutor: I offer that photograph in evidence.

Mr. Johnson: No objection.

(Said photograph marked Exhibit S-2.)

Q. I show you another photograph and ask you if you took that picture? A. I did.

Q. Of what is that a photograph? A. This is the inside of the kitchen.

Q. Of whose home? A. Of Mr. Horner's.

Q. When was that taken? A. On the 18th day of June, 1937.

Q. Was that also taken on the 18th day of June? A. Yes, sir.

Q. Look at it. A. This was on the 18th.

Q. 18th day of June and was that taken by you? A. Yes, sir.

Q. And does that photograph truly represent the condition— A. Yes, sir.

Q. Of Mr. Horner's kitchen at the time the photograph was taken? A. Yes, sir.

Mr. Johnson: If your Honor please, I ob-

ject to the introduction of this photograph. It is too remote from the time the crime is alleged to have been committed. There were certain people coming in and out of the place and we do not know whether the place has been changed since the time it happened or not.

The Prosecutor: If your Honor please, I will ask that that one photograph be marked for identification, and I will follow it up by subsequent proof.

The Court: The objection is well taken. Mark it for identification S-3.

(Said photograph marked Exhibit S-3 for identification.)

Q. I show you another photograph and ask you whether you took that photograph? A. Yes, sir, I did.

Q. And what date was it taken? A. Taken June 17, 1937.

Q. What does that represent? A. The opposite side of the kitchen.

Q. Of whose home? A. Mr. Horner's.

Q. And what time of the day on June 17th did you take that photograph? A. About 8 o'clock.

Q. In the morning? A. In the morning.

The Prosecutor: I offer that photograph in evidence.

Mr. Johnson: I object to it on the same ground, if your Honor please.

The Court: All right. The objection for the time being is sustained. Mark it for identification.

The Prosecutor: I offer it for identification.

(Said photograph marked Exhibit S-4 for identification.)

Q. I show you another photograph and ask you whether or not that was taken by you? A. It was.

Q. And on what date and at what hour? A. June 18, 1937, about 8 o'clock.

Q. Taken about 8 o'clock in the morning? A. In the morning.

Q. And what does that photograph represent? A. This represents the dining room of Mr. Horner's home.

Q. Does that accurately represent the condition of the dining room as you saw it? A. Yes, sir.

The Prosecutor: I offer that photograph in evidence.

Mr. Johnson: I have the same objection.

The Court: The same objection is sustained for the time being. Mark it for identification S-5.

(Said photograph marked Exhibit S-5 for identification.)

Q. I show you another photograph and ask you whether or not that photograph was taken by you? A. Yes, sir.

Q. And on what date and at what hour was it taken? A. June 17, 1937, about 8 o'clock.

Q. In the morning? A. In the morning, yes, sir.

Q. And what does that photograph represent? A. This photograph represents the dining room.

Q. Of whose home? A. Of Mr. Horner's.

The Prosecutor: I offer that photograph in evidence.

Mr. Johnson: Same objection.

The Court: The same objection is sus-

tained. Mark it for identification S-6.

(Said photograph marked Exhibit S-6 for identification.)

Q. I show you another photograph and ask you if that was taken by you? A. It was.

Q. What does that represent? A. Mr. Horner's home.

Q. It represents the outside view? A. The outside view of Mr. Horner's home.

Q. And on what date was it taken? A. June 18, 1937.

Q. And does that truly describe the condition of the outside of his home? A. It does.

Q. As of the date you took the photograph? A. Yes, sir.

The Prosecutor: I have, if your Honor please, three photographs—

The Court: To be marked S-7, S-8 and S-9?

The Prosecutor: Yes. I offer photograph showing the outside view of Mr. Horner's home from the side toward Mr. Wilson's, which I offer in evidence and ask that it be marked.

(Said photograph marked Exhibit S-7.)

The Prosecutor: I also offer in evidence a photograph showing the home of Mr. Wilson and the side of the Horner home and ask that that be marked.

(Said photograph marked Exhibit S-8.)

The Prosecutor: I also offer another photograph showing the lens of the camera pointed toward the front of the Wilson home and showing the space between the Wilson home and the side of Mr. Horner's home. I offer that in evidence and ask that it be marked.

Mr. Johnson: You are offering them all in evidence?

The Prosecutor: Yes.

Mr. Johnson: At this time they seem too remote.

The Prosecutor: I understood you had no objection?

Mr. Johnson: I have no objection to having them marked but I see no reason for introducing them at the present time.

The Court: Possibly you have a neighbor witness to show how far the houses are apart?

The Prosecutor: That is the purpose of it. Mr. Wilson is here in Court. He lives in the house next door.

The Court: All right.

(Said photograph marked Exhibit S-9.)

Q. Mr. Baji, on the morning of June 17th, when you went to Mr. Horner's home, do you recall which door of the house you entered? A. Yes, I do.

Q. Which door was it? A. Kitchen door.

Q. What was the condition of the screen door in the kitchen as you saw it? A. The wire was ripped off the screen door on the outside.

Mr. Johnson: Just a minute. If your Honor please, this man went into this house the day after this crime was committed.

The Prosecutor: About eight hours afterwards. It was first discovered, if your Honor please, at 8 o'clock on the morning of June 17th.

The Court: This happened on the night of June 16th?

The Prosecutor: June 16th.

Mr. Johnson: There were other people in there besides this man.

The Court: Well, this may be part of the evidence of what he saw.

Mr. Johnson: There had been other people going in there and that was the entrance they all used. No telling what could be done by those other people going in.

The Court: He testifies to what he saw. It is no conclusion. He does not testify they ripped what he saw.

Q. You say the covering on the screen door had been ripped or torn? A. It was torn, yes, sir.

Q. And where was it torn, in the upper half or the lower half? A. Upper half.

Q. Upper half of the screen door? A. Right.

Q. As you entered the kitchen of the Horner home, who was in the house, that you saw? A. As I recall, Chief of Police Atkinson, Dominick Travaline, another officer, and Mr. Wilson.

Q. When you say Dominick Travaline and another officer Mr. Travaline is the other officer? A. Is the other officer, yes, sir.

Q. So there was Chief of Police Atkinson, Officer Travaline and Mr. Wilson in the house when you entered it? A. Yes, sir.

Q. Using the photograph to refresh your recollection, if necessary, will you describe to the Court and jury the condition of that kitchen at the time you entered?

Mr. Johnson: Just a minute. I object to that, if your Honor please, for the same reason. This gentleman went in there when other people were there. It was on the next morning, after the officers had been in there and Mr. Wilson had been in there and we

do not know whether it has been changed. He said that was the condition of the property when he went in there.

The Prosecutor: If your Honor please, the officers were called between 8 and 8:30, right around that time. Mr. Baji arrived there at practically the same time that the officers arrived. I intend to follow up by proof from both officers that nothing had been changed except the removal of the body, at the time Mr. Baji got there.

Mr. Johnson: I still object.

The Prosecutor: If I cannot follow it up, I will admit it be stricken out.

The Court: You can recall him and call him back and follow up the other testimony. Is there any objection to that?

Mr. Johnson: Just at this time he has not made his ground for it.

The Court: You can recall him at this time, if you desire, and call him back to follow that up.

The Prosecutor: I will withdraw the question and recall the witness at a later time.

The Court: The witness is withdrawn and the objection is sustained.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. I show you Exhibit S-1 for the State—

The Court: S-1 is it?

Mr. Johnson: That is right.

Q. It was taken at what time? A. I just cannot recall exactly what time it was taken.

Q. Do you know the date? A. On June 18, 1937.

Q. Can you tell me what this patch is on this lip? A. On the lip?

Q. Yes. A. It is a piece of adhesive tape.

Q. And this mark up here, is there any medical stuff put on there? A. There isn't, there isn't anything.

Q. How long after Mr. Horner had died was this picture taken? A. Well, I don't recall. I don't know when Mr. Horner died.

Q. This was taken down at Paulsboro, wasn't it? A. Yes, sir.

Q. After he had been released, the body had been released from the hospital? A. Yes, sir.

Q. Had there been any marks put on his face by the doctors? A. That I do not recall.

Q. That would show on his face when you looked at him? A. I cannot recall that at all.

Q. When you went in the room in the morning, who did you say was there? A. Chief of Police Atkinson, Dominick Travaline, an officer and Mr. Wilson and myself.

Q. I show you Exhibit S-7 of the State. Which door did you go in? A. Kitchen door, right here (indicating).

Q. No one else in there besides you and the four men mentioned? A. Not as I remember.

Mr. Johnson: That is all.

The Prosecutor: Mr. Baji, I suppose it will be necessary for you to remain and I will call you later.

HARRY NELSON, sworn.

By the Prosecutor:

Q. You are a practicing physician of the State of New Jersey? A. I am.

Q. And have been for how long? A. Twelve years.

Q. And are connected with what hospital in Woodbury? A. Underwood Hospital.

Q. How long have you been connected with the Underwood Hospital? A. Twelve years.

Mr. Johnson: Qualifications are admitted.

Q. Did you treat William J. Horner when he was admitted to the hospital? A. Yes, I did.

Q. You saw him at the time he was admitted? A. A few minutes after he was admitted.

Q. Had you ever seen Mr. Horner before that time? A. No.

Q. Will you describe to the Court and jury the nature and extent of the injuries which were apparent to you at the time he was admitted to the hospital? A. When he was admitted to the hospital he was in an unconscious condition. His head and face were greatly swollen. He was admitted to the hospital and he had difficulty breathing. He had a lot of mucous in his throat, and he kept quiet for a while. Then his arms moved up and down, he seemed to improve a little, and his head was shaking from side to side, but otherwise he didn't show much signs of getting better. Later on in the day he got worse. We did a lumbar puncture on him, and drew out the spinal fluid, and found it had some blood in it, blood tinged, and the right ear had some small amount of blood coming from it. These are signs of a fractured skull. Then later on in the evening he got worse, and he died at five forty-three a. m. the next day, that's June 18, 1937. His face and head was greatly swollen as if he had been struck by a number of blows. The right side of the head,

in back, he had quite a lump, a contused swelling. The forehead had scratches on it, and both cheeks were swollen quite a bit, and had scratches on them. The left ear had a bad hemorrhage under the skin, which was swollen, so it closed over the ear canal. The upper lip was swollen and bleeding. The lower lip was also swollen, and inside the mouth on the right cheek was a large cut, a laceration. The nose was fractured, and pieces of bone could be felt very easily all loose. The neck was swollen also on both sides, and especially the right side under the angle of the jaw here it came out almost even with the jaw, and it was swollen and a subcutaneous hemorrhage through the neck and also down on the chest, down on the right side more than on the left; and there was a large bruise on the left arm over the upper arm. The legs had two or three small abrasions on them below the knees. The abdomen and chest otherwise were negative.

After he died we made another examination, and besides finding these different injuries we found—we opened the skull, before doing that we cut the scalp, and found that the scalp tissue was all full of hemorrhage on both sides. The hemorrhage spread through the tissue, and when the bone was taken off the head we found the left side of his brain was full of blood, not full of, but more blood than usual. It was red and loose blood flowing around in the brain, showing it had been shaken up. And then under the right side of the brain in the middle fossa we found a hemorrhage quite as large as an egg, which had been bleeding from vessels, causing pressure on the head and causing these symptoms, and the brain itself didn't seem to contain any blood inside. The chest and abdomen were both normal, we couldn't find any frac-

tured ribs, and we thought he had died from the cerebral hemorrhage, cerebral concussion and contusions, most likely from receiving a number of blows, and the neck was also swollen and he might have been choked. I guess that is all.

Q. Then, as I understand it, the majority of the injuries were from this part up, is that right? A. Yes.

Q. Can you give us any idea as to the number of blows which must have been struck to put a man's face and head in the condition it was in?

Mr. Johnson: I object to that.

The Court: Yes.

Q. Could all of the injuries that you have just described be caused by one blow from the fist? A. No.

Q. It would take more than one blow? A. Yes.

Q. You say the nose was fractured? A. Yes, it was.

Q. And after his death, did you perform a post mortem? A. Yes, we did.

Q. What other physician was with you at the time the post mortem was performed? A. Dr. Sheets.

Q. And in your opinion what was the cause of his death? A. The cause of death in our opinion was cerebral concussion, contusions and hemorrhage.

Q. And what part did the blows have in connection with the death?

Mr. Johnson: I object to that.

The Prosecutor: I will withdraw that.

Q. In your opinion what caused the hemorrhage of the brain? A. The blows he received on his head.

Q. The blows caused the hemorrhage, and the hemorrhage caused death? A. Yes.

Q. You said his head was swollen at the time he was admitted? A. Yes, sir.

Q. Can you give us any idea as to the extent of that swelling?

Mr. Johnson: I object to that, he had never seen this man before, he might have had an abnormal head.

The Prosecutor: We will follow that up by Dr. Sheets that he did have a normal head, and if I cannot prove that I will strike that out, too.

The Court: The objection is well taken, if he had not seen him before.

The Prosecutor: I want to bring out the extent of the swelling, and to show further by Dr. Sheets.

The Court: He has already testified to the swelling of the head, and the other swellings up here.

The Prosecutor: Will you repeat the question, Mr. Denham?

(Question repeated.)

The Court: He can answer the question yes, or no, if he can.

The Prosecutor: I will withdraw the question.

Q. Will you describe the swollen condition of this man's head? A. The head was swollen in many parts, in the posterior part of the head, more on the left side. He had the contusions, and swellings, and the left ear was swollen and contained a large hemorrhage. The forehead was swollen, and the left cheek and right cheek, they were both swollen, and the nose had some swelling, but most-

ly fractured. Both lips, upper and lower, were enlarged and swollen.

Q. What do you have to say as to the amount of force that would be necessary to cause injuries of the type that you have just described when they were made by a fist? A. I think there is a great deal of force necessary to cause all that hemorrhage around the scalp, and there was hemorrhage all through the tissue which needed quite a little force, and the cuts on the nose, too.

Q. As I understand it, some force must go from the outside to the inside of the brain to cause hemorrhage in the brain? A. Yes.

Q. Is that correct? A. Yes.

Q. Did you do anything to reduce the swelling in his head? A. We put cold compresses on his head.

Q. Did that have any effect upon his condition? A. Not much.

Q. And did he have any black and blue marks on him anywhere? A. Yes, he had some black and blue marks on his cheeks, and on his chest, his right shoulder, going down over the chest partly, and through his neck, and also there were some on his forehead, long abrasions there.

Q. You mentioned before about some marks, which appeared as if he had been choked, is that correct? A. There were marks there.

Q. Where were those marks? A. On each side of the neck. There was hemorrhage under the skin, and this hemorrhage went from his neck, went on down into his chest, it had drifted down there, you couldn't tell exactly any definite marks there. It had run on through his tissue.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. How long had this man laid in the hospital before you arrived? A. Well, when he first came in he was seen by Dr. Underwood, who saw him downstairs, and admitted him up in the ward right away, and I saw him about half an hour afterwards. He was admitted at eight thirty, I saw him about nine o'clock.

By the Court:

Q. You saw him at nine o'clock? A. In the morning, a. m.

Q. The 18th? A. 17th.

By Mr. Johnson:

Q. Did he receive any medical attention from the time he was first taken in there until the time you attended him? A. I couldn't tell that, because the time was so short, anyhow.

Q. You say that these fractures came from blows of the fist? A. I didn't say that.

The Prosecutor: He didn't say that, he said the hemorrhage was caused, but not the fractures. The hemorrhages were caused by the blows that were struck, whatever they were by.

Q. Could these same hemorrhages have been caused by falling against some hard object? A. He would have had to fall several times, I don't think so, he couldn't keep on falling a number of times. They were all around his head, front and back.

Q. Did I understand you to say that the marks on his neck were from choking? A. No, I didn't say that.

Q. You say his left ear was swollen, and had a hemorrhage. What do you mean by that, what is commonly known as a tin ear, like a boxer? A. Yes, hemorrhage under the skin, causing a large swelling.

Q. It doesn't take much of a blow to cause a hemorrhage of the ear, does it? A. Well, I don't know, sometimes it might not cause so much of a blow.

Q. That could happen also in coming in contact with some other object, couldn't it? A. Which other, I don't know how it could happen, if you get a blow there you get a hemorrhage.

Mr. Johnson: That's all.

The Prosecutor: That's all, Doctor.

CECIL C. SHEETS, sworn.

By the Prosecutor:

Q. Your name is C. C. Sheets? A. That's right.

Q. You are a practicing physician of the State of New Jersey? A. I am.

Q. And have been for how long? A. Thirteen years.

Q. And you are a graduate of what medical school or college? A. McGill University in Montreal.

Q. Have you practiced the entire thirteen years in the Borough of Paulsboro? A. Twelve years in Paulsboro.

Q. Are you at the present time one of the Coroners of Gloucester County? A. I am.

Q. And have you ever served as Coroner before this present term? A. One term prior.

Q. How long was that? A. Three years.

Q. This is your second? A. Second term.

Q. How long have you been serving this term? A. About a year and a half.

Q. In the course of your duties as coroner, and also as a private practicing physician, is it your duty and your business to examine people who have been injured in various ways? A. It is.

Q. When and where did you first see William J. Horner in connection with the case which is being tried at this time? A. I was called by Chief Atkinson right around eight o'clock the morning of June 17th to come down to his house, to come down to this house on the corner of Commerce and Jefferson Street, that there was a man beaten up, and I went down there and saw Mr. Horner in the dining room in this unconscious condition, and Mr. Pettit followed me, he got there I judge maybe two or three minutes after I did, and I ordered his removal to the hospital.

Q. You directed the removal of the body of Mr. Horner to the hospital? A. Yes.

Q. When you first saw him he was in the dining room? A. Yes.

Q. Is that room also used as a bedroom, was it used as a bedroom by Mr. Horner during his lifetime? A. There was a bed in the room, and a big stove, and he was lying between the bed and the stove.

Q. Was any portion of his body underneath the bed? A. As I recall his feet were under the bed.

Q. At that time was he conscious? A. He was unconscious at that time.

Q. Did he ever regain consciousness after that time? A. He did not.

Q. You then ordered Mr. Pettit to take him to the Underwood Hospital? A. I did.

Q. Did you go to the hospital? A. I did not go

at that time, I was up there, I went up about eleven o'clock.

Q. The same morning? A. The same morning.

Q. Did you know Mr. Horner prior to the morning you saw him lying on the floor in his bedroom? A. I never knew him intimately, he had never been a patient of mine, but I have seen him numerous times on the streets of Paulsboro.

Q. You knew him by sight? A. By sight.

Q. And by appearance? A. Yes.

Q. What was the condition of Mr. Horner's head when you first saw him lying partially under the bed on the floor in the bedroom? A. His head was tremendously swollen, there were black and blue marks all over his face and neck, and of course there was a hemorrhage, and this one was tremendously swollen, and he was breathing irregularly and there were marks on his throat, to look at him he was just like a dying man at that particular time. You could judge by his breathing that there had been some injury to the brain in addition to the tremendous swelling of the face.

Q. You saw and knew him before that morning. Can you give us any idea by comparison how much larger his head was? A. Half again as big, I would say fifty per cent larger than it normally was.

Q. When you mentioned the rattel in his throat, what did that mean to you? A. Irregular breathing, long breaths alternating with short breaths indicated there was some injury to the brain, and there was blood in his respiratory tract which would move up and down with each breath.

Q. Will you describe those injuries which you saw at that time? Describe them in detail. A. When I first saw him I only had a couple of minutes

to examine him, and I did not examine the injuries closely until after his death.

Q. All right, did you and Dr. Nelson perform an autopsy after his death? A. We did.

Q. Will you describe to the Court and jury the injuries which you found at the time you performed the autopsy? A. The autopsy was performed at the morgue of Mr. Adams in Paulsboro.

Mr. Johnson: Doctor, just a minute. Those notes which you are using, are they your own notes?

The Witness: I have the original notes, they are in pencil.

Mr. Johnson: You transcribed them yourself?

The Witness: Yes.

Mr. Johnson: I withdraw the objection.

Q. What time did you perform the autopsy? A. It was on the morning of June 18th, ten o'clock, shortly after ten o'clock.

Q. I understand he died at 5:43 that morning? A. Yes.

Q. Just describe to the Court and jury the nature and extent of all the injuries that you found on Mr. Horner. A. The body was that of an elderly male, six feet three inches tall, weighing about two hundred pounds. The injuries, I will describe first those that were visible, you could just look and see them, you did not have to do any cutting to arrive at this conclusion. I will just list what I have down here. Both eyes are markedly swollen and discolored. Upper and lower eye-lids on each eye show solid areas of ecchymosis, extravasation of blood in the tissues, ordinarily called a black and blue mark. The entire left cheek was swollen and purple extending down-

ward to the left angle of the mouth in front and backwards to the angle of the jaw. That would be approximately down to the angle of the mouth extending to the back of the jaw, that was purple. Behind the angle of the jaw this ecchmosis extended downward two inches into the neck tissues so that the neck was swollen. There was no dip in the neck. There was an abrasion at the outer angle of the left eye three-quarters by half an inch, that was right about here (indicating). The upper lip was swollen about twice its normal size, it was real puffy and black and blue. From this ecchymosis just below the hair margin in the forehead was six small abrasions in the skin, the largest of these little scratches were half an inch in diameter. The left ear was swollen and discolored. There is a fluid swelling present almost the size of the ear. The size or measure of the ear is three and a half inches by one and three-quarter inches, three and a half inches long and one and three-quarter inches across. The size of the swelling was two and a half inches by one and one-half inches, that means that part of the ear was entirely pressed up and you could only see the rim of the ear. This was a fluid area which was fluctuating and this swelling was so much it blocked the external opening of the ear. Behind the ear there is an area of swelling, that is in the scalp. The scalp was swollen and discolored, three inches by two and a half inches. That is this area just behind the left ear. The lower lip was swollen tremendously and was very much discolored. There was a laceration on the lip one and one-half inches long extending from the mid line toward the right margin of the mouth, that would be on this portion (indicating) of the lip. A laceration means a cut, right across here and extending to the right

angle of the mouth. There was mucous membrane on the inside of the lip. The mucous membrane was torn and there was free blood on the inside of the mouth, and on the right cheek there was an area of redness or discoloration three and a half by one and one-half inches in front of the ear and extending down to the jaw. The bridge of the nose, that is right here (indicating) was swollen and discolored, and in addition there was an abrasion present three-eights inches in diameter. There was also a fracture of the bridge of the nose, the nose could be moved all over his face. Coming down to the neck, there is a marked lividity on the entire front of the neck, the lividity and area of redness extending down the neck on the anterior front surface of the chest to the right nipple on the right side seven and one-half inches down in the middle. This lividity did not extend downward as far in the mid line, being three inches from the breast bone, and on the left side of the breast it extended down three inches. Further on the right than on the left. Superimposed, by that I mean you have a dark purplish redish area in the middle of this reddish area, on either side of his neck were two very dark areas, they were almost black. On the right side this dark area measured three inches by one inch and on the left side it is one and one-half inches by one inch. On the upper side of the left shoulder there was an area almost black three inches by two and a half inches. On his arms there is an area of ecchymosis, a discolored area present on the outer surface of his left arm in th middle third, three and a half by two and a half inches. The dorsal surface, the back of his left hand was swollen and discolored. This ecchymosis is most marked over the fifth metacarpal phalange joint, that is right

over this (indicating) knuckle. The area was almost black, on his left hand. His right elbow showed three abrasions at the tip, right here (indicating) the largest being one inch by three-quarters of an inch, and the two smaller ones being one-half inch in diameter. On his right leg there is an abrasion on the outer surface one and one-half inches in diameter and three inches below the knee, in this location (indicating). There is also an abrasion one and one-quarter inches by one-quarter inch diagonal on the inner surface of his right leg six inches below the knee, that is a break of the skin. All this that I have told you up to now was visible, that is, by observation, there was nothing done to the body to determine that.

Q. Doctor, how long did it take you to go over these injuries and make these measurements? A. About an hour I would say to list them all and measure them.

Q. Go ahead. A. The left ear which was swollen and which I described was opened up with a knife and there was dark blood in it which showed it to be a hematoma or blood tumor, it was fluid blood showing that the blood vessel had been ruptured. The scalp was reflected, the skull-cap taken off and when the scalp was cut on either side of the neck, particularly over the temporal bone there was blood. The scalp was mashed right down against the bone showing that there had been a tremendous amount of force to rupture these blood vessels on either side. The scalp was reflected, the skull-cap was taken off. When the bone was exposed, looking at the brain from the top with the head here (indicating) looking at it directly the left frontal lobe of the cerebrum the blood vessels were engorged, the brain was very

red and inflamed which showed that that section of the brain had been pressed up against the side of the skull. There were no fractures found in the bone, that is, the top of the scalp. The cerebral hemispheres were removed and underneath the right cerebral hemisphere, being the middle fossa, that is the middle area of the brain, there was found a clot of blood the size of a bantam egg, I would say the blood clot was about two inches in diameter, one and three-quarters to two inches in diameter. This clot was caused by a rupture of the blood vessels. The brain that was removed was sliced every half inch and there were no hemorrhages found inside the brain substance. The chest was opened. The heart was moderately enlarged and the lungs were free and showed no evidence of disease. There were no broken ribs. The abdomen was opened and everything was apparently normal. The causes of the death were concussion of the brain, contusion of the brain and intracranial hemorrhages, which would be the hemorrhage on this middle fossa.

Q. Would the blows which were inflicted have anything to do with the intercranial hemorrhage? A. Yes.

Q. What connection is there between the two? A. The blows on the head have apparently ruptured the blood vessels which caused the hemorrhage.

Q. What do you have to say or how would you describe the condition of the bruises on the legs, his arm and the right side of his head, the number of blows and the extent of the force which was used to inflict those blows.

Mr. Johnson: That question involves two points.

The Court: He is adjusting his question the same as the other: I presume it has reference as to how many, not the actual number.

Mr. Lord: I will reframe the question.

The Court: All right.

Q. Doctor, what have you to say as to the amount of force which would have been necessary to use in the application of those blows to cause an intercranial hemorrhage? A. It would take a great deal to cause a hemorrhage, it would take a very severe blow to cause a rupture.

Q. Inside the head? A. Inside the head.

Q. You described the dark area, there was a certain amount of lividity to the right nipple up toward the neck and superimposed on that were four dark marks. When you made your autopsy did you make any further examination of that? A. We did. I forgot to mention that we opened up his throat showing his vocal cords and the inside of the respiratory tract, the vocal cord and the larynx. There were no injuries found to those organs.

Q. The marks that you say were superimposed on the red mark, where were they? A. On either side of the neck, one on the right side and one on the left.

Q. What in your opinion would cause those marks? A. They looked as if he had been choked with a tremendous amount of force, probably put there with two or three fingers.

Q. The force that was applied did not interfere with the respiratory organs? A. Yes.

Q. The fingers were put in the wrong place? A. Yes.

Q. Who was at the Horner home when you first

went there on the morning of June 17th? A. As I recall Chief Atkinson was there and Mr. Wilson, a neighbor of Mr. Horner, and I think one of the police officers. Just who it was I couldn't be sure.

Q. When you got there you made four? A. I made the fourth.

Q. I understood you to say something about Mr. Pettit. A. He got there a few minutes after I did.

Q. What was the condition of the Horner home when you got there bewteen eight and eight-thirty on the morning of June 17th? A. In the room that you first go in, the kitchen, everything was torn up, everything was out of place, it was very bad. I saw a table all broken, I think one leg was broken off the table.

Q. That was in the kitchen? A. Yes, and there were blood marks on the floor as if something had been dragged over the floor, that was blood, red splotches. In the dining room Mr. Horner was lying and I could see a couple of drawers pulled out and papers strewn over the room.

Q. Did you notice any blood marks on the bed or where Mr. Horner's body was? A. I remember some being on the linoleum but I think it was in the middle room.

Q. That would be the dining room or the bedroom? A. Yes.

Q. When you saw these marks as if something had been dragged across the floor, that was in the kitchen or the outside room, the first room that you enter? A. Yes.

Q. They led toward what other room? A. Toward the doorway.

Q. Between the kitchen and the dining room? A. Yes.

Q. Doctor, I show you Exhibit S-5 for identi-

fication and ask you whether or not that photograph truly shows the condition of the dining room in Mr. Horner's home at the time you went there? A. Yes, it does.

Q. I also show you another photograph, Exhibit S-6, and ask you whether or not that truly shows the other section of the combined dining room and bedroom when you went there? A. It does.

Q. Doctor, do you see any marks on the bed in that photograph? A. Yes, I do.

Q. Does that in any way refresh your recollection of the appearance of the bed when you went there? A. Yes, that is the blood mark that I described.

Q. What about the mark on the bed? A. That was present when I arrived.

Q. What was that? A. Blood.

Q. Now, I also show you S-4 for identification. You refer to a table in the kitchen with a leg broken off and I ask you whether or not that photograph truly shows the condition of the kitchen of Mr. Horner's home at the time you arrived there. A. That shows it exactly.

Q. And the table with the leg broken, is that what you referred to? A. Yes, that is what I referred to.

Q. I show you Exhibit S-3, which is another photograph showing a different view of the kitchen, and ask you whether or not that truly represents the other section of the kitchen as you first saw it. A. It does.

Q. Doctor, I call your attention again to Exhibit S-4 for identification. I show you different spots or marks on the linoleum on the floor of the kitchen and ask you whether you noticed that when you arrived at Mr. Horner's home? A. Yes, I did.

Q. And what were those spots or marks? A. Blood.

Q. I show you Exhibit S-3, which shows the other portion of the kitchen, and I call your attention to the marks on the linoleum there. Is that also blood? A. That is.

Q. I again call your attention to Exhibit S-6 for identification, showing certain marks on the floor of the combined dining room and bedroom, and ask you what those marks were on the floor? A. Those were blood marks.

Q. I call your attention to the side of the bed and ask you if you remember those marks and what they were? A. They were there and they were blood marks on the blanket or sheet.

By the Court:

Q. I think you said at the time—is there any objection to this? What was the date you went down there? A. The 17th of June. The autopsy was the 18th of June.

By the Prosecutor:

Q. Now, Doctor, the man upon whom you performed the autopsy was the same William Horner that you saw in his home on Commerce Street in Paulsboro? A. Oh, yes.

Q. And naturally the man was dead at the time the autopsy was performed? A. Yes.

The Court: At this time we will have a recess. The jurors will pass out first. We will recess until 3:15 o'clock, P. M.

(At this point a recess was taken for fifteen minutes.)

Cecil C. Sheets—Direct.

DR. CECIL C. SHEETS, resumed.

The Prosecutor: There are one or two questions I had overlooked, if your Honor please.

The Court: All right.

By the Prosecutor:

Q. Dr. Sheets, when you first saw Mr. Horner at his home, it was in the Borough of Paulsboro, I assume? A. It was.

Q. What do you have to say as to the strength of the skull of Mr. Horner, was it an exceptionally strong skull or what? A. Mr. Horner was exceptionally heavy-boned. The front and the back portion of his skull were unusually thick.

Q. On the night of June 17th, did you examine the defendants, Smalley Burrell, William Albert Brown and Anna Brown, in the Gloucester County jail? A. I did.

Q. And in my opening I stated that you were accompanied by Dr. Nelson. That was Dr. Rogers? A. Dr. Rogers, yes.

Q. And is Dr. Rogers a practicing physician of the State of New Jersey? A. Yes, she practices in Woodbury.

Q. She is a lady practitioner? A. A lady practitioner.

Q. Did you examine the three defendants in the jail, for the purpose of ascertaining whether or not there were any injuries on the defendants? A. I did.

Q. And were there any marks of bruises on either or any of the three defendants? A. Dr. Rogers and I examined Anna Brown very thoroughly, she was stripped, and there was nowhere on her body any bruises of any description.

Q. Who examined the other two? A. I examined the other two, that is, Smalley Burrell and Brown. I examined them alone. She was not there.

Q. Were they stripped or not? A. They were.

Q. Were there any marks or bruises on them? A. There were no recent bruises of any kind.

Q. About what time of the night of June 17, was that examination made? A. About 7:30 P. M.

Q. Excuse me. A. 7:30 P. M.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. Doctor, you said that when you made the autopsy you found Mr. Horner's heart was enlarged? A. Yes.

Q. Is that correct? A. Yes.

Q. Could it have been possible for him to have died from heart failure rather than from these blows?

The Prosecutor: That is objected to, if your Honor please, what could have been possible. The question is what did happen, not all the possibilities.

Mr. Johnson: I will reframe the question.

A. I said it was—

The Court: Just one moment. What is the question again? What is the question?

(Question repeated)

The Witness: No.

The Court: Is objection taken to it?

The Prosecutor: The doctor has answered it and I withdraw my objection.

The Court: What was the answer?

The Witness: No.

Q. You were not the attending physician at any time for Mr. Horner, is that correct? A. No.

Q. You said that there were marks on his neck as if he had been choked. There was no evidence he had really been choked? A. There were marks on either side of the central portion of his neck, where there had been pressure applied but there was no injury to his respiratory, the upper respiratory tract, that is, his larynx or his windpipe, which would show any injury resulting from choking.

Q. How tall would you say Mr. Horner was? A. Six feet, three.

Q. How much did he weigh? A. Approximately —it was just estimated— around two hundred pounds.

Q. He was for his age a very healthy and strong man, wasn't he? A. He was fairly well developed.

Q. You say that the bones of the skull, front and back, were exceptionally hard. They were not broken, were they? A. They were not.

Q. Any blow on the side of the head or the front of the head that would cause a hemorrhage would not necessarily have to break the bone? A. No.

Q. That blood would seep into the head? A. It would.

Q. These blows could have been received by Mr. Horner through falling against a hard object, couldn't they? A. It is possible, yes.

Q. You said that he had a hemorrhage of the right ear or the left ear, which was it? A. The

right. There was a hemorrhage of his left ear. There was also a little hemorrhage of the right ear.

Q. This hemorrhage of the right ear is called or what is known among fighters as a tin ear? A. That was the left ear. It was the left ear that you would call a tin ear.

Q. The right ear was not swollen as much as the left? A. No.

Q. Is it necessary, to get one of these so-called tin ears, to receive a heavy blow? A. Yes.

Q. Have you had any experience where a football player has received a tin ear even while wearing a headgear? A. No, I never had.

Q. Have you heard of it occurring? A. No, I have not.

Q. I show you Exhibit S-4 for the State, marked for identification.

The Court: Is that S-4?
Mr. Johnson: S-4.

Q. Could Mr. Horner have been hit by that table falling and receiving some of the injuries that he had received?

The Prosecutor: Objected to.
The Court: Yes, it is a little too remote. The objection is sustained.

Q. You say these marks along the floor here were blood? A. It apparently was blood, yes.

Q. You did not make an examination of it? A. I did not make a chemical examination but it was very evident that it was blood.

Q. Were there any foot marks over the floor? A. I did not see any.

Q. I show you Exhibit S-6, marked for identification. Where on that picture was Mr. Horner

when you arrived at the Horner residence?

The Prosecutor: Hold it up, so the jury can see, doctor.

A. Mr. Horner was lying with his head about in this position, at the top of the bed, the upper portion of the bed, and his body extended toward this wall, with his feet slightly under the bed. I would say his feet and ankles were underneath the bed. He was lying just in this position, with his head this way (indicating).

Q. Can you tell me what the distance is between the bed and the stove? A. It is not very far. I would not say over two feet. I could not be accurate on that.

Q. Was Mr. Horner fully dressed when you saw him? A. He had his underwear on. It was a long union suit, knitted.

Q. Was that torn? A. I did not notice that.

Q. You say Mr. Horner's head was swollen about fifty per cent larger than ordinarily. How do you account for that? A. The bruising and the extravasation of the blood and serum in these tissues, his both cheeks were swollen, he was swollen in front of his ears and behind it, in the scalp, and his neck was all swollen.

Q. The swollen head could be caused more by the blood than by the blows, would it? I mean the upper portion of the head. A. Would you repeat that question to me again?

(Question repeated.)

A. That is a misleading question. The blood was caused by the blows and the blood caused the swelling.

Q. That is what I mean. It was not the blows

that caused the swelling of the head as much as it was blood?

The Prosecutor: If your Honor please, the witness says it was the blood. What happened is that the blows were struck, the blood vessels ruptured and they swelled out.

The Witness: That is what I say.

Q. These scars on the leg and the chest were not cut, were they? A. They were scraped. The one on his leg that I described, the one about three inches long, it was more of gouged-out appearance, just a scrape, what we call an abrasion. It does not extend all the way through the skin.

Q. Like a brush burn? A. Except a single brush burn, just like scraped by one object, a scratch, if you want to call it that.

Q. There was no—you did not see any cuts of any kind on his neck, did you? A. Not on his neck.

Q. The only cuts that you saw were scratches? A. There was a cut on his lower lip, that I described, on the right side. I think it was an inch and a quarter long, an inch and a half long.

Q. The blood that was in his chest, that caused the rales, was that from the cut on the lip? A. It was from the tear in the mucous membrane on the inside of his lip. There was a cut inside his lip, where the membrane was torn, and that had bled and he aspirated and drew in a certain amount of that blood.

Q. Could you tell how that cut arose? A. It was torn against the teeth.

Mr. Johnson: That is all.

By the Prosecutor:

Q. Doctor, when you knew Mr. Horner in his

lifetime, before you saw him that morning, did he ordinarily have an enlarged ear? A. He had very large ears.

Q. I mean did he have what is known as a tin ear? A. He did not. He had unusually big ears but no tin ear.

Q. The bruises you have described as being on the chin, could they have been caused, from their appearance, by the kick of a shoe or heel of a shoe? A. Yes.

Q. How about a woman's shoe, a woman's sharp shoe? A. Yes.

The Prosecutor: That is all, doctor.

By Mr. Johnson:

Q. Just a minute. They also, those bruises on the cheek, could be caused by a bumping into some other object, couldn't they? A. Yes.

Q. Like a table leg or something like that or the stove shown in that picture? A. Yes, if you hit it hard enough.

Mr. Johnson: That is all.

By the Prosecutor:

Q. How many times would he have to bump into a stove or table to have all the injuries? Could he get those all in one fall? A. I would say about thirty times, forty, maybe.

JOSEPH BAJI, recalled.

By the Prosecutor:

Q. I call your attention to Exhibit S-3 for identification, the photograph which you previously testified you took, and ask you whether or not

in that room when you first entered, there were or not any blood marks either on the floor or other parts of the room that you noticed? A. On this photograph it only shows the blood spots on the floor.

Q. That is Exhibit S-3 for identification? A. Yes, sir.

Q. I show you Exhibit S-4 for identification, and ask you whether or not there are any blood marks on the floor, or other parts of the rooms shown in that photograph? A. On this one that shows blood spots on the floor, on the cupboard and also on the walls.

Q. Those were apparent to you when you went there? A. Yes, sir.

Q. Does the photograph show the kitchen in the same condition as it was when you went there? A. Yes, sir.

The Prosecutor: I would like to offer these two photographs in evidence.

Mr. Johnson: I am willing, unless sometime in the future the Prosecutor will further identify the room as not being changed until after that.

By the Court:

Q. During the time you were there was anything moved? A. No, sir, there was not.

Q. Nothing moved? A. Not that I know of.

The Prosecutor: There is not much possible change that could be made in the kitchen and the dining room.

Q. For the purpose of taking these photographs did you move anything? A. No, sir.

The Prosecutor: I offer them in evidence.

The Court: They will be admitted.

(Received and marked Exhibits S-3 and S-4.)

By the Prosecutor:

Q. I show you Exhibits S-5 and S-6 for identification, the photographs you previously testified you took, and ask you whether or not anything was changed in either one of those photographs while you were there prior to the time the photographs were taken? A. No, sir, there was nothing changed to my knowledge, they were just as I found them.

Q. Do those two photographs show any blood marks? A. Yes, they do.

Q. Where were they?

The Court: Refer to each one according to the marking.

A. Exhibit S-6 on the floor, and also on the bed.

By the Court:

Q. What are they? A. Blood spots. Exhibit S-5, blood smears on the floor.

The Prosecutor: I offer these two photographs in evidence.

Mr. Johnson: All right.

The Court: All right, they will be admitted.

(Received and marked Exhibits S-5 and S-6.)

By the Prosecutor:

Q. I don't recall, but did you notice anything wrong with the screen door as you entered, the back screen door? A. Yes, I did.

Mr. Johnson: I object to that.

The Court: He has already answered that question.

The Prosecutor: I was not sure whether it was the question that was objected to, or not.

Mr. Johnson: I move that it be stricken out.

The Court: Yes, this is repetition, it will be stricken.

Mr. Johnson: No questions.

WILLIAM M. WILSON, sworn.

By the Prosecutor:

Q. You live at Paulsboro? A. Yes, sir.

Q. And have lived there for how long? A. Several years, close to forty, I think.

Q. Where are you employed at the present time? A. 1014 North Commerce Street.

Q. Where are you employed, where do you work? A. I work out to Thompson's Service Station.

Q. How long have you been working for Mr. Thompson? A. Between four and five weeks.

Q. Did you ever work for either the Vacuum Oil Company or the DuPont Company? A. DuPont.

Q. How many years? A. Twenty-eight.

Q. You are retired and pensioned from the DuPont Company? A. Yes, sir.

Q. What street do you live on in Paulsboro? A. Commerce Street, North Commerce Street.

Q. Where is your house with respect to the home of Mr. Horner? A. Next to him.

Q. As I understand it, Mr. Horner's house is

at the corner of Jefferson Street and North Commerce Street? A. Yes, sir.

Q. And your house is right next door to Mr. Horner's? A. Adams and Commerce.

Q. That's where your house is? A. Yes.

Q. I show you Exhibit S-8, and ask you whether or not your house is shown on that photograph? A. Yes, sir.

Q. And will you point out to the jury just where your house is? A. Right here (indicating), the corner of Adams and Commerce, 1014.

Q. Does that photograph show the home of Mr. Horner? A. It does.

Q. Will you point that out to the jury? A. Right there (indicating).

Q. Right next door to your house? A. Yes, the vacant lot is between them, you know, or gardens.

Q. I show you Exhibit S-9, and ask you whether or not that also shows your home, a front photograph of your home? A. It does.

Q. Will you point that out to the jury, please? A. Right here is my home, here is the line fence between Mr. Horner and I, right there.

Q. Does that photograph also show a portion of Mr. Horner's home? A. It does.

Q. Will you point that out to the jury? A. Right here, this tree is on the other side of the street, on the east side from ours.

Q. On the 16th of June of this year what was between your home and Mr. Horner's home, is there a garden there? A. Garden, that's all.

Q. To whom did that garden belong? A. Mr. Horner.

Q. Did any portion of it belong to you? A. No, the fence divided it.

Q. Was your garden on the side of the house or in back of the house? A. Both.

Q. Did you go over to Mr. Horner's house on the morning of June 17th? A. I did.

Q. And about what time in the morning did you go over there? A. About seven forty.

Q. Seven forty in the morning? A. Yes.

Q. Did you make a memorandum the same day that you went over there? A. No, sir, two days afterwards, a couple of days afterwards.

Q. What was the occasion of you going over to Mr. Horner's house that morning?

Mr. Johnson: I object to that, if your Honor please, what is the occasion?

A. I knowed there was something wrong.

Mr. Johnson: That is a conclusion.

By the Court:

Q. What was wrong? A. He had not got up, and the curtain was down on one side of the house.

By the Prosecutor:

Q. Had you and Mr. Horner run your gardens as sort of a race?

Mr. Johnson: I object to that.

The Court: Sustained.

Q. What did you notice wrong about Mr. Horner's home on the morning of June 17th? A. The curtain down next to Jefferson Street.

Q. When you saw the curtains were down next to Jefferson Street, what did you do? A. I didn't do anything at the present.

By the Court:

Q. With your hand in that position, the jurors

cannot catch what you are saying. A. I will keep it away, Judge, your Honor.

By the Prosecutor:

Q. When you first looked at Mr. Horner's home you noticed that the curtains were down? A. Couldn't see through the house.

Q. The curtain was down on the Jefferson Street side of the house? A. Yes.

Q. Did you see that from your home? A. Yes.

Q. Could you look right on through the house to the window on the Jefferson Street side? A. Yes, sir.

Q. Did you notice anything besides that? A. Well, yes.

Q. What did you notice? A. I noticed two streaks in the wire had been cut.

Q. In the wire of what? A. The net door.

Q. Of Mr. Horner's house? A. Yes, sir.

Q. I show you Exhibit S-7, and ask you if you will point out the door where you noticed the screen was cut? A. That was about fifteen inches, and this was about twelve inches cut in the screen door, and there had been a piece tore off on the top of this.

Q. When you noticed those things what did you do? A. I dropped my hand plow, and went over there to look.

Q. When you went over to look, is there a fence between your yard and Mr. Horner's yard? A. Yes.

Q. Where did you go, what line did you follow to go over to Mr. Horner's house? A. I went down Commerce to Jefferson, down Jefferson to his back gate.

Q. Then when you got to his back gate, what did you do? A. Started around the house.

Q. You started inside Mr. Horner's house or yard? A. Inside the yard, yes, sir.

Q. I again show you Exhibit S-7, and ask you if you will point out on there the gate where you entered the Horner property? A. Right over here on Jefferson Street (indicating), went in there.

Q. When you went into the Horner yard what did you see? A. When I got to that window I saw it was in that shape.

Q. You say when you got to the window, you say that it was what shape? A. This window here, where it was hooked on one side, and pointed across, one side was hooked and one wasn't.

Q. That's the top of the shade? A. Yes.

Q. One end was fastened and the other end was hanging down? A. Yes.

Q. Did you look in that back window? A. Yes, sir.

Q. Could you see in the kitchen or shed, what ever you call it? A. Yes, sir.

Q. In this back window? A. Yes, sir.

Q. What did you see when you looked in there? A. I saw a tray, and that was turned away from the wall, and I saw the table upset.

Q. And then what did you see, anything else, when you looked through the back window? A. I seen two spots, and some spots of blood on the cupboard.

Q. And then what did you do after you looked in the back window? A. I moved around to the other side window.

Q. This window (indicating)? A. Yes, sir.

Q. And what did you see when you looked in that window? A. The curtain on the floor.

Q. The curtain from that window? A. Yes.

Q. Was that on the floor? A. Yes, sir.

Q. What else did you see in the kitchen? A. Well, I saw most everything all over the house, blood over the floor, and everything all scattered over the house, and a quilt, he had a rocking chair in there, and there was a quilt on this side, next to his gas stove, over on that side, and that had blood on it.

Q. I show you Exhibit S-4, and ask you whether or not that truly represents the condition of the kitchen when you first looked in there? A. Part of it.

Q. That is a part of the kitchen? A. Yes, sir.

Q. Will you point out to the jury what you mean by a tray? A. This right here (indicating).

Q. You say that's usual place is where? A. Right by the window, and here is the cigar box with burnt match sticks right there (indicating).

Q. Where was the usual place for the little table? A. Right back here, right against the wall on the cupboard under the window.

Q. I show you Exhibit S-3, and ask you whether that truly represents the other portion of the kitchen as you saw it that morning, I mean the rest of the room with the exception of the bed quilt, does that show the condition of the kitchen? A. Yes, sir.

Q. Is that the bed quilt, to which you refer, that, as a general proposition, fairly represents the condition of the room? A. Yes, sir.

Q. Let us go back for a minute, you looked in the back window there into the kitchen, and then you went around the side and looked into that window where the curtain was torn down? A. Yes.

Q. And after you left that window where did you go then? A. Up to the window where he used to sleep, this was about half open, this window,

this curtain, about half up, and the one on the other side was down.

Q. That is, the one on the Jefferson Street side was all the way down to the sill? A. Yes, sir.

Q. This was about halfway up? A. Yes, sir.

Q. When you looked into that room, into what room did you look? A. The middle room.

Q. Is that where he used for a bedroom? A. Yes, sir.

Q. What did you see when you looked in there? A. Most everything.

Q. Tell us as accurately as you can. A. I looked for Mr. Horner, I couldn't locate him for a bit, I looked in his bed, so I looked on around through this window, and after a bit I spied him. I found him and looked at him for about a minute, I thought he was dead, and then I went for some help, went over to the house to telephone, my daughter called up the Municipal Building to get hold of the Chief.

Q. Then did you go back to Mr. Horner's home and stay there until the officers arrived? A. I did.

Q. I call your attention to Exhibit S-6, which shows a bed and a portion of Mr. Horner's dining room, and ask you where you first saw Mr. Horner that morning? A. Right in between here (indicating), his feet was under the bed.

Q. Where was his head? A. Southeast.

Q. Out towards the window in which you were looking? A. No, his head was pointing towards the cellar door, the cellar door is in the middle of this room, and his head was pointing right across here, and his left hand laid on his breast that way.

Q. I show you Exhibit S-5, and ask you whether or not that also truly represents the condition of the portion of the bedroom of Mr. Horner as

you saw it that morning? A. It certainly does.

Q. Was there any blood in the dining room, or bedroom, as he used it? A. Why, yes, some, and some on the mattress, some was on the mattress.

Q. Had you been in Mr. Horner's home on previous occasions? A. Several times.

Q. And was that the general way in which he kept his home? A. No, sir.

Q. What was his habit as far as housekeeping was concerned? A. One hundred per cent.

Q. By that you mean he was a neat housekeeper? A. Yes, sir, inside and out, both.

Q. Who else lived there with Mr. Horner? A. Nobody.

Q. He lived there all alone? A. Yes.

Q. About how old a man was he? A. Sixty-five the seventh of last February.

Q. Had he also worked at the DuPont Company for some time? A. Yes, sir.

Q. How many years? A. I don't know positively; he was pensioned off.

Q. What sort of work did he do around the time that he was killed? What was his job? A. Why, he was sexton of the Episcopal church across the street.

Q. That is diagonally across the street from his house on the corner also? A. Yes, sir.

Q. You say you waited there until the officers arrived? A. Yes, sir.

Q. Who was the officer who first arrived at the scene? A. Chief Atkinson.

Q. From the time that you first saw Mr. Horner's body with his feet under the bed and his head lying toward the stove had any one entered that home? A. Not that I noticed.

Q. Who went in first? You or the officer? A. The officer.

Q. Did any one besides Officer Atkinson come there? A. Dr. Sheetz.

Q. Who arrived there first? Officer Atkinson or Dr. Sheetz? A. They came together.

Q. How did you get into the Horner home? A. The chief broke the door in.

Q. Which door did he break in? A. The kitchen door.

Q. Did you go right in with him? A. I did.

Q. Did any one else enter the house at the same time you two men went in? A. Dr. Sheetz, I guess that is all. I don't know how many there were.

Q. Do you remember Mr. Pettit coming in? A. Yes.

Q. Mr. Pettit is the undertaker? A. Yes.

Q. Do you remember Mr. Baji, the photographer? A. Yes, sir.

Q. Do you recall him taking certain photographs that morning? A. Yes, sir.

Q. Had anything been disturbed from the time you first saw Mr. Horner's body until the photographs were taken except that Mr. Horner's body had been removed to the hospital? A. That is all.

Q. How long had you lived alongside of Mr. Horner? A. October, 1930.

Q. 1930? A. Yes.

Q. What sort of a man was he? A. Well, he was a pretty good kind fellow, a little unhandy to handle, outside of his being deaf, he was one hundred per cent good.

Q. He was hard of hearing? A. Yes, you had to go right up to his ear.

Q. Outside of that you always found him to be a peaceful sort of fellow? A. Yes, a good fellow.

Q. How long had he lived in Paulsboro to your

knowledge? A. I think he was born there.

Q. Practically all his life? A. Yes.

Q. When you went in and saw Mr. Horner lying on the floor with the officer what was his condition when you saw him lying on the floor? A. Pretty well battered up.

Q. Was he alive or dead? A. He was alive, he was breathing.

Q. Do you recall how he was dressed? A. He had a two-piece undersuit on.

Q. Long drawers or short drawers? A. Long ones.

Q. Long ones? A. Yes.

Q. As I understood you to say this was seven-forty when you first looked into the door of the house? A. Yes.

Q. How long after you first saw Mr. Horner was it that Officer Atkinson arrived? A. I don't know exactly, it wasn't long.

Q. You did not keep much track of the time; you were pretty much excited? A. Sir?

Q. You didn't keep track of the time; you were pretty much excited? A. Well, I was surprised.

Mr. Lord: Cross-examine.

Cross-examination by Mr. Johnson:

Q. Mr. Wilson, how far is it between your house and Mr. Horner's house? A. Why, I don't know how far it is, but from the line fence to the window it is twenty-three paces.

By the Court:

Q. Twenty-three paces? A. Yes.

By Mr. Johnson:

Q. Which side of the house do you sleep on? A. Me?

Q. Yes, in your house? A. I sleep most anywhere in this weather because I ain't home to go to bed.

The Court: That night.

Q. On the night of June 16th, were you home? A. Not after ten o'clock.

Q. You were not home after ten o'clock? A. No.

Q. Was your wife home? A. As far as I know.

Q. Show me on that picture just where you went when you went over to Mr. Horner's home, this Exhibit No. 8. A. I walked right over there, across the street, across the wire fence and went on around Commerce down Jefferson to the back gate.

The Court: Will you state that so it may be stenographically understood.

The Witness: I walked out of my garden, stepped over my wire fence, went down North Commerce to Jefferson, down Jefferson to the back gate.

The Court: Of Mr. Horner's home?

The Witness: Yes.

Q. Will you show me on this picture, Exhibit S-7 what window you looked through when you first noticed the curtain. A. I stood on my front porch and noticed this curtain being down.

Q. Your house is to the right of that? A. Yes. Yes.

The Court: Is it the curtain of the kitchen, middle room, or the front room?

The Witness: Why the middle room.

Q. The bedroom? A. That is where he sleeps in.

Q. Did you have your glasses on that morning

when you went over there? A. No, sir, I don't wear them only to read.

Q. You can see all right at a distance? A. Yes, sir.

Q. When you looked in the window first you looked in the kitchen window, this window (indicating)? A. No, this one right here (indicating).

Q. That is the one you looked through? A. Yes.

The Court: Which one are you showing? ing?

Q. On Exhibit S-3, what window is it on that picture that you looked through? Can you tell? A. I don't see it.

Q. Is it on this one, Exhibit S-4? A. This window here (indicating). I looked in that one first.

Q. Is that the condition you saw the room when you looked in that window? A. Yes, the spot of blood.

Q. Do you mean to tell me that you could look through this window and see these spots of blood? A. I seen some blood here at the rocking chair. I looked in there and I seen this blood here (indicating) and over here (indicating). And this little bag that is on the table is bread crumbs.

Q. Did you know it was blood at the time? A. I thought it was nice and red.

Q. How often had you gone over to Mr. Horner's home? A. I couldn't tell you. To tell the truth, quite often.

Q. You and Mr. Horner were very friendly? A. Yes, sir.

Q. I show you Exhibit S-6. Show me where Mr. Horner was lying when you first saw him. A. Right here (indicating), the feet was under the bed and his head was over here (indicating) and

the cellar door is over between the stove and the bed.

Q. Was he lying on his face? A. No, sir.

Q. On his back? A. Yes, sir.

Q. I show you Exhibit S-7. Is that the door that you say you entered with the officers? A. Yes, sir.

Q. Is that the door that you say was torn, the screen door was torn? A. Yes, sir.

Q. Where was it torn? A. Right here, fifteen inches up here and twelve inches here.

Q. Torn on both sides? A. Right side up.

Q. On that side of the door and this side of the door? A. Yes.

Q. Was it torn before? A. No, sir.

Q. When did you last notice that door? A. The day before.

Q. You didn't notice it this morning until you looked in the window? A. Yes, that is what took me over there when I seen this.

Q. Was that door locked when you went there? A. Yes, sir.

Q. Did you try it? A. Yes, sir.

Q. You say that nothing was moved in the house after you got there? A. Except Mr. Horner. Mr. Horner was moved out.

Q. Was he bleeding when he was carried out? A. I don't think he was.

Q. Were you there when they carried him out? A. Yes, sir.

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

Q. Outside? A. I helped put him in the ambulance.

Q. You don't know whether the marks were put there when they carried him out? A. No, they couldn't be gotten there that way.

Q. Why do you say that? A. Because they car-

ried him out the door right at the middle door, and the blood is over on that side.

Q. Is this the door they carried him out on Exhibit S-7? A. Yes, sir, that is the door.

By the Court:

Q. Is that the middle door? A. The kitchen door.

By Mr. Johnson:

Q. They carried him from the room in which this is a window? A. Yes, right out this door.

Q. On Exhibit S-6, he was lying right there on the floor, is that correct? A. Right in there.

Q. Is this the door on Exhibit S-5 through which they carried him? A. No, the door over here, that is the cellar door and that is the room door.

Q. Just turn around and say that to the jury. A. That is a writing desk, and that is a cellar door, and that goes into the front room. Here is the door they carried him out, right out this door.

Q. I show you Exhibit S-3. Is that the door through which they carried him from the other room? A. Yes, sir.

Q. Right through there? A. Yes.

Q. Out that door? A. Yes.

Q. You were on the outside? A. Yes, sir.

Q. Did Mr. Horner always do his own work, house work? A. No, sir.

Q. Whom did he have doing his house work? A. Some colored lady.

Q. Do you know who that colored lady was? A. No.

Q. You didn't see his house the day before, the inside of the house? A. No, I don't think I was in his house that day.

Q. You don't know whether he had the cleaning lady in there that day? A. No.

Q. Then part of that cluttering up of the house could have happened the day before without you knowing it?

Mr. Lord: Does counsel mean that condition of the room could be caused by the cleaning?

The Court: We are not concerned with possibilities. The objection is sustained.

Q. Did you go inside with the officers when they went in there? A. With the Chief.

Q. Did you go inside? A. Yes, sir.

Q. Did you see him touch anything when he got in there? A. No, he didn't touch anything, he said, "Don't touch nothing."

Q. Was Dr. Sheetz along with him? A. Yes, sir.

Q. Where did they go as soon as they got into the house? A. To Bill, to Mr. Horner.

Q. Where did you go? A. I went outside.

Q. You didn't see what they did? A. No, only they said don't touch anything.

Q. Who said that? A. The Chief.

Q. You don't know whether they disturbed anything when they brought him out or not? A. I don't think so.

Mr. Johnson: That is all.

By the Court:

Q. Did you try to talk to Mr. Horner? A. No, sir.

Q. Was he lying on the floor? A. No, sir, I didn't try to talk to him.

Q. Do you know whether he was conscious or

unconscious at the time? A. I don't know that. I just watched him and saw him breathing.

Q. You saw him breathing? A. That is all, he wasn't making no noise or anything and I thought that he was dead when I first saw him.

By Mr. Lord:

Q. Why did you watch the curtain in the house? A. Some time ago, quite a little while ago, the curtains were down one morning and I fooled around and I didn't go over until half-past nine. A curtain was up about a couple of inches where he was lying on Jefferson Street. After he saw me he opened up the back door and he said I am glad you came over, get me a doctor, he had been sick all night. He laid down and I got Dr. Smith and he came up there and he made three or four trips and I waited on him and ran to the store for him, waited on him all I could, so one day out in the garden, that was last year, he said I am going to leave those curtains up in the middle room and I want you to look in because I was sick last night so I got into the habit of looking into the window.

By the Court:

Q. That was how long before June 16th? A. That was some time last year.

Q. About a year ago? A. Somewhere around that time, I don't know exactly.

By Mr. Johnson:

Q. Do you know what was the matter with Mr. Horner at that time? A. No, I don't. I guess it was just inflammation of the stomach, a bad cold.

Q. How long was he sick? A. Seven or eight days.

Q. Did you ever see very many colored people

around Mr. Horner's house around the time this occurrence took place? A. No.

Mr. Lord: Objected to.

The Court: It has already been answered.

Mr. Johnson: That is all.

The Court: Ladies and gentlemen, you will be in the custody of the officers of the court and the sheriff. A place has been provided for you overnight and will be every night during the continuance of this hearing. I want to admonish you not to discuss the case even among yourselves until all the testimony and the evidence is in. You can talk about everything else but do not talk about the case. Above all, do not get into communication with any outsiders. You will remain in custody of the officers until the matter is finally determined. As I said before, if there is anything of importance that your family wants to get in touch with you, something by the way of sickness or death or otherwise, be sure that it comes by the way of the Court. I have to be somewhere in calling distance so I can communicate with you and the officer who will be waiting in attendance on you. Court will recess until tomorrow at ten o'clock.

(A recess was taken until ten o'clock A. M. July 13, 1937.)

SECOND DAY

July 13, 1937.

Before—Woods, *J.*, and a Jury.

Appearances:

For the State, Prosecutor Lynwood Lord.

For the Defendants, Frank L. Johnson, Esq.

Woodbury, N. J., July 13, 1937.

Trial of the case resumed at 10 o'clock, A. M., pursuant to adjournment, in the presence of the defendants and counsel for the respective parties.

MARY HENDRICKSON, sworn.

By the Prosecutor:

Q. Mrs. Hendrickson, you live at the corner of Adams Street and Commerce Street in the Borough of Paulsboro? A. Yes, I do.

Q. And will you speak up so we can all hear you? A. Yes, I do.

Q. What relation are you to William Wilson who testified as the last witness yesterday afternoon? A. Daughter.

Q. And you live in the same house with your father? A. Yes.

Q. You live there, as I understand it, with your husband? A. Yes.

Q. And your children and parents? A. Yes.

Q. I show you a photograph which has been marked Exhibit S-8 and ask you if you will point to the house in which you and your father and family live? A. Right there (indicating).

Q. Right on the corner of Commerce Street and Adams Street? A. And Adams.

Q. Were you home on the evening of June 16th? A. After 11 o'clock.

Q. And did you hear any noise or disturbance in the home of Mr. Horner? A. Not a sound.

Q. And the home in which you live, is it a bungalow or does it have a second story? A. It is a bungalow.

Q. And on which side of the house did you sleep that night, on the side towards Adams Street or on the side towards Mr. Horner's home? A. On the side toward Mr. Horner's home.

Q. And you got home that night about 11 o'clock? A. Yes.

Q. When was the first time that you knew that anything had occurred at Mr. Horner's home on the night of June 16 of this year and on the early morning of June 17th? A. My father came in and said, "There's something wrong with Mr. Horner." Then he left and went over there and when he came back he said, "Something terrible has happened. All the house is in an uproar and Mr. Horner is lying on the floor." They then told me to call Mr. Walter Thompson to get in touch with Chief Atkinson, which I did.

Q. Who is Mr. Walter Thompson? A. He is the Borough Clerk of Paulsboro.

Q. And did you call Mr. Thompson on the telephone? A. Yes, I did.

Q. And do you know the method they have in the Borough of Paulsboro of notifying police officers who are out on patrol or on duty, that they are needed? A. They call McCorkell's garage. They in turn turn on a light.

Q. Turn on a light? A. That is right.

Mary Hendrickson—Cross.

Q. Where is that light? A. Various sections of the town.

Q. They place the light there and it shows up in different sections of the town through there? A. That is right.

Q. Did the police officers come immediately? A. No, I don't know just how long it was before—I was rather impatient and then I called Chief Atkinson.

Q. You called him? A. I called McCorkell's garage and they said the officers were changing, that they hadn't got there, then I called Mr. Atkinson's home and told him what happened.

Q. How long after that did Mr. Atkinson— A. Almost immediately.

Q. Did you go that morning to Mr. Horner's home at all? A. No, I did not.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. Mrs. Hendrickson, how far is it from the room in which you were sleeping that evening to Mr. Horner's house? A. I haven't the slightest idea but there are just the two gardens between the two houses.

Q. It was a warm evening, that evening, wasn't it? A. Yes.

Q. Did you have your windows open? A. Yes.

Q. Did you hear anyone walking along the street? A. No.

Q. You did not hear any noise at all? A. Nothing out of the ordinary.

Q. Did you see any lights in Mr. Horner's house at any time after 11 o'clock? A. I did not notice.

Mr. Johnson: That is all.

IRVING C. PETTIT, sworn.

By the Prosecutor:

Q. Mr. Pettit, what is your full name? A. Irving C. Pettit.

Q. That is P-e-t-t-i-t? A. That is right.

Q. And where do you live, Mr. Pettit? A. Paulsboro.

Q. How long have you lived at Paulsboro? A. Seven years.

Q. What is your business? A. Undertaking business.

Q. Are you employed by someone else or are you in business for yourself? A. In business for myself.

Q. How long have you been engaged in the undertaking business in the Borough of Paulsboro, for yourself? A. Seven years.

Q. And prior to that time where were you employed? A. I worked in Camden for two years and before that I worked in Woodbury for Davis, for three years.

Q. So altogether you have had about twelve years' experience in the undertaking business? A. That is right.

Q. During the course of your experience in that business, have you seen and examined numerous bodies that have been killed by blows externally? A. Quite a good many.

Q. Did you go to the home of Mr. Horner on the morning of June 17th? A. I did.

Q. And did you know Mr. Horner prior to that time? A. Yes.

Q. And you knew where his home was in the Borough? A. Yes.

Q. And where he lived, as I understand it, is on the intersection of Commerce Street and Jefferson

Street in the Borough of Paulsboro? A. Right.

Q. About what time, Mr. Pettit, did you get to the home of Mr. Horner? A. It must have been a little before 8 o'clock.

Q. In the morning? A. Yes.

Q. And what was your purpose in going there? A. Steve, the Chief of Police, had come around and told me that somebody had beat up Bill Horner and they wanted to get him to the hospital right away and I went there to take him to the hospital, in the ambulance.

Q. You say you went to take him in an ambulance? A. Yes.

Q. To whom did the ambulance belong? A. To me.

Q. You have your own private ambulance? A. That is right.

Q. Did you go to Mr. Horner's home that morning? A. Yes.

Q. Who was there when you arrived at Horner's home? A. Took the stretcher right in the and Dr. Sheets, the coroner, that's all I remember seeing. I was in a hurry to get him out of there. I didn't wait long.

Q. What did you do when you arrived at Horner's home? 9A. Took the stretcher right in the house and what he had used for a bedroom, looked like a middle room in the house, and put him on the stretcher and carried him out, put him in the ambulance and brought him to Underwood Hospital.

Q. Where was Mr. Horner lying at the time you first saw him? A. He was lying with his feet and legs under the bed and his head sticking out behind the stove, out from under the bed, but the head would be here, was out from under the bed.

Q. How did you get him from the floor to the

stretcher? A. We laid the stretcher right down on the floor alongside of him and lifted him on the stretcher, slid him on.

Q. Did you have a stretcher that is real low? A. Yes, it didn't have any wheels on at all, it is a couple of iron bars and a mattress between them and it is only about five or six inches thick. We laid it right on the floor and put him right on it.

Q. Then it was not necessary to take the body from the floor up on the bed and then on to the stretcher? A. No, we didn't put him on the bed.

Q. What was Mr. Horner's condition as you noticed it when you moved him from the floor on to your stretcher? A. He was badly swollen, he had dried blood all over his face and head and I noticed one of his ears was swollen up so that you could hardly see the entrance to the ear, the hole in the ear—I don't remember which ear it was—but I know where that ear was swollen up, blood was right thick and all down clear around to his neck was black and blue and swollen up. He looked more like to me a man that had been dead and in the water for a week, looked like a floater, or maybe two weeks, in warm weather, he was swollen up that big.

Q. When a body is in the water, from your experience, it fills out, swells up, as I understand it? A. That's what makes it float.

Q. How about his head, was it discolored? A. Yes, the whole head was discolored, he had blood all over it. A lot of the blood was dried, and after we got him in the hospital, before the doctor got there, the nurse took him in there and commenced to clean his face up. She wiped this dry blood up with cold water before Dr. Underwood came in and after Dr. Underwood came in we got

the stretcher out from under him and went on home.

Q. You remained at the Underwood Hospital until you say he received attention from Dr. Underwood? A. Yes.

Q. Then you left? A. That is right.

Q. Did he have any clothing on, as you recall, as he was lying on the floor? A. He had some kind, looked like outing flannel, either underwear, pajamas, I don't know what it was, it was a two-piece suit on.

Q. Was there any blood on that clothing? A. Yes, there was blood all over, with spots of blood all over it.

Q. You went into Mr. Horner's home, did you go in the back door or the front door? A. The back door.

Q. Was it necessary then for you to go through the kitchen on into the dining room? A. That is right.

Q. Did you notice the condition of the kitchen as you went through the house into the dining room? A. I noticed everything was upset and in disorder, and in the dining room, what he used for a bedroom, I noticed papers, or drawers in some kind of buffet or something there were pulled out and papers throwed all over the floor and the furniture was all pushed around.

Q. Did you notice any blood marks on the floor and on other parts of the house as you went in there? A. Yes, I do remember there being some. I don't know just where they were but I noticed in the kitchen and in the dining room both there were blood marks.

Q. Your main idea was to get Mr. Horner and take him to the hospital as quickly as possible? A. That is right.

Q. Was anything disturbed or moved in the house while you were there? A. No, we didn't move anything. We laid the stretcher on the floor, pulled him out from under the bed and put him on the stretcher. We didn't even move the bed.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. When you went in the dining room and bedroom where Mr. Horner was lying, did you see a quilt or a blanket around him? A. No.

Q. How was he lying, face downward? A. No, he was lying on his back.

Q. Did you notice any blanket or quilt, anything around the room? A. I noticed the blankets and things on the bed were all in disorder. I am not positive whether there was a blanket on the floor or not.

Q. There was none around him? A. No, not wrapped around him, no.

Mr. Johnson: That is all.

By the Prosecutor:

Q. Was Mr. Horner breathing when you got there, Mr. Pettit? A. Yes, he was breathing. He was not breathing very evenly and he had a rattle or noise in his throat, as if he was going to choke on blood or mucous of some kind.

The Prosecutor: That is all.

MISS EMMA HORNER, sworn.

By the Prosecutor:

Q. Miss Horner, your name is Emma Horner? A. Yes, sir.

Q. And where do you live, Miss Horner? A. I live at the present time at Gloucester.

Q. And what relation are you to William J. Horner, the man who was killed? A. I am his sister.

Q. How old was your brother at the time of his death? A. Sixty-five.

Q. Now, I show you a gold watch and gold knife and ask you whether or not you recognize the watch? A. Yes.

Q. And to whom does that watch belong? A. It belongs to my brother.

Q. How do you know the watch belongs to your brother? A. Because I gave it to him for a Christmas present.

Q. You gave him this watch (indicating)? A. Yes.

Q. How about the knife, do you recognize the knife? A. No, I do not.

The Prosecutor: I would like to offer the watch for identification only at this time.

The Court: All right.

(Said watch marked Exhibit S-10 for identification.)

Q. I show you a small religious medal or ornament of some kind and ask you whether or not you recognize that? A. Yes, I recognize that as my own.

Q. That belongs to you? A. Yes, sir.

Q. Who had custody or charge of that? A. My brother.

Q. Your brother? A. Yes.

Q. And can you tell us about when you give him that article? A. There were several religious articles in my home.

Q. Speak up a little louder. A. There were

several religious articles in my home and I had a very valuable handkerchief box. It was several years old and it was valued very highly. It was inlaid and I had my personal effects in this box, with jewelry and several papers and it was broken into and all those things scattered and several of the religious articles were in that box. That is all I know.

Q. Where was that box kept? A. I had kept that box in my dresser drawer up in my own bedroom.

Q. And when had you given the medal to your brother? A. These medals and things were in a small box that he had kept in his desk.

Q. Down in his own home? A. In his own home, yes.

Q. What is the correct name for that (indicating)? A. That is the Miraculous Medal of the Blessed Mother.

The Prosecutor: I also offer that for identification.

(Received and marked S-11 for identification.)

Q. I show you a razor, and ask you whether or not you know to whom that razor belonged? A. That was a very old razor of my brother's.

Q. That belonged to your brother also? A. Yes.

Q. That was a razor he owned and had for a number of years? A. A number of years.

The Prosecutor: I ask that be marked for identification.

(Received and marked S-12 for identification.)

Q. After your brother was assaulted, did you go down to his home in the Borough of Paulsboro

in company with one of the police officers? A. Yes, I did, Mr. Apgar.

Q. You recollect what date it was you went down to his home? A. It was the morning that they found him, Thursday morning.

Q. And about what time did you get down to your brother's home? A. I don't very well recollect, it seems to me it was around noontime, something like that, I just don't quite remember.

Q. What was the condition of your brother's home when you arrived there? A. Why, it was very unsettled, everything was upside down, everything was moved out of place, things were turned over, and tables were turned over, things was moved out like the kitchen cabinet was moved out, things seemed to be topsy turvy, the desk had been moved out from its usual place, and things were scattered and papers all over, and papers like bills and receipts were all scattered over, all like that, and blood smeared on them, and the bedclothing seemed to be scattered, there was a quilt, I think it was out in the kitchen, that was terribly besmudged with blood, and the mattress I noticed was all sort of awry, blood was here and there, and then I sort of got half sick, I couldn't seem to see any more, I was just of sort of in a daze.

Q. Just before you went to your brother's home, or just after that, did you go to see him at the Underwood Hospital? A. Yes, prior to going down home I went to the Underwood Hospital.

Q. Your first visit was to your brother himself at the hospital? A. Yes.

Q. Did you see him at the time you went there? A. Yes, I did.

Q. Were you able to talk to him? A. No, he was unconscious.

Q. Did you go back to see him on that day? A. Yes, I went back around, I think I got down there something like seven o'clock, and I stayed until nearly one o'clock that night.

Q. During any of that time did your brother regain consciousness? A. No.

Q. Did he regain consciousness up until the time he died, as far as you know? A. No, as far as I know.

Q. What was his appearance, physical condition, as you saw him, while he was in the hospital? A. He was terribly battered up.

Q. Had you visited your brother's home on many occasions prior to his death? A. No, I had not.

Q. Had you been down there at all? A. I had not been down for a little over a year. To explain that, my brother was a pensioned man, and he thought that his pension was inadequate to support both of us, and he preferred to live alone, and I submitted to that proposal; so, therefore, I lived in Gloucester, that was from 1933 on to the present time, but intervening, he came up to see me until about a few months before he died.

Q. What sort of a housekeeper was your brother?

Mr. Johnson: I object to that.

The Prosecutor: I will withdraw the question.

Q. You, of course, attended your brother's funeral afterwards? A. I did.

The Prosecutor: Cross-examine.

Miss Emma Horner—Cross.

Cross-examination by Mr. Johnson:

Q. You say that your home is in Gloucester? A. Yes.

Q. You had not visited your brother for how long at his home? A. I had not visited my brother since nineteen—I just forget when I was down, I think the last time I was down there, I think it was—I can't very well remember.

Q. It was quite some time previous to this affair? A. It was quite some time. I attended a funeral down there of a friend, and that was the time I was down.

Q. When was the last time that your brother had come up to visit you in Gloucester? A. It was during the Easter week, prior to Easter of 1936.

Q. Did he have the watch on him at that time? A. Yes.

Q. Did you see it? A. Yes.

Q. Did you say that you had given your brother that razor? A. The razor, no, I didn't give him no razor.

Q. You said it was his? A. It was his.

Q. When was the last time you had seen that razor? A. The last time I saw that razor, he kept it in his desk.

Q. In Paulsboro? A. Yes.

Q. And you had not seen the razor for some time? A. No, I had not.

Q. Is there any distinguishing mark on this watch, which leads you to believe that it is his watch? A. I can tell by the engraving on the back.

Q. Is that the only identification you see to say it is his watch? A. It is an Elgin watch.

Q. Just because of the engraving and the fact

it is an Elgin watch? A. And the peculiar dial system of the face.

Q. The razor you say was his? A. It was his.

Q. Is there any identification marks on the razor which you can— A. The only thing is the peculiar oldness of the handle, the odd shape, because he told me that was a very old razor. Whether it really belonged to my father, I have no way of knowing, but he valued the razor and kept it in good condition.

Q. Is this medal, marked Exhibit S-11 for the State for identification, is that an unusual medal? A. No, it isn't an unusual medal, it's a medal that's been in existence for a long time, but it's just in the past couple of years that they have put it in bracelet form to wear on the wrist.

Q. Is there any identification mark on this medal that leads you to believe it was yours? A. No, because naturally I was the only Catholic of the family, and naturally he would not be or have anything in the house that was really of that religion belonging to him, because at that time him and I was just living together. They were my religious articles.

Q. Were you living down at Paulsboro with him at one time? A. Yes, I was.

Q. You left this medal there? A. I left that medal there.

Q. You are sure it was this medal that you left? A. Sure, it was that medal.

Mr. Johnson: That's all.

Lewis Morrison—Direct.

LEWIS MORRISON, sworn.

By the Prosecutor:

Q. Mr. Morrison, where do you live? A. In Clarksboro.

Q. How long have you lived in Clarksboro? A. Eight years the first of August.

Q. What is your occupation? A. Clergyman of the Episcopal Church.

Q. What churches in June of 1937, of what churches did you have charge? A. St. Peter's, Clarksboro, St. James, Paulsboro, St. Stephen's, Mullica Hill.

Q. Did you know William J. Horner, the man who has been killed in this case, during his life time? A. I did.

Q. Did he have any connection with the Episcopal Church in Paulsboro? A. He was employed as sexton of St. James' Church in Paulsboro.

Q. How long had he been employed? A. Approximately five years.

Q. While he was employed as sexton of the church did you ever have occasion to talk to Mr. Horner? A. Quite frequently.

Q. What do you have to say as to his ability to hear? A. His ability to hear was very much impaired, so much so I either had to shout in his ear, or else write out instructions and details on paper for him.

Q. Where is St. James' Church in Paulsboro in respect to Mr. Horner's home? A. Diagonally across the street from his house, the corner of Jefferson and Commerce Street.

Q. That would be on the northeast corner, I assume? A. I think that's the direction.

Q. Did you have occasion to see Mr. Horner

quite often during his lifetime? A. Quite frequently.

Q. What sort of a man was he? A. I should say that he was a quiet unassuming man, who would do a good turn for any friend, and a man whose habits were cleanly and neat, and, well, a man that I had no reason to think was other than the very nicest kind of a man.

Q. Did you ever have occasion to go to his home? A. Sometimes.

Q. What condition did he keep his home as far as the inside was concerned? A. One of the witnesses testified he thought one hundred per cent. I should say perhaps as clean, if not cleaner, than a great many women keep their homes.

Q. By that you mean he was extremely neat? A. Extremely neat for a man.

Q. You attended and preached at his funeral afterwards? A. I did.

Q. What date were they held? A. I think the 21st of June, the Monday after his death.

The Prosecutor: Cross-examine.

Mr. Johnson: No questions.

The Prosecutor: That's all, Mr. Morrison.

LEWIS KOKO, sworn.

By the Prosecutor:

Q. You are one of the police officers of the Borough of Paulsboro? A. That's right.

Q. Will you keep your voice up so that we can hear back in the corner. How long have you lived in Paulsboro? A. About ten years.

Q. How long have you been a police officer? A. About three months.

Q. Prior to that time what was your occupation? A. Working on the bridge in Paulsboro.

Q. On the morning of June 17, did you participate in the investigation of an assault which had been committed on Mr. Horner? A. I did.

Q. About what time was it when you first received notice that he had been beaten or assaulted? A. About ten minutes of eight.

Q. From whom did you receive the word? A. Mr. Atkinson, Chief of Police.

Q. When you received word from the Chief of Police, what did you do? A. I went there with him.

Q. Went where? A. With the Chief and Officer Travaline, the three of us went together.

Q. Where did you go? A. Mr. Horner's house.

Q. Where is Mr. Horner's house located in the Borough of Paulsboro? A. The corner of Jefferson and Commerce.

Q. And who else was there at the time you three officers arrived? A. I remember Dr. Sheets, Pettit, the undertaker, and Mr. Wilson, and Mr. Mortimer was there, too.

Q. Did you go to the house with Officer Atkinson, or did you go down there before him? A. He was there before me.

Q. Later you also reported there? A. No, I met him in town, and we talked up there, and he said "Come on with me".

Q. When you first went to Mr. Horner's home about what time was that? A. It was a little after eight.

Q. Did you go in Mr. Horner's home? A. Yes, sir.

Q. What was the condition of his home when you went in there? A. It was upset, in pretty bad shape, tables were upset, Mr. Horner was ly-

ing on the floor, and the blinds were down, looked like the house had been ransacked, papers scattered all over, and blood on the walls.

Q. Did you notice any blood on the floor? A. I did, the kitchen.

Q. In the kitchen? A. Yes, sir.

Q. How about in the bedroom or the dining room? A. On the bed.

Q. How long did you stay there? A. We stayed around there a few minutes, and then we went out and searched to pick up some people.

Q. You then proceeded with your investigation? A. That's right.

Q. To determine who had committed the crime? A. That's right.

Q. That morning did you interview a colored man by the name of Clavin Wright? A. Yes, sir.

Q. What is Clavin's nickname? A. They call him Clay.

Q. As a result of the information which you received from Clay Wright, did you see anyone that morning? A. Did I see anyone?

Q. Did you talk to anyone? A. I talked to him, and then—

Q. As a result of the information which you received from Mr. Wright, did you see or interview any or either one of the three defendants? A. Didn't interview any of them, we—

Q. Did you talk to them? A. We went around and got them as suspects, if that's what you mean.

Q. Where did you first see Smalley Burrell that morning? A. In his house.

Q. Where was that? A. I think it is 219 Hoffman Street.

Q. In Paulsboro? A. Paulsboro, yes, sir.

Q. Where was William Albert Brown when you first saw him? A. In his house.

Q. In whose house? A. Smalley Burrell's.

Q. So when you arrived at Smalley Burrell's house both Burrell and Albert Brown were there, is that correct? A. That's right.

Q. About what time in the morning was it when you arrived at Burrell's home? A. About eleven o'clock.

Q. In the morning? A. Yes, sir, ten-thirty, something like that.

Q. Prior to that time had you arrested the defendant Anna Brown? A. Yes, sir.

Q. Where had you placed or sent Anna Brown? A. Put her in jail in Paulsboro, the lock-up.

Q. She was arrested, I assume, for questioning? A. That is right.

Q. Then you put her in the jail in Paulsboro and went down to pick up both Smalley Burrell and William Albert Brown? A. Yes.

Q. And that was between ten-thirty and eleven o'clock? A. Yes.

Q. At the time you picked them up they were both in Smalley Burrell's home on Hoffman Avenue? A. Yes, sir.

Q. After you picked up Anna Brown and William Brown and Smalley Burrell did you pick up for questioning another colored man or woman? A. Yes, one other woman.

Q. What was her name? A. Annabelle Clark.

Q. What did you do after you picked up Annabelle Clark? A. Brought her to the lock-up.

Q. In Paulsboro? A. Yes.

Q. What happened after you had taken them to the lock-up in Paulsboro? A. The State police came in and Mr. Zickwolf said, "You better take them to Woodbury."

Q. Who brought the two men from Paulsboro to Woodbury? A. Travaline and I.

Q. Who took the two women? A. Zickwolf.

Q. The one was Anna Brown and the other woman's name would be what? A. Annabelle Clark.

Q. The two defendants you brought to Woodbury were Burrell and Brown? A. Yes.

Q. Where did you take them when they were brought to Woodbury? A. We got out downstairs and Mr. Zickwolf said, "We will take them up to the lock-up." Mr. Zickwolf did everything, turned them over to Mr. Simler and they were both in jail.

Q. Did you and Travaline return to Paulsboro? A. Yes.

Q. After you returned to Paulsboro did you make any search of the home of Smalley Burrell? A. Yes, sir.

Q. What did you find in the home of Smalley Burrell? A. A watch.

Q. I show you a watch which has been marked Exhibit S-10 for identification and ask you whether or not that is the same watch which you obtained from the home of Smalley Burrell? A. This is it.

Q. Where did you find the watch in Burrell's home? A. In the bedroom.

Q. Whereabouts in the bedroom? A. Under the mattress.

Q. Of the bed? A. Right.

Q. Now, did you also—

The Prosecutor: Strike that.

Q. I show you a knife which has not been marked in any way and ask you whether or not you ever saw the knife before? A. Yes, it was with the watch.

Q. It was with the watch? A. Yes.

Q. Under the mattress in Burrell's home? A. Yes.

Q. Now, did you also search the home of William Albert and Anna Brown? A. Yes, sir.

Q. Where do they live? In what street? A. 9 East Madison Street.

Q. In Paulsboro? A. Yes.

Q. Both defendants, Anna Brown and William Albert Brown, live at that same address? A. Yes, sir.

Q. That was their home on June 16th and 17th of this year? A. Yes, sir.

Q. Did you find anything in the home of William Albert Brown and his sister Anna Brown? A. That razor.

Q. Where did you find the razor? A. Under the mattress.

Q. Under the mattress? A. Yes.

Q. In the home of William Albert Brown and his sister Anna Brown, is that correct? A. Yes, sir.

Q. That is the razor which has been marked Exhibit S-12 for identification? A. Yes, sir.

Q. Now, I show you a religious medal and ask you whether or not you ever saw the religious medal before? A. This was on a table in Brown's house.

Q. In whose house? A. Brown's house. I understand it was Anna's bedroom.

Q. In the bedroom? A. Yes, sir.

Q. From your investigation that was Anna's bedroom? A. Yes, sir.

Q. The religious medal was lying on a table? A. Yes, sir.

Q. I show you two cigars which bear the brand Horse Shoe Curve Crooks and ask you whether or not you ever saw those cigars before? A. Yes, sir.

Q. Where did you see them and where did you get them? A. In the same house with the razor and this thing.

Q. Keep your voice up. A. In Brown's house.

Q. Whereabouts in Brown's house? A. Upstairs.

Q. Were they on the floor or where? A. In a coat pocket.

Q. What kind of a coat pocket? A. A brown coat.

Q. A coat like this (indicating)? A. In a little pocket.

Q. Up here (indicating)? A. Yes.

Q. Was that the bedroom where you found those? A. Yes, sir.

The Prosecutor: I would like to ask that these cigars be marked for identification.

The Court: They may be marked.

(The cigars referred to were marked "S-13 for identification.")

Q. I also show you a box bearing a brand Horse Shoe Curve Cigars, a cigar box, and ask you whether or not you ever saw that box before? A. I did.

Q. Where did you see the box? A. In Horner's house.

Q. Where was it when you saw it in the home of Mr. Horner? A. I believe it was in the middle room.

Q. That would be the room next to the kitchen? A. Yes, sir.

Q. Was that the room that apparently had been occupied as a bedroom? A. Yes, sir.

Q. You took that box into your possession? A. I did not but that is where I saw the box.

Q. But the box was picked up by another officer in your presence? A. Yes, sir.

Q. And that was Officer Travaline? A. Yes, sir.

The Prosecutor: I ask that that also be marked for identification.

The Court: It may be marked.

(The box referred to was marked "S-14 for identification.")

Q. I show you a box marked "S. Rosenblatt, Diamonds, 2605 Germantown Avenue, Philadelphia," and ask you whether or not you ever saw the box before? A. I did.

Q. Where did you see that? A. Lying on the bed in Horner's house.

Q. Was that box open or closed at the time you picked it up off the bed? A. Officer Travaline picked it up. He said, "We better take it with us."

Q. In your presence? A. Yes, sir.

Q. Do you know whether or not the watch fits in this box?

Mr. Johnson: I object to that, your Honor. Any watch can fit in the box.

The Court: What value has the question?

The Prosecutor: It has quite a bit of value. Here is a watch which was stolen from Mr. Horner's home and the State claims that the motive in this case was robbery. A man ordinarily does not keep his jewelry on top of the bed. The watch case was lying open and the watch was found in the home of one of the defendants. It might be that the watch would not even go in there.

The Court: There is no evidence that the watch was kept in this case.

Mr. Johnson: No one ever saw it in there.

The Court: I have no objection to the

identification of the case but you asked the question whether it fits in there.

The Prosecutor: I withdraw the question.

The Court: All right, the question is withdrawn.

The Prosecutor: I ask that the box be marked for identification.

The Court: It may be marked.

(The case referred to was marked "S-15 for identification.").

Q. I show you a watch case which has been marked "S-15 for identification" and I call your attention to certain brown or reddish marks on the inside of the case. A. Yes, sir.

Q. When you first picked up or when the watch case was first picked up in your presence what did the brown mark or the red mark on the inside of the case appear to be? A. Blood.

Q. Now, I also show you another religious medal of some kind and ask you whether or not you ever saw that before? A. I did.

Q. Where did you see that? A. Bill Horner's house.

Q. Was it picked up by you or by Officer Travaline in your presence? A. Officer Travaline.

Q. Were those spots or marks on the ribbon at the time it was picked up? A. Yes, sir.

The Prosecutor: I also offer that for identification.

The Court: It may be marked.

(The religious article referred to was marked "S-16 for identification.")

Q. Now, Officer, the religious medal which has just been marked for identification "S-16" and to which is attached a white ribbon with marks on it, where was that found? A. On the bed.

Q. Of Mr. Horner's home? A. Yes, sir.

Q. In the same room next to the kitchen? A. Yes, sir.

Q. Those marks on the ribbon, what are they, do you know? A. Blood.

Q. I show you a woman's pocketbook and ask you if you ever saw the pocketbook before? A. The chief of police had it trying to find finger-prints.

Q. Did you ever see the pocketbook in the home of Mr. Horner? A. That is where it was.

Q. That pocketbook also came from Mr. Horner's home? A. As far as I know.

Q. You saw the chief of police have it while he was in Mr. Horner's house? A. Yes.

The Prosecutor: I ask that it be marked for identification.

The Court: It may be marked.

(The pocketbook referred to was marked "S-17 for identification.")

Q. Were you present in the court house in Woodbury when any statements were taken from from the three defendants? A. No, I was not.

Q. You remained on duty in Paulsboro? A. I worked sixteen hours and went to bed.

Q. How many officers do you have in Paulsboro? A. Four.

Q. And the usual shift is eight hours when you get away? A. Yes, sir.

Q. Did you have any conversation with Smalley Burrell as to where the watch came from? A. Never asked him a word.

Mr. Johnson: I object to that. It is predicated—

The Court: It has already been answered

and it is harmless. The answer was, "I never asked him a word."

Q. Did you ever have any conversation with the three defendants with respect to any of the articles which have just been marked for identification? A. No, sir.

Q. So when you made the arrest and looked over the house then your duties in connection with the case were ended? A. That is right.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. Officer, where were you when this call came to police headquarters? A. The light went on and I answered the call and a man told me at the age for me to tell the Chief of Police that Walter Thompson wanted to see him and I went to the Chief's house and he had already received the call and was up there.

Q. He was up there? A. He came up and I ran into him at the drug store and he said, "Follow me to the Horner house."

Q. Had he been there previously? A. Yes.

Q. When you got there, it was his second trip? A. Yes.

Q. When you got there Mr. Horner had not been removed? A. No, sir.

Q. When you went to the respective homes, Smalley Burrell's home, to search it, did you have a search warrant? A. No, sir.

Q. When you went to the Brown home did you have a search warrant? A. No, sir.

The Prosecutor: Objected to as being irrelevant.

The Court: It is harmless and I am going to permit the question.

Q. Did you ask any one if you could go in and search the place? A. Yes, we asked her if we could search the house.

Q. Who? A. The lady in the house where Brown stays, I believe it is his sister-in-law.

Q. Did you see her? A. She came to the door and we asked her if we could search the house and she said, "Sure, you can look anywhere."

Q. When you went to the Burrell house what did you do? A. We went around to the back and I think it was Smalley's mother and we asked her if we could search the house.

Q. You had already searched the house? A. Oh, no, we had not already searched the house.

Q. When you went to Smalley's house did you get out of the car or did you stay in the car or did you both go into the house? A. When we went to arrest or search the house?

Q. When you went to arrest them. A. We both got out of the car.

Q. Did you go into the house? A. Yes, sir.

Q. Where was Smalley? A. Smalley and Brown were sitting on the davenport, sitting there smoking cigarettes.

Q. Both together? A. Yes.

Q. Did they stay there all the time? A. As soon as we went in we said, "We want to talk to you fellows, we want you to go with us." There were no words exchanged.

Q. Did you see Bill Brown come out of another room? A. I did not.

Q. They were both sitting there when you went into the house? A. Yes, sir.

Q. Did you go in first? A. Officer Travaline.

Q. How far back of him? A. Right in back of him.

By the Court:

Q. Was this Burrell's house? A. Yes, sir.

Q. In all these articles that were marked for identification on the part of the State—

The Court: You had possibly better refer to them specifically.

Q. The Prosecutor has shown you a number of articles which are marked from S-10 to S-17, both inclusive, for identification, by the State. Had you seen any of these articles previous to this morning? A. Yes, sir.

Q. Just what article had you seen? A. Saw the razor.

Q. This razor marked Exhibit S-12? A. Yes.

Q. Where had you seen that? A. In Brown's house, yes, in Brown's house, upstairs.

The Prosecutor: If your Honor please, I think possibly either the witness misunderstands Mr. Johnson's question—did you ever see any of these articles previous to this morning?

Q. I do not mean this morning. I mean June 17th? A. No, sir.

Q. You had never seen any of these articles marked S-10 to S-17 inclusive, previous to June 17th? A. No, sir, I have not.

Q. You do not know to whom they belong? A. I do not.

Mr. Johnson: That is all.

The Court: I will declare a recess at this time for fifteen minutes. Those in the audience remain seated until the jurors pass out. The officers will take care of the jurors.

(At this point a recess was taken for fifteen minutes.)

(After Recess)

The Prosecutor: If your Honor please, I would like to recall Officer Koko.

The Court: Proceed.

LEWIS KOKO, recalled.

By the Prosecutor:

Q. Officer, in your previous direct testimony you said that when you first arrested Smalley Burrell, William Albert Brown and Anna Brown, between 10:30 and 11 o'clock in the morning— A. No, no.

Q. What time was it when you arrested those people? A. It was in the afternoon.

Q. About what time was it? A. About 1:30 or 2 o'clock.

Q. Between 1:30 and 2 o'clock? A. Yes, sir.

Q. In the afternoon of June 17th? A. Yes, sir.

Q. While you were at the Horner home and up until the time that the photographer arrived, was anything disturbed in the Horner home? A. Not that I know of.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. Were you there when the photographer arrived? A. Yes, sir.

Q. You were in there with the Chief when he broke in the door, were you? A. No, sir, I was not.

Q. He had been there and came back for you? A. He had not come back for me. He went to the drugstore for something, I believe.

Q. And he met you? A. Yes, sir.

Q. How much time elapsed from the time you

first heard of the call until you met the Chief and went back there with him? A. It could not have been over twelve minutes.

Q. Was the photographer there when you got there? A. I don't remember but I remember him taking one picture. I saw him setting up his machine and then we went outside.

Q. Were you in the Horner home when Mr. Horner was taken out? A. I was outside.

Q. Did you see Mr. Horner? A. Just glanced at him. I did not go up close to him.

Q. Was a quilt or blanket around his head? A. No, sir, I don't remember.

Q. Did you see any quilt or blanket? A. Well, there were a pile of clothes all over the floor. I don't remember what they were.

Mr. Johnson: That is all.

DOMENICK TRAVALINE, sworn.

By the Prosecutor:

Q. Officer Travaline, you are one of the police officers of the Borough of Paulsboro? A. I am.

Q. And have been for how long? A. Approximately two years.

Q. Prior to that time what was your occupation? A. I worked as special officer for about four years, I imagine.

Q. So that altogether you have had about six years' experience in police duties? A. About that, yes, sir.

Q. Did you participate in the investigation of the killing of Mr. Horner? A. I did.

Q. And what day was it that you first knew the

offense had been committed? A. In the morning of the 17th of June, I believe it was.

Q. Of this year? A. Of this year.

Q. And what time in the morning did you first receive any report of the crime? A. At 8 o'clock in the morning, when I came on to work.

Q. That is your time to come to work on June 17th was at 8 o'clock in the morning? A. In the morning, yes, sir.

Q. And immediately upon coming on duty you received the notice of the affair at Mr. Horner's home? A. I did.

Q. Where were you at the time when you received that notice? A. Why, I had just got out of my home there and stepped into the police car when Officer Koko mentioned the fact that we were wanted at Horner's home.

Q. After he told you that, what did you do? A. Why, I asked him where the Chief of Police was. He said he thought he was home and we went down to the Chief's home and the Chief's wife told us that he had already been out to Horner's, so we went right out to William Horner's home at the corner of Jefferson and Commerce Street.

Q. Talk a little slower and keep your voice up. Then you went directly from Chief of Police Atkinson's home to the home of Mr. Horner on Commerce Street? A. I did.

Q. Did you pick anyone else up on the way from Atkinson's home to Horner's home? A. No, sir.

Q. When you arrived at Mr. Horner's house, who was inside of the Horner home? A. Chief Atkinson, Dr. Sheets, Undertaker Pettit and one of his assistants and I think Mr. Wilson was on the outside of the house.

Q. How did you get into the Horner home? A. Why, the back door was open.

Q. And did you notice the screen door on the back? A. I did.

Q. What was there that attracted your attention to that? A. It seemed to me as though there was a piece, I would say a brace just above the, I will say practically in the center of the door, was ripped out and you could see the mark and the screen itself was ripped, I will say, about eight inches from either side of the frame, towards the center.

Q. Was there any latch or hook on the inside of the screen door? A. I think there was, yes, sir.

Q. And do you know where the hook was with respect to the hole which was in the wire netting? A. I would imagine it would be just about the same height as the uppermost ripped part of the screen, in other words, where the screen was ripped and the hook would be on a—what will I say —on a level with one another.

Q. On a level? A. Yes, sir.

Q. And would it have been possible for a man to have put his arm in through that hole and undo that hook? A. Yes, sir.

Q. As you entered the Horner home, what room did you first go in? A. The kitchen.

Q. And will you describe to the Court and the jury the condition of that room as you saw it that morning? A. The first thing I spied was the table with the broken leg upset on the floor and all different things, dishes and so forth, knives and forks on the floor and the small kitchen cabinet pushed to one side of the room and there was a cupboard there that had blood stains all over it, the wall, and clots of blood on the floor beside the table.

Q. From the kitchen to what room did you go next? A. Why, the next room would be a din-

ing room but Mr. Horner used it as a bedroom.

Q. Will you describe to the Court and the jury just what you saw in that room? A. Why, the bed was on the left hand side, that is, as I came in the door, it would be on my left, and the stove would be about two or three feet from the bed and Mr. Horner was between the two of them, lying on the floor.

Q. So that as you entered the bedroom from the kitchen the stove was on your left? A. Yes, sir, that is right.

Q. And the bed was further over? A. Further over to the left.

Q. Towards the left and there was a space of about two or three feet in between the bed and the stove? A. Yes, sir.

Q. Did you see Mr. Horner there when you arrived? A. I did have a look at him, yes, sir.

Q. And what condition was he in and where was he lying? A. I could only see from his chest up and he looked pretty well battered up, he was full of blood and to me he looked as though he was dead.

Q. Was he lying on the bed or on the floor? A. On the floor, partly under the bed.

Q. Now, were there any blood spots or blood marks on the furnishings or floor or walls of the bedroom? A. I think I did notice a few on the floor.

Q. How long did you stay inside of the Horner home? A. Just a couple of minutes at that time.

Q. And then were you detailed to do some other duty? A. Yes, sir, I was detailed to get the photographer over there in a hurry.

Q. So that you left the Horner home and did you go down to Mr. Baji's home? A. To his place of business on Delaware Street.

Q. You got him? A. Yes, sir.

Q. And brought him back to the Horner home? A. I did.

Q. Did he take any photographs while you were there? A. He did.

Q. From the time that you first arrived at the Horner home until the time that the photographs were taken, was anything moved or changed around on the inside of the building? A. Not a thing.

Q. After you returned with Mr. Baji, how long did you stay inside the Horner home? A. I assisted Mr. Baji with a few pictures and then there was a few people gathering on the outside of the building and they thought there might be some footprints alongside of the window and I was detailed to chase the people away from there and keep them on the outside of the fence.

Q. After you completed that job, what did you do? A. Why, after that was completed, I came back into the house and the photographer was through taking pictures, and looked the house over for fingerprints or any instrument that might have been used in the assault.

Q. Were you able to get any fingerprints inside the house? A. There wasn't any clear that I could say, no, sir, plenty of smears.

Q. Of smears? A. Yes, sir.

Q. If a man's hand has bled, are you able to take a fingerprint of that? A. I don't imagine you are, no, sir.

Q. Did you search around Mr. Horner's house? A. I did.

Q. That same morning? A. I did.

Q. Is there a second story to his home? A. There is.

Q. Did you go upstairs? A. I did.

Q. And will you tell the Court and the jury what you found in your investigation upstairs, what you saw? A. Why, at the head of the steps, the first little room I came to, I imagine it was used as a study, and a sewing machine there with a lot of, well, I guess you call it accessories to a sewing machine, they were throwed all over the floor and it seemed as though every drawer and everything was just turned upside down, papers thrown all over the floor, clothing and everything else, everything upside down in every room.

Q. After you completed the investigation of the house inside, what did you do then? A. I was detailed by the Chief to pick up three suspects.

Q. And who were those suspects? A. Henry Anderson, Alex Beverly and William Gleaves.

Q. Was that Andrew or Alexander Beverly? A. Andrew.

Q. And did you talk to those three men that morning? A. Why, we couldn't locate Beverly or Anderson but we did learn they were at the CCC Camp in Middletown, New York, and had been there at least a month previous to the assault.

Q. That was Beverly? A. And Anderson.

Q. Now, the third man, Gleaves, did you locate him? A. We did.

Q. And where did you locate him? A. At his home on Penline.

Q. What was he doing at the time you found him? A. He was in the house there in the kitchen, painting, painting woodwork.

Q. And did you talk to him? A. We did.

Q. And did you question his activities on the night of June 16th? A. I did. I asked him to accompany me to the Mayor's office, where we took a statement from him more or less from the time,

that is, from the day before the assault until the time I had him in custody.

Q. Then you checked that statement which he gave you? A. I did.

Q. After you checked where Anderson and Beverly were and where Gleaves had been, what did you do next? A. Why, at that time we more or less had run out of suspects at the moment and Officer Koko and myself were riding around in the police car, trying to think up different things and we got the idea it might have been done by a few of the common drunks that we have in this town that never work and might have done something like that just to get a few pennies to buy something to drink.

Q. Did you interview any of those men? A. We searched the town over for most of them. We only found one and we interviewed him but couldn't learn anything to be connected with the case.

Q. After that did you see a colored man by the name of Clay or Clavin Wright? A. Yes, sir.

Q. And as the result of the information you received from Clay Wright, did you arrest the three defendants in this case? A. Not right away. I had a little talk with the Chief of Police, in front of the home of William Horner, before I had picked these suspects up.

By the Prosecutor:

Q. And what time did you pick up the defendant, Smalley Burrell? A. Why, I judge it was between one thirty, I will say right around one thirty.

Q. In the afternoon of June 17th? A. In the afternoon of June 17th.

Q. Who was with you at the time you picked Burrell up for questioning? A. Officer Koko.

Q. Where did you find Burrell? A. At his home, 219 Hoffman Avenue.

Q. In Paulsboro? A. In Paulsboro.

Q. Was there anyone else with Burrell at the time he was picked up for questioning? A. William Brown was in there, too.

Q. That is one of the three defendants? A. Yes, sir.

Q. Had you picked up Anna Brown prior to that time? A. Yes, we had.

Q. And where had you placed Anna Brown? A. In our local lock-up there in Paulsboro.

Q. She was also picked up for questioning? A. Yes, sir.

Q. Did you pick up any other women that afternoon for questioning? A. Yes, I did.

Q. Who was she? A. Annabelle Clark.

Q. After the four persons, that is, Smalley Burrell, William Albert Brown, Anna Brown and Annabelle Clark were picked up for questioning, where were they brought? A. We had just put them in the local lock-up a matter of two minutes, I imagine, when Trooper Zickwolf came along to assist in the case, and we more or less thought it would be a better idea to separate the four of them, and with Officer Koko and myself we brought up Burrell and Brown in the police car, the Paulsboro police car, and Trooper Zickwolf brought up the two women to the County Jail at Woodbury.

Q. I notice from the testimony that you give that Officer Atkinson, the Chief, was apparently not there much of the time? A. No, he was in court.

Q. Where was he? A. He was to appear in a case, in a court case here in Woodbury, I imagine

a rape case, at that time, I don't remember exactly.

Q. He was subpoenaed as a witness here in court on a rape case which had occurred in the Borough of Paulsboro? A. That's right.

Q. Later did you return to the home of Smalley Burrell on Hoffman Avenue? A. I did.

Q. And who accompanied you there on your second visit? A. Officer Koko.

Q. At that time did you make any search of Burrell's home? A. I did after getting permission to do so.

Q. From whom did you get the permission? A. Mrs. Washington, I believe her name is, mother-in-law of Smalley Burrell.

Q. Mother-in-law of Smalley Burrell? A. Yes, sir.

Q. I show you a watch, which has been marked Exhibit S-10 for identification, and ask you if you ever saw the watch before?

Mr. Johnson: I object to that. When Officer Koko was on the stand he said that there was no search warrant obtained. There was no permission given for the officer to go in either the Burrell home, or into the Brown home, although the officer says there was, there was no one home at the time. Mrs. Washington is not the owner, the lessee of the home of Smalley Burrell. There is a law by which an officer can go into a house to make a search, and the Constitution of the United States, and its government, says that a man's home is inviolate, and if anyone wants to go in there and make a search for anything he can obtain the proper papers. This was in the home,

not on the defendant, and I feel this question should be stricken out.

The Court: He found this property in the place where this boy was living.

Mr. Johnson: That's right.

The Court: Do you mean to say that an officer cannot go in there, even if he goes in there illegally and find something?

Mr. Johnson: I don't think that he can, that is his home, a man's home is his castle.

The Prosecutor: Mr. Horner's home was a castle, too, but that didn't amount to much.

Mr. Johnson: Just because you say Smalley Burrell committed a crime, does not give this officer the right to commit the same or similar crime?

The Court: We are not testing his right as to his going into the home, we want to know what he did, where he went and what he found.

Mr. Johnson: He had no right to go in.

The Court: Irrespective of that, it is here, what he found, and your objection is overruled.

Mr. Johnson: Exception.

The Court: All right.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

The Prosecutor: Now will you repeat the question?

(Question repeated.)

A. The only place I saw the watch was in the home of Smalley Burrell, the first time.

Q. On what date was it you saw the watch in the home of Smalley Burrell? A. On June 17, this year.

Q. Whereabouts, and where in the house was the watch at the time you saw it? A. It was in the back bedroom under the mattress, I will say at the head of the bed.

Q. You said something about opening the case of the watch? A. Yes, sir, that's the watch.

Q. Did you make any marks inside the case of the watch at the time you picked it up? A. I noticed the marking here, I believe it would be the mark of a pawnshop, or something, right here in the lower right hand corner under the number of the case. I have that number on my report to the Chief, the lower right hand corner.

Q. I show you a religious medal, which has been marked Exhibit S-11 for identification, and ask you whether or not you ever saw that medal before?

Mr. Johnson: I object, on the same grounds, and if overruled I would like to have an exception.

The Court: All right, you may have your exception.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

Q. Did you ever see that medal before? A. I saw that the first time in the bedroom of Anna Brown on a night table.

Q. And where was that, what address was her home? A. 9 East Madison Street, Borough of Paulsboro.

Q. Did you take into your possession both the watch and the religious medal? A. I did.

Q. I show you a razor, which has been marked Exhibit S-12 for identification, and ask you whether or not you ever saw that razor before?

Mr. Johnson: I object to that question on the same grounds.

The Court: All right, the objection will be overruled.

Mr. Johnson: Exception.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L. S.)
Judge.

A. The first place I saw this razor was in the home, in the bedroom of William Brown, under a mattress.

Q. Where was his home? A. At 9 East Madison Street, Paulsboro, on the first floor.

Q. Did you take them into your possession at the same time? A. Yes, sir.

Q. I show you two cigars bearing the brand of "Horse Shoe Curve Crooks", which have been marked S-13 for identification, and ask you whether or not you have ever seen these cigars before?

Mr. Johnson: I make the same objections.

The Court: Overruled and an exception may be taken.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

A. The first time I saw those cigars was in the coat, that is the upper pocket, outside pocket of a suit belonging to William Brown in his bedroom.

Q. In his bedroom in his home on Madison

Street in Paulsboro? A. 9 East Madison Street, Paulsboro.

Q. I show you a cigar box, bearing the words "Horse Shoe Curve Crooks, two for five cents", and ask you whether or not you ever saw the cigar box before? A. Yes, sir, I saw this in the home of William Horner at Commerce and Jefferson Street, Paulsboro.

Q. Did you take this box into your possession? A. I did.

Q. And on what date was that? A. That was the 17th of June.

Q. I show you a watch case box, which has been marked S-15 for identification, and ask you whether or not you ever saw that before? A. I saw this on the bed of William Horner at his home, Commerce and Jefferson Street.

Q. In Paulsboro? A. On the 17th of June, yes, sir.

Q. At that time did you take the watch box into your custody? A. I did.

Q. And whereabouts in Mr. Horner's home was the box when you saw it? A. Laying on the bed, amongst a lot of other things scattered around.

Q. Was the box open or closed when you first saw it? A. The box was open when I first saw it.

Q. I notice there are some reddish or brownish marks inside the box? A. Yes.

Q. When you first picked it up what did that appear to be inside the box? A. Blood.

Q. I show you another religious medal, and a white ribbon, and ask you whether or not you ever saw that before. That has been marked Exhibit S-16 for identification. A. I saw this in the home of William Horner.

Q. Whereabouts in the home was this? A. The whole thing was lying on the bed, but I think this

was supposed to have been clasped in the hand of Mr. Horner when he was found.

Q. When you first saw it it was on the bed? A. Yes, sir.

Q. You also took that into your custody? A. I did.

Q. There are two large brownish reddish marks on there. What did they appear to be at the time you picked up the ribbon and medal? A. I think they were blood.

Q. You say that after the three suspects were arrested for questioning, Trooper Zickwolf brought the two women to Woodbury and you brought the two men? A. Yes, sir.

Q. Where were they placed after they were brought to Woodbury? A. To my knowledge they were put in separate cells.

Q. In the County Jail? A. In the County Jail by the warden.

Q. And did you see Anna Brown again that afternoon after she had been placed in a cell in the jail? A. I did.

Q. And where did you see her at that time? A. In the County Detective's office.

Q. In the adjoining building? A. Yes.

Q. When she was brought down to the County Detective's office, who were present? A. Detective Apgar, Chief of Police Atkinson, Mayor Wert of Paulsboro, I believe that was all in the room at that time.

Q. You recognize the man sitting beside you? A. Yes, he was in there, too, that's right.

Q. Mr. Denham, the court stenographer, was also there? A. Yes, sir.

Q. How about Trooper Zickwolf, was he there? A. Yes, sir, he was.

Q. At that time did Anna Brown make any

statement? A. I think she started to make some sort of statement. I was more or less anxious to get back to town, and didn't pay particular attention to it. I know she was being questioned.

Q. How long did you stay there after she was brought down to the County Jail? A. I guess about an hour or so.

The Prosecutor: Mrs. Verdier, will you stand up, please?

(Mrs. Verdier stands up.)

Q. Was Mrs. Verdier there also? A. Yes, she was.

Q. And Mrs. Verdier is one of the matrons in the jail? A. Yes, sir.

Q. And Anna Brown, I understand, was in her custody? A. Yes, sir.

Q. From the jail down to our office? A. Yes, sir.

Q. At that time were any threats made against Anna Brown at the time she made a statement? A. No, sir.

Q. Was she promised anything to your knowledge if she made a statement? A. No, sir, she was only asked to tell the truth.

Q. Did she make a statement in your presence? A. She did.

Q. Will you tell us to the best of your recollection what she said at that time?

Mr. Johnson: I object to that, if your Honor please, as to the statement being made. I would like the defendants heard on the question. Whether the Prosecutor wants to question this witness, or bring any other witnesses, I think we ought to have the testimony of the defendants. He asked the witness to testify what she said, and I

object to his testimony at this time in answer to that question.

The Court: I will entertain your objection, and sustain it at the present time as to what the statement was.

Q. You recollect Mr. Apgar, in the presence of Mr. Denham, the court stenographer, and other persons you have just mentioned, giving a warning to Anna Brown prior to the time she made a statement? A. What do you mean by a warning?

Q. Telling her that any statement she made must be voluntary on her part, of her own free will, and without any fear or threats or promises or hope of reward? A. Yes, sir.

Q. Do you remember him making a statement to her of that kind? A. Yes.

Q. That was before she started to talk? A. Yes, sir.

The Prosecutor: I assume you would like to hear other witnesses who were present at the time before the actual statements are introduced.

The Court: Yes, sir. There is only one thing that has been developed. I see no objection, and that is that there was a statement made. Was that statement made before she was talked to about telling the truth, or anything? Did she make the statement when she came in there of her own free will and accord?

The Witness: She was asked to tell the truth.

The Court: Before that time, before any of the officers or you talked to her, did she make any statement?

The Witness: No, sir.

The Prosecutor: I will reserve the right to recall this officer.

The Court: You may have that right. You may cross-examine him now, if you desire to do so.

By the Prosecutor:

Q. Did you come to the County Jail on the Friday following the arrest of Anna Brown?

The Court: What date was that, the Friday following?

The Prosecutor: That would be the 18th.

Q. On the 18th of June, at that time did you show Anna Brown the razor, the watch and the medals? A. Yes, sir.

Q. Where was Anna Brown at the time you showed the watch to her? A. In the County Detective office.

Q. Here in the court house? A. Yes.

Q. At that time what did Anna Brown say about the watch?

Mr. Johnson: I object to that, your Honor, on the same ground of my previous objection that I made.

The Court: Having illegally obtained the watch?

Mr. Johnson: Yes.

The Court: I will overrule the objection.

Mr. Johnson: Will you allow me an exception?

The Court: Yes.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L. S.)
Judge.

Q. What did Anna Brown say about the watch? A. She said she knew nothing of it.

Q. Did you later show her the watch on another occasion? A. I think she was showed the watch by the county detective.

Q. That same afternoon? A. Yes, sir.

Q. What did she say at that time?

The Court: That is if he knows. Were you present?

The Witness: No, sir.

The Court: All right, then you cannot answer that question.

Q. Did you show the razor to Anna Brown which has been marked "S-12 for identification"? A. Personally, I did not.

Q. Was it shown to her in your presence? A. Yes, sir.

Mr. Johnson: I make the same objection.

The Court: All right, it was shown to her in the presence of the witness. Your objection is noted. I overrule the objection.

Mr. Johnson: May I have an exception?

The Court: Yes.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L. S.)
Judge.

The Witness: By the county detective.

Q. What did Anna Brown say at that time about the razor? A. I think she said she knew nothing of it at that time.

The Court: I don't like the word "think".

The Witness: I don't quite remember.

The Court: You don't remember. All right.

Q. Now, do you remember going back again and whether or not those articles were shown to her in the county detective's office here in the jail? A. They were shown to her in my presence by the county detective while she was being questioned. After that I don't know how many times she was shown the articles.

Q. That was on June 17th? A. That is right.

Q. You were not up in the jail on June 18th? A. No, sir.

The Prosecutor: You may cross-examine the witness but I reserve the right to recall the witness later.

The Court: All right. It is for the purpose of laying the foundation for what is to come hereafter?

Mr. Johnson: In regard to the confession?

The Court: Yes, I assume so.

Cross-examination by Mr. Johnson:

Q. Officer Travaline, when you went to the home of Mr. Horner you say there were four people there? A. I imagine there were two or three more, more than four. Four that I paid particular attention to.

Q. Inside of the house? A. Yes, sir.

Q. You don't know who the others might be? A. No, sir.

Q. You don't know whether any article had been disturbed in the house or not? A. In my presence nothing was disturbed.

Q. Did you see any blanket around Mr. Horner? A. I did not.

Q. Did you see a blanket in the bedroom? A. I didn't pay particular attention to a blanket. I saw a lot of clothing but I didn't see the blanket. The clothes there were lying around, things thrown around.

Q. When you went to the home of William Albert Brown you said you got a suit belonging to him and you got cigars out of the suit belonging to him? A. I did.

Q. Do you know whether it was his suit? A. I asked his sister-in-law, asked her who the suit belonged to.

Q. Did you take anything out in the home? A. A razor.

Q. I mean articles of clothing. A. Not at that time.

Q. Did you go back later and get some articles of clothing? A. Not that day.

Q. How about the next day? A. I did.

Q. What did you take? A. A pair of pants and a pair of shoes.

Q. Did those pants belong to William Brown? A. So Mrs. Brown told me.

Q. Do you still have those trousers? A. I do not.

Q. Do you know where they are? A. I turned them over to the chief of police.

Q. What else did you take in the way of clothing? A. Just like I say, a pair of old shoes.

Q. When you were in the office of the prosecutor and Anna Brown was brought down there, are these all the people who were Apgar, Atkinson, Worth, Denham, Zickwolf and Mrs. Verdere? A. And the defendant Anna Brown and myself.

Q. Anyone else? A. I would not be positive of anyone else.

Q. Did anyone else come in and go out? A. What do you mean?

Q. Did anybody come into the room while you were questioning the defendant? A. I think the prosecutor came in after the questioning was under way.

Q. Who did the questioning? A. The county detective.

Q. How far away from him were you standing? A. I should judge about the same distance I am now from him.

Q. Were you paying attention to everything he said? A. I would not say that I paid particular attention to everything that was said.

Q. Did you pay any particular attention as to what was said previous to the time the statements were taken? A. Yes, I did.

Q. Did you hear Mr. Apgar say to Anna if you don't tell us what you know we are going to send you back to the State Home? A. I didn't hear him say that.

Q. He might have said that?

The Prosecutor: I object to that.

The Court: That is a possibility. The objection is sustained.

The Witness: I will tell you, why—

The Prosecutor: Do not answer the questions. The objection has been sustained.

Q. Did you hear everything that Mr. Apgar said? A. I heard everything that was said as it was all news to me and I wanted to try to memorize what was said, and that is the reason why I paid particular attention to it.

Q. From the time Anna got into the room until

the statement was taken you heard everything that was said?

The Prosecutor: Objected to. The witness has not said that.

Mr. Johnson: I am asking him that.

The Court: The stenographer will repeat the question.

The Prosecutor: Withdraw the objection.

The Court: By whom. Make it specific.

Mr. Johnson: By Detective Apgar.

A. I did.

Q. Did you see anyone else in the room? A. I think I mentioned that before. I don't remember anyone else outside the ones that were mentioned.

Q. Was Mr. Eckman, this gentleman (indicating) in the room at any time while that statement was taken? A. I don't remember.

Q. When you first, on direct-examination in answer to Mr. Lord's question asking who was there in the room you said there was only Apgar, Atkinson and Wert. A. Just like I said, I remember later that Trooper Zickwolf was in the room and also that the court stenographer.

Q. These people were all big people, they are not hard to see? A. I saw them all.

Q. You had to have the fact that these other men were in the room recalled to your attention? A. What do you mean recall?

Q. When you first made the statement in answer to Mr. Lord's question you said only three of them were present.

The Prosecutor: I think it is perfectly apparent that it is argumentative. Certain people were there and it was enlarged upon.

The Court: It is argumentative but I am going to permit the question.

Q. You did not recall that these other people were there, did you? A. Not at the moment but I knew they were there.

Q. But you do recall that Detective Apgar did not make that statement to Anna Brown?

The Prosecutor: Objected to.

The Court: Well, I am going to permit it. You might repeat the statement.

The Prosecutor: The question does not correctly quote the witness' testimony. The witness said that he did remember Mr. Apgar giving the warning to the girl because it was all new to him. It is misquoting his testimony on cross-examination.

The Court: In other words, he is putting it in the negative.

The Prosecutor: He is misquoting the testimony.

The Court: The objection is well taken.

Q. You did not hear Mr. Apgar tell Anna Brown that if she did not tell what she knew about this case she would be sent back to the State Home in Trenton? A. Well, while I was there Mr. Apgar did not say anything like that in any shape or form.

Q. You can remember that he did not state that? A. He didn't say that.

Q. He did not make that statement to Anna Brown? A. To send her to Reform School?

Q. Yes. A. Did not.

Q. You could not recall until you were prompted that there were other people in the room than the first three names mentioned?

The Prosecutor: Objected to.

The Court: The objection is sustained.

Mr. Johnson: Will you allow me an exception?

The Court: Yes.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

Q. Was there any general talk to Anna Brown before Mr. Apgar, yourself, Mr. Atkinson or Trooper Zickwolf, as to any statement made by Anna Brown, warning her that any statement which she would make would be used against her?

The Prosecutor: Objected to.

The Court: What is the objection? Is it too long?

The Prosecutor: It is too long and I cannot understand it myself.

The Court: Simplify this matter. When you all got together, who was the first to speak? Do you remember that?

A. Detective Apgar.

By the Court:

Q. Do you remember what he said? A. He told them—

Q. Told them. Who are they? A. Rather Anna, that he wanted her to tell the truth and asked her if she would make a statement and she said she would, and before she started to make the statement he warned her that anything that she said would be used or could be used against her, and also that they were not making any rewards, something like that.

Q. To that, what did Anna say? A. She said she was willing.

Domenick Travaline—Cross.

By Mr. Johnson:

Q. Was anything else said to Anna prior to the time she started giving her statement?

The Prosecutor: Objected to.

The Court: I am going to permit the question to make doubly sure.

The Prosecutor: On cross-examination the witness should be asked whether a specific question was asked and whether she made a specific answer.

The Witness: Yes, Anna was asked if she was willing to tell the truth, that is all I can say I remember.

By the Prosecutor:

Q. Were you present that same afternoon when a statement was taken from the defendant Smalley Burrell? A. Yes.

Q. Was the same warning given to him as was given to Anna prior to his statement? A. It was.

Q. How about William Albert Brown? A. Yes, sir.

Q. A statement was obtained from him? A. Yes.

Q. Was he given the same warning as the others? A. He was.

Q. I overlooked in my direct-examination that you went back to the home of William Albert Brown and picked up a pair of pants and a pair of shoes. A. That was the following day.

Q. Were there any blood marks on the pants? A. There was stains on there which I thought were real blood.

Q. How about the shoes? A. Also on the shoes. I wasn't positive but it looked to me as if it was blood.

The Prosecutor: That is all.

PAUL FIRST, sworn.

By the Prosecutor:

Q. Where do you live, Mr. First? A. Woodbury, 26 Euclid Street.

Q. How long have you lived in Woodbury? A. Eleven years.

Q. Keep up your voice so we can all hear you. A. Eleven years.

Q. What is your business? A. Tobacco and confectionery, wholesale and retail.

Q. You have a tobacco and confectionery store in Paulsboro? A. Yes.

Q. Where is that located? A. 1218 Delaware Street.

Q. Did you know William John Horner during his lifetime? A. Yes, sir.

Q. Did you handle a brand of cigars known as Horse Shoe Curve Crooks? A. I did.

Q. Do you recall selling any of those cigars to Mr. Horner prior to his death? A. He bought a couple of boxes, bought one box about two months ago and another one about a month ago or five weeks ago.

Q. He bought those cigars from you in boxes? A. Yes, sir.

Q. Is that the type of box you handle and in which you place those cigars? A. I am the only man in Paulsboro that handles them.

Q. You are the only man in Paulsboro that handles them? A. You see, I am in the wholesale and retail business and I sell them in the retail store at a special price.

The Prosecutor: Cross-examine.

Mr. Johnson: No questions.

The Court: The noon recess has arrived

and the officers will take care of the jury for the noon recess. Those in the audience will remain seated until the prisoners have passed out and after that the jury will pass out. Court will recess until one-thirty.

(A recess was taken until one-thirty o'clock p. m.)

Hearing of the case resumed at 1:30 o'clock P. M., pursuant to adjournment, in the presence of the defendants and counsel for the respective parties.

STEPHEN B. ATKINSON, sworn.

By the Prosecutor:

Q. Mr. Atkinson, you are Chief of Police of the Borough of Paulsboro? A. Yes, sir.

Q. And have been a member of the Police Department for how long? A. Since 1929.

Q. And prior to that time what was your job? A. New Jersey State Police.

Q. And how long were you a member of the New Jersey State Police? A. Beginning in 1927.

Q. So that you have had practically ten years' police duty and experience? A. Yes.

Q. Did you participate in the investigation of the murder of Mr. Horner? A. I did.

Q. When was the first time that you received notice of the attack which had been made on Mr. Horner? A. In the vicinity of 7:50 A. M., on the morning of the 17th of June.

Q. Of this year? A. This year.

Q. And from whom did you receive the mes-

sage? A. Mary Henrickson was the name given over the telephone.

Q. And upon receipt of that message, what did you do? A. I went to the home of William Horner, at the corner of Commerce and Jefferson Streets, Paulsboro.

Q. And when you got there, what did you do? A. I spoke with Mr. Wilson, who met me at the gate.

Q. Was he the only person present at the time that you arrived? A. He was.

Q. Go ahead. A. And he took me to the window of the kitchen and told me to look through, which I did and saw the interior of the kitchen of Horner's home was in a very, very disorderly condition, blood stains, apparent blood stains, all over the floor and the walls, one of the shades in the kitchen was practically knocked down and the other shade, the other window, rather, through which I looked, the shade was part way down.

Q. Did you go inside the Horner home? A. After having looked through the dining room window, yes.

Q. When you looked in the dining room window, what did you see then? A. I saw another room that was in a very great state of disorder and, of course, the important feature of it was the body of Mr. Horner lying between the stove and his bed.

Q. Was any portion of his body under the bed? A. At that time I could not see.

Q. Did you see Mr. Horner's physical condition, indicating what was the matter with him, when you looked in through the window? A. As I looked through the window I could not see any apparent signs of life at all. I continued to look for perhaps twenty seconds and at the end of that

time Mr. Horner's hand moved in a gesture like that (indicating) and I immediately went to the door and broke it in.

Q. That is the back door that you broke in? A. That is right.

Q. Did you notice the screen door of the back door, prior to the time that you broke in the kitchen door itself? A. Yes.

Q. And what was the condition of the screen door as you saw it? A. The screen door was partially—part of the screen in the center portion of the door was ripped clear across almost the entire width of the door.

Q. And was there a screw or hook and eye inside that screen door? A. There was.

Q. And was the wire netting torn? A. That is right.

Q. Could it have been possible for a man to have put his arm in there and undo the screen latching the screen door? A. Very easy.

Q. When you went in the door and got into the kitchen, did you look around the kitchen first or did you go directly to Mr. Horner? A. Directly to Mr. Horner.

Q. Will you describe to the Court and the jury the condition of Mr. Horner and the position and the condition of the room at the time you went into the dining room which he used as a bedroom? A. The condition of the room was very, very disorderly indeed, the clothes, bedclothes, articles of furniture, personal effects of Mr. Horner scattered all over the room, especially on the bed where Mr. Horner apparently had been lying and at the foot of the desk which was in that room. The desk itself had been ransacked, very apparent to see. Whoever had done the deed had torn everything out, torn the drawers out of the places and scat-

tered the contents all over the room. It was not a very orderly search.

Q. What about the position of Mr. Horner on the floor, when you got into the bedroom, what was his position? A. Mr. Horner laid in the position between the stove and the bed, with his feet partially under the bed and his head outside and pointing towards the center of the room.

Q. What was the condition of his head as you saw him lying there on the floor? A. Terrific.

Q. Will you describe just as accurately as you can how it appeared to you as you looked down and saw Mr. Horner lying there? A. When I first saw Mr. Horner I thought possibly he had been hit with an axe.

Q. You mean the sharp end or the blunt end? A. No, the blunt end of some very very heavy instrument to cause bruises, swellings of such magnitude. I have never seen anything like it in my life.

Q. And in the course of your police duties have you had numerous cases involving assault and battery and murder? A. Several.

Q. And serious automobile accident cases? A. Yes.

Q. I show you Exhibit S-5 and Exhibit S-6, both of which show different portions of the bedroom of Mr. Horner and ask you whether or not they truly represent the condition of the dining room or bedroom at the time you entered the room? A. Yes, they do.

Q. Some mention has been made of a blanket which was on the floor. Do you know where the blanket is in the photograph? A. Why, yes, you can see a corner of it here behind the stove.

Q. The majority of the blanket behind the

stove, between the stove and the bed? A. That is right.

Q. After you and Mr. Wilson entered and up until the time the photographer arrived, had anything been disturbed in the house, with the exception that Mr. Horner had been removed to the hospital? A. Nothing had been disturbed.

Q. After you saw Mr. Horner, what did you do? A. After having seen the condition of Mr. Horner and finding out that he was alive, I immediately went to the home of Dr. Sheets, a physician, and told him to come right away to the home of William J. Horner and gave him the address at that time. I proceeded from Dr. Sheets' home to the home of Irving Pettit and advised him to come as quickly as he could with his ambulance in order to take Mr. Horner to the hospital.

Q. After you performed those two calls, did you go back to the Horner home? A. Yes, sir.

Q. Were you alone or was someone else with you when you went to Dr. Sheets and Mr. Pettit? A. I was alone at that time.

Q. And did you meet the other officers on your trip? A. I did.

Q. And they followed you back to the Horner home? A. I told them to come back with me.

Q. How long did you remain in the Horner home after the body of Mr. Horner had been taken to the hospital? A. I immediately closed it up. I stayed there myself to look for weapons, possible fingerprints, possible clues and, of course, I did not want to disturb anything at that time, I wanted it to remain exactly as it was awaiting arrival of the photographer and consequently I touched nothing, I merely looked.

Q. Were you able to obtain any fingerprints in-

side the house? A. No fingerprints of any value.

Q. Were there any blood smears around the kitchen, the walls of the kitchen and in the bedroom? A. Yes, sir, there were apparent blood stains.

Q. Much of them? A. Considerable.

Q. After you locked up the house, what did you do then? A. I instructed Mr. Wilson, who was about the scene, to remain there and to see that no one entered.

Q. After that, what did you do? A. Proceeded back to the office and got the fingerprint kit and came back again with the photographer, that is, the photographer was there when I arrived and we both entered together.

Q. Was that the second time that the photographer was there? A. That was the first time that the photographer was there.

Q. And about what time was that when he got there? A. I cannot say offhand. Those events were rather hurried. It was shortly after the—well, I would say it was between eight and eight thirty.

Q. When the photographer got there? A. That is right.

Q. After you had completed looking around the house and locking up the house and that sort of thing, what did you do then? A. After I had finished in the house, do you mean?

Q. Yes. A. I proceeded to come to Court here in Woodbury.

Q. In Woodbury? A. Yes.

Q. And was there a case on trial that day?

Mr. Johnson: I object to that, if your Honor please.

The Court: Is it harmful to say where he was?

Mr. Johnson: The other officer testified he was up here on a rape case that happened in the Borough of Paulsboro.

The Court: I see the reason for that. There is sufficient reason there.

The Prosecutor: My purpose, if your Honor please, is this, this officer was in charge of the case—

The Court: Tell him he had to testify in Court, without saying what he had to testify to. That is sufficient.

The Prosecutor: If it is admitted that Mr. Atkinson was under subpoena here in another case—

The Court: Without describing what kind of case it was.

The Prosecutor: And was obliged to appear here at 10 o'clock.

Mr. Johnson: Yes.

Q. You came to Court in Woodbury at 10 o'clock and when did you next return to the Horner home in Paulsboro? A. About 12:45 the same day.

Q. And who accompanied you from Woodbury to Paulsboro? A. No one to my knowledge.

Q. Did you meet anyone at the Horner home? A. Yes.

Q. And whom did you meet there? A. County Detective Apgar, Miss Emma Horner and Mr. Wilson.

Q. At that time did Miss Horner enter the home? A. Yes.

Q. With you three men? A. Yes, she did.

Q. Later that afternoon of June 17th were you present in our office here in the building when statements were taken from Anna Brown, William

Albert Brown and Smalley Burrell? A. Yes, sir.

The Court: On June 17th?
The Prosecutor: On June 17th.

Q. And to the best of your recollection who was present at the time the statements were taken? A. Mrs. Verdier, the matron of the jail, County Detective Apgar, Trooper Zickwolf, Mayor Wert and myself.

Q. Was Officer Travaline there any portion of the time? A. Some portion of the time, yes.

Q. And to your recollection did any other persons come in and go out while the statements were being taken? A. I don't believe there was.

Q. Prior to the time the statement was given by Anna Brown, was she given any warning of any kind? A. Oh, yes, of course.

Q. And by whom was the warning given to her? A. County Detective Apgar.

Q. And were you present at the time the warning was given to her by Mr. Apgar? A. I was.

Q. And during the time that the statements were being taken, were any threats made against Anna Brown by anyone present? A. None whatsoever.

Q. And was she offered any reward or anything of that kind? A. No, sir.

Q. Can you tell us generally what Mr. Apgar said to Anna Brown at the time he warned her about the statement she was to give? A. Mr. Apgar gave her the usual warning, which is to the effect that she must make a statement of her own free will and accord without any threat, fear or hope of any reward and also told her who was present.

Q. Did he also say at that same time that any statement she made could be used against her in

Court? A. Yes, that was part of the warning.

Q. And was Mr. Denham, the court reporter, present at that time? A. Mr. Denham was present.

The Prosecutor: We all seemed to miss him.

Q. Now, were you also present when a statement was taken from Smalley Burrell? A. Yes, I was.

Q. And was that statement taken the same afternoon of June 17th? A. Yes, it was.

Q. And while the statement was being taken were any threats made to or against Smalley Burrell? A. No threats whatsoever.

Q. Was he beaten or bruised or attacked in any way? A. Not even touched.

Q. And was the same warning which you have just stated was given to Anna Brown, was that also given to Smalley Burrell? A. Exactly the same.

Q. Were you present the same afternoon of June 17th when a statement was taken from William Albert Brown? A. I was.

Q. Were any threats made against Brown prior to the time or during the time he was making the statement? A. No threats whatsoever.

Q. Were any promises or hope or reward held out to him in your presence? A. Neither promise nor hope of reward.

Q. And was the same warning given to him prior to the time that he made the statement, as was given to the defendant Anna Brown? A. Exactly the same.

Q. And all during that time Mr. Denham, the stenographer, was present? A. Mr. Denham was present at all times.

Q. Now, a day or so following that did you see Anna Brown at the County Jail here in Woodbury? A. I did.

Q. Do you recall who was with you at the time you saw Anna Brown? A. Mrs. Verdier, the jail matron, and County Detective Apgar.

By the Prosecutor:

Q. I show you a watch, which has been marked Exhibit S-10 for identification, and ask you whether or not the watch was shown to Anna Brown in the County Jail in the presence of Mrs. Verdier and Mr. Apgar? A. It was.

Mr. Johnson: I object to that for the same reasons that I offered this morning when that was introduced the first time.

The Court: All right, the objection is overruled.

Mr. Johnson: Exception.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L. S.)
Judge.

The Court: What was the answer?

(Answer repeated.)

Q. Did Anna Brown say anything to you about the watch at the time you were talking to her in the jail? A. Yes.

Q. What did she say about it? A. She said the watch fell from a hook on the wall in Mr. Horner's home, but she didn't know who picked it up.

Q. That is, who was present, according to her statement when the watch fell from the wall in Mr. Horner's house? A. Smalley Burrell, Brown and herself.

The Court: It is understood that any-

thing Anna Brown said not in the presence of these other two defendants is binding on her alone.

The Prosecutor: Yes.

Q. Did she say what night that fell off the wall? A. Fell off the wall the night they beat William J. Horner.

Q. As I understand it, the watch was turned over to you by Officer Travaline? A. That's right.

Q. And has been in your custody ever since? A. Up until the time I gave it to the prosecution.

The Prosecutor: I would like at this time to offer the watch in evidence.

Mr. Johnson: I object to that for the same reasons as this morning, I object to it as illegal evidence.

The Court: The objection will be overruled.

Mr. Johnson: Exception.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

(Received and marked Exhibit S-10.)

Q. I show you a razor, which has been marked S-12 for identification, and ask you whether or not you had any conversation with Anna Brown in respect to the razor at the time you talked to her about the watch?

Mr. Johnson: I object to that for the same reasons.

The Court: The objection will be overruled, and you may take your exception.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

A. I did.

Q. What did she say about the razor? A. She said she remembered having seen the razor, or a razor similar to this, in the hands of her brother that night.

Q. What night? A. The night Mr. Horner was attacked.

Q. And where was her brother at the time he had the razor in his hands according to her statement? A. He was sitting on Mr. Horner's chest.

Mr. Johnson: I object to that statement.

The Court: Yes, the objection is well taken.

The Prosecutor: It seems that is binding as far as Anna Brown only is concerned, that's the only purpose for which the State offers it at this time.

The Court: She said she saw a razor, or one similar to that, and that's about as far as you can go.

The Prosecutor: I offer the razor in evidence.

Mr. Johnson: I object to it for the same reasons.

The Court: The objection will be overruled.

Mr. Johnson: Exception.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

(Received and marked Exhibit S-12.)

The Prosecutor: As I understand, Mr. Johnson's objection is on the ground that the evidence was illegally obtained.

Mr. Johnson: That's right.

Q. I show you a religious medal, which has been marked S-11 for identification. At the same time you showed this razor and watch to Anna Brown did you show her the exhibit which I have just handed you? A. I did.

Q. And what did she say about the religious medal? A. She said that came from Horner's home.

The Court: What was that answer?

(Answer repeated.)

Q. Did she say when she got it from Horner's home? A. The night Mr. Horner was attacked.

The Prosecutor: I offer the religious medal in evidence.

Mr. Johnson: I object to it for the same reasons.

The Court: The objection is overruled.

Mr. Johnson: Exception.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

(Received and marked Exhibit S-11.)

Q. I also show you a square box which has been marked S-14 for identification, and ask you whether or not you ever saw the box before? A. Yes, sir.

Q. Where did you see the box? A. In Mr. Horner's home.

Q. Has that box been in your custody up until

the time you delivered it to our office? A. It was.

The Prosecutor: I offer the cigar box in evidence.

The Court: It will be admitted.

(Received and marked Exhibit S-14.)

Q. I show you two Horse Shoe Crooks Curve cigars, which have been marked Exhibit S-13, for identification, and ask you whether or not they are the same cigars which you received from Officer Travalene? A. They are.

Q. Were they also kept in your possession up until the time they were delivered to our office? A. Yes.

The Prosecutor: I offer the exhibit in evidence.

Mr. Johnson: I object to it for the same reasons as the others.

The Court: The objection is overruled.

Mr. Johnson: Exception.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

(Received and marked Exhibit S-14.)

Q. I show you a watch case or box, which has been marked S-15 for identification, and ask you whether or not that is the same box which was delivered to you by Officer Travaline? A. Yes, it is.

Q. Was that box also kept in your possession up until the time you delivered it to our office? A. It was.

The Prosecutor: I offer the box in evidence.

Mr. Johnson: No objection.

(Received and marked Exhibit S-15.)

Q. I also show you Exhibit S-16, being another religious medal, and ask you whether or not the medal and ribbon were delivered to you by Officer Travaline? A. It was.

Q. Were they kept in your possession up until the time they were delivered to our office? A. They were.

The Prosecutor: I offer those in evidence.

Mr. Johnson: No objection.

(Received and marked Exhibit S-16.)

Q. Officer, did you take a photograph of the screen door in the rear of the house, of Mr. Horner's house? A. I did.

The Prosecutor: This photograph was taken by the officer, but was not developed by him. It was developed by Mr. Sutton, Mr. Baji, but was taken by the officer. Do you have any objection to that, Mr. Johnson?

By the Court:

Q. When was it taken? A. That was taken the same day, sir.

Q. June 17th? A. June 17th.

Q. By you? A. Yes, sir.

Q. After you came from Woodbury? A. Sir?

Q. After you came from the court in Woodbury? A. That's right.

Q. What time of the day? A. Twelve o'clock noon.

Mr. Johnson: For the present I object to the introduction of that, unless there is

further testimony showing there was no change in the condition of the door.

The Court: You may lay the foundation for that.

By the Prosecutor:

Q. You saw the screen door on the rear of Mr. Horner's home when you first went there on the morning of June 17, is that correct? A. That's correct.

Q. And does the photograph, which you took during the noon hour of that day, show the door in the same condition that it was when you first saw it that morning? A. No.

Q. What changes were made in the door? A. A cross brace of the door had been knocked down, completely off the door, and lay down between the screen door and the inside door. For the purpose of the photograph I stood that up.

The Prosecutor: I will not use the photograph under those circumstances.

By the Court:

Q. The screen door cross piece when you got there that morning was knocked down? A. It was completely off.

By the Prosecutor:

Q. For the purpose of the photograph you put it back in place? A. Yes, I stood it up, so it would show in the photograph.

Q. The piece to which you refer, is that also shown in the photograph? A. Yes.

Q. But it is standing up rather than lying down? A. It belongs across the door in the center.

The Prosecutor: Then I see no objection,

I offer the photograph in evidence, and I ask that it be marked.

(Received and marked Exhibit S-17.)

By the Court:

Q. Does that photograph represent the screen tear as you observed it in the morning? A. Yes, sir.

Q. The rip as you observed it in the morning? A. Yes, sir.

By the Prosecutor:

Q. Did you have any conversation with Albert Brown in respect to the two cigars, which have been marked Exhibit S-13.

Mr. Johnson: I object to that, if your Honor please, unless some ground is laid as to when this conversation took place, whether he was warned in regard to making any statement in regard to this.

The Court: All right, let us lay the foundation.

The Prosecutor: My purpose is to show they did have a conversation.

The Court: All right.

Q. Did you have a conversation with him about those cigars, with Albert Brown? A. Yes.

Q. Where did that conversation take place? A. The County Detective's office.

Q. Was that the same afternoon of June 17, to which you have just previously testified? A. Yes, it was.

Q. And when he was shown the cigars, was that before or after he had been warned by Mr. Apgar? A. After.

Q. At that time what did he say about the cigars?

Mr. Johnson: I object to that, that's part of the statement that he was supposed to have made when he was in the detective's office, and which statement we are objecting to having introduced at this time before the defendant is heard.

The Court: It's a matter for denial when he does make a statement. It is still going to the basic point whether or not a sufficiend ground is laid for the confession, which is about to be submitted, that it was voluntary. As far as the statement itself is concerned, I think that may be developed later. I will sustain the objection for the time being, with the privilege of introducing it subsequently.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. Mr. Atkinson, you said when Anna Brown was taken into County Detective Apgar's office he said she must make a statement?

The Prosecutor: No, the witness did not say that, if your Honor please.

Mr. Johnson: I am asking him if he did say it.

The Prosecutor: The witness did not.

The Court: What was the question?

(Question repeated.)

The Prosecutor: I object to it, as misquoting the testimony of the witness.

The Court: I think Mr. Johnson should reframe the question, which is rather cumbersome.

Mr. Johnson: The way I recall the statement, I have it in my notes, I asked him if he said on direct-examination whether Mr. Apgar said that Anna Brown must make a statement.

The Prosecutor: I object to that, because the statement made by the witness was to the effect that Mr. Apgar told Anna Brown if she wanted to make a statement it must be understood it was voluntary, of her own free will, without any hope, or threats, or promises of reward.

The Court: Break up your question.

Mr. Johnson: That's the only thing I want to find out, whether he said that, or not.

Q. Did Mr. Apgar tell Anna Brown that she must make a statement? A. No.

Q. Were you in the room all the time Mr. Apgar was talking to Anna Brown? A. Yes, I was.

Q. Did you hear Mr. Apgar make a statement to Anna Brown as follows: "If you do not tell we are going to send you back to the State Home"? A. No, indeed.

Q. Did you hear anyone else make that statement? A. No, sir.

Q. Did you make that statement yourself? A. I did not.

Q. When you were talking to William Brown did you say to William "You don't need to talk, I am going to see you burn, anyhow"? A. I never made any such statement as that.

Q. Did you hear anyone else make that statement? A. No, I didn't.

Q. Was the statement in regard to the watch falling from the hook made by Anna Brown? A. Yes.

Q. Was it made in your presence? A. Yes.

Q. To whom was it made? A. In answer to the questions contained in the statement.

Q. In the statement? A. Yes.

Q. In the statement that was made, or was that made in the jail? A. That was made in the statement which was taken in the afternoon, starting two-fifty p. m.

Q. Didn't you testify that Anna Brown made this statement when you and Detective Apgar and Mrs. Verdier were in the jail cell together? A. There has been no testimony from me to that effect.

Q. In this photograph, you say that was taken in the afternoon? A. That's right.

Q. Was that door braced any time during the day? A. No, the door wasn't braced, it was broken, it remained in its original condition.

Q. Perhaps you misunderstood the question. Was the door always closed like that, all during the time that you were there in the morning? A. Always closed as it is now, no, it had to be opened to get in.

Q. When you were going back and forth was the door kept like that? A. Yes.

Q. Closed and opened each time? A. Yes, it was unlocked if that's what you mean.

Q. Every time you had to go back and forth it was opened and closed again? A. Yes, that's right.

Q. You are positive that wire was not cut any more or ripped any more? A. That wire in the morning at the time of my first arrival was just as it is shown in that photo.

Q. It had not been ripped any more with the

continued opening and closing of the door? A. No, it had not.

Q. When the statement was made to Anna Brown that anything that she would say would be used against her, you were there, weren't you? A. I was there, yes, sir.

Q. Who made that statement? A. County Detective Apgar.

Q. Did he explain to her what that meant? A. Of course.

Q. What did he say, if you can recall, in your own words? A. I can't recall verbatim, I don't remember the words he used. It was to the effect that whatever she had to say, if she wished to speak, she must understand that would be used against her any time in court, and she must make it without any threat, without any fear, or without any promise or hope of reward.

Q. Was that the same statement made to Smalley Burrell? A. That same statement was made to all three defendants.

Mr. Johnson: That's all.

By the Prosecutor:

Q. At the time Mr. Apgar made the statement to these people did he tell them what matter you men were investigating? A. Yes, sir, of course.

Q. The assault at that time on Mr. Horner at Paulsboro? A. That's right.

The Prosecutor: That's all.

By Mr. Johnson:

Q. How many statements were taken, to your knowledge? A. Three statements to my knowledge.

Q. One of each? A. One of each defendant.

Q. No more than one to your knowledge? A. That's all I know of.

LILLIAN R. VERDIER, sworn.

By the Prosecutor:

Q. Mrs. Verdier, where do you live? A. Blackwood Terrace.

Q. How long have you lived at Blackwood Terrace? A. Nearly sixteen years.

Q. Where are you employed at the present time? A. In the Gloucester County Prison, Woodbury.

Q. What is your job in the prison? A. Matron.

Q. How long have you held that position? A. It will be five years in November.

Q. Did you hold that position on the 17th day of June of this year? A. Yes, sir.

Q. Do you recall coming down to our office with the defendants, William Albert Brown, Smalley Burrell and Anna Brown? A. Yes.

Q. As I understand it, when a female prisoner is brought from the jail to another place the matron always accompanies her? A. Yes.

Q. And that is the reason for your being there that day? A. Yes.

Q. Do you recall being in the office when a statement was made by Anna Brown? A. Yes.

Q. To the best of your recollection who was present at the time the statement was taken? A. Detective Apgar, Officer Atkinson, and Mayor Wert.

Q. Mr. Denham, the court stenographer, was there? A. Yes, he was there.

Q. Before Anna Brown made a statement was she given any warning by Mr. Apgar that you re-

member? A. She was given the regular warning all are given.

Q. Not remembering the exact words, do you recall what he said? A. He warned her that anything that she might state would be used against her, it was entirely up to her.

Q. Was any threat made against Anna Brown while you were there? A. No.

Q. Was she beaten or struck in any way? A. No.

Q. Was she given any promise of a reward? A. No.

Q. From what you could see was the statement given voluntarily of her own free will? A. Yes.

Q. Were you present in the room when a statement was taken from the defendant Smalley Burrell? A. I don't think I was.

Q. You don't think you were? A. No.

Q. Were you present when the statement was taken from William Albert Brown? A. Not the first time, the second time.

Q. I am speaking about the time in our office. A. No, I wasn't there the first time.

Q. After the statement was taken from Anna Brown you went outside? A. Yes.

Q. Around two or three days after that, after Mr. Horner died, were you present in Mr. Denham's office in this building when the three defendants were again brought down from the jail? A. Yes.

Q. Who was present at that time? A. Well, Mr. Apgar, Mr. Atkinson, and Mr. Wert.

Q. No, I mean the second time when they were brought down to Mr. Denham's office, the court stenographer's office. A. Mr. Apgar, Mr. Atkinson, the under-sheriff, you, and myself.

Q. Do you remember Sheriff Jones coming in? A. Yes.

Q. Are you sure that Mr. Atkinson was there at that time? A. No, I am not positive.

Q. But you know that you were? A. Yes.

Q. All three defendants were there? A. Yes.

Q. And Mr. Denham? A. Yes.

Q. Mr. Apgar? A. Yes.

Q. Mr. Eckman, the under-sheriff? A. Yes.

Q. And the sheriff and myself? A. Yes.

Q. At that time do you recall the fact that the statements which they had given on June 17th were read back to them question for question and answer for answer? A. Yes.

Q. Who read back the statements to them? A. You did.

Q. Who followed along on the copies of the statements? Do you remember who checked over what I was reading? A. I don't know which one it was.

Q. Someone checked what I was reading? A. Yes, but I don't remember who it was.

Q. At that time were any threats or promises held out to the defendants? A. No.

Q. Were they beaten or struck in any way? A. No.

Q. As far as you could see at that time everything that they did was voluntary? A. Yes.

Q. Do you recall the fact that the defendants were asked when the statements were read over to them to make any changes or corrections that they wanted to make in the statements? A. Yes.

Q. Do you recall whether or not the defendants made any changes? A. They made several corrections.

Q. In the statement which they had previously given on June 17th? A. Yes.

Q. Now, do you remember Saturday afternoon, June 19th of this year? A. Yes.

Q. Do you recall Mr. Apgar talking to the defendant Anna Brown that Saturday afternoon? A. Yes.

Q. How did he happen to be up in the jail talking to Anna Brown? A. She knocked on the door and I went back and she asked if I would bring Mr. Apgar up, she wanted to tell him something.

Q. Did you hear her when she talked to Mr. Apgar? A. Yes.

Q. Do you recollect what she told him?

Mr. Johnson: Just a minute. Unless the defendant Anna Brown was warned at that time that the statement made would be used against her I don't think that statement would be admissible, any time she made a statement because they warned her one time.

The Prosecutor: This is not a statement. We were sent for.

The Court: This is an admission, it would come under another category.

Mr. Johnson: She should be warned whether it is a statement or in another category.

The Court: After a request of the girl, the matron asked the county detective to come up to see her.

Mr. Johnson: At that time Anna Brown was not represented by counsel.

The Prosecutor: I do not think that is any legal objection.

Mr. Johnson: She is a girl sixteen years of age and she had been in the State Home for Girls as an incorrigible, she knew noth-

ing about court rules or regulations, as to what she should say or should not say. She changed the statement three times already and I think she should have been warned at that time. It stands in the same category.

The Prosecutor: Rather than to have any objection or exception I withdraw the question.

The Court: All right, if you are willing. You are not asking to rule on it?

The Prosecutor: No. You may cross-examine.

Cross-examination by Mr. Johnson:

Q. Mrs. Verdier, when you went down to the Prosecutor's office with Anna Brown you were right near her all the time? A. I sat right beside her.

Q. Did you hear Mr. Apgar tell her that if she did not make a statement she would be sent back to the State Home? A. No, I did not.

Q. Did you hear any one else in the room make such a statement? A. No.

Q. Did you make such a statement? A. I did not.

Q. When her statement was completed, did she say anything about home? A. About going home?

Q. Yes. A. Well, all she said, "I will be glad when I get out of this mess and get back home."

Q. Did she make the statement, "Now I made my statement, I can go home and will come back on the date of the trial." A. Yes.

By the Prosecutor:

Q. At that time Mr. Horner was alive? On June

17th Mr. Horner had not died, is that correct? A. Yes.

By Mr. Johnson:

Q. When the second statement was made do you know what date that was? I don't mean the second statement, I mean the time when the statements were read over to them? A. No, I don't know what date that was.

Q. Do you know if Mr. Horner had died? A. Do you mean when the corrections were made?

Q. Yes. A. Yes.

Q. Did they know about it? A. As far as I know of.

Q. Did you tell them? A. I never discuss anything like that with the prisoners.

Q. To your knowledge, they knew nothing about the death of Mr. Horner? A. As far as I know of.

By the Prosecutor:

Q. Refreshing your recollection, Mrs. Verdier, when they were brought down to Mr. Denham's office and Mr. Denham was there, Mr. Apgar, Mr. Eckman, the under-sheriff, do you remember me asking each of these defendants this question: "All three of you defendants understand that since the last statements were made that Mr. Horner has died and you have been indicted for murder, and of course you have entered your plea of not guilty to that crime? You understand that and Anna Brown answered, 'Yes, sir', Smalley Burrell answered 'Yes, sir', and William Brown answered 'Yes, sir'." A. That was in the office.

By Mr. Johnson:

Q. Was that after the statements were read to them? A. No.

Mr. Johnson: I am trying to find out when the statement was made.

The Prosecutor: The statement was made on June 21, 1937. The defendants were indicted for the crime of murder on the 19th day of June, 1937, and on the 19th day of June, 1937, Saturday afternoon, two days before the statement was taken entered a plea of not guilty before your Honor for murder.

Mr. Johnson: What statement is this? There are so many statements. There was one on the 17th—

The Prosecutor: I will be glad to explain it. A statement was taken by Mr. Denham in shorthand on June 17th and between June 17th and June 21st he transcribed the statements given by each of the defendants, and on the 21st day of June, after Mr. Horner had died, and after the defendants had been indicted for murder and entered a plea of not guilty, all three defendants were brought down to Mr. Denham's office and there in the presence of all the people the complete statements given by them on June 17th were read back by me and Mr. Denham checked it and Mr. Apgar checked it. I read each question and each answer and I told them if there were any corrections they wanted to make they could make them and that is the statement which Mrs. Verdier referred to, and they did make corrections at that time.

WALTER ZICKWOLF, sworn.

By the Prosecutor:

Q. Trooper Zickwolf, you are a member of the New Jersey State Police? A. Yes, sir.

Q. And have been for how long? A. Six years.

Q. Did you participate in the investigation of the murder of William J. Horner? A. I did.

Q. When did you first arrive in Paulsboro and participate in the investigation? A. I went to the house.

Q. About what time was that? A. About one o'clock.

Q. On what date? A. June 17th.

Q. You went to Mr. Horner's house. What did you do and what did you see when you got there? A. How the house was all ransacked.

Q. Will you describe to the jury how it was ransacked? A. The contents of the kitchen, everything was thrown about—

Mr. Johnson: I object to this witness' testimony on this question because it is so remote from the time the affair took place. There had been so many people in and out of the house I don't know what happened at the place.

The Prosecutor: All right, I withdraw the question.

Q. Did you bring the two colored girls, Anna Brown and another by the name of Annabelle Clark to Woodbury? A. I did.

Q. In your car? A. I did.

Q. Were you present in our office on the afternoon of June 17th when certain statements were taken from each of the three defendants? A. I was.

Q. Prior to the time the statement was made by Anna Brown was she given any warning by Mr. Apgar or any other officer? A. Yes.

Q. Will you tell us in your own words as nearly as you can recollect what warning was given to her by Mr. Apgar? A. She was warned to tell the truth, and nothing but the truth, and that she would not be rewarded, no promises or threats or hope of reward.

Q. Was anything said about any statement she would make being used against her in court? A. Yes.

Q. Mr. Apgar at the same time advised her what case you men were investigating? A. He did.

Q. After that warning was given to Anna Brown did she make a statement in your presence, Mr. Denham and the rest of the people who have been mentioned? A. She did.

Q. Was a statement taken the same afternoon from Smalley Burrell? A. Yes.

Q. Was the same warning that was given to Anna Brown given to Smalley Burrell by Mr. Apgar? A. Yes.

Q. On the same afternoon did William Albert Brown make a statement? A. He did.

Q. Was the same warning that was given to Anna Brown given to him? A. It was.

Q. In your presence was any threat made against any one or all of the defendants by any of the officers or persons present? A. No, sir.

Q. Did any one promise anything for making the statements? A. No.

Q. Were they beaten or struck by you or any one else in your presence? A. No.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. Where were you in the room, Trooper Zickwolf, when these statements were taken? A. I sat right to the left of Detective Apgar.

Q. Was he doing the questioning? A. Yes, sir.

Q. Did you hear him make the statement that if Anna did not talk they would send her back to the State Home? A. No, he did not.

Q. Did he say anything to her prior to the time he gave her the usual warning? A. Well, he told her what case we were investigating and that the statement would have to be made of her own free will and accord.

Q. Did ne say whatever she said would be used against her in court? A. Yes.

Q. After she had finished her statement, did you hear her say, "Can I go home now?" A. No, I did not.

Q. When William Brown made his statement, before he made his statement rather, did you hear Chief Atkinson say to him, "If you don't talk I am coming up to see you burn anyhow"? A. I didn't hear him say it.

Q. Did you make that statement? A. No.

Q. Did you hear any one else make that statement? A. No.

Q. Was any such statement made to Smalley Burrell? A. Not that I heard.

Q. Were you paying attention all the time to what was going on? A. I was.

Q. Was Mayor Wert in the room when those statements were taken? A. Yes.

Q. Did you hear him say to the defendants that he would not take them to Paulsboro to arraign them because the feeling against them was too high? A. I didn't hear him say it.

Mr. Johnson: That is all.

By the Court:

Q. When Mr. Apgar, and I assume he did the questioning, is that right? A. That is right.

Q. Said to Anna Brown, "What you say may or can be used against you in court" I am referring now particularly to the end of that preliminary warning, what did she say? Did she say anything? A. Then he asked her if she was still willing to make a statement and she replied yes.

Q. In the case of Smalley Burrell, what was said by him? A. The same thing.

Q. What did he say? A. He was willing to make a statement.

Q. What was said by William Albert Brown? A. The same thing.

Q. Did he hesitate? A. Brown?

Q. Yes. A. No.

Q. Did Burrell hesitate? A. No.

Q. Did Anna Brown hesitate? A. No.

Q. Mr. Zickwolf, when Smalley Burrell was brought in to be questioned, did Smalley say that he did not know anything about it? A. Well, he

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Q. This is Smalley (indicating). A. He gave a statement. He was only there a few seconds or a few minutes in the Prosecutor's office.

Q. Did he say he did not know anything about it? A. I did not hear him say it.

Q. Did you say or did you hear anyone else say, "Come on, Smalley, you know all about it, come on and tell it"? A. No.

Q. Smalley did not talk when he first was brought in there, did he? A. He was only in there a few minutes and he gave a voluntary statement.

Q. That is not responsive to the question. Did he talk or want to talk when he first was brought in there? A. He was only in there a few minutes.

Q. Didn't he refuse to give a statement at first? A. I don't recall him refusing.

Q. Were you paying attention when he was brought in there? A. I was.

Mr. Johnson: That is all.

The Prosecutor: That is all.

LEONARD B. ECKMAN, sworn.

By the Prosecutor:

Q. Mr. Eckman, you are Under Sheriff of the County of Gloucester? A. I am.

Q. And have been for how long? A. Since February.

Q. Of this year? A. That is right.

Q. Do you recall the three defendants, Burrell and the two Browns, being brought down to Mr. Denham's office in the building next door on June 21st of this year? A. I do.

Q. And who brought the three defendants down from the jail? A. Fred Simmler, the warden, Mrs. Verdier and myself.

Q. The three of you brought them down? A. That is right.

Q. They were taken into whose office? A. Into Mr. Denham's office.

Q. And who else was present at the time they were brought down? A. Mr. Denham, the Prosecutor, Mr. Apgar, Sheriff Jones, Mrs. Verdier and myself.

Q. Do you recall what happened while you were

there in the office, what was done? A. Well, you as Prosecutor asked the three defendants or, rather, told them that Mr.—the gentleman had died and asked them if they would care to listen to their previous confession and if there was any corrections or anything to be made, why, to make them then, and expressed to them then it was made of their free will and they were not being forced to say a thing and they in turn, the three, each had their confession read to them, word for word, slowly. Whenever there was something in there which they did not agree with, they spoke up, they were given that privilege, and those corrections were made. Mr. Denham would read them back and after the corrections were completed each defendant admitted that it was their true story, that they wanted to give willingly.

Q. Were all three defendants present as the other fellow's statement was read back? A. They were all three sitting together just as they are now.

Q. Mr. Denham's office is on the second floor of the adjoining building? A. That is right.

Q. The same floor as we are on now? A. Yes.

Q. Right at the head of the stairs? A. That is right.

Q. So that a person coming up the stairs would be right alongside of Mr. Denham's office? A. Correct.

Q. Do you recall what time of the day it was they were brought down to have their statements read back to them? A. It was in the afternoon. I don't know the exact time.

Q. Sometime before you go home in the evening? A. Before I go home. I judge it was around two o'clock but I would not be certain.

Q. And what time do you usually go home? A. 4 o'clock our office closes.

Q. Sometime between the lunch hour and 4 o'clock, right in the middle of the day? A. That is right.

Q. Were you present in our office on June 17th, when certain statements were taken from the defendants? A. No, I was not.

Q. You were there only on the one occasion? A. That is all.

Q. That was on June 21st of this year? A. Yes.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. Did you hear Smalley Burrell make a statement that he did not know whether what he had in his statement was true or not and that he was drunk? A. He may have, I am not certain of that.

Q. Did you pay attention to what was being said? A. I did. I was sitting right—well, just within—I could touch any one of the three.

Q. No one of the three defendants had a copy of their statement in their hand, did they? A. No, they did not.

Q. When did Mr. Lord make the statement to them that Mr. Horner had died? A. Right at the beginning.

Q. Right at the beginning? A. He first started with that and then he explained when he started, I think—I think Smalley Burrell was the first one he asked the questions of.

Q. Were there numerous changes made in these statements? A. There were not many. There

were just a few minor, as I would say, but at the time maybe five or six changes, I would say.

Mr. Johnson: That is all.

CLAYTON W. APGAR, sworn.

The Court: I think this will take a little time. I will declare a recess for fifteen minutes.

(At this point a recess was taken for fifteen minutes.)

(After Recess.)

The Prosecutor: If your Honor please, I would like to recall Mr. Apgar for the moment and call Sheriff Jones. He is a shorter witness.

The Court: All right.

ARLINGTON JONES, sworn.

By the Prosecutor:

Q. Sheriff, you are the Sheriff of the County of Gloucester? A. Yes.

Q. And have been for how long? A. A year and a half.

Q. On the 21st day of June of this year did you come into Mr. Denham's office while the three defendants, Mr. Eckman, Mrs. Verdier, Denham, Apgar and myself were in there? A. Yes, sir.

Q. Were you in Mr. Denham's office when the prisoners were brought down from the jail to his office? A. No.

Q. You came in during the course of the questioning? A. That is right.

Q. And from the time that you came in until the time you left, did you hear anyone make any threats against either or any of the defendants? A. No.

Q. And did you hear any of the persons present make any promise of reward to either or any of the defendants? A. No.

Q. And while you were in Mr. Denham's office what was being done, what was going on? A. Why, the statement, the statements that they had made was read to them and asked if they wished to make any changes or corrections.

Q. While you were there and in your presence did I make any statements to the defendants that since they made their statements on June 17th that Mr. Horner had died? Do you recall me saying that to the defendants? A. Yes.

Q. And from what you could see while you were in there were the statements which they made and which they corrected given voluntarily and of their own free will? A. It was.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. Did you hear the defendants make any statements at all? Did you hear Anna Brown make any statement? A. Well, any more than they made some minor changes.

Q. Did she say anything else outside of some changes she made in her statement? A. Not that I recall, no, not that I recall.

Q. Did William Albert Brown make any statement other than what was said about the statement had been read to him? A. No.

Q. Did Smalley Burrell? A. No.

Mr. Johnson: That is all.

CLAYTON W. APGAR, recalled.

By the Prosecutor:

Q. Mr. Apgar, you are County Detective of Gloucester County? A. I am.

Q. And have been for how long? A. Nine and a half years.

Q. And prior to that time what was your occupation? A. State Trooper.

Q. How long had you been a member of the New Jersey Police? A. Five and a half years.

Q. So altogether you have had about fifteen years' experience in police duties? A. Yes.

Q. Did you assist in the investigation of the murder of William J. Horner? A. I did.

Q. And when you first saw the defendants, Smalley Burrell, William Albert Brown and Anna Brown, were they in the Borough of Paulsboro or in the City of Woodbury? A. In the City of Woodbury.

Q. Where did you first see Anna Brown? A. In the County Jail.

Q. Upstairs on the third floor in the new building A. Yes, sir.

Q. What did you say to Anna Brown when you saw her up in the jail? A. When I went back to the County Jail—

Q. Mr. Apgar, you will have to keep your voice up. A. I said to her, "Aren't you on parole from the State Home for Girls?" and she said, "Yes."

Q. She was upstairs on the third floor? A. Yes.

Q. After that time was she brought downstairs to the Prosecutor's office? A. She was.

Q. And were the other two defendants, Burrell and Brown, brought down at the same time? A. No, sir.

Q. Brought down later that same afternoon? A. They were brought down separately and then collectively.

Q. Did you take any statement from Anna Brown that afternoon? A. I did.

Q. And prior to the time that you took a statement from her, did you give her any warning? A. I did.

Q. And what was the warning that you gave her? A. I told her that I was a County Detective of Gloucester County and mentioned the names of the other persons present in the room, told her it was our duty to investigate all crimes that occurred in Gloucester County and we were now investigating the robbery and assault of William J. Horner that occurred on or about midnight, June 16, for which crime she had been picked up for questioning, if she wished to make a statement we were willing to hear it but only with the understanding it must be made voluntarily, of her own free will and accord, without any fear, threats or promises of reward, that anything she said could or might be used against her in Court, and after I gave her that warning I asked her if she understood what I had just said and if she had and wished to make a statement, to go ahead.

Q. Did she make a statement, after given that warning? A. She did. She said she understood what I had said.

Q. Did you give the same warning to the other two defendants, Smalley Burrell and William Albert Brown, that you gave to Anna Brown? A. I did.

Q. Now, the warning which you just repeated,

have you memorized that warning? A. I have, yes, sir.

Q. From whom did the original form of the wording of the warning come? A. Justice Katzenbach.

Q. He was a Justice of the New Jersey Supreme Court? A. Yes, sir.

Q. And I understand that form of a warning was given to Mr. Summerill while he was Prosecutor of this County, to be used in taking statements from prisoners in various cases? A. That is correct.

Q. So that from that time on you memorized the statement and know it word for word? A. That is correct.

Q. And have you used that same warning in many other cases in addition? A. I use it in every case.

Q. Now, after the statements were taken, were they subsequently transcribed or typewritten by Mr. Denham and read back to the defendants? A. They were.

Q. And where were they read back to the defendants? A. In Mr. Denham's office in the Court House.

Q. In the Court House. A. In the Court House, second floor of this building, the new building.

Q. Who was present at the time the statements, typewritten statements, were read back to each of the defendants? A. Yourself, Sheriff Jones, Under Sheriff Eckman, Mrs. Verdier, the defendants, Mr. Denham and myself.

Q. Were all three of the defendants present at the same time? A. They were.

Q. What happened in Mr. Denham's office that afternoon, what was done? A. You read the statements of each of the defendants, to each one of

them, together with a warning that I had given them and told them that the same warning that I had given them now applied and if they had any changes or corrections to make in their statements they were free to do it.

Q. After I told them that, what was done? A. You read the statements and Mr. Denham and myself each checked as you read the copy of their statements.

Q. I had the original of their statements and you and Mr. Denham had a copy of the statements? A. Yes.

Q. Which they had given on June 17th? A. That is correct.

Q. And as I read the questions and answers from the original, you and Mr. Denham checked it and followed it from the copy? A. That is correct.

Q. And were the questions and the answers which I read to each of the defendants correct? A. Yes, sir.

Q. In accordance with the typewritten copies which you had and which I had? A. They were.

Q. Now, after those statements were read to them, did the defendants make any changes in the statements which they had made on June 17th? A. Two of them did, as I recall it.

Q. Some changes in their previous statements? A. Yes.

Q. And was anything said to the defendants to let them know that Mr. Horner had died since they made their statements on June 17th? A. You told them Mr. Horner had died and they said they knew.

The Court: When did you tell them?

Q. Now, do you recall when did I tell them that?

A. When they were first brought into the room.

Q. Were they all in there at the same time? A. Yes, sir.

By the Prosecutor:

Q. While you were in questioning the defendants in the office on June 17, in the presence of Mr. Atkinson and the other officers, did you or anyone else in your presence make any threats to either one or any of the defendants? A. I did not, neither did anyone else present.

Q. Did you hold out, or anyone else in your presence, hold out or offer to the defendants any promise or hope of reward? A. I didn't, neither did anyone else present.

Q. And the statements, which they made and gave on June 17, and reaffirmed and corrected on June 21, were those statements made voluntarily and of their own free will, as far as you know? A. They were.

Q. On the 21st, when the statements were read back to them, when I read them statements back, when they were checked by you and Mr. Denham, were any threats or promises of reward held out to either one or any of the defendants at that time? A. There were none.

Q. Were they offered any hope of reward? A. They were not.

Q. On June 19th of this year did you go up to the jail to see Anna Brown? A. I did.

Q. And what caused you to go to the jail to see Anna Brown? A. Mrs. Verdier, matron of the County Jail, phoned me and said that Anna Brown had requested her to communicate with me to ask me to come up to see her, that she had something that she wanted to tell me in addition to what she had already told.

Q. Did you go up to see her? A. I did.

Q. And what did Anna Brown say to you at that time? A. She told me that she had thrown some water in Mr. Horner's face to bring him to, so they could ask him where his money was, and that Smalley Burrell had kicked him.

Mr. Johnson: I object.

The Court: Yes, that will be stricken.

The Prosecutor: It is only insofar as it concerns the defendant, Anna Brown.

The Court: Yes.

Q. When she said they were asking him where his money was, to whom was she referring? A. She didn't mention names, I presume she meant the other two defendants.

Mr. Johnson: I move that be stricken.

The Court: Will you repeat the answer?

(Answer repeated.)

The Court: Yes, that will be stricken.

Q. Did Anna Brown at that time say anything to you about the blanket or coat? A. She said a blanket or a coat was thrown over Mr. Horner's head so that people outside couldn't hear him yelling.

Q. Did she say who was present at the time the blanket was thrown over his head? A. She said they were all present.

Mr. Johnson: I object to that, that cannot bind the other two defendants.

The Court: All right.

The Prosecutor: It is binding insofar as Anna Brown is concerned.

The Court: Only as far as Anna Brown is concerned, it's binding.

Q. Did she say, Mr. Apgar, who was present at the time she threw the blanket or coat over his head so people could not hear him yelling?

Mr. Johnson: That's the same question, he is asking who was present.

The Court: It's being answered. Will you repeat the question?

(Question repeated.)

Mr. Johnson: That is the same question in another form.

The Prosecutor: It is binding on Anna Brown.

Mr. Johnson: She said she was there. You are trying to elicit from that question who else was there.

The Court: I am going to permit the answer with this understanding and clarity to the minds of the jury, that what Anna Brown said at this particular time bound Anna Brown only, because these other two men were not there to either deny or to affirm what she said.

The Prosecutor: Now repeat the question.

(Question repeated.)

A. She did not say that she threw the blanket over his head.

Q. Who did she say threw the blanket? A. She said Smalley Burrell threw it over his head.

Q. Did she say who else was present at that time? A. She said they were all present.

Q. I show you a watch, which has been marked Exhibit S-10. Did you ever have any conversation with Anna Brown about this watch? A. I did.

Q. And where did the conversation take place?

A. In the warden's office of the Gloucester County Jail.

Q. And were the defendants, William Albert Brown and Burrell present at that time? A. I think they were, the three of them.

Q. On the date of June 17, when the three of them gave a statement in the Prosecutor's office in respect to their part in this crime, did Anna Brown at that time make any statement as to where the watch had come from in the presence of the other two defendants? A. She did.

Q. Where did she say the watch came from? A. She said it was on a nail in Mr. Horner's house, it was hanging on a nail, and it was knocked off the nail and one of the defendants picked it up, she didn't know which one.

Q. How did she say the watch happened to be knocked off the nail? A. She didn't say.

Q. When she referred to the defendants to whom was she referring? A. Smalley Burrell and her brother, William Brown.

Q. I show you a razor which has been marked Exhibit S-12. Did Anna Brown make any statement to you with respect to that razor in the presence of the other two defendants? A. She did.

Q. What did she say? A. She said that that looked like the razor that her brother held against Mr. Horner's throat.

Q. And do you recollect what she said, or what her brother said to Mr. Horner at the time he held this razor against his throat?

Mr. Johnson: Every one of these questions that the Prosecutor is asking the witness are questions about other defendants.

The Prosecutor: They were all present at the time this statement was made.

Mr. Johnson: There is no statement made that they were given an opportunity to contradict the statement made, and every statement that the witness has made, whether it was in the presence of the other parties or not is not admissible against the party.

The Court: I am admitting it rather as an admission, rather than a confession.

Mr. Johnson: Exception.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

The Prosecutor: Repeat the question.

(Question repeated.)

A. I do.

Q. What did she say that her brother had said? A. She said her brother had said "I got a good mind to cut your throat".

Q. Was that to Mr. Horner? A. To Mr. Horner.

Q. Were the other two defendants, Burrell and Brown, present at the time Anna Brown made that statement? A. Yes, and they made that statement themselves.

Q. Was there anyone else to have prevented either Smalley Burrell or William Brown from denying the statement which was made by Anna Brown? A. Was there anyone prevented that?

Q. To prevent it? A. No, they made the same statements themselves.

Q. When you say they made the same statements themselves, confine yourself to the defendant, William Albert Brown, the one sitting next to Mr. Johnson, with the necktie, what did he say he had to do with the razor? A. He said he wanted to be brave, or something, and he got the razor

off the table, and held it against Mr. Horner's throat, and said he was going to cut his throat, but he said he really wasn't going to do it.

Mr. Johnson: When were these statements made?

The Prosecutor: June 17th.

Mr. Johnson: Were they made before any warning was given to the defendants? You were up there the first time, and you brought them in. I object to the question, unless some statement is made as to the time they were made.

The Court: This was in the warden's office.

The Prosecutor: This was after they came downstairs on June 17th.

The Court: Preliminary to the alleged confession?

The Prosecutor: Yes, sir.

Mr. Johnson: I think all this testimony should be stricken out then, if they weren't given that warning.

The Prosecutor: I think we can follow that up. Will you repeat the last answer?

(Answer repeated.)

A. Or words to that effect, or what he did say is in the statement taken down by the court stenographer.

Mr. Johnson: All this testimony given by Mr. Apgar has been relative to statements given down in the Prosecutor's office before they were warned.

The Court: There is nothing in the evidence to show it was involuntary. Here is the County Detective confronting them with

articles, and asking them where they came from.

Mr. Johnson: They had the right to be warned that anything they may say could be used against them.

By the Prosecutor:

Q. At the time the defendant, William Albert Brown and the defendant Anna Brown made statement to you which you have just related with respect to the razor, was that before or after had given them the warning which you recited in the earlier part of your testimony? A. It was after I had given them the warning, because it was after they had received the warning we knew where the razor was. Albert Brown told us where to find the razor.

The Court: Any objection now?

Mr. Johnson: I don't get the time yet.

Q. What date was that, Mr. Apgar? A. June 17th in the afternoon, sometime after two-fifty p. m.

Q. You just made the statement that William Albert Brown told you where the razor was? A. He did, in his statement we first learned of the razor.

Q. Where did he tell you the razor was? A. Down at his home at Paulsboro with three or four other razors he had there.

Mr. Johnson: Was that after they had made the statement in Mr. Denham's or Mr. Lord's office, after they had made that statement?

The Prosecutor: This statement to which we are referring was made on June 17th.

The statement which I had something to do with was made four days later, June 21st.

Mr. Johnson: The first statement was taken from these defendants June 17th?

The Prosecutor: This is part of it.

The Witness: This is what they told us in the office on June 17th.

Mr. Johnson: I thought you said it was in the warden's office.

The Prosecutor: The testimony will show they were first taken upstairs, and were brought downstairs into our office.

By the Court:

Q. Where was the watch exhibited to these defendants? A. In the warden's office at the County Jail.

By the Prosecutor:

Q. Where was the razor shown to the defendants? A. I think it was shown to them in two places, in the warden's office of the County Jail and our office.

Q. After you had warned Anna Brown, while they were making the statements in the Prosecutor's Office on June 17th, did you have any conversation with her about the religious medal which has been introduced in evidence and marked S-11? A. I was there when that was shown to her together with these other things, and she said she received that from Mr. Horner's house the night they went there to rob him.

Q. Did Anna Brown in the presence of the other defendants tell you how much money they had gotten from Mr. Horner? A. She did.

Q. How much did she say they had got? A. Seventy cents.

Q. What did she say they had done with the money? A. They went down to Sam's Yockamein joint, as she called it, and two of them had Yockamein, and she had a fish sandwich, and they put two nickels in the electric victrola.

Q. Did you question Smalley Burrell about that after he had been warned?

Mr. Johnson: Is this about the statement, Mr. Lord, or what?

The Prosecutor: Part of the statement they made that afternoon after they had been warned.

Mr. Johnson: The statements that were taken from these defendants?

The Prosecutor: Correct.

Mr. Johnson: He is testifying orally as to what was taken down stenographically.

The Court: These are statements when they were confronted with the articles, and their reactions to the articles, and the admissions they made.

Mr. Johnson: Apparently, when the statements were taken down, they are part of the statements taken down stenographically and read back to them.

The Court: The Prosecutor is not referring to what was taken down stenographically, but only what was said orally when this medal was exhibited to her.

Mr. Johnson: My understanding is this was a statement that was taken down stenographically, is that correct?

The Prosecutor: Will you repeat the last question?

(Question repeated.)

Clayton W. Apgar—Cross.

By the Prosecutor:

Q. Was Smalley Burrell there at the time Anna Brown made the statement about getting the seventy cents and going down to the Yockamein joint? A. The statement was taken from each one of them separately, and then they were all brought in the room together, and then they were arguing between themselves, and at that time they were making statements accusing each other, and they were being taken down by the stenographer. I can't remember word for word what was said.

The Prosecutor: I will withdraw the last question. Cross-examine.

Cross-examination by Mr. Johnson:

Q. When you went into the County Jail to talk to Anna Brown, and asked her if she was not on parole from the State Home, didn't you further state to her as follows: "Anna, if you don't make a statement we are going to send you back to the State Home"? A. I didn't say that.

Q. You didn't say that? A. No, sir.

Q. Did you say anything in the nature of that?

The Prosecutor: Objected to.

The Court: You will have to confront him with just the exact words.

Q. Just what did you say to Anna Brown? A. I said to Anna Brown "Aren't you on parole from the State Home for Girls?" And she said "Yes". I said, "Well, if you don't behave yourself, you will be going back there".

Q. You said this when? A. That's the only time I said it. She voluntarily then started to—

Q. Will you repeat once more just what you said, Mr. Apgar?

The Prosecutor: I object to that, what is the purpose of it?

Mr. Johnson: Will you repeat Mr. Apgar's answer?

(Answer repeated.)

Q. When you first started to question Smalley Burrell, did he say to you that he knew nothing about it, because he was drunk? A. No, he did not.

Q. He didn't say anything in the nature of that?

The Prosecutor: Objected to.

The Court: Sustained.

Q. When you started to question Smalley did he answer immediately? A. Well, I don't know whether he answered immediately or whether he hesitated. He hesitated on some questions for a few seconds before he answered.

Q. Didn't you bring him down first and he would not talk and you took him back again and brought him down later? A. No, sir.

Q. After Anna Brown made her statement to you did she ask you if she could go home and come back when the trial was on? A. She said something about that. She said, "I will be glad when this mess is over. Can I go home and come back when the trial is on?" I don't know exactly what she said.

Q. What did she mean by "this mess"? A. I expect she meant the trouble she had gotten into at Mr. Horner's house.

Q. When these statements were read to the defendants, were they all together on the 19th or the 21st? I don't know which is the right date.

The Prosecutor: The 21st.

The Witness: Yes.

Q. Who read the statements? A. Prosecutor Lord.

Q. Did Smalley Burrell want to make some changes in the statement and he wasn't permitted to? A. Smalley Burrell did make some changes.

Q. I mean extensive changes. A. He had an opportunity to make any changes. He could have changed everything.

Q. When Mr. Lord was reading this statement, did he read in his usual tone of voice? A. Did he?

Q. Yes. A. He read loud enough for me to hear him and I was sitting across the desk from him.

Q. You have been used to hearing Mr. Lord talk? A. Yes.

Q. He talks quite fast? A. I would not say so.

Q. After each question and answer was read to each of these respective defendants did Mr. Lord stop and give them a chance to digest what had been read? A. He did.

Q. He did not go right on to the next question? A. He stopped and gave them an opportunity to answer.

Q. Who made the statement in regard to the razor? A. What statement?

Q. You testified that William Brown said that the razor was home, that there had been a razor used and held against Mr. Horner's neck, throat. Who made that statement to you? A. Mr. William Brown.

Q. Did he tell you where the razor was? A. He said the razor was down at his house.

Mr. Johnson: That is all.

By the Prosecutor:

Q. William Brown told you that he held the razor against Mr. Horner's throat. Did Anna

Brown say anything about the same things? A. Yes.

Q. How about Burrell? A. He told us the same things.

Q. That William Albert Brown held the razor against Mr. Horner's throat? A. Yes.

Q. Where was Mr. Horner at the time? A. Mr. Horner was sitting on the floor alongside of the bed begging for mercy.

Mr. Lord: That is all.

ALFRED W. DENHAM, sworn.

By the Prosecutor:

Q. Mr. Denham, where do you live? A. In Deptford Township.

Q. Near Woodbury Heights? A. Yes.

Q. Prior to that time you lived in the City of Woodbury? A. Yes.

Q. For several years? A. Yes.

Q. What is your business or occupation? A. Court stenographer and Supreme Court examiner.

Q. How long have you been in the business as stenographer? A. I followed it as a profession for approximately seventeen years.

Q. In the course of your duties as a stenographer have you had occasion to report for the State Water Policy Commission? A. I have been official stenographer to the State Department of Conservation and Development which later became the State Water Policy Commission for fourteen years.

Q. Have you also attended various medical conventions throughout the United States and Europe reporting the medical conventions for the Medical

Society? A. Yes, I went to Europe in 1929 and spent some eight or ten weeks there reporting the medical convention in England, Holland, Germany, Austria, Switzerland, France, some other countries that I just can't recall.

Q. How long have you been engaged in court work in Gloucester County? A. Since November, 1927.

Q. Prior to that time had you had any experience in court work in any other county than Gloucester County? A. Yes, for approximately five years prior to that time nearly all of my time was taken up by the Attorney General's department when I went through the whole State with Grover C. Richman who was then assistant attorney general.

Q. Taking down statements by the various witnesses and also in the court? A. Yes.

Q. Have you also taken testimony in the various courts, the Orphans' Court, Common Pleas Courts? A. Yes, and also the United States Court. I also took testimony by special dispensation in Canada for the United States District Court.

Q. You have been frequently in the District Court in Camden? A. Yes, and also in Philadelphia.

Q. On the 17th of June did you take statements from the defendants Smalley Dilks Burrell, William Albert Brown and Anna Julia Brown in my office in the court house? A. I did.

Q. Do you have with you a transcript of the statements which were given by these three defendants at that time? A. Yes.

Q. I show you a statement which says "Statement taken Thursday, June 17th, 1937," and so forth, statements of William Dilks Burrell, Wil-

liam Albert Brown and Anna Brown. Will you look over those statements and tell me whether or not those statements were taken by you stenographically on June 17th and later transcribed into typewriting? A. Yes.

Q. Before the statement of Anna Brown was taken, before she gave her statement, was she given any warning of any kind or description? A. Yes.

Q. Will you read back to the Court and jury the warning which was given to her at that time, telling who gave her the warning? A. "By Detective Apgar: Q. Anna, I am County Detective of Gloucester County, this is Chief of Police Atkinson of Paulsboro, Mayor Wert of Paulsboro, Trooper Zickwolf of the State Police, Mrs. Verderi, the matron of the county prison. It is our duty to investigate all crimes that happen in this county, and we are now investigating the crime of atrocious assault and battery and robbery committed upon William J. Horner, 1000 Commerce Street, Paulsboro, New Jersey, on or about the 16th day of June, 1937, about twelve o'clock midnight. You have been arrested in connection with this crime, and if you are willing to make a statement, we are willing to hear it; but only with the understanding that it is made without fear or threats, or promise of reward, and anything you say can and may be used against you in Court. If you understand what I have just said, and want to make a statement, go ahead."

Q. After that what did Anna Brown reply? A. Yes.

Q. What was the next question which was asked her? A. The next thing that happened was that the witness broke in without being asked a question.

Q. Read what happened that afternoon just in the form you have it. A. Following the warning which I have just read the following statement of Anna Julia Brown was made in the presence of—in addition to those whose names have been mentioned heretofore, William Albert Brown and Smalley Dilks Burrell, all three defendants being in the room together at one and the same time. The witness in this case, Anna Brown said, "Smalley hit the man, there ain't no use in me hiding." At that time Detective Apgar started to question her.

Q. Read the questions and answers.

Mr. Johnson: Just a minute, if your Honor please, I make objection to the admission of these statements, the statement made by Anna Brown for the simple reason that when Anna Brown was up in the county jail Mr. Apgar told her that she would go back to the State Prison or the State Home for Girls and this statement was taken from her a short time after that, and she was still under that fear, of going to the State Home, and for that reason I think the statement that she made is inadmissible and I ask that it be stricken out and not be allowed.

The Court: You mean to say that the statement "You are going back to the State Home before and after she was warned—

Mr. Johnson: This was made previous to the time she was taken downstairs.

The Prosecutor: This statement was made on June 17th.

Mr. Johnson: That statement, when Mr. Apgar went up to her and asked her if she

was not on parole from the State Home.

The Court: I don't know how long it was before but it seems to me a sufficient length of time to have her understood what was said up there.

Mr. Johnson: Before she was brought downstairs she was arrested and brought into the County jail.

The Court: It is not clear to the Court how long before that Mr. Apgar was upstairs.

The Prosecutor: It certainly seems to me that if a county detective says, "You are on parole from the State Home, if you don't behave yourself you are going back."

The Court: That is a very general statement, that is one that we might make to our own children.

Mr. Johnson: Will your Honor allow me an exception?

The Court: I will allow you an exception.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

The Court: Have we come to the point that you want to bring your witnesses on?

Mr. Johnson: I would like your Honor to call to the juror's attention that any statement made by any one of the defendants is not binding on the statement.

The Court: Any statement?

The Prosecutor: Will the following condition, unless it is made in the presence of the defendant. This statement was made in the presence of all three defendants and

they had an opportunity to deny it. We will show that at the end of Mr. Denham's testimony.

Mr. Johnson: It is my understanding that these people were brought down separately and three statements taken.

The Prosecutor: He said there were certain persons there and then the statements were taken in the presence of the other two defendants.

The Court: If they were all present at the same time it will be admitted as it is.

Q. Go ahead and read the questions and answers. A. "By Detective Apgar:

"Q. You gave us a statement? A. Yes.

Q. Now, I asked you after you were finished giving me such a statement if there was anything that's not true you wanted to correct, and you told us it was all true? A. Yes, I don't want to correct a thing, I went outside and—Bill and I and Smalley was in the Wonder Bar. When Smalley said I wanted to go down to Mr. Horner's, it was a lie. He wanted to go down to Mr. Horner's, so we left Julia, so Smalley and them was talking, so we goes on round then to Mr. Horner's. Mr. Horner came to the door, stuck his head out the door, so Smalley hit the first blow, he hit Mr. Horner, knocked Mr. Horner back in there, and then my brother hit him. Mr. Horner started to cry for help, but nobody heard him, so when he hollered "Help" Smalley struck him again, see, and then he started crying, 'Please don't hit me, please don't do that no more', so I stood in the doorway.

Q. Between the kitchen and the bedroom? A. Yes, right in that door. Mr. Horner, he was lying on the floor. Smalley struck him again, so Smalley

got down to his ear, so Smalley got down like that —'Give me some God damn money'. So Mr. Horner said he ain't got none. 'If you don't give me some God damn money, I am going to kill you.' Mr. Horner said he didn't have any money, so Smalley said 'I'll make this bitch give me some money tonight.' He hollered in his ear. Mr. Horner said he didn't have any, so he picked Mr. Horner up off the floor and knocked him down again. Mr. Horner told him not to do it any more, my brother, Bill, hit him. He said, 'If we let you up, will you get the money for us?', so Mr. Horner got up, and he hit Mr. Horner, and Mr. Horner went in the other room and sat on the bed. When he sat on the bed he didn't move, he went 'aaaahhhh' groaning, making a moaning sound. Smalley struck him again. 'Give me some God damn money' in his ear. Mr. Horner said he didn't have no money. 'Where's your wallet?' But Mr. Horner said 'I ain't got no wallet'. He told Mr. Horner he had come down from Philadelphia to get his money, so Mr. Horner said he didn't have no money. Smalley asked Mr. Horner when did he get his check. Mr. Horner said he didn't get it until next month. 'Ain't you got no God damn money?' Mr. Horner said 'No' and started hollering and crying, and Smalley struck him again. For a while they tussled, so Bill went upstairs. I stayed downstairs. So I seen some papers on the desk. I looked at them, old checks and things, and put them back. So after a while when Smalley hit him again, he laid down for a while, and Smalley, I think Smalley, found some change in the envelopes, little church envelopes. He dropped something on the floor, so I picked it up. I don't know what it was, but I think it was a nickel and I gave it to him. Smalley took the key out of the door

and put it on the window sill, so they struggled over there by the door, and Smalley grabbed him and knocked him down. He said "Please don't do that", so when he kept hollering, Smalley kicked him in the back of the head, in the head, and he was trying to make this man tell where the money was, but Mr. Horner insisted he didn't have any money, and the man was hollering and Smalley was kicking him, and I think Bill was searching the man's pants, so Mr. Horner was still hollering, and he said "I will have to cut your fucking throat" like that, and—

Q. Who said that? A. Bill said it, but he didn't do it.

Q. Did he have a razor? A. Yes, but the back of Mr. Horner's razor.

Q. What did Mr. Horner say then? A. Mr. Horner, so he says "I ought to cut your fucking throat." "Please don't do it" and Smalley hauled off and hit him again. So he started to groan and moan, and after a while Smalley found he couldn't get any money off of him. So a little later on he said "I thought you didn't have any wallet". He said "Eh?" "I thought you didn't have no wallet, you are a God damn liar, you has got a wallet." Smalley found the wallet, I don't know what was in it, so I asked Smalley did he take that man's money, and Smalley said he didn't get none, so he tried to baffle Mr. Horner to see if he could get money off him, and Mr. Horner said he didn't have no money, he said "We might as well clean the son of a bitch up while we can" so Smalley hauled off and socked him again, and knocked him down, and he laid on his face and groaned, and he gave him another one, and kicked him, and Mr. Horner—

Q. Where did he kick him? A. In the side. Mr.

Horner hollered. I was over here standing by the door, so I said "Smalley, why don't you let the man alone?" Poor Mr. Horner, he was crying and it sounded so pitiful. I told Smalley, and then he said something, Smalley said "I am going to get some God damn money before I go home, I didn't come down here for nothing." I said "Smalley, you best stop hitting that man." Smalley didn't stop hitting him, and after a while he said he might as well put him to sleep, so Smalley hauled off, and Bill hit him once, and then he laid down, and after a few seconds Mr. Horner started to get up so Smalley caught him up here in the chin with his shoe.

Q. Kicked him, you mean? A. Yes, he kicked the man, and the man started to get up again, he started to crawl over to the door, and Smalley hauled off and gave him a good blow, and he laid there, so after a while Smalley gave him another, he kept hitting him and Mr. Horner laid there. He took and knocked Mr. Horner down, and I guess that's what knocked him out, he laid there towards—his head was towards the kitchen, and his feet down this way. Mr. Horner laid there, and Bill said "Shall we pick him up?" and Smalley said "Let the son of a bitch lay there", and Smalley said "I will give him another one for safety first, to make him sleep", so Smalley hit him again, and then the man was out. Smalley took the key off the window sill and unlocked the door.

Q. Which door? A. Back door, and went out.

Q. You don't have to unlock the back door? A. He had it locked, he turned the lock on it.

Q. There's a snap lock? A. He didn't use the snap lock, he had a key, and they had got some cigars, I think Smalley got those cigars.

Q. When you were at the Wonder Bar, you say you planned to go down and rob Horner? A. Yes.

Q. How were you going to rob him? He was there, when they planned to rob him how were they going to get in his house? A. First, if Mr. Horner had not come to the door, they was planning on putting a heavy weight up against the door, and push it open. If they could not get it open that way, Smalley was going to put his foot through one of the windows.

Q. Then they were going in there and steal his money, figuring that being deaf Mr. Horner would not hear them? A. That's it.

Q. After you left the place, after Mr. Horner passed out, was unconscious, and you left, you went down to the chow mein place? A. Yes.

Q. And the money you stole from Mr. Horner, what did you use it for? A. He bought two yocs and he bought a fish—

Q. Who had the yocs? A. Bill and Smalley had the yocs, and I had the fish sandwich.

Q. Was there any change left from that money? A. He put a nickel in the slot machine.

Q. Who did? A. Smalley.

Q. What kind of a slot machine? A. You know, like a music machine.

Q. Who put it in there? A. Smalley.

Q. Did you put any in there? A. I didn't have a thing to put in.

Q. You heard your brother say you put the money in? A. He gave me a nickel to put in there, and I would not put it in, and Smalley put the nickel in.

Q. Did Mr. Horner have a dog? A. Mr. Horner got a dog, he used to have some kind of a dog.

Q. Did he have a dog there that night? A. I didn't see none, he used to have one.

Q. Before you told us you had never been to Mr. Horner's and got any money off of him. Now, how many times have you got money from Mr. Horner? A. I might as well come clean and tell the truth, you get much further when you tell the truth. Let's have facts now. Since I have been home, how many times I have been down Mr. Horner's. I went down there about a couple of times. If you tell Mr. Horner you need something—

Q. When was the last time you were down there? A. About last month was the last time I was down there.

Q. How much money did you get then, $17.? A. No, Anna Belle Clark got $17.

Q. How much did he give you? A. $1.98 for a pair of shoes.

Q. How much did you get off of him before when you came out with that new outfit? A. He gave me $5.

Q. When was that? A. May 30th.

Q. What did you give him? A. Nothing. You used to go around there, and say 'Mr. Horner' and he will say 'eh'. 'Mr. Horner, can you spare' such and such an amount. If you want $5. you ask for $10. 'I'm sorry I can't spare $10, but I can spare $5.' Like that, and he will give it to you. I used to go around and ask him. Frances, you know, she can't be like that, she had to come across when she asked him, because she don't know him, see.

Q. Frances out there (indicating the next room)? A. Yes.

Q. What do you mean she had to come across? A. You know, she had to give him something.

Q. What? A. He went up to Camden for Fran-

ces, one time she left and he went all the way up to Camden to bring Frances back.

Q. What do you mean she had to give him something, a present? A. A present, no, she had to give him something.

Q. What? A. Gizzard.

Q. What's that? A. You know what I mean.

Q. Say it, what it is you mean? A. Pussy, then.

Q. Do you mean she had to give him a cat? A. No, this (indicating).

Q. What was it? A. Cock, then, excuse me.

Q. Rooster? A. Vagina.

Q. Frances would have sexual intercourse with Mr. Horner? A. Yes, that's what I mean.

Q. Suppose Frances says she didn't? A. She can't say she didn't.

Q. Did you ever have intercourse with him? A. Hell, no.

Q. Why would he give you money? A. Well, we just go there, he knows my brother.

Q. How about the time that you and Smalley went around there for money, when you told him you were in a mess, you wanted $20, and he would not give it to you and told you to get out, and then Smalley said 'You give her ten and I will give her the other ten'? A. Mr. Horner, he used to try to ask me, like that, ask me, but I would not go, so I told Smalley, and Smalley said, 'Listen, we are going around to see Mr. Horner, and say that I am your brother, and tell Mr. Horner he had bothered with you, and Mr. Horner will get scared,' so we went around there and told Mr. Horner.

Q. Why would he get scared? A. Mr. Horner is dumb, he don't know anything. He will bother with somebody, and very often he won't know you. Edna Lewis used to go round there that way.

Q. And get money? A. Sure she did."

By the Prosecutor:

Q. Now, Mr. Denham, that statement was taken on June 17th? A. Yes.

Q. And on June 21st was that statement read back to the defendant Anna Brown, in the presence of other witnesses? A. Yes, in my office.

Q. In your office and who read it back? A. You did.

Q. And did you in any way check along what I was reading? A. Yes, both Mr. Apgar and I.

Q. Followed along with your office copy? A. Yes.

Q. After that statement was read to Anna Brown, I call your attention to page 11 of the statement which she gave that day and ask you if you will read that now. A. "The Prosecutor then read the statement of Anna Julia Brown, all three defendants still being together.

"ANNA JULIA BROWN.

"*By the Prosecutor*:

Q. The statement, which I have just read to you, and which you gave to Mr. Apgar and Mr. Denham and the other officers on June 17th of this year, is that a true and correct statement of your part in this particular crime? A. Yes, sir, with the exception of this, I might as well tell you this. I said I did not pay for the stuff, but the money was handed to me to pay for it, because Smalley, he was all bloody, and Smalley was afraid the Chinaman would see blood on his shirt.

Q. By that you mean down at the chow mein place? A. Yes.

Q. All three of you defendants understand that since the last statements were taken that Mr. Hor-

ner has died, and you have been indicted for murder, and, of course, you have entered your plea of not guilty of the crime. You do understand that, do you?

Anna Brown: Yes, sir.
Smalley Dilks Burrell: Yes, sir.
William Albert Brown: Yes, sir."

The Witness: Then follows some conversation between you and some of the other defendants and the final statement from Anna Brown.

Q. What did Anna Brown say in the final statement?

A. "*By the Prosecutor*:

"Q. You had on a white linen suit? A. Yes.
Q. The skirt and a white coat or jacket? A. Yes.
Q. And white shoes? A. Yes.
Q. You had on a red sweater? A. Yes, I believe I did have this sweater on.
Q. A red sweater on under your coat? A. Yes, this goes with my white linen suit, but I wear it with other things."

The Prosecutor: It is four o'clock. We have about another hour's work with Mr. Denham.

The Court: Very well. Ladies and gentlemen, as you go along, of course, we are getting more evidence, but do not among yourselves begin to argue or discuss the points. Remember and do not get into any arguments with the other jurors. Wait until all the evidence is in and you have a chance to be all together to discuss it. Con-

tinue your deportment, and I assume, not having heard any complaints, that you are well housed over night and that you are getting the proper refreshments. Be back again tomorrow morning at 10 o'clock. Court for a recess until tomorrow morning at 10 o'clock.

(At this point a recess was taken until July 14, 1937, at 10 o'clock A. M.)

THIRD DAY.

Before—Woods, *J.* and a Jury.

Appearances:

For the State, Prosecutor Lynwood Lord.

For the Defendants, Frank L. Johnson, Esq.

Woodbury, N. J., July 14, 1937.

Trial of the case resumed at 10 o'clock, A. M., pursuant to adjournment, in the presence of the defendants and counsel for the respective parties.

ALFRED W. DENHAM, resumed.

By the Prosecutor:

Q. Mr. Denham, I now refer you to the statements taken on Thursday, June 17, 1937, and ask you whether or not on the same afternoon of June 17, 1937, the day the statement was taken from Anna Brown, a statement was taken from the defendant Smalley Dilks Burrell? A. It was.

Q. And was that taken stenographically by you? A. Yes.

Q. And later transcribed into typewriting? A. Yes.

Q. Prior to the time the statement was taken from Burrell, was he given a warning by Detective Apgar or any of the other officers present? A. Yes.

Q. Now, referring to your original notes, the transcript of the testimony, will you read the warning that was given to the defendant Burrell by Mr. Apgar? A. Do you want the preliminary heading?

Q. Yes. A. "Statements taken June 17th, 1937, commencing at 2:50 P. M., in the office of the Prosecutor of the Pleas of Gloucester County, Woodbury, N. J., in the presence of W. Clayton Apgar, County Detective, Trooper Zickwolf, of the New Jersey State Police, Mayor Wert, of Paulsboro, Chief of Police Atkinson, of Paulsboro, Mrs. Verdier, the matron of the Gloucester County Jail, and Alfred W. Denham, the stenographer.

THE STATEMENT OF SMALLEY ELKS BURRELL.

By Detective Apgar:

Q. How old are you? A. 23.

Q. What is your address? A. 219 Hoffman Avenue, Paulsboro.

Q. I am County Detective of Gloucester County, this is Chief of Police Atkinson, of Paulsboro, Trooper Zickwolf, of the State Police, Officer Travaline, of the Paulsboro Police, Mayor Wert of Paulsboro, and it is our duty to investigate all crimes that happen in Gloucester County. We are now investigating a crime of robbery and assault and battery on William J. Horner, 1000 Commerce Street, in Paulsboro, that occurred about mid-

night, on or about the sixteenth day of June, 1937, for which crime you have been arrested. If you wish to make a statement, we are willing to hear it, but only with the understanding it must be voluntary, and of your own free will and accord, without any fear or threats, or promises of reward, and anything you say can and may be used against you in Court. If you understand what I have just said, and wish to make a statement, go ahead.''

Q. Will you proceed, Mr. Denham, with the various questions and answers asked of and the answers given by the defendant. A. The answer to that question was: ''A. Last night I walked out of the house, went up to the Wonder Bar, and was sitting there drinking, so we was drinking, and bought a pint of Wilkins Family. We were drinking that, so after we got through drinking, it was getting kind of late, so then Anna Brown—Julia Washington asked me to walk down Pratt's Alley with her, so I walked on down Pratt's Alley, and Anna and Bill come on down with me, Bill Brown, so Anna kept saying 'Let's go to Mr. Horner's house.' I said 'No'. Julia said 'You go with me.' I said, 'All right.' So we started over there, and she kept on saying, they started and I went with them.

Q. Who are they? A. Bill Brown, Anna Brown, we went over to Mr. Horner's house, and tried to get the door so he could undo the door.

Q. Who did? A. Bill Brown, to undo the door.

Q. What door? A. Front door, the front door was locked.

Q. Go on. A. The front door was locked, so he pushed it open, shoved against it.

Q. Front door or the side door? A. The side door, he pushed the door, so we went on in.

Q. Who went in? A. All of us, all three of us. He asked him did he have any money.

Q. Who asked? A. Bill asked him did he have any money. He said, 'No', so he hit him. When he hit him, and then I hit him, and then Anna, she went in and searched around the room trying to find something. 'Let's go' they kept on saying, because I was going to my sister-in-law, Julia Washington, to her house.

Q. Was it you or was it Bill that choked him? A. No, I didn't choke him.

Q. Who did? A. I don't know. I guess Bill must have choked him, because I didn't choke him.

Q. Didn't you see him? A. No.

Q. When you went in the house, did the three of you go in there together? A. Bill went in first, and then Anna and then I went in.

Q. When you got in there were there lights on? A. No, there wasn't no lights on.

Q. Where was Mr. Horner when you got in? A. I don't know, Bill and her had went in the front room, I think he was in the kitchen, he had got up to get a drink of water or something, and that's when they nabbed him.

Q. Who hit Mr. Horner first, you or Bill Brown? A. Bill Brown hit him first.

Q. What did he hit him with? A. His fist.

Q. And then did Mr. Horner fall down? A. Yes, he fell down.

Q. Then when did you hit him? A. Then I hit him the second time, I hit him after Bill hit him.

Q. While he was down? A. No, he was up.

Q. Did he get up again? A. Yes.

Q. Then you hit him? A. Yes. I said, 'Don't do that, don't hit the man no more.'

Q. What did Mr. Horner say? A. 'Don't do that, don't do that.'

Q. What did you do? A. I stopped.

Q. Then did you throw anything over him, as he fell? A. Yes, he fell down, but I didn't throw anything over him.

Q. Who threw something over him? A. I don't know exactly who threw it over, I think Anna had a blanket over her head.

Q. Anna had a blanket over her head so he would not know her? A. Yes.

Q. Who put the blanket, or coat or something over Mr. Horner after he was unconscious on the floor? A. Anna must have did it, Anna or either Bill, I couldn't tell you.

Q. Did you go in his pockets? A. No, I didn't.

Q. Who did? A. Bill went through his pockets while Anna searched the house.

Q. Bill went through his pockets while Anna searched the house? A. Yes.

Q. What did you do all this time? A. I was standing up there looking at them.

Q. Holding Horner down? A. I didn't hold him down, he was already down, I was standing over him.

Q. While they were going through his house? A. Yes, I am going to tell the truth about the thing.

Q. Go ahead. A. That's all I know about it, I can't say no more, I don't know no more.

Q. You said you were going to tell the truth about it? A. I have told the truth.

Q. Mr. Horner's head and his face are battered up pretty bad, and they didn't get that way from anybody's fist. What else was used to hit him with, a chair, or a lamp or a stove poker, or what? A. Absolutely nothing else but the fist.

Q. How about your feet to kick him, who kick-

ed him when he was down? A. Nobody kicked him.

Q. Sure of that? A. I didn't see nobody kick him.

Q. Tell the truth. A. I didn't see nobody kick him, that's all I can say.

Q. What did you go there for? A. I went there with them, I didn't go there to rob the man, because I had money coming today, I was going to get paid today.

Q. Did you get paid today? A. Yes.

Q. How much? A. $74.25.

Q. You were broke last night, weren't you, when you were at the Wonder Bar you were broke? A. No, I had a couple of dollars.

Q. How much, to be exact? A. Last night I had about four dollars.

Q. That's when you were at the Wonder Bar? A. Yes.

Q. You bought how many pints of whiskey? A. I bought two pints, one pint I bought, and then I got another pint, and then we got a pint of Wilkins Family.

Q. How much did it cost you for the whiskey you bought? A. Eighty cents.

Q. A pint? A. Yes.

Q. That's $1.60? A. Yes.

Q. What else did you have to drink at the Wonder Bar, you bought a couple of stubbies, small bottles of beer? A. No, I didn't buy no stubbies.

Q. Who bought those? A. I don't know, they was already in the house.

Q. That was over to Julia Washington's house or Frances Deputy's house? A. That was next door to Frances Deputy's house.

Q. Whose house? A. Louise lived there. I bought a pint of Spring Hill, and we drank it

there. Then we went up to the Wonder Bar and they bought a pint of Wilkins Family, and we drank that.

Q. What else? A. That's all I know about it.

Q. Did you take any cigars out of Mr. Horner's house? A. No.

Q. Did you see any cigars in his house? A. Bill, I seen Bill with about six of them in his pocket.

Q. Saw Bill Brown with about six cigars? A. Yes.

Q. Where did he get them from? A. I don't know.

Q. When did you see them in his pocket? A. Last night.

Q. Before he went to Horner's or after? A. After.

Q. Did you see anything else that they took from Horner's house? A. No.

Q. What did you get from Horner's house? A. Nothing.

Q. How about a watch? A. I didn't get that watch, Bill Brown got a watch.

Q. What did he do with it? A. I don't know what he did with it.

Q. When did you see it? A. I saw it last night.

Q. What time? A. The same time we was around there.

Q. Did you see him take that from Horner? A. He took that from Horner's, it was hanging up the side of the wall. He said "We can pawn it and get something out of it."

Q. What else did you see him get? A. Cigars and watch.

Q. Did you give Bill Brown anything to hold for you last night? A. No.

Q. And tell him to hold it until this morning? A. No.

Q. Sure about that? A. Honest, Bill Brown took that watch, took the cigars and that, what are they trying to do, frame me, put it all on me, they are trying to frame me, put it all on me altogether? I don't mind taking some parts of it, because I know I was in it, see?

Q. Do you know where that watch was found? A. Where it was found, I could tell you where it was found. Bill Brown, when Koko come after him, Koko and Travaline, Bill slipped the watch, he told me he slipped it under my mother-in-law's bed, under the mattress.

Q. When did Bill Brown tell you that he slipped the watch under your mother-in-law's mattress? A. When he was in the police car, right at the jail house down in Paulsboro. They had been going to see Mr. Horner before, I didn't know nothing about it, they had been going there all the time.

Q. Who has? A. Anna and Bill.

Q. How did you know? A. That's what I heard.

Q. Who told you? A. I heard they took $17. from him one time.

Q. When? A. One time before.

Q. They said you and Anna were around there and got the $17? A. No, absolutely no, I was working, I can prove that I was working on the W. P. A.

Q. You didn't work at eleven o'clock at night? A. That wasn't eleven o'clock at night.

Q. Were you ever around Mr. Horner's before, with either Anna Belle Clark, Anna Brown, or Frances Deputy, or any other girl? A. No, I was around there once with Anna Brown.

Q. When was that? A. That's been about two or three months ago.

Q. What did you go around there for then? A. She wanted me to go round with her, wanted me to act like her brother.

Q. That's what you did, didn't you? A. Yes.

Q. What did you do when you got round there? A. I didn't do nothing, I let her do all the talking.

Q. What did she say? A. She said she was all messed up, and she wanted some money so she could go to the doctor or the hospital.

Q. How much money did she want? A. It was I think $17 or $20.

Q. What did Mr. Horner say? A. Said he didn't have it, told her to get out. I said 'Come on out, don't bother with him.'

Q. Didn't you say to Mr. Horner "You give her ten and I will put the other half to it"? A. Yes, I did.

Q. Did he give you ten? A. No.

Q. You said "I am her brother, and I am going to have you arrested". Did you asy that? A. Yes.

Q. Whose idea was that? A. Whose idea was that, that was her idea.

Q. Why would Anna Brown go round to Mr. Horner's house and tell him she was all messed up, did Mr. Horner ever have anything to do with her? A. I couldn't swear.

Q. Did Anna Brown ever tell you he had? A. I used to hear her say she would be going round there all the time.

Q. Did you ever hear her say Frances Deputy had been there, too? A. No.

Q. You knew Frances Deputy was cleaning up for him, didn't you? A. No.

Q. How long have you lived around Paulsboro? A. A little over five years.

Q. Where did you live before you lived in Paulsboro? A. Swedesboro.

Q. And how long did you live in Swedesboro? A. About 17 years.

Q. Where did you live before that? A. Born in Swedesboro.

Q. Is James Burrell your brother? A. Yes.

Q. James Burrell was convicted in this county for atrocious assault and battery and robbery, wasn't he? A. Yes.

Q. Didn't you think of your brother before you went around there to Horner's house last night? A. No.

Q. Knowing what happened to your brother, wasn't that a lesson to you? A. Yes.

Q. You didn't think about it, did you? A. No, I had been drinking, I didn't think about it.

Q. Why did you hit Mr. Horner? A. Because the girl said not to let him up.

Q. What girl? A. Anna. I hit the man, which I should not have did, but it's too late.

Q. Anna said "Don't let him up.' What was he

Q. Anna said "Don't let him up." What was he going to do? A. He was trying to get up, he laid down.

Q. Did you hit him when he was down? A. No, he went to get up once, and I hit him, and then he started up again and Bill come and hit him.

Q. What with? A. His fist.

Q. How could he get these lumps on his head, somebody must have kicked him, or something? A. I don't know, I didn't do that.

Q. Those bumps on his head didn't come from

his fist? A. I certainly didn't kick him, I hit him with my fist.

Q. Who did kick him, did Anna kick him? A. No, I didn't see them kick him.

Q. The statement you have just made is a truthful one? A. Yes.

Q. And is there any of these statements that you have just made that you want to change now? A. No, there's nothing there I want to change. I have told the truth about the thing.

Q. You have made it voluntarily? A. Yes.

(Note: From this point on this statement was made in the presence of the other two defendants, William Albert Brown and Anna Brown.)

By Mr. Apgar:

Q. Smalley, there was something in addition I wanted to ask you. Before you went down to Mr. Horner's house last night, what did you intend to go down there to do? A. I didn't intend to go down to Mr. Horner's at all, but I was walking down Pratt's Alley with Julia Curtis, and Julia Curtis said "You come down the house", and we walked down the alley, Anna, me and Bill, and we gets down Pratt's Alley and Julia said "Come on, come with us," and Anna said "No, I am going round Mr. Horner's, let's go round Mr. Horner's." That's all she said, so her and Bill walked on up the street as though they were going towards Mr. Horner's.

Q. You told us you went down Mr. Horner's, you were going down to break in his house to rob him, is that correct? A. I didn't know what it was, when we got down Pratt's Alley, Anna, myself and Bill and Julia was going down.

Q. When you got to Pratt's Alley you knew what the plot was? A. Yes.

Q. How far away from Horner's house is Pratt's Alley? A. I guess about a block.

Q. And then who told you what the plot was? A. Anna, because she kept hollering out in the street.

Q. What did she say? A. 'Let's go round Mr. Horner's.'

Q. What did she say you were going round there to do? A. Rob him.

Q. How were they going to rob him? A. Any way that they could.

Q. Is that what they said? A. They didn't say that, they said 'Going to rob him, going down Mr. Horner's and rob him.'

Q. After they said they were going round to rob Mr. Horner, did they say they were going to break into Mr. Horner's house and get his money because he was hard of hearing? A. I didn't hear that.

Q. Where did you plan that? A. I don't know where they planned at all.

Q. You said you started to take the screen off the door? A. Yes, I pulled the screen door, the door was locked, we went through the screen, the door was locked.

Q. You tried to get in the door? A. Yes.

Q. When did you first plan, or they plan, or somebody plan to break in Mr. Horner's house and steal his money? A. They must have had plans when they were at the Wonder Bar.

Q. When did you know? A. When we was going down the street, she was hollering 'Let's go down Mr. Horner's'.

Q. About breaking into the house, how were

you going in, make him stick them up when he came to the door? A. No.

Q. What were you going to do, how were you going to rob him, were you going to knock at the door, and when he came to the door hit him over the head, or something, or try to get in without him hearing, or how were you going to do it? A. I guess that's the way we were going to get in, ease in the house, and get the door open and go in.

Q. And rob him without him hearing you, if you could? A. Yes.

Q. Did he hear you at the door, he came to the door? A. Yes, he went in the kitchen and got a drink of water.

Q. Did he see you? A. I don't know whether he did, or not, there's a window right there, he must have seen because he come to the door.

Q. That's when he got hit? A. Yes.

Q. Who hit him then? A. Bill hit him, then I hit him.

Q. Both about the same time? A. Pretty close, Bill hit him and then I hit him.

Q. Pretty close together? A. Yes, then we goes on in the house.

Q. After Mr. Horner got hit the first time, and he fell down, was that in the kitchen? A. Yes, that was in the kitchen.

Q. Now, did Mr. Horner go in his bed room, in the middle room there? A. Yes.

Q. What happened in there? A. When he goes in the bed room, that's where Bill hits him and knocks him down, Bill did, and then he picks him up and put him on the bed.

Q. Who picked him up? A. Bill.

Q. Bill picked up Mr. Horner? A. Yes, and put him on the bed, what he had for a bed, and he had

that razor at his throat, and said should he cut his throat. I said "No, don't kill him."

Q. What did Mr. Horner say? A. He couldn't say anything.

Q. Was he unconscious? A. I guess he was.

Q. Whose razor was that? A. That was Mr. Horner's razor.

Q. What became of the razor? A. He had it.

Q. What kind of razor was it? A. I don't know, but it was a razor, a straight razor.

Q. What color? A. I don't know.

Q. When you left the house where was Mr. Horner then? A. When we left the house?

Q. Yes, where was he lying, in bed, or under the bed, or in the kithcen? A. He was lying, head like underneath the bed, right down at the side of the bed.

Q. With his head underneath the bed? A. Yes.

Q. What time was that? A. I don't know what time it was.

Q. About what time was it? A. I don't know what time it was.

Q. How long did this all take, about? A. I will say about three-quarters of an hour.

Q. You went there about midnight, and must have left there about one o'clock? A. Yes.

Q. Daylight saving time? A. Yes.

Q. You figure you were in there about an hour altogether? A. About an hour altogether.

Q. You are sure that when you left Mr. Horner his head was underneath the bed? A. He was lying alongside the bed.

Q. In which direction was his head, towards the —— A. Towards the kitchen.

Q. His head was towards the kitchen? A. Yes.

Q. He was lying the same way the bed runs, lengthwise, that way? A. Yes.

Q. That's the way he was lying when someone threw a blanket over him? A. No, he was in the kitchen when somebody threw a blanket over him.

Q. When you left him did he have a blanket over him? A. Yes.

Q. Who emptied the black leather pocket book? A. I don't know, you will have to ask them two.

Q. How much money did you get off of Mr. Horner? A. I didn't get none of it.

Q. How much was gotten, how much was taken? A. They had the money.

Q. How much? A. I think about sixty cents or seventy cents.

Q. What happened to the money? A. Went up to the yoc joint and bought chow mein.

Q. Who paid for it? A. Anna.

Q. Who was eating chow mein, who had chow mein? A. All three of us.

Q. The sixty cents was spent for two chow meins and a fish sandwich, and two nickels in the music machine? A. Yes.

Q. You and Bill Brown each had chow mein, and Anna Brown, she had a fish sandwich? A. Yes.

Q. Now, on the 21st day of June, four days after the statement was taken, were you present when the statement was read back to the defendant Smalley Dilks Burrell? A. Yes, the following Monday.

Q. Where was the statement read and who was present at the time the statement was read? A. It was read in my office and the three of them sat on the other side of the desk in a row, Mr. Apgar on the left side of me and you to my right. The sheriff was sitting on the radiator behind me and the under-sheriff was sitting on the long table

that I have in there, and Mrs. Verdier was sitting in back of Anna Brown.

Q. At that time was the statement read over to Smalley Dilks Burrell in the same way as you read it here today, question for question and answer for answer? A. Yes, Mr. Lord read it and Mr. Apgar and I checked it.

Q. The statement which you are reading is the statement from which I read? A. Yes.

Q. And the statement which you have in your hand is that same statement? A. Yes.

Q. After the statement was completed, did Smalley Dilks Burrell make any corrections or additions to his previous statement? A. He did.

Q. Did you take that down stenographically? A. Yes.

Q. I refer you to your transcript of a statement taken June 21st and ask you if you will read that portion of it that refers to the defendant Smalley Dilks Burrell, inserting the proceeding before you read the questions and answers. A. "Statements taken beginning at 2:30 o'clock P. M., on Monday, June 21st, 1937, in the office of the Court Stenographer, Gloucester County Court House, Woodbury, N. J., in the presence of the Prosecutor, Detective Apgar, the Sheriff, Under Sheriff Eckman, Mrs. Verdier, the Matron of the County Jail, and the three defendants, Smalley Dilks Burrell, William A. Brown and Anna Julia Brown.

The Prosecutor then proceeded to read aloud the statement of Smalley Dilks Burrell, being followed line by line throughout on another copy of the same by Detective Apgar and Alfred W. Denham.

By the Prosecutor:

Q. You understand the same warning, which I

just read to you, and which was given to you the other day by County Detective Apgar, applies to this statement which you are making now, and our only purpose in reading over the testimony is to make sure everything in there is correct. A. Yes.

Q. Now I understand, Smalley, on page four of this statement, where you said Bill went in first and then Anna and that you went in, that you desire to correct that statement so that it reads that Bill went in first— A. And I went in second.

Q. You went in second, right behind him? A. Yes.

Q. And Anna went in third? A. Yes. I went to the screen door. The screen door was locked. I pushed the screen in, and ripped the screen up, the screen ripped as I pushed it in with my hand, and then I pulled it up and unlocked the screen door. Then I got the knob on the door, and shook it. I shook the knob of the door to see whether it was locked, or not locked, but the door was locked, and by my shaking the door Mr. Horner must have heard me, but whether he heard us, or got up to get a drink of water, but he come from the middle room out in the kitchen to get a drink of water, turned the spigot on, took a drink of water, then he comes to the door.

Q. Did he light a light? A. There's a window right there outside the house.

Q. Did he turn the light on? A. No, he didn't turn the light on.

Q. How did you see him drinking the water? A. He turned the spigot on, and gets some water, and the water is running, see, then when he come to the door I backs up, and Bill was right there at the door like this in front of me, and I was behind Bill. When he opens the door, Bill lands in on him and hits him, and I hits him from

around Bill's shoulder. When I hit him he fell. I didn't want to make no statements against him to make him a whole lot of damage, but they were jamming me all the time.

(The Prosecutor completed reading the statement)

By the Prosecutor:

Q. What part of that statement is not correct? A. When we go to the door, I am next to the door, I pushed the screen in.

Q. With the exception of that is the statement correct? What else do you say is incorrect in the statement? A. There's something in the statement that's never been told yet.

Q. Tell us then. A. When we gets there, he hits the man first, Bill did. Then I swing around over his shoulder and hits him, and he falls. When he falls, Bill walks over to him and hits him, punches him in the face.

Q. When he was down on the ground? A. Yes, while he was down Bill punched him in his face. Then Bill kicked him. I didn't tell that because I didn't want to jam Bill. Bill kicks him in his face, then when he kicks him he goes on in the room. He laid there, and he said, 'Watch him, Smalley, watch him.' Anna was already in the other room in the house, turning up everything, and Bill says 'We can't find nothing.' He was asking him where's his money, as I said, 'Mr. Horner, where's your money, where's your money?'

Q. You got right down close to his ear then? A. I was close, I was bending down. 'Where's your money, where's your money.' He didn't hear me. Bill said 'You will have to holler louder.'

Q. Who said that, Bill or Anna? A. I think

Bill told me that. I think one of them told me I would have to holler, and I says, 'Where's your money at?' He didn't hear me. Anna, she had a blanket around her shoulders. She comes out in the kitchen with the blanket around her, gets right down by his head 'Where's your money. We are from Philadelphia come to rob you.' That's what Anna said, Anna Brown. 'Where's your money at?' she said, 'We come from Philadelphia to rob you.' He said, 'Eh?' She says 'Where's your money at, we are come from Philadelphia to rob you.'? He said, 'Haven't got no money.' Then Anna stamped him on the head with her foot. She goes to the sink and gets a pitcher of water, and throws this water all over his head and face, and then he said, 'I will get the money'. He gets up, and I steps back to let him get up. He gets up, goes on in the other room, in the middle room.

Q. Walking on his feet? A. Yes, walking on his feet, bent over. He goes in the other room, and he goes to the bed, like he was looking for money. Then he says, 'I haven't got no money'. Then I hit Mr. Horner, and that time he dropped to his knees. When he dropped to his knees, Bill whirled him around alongside the bed, and sticks the razor at his throat, and said 'I ought to kill you.' Then Bill hits him, and he falls to the floor. That's when Bill said yesterday I said 'Well, he will sleep well now.' Bill said that.

Q. What did you do then? A. He said, 'Let's go,' so we come on out, Anna she come out second, he comes out last, and he gets to the house and Anna and him go across this way, up this street, and I said 'I will go up the next street, the next block and out across and meet you,' and that's when we met. So he said, after he got his

watch, he said 'We will pawn this and get something out of it, and these cigars, we will smoke them. Now we will go up the yoc and get something to eat.' So we goes on up Adams Street, cuts across Washington Street, and goes on down to the yoc's; and then in the yoc's Anna had 60 cents or 70 cents, whatever it was, and pays for the two yocs, and we come on out between the laundry, and him and Anna goes to Adams Street and I goes on through and goes home.

Q. Did you try the lock, or did you, as you went in Mr. Horner's house, did you try to fit the key in the door? A. No, sir, I absolutely did not.

Q. After you got into Mr. Horner's house, and after he had been struck by you and by Bill, did you lock the door from the inside, the door that you had gone in? A. I absolutely did not.

Q. Who did lock the door? A. I don't know.

Q. Did you lock the door after you got in, and did you lock it from the inside and put the key up on the window sill? A. No, sir, I did not.

Q. Did you see anybody lock the door after you got in there? A. No, sir, didn't even know the door was locked after we got in there.

Q. Who locked the door as you went out? A. I do not know. Anna, she was first, I was second and Bill was last.

Q. As I understand it, with the exception of the corrections which you have just made, the statement which I have just read to you, which you gave to Mr. Denham and Mr. Apgar and the other men on June 17th of this year is correct? A. Yes.

Q. You told this statement the other day, and you have made these corrections after you thought it over? A. Yes.

Q. This statement, which I am showing you now, and which I just read to you, with the cor-

rections which you have just dictated to Mr. Denham, make a true story of what happened that night, is that correct? A. Can I finish it?

Q. Yes. A. Next morning I was supposed to get paid. The boy comes around the house, and takes me up to Camden to get paid. Bill comes there to my house, he has his old clothes on. I said, 'Where you going, Bill?' He said, 'I am going over Clem Turner's now, I am going over like I am going to work.' I said 'I am going up to Camden to get my check, I said, 'I will be back'. So the boy come around and picks me up, me and Charley Green and another boy named Joe De Prince, we goes on to Camden, and I gets my check, 16th and Mickle, and gets my check $74.25.

Q. Where did you get it cashed? A. Got it cashed in Woodbury. I gets my check cashed in Woodbury over here to the bank, and to the boy I say 'Well, I will see you down Paulsboro.' Charley Green tells me he can't go with me, he had to go to the trial over here in the court room, and I goes over here to the trial. I said, 'Well, Charley, I am going down Paulsboro now,' I said, 'I will see you when you come down.' I goes down to get a taxicab, goes to Paulsboro, gets out and buys a bottle of soda, and comes on around to the house. Then I go to Hoffman Street and come back and then I comes back and lies on the couch. I said, 'Bill, I am going round the house and lie down a while.' Bill said, 'All right, I will be round after a bit.' Bill comes to the house, I was lying on the couch, he sat in the chair. Then when the cops come up, Domenick and Koko, Bill runs out in the kitchen, and goes in the bed room and slips this watch under my mother-in-law's bed. The cop comes in and asks me, 'Where's Bill?' I said,

'In back'. He goes back and got Bill and brings him out. He said, 'I want you, too, Smalley', and then me and Bill, we goes round to the jail, and when we get to the jail house Bill said, 'I slipped the watch underneath the back room, underneath the mattress.' I said, 'Yes'.

Q. Going around to the jail house, did you receive any money from him? A. I received the four dollars from him up in Woodbury, right out here, after we stepped out here Bill slips four dollars in my pocket.

Q. That was after you were arrested? A. Yes.

Q. Now, with the exceptions you have just told us about, the statement which we have just read to you is correct, with those additions you have added on? A. Yes.

Q. That is a correct statement? A. Yes.

Q. Made voluntarily, and of your own free will. That is, nobody forced you to make a statement, you made the statement voluntarily? A. Yes, I told just what it was all about.

Q. Of your own free will? A. Yes."

Q. Now, will you refer to page 11? He made a little statement further on. A. This is a colloquy between you and Smalley Dilks Burrell.

> "The Prosecutor: I understand you had some blood on your shirt this night, what did you do with that shirt?
>
> Smalley Dilks Burrell: I didn't have no blood on my shirt.
>
> The Prosecutor: Did you have any blood on your shoes?
>
> Smalley Dilks Burrell: I had blood up here, from his nose bleeding on the floor, blood was all over the floor, I was standing in.

The Prosecutor: You got that on the top of your shoe?

Burrell: Yes.

The Prosecutor: The top and side of your shoe?

Burrell: Yes.

The Prosecutor: Did you clean that off the shoes the following morning, or have anyone else do it for you?

Burrell: No, sir, I cleaned it off.

The Prosecutor: Are those the shoes you have on now?

Burrell: Yes, sir.''

The Witness: Smalley Dilks Burrell again:

"By the Prosecutor:

Q. You had on a pair of white shoes, the pair that you have on now? A. Yes.

Q. And the same plaid trousers you now have on? A. Yes.

Q. And a blue polo shirt the night Mr. Horner was killed? A. Yes.''

Q. Now, will you refer to page 11 of those statements and particularly that portion where they were informed that Mr. Horner had died? A. "Q. All three of you defendants understand that since the last statement was taken that Mr. Horner has died and that you have been indicted for murder and, of course, you have entered your plea of not guilty of the crime. You do understand that, do you?''

"Anna Brown: Yes, sir.

"Smalley Dilks Burrell: Yes, sir.

"William Albert Brown: Yes, sir.''

Q. At the same time those statements were

taken on June 17th was a statement also taken from the defendant William Albert Brown? A. Yes, sir.

Q. And prior to the time that statement was taken from him, was he given a warning by Detective Apgar or any of the other officers? A. Yes, sir.

Q. Will you read the warning which was given to the defendant William Albert Brown and also the statement which he made at that time? A. "Statement taken June 17, 1937, commencing at 2:50 P. M., in the office of the Prosecutor of the Pleas of Gloucester County, Woodbury, N. J., in the presence of W. Clayton Apgar, County Detective, Trooper Zickwolf, of the New Jersey State Police, Mayor Wert, of Paulsboro, Chief of Police Atkinson of Paulsboro, Mrs. Verdier, the matron of the Gloucester County Jail, and Alfred W. Denham, the Court stenographer.

THE STATEMENT OF WILLIAM ALBERT BROWN.

By Detective Apgar:

Q. How old are you? A. 23.

Q. Where do you live? A. Paulsboro, 9 East Madison Street.

Q. What do they call you, William or Albert? A. Call me Bill.

Q. Bill, I am the County Detective of Gloucester County, Chief Atkinson, Chief of Police of the Borough of Paulsboro, Mayor Wert of Paulsboro, Assistant Prosecutor Wick, Trooper Zickwolf, of the New Jersey State Police. It is our duty to investigate all crimes that happen in this county, and we are now investigating a crime of robbery and atrocious assault and battery committed upon William J. Horner, 1000 Commerce Street, Pauls-

boro, New Jersey, on or about the 16th day of June, 1937, and you have been arrested in connection with this crime. If you are willing to make a statement, we are willing to hear it, and only with the understanding that it must be without any fear or threats, or promise of reward, and that anything you say can and may be used against you in Court. If you understand what I have just said, and want to give a statement, go ahead.

Q. When did you first plan to go down to Horner's house to rob him? A. At the Wonder Bar.

Q. At the Wonder Bar? A. Yes.

Q. Who was there when you planned to do that? A. The three of us.

Q. Smalley Burrell, Anna Brown—your sister, and you? A. Yes, sir.

Q. How did you plan to rob Mr. Horner, how were you going to do it? A. It's supposed he can't hear, and we was going to get in the door.

Q. You knew the man was deaf? A. Yes.

Q. You were going down there to try to get into the house without him hearing you? A. Yes.

Q. When you got to the house, who tried to break in the door? A. Smalley tore the screen off and tried the lock.

Q. And then Mr. Horner came to the door? A. Came to the door.

Q. Then what happened? A. Mr. Horner opened the door, and that's when Smalley hit him, and he fell down, and we went in.

Q. What happened when you got in? A. We got in wrestling with him, he wasn't hurt, Horner wasn't hurt, and then they upset the table, and then I hit Horner and then Smalley hit him again, and Horner was down, and when Smalley was

standing over Horner, Anna was in that room and I was in the middle room.

Q. What doing? A. I was right at the door, and Anna was over there at the desk looking at some papers.

Q. What were you doing in the room? A. I looked in the pants pocket, and there wasn't anything in the pants pocket. We left the pants on the chair, there wasn't anything in the pants pocket.

Q. Did Mr. Horner get in the middle room then? A. No, Mr. Horner didn't get in the middle room then, so Smalley asked Mr. Horner 'Where's your money?', and Anna said 'He can't hear you,' and Smalley got down to Mr. Horner and asked him 'Where's your money?' and 'We was sent from Philadelphia to get your money' and Mr. Horner said 'I haven't got any money.' And he said 'I didn't have any money', Mr. Horner said 'I didn't have any money.'

Q. How did Mr. Horner get in the middle room? A. Smalley lifted Mr. Horner up off the floor. Mr. Horner comes in to the bed, he come to the stove, rather, going towards the place where we were looking for money. Mr. Horner said he was looking for money.

Q. Who was looking for money? A. He was supposed to get the money when he got pulled up. He said he ain't got no money. Smalley said 'You get something', and I said I don't think he got no check yet, that's what I said.

Q. Then what happened? A. Then Mr. Horner, I think he sat on the bed, or something, no, Mr. Horner got knocked on the floor.

Q. By whom? A. I did not hit him.

Q. Who hit him? A. I did not hit him.

Q. Who hit him then? A. Smalley hit him hard,

and he went down to the floor. Mr. Horner could have got up then, but I guess he didn't want to. We pulled the bed back, we couldn't find anything under the bed.

Q. Looked under the mattress? A. Somebody had an empty pocket book, there wasn't anything in it, I don't know who had the pocket book, because somebody said there was nothing in the pocket book, so I said, 'Let the man go, and get out of here, Smalley, you will wake the neighborhood up.'

Q. What happened then? A. Mr. Horner sat up, and sat up on the floor, and that's when he knocked him out.

Q. When? A. When he sat up.

Q. With his fist or kick him? A. He hit him, I didn't see him kick him.

Q. As he was sitting on the floor? A. He just raised up.

Q. Did anybody have a razor? A. The razor was right there by the wall on the box. I picked the razor up. You know the man's unconscious and I would not want to kill him.

Q. What did you say, whether you wanted to, or not? A. I said, 'I got his razor, can I cut it?' and Smalley said 'No.'

Q. Didn't you open it and put it to his throat? A. I opened it up.

Q. I suppose you wanted to play with it? A. I just took the razor, and put it at the side of his head, and put it down.

Q. What did you say? A. I said 'I ought to cut him', that's what I said, and put it down, because you know, when a man's unconscious, I would not say to cut him.

Q. What did you do with the razor? A. I don't know whether I carried it with me, or put it down,

because there's three razors around the house.

Q. Did Smalley say anything then? A. He said 'He will sleep a while.'

Q. I thought you said he was out? A. He was out, but he said he will sleep a while.

Q. Smalley said he would sleep a while? A. Yes.

Q. Had you hit him? A. Yes.

Q. Why did you want to cut the man if he was already out? A. I wasn't going to cut the man.

Q. What did you say it for? A. I just wanted to be like he was, there wasn't anything else I could say to him.

Q. How did Horner get off the floor on to the bed? A. I do not know.

Q. When he sat up you hit him and knocked him out? A. Smalley did. We didn't leave him on the bed, Smalley left him right in the corner.

Q. When was this you put the razor at his throat? A. That's when he got ready to sit up after Smalley hit him. He sat up when he hit him, he didn't fall, and he said, 'here, you hit him', and he didn't fall, and after that I said 'I ought to cut his throat'. And I put the razor back, and he clipped him, and he said 'He will sleep.'

Q. The first time he hit him he didn't go out? A. No.

Q. What did Horner say? A. Horner didn't say nothing.

Q. Didn't he say 'Don't hurt me'? A. That was at first he said 'Don't hurt me.'

Q. You say he didn't get up on the bed at all? A. No.

Q. He was sitting on the floor then? A. Yes.

Q. When you left him, how was he lying then?

A. The same place where he was hit, he stayed there.

Q. Tell us how and where. A. That was right between the stove—

Q. The stove and the bed? A. The stove and the bed.

Q. Which way were his feet? A. Just like this here, his head was this way.

Q. Towards the wall? A. Here is the bed here, and here's the stove, he was like here.

Q. Was his head towards the front room or towards the kitchen? A. Towards the kitchen.

Q. Where were his feet? A. His feet, I don't know, they may have been under the bed, I don't know.

Q. What was Anna doing then? A. Anna was in the room.

Q. Which room? A. In the next room.

Q. The same room? A. The same room, looking at them papers in the desk.

Q. Going through them? A. She was pulling them out.

Q. Where did you find the seventy cents or sixty cents? A. I don't know where it come from, it come out of some of the papers on the desk.

Q. And did Anna get it? A. Anna picked one of the quarters up that fell on the floor.

Q. What did she say? A. Anna said 'I have got a nickel or something, it's on the floor', and I didn't bother about looking for it, so I guess she found it, or somebody found it. She said it was a nickel.

Q. Who took Mr. Horner's watch? A. The watch was given to me, because I did not get the watch, I didn't know where it was, the watch was given to me.

Q. By whom, Anna, did Anna give you the

watch? A. I figure he give me the watch, and put it in my hand, and I said "I can pawn the watch."

Q. You say Smalley gave you the watch? A. Because I figured he had the watch on him some place.

Q. You were the one that went through his clothes? A. There was an extra pair of pants on the floor.

Q. Was Mr. Horner dressed? A. No.

Q. What kind of clothes did he have on? A. I don't know what Horner had on. He usually wore overalls, but these black pants was on the chair.

Q. He was in bed, had been in bed? A. I don't know, I didn't notice.

Q. Did he have on long underwear? A. I couldn't say. He usually wears overalls, but these black pants, he had been out somewhere, there wasn't anything in them when I searched.

Q. Here are two cigars that were found in your pocket by Officer Travaline, where did they come from? A. From Mr. Horner's cigars.

Q. Where were they? A. They were given to me in a pack.

Q. By whom? A. Four of them in a pack.

Q. Where did you get them from? A. They was given to me, handed in my hand.

Q. By whom, who gave them to you, Anna or Smalley? A. I think Smalley give me the pack of cigars, four or them, they come from off the table.

Q. Didn't Anna just sit there and give you a wink? A. No, I was looking at Smalley.

Q. Where did you get the cigars? A. They come off the table, I told you they were Smalley's cigars, four of them, two of them I threw away, the other two I put in my pocket and forgot.

Q. When did you get them? A. Last night.

Q. While you were in Mr. Horner's? A. Getting ready to leave.

Q. You had been drinking, hadn't you? A. Yes, we all had been drinking, but not Anna.

Q. You all knew what you were doing when you went down to Horner's? A. If it had not been for the whiskey nobody would have went there.

Q. You had enough to drink to make you a little bold and give you courage? A. We drank four pints.

Q. When you got there you knew everything that was going on? A. We knew everything that was going on, but was drunk. If we had not been drunk I don't think we would have been there.

Q. This statement you have just given is what you remember that happened last night? A. Yes.

Q. And everything in that statement you remember that happened last night? A. Yes.

Q. Is there anything else that happened that you do remember that you didn't tell us in the statement? A. That's all that happened.

Q. And everything that did happen, you have a clear picture now of what happened last night, it's all clear to you now what happened? A. Yes. This morning Smalley said to me 'If we had just listened to Anna we would not have went.'

Q. When did he say that? A. This morning.

Q. What did he mean by that? A. By not hurting him.

(Then, turning to Smalley Burrell, the following questions were addressed to him, and the following answers given by him.)

Q. Is that right, Smalley? A. Here's what I said, 'If we hadn't listened to Anna, we would have been all right, if we hadn't listened to Anna, we would have been all right.'

(Resumption of the questioning of William A. Brown.)

By the Prosecutor:

Q. In your statement you said that you told Mr. Horner 'We were sent down from Philadelphia to get your money.' A. I did not say that, Smalley hollered in his ear, because he was standing over him.

Q. Mr. Horner didn't know Smalley so well, did he? A. No, he didn't know Smalley.

Q. He knew you? A. Yes.

Q. You didn't have to tell him you were sent down from Phiadelphia? A. He knew where I live, but Smalley said we were gangsters, we were sent from Philadelphia."

Q. Now, were you present on June 21st when this same statement was read back to him? A. Yes.

Q. And that was the occasion when the sheriff, the undersheriff, Mrs. Verdier, Mr. Apgar, you, and the three defendants were all present? A. That is correct.

Q. That was on June 21st after the statement was taken? A. Yes, the following Monday.

Q. How was the statement read back to the defendant William Albert Brown? A. Exactly the same as I described it before. It was read back by you and checked by Mr. Apgar and by me.

Q. Was the statement in his case and also the statement for the other two defendants read back to them exactly the same way? A. Yes, we checked it word for word.

Q. Did Brown make any further statement on June 21st? A. Yes.

Q. Will you read what he said on June 21st? A. "(The prosecutor then read the statement of

William Albert Brown, all three defendants still being together.)

WILLIAM ALBERT BROWN

"*By the Prosecutor*:

Q. William Albert Brown, is the statement, which I have just read to you, and which was given to Mr. Apgar and Mr. Denham in the presence of the other officers on June 17th of this year a correct statement? A. That's a correct statement.

Q. That is a correct statement? A. Yes.

Q. Is that true? A. That's what happened at the house.

Q. The only way you desire to change it, as I understand it is once in the statement where you said you drank four pints of whiskey, and you say now that you drank three pints of whiskey? A. Three pints, and the part at the door. I did not go in the man's house first, because I didn't want him to see me."

Later on he was asked these questions by the Prosecutor:

"*By the Prosecutor*:

Q. You had on the white pair of shoes you now have on? A. The same shoes.

Q. And a pair of black pants with a high waist band? A. And the vest, no coat.

Q. What kind of a shirt? A. Green checkered shirt."

Q. Now, at any time while the statements were being taken on June 17th or June 21st were any threats or promises made to any one of the defendants that you heard? A. No.

Q. Now, will you again refer to page 11 of the

statement of June 21st and read that portion which refers to the death of Mr. Horner. A. "Q. All three of you defendants understand that since the last statements were taken that Mr. Horner has died, and you have been indicted for murder, and, of course, you have entered your plea of not guilty of the crime. You understand that, do you?

Anna Brown: Yes, sir.

Smalley Dilks Burrell: Yes, sir.

William Albert Brown: Yes, sir."

Mr. Lord: Cross-examine.

Cross-examination by Mr. Johnson:

Q. Mr. Denham, after the statement had been taken from Anna Brown, did you hear Anna Brown make the statement or ask whether she could go home now and come back when the trial started? A. I am not sure whether I heard her exactly say that but I have heard that she said it but I have a faint recollection that she said it to the Prosecutor himself.

Q. On what day? A. The 21st, in my office.

Q. Not on the 17th? A. No, sir.

Q. Referring to the 17th of June when the first statements were taken, the first statement was taken from Anna Brown, is that correct? A. Yes.

Q. The second statement was taken from William Albert Brown, is that correct? A. Yes.

Q. They were not together when those statements were made, is that correct? A. No, they were not.

Q. They were taken out of the room, taken upstairs or out of your presence? A. I don't think at that time they were even in the room. At the time we started the only one that was in the room was Anna.

Q. After she completed her statement she was taken out of the room, is that correct? A. As I remember it, she would not keep quiet so she had to be taken in the next room.

Q. Was that during the time her brother was making his statement? A. I think so.

Q. Smalley was not in the room? A. Not yet.

Q. Were they both taken away from the room before Smalley was brought in? A. No, I would not say that. What followed was this: When Smalley started to make his statement they were all there.

Q. Do you recall Smalley being in the room alone without the other two defendants? A. No, sir.

Q. Was not in the room at all? A. Not according to my recollection.

Q. Do you recall Smalley Burrell being brought down to the room the first time on June 17th and refusing to make a statement? A. No.

Q. Do you recall that he said he could not make a statement because he did not remember anything because he was drinking? A. No.

Q. Did Anna first make her statement alone with not one of the other defendants in there? A. That is right.

Q. While she was in the room Bill Brown was brought in? A. That is my recollection.

Q. After Bill was making his statement, did you have to send Anna out of the room so Bill could get his statement straight? A. Not for that reason. It was simply that she had made her statement but she wanted to interrupt and interject, you could not keep her quiet, and I think Detective Apgar asked that she take a seat in the next room.

Q. When Smalley was brought down to the

room, who was in the room? A. You mean of the defendants?

Q. Yes. A. On the 17th?

Q. Yes. A. May I refer to the statement?

The Prosecutor: She was there alone as shown in Mr. Denham's notes, and the latter part of the statement was taken in the presence of the other two defendants. I don't know just what date it is on.

The Witness: I think it is on page 15 of Smalley Burrell's statement. On the bottom of page 17 it says, "Note, from this point on this statement was made in the presence of the other two defendants, William Albert Brown and Anna Brown.

Q. Was the first part of that statement read to Anna and William Brown when they were brought into the room after Smalley had made it? A. No.

Q. When the three defendants had been brought into the room and Smalley continued with his statement, did Smalley, Anna, and William get into a quarrel in regard to the statements that were being made? A. I would not call it a quarrel, there were various differences of opinion.

Q. They clashed as to which was the truth in those statements? A. They clashed?

Q. Verbally? A. As to who did which?

Q. In other words, they did not agree, all three persons did not agree when those statements were read? Were they read to them after that? A. No, sir.

Q. All three were together only when the latter part of Smalley's statement was made, from page 15? A. From page 15 on to 23 inclusive.

Q. There were frequent differences of opinion between all three as to what happened? A. Yes, there were.

Q. Did Smalley Burrell say when Anna Brown's statement was being read that some of the facts relating to him were not true? A. I don't recollect that. When Smalley Burrell's statement was read as any point would be reached which to his mind needed to be cleared up, he would so signify to the prosecutor, and that is where we made the changes but I don't recall him making any definite rebuttal of anything that Anna said.

Q. How many times were those statements read to the defendant? A. Well, they were each read once, which means that all three of them heard it three times.

Q. On the 17th, that is the first day the statements were taken, were the statements read to them? A. No, sir.

Q. The 17th was on Thursday? A. Yes, sir.

Q. Were the statements read to them on Friday? A. No, sir.

Q. On Saturday they were indicted and informed by the Court that they would enter a plea of not guilty? A. Yes, I was here.

Q. Then the statements as you took them down in shorthand and transcribed them from your notes were read to them for the first time on the 21st? A. Yes, Monday afternoon.

Q. In reading those statements did Mr. Lord read through several questions at a time? A. No, he did not. He had them listen to the statement and had them interrupt him as they saw fit.

Q. He read the statement right along? A. Yes.

Q. Neither one of the defendants had a copy of the statement in his hand? A. No, sir.

Q. The only thing they could do was to listen? A. They just sat and listened and smoked, that is all.

Q. When the statement was made to them by

Mr. Lord concerning Mr. Horner's death, was that before or after the statements were read to them? A. After.

Q. The statement was made after? A. Yes.

Q. Was a question asked of each one of these defendants whether they remembered everything that was in the statement? A. I would have to refer to it, if I may?

Mr. Johnson: All right.

The Prosecutor: I may save time by stating that that question was not asked.

The Court: We will take a recess at this time.

The Prosecutor: Before we recess, I would like to offer in evidence the statements made on June 17th by each of the three defendants and the statement dated June 21st, 1937, by each of the three defendants.

Mr. Johnson: No objection.

The Prosecutor: Counsel has no objection to the introduction of the statements in evidence.

Mr. Johnson: Other than the objection I made the other day on the introduction of the statement of Anna Brown, and you allowed me an exception.

The Court: All right.

(The statements referred to were received in evidence and marked "State's Exhibit S-18 and S-19.")

The Court: At this time I will declare a recess until 11:30 and the officers will let the jury pass out at this time.

(A short recess was taken.)

Mr. Johnson: If your Honor please, at the time these statements were placed in

evidence and before Mr. Denham read them, I requested you to tell the jury that the statement made by any one of the defendants would not bind the other. Mr. Lord stated that they were all present and that could not affect them. The way I understand the law is, if a defendant is present with others and a statement is made against him to which he takes exception that statement cannot bind him but only binds the person making it.

The Court: That is right.

Mr. Johnson: I ask at this time that you instruct the jury that the statement as read by Mr. Denham, the court stenographer, only binds and affects those making the statement and no one else.

The Court: Yes, and you may also incorporate that in your instructions to charge.

The Prosecutor: I have no objection except to the fact that they were all read back in the presence of each other on the 21st.

The Court: All being present?

The Prosecutor: Yes, and therefore binding on each other.

Mr. Johnson: May I have an exception?

The Court: Yes.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

The Court: You may incorporate that in your instructions for charge so that I may reiterate it.

LEON SHAFFER, sworn.

By the Prosecutor:

Q. Mr. Shaffer, your full name is Leon Shaffer and you live in the City of Woodbury? A. Yes.

Q. For how long have you lived in Woodbury? A. Forty-three years.

Q. Where are you employed? A. In the Prosecutor's office.

Q. In what position? A. Stenographer and clerk.

Q. Did you go to the Underwood Hospital on June 17th to interview William J. Horner, the man who was killed in this case? A. I did.

Q. At the time you went to the hospital, what time of day was it? A. About one-thirty in the afternoon.

Q. On June 17th? A. That is right.

Q. Before you saw Mr. Horner did you interview the doctor at the hospital? A. I did.

Q. After that time did you see Mr. Horner? A. Yes, I was in there.

Q. At that time was he conscious or unconscious? A. He was unconscious.

Q. Did you go back at any time in an effort to get a statement? A. In the room with him?

Q. Yes. A. Yes, I did.

Q. Was he in such a condition that you could take a statement? A. No, he was unconscious, in very bad condition.

Q. Did you call back at the hospital? A. I called four times before I went and about three times after I went.

Q. Did you leave any message at the hospital what the hospital authorities should do if he regained consciousness? A. Yes.

Q. What message did you leave? A. To call you, Mr. Apgar, or myself.

Q. If he regained consciousness? A. Yes.

Q. Did you see Mr. Horner's head at the hospital? A. I did.

Q. Will you describe to the Court and jury the condition of his head when you saw it? A. It was about the worst that I have ever seen barring one since I have been in the Prosecutor's office, and it was in terrible condition, the head was swollen and looked to me almost twice the size of a normal head.

Mr. Johnson: I object to that, that is a conclusion.

The Prosecutor: Strike that portion out which says, "Twice the size of a normal head."

The Court: Yes.

Q. Was the face black and blue? A. Well, it was dark. They had some cloth on it which had slipped. He was breathing heavily, the movement of the throat falling down while I was there. I stayed there about ten or fifteen minutes with him.

Q. Was there anything peculiar about his breathing? A. Yes, it was like a man ready to die, short quick breaths.

Q. You have taken statements from other men immediately prior to their death? A. I have.

The Prosecutor: Cross-examine.

Mr. Johnson: No questions.

The Prosecutor: Your Honor please, I have a map of the Borough of Paulsboro showing the gas main, and of course in addition the various streets in Paulsboro. They are marked on the map in a scale one

inch to three hundred feet, and was revised in the present year, 1937, by Chris J. Burns. If Mr. Johnson has no objection I would like to offer the map in evidence so the jury may be able to determine the exact location of the various streets in Paulsboro.

Mr. Johnson: I have no objection.

The Court: Is the location of the house in which Mr. Horner lived shown?

The Prosecutor: No, it is not, but I can have it marked.

Mr. Johnson: I object to it being marked unless it is done according to measurement and scale. There is enough testimony in the case to show the jury just about where Mr. Horner's house was and where Mr. Wilson's house was.

The Court: Well, the photographs are here and I think there is enough in evidence to show on what streets the house was located.

The Prosecutor: Jefferson and Commerce.

The Court: The southeast or the south west corner.

The Prosecutor: The southeast corner. I offer the map in evidence and ask that it be marked.

The Court: All right.

(The map referred to was received in evidence and marked "State's Exhibit S-20.")

JULIA CURTIS, sworn.

By the Prosecutor:

Q. Your name is Julia Curtis? A. Yes.

Q. You are sometimes known as Julia Washington? A. Yes.

Q. On the night of June 16th were you in the Wonder Bar saloon at Paulsboro? A. Yes.

Q. What time did you go in there? A. I imagine it was about ten o'clock when I went in there.

Q. At night? A. Yes.

Q. How long did you stay? A. Oh, I imagine I stayed until maybe eleven-thirty.

Q. Did you see the defendants William Albert Brown and Smalley Burrell in the saloon while you were there? A. Yes.

Q. For a portion of the time in which you were in the saloon were the three of you sitting at the same table? A. Yes, I and Smalley sat at the table together. I called Smalley and we sat at the table together, and William when he came in he sat at the table with us.

Q. Was Anna Brown inside the saloon? A. I didn't see her in there.

Q. When you left the saloon who left with you, if any one? A. When I left the Wonder Bar, Smalley, Bill and myself and Anna left.

Q. Where did you pick up Anna? A. She was out front there.

Q. Outside the saloon? A. Yes, she was at the saloon.

Q. Where is the Wonder Bar saloon in Paulsboro? A. Adams Street.

Q. When you came out on Adams Street, where did you walk? A. When we left the Wonder Bar?

Q. Yes. A. When we left the Wonder Bar I go straight down Adams Street and we went

across Delaware, so I says, "Smalley, come on, I am going around to a friend's house of mine. We will go there for a while and we will go back. I am going to bed". So when we got there I bid them good-night. At the same time Smalley was sitting with me—

Q. Standing with you? A. Yes.

Q. When you left the Wonder Bar there was you— A. Yes.

Q. Smalley Burrell? A. Yes.

Q. Albert Brown? A. Yes.

Q. When you got out in front of the saloon you picked up Anna? A. Yes.

Q. Then the four of you walked down Adams Street together? A. Yes.

Q. Who was walking with you? A. Smalley.

Q. Where were William Albert Brown and Anna Brown? A. They were in back of us.

Q. So you two were walking down the street together? A. Yes.

Q. When you got down near this house where you mentioned you stopped— A. Yes.

Q. How far was that from the home of Mr. Horner on Commerce Street? A. I don't know how far that was from his home. That was around Chestnut and Washington.

Q. You know where the corner of Jefferson and North Commerce is? A. Yes.

Q. Where you people separated, where the three defendants and yourself separated, how many blocks is that from the corner of Commerce Street and Jefferson Street? A. I don't know because we came down Adams. That is Adams and Commerce where we crossed it. Then I turned one way then they went the other.

Q. They were in the opposite direction? A. Yes.

Q. Where did they go when they left you? A. I don't know where they went.

Q. In which direction did they start? A. I never even noticed whether they turned back or which way they went.

Q. While you were in the saloon did you have anything to drink? A. Yes.

Q. Did Smalley Burrell have anything to drink? A. Yes, me and he had some.

Q. Are you a relative of Smalley? A. He married my sister.

Q. While you were in the saloon at any time, and you left at half-past eleven, what was Smalley's condition as far as drink was concerned? A. Well, he looked like he had been drinking. We had some drinks together at the Wonder Bar.

Q. Did he know you when you came in there? A. Yes, he knowed me.

Q. Did he talk to you while you were in there? A. Me and he was sitting there cutting up like we always do.

Q. While you were walking down Adams Street, did he walk straight? A. Yes, I had hold of his hand.

Q. He walked perfectly straight as far as you could see? A. As far as I could see he was all right.

Q. That was about eleven-thirty when you left the three of them? A. Yes.

Q. When you left and separated did they say anything to you? A. Never said a word. I said good night.

Q. What did they say? A. They didn't give me no answer.

Q. What did you say? A. I told Smalley I would see him later.

Q. What did he say then? A. They went on, they didn't give me no answer.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. Julia, had you seen Smalley earlier that evening? A. Yes, early that evening I saw him.

Q. Where did you see him? A. Well, I passed the house where they were at. They was there, that was where my sister lives.

Q. Whose sister? A. My sister has a room there.

Q. What is your sister's name? A. Louise.

Q. Were Smalley, Anna, and Bill, all three, in Louise's house? A. They were all sitting there.

Q. What were they doing? A. At the time I went in there they had some beer bottles and I says, "You had some beer," like that, so they said, "Yes," but I didn't see any beer, but I saw the bottles there.

Q. Did you see Anna Brown have a glass of beer in her hand? A. No, I didn't, because when I got there the bottles were empty. I didn't see Anna Brown have any beer.

Q. Did you see a bottle of whiskey? A. They brought a bottle of whiskey.

Q. When you got in there was there a bottle of whiskey on the table? A. When I got in there?

Q. Yes. A. No, it wasn't.

The Court: Is this at Louise's?

Mr. Johnson: Yes.

Q. There wasn't a bottle of whiskey in there? A. Not when I got in there. I saw empty beer bottles, that is all I seen.

Q. Did you see any one drinking at all when

you got in there? A. I got in there, I stayed about one or two minutes, and I think there was one who brought a pint in but I don't know which one it was exactly.

Q. Did Smalley Burrell have a drink out of that pint? A. I guess they all drank out of the pint. I didn't stay no longer myself.

Q. Then you went out. You didn't see any more liquor brought in? A. After that I left there and went to the Wonder Bar.

Q. You were inside sitting at a table? A. At the Wonder Bar?

Q. Yes. A. Yes.

Q. How long were you there when Smalley came in? A. Smalley went in there before I did, I guess.

Q. Did you call Smalley over to the table? A. Yes, I says, "Smalley, come on over."

Q. What did you have to drink? A. Oh, we had a little beer and whiskey.

Q. Did Bill Brown then come in? A. Bill Brown came in, yes, sir.

Q. Did he sit down with you? A. He sat there with us. I remember I asked Smalley to buy me a drink, I never asked any of the rest.

Q. Did you see Bill Brown drinking? A. I guess he had been drinking whiskey.

Q. Did you see him drinking any? A. Not in the Wonder Bar.

Q. At any place? A. I couldn't say for certain.

Q. While you were at the table, he was sitting at the table with you and Smalley, did you see him drink any? A. I don't remember. I remember Smalley and me but I don't remember any one else.

Q. Can you tell me how many beers you and

Smalley had? A. I don't remember, I didn't count.

Q. One or two? A. I think they drank two or three if I seen them.

Q. Then you also had some whisky to drink while you were sitting there? A. Yes, a little.

Q. You were pretty well intoxicated yourself? A. I was feeling good; I wasn't intoxicated.

Q. Did you see Victor O'Neill come in the Wonder Bar? A. I saw him come in there, yes.

Q. Did you see him buy another quart of liquor, a pint of liquor, rather? A. Victor O'Neill?

Q. Yes. A. I don't remember but I know he came in there.

Q. Did you see Smalley and William Brown drinking out of a pint of liquor away from your table? A. I saw them with a pint. I don't know where it came from.

Q. Did you see them drink out of it? A. No, I didn't see them drink out of it. I saw them with the pint.

Q. When you left the Wonder Bar and walked down the street were you and Smalley steadying each other when you were walking down? A. I had hold of Smalley's hand.

Q. He was a little bit staggering, wasn't he? A. I didn't see him stagger. I know he was pretty well high. I couldn't say he was staggering. I know I had hold of his hand.

Q. You were pretty high yourself? A. I was feeling good. I wasn't high myself but I was feeling good, I wasn't high.

Mr. Johnson: That is all.

CHARLES McGUIRE, sworn.

By the Prosecutor:

Q. Mr. McGuire, you live at Paulsboro and own the Wonder Bar saloon? A. I do.

Q. Will you keep your voice up so the jurors can hear you? A. Surely.

Q. Were you in your saloon on the night of June 16 of this year? A. I was in and out.

Q. Did you see Smalley Burrell in the saloon? A. Not the first time but when I came in later the two of them were in there.

Q. By the two of them, which two do you mean? A. Smalley Burrell and Bill Brown.

Q. And when you saw them in the saloon, about what time was it? A. That was between 10 and 11 o'clock.

Q. And what time did they leave your saloon? A. Well, around 11 or quarter after, something like that.

Q. Did you talk to Smalley Burrell and William Albert Brown while they were in the saloon? A. I had been out on a little business and when I came back the girl was on the porch.

Q. Which girl? A. Anna Brown and I said, "This is no place for you," and she stayed there, so I went inside and Smalley and Bill were inside and Smalley patted me on the back and said, "You are a good fellow, you are a good fellow." That was on the bar side. Of course, it was a little busy on the other side but I don't know what happened over there.

Q. Did he recognize you when he came in A. Sure.

Q. Talking to you all right? A. Sure.

Q. Was he in such position that he could not

stand up or was real drunk or anything of that kind? A. He could stand up.

Q. What would you say he was, what was his condition? A. I would not say he was intoxicated to the extent you would call him drunk.

Q. Do you think he knew what he was doing while he was in your place of business? A. He seemed to be, to me.

Q. Conducting himself all right? A. He did not create any disturbance.

Q. Are you a graduate chemist? A. No.

Q. Did you ever attend college? A. Yes, I have had chemistry.

Q. You have had chemistry in college and you have conducted your saloon there for how long? A. Two years.

Q. And you are a brother of Dr. McGuire in Paulsboro? A. Yes.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. Mr. McGuire, did you see Smalley Burrell come in your saloon? A. No, he was in there when I returned.

Q. There were quite a few people in the saloon that night, were there not? A. Yes.

Q. You did not stop for a conversation with Smalley, did you? A. No, not exactly but I was standing up to the bar and he came along and patted me on the back and said he wanted to give me a drink, give me a treat, and I told him thanks, I did not care for any.

Q. You went on about your other business then? A. Sure.

Q. You did not have any protracted conversation with him at the time? A. No, because I had some other things on my mind.

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Q. You did not pay a whole lot of attention to him, did you? A. I can't say that. I said a few words to him, just the same as I would say to anybody else passing by.

Q. Did he have a bottle of liquor in his hand? A. No, but they got a pint of whiskey and carried it out with them when they left.

Q. Carried it outside with them when they left? A. Yes.

Q. Did you see them when they went out the door? A. Yes, I was there when they left. That was around 11 or 11:30, about 11 or quarter after 11, somewhere about that time.

Q. Did you see them go out with a pint of liquor? A. Smalley bought it and carried it out.

Q. Did you sell it to him? A. No, my bartender sold it to him.

Q. How far were you away from Smalley when he bought the liquor? A. Not very far. I guess about the distance from where you are sitting to here.

Q. Did they leave immediately after they bought the liquor? A. Yes, they carried it outside, because I don't allow them to break bottles inside and drink out of them, although some of them do.

Q. Did you see Victor O'Neill? A. Yes.

Q. Was he there? A. Yes, he was there.

Q. Did you see him buy his liquor? A. No, I didn't see that.

Q. Did you see him drink any liquor in there? A. No.

Q. Did you see Bill Brown? A. I saw him once when I came in.

Q. Where was he standing? A. If I am not mistaken, he was standing in the doorway between the bar and the grill.

Q. Did you see him alongside of Smalley? A.

No, he was not with Smalley.

Q. Did you see him with Mr. O'Neill? A. I think he was leaning up against the door by himself, right in the door entrance.

Q. You did not see Smalley, Victor O'Neill or Bill Brown together while you were in there? A. No.

Q. How long have you kept that saloon, the Wonder Bar? A. About two years.

Q. Smalley is a frequent patron of yours? A. He is a good customer.

Q. That is what I mean, he is in there quite often, isn't he? A. Well, a lot of the boys come there and like to hang around.

Q. You know him very well? A. Well, I guess so, yes.

Q. He knows you very well? A. Sure.

Q. How long have you known Smalley? A. Since I have been in business.

Q. How long have you known Bill Brown? A. About three to four months.

Q. Did you see Smalley Burrell and Julia Curtis sitting at the table together? A. No, I was not on the other side.

Q. You do not know whether he had anything to drink on the other side or not? A. No, because I was in there for a while then I went upstairs, came down and had to go out.

Q. When you talk about the other side, will you explain to me and the Court and the jury what you mean by the other side? A. See, I have one side that is a bar and there is a partition up and on the other side is a grill where I have music and entertainment.

Q. And you did not see Smalley over there? A. No, I was not over on that side.

Mr. Johnson: That is all.

By the Prosecutor:

Q. You say you have known Smalley for about two years? A. Yes, about two years.

Q. And your home is in Atlantic City, your original home? A. Yes.

Q. And you have been up in this county about two years? A. No, I have been here about five years, I guess. See, I came here with my brother.

Q. Your father is also a medical doctor in Atlantic City? A. Yes.

The Prosecutor: That is all.

MELVIN NELSON, sworn.

By the Prosecutor:

Q. Your name is Melvin Nelson? A. Yes, sir.

Q. Speak up. A. Yes, sir.

Q. And where do you live? A. 410 Berkley Avenue, Paulsboro.

Q. By whom are you employed? A. Charles McGuire.

Q. What is your job? A. Bartender.

Q. How long have you been there? A. About five months.

Q. What? A. About five months.

Q. I notice a scar on your face. What caused that? A. I was burned when I was a baby.

Q. Did you see Smalley Burrell in McGuire's saloon, the Wonder Bar, on the night of June 16th? A. Yes, sir.

Q. Did you sell him any liquor that night? A. Yes, sir.

Q. And what did you sell him? A. One pint of

Wilkins Family, one pint of Spring Hill.

Q. What time did you sell him the pint of Wilkins Family? A. I would judge around 8:30, probably nine, something like that.

Q. In the night time? A. Yes.

Q. What time did you sell him the Spring Hill? A. I would say about an hour or a half hour, about an hour later.

Q. Did you see them when they left the place that night? A. No, I did not.

Q. Did you see them while they were in there? A. Well, I paid particular interest in him when he was in the barroom, see, but outside of that I could not say.

Q. When he was in the barroom did he appear to you to be sober? A. Quite sober.

Q. That is Smalley? A. Yes.

Q. Was Albert Brown in the barroom? A. Not that I could recall.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. When Smalley Burrell bought the pint of Wilkins Family at 8:30, did he leave the Wonder Bar? A. Yes, he did go out the door, I know that.

Q. When he bought the Spring Hill did he go outside with it? A. Well, at that time I didn't pay any attention to him.

Q. Did you see him later in the evening, in the grill room, with Juia Curtis? A. I could not say that.

Q. Did you see him later in the barroom? A. No, I did not. After he bought the second pint, I could not say that I remember seeing him any more, due to the fact that on that particular night there was a pretty good business, see.

Q. You were quite busy? A. Yes.

Q. And you could not look over everybody that was coming in? A. Yes, sir.

Q. He might have been there but you— A. He may have.

Q. You did not see him when he went out the door? A. No.

Q. You do not know how much he had to drink, do you? A. Not outside. I could not say just how much he drank.

Q. You do not know how much he had to drink when he was in there, do you? A. No.

Mr. Johnson: That is all.

JOHN SAM, sworn.

By the Prosecutor:

Q. John, do you have a restaurant down at Paulsboro? A. Yes, sir.

Q. And how long have you had a restaurant down there? A. About over eight months, I think.

Q. Over eight months? A. Eight months.

Q. On the morning of June 17, right after midnight on June 16, did you see Anna Brown, Smalley Burrell and William Albert Brown in your place? A. Yes.

Q. What time did they get in there, John? A. About after 1 o'clock, I think.

Mr. Johnson: What time?

The Prosecutor: About after 1 o'clock. Cross-examine.

Cross-examination by Mr. Johnson:

Q. John, do you know Anna Brown? A. Well, many people come in and go out.

The Prosecutor: I think you better take time and ask him the questions slowly.

Q. Do you know Anna Brown? A. I know a couple of times come in my place, get some yoc.

Q. She has been in your place how many times? A. Well, so many times I can't tell.

Q. So many times you cannot tell? A. Yes.

Q. Do you know Smalley Burrell? A. Well, I know him. He lives in the section along there, about two squares from there, I think.

Mr. Johnson: If your Honor please, I am going to ask the stenographer to read these answers. He is right there close to him. I cannot hear and I do not believe the jury can. Will you repeat the answer, Mr. Stenographer?

The Court: Repeat the answer.

(Answer repeated.)

Q. Has Smalley Burrell been in your place many times? A. Yes, sir.

Q. Did you know him by name? A. I don't ask his name, so many people, I don't ask names. They come in the place, eat like a gentleman, I serve like a gentleman, many people, I cannot ask them all things.

Q. Were there many people in your restaurant on June 16th? A. Yes, well, a few people in there.

Q. When these people came in your restaurant was anyone else in there? A. Well, two people go out. After that, three people come in, two fellows and a girl.

Q. Do you know what they ordered that night? A. Two yoc and one fishy san.

Q. Do you know Bill Brown? A. I know him. He comes in my place so many times.

Q. Which one is Bill Brown? A. I told you before I don't know who Joseph Brown.

Mr. Johnson: Will you repeat the question and the answer?

(Question and answer repeated.)

Q. Did you see these three defendants in your place that night? A. Yes, I saw them come my place that night.

Q. Did you see them the night before? A. Yes, I saw them the night before too.

Q. Did you see them the night after? A. Night after I don't saw them.

Q. You did not see them the night before?

The Prosecutor: No, no.

A. I saw them the night before.

The Prosecutor: He said he saw them the night before but not the night after.

Q. Did you see them the Sunday night before? A. Don't ask me Sunday and Saturday, I got not so much time, I can't remember the day, Friday or Saturday.

Q. How do you remember, John, that these three people were in your place on Thursday night?

The Prosecutor: Thursday morning, June 17, Thursday morning, right after midnight.

Mr. Johnson: That is right, get him mixed up more than I have tried to.

The Prosecutor: It is 1 o'clock in the morning.

Mr. Johnson: When you talk to a foreigner, usually any time between dark and daylight is the same to them.

The Prosecutor: It does not mean the same to the jury.

The Court: I think maybe Mr. Johnson has in mind Oriental time. Just ask him that question, how he remembers that they were there early on the morning of June 17.

Q. John, how do you remember that they were there early on the morning of June 17th? A. How I know early?

Mr. Johnson: Repeat the question.

(Question repeated.)

A. Well, that restaurant is open the day time to 12 o'clock up to the morning closing 2 o'clock.

Q. And that is the reason you say they were in there at that time? A. I don't know what time. Soon I go to close.

Q. Why do you say they were there early on June 17 and not there the next day?

The Prosecutor: That is objected to.

Mr. Johnson: I think it goes to the credibility of the witness.

The Prosecutor: It is argumentative, why does he say they were there one day and not the next day. He has already testified that they were not there the next day.

The Court: I want a word in there. I am sorry I do not have a Confucian ear to interpret. Is there another Chinaman here in the room? Anyone here speaking Chinese language? Use the word fix and see whether he understands it.

The Prosecutor: How you know, he will know what you are talking about.

Q. How do you know they were in there early in the morning of June 17? A. Well, by that time come in, get some yoc, that's all I know.

The Court: I have no objection to your asking the question, "How do you fix that time and date?"

Q. How do you fix that time and date? A. Well, Chinese restaurant, people all come in, poor people, do business anyhow any time to American people, Chinese meal to any day time, before come get wash, get dressed and go out, go to a show, by that time go Chinese restaurant, get some people by that time different, like a lunch car.

Mr. Johnson: That is all.

WALTER THOMPSON, sworn.

By the Prosecutor:

Q. Your name is Walter G. Thompson? A. C.

Q. You live in Paulsboro? A. Yes.

Q. How long have you lived in Paulsboro? A. Fifty-four years.

Q. Do you have any official position in the Borough of Paulsboro? A. Borough Clerk.

The Prosecutor: Keep your voice up, because of the noise outside.

Q. Do you recall receiving a phone call from Mary Hendrickson, Mrs. Mary Hendrickson, on the morning of June 17th? A. I do.

Q. That phone call was received by you at what

office, where were you? A. At the Borough office.

Q. Did you know Mr. Horner during his lifetime? A. I did.

Q. How far away from his home did you live? A. Did I live?

Q. Yes. A. It's several blocks I live, on West Broad, he lives on Commerce Street, I judge half a mile.

Q. How long have you known Mr. Horner altogether? A. Ever since I can remember.

Q. Do you know as a matter of fact he was employed by the DuPont Company for a number of years? A. I do.

Q. What sort of a man was Mr. Horner? A. Very quiet man, very prompt in paying his bills, he wanted his bills before we had them made out in the Borough office.

Q. What sort of a living man would you say, was he a clean living decent sort of man? A. I would say in all my connections with him he seemed very neat and clean living. I never heard him use any language only of the best.

Q. He seemed to be a pretty nice type of old gentleman? A. He did.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. The only time you met Mr. Horner was when he came to the office? A. No, I met him I would say at least once a week, anyway.

Q. Where did you meet him, walking along the street? A. Walking along the street, and lodge meetings, and things like that.

Q. Did you ever call upon him at his home? A. I have been there.

Q. When was the last time you were at his home, do you recall? A. I would say maybe four or five months ago, I don't remember the exact time.

Mr. Johnson: That's all.

The Prosecutor: That's all.

ALEXANDER BONSACK, sworn.

By the Prosecutor:

Q. You live in Paulsboro? A. I do.

Q. And have lived there for how long? A. Practically all my life.

Q. What is your occupation? A. I am employed by the Atlantic City Electric Company in Paulsboro.

Q. How long have you been with the Atlantic City Electric Company? A. I have been with them four years.

Q. Prior to that time where were you employed? A. I was employed in Philadelphia by the White Dental Company.

Q. Did you know Mr. Horner during his lifetime? A. I did.

Q. How long did you know Mr. Horner? A. Practically all my life.

Q. Did you ever have occasion to go to his home on Commerce Street in Paulsboro? A. On several occasions.

Q. On those occasions were you inside the house? A. Inside the house.

Q. When would you say was the last occasion prior to his death you were inside the home? A. I would say about four months ago.

Q. What condition did he keep his house, inside

and outside? A. I would say for a man that kept his own house, very orderly and very clean.

Q. That included both inside and out? A. He had a wonderful outside place, had a very nice garden, vineyard in back, and he took a lot of interest in outside life.

Q. What sort of a man was he as far as his living and reputation? A. As far as his living and reputation was concerned I would say it was ideal.

The Prosecutor: Cross-examine.

Mr. Johnson: No questions.

By the Court:

Q. Could he hear very well? A. No, he couldn't hear you, when you wanted to talk to him you had to talk right to his ear, otherwise he couldn't hear a thing.

MORTIMER STEVENS, sworn.

By the Prosecutor:

Q. Mr. Stevens, where do you live? A. 116 East Jefferson Street, Paulsboro.

Q. How long have you lived in Paulsboro? A. Practically all my life from the time I was about nine or ten years old.

Q. Did you know Mr. Horner during his lifetime? A. Positively, yes, sir.

Q. How far is your home from the home where Mr. Horner did live? A. Just a line fence separates his property from the property that I am living in.

Q. You live on Jefferson Street? A. Jefferson Street, yes, sir.

Q. His house is at the corner of Jefferson and Commerce? A. Exactly so.

Q. For how many years did you know Mr. Horner? A. Practically all my life.

Q. You and Mr. Horner are about the same age, in that general neighborhood? A. Yes, sir.

Q. What sort of a man was he as far as his reputation was concerned, from what you saw? A. From what I have seen Mr. Horner was practically a good clean living man.

Q. A nice sort of neighbor? A. He was, positively, yes, sir.

Q. How about his deafness? A. Very deaf.

The Prosecutor: That's all, cross-examine.

Mr. Johnson: No questions.

FRANCES DEPUTY, sworn.

By the Prosecutor:

Q. Your name is Frances Deputy? A. Yes.

The Prosecutor: Answer up, Frances, so we can all hear you.

Q. Where do you live? A. 1014 Hoffman Avenue in Paulsboro.

Q. Did you know Mr. Horner during his lifetime? A. I knew him since 1934.

Q. Did you ever do any work at his home? A. Yes.

Q. What sort of work did you do at his house? A. Housework.

Q. Scrubbing and cleaning? A. Yes.

Q. Did you do any sewing or mending? A. Yes.

Q. Anna Brown, the defendant, in her statement says that you made a statement, or claimed

Mr. Horner had intercourse with you. Is that correct or not? A. It is not.

Q. As far as you know was he a nice respectable old gentleman? A. Yes.

The Prosecutor: Cross-examine.

Cross-examination by Mr. Johnson:

Q. How often did you go to Mr. Horner's house to clean? A. It wasn't so often.

Q. Not very often? A. No.

Q. How much did he pay you for cleaning? A. Sometimes he would give me a dollar and a half, sometimes two dollars.

Q. Did Mr. Horner ever give you any other money beside that? A. No.

The Prosecutor: I object to it.

The Court: It is answered.

The Prosecutor: I will withdraw the objection.

Q. Did Mr. Horner ever go to Camden to get you and bring you back? A. I don't know anything about it, he never brought me back from Camden.

Q. When was the last time you were in Mr. Horner's house? A. It was on a Tuesday, the Tuesday before his death.

Q. Were you there alone? A. No, I went there in the early part of the evening with my sister.

Q. What did you go there for? A. Mr. Horner told me, he said he was so hard of hearing, he said he didn't have many friends, and then said by me working for him and knowing him, to come and sit and talk with him sometimes.

Q. Just asked you to come around and talk to him?

The Prosecutor: She didn't say that.

The Witness: I said he said he didn't have many friends, but by him being hard of hearing, and I working for him, that I come around and sit and talk to him sometimes.

Q. Did you ever see Anna Brown around there? A. No, I did not.

Q. Did you ever see Anna Belle Clark around there? A. No.

Q. You say that the statement that Anna Brown made about you and Mr. Horner is not correct? A. It is not correct.

Mr. Johnson: That's all.

The Prosecutor: That's all. I have some other witnesses to come here at one-thirty.

The Court: We will recess at this time until one-thirty. The jury may pass out with the officers.

(Trial of cause resumed pursuant to adjournment at 1:30 p. m. in the presence of the Court and counsel for the respective parties.)

The Court: You gentlemen are satisfied the jury is in the box, there's no question about it?

The Prosecutor: Yes, sir.

The Court: Do you desire a roll call, or will you waive it?

Mr. Johnson: Waive it.

WILLIAM H. FLOWERS, sworn.

By the Prosecutor:

Q. Mr. Flowers, your name is William H. Flowers? A. Right.

Q. Where do you live? A. Paulsboro.

Q. How long have you lived in Paulsboro? A. All my life.

Q. What is your occupation? A. Cashier, First National Bank.

Q. How long have you been cashier of the bank at Paulsboro? A. Sixteen years.

Q. Did you know Mr. William Horner during his lifetime? A. I did.

Q. How long had you known Mr. Horner prior to his death? A. Went to school with him.

Q. Did you know him clear up to the time that he died, was killed? A. I did.

Q. What can you tell us about his hearing? A. Always appeared to be a little deaf.

Q. Did you have occasion to see people, other people who knew Mr. Horner? A. I have.

Q. And what was his general reputation in Paulsboro for decency and clean living? A. His reputation was always of the best.

Q. What sort of a man was he, what type of man was he? A. Well, he was a man of a kind, gentle disposition, always seemed to be willing to do a kindness or a favor to anybody.

Q. Sort of an easy going man? A. Always honest.

Q. Sort of an easy going man? A. Very easy.

The Prosecutor: Cross-examine.

Mr. Johnson: No questions.

The Prosecutor: That's all, Mr. Flowers, thank you very much.

There is one photograph of the screen

door at the back, or rather on the side of the house, which I thought was introduced in evidence yesterday. The photograph apparently has not been marked. I understand Mr. Johnson has no objection.

Mr. Johnson: I have no objection, I don't understand why it wasn't marked yesterday.

(Received and marked Exhibit S-21.)

The Prosecutor: There is one stipulation I have discussed with the defense, and that is that the crime was committed in the Borough of Paulsboro, County of Gloucester, State of New Jersey.

Mr. Johnson: No question about that.

The Prosecutor: State rests.

THE CASE FOR THE DEFENDANTS.

LOUISE WASHINGTON, sworn.

By Mr. Johnson:

Q. Louise, where do you live? A. 1012 Hoffman Street.

Q. Paulsboro? A. Yes.

Q. Were you at your home on the night of June 16th? A. I was.

Q. Did you see Smalley Burrell that night? A. I did.

Q. Did he come to your home? A. Yes.

Q. Had he been drinking when he came there? A. No, but he came in, and we bought some, and we was drinking it, we bought a pint.

Q. You drank it with him? A. Certainly.

Q. Who else was in the room beside you and Smalley? A. Bill Brown and Anna.

Q. William Brown and Anna Brown? A. Yes.

Q. Did Anna Brown have anything to drink while she was in your house? A. She took about that much (indicating), but the rest we drank.

Q. Of whisky? A. Yes.

Q. Did she have any beer in your house? A. We all drunk beer.

Q. Had she been drinking beer before Smalley came there with the whisky? A. Sure.

Q. Do you know how many glasses she had? A. No, because I didn't pay attention to how many glasses she drank.

Q. Was William Brown there at the same time? A. Yes, he was there with me.

Q. Was he drinking with you, too? A. Sure.

Q. After this first bottle of liquor was finished, did Smalley go out and buy another bottle? A. Yes, and we drank it.

Q. Drank the other bottle? A. Yes.

Q. About what time was it Anna Brown came to your house? A. Anna was to my house early, we were sitting down playing the victrola.

Q. What time did William get there? A. He was around there, too, see, he was right next door, and he came over and we was playing the music.

Q. What time did Smalley get to your house? A. Smalley come up the street and I called him in.

Q. Do you know what time it was? A. I didn't look at the clock.

Q. After this second bottle of whiskey was finished did you all sit around and talk? A. Smalley didn't stay in there then, he went up to the Wonder Bar.

Q. Did Smalley have any beer to drink? A.

Sure, he drank with me, everything I drank he drank some of.

Q. Did he take quite large drinks of whiskey? A. Sure, we all did.

Q. Would you say when Smalley left your house that he was drunk? A. He was high, and I was high, too.

Q. What do you mean by high? A. Feeling good.

Q. Was Bill Brown in the same condition? A. Certainly, he drank right with us.

Q. You say Smalley left your house and went to the Wonder Bar? A. He went up that way, he must have went in the Wonder Bar.

Q. Did William Brown go with him? A. He went later on.

Q. You didn't see him any more that evening, did you? A. No.

Q. Did Anna Brown stay at your house? A. She stayed a while, and then she said she was going home, and she left.

Q. Did she have anything more to drink after Smalley left? A. No.

Mr. Johnson: Cross-examine.

Cross-examination by the Prosecutor:

Q. What time did Smalley Burrell come to your house? A. I will say between eight and half past, because I did not look at the clock, I didn't know the time.

Q. What time did he finally leave? A. I don't know, it was a good while before he left, because we drank a quart before he left.

Q. The four of you drank a quart before he left? A. Two pints, sure.

Q. You would say he left somewhere around half past ten or ten o'clock? A. He left before

that, I guess, around about a quarter of ten, I don't know, I didn't look at the clock.

Q. That's the only reason you don't know what time he left because of the fact you didn't look at the clock? A. I didn't look at the clock.

Q. The only reason you don't know what time he left was because of the fact you didn't look at the clock? A. Yes.

Q. You remember him leaving all right? A. Sure, he left.

Q. Do you remember that he left first, is that right? A. Yes.

Q. Who left second? A. Bill went.

Q. Bill Brown went second, then who was the third one to leave? A. Anna.

Q. You remember all three leaving? A. Sure.

Q. You didn't have any difficuty remembering it? A. What?

Q. You didn't have any difficulty remembering that Burrell left first, Bill Brown left second, and Anna Brown third? A. Sure.

Q. You remember that? A. I know they left there.

Q. They drank as much as you drank? A. Yes, I drank right with them.

Q. Are you used to drinking? A. Yes.

Q. Smalley Burrell is used to drinking? A. I know he has.

Q. He is an iron worker, he is a rigger? A. Yes.

Q. That he is used to hard work and drinking? A. Sure.

Q. So what you had to drink did not interfere at all with your memory of what took place? A. When they left I went to bed.

Q. You remember everything that happened until the time they left? A. Sure.

VICTOR O'NEAL, sworn.

By Mr. Johnson:

Q. Victor, you live where? A. 110 Bucks Street, Paulsboro.

Q. You know Smalley Burrell? A. Yes.

Q. Do you know Anna Brown? A. Yes.

Q. Do you know William Brown? A. Yes.

Q. When did you first see Smalley Burrell on the night of June 16th? A. About ten o'clock in the Wonder Bar.

Q. Did you notice what he was doing? A. No, he and William were in a huddle.

Q. Anyone else with him? A. No.

Q. What did you do when you went into the Wonder Bar? A. It was my time to treat so I bought a pint of Old Quaker.

Q. Just three of you? A. Yes.

Q. Did all three of you drink the bottle of Old Quaker? A. Yes.

The Court: Who were the three?

Q. Smalley Burrell, William Brown, and yourself were the three people? A. Yes.

Q. Did anybody else buy any liquor? A. I didn't see any one.

Q. Was Smalley Burrell drunk? A. I would not say so.

Q. You would not say he was drunk? A. No.

Q. Do you know whether he had any liquor besides that? A. Yes, you could smell it on his breath.

Q. Did you see him drinking with Julia? A. No, I did not.

Q. After the bottle was finished, where did you go? A. Over to the poolroom.

Q. You left them there? A. Yes.

Q. Did you see them come outside the Wonder Bar? A. Yes, I saw them on the porch.

Q. To whom were they talking? A. They were talking to themselves, to Smalley.

Q. Smalley and Brown were talking to themselves? A. Yes, sir.

Q. Did you hear what they said? A. No, I didn't.

Q. Was Anna there? A. No.

Q. You didn't see Anna come out? A. No, I did not.

Q. You left and went right across— A. To the poolroom.

Q. While you were drinking were you standing up against the bar? A. No, we were in the other room.

Q. In the grill? A. It is another room on the other side of the dining room like a grill.

Q. Did you see the owner of the Wonder Bar come in? A. No, I did not.

Q. Did you see him at all that evening? A. No.

Mr. Johnson: Cross-examine.

Cross-examination by the Prosecutor:

Q. You would not say he was not there because of the fact that you did not see him? You would not say Mr. Maguire was not in and out that night? A. I am quite sure he wasn't there.

Q. At any time that night? A. Not when I was there.

Q. When were you there? A. Ten o'clock.

Q. How long did you stay? A. Ten-thirty.

Q. The pint that you had to drink, who drank out of that bottle? A. William, Smalley, and myself.

Q. Did you treat any other friends there? A. No.

Q. You say you saw Brown and Burrell in a huddle? A. Yes.

Q. Do you know whether or not they were discussing the murder of Mr. Horner at that time? A. They couldn't.

Q. The fact that they were going to? A. No.

The Prosecutor: That is all.

By Mr. Johnson:

Q. Do you know what they were discussing in the huddle? A. No.

MARY BURRELL, sworn.

By Mr. Johnson:

Q. Mrs. Burrell, where do you live? A. 1013 Hoffman Street.

Q. Turn around and speak as loudly as possible. Where do you live? A. 1013 Hoffman Street.

Q. What relation are you to Smalley Burrell? A. I am his mother.

Q. On the night of June 16th and the morning of June 17th, it being the 16th before midnight and the 17th after midnight, was Smalley at your house? A. He was at my home around twelve-thirty, between twelve-thirty and one o'clock.

Q. Did you see him come in? A. Yes, sir.

Q. When he came into your house what did he do? A. He just came in and staggered and fell down to the floor.

Q. Fell down on the floor? A. Yes.

Q. What else did he do? A. Vomit.

Q. Did he lay there on the floor? A. Yes, sir.

Q. Could he get up by himself? A. No, sir.

Q. Did some one have to help him up? A. Yes, sir.

Q. Who was it that helped him up? A. Myself and Mr. Bowler.

Q. Where did you place him? A. I laid him on the lounge.

Q. Where did you leave him? A. On the lounge in the room.

Q. After he laid down on the lounge, did you talk to him? A. No, I asked him what was the matter with him.

Q. Did he answer? A. No, sir.

Q. What did he do, fall right to sleep? A. Yes.

Q. Did you talk to him at all? A. That is all I said to him.

Q. Was he there the rest of the night? A. Yes, sir.

Mr. Johnson: That is all.

Cross-examination by the Prosecutor:

Q. What time was that? A. Twelve or twelve-thirty.

Q. How do you fix the time as twelve o'clock? A. Between twelve and one.

Q. Might it have been after one? A. It might have been.

Q. You don't know whether the fact that he saw Mr. Horner all beaten and covered with blood made him sick.

Mr. Johnson: I object to that question.

The Court: The objection is sustained.

The Prosecutor: I withdraw the question.

Q. You say Mr. Bowler was there? A. Yes.

Mary Burrell—Cross.

Q. Where is your bedroom in the house, Mrs. Burrell? A. Upstairs.

Q. The second floor? A. Yes.

Q. Were you waiting for your son to come home? A. Yes, I was waiting for him.

Q. What was that? A. Yes, sir.

Q. Who else was there at the time? A. Well that was all.

Q. You were the only one that waited for him to come home? A. I was sitting up there; I never go to bed nohow.

Q. Who else was sitting up? A. Mr. Bowler.

Q. Who lives in the house? A. Just the other children.

Q. You and the children? A. Yes.

Q. Is Russell Bowler the man you are talking about? A. No.

Q. Which Mr. Bowler? A. Jim Bowler.

The Prosecutor: That is all.

By Mr. Johnson:

Q. Mrs. Burrell, Smalley does not live with you? A. No, sir, he don't live with me but he comes there.

Q. You didn't have a clock in the room in which you were sitting? A. No.

Q. It was some time after midnight, wasn't it? A. Yes, some time between twelve and one, some time between that.

Q. You didn't look at the clock? A. I didn't look at the clock.

Q. When Smalley came in? A. No.

By the Court:

Q. You say that he does not live at your place? A. Well, he don't live there but he comes there any time he feels like it.

Q. You say you were sitting up waiting for him? A. Yes, I was sitting there when he came in.

Q. Why were you sitting there waiting for him? A. Because he told me he would be back.

Q. He had been there earlier in the evening? A. Yes.

Q. And he told you he was coming back? A. Yes.

Q. What time was he there in the evening? A. He was there earlier, I don't know what time it was because I didn't look at the clock.

Q. Did you see him come up to the house? A. Sir?

Q. Did you see him come up to the house? A. Yes, I seen him.

Q. Where were you sitting? A. At the window.

Q. Downstairs? A. Yes.

By the Prosecutor:

Q. Did your son send you after some shoe whitening the next morning? A. No.

Q. Did you go downtown to Paulsboro the next morning? A. No.

Q. To get some shoe whitening? A. No, sir.

By Mr. Johnson:

Q. Mrs. Burrell, you saw Smalley when he came in the house? A. When he came in?

Q. Yes. A. Yes.

Q. Was the light lighted in the room? A. Yes, but it was turned on dim.

Q. What kind of shoes did he have on? A. He had on his white shoes, I guess.

Q. Are you not positive? A. That is what he had on.

Q. Did you see any dark stains on his shoes? A. No, sir.

Q. Did you look at his shoes? A. No, I didn't take no notice of the shoes.

Q. Your house sits right on the ground? A. Yes, sir.

Q. There is only one step up to the doorway? A. Yes.

Q. Did you see Smalley as he came in the door? A. Yes, sir.

Q. Did he stagger? A. Yes, sir.

Mr. Johnson: That is all.

JAMES BOWLER, sworn.

By Mr. Johnson:

Q. Mr. Bowler, where do you live? A. 1013 Hoffman Street.

Q. 1013? A. Yes.

Q. Is that the same house in which Mary Burrell lives? A. Yes, the same house.

Q. Were you at home on the night of June 16th? A. Yes.

Q. Were you there on the 17th? A. Yes.

Q. After midnight of the 16th? A. Yes, I was there.

Q. Where were you sitting? A. Sitting down in the rocking chair by the window.

Mr. Johnson: Talk a little louder.

The Court: What was that?

(The last answer was read by the stenographer.)

Q. Was Mary Burrell in the same room with you? A. Yes.

Q. Did you see Smalley Burrell come into the room? A. Yes, he came into the room.

Q. What did he do when he came in the room? A. When he came in the room he staggered and fell.

Q. Talk louder so the jury can hear you. Will you repeat that answer. A. When he came in the room he staggered and fell.

Q. What did he do? A. He didn't do nothing; he laid still.

Q. Did he vomit? A. Yes, he did.

Q. Did you pick him up? A. Picked him up and put him on the couch.

Q. Did he talk at any time? A. Not any to me.

Q. What color shirt did he have on? A. I never noticed the shirt at all.

Q. Did you notice his shoes? A. No.

Q. Was he on the couch in the morning when you got up? A. Yes, he was on the couch when I got up and left for work.

Q. Did you look at him? A. Yes, I looked at him.

Q. Did you look at his shoes? A. No, I did not.

Q. Did you see any blood on him at all? A. Not a bit.

Q. Did you examine him to see if there was any? A. No, I didn't examine him.

Q. When you picked him up and put him on the couch, did you have hold of his feet? A. No, I caught him up here (indicating).

Q. Did you talk to him? A. I laid him up there and that was all I did.

Q. Did you see him coming up the street? A. Yes, he came up the street towards the door just as usual.

Q. Was he staggering? A. I don't know whether he was staggering or not. When he came

to the door he knocked and when she opened the door he fell right to the floor.

Mr. Johnson: Cross-examine.

Cross-examination by the Prosecutor:

Q. He walked up the street and came to the home of his mother alone? A. By himself.

Q. Walk up to the front door? A. Yes.

Q. You say he knocked on the door? A. Yes.

Q. Like he usually does? A. Yes.

Q. He knocked on the door the same as he usually did? A. Yes, he knocked.

Q. As I understand it, he came up to the door and knocked on the door? A. Yes, came right to the door.

Q. What time did you go to work the following morning? A. Eight o'clock.

Q. When you went out did you see any marks of any kind on the clothes of the defendant Burrell? A. No, I did not.

Q. You say that when he came to the door he was sick to his stomach and fell to the floor? A. That is what he did.

Q. Weren't there any marks on his clothes of any kind? A. No, I didn't notice.

Q. Now, when you say he walked down the street, in which direction was he coming from? A. Up from toward the Wonder Bar.

Q. He was walking down Hoffman Street? A. Yes.

Q. Now, do you know what time it was when he got there? A. It was around twelve or half-past twelve.

Q. It might have been after that, one o'clock? A. No, I don't think it was after one.

Q. When was the first time that day you had seen Smalley Burrell? A. The first time?

Q. Yes. A. I didn't see him until that night.

Q. That was when he came and knocked at the door. That was the first time you saw him? A. When he came to the door of my house.

Q. You say when he came to your house? A. Yes.

Q. That was some time after midnight, early in the morning of June 16th? A. Sometime after twelve, half-past.

Q. What time did you get home from work that afternoon, June 16th? A. Half-past four.

Q. Did you stay home from that time until Smalley Burrell came home? A. I stayed home until the next morning when I went to work.

Q. Did you stay home from that time until Smalley Burrell came there? A. Yes, I did.

Q. Your wife sat there with you? A. Yes.

Q. Not your wife, Mrs. Burrell, there were just the two of you? A. And the little children.

Q. All during the evening? A. Yes.

Q. And the first time you saw Smalley Burrell was when he came to the door? A. Yes, that was the first time I seen him.

Q. From your knowledge, had Smalley Burrell been at the house from half-past four until he came there shortly after midnight? A. No.

By Mr. Johnson:

Q. Was he there at any time after half-past four? A. Not to my knowledge.

Q. Were you inside the house? A. All the time.

Q. Did you see Smalley talk to his mother? A. No, I did not.

Q. Was Smalley's mother in the house all the time? A. Yes, she was in the house.

James Bowler—Cross.

By the Court:

Q. How long did you stay up after you put Smalley Burrell on the couch? A. I don't know exactly how long I stayed up because I had to go to work the next day. I was sitting there smoking and I got finished smoking and went to bed.

Q. You went to bed before Mrs. Burrell? A. Oh, yes.

By the Prosecutor:

Q. How long did you sit up after you— A. I don't know how long I sat up. I sat up until I finished smoking and then I went to bed.

Q. What was done immediately after you picked up Burrell and put him on the couch? A. He vomitted.

Q. Did he vomit while he was on the floor? A. While we picked him up and put him on the couch.

Q. At that time? A. Yes.

IRENE BURRELL, sworn.

By Mr. Johnson:

Q. Where do you live, Mrs. Burrell? A. 219 Hoffman Street.

Q. Are you the wife of Smalley Burrell? A. Yes, sir.

Q. How long have you been married? A. Pretty near three years now.

Q. How many children do you have? A. Two and expecting another one soon.

Q. On the day of the 16th did you see your husband, Smalley? A. Yes, sir.

Q. Did you see him around 6 o'clock at night? A. Yes, sir.

Q. What was he doing? A. What was he doing?

Q. Yes. A. He was setting down at home. He went up to the Wonder Bar and got a pint of whiskey and brought it home and when he went out he carried it with him.

Q. He did not drink any at home? A. No.

Q. You have been married for three years? A. Pretty near three now.

Q. Is Smalley working? A. He was working, sure.

Q. Where was he working? A. WPA.

Q. Do you know how much he was making? A. He was a first-aid boy at first, he made $33.60, I think.

Q. Is that a month? A. Every two weeks.

Q. Did Smalley ever beat you when he was drunk? A. No, sir.

Q. Did Smalley drink quite often? A. Once in a while he would drink and me and him would go to the Wonder Bar and drink together.

Q. Did he tell you he was going to the Wonder Bar that night? A. No, sir, he didn't.

Q. Did Smalley ever say anything to you about a Mr. William Horner? A. No, sir.

Q. Did you know Mr. William Horner? A. No, sir, not a thing about him.

Q. Did you ever see him? A. No, sir.

Q. You had Smalley arrested on the 16th, in the afternoon, didn't you? A. Yes, sir.

Q. Why did you have him arrested? A. I had him arrested for support but I was a little cross at the present time.

Q. You thought he had been paid that day, didn't you? A. Yes, I thought it.

Q. And he had not brought you any money? A.

No, but he got paid the next day and he gave it to me.

Mr. Johnson: Cross-examine.

Cross-examination by the Prosecutor:

Q. Did you have him arrested on the 16th of June? The week before that you had him arrested, wasn't it? A. No, it was during that week.

Q. It was not the same day that the murder was committed? A. I don't think so.

Q. It was about a week before that he was taken down to Mr. Daniels, a Justice of the Peace at Gibbstown and fined down there? A. Yes, he was fined down there.

Q. What was he fined for if you had him arrested for desertion and non-support? A. For support, that's all I had him arrested for.

Q. The fine was imposed upon him by Mr. Daniels? A. He just had to pay the costs, I think it was eight—

Q. Did you have your husband arrested for disorderly conduct, before Mr. Daniels? A. Disorderly conduct? Not as I know of.

Q. But you had him arrested some days before the murder was committed, for non-support of you and the two children? A. Just one. I didn't have but one child.

Q. One child? A. One now, that's all.

Q. So when he was not supporting you he was down in the saloon with the other girls, buying them beer and whiskey, is that right? A. No, sir.

Q. Who had him arrested the time before that? You said you never had any difficulty with him when he was drunk?

Mr. Johnson: If your Honor please, I think this woman is not a competent wit-

ness on that question. The defendant will go on the stand and he can testify.

The Court: Yes, I am going to sustain your objection.

The Prosecutor: My only purpose was because Mr. Johnson asked on direct-examination whether she ever had any trouble with her husband when he was drunk. I want to follow that up.

The Court: Well, I will sustain the objection anyway.

The Prosecutor: That is all.

Mr. Johnson: If your Honor please, I have a couple of character witnesses who have to get back to work. I would like to call them at this time rather than hold them over for another day.

The Court: Counsel will not object?

Mr. Johnson: Have you any objections to calling a couple of character witnesses?

The Prosecutor: Not a bit.

ALBERT FALCONI, sworn.

By Mr. Johnson:

Q. Mr. Falconi, where do you live? A. 19 East Washington Street, Paulsboro.

Q. How long have you lived there? A. Nineteen years.

Q. Do you know the defendant Smalley Burrell? A. I do.

Q. Have you worked with Smalley? A. I worked with him.

Q. How long had you worked with him? A. Fourteen months.

Q. Where are you employed? A. WPA.

Q. Are there numerous residents in Paulsboro employed on that same project? A. There are.

Q. Have you heard any of those people with whom you work or do you know yourself whether Smalley Burrell is of a mean and pugilist character? A. No, I don't.

The Prosecutor: Will you repeat the question and answer?

(Question and answer repeated)

Q. What was the reputation of Smalley Burrell among the people you knew, for his peacefulness? A. Well, on the job he is all right, didn't have any trouble with nobody with his work, everybody liked him on the job.

Q. Did you hear of anything detrimental to the character of Smalley Burrell? A. No, I have not.

Mr. Johnson: Cross-examine.

Cross-examination by the Prosecutor:

Q. You do not go around with many people who associate with him socially, do you? A. Well, just on the job.

Q. I am not talking about the job. I am talking about socially, outside the job. A. No, just go down, shoot a game of pool two or three times.

Q. While you are on the job? A. No, off the job.

Q. You would go down to the poolroom and shoot pool with him? A. Yes, sir.

Q. Where did you go? A. Down to the colored poolroom.

Q. Down to the colored poolroom? A. Yes.

The Prosecutor: That is all.

HOWARD DILKES, sworn.

By Mr. Johnson:

Q. Mr. Dilkes, where do you live? A. 20 E. Buck Street, Paulsboro.

Q. How long have you lived there? A. About three years.

Q. Do you know Smalley Burrell? A. I do.

Q. How long have you known him? A. About two years.

Q. Where have you been around Smalley Burrell? A. On the WPA. I was his timekeeper.

Q. Are there quite a few other Paulsboro people working on that same project? A. There is.

Q. Are they all Paulsboro people? A. Well, approximately, now.

Q. Were there during the time that you have known him? A. Well, at first we had a lot of outsiders.

Q. Did you have frequent chances to hear other people working and who live in Paulsboro talk about Smalley? A. You mean since the case or

---

Q. No, prior to the case? A. Yes.

Q. Did you hear anyone say anything about Smalley Burrell being other than a peaceful man? A. No, I did not.

Q. Did he get into any trouble with the men working on the projects? A. No, sir.

Q. You were there all the time, were you not? A. Yes, sir.

Q. Did you see Smalley Burrell drunk at any time when he was working? A. No, sir.

Mr. Johnson: Cross-examine.

Cross-examination by the Prosecutor:

Q. Are you on the job all the time? A. No, sir.

Q. You are in the office somewhere quite a distance away from the job, aren't you? A. Most of the time.

Q. And you do not go around with people with whom Burrell would associate, that is, his friends and neighbors? A. Not always.

Q. What is that? A. No, sir.

Q. Did I understand you to say not all the time? A. Not all the time.

Q. You do some of the time? A. Well, I didn't exactly get what you meant.

Q. What do you think I mean now? A. I don't know.

The Prosecutor: Will you repeat the question, Mr. Stenographer?

(The following question was repeated:

"Q. You do not go around with people with whom Burrell would associate, that is, his friends and neighbors?")

The Witness: Well, I do, I have to on the job.

Mr. Johnson: Will you read that reply, Mr. Stenographer? I do not think the jury got that.

(Answer repeated)

Q. Outside of the job do you go around with people with whom Burrell associates? A. No, I don't know any.

Q. And of course drinking is not permitted on the job, is it? A. It is not, no.

Q. And therefore you have never had occasion to see this man when he had some liquor under his belt, did you? A. Well, I have seen him on the street.

Q. You have seen him on the street that way? A. Yes, sir.

Q. On other occasions before June 16? A. I didn't see him on June 16.

Q. Did you see him on other occasions before June 16? A. Once.

Q. Do you remember how long ago that was? A. Probably a month and a half before the case.

Q. Do you remember what day of the week it was? A. I think it was on a Tuesday night.

Q. During the week, while he was working in the day time? A. Yes, sir.

Q. Drunk at night? A. He was.

Q. Where did you work before you worked for the WPA, Dilkes? A. I was on relief.

Q. Where did you work before that? A. Cassidy's service station and Green's.

Q. You did not work down there very long, did you? A. No, I did not.

Q. About a week or two? A. No, about a year and a half.

Q. Where did you work before that time? A. Worked at the Vacuum Oil for a while but not very long.

Q. You did not stay any place very long? A. No, I did not.

The Prosecutor: That is all.

By the Court:

Q. When you saw Smalley Burrell on that Tuesday evening, was he under the influence of liquor? A. Yes, he was, he come up to me.

Q. And how did he conduct himself? A. Well, he was worried about family affairs and he come up to me.

Howard Dilkes—Cross.

Q. He was worried about family affairs? A. Yes.

Q. He was not in a fighting mood? A. No, sir.

Q. He did not want to pick a fight with you? A. No, sir.

By the Prosecutor:

Q. He knew you and recognized you when he saw you? A. Yes, sir.

Q. Came up to you when he saw you and talked to you? A. Yes, sir.

Q. Talked sensibly enough? A. Yes, he was just worried about his family.

The Prosecutor: That is all.

HERMAN BROWN, sworn.

By Mr. Johnson:

Q. Herman Brown, where do you live? A. 9 East Madison Street.

Q. Speak loud, will you, Herman? A. 9 East Madison Street.

Q. Are you the brother of the defendant William Brown? A. Yes, sir.

Q. And the brother of the defendant Anna Brown? A. Yes, sir.

Q. On the night of June 16 did you see them? A. Bill came home that night and went right out after he had his supper.

Q. Did you see him again that evening?

The Prosecutor: Speak louder, Herman.

A. On June 16?

Q. Yes. A. No, I didn't see him no more, not after he had his supper.

The Prosecutor: You will have to talk louder.

Q. When was the next time you saw him, Herman? A. The next morning, after this thing had happened.

Q. What did you do? A. Well, I was getting ready to go to work and I opened the door and started out and I turns around and goes back and pushes the door open and calls him and asked him if he was going to work.

Q. Where was he? A. Lying in the bed.

Q. Was he fully dressed? A. I never noticed. He had never pulled the covers off him.

Q. Did you notice his shoes on the floor? A. Yes, I glanced at his shoes laying right down at the foot of the bed.

Q. Was the foot of the bed right in front of the door? A. Right in front of the door.

Q. Was the curtain up in his room? A. Yes, the curtain was up.

Q. Did you see any blood stains on his shoes? A. No, I did not.

Q. Later on the officers came to your house and took a pair of trousers. To whom did those trousers belong? A. Belonged to me.

Q. Had Bill ever worn those trousers? A. I never seen him with them on.

Q. Your trousers are too small for him, aren't they? A. Yes, too short.

Q. Did you get those trousers back? A. No.

Q. Were you at home when the officers came in there? A. No.

Q. You rent that house, don't you? A. Yes, I rents it.

Mr. Johnson: That's all.

Cross-examination by the Prosecutor:

Q. I suppose you found the officers took your trousers the same day they were there? A. Yes.

Q. I suppose you immediatey went up and told the police officers they had your trousers, did you? A. No, I didn't tell them.

Q. When was the first time you ever mentioned in the presence of any police officer they had your trousers, right now? A. No, when the fellow stopped, he was to see me, I asked him when he was going to bring my pants back.

Q. Which police officer are you talking about? A. Koko.

Q. The coat you have on now, isn't that your brother's coat? A. No.

Q. Can he wear that? A. This used to be his suit.

Q. That was the same coat that the cigars were taken out of? A. This coat?

Q. Yes, sir. A. No, sir, not this coat.

Q. Do you know which suit the cigars were taken out of? A. No, I don't.

Q. That was his suit? A. Not this here one.

Q. The suit that you have on, the coat and vest and pants, didn't your brother use to wear those? A. No.

Q. Didn't he ever wear them? A. Not around in Paulsboro.

Q. Did he some other place? A. He wore it up in Camden.

Q. It is not too big for him to wear in Camden, but down here in Gloucester County it is too big to wear? A. This here suit.

The Prosecutor: That's all.

Mr. Johnson: That's all.

ANNA BROWN, sworn.

By Mr. Johnson:

Q. You are the wife of Herman Brown? A. Yes.

Q. Where do you live? A. 9 East Madison Street.

Q. Did you see either Anna or Bill Brown on the night of June 16th? A. I seen them in the evening.

Q. At what time? A. I don't know just exactly what time, but it was supper time.

Q. At supper time? A. Yes.

Q. Do you know how Anna was dressed? A. When she was down to the supper table she was not dressed then.

Q. Did you see her when she went out? A. She had on a linen suit.

Q. White? A. I don't know whether you would call it exactly white, I guess it was, I don't know.

Mr. Johnson: Will you repeat that answer, I don't think the jury heard it.

(Answer repeated.)

Q. Do you know what kind of shoes she had on? A. White.

Q. Did she go out with Bill? A. No.

Q. Did you see Bill when he went out? A. Yes.

Q. What kind of trousers did Bill have on? A. Bill had on, I don't know whether you would call them black, or not, but they had blue buttons on them, high waisted.

Q. Did he have on white shoes? A. Yes.

Q. Did you see them any more that evening? A. Not after they left.

Q. Did you see William Brown the next morning? A. Yes, when he came back from Clem Turner's.

Q. Did you see him when he went out? A. That morning?

Q. Yes. A. Yes.

Q. Did he carry any shoes with him? A. No.

Q. Did he have his white shoes on? A. Yes.

Q. He had them on? A. Yes, he put them on after he came back.

Q. After he came back? A. Yes, from Clem's.

Q. Did he have them on when he went to Clem's? A. No, he had on black shoes.

Q. Did you see those white shoes when he came back and put them on? A. I seen him when he came out of the room, he had them on.

Q. Was there any blood stains on them? A. I didn't see any.

Q. You looked at them close enough? A. I just looked at them, white shoes will show anything. I didn't see anything on them.

Mr. Johnson: Will you read that answer to the jury?

(Answer repeated.)

Q. Did you see Anna's white shoes that morning? A. Yes, I took them off the stair step, and carried them upstairs and put them in front of her door.

Q. Did you see those shoes there the night before? A. No.

Q. Had they been freshly cleaned? A. It didn't look like it to me, I just picked them up, and carried them upstairs, and put them in front of her door.

Q. Did she clean them when she came downstairs in the morning? A. No, because she came downstairs a little after I came down, and she was out in the dining room listening to the radio.

Q. Did Bill clean his shoes? A. No, I know

that my polish was sitting on a china closet, that's where it was when I was downstairs, and I was down there before Anna, and Bill was gone when I come down.

Q. Was there any polish used of that bottle? A. Not as I know of.

Q. Were you at your home when the officers came there? A. No, I wasn't.

Q. Did you know that they had taken any clothing from your house? A. They came there and got the clothing when I was there.

Q. Did they ask you if they could take anything out of the house? A. They wanted to look at the things, so they went and looked around, took Bill's working shoes, I told them Bill had on white shoes, they took Bill's black shoes, and they took my husband's pants, I told him his high waisted pants.

Q. Did they ask you if they could look through the house? A. They looked through the h[illegible] before I got back, because when I got there my door was broken open.

Q. Your door was broken open? A. Yes, the lock was broken off.

Mr. Johnson: Cross-examine.

Cross-examination by the Prosecutor:

Q. Who else was in the house when you got there? A. There wasn't anyone there, because I left my baby and Anna there.

Q. You left your baby and Anna there? A. Yes.

Q. So when you left your house— A. I just left Anna and the baby there.

Q. And Anna is a full grown girl, Anna is a defendant in this case, Anna is a defendant in this case, and she was home? A. Yes.

Q. You say you looked at these shoes pretty carefully? A. I took them off the steps, and carried them upstairs. I didn't take them and look at them, because I carried them upstairs, and put them in front of her door.

Q. When Anna Brown went out that night were there any red marks on her shoes? A. I didn't see any.

Q. You say that white shoes are such that you can see any markings on them? A. If you look at them.

Q. Anna in her statement says she cleaned these shoes and took these blood marks off. Did you notice them on there? A. No, I simply saw them, and picked them up like this and carried them upstairs and put them in front of her door.

Q. Even if these markings on them were blood, you didn't notice them on there? A. No.

Q. Anna says she cleaned them off? A. I don't know anything about her cleaning them off, all I know is they were sitting on the stair steps.

Q. You didn't happen to notice a mark on the heel of your brother-in-law's shoes, did you, by any chance? A. No, they were sitting under the bed.

Q. Does that look anything like blood to you? A. I don't know what it is.

Q. Take a look. A. It could be.

Q. They are your brother-in-law's shoes, they are William Albert Brown's shoes, aren't they? A. Yes.

By Mr. Johnson:

Q. Were they the shoes William Brown had on? A. When he came back after my husband called him to go to work, when he came back those are the shoes he had on.

Q. I mean the night of June 16th? A. He had on white shoes.

Q. When he left at that time after supper, did he come back again that evening until he went to bed? A. He didn't come back while we were up.

Q. What time did you go to bed? A. Between nine-thirty and ten.

Mr. Johnson: That's all.

The Prosecutor: That's all.

(At this point a recess for fifteen minutes was taken.)

(After Recess)

ANNA JULIA BROWN, sworn.

By Mr. Johnson:

Q. Where do you live? A. 9 East Madison Street.

Q. How old are you? A. Sixteen.

Q. How far did you go in school? A. Seventh.

Q. Did you quit school? A. When I came home I learned from my sister I wasn't going to school any more.

Q. What do you mean when you came home from Trenton? A. When I came home from Trenton.

Q. When were you sent to Trenton? A. October 28, 1935.

Q. Why were you sent to Trenton? A. Disobedient, and running out on the streets and bad company.

Q. You had not stolen anything, had you? A. Not as I recall.

Q. Were you arrested any time previous to that? A. Previous to what?

Q. The time you were sent away for running around the streets? A. I believe that's the only time I was arrested.

Q. When you were in the County Jail did Mr. Apgar come up to see you? A. Yes, he did.

Q. When was the first time he came up to see you? A. I believe it was the same afternoon that I came in.

Q. Had you made a statement? A. No, I had not made a statement.

Q. What did Mr. Apgar ask you? A. He asked me wasn't I on parole from the State Home for Girls. I said "Yes", and he said if I didn't make a statement I was going back, and he said, I believe it was him, or Steve Atkinson, said my feet was probably there if I didn't make a statement, because all he had to do was to call up Miss Barton, and I would be there.

Q. I am going to ask you to hold down the speed of your voice. It is all right in regard to loudness, but don't talk so fast. A. Yes.

Q. Where were you on the night of June 16th? A. On the night of June 16th I was at Louise Washington's house.

Q. At what time? A. It was very early, I just can't recall what time it was.

Q. Was it after supper? A. Yes, sir.

Q. Who else was at Louise Washington's place? A. Who was at Louise'?

Q. Yes. A. Louise, and Smalley came in, and my brother. Let me see, I don't know whether Julia was there or not, I can't recall. That is all I remember.

Q. Did you have anything to drink when you were at Julia's? A. I had some beer and some whiskey also.

Q. How much beer did you have to drink? A. I don't know, I won't say for sure.

Q. How much whiskey did you have to drink? A. I don't know how much whiskey, I had quite a bit of that.

Q. Do you drink a lot? A. No, sir, I am not used to drinking but that night I took more than I should have taken.

Q. Were you drunk? A. Yes, I was.

Q. What time did you leave Louise's house? A. About quarter after eleven.

Q. Where did you go? A. I went up to the Wonder Bar after my brother, to get him home.

Q. Did you stay on the outside? A. First I went to the back door, and I called for my brother, and he told me that he would be out front, so I went around there and waited.

Q. Did your brother come out? A. Yes, he came out.

Q. Who came out with him? A. Smalley came out behind him.

Q. Did you stand there? A. I didn't stand there. He was called aside and said about clipping Mr. Horner.

Q. Who said that? A. Smalley called brother aside and said he was going to clip Mr. Horner.

Q. How long have you known Mr. Horner? A. I don't know how long I know Mr. Horner, but I know that Mr. Horner has known me since I was a baby.

Q. Did your mother do washing for him? A. Yes, she did.

Q. Did he use to come around to your house? A. Yes, sir.

Q. Did you go to his house? A. Yes, sir.

Q. Have you been around there numerous

times? A. I don't know about numerous times but I have been quite often.

Q. Did Mr. Horner ever give you any money? A. Yes, sir.

Q. What did you purchase with that money? A. I used to buy different things that I wanted.

Q. Did you ever go to Mr. Horner's house with your brother Bill? A. No, sir.

Q. Did you ever go to Mr. Horner's house with Smalley? A. Yes, sir, once.

Q. Did anyone else go with you? A. One girl.

Q. What did you do when you went there? A. We asked Mr. Horner for money.

Q. Did you get the money? A. No, sir, he would not give us none.

Q. Did you leave? A. Yes, we left.

Q. When was that? When did you ask for money? A. I can't recall when it was, about a month or so ago.

Q. Did you go back after that? A. The only time I—let me see, Annabelle Clark and I went there.

Q. Did you go back and ask him for money? A. No, sir, we didn't go there for money. We had seen Mr. Horner in town and Mr. Horner said he wanted us to clean up while he was taking care of the church, but when we went there instead of talking about cleaning up he asked us to go out of the way.

Q. The only time you went around there with Smalley was that one time? A. Yes.

Q. About a month and a half ago. Did Smalley go around there again? A. No, sir, the only time we went around there was when this mess started.

Q. Did you go around with your brother Bill? A. The only time we were all there was this once.

Q. Bill never went with you? A. No.

Q. You are living with your brother and sister-in-law? A. Yes, sir.

Q. Did Mr. Horner ever come to your house at 9 Madison Street? A. Yes, sir.

Q. To whom did he talk? A. He talked with me and my brother some time, and then he talked with my sister and brother-in-law.

Q. Which brother do you refer to? A. Herman.

Q. Did he talk to Bill? A. I don't know, I don't believe Bill was ever home when he came there.

Q. When you left the Wonder Bar on the night of June 16th who was with you? A. Julia, my brother, Smalley, and I.

Q. You walked down what street? A. Walked down Adams Street.

Q. Is the Wonder Bar on Adams Street? A. Yes, sir.

Q. Do you know how far the Wonder Bar is from Commerce Street? A. It is four or five blocks from Commerce Street.

Q. Who was walking with you when you went down the street? A. My brother and I were walking together.

Q. In back or front of Smalley? A. In back.

Q. Was Smalley walking with Julia? A. Yes, sir.

Q. Where did you walk to? A. We walked down to Chestnut and Pratt's alley.

Q. Is Chestnut the next block towards Broad Street? A. No, Chestnut Street is the street before Commerce.

Q. Chestnut Street is the street before Commerce? A. Yes.

Q. It runs the same way as Commerce? A. Between Adams and Chestnut, we were near Pratt's alley.

Q. Did Julia leave you? A. Yes, sir, she did, she left us.

Q. Did Smalley go with her? A. I don't know about him going with her.

Q. You misunderstand the question. Did Smalley leave and go down Broad alone? A. He stayed.

Q. Did Smalley go with you? A. Yes.

Q. Did Bill go with you? A. Yes.

Q. Where did you go? A. We went to Mr. Horner's.

Q. When you got to Mr. Horner's house, was there any light in the house? A. No, sir, no light whatsoever.

Q. What did you do? A. Oh, Smalley went up.

Q. I asked you what you did. A. I stood on the side of the house, out of the way of the cars.

Q. What do you mean, "Out of the way of the cars?" A. Because I had a white suit on.

Q. I show you Exhibit S-7 on the part of the State and ask you if you recognize that house? A. Yes.

Q. What side of the house did you stay on? A. Right here.

By the Court:

Q. Whose house is it? A. Mr. Horner's house.

By Mr. Johnson:

Q. You have been there a number of times? A. Yes.

Q. Do you recognize the house? A. Yes, I do.

Q. Where were you standing when you got around to Mr. Horner's house? A. Right here (indicating) right here (indicating), see.

Q. Right by that window (indicating)? A. Yes.

Q. What did you do while you were standing at

the window? A. Didn't do nothing but stand there to get out of the way of the cars.

Q. Do you know what you were going there for? A. All I know they were tipping up on Mr. Horner, I didn't hear them say nothing about hurting Mr. Horner.

Q. Did you know Mr. Horner was hard of hearing? A. Yes, sir.

Q. Did Bill know he was hard of hearing? A. Yes.

Q. Did Smalley know he was hard of hearing? A. I suppose he did.

Q. Did you go into the kitchen of Mr. Horner's home? A. Yes, I did.

Q. What did you do when you got in there? A. First, I stood between the doorway and the kitchen.

Q. Then, what did you do? A. Then I went over to the desk and I looked at some papers.

Q. Where is the desk? A. In the next room.

Q. Between the door and— A. Right close to the doorway, not quite.

Q. I show you Exhibit S-5 on the part of the State and ask you if that is the desk to which you refer? A. Yes.

Q. When you finished ransacking or going through the desk, what did you do? A. I came back to the kitchen.

Q. Did you at any time hit Mr. Horner? A. No, sir, I didn't hit Mr. Horner.

Q. Did you kick Mr. Horner? A. No, sir, I did not.

Q. Did you do anything to Mr. Horner? A. The only thing I did was when Mr. Horner was being kicked I got scared and started hollering, and I ran to the door, so I goes to the sink and grabs

two basins full of water and poured it over Mr. Horner and brought him to.

Q. Then what did you do? A. So I came back in between the door and the thing again, door and the kitchen.

Q. Was Mr. Horner still in the kitchen? A. Yes, he was still in the kitchen at that time.

Q. Then what did you do? A. I was standing there while Smalley hollered in the man's ear, said that we were gangsters from Philadelphia.

Q. Did you say that to Mr. Horner? A. No, sir, I did not.

Q. Did you yell anything into Mr. Horner's ear? A. Did I yell anything in Mr. Horner's ear? I don't recall yelling anything in Mr. Horner's ear.

Q. Did you step on Mr. Horner's face with your shoe? A. No, sir, I did not.

Q. Are these the shoes which you wore that night? A. Yes, they are.

Q. Are they the spots that you told the Prosecutor you tried to clean off? A. I don't recall telling him that I tried to clean anything off.

Q. These are your shoes? A. Yes.

Q. They are the shoes you wore that night? A. Yes, sir.

Q. Did you see Mr. Horner lying on the floor in the bedroom? A. Yes, I did, in the bedroom, only when he was knocked down and when he was sitting in the middle of the floor.

Q. Did you see him lying on the floor? A. When he was knocked out, I saw him.

Q. Did you throw a blanket over his head? A. No, sir, the blanket was taken from me, it was taken from me.

Q. Where was that first banket taken from you and put on Mr. Horner? A. The blanket was tak-

en from me in the kitchen and the blanket was not put on Mr. Horner.

Q. When was the blanket put on Mr. Horner? A. In the bedroom.

Q. When he was in the bedroom was a blanket put over his head? A. I didn't see no blanket over his head in the bedroom.

Q. Where was Mr. Horner when you left? A. In between the bed and the stove.

Q. Could you see him very plainly? A. You could see his feet very plain after you started out.

Q. Could you see the form of his body? A. You could see his feet, legs, rather.

Q. Were you very close to Mr. Horner at any time? A. Not very close to him. The only time I got close to him was when I poured that water over him.

Q. How close were you to Mr. Horner in the bedroom? A. I was about this far from Mr. Horner, see where my hand is.

Q. Was he lying down or sitting? A. Sitting on the bed, leaning not all the way back.

Q. When you left he was on the floor? A. Yes, sir.

Q. You left the house first? A. Yes, I left first.

Q. You say all the time you were in the room you never touched Mr. Horner? A. No, sir, I didn't touch Mr. Horner.

Q. Did you suggest at any time after leaving the Wonder Bar that you, Smalley, and Bill should go down to Mr. Horner? A. Not that I recall.

Q. Did you take any money from Mr. Horner's place? A. The only thing I picked up from the floor I handed it—somebody dropped a nickel and I picked it up and handed it to him.

Q. I show you Exhibit S-11 on the part of the

State. Where did you first see that medal? A. This medal?

Q. Yes. A. This looked like my own medal. I have one something like that or something like it or something like that one, one of these things in the middle.

Q. Where did you see it? A. This was brought from the State Home for Girls. Eva Johnson gave that to me.

Q. Who was Eva Johnson? A. Eva Johnson was a girl in the State Home for Girls at the time I was there.

Q. Did you have it on that night? A. I don't recall if I had it on or not.

Q. Do you recall taking it off when you got home? A. No, sir, I don't, because I was drunk.

Q. Do you know what this medal says? A. No, sir, I don't, but it has something on there about God or something, I don't know.

Q. Was this girl who gave you this medal at the State Home a colored girl? A. Yes, sir, colored.

Q. She was a colored girl? A. Yes, sir.

Q. Why did she give it to you? A. I don't know. I don't know why she gave it to me. You know, she was getting ready to leave, to go to another institution, so she was throwing things away, so I said, "Eva, if you give me that I will keep it for luck," I said, like that.

Q. I show you Exhibit S-12 on the part of the State. Did you ever see that razor before? A. I did.

Q. Where? A. Mr. Horner's.

Q. When did you see it the first time at Mr. Horner's? A. Oh, the night that we were there.

Q. Is that the first time? A. Yes, sir.

Q. How do you distinguish that razor from any

other razor? A. Because it was near the window and the light shone in through a little bit and I looked down and spied the razor.

Q. You just say that was the razor? A. That was the razor, because you can tell by the nasty looking razor.

Q. Did you have that razor? A. Did I have it? No, sir.

Q. Did Mr. Horner ever buy you anything to drink? A. Did he ever buy me anything to drink?

Q. Yes. A. Not since I have been home he hasn't bought me anything to drink.

Q. Had he bought you anything to drink prior to that? A. A long, long time prior to that, Mr. Horner used to keep wine and whiskey at that house and we used to go around and work for him and he used to give us some of that.

Q. Did you try to get out of the house? A. Yes, sir, but the back door was locked, I could not get out.

Q. What do you mean, the back door was locked? A. The door we came in was locked.

Q. How was it locked? A. It has a night-latch on but the night-latch wasn't locked. I could have got out if it wasn't for that but it had the key placed in the door and locked the door.

Q. Did you have the key? A. No, sir.

Q. Did you know you were going to Mr. Horner's house to rob him? A. I won't say thoroughly, because whiskey will make you say anything.

Q. Do you remember everything that night? A. I won't say everything.

Q. Were you drunk? A. I was very close to it, so I might as well say I was drunk.

Q. When you are drunk are you very clear-headed? A. Yes, sir.

Q. You can remember quite a lot? A. Yes, sir,

because sometimes drunken people can tell you more than sober people.

Q. When you left Mr. Horner's home was Mr. Horner lying on the bed? A. No, sir, he was not lying on the bed.

Q. Was he lying on the floor? A. Yes, sir, laying on the floor, between the bed and the stove.

Q. On his face? A. I don't know whether he was on his face or not. I can't say that.

Q. Where did you go from Mr. Horner's home? A. We went to Sam's Yockamein place.

Q. What did you order? A. Fish and two yocs.

Q. Did you make the order? A. Did I make it?

Q. Did you do the ordering? A. I told the man.

Q. You told? A. Told the man but I didn't know what they wanted, they had to tell me what they wanted.

Q. Who paid for it? A. I paid for it.

Q. How much did you pay for it? A. Let me see, about sixty-five cents.

Q. Where did you go after you left Mr. Horner's house?

Mr. Johnson: Strike that, please.

Q. Where did you go after you got out of the restaurant? A. Oh, we started for home.

Q. Who do you mean by we? A. Smalley, Bill and I.

Q. Does Smalley live in the same direction you do away from the restaurant? A. He lives away from the restaurant. You can come through the laundry and come across Adams Street and he lives right down on Hoffman.

Mr. Johnson: Cross-examine.

Cross-examination by the Prosecutor:

Q. Anna, this little religious medal which has been marked Exhibit S-11, did you ever wear that? A. Did I ever wear it?

Q. Yes. A. Yes, I have worn it.

Q. What kind of fastener does it have on it, do you remember? A. What kind of fastener? I don't think it had any. The one I had didn't have any fastener on it at all.

Q. It was all one piece? A. Not one piece. I had to tie a string to it to fasten it.

Q. And this night that you say you started to drink was about what time when you started to drink? A. When I started drinking?

Q. Yes. A. Let's see. It was after 8 o'clock.

Q. What time did you stop drinking? A. I don't know, because the Lord knows when I stopped.

Q. Did you stop drinking before you went down to the Wonder Bar? A. Oh, yes.

Q. You remembered that your brother had gone down to the Wonder Bar? A. Yes, sir.

Q. And at that time you remembered how to walk from Dewees' house down to the Wonder Bar? A. Yes, sir.

Q. And you went down there and you remembered talking to Mr. McGuire outside on the steps? A. He said something to me but I don't remember what it was.

Q. But you remember saying it? A. Yes, sir.

Q. And then you remember that you did not go inside the Wonder Bar? A. Yes, I did not go inside.

Q. And then you remembered when they came out of the Wonder Bar, did Smalley come first? A. My brother came first, I said.

Q. You are quite positive of that, that your

brother came first? A. Yes, sir.

Q. Did Smalley come second? A. Yes, sir.

Q. And then after that Julia Curtis or Julia Washington came out of the Wonder Bar? A. Yes, sir.

Q. And she was the last one who came out? A. Yes, sir.

Q. You remember that all right? A. Yes, I do.

Q. And then you started to walk out Adams Street, Julia Curtis and Burrell were in front and you and your brother were walking together in back, you remember that all right? A. Yes, sir.

Q. Then you got down to Pratt's alley and Julia Curtis left and went down to her house, you remember that all right? A. Yes, sir.

Q. And you remember that when Smalley Burrell and your brother were on the porch at the Wonder Bar that you heard them say something about going down to Mr. Horner's? A. Yes, I did.

Q. And clipping him? A. Yes, I did.

Q. You remember that all right? A. Yes, sir.

Q. Then you walked on down Adams Street to Julia Curtis' and then Julia left and the three of you started to go over to Mr. Horner's house? A. Yes, sir.

Q. And that time it was decided you were going to break in and steal the money, is that right? A. Yes, sir, something like that.

Q. Did you all three walk from Pratt's Alley down to Mr. Horner's house together? A. Yes, we walked down. What's that street? Commerce Street to Jefferson and came in the gate.

Q. Came in the gate? A. No, we jumped the fence on Commerce Street, that's right.

Q. You had on your white suit? A. Yes, sir.

Q. And you hid back by the house so that the

cars going by would not make your white suit stand out? A. Yes, sir.

Q. And you remember that all right? A. Yes, I do.

Q. And you remember why you did it? A. Yes, I do.

Q. So up until that time you knew everything that you were doing? A. Yes, sir.

Q. And there wasn't anything that you have forgotten to tell us? A. There wasn't anything?

Q. There isn't anything you have forgotten to tell us about walking down to Mr. Horner's house? A. That's all I know about the walking down to Mr. Horner's house.

Q. And you are positive that is correct? A. That is all correct that I remember.

Q. And you remember positively that you knew enough at that time to hide against the back of the house so the cars would not make your white suit stand out? A. Yes, sir.

Q. And that was your idea? A. I stood aside. I was told to stand aside so the cars would not see me.

Q. Who told you that? A. Smalley told me that, he told me to stand aside, "Because you will give us away as you got that white suit."

Q. Do you remember what he said to you? A. Yes, I remember.

Q. Do you remember going into Mr. Horner's house? A. Mr. Horner came to the door. First the screen door was ripped off and I guess he must have heard.

Q. Who ripped the screen door? A. Smalley.

Mr. Johnson: I object to that. That is not proper cross-examination. I asked her nothing about who ripped off the door.

The Prosecutor: If your Honor please,

this is one of the defendants and the general grounds have been covered by counsel and I think it is proper cross-examination.

Mr. Johnson: I said nothing in my direct-examination about Smalley Burrell or Bill Brown going into the house.

The Court: Having touched in direct-examination on part of the incident, on cross-examination it may be developed.

Mr. Johnson: May I have an exception?

(Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

Q. Who went in the house or, rather, before you tried to get into the house, who tore the screen door in the back door? A. Smalley.

Q. You remember that all right? A. Yes, I do.

Q. And then did he put his hand inside the screen door and undo the hook? A. Yes, sir.

Q. Then the door, the kitchen door itself was locked? A. Yes, sir.

Q. Did he rattle that trying to get in? A. Yes.

Q. And just after he had finished doing that, Mr. Horner came to the door, didn't he? A. No, sir, he had tried some keys. First he had a couple of keys on the ring and he tried those and they wouldn't work and he put full force against the door and he couldn't get it open and Mr. Horner must have heard him and got up, because it made a pretty loud sound.

Q. You remember that? A. Yes, sir, I do.

Q. Did Mr. Horner come to the door? A. Mr. Horner came to the sink first and pretended he was getting a drink of water and stuck his head out.

Q. You heard the water running? A. Yes, sir, I heard the water running.

Q. And Mr. Horner came to the door and opened the door? A. Yes, stuck his head out.

Q. When he stuck his head out, what happened then? A. Smalley hit him.

Mr. Johnson: I object to that. It was not asked on direct-examination.

The Court: Well, it goes to the veracity of the witness, by reason of the confession that was made here and I think I will have to allow it.

Mr. Johnson: May I have an exception?

(Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

Q. Now, will you answer?

The Court: He is trying to develop also her recollection, how clear she was. She said she was clear-headed. Proceed.

The Prosecutor: Will you repeat the last question?

(Question repeated.)

Q. Now, when Smalley hit him, did Mr. Horner go down on the floor? A. No, sir, he did not go down.

Q. All right. Who hit him next after Smalley hit him the first blow? A. My brother hit him next.

Q. And when your brother hit him did he go down on the floor? A. No, sir.

Q. And who hit him next? A. Him and Smalley was tussling, then finally my brother took a shot

at him and somehow Mr. Horner got knocked on the floor by Smalley.

Q. You remember that all right? A. Yes, I do.

Q. Then he went down on the floor, is that right? A. Yes, sir.

Q. Where did you get the blanket or coat that you had around your head? A. I was sent in the other room to get a blanket to put around me so the white wouldn't show, because one of the curtains was knocked down and somebody was next door.

Q. Who sent you in to get the blanket? A. Smalley told me to put a blanket around me on account of my white suit.

Q. Do you remember that all right? A. Yes, I do.

Q. And then after Mr. Horner was tussling with your brother— A. He was not tussling with my brother.

Q. Tussling with Smalley and then your brother hit him, was that when he fell down on the floor? A. No, sir, he was almost going down when my brother took a shot at him. I told you he didn't go down. So Smalley took another shot at him and the man went down when he was wrestling, fell over the table and broke it.

Q. And went down on the floor? A. Yes, sir.

Q. And broke the table? A. Yes, sir.

Q. When he was down on the floor did you say anything to him about getting some money? A. No, I didn't say nothing to Mr. Horner about getting any money.

Q. Who did? A. Smalley.

Q. Will you repeat what Smalley said to Mr. Horner? A. What he said to Mr. Horner? Yes, sir.

Q. While he was on the floor. A. Yes, sir, ex-

cuse my language, please, but I have to repeat what was said. He said, "Where's your God damn money?" He said, "We are gangsters that were sent down form Philadelphia to get your money and if you don't get it, why I am going to kill you."

Q. And you were there during that time? A. Yes, I was.

Q. Up until that time had you searched or gone through any of the papers in the house? A. No, sir, not that time.

Q. But after you heard that you did go in and search through the desk? A. I looked at some papers. I don't know I was searching but I looked at some papers.

Q. Didn't you pull all the papers out of the desk? A. No, I did not pull. I saw papers out. Somebody must have went there after I was there.

Q. What were you looking for? A. I don't know what we was looking for. I was looking at the papers.

Q. That is the first thing you have forgotten? A. Yes, sir.

Q. After you went through his desk did you go upstairs and ransack? A. No, I didn't go upstairs. My brother was upstairs.

Q. You remember that all right? A. Yes, sir.

Q. So that your memory comes back to you? A. Yes, sir.

Q. While he was on the floor out in the kitchen, Mr. Horner, was he moaning or groaning? A. Yes, he said, "Oh, please don't do that, please don't do that."

Q. And you stayed there? A. I was standing between the door and the kitchen. I couldn't get out. There was no way in the world to get out.

Q. After you heard the moaning and groaning,

you went in his desk? A. I went in his desk? I looked at some papers on the desk, I told you.

By the Prosecutor:

Q. At any time while he was on the kitchen floor, was Mr. Horner entirely unconscious? A. I don't know whether he was unconscious, or not, I can't say, because he was all breathing, all like that, I guess he was just naturally scared to get up.

Q. You think that would be so? A. Yes, I guess that's why, because I don't think he was knocked out.

Q. As a matter of fact, didn't you throw that water on him while he was in the kitchen to bring him back to consciousness, that you and these other fellows with you could get down and find out where his money was? A. No, sir, because I became afraid, that's why I threw the water on Mr. Horner, because I don't want anybody to be dying around me.

Q. After you threw water on him they asked for the money? A. Who asked for the money, my brother was not around, my brother was upstairs looking around.

Q. Your brother was searching the house? A. He was upstairs, yes.

Q. You and Smalley were in the kitchen? A. I was standing between the doorway and the kitchen. I got scared, and I tried to beat it, I couldn't get out. I ran to the sink after I tried the door and found I couldn't get out. I poured two basinfulls of water on Mr. Horner, because I was afraid the man was going to die, or something.

Q. And then at that time did Mr. Horner come to and say that he would get the money? A. When Smalley told him, asked him, said something about "Will you get the money, will you lead us to the

money if I let you up,'' something like that, and he said ''Yes''.

Q. Did both you and Smalley help him from the kitchen into his bedroom? A. I helped him up a little, but Smalley helped him up most.

Q. Was he groaning and moaning all the time? A. I don't know, I can't recall whether he was moaning, or not.

Q. But you both of you helped him up? A. Yes, we helped him up.

Q. To go in and get his money? A. I helped him up, I didn't help him to go after his money.

Q. You knew at the time you helped him up, it was because he was going to show you where he kept his money? A. Yes, he said he was going to get some money.

Q. When he said that you got kindhearted and helped him up? A. I didn't get kindhearted on account of that, if I had been so hardhearted I would not have found out where the money was.

Q. Then you would not have found out where the money was? A. So what, that was not worrying me.

Q. While you were in the dining room did you see your brother hit him in there? A. Did I see my brother hit him there, no, not that time, no.

Q. Any time while he was in the dining room did you see your brother hit him? A. Just once.

Q. And how about Smalley Burrell? A. Yes, he was hit.

Q. Do you remember your brother having a razor up to Mr. Horner's throat? A. Yes.

Q. What did he say when he had the razor up to his throat? A. ''I ought to cut your fucking throat''.

Q. You remember that all right? A. Yes, I do.

Q. You stayed there then? A. Well, there was

nothing for me to do, I couldn't get out.

Q. At the time he had the razor up against Mr. Horner's throat, was he moaning or groaning at that time? A. No, he was not moaning, he was going backwards and forth like this.

Q. Did you have a chance to look at his face right then? A. His head was going back and forth, I don't know what he looked like, I don't know what he looked like.

Q. After your brother put the razor up at his throat, and said he ought to cut his throat, who told him not to do it? A. Who?

Q. Yes. A. Smalley said "Don't do that".

Q. After he took the razor down, did your brother, Bill, hit Horner again? A. No, sir, I didn't see that, I can't say, I didn't see that.

Q. Did you see Smalley hit him again? A. Not that time, I did not.

Q. After that did you see Smalley hit him again? A. When Smalley said he was going to put him to sleep.

Q. So when the man apparently wasn't saying anything, wasn't doing anything, Smalley hit him again? A. He did hit him again for safety first.

Q. Who kicked him? A. Smalley kicked him, Smalley kicked the man when he was out in the kitchen, but he did not kick him in the front room.

Q. What did he kick him with? A. His shoe.

Q. You left there? A. Yes, we left.

Q. And you went out the kitchen door, that's the way you went out? A. Yes.

Q. Who went out of the kitchen door first? A. I went out first.

Q. Who came out second? A. My brother came out second.

Q. Who came out third? A. Smalley came out third, because he was looking for some kind of a

handkerchief, because the one he had was all packed with blood, and blood was flowing all over everywhere, because it was so full, he wanted to find another one, and he hesitated a few minutes, and couldn't find one.

Q. And then you got outside. Did you get any money while you were inside? A. Did who get any money?

Q. Any of you? A. I didn't find any money.

Q. Do you remember picking up a quarter? A. A nickel or something I handed somebody.

Q. Fell out of the dead man's— A. Somebody dropped a nickel, I picked it up.

Q. When you got outside you went down to the Chinese restaurant? A. Yes.

Q. And did the three of you talk it over on the outside, and two go down together, isn't that right? A. No, not down together, we had not started. My brother said he was going down Jefferson Street, and would meet Smalley and I down Adams and Chestnut, so we went on around.

Q. Who went out Adams Street, your brother? A. My brother went out Jefferson Street, and we was at Chestnut and Adams.

Q. Which way did you go? A. We went across, jumped the fence, jumped the fence and went down to Adams and Chestnut.

Q. And the reason that the three of you decided to do that was so that you would not be seen together? A. I don't know, I guess that's right, I don't know whether it was.

Q. You remember that all right? A. Go ahead.

Q. When did you get drunk? A. When did I get drunk, I told you in the evening, I was down to Louise's. I didn't go in the Wonder Bar.

Q. Then you went down to the restaurant and chow mein place? A. Yes.

Q. And you paid for the two yockameins? A. Yes, I was told to do it, because one of the comrades had blood on his shirt.

Q. One of the comrades? A. Yes, one of the boys had blood on his shirt, and he was afraid the Chinaman might get suspicious or something.

Q. Which one had blood on his shirt? A. Smalley.

Q. Where did he have it? A. Up here (indicating).

Q. And then you all three of you stayed in there, and you had a fish sandwich? A. Yes.

Q. And then you left there, and when you left the chow mein place, about what time was it? A. I don't know what time it was.

Q. Did you and Albert go home together? A. Yes, we did.

Q. What streets did you walk down? A. We went through Hoffman Street.

Q. Where is the chow mein place? A. On Washington Street.

Q. You left Washington Street, and what was the next street you went to? A. We came through by the laundry.

Q. Back to Hoffman Street? A. Yes, we came through by the laundry, and right from the laundry to Hoffman Street.

Q. And that's the way you got home? A. Yes.

Q. And did you and your brother both walk home together? A. We had hold of each other.

Q. You walked home together? A. Yes, I had my arm around my brother, because he was staggering.

Q. He started to stagger then? A. Yes, he was staggering all the while, but I had my arm around him.

Q. You weren't staggering? A. You know what I mean I was out in my head.

Q. Did you and your brother go home with Smalley Burrell? A. We walked past his door, but he hesitated in back of us, and we walked ahead.

Q. How far ahead of him were you? A. Let me see, about as far as that man is from the Jury.

Q. Which man do you mean? A. We was ahead of him, he was in back of us, that man over there, sitting there.

Q. When you left him at his home, did you say good night to him? A. We said "We will see you".

Q. Said "We will see you"? A. Yes.

Q. At that time you were right on the street, right in front of Burrell's home? A. He was in front of Burrell's home, we had passed his home.

Q. You had gotten a little by his home? A. Yes.

Q. At that time he was going in the door? A. He was coming down towards the door.

Q. You said "Good night, we will see you later"? A. We said "We will be seeing you".

Q. You said when Burrell came out of Mr. Horner's home he had a handkerchief that was all full of blood? A. Yes, sir, drying hands and things.

Q. He got that much blood on a handkerchief through drying his hands? A. Yes, because they were wringing wet.

Q. I suppose you went right back to help Mr. Horner, did you? A. Went back to help him where, help him what?

Q. To help take care of him? A. No, I did not go back, no, sir.

Q. Did you send anyone back? A. No, I did

not send anyone back, because I was scared myself.

Q. You didn't go back there to help him take care of his wounds? A. I did not go back to Mr. Horner's house. The cops didn't give me a chance to get nowhere.

Q. What time did you get up the next morning? A. I got up five minutes to nine next morning.

Q. And the cops didn't get down to your house until about one or two o'clock? A. I was working around the house.

Q. You thought it was more important than going back to help this man lying on the floor dying, did you? A. Because my sister-in-law she was busy, too, and she was sick, and I had to help her out.

Q. When you left Mr. Horner's home did you say you were the first one to go to his house? A. I came out.

Q. Did you come directly from the dining room out to the kitchen? A. Yes, I had to wait until the door was opened.

Q. And then went on outside? A. Yes.

Q. Who opened the door? A. Smalley opened the door.

Q. Where did he get the key? A. I don't know where the key come from, somewhere near the window sill, I don't know, I can't say for certain.

Q. Who locked the door? A. Smalley locked the door.

Q. And all these things you have just told us are correct? A. Are all correct, as far as I can remember.

The Prosecutor: That's all.

By the Court:

Q. You say you put a blanket around yourself

inside the house? A. Yes, I was told to put the blanket around me.

Q. Who told you that? A. Smalley told me, your Honor.

Q. How did you know where the blanket was? A. I had been to Mr. Horner's home before. He keeps it folded at the foot of the bed somewhere.

Q. You say it was taken off of you? A. It was what?

Q. The blanket was taken off of you? A. Yes, off in Mr. Horner's house.

Q. Who took it off of you? A. Smalley came over and took it from me.

Q. He told you to put it on so that they couldn't see you, or see your white dress, and then he told you to take it off? A. No, I was told to get another one in the place of that, because there was two of them.

Q. Why were you told to take it off? A. Because he was going to put that around Mr. Horner's head, or something.

Q. Was that just before you left? A. No, when we first got around the place, your Honor.

Q. Why did you go to the Wonder Bar? A. I went after my brother to come home.

Q. Do you usually go up to the Wonder Bar to get your brother to go home? A. Most of the time.

Q. Most of the time you find him there? A. Yes, sir, that's where he hangs out at.

Q. How often a week do you go up to the Wonder Bar to get your brother? A. I don't know how often, I knew he was up there that night, he usually goes Friday and Saturday nights, and sometimes through the week.

Q. You say you were home on parole? A. Yes, sir.

Q. And on parole are you supposed to be out at eleven fifteen at night? A. Miss Barton didn't give me any time for me to go to be in when I come home from Trenton. She didn't leave any special time I should be in.

Q. Your brother can find his way home without you? A. Yes, but I have these—see, my sister-in-law said if I was on the street with my brother, somebody like that, it would not be so bad as me walking there by myself.

Q. Why didn't you go home from Louise Washington's place? A. Because it was late, and I didn't know whether to stay at Louise's, or not, all night.

The Court: That's all.

By Mr. Johnson:

Q. How old do you say you are? A. Sixteen.

Q. When is your birthday? A. December 16th.

Q. How long has your mother been dead? A. About five years.

Q. Do you recall the year in which she died? A. '32.

Q. When did your father die? A. I don't know when he died, I think he died about '34, something like that, I don't know for sure.

Q. Was it after your mother died? A. Yes, sir.

Q. Did your father live there with you? A. No, sir.

Q. Where was he? A. He was living in Port Norris, New Jersey, working down there.

Q. Did he ever come to see you at your home? A. I ain't seen him.

Q. When was the last time you recall seeing your father? A. When I was nine, about eight or nine years old.

Q. Was your mother working? A. Yes, sir.

Q. Were you working? A. No, sir.

Q. Were you going to school when you were sent to the State Home? A. Yes, sir.

Q. Who had you arrested before you were sent to the State Home? A. I think my sister-in-law, if I am not mistaken.

Q. Why did she have you arrested? A. Going around in bad company and would not mind.

Q. What do you mean, what bad company? A. Running around the streets late hours at night.

Q. Was she the one who had control over you? A. Yes, sir.

Q. What time did you get in? A. Sometimes like when I would entertain, or something like that, I would not get in until about four thirty, sometimes.

Q. What do you mean, you would entertain? A. I used to entertain at cafes.

Q. When did you start to entertain at cafes? A. About 19, I believe 33 or 34.

Q. Were those cafes in and around Paulsboro? A. Yes, they were in Paulsboro, and Mayor Wert knew we used to entertain there.

Q. Did you get paid? A. Yes, we did.

Q. Who paid you, the proprietor of the cafe? A. Yes, the people at the place, and we used to get tips and things.

Q. Did you have regular places to go entertaining? A. Yes, sir.

Q. Did you have anything to drink at those places? A. I didn't drink at the time, the only thing we drank was soda water.

Q. What else did you do at these cafes other than entertain by singing and dancing? A. That's all I did, singing and dancing.

Q. When Mr. Apgar made the statement to you

about your going back to the State Home, what did that mean to you? A. What did it mean to me?

Q. Yes? A. Well, I figured like this, I think, well, they didn't even give me a chance to get my feet on the outside, before they come threatening me to go back to the State Home again.

Q. Was that the reason you made your statement? A. Yes, sir, and after all that wasn't exactly the reason, either, because after all, if I said that I had not been to Mr. Horner it would have been lying, because if he said those things were found at my home, I can't say a word, that shows we had been to Mr. Horner's home.

Q. What do you mean? A. His sister identifying the things, there was no way in the world I could lie and say we had not been to Mr. Horner's home, so I said I might as well come on out and say we had been to Mr. Horner's home.

Q. What things were identified by Mr. Horner's sister? A. The razor and the watch and things.

Q. Was your mother living when you were dancing at the cafes? A. No, sir.

Q. And your father wasn't there either? A. No, sir, my father was not there.

Q. Was your sister-in-law sickly? A. Was she sickly, I can't recall whether she was sickly, or not.

Q. How many children did she have at that time? A. She got one, she had one.

Q. Was your brother working? A. Yes, sir.

Q. Where was he working? A. I don't know where he was working, but I know he was working.

Q. Did he pay any attention to you? A. Yes, he did.

Q. Did he try to make you behave? A. Yes, sir.

Q. Did your brother, Bill, pay any attention to you? A. My brother Bill wasn't living with us at the time. He was staying in Camden.

Q. Did your brother Bill ever take you around drinking at any time? A. No, he never took me around drinking.

Q. He saw you drinking at Julia's, didn't he? A. He didn't take me around drinking, I drunk of my own accord.

Q. He saw you drinking around there, didn't he? A. I don't know whether he seen me, or not. I can't recall whether he seen me, or not, because he got up and went out.

Q. He was there, wasn't he? A. I guess he was, yes, I don't know.

Q. What do you mean, you guess he was? A. He was there, I guess he was, because I had been drinking before he even got in the door I started drinking.

Q. You say you were drunk, yet Mr. Lord has asked you a number of questions, and you say that you are positive that those questions, to which you gave answers, or those answers to those questions you gave, were all correct? A. Yes, they are correct, as far as I can remember they are correct.

Q. As far as you remember, what do you mean by that? A. As far as I remember they are correct, that's all, I can't remember all.

Q. Do you still say you were drunk? A. Yes, I was drunk.

Q. Did you in a drunken stupor make some of these answers? A. What?

Q. Did you in a drunken stupor make some of these answers up? A. I don't know whether I did, or not, I am going to tell the truth.

Q. You just told Mr. Lord these answers you have made were correct? A. I told him they was correct.

Q. You told him that you remembered everything that happened? A. I told him I remembered everything.

Q. You just told him that right now? A. I said, I told him I remembered everything?

Q. Did you remember everything, I am not asking you to remember something— A. Where?

Q. Let me finish, Anna. A. Excuse me.

Q. I am not asking you to remember anything that you didn't tell him. A. I am not doing that.

Q. Everything that you told him is the truth, is that right? A. No, sir, I made some up.

Q. When did you make it up? A. That has been made up. The reason why I am going to tell you, the reason I did make these here statements is because after all they are talking about me, and making statements, and going back to the State Home, I would go back to the State Home, anyhow, if I didn't make something up, I will go back there, I am going back anyhow. I didn't know everything that happened, but I just imagined it may be something that happened, just to make a statement.

Q. What were the things you made up, do you recall? A. Yes, sir.

Q. What were they? A. Smalley didn't kick the man, but he hit him.

Q. What else do you remember that you made up? A. Wait a minute, I can't think of no more.

Q. You made a statement of everything right on down to the time you left the Wonder Bar, everything that had been done in there by you, by your brother, and by Smalley? A. Yes, sir.

Q. You remember that they all happened just that way? A. I won't say for sure, but I think so, I don't know.

Q. Did you make those answers up? A. Did I make them up? Yes, I guess I did.

Q. Did they actually happen? A. I won't say because I am not sure whether they happened or not because I was scared.

Q. You say you still say it because you were scared? A. Yes, sir.

Mr. Johnson: That is all.

By the Prosecutor:

Q. You know all those questions that I asked you a few minutes ago? A. Yes.

Q. Did you tell me the truth when I asked you the questions right now? A. Some of them were true.

Q. Which ones were not true? A. If you ask me I can tell you, they being cluttered up on my mind.

Q. You gave me a statement on June 17th? A. Yes, sir.

Q. You gave that same statement today word for word? A. Yes, sir.

Q. Were parts of those two statements not true? A. I told you Smalley did not kick the man.

Q. That is the only thing. What else? A. I can't say.

Q. Is there anything else that you think of that you just told us that is incorrect with the exception of the one statement about Smalley kicking the man. A. Is incorrect?

Q. Yes. A. Wait. That is all I can think of.

Q. That is the only thing you told us that is wrong? A. Yes.

Q. Everything else actually happened? A. Yes, it happened.

By Mr. Johnson:

Q. You remember it actually happening? A. Yes, sir, yes, sir, yes.

Mr. Johnson: That is all.

The Court: Ladies and gentlemen of the jury, for the first half hour after ten o'-clock I have Orphans' Court matters. I have told counsel that so I will not ask you to return to the court house until ten-thirty. The officers of the court will take charge of the jury at this time.

(A recess was taken until ten-thirty o'-clock, July 15, 1937.)

FOURTH DAY.

Before Woods, *J.* and a Jury.

Appearances:

For the State, Prosecutor Lynwood Lord.

For the Defendants, Frank L. Johnson, Esq.

Woodbury, N. J., July 15, 1937.

Trial of the case resumed at 10:30 o'clock, A. M., pursuant to adjournment, in the presence of the defendants and counsel for the respective parties.

CLARENCE PORCH, sworn.

Mr. Johnson: If your Honor please, on account of the fact that this man has to get

back to work I am calling him out of turn.

The Court: I suppose there is no objection.

The Prosecutor: No objection.

By Mr. Johnson:

Q. Mr. Porch, where do you live? A. At the present time I live in East Greenwich Township.

Q. Prior to living in East Greenwich Township were you a resident of Paulsboro? A. I was.

Q. When did you move to East Greenwich Township? A. About five weeks ago.

Q. Do you know Smalley Dilks Burrell? A. I do.

Q. What is your occupation? A. Supervising foreman on the WPA.

Q. How long have you had that position? A. A year last April.

Q. How long have you known Smalley Dilks Burrell? A. A year last April.

Q. Has he been working with you on these various projects? A. He has.

Q. All the time? A. No, I am transferred from one job to another. I was transferred in February to National Park and I stayed there two months and came back to Paulsboro.

Q. On these projects of which you have charge and where you had Smalley Dilks Burrell working, have you had a number of Paulsboro's residents working there? A. Yes.

Q. Are there a good many who are in the same circumstances and social life as Smalley Dilks Burrell? A. Yes.

Q. Have you ever heard any of those people say anything about the pugnacious character of Smalley Dilks Burrell? A. No.

The Prosecutor: Objected to.

The Court: What is the objection?

The Prosecutor: My objection is that counsel has not laid the proper foundation for the character of the witness.

Mr. Johnson: Your Honor, I have shown that he lived in Paulsboro.

The Prosecutor: I withdraw the objection.

Q. You have had plenty of opportunity to observe Smalley yourself? A. I have.

Q. Do you think very highly of Smalley?

The Prosecutor: Objected to.

The Court: Yes, it is not what he thinks. It is the others who know the defendant.

Q. Did Smalley get along with these people who were working with him?

The Prosecutor: Objected to as immaterial and improper.

The Court: Objection sustained.

Q. Did any of these people say to you that Smalley had gotten into a number of fights.

The Prosecutor: Objected to.

The Court: Well, I will allow the question.

The Witness: No.

Q. In all the time that you had any of these people working with you did they say anything detrimental about Smalley Dilks Burrell? A. No.

Mr. Johnson: Cross-examine.

Cross-examination by the Prosecutor:

Q. Did you know that his wife had him arrested for failing to support her and the baby? A. Yes.

Q. That was while he was working for you? A. That was the night that this happened.

Q. Are you sure of that? Wasn't it a week before this affair happened? A. I think it was the night. He was down to my house the same evening after $8 to pay his fine.

Q. Outside of this one occasion you didn't see him that night? A. No.

Q. You don't associate with him except on the job? A. If I see him on the street I probably stop and converse with him and go on.

Q. You are not down where they are, down at the Wonder Bar? A. Yes, around election time I did.

The Prosecutor: That is all.

WILLIAM ALBERT BROWN, sworn.

By Mr. Johnson:

Q. Bill, how old are you? A. Twenty-three.

Q. Speak up so the jury can hear you? A. Twenty-three.

Q. How long have you lived in Paulsboro? A. I was born in Paulsboro.

Q. Speak louder. A. I was born in Paulsboro.

Mr. Johnson: Do not speak to me, speak to the stenographer and the jury. If you do that I can hear you. Did the jury hear that he said he was born in Paulsboro?

William Albert Brown—Direct.

Q. Do you know Anna Julia Brown? A. Yes, sir.

Q. Is she your sister? A. She is.

The Prosecutor: Keep your voice up.

Q. On the night of June 16th after supper how were you dressed? A. I had my black pants on with the high waist band, white shoes, a hat, and a shirt.

Q. What color shirt? A. A white shirt.

Q. A white shirt? A. Yes.

Q. Where did you go after you left your home? A. I brought my nephew, that is a little baby, I took him with me and I went down Hoffman Street.

Q. Where did you go? A. I went right to my sister-in-law.

Q. What is her name? A. Ruth Brown.

Q. Did you leave your sister's baby there? A. No, I took him to the barber shop.

Q. Did you take him back home? A. I took him back home.

Q. Talk louder. A. Yes, I took him back home.

Q. Where did you go from there? A. I brought the baby from the barber shop to Louise and Julia and I went down to the Mayor's office.

Q. Down to the Mayor's office? A. Yes.

Q. Then, did you come back after you finished at the Mayor's office to your sister's? A. I left them and went home and took the baby. I left them and took the baby home.

Q. What did you do? A. Combed my hair and came back up.

Q. Where did you go? A. I came to Hoffman Street.

Q. At whose place on Hoffman Street did you go? A. Smalley Burrell's house.

Q. Where did you go then? A. I stayed there and talked to Julia's daughter until his mother-in-law came, and I left there.

Q. Where did you go? A. I went down—I think my sister-in-law's house again.

Q. Had you had anything to drink up to this time? A. Had not had a drop.

The Court: What time was this? I am trying to fix the time.

The Witness: Between eight and eight-thirty.

Q. Where did you go then? A. I came out of the house and I met Smalley.

Q. Where? A. Going through Hoffman Street.

Q. Where did you go? A. I think—we didn't leave there then. Smalley had a bag in his hand and he asked me if I wanted a drink.

Q. Proceed. Tell me what happened. A. I told him, "You don't have anything." He said, "I have in the bag," so Smalley had only half a pint of whisky in the bag and I drank it.

Q. On the street? A. I don't know. I know him and I were the only ones drinking that.

Q. Then what did you do? A. I left Smalley.

Q. Where did you go? A. I came back to the house, and then I went to the poolroom, and I meets Smalley at the Wonder Bar again.

Q. What time was it that you met Smalley at the Wonder Bar? A. Between eight-thirty and quarter to nine.

Q. Did you and Smalley talk together? A. No, we didn't then.

Q. Did you and Smalley go anywhere then? A. Smalley had another pint of whisky then.

Q. Where did you go? A. We went across the street from the Wonder Bar.

Q. To whose house? A. I think it is Harvey Muse's house.

Q. What did you do in Harvey Muse's house? A. We drank some of this whisky there.

Q. How long were you in Harvey Muse's house? A. About twenty minutes.

Q. Then where did you go? A. I think we came back to Louise Washington's house.

Q. Up to this time had you seen your sister, Anna Brown? A. No, I had not.

Q. What time was it when you went into Louise Washington's house? A. That was about nine o'clock or a little after.

Q. How do you fix the time? A. It wasn't dark yet. It was getting dark.

Q. When you went into Louise's house who went with you? A. I think I went in first.

Q. Yes. A. And someone called Smalley.

Q. Was he going in with you? A. I imagine he was, he was down that way.

Q. Who called Smalley? A. I don't recall.

Q. When you got in the house was your sister Anna there? A. I think Anna came in.

Q. After you got there? A. I think Anna came in.

Q. Did you see Anna have anything to drink while she was in Muse's house? A. I saw Anna drinking beer.

Q. Did you see her drinking anything else? A. No, I didn't.

Q. Were you paying any attention to what she was drinking? A. I saw Anna drinking beer.

Q. Did you see her drink any whiskey? A. No, I did not.

Q. Did you see her drink any whiskey in Julia's house?

The Court: Julia or Louise?

Mr. Johnson: Louise.

The Witness: We finished drinking this other whiskey we had.

Q. Who was there drinking the whiskey? A. Louise, Anna, Smalley, and Julia, and I.

Q. Didn't you just tell me a few minutes ago that you did not see Anna drinking any whiskey? A. Anna drank beer there, there were two bottles, stubbies there.

Q. You just said that you saw Anna drinking some of the whiskey? A. That is my mistake, I didn't see Anna drinking whiskey.

Q. Did you finish the bottle? A. Yes, we finished the bottle.

Q. Did Smalley go out while you were all there? A. Smalley got up and went out in the street.

Q. Did he come back with another bottle of liquor? A. Came back with another pint of whiskey.

Q. Did you all three drink? A. I drank and Anna and Louise drank. Anna drank. Whether he drank I don't know.

Q. How long did you stay in Louise's house? A. I stayed at Louise's house until she sent me after a pack of chewing gum.

Q. Where did you go? A. She sent me to the store, and I went up to the Wonder Bar.

Q. Did you go with anyone? A. I went alone.

Q. Did you get the chewing gum? A. I think I bought the chewing gum.

Q. Did you ever take the chewing gum to Louise? A. No, I don't remember going back to Louise.

Q. Was Louise drunk when you left the house? A. I couldn't say whether she was drunk because they were all sitting down.

Q. Were you drunk? A. I was feeling—I do know I had been drinking.

Q. Did Smalley leave before you did? A. No, I think I left Smalley there because I went after the chewing gum.

Q. Did you go to the Wonder Bar then? A. Yes.

Q. What did you do when you went into the Wonder Bar? A. I went into the Wonder Bar and bought this chewing gum and I remember taking a few beers and playing the nickel machine.

Q. What do you mean by "nickel machine"? A. That is the victrola in there.

Q. Did you have anything to drink up to that time? A. I think I bought a couple of beers at the bar.

Q. Are you sure? A. I think I did. I had the chewing gum and I had about fifty cents in change in my pocket.

Q. How long were you in there when Smalley came in? A. I don't remember seeing Smalley until Victor O'Neal have this pint of whiskey.

Q. That was the first time you saw Smalley? A. Yes, in there.

The Court: What time was that?

A. That was near ten o'clock.

By Mr. Johnson:

Q. How do you fix the time as being near ten o'clock? A. It was dark.

Q. That is the only way you fix it? A. That is the only way.

Q. Do you know what time it got dark that night? A. No, it usually gets dark a little after nine.

Q. So you were in there about how long? A. I

was in there about between half and a quarter of.

Q. When Smalley came? A. Before I saw Smalley.

Q. Did you see Smalley and Louise Washington sitting at a table? A. I don't remember Smalley sitting at a table at all.

Q. Did you see Louise Washington in the Wonder Bar? A. No, I didn't.

Q. Up to this time? A. No, I didn't.

Q. You say the first time you saw Smalley was when Victor O'Neal— A. When Victor O'Neal bought the pint of whiskey.

Q. Who drank the pint of whiskey? A. Smalley, Victor and I.

Q. That makes four pints of whiskey that you had something to drink out? A. Out of four bottles.

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

Q. Besides that you had some beers? A. I had a couple of beers which I bought myself.

Q. After all three of you finished that bottle of whiskey that was bought by Victor O'Neal were you drunk? A. I don't know whether I was drunk or not.

Q. Did you know what you were doing? A. I won't say that.

Q. Talk loud. I don't think the jury can hear you. A. I would not say I did.

Q. What did you do then? A. I just don't know what we did when we drank the whiskey in there.

Q. Did you see your sister Anna Brown? A. Not till some one told me Anna called me.

Q. Where did you see her? A. I saw Anna on the porch.

Q. What porch? A. The Wonder Bar porch, but she came to the back first and called for me.

Q. Did you see her when she called you in the back? A. No, I didn't see her.

Q. Did you go outside and talk to her? A. I went outside.

Q. Did anyone go with you? A. No, I went alone.

Q. Was Smalley already out on the porch? A. No.

Q. Did Smalley come out after that? A. I told Anna to go back to Louise and wait until I came. She said Louise had gone to bed.

Q. Then what happened? A. I went back in and I came out again, and we were out there and Smalley came out behind.

Q. Did the three of you talk together? A. I don't remember.

Q. Then what happened? A. I remember then leaving the Wonder Bar, the four of us.

Q. Who were the four? A. Julia, Anna, Smalley and I.

Q. Who were walking together? A. I think Anna was walking with me and Julia with Smalley.

Q. Did Anna have to hold you up?

The Prosecutor: Objected to.

The Court: The objection is sustained.

Q. When you were going down the street, was Smalley ahead of you? A. Smalley was in front of us.

Q. With whom? A. Julia.

Q. About how far? A. They were just ahead of us.

Q. Where did you go? A. We went down Adams Street to Chestnut.

Q. Bill, I want you to step down here. A. (The witness complies.)

Q. See if you can find Adams Street on that map.

The Prosecutor: Suppose you pick it out for him, Mr. Johnson.

Q. Is that Adams Street? A. Yes, sir.

Q. Is that Hoffman Street? A. Yes, sir, that is Hoffman Street.

Q. Do you know where the Wonder Bar is on that map? A. The Wonder Bar is right at the corner of Hoffman Street.

Q. When you and Smalley, Anna, and Julia left the Wonder Bar, where did you go? A. Straight up Adams to Chestnut and stopped.

Q. Right here is Chestnut Street? A. Yes.

Q. Where is Commerce Street? A. Commerce Street is beyond.

Q. Is this Commerce Street? A. Yes, that is Commerce.

Q. You stopped at that corner? A. Yes.

Q. What did you do when you stopped there? A. That is where Julia left.

Q. Which way did Julia go? A. Julia went down Chestnut, this way. Julia came down this way. The same way she was going.

Q. Did you suggest going down to Mr. Horner's? A. No, I did not.

Q. You just went right on ahead to Mr. Horner's, is that right? A. After Julia left, we all three started right down Chestnut Street, down Adams Street further.

Q. Where did you go? A. We went to Commerce Street, Commerce and Adams.

Q. What did you do? A. From Commerce Street we went down Commerce to Mr. Horner's.

Q. Is Mr. Horner's house one block? A. One block I think there, Adams and Commerce.

Q. Towards Broad Street? A. Towards Jefferson, towards the railroad.

Q. Toward the railroad? A. Toward the railroad.

Q. Had you been at Mr. Horner's house before? A. I have been by there.

Q. Had you been at his house before? A. When I was a child.

Q. Had you ever been in his house? A. I don't remember being in Mr. Horner's house in ten years.

Q. When you got to Mr. Horner's house, what did you do? A. When we got to Mr. Horner's house, I got by the house.

Q. What did you do? A. Stood by the house, leaned against the house.

Q. Go ahead. A. Well, that's all we did right at that minute.

Q. Just stayed by the house? A. Just stayed by the house.

Q. And then what happened? A. Well, that's when he came to the door.

Q. Did you jump over the fence? A. I don't know how we got in the yard. I don't remember going over the fence or around the gate.

Q. When you got by the house, what did you do? A. I stood there by the house.

Q. Did you get in Mr. Horner's house? A. What do you mean, to tell what happened?

Q. Tell what you did to get in Mr. Horner's house. A. I stood there and waited until Smalley broke the screen.

Q. Yes. A. Smalley breaks the screen and tries the key in the door.

Q. Yes. A. Well, before he got away from the door, Mr. Horner opened the door.

Q. Yes. A. Smalley hit Mr. Horner and Anna

and I hesitated going in. They were wrestling in the kitchen.

Q. Why did you hesitate to go into his house? A. I don't know.

Q. You do not know? A. I don't know.

Q. Did you go in the house then later? A. I went in.

Q. What did you do when you got in there? A. When I went in, they were wrestling yet and I hit Mr. Horner.

Q. Where did you hit him? A. I couldn't tell you.

Q. Then what did you do? A. I left Mr. Horner alone.

Q. What did you do then? A. I went to the other door in between the kitchen and the other room.

Q. Did you stand there? A. I stood there a few minutes.

Q. And then what did you do? A. I searched a pair of pants on the chair by the door.

Q. Then where did you go? A. There was nothing in it. I stood in the door there a few more minutes, then I goes upstairs.

Q. Did you go back and hit Mr. Horner? A. No, I do not, I did not.

Q. What did you do upstairs? A. I went upstairs and I don't know what was up there but I found a little penknife up there.

Q. Then what did you do? A. I stayed upstairs and looked around and I couldn't find nothing but the penknife.

Q. What were you looking for? A. Anything I could find, I guess.

Q. Did you come downstairs then? A. I came downstairs in another room.

Q. In another room? A. In another room.

Q. What did you do in that other room? A. I just felt around in there. I couldn't see nothing in there. It was dark.

Q. Were there any lights on in the house? A. No, there were no lights.

Q. Then what did you do? A. I came back and I told them I couldn't find anything.

Q. Did you hit Mr. Horner again? A. I don't remember hitting Mr. Horner at all again.

Q. Where was Mr. Horner when you came back? A. When I came back, Mr. Horner was still in the kitchen.

Q. Was he on the floor? A. Yes, he was on the floor.

Q. Did you hit him while he was on the floor? A. I did not, I did not get close to him.

Q. Did you see Mr. Horner get up off the floor? A. Mr. Horner got up and he was half—he was bent down, I know, and he came in the room where I was at.

Q. Where were you? A. In the middle room.

Q. Where were you standing when all this was going on? A. I was standing in the middle room, after I came out of the back room.

Q. Did you see the kitchen from where you were standing? A. Yes, I could see the kitchen.

Q. Then what happened or what did you do? A. I stood there and Mr. Horner came in the room and sat down on the floor.

Q. Sat down on the floor or on the bed? A. Well, he was crawling. He didn't get to the bed. He was in the middle of the floor.

Q. Did you hit Mr. Horner? A. I did not.

Q. At that time? A. I did not.

Q. What did Mr. Horner do? A. Mr. Horner said, "I haven't got any money."

Q. Did you hit him then? A. I did not.

Q. Are you positive of that? A. I am positive I did not.

Q. Do you know what you were doing, so that you are positive you did not hit him? A. I did not hit Mr. Horner.

Q. Did you pick up a razor? A. That was afterwards.

Q. Where was the razor? A. The razor was on the chair by the bed, by a clock.

Q. You are positive it was there? A. It was by the chair and the clock was on the chair.

Q. How could you see that razor in the dark? A. I did not see the razor. I put my hand on the razor.

Q. Accidentally? A. I don't know, but the razor was on the chair. You couldn't see in there.

Q. When your hand came away from the chair, the razor came with it? A. The razor was on the chair and the clock was on the chair too, because you could hear the clock ticking. I picks the razor up. The razor wasn't open.

Q. What did you do with the razor? A. Well, that was after Mr. Horner had got over by the bed then.

Q. Did you knock him over there? A. No, I did not.

Q. Did you push him there? A. I did not.

Q. Did he crawl there by himself? A. I think Mr. Horner went over there looking for money. He was supposed to be looking for money.

Q. Did you put Mr. Horner on the bed? A. No, I did not.

Q. What about this razor? A. When Mr. Horner was sitting by the bed, on the floor, he was reeling and rocking and I picked the razor off the chair and said, "I ought to cut your throat," and I

did not put it to his throat or put the razor behind his head. The razor wasn't open.

Q. Will you demonstrate to the jury how Mr. Horner was sitting on the bed? A. He was on the floor, by the bed.

Q. Was he braced up against the bed? A. No, he was sitting up between the bed and the stove, where he was before he got knocked down.

Q. Did you have the razor open? A. No, the razor was not open. I did not have time to open it.

Q. Did you take his watch? A. I did not take the watch.

Q. When did you first see the watch? A. When I first saw the watch was when we were all getting ready to leave the house.

Q. Did someone give it to you? A. The watch was handed to me, between the kitchen door as you go out and the middle door.

Q. Did you get any money? A. No, I did not, I got the penknife.

Q. That was the only thing you got? A. That was the only thing I got, the penknife.

Q. Where had you been in the meantime? A. I did you hit him? A. I did not hit him.

Q. Up to this time you only hit him once? A. I remember hitting Mr. Horner once when we went in. That's when they were wrestling.

Q. Did you kick him? A. I did not remember kicking him.

Q. When you came out the door, who came out first? A. I think Ann came first, Smalley was near the door and he opened the door, Ann coming out. I came out and Smalley went back to find something he had dropped; I don't know which it was.

Q. Did you see Smalley away from Mr. Horner

at any time? A. Away from him? I don't know, because while they were wrestling I went upstairs.

Q. Did you see Smalley kick Mr. Horner? A. I did not.

Q. Did you see Anna kick Mr. Horner? A. I did not see Anna touch him at all.

Q. Was it dark in the room? A. It was dark. You could just concern what was—who was when you go.

Q. When you went in the door, you say Smalley and Mr. Horner were wrestling? A. They were wrestling.

Q. The door was not locked, was it? A. Which door was that?

Q. The kitchen door? A. No.

Q. Did you see Smalley lock the door? A. I did not.

Q. Did you see Smalley unlock the door? A. I don't know whether it was Smalley opened the door. I don't know whether he locked it or not.

Q. Did you hear any key turn in the door? A. No, I did not.

Q. All the time that you were in the house you only hit Mr. Horner once? A. All that I can remember when we first went in.

Q. Would you say you were so drunk that you did not know whether you hit him or not?

The Prosecutor: That is objected to.

The Court: What was the question?

(Question repeated.)

The Court: The objection is sustained.

Q. You are quite sure you did not hit Mr. Horner again? A. The only time I remember hitting Mr. Horner I went in the door while they were wrestling.

By the Court:

Q. Why did you hit him at that time? A. They were wrestling. Smalley and him were wrestling and I went in and hit Mr. Horner and left him alone and went in the other room.

The Prosecutor: He still does not answer your Honor's question why he hit him.

The Witness: I don't know why I hit him.

By Mr. Johnson:

Q. Did you tell Mr. Horner that you were gangsters? A. No, I did not.

Q. Did you put a quilt over Mr. Horner's face? A. I did not.

The Court: I think the word used was blanket. Ask him that question.

Q. Did you put a blanket over his face? A. I did not.

Q. Did you see anyone put a blanket over his face? A. I did not.

Q. Did Anna give you the watch? A. I would not say that Anna gave me the watch and I would not say Smalley gave me the watch but the watch was given to me between the kitchen door and the middle room door.

Q. When Mr. Horner was on the floor in the bedroom, was he unconscious? A. On the floor? When we left, he was.

Q. Could you see his face? A. No, I did not see his face at any time.

Q. Was he lying on his face when you left? A. No, because he was sitting up. He was sitting up, sitting up between the bed and the floor when he was hit the last time.

Q. Well, after he was hit the last time was he

lying down on the floor? A. Yes, he was laying on the floor.

Q. Was he on his face? A. He could not have been on his face because he was sitting up. He had his back toward the kitchen.

Q. When he was hit he was knocked right flat down on the floor? A. He was sitting up and he was knocked the rest of the way down.

Q. Did you put a blanket over his head after that time? A. I did not.

Q. Did you see anyone put a blanket over his head? A. I did not see any blankets at all used.

Q. All the time that you were in Mr. Horner's house you hit him just once? A. To my remembrance I hit him once. That's when we first went in.

Q. Where did you go after you left Mr. Horner's house? A. We went to Sam's Yockamein place.

Q. What time was that? A. I could not tell you what time it was.

Q. Did you have anything to eat there? A. Yes, we ate there.

Q. What did you have to eat? A. I had a pork yockamein.

Q. Who paid for it? A. The money was put on the table and Ann paid for it.

Q. Did you put the money on the table? A. I did not. I did not have the money.

Q. Did you have any money in your pocket? A. Not that night. My money was home. I spent what I had.

Q. When you gave your statement to the Prosecutor or to Mr. Denham—he is the Court stenographer here (indicating)—while Mr. Apgar was questioning you, was Anna in the room? A. Yes, Anna was there in the beginning.

Q. Did she argue with you in regard to what you did? A. Not with me she did not.

Q. Was she sent out of the room while your statement was being given? A. She was.

Q. Do you know why she was sent out of the room? A. They said she was winking or something and I told them she did not wink at me.

Q. Did she tell you that any of the statement that you made was wrong? A. Anna?

Q. Yes. A. No, Anna did not.

Q. You had not heard her statement, had you? A. I don't think so. I had not heard it because Anna was there first.

Q. And you were there second? A. I was second.

Q. What time did you get out of the yockamein joint? A. I don't know exactly the time.

Q. Where did you go from there? A. I remember coming to Adams Street, through by the laundry, and Smalley leaving and then I don't know which way we went.

Q. Who was walking with you? A. All three of us left the place together.

Q. Walked down the street together? A. Yes, walked down the street together.

Q. Did you jump over the back fence? A. No, I don't remember jumping over no fence.

Q. After you left Sam's or whatever you call it, did you go to your home? A. I think we did.

Q. Are you positive you did? A. We went home. We left Smalley at the corner. That's where I remember leaving him at, and after that we left to go home and I don't know which way we left to go home.

Q. When you got home, did you go right to bed? A. I think I did.

Q. Did you clean your shoes that night? A. No,

I do not remember taking them off.

Q. Are these the shoes you had on (indicating)? A. The same shoes I had on.

Q. What time did you get awake the next morning? A. I think it was a little after seven. My brother, he called me.

Q. What did you do then? A. He asked me wasn't I going to work and I told him yes. I got up, I did, I took my shirt off—I still had my shirt on—I took my shirt off and hung it up and put on another shirt and another pair of brown pants, my black shoes and a little sweater I used to have, a black jumper, and I got my lunch and went on out.

Q. Where did you go? A. I went to Turner's.

Q. What does Mr. Turner do? A. He is a constructor, I think building construction, something like that.

Q. Were you working for him? A. Yes, I had been.

Q. Did you come back to the house then? A. Not right away.

Q. How much later was it that you came back to the house? A. I came back about 9:30.

Q. When Mr. Horner was sitting on the floor, was down—I stopped on Hoffman Street.

Q. At whose house? A. No, the first stop I made was at the Wonder Bar porch, talking to some fellows there. I left there and came on down Hoffman Street.

By Mr. Johnson:

Q. Where did you go? A. I went to Mary Turner's house.

Q. How long did you stay at Mary Turner's house? A. I stayed there until her daughter got

ready, to go to work, and I walked around home with her.

Q. Did you go home then? A. I left her and went home.

Q. What did you do when you got home? A. I went home, I combed my hair, and went in and changed my shoes, changed my pants, and put on my coat to this suit, and came back out again.

Q. Where did you go? A. The first place I went to was Mrs. Hardin's house.

Q. Is that Rose Hardin? A. Rose Hardin's mother.

Q. How long did you stay there? A. I didn't go in, I stopped, I met her on the outside.

Q. Where did you go then? A. I left there and came back through Hoffman Street, I went from there to Adams Street back over to Jefferson and went through Hoffman.

Q. Then where did you go? A. I went around to where my sister-in-law lives.

Q. Who is your sister-in-law? A. Ruth Brown.

Q. Where does she live? A. 1014, I think, Hoffman.

Q. Is that near where Smalley Burrell's mother lives? A. Right across the street.

Q. Did you see Smalley there at that time? A. No, I did not then.

Q. Did you have Mr. Horner's watch in your pocket then? A. In my coat pocket.

Q. Where did you go after you left your sister-in-law's? A. I went to the Wonder Bar.

Q. Where did you go from there? A. I stayed up to the Wonder Bar on the porch, and talked there with the boys, and I came back down to Hoffman Street again.

Q. Then what did you do? A. I met Frances,

she was standing in front of my sister-in-law's house.

Q. Frances who? A. Deputy.

Q. How long did you talk to her? A. About five minutes.

Q. Then where did you go? A. I think I went across to Smalley's mother's.

Q. Was Smalley there? A. No.

Q. Did you stay there long? A. I stayed there about ten minutes.

Q. Then where did you go? A. I goes around, no, I think I met Smalley.

Q. Where? A. I think I met Smalley coming around from his house.

Q. His own home? A. His own home.

Q. Did you and he stand and talk? A. No, we didn't stand.

Q. Where did you go? A. I think we came back to his mother's house.

Q. Did you go inside? A. He was inside and I sat in the doorway.

Q. What did you do? A. We sat there and we talked.

Q. Did you say anything to Smalley about running away? A. No, I don't remember telling Smalley about running away.

Q. Then what happened? A. So I stayed there and talked to Smalley, and his little sister, until noon, I think.

Q. Yes? A. And it rained, I think, and we stayed there until after one o'clock, I think, sometime.

Q. Did Smalley leave at any time? A. No, not then he didn't. I stayed at Smalley's house and talked to him until the women came home from the W. P. A. job.

Q. Then what did you do? A. I went across to Louise's house.

Q. Did Smalley go with you? A. No, he did not.

Q. Then what did you do? A. And while I was over there they was telling me about my friend, see, your friend got beat up.

Q. Who do you mean by your friend? A. They were saying Mr. Horner.

Q. All right, who told you that? A. Louise and Edna.

Q. What else happened? A. So I stayed there and talked with them until they went back to work, and I went back across the street to Smalley's.

Q. Was Smalley still there? A. Smalley was still there.

Q. What happened then? A. I told Smalley about it.

Q. What did Smalley say? A. Smalley didn't say nothing, then, not right then.

Q. Then what did you do? A. So Smalley said "I am sleepy", he said "I am going around the house", he said "You come around later".

Q. Did he go around? A. Smalley left me and he went around to his own home.

Q. How much later was it when you got there? A. About, it was between one and one thirty when I got there.

Q. Was Smalley lying on the couch when you got there? A. When I came to the door Smalley was lying on the couch.

Q. Where did you sit? A. I sat right at the door, and I came to his house, and I hollered for him, and he said "Come in", so I came in and sat right at the window, between the window and the door in the big chair.

Q. Were you talking together? A. We was talking there awhile.

Q. About what? A. I don't know what we was talking about.

Q. Did you see the officers come to the house? A. I saw them before they got to the house.

Q. What did you do then? A. I says "Smalley, here comes the cop". Smalley was lying on the couch, so I walks in the other room, in the bedroom.

Q. Yes, what did you do? A. I didn't do anything. Then I heard the officer ask for Smalley, and he asked him had he saw me, or something, and I came out of the bedroom.

Q. While you were in the bedroom did you put the watch under the mattress? A. Not then I didn't, I came out of the room, and I told Domenick to wait a minute, and I went back and took the watch out of my pocket and put it under the mattress.

Q. You weren't in the room when the officer came in? A. The officer didn't see me in the room at all, he didn't see me at first, because when I saw him I went into the other room.

Q. When they got in Smalley's house only Smalley was in the living room? A. Smalley was on the couch, I came out.

Q. Did you hear Officer Travaline say that you were in the room in the chair when he came in the house? A. I heard him.

Q. He is wrong when he made that statement? A. He is wrong, I was not in the chair.

Q. Then what did they do then? A. They told us to come on, they wanted us, or something like that.

Q. Where did they take you? A. They put us in the car and took us around to the jail.

Q. Who was at the jail? A. Anna, my sister.

Q. Was Smalley there with you? A. Smalley and I were together.

Q. Anna was in the jail? A. Anna was in the jail.

Q. Then did they bring you to Woodbury? A. About five minutes after they brought us to Woodbury, they went in and let us out and put us in another car.

Q. Did anyone threaten you when you were coming up in the car? A. No, they didn't.

Q. All the time you were in the jail did anyone threaten you? A. No, nobody was there.

Q. Did anyone say anything to you when you were having your fingerprints taken? A. I remember Steve Atkinson up there, in front of Mayor Wert and George, while I was getting fingerprinted, he said he had not had my fingerprints for his office done there, and Steve Atkinson said to me something about "You hit the man", when I told him I didn't see anything used, or anybody kick him, and he said he would be up there to see me burn, that's what he said, right in front of the Mayor and George.

By the Court:

Q. That was in Paulsboro? A. That was in Woodbury up here in the jail house.

Mr. Johnson: Cross-examine.

Cross-examination by the Prosecutor:

Q. He said he would be there to see you burn? A. That's what he said to me, right in front of Mayor Wert. If he would tell the truth he would tell you the same thing.

Q. I suppose you did everything you could to

help Mr. Horner, didn't you, so you would not burn, you helped Mr. Horner after you beat him? A. No, I didn't help him.

Q. You left him there to die? A. I didn't know he was hurt that bad.

Q. You didn't know he was hurt? A. Not that bad, I didn't see nothing outside of when he was hit.

Q. Did you try to find out? A. No, I couldn't see him there.

Q. You didn't care, did you? A. In fact I cared, I guess, but—

Q. But what? A. I don't know.

Q. Didn't care very much about it, you went there to rob Mr. Horner, didn't you? A. Yes, they went, but not to hurt Mr. Horner.

Q. You went there to rob him? A. Yes.

Q. When you found out you couldn't get in there when you got there, you tried to break into the house first, is that right? A. I did not.

Q. You were there when it was being done? A. Yes.

Q. You planned it, the three of you planned it at the Wonder Bar, near the Wonder Bar? A. We left the Wonder Bar and came to Mr. Horner's house, it must have been planned down at the Wonder Bar.

Q. That was before you got to his house? A. Before we got to the house.

Q. Anna hid in back of the house so her white coat would not show up? A. Anna was behind me.

Q. Hiding up against the house, so her white suit would not show? A. I don't know where she was hiding, she was behind me.

Q. Then Burrell broke the screen door open? A. Yes.

Q. So is there any question about that? A. There's no question about that.

Q. Then he stuck the key in the door? A. He tried the door.

Q. But it would not open? A. No.

Q. It was just immediately after that that Mr. Horner came to the door? A. Yes.

Q. That's when Burrell hit Mr. Horner? A. Yes.

Q. You were right alongside of him? A. No, I was about three feet from him.

Q. You don't call that alongside of him, about three feet from him, what do you mean by three feet? A. About three feet behind him, between here and the table.

Q. What did you do to stop Burrell from hitting him? A. There was nothing I could do.

Q. Did you do anything? A. No, I didn't, no.

Q. Then after you saw Burrell hit him, and Anna and you were in there, that was to rob him, is that right? A. Yes, I went in.

Q. You only tapped him once? A. I hit him once.

Q. You saw the photograph of his face, didn't you? A. I did not.

Q. Well, I will show it to you, tell us what caused that. A. I don't know.

Q. Where did you hit him when you hit him? A. I couldn't tell you, it was dark in the house.

Q. What did you hit him with? A. My fist.

Q. You are used to doing construction work and steel work? A. No, a carpenter's helper.

Q. You are a carpenter's helper? A. Yes.

Q. You knew he was an old man? A. Yes, I knew he was an old man.

Q. You knew that Burrell was a rigger and an

iron worker? A. I didn't know what Burrell was, he was supposed to be a first aid man on the W. P. A.

Q. You know that Burrell was in Philadelphia working? A. I did not know, no.

Q. Working as a rigger? A. I did not know that.

Q. You knew Burrell was a young, strong and healthy man? A. I don't know how strong Burrell is.

Q. You don't know? A. No, he has never done anything to me.

Q. Have you seen him around town? A. I have seen him there.

Q. You see him now? A. Yes.

Q. How old a fellow is he? A. I don't know his age.

Q. He is about twenty or twenty-three? A. He may be, I don't know Burrell's age.

Q. How long have you known him? A. I just known Burrell this last month, or about a little over a month.

Q. Then you only hit him one blow? A. I hit Mr. Horner once when we went in.

Q. Then you took this razor out in the dark? A. Yes.

Q. And you couldn't see it was a razor except by the feel of it? A. That's the only way, because it was dark in the house.

Q. You didn't want to show off to Smalley Burrell or anybody else with that razor, did you? A. That's all I done it for.

Q. How could you show off, if you couldn't see the razor? A. I just picked it up off the chair, walked to Mr. Horner there, and put it behind his head, and said I should cut his throat, and put it back.

Q. Was he conscious at that time? A. No, he was moving, sitting up on the floor.

Q. Was the man groaning? A. I don't know whether he was groaning, or not.

Q. You were right there alongside of him? A. I can't recall that.

Q. You were not too drunk to know you put the razor at the back of his head? A. I know I did that.

Q. You were not too drunk to know the razor was closed, not open, you remember that, do you? A. Yes, I remember it.

Q. You remember the fact that you hit him when you came in? A. I hit him when I went in.

Q. When were you so drunk you didn't know what you were doing? A. I don't know, I guess I was under the influence of whiskey.

Q. How much influenced, were you just influenced enough to go there and kill him? A. I didn't know he was hurt so bad.

Q. Did you see Smalley kick him? A. No, I did not.

Q. How many times did you see Smalley hit him?

Mr. Johnson: I object to that. I objected to that yesterday, and it is the same thing with any testimony of this man given on cross-examination that I didn't ask him on direct-examination.

The Court: I will permit that question. No, I will sustain your objection. He may ask the question about whether anybody else hit him.

The Prosecutor: He has already testified on direct-examination he saw Burrell hit him.

The Court: When they were wrestling when they went in.

The Prosecutor: He hit him when they went in.

The Prosecutor: Will you repeat the question, Mr. Denham?

(Question repeated.)

A. I don't know.

Mr. Johnson: I still object to that question.

The Court: I will sustain the objection in this case, on the very point that counsel is making, that what he says would not bind Smalley Burrell.

The Prosecutor: What he saw him do would bind him.

Q. Who else did you see hit Mr. Horner besides Burrell?

Mr. Johnson: I object to that, for the reason that I didn't ask him any questions about whether he saw Anna hit him, or Burrell, either him or Anna, on my direct-examination.

The Prosecutor: He testified when they went in the door Burrell was the first one that hit him, and he is positive he was, and it is a matter of defense that he was so drunk he didn't know.

The Court: Did you see anybody—

Q. Did you see anybody else hit Mr. Horner? A. I did not, outside of Burrell and myself.

Q. How many times did you see Burrell hit him? A. I don't remember how many times he hit him.

William Albert Brown—Cross.

Q. Was it more than once? A. Yes, more than once.

Q. Was it more than ten times? A. I couldn't say that.

Mr. Johnson: I object to that, he said he didn't know how many times he hit him. I did not ask him anything about how many times Burrell hit him during the altercation, or during the time he was in there, it is not cross-examination, I didn't ask him anything about what Burrell did after the first time they entered the house.

The Prosecutor: This man is a defendant.

The Court: He has already testified to the effect that Burrell did hit him, and it is a part of the incident, and at this time it is proper, so I will overrule your objection.

Mr. Johnson: Exception.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

The Prosecutor: Mr. Denham, will you repeat the last question and answer?

(Last question and answer repeated.)

Q. Do you know it was more than once he hit him? A. I know it was more than once.

Q. Do you remember someone, either you, Burrell or Anna, getting down to Mr. Horner's ear and asking him where he kept his money? A. They didn't ask him where he kept it.

Q. What did they say to him? A. They asked him where was his money.

Q. Who asked him that? A. Burrell said we were gangsters from Philadelphia.

Q. Did you go and speak to Mr. Horner and say in his ear you were not gangsters? A. I did not.

Q. You stayed right there? A. I was right there where I were.

Q. Did you see any of this blood smeared all over the kitchen? A. I didn't see any blood around the house at all.

Q. Did you see Burrell when he came outside wiping his hands? A. I did not.

Q. Wait until I finish, wiping his hands off, and wringing out a handkerchief full of blood? A. I did not.

Q. You didn't see anything of it? A. I did not.

Q. When Mr. Horner was alongside of the bed and you had this razor at the back of his neck, could you see the razor, when you held it to the back of his neck? A. I know I had the razor in my hand.

Q. Could you see the razor when you held it to the back of his neck? A. Could I see it, I don't know whether I could see it, or not.

Q. How far away were you from Mr. Horner's face at that time? A. I was standing over him, he was sitting up and I was standing up.

Q. Did you have any marks on your hands the next morning? A. No, I did not.

Q. Didn't have a sore hand, or anything? A. There wasn't anything on my hand.

Q. Sure you didn't use the leg of a table on his head? A. No, I didn't see no leg of a table.

Q. That was all done with your fists and Burrell's fists? A. I expect to my knowledge it was, I didn't see any one kick him.

Q. What was he hit for? A. I don't know.

Q. You were not drunk? A. I was under the influence of whisky.

Q. How much? A. I don't know.

Q. Not very much under the influence of whisky? A. I was drunk.

Q. Did you think because you were drunk that gave you the right to rob him? A. That was the whisky.

Q. That caused you to beat him? A. Part.

Q. You knew what you were doing A. I suppose we did.

Q. I am speaking about you. A. I did, it showed the courage of the whisky.

Q. The courage of the whisky and you had two other people? A. I figured there was only one with us.

Q. That gave you the courage in addition to the whisky to hit the poor old man? A. The poor old man didn't have to be hurt at all.

Q. Didn't have to be hurt at all? A. No.

By the Court:

Q. Where did you first talk this over about going to Horner's? A. Where I first heard? We were going that way when we left the Wonder Bar. I don't know who said it.

Q. You don't know who said it? A. I don't recall who said it.

Q. That we are going to Horner's? A. Yes.

Q. Some one said that? A. Some one said, "We are going to Horner's."

Q. You don't remember who said it? A. I don't remember who.

Q. When did you first know you were going in there to get some money from Horner? A. After Julia left.

Q. After Julia left? A. After Julia left.

Q. Who told you? A. We were going to Horner's to clip him.

Q. Who said it? A. Between them two.

Q. They said that? A. We were on the way to Horner's when we left the Wonder Bar.

By the Prosecutor:

Q. What do you mean by the word "clip"? A. Let's go and take something from him.

Q. Take it how? A. Get into the house without him knowing it.

Q. That is what you call clipping? A. That is what they call it.

Q. Have you heard it used to indicate knocking a man down? A. No.

Q. It means breaking into his house without him knowing it? A. Yes.

Q. You have been convicted of crime before? A. Yes, sir.

By the Court:

Q. Did you have any cigars? A. Yes, I remember the cigars.

Q. Where did you get the cigars? A. From Horner's.

Q. Do you remember where you got them in Horner's home? A. It was given to me the same time the watch was, in a paper bag.

Q. Who gave them to you? A. I don't remember who gave me them, one of the two gave me the watch and the cigars.

Q. But you yourself picked up the knife? A. I got the knife myself.

By the Prosecutor:

Q. Now, when the watch was given to you, you said, "We can pawn it and get something"? A. I said, "We can pawn the watch."

Q. When you were going to cut Mr. Horner,

didn't Smalley say, "Don't cut him"? A. I don't remember that.

Q. Didn't he say he would put him to sleep? A. Yes.

Q. Didn't you get into an argument because Horner had recognized you? A. No.

Q. Wait until I finish the question. A. No.

Q. You wanted to treat him nicely? A. What was that?

Q. You wanted to treat him nicely? A. We didn't mean to hurt him at all.

Q. After you robbed him and stuck the razor to his throat you went down the street and had something to eat? A. Yes.

Q. Then you went home and went to sleep? A. Yes, and I went to work the next morning.

Q. You woke up and went to work? A. My brother woke me up. I am always up every morning three or four o'clock.

Q. You bought something to eat with the seventy cents you got from Mr. Horner's house? A. I imagine so.

Q. That was the money that fell out of the church envelope? A. I heard only one piece fall at the desk.

Q. You were the fellow that went upstairs and ransacked there? A. I went upstairs.

Q. That is where you went? A. I went upstairs; it was dark.

Q. There was a sewing machine there? A. I couldn't say.

Q. You remember pulling out drawers? A. I don't remember what I was doing.

Q. You remember pulling out the drawers and you were looking for jewelry or anything of value? A. I was up there looking for something. I don't know what.

Q. Something of what kind? A. I guess money or something.

The Court: Mr. Johnson, I don't know whether you have any objection to my interrupting. This word "clipping" on page 7 of the statement—

The Prosecutor: We do not have the statements. You have the only copy of the statements.

Q. On page 7 in the statement which you gave on June 21st to Mr. Denham in which we went over the statement which you gave on June 17th, and where we read back to you these questions and answers, this question was asked of you and you made the following answer: "Q. When was this you put the razor at his throat? A. That's when he got ready to sit up after Smalley hit him. He sat up when he hit him, he didn't fall, and he said, "Here, you hit him," and he didn't fall, and after that I said, "I ought to cut his throat." And I put the razor back and he clipped him, and he said, "He will sleep." When you use the word clipping what did you mean by that word? A. When he clipped him? I said Smalley clipped him?

Q. Will you say that you did not make that statement? A. I don't remember that; I don't remember saying that.

Q. By clipping you mean hitting him? A. I don't remember saying clipping. When I mention the word clipping to get anything, it means to go into your coat pocket. If I stand behind you and get something out of your pocket that is the way we use the word clipping.

Q. Did you ever talk to anybody about clipping? A. No.

Q. How do you know what it means? A. I heard the other people talking about.

Q. You said when you used the word. A. I don't use the word clipping. I heard them say, "We were clipping."

Q. Did that mean to get something when they were asleep and take it out of their pocket? A. Yes.

By Mr. Johnson:

Q. Bill, how long have you known Mr. Horner? A. I know Mr. Horner all my life.

Q. Did you ever go around to his house?

The Prosecutor: Objected to as already having been covered on direct-examination.

The Court: Yes.

Q. Did he ever come to your house? A. Yes.

The Prosecutor: Objected to as not being proper redirect-examination.

The Court: I will sustain the objection but I will permit the answer to remain.

The Prosecutor: Objected to on the further ground that it is immaterial.

The Court: What is your reason for asking the question?

Mr. Johnson: I want to show that this defendant had no quarrel with Mr. Horner.

The Prosecutor: I think the State will admit that he had no quarrel with Mr. Horner.

The Court: The objection is sustained.

Q. How many times have you been arrested, Bill? A. I think it is two or three times.

Q. What was the first time you were arrested?

The Prosecutor: Objected to.

The Court: Are you going into the matter of convictions?

Mr. Johnson: I think I have a right to ask for what crimes he has been convicted.

The Prosecutor: Not unless it is covered in the questions asked by the State.

Mr. Johnson: That opens the door for me to ask any questions about the conviction.

The Court: I will permit the question.

The Prosecutor: Your Honor will allow the State to cross-examine him on it?

Q. What was the first crime for which you were convicted? A. That is when I was sent away for receiving stolen goods.

Q. What were the goods which you received? A. Some hats; two boxes of hats.

Q. How much were they worth?

The Prosecutor: Objected to.

The Court: The objection is sustained.

Q. Were you convicted of petty larceny or grand larceny? A. Petty larceny.

Q. How long were you sent away for? A. They sent me away—they took me out of school in May, 1928, and brought me to Woodbury and sent me away and I came back 1930 in March.

Q. How old were you when you were convicted?

The Court: Properly speaking, that should not be brought into evidence at all. That was a juvenile matter.

Mr. Johnson: I didn't know that.

The Court: He is now twenty-three and this was nine years ago.

Q. When was the next time you were arrested? A. 1935.

Q. For what? A. I don't know what they call it.

Q. What did you do? A. Well, I was with two girls.

The Prosecutor: Objected to.

The Court: Yes, what was the charge against you?

The Witness: I don't know what they called it.

The Court: You were charged for doing what?

The Prosecutor: I have a copy of the criminal record and I am perfectly willing for Mr. Johnson to have it. He was charged with shop-lifting which I suppose he calls clipping.

By Mr. Johnson:

Q. You were arrested for shop-lifting? A. See, they didn't arrest me.

The Prosecutor: Objected to.

Q. What was the next time you were arrested? A. Stealing coal.

The Court: Properly speaking, he should not refer to arrests.

The Prosecutor: These are convictions that Mr. Johnson is reading.

Q. When was the next time you were arrested? A. That was for going after my clothes.

The Prosecutor: Your Honor, the question is when was he arrested.

The Court: Yes.

Q. When were you arrested? A. 1936.

Q. What was the charge? A. I went into a house after—

The Prosecutor: Objected to.

Q. Were you convicted? A. Yes, I was.

Q. When was the next time? A. That is the only three times.

Q. The only three times that you were arrested? A. Yes.

Mr. Johnson: That is all.

By the Prosecutor:

Q. You were arrested and convicted in Camden on May 11, 1935 charged with shop-lifting. Is that one of those clippings that you mentioned? A. I don't know nothing about that.

Q. Is that what you call clipping, shop-lifting? A. That is what it was; I don't know anything about it.

Q. Then you were arrested November 23, 1935, six months later, for larceny of coal and convicted for that? A. Yes.

Q. Then what was the third time? You were convicted for breaking and entering. A. That means—

Q. You were charged in Camden County with breaking and entering on July 18th, 1936 and were convicted of that crime in Camden County? A. Yes, I was.

The Prosecutor: That is all.

By Mr. Johnson:

Q. When you were convicted of breaking and entering what was the occasion of the crime?

The Prosecutor: Objected to.

The Court: The objection is sustained.

Mr. Johnson: Will you allow me an exception?

The Court: Yes.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S).
Judge.

By the Prosecutor:

Q. How old did you say you were? A. Twenty-three.

SMALLEY DILKS BURRELL, sworn.

The Court: Ladies and gentlemen, at this time we will declare a recess until one-fifteen and the officers in charge may conduct you to your eating place.

AFTERNOON SESSION

Trial of the case resumed at one-fifteen o'clock p. m., pursuant to adjournment, in the presence of the defendants and counsel for the respective parties.

SMALLEY DILKS BURRELL, resumed.

By Mr. Johnson:

Q. Your name is Smalley Dilks Burrell? A. Yes, sir.

Q. Talk loud so everybody can hear you. A. Yes, sir.

Q. Where do you live? A. 219 Hoffman Avenue.

Q. How old are you? A. Twenty-three.

Q. Do you know William Horner? A. Only by name.

Q. How many times were you at his house? A. Once, and I guess this time.

Q. What is that? A. Once, and I guess this time.

Q. With whom did you go to Mr. Horner? A. With Anna Brown and a girl by the name of Rose Harding.

Q. What did you go there for the first time? A. Anna asked me to walk down to Mr. Horner's with her and play on as her brother and Rose Harding as her sister.

Q. Did you go? A. Yes, I did.

Q. What was said to Mr. Horner by you at that time? A. Anna was doing the talking.

Q. By you. A. Anna said tell him that you are my brother and tell him "I want $20, $17 or $20."

Q. Did you ask him for any money? A. No, I did not.

Q. That was the only time you were at Mr. Horner's house? A. Yes.

Q. Was that the first time you had met him? A. Yes, sir, the first time. I had seen him otherwise on the street.

Q. That was the first time you had met Mr. Horner? A. Yes.

By the Court:

Q. How long ago was that? A. I would say three and a half months ago.

By Mr. Johnson:

Q. Did you know Mr. Horner received any money? A. No, I did not.

Q. Did you know that he was on a pension? A. No, I did not.

Q. Do you know what I mean by "pension"? A. I guess so.

Q. What does it mean? A. A pension means he is getting a sum of money at a certain time.

Q. After you met Mr. Horner, about two and a half or three months ago, did you speak to him when you passed him on the street? A. I did.

Q. How often did you see him? A. Not very often.

Q. Prior to June 16th did any one tell you that Mr. Horner was getting money on a pension? A. The only time I heard that was at the house.

Q. When was that? A. On that Wednesday night.

Q. You didn't know it prior to June 16th? A. No, I didn't, only through Anna Brown speaking around in the street.

Q. That was all you knew? A. Yes.

Q. Did you ever have a fight with William Horner? A. Never.

Q. Smalley, how many times have you been arrested? A. I would say three times.

Q. What were you arrested for the first time? A. The first time in self defense trying to protect myself from getting stabbed with a knife.

Q. Where was this? A. Down in Hoffman Avenue.

Q. What was the fight about? A. It was simply we had a misunderstanding between a gentleman by the name of Grover West and my wife.

Q. Did you have the knife? A. He had the knife.

Q. You hit him to prevent yourself from being stabbed? A. Trying to protect myself.

Q. How long was your sentence? A. I got thirty days in the County prison, March 5th.

Q. What were you arrested for the next time? A. The next time I was arrested in Gibbstown.

Q. For what? A. My wife was a little evil as women are in her condition, and she figured I got paid because I had $4 which I received from her brother for his room rent, and she came down to Gibbstown and said I wasn't supporting her.

Q. What happened down there? A. I was fined $8.72.

Q. Was that the fine or costs? A. I think that was the costs.

Q. Did you pay it? A. Yes.

Q. Do you know when that was? A. I think it was on Wednesday.

Q. Of the same week? A. Yes.

Q. Of June 16? A. Yes.

Q. Had you been arrested before that? A. I can't recall.

Q. How many other times have you been arrested? A. I was arrested once in Woodbury.

Q. For what? A. For driving without license.

Q. Were you fined that time? A. I was fined $5. fine and $1. costs.

Q. Did you pay it? A. I did.

Q. When you made this statement on June 17 in the Prosecutor's office, who was present in the room when you started to make your statement, limiting the persons to Anna and William. A. I was there first by myself.

Q. You were there alone? A. Yes.

Q. And you started to make your statement? A. I wouldn't talk. I didn't want to make a statement, on the simple reason why I didn't really

know how everything went that night but since I have been in jail I have come to myself so I can explain as close as possible that I can.

Q. When you made the first part of this statement, was that all that you remembered? A. When I made the first part of the statement?

Q. Yes, is that all that you remembered of the occasion at that time? A. I remembered them bringing Anna Brown and William Albert Brown in before I finished.

Q. You made this statement, "Last night I walked out of the house, went up to the Wonder Bar and was sitting there drinking, so we were drinking that, so after we got through drinking it was getting kind of late, so then Anna Brown, Julia Washington, asked me to walk down the Pratt's Alley with her, so I walked on down Pratt's Alley and Anna and Bill come on down with me, Bill, Brown, so Anna kept saying 'let's go to Mr. Horner's house.' I said, 'No.' Julia said, 'You go with me.' I said 'All right.' So we started over there and she kept on saying—they started and I went with them." Do you remember making that statement? A. No, I don't recall that statement. Probably I did.

Q. Just a minute. Do you remember on the night of the 16th that Anna Brown said to you, "Let's go to Mr. Horner's"? A. I do not.

Q. You do not remember that at all? A. I don't recall it.

Q. Do you remember who undid the door? A. I do.

Q. Who undid the door? A. I did, simply on account of William Brown said, "Go ahead, Smalley, push the door in, push the screen in."

Q. Did you have any keys? A. I had one key

belonged to my house where I lived and two other keys to the first-aid kit on the job where I worked.

Q. Did you try those keys in the door? A. I absolutely did not.

Q. Did you rattle the door? A. I did.

Q. Do you know who went in the house first? A. As close as I can recall, William Albert Brown went in first.

Q. Who went in second? A. I was shoved in the door, by Anna Brown nudging in the back to hit him, Mr. Horner.

Q. You remember her shoving you? A. Yes.

Q. Did you jump over the fence to get in the yard? A. I don't recall it.

Q. Did you see Bill hit Mr. Horner? A. I did.

Q. Did you hit Mr. Horner? A. I did.

Q. How many times? A. Three times, as I can recall.

Q. Do you remember that is all you hit him? A. That is all that I can recall.

Q. When did you first hit him? A. First when we first went in the door.

Q. Where was that, in the kitchen? A. That was in the kitchen.

Q. Did Mr. Horner fall down? A. No, he did not.

Q. Did you hit him again? A. No, I did not.

Q. Are you sure you did not? A. I am positive.

Q. Who did hit him? A. No one at that time. I grabbed Mr. Horner, simply on account of Bill Brown said, "Grab him, Smalley," and I grabbed Mr. Horner.

Q. Did you fall down with him? A. He had hold of me and I had hold of him. He was struck by Bill Brown and knocked over on the kitchen table.

Q. How do you know that he was struck by Bill Brown? A. Because Bill was in the back of us.

Q. Do you know it was Bill that struck him? A. No, I couldn't recall, I couldn't say.

Q. Might it have been Anna? A. I don't think Anna could hit that hard.

Q. Then you and Bill and Anna were the only ones in that room, with the exception of Mr. Horner? A. Yes.

Q. Did you fall down with Mr. Brown?

The Court: Repeat the last question.

Q. Did you fall down with Mr. Horner? A. I did.

Q. Did you lay on the floor with him? A. I tried to get up and I got up as far as my knees, and Anna was hollering, "Hold him, Smalley, hold him!"

Q. Do you remember that? A. I remember that.

Q. Where was she standing when she said that? A. As close as I can recall, in the middle room.

Q. Did you hit Mr. Horner any time that he was on the floor? A. I don't recall it.

Q. Did you see him get up? A. Off the floor?

Q. Yes. A. I helped him up off the floor.

Q. Did you help him in the other room? A. I did.

Q. When he went in the other room, that is, the bedroom, did you put him on the bed? A. No, I did not.

Q. Did you carry him in the room? A. No, I did not; he walked.

Q. He walked in? A. Yes.

Q. How did he walk? A. I can't recall it.

Q. Talk louder. A. I can't recall it.

Q. When he got in the room, what did he do? A. He said, "I haven't got no money."

Q. Did you hit him then? A. No.

Q. Are you positive of that? A. I will say I can't recall it.

Q. Did you put a blanket over his head? A. No, I did not.

Q. How many times did you hit Mr. Horner when you were in the bedroom? A. I can't recall it.

Q. Were you the last one to hit Mr. Horner? A. No, I was not.

Q. Who did hit Mr. Horner last? A. I can't recall who hit him last.

Q. Did you get a blanket from Mr. Horner's bed and put over him? A. I did not.

Q. Did you see a watch in there? A. Only out in the street, when we came out of the house.

Q. You did not see any watch in the house? A. I did not.

Q. Did you see Bill Brown take a razor off the table? A. I did not.

Q. Did you see Bill Brown have a razor? A. Yes, I did.

Q. What was he doing with it? A. He was getting ready to cut Mr. Horner's throat, as close as I can see, and I told him, "No, don't kill him."

Q. Did he put the razor against his throat? A. Yes, he did.

Q. Did you see him do that? Did you see him put that razor against his throat? A. I did.

Q. Did you say to Bill and Anna, "He will sleep there now"? A. I did not.

Q. When you went out the door, did you unlock the door? A. I can't recall unlocking the door.

Q. Did you lock the door when you went in? A. No, I did not.

Q. You are sure about that now? A. I am positive.

The Court: Did I understand you to say, "'I did not lock the door when I went in''?

The Prosecutor: That is right.

Q. When you went in the house or in the yard, rather, did you tell Anna to stay against the house? A. No, I did not.

Q. Did Bill tell her to stay against the house? A. I can't recall it.

Q. You say that you can't recall, to these questions. What do you mean, you did not see it? A. I did not see it. I did not hear him say nothing like that.

Q. And you claim that all the time you were in there you only recall hitting him three times? A. Three times.

Q. When this statement was first made, you said that you did not see any cigars in the house. When was the first time you saw cigars? A. Out in the street, going up.

Q. Who had the cigars? A. William Albert Brown.

Q. Did he have them in his hands? A. He passed them, he passed three or two or something like that to me. He said, "You take two and I will keep the rest."

Q. Now, when you were partly through the examination you were stopped and Anna and her brother came in. Is that correct? A. How was that?

Q. While you were being questioned by Mr. Apgar, they stopped in the middle of the questioning and brought in Albert and Anna, didn't they? A. Yes, sir.

Q. Did you start to have a discussion then with Anna? A. Yes.

Q. About what happened? A. Yes.

Q. It was not until that time that you knew more about this statement, the second part of the statement that you made, is that correct? A. How is that?

Q. When you first made your statement you did not remember very much? A. No, I did not.

Q. When Anna Brown and William Brown were brought in there you seemed to remember an awful lot more. What was the reason for that? A. They were trying to put it all on me. I tried to defend myself.

Q. You mean to say then that you made this up? A. No, I didn't make it up.

Q. Is this correct? A. Yes.

Q. All that you said when Anna—

The Prosecutor: He has already answered the question, if your Honor please. He says it is correct.

The Witness: I didn't recall.

Mr. Johnson: I want to see whether he fully knows what my question said, if your Honor please.

The Court: It probably should have been framed a little different than "This is all correct?" I presume you are referring to the statement that he made.

Q. The statement that I am referring to now is that part of the statement that was made by you after Anna and William were brought into the room. A. Was that correct, did you say?

Q. Just a minute. Is that part of the statement correct? A. The first part?

Q. No, the last part. A. I can't recall what I said.

The Court: Well, you might review some of those statements, Mr. Johnson. I am not trying to suggest the procedure.

The Prosecutor: If your Honor please, the proper way to do would be not to read him the question and the answer but just read the question and let him tell the truth now if he wants to.

The Court: I think I should let him hear both the question and the answer. "Now, is that correct?"

The Prosecutor: All right.

The Court: Ask him whether he remembers that and ask the question and whether he remembers the answer.

The Prosecutor: It seems to me, if your Honor please, we are not concerned with whether or not the statement is correct but we are concerned with what happened down there that night. He can tell him what happened and from that we can tell whether or not the statement is correct.

The Court: Yes, I much prefer it and then he can go back to the statement.

Q. Smalley, will you tell the Court and the jury—

The Court: Yes, in his own words.

Q. In your own words, what happened from the time you left the Wonder Bar to the time you came out of Mr. Horner's house, as far as you can remember it.

The Prosecutor: Now he is to tell the truth, is that right?

Q. And tell the truth. Go ahead. A. When we came out of Hoffman Avenue, my sister, Julia

Washington, and myself, she asked me to walk up to the Wonder Bar with her.

The Prosecutor: Keep your voice up, so we can hear you.

The Witness: She asked me to walk up to the Wonder Bar with her.

The Court: Let him have the introduction. I see no objection unless the State has objection.

The Prosecutor: We will have to start all over again.

The Court: I know, but it is a matter of recollection. Go ahead.

The Witness: When we went in the Wonder Bar, a fellow by the name of Victor Neill bought a pint of Wilkins Family and we all drink that, otherwise on Hoffman Avenue I had bought two pints of Spring Hill, then Julia asked me to walk down in Pratt's Alley, to a boy friend's house of hers, by the name of Charley Green, and I come out of the Wonder Bar, down Adams Street, and Anna Brown and William Brown followed behind us. We got down on the corner, in Pratt's Alley, anyhow on the corner of the street and Julia said, "Come on, Smalley, go with me." Anna laid me by the hand, "Come on, come on, Smalley, let's go down to Mr. Horner's and rob him." So me being under the influence of liquor so heavily, I went on down to Mr. Horner's. We got to Mr. Horner's. Bill Brown said, "Try the door, Smalley, push it in." I pushed the screen in and unlocked the door, then I shook the knob of the door, turned the knob of the door. Mr. Horner

must have heard the noise on the door. So Anna said, "Here he comes, Smalley." She was around the side of the house, peeping through a window. She said, "Here he comes, Smalley, get him, Bill, get him," and he come to the door and opened the door and Bill hit him, hit Mr. Horner first. Then Anna shoved me in the door, said, "Go ahead, hit him, Smalley, hit him," and I hit Mr. Horner, then Bill said, "Grab him, Smalley," and I grabbed Mr. Horner, tussled across the floor, and Bill hit him again and he fell on the table. So him having hold of me, he throwed me on the floor and him on the floor too and the table leg broke. Then Anna was hollering, "Hold him, Smalley, hold him," and I was holding him down on the floor simply on account of her saying, "Hold him, Smalley, hold him," and then they were ransacking the house, in the middle room and front room, and I kept hollering, "Let's go, let's go, what you going to do?" Bill Brown walked by the room, hit Mr. Horner several times in the face, kicked him and then told me to watch him and watch at the window and I did. Then we went back in the room and searched around the room, and couldn't find anything. He asked me to ask Mr. Horner where was his money, and I asked Mr. Horner where his money was. Bill said "Holler louder, he can't hear you, Smalley", and I hollered louder "Where's your money". Then Anna Brown came out of the room with a blanket around her shoulders, and yelled in Mr. Horner's ear "Where's your money?" and saying "We

are gangsters from Philadelphia, we come to rob you", and "Mr. Horner, we are gangsters from Philadelphia, we come to rob you" and stamped Mr. Horner on the head with her shoe heel and sole. Then she went to the sink and got some water and threw on Mr. Horner's head and face. Then she got on one side of Mr. Horner and helped him up, and I helped him up on the other side into the middle room. That was the bedroom, over to the bed. Mr. Horner looked over on the bed like he was looking for some money. He said "I haven't got no money". Then Anna nudged me in the back and said "Hit him, Smalley", and I hit him, and Bill hit him, and he fell down to his knees the side of the bed. Then he was kicked, that's when he was at the side of the bed, and this razor was stuck around his throat, and he said "I ought to kill you". Then he was kicked off the bed by Bill Brown on the floor, and slumped to the floor. I hit him last, simply because Bill said "Hit him for safety first", and then he said "He will sleep now, let's go".

Q. That's all you remember? A. That's all I remember.

Q. What you said there is the truth? A. As near as I possibly can recall.

Q. When you went outside did you go with Anna and Bill? A. Bill told me, he says, "You and Anna go one way and I will go around the other way and cut across and meet you".

Q. Did you jump the fence? A. No.

Q. Sure about it? A. Yes, I am sure about it.

Q. Then where did you go? A. Went up the street to the Yock joint.

Q. Did you have something to drink then? A. No, we didn't.

Q. What did you have? A. Had two yocks and a fish sandwich.

Q. Who paid for them? A. Anna Brown.

Q. Where did she get the money? A. I suppose she got it from this man's house.

Q. Not suppose, do you know? A. No, I don't know.

Q. Did you get any money from Mr. Horner? A. No, I did not.

Q. Did you carry anything away from Mr. Horner's? A. No, I did not.

Q. What time was it when you were in the yock joint, do you know? A. I can't recall what time it was.

Q. Where did you go from the yock joint? A. I went home.

Q. To your home? A. No, I went to my mother's house.

Q. Did you knock at the door when you went in? A. I don't recall whether I knocked on the door, or not.

Q. What happened, not what somebody told you, unless you know what happened? A. What happened when I went in the house?

Q. Yes. A. I went to bed on the couch.

Q. Did you put yourself to bed? A. Yes.

Q. Sure about that? A. As near as I can recall.

Q. What time did you get up next morning? A. About nine o'clock.

Q. Where were you when you got awake? A. Around my mother's house.

Q. Where? A. In Hoffman Street.

Q. What were you, still lying on the same couch? A. Yes, I was.

Q. Was your mother there when you got awake? A. No, she had gone to work.

Q. What shoes did you have on that day? A. These white shoes.

Q. Those pants? A. Yes, these pants.

Q. And shirt? A. That day?

Q. Yes. A. The second day?

Q. No, June 16th, the night of the 16th? A. When was that, on Wednesday night?

Q. Yes? A. No, I had on my blue shirt, a blue polo shirt.

Q. Did you have a blue polo shirt on when you got up in the morning? A. Yes, I did.

Q. Did you have those shoes on? A. Yes, I did.

Q. What did you do with the shirt when you got up? A. The shirt, I pulled it off and put it on the chair in the kitchen.

Q. Did you see any blood on it? A. Right up here, one spot (indicating).

Q. Any blood on your shoes? A. Yes, there was.

Q. Where? A. On the top of them.

Q. What did that come from? A. As near as I can recall when Anna Brown throwed the water on this man's head, and the floor, it splashed up on my shoes.

Q. Did you go on home then when you got up? A. When I got up?

Q. Yes? A. Yes, I went around my house.

Q. What did you do then? A. A fellow come around in the car for to take me to Camden for to get my money.

Q. Did you get it and go back to Paulsboro again? A. Yes, I got it.

Q. When was the first time you saw Bill Brown on the next day? A. Next day I saw him first thing in the morning before I went to Camden.

Q. Was he with you that morning? A. No, he wasn't.

Q. When did you next see him? A. Next time I seen him he was dressed up when I come from Camden.

Q. Where did you go? A. I went to my mother's house.

Q. Came back again then? A. Paid some of my bills there I owed, paid my Uncle King Wood.

Q. And then what happened? A. I give the kids some money for some ice cream.

Q. When you were at your house in the afternoon what time was it when the officers got there? A. I would say about one-thirty.

Q. Who came to the house? A. Koko and Domenick Travaline.

Q. Where were you when they came in? A. Lying on the couch.

Q. Where was Bill Brown? A. Sitting in the armchair.

Q. When they came in? A. Yes, when they came in Bill Brown jumped out of the chair and ran to the kitchen in my back room.

Q. Was he coming out of the back room when they came in? A. I couldn't recall, I don't know, I was in the front room.

Q. Did Travaline ask you where Bill Brown was? A. He did.

Q. What answer did you make to him? A. I said in the kitchen.

Q. Did they go in and get him? A. Yes, they did.

Q. Then they took the pair of you to the City Hall? A. Yes.

Q. Let's start out with right after supper on June 16, what did you do right after supper? A. Right after supper?

Q. Yes. A. I went downtown.

Q. What did you do downtown? A. Bought a new suit of underwear and this polo shirt.

Q. Anything else? A. And a pint of whiskey.

Q. Then you came home to change it? A. Yes.

Q. Did you drink any of the liquor on the way home? A. No, I did not.

Q. Did you meet Bill Brown on the way home? A. No, I did not.

Q. Did you go home and change your underwear? A. Yes, I did.

Q. Then where did you go? A. I come out round to King Wood's house.

Q. That is your uncle? A. Yes.

Q. What did you do there? A. Asked him did he want a drink.

Q. Did you drink there? A. He took a couple of drinks and I took one.

Q. From there where did you go? A. Down to my mother's house.

Q. Who did you see there? A. Mr. Bowler and my mother.

Q. Then what did you do? A. There was about that much (indicating) left in the bottle, and Bill was across the street, and he asked me, he said, "Smalley, give me a drink out of the bottle". I said "All right", and I passed him the bottle and he drank the rest.

Q. Then where did you go? A. Up to the pool room.

Q. With Bill? A. No.

Q. By yourself? A. Yes, sir.

Q. How long did you stay at the pool room? A. I would judge about an hour.

Q. Then where did you go from the pool room? A. Over to the Wonder Bar.

Q. What did you get there? A. A pint of whiskey.

Q. Did you drink up there? A. No, I did not.

Q. Where did you go with it? A. Down to Hoffman Street to a girl's house by the name of Edna Lewis.

Q. Edna Lewis? A. Yes.

Q. Did you drink it there? A. Yes, we drank it there.

Q. Then where did you go? A. Then Julia come in the house while we was drinking this pint. I asked her—it was empty, I asked her did she want some more whiskey to drink. She said "Yes" so I went back to the Wonder Bar and got another pint.

Q. You took that to whose house? A. Edna Lewis'.

Q. Edna Dorsey? A. Edna Lewis.

Q. Does Julia live there? A. No, Louise lives there.

Q. Who was in the room when you came back with the second bottle of liquor? A. Anna, Louise and Julia.

Q. Was Bill there? A. No, Bill wasn't there, Bill come in later.

Q. Who drank the liquor from the bottle? A. All of us that was in the house.

Q. Did Anna have some? A. Yes, she had some.

Q. Did you have some? A. Yes.

Q. Julia have some? A. Yes.

Q. Bill have some? A. Yes.

Q. Anyone else? A. Louise.

Q. Did you have any beer in there? A. I don't remember no beer.

Q. You don't remember any beer? A. Probably they had some beer before I got there.

Q. You didn't see anyone drinking beer? A. No.

Q. How long did you stay in Julia's house? A. Julia's house?

Q. Louise's house? A. I stayed there about a couple of hours, I guess.

Q. Where did you go from there? A. Up to the Wonder Bar.

Q. Up to this time you had had how many bottles of liquor to drink from? A. Three bottles.

Q. Then you went up to the Wonder Bar, and whom did you meet there? A. I met a fellow named Victor Neal.

Q. Did you see Julia? A. Julia was with me.

Q. She went up with you? A. Yes.

Q. Did you and she sit down at a table and have some beer? A. I don't remember.

Q. You don't remember? A. I don't remember sitting down to a table.

Q. Did Victor come up to you? A. Victor Neal?

Q. Yes. A. He was right at the bar.

Q. When you went in? A. Yes.

Q. Was Bill Brown there, too? A. No, Bill wasn't there at the time.

Q. Did Victor buy the liquor right away? A. The pint was bought.

Q. He had already bought it? A. Yes, in a little while Bill came in, I don't know whether he was already in the grill or not.

Q. This last time you were in the Wonder Bar you only had one bottle of Wilkins Family? A. Yes.

Q. Then who drank out of that bottle? A. Bill Brown, Victor Neal and myself.

Q. That was all? A. Yes.

Q. That was all you had to drink in the Wonder Bar that time? A. As near as I can remem-

ber. I might have had some beers, and might not.

Q. You don't recall drinking with Julia? A. I don't remember drinking with her.

Q. Then what did you do? A. It was getting late, and Julia asked me to walk down Pratt's Alley with her.

Q. Who did you go out the door with? A. With Julia.

Q. Do you know anyone else you went out the door with? A. No.

Q. Did you see Bill Brown outside the door? A. Bill must have come out behind us.

Q. Did you see him out there? A. No, I didn't see him.

Q. Did you see Anna Brown there? A. I saw her out on the porch.

Q. Did you leave there immediately? A. Yes.

Q. Did you and Julia come right out the door and go down the steps and turn and go down the street? A. As I can remember.

Q. Did Julia have you by the hand? A. Yes, she did.

Q. When did you first know that Anna and Bill were in back of you? A. Going down the street, down Adams Street.

Q. Did they holler at you? A. No, they was talking.

Q. Did you know it was them, or did you turn around to see who it was? A. I knew it was them, because Julia told Anna to come on and go with us, too.

Q. Did you talk, and say anything to Anna when you got out on the porch? A. No, I did not.

Q. Did you say anything to Bill? A. I don't remember saying anything to him.

Q. When you got down to Pratt's Alley who was it suggested going to Horner's? A. Anna.

Q. Sure about that? A. That's the only one I ever heard say anything about it.

Q. You mean that night or any other time? A. That night.

Q. Did you hear Bill say anything about going to Horner's? A. He just said "Come on Smalley".

Q. Do you know what they were going there for? A. Yes.

Q. When did they tell you what you were going there for? A. Down in Pratt's Alley.

Q. Down in Pratt's Alley? A. Yes.

Q. Did you know what that meant?

The Prosecutor: What what meant?

Mr. Johnson: By going down to Mr. Horner's.

The Prosecutor: Let him repeat what they said to him.

The Court: Yes I would like to know what they said.

Q. What did they tell you they were going down there for? A. They said they were going down to Mr. Horner's.

Q. Did they say why they were going down there? A. Yes.

Q. What did they say they were going down there for? A. To rob Mr. Horner.

Q. Were you going along with them to help? A. They asked me to go along with them.

Q. Did they want you to do anything? A. They didn't say nothing about me doing anything until we got there.

Mr. Johnson: Cross-examine.

Cross-examination by the Prosecutor:

Q. Smalley, do you remember seeing the watch, which has been introduced in evidence, which was found under the mattress in your mother's bedroom, do you remember seeing that watch while it was hanging on the wall in Mr. Horner's house that night? A. No.

Q. Do you know who took the watch from Mr. Horner's house? A. I do not.

Q. Did you take it from Mr. Horner's house? A. No, I did not.

Q. While you were at Horner's, was anything said by you or by anyone else in your presence about wanting the watch? A. William Albert Brown.

Q. What did William Albert Brown say about the watch? A. He said "We can pawn the watch and get something out of it".

Q. That was while you were at Mr. Horner's home? A. Yes.

Q. So that you did see the watch while you were at Mr. Horner's home? A. I didn't see the watch.

Q. How did you know what he was talking about? A. By what he said.

Q. What did he say? A. He said "We can pawn the watch". He said "I got his watch" he said "We can pawn it and get something out of it".

Q. Do you know where that watch had been hanging? A. No, I do not.

Q. But you do remember very definitely while you were in Mr. Horner's house that Bill Brown told you he had gotten Mr. Horner's watch, and said that you could hock it, or pawn it and get some money out of it, is that right? A. Yes.

Q. You saw that cigar box on the table there

at Mr. Horner's house, didn't you? A. No, I did not.

Q. When did you first know that anyone had taken cigars from Mr. Horner's house? A. Out in the street.

Q. Right after you got outside? A. Up the street when we was outside going up towards the Yock joint.

Q. How far away were you from Mr. Horner's house at that time? A. I don't know exactly how far.

Q. Didn't you see the cigars while you were in the house? A. No, I did not.

Q. When you left Mr. Horner's house you went in one direction and the other two went in another direction, isn't that right? A. William Brown went one direction and I went the other direction.

Q. Where were you when you first got hold of the cigars? A. Must have been on the corner of Pratt's alley.

Q. Before you went down to Mr. Horner? A. After.

Q. After you went down? A. Yes.

Q. Who gave you the cigars? A. William Brown.

Q. Where did he say he got them? A. From Mr. Horner's house.

Q. Now, how old are you? A. Twenty-three.

Q. Will you stand up? A. (The witness complies.)

Q. How tall are you? A. I can't recall.

Q. Will you roll up your right sleeve? Roll it all the way up. Turn around so the jury can see. A. (The witness complies.)

Q. What sort of work do you do? A. Rigging work.

Q. Iron worker? A. No.

Q. Did I ask you how much you weighed? A. No.

Q. How much do you weigh? A. On the scales up there, 178.

Q. As you stand now? A. Yes.

Q. You are twenty-three years old? A. Yes.

Q. And are an iron worker? A. Yes.

Q. Did you ever do any boxing or fighting of any kind? A. I did a little bit of boxing in CCC camp.

Q. Are you right-handed or left-handed? A. Right-handed.

Q. The following morning when you woke up at your home did your hands hurt you? A. No, they did not.

Q. You are sure you hit him with your hands? A. Yes.

Q. Close up your fist. You can close your fist? A. Yes.

Q. Turn it around and as though you were going to hit with it. Swing it as though you were going to hit somebody. (The witness complies.)

Q. The following morning there was nothing the matter with your right or left hand? A. No, there wasn't.

Q. Did you at any time beat Mr. Horner's head up and down on the kitchen floor? A. I did not.

Q. How did the blood get splashed all over the kitchen? A. Through this water that Anna throwed over his head.

Q. Here are some blood marks on the kitchen cabinet. Did the throwing of the water on the floor splash the blood on the kitchen cabinet?

Mr. Johnson: I object to that.

The Court: The objection is well taken.

The Prosecutor: I withdraw the question.

Q. Do you know how the blood got on the side of the kitchen cabinet, about two or three feet above the floor? A. No, I do not.

Q. While you were tussling around with Mr. Horner in the kitchen, did you have any difficulty throwing him? A. Throwing him?

Q. Throwing him down to the floor. A. I didn't throw him. He fell on the table. He was hit and he fell on the table.

Q. While you were tussling with Mr. Horner and holding him, Bill Brown hit him? A. Yes.

Q. That knocked you both down? A. No, he had hold of me.

Q. You fell over the table and broke the table? A. The table is broken in the picture.

Q. Then he went down to the floor? A. Yes.

Q. At any time did you bump into the kitchen table with the metal top while you were tussling around that kitchen? A. No.

Q. When you first came in the door, as I understand it, Bill Brown hit the first blow? A. Yes.

Q. Then Anna said, "Smalley, grab him"? A. Bill said that.

Q. Bill said, "Grab him"? A. Yes.

Q. And you grabbed him? A. Yes.

Q. You held Mr. Horner and were tussling around the room, and when Brown hit him—you said that Anna Brown could not hit that hard. How do you know that was a hard blow? Did you hear the smack? A. No, I did not.

Q. What makes you thing it was the hard blow? A. That is my mistake.

Q. Your mistake? A. Yes.

Q. In what way was that your mistake? A. It probably wasn't hard at all, probably it was.

Q. You think it wasn't a blow which knocked this old gentleman down? A. Yes.

Q. You landed on him and it knocked him down? A. No, it didn't knock him down.

Q. That was no love tap that you gave him? A. Under the influence of liquor I don't know how hard I hit him.

Q. You were under the influence of liquor but you remember what you were doing? A. Yes, I can remember some, hitting him.

Q. You can remember hitting him? A. Yes.

Q. You remember that he went down on the floor in the kitchen? A. Yes.

Q. How long were you in there beating up the old gentleman? A. I can't recall how long it was. Not beating him; I didn't beat him up.

Q. What do you call it? A. I hit him several times and held him down on the floor.

Q. You hit him several times and held him down on the floor? A. Yes.

Q. Then the other fellow kicked him in the neck and Anna Brown stamped on his face? A. Yes.

Q. You don't call that beating him up, is that right? A. Yes.

Q. I guess you did, and that is your mistake too? A. (There was no answer.)

Q. How long were you in there kicking him around, stamping on his face, and punching him? How long did that take? A. I don't know how long it was.

Q. An hour? A. I don't know.

Q. Half an hour? A. I don't know.

Q. A minute? A. I would not say.

Mr. Johnson: He said he did not know and I do not see why he should be asked so many questions on that point.

The Court: The Prosecutor wants to see if he can possibly remember and he is giving him the two extremes.

Q. Was it a minute? A. I would not say a minute.

Q. Tell us what happened when you three were in there. Did you ask him for money? A. I didn't ask him for the money.

Q. But the other two did? A. I didn't want his money because I was working.

Q. You didn't want his money? A. No, and didn't intend to hurt him, but under the influence of liquor I was led down to his house by Anna Brown and William Brown.

Q. Maybe you were not under the influence of liquor as much as you thought. You remember what you were doing and what you did. A. Since I have been in jail I remember.

Q. You came to yourself the first day. A. Downstairs when I made some of the statements?

Q. You made the same statement here today almost word for word that you made in our office on June 17th, didn't you? A. Some of it.

Q. Practically word for word? A. Some of it.

Q. When you left Mr. Horner's home, after this was all over, you went down and had something to eat, is that right? A. Yes, we went to the yoc joint.

Q. Wasn't one of the curtains ripped down in the kitchen of Mr. Horner's house? A. I didn't see it.

Q. Do you remember Anna Brown standing in the doorway between the kitchen and the dining room with her white suit? A. I didn't see it.

Q. You remember that she had her white linen suit on? A. I don't remember that.

Q. You remember putting a blanket around her head? A. Yes, sir.

Q. Do you remember getting down to the old gentleman and her asking for money? A. Yes.

Q. You remember that? A. Yes.

Q. Then you remember her going over to the sink and throwing a basin of water on him? A. I do.

Q. Was he unconscious at that time? A. I couldn't say.

Q. Was he moaning or groaning or was he out stone cold? A. No, he wasn't moaning or groaning.

Q. You were still on top of him? A. No.

Q. You were standing up then? A. Yes.

Q. Had been knocked out completely as far as you could see? A. He wasn't knocked out.

Q. What was he doing? A. Just lying on the floor.

Q. Not moving. Was he moving? A. He was hit and kicked in the kitchen by William Brown.

Q. In the kitchen that was before Anna Brown threw water on him. Was he conscious or unconscious? A. From what I could see he was conscious.

Q. From what you could see what made you think he was conscious? Did he talk? A. I didn't hear him say anything.

Q. Did he move? A. Yes, he was trying to get up.

Q. Isn't it a fact that he crawled from the kitchen into the dining room to find his money for you people and that is how all the blood marks got over the kitchen floor? A. No.

Q. Did you drag him across the kitchen floor? A. No, he walked.

Q. Was he able to walk? A. Yes.

Q. Did he do that? A. He walked by us having hold of his arm.

Q. He said he was going to get his money? A. He said it to Anna Brown.

Q. You were there and had hold of him, is that right? A. I helped him off the floor.

Q. Helped him to get his money? A. No, I didn't want his money, didn't want his money.

Q. When you got him to the bedroom did you have hold of one side of him and Anna Brown the other? A. When he was going in to get his money I don't know.

Q. Who dropped it on the floor in the bedroom? A. He didn't drop it on the floor.

Q. How did it get down there? A. He was knocked down.

Q. Who knocked him down? A. He was hit by William Brown.

Q. And you too? A. I didn't hit him.

Q. You were just along to sort of keep company and to see what was going on. Didn't you hit him after he got in there? A. Hit him several times.

Q. What did you hit him with? A. My fist.

Q. Show the jury the way you swung that night. A. (Witness complies.)

Q. Is that the way you did it? A. Yes.

The Prosecutor: That is all.

By the Court:

Q. You said that you hit him three times. Do you recall those three times when you hit him? A. Yes, I can recall that.

Q. When was the first time that you hit Mr. Horner? A. Going in the door.

Q. That is the time you hit him first? A. Yes.

Q. What was the next time you hit him? A. The next time he was hit in the middle room.

Q. Where was he then? A. I really don't know, I can't recall.

Q. Then the third time, where did you hit him

and where was he? A. I can't recall where he was.

Q. You can't recall where he was? A. No.

Q. Did you tell Anna Brown to go in the other room and get a blanket to cover herself? A. I don't recall saying that.

Q. You don't recall that? A. No.

Q. Did you take the blanket from Anna Brown and cover Mr. Horner? A. I don't recall covering up Horner with no blanket.

Q. Did you have a talk about going down to Horner's place outside on the porch of the Wonder Bar? A. I don't recall saying nothing about Mr. Horner.

Q. The first time they were talking about going to rob Mr. Horner, where was that? A. Down in Pratt's Alley.

Mr. Johnson: The defense rests.

The Prosecutor: The State rests.

Charge of the Court.

WOODS, *J.*

Ladies and gentlemen of the jury, the State has presented a charge against the three prisoners at the Bar, Smalley Burrell, William Albert Brown and Anna Brown. The charge is that Smalley Burrell, William Albert Brown and Anna Brown, late of the Borough of Paulsboro, in the County of Gloucester, on the 16th day of June, 1937, in the Borough of Paulsboro and within the jurisdiction of this Court, in and upon one William J. Horner, in the peace of God and this State then and there being, wilfully and feloniously and of malice aforethought did make an assault and him the said William J. Horner then and there wilfully, feloniously and with malice aforethought did mortally wound, of which said mortal wounds the said William J. Horner thence continually languished until on the 18th day of June, 1937, he died, wherefore the said Smalley Burrell, William Albert Brown and Anna Brown did wilfully, feloniously and of malice aforethought kill and murder the said William J. Horner, contrary to the form of the statute in such case made and provided.

The phraseology of this indictment comprehends murder in the first and in the second degree. To support the charge in this indictment, the State must prove to you the facts sufficient for that charge, by evidence beyond a reasonable doubt. Reasonable doubt would exist when in the judgment of the jury, after a careful review of all the testimony and the evidence, it finds itself unconvinced of the guilt of the prisoners. If such doubt exists, you are charged to resolve it in favor of the prisoners at the Bar.

The phraseology of this indictment too compre-

hends, ladies and gentlemen of the jury, that part of our criminal act dealing with murder, as set forth in Sections 106, 107 and 108. I shall read these sections so far as I feel they appertain to this hearing and I want you to mark closely with me the wording.

"Any person who, in committing or attempting to commit arson, burglary, rape, robbery, sodomy, or any unlawful act against the peace of this State, of which the probable consequence may be bloodshed, shall kill another; or if the death of anyone shall ensue from the committing or attempting to commit any such crime or act as aforesaid," then such killing shall be murder.

Let me strike those words out and put in, "then such killing by such person or persons * * *" or let me put it—I want to strike that out, "then such person or persons so killing as aforesaid shall be guilty of murder."

Now, right after this section there is another section. You will have observed what the statute says, an act or acts of that order should be—the statute says, such acts by such person or persons shall constitute murder.

Now, the next section provides:

"Murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate any arson, burglary, rape, robbery or sodomy, shall be murder in the first degree; and all other kinds of murder shall be murder in the second degree."

Then section 108 provides for the punishment. It is this:

"Every person convicted of murder in the first degree, his aiders, abettors, counsellors and pro-

curers, shall suffer death unless the jury shall by their verdict, and as a part thereof, upon and after consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed."

I might as well read the remaining words, although I do not feel they have an application in this case:

"Every person convicted of murder in the second degree shall suffer imprisonment at hard labor not exceeding thirty years."

In New Jersey, ladies and gentlemen of the jury, there are two degrees of murder, a wilful, deliberate and premeditated killing or a homicide or murder that is committed in perpetrating or attempting to perpetrate arson, rape, sodomy or robbery or burglary. The first two are murder in the first degree and all other kinds are murder in the second degree.

What is murder? Murder is the unlawful homicide with malice aforethought. That is the common law definition and a homicide is the killing of a human being by a human being and is either justifiable, excusable or felonious. In applying the law to the prisoners at the bar, you may take into consideration the two forms, excusable and felonious, provided you feel that the evidence warrants it.

Now, to make out a case, the State must have established by evidence beyond a reasonable doubt, first, the death of William J. Horner, at or about July 16th or 18th. The indictment says that this act of the prisoners at the Bar was committed on the 16th and that the deceased languished until the 18th when he died. There is no dispute of that. There is evidence here on the part of the defendant prisoners at the Bar as well as the testi-

mony of Dr. Nelson and those who first saw the man early on the morning of June 17th that William J. Horner is dead and you may regard this as true beyond a reasonable doubt.

If you believe the testimony given by his neighbor Mr. Wilson, by officers Atkinson and Travaline and the photographer, Joseph Baji, you will recall that about 8 o'clock on the morning of June 17th, William J. Horner was found in an unconscious state of mind, prostrate on the floor of his bedroom, with outward appearances about the face, the head, the neck, the chest as having been beaten, battered, cut, bruised, by blows or other acts, and further if you believe the statements by Doctors Nelson and Sheets, who performed the autopsy on the body of William J. Horner, and their statements remain uncontradicted, you have a right to be convinced beyond a reasonable doubt that, as Dr. Nelson related, he died from cerebral hemorrhage, cerebral contusion and contusions most likely from a number of blows received on his head or, as Dr. Sheets, after carefully detailing, describing and narrating the results of the autopsy, in his exposition said the causes of death were concussion of the brain, contusion of the brain and intercranial hemorrhage caused by blows on the head.

In the third place, the State must prove to you beyond a reasonable doubt that these blows and bruises, acts of force, cuts, wounds, inflicted upon William J. Horner, were so inflicted at the hands of the prisoners at the Bar.

Therefore having found that the man is dead and having discovered that it was by reason of blows received about the head, the next inquiry a jury goes into is to know who did it. The State charges that Smalley Burrell, William Albert

Brown and Anna Brown did it. The State too must prove by convincing you beyond a reasonable doubt that the defendants are guilty of murder in the first degree, if they demand of you a verdict of murder in the first degree. Now, the State, in order to convince you beyond a reasonable doubt that the defendants are guilty of murder in the first degree, the State must show that the murder was committed in perpetrating or attempting to perpetrate robbery or the crime of burglary. Now, what is robbery? Any person—it is defined by our statute—who shall forcibly take from the person of another, money or personal goods and chattels, in this section, of any value whatever, by violence, or putting him in fear, and his aiders, procurers and abettors, shall be guilty of a high misdemeanor. I need not read any more about that but the person who shall forcibly take from the person of another money or personal goods and chattels of any value whatsoever, by violence or putting him in fear, and his aiders, procurers and abettors, that person is guilty of robbery. To make this point, the State must show that there was actual violence or such a demonstration of threats as will create reasonable apprehension of bodily injury if the person who is robbed resists. Now, what do you recall in the testimony and the evidence to lead you to believe that the prisoners at the Bar committed a robbery? In recounting some of the testimony, I want you to understand that you go by your recollection and not by mine. One, two or three of the prisoners at the Bar, by their testimony on the witness stand or by the confessions that were admitted into evidence agreed and I think it is not questioned that the three went down to the Horner house with the idea of robbing or of get-

ting money. There is evidence that they went into his place, that they no sooner spied him when they hit him and that would be putting a man in fear, especially if he was in his own castle, and that they took by that violence from him—oh! yes, he was undressed to be sure, he did not have any money in his pockets but the money was in his presence in his house, it might have been at the desk, it might have been in the pants, although William Albert Brown said it was not in the pants, it might have been in an envelope in the desk but anyhow it is admitted by one or two of the defendants and possibly a third, by reference thereto, that seventy-five cents was obtained and Anna Brown said she picked a nickel off the floor. It is admitted too or stated or confessed by the prisoners at the Bar, one of them got a knife—I think it was William Albert Brown—that the same person got some cigars and shared them with them, another of the party outside of the house; that one got a watch and religious medal or charm. These articles for the most part were identified by the sister, as you will recall—I think her name was Emma Horner. This was corroborative testimony of what had already been admitted in the confessions of the prisoners at the Bar. If you believe the story and the stories of the prisoners at the Bar as well as that of Emma Horner, these articles were the property of William J. Horner, they were taken in his presence, if you believe the testimony beyond a reasonable doubt, and they were taken in violence by putting him in fear. Now, it is true, if I recall correctly, that not one of the prisoners at the Bar admitted that he or she took the money. There was simply a handling of the money in the dark and they did not know who got it but anyhow finally the money got into

the hands of Anna Brown. Not only that the State, as I said before, in order to convince you beyond a reasonable doubt that the defendants are guilty of murder in the first degree, must show that the murder was committed in perpetrating or attempting a robbery or a burglary. Now, what is burglary? Any person who shall by night—and if these acts on the part of the prisoners at the Bar happened at any time they happened at night —even the defendants agree that the time they were down at Horner's place was somewhere between eleven and one o'clock—any person who shall by night wilfully or maliicously break and enter any church, meeting-house or dwelling house —and this was a dwelling house where William J. Horner was—with intent to kill, rob, steal, commit rape, mayhem or battery, he, his counsellors, procurers, aiders and abettors shall be guilty of a high misdemeanor. What are the elements? The elements in this crime to be considered are, first, the time, the place, the manner and intent. What was the time? It was at night. What was the place? It was a dwelling house. What was the manner? I do not have to graphically describe how they went there. They all agree that first of all the screen was cut or pushed in or pushed through and that one of them—it does not matter which, the three were there—put his hand inside and pulled the latch, and we have authority to know that that act in itself is complete and a burglary or at least an attempt to burglarize. And what was the intent? I do not think anyone of the three denied that they intended to go down to rob the man of some money. Albert Brown said when he got upstairs he was after something, he did not know what. The girl said she went over to the desk, looking around at papers, looking at papers

in the dark, ladies and gentlemen of the jury, and, as referred to by counsel for the defendants, some things that I could not understand. They were feeling around. They felt a razor on the chair. Now, if you are convinced, ladies and gentlemen of the jury, that the State has shown to you beyond a reasonable doubt that these prisoners at the Bar committed or perpetrated or attempted to perpetrate either a robbery or burglary or both, then they have proved or the State has proved its case to be that of murder in the first degree. I said perpetrated or attempted to perpetrate. If the State has shown that there was an attempt made—and what is the attempt? That is defined very clearly. An attempt is an unfinished crime and is indictable at common law. An attempt is intended, an apparent unfinished crime. It does not appear from the evidence as far as I recall that they did not finish the job. But if the State should show the attempt so that it had the elements of an indictable offense, that is all the further the State would have to go in order to prove, if it has proved to you beyond a reasonable doubt, murder in the first degree. Early in evoking and eliciting testimony from the witnesses, the matter of attempting a confession or confessions came before you and the Court. The Court would feel that it would be remiss unless it should charge you with regard to confessions generally and probably specifically in this particular case. Now you will recall from the testimony by Mr. Denham that he sat on two distinct occasions when he took statements from the prisoners at the Bar. He told you too when and under what circumstances they were taken, who was present. I do not recall all the names of the officers, without referring to my notes but there was Officer Atkinson, Officer Trav-

aline, County Detective, one time the Sheriff, probably the Under-Sheriff. You will remember who was there. The first time it appears that some of these statements were taken individually when all the three were not present at the same time, then at another time when they were all present and then probably the same sitting when they were all present and then a second time when they were called in before certain persons, including the Prosecutor and the stenographer, Mr. Denham, and the Prosecutor read back the original statements that were made and these gentlemen prisoners and lady prisoner were called upon to make the corrections according to what they had in their recollection but the chief point to be discussed here in regard to confessions is whether or no these confessions were voluntary. There is a great deal of law on these voluntary and involuntary confessions. To assist you in having an understanding of the circumstances under which they might be introduced, I am going to read you some of the law. Before a confession made by a prisoner charged with a crime to an officer in whose custody he is upon that charge can be received in evidence, it must be shown that the confession was voluntary and this preliminary examination is for the Court and comprises mixed question of law and of fact. A confession by an accused to one in authority, to be admitted in evidence, must be voluntary. By this is meant that the confession must not be extorted by threats or obtained by any direct or implied promises. A confession obtained either by the flattery of hope or by the impressions of fear is not admissible evidence. The promise or hope excited must relate to some benefits to be derived by the prisoner in the criminal prosecution. The ground on which

confessions made by a party accused, under promises of favor or threats or injury are excluded as incompetent is not because any wrong is done to the accused in using them but because he may be induced by the pressure of hope or fear to admit facts unfavorable to him without regard to their truth. This is another point with regard to confessions that I want you to have in mind. Although it is necessary to the admissibility of a confession that it should have been voluntarily made, that is, that it should have been made without the pressure of hope or fear from persons having authority, yet it is not necessary that it should have been the prisoner's own spontaneous act. There is one other point that I would like to have you pay attention to and this point or quotation comes from the same case from which I read you the law. If the party has made his own calculation of the advantages to be derived from confessing and thereupon has confessed the crime, there is no reason to say that it is not a voluntary confession, and that comes from one of the greatest if not the greatest writer on evidence, Mr. Greenleaf.

Now, you heard what Anna Brown had to say. She said that, as I recall it, not in exact words—Mr. Apgar come, come up—maybe I had better read. You will have to bear with me because I have not had the time to assemble all this. I want the first part. 419 is what I want. She was asked, "Had you made a statement?" She said, "No, I had not made a statement." "What did Mr. Apgar ask you?" The answer was "He asked me wasn't I on parole from the State Home for Girls. I said, 'Yes', and he said if I didn't make a statement I was going back, and he said, I believe it was him or Steve Atkinson, said my feet

was probably there and if I didn't make a statement all he had to do was call up Miss Barton and I would be there." You heard what Mr. Apgar said that he had said. Which one of the two do you believe? After all, ladies and gentlemen of the jury, you are the judges of the credibility of the witnesses. You will recall that subsequently she was asked that question—and what page was that, Mr. Prosecutor?

The Prosecutor: 465.

The Court: 464?

The Prosecutor: 465.

The Court: "When Mr. Apgar made the statement to you about your going back to the State Home, what did that mean to you?" "What did that mean to me?" "Yes." "Well, I figured like this, I think, well, they didn't even give me a chance to get my feet on the outside, before they come threatening me to go back to the State Home again." "What was the reason you made your statement?" "A. Yes, sir, and after all that wasn't exactly the reason either, because after all if I said that I had not been to Mr. Horner it would have been lying, because if he said those things were found in my home, I can't say a word, that shows we had been to Mr. Horner's home." Was the statement made voluntarily? Was it made out by reason of threat or fear or promise of reward? I do not believe I need discuss any further with you the matter of confessions except the law as stated and to say this, that the law further is: "there having arisen a conflict of evidence as to whether the confessions of Anna Brown, Albert Brown and Smalley Burrell are or were not voluntary, the question is left to you to determine whether upon all the evidence you are satisfied that these confessions were the voluntary acts of

the defendants." In other words, a Court can present it to the jury for their determination.

Now, there is another—by the way, I say this parenthetically, I do not think I need rehearse in all the details the testimony of all the witnesses. That point has been brought out by the attorney for the prisoners. It is the element of intoxication. There is some evidence here, ladies and gentlemen of the jury, which you have a right to regard but just bear this in mind, that you have to, because with intoxication as an ingredient of the alleged criminal act at the home of Horner, not at Louise's house, not at the Wonder Bar, not at the yockamain restaurant or not at the home, not at the home of Burrell's mother. There is evidence that these people had been drinking. I think in the evidence there is for your consideration—counsel for the defendants talked about bottles, the witness talked about pints—I think there were four pints and if I recall correctly there were about, well, you will remember how many were tippling at the pints. I believe you have a right to regard the quantity that was imbibed, to show whether or not these prisoners at the Bar were inebriates, to show whether or not the intoxication made them insane. If intoxication makes a man insane or if insanity comes by reason of intoxication it can be made a defense. There is a statement on the part of Mrs. Burrell and I think of the gentleman who stayed at her house that he came home, stepped across the door, fell flat on the floor, got up or was picked up and as that happened he was put on the couch. Now, I have to, of course, appeal to your experience. I would rather not put it in the first person. The Court will have to appeal to your experience, for after all you will remember or at least heard tell of

that sometimes what we do when we have had too much to drink makes us sick. I do not know what yocks are. Anyhow, one of them was sick. You are not concerned as to whether or not he was sick. You are not concerned particularly except to get some light or interpretation or determination as to whether or no there was insanity by reason of the intoxication, to learn that "I was feeling high," as I think one or two of the witnesses has said. There were several words, by the way, that crept into this evidence that were new to me for the first time, especially the word "clipping," and it seems from the testimony, even from some witnesses the word "clipping" was used in two different ways. Now, what is the law on intoxication? One of our leading cases, the Court said intoxication wilfully entered upon furnishes no excuse for crime and no defense against the consequences which the law denounces against crime. Any intoxication may be considered with reference to the existence of intent and its wilful, deliberate and premeditated character but if at the time of doing the act the evidence shows that the defendant was so intoxicated that his faculties were prostrated and he was rendered incapable of forming a specific intent to take life, which I have stated is an essential ingredient of this crime, then although it is no defense and no justification for crime, his offense thereby may be mitigated to murder in the second degree. Now, this statement was made where the jury was called upon to determine whether or no it was murder in the first or murder in the second degree.

I do not feel and I will say this now that for you gentlemen of the jury this is a case where you shall say it is murder in the first or murder in the second degree. I shall touch on that point a little

later. Now, the jurist said in that case further, "but I charge you in dealing with such a condition you ought to use great caution not to give immunity to persons who commit crime when they are inflamed with intoxicating drinks. You must discriminate between the conditions of mind merely excited by intoxicating drink and yet capable of forming a specific intent to take life and such prostration of the faculties as renders a man incapable to forming—incapable of forming the intent," and in that same case, if I recall correctly, Justice Van Syckel said there is no rule of the English law more firmly established than the voluntary intoxication—than that voluntary intoxication does not excuse or palliate a crime. The true rule in my judgment to be deduced from a mass of authorities is that there is a situation in which the fact of drunkenness is entitled to weight, not as an excuse for crime nor in extenuation of it but as a fact tending to show that the crime imputed was not committed. When the character of a crime is made by law to depend upon the state and condition of the defendant's mind at the time and with reference to the act done, intoxication as a circumstance affecting such state and condition of the defendant's mind is a proper subject for inquiry and consideration. I ask you ladies and gentlemen of the jury, on this subject of intoxication, were the prisoners at the Bar, any one or all of them in such a frame of mind after having imbibed these liquors which they said, as not to know what they were doing? Did they know when they came out of the Wonder Bar where they were going? They were at Pratt's Alley. Did they know when they separated, three and one, at Pratt's Alley, where the three were going and what they intended to do? Was there any one of these wit-

nesses who said that he did not or she did not know? Were the acts of hiding alongside of the house, going through the screen door, letting the man open the door, hitting him, wrestling with him, going through the desk, going upstairs, saying, "We are gangsters from Philadelphia. Where is your money?" I am not going to quote the words as they were elicited in the statements and coupled with the final act which probably put him to sleep in that unconscious state from which he never recovered, the final act for safety's sake, as was related by these witnesses. Were those acts of a person of an insane mind or one fired as that of a fiend? The intent—and what is the law there? Let me quote one of the leading authorities and I shall soon be through. This case quotes Wharton, the authority on homicide, in the third edition, page 658. This has to deal not only with the matter of intent but also with the conspiring together to do a criminal act. This is the quotation. It is laid down that where several persons combine and conspire together for the common object to commit robbery and in pursuit of that object one of them does an act which causes the death of a third person, each and all are principals and each and all may be convicted of murder, usually in the first degree, under the statute. That is a concise statement and it is applicable in this instance.

Now as to this matter of intent, wilfulness, deliberation and premeditation, elements in the crime of murder. It is stated that where killing in the perpetration or attempt to perpetrate a felony or one of the certain enumerated felonies —and I have already enumerated by reading to you the sections—is made murder in the first degree, the perpetration or attempt to perpetrate the felony is regarded as standing in the place of

or as the legal equivalent of the wilfulness, deliberation and premeditation necessary under the statute as to other killings and dispenses with the necessity of proof thereof. And Wharton again in his criminal law, on that very same point with regard to intent, says that "a homicide committed in the perpetration of a felony is murder whether there was any precedent intention of doing a malicious act or not, the engaging in the perpetration of the felony supplying the place of malice. This rule applies with special force," he says, "if death was the probable consequence of the felonious act."

In our State, the case of State against Carlino, with regard to aiders and abettors, in this particular case, in these prisoners, one was aiding and abetting the other, if you believe the story of the State beyond a reasonable doubt.

It is well settled, the Court said in that case, following the English law, that all who are present aiding and abetting in a felony are principals, if several persons set out together or in small parties upon one common design. What was the common design in this instance, be it murder or other felony or for any other purpose unlawful in itself and each takes the part assigned to him? It appears in this particular case, although the evidence is conflicting, one said the other told him to do it, the other said she told him to do it, and she said the other told him to do it. You will recall the conflict of evidence. I repeat, and each takes the part assigned to him, some to commit the fact, others to watch at proper distances to prevent surprise or to favor if need be the escape of those who are immediately engaged, they are all, provided the fact be committed, present at it. If divers persons come in one company to do any un-

lawful thing, as to kill, rob or beat a man or to commit a riot or to do any other trespass and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party, abetting and consenting to the act or ready to aid him, though they did but look on.

So in this instance it does not matter who delivered the fatal or critical blow. If you believe from all the evidence, beyond a reasonable doubt, not one but all would be guilty under the circumstances. The element relied on in all these cases of proof is predicated on one fundamental point and that is that you are to be convinced beyond a reasonable doubt. The State has to make out its case to you beyond a reasonable doubt, besides the testimony, besides the statements and the confessions that have been made. You have before you these photographs. They have been admitted into evidence. You have the map. You have the articles which were connectd up with these defendants, to which the defendants have already made admissions.

You have heard some character witnesses, some who have talked about the reputation of these prisoners and there may be something in that character or reputation evidence that has been brought before you which may engender in your mind a doubt, a reasonable doubt as to the guilt or the innocence of one, two or all of the defendants, and that reasonable doubt has been well stated in the leading case and I am going to read the definition as we accept it in the law. It is a term often used, probably pretty well understood but not easily defined. It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state

of the case which after the entire comparison and consideration of all the evidence leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

The burden of proof is on the prosecution. If upon such proof there be reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. The evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

Then too, ladies and gentlemen of the jury, you are the judges of the fact. The Court gives you the law. The facts as related, as by other evidence and photographs, tokens, articles that were presented and marked for you, all these you weigh and then after reviewing all the evidence you are to be convinced beyond a reasonable doubt.

Going back to those clauses again dealing with the definition first of murder, "any person who in aiding or attempting to commit arson, burglary, rape, robbery, sodomy or any unlawful act against the peace of this State, of which the probable consequence may be bloodshed, shall kill another or if the death of anyone shall ensue from the committing or attempting to commit any such crime or act as aforesaid, then such person or persons so killing as aforesaid shall be guilty of murder."

Then the next section says, "murder which shall be perpetrated by means of poison or by lying in wait or by any other kind or wilful, deliberate and premeditated killing or—this applies to this particular case—which shall be committed in perpetrating or attempting to perpetrate any ar-

son, burglary, rape, robbery or sodomy, shall be murder in the first degree," and the Court not exultantly but in all seriousness says to you ladies and gentlemen of the jury that the evidence does not warrant anything other than a verdict, guilty or not guilty of murder in the first degree. I have read enough of the law to you to make that point clear.

If these defendants have made out to you convincingly, but not beyond a reasonable doubt, that by reason of their intoxication they were insane and did not know what they were doing within the meaning of intoxication as I defined it to you, then they ought to be acquitted.

If on the other hand the State has made out a case beyond a reasonable doubt, predicated on the law as I have read it to you and as applied to the facts, you ought to find Smalley Burrell guilty; or, if not, not guilty of murder in the first degree; William Albert Brown guilty; or, if not, not guilty of murder in the first degree; Anna Brown guilty; or, if not, not guilty of murder in the first degree.

The law further states that after having found, if you do find, one, two or all guilty of murder in the first degree, that you ought to observe this part of the statute and the Court has a right to make it clear to you, that every person convicted of murder in the first degree, his aiders, abettors, counsellors and procurers shall suffer death unless the jury shall by their verdict and as a part thereof, upon and after consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed. If you should conclude that your verdict should be guilty of murder in the first degree or you say, "We find Smalley Burrell, William Albert Brown and Anna Brown guilty of

murder in the first degree," and stop there, then we know it and if you should feel, after your deliberation, that you should make that recommendation, then you will do so.

I have been asked to charge specifically by counsel for the defendants and I am taking up those specific requests at this time.

The first request I deny. There are some parts of it but there are some other parts that I do not feel I can so charge and therefore I am denying the first request.

The counsellor for the prisoners asks me to charge this:

"When a common enterprise is at an end no one of the co-defendants is permitted by a subsequent action or declaration of his own to affect the others. The statements of each co-defendant in this case can only be used against the person making that statement."

I assume that counsel means to say where that after an act by two or more alleged criminals has been committed and one makes a statement in the absence of the other two that statement is not binding on the other two who are absent. Is that correct?

The Prosecutor: That is correct.

Mr. Johnson: Yes.

The Court: I so charge.

I think I have already charged on the drunkenness. Do you feel that I have too?

The fourth I refuse.

The fifth, do you have any authority for that No. 5?

Mr. Johnson: Yes, I do.

The Court: How?

Mr. Johnson: I do.

The Court: Sorry to hold you up.

Mr. Johnson: No, that is not the one that I had in mind.

The Court: I have already charged. I will refuse the fifth.

The sixth is O. K., is all right.

"Reasonable doubt is a doubt which may be entertained by reasonable men and women after a thorough review and consideration of all the evidence."

I so charge, in conjunction with what I have already said.

"7. The benefit of a reasonable doubt always goes to the accused and is always applied in his favor. He is never presumed to be any more guilty than the facts make him."

I so charge. There is nothing harmful about that.

"8. If you believe from the testimony that the confession of Anna Brown was made upon threat that she was to be sent back to the State Home at Trenton, New Jersey, you are to disregard the confession in its entirety and all statements contained therein."

Do you insist on that?

Mr. Johnson: Yes.

The Court: I will so charge you.

The Prosecutor: There is one place in which your Honor I think unintentionally made a statement. You said it was the duty of the defendants to prove beyond a reasonable doubt that they were intoxicated.

The Court: Did I say defendant?

The Prosecutor: Yes.

The Court: In what part?

The Prosecutor: Back about two or three minutes.

The Court: Where is it?

The Prosecutor: That is where you discussed the question of insanity—drunkenness, rather.

The Court: By a preponderance of the evidence?

The Prosecutor: You said reasonable doubt. You said it is the duty of the defendants to prove beyond a reasonable doubt their drunkenness.

The Court: Is it that part of Justice Van Syckel's?

The Prosecutor: Just before you read the degrees of murder.

The Court: Using the word defendant instead of—

The Prosecutor: Yes, you said it was the duty of the defendant to prove that they were intoxicated and that it affected their mentality beyond a reasonable doubt. I do not think your Honor meant to state that; by a preponderance of the evidence.

The Court: By preponderance of the evidence?

The Prosecutor: Yes, sir.

The Court: The Prosecutor calls my attention to a statement having been made as to the requirements of proof by the defendant and calls my attention to the fact that the Court said proof would have to be made to you beyond a reasonable doubt by the defendants. If that was said, that is to be corrected by saying the defendants have to show to you by a preponderance of the evidence that they were intoxicated, in the sense as I have already defined it to you. I do not recall having said that but you may be right.

The Prosecutor: You were going quite fast at the time and it was unintentional.

The Court: Now, ladies and gentlemen, the case is in your hands. You will go to your delibera-

tion room and bring in your verdict. Pass out. Constables will be sworn.

The Prosecutor: Judge, do you want to say anything about the fact of recommendation? You said they could find any one or all of the defendants guilty of murder in the first degree but when you came to the recommendation of mercy you included all of them.

The Court: For the purpose of clarity—and it may be nothing more than repetition—you will regard each of the defendants individually and you will frame your verdict—I thought I said that in the beginning—your verdict will be, we find Smalley Burrell guilty or not guilty, William Albert Brown guilty or not guilty, we find Anna Brown guilty or not guilty. That is the way the verdict ought to come in and in your recommendation, if you want to discriminate, if you think you should in the case of one, two and if you go to the third, of course, it will take the three, you have a right so to do. Is that the point you wanted to make?

The Prosecutor: That is correct, sir. Mr. Johnson has a certified copy of the indictment and has no objection to the jury taking that with them.

The Court: Here it is.

(Original indictment handed to the jury.)

The Court: At this time the Court will recess until 6:30 o'clock, to take the verdict of the jury, and if they have not returned by that time or if they return before, the Court will be here.

EXCEPTION FOR DEFENDANTS.

Mr. Johnson: If your Honor please, on the requests to charge which I presented to you that

you refused to charge the jury, I ask an exception to your refusal to charge as requested.

The Court: I wish you would designate the numbers. It is No. 1, 3 and 4?

Mr. Johnson: Yes.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

DEFENDANT'S REQUESTS TO CHARGE

1. Uncorroborated testimony of co-defendants in a case must be observed and stand the closest scrutiny, and in order to believe the testimony of one of the co-defendants, the jury must take into consideration whether in the light of all the testimony and actions of that particular co-defendant, his or her testimony can be believed in full or part must be rejected. The State has not produced any testimony in corroboration of what happened in Mr. Horner's house. Therefore, the jury must be guided by the statements of the respective defendants and must also decide whether the testimony reflecting the entire blame on one co-defendant and very little to himself or herself are true.

2. When a common enterprise is at an end no one of the co-defendants is permitted by a subsequent action or declaration of his own to affect the others. The statements of each co-defendant in this case can only be used against the person making that statement.

3. While drunkenness is not an excuse for crime, temporary drunkenness is a form of alcoholic insanity which may deprive the defendants, Smalley Burrell and William Brown, of all their

faculties to distinguish right and wrong and that by their drunkenness or temporary alcoholic insanity they were made incapable of having the necessary felonious intent to break and enter, steal and murder and it is for you to judge from the testimony whether Smalley Burrell and William Brown were in that condition when the crime was committed and if they were, they cannot be convicted of murder in the first degree unless you also follow your verdict with a recommendation of imprisonment for life of hard labor or you must find them guilty of murder in the second degree.

4. If you find from the evidence that Anna Brown was also drunk or was in the same state of mind of temporary alcoholic insanity or that she was so far deprived of her reasoning on account of the liquor she drank, and under the influence of her brother, William Brown, and Smalley Burrell that she did not have a mind of her own, she likewise cannot be convicted of murder in the first degree unless you also follow your verdict with a recommendation of imprisonment for life at hard labor or you may find her guilty of murder in the second degree.

5. The law does not require the defendants to prove beyond a reasonable doubt that they were so intoxicated that they *could not the intent,* or were suffering from temporary alcoholic insanity so as not to comprehend the seriousness of their acts, but if the defendants raise a doubt in your mind of their condition at the time of the commission of the crime, the offense would be mitigated, and you must find them guilty of murder in the first degree with a recommendation for mercy or murder in the second degree.

6. Reasonable doubt is a doubt which may be entertained by reasonable men and women after

a thorough review and consideration of all the evidence.

7. The benefit of a reasonable doubt always goes to the accused and is always applied in his favor. He is never presumed to be any more guilty than the facts make him.

8. If you believe from the testimony that the confession of Anna Brown was made upon threat that she was to be sent back to the State Home at Trenton, New Jersey, you are to disregard the confession in its entirety and all statements contained therein.

The jury returned at 8:05 o'clock, P. M., the defendants and respective counsel being present before the Court.

The Clerk called the roll.

The Clerk: Jury, rise. Prisoners, rise. Jury, look upon the prisoners. Prisoners, look upon the jury. Members of the jury, have you agreed upon your verdict?

The Jury: We have.

The Clerk: Who shall say for you?

The Jury: Foreman.

The Clerk: Mr. Foreman, how say you, do you find the defendant Smalley Burrell guilty or not guilty?

The Foreman: Guilty.

The Clerk: Members of the jury, hearken to your verdict as the Court has ordered it recorded. You say you find the defendant Smalley Burrell guilty?

The Jury: We do.

The Court: The instruction of the Court was guilty of murder in the first degree. Is that the verdict?

The Foreman: Yes, sir.

Verdict.

The Clerk: Members of the jury, hearken to your verdict as the Court has ordered it recorded. You say you find the defendant Smalley Burrell guilty of murder in the first degree, in the manner and form as he stands charged and so say you all?

The Jury: We do.

The Clerk: Mr. Foreman, how say you, do you find the defendant William Albert Brown guilty or not guilty?

The Foreman: Guilty.

The Court: Of murder in the first degree?

The Foreman: Of murder in the first degree.

The Clerk: Members of the jury, hearken to your verdict as the Court has ordered it recorded. You say you find the defendant William Albert Brown guilty of murder in the first degree, in the manner and form as he stands charged and so say you all?

The Jury: We do.

The Clerk: Mr. Foreman, how say you, do you find the defendant Anna Brown guilty or not guilty?

The Foreman: Guilty with recommendation of life imprisonment.

The Court: That is understood guilty of murder in the first degree with the recommendation for life imprisonment, is that correct?

The Foreman: Yes, sir.

The Clerk: Members of the jury, hearken to your verdict as the Court has ordered it recorded. You say you find the defendant Anna Brown guilty of murder in the first degree with the recommendation of mercy of life imprisonment, in the manner and form she stands charged and so say you all?

The Jury: We do.

The Court: Be seated.

Sentence.

(The jury is seated.)

The Assistant Prosecutor: The State moves for sentence at this time.

The Court: Let me have the indictment. Smalley Burrell!

(Smalley Burrell stands before the Court.)

The Court: Have you anything to say why sentence should not be pronounced against you?

Smalley Burrell: How was that?

The Court: Have you anything to say why sentence should not be pronounced against you?

Smalley Burrell: Only this, if I had been in my right mind and not led off to this poor man's house, Mr. Horner, this all would not have happened.

The Court: The judgment and the sentence of this Court is that you suffer the punishment of death at the place and in the manner provided by law, on some day within the week beginning Sunday, August 22, 1937, and may God have mercy upon your soul.

The Court: William Albert Brown!

(William Albert Brown stands before the Court.)

The Court: Have you anything to say why sentence should not be pronounced against you?

William Albert Brown: Only that I am very sorry.

The Court: The judgment and sentence of this Court is that you suffer the punishment of death at the place and in the manner provided by law, on some day within the week beginning Sunday, August 22, 1937, and may God have mercy upon your soul.

The Court: Anna Brown!

(Anna Brown stands before the Court.)

The Court: Have you anything to say why sentence should not be pronounced against you?

Anna Brown: I haven't anything to say about the sentence should not be pronounced against me but I will say this, that I am sorry we all got ourselves in such a trouble as this.

The Court: You were convicted by a jury of murder in the first degree. As the jury, at the time of rendering its verdict, recommended imprisonment at hard labor for life, it becomes the duty of the Court, under the law, to impose such sentence; therefore the sentence of the Court is that you be confined in the New Jersey State Prison, at hard labor for the term of your natural life.

The Court: Mr. Johnson.

Mr. Johnson: If your Honor please, at this time I would like to make an informal motion, not a motion but notice that I will serve upon you in the future, in a short time, that I will make an appeal in the case of Smalley Dilks Burrell and William Albert Brown.

The Court: The Court stands adjourned.

The Assistant Prosecutor: If the Court please, I make a motion that all of the Exhibits, by reason of the motion for an appeal, be impounded until the further order of the Court.

The Court: I grant the motion.

CERTIFICATE OF STENOGRAPHER.

I hereby certify that the foregoing is a true and accurate transcript of the testimony and proceedings as taken stenographically by me at the time, place and dates hereinbefore set forth in the matter of the State vs. Smalley Burrell, William Albert Brown and Anna Brown.

WILLIAM B. McDONALD,
Official Court Stenographer,
Second Judicial District of N.J.

CERTIFICATE OF JUDGE.

I hereby certify that the foregoing record constitutes the entire record of the proceedings had upon the trial of the cause wherein the State of New Jersey is the complainant and Albert Brown and Smalley Burrell are the defendants.

In Witness Whereof, I have hereunto set my hand and seal this 31st day of December, 1937.

ELMER B. WOODS,
Judge.

Certificate of Stenographer.

I hereby certify that the foregoing is a true and accurate transcript of the TESTIMONY AND proceedings as taken stenographically by me at the time, place and dates hereinbefore set forth IN THE MATTER OF THE STATE VS SMALLEY BURRELL, WILLIAM ALBERT BROWN AND ANNA BROWN

WILLIAM B. McDONALD,
Official Court Stenographer,
Gloucester County Court of
Common Pleas.

Certificate of Judge.

I hereby certify that the foregoing record constitutes the entire record of the proceedings had upon the trial of the cause wherein the State of New Jersey is the ~~plaintiff in error~~ COMPLAINANT and ~~William~~ Albert Brown and Smalley Burrell are the defendants ~~in error~~.

In Witness Whereof, I have hereunto set my hand and seal this 30th day of December, 1937.

ELMER B. WOODS,
Judge.

Certificate of Chancellor.

IN CHANCERY OF NEW JERSEY.

STATE OF NEW JERSEY, Defendant-in-Error, vs. WILLIAM BROWN and SMALLEY BROWN, Plaintiffs-in-Error.	Sur Indictment for Murder.

This is to certify that application has been made to me for the allowance of a writ of error in behalf of Smalley Burrell, to be issued out of the New Jersey Supreme Court for review of the judgment of the Gloucester County Court of Oyer and Terminer in this State, convicting the said Smalley Burrell and William Brown of the crime of murder in the first degree, without recommendation of life imprisonment, and wherein the defendants have been sentenced to death, and without exhibiting to me the record of the proceedings in the cause or any part thereof, and without showing any error in those proceedings, and that I have refused to order a writ of error for the review of said judgment, solely because no cause, arguable or otherwise, is shown for the granting of such writ of error to the Supreme Court.

Dated: September 28, 1937.

LUTHER A. CAMPBELL,
Chancellor.

Assignments of Error.

NEW JERSEY COURT OF ERRORS
AND APPEALS

STATE OF NEW JERSEY, Defendant-in-Error, vs. SMALLEY BURRELL and WILLIAM ALBERT BROWN, Plaintiffs-in-Error.	Sur Indictment for Murder. On Writ of Error to Gloucester County.

Afterwards, in the Court of Errors and Appeals of the State of New Jersey, comes the said William Albert Brown and says that in the record and proceedings aforesaid and also in the matters recited and contained in the bill of exceptions, and also in the giving of the verdict and judgment aforesaid, there is manifest error in this respect, to wit:

1. Because the Court committed prejudicial and harmful error in permitting the following remark to be made by the prosecutor in the presence of the jury:

> "The Prosecutor: Mr. Horner's home was a castle, too, but that didn't amount to much." (S. of C. pg. 115)

Said statement was not based upon any evidence in the cause, and the only possible effect it could have upon the jury was to unduly and illegally prejudice their minds and arouse their passion against the plaintiff-in-error.

2. Because the Court committed prejudicial and harmful error in admitting in evidence, over the objection of the plaintiff-in-error, testimony

relating to the following items which were unlawfully and illegally obtained and seized by the officers from the following homes, which were illegally entered by the officers without a search warrant:

(a) A watch marked Exhibit S-10 for identification, seized by the officers from the home of Smalley Burrell. (S. of C. pg. 114)

(b) A religious medal marked Exhibit S-11 for identification, seized by the officers from the home of Anna Brown. (S. of C. pg. 116).

(c) A razor marked Exhibit S-12 for identification, seized by the officers from the home of William Albert Brown. (S. of C. pg. 117).

(d) Two cigars bearing the brand of "Horse Shoe Curve Crooks", marked Exhibit S-13 for identification, seized by the officers from a coat belonging to William Albert Brown, which was in the home of the said William Albert Brown. (S. of C. pg. 117).

3. Because the Court committed prejudicial and harmful error in permitting the following questions to be asked of Domenick Travaline, a witness for the State, and the following answers made thereto:

"Q. At that time what did Anna Brown Brown say about the watch?

Mr. Johnson: I object to that, your Honor, on the same ground of my previous objection that I made.

The Court: Having illegally obtained the watch?

Mr. Johnson: Yes.

The Court: I will overrule the objection.

Mr. Johnson: Will you allow me an exception?

The Court: Yes.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

Q. What did Anna Brown say about the watch? A. She said she knew nothing of it.

Q. Did you later show her the watch on another occasion? A. I think she was showed the watch by the county detective.

Q. That same afternoon? A. Yes, sir.

Q. What did she say at that time?''

''Q. Did you show the razor to Anna Brown which has been marked 'S-12 for identification'? A. Personally, I did not.

Q. Was it shown to her in your presence? A. Yes, sir.'' (S. of C. pgs. 122-123).

Said questions and answers were not based upon any legal evidence in the cause on the ground that the watch and razor had been unlawfully seized by the officers who illegally entered the homes of Smalley Burrell and William Albert Brown, without search warrants.

4. Because the Court committed prejudicial and harmful error in sustaining the objection of the State to the following question asked of Domenick Travaline, a witness for the State:

''Q. You could not recall until you were prompted that there were other people in the room than the first three named mentioned?'' (S. of C. p. 128).

5. Because the Court committed prejudicial and harmful error in admitting in evidence the following questions and answers to be asked of Stephen B. Atkinson, a witness for the State:

''Q. I show you a razor, which has been marked Exhibit S-10 for identification, and ask you whether or not the watch was shown

to Anna Brown in the County Jail in the presence of Mrs. Verdier and Mr. Apgar? A. It was." (S. of C. pg. 141).

Q. I show you a razor, which has been marked S-12 for identification, and ask you whether or not you had any conversation with Anna Brown in respect to the razor at the time you talked to her about the watch?" (S. of C. pg. 142).

"A. She said she remembered having seen the razor, or a razor similar to this, in the hands of her brother that night." (S. of C. pg. 143).

Said questions and answers were not based upon any legal evidence in the cause on the ground that the watch and razor had been illegally taken from the home of Smalley Burrell without a search warrant.

6. Because the Court committed prejudicial and harmful error in overruling the objection of the plaintiff-in-error to the offer of the razor, the religious medal, cigar box and two Horse Shoe Curve Crooks cigars, and the receipt of the same in evidence by the State, on the ground that the said razor, religious medal, cigar box and two Horse Shoe Curve Crooks cigars, were unlawfully seized by the officers who illegally entered the homes of William Albert Brown and Anna Brown. (S. of C. pgs. 142, 144, 145).

7. Because the Court committed prejudicial and harmful error in admitting into evidence a watch marked Exhibit S-10 for identification, a religious medal marked Exhibit S-11 for identification, a razor marked Exhibit S-12 for identification, and two cigars bearing the brand of "Horse Shoe Curve and Crooks", marked Exhibit S-13 for identification, on the ground that it vio-

lates Article 1, Section 6 of the New Jersey Constitution. (S. of C. pgs. 142, 144, 145).

8. Because the Court committed prejudicial and harmful error in admitting into evidence a watch marked Exhibit S-10 for identification, a religious medal marked Exhibit S-11 for identification, a razor marked Exhibit S-12 for identification, and two cigars bearing the brand of "Horse Shoe Curve and Crooks", marked Exhibit S-13 for identification, on the ground that it violates Article 4, of the United States Constitution. (S. of C., pgs. 142, 144, 145).

9. Because the Court committed prejudicial and harmful error in admitting the statement of Anna Brown over the objection of the plaintiff-in-error and exception duly taken thereto on the ground that the same constituted illegal and incompetent evidence as against the plaintiff-in-error. (S. of C. pg. 190).

10. Because the Court committed prejudicial and harmful error in admitting the statement of Anna Brown over the objection of the plaintiff-in-error and exception duly taken thereto, which statement was intended to bind all the plaintiffs-in-error on the ground that the same did not constitute legal or competent evidence against this plaintiff-in-error. (S. of C., pg. 190).

11. Because the Court committed prejudicial and harmful error in admitting over objection of the plaintiff-in-error, the following questions and answers on cross-examination of the defendant, Anna Julia Brown:

> "Q. Who ripped the screen door? A. Smalley." (S. of C. pg. 308).
>
> "Q. When he stuck his head out, what happened then? A. Smalley hit him." (S. of C. pg. 310).

on the ground that the same did not constitute proper cross-examination and were prejudicial to the interest of the plaintiff-in-error.

12. Because the Court committed prejudicial and harmful error in admitting, over objection of the plaintiff-in-error, the following questions and answers on cross-examination of the plaintiff-in-error, William Albert Brown:

> "Q. Was it more than ten times? A. I couldn't say that." (S. of C. pg. 359).
>
> "Q. When you were convicted of breaking and entering what was the occasion of the crime?" (S. of C. pg. 368).

13. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

> "Uncorroborated testimony of co-defendants in a case must be observed and stand the closest scrutiny, and in order to believe the testimony of one of the co-defendants, the jury must take into consideration whether in the light of all the testimony and actions of that particular co-defendant, his or her testimony can be believed in full or part must be rejected. The State has not produced any testimony in corroboration of what happened in Mr. Horner's house. Therefore, the jury must be guided by the statements of the respective defendants and must also decide whether the testimony reflecting the entire blame on one co-defendant and very little to himself or herself are true." (S. of C. pg. 423).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

14. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

"While drunkenness is not an excuse for crime, temporary drunkenness is a form of alcoholic insanity which may deprive the defendants, Smalley Burrell and William Brown, of all their faculties to distinguish right and wrong and that by their drunkenness or temporary alcoholic insanity they were made incapable of having the necessary felonious intent to break and enter, steal and murder and it is for you to judge from the testimony whether Smalley Burrell and William Brown were in that condition when the crime was committed and if they were, they cannot be convicted of murder in the first degree unless you also follow your verdict with a recommendation of imprisonment for life of hard labor or you must find them guilty of murder in the second degree." (S. of C. pgs. 423-424).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

15. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

"If you find from the evidence that Anna Brown was also drunk or was in the same state of mind of temporary alcoholic insanity or that she was so far deprived of her reasoning on account of the liquor she drank, and under the influence of her brother, William Brown, and Smalley Burrell that she did not have a mind of her own, she likewise cannot be convicted of murder in the first degree unless you also follow your verdict with a recommendation of imprisonment for life at hard labor or you may find her guilty of murder in the second degree." (S. of C. pg. 424).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

16. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

> "The law does not require the defendants to prove beyond a reasonable doubt that they were so intoxicated that they could not the intent, or were suffering from temporary alcoholic insanity so as not to comprehend the seriousness of their acts, but if the defendants raise a doubt in your mind of their condition at the time of the commission of the crime, the offense would be mitigated, and you must find them guilty of murder in the first degree with a recommendation for mercy or murder in the second degree." (S. of C. pg. 424).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

MINTURN & WEINBERGER,
Attorneys for Plaintiff-in-Error
William Albert Brown.

HARRY H. WEINBERGER,
SAMUEL I. ROTHBARD,
ROGER M. YANCEY,
LOUIS R. CEREFICE,
Of Counsel.

Specification of Causes for Reversal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY, Defendant-in-Error, vs. SMALLEY BURRELL and WILLIAM ALBERT BROWN, Plaintiffs-in-Error.	Sur Indictment for Murder. On Writ of Error to Gloucester County.

And now comes the said plaintiff-in-error, William Albert Brown, by his attorneys, Minturn & Weinberger, Esquires, and having caused the entire record of the proceedings had upon this trial to be certified and returned with this writ of error, and says that in the record and proceedings aforesaid had before and at the trial of the said issue so joined between the State of New Jersey and the said William Albert Brown, and also in the matters recited and contained in the said bill of exceptions, and also giving judgment aforesaid, plaintiff-in-error suffered manifest wrong and injury and hereby certifies the following causes upon which he relies for the reversal of said judgment:

1. Because the Court committed prejudicial and harmful error in permitting the following questions to be asked of Domenick Travaline, a witness for the State, and the following answers made thereto:

> "Q. Where was he? A. He was to appear in a case, in a court case here in Wood-

bury, I imagine a rape case, at that time, I don't remember exactly.

Q. He was subpoenaed as a witness here in court on a rape case which had occurred in the Borough of Paulsboro? A. That's right." (S. of C. pgs. 113-114).

Said statement was not based upon any evidence in the cause, and the only possible effect it could have upon the jury was to unduly and illegally prejudice their minds and arouse their passion against the plaintiff-in-error.

2. Because the Court committed prejudicial and harmful error in permitting the following remark to be made by the prosecutor in the presence of the jury:

"The Prosecutor: Mr. Horner's home was a castle, too, but that didn't amount to much." (S. of C., pg. 115).

Said statement was not based upon any evidence in the cause, and the only possible effect it could have upon the jury was to unduly and illegally prejudice their minds and arouse their passion against the plaintiff-in-error.

3. Because the Court committed prejudicial and harmful error in admitting in evidence, over the objection of the plaintiff in error, testimony relating to the following items which were unlawfully and illegally obtained and seized by the officers from the following homes, which were illegally entered by the officers without a search warrant:

(a) A watch marked Exhibit S-10 for identification, seized by the officers from the home of Smalley Burrell. (S. of C. pg. 114).

(b) A religious medal marked Exhibit S-11 for identification, seized by the officers from the home of Anna Brown. (S. of C. pg. 116).

(c) A razor marked Exhibit S-12 for identification, seized by the officers from the home of William Albert Brown. (S. of C. pg. 117).

(d) Two cigars bearing the brand of "Horse Shoe Curve Crooks", marked Exhibit S-13 for identification, seized by the officers from a coat belonging to William Albert Brown, which was in the home of the said William Albert Brown. (S. of C. pg. 117).

4. Because the Court committed prejudicial and harmful error in permitting the following questions to be asked of Domenick Travaline, a witness for the State, and the following answers made thereto:

"Q. At that time what did Anna Brown say about the watch?

Mr. Johnson: I object to that, your Honor, on the same ground of my previous objection that I made.

The Court: Having illegally obtained the watch?

Mr. Johnson: Yes.

The Court: I will overrule the objection.

Mr. Johnson: Will you allow me an exception?

The Court: Yes.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

Q. What did Anna Brown say about the watch? A. She said she knew nothing of it.

Q. Did you later show her the watch on another occasion? A. I think she was showed the watch by the county detective.

Q. That same afternoon? A. Yes, sir.

Q. What did she say at that time?"

"Q. Did you show the razor to Anna

Brown which has been marked 'S-12 for identification'? A. Personally, I did not.

Q. Was it shown to her in your presence? A. Yes, sir." (S. of C. pgs. 122-123).

Said questions and answers were not based upon any legal evidence in the cause on the ground that the watch and razor had been unlawfully seized by the officers who illegally entered the homes of Smalley Burrell and William Albert Brown, without search warrants.

5. Because the Court committed prejudicial and harmful error in sustaining the objection of the State to the following question asked of Domenick Travaline, a witness for the State:

"Q. You could not recall until you were prompted that there were other people in the room than the first three named mentioned?" (S. of C. p. 128).

6. Because the Court committed prejudicial and harmful error in admitting in evidence the following questions and answers to be asked of Stephen B. Atkinson, a witness for the State:

"Q. I show you a watch, which has been marked Exhibit S-10 for identification, and ask you whether or not the watch was shown to Anna Brown in the County Jail in the presence of Mrs. Verdier and Mr. Apgar? A. It was." (S. of C. pg. 141).

"Q. I show you a razor, which has been marked S-12 for identification, and ask you whether or not you had any conversation with Anna Brown in respect to the razor at the time you talked to her about the watch?" (S. of C. pg. 142).

"A. She said she remembered having seen the razor, or a razor similar to this, in the hands of her brother that night." (S. of C. pg. 143).

Specification of Causes for Reversal.

Said questions and answers were not based upon any legal evidence in the cause on the ground that the watch and razor had been illegally taken from the home of Smalley Burrell without a search warrant.

7. Because the Court committed prejudicial and harmful error in overruling the objection of the plaintiff in error to the offer of the razor, the religious medal, cigar box and two Horse Shoe Curve Crooks cigars, and the receipt of the same in evidence by the State, on the ground that the said razor, religious medal, cigar box and two Horse Shoe Curve Crooks cigars, were unlawfully seized by the officers who illegally entered the homes of William Albert Brown and Anna Brown. (S. of C. pgs. 142, 144, 145).

8. Because the Court committed prejudicial and harmful error in admitting into evidence a watch marked Exhibit S-10 for identification, a religious medal marked Exhibit S-11 for identification, a razor marked Exhibit S-12 for identification, and two cigars bearing the brand of "Horse Shoe Curve and Crooks", marked Exhibit S-13 for identification, on the ground that it violates Article 1, Section 6 of the New Jersey Constitution. (S. of C. pgs. 142, 144, 145).

9. Because the Court committed prejudicial and harmful error in admitting into evidence a watch marked Exhibit S-10 for identification, a religious medal marked Exhibit S-11 for identification, a razor marked Exhibit S-12 for identification, and two cigars bearing the brand of "Horse Shoe Curve and Crooks", marked Exhibit S-13 for identification, on the ground that it violates Article 4 of the United States Constitution. (S. of C. pgs. 142, 144, 145).

10. Because the Court committed prejudicial

and harmful error in admitting the statement of Anna Brown over the objection of the plaintiff in error and exception duly taken thereto on the ground that the same constituted illegal and incompetent evidence as against the plaintiff-in-error. (S. of C. pg. 190).

11. Because the Court committed prejudicial and harmful error in admitting the statement of Anna Brown over the objection of the plaintiff-in-error and exception duly taken thereto, which statement was intended to bind all the plaintiffs-in-error on the ground that the same did not constitute legal or competent evidence against this plaintiff-in-error. (S. of C. pg. 190).

12. Because the Court committed prejudicial and harmful error in refusing to direct a verdict of acquittal in behalf of the plaintiff-in-error at the close of the State's case, on the ground that the evidence produced by the State was insufficient to convict the plaintiff-in-error.

13. Because the Court committed prejudicial and harmful error in refusing to direct a verdict of acquitaal in behalf of the plaintiff-in-error at the close of the State's case, on the ground that the evidence produced by the State failed to substantiate an essential element of the crime charged, to wit: A robbery defined as a forcible taking from the person of another money or personal property of any value by violence or putting him in fear; or, a burglary, defined as the breaking in and entry of any dwelling house by night, wilfully or maliciously, with intent to kill, rob, steal, commit rape, mayhem or battery.

14. Because the Court committed prejudicial and harmful error in refusing to direct a verdict of acquittal in behalf of the plaintiff-in-error at the close of the entire case, on the ground that the

evidence produced by the State was insufficient to convict the plaintiff-in-error.

15. Because the Court committed prejudicial and harmful error in refusing to direct a verdict of acquittal in behalf of the plaintiff-in-error at the close of the entire case, on the ground that the evidence produced by the State failed to substantiate an essential element of the crime charged, to wit: A robbery defined as a forcible taking from the person of another money or personal property of any value by violence or putting him in fear; or, a burglary, defined as the breaking in and entry of any dwelling house by night, wilfully or maliciously, with intent to kill, rob, steal, commit rape, mayhem or battery.

16. Because the Court committed prejudicial and harmful error in admitting over objection of the plaintiff-in-error, the following questions and answers on cross-examination of the plaintiff-in-error, Anna Julia Brown:

> "Q. Who ripped the screen door? A. Smalley." (S. of C. pg. 308).
>
> "Q. When he stuck his head out, what happened then? A. Smalley hit him." (S. of C. pg. 310).

on the ground that the same did not constitute proper cross-examination and were prejudicial to the interest of the plaintiff-in-error.

17. Because the Court committed prejudicial and harmful error in admitting, over objection of the plaintiff-in-error, the following questions and answers on cross-examination of the plaintiff-in-error, William Albert Brown:

> "Q. Was it more than ten times? A. I couldn't say that." (S. of C. pg. 359).
>
> "Q. When you were convicted of breaking

and entering what was the occasion of the crime?" (S. of C. pg. 368).

18. Because the verdict is against the weight of the evidence.

19. Because the verdict was the result of bias, passion and prejudice.

20. Because the verdict was the result of malice.

21. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "Reasonable doubt would exist when in the judgment of the jury, after a careful review of all the testimony and the evidence, it finds itself unconvinced of the guilt of the prisoners. If such doubt exists, you are charged to resolve it in favor of the prisoners at the Bar." (S. of C. pg. 400).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

22. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "Now, to make out a case, the State must have established by evidence beyond a reasonable doubt, first, the death of William J. Horner, at or about July 16th or 18th. The indictment says that this act of the prisoners at the Bar was committed on the 16th and that the deceased languished until the 18th when he died. There is no dispute of that." (S. of C. pg. 402).

which instruction was erroneous in law and erroneously assumed facts which were not existent and erroneously interpreted the purport of the testimony by virtue of which the trial judge invaded the province and function of the jury to the prejudice and damage of the plaintiff-in-error.

Specification of Causes for Reversal.

23. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "Now, the State, in order to convince you beyond a reasonable doubt that the defendants are guilty of murder in the first degree, the State must show that the murder was committed in perpetrating or attempting to perpetrate robbery or the crime of burglary." (S. of C. pg. 404).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error, in that:

(a) It was unjustified under the language of the indictment, and

(b) The same was placing the plaintiff-in-error on trial for a charge for which he was not indicted.

24. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "One, two or three of the prisoners at the Bar, by their testimony on the witness stand or by the confessions that were admitted into evidence agreed and I think it is not questioned that the three went down to the Horner house with the idea of robbing or of getting money." (S. of C., pgs. 404-405).

which instruction was erroneous in law and erroneously assumed facts which were not existent, and erroneously interpreted the purport of the testimony by virtue of which the trial judge invaded the province and function of the jury to the prejudice and damage of the plaintiff-in-error.

25. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

Specification of Causes for Reversal.

"There is evidence that they went into his place, that they no sooner spied him when they hit him and that would be putting a man in fear, especially if he was in his own castle, and that they took by that violence from him—oh! yes, he was undressed to be sure, he did not have any money in his pockets but the money was in his presence in his house, it might have been at the desk, it might have been in the pants, although William Albert Brown said it was not in the pants, it might have been in an envelope in the desk but anyhow it is admitted by one or two of the defendants and possibly a third, by reference thereto, that seventy-five cents was obtained and Anna Brown said she picked a nickel off the floor." (S. of C. pg. 405).

which instruction was erroneous in law and erroneously assumed facts which were not existent, and erroneously interpleaded the purport of the testimony by virtue of which the trial judge invaded the province and function of the jury to the prejudice and damage of the plaintiff-in-error.

26. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

"The elements in this crime to be considered are, first, the time, the place, the manner and intent. What was the time? It was at night. What was the place? It was a dwelling house. What was the manner? I do not have to graphically describe how they went there. They all agree that first of all the screen was cut or pushed in or pushed through and that one of them—it does not matter which, the three were there—put his hand inside and pulled the latch, and we have authority to know that that act in itself is complete and a burglary or at least

an attempt to burglarize. And what was the intent? I do not think anyone of the three denied that they intended to go down to rob the man of some money." (S. of C. pg. 406).

which instruction was erroneous in law and which instructions were all findings of fact which in effect denied the plaintiff-in-error the right of trial by jury to the prejudice and damage of the plaintiff-in-error.

27. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

"Now, if you are convinced, ladies and gentlemen of the jury, that the State has shown to you beyond a reasonable doubt that these prisoners at the Bar committed or perpetrated or attempted to perpetrate either a robbery or burglary or both, then they have proved or the State has proved its case to be that of murder in the first degree." (S. of C. pg. 407).

which instruction was erroneous in law and which instruction permitted a finding of murder although only a burglary or robbery may have been committed to the prejudice and damage of the plaintiff-in-error.

28. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

"But if the State should show the attempt so that it had the elements of an indictable offense, that is all the further the State would have to go in order to prove, if it has proved to you beyond a reasonable doubt, murder in the first degree." (S. of C. pg. 407).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

29. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "The ground on which confessions made by a party accused, under promises of favor or threats or injury are excluded as incompetent is not because any wrong is done to the accused in using them but because he may be induced by the pressure of hope or fear to admit facts unfavorable to him without regard to their truth." (S. of C. pgs. 408-409).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

30. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "Although it is necessary to the admissibility of a confession that it should have been voluntarily made, that is, that it should have been made without the pressure of hope or fear from persons having authority, yet it is not necessary that it should have been the prisoner's own spontaneous act." (S. of C. pg. 409).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

31. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "Now, I have to, of course, appeal to your experience. I would rather not put it in the first person. The Court will have to appeal to your experience, for after all you will remember or at least heard tell of that sometimes what we do when we have had too much to drink makes us sick. I do not know

what yocks are. Anyhow, one of them was sick." (S. of C. pgs. 411-412).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

32. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "I do not feel and I will say this now that for you gentlemen of the jury this is a case where you shall say it is murder in the first or murder in the second degree. I shall touch on that point a little later." (S. of C. pgs. 412-413).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

33. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "The true rule in my judgment to be deduced from a mass of authorities is that there is a situation in which the fact of drunkenness is entitled to weight, not as an excuse for crime nor in extenuation of it but as a fact tending to show that the crime imputed was not committed." (S. of C. pg. 413).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

34. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "It is laid down that where several persons combine and conspire together for the common object to commit robbery and in pursuit of that object one of them does an act which causes the death of a third person, each and all are principals and each

> and all may be convicted of murder, usually in the first degree, under the statute. That is a concise statement and it is applicable in this instance." (S. of C. pg. 414).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error, in that:

(a) No charge of a conspiracy was made in the indictment and, therefore, this instruction was unwarranted, and

(b) The Court erroneously adopted a theory of law in his charge that was legally without basis.

35. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "Then the next section says, 'murder which shall be perpetrated by means of poison or by lying in wait or by any other kind or wilful, deliberate and premeditated killing or—this applies to this particular case —which shall be committed in perpetrating or attempting to perpetrate any arson, burglary, rape, robbery or sodomy, shall be murder in the first degree,' and the Court not exultantly but in all seriousness says to you ladies and gentlemen of the jury that the evidence does not warrant anything other than a verdict, guilty or not guilty of murder in the first degree. I have read enough of the law to you to make that point clear." (S. of C. pgs. 417-418).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error, in that the Court erroneously excluded from the jury's deliberation lesser degrees of murder which the plaintiff-in-error was entitled to have the jury consider under the evidence submitted by the State and the plaintiff-in-error respectively.

Specification of Causes for Reversal.

36. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "If on the other hand the State has made out a case beyond a reasonable doubt, predicated on the law as I have read it to you and as applied to the facts, you ought to find Smalley Burrell guilty; or, if not, not guilty of murder in the first degree; William Albert Brown guilty; or, if not, not guilty of murder in the first degree; Anna Brown guilty; or, if not, not guilty of murder in the first degree." (S. of C. pg. 418).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

37. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

> "Uncorroborated testimony of co-defendants in a case must be observed and stand the closest scrutiny, and in order to believe the testimony of one of the co-defendants, the jury must take into consideration whether in the light of all the testimony and actions of that particular co-defendant, his or her testimony can be believed in full or part must be rejected. The State has not produced any testimony in corroboration of what happened in Mr. Horner's house. Therefore, the jury must be guided by the statements of the respective defendants and must also decide whether the testimony reflecting the entire blame on one co-defendant and very little to himself or herself are true." (S. of C. pg. 423).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

38. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

"While drunkenness is not an excuse for crime, temporary drunkenness is a form of alcoholic insanity which may deprive the defendants, Smalley Burrell and William Brown, of all their faculties to distinguish right and wrong and that by their drunkenness or temporary alcoholic insanity they were made incapable of having the necessary felonious intent to break and enter, steal and murder and it is for you to judge from the testimony whether Smalley Burrell and William Brown were in that condition when the crime was committed and if they were, they cannot be convicted of murder in the first degree unless you also follow your verdict with a recommendation of imprisonment for life of hard labor or you must find them guilty of murder in the second degree." (S. of C. pgs. 423-424).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

39. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

"If you find from the evidence that Anna Brown was also drunk or was in the same state of mind of temporary alcoholic insanity or that she was so far deprived of her reasoning on account of the liquor she drank, and under the influence of her brother, William Brown, and Smalley Burrell that she did not have a mind of her own, she likewise cannot be convicted of murder in the first degree unless you also follow your verdict with a recommendation of imprisonment for life at hard labor or you may find her guilty of murder in the second degree." (S. of C. pg. 424).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

Specification of Causes for Reversal.

40. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

> "The law does not require the defendants to prove beyond a reasonable doubt that they were so intoxicated that they could not the intent, or were suffering from temporary alcoholic insanity so as not to comprehend the seriousness of their acts, but if the defendants raise a doubt in your mind of their condition at the time of the commission of the crime, the offense would be mitigated, and you must find them guilty of murder in the first degree with a recommendation for mercy or murder in the second degree." (S. of C. pg. 424).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

41. Because the Court committed prejudicial and harmful error in instructing the jury as follows:

> "Reasonable doubt would exist when in the judgment of the jury, after a careful review of all the testimony and the evidence, it finds itself unconvinced of the guilt of the prisoners. If such doubt exists, you are charged to resolve it in favor of the prisoners at the Bar." (S. of C. pg. 400).
>
> "You have heard some character witnesses, some who have talked about the reputation of these prisoners and there may be something in that character or reputation evidence that has been brought before you which may engender in your mind a doubt, a reasonable doubt as to the guilt or the innocence of one, two or all of the defendants, and that reasonable doubt has been well stated in the leading case and I am going to read the definition as we accept it in the law. It is a term often used, probably pretty well understood but not easily defined.

Specification of Causes for Reversal.

It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." (S. of C. pgs. 416-417).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

42. Because the Court committed prejudicial and harmful error in requiring that the jury return a verdict of guilty of murder in the first degree or not guilty, and prohibiting the jury from bringing in a verdict of guilty in the second degree.

43. Because the Court committed prejudicial and harmful error when it directed the jury to bring in a verdict of murder in the first degree or not guilty, and that the jury could not consider the evidence concerning the intoxication of the plaintiff-in-error in mitigation of the degree of the crime.

44. Because the Court committed prejudicial and harmful error in directing the jury that it may find that the homicide was committed in the course of robbery or burglary, and that the Court should have directed the jury to find one or the other of the crimes to have been committed.

45. Because the Court committed prejudicial and harmful error in placing the plaintiffs-in-error on trial for a crime for which they were not indicted, on the ground that it violated Article 1, Section 9 of the New Jersey Constitution.

46. Because the Court committed prejudicial

and harmful error in placing the plaintiffs-in-error on trial for a crime for which they were not indicted, on the ground that it violates Article 14, Section 1, and Article 5, of the United States Constitution.

47. Because the Court committed prejudicial and harmful error in sentencing the plaintiffs-in-error on the ground that the verdict returned by the jury was insufficient because it did not designate the degree of murder and was, therefore, improper, illegal and contrary to law.

48. Because the Court committed prejudicial and harmful error in placing the plaintiff-in-error on trial for murder without the assistance of proper and competent counsel as provided in Article 1, Section 8, of the New Jersey Constitution.

49. Because the Court committed prejudicial and harmful error in placing the plaintiff-in-error on trial for murder without the assistance of proper and competent counsel as provided in Article 14, Section 1, and Article 6 of the United States Constitution.

50. Because the Court committed prejudicial and harmful error in assigning a police magistrate to act as counsel for the plaintiffs-in-error on the ground that such an officer is not such counsel as is contemplated under Article 1, Section 8 of the New Jersey Constitution.

51. Because the Court committed prejudicial and harmful error in assigning a police magistrate to act as counsel for the plaintiffs-in-error on the ground that such an officer is not such counsel as

is contemplated under Article 14, Section 1 and Article 6 of the United States Constitution.

MINTURN & WEINBERGER,
Attorneys for Plaintiff-in-Error
William Albert Brown.

HARRY H. WEINBERGER
SAMUEL I. ROTHBARD,
ROGER M. YANCEY
LOUIS R. CEREFICE
Of Counsel.

Additional Specification of Causes for Reversal.

NEW JERSEY COURT OF ERRORS AND APPEALS

STATE OF NEW JERSEY, Defendant-in-Error, vs. SMALLEY BURRELL and WILLIAM ALBERT BROWN, Plaintiffs-in-Error.	Sur Indictment for Murder. On Writ of Error to Gloucester County.

And now comes the said plaintiff-in-error, Willian Albert Brown, by his attorneys, Minturn & Weinberger, Esquires, and having caused the entire record of the proceedings had upon this trial to be certified and returned with this writ of error, and says that in the record and proceedings aforesaid had before and at the trial of the said issue so joined between the State of New Jersey and the said William Albert Brown, and also in the matters recited and contained in the said bill of exceptions, and also giving judgment

Additional Specification of Causes for Reversal.

aforesaid, plaintiff-in-error suffered manifest wrong and injury and hereby certifies the following additional cause upon which he relies for the reversal of said judgment:

1. Because the trial court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "Now, what is burglary? Any person who shall by night—and if these acts on the part of the prisoners at the Bar happened at any time they happened at night—even the defendants agree that the time they were down at Horner's place was somewhere between eleven and one o'clock—any person who shall by night wilfully or maliciously break and enter any church, meeting-house or dwelling house—and this was a dwelling house where William J. Horner was—with intent to kill, rob, steal, commit rape, mayhem or battery, he, his counsellors, procurers, aiders and abettors shall be guilty of a high misdemeanor." (S. of C. pg. 406)

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

MINTURN & WEINBERGER,
Attorneys of Plaintiff-in-Error,
William Albert Brown.

HARRY H. WEINBERGER,
SAMUEL L. ROTHBARD,
ROGER M. YANCEY,
LOUIS R. CEREFICE,
Of Counsel.

Service of a copy of the within is hereby acknowledged this 31 day of December, 1937.

LYNWOOD LORD,
Attorney for Defendant-in-Error.

Notice of Argument.

NEW JERSEY COURT OF ERRORS AND APPEALS

ORAL ARGUMENT.

STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

WILLIAM ALBERT BROWN,
Plaintiff-in-Error.

Sir:

Please to Take Notice, that the argument of the issue joined in this cause will be moved before said Court, in the presence of such Justices thereof, as shall then be holding said Court, on the 1st Tuesday of February A. D. 1938, at the State House Annex, in Trenton, in and for the County of Mercer, at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

Dated, December 30, A. D. 1937.

MINTURN & WEINBERGER,
Attorneys for Plaintiff-in-Error,
William Albert Brown.

HARRY H. WEINBERGER,
SAMUEL L. ROTHBARD,
ROGER M. YANCEY,
LOUIS R. CEREFICE,
Of Counsel.

To LYNWOOD LORD, ESQ.,
Attorney of Defendant-in-Error.

Notice of Argument.

Sat Below:
ELMER B. WOODS,
Judge Gloucester County Court
of Oyer & Terminer.

Service of the within Notice of Argument is hereby acknowledged this 31 day of December, A. D. 1937.

LYNWOOD LORD,
Attorney for Defendant-in-Error.

Assignments of Error.

NEW JERSEY COURT OF ERRORS AND APPEALS

STATE OF NEW JERSEY, Defendant-in-Error, vs. SMALLEY BURRELL and WILLIAM ALBERT BROWN, Plaintiffs-in-Error.	Sur Indictment for Murder. On Writ of Error to Gloucester County.

Afterwards, in the Court of Errors and Appeals of the State of New Jersey, comes the said Smalley Burrell and says that in the record and proceedings aforesaid and also in the matters recited and contained in the bill of exceptions, and also in the giving of the verdict and judgment aforesaid, there is manifest error in this respect, to wit:

1. Because the Court committed prejudicial and harmful error in permitting the following remark to be made by the prosecutor in the presence of the jury:

> "The Prosecutor: Mr. Horner's home was a castle, too, but that didn't amount to much." (S. of C. pg. 115)

Said statement was not based upon any evidence in the cause, and the only possible effect it could have upon the jury was to unduly and illegally prejudice their minds and arouse their passion against the plaintiff-in-error.

2. Because the Court committed prejudicial and harmful error in admitting in evidence, over the objection of the plaintiff-in-error, testimony

relating to the following items which were unlawfully and illegally obtained and seized by the officers from the following homes, which were illegally entered by the officers without a search warrant:

(a) A watch marked Exhibit S-10 for identification, seized by the officers from the home of Smalley Burrell. (S. of C. pg. 114)

(b) A religious medal marked Exhibit S-11 for identification, seized by the officers from the home of Anna Brown. (S. of C. pg. 116).

(c) A razor marked Exhibit S-12 for identification, seized by the officers from the home of William Albert Brown. (S. of C. pg. 117).

(d) Two cigars bearing the brand of "Horse Shoe Curve Crooks", marked Exhibit S-13 for identification, seized by the officers from a coat belonging to William Albert Brown, which was in the home of the said William Albert Brown. (S. of C. pg. 117).

3. Because the Court committed prejudicial and harmful error in permitting the following questions to be asked of Domenick Travaline, a witness for the State, and the following answers made thereto:

"Q. At that time what did Anna Brown Brown say about the watch?

Mr. Johnson: I object to that, your Honor, on the same ground of my previous objection that I made.

The Court: Having illegally obtained the watch?

Mr. Johnson: Yes.

The Court: I will overrule the objection.

Mr. Johnson: Will you allow me an exception?

The Court: Yes.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

Q. What did Anna Brown say about the watch? A. She said she knew nothing of it.

Q. Did you later show her the watch on another occasion? A. I think she was showed the watch by the county detective.

Q. That same afternoon? A. Yes, sir.

Q. What did she say at that time?''

''Q. Did you show the razor to Anna Brown which has been marked 'S-12 for identification'? A. Personally, I did not.

Q. Was it shown to her in your presence? A. Yes, sir.'' (S. of C. pgs. 122-123).

Said questions and answers were not based upon any legal evidence in the cause on the ground that the watch and razor had been unlawfully seized by the officers who illegally entered the homes of Smalley Burrell and William Albert Brown, without search warrants.

4. Because the Court committed prejudicial and harmful error in sustaining the objection of the State to the following question asked of Domenick Travaline, a witness for the State:

''Q. You could not recall until you were prompted that there were other people in the room than the first three named mentioned?'' (S. of C. p. 128).

5. Because the Court committed prejudicial and harmful error in admitting in evidence the following questions and answers to be asked of Stephen B. Atkinson, a witness for the State:

''Q. I show you a razor, which has been marked Exhibit S-10 for identification, and ask you whether or not the watch was shown

to Anna Brown in the County Jail in the presence of Mrs. Verdier and Mr. Apgar? A. It was." (S. of C. pg. 141).

Q. I show you a razor, which has been marked S-12 for identification, and ask you whether or not you had any conversation with Anna Brown in respect to the razor at the time you talked to her about the watch?" (S. of C. pg. 142).

"A. She said she remembered having seen the razor, or a razor similar to this, in the hands of her brother that night." (S. of C. pg. 143).

Said questions and answers were not based upon any legal evidence in the cause on the ground that the watch and razor had been illegally taken from the home of Smalley Burrell without a search warrant.

6. Because the Court committed prejudicial and harmful error in overruling the objection of the plaintiff-in-error to the offer of the razor, the religious medal, cigar box and two Horse Shoe Curve Crooks cigars, and the receipt of the same in evidence by the State, on the ground that the said razor, religious medal, cigar box and two Horse Shoe Curve Crooks cigars, were unlawfully seized by the officers who illegally entered the homes of William Albert Brown and Anna Brown. (S. of C. pgs. 142, 144, 145).

7. Because the Court committed prejudicial and harmful error in admitting into evidence a watch marked Exhibit S-10 for identification, a religious medal marked Exhibit S-11 for identification, a razor marked Exhibit S-12 for identification, and two cigars bearing the brand of "Horse Shoe Curve and Crooks", marked Exhibit S-13 for identification, on the ground that it vio-

lates Article 1, Section 6 of the New Jersey Constitution. (S. of C. pgs. 142, 144, 145).

8. Because the Court committed prejudicial and harmful error in admitting into evidence a watch marked Exhibit S-10 for identification, a religious medal marked Exhibit S-11 for identification, a razor marked Exhibit S-12 for identification, and two cigars bearing the brand of "Horse Shoe Curve and Crooks", marked Exhibit S-13 for identification, on the ground that it violates Article 4, of the United States Constitution. (S. of C., pgs. 142, 144, 145).

9. Because the Court committed prejudicial and harmful error in admitting the statement of Anna Brown over the objection of the plaintiff-in-error and exception duly taken thereto on the ground that the same constituted illegal and incompetent evidence as against the plaintiff-in-error. (S. of C. pg. 190).

10. Because the Court committed prejudicial and harmful error in admitting the statement of Anna Brown over the objection of the plaintiff-in-error and exception duly taken thereto, which statement was intended to bind all the plaintiffs-in-error on the ground that the same did not constitute legal or competent evidence against this plaintiff-in-error. (S. of C., pg. 190).

11. Because the Court committed prejudicial and harmful error in admitting over objection of the plaintiff-in-error, the following questions and answers on cross-examination of the defendant, Anna Julia Brown:

> "Q. Who ripped the screen door? A. Smalley." (S. of C. pg. 308).
>
> "Q. When he stuck his head out, what happened then? A. Smalley hit him." (S. of C. pg. 310).

on the ground that the same did not constitute proper cross-examination and were prejudicial to the interest of the plaintiff-in-error.

12. Because the Court committed prejudicial and harmful error in admitting, over objection of the plaintiff-in-error, the following questions and answers on cross-examination of the plaintiff-in-error, William Albert Brown:

> "Q. Was it more than ten times? A. I couldn't say that." (S. of C. pg. 359).
>
> "Q. When you were convicted of breaking and entering what was the occasion of the crime?" (S. of C. pg. 368).

13. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

> "Uncorroborated testimony of co-defendants in a case must be observed and stand the closest scrutiny, and in order to believe the testimony of one of the co-defendants, the jury must take into consideration whether in the light of all the testimony and actions of that particular co-defendant, his or her testimony can be believed in full or part must be rejected. The State has not produced any testimony in corroboration of what happened in Mr. Horner's house. Therefore, the jury must be guided by the statements of the respective defendants and must also decide whether the testimony reflecting the entire blame on one co-defendant and very little to himself or herself are true." (S. of C. pg. 423).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

14. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

"While drunkenness is not an excuse for crime, temporary drunkenness is a form of alcoholic insanity which may deprive the defendants, Smalley Burrell and William Brown, of all their faculties to distinguish right and wrong and that by their drunkenness or temporary alcoholic insanity they were made incapable of having the necessary felonious intent to break and enter, steal and murder and it is for you to judge from the testimony whether Smalley Burrell and William Brown were in that condition when the crime was committed and if they were, they cannot be convicted of murder in the first degree unless you also follow your verdict with a recommendation of imprisonment for life of hard labor or you must find them guilty of murder in the second degree." (S. of C. pgs. 423-424).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

15. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

"If you find from the evidence that Anna Brown was also drunk or was in the same state of mind of temporary alcoholic insanity or that she was so far deprived of her reasoning on account of the liquor she drank, and under the influence of her brother, William Brown, and Smalley Burrell that she did not have a mind of her own, she likewise cannot be convicted of murder in the first degree unless you also follow your verdict with a recommendation of imprisonment for life at hard labor or you may find her guilty of murder in the second degree." (S. of C. pg. 424).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

16. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

> "The law does not require the defendants to prove beyond a reasonable doubt that they were so intoxicated that they could not the intent, or were suffering from temporary alcoholic insanity so as not to comprehend the seriousness of their acts, but if the defendants raise a doubt in your mind of their condition at the time of the commission of the crime, the offense would be mitigated, and you must find them guilty of murder in the first degree with a recommendation for mercy or murder in the second degree." (S. of C. pg. 424).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

MINTURN & WEINBERGER,
Attorneys for Plaintiff-in-Error
Smalley Burrell.

HARRY H. WEINBERGER,
SAMUEL I. ROTHBARD,
ROGER M. YANCEY,
LOUIS R. CEREFICE,
Of Counsel.

Specification of Causes for Reversal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY, Defendant-in-Error, vs. SMALLEY BURRELL and WILLIAM ALBERT BROWN, Plaintiffs-in-Error.	Sur Indictment for Murder. On Writ of Error to Gloucester County.

And now comes the said plaintiff-in-error, Smalley Burrell, by his attorneys, Minturn & Weinberger, Esquires, and having caused the entire record of the proceedings had upon this trial to be certified and returned with this writ of error, and says that in the record and proceedings aforesaid had before and at the trial of the said issue so joined between the State of New Jersey and the said Smalley Burrell, and also in the matters recited and contained in the said bill of exceptions, and also giving judgment aforesaid, plaintiff-in-error suffered manifest wrong and injury and hereby certifies the following causes upon which he relies for the reversal of said judgment:

1. Because the Court committed prejudicial and harmful error in permitting the following questions to be asked of Domenick Travaline, a witness for the State, and the following answers made thereto:

"Q. Where was he? A. He was to appear in a case, in a court case here in Wood-

bury, I imagine a rape case, at that time, I don't remember exactly.

Q. He was subpoenaed as a witness here in court on a rape case which had occurred in the Borough of Paulsboro? A. That's right." (S. of C. pgs. 113-114).

Said statement was not based upon any evidence in the cause, and the only possible effect it could have upon the jury was to unduly and illegally prejudice their minds and arouse their passion against the plaintiff-in-error.

2. Because the Court committed prejudicial and harmful error in permitting the following remark to be made by the prosecutor in the presence of the jury:

"The Prosecutor: Mr. Horner's home was a castle, too, but that didn't amount to much." (S. of C., pg. 115).

Said statement was not based upon any evidence in the cause, and the only possible effect it could have upon the jury was to unduly and illegally prejudice their minds and arouse their passion against the plaintiff-in-error.

3. Because the Court committed prejudicial and harmful error in admitting in evidence, over the objection of the plaintiff in error, testimony relating to the following items which were unlawfully and illegally obtained and seized by the officers from the following homes, which were illegally entered by the officers without a search warrant:

(a) A watch marked Exhibit S-10 for identification, seized by the officers from the home of Smalley Burrell. (S. of C. pg. 114).

(b) A religious medal marked Exhibit S-11 for identification, seized by the officers from the home of Anna Brown. (S. of C. pg. 116).

(c) A razor marked Exhibit S-12 for identification, seized by the officers from the home of William Albert Brown. (S. of C. pg. 117).

(d) Two cigars bearing the brand of "Horse Shoe Curve Crooks", marked Exhibit S-13 for identification, seized by the officers from a coat belonging to William Albert Brown, which was in the home of the said William Albert Brown. (S. of C. pg. 117).

4. Because the Court committed prejudicial and harmful error in permitting the following questions to be asked of Domenick Travaline, a witness for the State, and the following answers made thereto:

"Q. At that time what did Anna Brown say about the watch?

Mr. Johnson: I object to that, your Honor, on the same ground of my previous objection that I made.

The Court: Having illegally obtained the watch?

Mr. Johnson: Yes.

The Court: I will overrule the objection.

Mr. Johnson: Will you allow me an exception?

The Court: Yes.

Said exception is hereby allowed for the defendants and sealed accordingly.

ELMER B. WOODS, (L.S.)
Judge.

Q. What did Anna Brown say about the watch? A. She said she knew nothing of it.

Q. Did you later show her the watch on another occasion? A. I think she was showed the watch by the county detective.

Q. That same afternoon? A. Yes, sir.

Q. What did she say at that time?"

"Q. Did you show the razor to Anna

Brown which has been marked 'S-12 for identification'? A. Personally, I did not.

Q. Was it shown to her in your presence? A. Yes, sir." (S. of C. pgs. 122-123).

Said questions and answers were not based upon any legal evidence in the cause on the ground that the watch and razor had been unlawfully seized by the officers who illegally entered the homes of Smalley Burrell and William Albert Brown, without search warrants.

5. Because the Court committed prejudicial and harmful error in sustaining the objection of the State to the following question asked of Domenick Travaline, a witness for the State:

"Q. You could not recall until you were prompted that there were other people in the room than the first three named mentioned?" (S. of C. p. 128).

6. Because the Court committed prejudicial and harmful error in admitting in evidence the following questions and answers to be asked of Stephen B. Atkinson, a witness for the State:

"Q. I show you a watch, which has been marked Exhibit S-10 for identification, and ask you whether or not the watch was shown to Anna Brown in the County Jail in the presence of Mrs. Verdier and Mr. Apgar? A. It was." (S. of C. pg. 141).

"Q. I show you a razor, which has been marked S-12 for identification, and ask you whether or not you had any conversation with Anna Brown in respect to the razor at the time you talked to her about the watch?" (S. of C. pg. 142).

"A. She said she remembered having seen the razor, or a razor similar to this, in the hands of her brother that night." (S. of C. pg. 143).

Said questions and answers were not based upon any legal evidence in the cause on the ground that the watch and razor had been illegally taken from the home of Smalley Burrell without a search warrant.

7. Because the Court committed prejudicial and harmful error in overruling the objection of the plaintiff in error to the offer of the razor, the religious medal, cigar box and two Horse Shoe Curve Crooks cigars, and the receipt of the same in evidence by the State, on the ground that the said razor, religious medal, cigar box and two Horse Shoe Curve Crooks cigars, were unlawfully seized by the officers who illegally entered the homes of William Albert Brown and Anna Brown. (S. of C. pgs. 142, 144, 145).

8. Because the Court committed prejudicial and harmful error in admitting into evidence a watch marked Exhibit S-10 for identification, a religious medal marked Exhibit S-11 for identification, a razor marked Exhibit S-12 for identification, and two cigars bearing the brand of "Horse Shoe Curve and Crooks", marked Exhibit S-13 for identification, on the ground that it violates Article 1, Section 6 of the New Jersey Constitution. (S. of C. pgs. 142, 144, 145).

9. Because the Court committed prejudicial and harmful error in admitting into evidence a watch marked Exhibit S-10 for identification, a religious medal marked Exhibit S-11 for identification, a razor marked Exhibit S-12 for identification, and two cigars bearing the brand of "Horse Shoe Curve and Crooks", marked Exhibit S-13 for identification, on the ground that it violates Article 4 of the United States Constitution. (S. of C. pgs. 142, 144, 145).

10. Because the Court committed prejudicial

and harmful error in admitting the statement of Anna Brown over the objection of the plaintiff in error and exception duly taken thereto on the ground that the same constituted illegal and incompetent evidence as against the plaintiff-in-error. (S. of C. pg. 190).

11. Because the Court committed prejudicial and harmful error in admitting the statement of Anna Brown over the objection of the plaintiff-in-error and exception duly taken thereto, which statement was intended to bind all the plaintiffs-in-error on the ground that the same did not constitute legal or competent evidence against this plaintiff-in-error. (S. of C. pg. 190).

12. Because the Court committed prejudicial and harmful error in refusing to direct a verdict of acquittal in behalf of the plaintiff-in-error at the close of the State's case, on the ground that the evidence produced by the State was insufficient to convict the plaintiff-in-error.

13. Because the Court committed prejudicial and harmful error in refusing to direct a verdict of acquitaal in behalf of the plaintiff-in-error at the close of the State's case, on the ground that the evidence produced by the State failed to substantiate an essential element of the crime charged, to wit: A robbery defined as a forcible taking from the person of another money or personal property of any value by violence or putting him in fear; or, a burglary, defined as the breaking in and entry of any dwelling house by night, wilfully or maliciously, with intent to kill, rob, steal, commit rape, mayhem or battery.

14. Because the Court committed prejudicial and harmful error in refusing to direct a verdict of acquittal in behalf of the plaintiff-in-error at the close of the entire case, on the ground that the

evidence produced by the State was insufficient to convict the plaintiff-in-error.

15. Because the Court committed prejudicial and harmful error in refusing to direct a verdict of acquittal in behalf of the plaintiff-in-error at the close of the entire case, on the ground that the evidence produced by the State failed to substantiate an essential element of the crime charged, to wit: A robbery defined as a forcible taking from the person of another money or personal property of any value by violence or putting him in fear; or, a burglary, defined as the breaking in and entry of any dwelling house by night, wilfully or maliciously, with intent to kill, rob, steal, commit rape, mayhem or battery.

16. Because the Court committed prejudicial and harmful error in admitting over objection of the plaintiff-in-error, the following questions and answers on cross-examination of the plaintiff-in-error, Anna Julia Brown:

> "Q. Who ripped the screen door? A. Smalley." (S. of C. pg. 308).
>
> "Q. When he stuck his head out, what happened then? A. Smalley hit him." (S. of C. pg. 310).

on the ground that the same did not constitute proper cross-examination and were prejudicial to the interest of the plaintiff-in-error.

17. Because the Court committed prejudicial and harmful error in admitting, over objection of the plaintiff-in-error, the following questions and answers on cross-examination of the plaintiff-in-error, William Albert Brown:

> "Q. Was it more than ten times? A. I couldn't say that." (S. of C. pg. 359).
>
> "Q. When you were convicted of breaking

and entering what was the occasion of the crime?'' (S. of C. pg. 368).

18. Because the verdict is against the weight of the evidence.

19. Because the verdict was the result of bias, passion and prejudice.

20. Because the verdict was the result of malice.

21. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> ''Reasonable doubt would exist when in the judgment of the jury, after a careful review of all the testimony and the evidence, it finds itself unconvinced of the guilt of the prisoners. If such doubt exists, you are charged to resolve it in favor of the prisoners at the Bar.'' (S. of C. pg. 400).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

22. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> ''Now, to make out a case, the State must have established by evidence beyond a reasonable doubt, first, the death of William J. Horner, at or about July 16th or 18th. The indictment says that this act of the prisoners at the Bar was committed on the 16th and that the deceased languished until the 18th when he died. There is no dispute of that.'' (S. of C. pg. 402).

which instruction was erroneous in law and erroneously assumed facts which were not existent and erroneously interpreted the purport of the testimony by virtue of which the trial judge invaded the province and function of the jury to the prejudice and damage of the plaintiff-in-error.

Specification of Causes for Reversal.

23. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "Now, the State, in order to convince you beyond a reasonable doubt that the defendants are guilty of murder in the first degree, the State must show that the murder was committed in perpetrating or attempting to perpetrate robbery or the crime of burglary." (S. of C. pg. 404).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error, in that:

(a) It was unjustified under the language of the indictment, and

(b) The same was placing the plaintiff-in-error on trial for a charge for which he was not indicted.

24. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "One, two or three of the prisoners at the Bar, by their testimony on the witness stand or by the confessions that were admitted into evidence agreed and I think it is not questioned that the three went down to the Horner house with the idea of robbing or of getting money." (S. of C., pgs. 404-405).

which instruction was erroneous in law and erroneously assumed facts which were not existent, and erroneously interpreted the purport of the testimony by virtue of which the trial judge invaded the province and function of the jury to the prejudice and damage of the plaintiff-in-error.

25. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

Specification of Causes for Reversal.

"There is evidence that they went into his place, that they no sooner spied him when they hit him and that would be putting a man in fear, especially if he was in his own castle, and that they took by that violence from him—oh! yes, he was undressed to be sure, he did not have any money in his pockets but the money was in his presence in his house, it might have been at the desk, it might have been in the pants, although William Albert Brown said it was not in the pants, it might have been in an envelope in the desk but anyhow it is admitted by one or two of the defendants and possibly a third, by reference thereto, that seventy-five cents was obtained and Anna Brown said she picked a nickel off the floor." (S. of C. pg. 405).

which instruction was erroneous in law and erroneously assumed facts which were not existent, and erroneously interpleaded the purport of the testimony by virtue of which the trial judge invaded the province and function of the jury to the prejudice and damage of the plaintiff-in-error.

26. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

"The elements in this crime to be considered are, first, the time, the place, the manner and intent. What was the time? It was at night. What was the place? It was a dwelling house. What was the manner? I do not have to graphically describe how they went there. They all agree that first of all the screen was cut or pushed in or pushed through and that one of them—it does not matter which, the three were there—put his hand inside and pulled the latch, and we have authority to know that that act in itself is complete and a burglary or at least

an attempt to burglarize. And what was the intent? I do not think anyone of the three denied that they intended to go down to rob the man of some money." (S. of C. pg. 406).

which instruction was erroneous in law and which instructions were all findings of fact which in effect denied the plaintiff-in-error the right of trial by jury to the prejudice and damage of the plaintiff-in-error.

27. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

"Now, if you are convinced, ladies and gentlemen of the jury, that the State has shown to you beyond a reasonable doubt that these prisoners at the Bar committed or perpetrated or attempted to perpetrate either a robbery or burglary or both, then they have proved or the State has proved its case to be that of murder in the first degree." (S. of C. pg. 407).

which instruction was erroneous in law and which instruction permitted a finding of murder although only a burglary or robbery may have been committed to the prejudice and damage of the plaintiff-in-error.

28. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

"But if the State should show the attempt so that it had the elements of an indictable offense, that is all the further the State would have to go in order to prove, if it has proved to you beyond a reasonable doubt, murder in the first degree." (S. of C. pg. 407).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

29. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "The ground on which confessions made by a party accused, under promises of favor or threats or injury are excluded as incompetent is not because any wrong is done to the accused in using them but because he may be induced by the pressure of hope or fear to admit facts unfavorable to him without regard to their truth." (S. of C. pgs. 408-409).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

30. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "Although it is necessary to the admissibility of a confession that it should have been voluntarily made, that is, that it should have been made without the pressure of hope or fear from persons having authority, yet it is not necessary that it should have been the prisoner's own spontaneous act." (S. of C. pg. 409).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

31. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "Now, I have to, of course, appeal to your experience. I would rather not put it in the first person. The Court will have to appeal to your experience, for after all you will remember or at least heard tell of that sometimes what we do when we have had too much to drink makes us sick. I do not know

what yocks are. Anyhow, one of them was sick." (S. of C. pgs. 411-412).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

32. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

"I do not feel and I will say this now that for you gentlemen of the jury this is a case where you shall say it is murder in the first or murder in the second degree. I shall touch on that point a little later." (S. of C. pgs. 412-413).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

33. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

"The true rule in my judgment to be deduced from a mass of authorities is that there is a situation in which the fact of drunkenness is entitled to weight, not as an excuse for crime nor in extenuation of it but as a fact tending to show that the crime imputed was not committed." (S. of C. pg. 413).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

34. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

"It is laid down that where several persons combine and conspire together for the common object to commit robbery and in pursuit of that object one of them does an act which causes the death of a third person, each and all are principals and each

and all may be convicted of murder, usually in the first degree, under the statute. That is a concise statement and it is applicable in this instance." (S. of C. pg. 414).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error, in that:

(a) No charge of a conspiracy was made in the indictment and, therefore, this instruction was unwarranted, and

(b) The Court erroneously adopted a theory of law in his charge that was legally without basis.

35. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

"Then the next section says, 'murder which shall be perpetrated by means of poison or by lying in wait or by any other kind or wilful, deliberate and premeditated killing or—this applies to this particular case —which shall be committed in perpetrating or attempting to perpetrate any arson, burglary, rape, robbery or sodomy, shall be murder in the first degree,' and the Court not exultantly but in all seriousness says to you ladies and gentlemen of the jury that the evidence does not warrant anything other than a verdict, guilty or not guilty of murder in the first degree. I have read enough of the law to you to make that point clear." (S. of C. pgs. 417-418).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error, in that the Court erroneously excluded from the jury's deliberation lesser degrees of murder which the plaintiff-in-error was entitled to have the jury consider under the evidence submitted by the State and the plaintiff-in-error respectively.

Specification of Causes for Reversal.

36. Because the Court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "If on the other hand the State has made out a case beyond a reasonable doubt, predicated on the law as I have read it to you and as applied to the facts, you ought to find Smalley Burrell guilty; or, if not, not guilty of murder in the first degree; William Albert Brown guilty; or, if not, not guilty of murder in the first degree; Anna Brown guilty; or, if not, not guilty of murder in the first degree." (S. of C. pg. 418).

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

37. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

> "Uncorroborated testimony of co-defendants in a case must be observed and stand the closest scrutiny, and in order to believe the testimony of one of the co-defendants, the jury must take into consideration whether in the light of all the testimony and actions of that particular co-defendant, his or her testimony can be believed in full or part must be rejected. The State has not produced any testimony in corroboration of what happened in Mr. Horner's house. Therefore, the jury must be guided by the statements of the respective defendants and must also decide whether the testimony reflecting the entire blame on one co-defendant and very little to himself or herself are true." (S. of C. pg. 423).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

38. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

Specification of Causes for Reversal.

"While drunkenness is not an excuse for crime, temporary drunkenness is a form of alcoholic insanity which may deprive the defendants, Smalley Burrell and William Brown, of all their faculties to distinguish right and wrong and that by their drunkenness or temporary alcoholic insanity they were made incapable of having the necessary felonious intent to break and enter, steal and murder and it is for you to judge from the testimony whether Smalley Burrell and William Brown were in that condition when the crime was committed and if they were, they cannot be convicted of murder in the first degree unless you also follow your verdict with a recommendation of imprisonment for life of hard labor or you must find them guilty of murder in the second degree." (S. of C. pgs. 423-424).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

39. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

"If you find from the evidence that Anna Brown was also drunk or was in the same state of mind of temporary alcoholic insanity or that she was so far deprived of her reasoning on account of the liquor she drank, and under the influence of her brother, William Brown, and Smalley Burrell that she did not have a mind of her own, she likewise cannot be convicted of murder in the first degree unless you also follow your verdict with a recommendation of imprisonment for life at hard labor or you may find her guilty of murder in the second degree." (S. of C. pg. 424).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

Specification of Causes for Reversal.

40. Because the Court committed prejudicial and harmful error in refusing to instruct the jury as follows:

> "The law does not require the defendants to prove beyond a reasonable doubt that they were so intoxicated that they could not the intent, or were suffering from temporary alcoholic insanity so as not to comprehend the seriousness of their acts, but if the defendants raise a doubt in your mind of their condition at the time of the commission of the crime, the offense would be mitigated, and you must find them guilty of murder in the first degree with a recommendation for mercy or murder in the second degree." (S. of C. pg. 424).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

41. Because the Court committed prejudicial and harmful error in instructing the jury as follows:

> "Reasonable doubt would exist when in the judgment of the jury, after a careful review of all the testimony and the evidence, it finds itself unconvinced of the guilt of the prisoners. If such doubt exists, you are charged to resolve it in favor of the prisoners at the Bar." (S. of C. pg. 400).
>
> "You have heard some character witnesses, some who have talked about the reputation of these prisoners and there may be something in that character or reputation evidence that has been brought before you which may engender in your mind a doubt, a reasonable doubt as to the guilt or the innocence of one, two or all of the defendants, and that reasonable doubt has been well stated in the leading case and I am going to read the definition as we accept it in the law. It is a term often used, probably pretty well understood but not easily defined.

Specification of Causes for Reversal.

It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." (S. of C. pgs. 416-417).

which refusal was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

42. Because the Court committed prejudicial and harmful error in requiring that the jury return a verdict of guilty of murder in the first degree or not guilty, and prohibiting the jury from bringing in a verdict of guilty in the second degree.

43. Because the Court committed prejudicial and harmful error when it directed the jury to bring in a verdict of murder in the first degree or not guilty, and that the jury could not consider the evidence concerning the intoxication of the plaintiff-in-error in mitigation of the degree of the crime.

44. Because the Court committed prejudicial and harmful error in directing the jury that it may find that the homicide was committed in the course of robbery or burglary, and that the Court should have directed the jury to find one or the other of the crimes to have been committed.

45. Because the Court committed prejudicial and harmful error in placing the plaintiffs-in-error on trial for a crime for which they were not indicted, on the ground that it violated Article 1, Section 9 of the New Jersey Constitution.

46. Because the Court committed prejudicial

and harmful error in placing the plaintiffs-in-error on trial for a crime for which they were not indicted, on the ground that it violates Article 14, Section 1, and Article 5, of the United States Constitution.

47. Because the Court committed prejudicial and harmful error in sentencing the plaintiffs-in-error on the ground that the verdict returned by the jury was insufficient because it did not designate the degree of murder and was, therefore, improper, illegal and contrary to law.

48. Because the Court committed prejudicial and harmful error in placing the plaintiff-in-error on trial for murder without the assistance of proper and competent counsel as provided in Article 1, Section 8, of the New Jersey Constitution.

49. Because the Court committed prejudicial and harmful error in placing the plaintiff-in-error on trial for murder without the assistance of proper and competent counsel as provided in Article 14, Section 1, and Article 6 of the United States Constitution.

50. Because the Court committed prejudicial and harmful error in assigning a police magistrate to act as counsel for the plaintiffs-in-error on the ground that such an officer is not such counsel as is contemplated under Article 1, Section 8 of the New Jersey Constitution.

51. Because the Court committed prejudicial and harmful error in assigning a police magistrate to act as counsel for the plaintiffs-in-error on the ground that such an officer is not such counsel as

is contemplated under Article 14, Section 1 and Article 6 of the United States Constitution.

MINTURN & WEINBERGER,
Attorneys for Plaintiff-in-Error
Smalley Burrell.

HARRY H. WEINBERGER
SAMUEL I. ROTHBARD,
ROGER M. YANCEY
LOUIS R. CEREFICE
Of Counsel.

Additional Specification of Causes for Reversal.

NEW JERSEY COURT OF ERRORS AND APPEALS

STATE OF NEW JERSEY, Defendant-in-Error, vs. SMALLEY BURRELL and WILLIAM ALBERT BROWN, Plaintiffs-in-Error.	Sur Indictment for Murder. On Writ of Error to Gloucester County.

And now comes the said plaintiff-in-error, Smalley Burrell, by his attorneys, Minturn & Weinberger, Esquires, and having caused the entire record of the proceedings had upon this trial to be certified and returned with this writ of error, and says that in the record and proceedings aforesaid had before and at the trial of the said issue so joined between the State of New Jersey and the said William Albert Brown, and also in the matters recited and contained in the said bill of exceptions, and also giving judgment aforesaid, plaintiff-in-error suffered manifest wrong and injury and hereby certifies the following additional cause upon which he relies for the reversal of said judgment:

1. Because the trial court committed prejudicial and harmful error in its instruction to the jury, which charge was as follows:

> "Now, what is burglary? Any person who shall by night—and if these acts on the part of the prisoners at the Bar happened at any time they happened at night—even the defendants agree that the time they

were down at Horner's place was somewhere between eleven and one o'clock—any person who shall by night wilfully or maliciously break and enter any church, meeting house or dwelling house—and this was a dwelling house where William J. Horner was—with intent to kill, rob, steal, commit rape, mayhem or battery, he, his counsellors, procurers, aiders and abettors shall be guilty of a high misdemeanor." (S. of C. pg. 406)

which instruction was erroneous in law and to the prejudice and damage of the plaintiff-in-error.

MINTURN & WEINBERGER,
Attorneys for Plaintiff-in-Error,
Smalley Burrell.

HARRY H. WEINBERGER,
SAMUEL L. ROTHBARD,
ROGER M. YANCEY,
LOUIS R. CEREFICE,
Of Counsel.

Service of a copy of the within is hereby acknowledged this 31 day of December, 1937.

LYNWOOD LORD,
Attorney for Complainant-Appellee.

Notice of Argument.

NEW JERSEY COURT OF ERRORS AND APPEALS

ORAL ARGUMENT.

STATE OF NEW JERSEY,
Defendant-in-Error,

VS.

SMALLEY BURRELL,
Plaintiff-in-Error.

Sir:

Please to Take Notice, that the argument of the issue joined in this cause will be moved before said Court, in the presence of such Justices thereof, as shall then be holding said Court, on the 1st Tuesday of February, A. D. 1938, at the State House Annex in Trenton, in and for the County of Mercer, at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

MINTURN & WEINBERGER,
Attorneys of Plaintiff-in-Error,
Smalley Burrell.

HARRY H. WEINBERGER,
SAMUEL L. ROTHBARD,
ROGER M. YANCEY,
LOUIS R. CEREFICE,
Of Counsel.

TO LYNWOOD LORD, ESQ.,
Attorney of Defendant-in-Error.

Notice of Argument.

Sat Below:
ELMER B. WOODS.
Judge Gloucester County Court
of Oyer & Terminer.

Service of the within Notice of Argument is hereby acknowledge this 31 day of December, A. D. 1937.

LYNWOOD LORD,
Attorney for Defendant-in-Error.

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, Defendant-in-Error, vs. SMALLEY BURRELL and WILLIAM ALBERT BROWN, Plaintiffs-in-Error.	On Writ of Error to Gloucester County Court of Oyer and Terminer.

BRIEF IN BEHALF OF PLAINTIFFS-IN-ERROR.

(Italics ours unless otherwise indicated)

Statement of Facts.

The writs of error in the above entitled cause bring before this Honorable Court the convictions of the plaintiffs-in-error of the crime of murder in the first degree without recommendation to life imprisonment and the consequent sentence of death. This appeal is on bill of exceptions, assignments of error thereon and on specifications of causes for reversal, under Sections 135, 136 and 137 of the Criminal Procedure Act.

Plaintiffs-in-error, Smalley Burrell and William Albert Brown were indicted by the May 1937 Grand Jury of Gloucester County, the indictments having only one count in each, charging murder in the first degree in the common law form of such indictment. Thereafter, on June 24, 1937, an order of appointment was made by the Honorable Frank T. Lloyd, Justice of the Supreme Court and Presiding Judge of the Gloucester

County Court of Oyer and Terminer, whereby Frank L. Johnson, Esquire, Recorder of Woodbury, was appointed to defend the said plaintiffs-in-error upon the trial of said indictment. Plaintiffs-in-error were brought to trial on July 12, 1937, at the conclusion of which they were convicted of murder in the first degree without a recommendation, and were sentenced to death in the electric chair some time during the week commencing Sunday, August 22, 1937. The Honorable Elmer B. Woods presided as judge of the said trial. Subsequent to the conviction, the Honorable Governor, Harold G. Hoffman, granted a reprieve to the plaintiffs-in-error on the 23rd day of August, 1937, for a period of thirty days. Thereafter this appeal followed and sentence was further stayed pending said appeal.

The facts relating to the alleged crime are brief and are hereinafter set forth.

On the night of June 16, 1937, the plaintiffs-in-error, Smalley Burrell and William Albert Brown, together with Anna Brown, a co-defendant, were in the Wonder Bar, a saloon in Paulsboro. Somehow, and this fact is not clearly set forth in the record, the three decided to go to the home of the deceased, William Horner. (S. of C., pg. 190). From the statement given by Anna Brown, a co-defendant, the fact is revealed that various visits were paid to Mr. Horner's home and that he gave money to these defendants at various times. (S. of C., pg. 195).

The testimony is replete with instances wherein it is clear that Brown and Burrell were drunk at the time they left the Wonder Bar in Paulsboro to go to the home of Mr. Horner. Anna Brown, when questioned as to whether or not she was drunk, answered that she was. (S. of C., pg. 296). Reference is made throughout the testimony as to the

quantity of liquor purchased by Brown and Burrell, and the fact that they were unable to stand without proper support. (S. of C., pgs. 201-208; 243-245; 265-267; 332; 357; 272).

The three thereafter proceeded to Mr. Horner's home and Mr. Horner came to the door and was struck some time thereafter. (S. of C., pg. 190). There are various contradictions in the evidence as to who was the first to strike Horner. However, the medical testimony indicates that he was beaten to the point where he died on the 18th day of June, 1937. The fact is undisputed that the plaintiffs-in-error had no weapons of any kind with them when they left the Wonder Bar for Mr. Horner's home. Likewise, various references are made in the testimony as to the fact that the three did not go to the deceased's home for the purpose of robbing him, (S. of C., pgs. 204; 303-304) and the actual purpose of the visit in the present state of the proofs is undetermined. About one hour later, the plaintiffs-in-error and the co-defendant left Mr. Horner's home and proceeded to a restaurant where they had something to eat. (S. of C., pg. 194). Thereafter the plaintiffs-in-error and the co-defendant went to their respective homes where they stayed until the next morning.

The testimony indicates that the home of Mr. Horner was upset at the time the police arrived the next morning. (S. of C., pgs. 93, 108). About one o'clock in the afternoon, the plaintiffs-in-error were arrested by the authorities and brought to the County Jail, where Anna Brown had already been taken earlier in that day.

At the time of the arrest the authorities, and especially Officer Koko, searched the homes of Smalley Burrell and William Albert Brown, and the following items are alleged to have been taken from those places, to wit: a watch at Burrell's

home (S. of C., pgs. 96, 116); a razor at Brown's home (S. of C., pg. 97), a religious medal (S. of C., pg. 97), and two cigars (S. of C., pg. 98). Mr. Horner's sister testified that she gave him the watch as a Christmas present, and that is all the proof in the case to indicate that he was in possession of the same on June 16, 1937. (S. of C., pg. 85).

On the afternoon of June 17, 1937, statements were taken separately from each of the plaintiffs-in-error and the co-defendant, (S. of C., pgs. 138-140) which statements constitute the sole proof implicating these defendants, and which statements the State contends were obtained from the plaintiffs-in-error voluntarily.

In the course of questioning, the plaintiffs-in-error at the time the statements were taken, admissions were made by them with reference to the purpose of the visit to Mr. Horner's home. The following question and answer appears in the statement of Smalley Burrell (S. of C., pg. 210):

> "Q. What did she say you were going round there to do? A. Rob him.
>
> Q. How were they going to rob him? A. Any way that they could.
>
> Q. Is that what they said? A. They didn't say that, they said 'Going to rob him, going down Mr. Horner's and rob him.' "

In the statement of William Albert Brown, the following appears (S. of C., pg. 223):

> "Q. When did you first plan to go down to Horner's house to rob him? A. At the Wonder Bar.
>
> Q. At the Wonder Bar? A. Yes.
>
> Q. Who was there when you planned to do that? A. The three of us.
>
> Q. Smalley Burrell, Anna Brown—your sister, and you? A. Yes, sir."

On cross-examination of William Albert Brown, the prosecutor asked a question and received the following answer (S. of C., pg. 355):

> "Q. Then after you saw Burrell hit him, and Anna and you were in there, that was to rob him, is that right? A. Yes, I went in."

On June 18, 1937, William Horner died, and thereafter, on June 21, 1937, additional statements were taken from the plaintiffs-in-error and the co-defendant, and the old statements apparently were re-read to them. (S. of C., pg. 155).

Thus, we have attempted to set forth the facts of the case chronologically. There are 51 specifications of causes for reversal in behalf of each plaintiff-in-error, and 16 assignments of error in behalf of each. We shall, however, confine ourselves in this brief only to those glaring errors which are so patent as to undoubtedly constitute reversible error, and by virtue of the same, ask this Honorable Court to reverse the judgments under review.

Since this is a capital case and the plaintiffs-in-error's lives are at stake, and in view of the fact that many of the errors argued have not been assigned as error in the assignments of error, but on the contrary have been set forth in the specifications of causes for reversal we at the threshhold of the argument call the court's attention to the fact that the right exists to the plaintiffs-in-error to challenge any error which involves a course of action taken by the Trial Court, particularly where matters in the trial record disclose manifest wrong or injury done to the plaintiffs-in-error at such trial.

In

> *State* v. *Lyons,* 70 N. J. L. 635, (E. & A. 1904)

Chancellor MAGIE said at page 638:

> "The legislation which is now contained in section 136 of the Criminal Procedure act was plainly designed to enlarge the privilege and right of one convicted of crime to question the propriety of his conviction beyond the limits of the privilege and right previously conferred by our statute, which permitted exceptions to be taken and required errors assigned thereon to be reviewed. It was not designed to supersede a review of matters reviewable under assignments of error. On the contrary, the relief permitted, when it appeared from the record of the trial that the plaintiff-in-error had suffered manifest wrong or injury in certain respects, is to be given 'whether objection was made thereto or not,' and 'whether a bill of exceptions was settled, signed and sealed thereto and error assigned thereon or not.' The plain purpose is to permit a review by writ of error (1) for errors properly assigned upon the record or bills of exception, and (2) for matters appearing in the trial record disclosing that manifest wrong or injury had been done to plaintiff-in-error by the course taken at the trial in respect to certain specified matters."

At this point, it is also our desire to indicate to the court the theory of the state's case, so that there may be no misunderstanding under any of the points hereinafter argued.

At page 99 of the State of the Case, the prosecutor set forth the state's theory of the case and said:

> "The Prosecutor: *It has quite a bit of value. Here is a watch which was stolen from Mr. Horner's home and the State claims that the motive in this case was robbery.*"

Consequently, the state limited itself to proofs concerning a homicide in the course of a robbery and nothing else. This fact is even more apparent in view of the foregoing admissions and statements taken from the defendants at the time they were incarcerated in the County Jail.

We proceed to discuss the errors committed in the course of this trial *ad seriatim*.

POINT I.

The Court committed prejudicial and harmful error in charging the jury as follows:

> "Reasonable doubt would exist when in the judgment of the jury, after a careful review of all the testimony and the evidence, it finds itself unconvinced of the guilt of the prisoners. If such doubt exists, you are charged to resolve it in favor of the prisoners at the Bar." (Ss. of R. No. 21, pgs. 446 and 477; Ss. of R. No. 41, pgs. 455 and 486).
>
> "You have heard some character witnesses, some who have talked about the reputation of these prisoners and there may be something in that character or reputation evidence that has been brought before you which may engender in your mind a doubt, a reasonable doubt as to the guilt or the innocence of one, two or all of the defendants, and that reasonable doubt has been well stated in the leading case and I am going to read the definition as we accept it in the law. It is a term often used, probably pretty well understood but not easily defined. It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and

consideration of all the evidence leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.'' (Ss. of R., No. 41, pgs. 455 and 486).

There is argued under this Point, specifications of causes for reversal No. 21 in behalf of both plaintiffs-in-error, which involved the first paragraph of the foregoing quoted charge, found at pages 446 and 477; and specifications of causes for reversal No. 41, found at pages 455 and 486, which involves the entire foregoing quoted charge, all of which are argued together for convenience.

The errors involved hereunder are: (a) An erroneous instruction on reasonable doubt; and (b) The Court submitted two instructions on the law of reasonable doubt, a correct and an erroneous instruction without withdrawing the erroneous one.

The Court, at the beginning of the charge, stated that ''the State must prove to you the facts sufficient for that charge, by evidence beyond a reasonable doubt''. We have no complaint to make with this portion of the charge. We further concede that if the Court had stopped at that point, the same would undoubtedly not constitute error. However, the Trial Court took upon itself to discuss further the subject matter of reasonable doubt, and, at that point, fell into error.

The crux of the harm committed, is found in the phrase, ''reasonable doubt would exist when in the judgment of the jury, after a careful review of all the testimony and the evidence, it finds itself unconvinced of the guilt of the prisoners. If such doubt exists, you are charged to resolve it in favor of the prisoners at the bar.'' The quantity of proof necessary by virtue of the foregoing for the jury to convict, is the mere situation where

the jury would find itself *convinced* of the guilt of the prisoners.

In the case of

> *State* v. *Linker,* 94 N. J. L. 411, (E. & A. 1920),

Chancellor WALKER, speaking for the Court, set forth the Court's view as to the validity of such a charge. At pages 414-415, he stated:

> "However, he did charge on the question, and was therefore required to charge correctly. But he neither defined nor correctly applied the doctrine. His deliverance on this subject was as follows:
>
> 'The whole circumstances surrounding the case, as testified to by witnesses, is before you, and from the evidence thus produced, you are to determine whether or not the two defendants are guilty. If they are guilty it must be beyond a reasonable doubt, which means nothing more or less than that you, as the men sworn to conscientiously determine this case, are satisfied, in your minds, that the defendants did conduct a disorderly house. If you are not so satisfied, you should acquit; if you are so satisfied, you should convict.' "

This was excepted to and assigned for error.

> What the trial judge told the jury was equivalent to saying: 'If you are satisfied in your minds that the defendants did conduct a disorderly house, they are guilty beyond a reasonable doubt.' This left no room for the operation of the doctrine of reasonable doubt, but permitted the jury, if, on a review of the evidence, without considering reasonable doubt, they believed the defendants guilty, to exclude reasonable doubt; while, under the law, the jury had no right to find defendants guilty if they entertained

> a reasonable doubt of their guilt. The fault of this instruction is well illustrated in State v. Raymond, 53 N. J. L. 260. There the court charged in effect that if the jury thought the defendant did not commit the crime they shoud give him the benefit of the doubt, which was held erroneous. Here the charge in effect was that if the jury thought the defendants did commit the crime then they were guilty beyond a reasonable doubt."

In view of the importance of the further discussion in this case, we deem it advisable to set forth at length the statements of the Court as to the foregoing. At page 415, the Court continued:

> "Not having been requested to define reasonable doubt, or to instruct the jury on the subject at all, the charge of the trial court would have been faultless in this regard if the judge had contented himself with saying, as he did, 'If they (defendants) are guilty it must be beyond a reasonable doubt,' but he immediately proceeded to qualify that assertion by saying this, 'which means nothing more or less than that you, as the men sworn to conscientiously determine this case, are satisfied in your minds that the defendants did conduct a disorderly house; *if you are not so satisfied, you should acquit;* if you are so satisfied, you should convict.' Plainly, these words gave the jury to be informed that if, upon a review of the evidence, they were satisfied that the defendants were guilty, they should convict them, and that, being guilty, there was, of course, *no room for the operation of the doctrine of reasonable doubt.* How obviously this is so will appear from the principle of law that a person charged with crime is presumed to be innocent until proven guilty. And this presumption abides with him through the trail, so that, therefore, when

> the jury go from the bar of the court to their room to deliberate, they enter that room with the presumption of innocence still protecting the accused. It was in this view that the Supreme Court said in State v. Raymond, 53 N. J. L. (at p. 267):
>
> 'In the various mental conditions, ranging from that in which the jury think the accused innocent to that in which they are convinced beyond a reasonable doubt of his guilt, he is entitled to the benefit of their uncertainty.'
>
> The above-mentioned qualification of the otherwise correct charge on the question of reasonable doubt in this case, vitiated the whole deliverance on that question."

Because of the foregoing error, the judgment under review was reversed and a *venire de novo* allowed.

In

> *State* v. *Parks,* 96 N. J. L. 360, (S. Ct. 1921),

Justice PARKER at page 362 stated:

> "The court also erred in the charge on reasonable doubt. The judge charged in part:
>
> 'But there is one comment I want to make, and make emphatically, gentlemen, and *that is that if you are convinced beyond a reasonable doubt that this defendant is guilty,* he should not be allowed to escape. And I put emphasis upon that; *whether you are convinced beyond a reasonable doubt* of his guilt. It would not do for you to say: "Well, I believe this man is guilty but this lady's story creates in my mind some doubt, and, therefore, I will give him the benefit of it and let him go." That is not a doubt, gentlemen, in the case that would justify an acquittal * * *.' "

And at page 363:

> "Of course, defendant may well have been the right man; but it needs no argument to show that on testimony of this kind the jury may believe the defendant guilty but not entertain that abiding conviction to a moral certainty, of his guilt, which is laid down as a test by the Court of Errors and Appeals. State v. Linker, 94 N. J. L. 411. Reasonable doubt is not necessarily a result to be worked out by the rules of logic; it may likewise legitimately arise from the impressions, often incapable of analysis, made upon the minds of the jurors by the evidence and the witnesses."

In

> *State* v. *Raymond,* 53 N. J. L. 260, (S. Ct. 1891),

the Trial Court charged as follows at pages 266-267:

> "The court charged: 'That is correct—you must be satisfied;' and then gave a summary of the testimony, closing with this instruction: 'So, on this point of the case (the defendant's request that he is entitled to the benefit of the doubt), if you think he was not there that night, and if you think he did not set fire to it; if you think all these circumstances that have been related to you by Leeper, McGreevy and the railroad people and the furniture people, and all this testimony that has been gone over here for the last sixteen or seventeen days—if you think that all that shows that the defendant is not the man who did it, and that he did not have an interest in doing it, then you are to give him the benefit of the doubt."

As to this charge, Chief Justice Beasley stated at page 267:

> "The effect of this charge is, that the jury are to give the prisoner the benefit of

> the doubt only in case they entertain an affirmative opinion that he is not guilty. The defendant in a civil cause is entitled to more than that; an affirmative opinion must be formed against him, before a verdict for his adversary is warranted. But on a criminal trial, it is not merely a belief in the defendant's innocence, but it is the absence of a belief in his guilt so clear and strong as to exclude reasonable doubt, which requires his acquittal. In the various mental conditions, ranging from that in which the jury think the accused innocent, to that in which they are convinced beyond a reasonable doubt of his guilt, he is entitled to the benefit of their uncertainty. This was not accorded to the prisoner under the charge in the present case.
>
> Upon the other assignments of error it is unnecessary to decide.
>
> The judgment must be reversed, and a *venire de novo* awarded."

Upon a careful analysis of the charge of the Trial Court in the case *sub judice,* the same effect is given to the jury as stated in the *Raymond* case, *supra.* The sole effect of the charge in this case is to give the defendants the benefit of the doubt only in the event that an affirmative opinion is had that they are not guilty. In this case, by virtue of the charge, if the jury finds that it is not convinced of the guilt of the prisoners, then it may give to the prisoners the benefit of the doubt. But on the other hand, *if the jury is convinced of the guilt of the prisoners, then the benefit of reasonable doubt is not given to the defendants, although the status of the minds of the jury is merely that of "being convinced".*

At this point it is important to note that the Court, in its further charge to the jury, correctly defined reasonable doubt and submitted the same

to the jury for its consideration. However, this presented a situation of contradictory instructions, and, in the absence of the withdrawal of the erroneous instruction, the error was not cured.

In

State v. *Parks*, supra,

Justice PARKER stated at page 363:

> "It is suggested for the state that other parts of the charge should be considered as curing any such error as we have just discussed. But, at the best, this would merely make a case of contradictory instructions, and, unless the erroneous instruction is withdrawn, the error is not cured. Burnett v. State, 60 N. J. L. 255; State v. Tapack, supra; Metropolitan Co. v. Brazos, 81 Id. 649, 654; State v. Clayton, 83 Id. 673, 675, 676; State v. Diamond, supra; State v. Mausert, 85 Id. 498, 501; Collins v. Central Railroad Co., 90 Id. 593.
>
> The judgment will be reversed that a *venire de novo* issue."

In

State v. *Lang*, 87 N. J. L. 508, (E. & A. 1915),

the Court speaking through Chancellor WALKER, stated at page 514:

> "In Huebner, Administrator v. Erie Railroad Co., 68 N. J. L. 468, where the judge instructed the jury as requested upon a certain question, but so modified that request by other instructions as to likely mislead the jury and thereby harm the defendant, a new trial was granted. That was a civil suit. The rule will be applied with equal, if not greater, liberality in a criminal case.
>
> It appears that it is only when sentences extracted from a charge, if read apart from their connection with the rest need qualifica-

tion, and the qualification is given in the context so that the jury could not possibly have been misled, there is no error. Redhing v. Central Railroad Co., 68 N. J. L. 641, 646.

Certainly, when sentences, that is to say, parts of a charge are erroneous and no proper qualification of them is to be found in the context or in the entire charge, then there is error; and this is so, when, as in this case, the part of the charge pointed out as erroneous is in and of itself a particular qualification and limitation of language which, without such qualification and limitation, is unobjectionable."

In

State v. *Guarino,* 105 N. J. L. 549, (E. & A. 1929),

Chancellor WALKER again stated at pages 552-553:

" 'The rule is well settled that an erroneous instruction, followed or accompanied by the correct one, is not cured by the latter unless it is also expressly withdrawn, as the jury is left at liberty to adopt either.' "

"In State v. Parks, 96 Id. 360 (at p. 363), the Supreme Court had pointed out a harmful error but it was suggested for the state that other parts of the charge should be considered as curing any such error as had just been discussed. And that court said that at best that would merely make a case of contradictory instructions, and unless the erroneous instruction is withdrawn the error is not cured."

In this case, the Court charged on the subject of alibi, but the instructions were contradictory and one was erroneous, which one was never withdrawn. As to this, the Court said at pages 555-556:

"This was contradictory and erroneous, and was never withdrawn. It could not but have misled the jury."

Because of the foreoging, the Trial Court was reversed and a new trial ordered.

We recognize the rule that where the Court erroneously charges the jury and thereafter states the correct rule, and at the same time withdraws the erroneous instruction, that the error committed is rectified; but where the Court offers contradictory instructions and does not state to the jury which one is correct and which one is wrong, then the necessary result is that the verdict of the jury may be based upon either the correct or the erroneous instruction, in which event the jury is necessarily misled, necessitating a reversal of the judgment of the Trial Court.

Further expressions of opinion from the Courts on this subject, are set forth in

> *State* v. *Underdown,* 107 N. J. L. 486, (E. & A. 1930),

wherein Justice CASE stated at page 491:

> "The rule is well settled that an erroneous instruction followed or accompanied by a correct one is not cured by the latter unless the former is also expressly withdrawn, as the jury is left at liberty to adopt either, and it cannot be said which one was in fact adopted. State v. Tapack, 78 Id. 208. A jury is not required to determine what part of a contradictory charge is correct. State v. Sandt, 95 Id. 49. If we consider the charge as a whole, under the principle stated in McLaughlin v. Demboldt, 100 Id. 127, we are still confronted with the fact that the case went to the jury with two conflicting sets of legal instructions. The one, unsound in law and prejudicial to the defendant, was given equal force and favor with the sound and correct. We conclude that this was harmful error."

Justice GARRISON, in

State v. *Erie R. R. Co.*, 84 N. J. L. 661, (E. & A. 1913),

again voiced the opinion of the Court of Errors and Appeals at pages 666-667, wherein he stated:

> "If a judge makes a mistake in charging the jury, he may undoubtedly cure it by calling attention to it as a mistake and directing the jury to disregard it or to substitute for it a later statement of the law. Nothing of that sort was done in the present case, where the most that can be said is that two statements of the law were made to the jury, one of which was erroneous. Unless we conceive of our trial system as one in which the jury is clothed with the capacity to decide between two judicial statements of the law and unerringly to select the correct statement and to disregard the incorrect, the error of the charge in the present case was not cured or rendered non-injurious to the defendant who excepted to it.
>
> The judgment of the Supreme Court is reversed, to the end that a *venire de novo* may be awarded."

And finally, Justice PARKER, in

State v. *Tapack*, 78 N. J. L. 208, (S. Ct. 1909),

said at page 211:

> "The rule is well settled that an erroneous instruction followed or accompanied by a correct one is not cured by the latter unless it is also expressly withdrawn, as the jury is left at liberty to adopt either, and it cannot be said which one was in fact adopted. Burnett v. State, 31 Vroom 255; State v. Fitzgerald, 72 Vt. 142; 12 Cyc. 656, 657.
>
> The judgment of conviction will therefore be reversed, and a *venire de novo* awarded."

We have deemed it advisable to review many of the leading New Jersey cases on the foregoing subject, because we feel that the foregoing error committed by the Trial Court is sufficient to warrant a reversal in this cause. However, in view of the other errors committed, we shall proceed to discuss them *ad seriatim*.

POINT II.

The Court, in adopting the theory of law which it did in its charge to the jury with regard to the crimes of robbery, burglary and murder, in effect, placed the plaintiffs-in-error on trial for charges not justified under the language of the indictment, which resulted in placing the plaintiffs-in-error on trial for additional crimes for which they were not indicted.

(Ss. of R. No. 45, pgs. 456 and 487; Ss. of R. No. 46, pgs. 456 and 487.)

The foregoing specifications of causes for reversal have been consolidated and will be argued together because they involve the same subject matter.

In the case at bar, the indictment returned by the Grand Jury set forth the common law form indictment of murder in the following language:

> "* * * then and there being, wilfully and feloniously and of malice aforethought, did make an assault, and, him the said William J. Horner then and there wilfully, feloniously and of malice aforethought did mortally wound, of which said mortal wounds the said William J. Horner, thence continually languished until on the eighteenth day of June, one thousand nine hundred and

> thirty seven, he died, wherefore the said Smalley Burrell, William Albert Brown and Anna Brown did wilfully, feloniously and of malice aforethought, kill and murder the said William J. Horner, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same."

This indictment, in effect, charged the necessary ingredients "for the crime of murder without regard to the degree".

Graves v. *State,* 45 N. J. L. 347.

The Criminal Procedure Act provides in Section 36 (C. S. pg. 1832) that:

> "It shall be sufficient in every indictment for murder to charge that the defendant did wilfully, feloniously and of his malice aforethought kill and murder the deceased."

Concededly, under the foregoing indictment, a conviction for any degree of murder could be returned.

It is our insistence that the court, by its charge, placed the plaintiffs-in-error on trial for offenses not embraced within the scope of the indictment. By the very language of the court, there was added an offense for which the said plaintiffs-in-error were, in fact, never indicted, and under which indictment no legal justification existed for the language used by the court in its charge with regard thereto. In effect, the very criticism which resulted in the reversal of the *Sing Lee* case, *infra,* hereinafter referred to at length, is applicable to the situation created by the court in the case at bar.

The proposition is elementary by virtue of Article I, Section 9 of the New Jersey Constitution,

that a person cannot be placed upon trial for a crime for which he was not indicted. This provision of the Constitution is as follows:

> "No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or navy or in the militia, when in actual service in time of war or public danger."

We appreciate the alternative which the State has under this form of indictment to prove either one or the other crime during which the homicide was committed, and rest its case upon one. But that is not the situation in this case. The Court, in its charge, stated:

> "Now, if you are convinced, ladies and gentlemen of the jury, that the State has shown to you beyond a reasonable doubt that these prisoners at the Bar committed or perpetrated or attempted to perpetrate *either a robbery or burglary or both,* then they have proved or the State has proved its case to be that of murder in the first degree." (S. of C., pg. 407).

In

> *State* v. *Sing Lee,* 94 N. J. L. 266, (E. & A. 1919),

the defendant was convicted on two counts in an indictment which charged carnal abuse. In that case, after the State had practically closed its case, the prosecutor moved to amend the indictment so as to charge the offense to have been committed on June 1st and 3rd, instead of June 10th. The indictment, in its original form before the Trial Court, left for the jury's consideration only

one count which contained the date June 10th. By virtue of this amendment, two new dates were inserted, which procedure was objected to.

In the *Sing Lee* case, *supra,* the court held at page 269:

> "*The vice of the amendment lay in the substitution of another offense for the one found by the grand jury.* And, so, in the case *sub judice* the grave fault committed was to allow an amendment which in effect altered the indictment, in substance, by substituting for the date of June 10th, the day alleged therein on which the crime was committed, the dates of June 1st and 3d, thereby charging the defendant with *the commission of two separate crimes of like character, in a single count, whereas the indictment of the grand jury was predicated only upon the commission of a single offence. The error in permitting such amendment is too glaring to justify any further comment.*"
>
> "For it is patent that the amendment was a substitution of two offenses for one which in effect was equivalent to adding a count to the indictment, and, hence, was prejudicial to the defendant's defense upon the merits of the case."

It is to be noted that the indictment in its original form charged the commission of a single offense only and the amendment charged two offenses. Consequently, the addition of another count in the indictment, which count was not the result of the action of the Grand Jury, was considered reversible error. So, in the case at bar, *the single count in the indictment must necessarily refer to a killing committed in the course of a burglary or a robbery, but not the additional crime of both robbery and burglary,* for if both issues are permitted to be passed upon by the jury, then

necessarily the defendants were not apprised of the additional crime for which they were indicted, which additional crime was never heard by a Grand Jury nor an indictment returned for the commission of the same.

We urge the additional ground that the court went further and charged as to the third crime, namely, a homicide committed in the course of a burglary and robbery, which fact is indicated by the phrase "or both" in the court's charge, as set forth above. What the court said in effect was: Irrespective of the indictment, I charge you that you have a perfect right to convict the plaintiffs-in-error, if they committed or perpetrated or attempted to perpetrate *either a robbery or burglary, or both,* the words "or both", obviously meaning and contemplating a robbery and burglary.

Assuming, but not conceding, that the court was justified in charging the alternative, namely, a robbery or burglary, the moment it proceeded to add "or both a robbery and burglary", it obviously placed the plaintiffs-in-error on trial for a charge never contemplated by the Grand Jury. We contend that this charge was unsupported by the proofs, and, further, if proofs were offered to show such a situation, then, clearly, no justification would exist for the charge in the absence of two separate and distinct counts in the indictment, to wit, one for burglary or robbery, and the other for both burglary and robbery.

The court, in its charge, usurped the function of a Grand Jury by placing these plaintiffs-in-error on trial for a charge or charges for which they were never legally indicted, and the conclusion cannot be escaped that what was said in the *Sing Lee* case, *supra,* is applicable to the situation herein discussed, and the condemnation and criti-

cism therein directed of placing the plaintiffs-in-error on trial for charges other than those for which they were indicted applies with equal force to the present argument.

It might be added at this point, that the charge of the court was clearly at variance with the indictment and the proofs offered because the state's theory of the case was limited either to a robbery or burglary, but at no time in the proceedings was it ever the contention of the state that these plaintiffs-in-error were engaged in both the commission of a robbery and a burglary.

In the face of the state's concession, which eliminated every other phase of law except that of robbery:

> "The Prosecutor: *It has quite a bit of value. Here is a watch which was stolen from Mr. Horner's home and the State claims that the motive in this case was robbery.*" (S. of C., pg. 99).

Certainly no justification existed for the verbiage employed by the court, which, in its charge, submitted to the jury the possibility of a conviction upon one of three theories, namely, a homicide in the course of a (1) robbery; or (2) burglary; or (3) robbery and a burglary.

Jeopardizing the lives of humans under any such fantastic legal theory as was embraced in the language of the court's charge, has never been permitted, approved or tolerated by our appellate courts, and, we certainly cannot conceive of a departure from the principles of law so well imbedded in our jurisprudence. It is not amiss to state at this time that advantage may be taken of such a defect at this stage of the proceedings, and that an attack upon the indictment at the inception is not necessary.

As to this, the Court in the *Sing Lee* case, *supra*, stated at page 270:

> "It is well settled in this state that where no objection has been made to an indictment before the jury is sworn, as provided by the section above cited, the statute is a bar against any attack upon the indictment in a court of review. State v. Sharkey, 73 N. J. L. 491; Shuster v. State, 62 Id. 521; Noyes v. State, 41 Id. 418; Moschell v. State, 53 Id. 498.
>
> Nor was the defendant obligated to move that the prosecution elect between the offenses, one of which was found by the grand jury and the other disclosed by the testimony, because the defendant was entitled to stand upon his constitutional right to be tried for no other offense than the one of which he stood indicted."

It is no answer to our contention that the plaintiffs-in-error could have demanded a bill of particulars and did not do so, for, as the Court stated, the plaintiffs-in-error are not compelled to move to have the prosecutor elect between the offenses charged in the indictment and the offenses as disclosed by the testimony, because of the paramount fact that this involves a constitutional question and the plaintiffs-in-error were justified in the expectations that they would not be tried for any offense other than that for which the Grand Jury indicted them. We further contend that there could be no amendment made by the prosecutor so as to permit an additional crime to be charged if he intended to submit both theories of the case to the jury, to wit, a homicide committed during a robbery or burglary or both, for this would be a violation of the constitutional provision aforementioned.

In

State v. *Startup,* 10 Vroom 423,

which case is referred to by Justice SWAYZE in the case of

State v. *Twining,* 71 N. J. L. 388, (S. Ct. 1904),

the following excerpt appears:

> "A case arose soon after the passage of the act. In State v. Startup, 10 Vroom 423, two of the indictments before the court, upon motion to quash, were held defective because they failed to charge a criminal intent, and a motion was made to amend. One of the justices before whom the case was heard was Justice Depue, who had been one of the revisers, and the case therefore has the advantage of being a contemporaneous construction of the statute, concurred in by one of its authors. The court held that 'the legislature cannot constitutionally authorize an amendment, in substance, which will change an indictment found by a grand jury so as to substitute *one crime for another charged therein; nor if the indictment fail to set out any crime, can the court so amend it as to charge the crime which it is supposed they intended.*'
>
> In State v. Kern, 22 Vroom 259, 264, the present Chancellor said, in reference to this section: 'In view of the constitutional provision that no person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, the legislative grant was broader than it had a right to make,' and *he referred, apparently with approval, to State* v. *Startup.*
>
> If the indictment in this case failed to set out any crime, the court under these decisions, which we approve, was without power to amend it."

From the foregoing, it is obvious that if the prosecutor intended to place the plaintiffs-in-error on trial for the commission of two crimes, to wit, burglary or robbery, and the second, a burglary and robbery, which was done in this case, then we submit that the plaintiffs-in-error were not indicted for the second crime, and, consequently, could not legally be tried for the same. This being so, it was error for the court to submit to the jury for its consideration, the question of whether the murder was committed during the course of either burglary or robbery, or both.

POINT III.

The Court committed prejudicial and harmful error in submitting to the jury the issue of a killing committed in the course of a burglary or robbery, or both, after the Prosecutor elected upon which crime he would rest his case.

(Ss. of R. No. 23, pgs. 447 and 478; Ss. of R. No. 44, pgs. 456 and 487; Ss. of R. No. 45 and No. 46, pgs. 456 and 487)

The foregoing specifications of causes for reversal have been consolidated for the purposes of this argument, in that they involve the same subject matter.

At the outset of this argument, it is of the utmost importance that we direct this court's attention to the statement of the prosecutor found at page 99 of the State of the Case:

> "The Prosecutor: *It has quite a bit of value. Here is a watch which was stolen from Mr. Horner's home and the State claims that the motive in this case was robbery.*"

The binding effect of this statement is, of course, supported by the fact that the evidence offered by the State in its very nature and character was limited to the possibility of a convinction only for robbery, resulting in death. This fact is further corroborated by the admissions and statements given by the plaintiffs-in-error at the time they were incarcerated at the County Jail in Woodbury, as set forth in the statement of facts heretofore discussed, to the effect that if any crime was intended, it was that of a robbery. (S. of C., pgs. 210, 223, 355). In the face of this statement, however, the court charged as follows: (S. of C., pg. 404)

> "Now, the State, in order to convince you beyond a reasonable doubt that the defendants are guilty of murder in the first degree, the State must show that the murder was committed in perpetrating or attempting to perpetrate robbery or the crime of burglary."

It was not until the termination of the case when the court delivered its charge in the form hereinabove quoted, that the plaintiffs-in-error were apprised that the jury would deliberate upon three theories, and that proof beyond a reasonable doubt (subject to the error hereinbefore referred to on its charge on reasonable doubt) upon one of the theories, would be sufficient to convict them.

As heretofore stated, we firmly believe and contend that the State could not submit to the jury for its consideration two crimes in view of the indictment in this case. However, for the purposes of our contention under this point, we shall assume that the State, under this form of indictment, may proceed to prove a homicide committed in the course of burglary or robbery, and per-

haps submit both crimes to the jury for its deliberation, if the prosecutor sets forth that fact either in the opening or in the course of the trial.

We respectfully refer to that portion of the charge stated under Point II, wherein the Court submitted to the jury both theories of the homicide and incorporate that portion of the charge as part of our argument under this point.

It must be conceded, and can unequivocally be stated, that the Court submitted to the jury for its consideration the crime of murder committed in the course of a burglary or a robbery. *The glaring and patent error is the fact that the prosecutor elected to rest his case upon a robbery rather than a burglary,* as shown at page 99 of the State of the Case.

We submit, that in this status of the proofs, the State was thereafter bound and the plaintiffs-in-error had a right to depend upon the prosecutor's statement to the effect that the proofs would be limited to a homicide committed during a robbery and not a burglary. It is entirely settled that a statement by the prosecutor made in the course of the trial as to what he will prove and upon what theory he rests his case, is as binding as any statement made in his opening as to the theory upon which he will rest, and as to the latter, the plaintiffs-in-error have a right to depend upon the limitation of the issues set forth in the opening. At page 453, Vol. I, Chitty's Criminal Law, it says:

> "It is now settled that he (the Prosecutor) must prove every statement which enters into the substance of the charge, but he will not be compelled to maintain any averments which, without being repugnant, are merely formal or superfluous. The distinction between material and immaterial aver-

> ments, is perfectly well settled in criminal, as well as civil cases; and, if the averment be material, that is, if it be connected with the charge, it must be proved."

The theory upon which any criminal charge is tried in Court is within the discretion of the prosecutor, and the law applicable to that theory is within the domain and control of the Court. In this case there was one count, and the prosecutor had the opportunity to elect upon which single theory he would proceed, which he did as heretofore stated. But upon making such choice, the Court, in applying the law to the theory adopted by the prosecutor, cannot adopt an additional theory and submit the same to the jury for its consideration. This is not the case of an indictment for murder in the first degree where there are several counts, and the various crimes which were committed by the single act of murder, are set forth individually and the State submits proofs on each count, so that all may be considered by the jury. Here the prosecutor stated what his theory of the case was, and elected to prove his case upon the commission of a homicide during a robbery. Upon this statement, as set forth at page 99 of the State of Case, the plaintiffs-in-error had a right to depend upon the prosecutor's statement to the court and to the jury, and to conduct their defense and their cross-examination of witnesses upon that single theory.

As previously stated, it was not until the termination of the case, when the court began its charge to the jury, that the plaintiffs-in-error were apprised for the first time that the jury would deliberate upon three theories, and that proof, beyond a reasonable doubt, subject to the error hereinbefore argued, upon one or the other, would be sufficient to convict them. If this knowl-

edge had been imparted to them during the course of the trial, then, certainly, the cross-examination and the general conduct of the proceedings would have been entirely different in view of the added elements which were necessary to be shown, and the added cross-examination of the witnesses who would attempt to show these elements. This fact can bear repetition, that the first time the plaintiffs-in-error were apprised of the fact that the jury would consider three theories upon which they could convict them, was after the close of the case and during the charge of the court. Nor is it an answer to say that the plaintiff's-in-error counsel should have brought that fact to the court's attention or that some objection should have been made, for it is not within the province of counsel, or the plaintiffs-in-error, or the court, to consent to being tried upon a theory never disclosed in the case until after the entire proceedings were closed. As to this, we refer to the excellent dissenting opinion of Justice HEHER, in

State v. *Metalski,* 116 N. J. L. 543, (E. & A. 1936),

wherein the Justice stated at page 558:

> "It was not his province nor that of his counsel to consent to his trial upon the fundamentally mistaken theory, propounded by the state and adopted by the trial judge, that, at the time of the shooting, the accused and his accomplice were still engaged in the commission of the Pennsylvania robbery, and that the killing was therefore murder of the first degree, within the intendment of our statute, even though utterly lacking in deliberation and premeditation. As this court said in State v. O'Leary, *supra,* borrowing the language of Mr. Justice HARLAN, speaking for the feder-

> al Supreme Court in Hopt v. Utah, 110 U. S. 574 (at p. 579); 4 S. Ct. 202; 28 L. Ed. 262: 'The natural life, says Blackstone, "cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority." 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. *That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods'.*"

In a very recent case,

> *State* v. *Jones,* 115 N. J. L. 257 (E. & A. 1935),

This Court was confronted with a very similar contention in a case wherein the defendant, who was a negro, as the present plaintiffs-in-error are, was charged with murder in the first degree. In that case the prosecutor in the opening stated that the killing was either wilful, deliberate and premeditated, or that there was a commission or attempted commission or a burglary or both. Nowhere in the case is there any mention made of robbery, but after the State rested and the Court began to instruct the jury, it stated that: (Page 260)

> "* * * even though the killing was not perpetrated in the commission of a burglary, still if it was perpetrated in the commission of a robbery, the defendant could be convicted of murder in the first degree."

It is significant to note, that the Court in this case stated that if the case had been tried on al-

ternative theories, then the charge may have been legally correct. But the State had rested on a homicide in committing a burglary, or a homicide which was wilful, deliberate and premeditated. As to this, the Court said at page 261, in language which is more forceful and upon which we base our contention:

> "The state elected to put the case on those grounds, separately or together. When the state asked, and the court permitted, the introduction of an *additional theory of murder in the first degree* after the state's case was in, and the cross-examination of its witnesses had been necessarily restricted to the two theories originally propounded, there was injected a new theory which had previously been omitted, apparently with purpose, and in the course of meeting the demand for particulars; which had not been made apparent during the presentation of the state's evidence, and which left the defendant without the benefit of cross-examination on that new theory. It may be said, and perhaps with justice, that the defense should have gone farther than a protest and exception, and should have asked the recall of witnesses, for further cross-examination; and failing such request, that the error in permitting the new issue—and we think it was an error—was waived. We do not pass upon this point; but at best, and assuming the request had been made and *granted, the whole proceeding would still have been a serious blemish upon the orderly conduct of a trial where the life of a human being was at stake, and where, above all other trials, such irregularities should not be allowed to creep in.* We may go even farther, and say that the theory of murder in perpetration of a robbery should not have been waived or ignored in the first place. *That theory was apparent in the very confession of the de-*

fendant in possession of the prosecutor's office, stating facts much as they are stated above.''

It is clear that the Court is of the opinion that there can be no "serious blemish'' upon orderly procedure during the course of a criminal trial for murder, and that irregularities cannot be let into the case.

At this point, we again take the liberty to indicate that under the proofs in this case, it is clear that the confessions taken in the prosecutor's office, if they are indicative of the alleged commission of any crime, necessarily would be that of a homicide during the course of a robbery, although we are definitely of the opinion that the proofs are not indicative of nor do they substantiate even that crime.

In the *Jones* case, *supra,* there was an unanimous reversal because of the trial errors committed. Nor were the errors, committed by the Trial Court in its charge in the case *sub judice,* cured in any other part of its charge. Therefore, the jury had two alternatives. The finding of either might justify a verdict of murder in the first degree. But the alternative with respect to the homicide committed in the course of a burglary was legally incorrect, and the charge, therefore, was harmful and, we maintain that it was reversible error.

State v. *Tapack,* 78 N. J. L. 208;
State v. *Guarino,* 105 N. J. L. 549.

We urge that the Court committed error by the mere act of submitting both theories of the homicide to the jury, together with the third theory of homicide in the course of both burglary and robbery.

At this writing, neither the plaintiffs-in-error,

nor their counsel, nor the Court, know whether or not the jury convicted these men on the theory of a homicide committed in the course of a burglary or a robbery or both. It is also our contention that further error was committed with reference to this charge, in that a burglary was not proven in accordance with the elements necessary to prove this crime. Further, a robbery was not definitely established under the proofs and, therefore, if the jury convicted upon the theory of a homicide during the commission of a burglary or even a robbery, the factual situation would likewise constitute reversible error.

As to a discussion of the insufficiency of the facts to constitute the crime charged, we respectfully refer to other points hereinafter discussed.

POINT IV.

The Court committed harmful and prejudicial error when it charged the jury as follows:

> "Now, what is burglary? Any person who shall by night—and if these acts on the part of the prisoners at the Bar happened at any time they happened at night— even the defendants agree that the time they were down at Horner's place was somewhere between eleven and one o'clock—any person who shall by night wilfully or maliciously break and enter any church, meeting-house or dwelling house—and this was a dwelling house where William J. Horner was—with intent to kill, rob, steal, commit rape, mayhem or battery, he, his counsellors, procurers, aiders and abettors shall be guilty of a high misdemeanor." (Add. Ss. of R. No. 1, pgs. 459 and 490)

The foregoing specifications of causes for reversal are identical and are urged by both plaintiffs-in-error and are, therefore, consolidated for the purposes of convenience of this argument.

In the case *sub judice,* the Court, at page 406 of the State of Case, defined burglary in accordance with Section 131 of the Crimes Act, which provides: (C. S. pg. 1787)

> "Any person who shall, by night, willfully or maliciously break and enter any church, meeting-house, dwelling-house, shop, warehouse, mill, barn, stable, outhouse, railway-car, canal-boat, ship or vessel, or other building whatever, with intent to kill, rob, steal, commit rape, mayhem or battery, and his counsellors, procurers, aiders and abettors, shall be guilty of a high misdemeanor." (P. L. 1898, p. 830.)

and did not apply the common law definition of burglary, which by virtue of the cases is the following:

> " * * * he that by night breaketh and entereth into a mansion-house with intent to commit a felony." (Conners v. State, 45 N. J. L. 340, at pg. 342)

It is our contention that the burglary referred to in Section 107 of the Crimes Act, which provides for the definition of murder in the first degree, to wit, a homicide committed in the course of burglary, etc., is definitely intended to mean burglary as at common law, and not burglary under the statute. In the same way, the Courts have already determined the question as to the definition of robbery under Section 107 of the Crimes Act, in the case of

State v. *Compo,* 108 N. J. L. 499,

at page 501, wherein Justice Bodine speaking for

the Court said:

> "The common law definition of robbery has, notwithstanding, been uniformly approved and followed in cases where homicide has been committed in the perpetration of a robbery."

However, there is no definite ruling in this State as to whether the "burglary" mentioned in Section 106 and 107 of the Crimes Act is burglary at common law or the act denounced in Section 131 of the Crimes Act. The Court of Errors and Appeals has indicated its views in the case of

State v. *Jones,* 115 N. J. L. 257,

wherein Justice PARKER stated in an unanimous reversal of a murder case, at page 263:

> "Reverting to the burglary theory, which was one of the two relied on in the charge —if, as we have intimated, homicide in the commission of a robbery was well supported by the evidence, the theory of homicide in the commission of a burglary loses some of its practical importance. That theory raises the troublesome question, never decided in this court, whether the 'burglary' mentioned in sections 106 and 107 of the Crimes Act is, on the one hand, burglary at common law, viz., the breaking and entering by night into a mansion house with intent to commit a felony (4 Blk. 224; 2 Bish. New Cr. L., Sec. 90; 1 Russell on Crimes 785), or, on the other, any act denounced in section 131 of the Crimes Act, which, it may be noted, does not in its text describe violations as constituting burglary, but merely pronounces them high misdemeanors (though in sections 123 and 129 certain described burnings are declared to be 'arson'). This question, never decided in this court has been considered in an-

other phase in the Supreme Court, and adverted to more than once in other cases. See Conners v. State, 45 N. J. L. 340, 346; Downs v. Insurance Co., 91 Id. 523; State v. Tonghanni, 96 Id. 63; State v. Rosenberg, 97 Id. 430.''

It is to be noted that Section 131 of the Crimes Act merely denounces the crime of breaking and entering and statutory burglary as a high misdemeanor. It does not contemplate common law burglary, the felony, as the Legislature obviously intended the same in Section 107 of the Crimes Act. The intention is clear that the burglary as set forth in Section 107 of the Crimes Act, relates to and of necessity applies only to the distinctive crime of burglary as at common law. The fact is, that the charge as set forth by the trial judge specifically referring to the offenses denounced in Section 131 of the Crimes Act, related to offenses denounced by the Legislature as high misdemeanors, with the result that the jury was privileged to consider thereby the statutory offense of burglary as embraced within that statute and other high misdemeanors therein incorporated, denying unto the plaintiffs-in-error the right to have a specific charge on burglary as it existed at the common law, and which was one of the felonies specifically adverted to by the Legislature in Section 107 of the Crimes Act. In effect, the court said to the jury: I charge you that you may convict these plaintiffs-in-error of murder in the first degree if you find that they committed the high misdemeanors enumerated in Section 131, resulting in death, specifically directing their attention, however, to the statutory offense of burglary.

In

Downs v. *N. J. Fidelity & Plate Glass Ins. Co.,* 91 N. J. L. 523, (E. & A. 1917)

Chancellor WALKER stated at page 525-526:

> "Although section 131 of the crimes act (Comp. Stat. p. 1787) denounces as a high misdemeanor the crime of willfully and maliciously breaking into and entering any church, meeting-house, dwelling-house, shop, &c., by night, with intent to rob, steal, kill, &c., *that does not do away with the distinctive offense of burglary at common law, although it includes it.* Conners v. State, 45 N. J. L. 340, 346."

By virtue of the definition of burglary, as stated to the jury in the charge of the court, it must be conceded that the jury could have concluded that the plaintiffs-in-error were guilty of a lesser crime than burglary, to wit, a theft.

State v. *Cooper,* 13 N. J. L. 361.

The principal is settled in New Jersey that one convicted for a crime may be convicted of any offense of a lower degree; provided such lower offense is necessarily included in the higher one charged in the indictment.

State v. *McDonald,* 89 N. J. L. 421, affd. 91 N. J. L. 233 (E. & A.)

So, in the case at bar, the jury was empowered to find the plaintiffs-in-error guilty of a crime of a lesser degree than common law burglary, and, if they did, then it logically follows that they could not be guilty of murder in the first degree, since any crime of a lesser degree than burglary, is not one of the enumerated felonies set forth in Section 107 of the Crimes Act.

We contend, therefore, that in view of the erro-

neous submission to the jury of the definition of the distinctive offense of burglary required under Section 107 of the Crimes Act, the court committed harmful and prejudicial error, and the plaintiffs-in-error suffered manifest wrong and injury in permitting the jury to pass upon the question of a homicide committed in the course of the perpetration of a crime of a lesser degree than the common law felony set forth in Section 107 of the Crimes Act.

POINT V.

The Court committed prejudicial and harmful error in excluding from the jury's consideration the question of a lesser degree of murder than first degree.

(Ss. of R. No. 32, pgs. 451 and 482; Ss. of R. No. 33, pgs. 451 and 482; Ss. of R. No. 35, pgs. 452 and 483; Ss. of R. No. 36, pgs. 453 and 484; Ss. of R. No. 38, pgs. 453 and 484; Ss. of R. No. 39, pgs. 454 and 485; Ss. of R. No. 42 and No. 43, pgs. 456 and 487; As. of E. No. 14, pgs. 436 and 467; As. of E. No. 15, pgs. 437 and 468)

The foregoing specifications of causes of reversal and assignments of error embrace the same legal subject matter, and, have, therefore, been consolidated for the purposes of this argument.

We respectfully refer to our argument under page 4, to support our contention herein that since the jury was empowered to find the plaintiffs-in-error guilty of a crime of a lesser degree than burglary, they could not legally be convicted of murder in the first degree, but on the contrary, the question of a lesser degree of murder should

have been submitted to the jury for its consideration.

As heretofore stated under Point II, the indictment returned against these plaintiffs-in-error set forth the common law definition of murder. Concededly, a conviction for any degree of murder could be returned under this form of indictment. It is now settled, that under this form of indictment, the jury may determine the innocence or guilt of the plaintiffs-in-error, and, if guilty, the degree of that crime.

In the early case of

> *Graves* v. *State,* 45 N. J. L. 347, (E. & A. 1883),

the Chancellor stated at pages 358-359:

> "The indictment in the statutory form is for the crime of murder, without regard to the degree. Under such an indictment, the defendant is not only informed of the nature and cause of the accusation, but is apprised of what it is exactly. It is a charge of murder, and the cause the wilful and felonious killing, by him, of the deceased, of his malice aforethought. The offence for which he is called to answer is charged in the indictment. It is murder. According as he shall or shall not be proved to have committed the crime of murder, he will be convicted or acquitted; and if convicted, according as it shall be proved that he committed it under circumstances which characterize the one degree or the other, so it will be found or adjudged with a view to his punishment, and he will be punished accordingly.
>
> No right of the defendant was violated, nor any privilege of his disregarded or contravened by convicting him of murder of the first degree on an indictment which

> described the crime according to the statutory form."

This rule has been referred to and approved in many later cases, one of which is

> *State* v. *Turco,* 98 N. J. L. 61, (S. Ct. 1922) Aff. 99 N. J. L. 96, (E. & A. 1923)

It is conceded, that if the proofs in this case were solely limited to the commission of a homicide in the course of a robbery, there would be no question as to the propriety of the Court's charge with reference to the degree of murder which the jury should find if at all. However, the facts in the case and the charge offered by the Court with reference to the intoxication of the plaintiffs-in-error, together with the attempted offer of proof concerning a burglary, which necessarily requires intent, clearly evinces the fact that the charge, as delivered to the jury, constituted harmful and prejudicial error. In the light of the submission of the issues aforementioned to the jury, to wit, the question of intoxication, together with the question of a homicide committed during the course of a burglary, it is our contention that second degree murder could not be legally barred from the jury's consideration.

In the statement of facts set forth in the beginning of this brief, we have referred to the various instances in this case wherein the proof is existent that the plaintiffs-in-error were intoxicated at the time of the commission of their acts, to the point where they probably were not cognizant of their actions. Amongst other references made in this statement of facts, we again refer to the question put to Anna Brown at page 296 of the State of Case:

"Q. Were you drunk? A. I was."

and the question put to William Brown at page 335 of the State of Case:

"Q. Were you drunk? A. I was feeling —I do know I had been drinking."

The testimony in the case was so potent with reference to the intoxication of the plaintiffs-in-error, that the Court saw fit to charge upon this point in various portions of the charge. (S. of C., pgs. 412, 413) Therefore, the defense of intoxication was admittedly brought before the Court and received by the latter as an issue in the case. We appreciate the rule that intoxication or insanity may not constitute a defense to a murder committed in the course of a robbery as set forth in Section 107 of the Crimes Act, insofar as the same may be urged in mitigation of the seriousness of the offense, so that the verdict should be guilty of murder in the first degree, or not guilty. This is the rule because of the fact that there is no necessity for the proof of a wilful, deliberate or premeditated killing, which necessarily does away with the proof required to manifest an intent to take life.

The rule of law, as aforementioned, is a substantial one where the specifically enumerated crime can be shown to have been committed by the plaintiffs-in-error. However, the crime of burglary must first be proven before the jury can find that the homicide committed constitutes murder in the first degree. We, therefore, revert to the proof necessary to support a finding that a burglary was committed. As to this, the Court specifically stated at page 406 of the State of Case:

"Now, what is burglary? Any person who shall by night—and if these acts on the part of the prisoners at the Bar hap-

> pened at any time they happened at night—even the defendants agree that the time they were down at Horner's place was somewhere between eleven and one o'clock—any person who shall by night wilfully or maliciously break and enter any church, meeting-house or dwelling house—and this was a dwelling house where William J. Horner was—with intent to kill, rob, steal, commit rape, mayhem or battery, he, his counsellors, procurers, aiders and abettors shall be guilty of a high misdemeanor. What are the elements? The elements in this crime to be considered are, first, the time, the place, the manner and intent."

It is apparent, from the foregoing, assuming the charge is correct, that the intent must first be shown before the jury can find that a burglary was committed, and it is with reference to this finding that we urge that the question of intoxication becomes pertinent. For, if the jury found that the plaintiffs-in-error were so intoxicated to the point that they could not form a specific intent to kill, rob, steal, commit mayhem, rape or battery, they could not find that the plaintiffs-in-error committed a burglary, which in turn, is indicative of the fact that the killing could not be first degree murder. Consequently, the question of intoxication was pertinent to the jury's deliberations when the Court saw fit to submit both theories of the case, to wit, a homicide in the course of a robbery or burglary, or both.

We maintain that it was not for the Court to state that the jury was compelled to find a verdict of murder in the first degree or not guilty and thereby foreclose the plaintiff's-in-error right to have the jury determine the issue of fact as to whether or not the intoxication was of such a degree as to mitigate the original alleged offense

committed, to wit, burglary to a lower degree of the offense. If the jury had decided that a lower degree than the offense of burglary had been proven, then we submit, that the homicide committed would not have come within the purview of the enumerated felonies in Section 107 of the Crimes Act, and, therefore, would not be murder in the first degree. That the questions concerning intent are solely for the jury, we respectfully refer to a leading case in New York,

> *Peoples* v. *Moran,* 158 N. E. 35, (Ct. of Appeals)

wherein Justice CARDOZO, then Chief Judge of the New York Court of Appeals, and now a Justice of the United States Supreme Court, discussed this very doctrine. In the *Moran* case, *supra,* the defendant and four others were riding in a car. Two policemen ordered the car to stop, which the driver did, although the defendant told him to continue. Thereafter, the defendant drew a revolver and fired at one officer and then at the other. The defendant was found guilty of murder in the first degree, and Justice CARDOZO, in reversing this verdict, said:

> "The judgment must be reversed because of basic error in the charge. The trial judge left the case to the jury upon the single theory of a homicide by one engaged in the commission of a felony, and he confined the jury to a choice between a verdict of acquittal and one of murder in the first degree. He refused to submit the other degrees of homicide * * *. He said (referring to the trial judge) that if the defendant, after shooting D. shot and killed B. in an effort to escape, this was homicide while engaged in the commission of a fel-

ony, and so murder in the first degree irrespective of intent. The jury were not to consider whether the defendant had fired with a deliberate and premeditated design to kill. Enough that D. had been shot, and that the defendant was escaping.

Repeated decisions of this Court bear witness to the fact that such is not the law. (Citing numerous cases.) Homicide is murder in the first degree when perpetrated with a deliberate and premeditated design to kill, or, without such design, while engaged in the commission of a felony. To make the quality of the intent indifferent, it is not enough to show that the homicide was felonious, or that there was a felonious assault which culminated in homicide * * *. Such a holding would mean that every homicide not justifiable or excusable, would occur in the commission of a felony, with the result that intent to kill and deliberation and premeditation would never be essential (Cases). The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein, as e. g. robbery or larceny or burglary or rape. Cases are found at times where the inculpatory facts are susceptible of one interpretation only: Either the one accused was engaged in an independent felony at the time of the killing, or he did not kill at all * * *. *If, however, the facts are susceptible of varying interpretations, there must be a submission of whatever forms and grade comport with the proofs and the indictment* * *. *Whenever intent becomes material, its quality or persistence, the deranging influence of fear or sudden impulse, etc., is matter for the jury, if such emotions or disabilities can conceivably have affected the thought or purpose of the actor.*

This killing was not done in circumstances excluding every possible hypothesis ex-

> cept one of homicide while engaged in another or independent felony. The trial judge told the jury that the defendant was engaged in such a felony, if, before he had been placed in the lawful custody of an officer, he shot Officer B. in an effort to escape. We have held exactly to the contrary. (Cases cited.) The very meaning of flight is desistance or abandonment, unless, indeed, in special circumstances as in cases where a thief is fleeing with his loot. *If the defendant was trying to escape, then the first felony, the assult upon D. was over.* A second felony had begun, a felonious assault on B. The felony then begun was not independent of the homicide. It was the homicide itself."

It is clear, from the foregoing, that the felony that eliminates the quality of the intent, is one that is independent of the homicide and one which must be proven before the homicide can be classified as murder in the first degree. Therefore, the intent necessary in the crime of burglary in the case *sub judice* must be shown; that is, an intent to commit a robbery or any of the other enumerated crimes contained in the definition of burglary as set forth by the Court in the State of Case, page 406, *supra,* assuming, but not conceding, for the purposes of this argument, that the definition as set forth is correct.

In

> *State* v. *Mangano,* 77 N. J. L. 544, (E. & A. 1908),

Justice PARKER at page 549 stated:

> "In Wilson v. State, 31 Vroom 171, it was further held by this Court that 'if at the time of doing the act the evidence showed that the defendant was so intoxicated that his faculties were prostrated and he

> was rendered incapable of forming a specific intent to take life, then, although it was no defense for crime, his offence may thereby be mitigated to murder in the second degree.' Several judges held that this rule was too harsh, as requiring a jury to find that the defendant had been rendered incapable of forming an intention to kill, rather than that such intention did not in fact exist; but the court seems to have been unanimous on the point that the fact of intoxication was one which should be proved by weight of evidence, the majority holding that it must also be shown to have been sufficient to render the defendant incapable of forming an intent to take life, and, if so proved, would mitigate the offense to murder in the second degree."

Justice SWAYZE, in

> *State* v. *Mack*, 86 N. J. L. 233, (E. & A. 1914)

speaking for the Court, at page 235, said:

> "As to the effect of intoxication the charge was quite as favorable as the defendant had any right to ask. The judge charged that if the defendant was so intoxicated or in such a condition of mind because he was getting over a debauch that his faculties were prostrated and rendered him incapable of forming a specific intent to kill with this willful, deliberate and premeditated character, then although it is no defense or justification, his offense would be murder in the second degree. This follows the rule in Wilson v. State, 60 N. J. L. 171."

Concededly, the question of intent is a paramount factor in determining whether or not the killing was committed during the course of a burglary, which proposition was submitted to the

jury for its deliberation. And, it is because of this intent necessary, that the subject of intoxication should have been considered by the jury as and when the issue was raised, which issue, concededly, is present in the case at bar as manifested by the Court's remarks in its charge to the jury.

Wherefore, we respectfully submit, that the Court committed harmful and prejudicial error in excluding from the jury's consideration the question of a lesser degree of murder than first degree.

POINT VI.

The Court committed harmful and prejudicial error in sentencing the plaintiffs-in-error on the ground that the verdict returned by the jury was insufficient because it did not designate the degree of murder and, therefore, was improper, illegal and contrary to law.

(Ss. of R. No. 47, pgs. 457 and 488.)

The foregoing specifications of causes for reversal are identical and are urged by both plaintiffs-in-error and are, therefore, argued together for convenience.

The Court, in its charge, instructed the jury that it should return a verdict of guilty of murder in the first degree, or not guilty. (S. of C., pg. 418). When the jury returned with its verdict, the following colloquy took place between the clerk, the court, the Trial Judge and the foreman (S. of C., pg. 425):

> "The Clerk: Jury, rise. Prisoners, rise. Jury, look upon the prisoners. Prisoners, look upon the jury. Members of the jury, have you agreed upon your verdict?

The Jury: We have.

The Clerk: Who shall say for you?

The Jury: Foreman.

The Clerk: Mr. Foreman, how say you, do you find the defendant Smalley Burrell guilty or not guilty?

The Foreman: Guilty.

The Clerk: Members of the jury, hearken to your verdict as the Court has ordered it recorded. You say you find the defendant Smalley Burrell guilty?

The Jury: We do.

The Court: The instruction of the Court was guilty of murder in the first degree. Is that your verdict?

The Foreman: Yes, sir."

Likewise, the verdict against William Albert Brown was rendered in a similar manner, and the following colloquy took place (S. of C., pg. 426):

"The Clerk: Members of the jury, hearken to your verdict as the Court has ordered it recorded. You say you find the defendant Smalley Burrell guilty of murder in the first degree, in the manner and form as he stands charged and so say you all?

The Jury: We do.

The Clerk: Mr. Foreman, how say you, do you find the defendant, William Albert Brown guilty or not guilty?

The Foreman: Guilty.

The Court: Of murder in the first degree?

The Foreman: Of murder in the first degree.

The Clerk: Members of the jury, hearken to your verdict as the Court has ordered it recorded. You say you find the defendant William Albert Brown guilty of murder in the first degree, in the manner and form as he stands charged and so say you all?

The Jury: We do."

Section 107 of the Crimes Act, (Ph. L. 1917, pg. 801) provides:

> "* * * and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first degree or in the second degree * * *"

It is clear from the foregoing, that at no time did the foreman or the jury itself state that the plaintiff-in-error, Smalley Burrell was guilty of murder in the first degree, but merely answered affirmatively upon the suggestion being made by the Court. The same situation applies to the plaintiff-in-error, William Albert Brown.

In the case of

> *State* v. *Turco*, 98 N. J. L. 61, (Sup. Ct. 1922),

the jury returned a verdict of "guilty" without designating the degree of murder. The jury was thereafter discharged. Justice TRENCHARD, in reversing the judgment of the Trial Court, stated at page 63:

> "The jury before whom the trial is had, if they find the defendant guilty, are required to find this fact, and to designate by their verdict whether it be murder in the first degree or in the second degree. It is therefore apparent, from the plain and imperative provisions of the statute, that a verdict (such as the present) which fails to designate the degree of murder of which the jury find the defendant guilty, is so fatally defectice that no judgment can be legally pronounced thereon. It follows, of course, that if (as here) the jury be discharged *and judgment pronounced without such verdict being amended by the jury by adding the intended*

> *degree, the judgment must be reversed and a new trial awarded.* That interpretation of the statute not only accords with its plain and positive language, but it is supported by a long train of decisions in other states having statutes the provisions of which are similar to our own. The cases are collected in 13 R. C. L. 782, and Whart. Hom., Sec. 652."

It must be noted that the fact that the Court charged that the verdict must be guilty of murder in the first degree, if at all, or not guilty, is not material and does not justify the verdict of "guilty". For the determination as to whether or not the verdict is sufficient, must be considered in the light of the indictment, which, in the case *sub judice* may support a verdict of murder in both degrees.

In support of the foregoing, Justice TRENCHARD said at page 63 of the *Turco* case, *supra*:

> "The argument of the state that the judgment of death was justified rests upon the contention that the verdict of 'guilty' is tantamount to conviction of first degree, because the judge instructed the jury that under the law and the evidence the defendant was either guilty of murder in the first degree or of no offense at all. But that argument ignores the rule that, in determining whether the verdict is sufficient in the specification of the degree of the offense charged, its finding must be considered in connection with the charge in the indictment (which in the present case would support a verdict for both degrees of the crime) and with the statutory requirements."

We appreciate the rule that the Trial Court may mould a verdict so long as he does not alter or amend it. But, in a murder case, we are concerned

with the strict rules, and any suggestions forthcoming from the Court to the jury with reference to the degree of the crime after the jury has rendered its verdict, are improper.

In the case of

State v. *Nardella,* 108 N. J. L. 148, (E. & A. 1931),

a similar situation arose wherein the forelady answered "guilty" and the Court suggested "guilty of murder in the first degree", and the forelady answered, "Yes, your Honor". Thereafter, the Clerk polled the jury and separately interrogated each juror, from whom the clerk received the same reply. As to this the Court held that there was no error committed. However, in the case *sub judice,* there was no attempt to poll the jury, nor were any of the jurors interrogated separately as to their verdict. At page 153 of the *Nardella* case, *supra,* Justice DONGES was careful to point out that a poll was made of the jury as distinguished from the case at bar, and as to which he said:

> "Each juror plainly announced his or her finding. There was no impropriety in the court's inquiry."

In

13 R. C. L. 782,

the author therein stated:

> "The court must be able to say from the indictment and the verdict together, what is the precise crime of which the accused has been convicted; and where a crime has been divided into degrees, and the punishment thereof graduated according to the degree, the court ought in like manner, to be able to determine the degree of such crime, or no valid judgment can be pronounced. In many states the matters have been set at rest by

statutory enactments requiring the jury to determine whether the prisoner is guilty in the first or second degree. These acts are held to be imperative and to render nugatory a verdict which does not find the degree."

In view of the foregoing, we respectfully submit that the Court committed harmful and prejudicial error in sentencing these plaintiffs-in-error upon the improper and illegal verdict rendered by the jury.

POINT VII.

The Court committed harmful and prejudicial error in admitting the statement of Anna Brown over the objection of the plaintiffs-in-error and the exception duly taken thereto, on the ground that the same was intended to be binding upon the plaintiffs-in-error and constituted illegal and incompetent evidence against them.

(Ss. of R. Nos. 10 and 11, pgs. 443 and 475; As. of E. Nos. 9 and 10, pgs. 435 and 466.)

The foregoing specifications of causes for reversal and assignments of error embrace the same subject matter and we have, therefore, consolidated them for convenience in this argument.

After the death of Mr. Horner, the authorities saw fit to bring the plaintiffs-in-error and Anna Brown together and reread the statements separately given to them by the plaintiffs-in-error and the defendant, Anna Brown. This was, of course, done so that the statement of Anna Brown would be binding upon the plaintiffs-in-error. (S. of C., pg. 155). That the statement of Anna Brown was

intended to bind the plaintiffs-in-error, is clearly manifested by the statement of the prosecutor and court at page 190 of the state of case, wherein the following appears:

> "The Prosecutor: He said there were certain persons there and then the statements were taken in the presence of the other two defendants.
>
> The Court: If they were all present at the same time it will be admitted as it is."

We are familiar with the rule that generally an accusation or statement made by a defendant against the co-defendant in the presence of both, is binding unless the accused answers and denies the same. By virtue of this rule, the court admitted the statement of Anna Brown as binding against the plaintiffs-in-error, since it was made in the presence of both. However, there is an exception to this ruling, namely, that where the circumstances are such that a person is not in a position to answer the accusation, the statement made at that time is not binding in any way upon him, and cannot be used against him.

It is conceded that at the time the statements were taken, the three defendants were under arrest and were in the County Jail at Woodbury, New Jersey. (S. of C., pgs. 187-189). The law is lettled that where one is under arrest and he is silent when an accusation is made, that accusation cannot be used against him and the statement of the accuser is not binding in any way upon him.

In the case of

Roesel v. *State,* 62 N. J. L. 216, (E. & A.)

Justice DEPUE said at page 235:

> "The prisoner was at liberty to speak or not, as he saw fit, and his silence under such

> circumstances could not be made evidence against him. *To affect one person with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence or even to himself, but they must also have been made on an occasion when a reply from him might properly be expected.* 1 Tayl. Evid., Sec. 814; Commonwealth v. Kenney, 12 Metc. 235, 237; Donnelly v. State, 2 Dutcher 463, 504, 601, 612, 632, 634. In the case last cited, Mr. Justice Ogden, delivering the opinion of this court, discussing the question whether declarations of the deceased, in the presence of the prisoner and not contradicted, should be received in evidence, said: 'If it appeared that it (the declaration of the deceased) was made * * * when circumstances existed which rendered a reply inexpedient or improper, or that fear, doubts of his rights or belief that his security would be better promoted by silence than by response governed him at the time, then the testimony should not have been admitted, for the reason that the jury in such case ought not to have been allowed to infer anything against the prisoner from his silence.' ''

Although Anna Brown was under arrest, any statement she made may be used against her, but can in no wise effect the plaintiffs-in-error.

In

16 Corpus Juris 632, Section 1258 (c),

the author states the following:

> "A written accusation or incriminating statement which was read to defendant is not admissible on the ground that by his silence he tacitly acquiesced in its truth, *where the situation and circumstances are not such as clearly to require from him some reply, or where the circumstances are such as to show*

> *that he did not intend to commit himself.* The failure of accused to reply in writing to a letter addressed to and received by him does not have the same significance as a failure to reply orally to an oral communication and does not render the letter admissible in evidence to show an admission of the truth of its contents."

And at page 633, Sec. 1259 (d):

> "*Silence Under Arrest.* Some of the Courts have held that the fact that one is under arrest and in the custody of an officer, when he is silent under accusation, prevents his silence or the statements themselves from being admissible against him, on the ground that under such circumstances *he is not called upon to speak.*"

In view of the foregoing, we submit that the court erroneously stated and ruled that the statement would be binding upon the plaintiffs-in-error, which necessitates a reversal of the judgments against the plaintiffs-in-error.

POINT VIII.

The Court committed harmful and prejudicial error in its charge, when it said:

A. "Now, to make out a case, the State must have established by evidence beyond a reasonable doubt, first, the death of William J. Horner, at or about July 16th or 18th. The indictment says that this act of the prisoners at the Bar was committed on the 16th and that the deceased languished until the 18th when he died. *There is no dispute of that.*" (Ss. of R., No. 22, pgs. 446 and 477).

B. "One, two or three of the prisoners at the Bar, by their testimony on the witness stand or by the confessions that were admitted into evidence agreed and *I think it is not questioned that the three went down to the Horner house with the idea of robbing or of getting money.*" (Ss. of R., No. 24, pgs. 447 and 478).

C. "There is evidence that they went into his place, that they no sooner spied him when they hit him and that would be putting a man in fear, especially if he was in his own castle, and that they took by that violence from him—oh! yes, he was undressed to be sure, he did not have any money in his pockets but the money was in his presence in his house, it might have been at the desk, it might have been in the pants, although William Albert Brown said it was not in the pants, it might have been in an envelope in the desk but anyhow it is admitted by one or two of the defendants and possibly a third, by reference thereto, that seventy-five cents was obtained and Anna Brown said she picked a nickel off the floor." (Ss. of R. No. 25, pgs. 448 and 478).

D. "The elements in this crime to be considered are, first, the time, the place, the manner and intent. What was the time? It was at night. What was the place? It was a dwelling house. What was the manner? I do not have to graphically describe how they went there. They all agree that first of all the screen was out or pushed in or pushed through and that one of them—it does not matter which, the three were there—put his hand inside and pulled the latch, and we have authority to know that that act in itself is complete and a burglary or at least an attempt to burglarize. And what was the intent? *I do not think anyone of the three denied that they intended to go down to rob the man of some money.*" (Ss. of R. No. 26, pgs. 448 and 479).

In the interest of brevity, we have consolidated the foregoing errors under one heading in view of the fact that the same law is applicable to all.

As we view the foregoing parts of the charge, they are in effect an instruction to the jury to determine the matter in the manner set forth by the Court. First, the Court stated in its instruction that the indictment charged that the act of the plainiffs-in-error was committed on a certain day, and that the deceased died two days later, and went on to say "there is no dispute of that". (S. of C., pg. 402). In effect, he told the jury that there is no question as to the fact that the plaintiffs-in-error murdered the deceased. Clearly, this instruction invaded the province of the jury, and we may rightfully ask why the necessity of a jury in the face of the charge?

The Court in its charge, under Section B above quoted, then stated "I think there is no question that the three went down to the Horner house with the idea of robbing or of getting money." Again

the jury was never permitted to pass upon this factual question as to whether or not a robbery was ever committed, but rather the instruction was such that the jury was to begin its deliberations with the fact that a robbery was committed.

Thereafter, in that portion of the charge, classified as Section C above, the Trial Judge said: "But anyhow, it is admitted by one or two of the defendants and possibly a third by reference thereto that 75c was obtained, and Anna Brown said she picked a nickel off the floor." (S. of C., pg. 405). Nowhere in the testimony is there any such fact or attempt to prove that two or three of these defendants received 75c, which was the item of personal property upon which the State rested to substantiate one of its elements necessary to prove a robbery.

Then again, under Section D, the Court states as a fact that the elements necessary to prove a burglary are already existent in the cause, and it would not be necessary for the jury to pass upon them.

Throughout the charge, we find elements injected into the case which are totally strange and foreign from any of the evidence adduced from any of the witnesses, all of which finds no legal basis in the case. Consequently, we contend that the Judge in his charge, in effect, became a witness for either party, and gave his views to an extent not permitted by law. He was not subject to cross-examination and, in that respect, deprived the defense of obtaining or testing the factual value of his testimony. It is entirely settled that a Judge cannot act as a witness in the cause, in the manner that the Trial Judge did in the case *sub judice*, and this is especially so where the statements of the Court have no legal or factual foundation in the evidence. A conviction, to be fair, must be based upon the evidence and testimony legally and

properly appearing during the course of the trial.

We appreciate and concede the rule that the Judge can indicate an opinion on the facts, thereby giving the jury the benefit of his experience. But this can be done only when his expressions and opinions are based upon evidence which appears in the case. That is the crux of our contention that there was no evidence in the case upon which the foregoing remarks were based, thereby entirely vitiating any and all defense which the plaintiffs-in-error might have.

We refer briefly to various cases throughout the State wherein the courts uphold the plaintiffs'-in-error right to have the jury pass upon such questions and disallow the Court from making statements not founded upon the evidence. In

Smith and Bennett v. *State,* 41 N. J. L. 370, (E. & A.),

Chief Justice BEASLEY stated that it was error if, in the charge of the Judge in a criminal case, a pertinent fact clearly connected with the merits of the case is stated to be in proof, when such fact has neither testimony nor the color of testimony to support it. This case was followed by

Heindel v. *Hetzel,* 82 N. J. L. 155, (Sup. Ct. 1912),

wherein the Court reversed the judgment and adopted the exact language of the *Smith and Bennett* case, *supra.* Other cases to this effect are

Gerety v. *N. Y. & N. J. R. R. Co.,* 89 N. J. L. 175;

State v. *Schilling,* 95 N. J. L. ~~151~~ 145

In

State v. *Lovell,* 86 N. J. L. 509, (Sup. Ct.),

the Court stated that a direction from the Trial Court which states as a fact proven in the case,

a condition of affairs which is not in the case and not properly inferable from the testimony, is not judicial comment and presents grounds for reversal. This case was reversed in the Court of Errors and Appeals, but only on the ground that there was testimony adduced sufficient to permit the comment made. However, the rule in the *Smith and Bennett* case, *supra,* was left intact. The Court said in this case in the Court of Errors and Appeals, in 88 N. J. L. 355:

> "This rule, however, is clearly distinguished from the equally well-accepted rule, that it is error in law for a judge in a criminal case to state in the charge a fact of the utmost importance (clearly connected with the merits to be in proof), when such fact has neither testimony nor the color of testimony to support it. Smith v. State, 41 N. J. L. 370; State v. Diamond, 84 Id. 17."

In

State v. *Zamofsky,* 105 Atl. 71,

the defendant was charged with arson and the question arose as to whether there was a fire in the stove on the premises, which, under the evidence, was for the jury. The Court in the *per curiam* opinion held:

> "The Court instructed the jury that the stove was cold, and if the fire was not of incendiary origin, there was no evidence to show how it did arise. We have examined the testimony carefully and while the part claimed by the plaintiff in error with regard to there being a fire in the stove, as a foundation for the theory of accidental ignition of the store, is not immune from criticism for ambiguity, it is just such an ambiguity as the jury should resolve without control by the court. Heindel v. Hetzel, 82 N. J. L. 155, 82 Atl. 511."

Wherefore, we respectfully submit that when the Court in its charge instructed the jury on a major point not supported by the evidence and disallowed the jury to pass upon factual questions, thereby invading the province of that jury and thereby vitiating the defense, all of which exceeded the bounds of fair judicial comment, it committed harmful and prejudicial error necessitating the reversal of the judgment.

POINT IX.

The Court committed harmful and prejudicial error in refusing to instruct the jury as follows, and in erroneously charging as it did in the following manner:

> "The law does not require the defendants to prove beyond a reasonable doubt that they were so intoxicated that they could not the intent, or were suffering from temporary alcoholic insanity so as not to comprehend the seriousness of their acts, but if the defendants raise a doubt in your mind of their condition at the time of the commission of the crime, the offense would be mitigated, and you must find them guilty of murder in the first degree with a recommendation for mercy or murder in the second degree." (Ss. of R. No. 40, pgs. 455 and 486; As. of E. No. 16, pgs. 438 and 469).

The Court did charge as follows:

> "*If these defendants have made out to you convincingly,* but not beyond a reasonable doubt, that by reason of their intoxication they were insane and did not know what they were doing within the meaning of intoxication as I defined it to you, then

they ought to be acquitted." (S. of C., pg. 418).

The foregoing specifications of causes for reversal and assignments of error have been consolidated for the purposes of this argument because they involve the same subject matter.

The court was requested by counsel for the plaintiffs-in-error to charge in the foregoing language as to the necessary proof concerning intoxication and the effect of the same. This the court refused, but on the contrary charged as it did above and which in our opinion constitutes reversible error.

By virtue of what the court did say, the plaintiffs-in-error were required to prove to the jury "convincingly" that they were intoxicated. It is definitely established in New Jersey that this quantum of proof is not necessary. The cases set forth under Point V of this brief definitely establish the quantum of proof necessary to be that of a preponderance of the evidence in order to establish intoxication. We respectfully urge, that the requirement of "convincingly" placed upon the plaintiffs-in-error a burden of proof which by law they were not required to bear.

In

State v. *Mangano,* supra,

Justice PARKER at pages 549-550 said:

> "The court, however, proceeded as follows:
>
> 'But, when he sets up this defense of intoxication, he must prove the defense he sets up by a preponderance of evidence; he must, by the evidence, create such a doubt as to his mental capacity, *as to convince you that he was unable to reason or deliberate.*'
>
> It is claimed that this last portion of the

charge imposed upon the defendant a burden of proof which by law he was not required to bear.

In Warner v. State, 27 Vroom 686, this court sustained as correct a charge to the jury that if the defendant was mentally capable of conceiving a design to take the life of the deceased, and did conceive such a design, and if they were satisfied that, in pursuance of such design so conceived, he purposely inflicted the fatal blow, then he was guilty of murder in the first degree. Whereas, if they should find that he was incapable, from the condition of his mind, of conceiving such a purpose, or that in point of fact he had not fully conceived such a purpose, &c., then it would be murder in the second degree.

In Wilson v. State, 31 Vroom 171, it was further held by this court that 'if at the time of doing the act the evidence showed that the defendant was so intoxicated that his faculties were prostrated and he was rendered incapable of forming a specific intent to take life, then, although it was no defense for crime, his offense may thereby be mitigated to murder in the second degree.' Several judges held that this rule was too harsh, as requiring a jury to find that the defendant had been rendered incapable of forming an intention to kill, rather than that such intention did not in fact exist; but the court seems to have been unanimous on the point that the fact of intoxication was one which should be proved by weight of evidence, the majority holding that it must also be shown to have been sufficient to render the defendant incapable of forming an intent to take life, and, if so proved, would mitigate the offense to murder in the second degree.

The charge under examination, however, seems to go further than either of the above-cited cases, for it requires the jury to be convinced that the defendant was unable to

reason or deliberate. This is more than is called for by the rule, which under no contention requires more than that they should be satisfied by a preponderance of evidence.''

We think that the court committed error in refusing to charge as requested by counsel. Certainly, however, no legal justification existed for the modified instruction given by the court on the subject matter of intoxication and the quantum of proof required. We believe that every factor involved in the request to charge, the plaintiffs-in-error were entitled to have submitted to the jury in the form presented. If the court refused to do so for some reason, then certainly we were entitled to have a proper charge. This was denied to the plaintiffs-in-error by the specific instruction given as hereinbefore referred to. Under the circumstances, we respectfully submit that the court made the precise error which led to a reversal in the *Mangano* case, in placing the additional burden of proof, by the use of the word "convincingly", upon the plaintiffs-in-error.

This prejudicial and harmful error, we submit, necessitates a reversal of the judgments.

POINT X.

The Court committed harmful and prejudicial error in its instruction to the jury, when it charged as follows:

> "Now, if you are convinced, ladies and gentlemen of the jury, that the State has shown to you beyond a reasonable doubt that these prisoners at the Bar committed or perpetrated or attempted to perpetrate *either a robbery or burglary or both, then they have proved or the State has proved its case to be that of murder in the first degree.*" (Ss. of R. No. 27, pgs. 449 and 480).

The foregoing specifications of causes for reversal are identical and are urged by both plaintiffs-in-error and are therefore, argued together for the purpose of convenience.

The court charged the jury in the language above and unequivocally stated that if the state proves beyond a reasonable doubt that the plaintiffs-in-error committed or attempted to commit a robbery or burglary or both, then the state has proved its case to be that of murder in the first degree. Clearly, this charge permitted the jury to find a verdict of murder in the first degree, although only a burglary or robbery may have been committed. This particular portion of the charge nowhere states that the homicide must be shown in addition to the robbery or burglary and, undoubtedly, misled the jury. The finding of either robbery or burglary clearly does not come within the purview of Section 107 of the Crimes Act, to which we have referred to heretofore, and, therefore, does not constitute murder in the first degree.

The patent error committed by virtue of this language in the charge, requires no further discussion.

POINT X I.

The Court committed harmful and prejudicial error when it charged the jury as follows:

> "It is laid down that where several persons combine and conspire together for the common object to commit robbery and in pursuit of that object one of them does an act which causes the death of a third person, each and all are principals and each and all may be convicted of murder, usually in the first degree, under the statute. That is a concise statement and it is applicable in this instance." (Ss. of R. No. 34, pgs. 451 and 482).

The foregoing specifications of causes for reversal are urged by both plaintiffs-in-error, and are consolidated for the purposes of this argument.

The court, by virtue of the foregoing charge, injected an issue into the case of a crime to commit a conspiracy the common object of which was to commit robbery, and in pursuance of that object a resulting death ensued. And the court further stated, that where one of the plaintiffs-in-error does an act which causes the death of a third person, each and all are principals, and each and all may be convicted of murder, usually in the first degree under the statute. By what right or authority the court adverted to the theory of a conspiracy under the evidence in this case and under the indictment returned by the Grand Jury, we fail to understand.

Under this charge, it was within the province of the trial jury to conclude that the plaintiffs-in-error were both guilty of the crime on the mere

statement which was made by Anna Brown. The statements which were offered in evidence under the law of conspiracy apply with equal force to all of the other defendants, being a statement made by a co-conspirator while engaged in the commission of the crime which was the object of the conspiracy. Certainly that was not the law applicable to the plaintiffs-in-error under the charge set forth in the indictment.

There was no allegation in the indictment relating to a conspiracy which had for its common object the commission of the crime of robbery. The court took it for granted, in effect, that there was a combination of these plaintiffs-in-error and the defendant, Anna Brown, in the form of a conspiracy to commit a robbery, and that in pursuit of that object, an act was done by one of them which caused the death of a third person, and as a result, each and all were principals and each and all could be convicted of murder.

The foregoing charge is at variance with other features of the charge wherein the court proceeded to discuss the crime of burglary and charged on the same. In this particular portion of the charge, the court definitely states that the object of conspiracy was to commit the crime of robbery, which, in effect, eliminated from the jury's mind the fact that it might have been a burglary that they were engaged in or both robbery and burglary, as was charged in the language of the court found under Point II. There was no legal justification for the court's commenting on or injecting into this case the question of a conspiracy between the plaintiffs-in-error, the common object of which was to commit robbery. The proofs do not substantiate any such charge and there is not a scintilla of evidence in the entire record of the case showing such a combination or a conspiracy,

and there certainly is no basis therefor in the indictment. So, too, the legal proposition set forth, to wit, that because of the fact that there was a conspiracy all were principals and the act of each was chargeable to the other, had no place in this case under the theory of the indictment and the proofs submitted thereunder.

In our opinion, the court opened the door wide to a realm of speculation on the question of a conspiracy, the common object of which was to commit a robbery. The issue in our judgment created by the language of the court, is at variance with the other portions of the charge already referred to and could not be legally sustained or justified upon the theory that the indictment and the language therein permitted of such charge, nor can it be argued or urged that under the proofs such theory could have been injected by the court for the consideration of the jury.

A conspiracy to commit a robbery resulting in death, if charged in the indictment, is such crime as in our opinion would carry with it the penalty accompanying the crime of which the jury found the plaintiffs-in-error guilty, to wit, conspiracy. If the jury concluded under this charge that these plaintiffs in error had in fact conspired for the common object to commit robbery and in pursuit of that object a death resulted to a third party, the charge of such conspiracy in an indictment would merely entitle the state to ask for a conviction of conspiracy despite the fact that there may have been a resultant death. It may be that under this charge the jury would find the plaintiffs-in-error guilty of having combined and conspired to rob. How are we to know what motivated and enjoined them in reaching the verdict which they did? If their conclusion was that there was such a combination or conspiracy to commit the crime

of robbery, then certainly this court is in no position to enforce a conviction upon the indictment hereunder.

We feel that under all of the circumstances, no legal excuse can possibly be found justifying this charge.

POINT XII.

A. The Court committed prejudicial and harmful error in placing the plaintiffs-in-error on trial without the assistance of proper and competent counsel, as provided in Article 14, Section 1, and Article 6 of the United States Constitution, and Article 1, Section 8 of the New Jersey Constitution.

(Ss. of R. No. 48 and No. 49, pgs. 457 and 488.)

B. The Court committed harmful and prejudicial error in assigning a police magistrate to act as counsel for the plaintiffs-in-error, on the ground that such officer is not such as contemplated under Article 1, Section 8 of the New Jersey Constitution, and Article 14, Section 1, and Article 6, of the United States Constitution.

(Ss. of R. No. 50 and No. 51, pgs. 457 and 488.)

The foregoing specifications of causes for reversal involve the same legal argument and we have, therefore, consolidated all of the foregoing for the purpose of convenience in this argument.

After the death of Mr. Horner and the indictment of the plaintiffs-in-error for murder, the Court appointed Frank L. Johnson, Esquire, to defendant Smalley Burrell and William Albert

Brown, upon the trial of said indictment. (S. of C., pgs. 7 and 19). Mr. Johnson is, concededly, the police magistrate in the City of Woodbury in Gloucester County. We respectfully and sincerely urge that the appointment of Mr. Johnson is not the counsel contemplated under Article 14, Section 1 of the United States Constitution, and Article 1, Section 8 of the New Jersey Constitution, which provides as follows:

> Article 14, Section 1 of the United States Constitution:
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property, without due process of law,* nor deny to any person within its jurisisdiction the equal protection of the laws."

> Article 1, Section 8 of the New Jersey Constitution:
>
> "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel in his defense.*"

The judge of a police court of a City, of course, belongs to the Judicial Department of the State, (96 Atl. 769) and can be categorized on the same plane as a criminal judge sitting in an upper court. He is sworn to uphold the law and to administer justice in accordance with the same. He is not the type of counsel which the constitution contemplates to represent a defendant in a criminal trial.

Both morally and legally, he is not bound to put forth his best efforts and to defend his clients on the same standard as a practicing attorney at law who is not directly affiliated with the Judicial Department of the municipality or state. It must be remembered that the plaintiffs-in-error did not retain this counsel, but that the Court took upon itself to assign a police magistrate when it could have clearly assigned one who is not connected with the Judicial Department. This question has not been determined in this state, but various inferences can be drawn from cases already on record in New Jersey.

In

State v. *Favorito,* 115 N. J. L. 197, (E. & A. 1935),

the defendant was convicted of murder. An accomplice in the crime, and a defendant in the cause, was assigned counsel by the trial judge. The person who was assigned was a former judge and one who sat in a case wherein his present client, the accomplice, was convicted and sentenced by him as the judge then presiding. Thereafter, the Judge's term expired and when this homicide arose, he held no official position and was assigned by the present judge to represent this accomplice. Counsel for the defendant, Favorito, on cross-examination, asked the question, "And the judge who sentenced you is now your lawyer, is he not?" The trial court refused to permit counsel to ask this question, and it was urged as error on appeal. Although the court held that the question was irrelevant, the language used in the opinion, and the inference to be drawn from the statement of Justice TRENCHARD at page 201, is as follows:

"We think there is no merit in this point.

> Wiese was an accomplice in the homicide in question which occurred in 1934 and testified as witness for the state. He had been convicted in 1930 of burglary and was sentenced by the judge then presiding. *That judge's term expired, and when the homicide in question occurred he held no official position in the state. He was assigned by the present judge to represent Wiese in the homicide case.* In such circumstances the question 'and the judge who sentenced you is now your lawyer, is he not' was irrelevant and was properly excluded."

It is to be noted that the Court said "in such circumstances" the question asked was not material, referring, of course, to the circumstances that the counsel for the accomplice was no longer a judge, and that if he was a judge at the time he represented this accomplice, the implication is that the situation may have been different.

The mere appointment of counsel is not sufficient under the rules and cases laid down by the United States Supreme Court. In the recent case of

> *Powell* v. *Alabama*, 77 L. Ed. 158; 287 U. S. 45,

the Court appointed counsel for the defendant. We realize that the situation in that case was slightly different than the circumstances existent herein. However, the rule laid down and the language of the Court is perinent. At page 165 Justice SUTHERLAND, who wrote the opinion for the Court, said:

> "It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-go-

> ing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. *Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: 'The record indicates that the appearance was rather pro forma than zealous and active.'* Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities. This conclusion finds ample support in the reasoning of an overwhelming array of state decisions, among which we cite the following: (Citing cases)".

The language used, to wit, that the "appearance (of counsel) was rather *pro forma* than zealous and active", is of the greatest significance. In this case, the fact that the Court assigned the counsel was not sufficient. On the appeal, the United States Supreme Court was concerned with actuality and not the form that the trial took.

In reviewing the ancient law and the basis for its decision, the Justice further stated at page 166:

> "One of the grounds upon which Lord Coke defended *the rule was that in felonies the court itself was counsel for the prisoner.* 1 Cooley, Const. Lim., supra. *But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused?* He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes par-

take of the inviolable character of the confessional."

Finally, at page 172, the Court discussed the importance of counsel in a capital case, and said:

> "All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; *and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.* To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' "

At this time, it is proper to refer to another important conclusion reached by the Court in the *Powell* case, *supra,* to wit, that the denial of the assistance of proper and competent counsel, as contemplated by the constitution of the United States, is violative of Article 14, Section 1 of that constitution, and that the same has been engrafted upon the "due process" provisions of this Article.

In Georgia, the case of

Gaulden v. *State,* 11 Georgia 47 (1851),

discussed the question of a solicitor general acting as counsel for a defendant in a criminal case. In this appeal, the question arose as to whether or not a solicitor general, who, in his official ca-

pacity, has procured an indictment against the defendant as counsel for the State, can be permitted, after the expiration of his term of office, to represent such defendant and appear as his counsel on the trial. We realize that this case is not on all fours with the facts existent in the case *sub judice*. However, a public official was involved as counsel for a defendant in a criminal trial and the language generally is applicable to the case at bar.

In the *Gaulden* case, *supra,* the Court said, at pages 50-51:

> "* * * in our judgment, public policy most emphatically demands that a solicitor general who has been employed by the State, to prosecute defendants for a violation of her laws, for the compensation affixed by law, should not be allowed to defend such defendants from the charge contained in the indictment, after the expiration of his term of office, for a compensation to be paid by them for that purpose. *Such a practice will have a tendency to greatly embarrass the administration of the Criminal Law, for, as the term of the office of solicitor general is about to expire, prosecutors and others,* who may be intrusted to prosecute offenders, will necessarily be restrained from communicating freely with the State's counsel, when he may be employed at the next term of the Court to defend the indicted culprit."
>
> "If he has knowledge of facts, derived from his official connection with the prosecution, which will operate to the prejudice of the State, and he is permitted to act as counsel for the defendant, that knowledge will be made available in the defense; therefore, *we place our judgment on the ground, that public policy forbids a solicitor general who has prosecuted a defendant for a violation of the law,* by preferring an indict-

ment versus him, should appear as his counsel to defend him from the charge, after the expiration of his term of office. We take pleasure in stating, that in the present instance the plaintiff-in-error has only pursued the general practice which has heretofore prevailed in most of the Circuits of this State, and that no positive abuse of his professional confidence has been made to appear, and none is imputed to him in this case, by the judgment which we have felt it to be our duty to award, but we affirm the judgment of the Court below, as before stated, on the ground of public policy, irrespective of the particular facts of this case."

Our argument is all the more potent, in view of the fact that this is a capital case where the Courts have repeatedly held that no irregularities should be permitted to creep into the course of a trial in such a case.

In the case of

Sheppard v. *State,* 165 Ga. 460, 464, (1928),

Justice RUSSELL said:

"Benefit of counsel either means something or it means nothing. To promise the benefit of counsel and then render the service ineffective is, as Judge Blandford once remarked, 'to keep the word of promise to the ear and break it to our hope.' The intense strain involved in the responsibility of defending one whose life is at stake is such as can scarcely be described in words; and altogether aside from inquiry into the facts of the case and legitimate inquiry so far as possible into the character of the jurors, as much time and thought are required to consider and determine what course of action shall be pursued in defending one whose life is at stake as in import-

ant civil cases where many thousands of dollars are involved."

The beginning of the foregoing quotation is the crux of our argument under this point. Merely assigning counsel to a person is not sufficient for compliance with the constitutional guarantees to the plaintiffs-in-error. By virtue of the assignment of a police judge, we submit that the very service was rendered ineffective because of the official capacity of this person. The fact that counsel is assigned in a murder case to represent defendants and that counsel holds the official position of a police judge, is on its face paradoxical. The fallacy is apparent when we conceive of a case where the prisoner did confess to his counsel who was a police judge. What would be the judge's duty under the circumstances? He is sworn to uphold the law and administer justice. He is, therefore, duty bound to report this confession to the higher authorities in order to execute his duties in accordance with his oath. The oath of a counsellor at law, is, of course, not on a par with that of a judge, and a confession to the former would necessarily be held in strict confidence.

Wherefore, we submit, that the appointment of a police magistrate as counsel for defendants in a murder case, is not proper and does not rest upon a legal basis, and further, it is not that counsel contemplated by virtue of the guarantees given in the Federal and State Constitutions, as interpreted by the United States Supreme Court in the case of *Powell* v. *Alabama,* supra, thereby necessitating the reversal of the judgment in this cause.

POINT XIII.

The Court committed harmful and prejudicial error in refusing to instruct the jury as follows:

> "Uncorroborated testimony of co-defendants in a case must be observed and stand the closest scrutiny, and in order to believe the testimony of one of the co-defendants, the jury must take into consideration whether in the light of all the testimony and actions of that particular co-defendant, his or her testimony can be believed in full or part must be rejected. The State has not produced any testimony in corroboration of what happened in Mr. Horner's house. Therefore the jury must be guided by the statements of the respective defendants and must also decide whether the testimony reflecting the entire blame on one co-defendant and very little to himself or herself are true." (Ss. of R. No. 37, pgs. 453 and 484; As. of E. No. 13, pgs. 436 and 467).

The foregoing specifications of causes for reversal and assignments of error involve the same legal error and we have, therefore, consolidated them for the purpose of this discussion.

Anna Brown, a co-defendant, was an accomplice in this alleged crime, and her testimony was used as against the plaintiffs-in-error and was definitely intended to bind them. Counsel for plaintiffs-in-error requested the court to charge as to the value of the testimony of an accomplice in the foregoing language, which the court refused.

The rule is conceded, that a defendant can be convicted upon the testimony of an accomplice alone if the jury is satisfied that he is telling the

truth, and, we, therefore, do not discuss this feature. Our contention is that there was a duty upon the trial court and, especially so in a murder case, to warn the jury as to their duty in considering and analyzing the testimony of an accomplice; and, they should not consider that testimony in the same light as a disinterested third party.

In the cases in New Jersey which we have observed, the courts invariably held that the prisoner could be convicted upon the testimony of the accomplice alone, but always cautioned the jury to closely scrutinize this testimony for reasons that are apparent and especially so where the plaintiffs-in-error request such a charge.

In the case of

State v. *Hogan*, 13 Misc. 117, (Sup. Ct. 1935), aff'd 115 N.J.L. 531 (E+A.)

the Court stated as to testimony of an accomplice at page 119:

> "But such testimony must, for obvious reasons, be closely scrutinized. The accomplices, tainted as they are with confessed criminality, are often influenced in their testimony by the strong motive of hope of favor or pardon. Therefore, it is incumbent upon the courts to 'look carefully into the secret motives that might actuate bad minds to draw in and victimize the innocent.' State v. Hyer, supra. See, also, State v. Bien, supra. In these circumstances there was all the more reason for a liberal application of the general rule that questions directed toward eliciting the interest of the witness are proper."

In

State v. *Bossone*, 88 N. J. L. 45, (Sup. Ct. 1915), aff'd 89 N.J.L. 724 (E+A.)

Justice SWAYZE stated the general rule as aforementioned, but went on to say:

> *"The trial judge properly cautioned the jury as to the weight to be given to such evidence."*

In

State v. *Hyer,* 39 N. J. L. 598,

Justice KNAPP said at page 601:

> "The legal competency of accomplices as witnesses is clearly established. Indeed, it is said to be the policy of the law to invite such persons to come forward and expose undiscovered participants in their guilt. Jordaine v. Lashbrooke, 7 T. R. 609. Yet, tainted as they are with confessed criminality, and testifying, as they often do, under the strong motive of hope of favor or pardon, it is but natural to withhold from them that faith in their testimony which we accord to the upright, disinterested, and innocent. *It was reasonable that courts should regard their testimony with suspicion, and look carefully into the secret motives that might actuate bad minds to draw in and victimize the innocent; and,* consequently, there has grown up in the courts a settled practice quite universal, and entitled in its observance almost to the reverence of law, *to advise jurors, in the strongest cautionary terms, not to convict defendants on such testimony, unless they can find corroboration in the testimony of other and unsuspected witnesses,* upon such material circumstances as tend directly to establish the guilt of the accused. And quite frequently do the courts, *in their discretion, direct juries to acquit and set aside verdicts, founded on the testimony of uncorroborated accomplices.* But I think it may be asserted as the law that, when the jury acting upon such testimony, he being a legal witness, find a verdict of guilty, it is a lawful verdict, and cannot be disturbed on error."

And further, at page 602:

> "*The wise practice of courts to admonish jurors against too great reliance on the evidence of particeps criminis,* found much support in the circumstance that the mouth of the accused was closed against the accusations of his criminality, while the self-convicted criminal was allowed to speak. The admission of persons accused of crime, as witnesses in their own behalf, has removed this one ground for disfavoring such testimony. But while cogent reasons still exist for scrutiny and distrust of evidence from such impure sources, I have not fallen in with any case condemning a conviction founded on the uncorroborated testimony of an accomplice as illegal. On the other hand, I find cases of high authority in support of such conviction."

And further, at page 603:

> "ALDERSON, B., in Rex v. Wilkes, 7 C. & P. 272, in summing up to the jury, says: 'You may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony, but I advise jurors never to act on the evidence of an accomplice only, unless he is confirmed as to the particular person charged with the offense'."

And further, at page 604:

> "It will be found, on examination, that the rule in this country is the same. In 1 Whart. Crim. Law, Sec. 783, the author states that the preponderance of authority, in this country is, that a jury may convict a prisoner on the testimony of an accomplice alone, though the court may, at its discretion, advise them to acquit unless such testimony is corroborated on material points. And in the note in the sixth edition, a number of American cases are cited in

support of the statement in the text. These cases recognize the same practice in our courts, to caution and advise juries against conviction upon such testimony alone."

In

State v. *Simon,* 71 N. J. L. 142, (Sup. Ct. 1904),

Justice HENDRICKSON said at page 145:

"The common law rule is in force in this state and was laid down by Mr. Justice KNAPP, in State v Hyer, 10 Vroom 598, as follows: 'Although the practice of courts is to advise juries not to convict a defendant on the uncorroborated testimony of an accomplice, yet a conviction founded on such evidence is strictly legal.' The trial judge, in another part of the charge, alluded to the great infirmity that attaches to the evidence of a man convicted of a crime and a self-confessed perjurer, as the witness was, and said: 'But you have a right to consider whether what the witness said was not in line with the other circumstances of the case, so as to give them an air of veracity and truth'."

Wherefore, we respectfully submit, that it constituted harmful and prejudicial error for the trial court to refuse the foregoing request to charge.

POINT XIV.

The verdict was contrary to the weight of the evidence and was the result of bias, prejudice, passion and malice.

(Ss. of R. No. 12, No. 13, and No. 15, pgs. 444, 445, 475, and 476; Ss. of R. No. 18, No. 19 and No. 20, pgs. 446 and 477)

The foregoing specifications of causes for reversal have been consolidated and will be argued together under this point.

It is undisputed that the case of the State depends solely upon the evidence derived from the statements of the plaintiffs-in-error, and it is with reference to those statements that we contend that they are insufficient to support the verdict of the jury and consequent sentence of the Court based upon the commission of a homicide in the course of a robbery or burglary. We respectfully refer to our argument under Point IV wherein it appears that there was no proof in the case of a burglary, which issue was submitted to the jury for its consideration.

The question of the intent necessary to support a finding of a burglary is entirely lacking in the proofs. A careful study of the record indicates that nowhere is there any direct proof that the plaintiffs-in-error went to the home of Mr. Horner to rob him, nor is there any direct proof that they stole any personal property which is necessary to substantiate the crime charged. The testimony is that a watch was knocked off a nail in the house, (S. of C., pg. 176) and thereafter alleged to have been found in the home of one of the plaintiffs-in-error. The testimony also reveals the fact that the watch in question, marked

Exhibit S-10, (S. of C., pg. 85) was given to Mr. Horner as a Christmas present some time prior to the alleged crime. (S. of C., pg. 85) Nowhere is there any proof as to what happened to the watch between Christmas and the date of the alleged crime. Whether or not the watch was given to anyone or turned over to the plaintiffs-in-error by the deceased, is undetermined by the record. The requisite intent to steal this necessarily implies the fact that the State must first prove that the deceased was in possession of the same, and that he did not voluntarily give it to the plaintiffs-in-error or any one else.

It is also significant that the proofs are barren as to the presence of any deadly weapon by the plaintiffs-in-error at the time they allegedly went to Mr. Horner's home. They walked to the home of the deceased empty handed, indicative of the fact that there was no intention to steal or to hold up the deceased.

Referring again to the issue of a robbery, which was submitted to the jury, we contend that there was no weapon which the plaintiffs-in-error had in their possession at the time to show any intention to forcibly take any property of the deceased. Likewise, we refer to Point XIII with reference to the fact that the proof of Anna Brown, submitted by the State to the jury to be used against the plaintiffs-in-error, is the testimony of an accomplice, which, concededly, by virtue of the law aforementioned, must be carefully scrutinized and given little or no value.

The definite conclusion to be drawn from the testimony is decidedly not that of a robbery or a burglary committed by plaintiffs-in-error, and, in the absence of such proof, the homicide which consequently occurred cannot be categorized as first degree murder.

Because of the foregoing reasons, we submit, that the verdict was contrary to the weight of evidence.

Summary.

The plaintiffs-in-error are young men, both of the age of 23, (S. of C., pg. 222) and both are negroes. That they were illiterate and uneducated can be gleaned from a reading of the record. We have urged those flagrant errors which we think are apparent from a reading of the testimony, and have deemed it unnecessary to discuss other specifications which have been urged and filed with the court. The excerpts from the charge and the other errors urged were highly prejudicial in their nature and character, and contained statements clearly violative of the fundamental principles of law imbedded in our system of jurisprudence, with the ultimate result that a new trial should be granted to these plaintiffs-in-error.

We are taking the liberty, at this time, to reiterate the one flagrant and most glaring error in the case, to wit, that one discussed under Point III of this brief. It is our sincerest contention, that where the prosecutor, as in the case *sub judice,* stated what theory he was proceeding upon, thereby binding the State, the Court could not at the last stages of the trial in its charge to the jury for the first time inject into the case a new theory or issue for the jury to pass upon.

It is not our contention that no crime was committed. On the contrary, we state that the plaintiffs-in-error were guilty of some criminal act, but the mere fact that a death occurred cannot be interpreted to mean that the plaintiffs-in-error should be sentenced to die for the commission of the same. Regardless of how scandalous a man is and how much of a scoundrel he may have been,

certain fundamentals are guaranteed to him, and upon which he may rely, in the trial of a cause wherein his life is placed in the hands of a jury. The court must be cautious and must generally supervise the course of a trial, so that the prisoners are accorded a fair and impartial trial, and must be careful that no errors, however slight, be permitted to creep into the proceedings to the prejudice and harm of the accused.

In closing, we refer to the humane language of Justice HEHER, in his dissenting opinion which he filed in

State v. *Metalski,* 116 N. J. L. 543,

wherein he stated at page 553, part of which we have already referred to, but we take the liberty of repeating the same at this time:

> "It was not his province nor that of his counsel to consent to his trial upon the fundamentally mistaken theory, propounded by the state and adopted by the trial judge, that, at the time of the shooting, the accused and his accomplice were still engaged in the commission of the Pennsylvania robbery, and that the killing was therefore murder of the first degree, within the intendment of our statute, even though utterly lacking in deliberation and premeditation. As this court said in State v. O'Leary, *supra,* borrowing the language of Mr. Justice HARLAN, speaking for the Federal Supreme Court in Hopt v. Utah, 110 U. S. 574, (at p. 579); 4 S. Ct. 202; 28 L. Ed. 262: 'The natural life says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. *That which the law makes essen-*

tial in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods'.

Basic safeguards devised by the law to protect against unjust and unfounded accusation are not alone for the just and the righteous. The accused, no matter how grave the offense, or the degree of his depravity, comes into court under a presumption of innocence; and the burden rests upon the state to establish his guilt of the offense charged—one known to the law—beyond all reasonable doubt, with a due regard for all the essential rights that are his. *This is none the less the state's obligation when the accused is one who has pursued a lawless career. The peremptory duty is ever present to guard against evil repute or anti-social conduct becoming a substitute for proof of a crime sufficient in the law."*

WHEREFORE, we respectfully submit that in view of all of the foregoing, a trial *de novo* should be awarded to the plaintiffs-in-error.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, Defendant-in-Error, vs. SMALLEY BURRELL and WILLIAM ALBERT BROWN, Plaintiffs-in-Error.	On Writ of Error.

REPLY BRIEF OF PLAINTIFFS-IN-ERROR.

(All italics, unless otherwise indicated, are ours.)

At the time of the oral argument, the Court extended to counsel for the plaintiffs-in-error the privilege of submitting a reply brief. We desire to clarify what seems to be the important contentions in this case.

The State in its brief in Point II and in the oral argument, for the first time made reference to the opening of the Prosecutor and quoted verbatim from that opening. It is significant that the opening has not been printed in the State of Case nor was any request made to have the same incorporated within the State of Case.

Rule 22 of the Court of Errors and Appeals provides:

> "Three copies of the State of Case shall be furnished to each adverse party at least twenty days before the time noticed for argument, *and unless the adverse party give notice within ten days after service of his objections thereto, it shall be deemed complete.*"

No objection was made thereto, and, therefore, no reference can be made to this subject matter which is not part of the State of Case. It is of further importance that the opening is not part of the record and cannot be urged by the Prosecutor in support of his argument.

In the case of

State v. *Catania,* 102 N. J. L. 569, (1926, Supreme Court)

Justice KATZENBACH, at page 576, said:

> "There is one matter in the consideration of this case to which we think attention should be called. There is printed in the record the preliminary examination of all jurors called whether accepted or challenged. No question is raised with reference to empanelling of the jury. There is also printed the opening addresses of counsel to the jury and their summations of the evidence. *These form no part of a record. The defendant was impecunious.* The testimony had to be transcribed and printed at the expense of the County of Cumberland to give the defendant this review. The matter referred to should not have been embodied in the record even if the expense were borne by the defendant. *To impose this expense upon the county is a waste of its funds.*"

The facts in this case are on all fours with the facts set forth in the foregoing quotation. This is likewise a murder case and the testimony has been printed at the expense of the County of Gloucester. In view of the fact that the opening does not constitute part of the record, we submit that any reference to it must be disregarded. Regardless of what this Court may conclude with reference to the foregoing contention, we respectfully submit that a careful reading of the Prosecutor's

opening as set forth at page 8 of the State's brief will not manifest a charge by the State that it was proceeding against the plaintiffs-in-error on the theory of a burglary. At page 8 of the State's brief the one quotation using the word "burglarizing" appears.

> "* * * When Anna Brown was at the saloon she called the other two defendants out and they talked about plans of burglarizing the home of Mr. Horner."

It is of the utmost significance to note that the foregoing statement of the Prosecutor does not directly charge the plaintiffs-in-error with the commission of a burglary nor does it indicate that the State is proceeding upon that theory. The word as used by the Prosecutor is merely his characterization of the conversation held between Anna Brown and the plaintiffs-in-error. It follows, therefore, that assuming but not conceding, that the State's opening is part of the record at this time, the plaintiffs-in-error were nevertheless not apprised of the fact that the State allegedly was proceeding on the theory of a burglary, nor were they charged with burglarizing the home of Mr. Horner. The Prosecutor's legal conclusion of the conversation held between the three persons involved certainly does not bind nor apprise the plaintiffs-in-error as to the State's theory of the case. Further, whatever the Prosecutor said in the opening was definitely abandoned as a theory in the case when he made the statement that appears at page 99 of the State of Case, in the following language:

> "The Prosecutor: It has quite a bit of value. Here is a watch which was stolen from Mr. Horner's home and *the State claims that the motive in this case was robbery.*"

By that time the Prosecutor certainly knew and we have a right to assume that he knew, that the State's case was limited to the theory of robbery. This was manifestly based upon the statements which were offered in evidence and the doubt that must have existed in his mind as to whether or not the opening of the door by Horner did not raise a serious question as to whether a burglary in fact had been committed.

There are many other factors which may have motivated the Prosecutor to abandon the theory of burglary or discontinue it as an alternative theory in the case. That he actually abandoned the theory of burglary cannot be questioned because nowhere in the record of the case, from cover to cover, is the word specifically used except in the opening statement to the jury and in the Court's charge. The only justification now offered by the Prosecutor for the Court's charge is the reference contained in the opening. That, certainly, is no part of the case under the decisions aforementioned and under the rules of the Court hereinbefore referred to.

AS TO POINT IV.

There is squarely presented for determination by this Court the following question: Will this Court sustain a conviction of murder in the first degree under a charge predicated upon Section 131 of the Crimes Act where the proofs establish that the alleged breaking and entering was made with the intention and actual commission of *a battery* by persons who concededly visited the premises without any weapon or instrument, and as a result of the infliction of the battery a person dies therefrom, without any proof of a wilful, deliberate and premeditated murder. The Court, in its charge on burglary, set forth the language of Section 131 of the Crimes Act. Concededly, a battery was committed in this cause and that factor was submitted to the jury for its consideration. By virtue of the Court's charge with reference to tne foregoing (S. of C., p. 406) the jury could properly find that the plaintiffs-in-error had broken into and entered the dwelling house of the deceased with intent to commit a battery, and upon arriving at such a conclusion, adjudge the plaintiffs-in-error guilty of murder in the first degree.

This has never been the law in this state, nor was it the Legislature's intention when it passed Sections 106 and 107 of the Crimes Act. The word "burglary" as used in Section 107 of the Crimes Act, undoubtedly refers to the Common Law Crime, which proposition we have urged in our main brief and at the oral argument. Assuming, but not admitting, that the common law crime of burglary is included within the definition of the crime set forth in Section 131 of the Crimes Act, we submit that under the charge of the Court

it was within the province of the jury to find that any person who broke and entered one of the described buildings referred to in Section 131 with intent to commit a battery therein, would be guilty of burglary because that is the crime which the Court was then defining. Under the proof in the State's case, these defendants had definitely committed a battery upon Horner. It was, therefore, under the charge, as given, perfectly proper for them to conclude that since there was a breaking and entering into the home of Horner with intent to commit a battery, which resulted in the eventual death of Horner, that the plaintiffs-in-error were guilty of murder in the first degree. That tnat is not tne law and cannot be the law is apparent. The common law definition of burglary as set forth in our main brief is as follows:

> " * * * he that by night breaketh and entereth into a mansion-house *with intent to commit a felony.*" (Conners v. State, 45 N. J. L. 340, at pg. 342).

A battery is not one of the enumerated common law felonies and we certainly do not think that if the jury did find as a fact that there was a breaking and entering into Horner's home with intent to commit a battery therein, that that would be the common law offense of burglary, nor would it be a crime which would justify a charge of murder in the first degree against these plaintiffs-in-error, without the need and necessity of proving affirmatively the common law ingredients of a wilful, deliberate and premeditated killing which went to make up the crime of murder in the first degree.

The State, we contend, elected to try this case upon the theory of a robbery and that, therefore, the Court was not justified in charging on the

law of burglary. Assuming, however, for present purposes, that the Court was justified in charging on burglary, then, it is submitted, the Court was certainly not justified in charging the jury on Section 131 of the Crimes Act. That section is as follows:

> "Any person who shall, by night, willfully or maliciously break and enter any church, meeting-house, dwelling-house, shop, warehouse, mill, barn, stable, outhouse, railway-car, canal-boat, ship or vessel, or other building whatever, with intent to kill, rob, steal, commit rape, mayhem *or battery,* and his counsellors, procurers, aiders and abettors, shall be guilty of a high misdemeanor." (P. L. 1898, p. 830.)

It is our opinion that the language as used by the Court in defining burglary as the breaking and entering into premises with intent to commit a battery was insufficient to warrant a conviction of murder in the first degree.

A history of the crime of murder and of the felonies at common law, in our judgment, precludes any interpretation which would result in an attempt to enlarge upon the murder statute which specifically provides as follows, which the Court correctly charged: (S. of C., p. 401)

> "'Any person who, in committing or attempting to commit arson, burglary, rape, robbery, sodomy, or any unlawful act against the peace of this State, of which the probable consequence may be bloodshed, shall kill another; or if the death of anyone shall ensue from the committing or attempting to commit any such crime or act as aforesaid,' then such killing shall be murder."

The Legislature, in its entirety, in our judgment, preserved the common law felonies by the language used in this statute and made it mandatory, that the essentials necessary to constitute the respective offenses enumerated, had to be established in order to eliminate proof as to a wilful, deliberate and premeditated killing. Where the common law felonies were being committed, and a killing ensued, then clearly under the statute the State was relieved from the duty of establishing proof of a wilful deliberate and premeditated killing.

By the enactment of Section 131, obviously the Legislature created statutory burglary and distinguished the crime so created from the common law felonies by characterizing that crime as a high misdemeanor. When a person is engaged in committing the crime defined in Section 131 and death ensued, we submit that the crime of murder so resulting requires proof of a wilful, deliberate and premeditated killing, provided in the following section of the murder statute, unless the proofs as interpreted by the *Hauptmann* case, *infra,* clearly justify the submission of the case to the jury because all of the elements required under the common law felony of burglary exist, or unless the proofs establish all of the ingredients necessary to constitute any of the common law felonies enumerated in Section 107, to wit, arson, robbery, rape, sodomy or burglary. This section which was also correctly charged by the Court provides as follows (S. of C., p. 401):

> " 'Murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate any arson, burglary, rape, robbery

> or sodomy (which includes all of the common law felonies) shall be murder in the first degree; and all other kinds of murder shall be murder in the second degree'."

Under this point in the State's answering brief, reference is made to the cases of

> *State* v. *Compo*, 108 N. J. L. 499, (Errors and Appeals);
> *State* v. *Jones*, 115 N. J. L. 257 (Errors and Appeals);

and

> *State* v. *Hauptmann*, 115 N. J. L. 412 (Errors and Appeals),

in support of the Court's charge in the case *sub judice*. In the *Hauptmann* case, *supra*, Mr. Justice PARKER speaking for this Court overruled the contention of counsel on the facts holding that *the conjunctive* was employed and *not the alternative*, to wit, an intent not to merely steal the child's clothing which would have sufficed, but as well an intent to steal the child and commit a battery. These were joined not in the alternative but in the conjunctive. *To constitute burglary in the language of the instruction, all three must be included in the intent.* Hence, the error, if any, was prejudicial to the State rather than to the defendant. Justice PARKER was careful to add the following at page 426:

> "These, we would point out, were joined not in the alternative but in the conjunctive."

The Court further stated the following which is very significant:

> "We have just said that for present purposes the construction put by defendant's counsel on the word 'burglary' in sections

> 106 and 107 may be conceded; but the question was alluded to in State v. Jones, 115 N. J. L. 257 (at pp. 263, 264) and there passed; and it is needless to consider it now, for reasons just given."

We have no complaint with the ruling in the *Hauptmann* case, *supra,* but in the case *sub judice,* the instruction of the Court was stated in the alternative and not in the conjunctive so that the finding of an intention to commit a battery alone would permit the jury to conclude that the crime of burglary was perpetrated and, therefore, under Sections 106 and 107 of the Crimes Act the plaintiffs-in-error were guilty of murder in the first degree.

There is no case in the State of New Jersey holding that a battery was a common law felony as contemplated by the distinctive crime of burglary at common law. It, therefore, follows that if the jury concluded it was the intention of the plaintiffs-in-error to commit a battery when they broke into and entered the home of the deceased, which conclusion is entirely probable under the facts in this case, then the act of the plaintiffs-in-error was not a burglary and they could, therefore, not be convicted of murder in the first degree under the charge submitted by the Court.

Because of the foregoing, we submit that the judgments should be reversed.

We also desire to point out at this time that under Point IX of the State's brief, the Prosecutor makes the statement that the charge of the Court when it used the word "convincingly" was later corrected at page 421 of the State of Case. We respectfully submit that at no time in the charge did the Court call the jury's attention to the fact that it was correcting the word "convinc-

ingly'' which, undoubtedly, constituted error with reference to his charge on intoxication. At page 421 of the record some reference is made to a prior charge that intoxication must be proven by the defendants beyond a reasonable doubt, and the Court states that it is correcting that statement. Nowhere does the Court refer to the word ''convincingly'', nor did the Prosecutor call the Court's attention to that word. We submit that the error committed was not corrected. That the foregoing constitutes harmful and prejudicial error, is apparent.

Respectfully submitted,

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NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY,
Defendant-in-Error,

v.

SMALLEY BURRELL and WILLIAM ALBERT BROWN,
Plaintiffs-in-Error.

ON WRIT OF ERROR TO GLOUCESTER COUNTY COURT OF OYER AND TERMINER.

BRIEF IN BEHALF OF DEFENDANT-IN-ERROR.

STATEMENT OF FACTS.

The State contends the facts set forth in the brief of the plaintiffs-in-error are not in sufficient detail.

The State submits its summary of facts as follows:

On the evening of June 16th, 1937, the plaintiffs-in-error, together with one Anna Brown, a co-defendant, burglarized the home of William J. Horner,

in the Borough of Paulsboro, County of Gloucester and State of New Jersey. It was the intention of the plaintiffs-in-error, to burglarize the home of Mr. Horner (S. of C., pages 307, 339, 380). Mr. Horner was known to them to be deaf (S. of C., page 300), was a man sixty-five years of age and lived alone in the house where the burglary was committed.

The plaintiffs-in-error, together with said Anna Brown, broke the screen door at the Horner home, making the entry complete (S. of C., pages 308, 339, 380), and at that time, Mr. Horner opened the door and was struck by one of the plaintiffs-in-error (S. of C., pages 339, 381). The plaintiffs-in-error, together with Anna Brown, then entered the Horner dwelling house and severely beat Mr. Horner in an effort to compel him to tell them where his money was hidden (S. of C., pages 312, 342, 381, 382). They also informed Mr. Horner they were gangsters from Philadelphia and they must have money (S. of C., pages 312, 382). The plaintiff-in-error, William Albert Brown, during the course of beating Mr. Horner, held a razor at Mr. Horner's throat and threatened to cut his throat (S. of C., pages 314, 382). At that time Mr. Horner was on the bed in the room which he occupied as a combined living room and bed room. The plaintiffs-in-error searched Mr. Horner's home, going through the papers in his desk, his clothing, and through the articles of furniture in the second floor of the Horner home (S. of C., pages 300, 312, 363, 381). They did obtain approximately seventy-five cents from the Horner home, a gold

watch, a razor, a penknife, a few Horseshoe Curve Crook cigars, and two religious medals.

The plaintiffs-in-error, after obtaining the money and other articles from Mr. Horner, left his home and separately went to a Chinese restaurant operated by John Sam, where they spent the seventy-five cents they had obtained from the Horner home, and after eating, the plaintiffs-in-error, together with Anna Brown, left the restaurant and went to their respective homes (S. of C., pages 305, 347, 383).

The following morning a Mr. Wilson, a neighbor of Mr. Horner's, looked at the Horner home and saw the back screen door had been broken and that the shades were not in the same condition as had been previously arranged between Mr. Wilson and Horner. Mr. Horner lived alone and Mr. Wilson more or less watched the home at the request of Mr. Horner, in case Mr. Horner was taken ill (S. of C., page 62). Mr. Wilson then proceeded about twenty-three paces to the Horner home and looked in the kitchen window and saw the kitchen completely disarranged, the furniture knocked about and broken and everything covered with blood (S. of C., page 64). He then looked in the bed room window on the first floor and at first could not see Mr. Horner and finally saw him lying on the floor partially under the bed. The furniture in the bed room was also disarranged and quite a bit of blood was about the floor and furniture (S. of C., page 64). Mr. Wilson then notified Chief of Police Atkinson, of the Borough of Paulsboro, returned to the Horner home and

remained on guard until the police officers arrived at the scene of the crime (S. of C., page 66). The officers and Mr. Wilson broke through the outside door leading into the Horner property and the officers instructed Wilson and other persons who arrived shortly after, not to touch anything. Doctor Sheets, one of the coroners of the County of Gloucester, was summoned and he stated Mr. Horner should be removed to the Underwood Hospital, in Woodbury, Gloucester County, New Jersey. Mr. Horner remained in the Underwood Hospital until June 18th, 1937, when he died from the result of the beating which he received at the hands of the plaintiffs-in-error and Anna Brown. Horner never regained consciousness.

The police officers of the Borough of Paulsboro proceeded with the investigation of the crime and as a result arrested the plaintiffs-in-error and Anna Brown. The three persons were brought to the Court House in Woodbury and questioned by the police officers of the Borough of Paulsboro, W. Clayton Apgar, County Detective of Gloucester County, in the presence of Alfred W. Denham, the court stenographer, and other persons. The said Anna Brown finally, on June 17th, 1937, admitted that she and the plaintiffs-in-error had gone to the home of Mr. Horner with the intent to break in and steal his money, or to rob him and that Mr. Horner apparently was awakened by the burglary, came to the door and was struck by one of the plaintiffs-in-error. After a confession was given by Anna Brown, a confession was given by each of the

plaintiffs-in-error in which they also admitted they broke in the screen door of the Horner home, Mr. Horner had opened the door and that they had beaten and struck him (S. of C., pages 100, 201, 223). At the time these confessions were given Mr. Horner had not died and no warrant had been issued for the arrest of the plaintiffs-in-error, although at that time they were in the custody of the police officers (S. of C., pages 187, 200, 222).

After the death of Mr. Horner, on June 19th, 1937, the matter was presented to the Grand Jury, and the plaintiffs-in-error and Anna Brown were arraigned and pleaded "Not Guilty," on the afternoon of June 19th, 1937. Thereafter, on the afternoon of June 21st, 1937, the plaintiffs-in-error and said Anna Brown, were taken to the office of Mr. Denham, the court stenographer, and the confessions which they had made prior to the death of Mr. Horner were read back to them and they were requested to make any changes in the confessions which they saw fit to make. Certain changes were made by the plaintiffs-in-error and Anna Brown, in their confessions, but the changes were not material. At the time the confessions were read to the plaintiffs-in-error and Anna Brown, on June 21st, 1937, they were all present at the same time, and there was also present the Court Stenographer, the County Detective and Leonard Eckman, Under-Sheriff of the County of Gloucester, the Matron of the Jail, the Prosecutor and other witnesses (S. of C., pages 197, 214, 231).

The State contends there was sufficient evidence

against the plaintiffs-in-error to require the case to be submitted to a jury, without the use of the confessions, in view of the fact the plaintiffs-in-error, together with Anna Brown, were together on the evening of June 16th, 1937, at the Wonder Bar in the Borough of Paulsboro, State of New Jersey, and left there about twelve o'clock in the evening and were seen there by numerous witnesses (S. of C., pages 241, 247, 251); that after they left the Wonder Bar they were seen in the neighborhood of the home of Mr. Horner (S. of C., page 242), also shortly after the crime was committed they were seen in the Chinese restaurant at Paulsboro, New Jersey (S. of C., page 253). In addition, the police officers of the Borough of Paulsboro found Mr. Horner's watch in the home of the plaintiff-in-error, Smalley Burrell, and the watch was concealed in the back bedroom, under the mattress (S. of C., page 96); Mr. Horner's razor was found under a mattress in the home of plaintiff-in-error, William Albert Brown, and his sister, Anna Brown (S. of C., page 97). The religious medals identified as Mr. Horner's property were found on a table in the Brown home in Anna's bedroom (S. of C., page 97). Two Horse Shoe Curve Crook cigars were found in the Brown home, in a pocket of a coat belonging to the plaintiff-in-error, William Albert Brown (S. of C., page 98). An empty Horse Shoe Curve Crook cigar box was found in the middle room of the home of Mr. Horner (S. of C., page 98). There was blood on the shoes of plaintiff-in-error, William Albert Brown, and his sister, Anna Brown. The plaintiffs-

in-error were sworn as witnesses in their own behalf at the time of the trial and admitted under oath their participation in the crime (S. of C., pages 294, 330, 369). An excellent statement of what actually occurred is given by the plaintiff-in-error, Smalley Burrell, in his direct testimony (S. of C., page 369).

The following opening was made by the Prosecutor:

> "The Prosecutor: With the permission of the Court and ladies and gentlemen of the jury: The defendants in the present case, Smalley Burrell, William Albert Brown, and Anna Brown are charged in the indictment with the crime of murder on June 16, 1937, in which indictment the State alleges that the three defendants did kill and murder a man by the name of William J. Horner. As a general proposition of law, our statute provides that murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing or which shall be committed in perpetrating or attempting to perpetrate any arson, burglary, rape, robbery or sodomy, shall be murder in the first degree; and all other kinds of murder shall be murder in the second degree. I read that to you so you may have some general idea of exactly what crime these defendants are charged with.
>
> In this case the State will endeavor to show that on the night of June 18, 1937, which was less than a month ago, the defendants were in the Wonder Bar saloon at Paulsboro. The de-

fendant, Anna Brown, is just beyond the age of sixteen, William Albert Brown is from twenty to twenty-three years of age, and Smalley Burrell is about twenty to twenty-one years of age. Anna Brown is the girl in green, the one next to her is Albert, and the one on the other end is Burrell. On the night in question there was a man living in Paulsboro by the name of William J. Horner who lived at 1000 Commerce Street, which is the street not far from Crown Point Road. As I said, Mr. Horner, the man who was killed, lived at the corner of the Commerce and Jefferson Streets, known as 1000 Commerce Street. We will show you that on the night of June 18th that the girl defendant, Anna Brown, was not in the Wonder Bar saloon but outside the premises, somewhere, between eleven and twelve o'clock, and was accompanied by another woman by the name of Julia Curtis and Louise Washington. They did walk down the street together. Prior to the time they left the saloon and while they were on the way down to the saloon these two women left the girl defendant, Anna Brown. When Anna Brown was at the saloon she called the other two defendants out and they talked about plans of burglarizing the home of Mr. Horner. We will show you that they went to the home of Mr. Horner at the corner of Commerce and Jefferson Streets. The three of them went to the door which is on the side of the street, toward the back end of the house. This was somewhere around 11 or 12 o'clock and the three defendants went up to the door. The screen-door was locked so it was impossible for them to enter into the house and one of the defendants ripped the wire screening from the door, and went in through the door. As they tried to get

in the back door apparently Mr. Horner was awakened and he came to the door. When he came to the door he was struck by Smalley Burrell or Albert Brown and knocked down. He was also struck by Albert. Smalley struck him first. So far as the State is concerned there was no difference at all as to who struck first because they had planned to go down and burglarize and rob the house. Their idea was that he was deaf, he was some sixty-five years of age and he could hear nothing. He was sexton of the Protestant Episcopal Church, and it was sometimes necessary to write out orders because he could not hear. Their idea was to break in, steal and get away without Mr. Horner hearing them. They went and attempted to break in at 11 o'clock or 12 o'clock but he heard them and then he was struck by Smalley Burrell or Albert Brown. At that time the three of them all went into the home of Mr. Horner. From that time on they beat him with their fists, struck him, choked him, and dragged him all over the place all the time asking him for the money. Smalley went around the house and searched for the money and Albert Brown went through Mr. Horner's clothing, and all they got that night was the sum of seventy cents, one gold watch, one razor and some small religious articles which will be shown to you and described by Mr. Horner's sister.

While they were beating him and asking him for the money Mr. Horner was down on the kitchen floor. He had been knocked down by one or both of the defendants and at that time they both beat him and asked him how much money he had. He then started toward his bedroom which was also his dining room. He slept on the first floor. As he went into this room he

was struck again and knocked down between the bed and the stove. At that time William Albert Brown pulled Mr. Horner off the floor and took the razor and said he was going to cut his head off, using some other words which will be shown in the testimony. They beat him until he was unconscious from which he never recovered. They left him and went away and they went to a Chinese place and they got some sandwiches which they purchased with the seventy cents which they had stolen from Mr. Horner.

We will show you that on the following morning Mr. William Wilson, who lives in the house next door, saw that Mr. Horner's house was in the same condition as it had been the night before. He could not see from his house that the screen door had been torn. It appeared that some months before Mr. Horner was taken ill and had no one to take care of him and it was then agreed that they would make some arrangement whereby they would have some signal between them so Mr. Wilson could see if everything was all right. Mr. Wilson was practically the same age, neither of them working and both having gardens. We will show you that Mr. Wilson went to the window of the house and saw it in the same condition as it had been left the night before. We will show you that Smalley Burrell was an iron worker and rigger and on the stand you will have an opportunity to see him and also Albert Brown, and you will see that Smalley Burrell was a powerful man. On the morning of June 17th Mr. Wilson walked over to Mr. Horner's house and he saw that the screen door had been cut and he looked into the kitchen and saw everything upset and pulled apart and that the cur-

tains had been torn off the windows and that they were covered with blood. Then he looked into the bedroom and saw this man lying on the floor just about breathing. At that time he was taken to the Underwood Hospital. While he was at the Underwood Hospital Mr. Horner died as a result of a concussion, contusion and hemorrhage of the brain which was induced by the terrific beating administered to him by the three defendants. At that time his death was reported to the police at Paulsboro and Chief of Police Atkinson came around and Dr. Sheets, the County Coroner came. Both of these men were also at the Horner home before he was taken to the hospital. At that time the police department of Paulsboro began to question various suspects in the case and found that Smalley Burrell and Anna Brown had extorted money from him and as a result of that they arrested Anna Brown and Albert Brown at their home on the 17th and Smalley Burrell was arrested in Paulsboro at the same time. At the time of the arrest they searched the home of Anna Brown and there found the religious articles which had belonged to Mr. Horner. Those articles will be identified by Mr. Horner's sister. They also found in the coat pocket of William Albert Brown some cigars known as Horseshoe Crooks. It seems that Mr. Horner had always smoked those cigars and had a box in his home and before the defendants left one of them reached into the box and pulled out three or four cigars and Albert Brown had them in his coat pocket at the time he was arrested.

At that time they were questioned by the officers and Anna Brown was the first one to make a statement. At that time she told the officers

that the three of them had planned to break into Mr. Horner's home and rob it, and when the other defendants learned that Anna Brown had made the statement they also admitted that they had gone into his home and robbed him and beat him. That statement was completed sometime in the afternoon and that evening they were stripped in the Gloucester County jail and were examined by Dr. Sheets and Dr. Nelson who will testify that there were no marks or bruises on their bodies. The statements were made in the presence of Mr. Apgar, the Chief of Police of Paulsboro and some of the other officials in the presence of Mr. Denham who is the Court Stenographer of this County. These statements were taken from each of the three defendants and in a day or so they were transcribed by Mr. Denham and then the defendants were brought into the same room, brought into the room together, and in the presence of Mr. Apgar, Mr. Denham, and Mr. Eckman and at that time they were informed that Mr. Horner had died as a result of the injuries inflicted upon him. Their statements were then read to them, each question and answer, and they were asked if there were any corrections and at that time they said that the statements were correct.

We will show you that the three defendants admitted going into the home of Mr. Horner, that they admitted striking Mr. Horner, and that the defendant, William Albert Brown, admitted putting the razor to his throat, and we will show that it was a cold, premeditated murder for which we shall ask you for a verdict of guilty of murder in the first degree without a recommendation for mercy."

In order to avoid confusion, the points raised by the plaintiffs-in-error, are answered *seriatim.*

The plaintiffs-in-error complain that the Court submitted two instructions on reasonable doubt:

Point I.

(a) An erroneous instruction and (b) a correct instruction, without withdrawing the erroneous instruction.

The definition of reasonable doubt which is alleged to be erroneous was approved by the Court of Errors and Appeals in the case of

Wilson v. State, 60 New Jersey Law, page 171, at page 185.

Practically the same definition was adopted by the Court in the case of

State v. Leo, 80 New Jersey Law, page 21, at pages 24 and 25 (Supreme Court, Chief Justice Gummere).

The second definition of reasonable doubt as given by the Court is found in the case of

State v. Donnelly, 26 New Jersey Law, page 615, affirmed.

Point II.

The plaintiffs-in-error complain the Court, in adopting the theory of law which it did in its charge

to the jury with regard to the crimes of robbery, burglary and murder, in effect placed the plaintiffs-in-error on trial for charges not justified under the language of the indictment, which resulted in placing the plaintiffs-in-error on trial for additional crimes for which they were not indicted.

Counsel for the plaintiffs-in-error seems to assume that counsel for the State proceeded on the theory of robbery, only. This is untrue in fact. Counsel for the State in his opening to the jury stated, "When Anna Brown was at the saloon she called the other two defendants out and they talked about plans of burglarizing the home of Mr. Horner." Counsel for the State further stated in his opening to the jury in reference to the confession of Anna Brown, "At that time she (Anna Brown) told the officers that the three of them had planned to break into Mr. Horner's home and rob him and when the other defendants learned that Anna Brown had made the statement they also admitted they had gone to his home and robbed him and beaten him." It was the theory of the State throughout the entire case that the murder was committed in perpetrating or attempting to perpetrate a burglary or robbery or both. It was and is the theory of the State that robbery may be a part of the crime of burglary. It was also the theory of the State that if it failed to show a sufficient breaking and entering by night into the dwelling house of Mr. Horner that it could show that it was the intention of the plaintiffs-in-error and that they did actually attempt to commit the crime of robbery.

The Court in its charge (S. of C., page 404) stated:

> "Now, the State, in order to convince you beyond a reasonable doubt that the defendants are guilty of murder in the first degree, the State must show that the murder was committed in perpetrating or attempting to perpetrate robbery or the crime of burglary. Now, what is robbery?"

The Court then proceeded to define robbery and discussed some of the testimony which would indicate a robbery had been committed and the Court (S. of C., page 406) further charged:

> "Not only that the State, as I said before, in order to convince you beyond a reasonable doubt that the defendants are guilty of murder in the first degree, must show that the murder was committed in perpetrating or attempting a robbery or burglary. Now, what is burglary?"

The Court then proceeded to give the definition of burglary as set forth in the Crimes Act. The charge of the Court must be read as a whole and there is no question that the charge was perfectly clear, plain and proper.

Point III.

The plaintiffs-in-error complain that the Court committed prejudicial and harmful error in submitting to the jury the issue of a killing in the course of burglary or robbery, or both, after the Prosecutor elected upon which crime he would rest his case. As hereinbefore stated under Point II, counsel for the

State in his opening and in the proof of the case proceeded upon the theory the murder was perpetrated in the commission of a burglary or robbery or both.

Point IV.

The plaintiffs-in-error complain that the charge of the Court, in which it gave the statutory definition of burglary, was erroneous in that it should have given the common law definition of burglary and this precise question has not been passed upon by our Courts.

In the case of

State v. Compo, 108 New Jersey Law, page 499 (E. & A.),

the Court held that the word robbery, as used in the statute defining murder in the first degree included the common law offense, as well as that defined by our statute if the latter can be regarded as having a different meaning.

In the case of

State v. Jones, 115 New Jersey Law, page 257,

the plaintiff-in-error was charged with murder. The theory of the State was that the murder was committed in the perpetration of a burglary, and even though there was served upon the State a Demand for Particulars, requesting whether or not the State intended to rely upon robbery or burglary to make

out a case of first degree murder, and the State informally replied it intended to rely upon burglary and proceeded with the trial upon that theory until the end of its case, when it adopted the alternative theory of homicide committed in perpetrating robbery or burglary.

(The above state of facts did not exist in the present case.)

Justice Parker, speaking for the Court in the Jones case at page 216, etc., said:

> "If the case has been tried throughout on this alternative theory of robbery the charge in this regard might have been impregnable."

The further questions of burglary contemplated under Sections 106 and 107 of the Crimes Act were thoroughly discussed in the case of

State v. Hauptmann, 115 New Jersey Law, page 412, at page 424.

As pointed out in the Hauptmann case at page 425, Section 131 of the Crimes Act sets forth all the elements of common law burglary.

Further, the Court in the instant case quoted

2 *Russell on Crimes,* 7th English and 1st Can. Edition, page 1065.

Point V.

The plaintiffs-in-error contend the Court committed prejudicial and harmful error in excluding

from the jury's consideration the question of a lesser degree of murder than first degree.

It is well settled under the decisions of our State that a homicide by one engaged in perpetrating a robbery, made by statute murder in the first degree, the jury was properly charged that on such a state of facts, the verdict should be murder in the first degree or the defendant was entitled to an acquittal.

See:

State v. Palmieri, 93 New Jersey Law, page 195, at page 196.

State v. Moynihan, 93 New Jersey Law, page 253, at page 256.

State v. Pulley, 82 New Jersey Law, page 579, at page 585.

State v. James, 96 New Jersey Law, page 132.

Point VI.

The plaintiffs-in-error claim the verdict returned by the jury was insufficient because it did not designate the degree of murder and, therefore, was improper, illegal and contrary to law. In

State v. Nardella, 108 New Jersey Law, page 148 (E. & A.), at page 155,

the jury returned the same verdict as was returned in the instant case. The jury was polled in the Nardella case but was not polled in the present case, no request being made therefor.

It is the State's contention the verdict of the jury was sufficient and proper.

Point VII.

The plaintiffs-in-error complain that the Court committed harmful and prejudicial error in admitting the statement of Anna Brown, on the ground the same was intended to be binding upon the plaintiffs-in-error.

The above statement is incorrect in fact and the statement was admitted as binding on Anna Brown only (S. of C., page 237). Also see the charge of the Court (S. of C., page 419).

Furthermore, it is the State's contention that when the confessions and statements were read to the plaintiffs-in-error, in the presence of each other and of Anna Brown, that they were given every opportunity to change and correct said statements and, in fact, did make such corrections. See testimony of court stenographer, Alfred W. Denham (S. of C., page 237).

Point VIII.

The plaintiffs-in-error complain that the Court committed harmful and prejudicial error in its charge when it said the State must have established by evidence beyond a reasonable doubt,

> First: The death of William J. Horner at or about June 16 or 18—there is no dispute of that. See the testimony of Dr. Harry Nelson (S. of C., page 83), and testimony of Dr. Sheets (S. of C., page 42). They further complain that:

> When the Court stated that one, two or three of the plaintiffs-in-error by their testimony on the witness stand or by their confessions which were admitted into evidence agreed and I think that it is not questioned, that the three went down to the Horner house with the idea of robbing or getting money. See the confession and testimony of co-defendant Anna Brown (S. of C., pages 191, 192, 194, 296 and 307). Also see confession of plaintiff-in-error Smalley Burrell (S. of C., page 210). Also see the confession of plaintiff-in-error William Albert Brown (S. of C., page 361 and 362).

The plaintiffs-in-error further complain of the statement made by the Court when the Court said, "There is evidence that they went into his place, that they no sooner spied him when they hit him and that would be putting a man in fear." See confession of co-defendant Anna Brown (S. of C., page 190). Confession of Smalley Burrell (S. of C., pages 202 and 216) and confession of William Albert Brown (S. of C., page 224).

They further complain when the Court stated, "He was undressed to be sure." See testimony of Mr. Wilson (S. of C., page 69), and testimony of plaintiff-in-error, William Albert Brown (S. of C., page 228).

The plaintiffs-in-error also complain that the Court's statement, "that the money might have been in the envelope in the desk, but, anyhow, it is admitted by one or two of the defendants and possibly a third, by reference thereto, that 75¢ was obtained and Anna Brown said she picked a nickel off the floor." See confession of Anna Brown (S. of C.,

page 302) and confession of plaintiff-in-error, William Albert Brown (S. of C., page 227).

The plaintiffs-in-error also complain of the statement of the Court, "the elements in this crime to be considered are first the time, the place, the manner and intent." (See Wharton's Criminal Law, 12th edition, volume two, page 1271.) They further complain of the statement made by the Court to the effect that "it was not disputed that they did break the screen door." See the testimony of the plaintiff-in-error, Smalley Burrell (S. of C., page 380) and testimony of plaintiff-in-error, William Albert Brown (S. of C., page 339).

It is respectfully contended that all the above statements made by the Court in its charge were based upon the evidence produced in the case.

Point IX.

Plaintiffs-in-error contend that the Court committed harmful and prejudicial error in refusing to charge the jury on intoxication, in the manner and form requested by counsel for the plaintiffs-in-error. The Court did charge on intoxication as set forth in the brief of the plaintiffs-in-error (S. of C., page 418). In this portion of the charge, the Court used the word "Convincingly," but the Court later in its charge (S. of C., page 421), corrected the charge as originally given.

Point X.

The plaintiffs-in-error contend that the Court committed harmful and prejudicial error in its instructions to the jury and the Court stated:

> "Now, if you are convinced, ladies and gentlemen of the jury, that the State has shown to you beyond a reasonable doubt that these prisoners at the bar committed, or perpetrated, or attempted to perpetrate either robbery or burglary, or both, then they have proved or the State has proved its case to be that of murder in the first degree."

The plaintiffs-in-error allege this portion of the charge would permit the jury to find the plaintiffs-in-error guilty of murder even though there was no proof of homicide. This portion of the Court's charge must be read in connection with the entire charge given by the Court and when this is done there should have been no doubt in the minds of the jury that it was necessary to prove a homicide in addition to the burglary or robbery.

Point XI.

The plaintiffs-in-error allege the Court committed harmful and prejudicial error when it charged the jury:

> "It is laid down that where several persons combine and conspire together for the common object to commit robbery and in pursuit of that

> object one of them does an act which causes the death of a third person, each and all are principals and each and all may be convicted of murder, usually in the first degree, under the statute. That is a concise statement and it is applicable in this instance."

The plaintiffs-in-error apparently failed to take into consideration the confession of Anna Brown and the confessions of the plaintiffs-in-error, wherein they admitted they planned to rob Mr. Horner. In view of the confessions, the charge of the Court, as above set forth, was pertinent and correct.

Point XII.

The plaintiffs-in-error allege (a) The Court committed prejudicial and harmful error in placing the plaintiffs-in-error on trial without the assistance of proper and competent counsel; and (b) The Court committed harmful and prejudicial error in assigning a police magistrate to act as counsel for the plaintiffs-in-error.

Neither the Constitution of the United States nor the Constitution of the State of New Jersey contain any prohibition against a police magistrate handling a private law practice. If the plaintiffs-in-error in this case had seen fit to retain the services of Frank L. Johnson, Esquire, as their attorney, there would have been nothing improper if Mr. Johnson had accepted the retainer. Mr. Johnson is a police recorder of the City of Woodbury and, as such, is appointed by the Mayor and Council of the City of

Woodbury and does not hear criminal cases except those occurring within the corporate limits of the City of Woodbury, New Jersey.

As such police magistrate he would gain no knowledge of crimes occurring in the Borough of Paulsboro and has for the past seventeen years practiced law in the City of Atlantic City and the City of Woodbury.

The duty of counsel, whether retained or assigned, is to see that his client receives the protection which the law affords. An examination of the testimony in this case will show that counsel for the plaintiffs-in-error did everything possible to see that plaintiffs-in-error received a fair and impartial trial.

Point XIII.

The plaintiffs-in-error alleged the Court committed harmful and prejudicial error in refusing to instruct the jury as to uncorroborated testimony of co-defendants.

The request to charge, as submitted, was improper in that there was ample testimony adduced at the time of trial to corroborate the confession of Anna Brown.

Point XIV.

The plaintiffs-in-error allege the verdict was contrary to the weight of evidence and was the result of bias, prejudice, passion and malice.

The State alleges this contention is without merit. The defendants confessed to the commission of the crime and when called to testify as witnesses in their own behalf, admitted they had broken into Mr. Horner's home, beaten him most severely, searched his clothing and house for money and other articles of value and left him lying on the floor of his home, unconscious. In view of their own admissions under oath it cannot be said the verdict of the jury was not proper.

SUMMARY.

It is respectfully contended the plaintiffs-in-error received a fair and impartial trial, were represented by competent and capable counsel, that the jury was properly instructed by the Court and the verdict should be affirmed.

Respectfully submitted,

LYNWOOD LORD,
Attorney for Defendant-in-Error.

To be argued orally by
Lynwood Lord

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