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Writ of Error.

STATE OF NEW JERSEY, ss.: TO HONORABLE DALLAS FLANNAGAN, President Judge of the Court of Common Pleas in and for the County of Essex, in the absence of Justice of the Supreme Court, holding and constituting the Court of Oyer and Terminer in and for the County of Essex—GREETING:

(Seal)

Because in the record and proceedings, as also in the rendition of judgment on a certain indictment for murder against James Brooks, said indictment charging that the said James Brooks did wilfully, feloniously and of his malice aforethought, kill and murder one Mortimer Bateman, 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 and the several counts therein whereof, before you, the said James Brooks has been indicted and convicted by a certain jury of the County, taken between the State of New Jersey and the said James Brooks, as it is said, manifest error has intervened, to the great damage of the said James Brooks, as from his complaint we have received information, we are willing, in this behalf, to correct the error, if any there shall be in due manner, Therefore, that full and speedy justice be done to him, the said James Brooks, we command you, if judgment be therein given, that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching and concerning the same, including the entire record of the proceed-

ings had upon the trial, to the Judges of our Court of Errors and Appeals in the last resort in all causes, on the 3rd day of May 1947, together with this writ, that the record and proceedings aforesaid being inspected, we may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of New Jersey, should be done.

Witness, Honorable A. Dayton Oliphant, our Chancellor and President Judge of the Court of Errors and Appeals in the last resort in all causes, at Trenton, the 14th day of April in the year of our Lord one thousand nine hundred and forty-seven.

Lloyd B. Marsh,
Clerk.

Gerald T. Foley,
Of Counsel for James Brooks,
Plaintiff-in-Error.

Presented in open court this 17th day of April, A. D. one thousaid nine hundred and forty-seven.

Dallas Flannagan,
Judge of the Court of Oyer and Terminer.

Return to Writ of Error.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

I, DALLAS FLANNAGAN, Judge of the Court of Common Pleas of Essex County, New Jersey, holding Court of Oyer and Terminer, for the County of Essex, State of New Jersey, do hereby certify and return to the Court of Errors and Appeals, being the Court of last resort in all causes in the State of New Jersey, the indictment, judgment record and proceedings with all things touching and concerning the same, together with the entire record of the proceedings had at the trial as by the within writ to me directed, I am commanded.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, this twenty-first day of April A. M. Nineteen hundred and Forty-seven.

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

(Seal)

RUSSELL C. GATES,
Clerk of the Court of Common Pleas and Clerk of the Court of Oyer and Terminer, Essex County, New Jersey

Judgment Roll.

ESSEX COUNTY COURT OF OYER AND TERMINER.

No. 233.

No. 329. DECEMBER TERM, 1946.

THE STATE,
vs.
JAMES BROOKS.

Sur Indictment and Conviction for Murder.

BE IT REMEMBERED, that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex, on the second Tuesday in December, in the year of our Lord one thousand nine hundred and forty-six, by the Hon. Charles W. Parker, Justice of the Supreme Court of Judicature of the State of New Jersey, and holding the said Court of Oyer and Terminer, in and for the County of Essex, New Jersey, by the oath of William E. Hocker, Foreman, Mrs. Jane Scheerer, John Chambers, Arthur F. Smethurst, Lee J. Sherman, Amos B. Hostetter, Robert E. Tirrell, James Killough, Jr., Mrs. Phoebe B. Shackelford, Mrs. Margaret Munson, H. William Auringer, T. Langdon Sisserson, Theodore W. Osbahr, Edwin R. Grove, Edgar S. Keepers, Jr., Harry H. Rosenberg, Herbert C. Schmutz, Mrs. Barbara M. Colwell, Edward H. Simpson, Kenneth J. Grapel, Frank J. Ostertag, George B. Underwood, Gustave A. Modersohn, Jr., good and lawful men and women of the said County of Essex, duly summoned and then and there duly sworn and charged to enquire in behalf of the state of New Jersey,

in and for the said County of Essex, it is presented in manner and form following, to wit:

Essex County, to Wit.

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that James Brooks, on the seventeenth day of December, in the year of our Lord one thousand nine hundred and forty-six, at the City of Newark, in the County of Essex aforesaid, did wilfully, feloniously and of his malice aforethought kill and murder Mortimer Bateman, 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.

Duane E. Minard, Jr.,
Prosecutor of the Pleas.

On the third day of January, Nineteen hundred and forty-seven, on which day the said indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, and the said Justice did then and there order the said indictment to be delivered to the said Clerk of the Court of Oyer and Terminer in and for the said County of Essex and then and there the said indictment was delivered and duly filed by the said Clerk and an entry of such delivery and filing was then and there made in the minutes of said Court, at the same time pursuant to the Statute in such case made and provided.

And afterwards, on the sixth day of January, nineteen hundred and forty-seven, at a Court of Oyer and Terminer holden at Newark, in and for the County of Essex, before the Honorable Dallas

Flannagan, Judge, James Brooks, being brought before the bar in his own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon him, how he would acquit himself thereof, says that he is Not Guilty thereof, and therefor for good and evil he puts himself upon the County &c., and Duane E. Minard, Prosecutor of the Pleas of the said State for the said County of Essex in this behalf doth the like.

And Afterwards, on the seventeenth day of March, nineteen hundred and forty-seven, the Court Judge Flannagan, on motion of Richard J. Congleton, Esq., First Assistant Prosecutor, order on the trial of the above stated indictment and that the Sheriff return a panel from the Special Panel served on the defendant according to law; whereupon the following named persons were returned from the Special Panel and sworn as jurors numbers 1. John M. Everett, 2. Joseph W. Courter.

At this stage of the proceedings the Court order Officers William Kurzman and George Shugrue sworn to attend the jury during the trial and further order a recess for luncheon until two o'clock P.M.

And afterwards, at two o'clock P. M. the two jurors being called, both appeared, and thereafter the following named persons were returned from the said Special Panel and sworn as jurors numbers three to six inclusive: 3. Bernard A. Decker, 4. James A. Brower, 5. Dennis Birtwistle, 6. George W. Cameron.

At this stage of the proceedings the Court order Officers Woodrow Laurie and Anthony Schaefer sworn to attend the jury during the trial and further order a continuance until Tuesday, March 18, nineteen hundred and forty-seven at ten o'clock A. M.

And afterwards, on the eighteenth day of March, nineteen hundred and forty-seven, the jury of six being called, all appeared and the Court order the trial to proceed, whereupon the following named persons were returned from the Special Panel and sworn as jurors Numbers 7 to 9 inclusive: 7. Harry W. Bray, 8. Bernice F. Dreyfus, 9. Daniel J. Daughrty.

After Juror Number nine was sworn the said Special Panel was exhausted and the Court order the remainder of the Jury drawn from the General Panel; whereupon the following named persons were returned from the General Panel and sworn as jurors numbers ten and eleven: 10. William F. Bird, 11. Frank Cronshey.

At this stage of the proceedings the Court order a recess for luncheon until two o'clock P. M.

At two o'clock P. M. the jury of eleven being called, all appeared and the Court order the trial to proceed; whereupon the following named persons were returned from the General Panel and sworn as jurors numbers twelve to fourteen inclusive: 12. Arthur L. Brown, 13. Irving M. Baker, 14. John Duerr. The State challenged nine jurors. The Defendant challenged eighteen jurors. The Court excused six jurors. Twenty-four jurors were excused for cause. Fourteen jurors were excused by consent.

At this stage of the proceedings the Court order a continuance until Wednesday, March nineteenth, nineteen hundred and forty-seven, at ten o'clock A. M.

And afterwards, on the nineteenth day of March nineteen hundred and forty-seven, the jury of fourteen being called, all appeared and the Court order the trial to proceed.

For the State

Richard J. Congleton, Esq.
James R. Giuliano, Esq.

For the Defendant

Gerald T. Foley, Esq.
Joseph A. Hayden, Esq.

Evidence for State:

Dr. Harrison S. Martland
Ex. S-1—Envelope containing bullet
Ex. S-2—Envelope containing bullet

At this stage of the proceedings the Court order a recess for luncheon until 2 o'clock P. M.

And afterwards, at 2:10 P. M. the jury of fourteen being called, all appeared and the Court order the trial to proceed.

Evidence for State continued:

Herbert A. Haufler
Ex. 7—Map or drawing of truck
Frank J. Hager
Ex. S-8—Photo
Ex. S-11—Photo
Ex. S-14 and 15—Photos
Ex. S-17 and 18—Photos

Judgment Roll.

At this stage of the proceedings, Richard J. Congleton, Esq. First Assistant Prosecutor made an application to the Court to have the jury view the truck the deceased was driving, which application the Court granted; whereupon the jury, accompanied by the attendants, the Judge of the Court and respective counsel, was taken to view the truck in the tunnel driveway of the Court House.

Evidence continued:

Phinias L. Wigler,
Ex. S-19—duplicate bank deposit slip
Ex. S-20—duplicate bank deposit slip
Ex. S-21—Money Bag, (Canvas)
Ex. S-23—Envelope containing money
Adele Engel
Max Bomwell
Ex. S-12—Photo
Ex. S-13—Photo

At this stage of the proceedings, the Court order a continuance until Thursday, March twentieth, nineteen hundred and forty-seven at ten o'clock A. M.

And afterwards, on the twentieth day of March, nineteen hundred and forty-seven, the jury of fourteen being called all appeared, and the Court order the trial to proceed.

Evidence for the state continued:

Max Bomwell—recalled
Ex. S-28—Statement of Max Bomwell

At this stage of the proceedings the Court, after consultation with counsel, withdrew Exhibit S-28 from evidence and ordered S-28 marked for identification only.

Evidence continued:

Dr. David Biber
Dr. Emil Stein
Max Bomwell—recalled
Ex. S-28—Statement of Max Bomwell in evidence

At this stage of the proceedings the Court order a recess for luncheon until two o'clock P. M.

And afterwards, at two five P. M. the jury being called, all appeared and the Court order the trial to proceed.

At this stage of the proceedings Gerald T. Foley, Esquire, of counsel for the defendant made application to the Court to have the jury view the street scene on which the truck was travelling or at least to have the jury again view the truck, on which application the Court reserved decision.

Evidence continued for State:

Thomas Tutler
Earlie Newby
Off. Vincent A. Nygard
Ex. S-29—Copy of Police Report
Off. Albert Gindale
Emma Coleman
Thomas Moore
Elizabeth Weaver
Clowtell Thomas

At this stage of the proceedings the Court order a continuance until Friday, March twenty-first, nineteen hundred and forty-seven, at ten o'clock A.M.

And afterwards, on the twenty-first day of March, nineteen hundred and forty-seven, the jury of fourteen being called all appeared and the Court order the trial to proceed.

Evidence for the State continued:

Ex. S-3 to S-6, inclusive—4 photos

At this stage of the proceedings the application of Gerald T. Foley, Esquire, of counsel for the defendant, to have the jury again view the truck was granted by the Court; whereupon the jury, accompanied by Officers, the Judge of the Court and Counsel were taken to the driveway in back of the Hall of Records to view the truck.

Evidence for the State continued:

Frances Bateman
Ex. S-26—Coat
Off. Michael J. Tymczyn
Off. William E. Whittaker
Det. Joseph A. Kinney
Lt. William G. Wangner
Det. Joseph A. Kinney,—recalled
Off. Albert G. Delmar
Ex. S-30 Lead Pellet found in truck
Off. Joseph P. Spies
Ex. S-31—Lead Pellet found on truck running board
Adrianna L. Smart

At this stage of the proceedings the Court order a recess for luncheon until two o'clock P.M.

And afterwards, on the same day at 2:20 P.M., the jury being called, all appeared, and the Court order the trial to proceed.

Evidence for the State continued:

Adrianna L. Smart, continued
Dandrich Wood
Ex. S-32—Record card of taxi driver
Sgt. Raymond Edighoffer
Det. Thomas O'Beirne
Ex. S-25—Roll of Coins (Money)
Det. Paul J. Geiger
Ex. S-34—Gun
Ex. S-35—Holster
Lt. William M. Flynn
Ex. S-36—Cloth Bag containing No. 237 and change
Thomas Mathis (sworn before recall of Wm. M. Flynn)
Lt. William M. Flynn,—recalled
Thomas Mathis, continued
Ex. S-9—Photo

At this stage of the proceedings the Court order a continuance until Saturday, March twenty-second, nineteen hundred and forty-seven, at ten o'clock A.M.

And afterwards, on the twenty-second day of March, nineteen hundred and forty-seven, the jury of fourteen being called all appeared and the Court order the trial to proceed.

Evidence continued:

William J. Schuttert
John J. Hickey
Capt. Joseph Cocozza

At this stage of the proceedings Gerald T. Foley, Esquire, of counsel for the defendant, made an application to the Court to have the jury

view the firing of two test shots upon which application the Court reserved decision and later denied the application.

Evidence for the State continued:

Ex. S-43 to 45, inclusive—Blotters used firing test bullets

Ex. S-39 to 42, inclusive—4 envelopes each holds test fired bullet & cartridge

Lt. William G. Wangner,—recalled

Ex. S-37—Envelope containing $45

Ex. S-22—Bundle of money totaling $1150

Ex. S-24—Roll of Quarters totaling $10.00

Ex. S-46—Bundle of Money (unwrapped) totaling $227

Ex. S-25—Roll of Quarters totaling $10 (in evidence but re-offered and admitted

Det. Philip J. Smith

James B. Graham

Ex. S-51—Blue Suit

William Cash

Abe Fischer

At this stage of the proceedings the Court order a recess for luncheon until two o'colck P. M.

And afterwards, on the same day, at 2:10 P. M. the jury of fourteen being called, all appeared and the Court order the trial to proceed.

Evidence for the State continued:

John P. Brady

Capt. Joseph Cocozza (recalled)

And afterwards, on the same day, the twenty-second day of March, nineteen hundred and forty-seven, at this stage of the proceedings the State had the statement of the defendant marked for identification; whereupon Gerald T. Foley, Es-

quire, of counsel for the defendant, requested a hearing on the voluntariness and admissability of the statement, upon which the Court ruled that testimony would be limited to procedure of taking statement and not to its substance.

Evidence for the State continued:

Charles J. Kilcullen

Ex. S-55—Certified copy of Death Certificate of Joseph Smart

Deputy Chief Frank A. O'Neill

Det. Michael J. Kosloski

At this stage of the proceedings Gerald T. Foley, Esquire, of counsel for the defendant, applied to the Court for a hearing on the voluntariness of defendant's statement upon which the Court ruled that the hearing had been in progress but would permit the recall of desired witnesses for further cross examination.

Evidence for the State continued:

Capt. Joseph Cocozza (recalled)

The State offered the defendant's statement in evidence and after objection of defense counsel the Court ruled rebuttal testimony on this offer would have to be presented at this time.

For Defendant:

James J. Brooks (on statement)

At this stage of the proceedings the Court order a continuance until Monday, March 24th, nineteen hundred and forty-seven at ten o'clock A. M.

And afterwards, on the twenty-fourth day of March, nineteen hundred and forty-seven, the jury of fourteen being called all appeared and the Court order the trial to proceed.

Evidence for Defendant continued:

James J. Brooks continued on statement

Evidence for State:

Deputy Chief Frank O'Neill (recalled)
Chief Philip Sebold
Dr. Marcus H. Greifinger

At this stage of the proceedings the Court order a recess for luncheon until two o'clock P. M.

At this stage of the proceedings, that is at two fifteeen P. M., the jury of fourteen being called, all appeared and the Court order the trial to proceed.

State's evidence continued:

Marvin A. Robinson
Det. Philip Smith (recalled)
Det. Clarence J. Cook
Lt. William G. Wangner (recalled)
Lt. John Strong
Off. George E. P. Daly
Lt. William M. Flynn (recalled)
Off. Thomas A. Queenan
Capt. Joseph Cocozza (recalled)
Det. Michael J. Kosloski (recalled)
Det. Thomas O'Beirne (recalled)
Lt. William G. Wangner (recalled)
Det. Joseph A. Kinney (recalled)

For Defendant

James Brooks (recalled)

At this stage of the proceedings the Court order a continuance until Tuesday, March twenty-fifth, nineteen hundred and forty-seven at ten o'clock A. M.

And afterwards, on the twenty-fifth day of March, nineteen hundred and forty-seven, the jury

of fourteen being called all appeared and the Court order the trial to proceed.

State's evidence continued:

Ex. S-53—Statement of defendant admitted in evidence
Capt. Joseph Cocozza recalled
Ex. S-27—Hat
Ex. S-52—Overcoat
Ex. S-47—Envelope containing ($700.) in money
Ex. S-48—Envelope containing ($160.) money
Ex. S-49—Envelope containing ($124.50) money
Ex. S-50—Envelope containing ($13.95) money
Angelo G. Ciccone
Off. Thomas J. Burns
Phinias L. Wigler (recalled)
Ex. S-57—Keys
Ex. S-16—Photo

At this stage of the proceedings the Court order a recess for luncheon until two o'clock P. M.

At two forty-five P. M. on the same day, the jury of fourteen being called, all appeared and the Court order the trial to proceed.

At this stage of the proceedings, both the State and the defense having rested, Gerald T. Foley, Esquire, of counsel for the defendant, made a motion for a "Direction of a Verdict of Acquittal", which motion the Court denied and order a continuance until Wednesday, March twenty-sixth, nineteen hundred and forty-seven, at ten o'clock A. M.

And afterwards, on the twenty-sixth day of March, nineteen hundred and forty-seven, before

the jury of fourteen was called, Officer Anthony Schaefer, sworn to attend the jury during the trial, was placed under oath in the chambers of Judge Flannagan to testify before all counsel as to a sickness suffered by juror No. 5, Dennis Birtwistle; whereupon in open Court the jury of fourteen being called, all appeared and the Court thereupon excused juror No. 5, Dennis Birtwistle, from further consideration of the above stated cause, all respective counsel concurring with Court's decision before such announcement.

After completion of summation by both defense counsel and counsel for the State the Court order a recess for luncheon until two o'clock P. M.

On the same day, at 2:20 P. M. the jury of thirteen being called, all appeared; whereupon the Court charged the jury, and there being thirteen jurors the Clerk drew the following named (12) twelve jurors, from the thirteen heretofore drawn, for consideration and rendition of a verdict:

1. Daniel J. Dougherty, 2. William F. Bird, 3. John Duerr, 4. Irving M. Baker, 5. Joseph W. Courter, 6. John M. Everett, 7. Arthur L. Brown, 8. Bernard A. Decker, 9. Frank Cronshey, 10, James A. Brower, 11 Bernice F. Dreyfus, 12. George W. Cameron.

The evidence being closed and the Court having charged the jury, the jury retired to consider of their verdict; four officers having been sworn to attend them, when having returned into Court they say they have agreed upon their verdict and by their foreman, say: We find the defendant, James Brooks, Guilty of Murder in the First Degree, and so they say all.

At the request of counsel for the defendant, the jury was polled; the verdict of the jury as announced by the foreman was read by the Clerk and upon inquiry as to how he finds the defendant, when called; each juror for himself answered, "Guilty of Murder in the First Degree".

Later the Court, on motion of the Prosecutor, order the Sheriff to set the above named defendant, James Brooks, to the bar that he may receive his sentence; whereupon being accordingly so set to the bar the Court do order that "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, the 20th day of April, nineteen hundred and forty-seven, and May God have Mercy Upon your Soul."

And afterwards, on the twenty-seventh day of March, nineteen hundred and forty-seven, the Court order the above named defendant set to the bar that he may hear a correction in the sentence imposed upon him on March twenty-sixth, nineteen hundred and forty-seven; whereupon, the defendant being so set to the bar, the Court saith: "The Court has sent for you to correct a direction inadvertently given at the time of your sentence yesterday afternoon in that the statement of the Court sentencing you shall read as follows:

"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, the fourth day of May, nineteen hundred and forty-seven, and May God have Mercy upon Your soul."

Judgment signed March 27, 1947.

Dallas Flannagan, Judge.

April 21, 1947

Testimony.

ESSEX COUNTY COURT OF OYER AND TERMINER.

THE STATE OF NEW JERSEY, *vs.* JAMES BROOKS.	On Indictment No. 329, December, 1946 Term, for Murder.

March 19, 1947.

Before:

HONORABLE DALLAS FLANNAGAN, Judge, and a Jury.

Appearances:

RICHARD J. CONGLETON, Esq., and JAMES R. GIULIANO, Esq., for the State.

GERALD T. FOLEY, Esq., and JOSEPH A. HAYDEN, Esq., for the Defendant.

(Mr. Congleton makes an opening statement to the jury on behalf of the State, as follows):

Mr. Congleton: If it please the Court, Mr. Foreman, Miss Dreyfuss, and gentlemen of the jury: Before I start my formal opening, it might make it a little bit easier during the course of the trial if I told you the names of some of the people sitting here at counsel table on both sides, so you will know, as you hear the names, who they are.

The gentleman sitting in the back here is Mr. Minard, the Prosecutor of the Pleas. This is my associate in this trial, Assistant Prosecutor Giuliano, this is Captain Cocozza, of the Homicide Squad. Mr. Foley, whom you met yesterday, is defense counsel, and he is assisted by Mr. Joseph Hayden.

Of course, it is quite obvious to all of you from the questioning that took place yesterday and the day before, that this is a murder trial. As in all criminal cases, the State is the moving party, or the prosecution, and the defendant in this case is James Brooks. The killing in this case took place on December 17, 1946, which is a little over three months ago. It was three months to the day when we started picking the jury. The decedent, the man that was killed, was Mr. Mortimer Bateman, who was a route salesman running a wholesale route for Wigler's Bakery, which is located on Prince Street, Newark.

On the 17th of December 1946, somewhere shortly after 1:30 in the afternoon, in broad daylight, Mr. Bateman drove down toward the Federal Trust Company in Newark, located on Commerce Street with a deposit of some four thousand dollars.

Mr. Bateman never reached the Federal Trust building. Somewhere en route this defendant and his accomplice, Smart, took over. The deposit was never made, and Mr. Bateman never lived to tell what happened.

This indictment in this case, as in all criminal cases, has been returned by the Essex County Grand Jury. It is a short indictment, and it is in what we lawyers call statutory form. You will have it with you when you go to the jury room, so I would like to read it to you at this time.

"Essex County, to wit: The grand jurors of the State of New Jersey, for the County of Essex, upon their oath present that James Brooks, on the 17th day of December, in the year of our Lord 1946, at the City of Newark, in the County of Essex aforesaid, did wilfully, feloniously and of his malice aforethought kill and murder Mortimer Bateman, contrary to the form of the statute in such case made and provided and against the peace of this State, the Government and the dignity of the same."

As I said, that is what we lawyers call the statutory form.

It does not go into details or give you the facts.

In order that I may more logically present this case to you in the opening, I would like to tell you at this time what some of the State's contentions are as to the law which governs this case. I recognize that it is not my province to instruct you in the law—that is the Court's province. And if anything I should say in reference to the law is contrary to what his Honor should charge you, you will, of course, disregard anything that I say. But so that you may understand where the chinks of this evidence fit into the legal picture, I would like to call your attention quickly to a couple of points of law.

In every murder case the jury trying the case has certain responsibilities. If you should find the defendant not guilty, your responsibility stops. However, if you find the defendant guilty, you must determine what degree of murder he committed. And in this case the State contends that there was only one degree of murder that could be considered by you; namely, first degree murder. And if you find that this defendant is guilty of first degree murder, then the responsibility becomes yours to fix the punishment.

Now, our statute in this State, which is very brief—and so that there will be no misunderstanding, I will read it to you— provides that every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers shall suffer death unless the jury shall by its verdict and as a part thereof, upon and after the consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed.

The State contends that not only was this first degree murder, but there are no circumstances or no facts that will be developed in this case that would justify the jury in doing anything other than finding him guilty of murder in the first degree, which carries with it the death penalty. There should be no compromise and no adjustment.

The State's theory in this case is that this killing was wilful, deliberate, and, yes, even pre-meditated. But the State does not have to prove in this case, nor does it have to rely upon proof to show, that this killing was wilful, deliberate, and premeditated to constitute this defendant guilty of murder in the first degree, because we have another statute in this State which covers that situation, and that statute—again so that there will be no misunderstanding—I will read the pertinent portion of it. "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 arson, burglary, rape, robbery, or sodomy, shall be murder in the first degree."

And in this case it is the State's contention that Mortimer Bateman was killed during the perpe-

tration of a robbery committed by the defendant Brooks and his accomplice, Smart.

Now, you will recall that when I read you the previous statute it pointed out "every person convicted of murder in the first degree, his aiders, abettors, counselors, and procurers." Under the law in our State, if two or more people join in a robbery, and a killing ensues, everyone who is a participant, either as an aider or abettor, is just as guilty as the man who fires the fatal shots. But in this case it is the State's contention that Mortimer Bateman met his death at the hands of the defendant Brooks, who fired this gun that he had until it was completely empty of bullets, and then not satisfied he beat the man over the head with the butt end of the revolver.

Now, what happened? As I said before, on the afternoon of December 17, 1946, Mortimer Bateman, who had been in the employ of Wigler's Bakery for some 25 years, a gentleman of the age of 46, a man too young to die, a man about five feet four inches in height and weighing approximately 150 and some odd pounds, in the course of his regular duties, which included making deposits for the company at their bank downtown, got in his truck and he was given the deposit which had been prepared, and he started toward the Federal Trust Company.

Now, there was in the employ of Wigler's Bakery a man by the name of Joseph Smart. Joseph Smart was a man of about 31 years of age, had known Mr. Wigler for some years but had not actively gone to work for him until July 1946, although he had some relatives who had worked for Mr. Wigler for a number of years. Joseph Smart had a fourth or fifth or maybe it was a third cousin by the name of Brooks, the

defendant in this case, and about three or four weeks before December 17, 1946, when they were together at Brooks' house, they had a conversation about obtaining easy money, and during the course of that conversation Smart said to Brooks, "You know, up at the place where I work, Wigler's Bakery, they make deposits about three times a week. They either make the deposit on Monday or Tuesday, they usually make a deposit on Thursday, and they always go to the bank on Friday to get the payroll". And then in a series of meetings between these two men it was agreed that this truck should be held up.

The original plans, however, called for the defendant, Brooks, to stop the truck, because they were afraid that Smart, who would of course be recognized, would make it possible for Bateman to point them out. So it was agreed, after Smart had explained the whole layout to Brooks, that on December 9th the first attempt to hold up this truck would take place.

Accordingly, on December 9th Brooks, who had only been working at that time for three or four days, went to his place of employment, stayed for a short time, and left. He went to the movies and he stayed in the movies for several hours. Then he came out of the movies because he had been told it was usually some time after half past eleven or twelve, and more often around one or two o'clock, when Bateman took the money to the bank.

This particular day Brooks went up on Prince Street across from Wigler's Bakery, getting there, I believe, sometime around 1 o'clock—the evidence will bring out the details—and he watched for Bateman to come out of the bakery. In due course he saw Bateman come out of the

bakery. He ran to stop the truck and he missed it, and the truck went on down its normal course, down Prince Street in a northerly direction toward South Orange Avenue, with Brooks on foot chasing it in hopes that it would get held up by traffic, but he didn't get it.

Then along in the opposite direction, in Mr. Wigler's car, came Mr. Smart, who drove Wigler as a private chauffeur as part of his regular employment, and he stopped. He asked what was the trouble.

Brooks said, "I missed the truck".

Smart said, "Hop in and we will see if we can catch it".

They got in the car, turned the car around, and followed the course that the truck usually takes to the bank, and Smart knew the course that the truck usually took to the bank because he had ridden with Bateman on several occasions when he made deposits. They never did catch the truck that day. By the time they got downtown they found the Wigler Bakery truck parked in front of the Federal Trust, which meant that the deposit was being made.

At that time Brooks only had a toy gun, and he was carrying that toy gun with him. Brooks and Smart saw each other, perhaps, during the course of that week, but I will jump now to Sunday, December 15th.

That evening Smart goes to Brooks' home. Brooks calls him into a side room and says he didn't want his wife to hear, but he now has a gun, a real gun, and shows it to him, and you will see that gun.

So they then have a discussion about the hold-up that is to take place on Monday, December 16th, and it is agreed that Smart must take

part in the hold-up because unless he does Bateman may not stop the truck. So for the first time it is agreed that Smart is to come into the actual holdup.

The next morning they met according to arrangement and again they went to the movies. They stayed in the movies for some time. Then they came up Prince Street and stayed on Prince Street watching for Mortimer Bateman to bring the deposit out and get in the truck. And Smart was supposed to be working that day but he didn't show up for work, and Brooks was supposed to be working that day and he didn't show up for work.

Then as the afternoon wore on, they realized that this must be one of the Mondays when Bateman did not make his usual deposit. So they figured if it didn't happen Monday it would surely happen on Tuesday.

On Tuesday morning they met again according to agreement. This time I believe it was at the house where Smart was living. They went over the plans, and that evening went so far as to talk about shooting Mortimer Bateman so he wouldn't recognize Smart, and of driving the truck and the body in the river so that it wouldn't be found. Then they decided no, they would shoot him, but they would drive the truck to Vaux Hall, New Jersey, which, as some of you know, is the northerly end of Union Township adjacent to parts of Maplewood and Millburn in Essex County.

After talking for some time at Smart's home, at about 11 o'clock in the morning or maybe a little after, they left Smart's home, Brooks carrying a revolver, fully loaded with five cartridges, and ready for business. They went and hired a taxicab and had it drive them across town until

it got to the corner of Prince Street and South Orange Avenue, which is approximately a block or two north of Wigler's Bakery, and they got out.

As they went by in the taxicab and passed this bakery, this bakery has in the back of it on the first floor at the right, an office. It is up two little steps. In that office there is a window. On that window are Venetian blinds. When they are doing something in the office, particularly with money, those Venetian blinds are pulled down and the door is closed. They thought that they saw the blinds down and the door closed when they went by in the taxi, so that they were sure that money was being gotten ready to bring to the bank. They waited, and they went to the tavern and had a drink and they came back.

Now, in the meantime, in fact, on Monday, the day before, Mr. Wigler, the secretary-treasurer, manager, in effect of this bakery, together with his secretary-bookkeeper, the major factotum, Miss Engler, got together two deposits that were to be sent to the Federal Trust, and when they prepared these moneys for deposit they naturally took bills of the same denominations and stacked them into piles of even amounts, and then there was a wrapper put around these bills which carried printing on it about the Federal Trust Company. Then, so that there would be no misunderstanding when it got to the Federal Trust Company as to whose money it was, they had a little rubber stamp with an ink pad and they put the rubber stamp on the ink pad and stamped the Federal Trust Company wrapper so that it read "Wigler's Bakery." So these moneys as prepared for the bank carried in these wrappings not only the name of the Federal Trust Company,

but "Wigler's Bakery," as well, and when they had rolls of coins, such as five dollars' worth of quarters, they would be wrapped up in the proper wrapping and then they would be stamped "Wigler's' Bakery."

And they had completed the task of preparing this deposit, which deposit totaled $3,879.42. $3,261.61 of that was in cash. There were $617.81 in checks. And so having finished that up at 6 o'clock on the afternoon of December 16th, they put that in the large safe in the office, in a canvas bag which they used to take money back and forth to the bank. And about 1:30 or shortly thereafter on the afternoon of Tuesday, December 17th, Mortimer Bateman walked into the office, and Miss Engler was there. He said he was ready to go to the bank, so she went to the safe and took out this bag containing this deposit, handed it to Mr. Bateman. He said goodbye to her in the best of spirits, and she saw him go out and get in his truck. He drove off; he went down Prince Street to South Orange Avenue; he turned down South Orange Avenue and went as far as Wickliffe Street, when just after having passed and made the turn from Prince Street to South Orange Avenue, who steps out but Joe Smart. And Batement, whose nickname was Hooks, stopped and said "Joe, what are you doing here?"

And Joe said, "I am looking for a ride down town", or "I have to go to the doctor's" or something like that.

And Joe stepped into the truck. And as Joe stepped into the truck, behind him stepped in the defendant Brooks. Brooks was unknown to Bateman.

Opening for the State.

Now, so that you can visualize the situation from this point, let me breifly digress to explain this truck to you.

This truck is a three-quarter-ton International. I have forgotten just what year, but it looked in very good shape. In fact, I think you will find some of the witnesses may refer to it as a new truck. This truck had been specially prepared for the bakery business and, of course, there was a seat for the driver behind the wheel. But that is the only seat in the truck. The space alongside that seat, where normally you would have a seat adjacent to the driver's seat, has no seat there. And so they used to carry an old milk box in this truck, which they would pull up from the back if somebody was riding along with them, and he would sit alongside the driver. This is a closed panel truck, with a door on each side—one alongside the driver and one opposite; and, of course, the usual two big doors that open from the back. But then the truck has one unusual feature, which would not be unusual, perhaps, for bakery products, but unusual for most of us in thinking of a three-quarter-ton delivery truck. Just back of what would be the driver's seat and about two feet, 10¾ inches—and the exact measurements will be given to you by an engineer, so that if I misquote them, throw them out the window—but two feet, 10¾ inches is my recollection—off the floor of this truck is a shelf built completely across the truck, and almost extending all the way to the rear. There is maybe that much space between the rear of the shelf and the back doors of the truck. And, of course, that is put there because bakery products are light products. If you fill the truck up with everything consisting of bakery products, you still would not have it to

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capacity. But if you pile too many products on top of each other, the loaves of bread on top would probably squash the loaves of bread underneath. So they put this shelf across.

As Joe Smart got into this truck followed by Brooks, Joe Smart went over as close as he could to the driver's seat and squatted down. And I assume that the rear portion of his body was probably under the shelf, with his head up by the driver. And Brooks got in and sat down on this box. Bateman looked at him kind of quizzically; said nothing. And they proceeded to Wickliffe Street and they turned north on Wickliffe Street and when they got about 40 or 50 feet south of Thirteenth Avenue—in other words, as they were approaching Thirteenth Avenue—and, incidentally, for those of you who know the locality, and perhaps to help those of you who don't. Thirteenth Avenue is the street that runs up here alongside the Courthouse and alongside the Hall of Records, on the south side of the Hall of Records, and continues on up in a westerly direction.

Wickliffe Street is just about two blocks up. So this incident took place within two or two and a half blocks of where we are gathered today. This truck got, as I say, within 30 or 40 feet of 13th Avenue. Brooks pulled his gun and says to Bateman, "This is a stickup." Bateman looked around and smiled. He thought they were kidding —Smart was a friend of his—and Brooks says to him, "This is the real thing." With that Bateman turns off the ignition, bringing the truck to a complete stop, and tries to defend himself and tries to grab the gun out of Brooks' hand, and then a scuffle takes place. And it must have been some scuffle. The right side door, that is, the door on the other side of the driver's seat, flew open.

They went into the back of the truck. At that point two shots were fired—whether before Bateman was taken out of the seat or after, I don't know—but Smart and Brooks dragged Bateman out of that seat and into the back of that truck. And now remember that shelf. It is two feet and 10¾ inches from the floor. So from then on that action took place where everybody must have been on their hands and knees or in a crouched position. At that point a citizen of this community was standing near the corner of 13th Avenue and Wickliffe Street, and he hears these reports and he looks down the street, and there, 30 or 40 feet from him, is this truck parked out in the center of the street—Wickliffe Street is not a very wide street—and he hears another report, but he sees no one behind the wheel. He could see no one in the truck at all. Then he saw a colored man come from in back of the truck, or at least came up where he could be seen, and he got behind the wheel. That man was Smart. Smart then tried to start the truck, but stalled a couple of times. He semed to have some trouble with it, and he came down the street in first gear at a very slow rate of speed and he passed right by this citizen who I told you was there. Remember, the door of this truck had opened. So as this citizen looked in he saw a colored man sitting behind the wheel with both hands on the wheel. He heard another shot, and he saw smoke come out from inside the truck. On the floor where normally there would be a seat in this truck he sees a man's leg in a position similar to this. He can see it from the toe to about almost the hip. The truck then slowly goes across 13th Avenue and keeps on down Wickliffe Street. He hears more shots. While the truck was parked he had heard this scuffling in it. Then

he did what we hope more citizens will continue to do: he stepped to a telephone and notified the police. Just before this citizen stepped in to notify the police a gentleman walked up to him and handed him a hat. A thorough search of that section disclosed that another witness, looking out her window, saw this man pick this hat up just as the truck left and bring that hat down and hand it to this citizen.

At exactly 1:45 the radio car working that area got an alarm and it proceeded at once and made what investigation it could on the spot and again reported into Headquarters by telephone. The man with the hat gave it to the police, to the two officers who were in this radio car, and the radio car made a quick search of the vicinity in order that they might see whether or not a truck had been abandoned in that vicinity and found no truck. Then they shot over to Wigler's Bakery, because on the side of the truck these citizens had seen "Wigler's Bakery, Prince Street," and they went up there to make inquiry about a truck, and it was learned that Bateman had never reached the Federal Trust.

An alarm was sent out and then at that point as far as outsiders are concerned the story jumps to another locale. But what happened in that truck the State contends was this. Brooks was armed with a revolver containing five shots, and when he pulled Bateman out of this seat or in the course of doing it he fired within a comparatively short time the entire five shots, three of which entered the body of the decedent, one in the front, one in the back and one right straight through the leg above the knee. We will present evidence to you which will show that neither of those shots through the front or through the back were fired

from a gun held any more than six inches away from Bateman. Then Bateman, shot and dying in this truck, with Brooks underneath this shelf in the back of the truck, in this rolling coffin, pleads for his life and says, "Take me to a hospital. Take the money, but take me to a hospital. Don't leave me here to die."

Brooks isn't satisfied. He takes this revolver by the barrel and starts hitting Bateman over the head, first on the right side and then on the left side, and finally punches him in the nose with his fist.

In the meantime Smart continued to drive this truck, and the next we know of that truck is that at 2:11 the Union Township police received a call telling them that there was a man at Vaux Hall on Waldorf Place who was shot and dying. Smart had driven this truck up to Vaux Hall. Just what route he took, I don't know. Generally it is believed and the State contends that they went over West Market probably up 11th Avenue or 9th Avenue and then up to 12th Street and gradually worked their way over through Irvington then up Springfield Avenue until they came up to Vaux Hall and then they had to go in about a mile or so. We will present evidence that following that general route it is about seven and a half miles. That is where they drove this dead and dying man. When they got to Vaux Hall a person heard a noise, and looking out of her window, she saw two men, two colored men, leave the truck, one with a paper bag in his hand, and go toward the woods. The State contends and will prove that when that truck reached Vaux Hall that they searched the truck and picked up the empty cartridges which Brooks had pulled loose in the truck because he had broken the gun to see if

there were any more shots left to fire, and they started to get out this money bag, and decided that would be too conspicuous, and being that the bakery truck had some odd paper bags around, they put it in the paper bag and went off to the woods.

The woman who saw them then saw coming out of that truck a man bleeding from the head, bleeding from the stomach, bleeding from the back, holding his stomach, bent over, screaming, "Someone help me." She ran down to a neighbor's house hollering, and that neighbor came out and looked and saw this man and rushed in and phoned the Union police, which received the call at 2:11, and the Union police came.

Bateman was rushed to a doctor, and he saw that immediate surgery was required, and he gave him a shot to quiet the pain and sent him on his way to a hospital in Elizabeth. All that medical skill and knowledge could do was done to try to save that man's life, but at 7:10 that night he died as a result of these bullets pumped into him by that defendant, Brooks, who is on trial.

But before he died, somewhere around 4 or 5 o'clock in the afternoon, and before they operated on him, he was questioned by the police. Unfortunately we have no dying declaration because, in order to have a dying declaration that is admissible, the man must be told by the doctor or must know that he is about to die, and of course when they are trying to save the man's life and about to put him under an operation, you are not going to tell him he is going to die.

After the police interviewed this man an alarm was sent out for Joe Smart and another unknown man. Now, we left Smart and Brooks going into the woods. And where did they go.

Mr. Foley: If your Honor please, I don't wish to interrupt the Prosecutor, but it does seem to me that what happened subsequent to the alleged crime would not be admissible in evidence.

The Court: Only to show flight.

Mr. Foley: Pardon me, sir?

The Court: Only to show flight.

Mr. Foley: To show flight?

The Court: That is all.

Mr. Congleton: Yes, sir.

Mr. Foley: That would be the only purpose?

Mr. Congleton: That is right.

The Court: That is right

Mr. Foley: So that then I assume counsel will limit his opening to such events as would indicate flight.

Mr. Congleton: And what events followed chronologically in the apprehension of these men.

The Court: Well, of course, after the event, anything indicating flight may be shown, and anything said or done.

Mr. Congleton: Or anything indicating an admission may be shown.

The Court: An admission may be shown, of course.

Mr. Congleton: And any evidence found on them or on their person.

The Court: Yes, that may be shown also.

Mr. Congleton: These men left this truck and fled to the woods, and some time after 3 o'clock that afternoon the sister-in-law of Smart — in other words, a lady married to Smart's brother, who lived in Vaux Hall—heard someone in the house. She came out, and there were her brother-in-law, Joe Smart, and the defendant, Brooks, whom she knew by his nickname as Gill.

And the State contends that at that point one of them went into the toilet and tried to wash the cartridges down the toilet—the empty cartridges —but they were unable to do it. So they kept them in their possession. They then asked if the furnace fire was going and on being told yes, they went down to the cellar. The sister-in-law then smelled something burning, and went down, and they told her to go back upstairs, and they slammed the door of the furnace closed.

Now, the State contends that when these two men were down in the cellar they burned the checks that had been part of this deposit, and they burned the hat of the decedent, Bateman, because it later developed that Brooks had no hat with him at that point, because that hat that fell out of the truck on Wickliffe Street near 13th Avenue was the hat of the defendant Brooks. And they then asked the sister-in-law to send for a cab. We have the cab driver here. And while they were waiting for the cab they asked for a whiskbroom—Smart and Brooks— and they tried to brush off their clothes, because Brooks' clothes in particular were all dirty from rolling around on the floor of this truck, with flour and things like that that naturally had sifted there at some time or another. And also he had some spots of blood on his clothes.

The taxi came; Brooks left; Smart stayed. Brooks got in the taxi and ordered the driver to take him to the Pennsylvania station in Newark, and he proceeded to the Pennsylvania Station in Newark, where he then took and went back to his own home by another cab, to cover up his trial if it was possible. But before Brooks and Smart parted company up in the house of Smart's sister-in-law, they changed overcoats. Brooks had

been wearing a blue overcoat; Smart had been wearing what some refer to as a trench coat or a raincoat, but at least a dark brown coat. And they switched overcoats to mix up any identification. Brooks put on dark glasses and got a brown hat—from where I don't know—and that is what he was wearing when he was in this taxicab.

Smart stayed around for some little time and then went uptown in Vaux Hall and had his hair cut and some other things, and came back. And finally sometime after five in the afternoon it got too much for him, and he went back to this truck. And when he got there he found a crowd of people and he found his cousin, Tommy. Tommy, who worked for Wigler's Bakery for twelve years, was there trying to put the rotor back on the truck. Tommy had been sent up to get this truck, and when he got there he had taken the police around to Smart's mother's and some other houses in Vaux Hall, where they thought he might be.

And at that point Tommy recognized Smart and Smart recognized Tommy, and Smart says, "I understand the police are looking for me," and turns himself over to a police sergeant there. And, of course, he is taken into Union Police Headquarters and brought to Newark, which does not involve this defendant.

And then the next day the police are looking for one Mr. Brooks, and about 3 o'clock or shortly thereafter in the afternoon three Newark policemen are up in Brooks' home, waiting for him. And Mr. Brooks arrives in, of all things, a Cadillac automobile that he has just purchased. And they arrest him and they search him, and they find on his person a roll of quarters — five dollars' worth of quarters—stamped on the outside, "Wigler's Bakery." And they take him into Head-

quarters, and while the detectives are there they talk to him, as a result of which they go back to his home, and in the third drawer, where he told them it would be, they found this revolver.

The day before when the Union Township police had been searching this truck they had found two bullets, one flattened and one not marked too much, one on the left running board of the truck, and the other one in the front near the driver's seat, and of course they have been kept.

When Dr. Martland, the medical examiner of Essex County, performed the autopsy on the decedent, he removed from him two bullets. Those bullets have been kept. Tests have been made by a ballistic expert of our office, Captain Cocozza, which show conclusively that the bullets that were found in the decedent and the two bullets that were found in the truck were fired from the same gun that was found in the defendant's home on the afternoon of December 18, 1946.

Then they searched some more at Brooks' home and they couldn't find anything for a little while, until Brooks' wife pointed to the baby carriage. One of the police officers went over to the baby carriage and reached down in the bottom and come up with some fourteen hundred dollars in cash.

Miss Dreyfuss and gentlemen of the jury, a large portion of that cash, strangely enough, had wrapped around it wrappers of the Federal Trust Company, stamped on it, "Wigler's Bakery."

Thereafter, this arrest having taken place about 3:30 in the afternoon, Brooks is questioned at Newark Police Headquarters by members of the staff of the Prosecutor's Office and of the Newark Homicide Bureau, and as a result, beginning around 7 o'clock that night, a full confession is taken from Mr. Brooks, written out in longhand

by Captain Cocozza. It took from 7 o'clock at night until somewhere around 1 o'clock in the morning before the whole thing was written out, signed, sealed and published, and that statement recites in full detail what happened in this case, although Brooks in that statement insists he only fired three shots and didn't fire the last two shots, but you can check when you get that, you can check every item in detail in it, and it checks out.

As a result of the statement taken from Brooks, it is then found that on the night of December 17th, when he got to his own home he took four or five hundred dollars' worth of money and went downtown, and he bought himself two suits, an overcoat, two hats, a man's gold ring, a gold watch for his wife, and just so that they could have a good party on the night of December 17th, he brought some liquor home. Mr. Bateman, lying in the hospital, dying, was not bothering him.

That night at Brooks' home they had a party, and during the course of it a friend of his came in. During the course of the conversation Brooks asked the friend if he would help him buy a car the next day. There was some difficulty about the defendant Brooks being able to buy a car in his own name.

So the friend told him, "Well, I don't know. I have to work tomorrow, but maybe at noontime. I can't take off except at noontime."

Brooks said to him, "What is your employment?"

This man says, "I work in a tailor shop and cleaning establishment."

Brooks said, "That's fine. I have a blue suit that I would like to have you get cleaned for me," and they rolled it up in a ball and this man took it to his shop.

The next day after this arrest took place, the police went to that shop and recovered that blue suit of Brooks, and a chemical analysis shows that on that suit was human blood. That was the suit that Brooks was wearing when he bumped off Bateman during this stickup.

The next day, on December 18th, Brooks went up and met his friend at the tailor establishment, and they went around and they arranged to buy in the friend's name a Cadillac automobile for $2100 or $2200, and they put down $700 cash deposit on it. That is the automobile that Brooks was driving when he came up to his home when the police arrested him. He waited for it at the garage.

The State is moving this indictment, which has been returned against James Brooks, and contending that he is guilty of first degree murder. You may wonder why Smart is not on trial. Smart died three or four day after December 17th by an act of his own hand. That is why he is not here today, so that the State can ask that he pay the full penalty for this horrible crime that was committed.

So that we have today on trial James Brooks. The State says that in this situation there can be no compromise, no adjustment. This killing was the result of a stickup, which, under the law of the State of New Jersey, is murder in the first degree. This defendant is entitled to his day in court, to the benefit of his reasonable doubt, which he is given under the law, and to the services of able counsel, and the State says, "Give it to him," but when this case is completed and the evidence is in and you have heard the charge of his Honor, then the State says to you that the citizens of the State of New Jersey, through their Legislature,

have established the law that a killing committed during the course of a robbery is first degree murder, and that there are no facts or circumstances that can be developed or will be developed in this case which should allow you to reach any compromise or adjustment in your verdict, and the State will ask you at the end of this case when you retire to the jury room and return to render your verdict, that you render it in the following form through your foreman: "We, the jury, find the defendant, James Brooks, guilty of murder in the first degree," and stop. There should be no recommendation in view of this horrible, dastardly crime that has been committed by this defendant. Thank you.

(Mr. Foley makes an opening statement to the jury on behalf of the defendant, as follows:)

Mr. Foley: If your Honor please, Mr. Prosecutor, Mr. Foreman, Miss Dreyfus, and gentlemen of the jury: At the beginning of Mr. Congleton's opening, he introduced everyone at both counsel tables and he mentioned my name to you. I think it might be important to you to know not only who I am but also how I happen to be here and how Mr. Hayden happens to be here.

That, perhaps, is a little more important than usually because in the course of the opening Mr. Congleton mentioned a large sum of money that was stolen in this affair, and the thought might occur to you that it is with that money that the defense in this matter is being financed.

I want to dispel any idea that you may have along that line. I am an officer of the Court, as is Mr. Hayden. We were appointed by Judge Flannagan to defend Mr. Brooks. We did not

seek the task. We are honored by the appointment. It is our duty to accept such an appointment, and by that I do not mean to apologize for my being here. We will do our very best to present everything to you which in any way favors the cause of Mr. Brooks.

But we are officers of the Court, arms of the Court, and we are serving in the administration of justice just as you are. Neither of us is a criminal lawyer. As far as Mr. Hayden is concerned, he has never been in a murder case. As far as I am concerned, it is a little over five years since I stood before a jury in this county or in any county, for that matter, in a case of this kind, and that was the only case of this kind that I have ever tried in the course of the twenty years that I have been admitted to practice.

So, madam and gentlemen, you need not look for any moving picture story defense or radio program defense from Mr. Hayden and me. We will not attempt to fool you in any way. We will not undertake to manufacture or to present anything that has been manufactured by anyone else which is in the nature of a fantastic effort on the part of the defendant to defend himself. We will meet the issue here fairly and squarely. We will do our very best to be completely honest with the Court and with you and the Prosecutor at all times, and in that way we will be doing the duty which has been imposed on us. In return for that we only ask you fully perform the duty which has been imposed upon you, and that duty, in the first instance, involves your keeping a perfectly open mind, notwithstanding the course of this affair as Mr. Congleton unfolded it to you.

There are not going to be very many denials of what he said. Substantially he has told you what

happened, and for the most part what he has said are the facts.

There are some things that are in dispute, and in those things which are in dispute we find the basis for asking you—not now, but at the end of this case—to give consideration to staying the hand which would execute this man and recommend life imprisonment for him.

As Mr. Congleton pointed out to you, Mr. Smart is not here; Mr. Smart's voice is stilled forever. Mr. Smart killed himself while in custody, while in the custody of the authorities of this County. Somebody was that neglectful as to permit Mr. Smart to have the belt of a trench coat in his cell with him, with which to hang himself. How that came about and why that slip was made, we'll never know. But although it deprives the State of the opportunity of trying Mr. Smart for this crime, and the State perhaps suffers thereby, in the sense that it cannot obtain the penalty which it might otherwise exact, his absence and the permission or the thoughtless granting of permission to Mr. Smart to have this belt with which he could hang himself in his cell also works to the disadvantage of Brooks, because if Smart were here, I think we will show you, and if he were honest and truthful, I think we could establish that this whole thing was Smart's idea. In fact, as Mr. Congleton pointed out in his opening—I am going to quote him now—in speaking of the early days when the plan of robbery was evolved, Mr. Congleton said, "Smart came to Brooks' home, and after Smart had explained the whole layout—the layout being the place where Smart worked—they did thus and so."

So I think you will find that in the first instance it was Smart who picked the place where the

robbery was to be committed, picked the victim, and sold to Brooks the idea of participating in this crime.

Again I am quoting Mr. Congleton. Upon the occasion, I think a few days—either a day or a few days—before the actual robbery, when Brooks chased the truck down the street, you remember Mr. Congleton said, "Smart came along in the other direction in his employer's automobile; Bateman, in his truck, had gone by that time; and it was Smart who said to Brooks, "Hop in, Brooks; we'll chase him and catch him!"

So I believe, Madam and Gentlemen, that in the course of this trial you are going to find, you are going to see it quite definitely established, that the 31-year-old Smart was the leader and the 23-year-old Brooks was the follower. And I think you are going to find, too, before this case is concluded that the shots which were fired into the body of Bateman and from which Bateman died were fired by Smart and not Brooks.

Now, of course, it may be said that if they both participated each is equally guilty. That is the law. But that brings us to the point of discussing another part of the law about which I interrogated you yesterday. It is the fact that our Legislature has provided that even where—in fact, only where—a defendant is found guilty of murder in the first degree—otherwise the consideration would be unnecessary—where a man has been found guilty of murder in the first degree, his guilt established, it is still for the jury to fix the punishment. It is an odd part of the law, members of the jury, for this reason: In all of the criminal law, I think I am correct when I say, it is the only instance where the jury not only passes upon the guilt or innocence of the de-

fendant, but has the absolute right to fix the punishment. It is the only instance I know of. Now, that law was not passed inadvisedly; someone must have thought at some time or another that even though a man is guilty of murder in the first degree there may be circumstances—perhaps circumstances of comparing his participation in an affair with that of a confederate—a comparison between the two—toward bringing about the end result—a differentiation between the two. Perhaps that is what they had in mind. But even though a man may be guilty, somebody apparently thought—the Legislature apparently decided—that in the final analysis, the mere finding of murder in the first degree would not in all cases require punishment by death. Each case must be examined upon its own basis, all of the evidence examined, every consideration given, and then a determination made as to whether or not in that particular case and with that particular defendant the hand of Justice should not be stayed, at least to the extent of withholding the taking of the man's life. And I can say to you honestly and frankly now, although I have a certain obligation to see to it that no evidence is presented which is not legal evidence, you are not going to find me battling and scrapping with every witness who takes the stand. I do not try that kind of case ever, and I am not going to try that kind of case here.

I am going to ask you, however, to bear in mind that for the next few days you will be doing the most important civic duty which will ever be cast upon you. It is one of great responsibility. You are going to be dealing with human life. It is going to be the life of a man for whom you are going to have no respect.

Because of that it is of the utmost importance that you try harder than ever to give to a man for whom you have no respect and who you might think would be better off out of the world, every single consideration that you would give to the most righteous person were such a person before you at this time.

You have got to bend over backwards to be fair and honest, and then whatever you do will have to be satisfactory to everybody, the prosecution and the defendant alike.

I know if you do fully perform your duty and give this case every consideration I feel confident that you will find from the evidence that there is sufficient there, sufficient to find Brooks' part in this matter much the less important part, sufficient to have a reasonable doubt in your mind as to whether or not he should be sent to the electric chair. I ask you to keep an open mind and if at the conclusion you do feel that way, anyone or two or three or five or all of you, that you do what you said you would do, have the courage of your convictions to stand by your belief—I will not use the word *insist*—and do not permit a verdict to be rendered unless it bears a recommendation of life imprisonment, if you believe that is the proper punishment. Thank you.

(A short recess is taken.)

HARRISON S. MARTLAND, sworn.

Direct examination by Mr. Congleton:

Q. Dr. Martland, you are a licensed physician and surgeon of the State of New Jersey? A. Yes, I am.

Mr. Foley: We admit Dr. Martland's qualifications.

Mr. Congleton: I appreciate that, but I just would like the jury to know who he is.

Q. How long have you been practicing, doctor? A. Since 1905.

Q. Have you specialized in any particular field? A. Yes, in pathology and, since 1925, in the investigation of violent and suspicious deaths.

Q. Are you the Chief Medical Examiner of Essex County? A. Yes, I am.

Q. You have been for how long, sir? A. Since 1927.

Q. Now, doctor, in the course of your official duties, did you perform an autopsy on Mortimer Bateman? A. Yes, I did.

Q. When did you perform that autopsy, doctor? A. On the 18th day of December, 1946, at Mullen's Morgue in Newark at around 10:30 o'clock in the morning, about fifteen or fifteen and a half hours after death. This man died at St. Elizabeth's Hospital in Elizabeth on December 17 at 7:10 p.m. He was admitted to the Hospital at——

Mr. Foley: I have to object to the doctor's testifying to these things which are not within his knowledge.

The Court: Very well.

Mr. Foley: I ask that that part be stricken which deals with the matters that are not in the doctor's knowledge.

Mr. Congleton: I feel that it is all part of the doctor's official knowledge as Chief Medical Examiner of Essex County.

The Court: I do not think so, Mr. Prosecutor.

Mr. Congleton: And it is a history on which he bases——

The Court: Precisely, but if you want to prove the entry in the hospital, it must be done by those who have personal knowledge.

Mr. Congleton: Very well, sir. We will have the doctor and the hospital records here.

Q. Will you tell us what your autopsy consisted of and what you found? A. The body had to be released. The man died under the jurisdiction of Union County, and the body was released to me after the death was reported and we sent for the body, and is was taken from St. Elizabeth's Hospital to Mullen's Morgue in Newark. I autopsied it the next morning. The autopsy showed a man about 46 years of age, a white man, five feet, four inches high, and about 165 pounds in weight. The abdomen and the back on the left side was covered with surgical dressings over the bullet wounds and over the abdominal operation made by the surgeon.

The clothes that I got with the body consisted of brown high shoes with rubber heels, maroon socks, khaki pants with a bullet hole just about the right knee in the pants, with surrounding bloodstains and a slit in the back of the right knee where the bullet had passed through the right knee and passed out through the pants, and a leather belt. I did not have with the body any shirt or any jacket which the deceased had on at the time of the shooting.

The autopsy showed that he had been operated on by the surgeons and had a laparotomy incision starting at the belly beneath the right free coastal margin and passing downward for about eight or

nine inches. This incision was closed with eighteen metal clips and three tension sutures. This incision was two and a half inches to the right of the navel and extended from the free ribs—border of the ribs—downward to below the navel.

On opening this wound and taking the clips out and the sutures out, there was evidence of a bullet wound of entrance in the surgical incision. This bullet wound had been party cut out by the surgeon, so-called debris-ed the wound, but the location of the bullet wound was two and one half inches to the right of the navel and three and a half inches above the navel, so that would be on me about here.

The surgeon had made another laparotomy wound in the left lower abdomen for exposure of the region of the bladder, and so forth, in this case.

The autopsy shows that this bullet wound passes downward, slightly to the left, and very slightly backward in the straight position of the body. It goes through the small intestine eight times, making a wound of entrance and a wound of exit. So there are eight holes in the small intestine, and these were all closed tight by the surgeon, so there was no leakage. The bullet in passing downward then goes through the large intestine in the sigmoid flexure, making a wound of entrance near the pelvis, which was sutured by the surgeon tight. And on its posterior surface another wound, where the bullet came out, which the surgeon had missed and did not suture. The bullet then in passing downward and to the left passes through the posterior wall of the bladder, near the top of the bladder, and the surgeon found this and sutured it. And on the anterior wall of the bladder, after the bullet passed through the bladder, there is another hole where it comes out.

And this was missed by the surgeon. It is in a difficult place. And in this area behind the pelvic bone—the symphisis—I found a .38 calibre lead bullet.

Q. Now, Doctor, I hand you an envelope and ask you if you can tell me what that is. A. I have designated this wound that I have described in the belly as wound No. 1. That does not necessarily mean that it was made first; it was just to simplify it. This is the .38 calibre lead bullet which I removed from in front of the bladder, due to this wound in the belly, coming down in this direction.

Q. Doctor, after you removed that bullet you placed it in that envelope? A. That's right.

Q. That handwriting on that envelope is yours? A. It is mine.

Q. Then you turned it over to Captain Cocozza, of the Prosecutor's Office? A. Yes, on December 21, at the City Hospital.

Mr. Congleton: I offer this envelope and bullet in evidence.

Mr. Foley: There is no objection.

(The envelope and bullet referred to are marked Exhibit S-1.)

The Witness: Now, there is a beginning peritonitis in the belly cavity due to this wound, wound No. 1, and there is considerable hemorrhage in the belly cavity due to this belly wound. In all probability when the surgeon first opened him up there was a belly full of blood, and of course most of that has leaked out.

Mr. Foley: I think I must object to that, too. After all, the man who performed the operation is available to testify, and I do

not believe that this doctor can give that as his opinion, that in all probability there was a belly full of blood, because it is a matter which can be established as a matter of fact, rather than as a matter of theory.

Mr. Congleton: We will produce the doctor.

The Witness: I found over a pint of blood in the belly at the autopsy.

The Court: All right. We will let that part stand. The doctor said that he found over a pint of blood in the belly.

Mr. Foley: Of course I can have no objection to his testifying as to that, but as to what may have been there before I think should be established by a proper person.

The Court: Yes.

The Witness: I found also a bullet wound in the back of the body which I have designated bullet wound No. 2. It is situated in the left chest posteriorily about 6½ inches to the left of the spine and between the 10th and 11th ribs. This is a bullet wound. It is situated 3 feet and 10 inches above the heel and 6 inches to the left of the spine. This wound passes forward and enters the body. There are no surrounding powder marks on the skin or burns on this wound, and I saw no powder burns or marks on the abdominal wound, on the skin. I don't know what was over the clothing, but on the skin on every one of these wounds there are no powder burns. This bullet enters the body and enters the left pleural cavity between the 10th and 11th ribs in the postero-axillary line and it passes forward and downward and to the

right, slightly to the right. It makes a longitudinal wound on the back of the left kidney and there is an extensive hemorrhage about this track due to bleeding from the kidney and also bleeding in the pleural cavity, because it enters the pleural cavity and, without injuring the lung, passes through the costophrenic space through the diaphragm, and then over the posterior surface of the kidney. In the psoas muscle, lying close to the kidney and spine, there is considerable hemorrhage and I found a .38 calibre bullet in the psoas muscle on that side.

Mr. Congleton: If I may interrupt you, I hand you another envelope and ask you what that is.

The Witness: This is the bullet that I removed from the left psoas muscle, due to wound No. 2 in the back of the left chest.

By Mr. Congleton:

Q. Doctor, you then put it in that envelope and that is your handwriting on it? A. Yes.

Q. And then you turned it over to Captain Cocozza? A. Yes.

Mr. Congleton: I offer this in evidence.

Mr. Foley: No objection.

(The envelope and bullet are received in evidence and marked Exhibit S-2.)

Q. Will you continue, please, Doctor. A. Now, there is another bullet wound which I have designated as wound No. 3, and the entrance of this wound is situated just above the right knee about 20 inches above the heel in this man. This bullet

passes backwards and slightly to the left and very slightly upwards, passing upwards for a distance of about one inch and it comes out on the back of the thigh just above the knee about 21 inches above the heel. The entrance is 20 inches and the exit was 21 inches above the heel in that direction. This passes behind the femur, the bone, and the bullet is not recovered; it passes out of the body. There is no excessive hemorrhage. It is not a fatal wound, unless he lived and it might have been infected, or something like that, but it is not a fatal wound.

I found also over the right temple region a laceration of the scalp which had a semi-circular pattern mark about 3/8 of an inch in diameter, and this is due to external violence. The scalp beneath this shows hemorrhage in the scalp, but there is no underlying fracture of the skull and there is no injury to the underlying brain. On the opposite side, just above the ear on the left side, there is a linear laceration about an inch and a quarter—a ragged laceration—in size, and there is hemorrhage in the scalp beneath this, but there is no fracture of the skull and no evidence of any brain injury.

Q. Now, Doctor, may I interrupt you at this point? I show you this picture and ask you if you can tell us what it represents. A. That represents the body. It shows in the right temporal region the laceration that I have just described—the semi-circular laceration—and in the left temporal region, the laceration on the left side. You can just see the beginning of the——

Mr. Foley: Doctor, do you mind refraining from exhibiting the picture to the jury until it is offered, please?

The Witness: You can just see the beginning of the surgical incision.

Q. And that fairly and truly represents the man's head whose autopsy you performed—Mortimer Bateman? A. That's right.

Mr. Congleton: I offer it in evidence.

Mr. Foley: I object to the picture, if your Honor please, for this reason: The doctor is well able to describe clearly the evidences of injury which he found. The purpose of this picture or the effect of this picture, it would seem to me, would be to inflame the jury, and for the reason that the picture is inflammatory and is not necessary to the establishment of the State's case, I object to it.

The Court: May I see it, please, Mr. Prosecutor?

Mr. Congleton: Certainly.

The Court: It may be marked for identification for the time being. The Court will reserve the question of admitting it.

(The photograph referred to is marked S-3 for identification.)

Q. Now, Doctor, I show you another picture and ask you if that is the picture of the man upon whom you performed the autopsy; namely, Mortimer Bateman. A. Yes, that is.

Mr. Congleton: I ask that it be marked for identification.

(The photograph referred to is marked S-4 for identification.)

Q. I show you another picture, Doctor, and ask you if that is a picture of Mr. Bateman. A. Yes, that is.

Q. What does that picture show? A. That shows the two abdominal wounds made by the surgeon in opening the belly. The one on the left lower abdomen shows a rubber drain for drainage purposes. It also shows the wound of entrance in bullet No. 3. on the inner aspect of the right knee, just above the right knee.

Mr. Congleton: I ask that it be marked for identification.

By the Court:

Q. That does not show, either, what you have termed No. 1 and No. 2, does it, Doctor? A. It doesn't show No. 1, because No. 1 is closed in the surgical incision. So you don't see No. 1 until that is opened up. And No. 2 is in the back.

(The photograph referred to is marked S-5 for identification.)

By Mr. Congleton:

Q. I show you another picture and ask you if that is a picture of Mortimer Bateman taken at the time of the autopsy. A. Yes, that is.

Q. What does that picture show? A. That shows wound number two, wound of entrance in the back of the left chest, lower chest. It also shows the exit wound of wound number three in back of the right thigh.

The Court: Do you have any pictures showing the entry of number one and number two?

Mr. Congleton: This shows the entry of number two.

The Court: Excuse me. I meant the other way around, the entry of the other bullet. That would be number one.

Mr. Congleton: Number one is the picture you just previously asked the doctor about.

The Court: But that wouldn't show it and couldn't show it, I imagine because the surgeon made his incision at that point.

The Witness: Yes, and partly removed part of it, so that I see a semicircular remains of the wound.

The Court: Would it be agreeable to the Prosecutor for the doctor to mark the point of entry on that photograph?

Mr. Congleton: I would like very much to have him do that.

Q. Will you take a pen on Exhibit S-4 for identification and mark the point of entry. A. It is about two and a half inches to the right of the navel and about three inches above. So it is somewhere about here. (Witness marks on Exhibit S-4 for identification.) I marked it with an arrow.

By the Court:

Q. Will you designate that with an "E" to show entry? A. I will mark it "Wound No. 1 entry."

The Court: All right. That will be all right.

(The witness marks on Exhibit S-4 for identification.)

The Court: On the other picture would you follow the same procedure?

Mr. Congleton: May I have this other photograph marked for indentification?

The Court: Certainly.

Mr. Congleton: We never got it marked.

(The photograph is marked Exhibit S-6 for identification.)

Mr. Foley: Is that the last one he referred to?

Mr. Congleton: That is the one he identified as showing the point of entrance on wound number two. Then the Judge asked another question about a previous photograph.

Q. Showing you Exhibit S-6 for identification, will you mark on there the point of entrance and designate what wound it is? A. Wound number two, entrance. This here is wound number three, exit.

(The witness marks on the photograph.)

The Court: I notice the picture of a person looking over that body.

The Witness: Yes, sir.

The Court: Who is that?

The Witness: That is my son, Dr. Martland, Jr., who is now at Hopkins. He is holding the body there so that it won't move while the police are photographing it.

The Court: The person looks so young.

The Witness: He is older than he looks.

The Court: He has only recently become a doctor, is that it?

The Witness: No, he has been into it for some time. He was in the Navy two and a half years after interning at Bellevue.

The Court: He was there professionally?

The Witness: Yes.

The Court: Assisting you, I suppose, maybe voluntarily, but still—

The Witness: He was watching the autopsy. I mean, I don't need anyone to assist me in autopsy. I do it myself. He either does that or the morgue keeper holds the body.

Q. I show you again Exhibit S-5 for identification and ask you if you will indicate the point of entrance of any wound that appears in that picture. A. This is wound number three, entrance, inner aspect of the right thigh, just above the knee.

(The witness marks on Exhibit S-5 for identification.)

The Court: That shows the point of entry also?

Mr. Congleton: Yes, sir.

The Witness: Yes, sir.

The Court: It is also shown on another one?

Mr. Congleton: The point of exit is shown on another.

The Court: That is the only picture where the point of entry is shown?

Mr. Congleton: Of wound number three, yes, sir.

Q. Did your autopsy disclose anything further? A. No. The organs were in good order of condi-

tion, except that he had from the bladder wound the beginning of an extravasation of urine from the leaky wound and he was beginning to have very rapid post mortem decomposition from a gas bacillus due to peritonitus.

Q. Did you as a result of your findings in the autopsy reach any conclusion as to the cause of Mortimer Bateman's death? A. Yes.

Q. What was that cause? A. Multiple bullet wounds of the body, wound number one passing into the abdomen, perforating the small intestine eight times, perforating the large intestine twice, and perforating the bladder twice, with peritonitus and shock and hemorrhage; and wound number two, extensive hemorrhage and laceration about the left kidney. Wound number three is insignificant.

Q. In your opinion, doctor, either wound number one or wound number two would have caused death? A. My opinion is that wound number one caused the death in this case. Wound number two might aggravate it somewhat by the hemorrhage, and if he had lived wound number two might have become infected, and there might have been a hemorrhage from the left kidney from the wound which might have caused death; but actually death is due in this case to wound number one, perforating the intestines and bladder, and producing peritonitius, hemorrhage and shock.

Q. You were able to determine from your autopsy the course of the direction that the bullet took in wound number one, weren't you? A. Yes.

Q. I wonder if you would demonstrate the course of this bullet on somebody here who is about five feet four. A. All right.

Mr. Congleton: How about you, Captain Cocozza? How tall are you?

Captain Cocozza: Five feet, four inches.

The Witness: Now, put your finger on your navel. All right. I have it. And on the lower border of your ribs. I think that is close enough. Now the navel once more.

Q. Doctor, I don't want to interrupt. Could you stand around a little bit? Because there are three or four jurors here that can't see. A. All right.

The Witness: Take your finger away. We will say that is his navel. The surgical incision passes down this way, and there is another surgical incision passing down this way, with a rubber drain. The wound of entrance of wound number one, which is undoubtedly the fatal wound in this case, is situated about two and a half inches to the right of the navel and about three inches above, and that is included in the surgical incision; that is, when he opens the belly he cuts out part of that wound, so that I see the remnants of the wound. That wound passes—it is very hard to show—but it passes this way. The bullet is found in front of the pelvis, down a little farther that way, so it passes that way. Here is where the bullet was found. It passes downward, slightly to the left, and slightly backward. So that is the direction of the wound. Now, that means that the revolver—bullets are very rarely deflected.

Mr. Foley: If your Honor please, I think the doctor is departing from his own profession when he undertakes to discuss the significance of the wound. I think he can tell us where it was, but as far as under-

taking to qualify as a ballistics expert, I don't think the doctor can.

The Court: I wouldn't take it that the doctor was qualifying as a ballistics expert; I imagine he is testifying from his experience in the performance of autopsies, and where bullets have had occasion to cause death or injury.

By the Court:

Q. Isn't that right, doctor? A. Yes, autopsy experience.

The Court: Certainly.

The Witness: That bullets are rarely deflected unless they hit strong bone.

The Court: I will let it stand.

The Witness: So that is the direction or the course of the bullet in this case. Therefore, the revolver is on a line projected in that direction. Now, it depends on the position of the body when it is struck.

Mr. Foley: I don't like to interrupt you, doctor, but when you say, "on a line projected in that direction," there is nothing in the record to indicate what that means. So I think if you don't mind my interrupting, I should like to have it described for the purpose of the record. Will you return the pointer to the position in which it was.

The Court: Well, now, how can that be described any more except by his occular exhibition? Can you suggest something, Mr. Foley?

Mr. Foley: I would undertake to do it if it meets with the approval of the Court.

When the doctor said that it indicates the gun was fired in that direction—and I am quoting him now—he was standing before Captain Cocozza, with a pointer about three feet long, the lower point of which indicated the position or the place where the bullet was found.

The Witness: Where the bullet was found—that's right.

Mr. Foley: And approximately 11 or 12 inches, doctor, would you say?

The Witness: Yes, about that—about 10 inches.

Mr. Foley: Approximately.

The Witness: It is hard to demonstrate.

Mr. Foley: Yes, I know it is. Approximately ten inches above that point; that is, above the lower point of the ruler, he indicated a mark on Captain Cocozza's coat, which he says evidenced the point where the bullet entered the body. The pointer is held at an angle of perhaps 22½ degrees, would you say?

The Witness: That is very difficult, because I can't put this inside the body.

Mr. Foley: Well, was the angle greater than that, doctor?

The Witness: What is that?

Mr. Foley: Was the angle of the course of the bullet greater than 22½ degrees?

The Witness: I would say about 25 or 30 degrees.

Mr. Foley: About 25 or 30 degrees, running from the point of entry back into the body, and downward. Is that correct?

The Witness: Yes, downward to the left and slightly backward.

Mr. Foley: Downward to the left and slightly backward, at an angle of about 25 degrees?

The Witness: Yes.

Mr. Foley: The doctor indicated that the position of the revolver——

By the Court:

Q. Excuse me. Would that mean 25 degrees from the perpendicular? A. From the horizontal.

Mr. Foley: From the horizontal?

Q. From the horizontal? A. From the horizontal—the perpendicular.

Mr. Foley: The perpendicular?

The Witness: That's right. I take it while they are lying flat; they are not standing up.

The Court: The perpendicular is right.

Mr. Foley: The doctor then indicated by placing his hand near the top of the pointer that the gun from which that bullet was fired was held above the point of entrance of the bullet.

Would you indicate again, doctor, placing it back again? Would you indicate again on the pointer where you placed your hand before when you showed the place where that gun was probably held?

Mr. Congleton: If the Court please, I have gone along with Mr. Foley's description up to date, but all I understood the doctor indicated when he held the gun would be the direction that the bullet would take; that he made no attempt to indicate how

far the gun was held away from the body when the bullet was fired.

Mr. Foley: He placed his hand on the pointer when he was indicating where the gun was held, and I simply would like him to again place his hand on the pointer to show what he meant.

The Witness: Yes. The gun producing this wound, where there is no deviation—the autopsy shows no deviation of the bullet—is on a projected line in that direction. I have already said there were no powder marks on the skin around this wound. I have not examined the overlying clothing, but it is not a contact shot. Now, the gun may be anywheres from two or three inches to two or three feet along that line. That is all I can say.

By Mr. Congleton:

Q. Now, Doctor, would you be good enough while you have Captain Cocozza there, to mark up his suit some more and tell us the direction of wound number two. A. Wound No. 2 is situated in the left chest about 6½ inches to the left of the spine and is about there. This passes downwards and forward slightly to the right and passes through the chest cavity, the lower part, without injuring the lung and passes through the costophrenic space and passes downwards through the diaphragm and makes a grooved laceration of the posterior surface of the left kidney. The bullet is found in the left psoas muscle close to the spine with a depth of some 8 or 9 inches.

Q. Does the pointer indicate the angle that you think that bullet took? A. I would say about that.

Mr. Congleton: Can we agree that there now seems to be about 20 degrees from the perpendicular?

Mr. Foley: Let us ask the Doctor.

By Mr. Foley:

Q. Was the angle about the same as the other one, Doctor? A. That is very hard to say, because I can't put this inside the body. I would say yes, about the same. That depends entirely on the position of the body when struck. If he leans over like that, it is that way; if he leans back, it is that way.

By Mr. Congleton:

Q. But the angle would remain the same with respect to the plane of the man's spine? A. Yes.

Q. Now, Doctor, in the course of your professional experience as Chief Medical Examiner and your other work as a pathologist, about how many bodies would you say you autopsied in your time? A. Over 15,000.

Cross examination by Mr. Foley:

Q. I understand you to say that the third wound, No. 3 in this case, could not have been a fatal wound. A. I wouldn't think so, no. I mean if the man had lived such a wound might have become infected.

Q. But in this case he did not live long enough for that to have taken effect, and so under no circumstances could it have been a fatal wound? A. No, it did not. In this case it was not a fatal wound and I do not believe it even aggravated the condition, except for a small amount of hemorrhaging that might have come from it.

Q. As to the injuries that you found on the head, there was a laceration of the scalp and a hemorrhage of the scalp as distinguished from a hemorrhage of the brain? A. Yes, no hemorrhage in the brain and no fracture of the skull.

Q. There was no brain damage? A. No.

Q. So whatever blow, if it was a blow, that was struck to the head, produced only a cut and the hemorrhaging of the surface? A. Of the skin.

Q. Of the scalp? A. That's right.

Q. It did no greater damage than that? A. No visible damage to the brain. There might have been a temporary concussion, but I do not believe there would have been loss of consciousness due to that.

Q. If there was a concussion, it must have been a very slight one? A. Yes.

Q. When we speak of a concussion, we have in mind, do we not, that any blow to the head which produces even the effect of seeing stars, as we say in common parlance, comes under the category of a concussion? A. Yes, it does. There is usually a slight lapse of consciousness if it amounts to anything. Maybe it is only a second.

Q. A professional fighter who is, let us say, struck on the chin and knocked down for even a matter of a fraction of an instant has suffered a concussion, has he not? A. Yes. I described that years ago.

Q. So that whatever blow was struck to the head was not severe enough to have produced a concussion from which you could find visible evidence? A. That's right.

Q. That applies to both of the evidences of the violence to the head? A. Yes, on either side.

Q. Doctor, you have a fixed conclusion in your own mind that there was one fatal wound and that

was the wound which you have described as wound No. 1? A. Yes, that is right.

Q. You found no evidence of powder burns in any of those wounds, did you? A. Not on the skin, not on the body.

Q. You did not find it anywhere, did you? A. No. I have not seen the overlying clothes from wound No. 1 and wound No. 2.

Q. They were never shown to you? A. I have not seen them. I saw the bullet wounds on the pants, the exit and entrance, and I did not see any burning on the pants. I did not examine them microscopically; only roughly.

Q. Finding no evidence of powder burns, either on the leg or on the pants, what does that indicate with relation to the distance at which the gun was fired which produced that wound?

Mr. Congleton: If the Court please, I think the prosecutor must object to that on the ground that Mr. Foley is now attempting to use the doctor as a ballistics expert.

Mr. Foley: That might be so except for the fact that on direct examination the doctor testified that his failing to find any powder burns at wounds No. 1 and No. 2, plus the fact that he had not had an opportunity to examine the clothing, indicated to him that the gun could have been anywhere from 2 inches to, I think he said, two or two or three feet——

The Witness: Yes.

Mr. Foley: —or two or three feet from the body when it was fired. That was offered by the Prosecution as a part of the direct testimony and therefore since the doctor has testified to that I think in the

course of cross-examination I may inquire as to the significance of the absence of powder burns with respect to this other wound.

The Court: The whole thing is, would the same testimony apply to this shot, too, isn't it?

Mr. Foley: It is not, sir, because as to this shot he did have the benefit of examining the clothing and he found no powder burns on the clothing, and with that additional evidence he may be able to give us some idea of how far away the gun was when that shot was fired.

The Court: I will allow it. The inference is deducible from what he has already testified, but he may state it.

A. On wound No. 3 in which I examined the pants roughly, making no microscopic or chemical test, I did not see any powder marks or burning on the pants. Therefore it all depends on the gun, which I have not seen, and test shots from the gun, and so forth, but I think if that is so there might be powder marks on the pants, which I did not see.

Q. Assuming that there are none. A. Assuming that there are none, I should think that the wound was over a foot from the body.

Q. More than one foot? A. More than one foot. I mean that is a rough estimate.

Mr. Foley: That is all. Thank you, Doctor.

(Recess is taken from 1 to 2 o'clock.)

AFTERNOON SESSION.

HERBERT A. HAUFLER, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Haufler, you are a duly licensed engineer and surveyor of the State of New Jersey? A. I am.

Q. And you have been for how long, sir? A. For 18 years.

Mr. Foley: I will be glad to admit Mr. Haufler's qualifications as an engineer.

Q. By whom are you employed, sir? A. By the County of Essex.

Q. In what department? A. In the Department of Highways and Bridges.

Q. Mr. Haufler, did you at the request of the Prosecutor's Office make measurements and from those measurements a map or sketch of an International truck owned by Wigler's Bakery? A. I made the measurements and made part of the drawing, not the entire drawing.

Q. But you made all the measurements; is that so, sir? A. That's right.

Q. I point to this map which now appears on the board. Is that the map that was made as a result of the measurements you made? A. It is.

Q. When you say you made part of the map, will you tell us what you mean by that? A. I blocked it out and made an appropriate scale so that it would be presentable to the jury.

Q. In other words, you did all of it except ink it; is that right? A. Not all the penciling. The plotting was done by someone else.

By the Court:

Q. Was it done under your supervision? A. It was done under my supervision, yes.

Q. You say here it is correct? A. Yes, it is correct. I have checked it.

By Mr. Congleton:

Q. Mr. Haufler, pointing to the map there on the board, is that the map that was made as a result of your measurements? A. Yes, it is.

Q. Is that an accurate representation? A. That is an accurate scale drawing of the truck.

Q. What is the scale of the map? A. The scale is 1½ inches equals 1 foot.

Mr. Congleton: I offer the map in evidence.

Mr. Foley: No objection

(The map is received in evidence and marked Exhibit S-7.)

Q. Now, Mr. Haufler, directing your attention to this map and pointing to the upper lefthand part of the map, what does that drawing there represent? A. That represents what you might call a top view of the truck, with the body cut away to expose the floor.

Q. At what point did you theoretically cut the body away to expose the floor? A. Immediately above that horizontal striping line that you see.

Q. Will you step over here and show us what you mean A. This line right here.

Q. That line right there? A. Yes.

Q. Isn't the side of the truck somewhat curved? A. That's right, yes.

Q. And that is why you had to pick a cut-off point in order to show your floor sketch, is it not? A. That is true.

Q. Now, Mr. Haufler, all of the drawings and lines on here are drawn in accordance with this scale, isn't that correct? A. That is true.

Q. So that any measurements that we wanted to take of any portions of this truck we could take by using a scale of an inch and a half to one foot. Is that correct? A. That's right.

Q. Directing your attention to the extreme right of the map, what does that drawing represent? A. That represents a cross-section of the truck—a vertical cross-section of the truck—taken right along the line here.

Q. Just forward of the wheels and mudguard. Is that correct? A. That's right.

Q. Directing your attention particularly to the drawing at the right, what does that line at the very bottom represent? A. It represents the floor.

Q. Needless to say, the two lines at the top represent the top. Is that correct? A. That's right.

Q. What do these two lines across the drawing represent? A. They represent a shelf in the body of the truck.

Q. Directing your attention to this drawing at the bottom left of the map, what does that represent? A. That is a side elevation of the left—what you would call the lefthand side of the truck.

Q. Directing your attention to certain things that appear in this drawing by dotted lines, what does this dotted line that runs along the lower portion of the map represent? A. That represents the floor of the body of the truck.

Q. I assume that this is the steering wheel. A. The steering post and wheel.

Q. And this is the front seat? A. The front seat, yes.

Q. In back of where the printing appears here, "Wigler's," I notice some dotted lines. What do they represent? A. They represent this same shelf shown in this view. That is the extent of the shelf.

Q. In other words, the view at the extreme right shows the width of the shelf, running from side to side of the truck. Is that right? A. That is true.

Q. And the dotted lines here show the length of the shelf as it runs in the truck. Is that correct? A. Yes.

Q. Now, Mr. Haufler, directing your attention to the map at the right, can you give us the distance from the line representing the floor to the bottom of the shelf? A. I have a direct measurement on that instead of scaling that.

Q. All right. A. That scales — rather, that measures 2.90 feet, which would be about two feet, ten and seven-eighths inches.

Q. Could you mark that on here? A. Yes. (The witness marks on the drawing.)

Q. 2 feet 10⅞ inches, is that correct? A. Yes.

Q. Could you indicate on here the width of the truck, that is, the interior width of the truck from side to side? A. At the floor level that is 4½ feet.

Q. Will you mark that on here, please? A. (The witness marks on the drawing.)

Q. Now so that it will be complete, would you be good enough to indicate the distance between the top of the truck and the top of the shelf? A. I will have to scale that off.

Q. All right. That will be satisfactory, won't it, Mr. Foley?

Mr. Foley: Entirely so.

A. That is from the top of the shelf itself?

Q. Yes, please. A. That scales 1 foot 5 inches.

Q. 1 foot 5 inches? A. Yes.

Q. Directing your attention to the view at the top, at the upper lefthand top, I assume that this object shown here is the top view of the seat, is that correct? A. That's correct.

Q. This line drawn across here represents what, sir? A. That represents a 2-inch-and-a-half step between the floor of the body and what you might call the floor of the driver's seat.

Q. In other words, that is the line showing the offset that appears here by a dotted line, is that correct? A. Yes.

Q. Now, Mr. Haufler, can you show us on here on this sketch the beginning point and the ending point of this shelf that appears here in this lower left-hand drawing? A. I could do that by projecting this out.

Mr. Congleton: Suppose we pass that for a moment until we get a straight edge.

The Witness: I do have a definite measurement on this of 10½ inches back from this line to where that is plotted in.

Mr. Congleton: Will you indicate that and plot that on with your scale, please?

The Witness: Do you want me to put that in?

Mr. Congleton: Yes, if you will.

The Witness: With a pencil line?

Mr. Congleton: Pencil line or dash line or anything you think will probably show what it is.

(The witness marks on the map, Exhibit S-7.)

Q. You examined this truck, did you not? A. I did.

Q. Did you find that the door on the left side of the truck that appears in this drawing is the same size as the door that appears on the right side? A. That's right, yes.

Q. Can you give us the measurement between the points that the door is open as to what its width is, particularly on the right-hand door? A. On the right-hand door?

Q. Please. A. 2 foot 6¾ inches.

Q. It isn't necessary to indicate that. We will make a note of it, 2 foot 6¾ inches. Mr. Haufler, I asked you about this measurement, and you said from the floor of the truck to the bottom of the shelf was 2 foot 10⅞ inches. A. That's right.

Q. So that there will be no misunderstanding as to what 2 foot 10⅞ inches would be, would you measure off 2 foot 10⅞ inches against this rail here, please? A. 2 foot 10⅞ inches?

Q. Yes. A. That is just to the bottom of this rounded portion here.

Q. In other words, 2 foot 10⅞ inches would be from the floor of this courtroom to the lower part of the top part of the rail? A. Of the curved portion.

Q. Of the curved portion, that is 2 foot 10⅞ inches? A. That's right.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. Would you indicate, stepping back down here, the distance from the floor to the top of the truck interiorly? A. You mean the sum of those measurements there?

Q. Yes. A. I would have to add them up.

Q. All right, we don't mind waiting. A. That would be 4 foot 6.

Q. Would you make that measurement from the floor up toward this board? A. 54 inches.

Q. That is the height of the body? A. Yes.

Mr. Congleton: May I suggest, not to interrupt, that we don't put a mark on the map that may confuse us.

The Witness: Do you want to make a mark on this wall?

Mr. Foley: I don't think any purpose would be served in making a mark on the walls. The jury has observed it, but I have no objection to making it except I don't like to deface the courthouse.

The Court: You can make a little mark with a pencil, making it very lightly so as not to scar it.

Q. While you are at it will you make a mark to indicate the height of the shelf so that we will be able to see that. A. Yes.

Mr. Congleton: 2 feet 10⅞ inches.

The Witness: 2 feet 10⅞ inches.

By the Court:

Q. Is that measurement from the floor of the truck? A. Yes, the underneath side of the shelf.

Q. And the other measurement is to the top of the truck itself? A. That's right.

By Mr. Foley:

Q. Mr. Haufler, the indication of that distance between the shelf and the roof is seventeen inches. Isn't that a greater distance than seventeen inches? A. Well, you have the thickness of the shelf to take into account, too.

Q. How thick was the shelf? A. A little over an inch, I think. Yes, a 7/8 inch shelf that was.

Q. What was the measurement that you just took—the distance between these two points? A. Well, now, there will be a difference there, because this particular sketch is taken at one particular point on the truck. You see, there is a rise in the roof on that.

Q. That is the highest? A. No, it isn't the highest; that is the point taken right immediately behind the wheel. There is a difference in height there.

Q. What is the distance between those two points?

Mr. Congleton: I wonder if the witness could keep his voice up. I don't think the jurors can hear.

A. This distance here is about nineteen inches.

Mr. Foley: That is all.

The Court: I don't understand what you mean. The jury suggests that that is concealed by the board. So they suggest that it be marked on the side of the map so that they can view it from where they are.

Mr. Congleton: I have no reason to object to that, but the only thing I would like to point out about that, if the Court please, is that if the map should be removed from the board during the course of this trial I am afraid it would not be put back in quite exactly the same spot.

The Court: Perhaps we can put a piece of paper there. Why not do this. Why not make a mark on the frame with chalk?

Mr. Foley: That is entirely agreeable with me.

(The witness marks on the frame of the board.)

The Court: Now, put the other mark on the wall.

(The witness complies.)

By Mr. Foley:

Q. As I understand it, the distance that the shelf is from the floor remains constant. A. Yes, that remains constant.

Q. But the distance from the shelf to the roof varies depending upon the contour of the top of the truck? A. Yes, as you see it here. The distance here will vary.

Q. This section is all open? There is no seat? A. There wasn't a seat. There was only the driver's seat.

Q. And this is all open cab, you might say. A. Yes.

Q. This line which you have indicated here shows the difference in the level at the floor? A. Yes.

Q. But otherwise it is all open, is it? A. Yes, with the exception, of course, of that shelf.

Q. It is open as you look back toward the shelf? It is completely open. You look back and you see a shelf there? A. That's right.

FRANK J. HAGER, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Hager, what is your business? A. Police photographer.

Q. In connection with what department? A. Newark City Police.

Q. How long have you been connected with the Newark City Police? A. Thirty two and a half years.

Q. How long have you been connected in your capacity as a photographer? A. Twenty-five years.

Q. Now, Mr. Hager, I show you an envelope marked S-3 for identification and ask you if you took that picture. A. Yes, sir.

Q. When did you take that picture? A. That was on December 18, 1946.

Q. Where did you take it? A. Mullen's Morgue in company with Dr. Martland, junior and senior.

Mr. Congleton: I will offer it in evidence.

Mr. Foley: I object to it, if your Honor please, at this time and I say in behalf of the defendant that it is admitted that the person whose picture is shown here is the deceased, Mortimer Bateman. That is not in issue in this case. Testimony has been given to indicate the nature of his injuries. Nothing that Dr. Martland testified to from the picture was different from the testimony he gave without the picture. I feel this picture and all the other pictures will have a tendency to inflame the jury and thus prejudice the defendant. Since the pictures serve no purpose necessary to the State's case, I respectfully submit that your Honor should not admit them in evidence. And I say so particularly with respect to the offer which is now made.

Mr. Congleton: Do you want to hear me?

The Court: Yes, I will hear you Mr. Prosecutor.

Mr. Congleton: If the Court please, this is a trial, as you know, of a murder indictment. The State has the right to proceed in an orderly fashion and present all the evidence that it feels is necessary to fully prove its case. The State does not have to accept any admissions from the defendant as far as the gruesomeness or anything of that nature is concerned; the defendant should have thought of that before he did this.

Mr. Foley: If your Honor please, that is scarcely a proper reply to a legal objection.

The Court: That is not.

Mr. Foley: I am not going to try this case that way, and I don't think the Prosecutor should, either.

The Court: I think you are correct. I will strike it out.

Mr. Congleton: These pictures show the points of entrance and the points of exit of the bullets.

The Court: Yes, but how about this one that you are offering now?

Mr. Congleton: This one shows the marks on the head, which were inflicted upon this man's head, the State contends, by blows struck by this defendant.

The Court: Well, that is true, that is your contention, but I am not prepared to admit this picture at this time. I will reserve it, but I will not admit it now.

Mr. Congleton: Do I understand, then, your Honor will not accept the offer at this time?

The Court: Not at this time, no.

Mr. Congleton: All right, sir.

Q. I show you S-4 for identification and ask you if you took that picture? A. Yes, sir.

Q. What does that picture represent? A. That represents a white man photographed at Mullin's Morgue December 18, 1946.

By the Court:

Q. That is the same man you referred to before? A. That's right, sir.

Mr. Congleton: I assume that your Honor does not want me to offer these in evidence?

The Court: You can offer it. There is no harm in offering it, but the Court will reserve it and will not admit the photographs at the present time.

Mr. Congleton: I offer Exhibit S-4 for identification in evidence.

Mr. Foley: I object for the reasons previously stated. If your Honor wishes me to recite them for the record, I will.

The Court: No, I understand that your argument and your objection goes to this entire line of photographs.

Mr. Foley: Exactly.

The Court: And so does my ruling. I am reserving them all for the present at least and inclining to receive them in evidence at this time but not necessarily for all time.

By Mr. Congleton:

Q. I show you S-5 for identification and ask you what that represents. A. That is the body of the same man, taken the same day, at the same time, at Mullin's Morgue.

Mr. Congleton: I offer that in evidence.
Mr. Foley: The same objection.
The Court: The same disposition.

Q. I show you S-6 for identification and ask you what that represents.

Mr. Congleton: If the Court please, I don't know whether defense counsel can object to these going in and examine them at the same time.

Mr. Foley: Anything which is marked for identification I think I should have a right to look at in order to interrogate the witness who is being examined upon it.

The Court: How does he know whether he wants to consent or object, as the case may be, unless he sees what it is?

Q. What does that represent? A. That is the body of the same man, showing the back of him, taken December 18, 1946 at Mullin's Morgue.

Mr. Congleton: I offer that in evidence.
Mr. Foley: Objected to.
The Court: The same disposition.

Q. I show you a picture and ask you if you took that picture. A. Yes, sir.

Q. When did you take that picture? A. I took that picture on December 18 at the Safety Service Station on William Street.

Q. What does that picture represent? A. That represents the truck of Wigler's Bakery, the address being 74 Prince Street, Newark, New Jersey.

Mr. Congleton: I offer that picture in evidence

Mr. Foley: May I see it, please?
Mr. Congleton: Yes.

(Counsel confer off the record.)

Mr. Foley: I have no objection to this.
The Court: Very well. Mark it.

(The photograph is received in evidence and marked Exhibit S-8.)

Q. I show you another picture and ask you if you took that picture. A. Yes, sir.

Q. When? A. December 18, 1946.

Q. What does that picture represent? A. That is the front view of the Wigler Bakery building at 71 or 74 Prince Street. I believe it is 71, No, 74 Prince Street.

Q. Directing your attention to an object appearing in the lower left, what does that show? A. That is one of the Wigler Bakery trucks.

Q. Parked in front? A. Parked in front of the bakery building.

Mr. Congleton: I offer that in evidence.

Mr. Foley: May I inquire as to the purpose of this?

Mr. Congleton: Yes.

Mr. Foley: I see a truck parked there, and I wonder what that means.

Mr. Congleton: I want to show the front of the bakery, first, and the ability to look into the store, and, secondly, I want to show the manner in which the trucks are parked there so that someone standing down some distance down the street could observe the truck and observe when it leaves the bakery.

Mr. Foley: I have no objection to the picture as it shows the bakery store, but

the question of how the truck was parked on that particular day is a matter of proof, and it is not of any importance that trucks had been parked a certain way on other occasions or every other occasion or perhaps on this occasion, but my objection is that if the proof is to establish that this particular truck was parked as that truck is, then I do object.

Mr. Congleton: I will connect it up, of course, with the testimony, sir.

The Court: Very well. Suppose we leave it this way, gentlemen. The objection is that there is no proof that the truck we are concerned with was ever parked in that position, and the Prosecutor says he will supply that proof. The Court will reserve it until that proof is supplied.

Mr. Foley: It may be marked for identification at this time.

Mr. Congleton: I ask that it be marked for identification.

(The photograph is marked Exhibit S-9 for identification.)

Q. I show you another picture and ask you what that represents? A. It represents the rear of an International truck belonging to the Wigler Bakery Company with the rear doors open showing the shelf and boxes and so on contained inside the truck.

Q. And that is the interior of the same truck that is shown in S-8? A. Yes. That was taken the same day, a few minutes after that exposure there was made.

Mr. Congleton: I offer it in evidence.

Mr. Foley: I object to this ptcure, if your Honor please, in so far as it shows certain objects lying within the truck. There is no proof that these objects were there at the time.

Mr. Congleton: I think that is a well merited objection and I will ask that it be marked for identification at this time. I will connect it up later.

(The photograph is marked S-10 for identification.)

Q. I show you another picture, sir, and ask you if you took that? A. Yes, sir.

Q. When did you take it? A. December 18, 1946.

Q. What does that represent? A. That represents the rear of the said truck mentioned before with the rear doors closed showing the license plate and the rear of the truck.

Mr. Congleton: I offer it in evidence.

Mr. Foley: This is the truck involved?

Q. This is the same truck that you took the other pictures of? A. Yes.

Mr. Congleton: I offer it in evidence.

Mr. Foley: No objection.

(The photograph is received in evidence and marked Exhibit S-11.)

Q. Now, I show you a picture and ask you if you took that, Mr. Hager. A. Yes, sir.

Q. When did you take that? A. December 18th.

Q. What does that picture represent? A. That is the southeast corner of 13th Avenue and Wick-

liffe Street, showing this gasoline and battery store. The view is a south direction toward South Orange Avenue from 13th Avenue, looking toward South Orange Avenue.

Q. Approximately where was your camera set when you took that picture? A. I was directly across the street, in the center of the crosswalk of Wickliffe Street, facing South Orange Avenue.

Mr. Congleton: I offer that in evidence.

Mr. Foley: This is offered purely for the purpose of showing the physical appearance of the street, without regard to the presence of automobiles and this and that.

Mr. Congleton: That is correct, Mr. Foley. We couldn't get all the cars cleared off the street when we took the picture.

Mr. Foley: I wouldn't expect you would be able. But I mean there is no significance in these cars; it is just to show the location?

Mr. Congleton: That is correct, sir.

Mr. Foley: No movable object is of any significance on this picture?

Mr. Congleton: The only ones that I think might be of significance are these gasoline tanks, which are parked there all the time. The witness may refer to them, but they have no particular significance. He might say that he was so close to the gasoline tank, or something like that. But they have no significance as far as any physical features are concerned.

Mr. Foley: Since there are movable objects there, I would prefer that the offer be withheld until it is established that these gasoline tanks were in the same position then as of the time the witness was there, and as they are on the picture.

Mr. Congleton: Very well. I will have it marked for identification.

(The photograph referred to is marked S-12 for identification.)

Q. I show you another picture, Mr. Hager, and ask you if you took that. A. Yes, sir.

Q. When? A. December 18, 1946.

Q. What does that represent? A. That is Wickliffe Street, looking north, at a 45 angle, toward the northeast corner of 13th Avenue and Wickliffe Street, showing mostly the southeast corner of 13th Avenue and Wickliffe Street.

Mr. Congleton: I ask that it be marked for identification.

(The photograph referred to is marked S-13 for identification.)

Mr. Foley: Perhaps I can admit it in evidence.

Mr. Congleton: It has the same tanks.

Mr. Foley: That is right, I didn't see them.

(The photograph referred to is received in evidence as Exhibit S-13.)

Q. Now, Mr. Hager, I show you a picture and ask you if you took that? A. Yes, sir.

Q. When? A. December 18, 1946. That was later in the afternoon, about 2:30 p. m.

Q. What does that picture represent? A. That is the road known as Waldorf Place, Vaux Hall, New Jersey, and the view, if I have it in mind correctly, shows an easterly direction.

Mr. Congleton: I offer that in evidence.

Mr. Foley: Purely to show the physical appearance?

Mr. Congleton: That is correct, sir. I can't see anything that is movable there except something away down at the end, and that is not in focus.

Mr. Foley: There are no marks on here of any kind that are of any significance?

Mr. Congleton: The telegraph pole may be.

Mr. Foley: You mean as a point of identification?

Mr. Congleton: Yes, and the houses.

Mr. Foley: Yes. I have no objection.

(The photograph referred to is received in evidence S-14.)

Q. I show you another picture and ask you if you took that? A. Yes, sir. That was taken the same day, around the same time.

Q. Your camera is set just a little farther east than S-14 that just went into evidence, looking in the same direction down the same road? A. That is correct, sir.

Mr. Congleton: I offer it in evidence.

Mr. Foley: What we said about the other one applies to this?

Mr. Congleton: Yes, except you see the houses and the telegraph pole a little bit better.

Mr. Foley: No objection.

(The photograph referred to is received in evidence as Exhibit S-15.)

Q. I show you another picture and ask you if you took that? A. Yes, sir.

Q. When? A. On the 13th of this month, last Friday.

Q. Now, directing your attention to S-10 for identification, it shows up here in this picture this bracket is broken. A. Yes, sir.

Q. But the bracket has been fixed since this picture was taken? A. Yes, sir.

Mr. Congleton: I will ask that that be marked for identification at this time, because it has an object in it that I will have to connect up later.

(The picture is marked S-16 for identification.)

Q. I show you another picture and ask you if you took that? A. Yes, sir.

Q. When? A. That was taken the 13th of this past month.

Q. I ask you what that represents. A. That is the same truck in question showing the right door open in the front part of the car.

Mr. Congleton: I offer it in evidence.

Mr. Foley: I notice in that one you just offered that the movable object which appears in S-16 for identification is not observable. Will there be some proof as to whether or not the movable object was there on the day of this occurrence?

Mr. Congleton: Yes, sir.

Mr. Foley: With that understanding, that that will be proved, I have no objection.

Mr. Congleton: Wait a minute. There is going to be proof that it was not in this spot.

Mr. Foley: You are going to prove where it was?

Mr. Congleton: Yes.

Mr. Foley: All right. I have no objection.

(The picture is received in evidence and marked Exhibit S-17.)

Q. I show you another picture and ask you if you took that? A. Yes, sir. That was taken the same day, the 13th of this month, at 74 Prince Street in front of the bakery, showing the right side of the truck with the door open.

Mr. Congleton: I offer it in evidence.

Mr. Foley: No objection.

(The photograph is received in evidence and marked Exhibit S-18.)

Mr. Congleton: That is all. Cross examine.

Mr. Foley: No questions.

Mr. Congleton: At this time, if the Court please, the State has an application to make. It is respectfully requested that this jury and the Court be given an opportunity to view the truck in question, which can be made available to us in a very few minutes, for the purpose of acquainting the Court and jury with this truck, so that as the evidence is offered they can better appreciate the physical facts and the interior and exterior of the truck in question.

Mr. Foley: The defendant has no objection to that application, provided that the interior of the truck is completely clear of any movable objects other than the one which appeared in Exhibit S-14, the box.

Mr. Congleton: I think I can state this in front of the jury. I don't think it will

prejudice the defendant in any way. The testimony will be that there was always a movable object in this truck, and there was one in there on this occasion, and I believe that this is the one that was there, and therefore I think it would be well if it was present.

Mr. Foley: But there will be no other movable objects?

Mr. Congleton: We didn't see any yesterday, did we?

Mr. Foley: No, we didn't when we examined it.

Mr. Congleton: You saw it yesterday and at that time there weren't any and there has been nothing added that I know of.

The Court: The Court will grant the application, and in a little while, after proper arrangements are made, the Court will adjourn to the point where this object will be, for the purpose of offering a view on the part of the jury of the truck and the Court will give suitable instructions to the Sheriff to cover the situation. The jury may now retire to their room.

(The jury retires from the courtroom.)

(Court and counsel confer in chambers.)

(The Court, jury and counsel proceed to the passageway under the Courthouse steps where the following takes place:)

The Court: Now, if the jurors want to get inside and look in this truck, they are privileged to do so, and also notice the whole business, everything about it.

(The jury examine the truck.)

The Court: I take it, Members of the jury, that you have finished your inspection. If so, we will return to the courtroom, and you will return to your jury room, please.

(The Court, jury and counsel return to the courtroom, and the following takes place.)

PHINEAS L. WIGLER, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Wigler, where do you live? A. 42 Keer Avenue, Newark.

Q. What is your business? A. I am in the bakery business at 74 Prince Street, Newark.

Q. Under what name do you carry on business, Mr. Wigler? A. Wigler Bakery, Incorporated.

Q. What is your official connection with Wigler Bakery, Incorporated? A. I am the secretary and treasurer.

Q. Now, Mr. Wigler, did you know a Mr. Mortimer Bateman? A. Yes, sir.

Q. Was he an employee of yours? A. Yes, sir.

Q. For how long had Mr. Bateman been in your employ?

Mr. Foley: Objected to. That is not important, if your Honor please. It is not material to this matter.

Mr. Congleton: If the Court please, it is being asked for the purpose of leading up to the duties performed by Mr. Bateman.

Mr. Foley: That can be ascertained without any consideration of how long he was employed.

The Court: That is true. There was another man mentioned here in the opening who was employed there also, wasn't there?

Mr. Congleton: Yes, sir.

The Court: I am disposed to think that it would be proper to show how long they had been employees together. In that connection I should think it would be proper to show it.

Mr. Foley: I pray an exception.

Q. How long had he been in your employ or the employ of the Wigler Bakery, I should say? A. Approximately 27 years.

Q. Confining yourself now to 1946, what were Mr. Bateman's general duties with your company?

The Court: Mr. Prosecutor, won't you please follow out that line to show how long he and the other man who was in the truck had been employed together? That is the point.

Mr. Congleton: I appreciate that. I will do that but I intended to take each one separately.

The Court: That is true, but I would like to have them connected together so as to show why the ruling was made.

Q. Did you have a Joseph Smart in your employ? A. He acted as a private chauffeur, not under the Wigler Bakery, but as my private chauffeur.

Q. And his duties as private chauffeur: did they or did they not take him to the bakery? A. Yes, sir; they did.

Q. How frequently would you say? A. Every day that he worked.

Q. How long did he work for you? A. Approximately four or five months.

Q. Had you known him before he went to work for you, sir? A. Yes, sir.

Q. For how long? A. Probably 10 years.

Q. During that period when you had known him for ten years and before he went to work for you did he come in and out and around the bakery? A. He did.

Q. Can you say with what frequency? A. Not too frequent.

Q. Well, what do you mean by that, sir? A. Well——

Q. Once a week, once a month, or what? A. Well, it would be sometimes once a week, and then probably not for even once a month.

Q. Did you have some other employees who were relatives of Joseph Smart? A. Yes, sir; we do.

Q. Who are they, sir? A. He had—we have two of his cousins that are still in our employ.

Q. What are their names? A. One is Thomas Matias, and Grady McDonald.

Q. How long did Thomas Matias work for you? A. He is with Wigler's Bakery now about 12 years.

Q. How long has Grady McDonald worked for you? A. About 17 years.

Q. Directing your attention to 1946, what were Mr. Bateman's general duties with Wigler's Bakery? A. He was a route salesman, drove the International truck, and distributed the bread and rolls and other products that Wigler's Bakery manufactured. And his other duties were in the bakery to help if it was needed. He also used to make our deposits; he used to also collect money from the various customers that he served.

Q. Mr. Wigler, with what frequency during 1946 did Mr. Bateman make deposits for you? A. He went to the bank at least three times a week.

Q. Was there any specified days that he used to go? A. He went on Monday, and if it wasn't a Monday he definitely went on a Tuesday. Then he also went on Thursday to make a deposit and he also used to go and bring the weekly payroll back on Friday from the bank.

Q. So that he used to go to the bank on approximately three occasions a week, is that correct, sir? A. That's correct.

Q. And to what bank did Mr. Bateman used to go to make the deposits? A. He went to the Federal Trust Company on Commerce Street, Newark.

Q. To your knowledge did Joseph Smart ever go with him when he made these deposits? A. No, sir.

Q. You don't know whether he did or not? A. I wouldn't know, but I don't believe he did.

Q. And who would prepare the deposits Mr. Bateman took to the bank? A. I would prepare the deposits with the help of my secretary.

Q. What is her name, sir? A. Miss Adele Engel.

Q. Directing your attention to the week of December 16, 1946—December 16th was a Monday—do you recall whether or not Joseph Smart came to work for you that day? A. He did not.

Q. I direct your attention to December 17, 1946. Did he come to work that day? A. He did not.

Q. Had he notified you as to whether or not he would be at work on these days?

Mr. Foley: That is object to. No statement made by Smart is binding on the de-

fendant in this case. There is no charge of a conspiracy.

The Court: No, but the State contends that these men acted in concert. Is that it?

Mr. Congleton: That is correct, and that this was planned, and the purpose of the testimony is to show that as part of the plan he notified his employer that he would not be to work on the 17th.

The Court: I will allow it for the time being, and if it is not connected up it will be stricken on motion.

Mr. Foley: Exception. Do you mean on the Court's motion?

The Court: No. If the Court thinks of it, on the Court's motion; if it is called to the Court's attention by counsel, on counsel's motion.

Mr. Foley: I would like to state, that since your Honor suggests that there may be some obligation on my part to strike the testimony if it is not connected up, that I do not feel that that obligation is properly cast upon me and I therefore enter my exception with the view in mind that I would be under no such obligation.

(The pending question is read by the court reporter.)

A. Do you want—the question is——

Mr. Congleton: I will strike the question out and I will ask it this way:

Q. Did Joseph Smart at any time inform you that he would not be at work on December 16th or December 17th?

Mr. Foley: I desire to object for the reasons stated, and I will not burden your Honor with further argument. My objection is the same as that which I interposed to the previous question.

The Court: I wonder if the Prosecutor would not ask the witness whether he received any notice from any source that he would not be there.

Mr. Congleton: I accept your Honor's suggestion.

Q. Did you receive any notice from any source that Joseph Smart would not be to work on December 16th? A. I received——

Mr. Foley: If your Honor please, I think that question should be answered yes or no. I have no objection to the question if it is answered yes or no but I may have an objection otherwise.

The Court: Yes, it can be answered yes or no.

A. Yes, I did receive notice.

Q. When? A. Sunday evening.

Q. That would be December 15th? A. That is correct.

Q. Now, Mr. Wigler, directing your attention back to Monday, December 9th, the Monday before, do you recall whether or not Joseph Smart worked that day? A. He did, sir.

Q. Again directing your attention to December 9th, do you recall whether or not Mr. Bateman made a deposit on that day?

Mr. Foley: I object, if your Honor please. We are not concerned with what happened

on December 9th. The date alleged in the indictment is December 17th.

Mr. Congleton: The State opened that Smart and Brooks, acting in concert, had attempted on previous occasions to get this payroll. December 9th is one of the dates alleged by the State that the defendant Brooks attempted to stop that truck. I think that I can show that properly as part of the case.

Mr. Foley: May I say that counsel has repeatedly mentioned the theory of the State being that these men acted in concert. I think that my client is entitled to rely upon the charge laid in the indictment, and I respectfully submit that a theory of acting in concert is not within the allegations of the indictment, and I should like to have it distinctly understood that I am not consenting to the trying of the case upon any theory other than that laid in the indictment.

The Court: I think it is permissible under the charge in the indictment.

Mr. Foley: I pray an exception.

Q. Directing your attention to December 9th——

Mr. Foley: Mr. Congleton, may we have the question read to keep the record clear?

Mr. Congleton: I think that is a good suggestion.

(The pending question is read by the reporter.)

Mr. Foley: Your Honor has permitted that question and allowed me an exception?

The Court: Yes, I did.

The Witness: Should I answer the question?

The Court: Yes.

The Witness: Yes, he did make a deposit on that day.

Q. Now, directing your attention to Monday, December 16, 1946, did Bateman make a deposit that day? A. No, sir.

Q. Did you on that occasion prepare any deposit to be made on Tuesday? A. Yes, sir.

Q. When did you prepare the deposit that was to be made on Tuesday, December 17th? A. Late Monday afternoon. And I completed it approximately at six o'clock.

Q. Who assisted you when you did that? A. Miss Adele Engel.

Q. Will you tell us just what you did when you prepared that deposit on December 16? A. In preparing the deposit we separate the $1-bills. We separate, in other words, the denominations of the bills. And when we would count the money and we would have $50 in $1-bills, we would use a wrapper that is supplied by the bank to wrap the $50 in—these single bills—in a wrapper. The same procedure was done with the $5-bills. We wrapped them in $250 wrappers; the $10-bills we wrapped in a $500 wrapper. The quarters—we also deposit the 25¢ pieces in a $10 wrapper.

Q. Now, Mr. Wigler, I show you two pieces of paper and ask you if you recognize those. A. Yes, sir.

Q. What are they, sir? A. These are the duplicate deposit slips, the original going with the deposit to the bank, and the office retaining the duplicate.

Q. Who made out those slips? In whose handwriting are those slips? A. One slip is in my own writing; the other slip is in Miss Engel's.

Q. Suppose I unfasten this and ask you to point out which slip is which. Which of those two slips is in your handwriting, sir? A. This one, sir.

Mr. Congleton: I offer it in evidence.

Mr. Foley: No objection.

By the Court:

Q. Are these the slips that you retain in your office, or are they the originals which were retained by the bank? A. These are the ones that we retain in the office.

Q. Those are the duplicates? A. That is correct, sir.

(The paper referred to is received in evidence as Exhibit S-19.)

Q. I take it then that there were two deposits prepared on Monday afternoon to be made on December 17. Is that correct, sir? A. That is correct.

Q. Now, directing your attention to S-19, I see some writing on the back of that. What does that writing on the back indicate? A. This is the analysis of the deposit itself. In other words, what the money would consist of, meaning our sales for Friday and Saturday, which this deposit money consists of.

Q. Now, so that there will be no mistake, this says, "B, Friday, 227.12." What does that mean? A. That means what the bread sales were for that particular day.

Q. And this says, "C, Friday." What is that? A. That is the cake sales, which we keep separate.

Q. Miss Engel at the same time prepared this other slip? A. Yes.

Mr. Congleton: I ask that it be marked in evidence.

Mr. Foley: No objection.

(The slip referred to is marked Exhibit S-20.)

Q. This deposit that you prepared to be made on December 17, can you tell me what that deposit consisted of in cash and checks? A. Can I refer to this?

Q. If that will refresh your recollection, you may. A. There were in the deposit that I made up $1,593 in bills. There was $40 in 25c pieces. The other deposit that Miss Engel assisted me in making consisted of $10.61 in a separate envelope and $1,318 in bills. In other words, that would make a total of——

Q. You don't need to total it. We will do it for you later. Now, after these deposits were prepared, what did you do with them? A. I put the bills with the checks in a canvas bag that were used to hold the money and I then handed it to Miss Engle and she put it in our safe.

Q. Were there any other moneys sent to the bank that day or gotten together to send to the bank on December 17th that do not appear on these deposit slips? A. Yes.

Q. What moneys were those? A. He was given $300 which was left in the canvas bag to bring from the Federal Trust Company, the change that we use in our registers, consisting of pennies, nickels and dimes.

Q. I show you a canvas bag and ask you if that is similar to the canvas bag in which these moneys were placed on December 16th when you completed making up the deposit? A. This is the bag, or exactly a similar bag.

Mr. Congleton: I ask that it be marked in evidence.

(The bag is marked Exhibit S-21.)

Mr. Congleton: The State does not contend that this is the same bag. We only contend that it is a similar one.

Q. I show you some packages of money and ask you if those are similar to the packages that you prepared on December 17th for the deposit to be made on December 17th.

Mr. Foley: Did you say "similar"?

Mr. Congleton: I say similar because I can't connect it up with this money, and the money that came from Brooks. I will allege, Mr. Foley, and I represent to you and to the Court, that these are the actual moneys.

Mr. Foley: Put them in evidence if you want to.

The Witness: This is exactly what we do, as I explained heretofore. We wrap them in 250's and we put our stamp "Wigler's Bakery" on it for identification at the bank.

Q. When you say a stamp, that is an ink stamp that appears on here? A. That is correct.

Q. Now I show you a little brown envelope and ask you if you can recognize that? A. Yes, sir.

Q. What is that, sir? A. If it contains what it should, it should represent this duplicate of 61 cents that is on this slip.

Mr. Congleton: Let us open it and see what it does contain.

Mr. Foley: Is it sealed?

The Witness: Yes.

Mr. Congleton: Will you open it?

(The witness complies.) Two quarters, a dime and a penny. 61 cents.

Mr. Congleton: I ask that this be marked in evidence.

Mr. Foley: No objection.

(The envelope and contents are received in evidence and marked Exhibit S-23.)

Q. I show you a couple of rolls of coin, one of which obviously has been opened, and ask you if you can identify them as being similar to the ones you prepared on December 16th. A. These are exactly the ones that were prepared with the stamp of Wigler Bakery on the roll.

Mr. Congleton: I ask that they be marked for identification only.

(The rolls of coin are marked Exhibits S-24 and S-25 for identification respectively.)

Q. Mr. Wigler, this International bakery truck that Mr. Bateman drove, how long had you had that? A. I just don't remember but it wasn't very long. It was almost a new truck.

Q. Can you recall when was the last time that you saw that truck before Mr. Bateman went to the bank on December 17th? A. The last time I

saw that truck was on Saturday, December 14th, I believe.

Q. Directing your attention to S-10 for identification, at that time was this hinge up in the left-hand door broken? A. No, sir; it wasn't.

Q. When was the first time after December 17th that you examined this truck, sir? A. When it was returned by the police.

Q. Can you recall when that was? A. No, I can't.

Q. Did you notice when it was returned by the police that that hinge was broken?

Mr. Foley: Objected to. No time has been fixed. It would only be important to establish that this condition was present immediately after or within a reasonable time after this occurrence took place.

The Court: I think that is so.

Q. Mr. Wigler, can you tell us whether it was a matter of days or weeks after December 17th that this truck was returned to you? A. A matter of days.

Q. Can you recall whether it was in the same week? A. Yes, sir; it was.

Q. When it was returned did you examine it at that time? A. Yes, sir.

Q. At that time did you notice whether this bracket was broken?

Mr. Foley: That is objected to, if your Honor please. This could happen in a matter of minutes, let alone days and weeks.

The Court: Yes. Well, Mr. Prosecutor, I assume that when the officers took the truck they noticed its condition, and they can testify to that.

Mr. Congleton: Very well, sir.

Q. Now, I direct your attention to S-4 for identification. Can you tell us who that is? A. Yes, sir.

Q. Who was it? A. It was Mortimer Bateman.

Q. Mr. Wigler, directing your attention to the afternoon of December 17th, did you see Mr. Bateman that afternoon? A. No, sir.

Q. You were not in the store in the early part of the afternoon? A. No, sir.

Q. About when was it when you returned to the store, if you remember? A. It was approximately 2 o'clock.

Q. Did anything out of the ordinary occur that afternoon? A. Yes, sir.

Q. What happened? A. A police officer came into our store and——

Q. Just a minute, Mr. Wigler. You can't tell us what the police officer said. But a police officer came into your store. Is that correct? A. Yes, sir.

Q. And he asked you some questions? A. Yes, sir.

Q. Thereafter what was done by you or anyone connected with your bakery? A. I called the —I had Miss Engel call the Federal Trust Company.

Q. All right, sir. You can't tell us what she said. Thereafter did you give the police the license number of the truck? A. Yes, sir.

Q. Did the police then leave? A. Yes, sir.

Q. Can you fix approximately the time that afternoon it was that the police were to your place of employment? A. The first time?

Q. Yes. A. Two o'clock.

Q. Thereafter, Mr. Wigler, did anything further occur?

Mr. Foley: In your presence. I assume you mean that, don't you? I simply want the witness to be——

Mr. Congleton: I am asking him only about what he knows, Mr. Foley.

Mr. Foley: All right, as long as he understands that.

Q. Did you receive a 'phone call?

Mr. Foley: I am sorry I interrupted you.

Mr. Congleton: That is all right, Mr. Foley.

Q. Did you receive another 'phone call? A. Yes, sir.

Q. Thereafter did you send any one of your employes anywhere? A. Yes.

Q. Where? A. To Vaux Hall.

Q. Did you go anywhere that afternoon? A. Yes.

Q. Where? A. To the hospital.

Q. What hospital? A. St. Elizabeth's. Or am I correct on that name? I know it was in Elizabeth.

Q. It was a hospital in Elizabeth. A. Yes, sir. I believe it is St. Elizabeth's.

Q. Whom did you send to Vaux Hall? A. I sent Thomas Matias and another man—Herman Schuttert——

Q. Don't tell us what for. A. Okay.

Mr. Congleton: Cross-examine.

Mr. Foley: No questions.

Adele Engel, for the State—Direct.

ADELE ENGEL, sworn.

Direct examination by Mr. Congleton:

Q. Where do you live, Miss Engel? A. 239 South Orange Avenue, in Newark.

Q. By whom are you employed? A. Wigler's Bakery.

Q. How long have you been employed by Wigler's Bakery? A. Five and a half years.

Q. I know it is difficult, but would you try and talk just a little bit louder? A. Five and a half years.

Q. In what capacity are you employed there? A. As a bookkeeper.

Q. As part of your duties as bookkeeper do you assist Mr. Wigler in preparing the deposits to go to the bank? A. I do.

Q. Directing your attention to 1946, prior to December 18th, who used to take the deposits you prepared to the bank? A. Morty—Morty Bateman.

Q. Directing your attention to Monday, December 16th, did you assist Mr. Wigler when a deposit was prepared to go to the Federal Trust? A. I did, on one deposit. One deposit I did.

Q. Showing you S-20, is that the deposit slip? A. That is my deposit slip.

Q. That is a duplicate of the original deposit slip that accompanied the deposit to the bank on December 17th? A. That's right.

Q. Did you see Mr. Wigler prepare the deposit slip marked S-19? A. No, I did not.

Q. When you prepared this deposit what did you physically do with the bills that were involved, like ten-dollar bills or five-dollar bills? A. I put them in the wrappers that were specifically marked—the five hundred dollar wrappers and the

two hundred and fifty dollar wrappers and the fifty dollar wrappers—as given by the bank.

Q. Now, I show you S-22 for identification. Are these moneys in wrappers that I show you similar to the ones that were prepared on the afternoon of December 16th? A. That is correct.

Q. Who stamped "Wigler's Bakery" on these wrappers? A. I did.

Q. That was your job? A. That's right.

Q. Showing you S-23, did you prepare that or did Mr. Wigler prepare it? A. I believe Mr. Wigler prepared it.

Q. That is not your handwriting? A. No.

Q. When you prepared amounts for deposit, did you prepare them in the manner as shown in S-24 for identification and S-25 for identification? A. I put the stamper on it.

Q. You put the stamper on? A. Yes.

Q. That is it here? A. Yes.

Q. You stamped them before you rolled them? A. No, after it was already rolled we put the stamp on it.

Q. On both of these the stamp "Wigler's Bakery" appears? A. Yes.

Q. These contain quarters, do they not? A. That's right, sir.

Q. After you prepared the deposit on the afternoon of December 16th, what did you do with the moneys? A. I put them in the safe.

Q. Did you put them in anything before you put them in the safe? A. No, I put them in the canvas bag and I locked them in the safe before I was ready to go home.

Q. You did put them in a canvas bag? A. Yes.

Q. I show you S-21 and ask you if that is similar to the canvas bag in which you placed them? A. Yes, it is.

Q. Now, would you describe to the Court and jury the layout of this office you have there in the bakery and where it is in proximity to the rest of the bakery? A. There are two desks in the office. One belongs to Mr. Wigler and one belongs to me. My desk faces the window, in which we have Venetian blinds there, and the door is right next to the window. It is a very small office. The safe is in there and the desks and about three chairs.

Q. As you come in the door of the store from Prince Street you walk into a bakery, do you not? A. That's right.

Q. I don't mean where you bake things but where you have showcases. A. That's right.

Q. There are showcases running along both sides? A. That's right.

Q. At right angles to the sidewalk; is that correct? A. Yes.

Q. As you come in the door and walk down between these showcases, where is the entrance to the office? A. There is a mirror as you walk in the store, and right alongside the mirror there are two steps which lead into the office. You can see yourself in there if you really want to look in it.

Q. But it is behind the counter on the right, is it not? A. That's right.

Q. In this office in the direction of the front of the store what is there there in the way of doors and windows? A. There is just one door and a small window with Venetian blinds on the window.

Q. The window has Venetian blinds? A. That's right.

Q. Directing your attention to December 16, 1946, when you were preparing this deposit, do

you recall whether or not the door was open? A. No, the door was closed, and the Venetian blinds were down, closed.

Q. So that nobody could see into the office what you were doing; is that correct? A. That's right.

Q. Directing your attention specifically to the afternoon of December 17, 1946, did you see Mortimer Bateman? A. I did.

Q. About what time did you see him? A. About quarter to two.

Q. Where did you see him? A. He was in the office, and I gave him the money bag to go down to the bank to make the deposit.

Q. Was there anyone else present when you gave him the money bag? A. No.

Q. Where did you get the money bag from? A. I went to the safe and opened the safe and took out the money bag.

Q. Did you see what he did with the money bag after he left the office? A. Before he left the office I told him to bring back some change which we needed for the bakery, and I gave him $300 from the office and he went directly to his truck.

Q. Did you see him go to his truck? A. Yes, I did.

Q. You watched him? A. I did.

Q. Did you see him get in his truck? A. I did.

Q. Can you tell us approximately what time it was? A. It was exactly—well, approximately between—say about 17 minutes of 2.

Q. Did you see the truck leave? A. Yes, I did.

Q. That is the last time you saw Mortimer Bateman? A. That is the last I saw Mortimer Bateman.

Q. Did you notice what direction the truck went when it left? A. It went south.

Q. That is to— A. Toward Springfield Avenue.

Q. That is north, isn't it? A. I am sorry. Is it north?

Q. In other words, as you come out of the store he went what would be the righthand direction? A. That's right.

Mr. Congleton: I think we can agree that is north.

Mr. Foley: I agree to that.

Q. Did you notice how Mortimer Bateman was dressed that afternoon? A. Yes.

Q. How was he dressed? A. He had his old working clothes on and put on his sheepskin jacket.

Q. I show you a sheepskin jacket and ask you if you recognize that. A. I do.

Q. What is that? A. That was his sheepskin jacket that he wore.

Q. He had that on that afternoon? A. He put that on when he left for the bank.

Mr. Congleton: I ask that it be marked for identification.

(The sheepskin jacket is marked Exhibit S-26 for identification.)

Q. After Mortimer Bateman left at what you think was approximately 17 minutes before 2, did anything out of the ordinary occur thereafter that afternoon? A. Yes.

Q. What was it? A. Well, a policeman came into the office.

Q. Do you recall about what time it was that the police came to the office? A. Approximately 2 o'clock or a couple of minutes after.

Q. I assume he talked to you and you talked to him? A. Yes.

Q. Did you do anything after talking to the police officer? A. Mr. Wigler walked in at the time, and he had me go to the Federal Trust to find out——

Q. Don't tell us why, but you went to the Federal Trust? A. I did.

Q. Did you stay there? Thereafter, I assume, the policeman left; is that correct? A. Yes.

Q. Did you stay there the rest of the afternoon? A. Yes.

Q. Thereafter that afternoon did anything else occur? A. I got a call from the Union police.

Q. About what time was that when you got that call from the Union police? A. About 2:30.

Q. You continued to work there the rest of the afternoon? A. That's right.

Mr. Congleton: Cross-examine.

Mr. Foley: No questions.

MAX BOMWELL, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Bomwell, where do you live? A. 185 Kimberley Road, Union.

Q. What is your business, sir? A. Battery service station.

Q. Where is your place of business? A. 13th Avenue and Wickliffe Street.

Q. What type of business is it? A. Automobile and service station; batteries and gasoline.

Q. Are you the proprietor? A. I am, sir.

Q. Now, Mr. Bomwell, I show you S-12 for identification and ask you if you recognize what that is. A. Yes, I do.

Q. Will you keep your voice up? A. That is my store at the corner of 13th Avenue and Wick-
10 liffe Street.

Q. Now, directing your attention in this photograph specifically to the gasoline pumps that appear out there and also directing your attention to them on the afternoon of December 17, 1946, were those gasoline pumps there that day? A. Yes, they were.

Q. In the position as indicated in this picture? A. That is correct.

Q. Showing you S-13 for identification, do you
20 recognize what that picture is? A. Yes, that is the second and third houses past the store.

Q. Will you keep your voice up, please. A. Yes, sir.

Q. That is your store over here? A. At the corner; that is correct.

Q. And again directing your attention to the gasoline pump that appears there and the top of one that appears there, and specifically directing your attention to the afternoon of December 17,
30 1946, were those gasoline pumps in that position on that day? A. Definitely, yes.

Mr. Congleton: I offer the two pictures in evidence.

Mr. Foley: I have no objection.

(The pictures referred to are received in evidence as Exhibits S-12 and S-13.)

Q. Mr. Bomwell, do you remember the after-
40 noon of December 17, 1946? A. Yes, I do.

Q. Where were you that afternoon? A. I was standing on the Wickliffe Street side, right by the pump, on the outside of the store.

Q. About what time? A. Roughly, I would say, about 1:30.

Q. About what time? A. Approximately 1:30 I imagine.

Q. Showing you Exhibit S-12, can you put an "X" and your initials approximately where you were standing, as you say it was, about 1:30 on the afternoon of December 17th? A. (The witness marks exhibit.)

Q. As you were standing there did anything attract your attention? A. Yes. There was a sound that sounded like the backfire of an automobile, and that in itself did not attract my attention half so much as the scuffle that took place or appeared to take place inside of a truck.

Q. Now, you say a scuffle? A. Yes.

Q. You did not see any scuffle? A. No.

Q. But you heard noise? A. Correct.

Mr. Foley: Just a minute. If your Honor please, I move to have stricken from the record the witness' statement that something took place which appeared to be a scuffle inside the truck. It now appears in evidence that this man did not see the scuffle, and so when he says that it was something which appeared to be a scuffle, he is testifying to a conclusion. He did not see it; therefore, it could not have appeared to be a scuffle.

The Court: I think that is correct. Probably the witness means something different by the word *appeared* than would naturally appear that he meant.

Mr. Foley: May I have stricken that part of his testimony in which he says something took place which appeared to be a scuffle?

The Court: Strike it out.

Q. What did you hear. A. It sounded like men fighting inside of a truck, the moving of feet, the throwing of bodies against part of the inside of that truck.

Mr. Foley: If your Honor please, that obviously is a conclusion. One cannot tell from a particular sound within a vehicle what causes the sound—the sound that sounded like men wrestling or struggling within a truck, or the kicking of their feet. Certainly it is that unusual sound that one could not very well characterize. He could hear a sound, to be sure.

The Court: He said it sounded to him like that. That is what he said.

Mr. Foley: I submit, if your Honor please, it is a conclusion which a witness is not permitted to draw, because it is obviously a conclusion which is arrived at as the result of subsequent knowledge.

The Court: Well, I wouldn't want to say that—not necessarily.

By the Court:

Q. Are you testifying to what it sounded to you like at that particular time? A. Yes, sir.

Q. At the time you heard it? A. Correct, sir.

The Court: I think I will allow it on that basis.

Mr. Foley: I pray an exception.

By Mr. Congleton:

Q. When you heard this sound did you make any observation? Did you look anywhere? A. Yes, I looked back toward the truck, and I noticed the truck there.

Q. Just a minute. You looked toward a truck? A. Towards that truck.

Q. Where was the truck? A. That truck would have been in the center of the street at approximately——

The Court: Let us see where this sound came from. He hasn't told us that yet.

Mr. Congleton: I appreciate that, sir.

Q. You heard a noise? A. Yes.

Q. Correct? A. Yes.

Q. Did you make an observation south on Wickliffe Street? A. Yes.

Q. What did you see? A. There was a truck parked there without a driver.

Q. Is that the truck from where those sounds seemed to come? A. That is where they came from.

Q. I think you said this truck was approximately in the center of the street. A. That's correct.

Q. About how far down Wickliffe Street was it from where you were standing? A. I would say approximately fifty feet from the store.

Q. As you looked at that truck, did you see anyone in it? A. There was nobody in the driver's seat of the truck at the time.

Q. You couldn't see anybody in the truck? A. No, sir.

Q. Did you continue to observe that truck? A. Definitely.

Q. What happened thereafter that you saw or heard? A. Then one of the—there was a man that came out of the truck and got into the driver's seat.

Q. When you say got out of the truck, what do you mean? A. From the inside of the truck.

Q. He came from the inside of the truck? A. He came from the inside of the truck into the driver's seat and started to start that truck up and drive past me where I was standing.

Q. Now, could you tell who that man was? A. I could at the time. I couldn't now.

Q. Could you describe him at all? A. The only description I could give was the type of gloves he wore and the hat he wore at the time.

Q. You couldn't tell how he appeared? A. I would say clean cut, if that is what you mean.

Q. What race was he a member of? A. The colored race.

Q. You could observe that he was a colored man? A. Yes.

Q. Did this truck come in the direction of——

By the Court:

Q. The man you saw was the man that got into the truck? A. The man came from inside the truck.

Q. He came from inside the truck? A. Yes.

By Mr. Congleton:

Q. That man never got out of that truck into the street, did he? A. No.

Q. You mean he came— A. He came from the inside of the truck and sat down in the driver's seat.

Q. And as this truck approached you did you notice anything about it that was unusual? A.

Yes, there were two shots—one or two shots fired, and while I couldn't see who was doing the shooting I could see a puff of smoke as each bullet went off.

Q. You saw a puff of smoke on each occasion when you heard this noise? A. That's correct.

Q. How much could you see inside that truck? A. Just in the driver's compartment, just where the driver was sitting.

Q. How were you able to see into the driver's compartment? A. The door was wide open.

Q. The door was wide open? A. Yes.

Q. That would be the righthand door? A. On the righthand side.

The Court: I am not clear on that.

By the Court:

Q. You first spoke of a noise which you said sounded to you like the backfire of an automobile. A. That is correct, sir.

Q. You later said that you heard two shots. A. That's correct.

Q. Did you hear those two shots before this man took his seat in the driver's seat or after? A. After.

Q. After? A. After he was in the driver's seat, yes, sir.

By Mr. Congleton:

Q. After this man had taken his place in the driver's seat did he start the truck? A. He started the truck.

Q. Did it come in your direction? A. That is correct.

Q. Was it after the truck was moving that you heard these other two shots? A. Yes.

Q. And saw the puffs of smoke? A. Yes.

Q. And that truck then proceeded to pass you? A. Yes, it passed me.

Q. About how far from you was it when it passed you? A. I should say approximately twelve feet.

Q. There was nothing between you and the truck? A. Nothing, no, sir.

Q. The right hand door, that is, the door on your side of the truck, was open? A. That is right.

Q. I show you Exhibit S-17 and ask you if you know what that picture represents. A. That is the truck that was involved in the case.

Q. Is that the manner in which the door was open? A. That is correct.

Q. I show you S-18 and ask you if you recognize that picture. A. That looks like the same truck.

Q. Is that the manner in which the door was open? A. The door was wide open.

Q. As the truck got up close to you were you able to see anything inside that truck? A. There was a foot of a man that appeared to be stretched out lying on the floor of the truck.

Q. It was not the foot of the driver you saw? A. It was not the foot of the driver; no, sir.

Q. Can you tell us what you saw of that foot, how much of it you saw? A. I would say approximately a foot; say about twelve inches of the leg itself.

Q. Did you notice in which direction the toes of the foot were pointing? A. They were pointing upward.

Q. Thereafter the truck continued on? A. It continued straight ahead.

Q. When it went by you about how fast was it moving? A. Just crawling along in first gear.

Q. Did you observe it cross 13th Avenue? A. It did; that's right.

Q. In what direction did it go? A. In a northerly direction.

Q. What did you do then? A. I immediately called the police.

Q. After this truck had passed was anything given to you by anyone? A. Yes. Between the time I called the police and the time they arrived there was a gentleman brought a hat up to me.

Q. Do you know who that gentleman was? A. I don't remember; no, sir.

Q. He brought a hat up to you? A. Yes, sir.

Q. What did you do with that hat? A. I put that on the portable, the gas portable on the truck, of my tank outside, until the police arrived, and then I gave them the hat.

Q. When you gave them the hat did you mark your initials in the band of the hat? A. Yes.

Q. I show you on the band of the hat the initials M.B. A. That's right.

Q. Is this the hat you gave the police? A. That's correct.

Q. And this is the hat the man gave you? A. That's correct.

Mr. Congleton: I ask that it be marked for identification.

(The hat referred to is marked Exhibit S-27 for identification.)

Q. You say you went in and immediately called the police. A. That's right.

Q. Did the police come? A. They did.

Q. About how long was it afterwards, after you placed your call, that the police arrived? A. Within a question of minutes, I should say.

Q. I suppose you told them what you told us. A. That's correct.

Q. Thereafter they left your place of business? A. That's right.

Q. As this truck passed you that day did you observe anything painted or printed on the side of the truck? A. Outside of the name of the company.

Q. What was the name of the company? A. Wigler Bakery Company.

Q. You observed that on the truck? A. Yes.

Q. You gave that information to the police; is that correct, sir? A. That's correct.

Q. As this truck passed you and you observed through the door the man behind the wheel, were you able to observe in what position his hands were? A. Yes.

Q. Where were his hands? A. Both of his hands were on that wheel.

Q. I think you said something before about gloves. A. That's right. He had on a pair of brand new gloves, light shade of gloves.

Q. On the man's hands that was driving? A. On the man's hands that was driving.

Q. Was it before or after or at the time that you heard these shots that you observed this man with his hands on the wheel? A. The hands were on the wheel driving while these shots were taking place.

Q. After the truck passed you did not hear any further shots? A. I did not, no, sir.

Mr. Congleton: Cross-examine.

Cross-examination by Mr. Foley:

Q. I understood you to say that when you first noticed the truck it was some distance away from you. A. That's right. Fifty feet.

Q. How far from where you were standing? A. Approximately fifty feet.

Q. Had you been out on the sidewalk for some time before that? A. I was out there, yes.

Q. Did you notice the truck approach that way? A. I did not.

Q. The first time you saw it it was standing still? A. The first time I saw it it was standing still, that's right.

Q. You heard a noise which you thought was backfire? A. That's correct.

Q. Was that noise which you thought was backfire the same as the noise which you subsequently heard? A. That was the same noise I heard as the truck was passing, that's right.

Q. And that was the noise which you say you thought was backfiring? A. That is the noise.

Q. How long did the truck remain standing in the street? A. From when I first observed it? A very, very short time. Less than a minute, I would say.

Q. Less than a minute? A. That is correct.

Q. During that minute you heard some noises from within the truck? A. That is correct.

Q. You have said that it sounded like men struggling inside the truck. A. That is right.

Q. It sounded like a man kicking his feet against the truck? A. That's right.

Q. Had you ever before heard men struggling inside a truck? A. Have I? Yes, I have.

Q. Many times? A. Quite often.

Q. Well, how often have you heard men struggling inside a truck? A. Well, may I answer that in my own way, sir?

Q. No. Just please answer the question. A. Well, the reason I asked that is because I am in

the gas business, and quite often a truck will pull up with several young fellows in the truck.

Mr. Foley: If your Honor please, I am entitled to have my question answered without any side explanations to your Honor.

Q. How often have you heard men struggling on the inside of a truck? A. Quite often.

Q. Times running into the hundreds, would you say? A. I would, yes.

Q. There have been hundreds of occasions when you heard men wrestling and struggling inside a truck? A. That is correct.

Q. You do not describe this as a struggling inside a truck because you subsequently learned of what happened, do you? A. No, I do not.

Q. Even if you had never seen the truck again from that time until this you would still say because of your lengthy experience in listening to men struggling inside of trucks that that is what was happening? A. That is correct.

Q. When you heard this backfiring and then knew that some sort of struggle was going on inside the truck, didn't it occur to you that something was wrong? A. Yes.

Q. Notwithstanding that you say that you stood there for about a minute watching what was going on? A. That is correct.

Q. You were, you say, fifty feet way? A. Approximately that.

Q. How far would you say it is from where you are to the back of the courtroom?

The Court: He means to the door.

A. To the door. I know where he means. Well, I would say about this distance. I will say this is approximately fifty feet. I may be wrong or right.

Q. Although you knew that men were struggling inside the truck you made no effort to go over to the truck? A. No, none whatsoever.

Q. You just stood there perfectly still? A. I beg your pardon?

Q. You stood there perfectly still? A. Perfectly still.

Q. You made no effort to get any help? A. No effort at all.

Q. Or made no effort then to call the police? A. No, I did not.

Q. Having in mind the position of the truck standing out in the middle of the street and having in mind this struggle which you were so fully aware of, did you then think that this backfire might have been a shot? A. No, I didn't realize what that was until the truck pulled close to me. Then I could see the puff of the bullet, so to speak, and then I realized what that first sort of backfire was.

Q. It did not occur to you that somebody might have been shot in the course of this struggle? A. I realized what might have been when I saw that leg stretched out.

Q. But at first you didn't think of it? A. I didn't have any reason to realize what was taking place.

Q. Two men struggling in a truck standing out in the middle of a public highway is a rather unusual thing, isn't it? A. Yes and no. It is not uncommon for trucks of that type to be parked in the middle of the street when they make deliveries. It is very common.

Q. Is it not very uncommon for men to be struggling within trucks? A. I did not say struggle. I said scuffle. There is a difference.

Q. Will you tell us the distinction that you draw between a scuffle and a struggle? A. Yes.

Q. Tell us. A. In a suffle I would use the distinction that in a scuffle it is where men were fooling around or pushing each other in a friendly or joking fashion, rather than struggling, where it is with an intention to do somebody bodily harm. I would differentiate it that way.

Q. So although you could hear these bodies or some bodies scuffling within a truck and you could hear feet striking the side of the truck, it was your impression that this truck was parked out in the middle of the street and that a couple of people were inside of it just fooling around? A. I imagined so. That is what drew my attention to it, was that noise inside the truck.

Q. That is what you thought was happening? A. That is what I thought was happening.

Q. When you saw this man or a man come from within the truck and take his position behind the driver's seat, was this scuffle still in progress? A. No.

Q. It had stopped? A. It had stopped.

Q. Everything was quiet? A. Quiet.

Q. Did the man have any difficulty getting the truck started? A. Not too much difficulty, no.

Q. Did he have any difficulty, I ask you. A. No, I don't think he did.

Q. The truck started right up? A. The truck started right up and he just drove on.

Q. Was the truck standing or moving when you heard the second of these noises? A. Do you mean the shots or the—are you talking about the shots now? The truck was moving at the time.

Q. I am talking about the noises you heard, whether they were shots or backfires. A. About the first one?

Q. I am talking about the second one. A. The second one. The truck was moving at the time.

Q. How far away from you was it then? A. I would say approximately five feet. Not much more.

Q. When the truck started up did it come directly down the street or turn to the left or right? A. I would say directly down the street.

Q. It had been standing in the middle of the street? A. Approximately in the middle.

Q. And it came directly down the street? A. Yes.

Q. And it came within five feet of where you were standing? A. When you say five feet, I mean it was five feet back, not from the curb.

Q. Back from where? A. From where I was standing.

Q. You mean extending the line across the street from where you were standing, five feet back from it? A. That is correct.

Q. And at that time when the truck was some distance to your left, that is, at an angle from you out in the middle of the street and five feet back from the corner, you were not able to see inside the truck, were you? A. I was able to see when that truck was approximately five feet from me. I was able to see.

Q. When the truck was five feet to the left of an extended line across the street, you were able to see? A. Yes.

Q. Don't you know that that truck door opens with—or, rather, that the hinge of the door is on the righthand side of the door as you face the truck? A. In other words, when the door opens it opens toward the motor, toward the front.

Q. Yes. Do you know, too, that the door does not open beyond a right angle? A. I am not so sure of that.

Q. Do you think the door was completely open so you could see in the whole doorway? A. I would say yes, at that time.

Q. In other words, this door when opened was resting back against the fender? A. Against the fender. Pretty close to the fender if not on it.

Q. If it were not close back to the fender, from the position in which you were standing you couldn't see inside the truck, could you?

Mr. Congleton: I object to that as argumentative.

The Court: I will allow the question.

(The pending question is read by the Court Reporter.)

A. I can't answer that question. I don't know what could have been.

Q. If the door were open at right angles to the body of the truck and was any distance to the left of you the door itself would have obscured your view inside the truck in so far as the floor of that truck was concerned.

Mr. Congleton: I object to that on two grounds. First of all, it is argumentative. Secondly, there has been no testimony that this man has ever made any subsequent examination of this truck as to how far this door opens. He testified as to what he saw that day and the position the truck was in. And I submit that it is an unfair line of cross-examination to ask about—if the door were here. We have pictures that are in evidence, and the pictures show that they are taken from an angle more than five feet forward of the door.

Mr. Foley: If your Honor please, there is no evidence of that, and counsel cannot state that that is the fact. I do not agree that they are taken at an angle more than five feet from the door at all, but certainly there is no evidence of that.

Mr. Congleton: They are in evidence.

Mr. Foley: That is true, but this is cross-examination. Your statement as to where the pictures were taken from is not in evidence.

The Court: Excuse me. Will you read that question?

(The pending question is read by the Reporter.)

The Court: I think that is argumentative. I think the witness is called upon to state the position of the door, and what could be seen in that position I think is a conclusion that can be drawn by one person as well as another.

Mr. Foley: I pray an exception.

Q. Mr. Bomwell, I show you Exhibit S-17 and ask you whether or not the door of this truck was further open than it appears on here at the time you say you looked inside the truck. A. The first time that I saw the truck, when it was close to me, it was open approximately that way, I would say.

Q. Having looked at that picture do you say that standing in the position in which you were you could see inside the truck when that truck was to your left? A. When it was approximately 5 foot to the left, in the center of the street, where that truck was, definitely I could see in there. I could see the floor board here. I could not see inside the panel.

Q. Could you see the floor board of the truck—any part of the floor board? A. Yes, definitely.

Mr. Congleton: I assume these questions of Mr. Foley, "Could you?" are directed to the afternoon of December 17.

Mr. Foley: Did you?

The Court: Certainly. We are discussing a particular time.

Mr. Foley: That's right, sir. That is what I have in mind.

By the Court:

Q. He referred to the time of the happening. You understand that? A. Definitely.

By Mr. Foley:

Q. Where was this smoke you saw? A. Inside the truck itself, closer to the, I would say, closer to the driver's seat but inside of the truck.

Q. You mean behind the driver's seat? A. That's correct.

Q. And in order to see a point behind the driver's seat did you have to look through the windshield of the truck? A. No, I did not. By the time the second shot was fired, that truck was definitely parallel with that so-called line. I could see the smoke of that so-called first shot and the smoke of that second shot.

Q. You don't know which shot, if either shot, the smoke came from, do you? A. There were two shots fired as the truck was practically close to me. The puffs of smoke from those shots I heard or saw.

Q. That is your conclusion. You heard two noises and saw two puffs of smoke? A. That's right.

Q. Do you mean to tell us that the smoke you saw was behind the driver's seat? A. It was behind the driver's seat. When I say "behind" I mean in the back or inside of that truck, not necessarily behind the driver's seat.

Q. Here is the driver's seat. A. That's right.

Mr. Foley: I am referring now to S-7.

Q. This is the body of the truck behind the driver's seat. You saw this smoke back in here? A. No, the smoke wasn't there.

Q. Show us where you saw the smoke. A. The smoke was right here, closer to this part here, within a foot or so back.

Q. Do you mind, if you will—I don't want to make a mark for you—just making a circle showing the area of this smoke? A. I would say it was somewhere around here.

(The witness marks on Exhibit S-7.)

Q. You indicated a moment ago it was over here. A. This is about where it would be on the scale.

Q. Did you see two separate puffs? A. Two separate puffs of smoke.

Q. Both there, or were they in two different places? A. That I couldn't say. I don't remember.

Q. And this smoke you saw standing out on the sidewalk? A. That's right.

Q. You have in mind, have you not, that the smoke was some distance beyond the line of the back of the driver's seat? A. That's right.

Q. Somewhere back in? A. That's right.

Q. I call your attention to this photograph. There is the driver's seat. A. That's right.

Q. So that this smoke you saw, you saw back in here somewhere? A. Just about behind this driver's seat. Within one foot of the back of that driver's seat is where I saw the puffs of smoke rising.

Q. But you didn't see it on the driver's seat side of the car but you saw it on the other side? A. Not on the driver's seat side. This part back here.

Q. Here is the driver's seat here, referring to Exhibit S-17. Then you extend the line of the driver's seat across and somewhere back in here? A. That's right.

Q. Somewhere back in here you saw the smoke? A. That's right.

Q. And you were standing out on the sidewalk? A. That's right.

The Court: Mr. Foley, I don't want to interrupt your cross-examination, but I believe we have lost sight of the fact that it is about 12 minutes to 5.

Mr. Foley: I have, but at the same time I feel since I had undertaken this cross-examination I should continue it, but I might say to your Honor that I have quite a bit more, and I would prefer to suspend now if your Honor doesn't mind.

The Court: I hate to interrupt you, because sometimes counsel prefer not to be interrupted in the middle of their cross-examination.

Mr. Foley: I would just like to ask one more question now.

The Court: All right.

Q. Will you indicate on this picture the point inside the truck where you saw this smoke, which

would be opposite to this exterior view? Do you know what I mean? A. I think I know what you mean. I would say down about here, just about inside that. (The witness marks on the photograph.)

Mr. Congleton: May I ask how that is marked?

Mr. Foley: It is marked with an "X".

Mr. Congleton: Will you mark that "Smoke" or initials or something so that we don't get it mixed up with some other marks?

The Witness: Very well.

(The witness marks on the photograph.)

Q. The place which you have indicated now is not a point beyond the driver's seat but forward of the driver's seat. A. I am looking at a photograph.

Q. Yes, sir. A. This from all outward appearances appears to be opposite this window. But you can't depend on pointing it out on the photograph the way you could point out on an inanimate object.

Q. Do you still say that this smoke was on the righthand side of the truck? A. That is correct.

Q. At some point beyond, further to the rear, than the driver's seat? A. Definitely.

Q. How far beyond the driver's seat would you say the smoke was? A. Roughly I would say approximately 12 inches.

Q. About a foot beyond the driver's seat? A. Yes.

Q. So that if you could picture this driver's seat being on the righthand side of the car rather than on the lefthand side of the car and in the

same position with respect to that window, the smoke which you saw would be some twelve inches beyond where the back of that driver's seat stood on the righthand side? A. It would be twelve inches on the other side of the truck.

Q. And if this X which you have marked does not indicate a point twelve inches beyond the driver's seat, then you desire to have your testimony indicate that it was twelve inches beyond the driver's seat and not at the X indicating where the smoke was; is that correct? A. I don't know whether you are making it clear to me. This smoke is approximately twelve inches beyond the driver's seat. It may have been fifteen inches. I didn't measure it.

Q. But the X you put on there you intend to indicate as a point which is twelve inches within the truck beyond the driver's seat? A. Definitely.

Q. If the X does not happen to be in that position, then you would prefer to have your testimony that the smoke was twelve or fifteen inches beyond the driver's seat toward the rear stand in place of the X? A. Definitely, that's right.

Mr. Foley: If your Honor please, I would like to suspend at this time.

The Court: Very well. The jury may be excused until tomorrow morning at ten o'clock.

(Adjourned to Thursday, March 20, 1947, at 10 a.m.)

FOURTH DAY.

March 20, 1947

MAX BOMWELL, resumes the stand.

Cross examination continued by Mr. Foley:

Q. Mr. Bomwell, yesterday I asked you whether you had on other occasions heard a suffle inside of a closed truck and you told us that that was not an uncommon experience for you; that you had heard such occurrences on hundreds of occasions. A. Yes.

Q. In the course of my examination of you, you took exception to my use of the word struggle and said that what you meant was scuffle. A. That's right.

Q. And you drew a distinction between a scuffle and a struggle, your distinction being that in the case of a scuffle you had in mind that there were men playing or wrestling—playing, you said, inside a truck. A. That's right.

Q. Do you draw the same distinction between the word scuffle and the word fighting? A. If I were in a position to observe—if I were in a position to observe, I naturally would make a distinction, but I can't see what is taking place inside of a truck.

Q. So that you were not in a position to observe, and so would you characterize what was going inside the truck as fighting or scuffing? A. I used the term scuffle.

Q. Not fighting? A. I couldn't see to determine whether it was a fight or not.

Q. Let me call your attention to your testimony on direct examination. That is the examination by Mr. Congleton. Mr. Congleton asked you this question:

"Q. What did you hear? A. It sounded like men fighting inside of a truck, the moving of feet, the throwing of bodies against part of the inside of that truck."

That is what you testified to, isn't it? A. The moving of feet and the—yes, it could be a scuffle.

Q. Did you testify in answer to the question that I have just read to you that it sounded like men fighting inside of a truck? A. Right.

Q. You did not mean to say that, did you? A. I should not have used the term fighting.

Q. Now, Mr. Bomwell, you are well aware of the importance of your testimony in this case, are you not? A. Yes, sir.

Mr. Congleton: I object to that question, if the Court please.

The Court: He has answered it. I will let it stand.

Q. You realize, do you not, that if your testimony is believed you will have established, first, that three shots were fired in your presence?

Mr. Congleton: I object to that, if the Court please.

The Court: Is that the end of the question?

Mr. Foley: Yes, sir.

The Court: I think I will sustain that.

Mr. Foley: I pray an exception. Of course, your Honor has ruled. May I say a word as to why I think it is a proper question?

The Court: All right, I will be glad to hear you.

Mr. Foley: If your Honor please, this witness——

Mr. Congleton: If the Court please, I don't want to stop Mr. Foley, but I think perhaps this argument should be at side bar.

Mr. Foley: I don't see any reason for having it at side bar. I am not going to say anything which will prejudice your case.

Mr. Congleton: Nothing will prejudice our case.

Mr. Foley: Then why should you be concerned about the conversation being at side bar?

Mr. Congleton: Because I think it might be a summation.

Mr. Foley: May I be heard?

The Court: You mean on which question —this question raised by the Prosecutor that he thinks the argument should be at side bar? The main question is a different question. That is whether or not this is a proper question. I am disposed to think it is not, but I will be very glad to hear counsel on the subject, because I might very easily be mistaken about it. My feeling is that it is not a proper question, and I am disposed to rule that way, but in order to avoid any possibility of mistake on the subject, I will be glad to hear counsel, but I will hear him at side bar. I think I would rather have this in chambers.

(The following takes place in the Court's chambers:)

The Court: I will tell you how it appears to me. The reason I am disposed to sustain the objection is that it tends to intimidate or, you might say, browbeat the witness. I

know Mr. Foley does not intend anything of that sort; that is not his makeup. But I am afraid that is the effect of it. The witness has testified, and if you put an additional strain on him, indicating to him that he is responsible for a human life, it may have an influence to vary his testimony from what he actually thinks. That is my feeling about it. I don't know whether that is the basis of the Prosecutor's objection or not.

Mr. Congleton: Well, I didn't think that the question was proper for that reason, and also for the reason that it is argumentative and it calls for a conclusion. And I don't think that it goes to the facts that this man has testified to.

The Court: Yes. Well, I think that is a very good point, too; namely, that it starts an argument in debate with the witness.

Mr. Congleton: That is correct, sir. It calls for a conclusion on his part.

The Court: Well, the conclusion called for is whether he is aware of the fact that his testimony is important; and, furthermore, whether he is aware of the fact that the summation of his testimony is as Mr. Foley puts it. That is what it comes to.

What do you say about it, Mr. Foley?

Mr. Foley: If your Honor please, first of all, I desire to tell your Honor that I am by this question laying a foundation for something which I shall do hereafter. Specifically, the foundation I am laying is this: I want to find out from this man if he realizes the importance of his testimony, and then I intend to ask him whether or not he

made a statement to either the police or to the Prosecutor's Office. If he did, I intend to ask him whether or not he has refreshed his recollection from that statement.

The Court: Well, that, I think, is entirely proper.

Mr. Foley: Very well. If it then develops that what he said in the statement is different from what he has testified to, I intend, if I am permitted to have this question answered, to ask him how it happened that that which he understands to be important and perhaps crucial did not appear in the statement which he had made to the police or to the Prosecutor's Office. In other words, I feel that before going into that question I should foreclose the situation where if it is developed that there is a discrepancy between his testimony and his previous statements that he cannot give me the answer, "Well, I didn't think it was important." I want to establish in the first instance that he knows it is important.

Mr. Congleton: May I answer that?

I don't want to interrupt you. Are you finished?

Mr. Foley: Yes.

Mr. Congleton: May I ask how you determined whether or not what he testified is the same as he gave in the statement?

Mr. Foley: We will come to that by a comparison of his testimony with the statement.

Mr. Congleton: Have you the statement?

Mr. Foley: I don't have the statement, but I intend to ask for it. I can't ask ten questions at once. We can only move along

from step to step. But you can readily see that if I should go into this and if I should be permitted to have the statement, if there is a statement, and if it should appear that there is a discrepancy between the statement and his testimony on important matters—the number of shots, who fired the shots, where the shots were fired—and he should then say, "Well, I would have told the police that," or "I would have told the Prosecutor's Office that if I thought it was important," I am in a very unhappy position, because I cannot then get him to say that he realizes it was important. So that I should like to establish his knowledge of the importance of it, so that he may not then take as an excuse the thought that it was not important.

Mr. Congleton: If the Court please, I might just as well say this while we are in chambers, because this is one of the situations that develop out of only one man being present instead of two.

If your Honor were prone to go along with such a question, it must be remembered that when this man saw this and when, if he gave any statement, there were two people in the truck, there was no question of his having to determine one or the other or anything of that nature. He just told what he saw happen.

The Court: Well, there is really only one thing before me, the pending question.

(The pending question is read by the court reporter.)

The Court: I am disposed to sustain the objection.

Mr. Foley: I pray an exception.

The Court: And the rest that you propose we will pass upon when we get to it. I am inclined to agree with you, Mr. Foley, but there is another difficulty, and that arises in connection with this statement. Of course there is nothing before the Court to show that the man ever made a statement, but he will know whether or not he did or not.

Mr. Foley: I intend to find out.

(The following takes place in the courtroom:)

By Mr. Foley:

Q. Mr. Bomwell, there were only three reports or shots which you heard, were there not? A. That's right.

Q. At any time? A. That's all I heard.

Q. You realize, do you not, Mr. Bomwell, that your testimony that you observed one man seated behind the wheel with both of his hands on the wheel while two shots were being fired would, if believed, establish that someone other than he fired those two shots?

Mr. Congleton: I object, if the Court please, for the reasons heretofore stated.

The Court: Sustained.

Mr. Foley: And your Honor will permit me to have noted on the record the same argument I made in support of the other question which was argued in chambers?

The Court: Certainly.

Mr. Foley: And I pray an exception.
The Court: Certainly.

Q. Mr. Bomwell, where was the truck when you last saw it? A. When I last saw it, going toward West Market Street, going in a northerly direction.

Q. How far from where you were standing on the corner was the truck when you last saw it? A. I don't believe the truck was over five feet away from me when I went in to make my call to the Police Department.

Q. You say when you first observed smoke back inside the truck, the truck was about five feet to the north, would that be? A. That would be south.

Mr. Congleton: South.

Q. To the south of the extension of the line across the street from where you were standing? A. That's correct.

Q. How far would you say the door—the open part of the door—was from you at that time? A. I would say about 17 feet or 18 feet or thereabouts, more or less in the center of the street.

Q. The street is about 30 feet wide? A. That's right.

Q. And the truck was about in the center of the street? A. About in the center; five feet up; it could be a few feet.

Q. About how wide would you say the truck was? A. I wouldn't offer any opinion. I don't know.

Mr. Foley: We can establish that by actual measurement, I guess.

Mr. Congleton: I think you will find it is 6 feet or something like that. I had occasion to measure it.

Mr. Foley: That seems to be the widest point, Mr. Congleton, isn't it? 9 times 1½.

Mr. Congleton: That would be 6 feet.

Mr. Foley: No, it wouldn't be 9 times 1½.

Mr. Congleton: It is 6 feet. That would make a total of 9 inches.

Mr. Foley: Yes, it would be 6 feet.

Mr. Congleton: That's right. I think it might be taken judicial notice of that probably the worst people in the world with mathematics or figures are lawyers.

The Court: We don't raise any questions on that, I suppose.

Mr. Foley: I will accede to that statement.

Q. So that if the truck is 6 feet wide and the street is approximately 30 feet in width and the truck was riding in the center of the street, the righthand side of the truck would have been approximately 12 feet from the righthand curb. Is that right? A. That is correct.

Q. When you last saw the truck how far was the open door from you? A. Well, I would say about the same distance.

Q. From the time you first saw the open door and you first observed the smoke until the last time you saw the open door how far did the truck travel approximately?

Mr. Congleton: I object to that question, sir, for this reason: It includes two statements of fact that I don't believe are this witness' testimony. Mr. Foley said in his

question, "When you first saw the open door and saw the puffs of smoke."

Mr. Foley: I will reframe the question. Withdrawn.

Q. From the first time you saw the open door until the last time you saw the open door how far did the truck travel? A. I can't tell you. I don't know.

Q. Well, it wasn't very far, was it? A. No.

Q. It was only five feet from you; that is, five feet to the south of you, when you first observed the open door? A. That's right.

Q. It was only five feet to the north of you when you last saw it? A. That's right. Say, 10 feet.

Q. About 10 feet. Now, of course, after the open door had passed your line of vision you could no longer see back into the truck, could you? A. No.

Q. So that your opportunity for seeing inside the truck was limited to the 5 feet of distance that it traveled from the time you first could see in the truck? A. That's right.

Q. Until— A. Until it came into a direct line.

Q. Even before it came into a direct line you would no longer be able to see into this side of the truck, would you? A. What do you mean, even before?

Q. Even before the truck came directly in front of you, you could not look into this side of the truck as it approached you; you couldn't see inside the truck, could you? A. Yes, you could.

Mr. Congleton: If the Court please, I must object to this question.

Mr. Foley: He has answered.

Mr. Congleton: Well, all right. I still would like to state my objection.

Mr. Foley: If your Honor please, is counsel moving to strike the answer?

Mr. Congleton: No, sir.

Mr. Foley: The question has been answered.

Mr. Congleton: I think I made my objection timely. I think I have a right to——

The Court: I think your objection was timely. The witness answered the question, notwithstanding.

Mr. Congleton: He keeps talking about——

The Court: (Addressing the witness): When there is an objection, will you please wait?

The Witness: Yes, sir. I am sorry, your Honor.

Mr. Congleton: I just want to avoid confusion. Mr. Foley keeps asking him about when this truck was in front of him.

The Court: Yes.

Mr. Congleton: Now, I think if we measure this truck we will see it is over 10 feet long. The witness said that he saw something 5 feet this side and something 5 feet this side. That would be the length of the truck. So I think we have to get down to the parts of this truck to make it clear.

Mr. Foley: All these questions have been directed to the open door of the truck. I have purposely limited the testimony to that. He said when he first saw the open door and could see inside the truck, the truck was 5 feet to the north of him.

Mr. Congleton: That is correct.

Mr. Foley: When he last observed the truck at all, which, of course, would include his seeing the open door, it was 5 feet to the south of him.

Q. That is your testimony, isn't it, sir?

By the Court:

Q. Well, are you referring all the time to the open door or are you referring to the truck as a whole? A. I am referring to the open door. In his question I had reference to the time that the door was on a straight line from 5 feet south to the straight line.

Q. Yes. A. The last time I saw the truck it was the end of the truck.

Q. Yes. A. Which was 5 feet past that line. That is what I meant. I don't know whether if that is what he is questioning me on.

By Mr. Foley:

Q. But you do say that after the door passed directly in front of you, of course, you could no longer see in back, inside the truck, so that your opportunity of seeing into the interior of the truck was limited to that time while the truck was traveling the 5 feet? A. 5 feet on the south are you speaking of now, until the straight line?

Q. That is right. A. More or less. You can see into the body of the truck even when it is a few feet to your right.

Q. You can't? A. You can, yes.

Mr. Congleton: He said you can.

Q. You can or you can't? A. You can. You can see inside the body of the truck, into the—

shall we say—the cabin part of the truck. You can see that if the door is still open.

Q. Well, now, the first time you could see into the truck at all was when the truck was five feet to the south of you? A. Then you could see part of the inside of the truck.

Q. That is the first time? A. Yes.

Q. And the last time you could see any part of the interior of the truck was when it had traveled five feet and come directly into line? A. When the truck was even five feet, the door part was even five feet to the right, you could still see inside the cab.

Q. But not inside the interior of the truck, the section of the truck to the rear of the driver? A. That's right.

Q. So your opportunity to see that part of the truck which was behind the driver was limited to some part of that distance of five feet from the time you could first look in until it came into a straight line? A. Approximately that.

Q. How fast was this truck going? A. I don't think I could estimate the mileage at the time. I don't think it was going over five miles an hour at the time.

Q. Do you know that an automobile traveling even five miles an hour travels approximately seven and a half feet a second? A. I don't know that.

Q. In any event, you do know that while this truck was traveling this five foot distance you had only the merest fraction of an instant within which to see inside? A. I had sufficient time to make all my observations.

Mr. Foley: I ask that the answer be stricken and I ask that the witness be instructed to answer that question yes or no.

(The pending question is read by the court reporter.)

The Court: I think the question itself was argumentative, and probably the witness' answer is in the same category, but inasmuch as they both stand on the same footing I will allow them both to stand.

Mr. Foley: I pray an exception.

Q. Is it not the fact that you had less than one second within which to see into the interior of the truck beyond the driver's seat and to make whatever observations you have testified that you did make?

Mr. Congleton: I object to that.

Mr. Foley: He can answer the question yes or no.

The Court: Isn't that a conclusion?

Mr. Congleton: That is my ground of objection. I did not have an opportunity to state it.

The Court: Isn't that a conclusion involving argument?

Mr. Foley: I don't think it is, sir.

The Court: The facts are his testimony, and if that is the result of it, why, it is as easily deducible by the jury as it is by a witness.

Mr. Foley: This is cross examination.

The Court: That is true. Nevertheless, it seems to me, as I said before, it is argumentative and calls for a conclusion from the testimony, and it seems to me that the jury are able to draw that, and I will sustain the objection.

Mr. Foley: I pray an exception.

Q. Was it during the time that the truck was traveling from where you first were able to see within the truck until it came in a direct line in front of you that you observed that the driver of it had both hands on the wheel and was wearing brand new gloves? A. Right.

Q. Weren't you at all excited by the sound of these shots? A. No.

Q. You were perfectly calm and cool? A. Yes.

Q. Well, at that time you realized that something very serious was happening, didn't you? A. As the truck came in line and I could see the upturned foot and I could see the puffs of the smoke, then I knew that something was radically wrong, and that is about when I made my call for the police.

Q. Was it before or after that that you made the observation of the man with the brand new gloves with both hands on the wheel? A. Before what? I don't quite follow that.

Q. Before or after you saw the outstretched foot that you made the observation of the man holding the wheel with both hands and wearing brand new gloves? A. I would say both at about the same time.

Q. Were you then excited? A. I wasn't excited.

Q. Not at all? A. Not at all.

The Court: Pardon me. Did the witness say he was wearing brand new gloves? I thought he said light gloves.

The Witness: That is correct, your Honor.

Mr. Foley: Brand new light gloves, was his testimony.

The Witness: They looked clean. They looked new.

Q. Did you become excited at any time thereafter? A. Yes.

Q. Mr. Bomwell, did you make a statement to the police of the City of Newark? A. I did.

Q. When did you make the statement? A. I believe after my 'phone call to the police, the radio car came up, and it was at that time that I gave them a statement.

Q. At that time was your mind perfectly clear as to what happened? A. At that time I might have been a little bit more excited than I was at any other time.

Q. Did you tell them everything that you knew about it? A. Everything that I thought I knew about it, yes.

Q. Did you tell them everything that you have testified to in this courtroom? A. To the best of my knowledge.

Q. Did you tell them that you observed two puffs of smoke on the inside of the truck? A. I believe I did.

Q. And did you tell them that you saw a man driving who had brand new gloves on and had both hands on the wheel?

The Court: Are you talking about the contents of the written statement or the verbal statement?

Mr. Congleton: There has been no testimony whether it was verbal or a written statement.

The Court: I don't think we want to have any confusion about it.

Mr. Foley: I will establish that.

Q. We are discussing a written statement, are we not? A. There were two statements given. Which statement are you referring to?

Q. There were two written statements, were there not? A. One statement that I believe I signed. That was one I believe was given to the Prosecutor's Office.

Q. In other words, you made one statement to the police of the City of Newark? A. That's right.

Q. And that was taken down in writing by the police officer to whom you gave it? A. Right.

Q. You don't know whether you signed that statement? A. I don't know whether that was signed. I don't think that was signed. I am not sure of that.

Q. That statement was given shortly after the police arrived? A. That's right.

Q. Subsequently you gave another written statement to the Prosecutor's Office? A. Yes.

Q. That statement was given when? A. I am not sure of the time. I think around the 26th of the month. I am not sure of the date at all.

Q. That statement you did sign? A. I believe I signed that statement, yes.

Q. Did you have the opportunity of reading or going over either of those statements before you came here in order to refresh your recollection? A. I did.

Q. Did you go over both of them in order to refresh your recollection? A. No.

Q. Which one did you use to refresh your recollection? A. I believe the one in the Prosecutor's Office.

Q. Have you ever seen the statement that you gave the police of the City of Newark from the time you gave it until now? A. I don't think I have; no, sir.

Mr. Foley: If your Honor please, in view of the fact that the witness has testified

that he used a statement to refresh his recollection before testifying, I now call upon the Prosecutor to produce that statement in order that I may examine it and see whether or not it contains facts sufficient to refresh his recollection to give the testimony which he has given.

Mr. Congleton: If the Court please, the Prosecutor's Office is here to present this case in a fair manner. Anything we have in our file that bears on the merits of this case, we are perfectly happy to call to the attention of the Court and jury. The written statement that was given was not given to the Prosecutor's Office, if you don't mind my testifying.

Mr. Foley: Your witness says it was.

Mr. Congleton: Then I cannot produce the statement you are asking for. He gave a statement to Lieutenant Wangner and Detective Norris of the Newark Homicide Bureau on December 26th. I assume that is the statement he is referring to.

Mr. Foley: He says he gave two statements.

Mr. Congleton: We have no preliminary statement. He must refer to the statement to the radio officers when they arrived.

The Witness: That is correct, your Honor.

Mr. Congleton: If the Court please, I have no objection to producing it, but if it is produced I feel it should go in evidence. The defense should not have an opportunity just to——

The Court: Wait a minute, Mr. Prosecutor. I think the situation is this:

If a statement is produced by anybody, whether it is the Prosecutor or anyone else, or a party, and handed to a litigant, that litigant is not, as I understand it, obliged to put that statement in evidence. But if a litigant comes to the Court and invokes the processes of the Court, and the statement is produced because of the pressure or authority or under the direction of the Court, then I understand the rule to be that it must be all put in evidence. Now, I don't know what the situation is here. I am uncertain whether you are producing your statement of your own volition or whether you are declining to produce it of your own volition and demanding that if it be produced it must be under the processes of the Court, which are, of course, available to the defendant as well as to the State.

Mr. Congleton: I am saying, in fairness to the State's case, I believe that the Court should order us to produce it, if that is what the defense counsel wants, so that it may go into evidence and the jury can have the benefit of it.

The Court: The Court is not going to order it unless you decline to produce it otherwise. You must exercise your opinion.

Mr. Congleton: I decline to produce it.

The Court: You can't put it up to the Court.

Mr. Congleton: I decline to produce it unless the defense council beforehand will agree to put it in evidence.

Mr. Foley: If your Honor please, so that the record may be perfectly clear, I under-

stand that Mr. Congleton states he has in his possession the statement which this witness used to refresh his recollection before testifying. Is that correct?

The Court: That is the way I understand it.

Mr. Foley: Is that correct, Mr. Congleton?

Mr. Congleton: I am sorry. I thought you were addressing the Court, and I wasn't paying attention.

(A previous statement by Mr. Foley is read by the court reporter, as follows: "If your Honor please, so that the record may be perfectly clear, I understand that Mr. Congleton states he has in his possession the statement which this witness used to refresh his recollection before testifying. Is that correct?")

Mr. Congleton: That is correct.

Mr. Foley: And I now request of your Honor that your Honor direct Mr. Congleton to permit me to examine this memorandum which was used by this witness to refresh his recollection before he testified.

The Court: Well, as I understand it, you ask to see it for the purpose of determining in your own mind the truth of the statement of the witness that he refreshed his memory from it.

Mr. Foley: Well, I wouldn't want to limit myself to that, if your Honor please. That is one thing that I want to ascertain. And if I find that this memorandum which he says he used to refresh his recollection does not contain information which would have

enabled him to testify to those things that he did testify to or that it should be established that it contained matter which is different from what he has testified to, then I should like to call that to his attention and have the jury learn that discrepancy between this memorandum which he used to refresh his recollection and the testimony which he gave.

The Court: Precisely. In other words, you wish to use the situation to ascertain whether or not amongst other things this memorandum does contradict the witness—at least, this statement does contradict the witness' testimony as he now gives it.

Mr. Foley: Among other things, that is true.

The Court: Among other things, yes. Well, the Court will rule this way: As I said before, if you invoke the authority and the order of the Court to produce the statement, the Court will direct its production. But if the Court does direct its production, the jury are entitled to see it in toto.

Mr. Foley: Well, I can only say in response to that, if your Honor please, that I believe that where any witness testifies that he used a memorandum, whatever it may be—his own memorandum or someone else's memorandum, a statement or whatever—to refresh his recollection before giving testimony, the adverse party is entitled to see that memorandum in order to find out whether it did in fact or could in fact refresh his recollection and thus enable him to testify, without being bound to make any demand for the production of it

and without being bound to put it in evidence.

The Court: I will agree with you, assuming that the memorandum is in the control of the witness . But the witness has no control over this memorandum; it is in the possession and the control of the law-enforcing agencies of the State. And if the Court intervenes and requires the law-enforcing agencies of the State to produce this memorandum, it must be under the rule that I have just stated.

Mr. Foley: I take it then that your Honor declines to direct the Prosecutor to furnish me with the memorandum which he says he has before him, and which this witness says he used to refresh his recollection.

The Court: You take it wrong. That is not the situation.

Mr. Foley: I am sorry, sir. I did not mean to misstate your Honor, to be sure.

The Court: I understand that, but that is not the Court's position. You can demand the production of this memorandum or statement, and you may demand the processes and power of the Court to produce it. The Court merely cautions you in advance that if you avail of that and it is produced, the rule is that it must go before the jury.

Mr. Foley: Well, I respectfully disagree with your Honor as to the law.

The Court: That is all right. I respectfully accept your disagreement, because I have a great deal of respect for your views.

Mr. Foley: And I pray an exception to your Honor's refusal to instruct the Prosecutor to make the statement available to me at this time.

The Court: I won't allow that exception because it is not consistent with the fact. The Court does not refuse. The Court, on the contrary, says it will do so if you ask for it. That is just the reverse of what you said.

Mr. Foley: Let me make my motion again, if your Honor please, and your Honor will rule upon it and we will keep the record straight.

I move, if your Honor please, that the Prosecutor be directed by the Court to produce the statement which he says he has in his possession which was used by this witness to refresh his recollection. I make this motion because the Prosecutor has stated that he will not produce this statement unless directed by your Honor to do so.

The Court: Motion granted.

Mr. Congleton: I here produce the statement.

The Court: Give it to Mr. Foley.

Mr. Congleton: I ask to have it marked for identification.

(The statement is marked S-28 for identification.)

Mr. Congleton: I have a typewritten copy here. (Hands paper to Mr. Foley.)

Mr. Foley: Thank you.

Q. I understand that you made a statement on the day of this occurrence and within a very short time after it occurred, is that right?

The Court: Let us understand this. Is this a written statement or verbal? I think there may be some confusion there.

Mr. Foley: I withdraw the question.

Q. Did you testify that you made a statement to the police of the City of Newark which statement was taken down in writing shortly after the occurrence which you have described? A. Yes, that's right.

Q. Where was that statement given? A. That statement was given in my store to the radio police who responded to the radio call.

Q. And you observed the radio officer write down what you said? A. I did not observe what he wrote, but I gave him the statement.

Q. But you saw him writing? A. That's right.

Q. How long did it take him to write the statement which you gave? A. Just a question of minutes, I imagine.

Q. And in that statement did you tell him what——

The Court: No. The best evidence of what the statement says would be the statement itself, wouldn't it?

Mr. Foley: I don't have it, if your Honor please.

The Court: Of course you don't, but you could get it.

Mr. Foley: Possibly.

The Court: At least the Court will certainly give you a subpoena *duces tecum.*

Mr. Foley: I would understand that your Honor would give me a subpoena.

Mr. Congleton: If I may interrupt, so that there will be no misunderstanding by either your Honor or the jury, I do not have any such statement in my possession.

The Court: I know you don't. At least you said so heretofore.

Mr. Foley: I am sure that if Mr. Congleton says so, it is true.

The Court: We all agree to that. What we have told now is that the radio police took down something in writing and that is what Mr. Foley has in his mind, not something that the Prosecutor has in his possession.

Mr. Congleton: I have the radio police here, sir, and they will be witnesses.

The Court: Yes, the police are here now.

Mr. Foley: Would the radio police stand up?

(Two men stand up in the courtroom.)

Q. Are those the two gentlemen to whom you gave the statement? A. That's correct.

Q. Which one of them wrote the statement down? A. I don't remember that.

Q. Either one or the other? A. That's correct.

Q. At that time did you tell those officers that you heard a scuffle in the truck while the truck was standing still? A. I believe that is the statement I gave them.

Q. Did you tell those officers or either one of them that as the truck approached you heard two shots? A. It is possible I did.

Q. What is that? A. It is possible that I did.

Q. It is possible that you did? A. Yes.

Q. You say that is what happened. A. That is what happened, but at that time it is possible that I may have said just what you are saying.

Q. Well, is it possible that you said anything else except what I have just told you? A. I may have added to that.

Q. So you told them at least that much? A. That's right.

Q. Did you tell them or either of them that you saw two puffs of smoke inside the truck? A. That's right.

Q. Beyond the line of the driver's seat? A. We did not go into distances.

Q. But you told them you saw the two puffs of smoke inside the body of the truck? A. That's right.

Q. Beyond the cab? A. That's right.

Q. Did you tell them that you saw one man driving with brand new gloves and with both hands on the wheel? A. I don't remember what was said in that particular statement. Remember, I didn't sign that statement. I don't know what they wrote. I only told them what I saw.

By the Court:

Q. You never saw the statement after that? A. No, I did not. I only told them what I saw and they relayed that information into Police Headquarters right from there.

Q. What they put down on the paper you don't know? A. I don't know what they put down there; no, sir.

By Mr. Foley:

Q. Do you know whether you told them that you saw a man driving with brand new gloves and with both hands on the wheel? A. I may have. I don't remember that I told them that, no.

Q. When you gave the statement that you signed, the statement which you used to refresh

your recollection from, did you tell the man who took that statement that you saw a man driving the car with both hands on the wheel and that he had brand new gloves on his hands? A. When I looked at that statement I was only interested in the date. I was not interested in the content because the story I gave was the true story. I expected to be asked the date that this particular matter took place, and I didn't remember that. I was only interested in the date. Had I known then that I——

Mr. Foley: None of this is responsive to my question.

Mr. Congleton: I submit it is responsive to the question.

The Court: Read the question and answer.

(The last question and answer are read by the court reporter.)

The Court: Perhaps it isn't responsive, but I wonder if we gain anything by striking it because it will only be asked again by the Prosecutor.

Mr. Foley: We would gain this much, that the question could be read and answered responsively; otherwise I have to repeat the question.

The Court: Very well. I will grant your motion and strike it as not responsive.

(The last question is read by the court reporter.)

A. I don't know just what was said at that particular time relative to the man wearing brand new gloves, but I am pretty sure that I explained

that the man had both hands on the wheel. I am pretty sure of that, your Honor.

Q. Look at S-28 and refresh your recollection again and tell us whether there is anything in that statement to indicate——

The Witness: I am sorry. I don't have my glasses here, your Honor.

The Court: The witness said before he didn't refer to that statement for any purpose except to refresh his recollection on the date, that he was uncertain as to the date, and that has been stricken, but your question involves an assumption that he did look at the statement for some other purpose except to look at the date.

Mr. Foley: He has already said so.

The Court: But you have had it stricken.

Mr. Foley: Long before that question was asked, at the time that we were having difficulty in obtaining this statement, my motion was based upon his previous testimony that he had used this statement to refresh his recollection before testifying.

The Court: He wanted to explain that and say that the extent to which he used it was with respect to the date only.

The Witness: That is true.

Mr. Foley: I submit that I would like to have my question ruled upon in the light of what is in the record and in the light of what has been stricken from the record. There is in the record at this time the testimony that he used this statement for the purpose of refreshing his recollection before testifying. Upon that basis I submit that the question, which I was not permitted to complete, incidentally, is a proper one.

The Court: Your question is really as to what he said to the police that took the statement. Isn't that correct?

Mr. Foley: Suppose I ask the question anew? I didn't complete it at the time, and the witness started to answer, and then your Honor broke in.

The Court: I don't want any unnecessary confusion. That's all.

Mr. Foley: Let me reframe the question.

Q. Mr. Bromwell, I will ask you now to examine S-28, which you have testified you used to refresh your recollection, and having examined it, tell us if there is one single solitary word in the statement about any driver of the truck or about anybody holding the steering wheel of the truck with both hands, gloved or ungloved.

Mr. Congleton: I object. I submit that the statement speaks for itself. The State cannot bring it in on cross examination, but the State will offer it in evidence, and if it will help Mr. Foley in his examination I will offer it in evidence now if he wants it.

The Court: I don't know. Do you make the offer?

Mr. Congleton: I make the offer.

Mr. Foley: If your Honor please, I object to the statement going in evidence upon the ground that it is self-serving. The sole purpose for which I am using this statement is to interrogate the witness for the purpose of affecting his credibility he having stated that this statement was made by him and used by him before he took the stand to refresh his recollection.

The Court: In order that there will be no confusion, I believe, Mr. Witness, you said that you used the statement to refresh your recollection.

The Witness: Of the date, your Honor.

The Court: But will you answer that question yes or no?

The Witness: I did use that statement to refresh my recollection.

The Court: Was that in any particular or in general?

The Witness: Just in particular; the date in particular. That was all I was interested in.

The Court: I want to get that straight.

The Witness: That was all I was interested in.

The Court: Then we cross the next bridge, which is the motion pending, and that is that the Prosecutor offered it in evidence, and this was the statement which was produced under the ruling of the Court and by direction of the Court, and inasmuch as the Prosecutor offered it in evidence there is only one question in the Court's mind, and that is as to whether now is the time.

Mr. Congleton: That question was in my mind, too, but I thought it might shorten the whole proceeding if Mr. Foley had the use of it in evidence because it speaks for itself.

The Court: The Court will admit it in evidence at the proper time anyway. Whether it is admitted now is a different thing. The order of proof is always in the control of the Court. I think we will

save time by admitting it in evidence now and I grant Mr. Foley an exception.

(The statement is received in evidence and marked Exhibit S-28.)

Mr. Foley: In view of your Honor's admission of the statement in evidence, which I resisted, I would feel that the force of my exception, if it has any force at all, would be lost to me if I now pressed the question which is presently pending, and upon which your Honor has not ruled, because, as I said before, my theory of the use of the statement is that I may use it, the witness having testified that he used it to refresh his recollection. In order that I may not prejudice my exception, I feel obliged to withdraw the pending question.

Mr. Congleton: If the Court please, I would like to resist the withdrawal of the question. It has just been called to my attention by my associate that the offer of the State was predicated upon the question that was asked and objected to by the State, and in that status of affairs I don't think that once the State having objected and the offer made the defendant can now withdraw it.

Mr. Foley: Well, surely, if your Honor please, I can't anticipate that counsel is going to proceed out of the ordinary order at the time I present a question to the Court. He chose to do so, and your Honor, within your Honor's discretion, having the right to fix the order of proof, permitted the admission of the statement. But at the time I asked the question the statement was not admitted, and had the state-

ment been in evidence at that time I would not have asked the question. Since it is now admitted by reason of the action of the Prosecutor, which I can't control, I desire to withdraw my objection.

The Court: If the Prosecutor states that his offer was predicated on the assumption that your question was pending and would be answered, he may exercise the same privilege that you did—he may withdraw his offer of the statement in evidence at this time.

Mr. Foley: I would have no objection to that.

Mr. Congleton: I won't withdraw it.

The Court: You will not withdraw it?

Mr. Congleton: No, sir.

The Court: All right.

Mr. Foley: Then I can withdraw the question which is presently pending?

The Court: Yes, I think so.

Q. Mr. Bomwell, you said that as you looked inside the truck you saw somebody's foot extended into the cab. Is that right? A. I don't remember saying that the foot was extended in the cab; I said——

Q. Perhaps I misquoted you. A. I said I saw an upturned foot.

Q. I think you indicated that you saw about 10 or 12 inches back on the ankle. A. I would say approximately half the length of the foot from the knee down. At least that.

Q. Half the length of the foot from the knee down? A. At least that.

Mr. Congleton: Do you mean the foot or the leg?

Mr. Foley: The leg.
The Witness: The leg.

Q. Half the lower leg? A. Half the lower leg.
Q. You did not see almost up to the hip, did you? A. I did not, no.
Q. Were you present in court here yesterday when Mr. Congleton opened the State's case to the jury and outlined what he would prove? A. I was not here yesterday at that time.
Q. By the way, when you first saw this truck, was the door open at that time? A. I don't remember whether it was or not. I don't think so, but I don't remember that for certain.
Q. Do you remember seeing the door fly open at any time? A. I did not see it fly open.
Q. Did you tell Mr. Congleton or anybody in the Prosecutor's Office that the right door, that is, the door on the other side of the driver's seat, flew open? A. No.
Q. Did you say that while the truck was standing still two shots were fired? A. No.

Mr. Congleton: If the Court please, I don't know of any foundation for these questions that Mr. Foley is referring to now.
Mr. Foley: I can tell you the foundation for it.
The Court: But I do not see that counsel has the right to check up the Prosecutor's opening with the witness' testimony.
Mr. Foley: If your Honor please——
The Court: And that is what you are doing.
Mr. Foley: If your Honor please, the defendant has a right to assume that what the Prosecutor says in his opening he will

prove and prove beyond a reasonable doubt. If the Prosecutor is willing to state to your Honor that there is some other witness who will testify to these things which he said to the jury in his opening, I won't interrogate this witness about them, but at this moment I have to assume that this is the only witness who will establish certain things which the Prosecutor said he would prove to the jury beyond a reasonable doubt. I want to establish either that this man did tell the Prosecutor those things, in which event his testimony now is different from what his statement to the Prosecutor was; or that he did not tell these things to the Prosecutor, in which event the Prosecutor had no right to tell the jury that he would prove these things that I am interrogating the witness about now.

Mr. Congleton: I resent the remarks of Mr. Foley and I ask that they be stricken. The State opened its case in what we considered a proper and orderly manner and the State will prove what they said in the opening, and I do not have to tell Mr. Foley at this time whether I will prove it by this witness or by what witness. I will prove it all.

The Court: I don't think the Court says you have to. I do not think the line of examination is proper, for this reason, that it simply is a checkup between the witness' statement and the Prosecutor's opening. The Prosecutor's opening to the jury is not evidence and I know the jury realizes that. It is a mere outline or statement on his part of what he expects to prove. Well,

if he did not act in good faith or if he made a mistake, it certainly was not of such great consequence.

Mr. Foley: I do not suggest for one minute that Mr. Congleton would act in bad faith.

The Court: I understand that, but Mr. Congleton is like all the rest of us, he is human and he is subject to make a mistake, and he may think that he is going to prove a thing and then not succeed.

Mr. Congleton: I still think that I am going to prove that and I will prove a lot of things that I did not tell in my opening.

The Court: Well, we will cross that when we get to it. The Court rules that your line of examination is improper for the reasons stated, to wit, that it is merely an attempt to check this witness' testimony against the opening of the Prosecutor.

Mr. Foley: Well, if your Honor please, there is pending a single question, which I understand has been objected to and your Honor sustained that objection.

The Court: That is right.

Mr. Foley: I pray an exception.

Q. Did you tell Mr. Congleton or anyone in the Prosecutor's Office that while this truck was still parked after the first two shots were fired, a third shot was fired?

Mr. Congleton: I object to that.

The Court: The objection is sustained. The same ruling.

Mr. Foley: I pray an exception.

Max Bomwell, for the State—Cross.

Q. Now, you told us that when you saw one man come from the back of the truck and start the truck forward the truck started without difficulty and moved on down the street slowly. A. I would say there was no difficulty.

Q. Did you ever tell the Prosecutor's Office or anybody connected with it that the truck stalled a couple of times when the driver attempted to start it?

Mr. Congleton: I object to that.
The Court: Sustained.
Mr. Foley: I pray an exception.

Q. What is your answer? A. I can't recall making that statement.

Mr. Foley: Oh, I beg your pardon.
The Court: It has been sustained.
Mr. Congleton: I know that was entirely a lapse of mind on your part.
Mr. Foley: I did not mean to ask him to answer that question.
The Court: You objected to it and I sustained it.
Mr. Congleton: Yes, and Mr. Foley just had a lapse of memory in asking him that, because I will probably do that unintentionally before this case is over.

Q. Did you tell the Prosecutor or anyone connected with his office that thereafter, after the two shots had been fired with the truck parked, a third shot fired with the truck parked there, that you heard another shot, one other shot?

Mr. Congleton: Objected to.
The Court: Sustained.

Mr. Congleton: I think that this whole line of questioning by Mr. Foley is improper now.

Mr. Foley: I have to make a record.

The Court: And I think you have made the record already. Cross examination to check a witness' testimony with the Prosecutor's opening is not a proper course, especially where the Prosecutor's statement may be a deduction from the whole evidence or may be his conclusion or a conclusion to be drawn from the evidence. It does not necessarily mean that any particular witness told him that. So that is the basis of the ruling, and I think you have had certainly three exceptions on that objection.

Mr. Foley: I pray an exception to your Honor's ruling, and I have one more question which I desire to ask and I will ask no more on this line after that.

The Court: Very well.

Mr. Congleton: I object to his asking any more along this line after your Honor has already ruled on it.

The Court: If I am wrong, let us get it on the record. I am subject to being reviewed.

Q. Did you tell the Prosecutor or anyone connected with his office that after the truck had passed 13th Avenue and gone down Wickliffe Street that you heard more shots?

Mr. Congleton: That is objected to, if the Court please.

The Court: Sustained.

Mr. Foley: I pray an exception.

(A short recess is taken.)

The Court: I think I advised you gentlemen in my chambers that I have decided to change the status with respect to this exhibit, which is the statement which was marked in evidence, and I am going to withdraw that and restore the exhibit to the point that it is marked for identification only.

Mr. Foley: Referring to S-28.

Mr. Congleton: If the Court please, I would like to ask the Court's permission—and I have already spoken to Mr. Foley about it—to have this witness withdrawn but be kept in the courtroom for a few minutes. I have two doctors who came here from Union County who are presently in the Courtroom, and both are busy men, and I don't think their testimony will be very long. I know they would like to get back to Union County and take care of the sick, maimed and wounded.

The Court: Is that objected to, Mr. Foley?

Mr. Foley: I told Mr. Congleton that the only thing that discouraged me is this: It is now 12:25, and I have some further cross examination of this witness, as a result of your Honor's ruling, and I am not intending to reflect upon the witness or anybody else in any way, but I would not like to defer my cross examination of the witness until after the lunch hour. That is the only thing.

The Court: That would be all right.

Mr. Foley: I would like to examine him while he is still in the courtroom.

The Court: You mean you would like to examine him——

Mr. Foley: I would like to examine him before we adjourn for lunch.

The Court: I don't see how you can do that and examine the doctors, too.

Mr. Congleton: I don't think that the first doctor will take any more than three minutes, and I don't think that the second doctor will take any more than five minutes.

The Court: It is now half-past twelve. That only leaves you a half hour. How long do you think it will take?

Mr. Congleton: The first doctor about three minutes and the second doctor about five minutes

The Court: Well, let's do that.

DAVID BIBER, sworn.

Direct examination by Mr. Congleton:

Q. Doctor, you are a duly licensed physician and surgeon of the State of New Jersey? A. Yes, sir.

Q. And you have been for how long, sir? A. Six years.

Q. Where is your office, Doctor?

Mr. Foley: I will admit the doctor's qualifications.

Mr. Congleton: Thank you.

A. 900 Stuyvesant Avenue, Union.

Q. Directing your attention to the afternoon of December 17, 1946, was a person by the name of Mortimer Bateman brought to your office? A. Yes, sir.

Q. About what time? A. I don't recall exactly. It was about mid-afternoon, I should say.

Q. Did you examine Mr. Bateman? A. Yes, sir.

Q. Will you tell us what you found? A. The police officer who brought him came into my office in a hurry and told me he had a man——

Mr. Foley: I object.

Q. Don't tell me what the officer told you. Did you go outside? A. I went outside and found a man in a serious condition, sitting in the back seat of this car. And I made a quick examination, found him in shock, and told the officer that he would have to go to the hospital immediately without removing him from the car. I gave him some preliminary treatment and——

Q. What preliminary treatment? A. I gave him a hypodermic injection of morphine, and I gave the officer a note telling how much morphine I had given him and what time, and set him off to the hospital.

Q. What was his condition as you observed it, physically? A. He was slumped in the back seat. His pulse was thready and feeble and rapid, over 120; and he was perspiring slightly. His hands and face were cold.

Q. Did you observe anything unusual about his features? A. He had some blood stains on his clothing.

Mr. Congleton: I think that is all, Doctor.

Mr. Foley: No questions.

Emil Stein, for the State—Direct.

EMIL STEIN, sworn.

Direct examination by Mr. Congleton:

Q. Doctor, you are a duly licensed physician and surgeon of the State of New Jersey? A. I am.

Mr. Foley: I will admit his qualifications.

Q. Where is your office? A. Elizabeth.

Q. With what hospitals are you connected? A. St. Elizabeth's Hospital and Elizabeth General Hospital.

Q. I direct your attention to the day of December 17, 1946. Did you have occasion to treat one Mortimer Bateman? A. I did.

Q. Where did you treat him? A. At the hospital.

Q. At about what time was it when you first saw him? A. About 3:30 in the afternoon.

Q. What was his condition when you saw him? A. He was desperately ill; he was in shock; his abdomen was markedly distented; gasping hard, and he indicated that he needed surgery at once.

Q. Did you notice any marks on his body? A. I did.

Q. What did you observe? A. There was a gunshot wound in the front of the abdomen, there was a gunshot wound in the back, his scalp was lacerated, bleeding and there was a gunshot wound in his leg.

Q. After you ascertained that surgery was necessary, what did you do, doctor? A. We transferred him, treated him for shock, and immediately operated on him.

Q. Did you perform the operation, doctor? A. Yes.

Q. Will you tell us what it consisted of. A. The first incision was over the site of the penetrating wound in the abdomen on the right upper abdomen. Through that incision I found seven holes in his bowel, in the small bowel. Every one of them was sewed up. There were three holes in the mesentery. That is part of the fold of fat tissue which holds the blood supply for the bowel. There were three holes in that. I found a perforation, a hole, in the urinary bladder, way down below. So, after sewing him up, the perforations in the bowel and the mesentery, I had to sew that wound and make another incision down below and sew the bladder. By that time he was in pretty desperate shape and we had to stop. He was being transfused all the time, and we had to close him up. We couldn't proceed to look for any other injury.

Q. What happened after that? A. He died about a half hour after he was returned to bed.

Q. Do you remember about what time that was? A. About 7 o'clock, I would say.

Q. Now, doctor, I show you S-4 for identification and ask you if you recognize that as the man you performed the operation on? A. Yes, that is Mr. Bateman. This is my incision, and this is the second incision.

Q. Directing your attention to S-6 for identification, do you recognize that as Mr. Bateman? A. Well, that is the back, and I wouldn't say that that is—I can't say.

Q. But is it a representation of where you say the bullet wound was in the back? A. In the back, yes. The contour and everything else would be that of Mr. Bateman.

Q. I show you Exhibit S-5 for identification. A. This is Mr. Bateman, yes.

Q. That shows the two incisions? A. Yes.

Q. It shows the point of entrance in the leg? A. Yes.

Q. I show you S-3 for identification, doctor, and ask you if you can point out the laceration? A. The lacerations were all down here.

Q. I direct your attention specifically to that and to this. A. There is one there, and he was all black and blue over that entire scalp and penetrating down toward the eye.

Mr. Congleton: May the record show that the doctor put his hand to the forehead as indicating where he was all black and blue.

Q. I don't know whether I did or not, but did I ask you what time he died? A. I beg your pardon?

Q. Did I ask you what time he died? A. About 7 o'clock, I said, p.m.

Q. Doctor, prior to the time that the operation was performed, was Mr. Bateman conscious at any time? A. Yes, he was conscious when I first saw him. He spoke and was conscious—fully conscious.

Q. Were you present when anyone else spoke to him? A. I do know that an officer did go and talk to him. I consented to his being interviewed.

Mr. Congleton: That is all.

Cross examination by Mr. Foley:

Q. Doctor, for the purpose of identification will you assume that the bullet wound in the abdomen was wound number one—we are not speaking now or the order in which the wounds were inflicted—merely to identify them—that the wound in the

back was wound number two; and that the wound in the leg was wound number three? Which of these wounds in your opinion was the fatal wound? A. Which was the fatal wound? Most likely the one that came in anteriorly.

Q. Anteriorly doesn't help us. A. In the front of the abdomen—in the right upper abdomen.

Q. You believe that was the fatal wound and the other two wounds were not fatal? A. Yes, because I don't know how many shots were fired. But I do know the man had perforation indicating that. Whether the bullet went in or out, I don't know. But in my opinion the wound that went into the anterior abdomen was the wound that produced the most of the damage. And then, of course, there was the wound that came through the leg. That wound—it is hard to say—the bladder injury—from what bullet that came. All we know is that he had all these things.

Q. In other words, it would be difficult to determine whether the bladder injury was the result of the bullet by which wound number one was inflicted or that by which number two was inflicted or that by which number three was inflicted. A. I would say that wound number three in the back would have nothing to do with it.

Q. Two is the back, sir. A. Well, then, two is the back. That, I would say, had nothing to do with the urinary bladder, but the wound in number one and number three had something to do with it.

By the Court:

Q. You mean the wound in the leg? A. It might have even gone through.

Q. In other words, that would make only two shots, wouldn't it? A. I don't know how many

went through. I was in no position to look for the bullets.

By Mr. Foley:

Q. Do you feel that the bladder injury was the primary cause of his death? A. Oh, no, no, no. Multiple. There are so many injuries, all the intestinal injuries. I may say that I had had a report on the autopsy, and I missed some of the perforation. I couldn't go ahead.

Q. Naturally, you were working under difficulty. A. Yes.

Q. Even the wound that entered the back caused some of the injury within the abdomen? A. True. I think they all contributed to the death. It wasn't one specially that was the cause of death. Every one of them contributed to the death and the amount of shock.

Q. You would not wish to say that any one in particular produced the death? A. No, I think all taken together produced the death.

Re-direct examination by Mr. Congleton:

Q. I neglected to ask you one question. May I ask you this question: When you operated you did not take any bullets out of him? A. No, I did not.

Re-cross examination by Mr. Foley:

Q. Did you observe any powder marks or burns? A. There were. From the penetration of the bullet there were burns around the edge of the penetration. I mean to say you could see that it was black.

Q. On the skin? A. Right where the wound was separated, that was burned.

Q. It was? A. Not any distance, but if this was the hole, just the torn part was black. I wouldn't say it was powder marked, but it struck me it might be a burn.

Q. All three of them? A. I only took particular interest in the wound in front. That is the one I made the incision in.

Q. What about the one in back? A. I don't recall except that there was an opening, and in the leg was an opening.

Q. Did you read the autopsy record? A. No.

Q. I believe you said that you learned from the autopsy that further findings were made. A. I got that from Dr. Martland's secretary. Naturally, being the operator in the case, I wanted to know what they found when he was through.

Q. Were you aware of the fact that Dr. Martland found no powder marks or burns? A. I didn't say there was any powder marks.

Q. Or burns. A. The edge of the cut was black.

Q. Were you aware of the fact that Dr. Martland found no powder marks or burns? A. No, I am not aware of it.

Q. If that were the fact, would you still believe you saw burns or wouldn't you? A. I would say that the edge of the wound was black, and it would only come from a burn. When I cut through, that would have changed it partly and some of the serum would have escaped. Perhaps Dr. Martland could not find the burn because I trimmed some of that off to sew the wound.

Q. You didn't trim all of that off? A. In sewing the skin I did trim the black part, what we call the debrisment.

Q. So that nobody would be able to find the bullet hole? A. So that nobody would be able to

find that except myself, whether it was burned or not, because I trimmed that off the wound in my operative procedure.

Q. You are sure you trimmed all of it? I notice you said you trimmed some of it. A. This is all war surgery, way back, what we call debrisment, in order to cut down to the healthy tissue. You can see from these photographs that he has a straight line incision, and it is all proximated very well. Of course, it didn't do any good, but Dr. Martland could not see what I had trimmed away.

The Court: Which exhibit have you in mind, doctor?

The Witness: May I show you this?

Mr. Congleton: There were two.

The Witness: The abdominal incisions.

Mr. Congleton: S-4 and S-5 for identification.

The Court: Which one?

The Witness: This one.

The Court: You had that in mind?

The Witness: Yes.

The Court: Then we won't bother about this one. This is S-4.

The Witness: This part around here was probably the hole.

The Court: Excuse me. Will you confine yourself to this one?

The Witness: The incision was made this way, right through it.

Mr. Foley: Will you please put marks on there so that we will know what you are doing?

The Witness: When the wound is being sewed up, you take a scissors and go around and trim off the wounded area made by the bullet, and you go deep with it, right

through and through, and you can still bring the parts together so that there will be no evidence here of any perforation by a bullet. I destroyed the evidence of perforation by my procedure.

The Court: A subsequent operator or surgeon coming along would find that that part containing the black had been trimmed away?

The Witness: Yes, because he has a clean incision there.

By Mr. Foley:

Q. Did you make a record of having done so in the hospital record? A. No, sir, because here is the record. It is just such a small procedure that we never put anything like that in the record. The record of the operative procedure is just this,——

Q. Don't tell me what the record of the operative procedure is. Did you use this record to refresh your recollection before coming here? Did you read it? A. I saw it, yes.

Mr. Foley: May I examine it then?

Q. In this record you describe the location and appearance of these wounds. A. The history, yes.

Q. There is no record of the finding of any powder marks or burns? A. No.

Q. Is there any record of any cutting away of the skin? A. No, but I know I did it, and I am testifying accordingly.

Q. But it is not in your record? A. No, sir.

Mr. Foley: That is all.

Max Bomwell, for the State—Further Cross.

MAX BOMWELL, resumes the stand and testifies further, as follows:

Cross examination (continued) by Mr. Foley:

Mr. Congleton: If the Court please, I understand that——

Mr. Foley: It is marked for identification.

Mr. Congleton: I understand that Mr. Foley now uses this statement which you ruled could not go in evidence, or does he?

The Court: Well, Mr. Foley is handling his own matters. If he wants to take it, that is his affair. It stands at the moment as marked for identification.

Q. Mr. Bomwell, referring to Exhibit S-28 for identification, will you tell us whether or not this statement contains any reference to your having seen the driver of the truck at any time?

Mr. Congleton: I object, if the Court please, on the ground that the statement speaks for itself.

The Court: Well, I think I will allow the question.

A. I can't see without my glasses. I am sorry.

The Court: I did not hear the witness.

The Witness: I can't see without my glasses.

Q. Do you want to try these? No good? A. No, they are too strong.

Q. Do you want to try these? If those don't work, we will send for an optometrist. A. I think these are out.

New Jersey State Library

Mr. Foley: We want to be sure you are able to read.

By the Court:

Q. Can you read with a magnifying glass? A. I probably can.

By Mr. Foley:

Q. Here is a pair from the foreman of the jury. Try those. A. Those are worse than yours. What was your question again, sir?

(A previous question is read by the court reporter, as follows: "Mr. Bomwell, referring to Exhibit S-28 for identification, will you tell us whether or not this statement contains any reference to your having seen the driver of the truck at any time?")

The Witness: Well, it tells you right here, "Then I saw"——

Q. Just point it out to me. Answer yes or no. A. Yes, I saw the driver.

Q. Now I will have to borrow them. A. You can have them.

Mr. Congleton: May I ask what he pointed out?

Mr. Foley: Yes, you may, Indicating this part: "Then I saw"——

Mr. Congleton: Would you like to use the typewritten copy?

Mr. Foley: I think we had better for the purpose of deciphering it.

Q. "Then I saw an unknown colored man get into the driver's seat. He came from inside the truck." A. That is correct.

Max Bomwell, for the State—Further Cross.

Q. Now, will you refer to the statement again and will you please tell us whether or not it contains any reference or any statement to the effect that as the truck passed you, you saw the driver holding both hands on the wheel. A. No, I don't see any record of it here.

Q. Is there anything in the statement to indicate that you were able to see that he wore a pair of brand new gloves? A. No record of that down here, either.

Mr. Foley: That is all from this witness.

Mr. Congleton: If your Honor please, the State offers S-28 for identification in evidence.

The Court: Very well. Mark it.

Mr. Foley: Objected to as self-serving.

The Court: Mark it.

Mr. Foley: I pray an exception.

(The document referred to is received in evidence and marked Exhibit S-28.)

Mr. Congleton: At this time, if the Court please, I ask permission to read this statement to the jury.

The Court: No, I think you better wait until the defendant closes his case.

Mr. Congleton: What is that, sir?

The Court: That is what I said. You can wait until the defendant closes his case. The defendant has not finished as yet. Didn't you want to have further cross examination?

Mr. Congleton: No, he said he was finished.

Mr. Foley: No, and I said so.

The Court: Oh, I thought you want to further examine the witness.

Mr. Foley: No, sir.

The Court: All right, proceed.

Mr. Congleton: Mr. Foley said that he had finished his cross examination and I offered this statement and I now ask permission to read it and then I would like to ask some more questions of this witness.

The Court: Do you have further examination of this witness?

Mr. Congleton: I have a few questions.

The Court: Then you had better finish those first, please.

Re-direct examination by Mr. Congleton:

Q. Now, Mr. Bomwell, on cross examination by Mr. Foley yesterday there were some questions put to you about your having on previous occasions heard people scuffling in trucks—

Mr. Foley: At the time the statement was offered I made an objection. The objection was the same objection that I had when it was offered originally. I did not want to burden the record by explaining what I meant when I said "self-serving", and I did make that as the ground of my objection. I assume your Honor will not require me to reiterate the objection I made before.

The Court: Well, we will consider that you renewed the objection that you made before.

Q. (Continuing)—and I think you said you heard it hundreds of times. A. Yes.

Q. What did you mean by that? A. Well, I have been up in that location for 23 years, and it is quite often that we will have a truck parked

in front of the store and while I am doing some work on the outside, some work on the motor, we will say, to hear this scuffling, these scuffling sounds taking place inside, where two or more boys may be fooling around in there and pushing each other around in a friendly battle, so to speak.

Q. Now, Mr. Bomwell, after you saw this truck pass and you had observed what you told the jury about it, I understand that you immediately went inside and phoned the police, is that correct? A. Yes.

Q. And that was after you had heard these shots fired? A. That's correct.

Q. How soon after? A. Immediately.

Mr. Congleton: That is all. Now may I read the statement?

The Court: Wait a minute. I think we better take our recess now until 2 o'clock.

(A recess is taken from 1 to 2 o'clock.)

AFTERNOON SESSION

Mr. Congleton: May it please the Court, at this time I would like to read S-28 to the jury.

The Court: Very well.

(Mr. Congleton reads Exhibit S-28 to the jury.)

Mr. Foley: If your Honor please, at this time I desire to make application to the Court, at such time as the Court deems to be the proper time, to have the jury given the opportunity of standing at this corner,

which is only two blocks distant from the Courthouse, and to observe this truck being operated at a low speed, at a speed not exceeding five miles an hour, from a point approximately 50 feet from where each juror is standing, past the point where the jury is standing and on across 13th Avenue, the truck to be operated in the center of the street, and the door of the truck to be open. I ask this in order that the jury may determine by its own view whether or not the witness Bomwell could have seen those things to which he has testified.

The Court: I will consider it. You are not particularly interested in the time?

Mr. Foley: Pardon me?

The Court: You said at a convenient time.

Mr. Foley: Yes, sir. I would prefer it to be while the testimony of Bomwell is fresh in the jury's mind. I have in mind that we are going to be here for several days. I understand the State's case will take considerable time. The sooner it were done the better. On the other hand, I don't wish to disrupt the Court's day or perhaps the order of the Prosecution's calling of witnesses. I don't wish to discommode anybody, but I would like to have it done as soon as possible.

The Court: As I said, the Court will consider it. It presents some difficulties, as I see it, to start with, and that is it would be very difficult to produce the exact conditions that have been testified to, the speed of the truck and positions and so forth.

Colloquy.

Mr. Foley: Ordinarily that might be so, but it seems to me we were able to obtain from this witness rather definite information with reference to those things. He identified the distance the truck was from him when parked in the street as being about the same distance from the jury seat to the back of the courtroom, and that your Honor has a measurement of, and we can readily ascertain that. As to the position of the truck, he says that it was in the center of the street, and that is not difficult to determine. As to the speed of the truck, he says the truck was in low gear and not going more than five miles an hour, and with respect to that I would not mind how slowly under five miles an hour it was driven, giving the witness the benefit of whatever slowness of speed might be required to substantiate his story. However slowly the truck was driven would not make any difference to me. I would like to have the jury have an opportunity to see whether or not with that door open in that position, the only position in which it can be open, which, it happens, is not the position testified to by Mr. Bomwell, because it cannot be closed all the way back to the fender as he says, and can only be open something less than a right angle—whether or not they could in the same position see what he says he saw. His testimony, I think I need not say to your Honor, is vital in this matter, and I can think of no better way of a jury evaluating the weight to be given that testimony than to have the same opportunity that he had. I do not think that we have

in this case any insuperable obstacle. I could see if someone had testified that the car was being driven 75 miles an hour, or 80 miles an hour, that I could not very well ask your Honor to permit somebody to break the law by driving an automobile at such a speed, but here we have a series of statements which can be translated into a demonstration.

The Court: There are so many details and so many particulars that it would be so easy for the parties to differ as to whether that was a real reproduction of the scene as it existed, and it is not very practical; at least it does not so impress me for the moment. However, as I said, I will consider the matter and give you an answer at some future time during the trial.

Mr. Foley: Thank you very much.

Mr. Congleton: Your Honor does not want to hear me at all?

The Court: I will be glad to hear you.

Mr. Congleton: The State, of course, if all the conditions that were present on that day can be demonstrated, has no objection to the demonstration and, in fact, would welcome it, but it seems to me that to reproduce the conditions would require the firing of two shots of that same kind of bullets that produced the same kind of smoke as were used on that day, and the jury is composed of 14 persons, and for them to be put in a position where they would have the same power or chance of observation as Mr. Bomwell had, it seems to me, the demonstration would have to be repeated several times, because I do not think that you can

get all 14 people into the exact spot where he was and had the opportunity to observe what he did, not at one time.

The State does not, however, oppose a demonstration where all the conditions can be reproduced.

Mr. Foley: I, of course, did not have in mind that there were going to be any shots fired; I had in mind only that the jury see whether or not they could see inside the truck, whether they saw smoke or what they saw.

The Court: I did not understand that you contemplated, Mr. Foley, a reproduction of the shots and smoke.

Mr. Foley: Of course not.

The Court: The matter presents physical difficulties and, as I said before, it might simply result in a question arising as to whether the physical difficulties were precisely the same, whether the demonstration coincided with the conditions that existed at the time; the speed might be varied, the door might not be in that position. I don't know. So I am not sure it would serve any useful purpose, and I am perfectly willing that the jury should view the truck again if you desire.

Mr. Foley: Well, I will certainly want that.

The Court: Yes. But to undertake to go through with this demonstration, I am afraid it might merely lead to confusion rather than serve a useful purpose. At the same time, as I said before, I won't dispose of it finally, and I will give you my answer at some later time.

Mr. Foley: May I ask your Honor also at the time you are considering it to consider this: That if you should decide it inadvisable to accede to my request, when the truck is next seen by the jury, could it be seen at a place where it would be possible for the jury to step back that distance?

The Court: Yes.

Mr. Foley: Which would enable it to conclude whether or not those things could be seen?

The Court: Yes. You think it over, will you please, and see if you think that demonstration could be made at the point where it is customarily parked, if you know where that it.

Mr. Foley: It so happens that it is parked too close to a building right now to permit that. But it could be done in that space, particularly if two or three other cars were moved.

The Court: If the other cars were taken out of the way and you had the use of the entire space.

Mr. Foley: Yes, or even a quarter of the space would do.

THOMAS TUTLER, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Tutler, where do you live? A. 119 Wickliffe Street.

Q. Newark? A. That's right.

Q. How long have you lived there? A. About five years.

Q. Will you keep your voice up a little bit, now, so we can all hear you? A. Yes, all right.

Q. 119 Wickliffe Street is on which side of the street? A. It is on the lefthand side going toward West Market Street—the lefthand side going this way.

Q. In other words, it is on the west side? A. West side from here, that's right.

Q. How close is it to Thirteenth Avenue? A. It is four—it is the fourth house from Thirteenth Avenue—the fourth house going down toward South Orange Avenue.

Q. In other words, if you were walking up Thirteenth Avenue towards South Orange Avenue, yours is the fourth house on the right? A. That's right, the fourth house.

Q. What floor do you live on, sir? A. I live on the second floor.

Q. Does your apartment have a front view? A. Front, that's right.

Q. Were you home on the afternoon of December 17, 1946? A. That's right.

Q. That afternoon did anything occur that attracted your attention? A. Yes, sir. The first thing that attracted my attention, I had just got up, I guess around 1:30, the best I could judge it now, and both of my windows face Wickliffe Street, and I saw the Wigler Bakery truck was stopped, and two other cars stopped, waiting on the Thirteenth Avenue traffic to pass.

Q. Where was the Wigler Bakery truck when you saw it in reference to the front of your house? A. It was behind these other two cars, just opposite my window.

Q. It was about opposite your window? A. That's right. While they were standing there at Thirteenth Avenue for the traffic to pass——

Mr. Foley: What is that?

(The last answer is read by the court reporter.)

A. (Continuing)—these other two cars, the traffic running on Thirteenth Avenue downtown, the Thirteenth Avenue traffic had the right of way, and these two other cars had been standing and the Wigler truck pulled up for traffic to pass on Thirteenth Avenue. The Wigler Bakery truck stood there about a minute, and I heard what I thought was backfire. I looked down on the truck and I heard a report fire twice, and it seemed like to me it was backfire of a truck. I didn't pay any attention to it. When it pulled on toward Thirteenth Avenue, toward West Market Street, I think it was, about Thirteenth Avenue, to the best of my recollection, I heard a report fire again. I didn't know what happened. I went downstairs and started toward West Market Street. I saw Mr. Bomwell standing there.

By the time I got to the corner I saw the radio cop fixing to leave Mr. Bomwell's shop. I walked down the street at the corner toward West Market Street, and I saw the radio cop leaving Mr. Bomwell's shop, that is just opposite that, and somebody called me and said——

Mr. Congleton: Don't tell us what somebody said. I don't believe you want any conversation.

Mr. Foley: I don't believe so.

Q. Now, when you heard these reports did you see anything? A. I saw like smoke, just like it was flying around the truck, like back in the truck. That's what I seen.

Thomas Tutler, for the State—Cross.

Q. Did you see that on more than one occasion or just once? A. I seen it at the time the truck was standing there, like a little fog of smoke was around it.

Q. Your best recollection is it was sometime around 1:30? A. Yes, it was sometime around 1:30, probably a few minutes after. I know it was a little before 2 o'clock. I know that.

By the Court:

Q. How many of these noises did you hear that sounded like backfire? A. I heard three.

Mr. Congleton: That is all. Cross examine.

Cross examination by Mr. Foley:

Q. Is your home on the same side as Bomwell's shop? A. No, sir.

Q. Across the street? A. Across the street. Bomwell's shop is on the righthand side, and my home is on the west side from here.

Q. Your home was the fourth house from the corner? A. That's right.

Q. You live on both floors of this house or only on the second floor? A. No, the second floor I lives on.

Q. Is there just one flat on the second floor or more than one? A. There is more than one. I live on the righthand side going up the stairs. There's a couple of more flats upstairs; rooms, anyhow.

Q. Are there windows in the front of your flat? A. Yes, two windows and a door.

Q. But the two windows do face Wickliffe Street? A. Yes.

Q. What were you doing at this time? A. I had just got up. That's my day off. I had just got up and was dressing to go to West Market Street.

Q. Were you dressing in the same room in which you were when you looked out the window? A. That's right. That's right.

Q. You weren't looking out the window before you heard these shots, were you? A. I don't think I was, because I just turned around and when I looked down I was looking down on the traffic outside and I looked out on Wigler's truck.

Q. What attracted your attention? Was it that you heard a report? A. That's right, I heard a report.

Q. Did you look out after you heard the first report or was it after you heard two or three reports that you looked out? A. Well, I was looking out and I heard the reports of the gun or a truck that was backfiring, while I was looking down on the truck.

Q. It was one report that you heard before you looked? A. No, sir.

Q. As you looked? A. No, sir.

Q. Didn't you say that— A. No, sir.

Q. Wait a minute, now. You don't want to say anything until you hear what I ask you, do you? Didn't you say that what attracted your attention or what made you look down in the street was that you heard a report? A. I don't remember saying that if I said it.

Q. You don't remember saying that just a few minutes ago? A. I remember saying while I was looking down I heard the report.

Q. Didn't you say that what attracted your attention to the street, that made you look out the window, was that you heard a report? A. I don't remember saying that.

Q. Is that true? A. The report of the gun did not call my attention. I was looking out the window when I heard the report.

Q. When you were fixing your necktie you were looking in the mirror, weren't you? A. No, sir, I was looking out at the traffic.

Q. Didn't you say you were fixing your necktie and then heard a report and you turned and looked out the window?

Mr. Congleton: If the Court please, if Mr. Foley says that the witness said that, can we refer to the record?

Mr. Foley: I am asking him whether or not he said that.

Mr. Congleton: And you asked it in another form, and he said he didn't mean that.

(The pending question is read by the court reporter.)

A. If I said that, I don't remember saying it. I was looking out the window when I was fixing my necktie.

Q. Was the truck standing or moving? A. The truck was standing when I seen it.

Q. You didn't see it until after you heard the report? A. Yes, sir; I seen the truck. The truck was standing. As I looked down, I seen the truck and two more cars standing headed toward West Market Street, and it looked like the cars all had stopped, waiting for the Thirteenth Avenue traffic to pass.

Q. You mean there were two other cars parked there? A. They weren't parked; they were standing in the middle of the street, waiting for the traffic.

Q. They were standing still? A. They were standing still; that's right.

Q. They were in front of the bakery truck or in back of it? A. That's right, in front of the bakery truck.

Q. How far back in feet is your house from Thirteenth Avenue? A. Well, I couldn't tell you. I imagine—I live in the fourth house, and there is a store right on the corner that got the corner. Then there are three more houses betwixt my house.

Q. Well, will you say that your house and each of the houses has, let's say, a 25 foot lot, and it would be 100 feet back from the corner? A. No, it's more than 25 feet, I know.

Q. All of that? A. Yes, sir; it's more than 25 feet from the corner of my house.

Q. A hundred feet from the corner? A. Well, I couldn't judge, because I haven't stepped it off. But it is right close to, I will say—well, I wouldn't say exactly how much. I couldn't judge how much.

Q. What did these cars look like, sir? A. Well, they were just regular passenger cars. There wasn't no trucks; they were just two other cars. I didn't pay no attention to what kind of make they was; I just walked and looked out, and there was two cars and the Wigler truck was the third car standing there waiting on the traffic to pass.

Q. And they seemed to be in line? A. That's right; they was right behind each other—behind each other.

Q. The Wigler truck was right behind the two others, which also were one behind the other? A. Yes.

Q. The three were standing in line, and the Wigler car being third? A. No, sir—yes, sir, the Wigler car was third; that's right.

Q. How close was the front of the Wigler car to the back of the car in front of it? A. I couldn't tell you. It wasn't jammed. It wasn't jammed. I mean traffic wasn't jammed. I couldn't say exactly how close.

Q. How far was the first car parked or standing from the corner? A. Well, I don't know right—I couldn't judge exactly, because I wasn't looking at it.

Q. From your window can you see the corner? A. Certainly, I can look across Thirteenth Avenue, down Wickliffe Street a pretty good piece from my window.

Q. You are sure that while you saw the Wigler truck standing there there were two other cars standing— A. That's right.

Q. —directly ahead of it? A. That's right.

Q. Did the drivers or passengers of those cars get out of their cars when you heard these reports? A. No, sir; no, sir. This report didn't go off until these two cars pulled away.

Q. How long was the Wigler car standing there, to your knowledge, before you heard the first report? A. Well, to the best of my knowledge, I would say about a minute or a minute and a half, because the Thirteenth Avenue traffic was passing when I walked to the window and looked, and as the traffic passed, these two other cars pulled on away and the Wigler truck stood there, it looked like to me, like a minute or a minute and a half, I guess.

Q. Did you know that anything was going on until you heard the report? A. No, sir; nothing. I don't know nothing about that.

Q. You say you stayed there and you watched it for about a minute and a half before you heard the report— A. About——

Q. Just wait, will you please, and listen to my questions. A. All right, sir.

Q. About a minute and a half. A. Well, I guess about a minute and a half.

Q. There was nothing unusual about its appearance in that— A. Oh, no.

Q. Just a minute, please, sir. Nothing unusual about its appearance or its presence on the highway until you heard the first shot, was there? A. What do you mean?

Q. I say there was nothing about the car standing there down the street which seemed to you to be unusual until you heard the report? A. No, that's right.

Q. Well, what caused you to stand watching it for a minute and a half then? A. Well, I just walked to the window as usual. My window is to the front. My window is to the front of the house, understand?

Q. Yes. A. And as I just got up and was dressing, I just walked to the window, looked out the window. I think it was, if I am not making a mistake, kind of damp that day. I just walked to the window, looked out as usual. Nothing called my attention to the window to look out; I just walked to the window and looked out. And I was looking out, and as I was looking out I looked down to see the traffic as usual.

Q. You kept watching this truck right up to the time you heard the report? A. I didn't look exactly at the truck; I was looking at the traffic, because the truck was there like the other traffic was.

Q. Yes, but the other traffic moved away— A. Moved away after the Thirteenth Avenue traffic passed; yes, sir.

Q. Will you please wait until I have asked you the question? You don't know what I am going to ask you, do you?

Mr. Congleton: I object to that.

The Court: Go ahead.

Mr. Foley: If your Honor please, the witness persistently starts an answer before I finish my question.

The Court: He doesn't pretend to know what you are going to ask him.

Mr. Foley: Will your Honor instruct him to wait until I have completed my question?

The Court: Yes. I think he will.

The Witness: Yes.

Q. The other cars moved away and after that, for a minute and a half the truck stood there before there was any report. Is that right? A. That's right. But I won't say a minute and a half—about that. I couldn't judge it.

Q. About a minute and a half? A. That's right.

Q. How many reports did you hear while the truck was standing still? A. I heard two.

Q. Before it moved at all? A. That's right.

Q. How many reports did you hear thereafter? A. To the best of my judgment, I heard one.

Q. Where was the truck when you heard that one? A. I didn't look exactly the distance, but to my knowledge I think it was right at the corner, done crossed 13th Avenue, and I heard another one.

Q. It was what? A. I think he got to the corner of 13th Avenue and Wickliffe Street heading toward West Market.

Q. Had it started across? A. Yes, it had started. When I heard the third report it done started off from the corner where it was standing there.

Q. Let's get this straight. When the first two reports were heard by you, the truck was standing right in front of your house at 115 Wickliffe Street? A. Yes, sir.

Q. It hadn't moved? A. That's right.

Q. Then it moved, and the third report was not heard by you until the truck had started to cross 13th Avenue? A. That's right, by 13th Avenue, yes, sir.

Q. You said it had started to cross it. A. That's right.

Q. That is what you mean, isn't it? A. That's right.

Q. Was it standing in front of your house when you saw this smoke come out of the back of the truck? A. It wasn't standing even in front of my door, just opposite my window. It wasn't standing in front of my door.

Q. He was still standing still when you saw the smoke come out of the rear of the truck? A. That's right.

Q. Were the back doors of the truck open? A. No, sir.

Q. Even though the back doors of the truck were not open, you, from the second floor of your house, looking down the street, could see smoke coming out from the back of the car, from the back of the truck? A. I didn't see it come exactly from the back. You know, like smoke fogging around the truck, like a backfire generally do.

Q. That is at the back, isn't it? A. It wasn't coming straight out from behind the back. It was like smoke when a car backfires.

Thomas Tutler, for the State—Cross.

Q. Whatever smoke you saw was at the back of the truck, wasn't it? A. I wouldn't say all I saw. It was just fogging around the truck. I couldn't say it was coming from the back.

Q. Didn't you say in answer to the Prosecutor's question when you saw the smoke it was coming out of the back of the truck? A. I might have said that. I don't remember that.

Q. You don't remember that? A. I don't remember saying it come out of the back end of the truck.

Q. Out of the back of the truck. Didn't you say that? A. It was coming all around it like backfire.

Q. Let's forget where it was coming from. Didn't you say that the smoke was coming out the back of the truck?

Mr. Congleton: I object to that. I don't think there is any such testimony. I don't think we can keep changing these words a little bit and asking him if he said that. I think he said from the beginning that it came from like a backfire from around the back of the truck.

Mr. Foley: I submit I would like to have the record read to see whether the witness said it came from the back of the truck or not.

(The court reporter reads the following:)

"Q. Now, when you heard these reports did you see anything? A. I saw like smoke just like it was flying around the truck, like back in the truck. That's what I seen."

Mr. Foley: Wasn't there another question on the same subject?

(The court reporter reads as follows:)

"Q. Did you see that on more than one occasion or just once? A. I seen it at the time the truck was standing there, like a little fog of smoke was around it."

Mr. Foley: Very well.

Q. So that the smoke you saw was like smoke and it was in the vicinity of the back of the truck? A. It was just like around the truck, and the back too, I guess, but I wouldn't say definitely just out of the back.

Q. Well, it was around the back part, wasn't it? A. Not all I seen was around the back part.

Q. I refer to Exhibit S-11. Here is a picture of the back of the truck. Where you saw the smoke, was the smoke anywhere near the back end of the truck? A. I would say the smoke was here, like a little fog of smoke, and around here a little fog of smoke. I can't say it was coming immediately out of the end of the truck.

Mr. Congleton: May we have it indicated where he pointed?

Q. Point it out. A. Well, when I seen the truck and I heard the report like backfire, I was looking down at the truck, and I seen like fog or smoke just around the truck, around here and around there.

Mr. Congleton: He is pointing with his pencil to the lower part of the truck. Is that right?

The Witness: That is right.

Q. You couldn't see the righthand side of the truck from where you were? A. I couldn't see this side, but I could see over the truck.

Q. You could see the left side and down towards the rear? A. I could see the smoke around the outside.

Q. The smoke was, generally speaking, around the rear of the truck? A. I wouldn't say altogether around the rear, not altogether.

Q. Was there a lot of smoke? A. No, it wasn't so much.

Q. I mean, was it a cloud of smoke? A. No, sir, just a little fog of smoke, like a backfire of a car.

Q. Just a fog of smoke? A. Yes, sir, just a little fog of smoke.

Q. Can you tell us whether the area of this smoke was a little circle? A. Just a little fog of smoke, like a backfire.

Q. Did it come up over the top of the truck? A. I couldn't say that.

Q. You couldn't tell how high it was off the ground? A. No, sir.

Q. And that you saw while the truck was still standing still? A. Yes, sir.

Q. And then from the time the truck started up from this standing position which you described in front of 115 Wickliffe Street— A. 119.

Q. —119 Wickliffe Street— A. That's right.

Q. —from then on till the truck had started to cross 13th Avenue, there were no more reports, is that right? A. There was no more report until after the truck had started. It was about 13th Avenue and it might have been across. I didn't watch it then.

Q. It was either starting to cross 13th Avenue or had already crossed 13th Avenue before there was another report? A. That's right. That's right.

Q. Do you drive an automobile? A. Yes, sir. I don't drive one now, but I can drive one.

Q. You can drive? A. Yes. I used to.

Q. Are you familiar with the speeds of an automobile? A. When I am driving I know the speed.

Q. How fast would you say the car— A. I wouldn't say that.

Q. What is that? You wouldn't say what? A. I wouldn't say how fast it was going.

Q. Would you say it was going fast or slow? A. Like to me it was—it wasn't running fast or extra fast or extra slow. Usually as the truck starts up. You don't get speed up.

Q. From the time the truck started until the time you last saw it it was running at the speed that trucks usualy go at? A. Yes.

Q. Is that what you mean? A. Well, I couldn't —I would judge—if you will allow me to speak, it's like some people drive fast and some people drive slow, and this was just ordinary. There was no speed extra slow or extra fast; just ordinary.

Q. As you saw the truck going down the street it was going neither extra fast nor extra slow? A. No, sir.

Q. It was going at what you would call an ordinary, moderate rate of speed? A. Yes, sir.

Mr. Congleton: I assume you mean for a truck starting up.

Mr. Foley: That is what this had to do.

Mr. Congleton: I understand.

Mr. Foley: And it had to start and also to drive down to the corner and across the street. That is all.

Re-direct examination by Mr. Congleton:

Q. Now, when this truck started up and went down the street, did it travel in a straight line

or did it go from side to side? A. It went right straight down toward West Market.

Q. I neglected to ask you a question on direct examination.

Mr. Foley: I neglected one, too, and perhaps I should go ahead now.

Mr. Congleton: You may want to cross on this, too. Suppose I ask my question first.

Q. After this truck left, whenever it was, did you see anybody pick anything up from the street? A. I don't remember seeing anybody picking up anything. I don't remember that.

Mr. Congleton: No further questions.

Re-cross examination by Mr. Foley:

Q. When you heard these reports and saw the smoke coming out of the back of the truck, did you think anything unusual was happening down the street?

Mr. Congleton: I object to that as immaterial, as to what the witness thought.

Mr. Foley: I am laying the foundation for examining into his conduct, depending what his reactions were.

Mr. Congleton: The witness has already testified that after he came out of his house and walked to the corner, the radio police were there.

Mr. Foley: Were leaving.

Mr. Congleton: Were leaving.

Mr. Foley: I want to find out whether this man saw what he said he saw. It seems to me his reaction would be to go down to

the street immediately and not to take that length of time that would give the police to come up there and to be on their way again.

The Court: What he did is material and that is already before the jury.

Mr. Foley: But, if your Honor please——

The Court: What he did is material. Why he did it I don't think is.

Mr. Congleton: So that there will be no misunderstanding, this man has not testified that these were shots. He said they were reports.

The Court: He said they were sounds that sounded to him like a backfire.

Mr. Foley: Your Honor sustains the objection?

The Court: Yes.

Mr. Foley: I pray an exception.

Q. How long was it before you went down to Bomwell's place? A. Well, I wouldn't—I couldn't just say exactly the minutes, but I reckon it was at least three or four minutes, because I was fixing to come out of the house. At least three or four minutes. I will say three or four minutes.

Q. When was it that you first learned that anything unusual happened on Wickliffe Street? A. Well, it was the next morning when I went back to the shop, and the cashier there—when I walked in the door that morning—I works on Prince Street, and I spoke to the cashier, and he spoke about——

Q. Don't tell us what he said. It was the next morning? A. Yes.

Mr. Congleton: You asked for it.

Mr. Foley: I asked him when it was he learned.

Mr. Congleton: Was that the question?

(The last question is read by the court reporter.)

Mr. Congleton: All right.

Mr. Foley: I assume that the conversations would not be responsive to that question.

The Court: That is correct. The next morning.

Q. The next morning? A. Yes.

Q. You did not then tell the police officers when you saw them coming from Bomwell's what you had heard a few minutes before? A. No, sir; I hadn't spoken to the officers at all.

Q. When was it that you first told the police officers what you heard? A. Just when Detective Norris came to the store and asked me to come down to Police Headquarters.

Q. When was that? A. I don't know exactly what day, but it was a few days after this happened. I can't refer exactly to the date.

Q. In the meantime had you told anybody else what you had heard? A. Oh, certainly, because it was in all the papers, you know, and then——

Q. Had you told anybody else? Had you yourself told anyone what you heard?

Mr. Congleton: He has already answered that certainly he did.

Mr. Foley: It was in the papers, he said.

Mr. Congleton: No, in the first part of his answer he said, "Certainly, I did".

The Witness: Certainly.

Q. Who did you tell? A. Oh, I don't know. Different friends, and everybody was talking about it.

Q. So that notwithstanding that it was several days before the police officer came to you or the detective came to you? A. You mean before I told anybody?

Q. No, before the detective came to see you. A. I don't understand your question, sir.

Q. It was several days after this happened before the police came to see you to find out what you knew about it? A. Yes, sir.

Mr. Congleton: I object to that as having been already asked and answered.

The Witness: That's right.

The Court: He said yes.

Q. Where do you work on Prince Street? A. That's right.

Q. Where do you work on Prince Street? A. I work at Mr. Sidney Solomon's delicatessen.

Q. Is that anywhere near Wigler's Bakery? A. That's right. Where I work at is 62, and I think Wigler's is—I forget the number, but it is only but a few doors down.

Q. Did you know Mortimer Bateman? A. Certainly.

Q. How long had you known him? A. Well, I will say about close to twelve years.

Q. Twelve years? A. That's right.

Q. Did you make a written statement to the police or to the Prosecutor's Office? A. Down to Police Headquarters, you mean? Yes, sir.

Q. Did you sign it? A. That's right.

Q. Before you testified today did you have an opportunity to read that statement in order to refresh your recollection as to what you had said?

A. I haven't read the statement ever since I was down there. Detective Norris read it to me, because I couldn't see real clear without my glasses. He read it to me.

Q. When? A. When I made the statement to them that day.

Q. Did he read it to you— A. That's right.

Q. Just a minute, please. Did he read it to you recently before you took the witness stand, before you testified? A. Here?

Q. Yes. A. Oh, no, sir. No, I ain't seen it.

Q. You haven't seen it since then? A. No, I haven't seen it since.

Mr. Foley: That is all.

Re-direct examination by Mr. Congleton:

Q. You say you knew Mortimer Bateman for twelve years? A. That's right.

Q. How did you come to know him? Because you both worked in the same location? A. That's right.

Q. During those twelve years? A. That's right.

Mr. Congleton: That's all.

Erlie Newby, sworn.

Direct examination by Mr. Congleton:

Q. Mrs. Newby, where do you live? A. 115 Wickliffe Street.

Q. Newark? A. Yes.

Q. How long have you lived there? A. Ten years.

Q. 115 Wickliffe Street is on which side of the streeet? A. It is on the right side going toward South Orange Avenue.

Q. In other words, it is the side away from downtown Newark? A. Yes.

Q. It is the west side, isn't it? A. Yes.

Q. 115 Wickliffe Street is how many doors in from the corner of Thirteenth Avenue and Wickliffe Street? A. One house.

Q. On the corner is a store? A. Yes.

Q. Then there is a house? A. The store and the house is together.

Q. That is the first one? A. Yes.

Q. Then there is another one? A. That is my house.

Q. That is your house? A. Yes.

Q. What floor of that house do you live in? A. I live on the first floor.

Q. On the afternoon of December 17, 1946, did anything attract your attention around that vicinity? A. Yes.

Q. What? A. Some noise like the backfire of a truck, of a car.

Q. Where were you when you heard that noise? A. I was walking from the kitchen to the front.

Q. After you heard the noise what did you do? A. I looked out of the window, pushed the curtain back and looked out of the window.

Q. When you say you looked out of the window, that is a front window that faces on Wickliffe Street? A. That's right.

Q. On the first floor? A. Yes.

Q. You heard one report like a backfire before you looked out of the window? A. Yes.

Q. When you looked out of the window what did you see? A. I saw a truck passing.

Q. Did you notice what truck it was? A. Yes.

Q. What was it? A. Bakery.

Q. Bakery? A. Yes.

Q. Did you notice anything after that? A. No, I didn't.

Q. Did you hear any more reports? A. Yes.

Q. How many? A. Three.

Q. You heard three more? A. Yes.

Q. Did you notice where the truck was at that time? A. In the middle of the street.

Q. In the middle of the street on Wickcliffe Street? A. Yes.

Q. Was it opposite your house or past your house? A. It was right in the middle of the street passing by.

Q. Passing by? A. Yes.

Q. It was moving, is that right? A. Yes.

Q. Did it keep on moving? A. Yes, as far as I know. I didn't watch it. I just seen it passing.

Q. You heard three reports; is that right? A. I heard three reports.

Q. After is passed did you see anything else happen? A. Yes.

Q. What did you see? A. I saw a man walk across the street and pick up a hat.

Q. He picked up a hat? A. Yes.

Q. Where was the hat when he picked it up? A. It was lying near the curb, close to the battery station.

Q. Did you see what he did with the hat? A. Yes.

Q. What did he do with it? A. He laid it on a little box with two wheels at the battery man's station.

Q. Did you see the battery man there? A. Yes.

Q. But the battery man was not the man who picked up the hat? A. No.

Q. Do you know who the man was? A. No, I don't.

Q. After that did you see the battery man take the hat? A. No, the last I saw the hat was laying on the box.

Q. You didn't know anything unusual happened until when? A. Until the next morning.

Q. Where, when you looked out of the window the first time, was the truck in reference to the front of your house? Had it reached your house or in front of it or had it passed? A. When I looked out?

Q. You testified that you heard a sound like a backfire, and that you went to the window and looked out. A. Yes.

Q. You saw a bakery truck? A. Yes.

Q. Where was the bakery truck when you first looked out? A. In front of my house.

Q. Just about in front of your house; is that right? A. Yes.

Q. At all times when you saw this truck it was moving; is that right? A. Yes.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. You say you heard three reports— A. Yes.

Q. —after you first saw the truck? A. Yes, I heard three reports.

Q. You mean four altogether, one before you saw the truck and three after? A. No. One before I looked out of the window, and I looked out of the window, and I heard it again, and I let the curtain go and I heard it again and I looked out.

Q. So that you heard three altogether? A. Yes.

Q. Two of the reports while the truck was in motion? A. (No response.)

Mr. Foley: I will reframe that.

Q. You didn't see the truck when it was standing still? A. No.

Q. You didn't see the truck before you heard the first report, did you? A. No.

Q. When you did see the truck it was moving, and then you heard two reports? A. Yes.

Q. I think you said that you heard both of those reports before the truck reached Thirteenth Avenue? A. I didn't see it when it reached Thirteenth Avenue. I only seen it when it was passing my house.

Q. It was at that time that you heard two reports? A. I heard one report before I looked out of the window, and I looked out of the window——

Q. And you heard two more while the truck was passing? A. I looked out of the window and I heard two more, and I let the curtain go.

Q. At that time the truck had not reached Thirteenth Avenue? A. Well, I don't know. I didn't see the truck when it reached Thirteenth Avenue. I didn't notice it that much.

Q. You saw the truck when you heard the two reports, didn't you? A. When I saw the truck it was passing. When one report was fired I looked, and I heard two more. Just as I let the curtain go I heard the last one. I didn't pay it any mind.

Q. When you heard those last two reports the truck was passing your house? A. The truck done passed then.

Q. Had it reached Thirteenth Avenue? A. I guess it had. I didn't see it when it reached Thirteenth Avenue.

Q. You don't know whether it had reached Thirteenth Avenue or not? A. I don't know.

Mr. Foley: That is all.

Mr. Congleton: That is all, thank you.

Vincent E. Nygard, for the State—Direct.

VINCENT E. NYGARD, sworn.

Direct examination by Mr. Congleton:

Q. Officer Nygard, you are a member of the Newark Police Department? A. I am.

Q. And you have been for how long? A. Since 1929.

Q. In December 1946, to what bureau were you assigned? A. Radio division.

Q. Out of what precinct were you working? A. Fourth precinct.

Q. Directing your attention to December 17, 1946, at what time did you go to work that day? A. 8:45.

Q. You were working in the radio car? A. Radio Car 41.

Q. What was your partner's name that day? A. Patrolman Gindele, Albert Gindele.

Q. Is he your regular partner? A. No, sir, he was an extra man.

Q. Directing your attention to the early afternoon of December 17th, were you and your partner in the car when you received a report of an alarm? A. Yes, sir.

Q. About what time did you receive an alarm? A. At 1:45 p.m.

Q. At that time, Officer, about where were you and your partner in the car? A. In the vicinity of Bergen Street and Thirteenth Avenue.

Q. As a result of the alarm you got over the radio at 1:45 where did you proceed? A. Thirteenth Avenue and Wickliffe Street.

Q. Can you tell us about how long after you received that report at 1:45 you arrived at Thirteenth Avenue and Wickliffe Street? A. Within about two minutes.

Q. Within about two minutes? A. Yes.

Q. When you got to the corner of Thirteenth Avenue and Wickliffe Street whom did you see? A. There was a man standing there on the corner and he called us over to him.

Q. Do you know who that man was? A. Yes, sir, Mr. Bomwell.

Q. What did he tell you?

Mr. Foley: Objected to.

The Court: Sustained.

Mr. Congleton: Would your Honor hear me just a minute on that?

The Court: Yes, I will.

Mr. Congleton: I called the Court's attention to the fact this morning that when Mr. Bomwell was on the stand Mr. Foley questioned him about what he called a statement which he gave to the radio officers and had him identify these radio officers. He asked him what he told them, if he told them this, if he told them that, and if he told them the other thing.

The Court: Was that on this occasion?

Mr. Congleton: Yes, sir.

The Court: I had the impression he was referring to some other examination.

Mr. Congleton: No, sir.

Mr. Foley: I believe it was on this occasion, and I would have the right to cross examine this officer on that subject if I wish to, but in so far as the State's right to bring it in, the State is foreclosed from doing so by reason of the hearsay rule, and I object to the question.

But in so far as the State's right to put it in, the State is foreclosed from doing so by reason of the hearsay rule, and I object to the question.

The Court: I wonder if the fact that he was asked on cross examination would entitle you to go through the whole conversation.

Mr. Congleton: Mr. Foley even asked these officers to stand, and they were identified as the officers to whom Bomwell made this report.

The Court: Yes, that is correct.

Mr. Congleton: I will withdraw the question for the time being.

Q. You found Mr. Bomwell there on the corner when you got there. Is that right? A. Yes, sir.

Q. You asked him what happened? A. Yes, sir.

Q. You had a conversation with him. Is that so? A. I did.

Q. By the way, who was driving the radio car that day? A. My partner, Officer Gindele.

Q. After you had this conversation with Mr. Bomwell what did you do? A. I searched the neighborhood.

Q. Before you left his place of business what did you do? A. I telephoned to my radio dispatcher, whom I have to call.

Q. You telephoned on whose telephone? A. Bomwell's.

Q. You gave the radio dispatcher by phone the information that Mr. Bomwell had given you. Is that right? A. That's right.

Q. Was that the only time that day you were at Mr. Bomwell's store? A. Yes, sir.

Q. When you questioned him did you write down anything. A. A few notes.

Q. A few notes. Did you write anything in the form of a statement? A. No, sir.

Q. About how long were you there in Mr. Bomwell's store? A. Oh, less than five minutes, I will say.

Q. While you were there did Mr. Bomwell give you anything? A. Yes, he did.

Q. What? A. A hat.

Q. I show you this hat, marked S-27 for identification, and call your attention to the initials "MB" on the lining, and I ask you if this is the hat that Mr. Bomwell handed to you that day? A. Yes, it is.

Q. Did you take the hat from Mr. Bomwell? A. Yes, I did.

Q. Took it into the radio car with you? A. Yes.

Q. When you and your partner left his place of business, what did you do? A. We searched the neighborhood looking for a truck.

Q. When you say the neighborhood, about how big an area? A. Three and four blocks either way.

Q. You found no truck? A. No.

Q. Where did you go then? A. I went to Wigler's Bakery on Prince Street.

Q. Have you any idea what time it was about when you got to Wigler's Bakery? A. Approximately 2 o'clock.

Q. Whom did you see when you got to Wigler's Bakery? A. I went into the rear office, in the rear of the bakery store, and Mr. Wigler was there, and the bookkeeper was there.

Q. You made some inquiry from them? A. I did.

Q. Thereafter did Miss Engel make a phone call? A. She did.

Q. Did you get any information from Mr. Wigler?

Mr. Foley: Answer that yes or no, please.

A. Yes.

Q. After you obtained the information from Mr. Wigler did you do anything? A. Yes, I telephoned again.

Q. Where did you telephone this time? A. The radio dispatcher again.

Q. The information you had obtained from Mr. Wigler you gave to the radio dispatcher? A. That's right.

Q. And when you went into the store did your partner go in with you? A. No, he stayed with the car.

Q. How long were you at Wigler's? A. About ten minutes.

Q. After you left Wigler's Bakery, where did you go? A. To the Fourth Precinct.

Q. When you got to the Fourth Precinct, what did you do? A. I turned the hat in as evidence and put a tag on it, a paper tag.

Q. While you were at Mr. Bomwell's, you testified that you made a telephone call to your dispatcher. A. Yes.

Q. Was that before or after you talked to Mr. Bomwell? A. After I talked to him.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. Officer, when you made notes of your conversation with Bomwell, did you write down everything that Bomwell told you about what he had seen? A. Well, he didn't tell me much at that time, because I spoke to him and he said that——

Q. No. Will you answer the question? A. Yes.

Q. You wrote down everything that he told you? A. Everything he told me, yes, sir.

Q. Did you ever have any other conversation with him? A. No, sir.

Q. Do you have the notes of your conversation with you? A. No, sir. They have been misplaced.

Q. They have been misplaced? A. Yes, sir.

Q. When did you discover their absence? A. Oh, about two weeks afterwards. I was looking through my overcoat and I put some papers together, and I couldn't find the paper that I had marked at the time of the conversation.

Q. When you got back to the Fourth Precinct to make a report of your mission did you copy from your notes the things which Bomwell told you and put them in the report to your superiors? A. Yes. sir.

Q. Does that report contain anything other than what Bomwell told you? A. No. sir.

Q. Does that report contain everything that Bomwell told you? A. Everything that he told me at the time, sir.

Q. You never talked to him any other time, did you? A. No, sir.

Q. So everything that Bomwell ever told you is in that report? A. That's right.

Q. Do you have a copy of that report with you? A. Yes sir.

Q. Did you use that report to refresh your recollection before you came here? A. I didn't need it, sir.

Q. May I see the report? A. You may.

Q. So Mr. Bomwell told you, did he, that he saw two colored men driving a Wigler's Bakery truck when you saw him a few minutes after this thing happened? A. He didn't say that both of

them were driving it; he said both colored men were in the truck.

Q. He said he saw two colored men? A. That's right.

Q. He told you that? A. That is in the report, sir.

Q. And the way you wrote it was that he saw two colored men driving a Wigler's Bakery truck north on Wickliffe Street. That is the way you wrote it? A. That's right, I did.

Q. There is nothing in your report to indicate that Mr. Bomwell told you that he saw any smoke, is there? A. No, sir.

Q. There is nothing in your report to indicate that Bomwell told you that he saw the man that was driving holding the wheel with both hands?

Mr. Congleton: Objected to, if the Court please. There has been no foundation laid for this line of examination. It calls for a comparison of the testimony.

The Court: There is no statement by the witness that he made such a statement, is there? There was no statement by Mr. Bomwell that he made such a statement to this witness.

Mr. Foley: If your Honor please, he said he made a statement and told the police officer everything he had seen.

Mr. Congleton: That is not my recollection.

Mr. Foley: It is mine.

Mr. Congleton: He said at that time he was excited, and he doesn't remember what he told those officers on the first occasion. That is my recollection of the testimony.

The Court: I don't think he undertook to say he told them everything he saw at that time. That is not my recollection.

Mr. Foley. Whether he did or not, if your Honor please, I think my question is perfectly proper.

Mr. Conglton: Well, it encompasses a lot of facts which are not before us.

The Court: Well, I hardly think it does. Will you read it, please?

(The pending question is read by the court reporter.)

Mr. Congleton: That question assumes that Bomwell told this man. There is no such testimony.

The Court: Well, more than that—he is supposed to testify to the contents of that piece of paper that Mr. Foley has in his hand. Why don't we have the paper itself?

Mr. Foley: I am entirely willing. Do you wish to offer it, Mr. Congleton?

Mr. Congleton: I have never seen it. You called for it.

Mr. Foley: Do you want to look it it?

Mr. Congleton: I have no objection to its being offered.

The Court: Very well. Offer it in evidence.

Mr. Congleton: Is it offered as a defendant's exhibit?

The Court: Are you offering it? Who is offering it?

Mr. Foley: I have no objection to offering it. I can't offer it now, of course.

The Court: Do you want to offer it, Mr. Prosecutor?

Mr. Congleton: It wouldn't make any difference to me, as long as the record appears that the defendant wanted it to go in.

(The document referred to is received in evidence and marked Exhibit S-29.)

Q. Just so we may be absolutely clear, everything that Bomwell told you is contained on Exhibit S-29. Is that right? A. That is all he told me when I was at the scene.

Q. That is all he ever told you? A. That is all.

Q. At the scene or any other place? A. That is all.

Mr. Foley: That is all. I have no objection to your reading it at this time, if you wish, Mr. Congleton.

Mr. Congleton: Fine. Thank you.

(Mr. Congleton reads Exhibit S-29 to the jury.)

By the Court:

Q. How long had you been talking to Bomwell? A. Just a few minutes.

Q. How much? A. A few minutes.

Q. What do you mean by a few minutes? A. He gave us——

Mr. Congleton: Excuse me, sir. I don't like to interrupt the Court's questioning, but I am sure none of us back here could hear the question or hear the answer.

The Court: I asked the witness how long he was talking to Bomwell. He said, "A few minutes". I am asking him now what he means by a few minutes.

Q. A few moments ago didn't you give us the time to be roughly— A. Five minutes.
Q. About five minutes? A. That's right.

Re-direct examination by Mr. Congleton:

Q. During those five minutes, as I understood it, you not only talked to Mr. Bomwell, but you called the radio dispatcher. A. Yes, sir.

Mr. Foley: Just a minute. That is not what he said.

Mr. Congleton: Oh, now, if the Court please, I refer to his original testimony, when I asked him the question how long would he say he was at Bomwell's store, and he said, "About five minutes".

Mr. Foley: That may well be, but just a moment ago the Judge asked him how long he was talking to Bomwell, and he said, "About five minutes".

Mr. Congleton: I think he was asked if he hadn't said something about five minutes before.

Mr. Foley: I object to the form of the question. It is leading, for one thing; and, secondly, it does not take into consideration the statement that the witness made in response to the Court's question.

The Court: Well, let's see.

By the Court:

Q. How long were you there altogether at the place? A. About five——

Mr. Congleton: Will you take your hand down from your mouth and speak up, please, so the jurors can hear you?

The Witness: I will. About five minutes I said to the last question.

Mr. Congleton: Did you have another question, sir?

Mr. Foley: Are you asking me? No, I have no question.

By Mr. Congleton:

Q. From the time you got there until the time you left; that is, Bomwell's what did you do? A. Well, I listened to what he told me, I got on the telephone, and I called my dispatcher and told him to notify the Detective Bureau that something——

Q. You can't tell us what you said. But you had a conversation? A. I did.

Q. About how long did that conversation take? A. A minute or two.

Q. Then you came out, or did you come out after that? A. I did.

Q. Then what did you do? A. We scoured the neighborhood.

Q. When did Mr. Bomwell give you the hat? A. Right away.

Q. When you got there? A. Yes.

Q. Your purpose in going there was to answer an alarm. Is that correct? A. That's right.

Mr. Foley: I object to it as leading. He has already testified what he went there for. Whatever the purpose would be, would be of no consequence.

Mr. Congleton: I think it would. That was a preliminary question.

The Court: He said he went there in response to an alarm.

Mr. Congleton: Now I am going to ask him after he had obtained the information what his duties were then.

Mr. Foley: I object to that.

Q. What is your duty as a police officer under those occasions?

Mr. Foley: I object, if your Honor please. We are concerned with what he did—not what his duties are.

The Court: Isn't that right, Mr. Prosecutor?

Mr. Congleton: I don't want to press it, but I would be glad to tell you why I think it is important. If I may state this, I think I have a right to show that this officer is a man in a radio car who is supposed to apprehend people, if possible. His duty is not to get statements from witnesses under such conditions to prepare a case for trial or make a full investigation. That is what my purpose is.

Mr. Foley: Certainly, if your Honor please, it is highly prejudicial to the defendant for counsel to state in the presence of the witness what he wants him to answer in reply to a question which is now going to be put. Counsel knows better than to do a thing like that.

Mr. Congleton: I don't think I did anything improper. I stated to the Court the reason why I did not agree with his ruling, and was asking him to reconsider it.

The Court: What is your question?

(The pending question is read by the court reporter.)

The Court: Sustained.

Mr. Congleton: That is all.

ALBERT GINDELE, sworn.

Mr. Foley: If the testimony of this officer is merely to be cumulative of the testimony of Officer Nygard with respect to when they got to the place and where they went and what they did, I am willing to stipulate that the officer, if he testified, would corroborate Officer Nygard in all of those particulars.

Mr. Congleton: I am willing to accept that stipulation, but I still have to ask him one question, so that none of us here will be under any misapprehension.

The Court: The stipulation has the same effect as if he did so testify.

Mr. Foley: Exactly.

Mr. Congleton: That is correct.

Direct examination by Mr. Congleton:

Q. On this day when you were with your partner, Officer Nygard, did you have a conversation with Bomwell, or did you stay in the car? A. I remained in the car. I had no conversation with him.

Q. You remained in the car when you got to Wigler's Bakery? A. Yes.

Cross examination by Mr. Foley:

Q. You made no report? A. I made no report, no, sir.

Emma Coleman, for the State—Direct.

EMMA COLEMAN, sworn.

Direct examination by Mr. Congleton:

Q. Mrs. Coleman, where do you live? A. I live in Vaux Hall, 151 Waldorf Place.

Q. What is the name of the street? A. Waldorf Place.

Q. I show Exhibit S-14 and ask you if you recognize what that picture is. A. That is my house right there.

Q. That is your house? A. Yes.

Q. Would you take my pen and put a little "X" right there on the side of your house? Just mark an "X" on it between those windows so that we don't get it mixed up.

(Witness marks on photograph.)

Q. Would you put your initials, E.C., so that we will know it is your "X".

(Witness marks on photograph.)

Q. I show you S-15. Do you recognize that picture? A. Yes. That is still my house.

Q. That is still your house, but it is a picture closer to it; is that right. A. That's right.

Q. Do you occupy that whole house there? A. Yes, I do.

Q. Directing your attention or calling your attention to the afternoon of December 17, 1946, did anything unusual occur in your vicinity? A. Yes, it did.

Q. What? A. Well, the noise I heard, that's what occurred to me.

Q. You heard some noise; is that right? A. That's right.

Q. About what time was it when you heard this noise? A. It was like around about 2:30 or 2:20.

Q. When you say you heard some noise what did you hear? A. Well, to be frank with you what I heard, the kids were all going to school. It may seem kind of funny, but the kids were all going to school, and I was going to take medicine, and I didn't feel like going to the store, and we have so many people that come from Newark hollering, you know, selling vegetables and stuff, and I goes to the door thinking he was passing, and I didn't see anything.

Q. You mean by that when you heard some noise, you heard some hollering? A. That's right.

Q. You heard some hollering and went to the door? A. That's right.

Q. When you went to the door what did you see? A. I didn't see anything at present, because I looked up the street that way and I looked back, and I still didn't see no truck and no one. The noise had quit. Just as I went to close the door, to turn my head back in, there stood the man outside on the street, as bloody as he could be, and I don't know whether he was shot or what. I just screamed and went back in the house.

Q. You say you screamed? A. And I went back inside the house.

Q. This man, was he a white man or a colored man? A. He was a white man.

Q. Where was he in reference to your house, in front of it or up the road? A. Bring it here and I will show you.

Q. Showing you S-15. A. All right. This here, this is the trees in front of my door.

Q. Keep your voice up. A. This is the trees in front of my door here, but you ain't got the

other side of my friend's house that lives in front of me, to my knowing.

Q. Can you see it in that picture, showing you S-14? A. Yes, this is it, right here. This is my house here. She has got stops all along here to keep the cars from running up on her hedge. He was posted to one of these little posts. He was standing, just dragging and hanging on the post, crying for help.

Q. Did you do anything? A. Well, at the present time I was too nervous to do anything. When I got where I could remember myself, I went out to try to get help for him.

Q. How long was that? A. That was about three seconds, I guess. I don't know whether it was that long, because I was frightened.

Q. You got frightened when you looked out, and you screamed and went in the house, and how long did you stay in the house before you went out? A. I couldn't tell you that.

Q. Where did you go for help when you went? A. I went up to my friend's, Mr. Moore's.

Q. Did you see Mr. Moore? A. I did. I called him. He was coming outdoors as I was going in. I asked him to call for help for this man.

Q. You say when you looked at this man he was all bloody? A. Yes, he was all bloody.

Q. Well, when you say "all bloody" what do you mean? What part of his body do you mean? A. Well, I looked at him naturally, and I saw he was covered with blood all here (indicating), and his head and he had one button on his—he had a khaki suit on and he had one button to his clothes and that's the only one that was buttoned, and he was showing where he was shot in his stomach and where he was shot in his leg and then he said he was shot in the back, and I was frightened be-

cause I thought whoever did it might be after me. I was frightened.

Mr. Congleton: That is all.

Mr. Foley: No questions.

THOMAS MOORE, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Moore, where do you live? A. 168 Waldorf Place, Vaux Hall, New Jersey.

Q. How long have you lived there? A. About fifteen years.

Q. What is your business? A. Coal and ice.

Q. You run that business from your home? A. That's right.

Q. I show you Exhibit S-14 and ask you if you recognize that picture. A. That looks like Mrs. Coleman's house.

Q. You say that looks like Mrs. Coleman's house? A. Yes.

Q. You say that looks like Mrs. Coleman's house? A. Yes.

Q. Can you see your house in that picture? A. Yes, here is my house, back over here.

Q. That is the white one here on the side; is that your house? A. Yes.

Q. Would you mark an X on the side of that house and then put your initials alongside of the place? A. That's not so good.

Q. No, I don't see where you marked it. Maybe I'd better do it.

Mr. Congleton: Do you mind if I mark an X on the side of the house, Mr. Foley?

Mr. Foley: No, go ahead.

Q. Is that your house? A. Yes.

Q. Your initials are what? T. M.? A. T. M.

Q. (Mr. Congleton marks on the photograph.) Do you have a telephone in your home? A. Yes.

Q. You use it in connection with your business? A. That's right.

Q. Calling your attention to the afternoon of December 17, 1946, did anything unusual occur? A. Yes, it did.

Q. About what time, sir? A. Around 2; between 2 and 2:30.

Q. What happened? A. Well, I just came in for luncheon and I hear some squawking out on the street, "Oh, Lord, oh, Lord, help me, call the radio cops." I ran out and I seen a man drooping like this and all bloody all over.

Q. Where was the man when you saw him? A. He was about, I would say, about fifty feet from my house.

Q. In which direction? A. To my right.

Q. To your right? A. Yes.

Q. That would be in S-14 closer to the camera, wouldn't it? In other words, was it past Mrs. Coleman's house? A. No, it was right here.

Q. Right in there? A. Yes, as near as I can say.

Q. As near as you can say it was right there? A. Yes.

Q. Try this pen now and put an X there. A. Yes. (Witness marks on the photograph.)

Q. Will you put alongside of that "B"? A. (Witness marks on photograph.)

Q. Now, you say you saw a man where you have marked that X? A. That's right.

Q. What was his appearance when you saw him? A. Pretty bloody, I'll tell you.

Q. Where was the blood on his body as you saw it? A. Over his head, through his stomach and it ran all down his pants, you know. He was all over practically, to tell you the truth, in spots.

Q. Was he standing up? A. Yes, he was standing up in a droop shape.

Q. Will you show us what you mean by a droop shape? A. Like this.

Q. Bending over? A. Yes.

Q. With his hands— A. His hands to his stomach.

Q. His hands to his stomach? A. That's right.

Q. What did you do after you saw this man? A. Well, I didn't get a good look at him. I seen him all bloody and I ran back and called headquarters.

Q. You mean the Union Township Police? A. That's right.

Q. After you made the telephone call you came back outside? A. Yes, but they beat me there. Before I got back there they were down there already. They ran in ahead of me.

Q. So when you got back after you made your 'phone call the Union Police were already there? A. Yes, sir. By the time I got out to get—when I got in about ten feet of him they passed me coming in, the radio cops.

Q. They took the man away in the car? A. Yes.

Q. Now, did you notice any other cars or vehicles or trucks in that vicinity that afternoon? A. Why, yes. He was hollering when the police came. He said, "That's my truck up there."

Mr. Foley: Don't tell us what the man said.

Q. The man said something to you and you looked up the road? A. Yes.

Q. What did you see when you looked up the road? A. I seen a little green International truck.

Q. Did you go up by it? A. No, sir, I did not.

Q. You did not? A. No, sir.

Q. Then you returned to your home? A. That's right.

Mr. Congleton: That is all. Cross examine.

Cross examination by Mr. Foley:

Q. How long after you telephoned did the police come? A. Well, it couldn't have been over about two minutes. I was so close—they whipped up right away and before I got the telephone down and could get over to give him assistance they were there.

Mr. Foley: That is all.

ELIZABETH WEAVERS, sworn.

Direct examination by Mr. Congleton:

Q. Mrs. Weavers, where do you live? A. 137 Oswald Place.

Q. What town? A. Vaux Hall.

Q. Mrs. Weavers, Oswald Place is how close to Waldorf Place? A. It is one block. Waldorf Place is my backyard.

Q. And Oswald Place is in the same direction? A. The front.

Q. Showing you this picture, S-14, which is a picture of Waldorf Place, your house does not show in there, does it? A. No.

Q. How far would you say it is from the back of your house to Waldorf Place? Could you tell us? A. If six and a half—I couldn't explain. Six and a half—four and a half lots.

Q. Four and a half lots? Twenty-five-foot lots? A. I believe—I couldn't tell you exactly.

Q. Can you see any part of Waldorf Place from your house? A. I do.

Q. Is your house a one-family house or— A. One-family house.

Q. From the back windows of your house you can see Waldorf Place? A. That's right.

Q. On the afternoon of December 17, 1946 were you home? A. I was home.

Q. Where were you? A. Upstairs on the second floor.

Q. Did anything happen that caused you to look out? A. First I heard a noise—a slam like, either a car door or truck door.

Mr. Foley: What is that?

Mr. Congleton: She said she heard a noise that sounded like either a car door or a truck door slamming.

Q. Is that right? A. That's right.

Q. After you heard that what did you do? A. I didn't pay no attention; I keep doing my work upstairs.

Q. Then what happened next? A. Then in a little while after I saw—looked through my bedroom window and I saw a truck parked.

Q. What kind of truck, do you know? A. It has a sign—bakery truck.

Q. It had a sign? A. A sign—some bakery truck.

Q. Do you remember which bakery it was? A. Wigler's Bakery.

Q. You could see that from your house? A. I saw it through my window.

Q. As you looked at the truck did you see anybody around? A. When I looked, when I saw that truck, I didn't see nobody except some moving, passing by.

Q. Some who? A. Some passing by.

Q. Somebody passing? A. Somebody passing by.

Q. Do you know whether it was a man or a woman? A. I couldn't tell you who it was.

Q. Did you see anything else? A. I didn't see nothing else after that. Then I keep doing my work still; I get off the window.

Q. I am sorry, I didn't get that last. A. I says I get off the window and keep doing my work.

Q. Yes. A. Yes, sir.

Q. Then after that did anything happen? A. Then I came down on my yard.

Q. Yes. A. And I walked through my yard, and I heard a noise—a man yelling for help. Then I started to run to him through all my yard, through Waldorf Place. He was near by my gate. And when he saw me, so he says to me, "Lady, please"——

Q. You can't tell us what he said. I am sorry. You saw him, though, didn't you? A. I do so.

Q. What did he look like when you saw him? A. All bloody, holding his stomach like that, walking slowly like this.

Q. You say he was all bloody? A. All bloody all over.

Q. All over his head and face? A. His head, stomach and leg and all over.

Q. Then what did you do? A. Then I ran in the house. When he asked me—when he asked me I should call the ambulance before he dies, he

says, then I ran into my house, I picked up the receiver, and I called for Union Headquarters. So I got the answer from Union Headquarters that somebody notified them already. Then I get in the back and tell him somebody on the way already.

Mr. Congleton: What was that last part of the answer? I didn't hear it.

(The last part of the witness' answer is read by the court reporter, as follows: "Then I get in the back and tell him some body on the way already.")

Q. On one of these occasions you testified that you looked out your window and you saw a man passing by. A. I didn't see who that was.

Q. You didn't see who it was? A. I didn't see who it was.

Q. Did you see how he was dressed? A. No, I did not.

Mr. Foley: I object. The witness said she couldn't tell whether it was a man or a woman.

Mr. Congleton: I am sorry; I had forgotten that, Mr. Foley. I think you are correct.

Q. This person you didn't know whether it was a man or woman, you couldn't tell how he was dressed? A. I didn't recognize that. I didn't look long enough.

By the Court:

Q. He wants to know whether you could tell whether it was a man or woman. A. I am sorry. I didn't look long enough.

Mr. Congleton: That is all. Cross examine.

Mr. Foley: No questions.

CLOWTELL THOMAS, sworn.

Direct examination by Mr. Congleton:

Q. Where do you live? A. I live 151 Waldorf Place, Vaux Hall.

Q. Is it Miss or Mrs. Thomas? A. Mrs. Thomas.

Q. Whom do you live there with? A. My mother, Emma Coleman.

Q. That was your mother who testified a short time before; is that right? A. That's right.

Q. I show you Exhibit S-14 and ask if you recognize that picture? A. Yes. That is my mother's house.

Q. You are pointing now to a white house on the right which has an "X" on it and also the initials E. C.? A. Yes.

Mr. Foley: Mr. Prosecutor, is the testimony to be the same as the mother's testimony?

Mr. Congleton: No, sir.

Q. Now, Mrs. Thomas, were you home on the afternoon of December 17, 1946? A. I was. I happened to be home. I generally work but some of my children were sick, so I happened to stay home.

Q. Where were you in the house that afternoon? A. I was in the kitchen.

Q. Did something unusual occur? A. Yes, I was looking out of the window.

Q. About what time was it? A. Near my mother's home there is a hill, and the children generally cut across there to go to school. The school is only two blocks from my mother's house. I happened to be looking out of the window, because it was after one, watching the children go to school, and I seen a truck approach from the woods, from the north end of Waldorf Place.

Q. Do you know what kind of truck it was? A. It was a green truck. It looked to me as though it was a new truck.

Q. You saw it approach. Did you see where it went? A. It stayed there. It stayed by the hill. It wasn't in between anyone's house. It was by the hill.

Q. Showing you S-14 again, do you see the telegraph pole that the truck stopped by? A. Yes, right here.

Q. You are indicating the telegraph pole about in the center of the picture? A. Yes.

Q. Just before you get to your house, looking in the direction down the road that the picture looks; is that right? A. That's right.

Q. You saw the truck stop there. Then what did you see, if anything? A. I took my notice by the truck stopping not between anyone's house, just by the hill there.

Q. In other words, you mean it didn't stop in front of anybody's house? A. No. When it stopped it turned the wheels toward the hill, and made like you know, the steering wheel, I mean the wheels were like turned toward the hill.

Q. Could you see who was driving the truck? A. There was one colored man that was at the wheel when I seen it, and this fellow gets out.

Q. When the fellow gets out which side did he get out of? A. He got out the door by the wheel.

This fellow that got out, what was at the wheel, he got out and went toward the woods. He didn't go around the truck, but the other fellow——

Q. What other fellow? A. Another fellow was in there, and he comes out from the back entrance of the truck.

Q. He came out from the back of the truck? A. From the back. There wasn't only one seat in there. The fellow that was driving, that drove the truck up there, he gets out and goes toward the woods. Another fellow comes out of the truck, and he had a brown paper bag clasped in his hand, what took my notice, and he made to get around the back of the truck and decided he wasn't going around the back of the truck, and came in the front of the truck by the headlights and he decided——

Mr. Foley: If your Honor please, I object.

Mr. Congleton: I don't think this witness ought to be interrupted.

The Court: Strike out what he decided.

Mr. Congleton: She said it looked like—

Mr. Foley: He decided.

A. (continuing) He had this paper bag and he went to the back of the truck. He still had this paper bag, brown paper bag in his hand. He went to the front of the truck by the headlights and he stood there and paused for two or three minutes. He goes back to the back of the truck and also went toward the woods.

By the Court:

Q. Was this man you spoke of in the back a white man or a colored man? A. Both was colored.

By Mr. Congleton:

Q. Could you recognize either of those men if you saw them? A. No, I couldn't. All I know they had dark clothes on.

Q. Then what did you see after that? A. I was combing my little girl's hair, and I heard my mother in the front. She was in her front. I heard her in there making her bed or doing something in there. So I heard a noise, and I told my little girl. She was sick. I said, "Janet, go around——"

Q. You can't tell us what you said. Did you go out of the house? A. When the kid didn't came back I goes through the front myself and I seen this fellow, and he was hollering for help.

Q. When you say you saw this fellow do you mean a white or colored man? A. A white fellow.

Q. When you saw him what did you see about his appearance? A. He was baldheaded, and he had khaki clothes on, brown clothes on, and also I took notice he told me he was robbed——

Mr. Foley: Objected to and I ask that it be stricken out.

The Court: Strike that out.

Q. You say he was baldheaded? He wasn't wearing a hat? A. No, he didn't have a hat on.

Q. Did you notice anything unusual about his appearance? A. He was bloody.

Q. Where? A. From his head and his stomach and his legs and all. In fact, his whole clothes were that way.

Q. You didn't see him get out of the truck? A. No, I didn't.

Q. When you saw him was he standing? A. He was bent over, leaning over, holding his stomach.

Q. Holding his stomach? A. Yes.

Q. Was he walking or standing? A. He was standing.

Q. I meant to ask you before and forgot it: You said you saw one man come out of the truck. The man who had been driving went toward the woods, and then you saw the other man come out and do certain things and he went toward the woods. Calling your attention to S-14, which way do you go to get to these woods? A. Toward this way.

Q. Back this way to the right? A. Yes.

Q. Did they go down the road or how? A. They went down the road.

Q. Down the road? A. Yes.

Q. How far could you see them? A. I could see them, I guess, I could see them a pretty good ways. At the end of the street, I mean this place where you go down the road, is a turn, and you can see a good ways.

Q. When you saw this one man he always had a brown bag in his hand; is that right? A. Yes.

Q. Can you tell us about how big that bag appeared to be? A. It was a large paper bag; I should say a bag about that high.

Mr. Congleton: Indicating for the record about two and a half feet.

A. (Continuing) And he had it in the middle like that.

Q. He had it in the middle? A. Yes.

Q. By a rope you say? A. No, with his hand.

Q. It was the kind of bag you sort of squeeze together at the top and hold? A. Yes.

Mr. Congleton: Cross examine.

Mr. Foley: No questions.

The Court: It is 4 o'clock, gentlemen, and we will take a recess until tomorrow morning.

(A recess is taken until tomorrow, Friday, March 21, 1947, at 10 a.m.)

FIFTH DAY.

March 21, 1947.

(The following takes place in the Court's chambers:)

The Court: I called you gentlemen in here because I wanted to get these pictures passed upon. That question is still pending, and I wanted to dispose of that and get them out of the way. What I want to do if I can is to find a way in which we might meet the views of you gentlemen. As I understand it, Mr. Foley is objecting to them.

Mr. Foley: I think for the purpose of the record maybe a formal offer of them should be made at this time by Mr. Congleton, and I will state my objections to them again so that there will be no question about it.

The Court: I am perfectly willing to do that. The only reason I asked you to come in here is so that this can be straightened out without showing them to the jury. They are flashed this way and that way.

Mr. Foley: That is right. They have been flashed around, not purposely to be sure, but you can't help that.

The Court: Intentionally or unintentionally it comes to the same thing, and I

thought maybe if I understood exactly how you gentlemen stand on it, that possibly some common ground could be reached. Now, take this one. I imagine you feel the same way about that as you did before.

Mr. Foley: I feel as to all of these pictures (and since I am speaking for the record I think I had better refer to the numbers, S-3, S-4, S-5 and S-6 for identification) that they all are objectionable to the defendant for the reason that there is nothing contained in the pictures which is not already in the proof, and that there is no dispute as to anything that the pictures show. Therefore, the pictures are not necessary to the proof of the indictment, and all of them are of a character which is likely to inflame the jury and to play upon the sympathies of the jury. I think that each would tend to stir the emotions of the jury, and for that reason I believe they should not be admitted.

The Court: What do you say about it, Mr. Prosecutor?

Mr. Congleton: Referring to these picture separately, sir, S-3 specifically shows the lacerations appearing on the man's head, that the State contends were put there by a revolver held in the hand of the defendant when he struck him over the head with the butt of the revolver. For that reason we feel that this picture is a necessary part of the proof.

S-4 shows the point of entrance of wound No. 1, as marked by Dr. Martland. There was also a pencil mark made by Dr. Stein showing the part of the wound he treated,

and it was also used in the proof of the *corpus delicti.*

S-5 shows the point of entrance of wound No. 3, and also again shows wound No. 1 and the incisions made. That picture might be considered somewhat unnecessarily exposed as to the private parts or penis, and I have a little piece of sticker here that I would be very glad to have stuck over that part.

The Court: What you really want to show is what you claim is the entry of the bullet up here in the navel, and also the shot down near the leg?

Mr. Congleton: That is right.

(The Court places a sticker over a portion of Exhibit S-5 for identification.)

The Court: Now, Mr. Prosecutor, how does this strike you? This still would enable you to make such arguments as you would like to make.

Mr. Congleton: Very good, sir. S-6 for identification shows the point of entrance of what Dr. Martland refers to as wound No. 2, and also the point of exit of wound No. 3.

The Court: I suppose whatever ruling I make should be outside in the courtroom.

Mr. Conglton: I think I should make the formal offer outside.

Mr. Foley: And then I will state my objections, too. I assume your Honor is going to admit the pictures. If you do, having in mind the nature of my objection, I believe it would be proper for your Honor to instruct the jury that they must guard against permitting these pictures——

The Court: Not to excite their emotions or to prejudice them.

Mr. Foley: Yes.

The Court: All right, I will do that. The next thing is this: In regard to this exhibit here, S-29, since we have had our arguments and differences of opinion, we might call it, on the subject of that exhibit—at least that would be as to Exhibit S-28—since that occurred there has been a further examination in regard to what the witness Bomwell said about seeing smoke in the car, and Mr. Foley developed that according to this witness Bomwell didn't mention anything about smoke at the time the police first came there. Then in a subsequent statement, however, which was made some days later——

Mr. Foley: Referring to Exhibit S-28.

The Court: —he does refer to seeing smoke in the car. That is the exhibit over which there was the most controversy or difference of opinion. What I wish to call attention to is this: It seems to me that this exhibit becomes evidential for a new and different reason, and that is if the witness' testimony is to be impeached to any extent or questioned because he didn't mention smoke on the occasion when the officers were there, it is permissible for the Prosecutor to show that in a recent other statement to rehabilitate him that he did mention having seen this smoke, and that is another reason why this exhibit S-28 is admissible in evidence. I might say I rely upon the case of *State against Neiman*, 123 N. J. L. 342, which was affirmed on the

opinion below in the Court of Errors and Appeals in 124 N. J. L. 562.

Mr. Congleton: May I call something to your Honor's attention so that the record will be clear? In reference to S-29, that does not purport to be a statement of Bomwell.

The Court: Certainly not.

Mr. Congleton: All right.

The Court: But it purports to reflect a statement of Bomwell.

Mr. Congleton: It is a report made by some police officers later from notes which they made at the time they were in the course of their investigation.

Mr. Foley. Those notes being their record of what Bomwell said to them at the time.

The Court: That is what is claimed by the defense, and therefore it impeaches the credibility of the witness.

Mr. Foley: On that subject, if your Honor please, the statement S-28 has already been admitted, and I have taken an exception to that. So there is really no point in my making any argument at this time. Your Honor is merely stating an additional ground upon which the statement would be evidential.

The Court: Having developed since.

Mr. Foley: I, of course, do not concur in your Honor's views, and I should like the record to indicate my objection is no less forcibly taken at this time than it was before.

The Court: Certainly. I don't understand that you meant to withdraw it at all. The next thing is this: It would be a good

thing to agree upon the time for the view that Mr. Foley wants of the automobile truck. See if this is not a good idea: Tomorrow is Saturday. Under the new laws, there are very few people around on Saturday, and that might give you a pretty free space in back of the Hall of Records, and why would not that be a good time for your view?

Mr. Foley: That is satisfactory to me. I take it your Honor definitely decided that you will not permit the view of the moving truck at the point where this is said to have occurred?

The Court: Yes.

Mr. Foley: So that we are now speaking of a view of the truck as it is parked where the jury may have sufficient room to step back and make such observations as it desires.

The Court: That's right.

Mr. Foley: That is agreeable to me, and tomorrow morning will be perfectly satisfactory.

The Court: Yes.

Mr. Foley: I should like, if possible, to have the jury know before we do go there what I would like them to look at. In other words, if we merely turn them loose, they may do what they did the other day, look about and not stand any particular place. So that before we go over, if I could make a statement in open court as to what I would like them to observe, I think it would be of considerable help.

The Court: Yes, before we go each side may make a statement to the jury of what they would like them to look at.

Mr. Congleton: I am in hearty agreement as to that suggestion, but I want to call your Honor's attention to the fact that we have good weather today, and this view would be outside. We have had good weather now for several days and I don't know what the prognostication is for tomorrow, and it would be a very messy affair if we had rain.

The Court: There is something in that.

Mr. Foley: I think there is a great deal in that. I really don't see any reason why you couldn't have it almost any time. It would be necessary, perhaps, to move a few cars, but I think there is an attendant over there.

Mr. Congleton: I think we could back the truck in such a position by swinging the tail around toward the other parked cars, that the whole space to the right of the truck for 40 or 50 feet will be clear. I think you know what I mean. If it was backed out and the nose put up against the other building, it will serve the purpose.

The Court: When do you expect to put the car in position satisfactory to both sides?

Mr. Congleton: We can do that at a moment's notice.

The Court: The idea is that you would precede the jury.

Mr. Congleton: We could go over with somebody and in five minutes we could put the car in position.

Mr. Foley: We could do it right now as well as later.

The Court: It is all right with me. You can do it now if you prefer.

Mr. Congleton: I have no objection to doing it now.

Mr. Foley: I would like to have it done as soon as possible.

The Court: I am not against that for any reason, except Saturday is a holiday, and these people around here who work here are out of the way, and their cars are out of the way. That place over there is usually full of cars, and on Saturday I thought maybe there wouldn't be very many there, but it is all right with me. You can do it today if you prefer. We will go into the courtroom, and you gentlemen can make your statements to the jury, and in the meantime we can have the preparations made and go right over.

Mr. Foley: Could the jury be supplied with some sort of ruler or tape measure? I am going to ask them to stand at a certain point so that we could make a reasonably accurate measurement.

The Court Clerk: I have a 1-yard rule, if that will help. Also, your Honor, I might suggest the Nelson Place side has a little more room than on 13th Avenue.

Mr. Congleton: We will look at it. There is only one thing about the measurements or specific distances, and that is I think the jury should be cautioned that that was the witness' best recollection of the distance, and everybody's ideas of distances vary somewhat, so that it is not a mathematical certainty as to standing on that particular point, but that they should move around that particular point.

Mr. Foley: I think there will be no objection to that.

The Court: Of course, each one of you may make what statement you see fit before going over. Why not measure the distances you have in mind in advance and put a chalk mark there and say, "We agree that those chalk marks represent certain things"?

Mr. Congleton: I don't want to bind the State to the position of this man's actual statement that the truck was 12 feet out from his position and 5 feet back, as a mathematical certainty, because I don't think that human fallibility is that close.

Mr. Foley: One other thing I would like to state is this: You will recall the witness Bomwell said that the truck, when he saw it standing, was about the same distance from him as from where he was seated to the back of the courtroom.

The Court: Yes.

Mr. Foley: I wonder if you would look at the chart and give us that measurement.

The Court: You will find a diagram right there on my desk.

Mr. Foley: All right, sir.

(The following takes place in the courtroom in the presence of the jury.)

The Court: Did the Prosecutor wish to do anything with exhibits?

Mr. Congleton: At this time, if the Court please, I desire to offer in evidence Exhibits S-3 for identification, S-4 for identification, S-5 for identification, S-6 for identification, for the reasons that I have previously stated on two other occasions when I proffered these pictures.

Colloquy.

Mr. Foley: The defendant objects to the admission of the pictures for this reason: There is nothing contained in the pictures or depicted in them which has not already been proved by the State. If there is any fact demonstrable in the pictures which has not been proved and the Prosecutor desires to state what it is, I would in all probability stipulate such fact to be true. No such request has been made of me. As the record now stands, everything that is contained in the pictures has been supported by testimony and so, it seems to me, that the handing of pictures to a jury which show a corpse and which indicate the location of surgery and the like, can only have the effect of inflaming the passions of the jury, perhaps playing upon their sympathy, and certainly stirring their emotions. Such a thing should play no part in this trial and every effort should be made to avoid any such effect by both the prosecution and defense.

I do feel that the pictures will have that effect, and I therefore object to them.

Mr. Congleton: Does the Court desire to hear me further?

The Court: Certainly.

Mr. Congleton: The State is offering these pictures as part of its orderly proof of their case. The State does not have to accept stipulations, particularly in a case of this type, and I call your Honor's attention particularly to the fact that Exhibits 4, 5, and 6 for identification were all used by Dr. Martland when he testified, and that he made certain arrows on there to indicate

points of entrance and exit of bullets at your Honor's request.

Without these pictures his testimony carries no sense to the jury at all, unless they have the benefit of the pictures and the markings he put on them. Also, Dr. Stein, in his testimony yesterday, put pencil marks indicating certain matters that he testified to, on S-4 for identification and S-3 for identification as to whether or not they show the marks of lacerations on the top or sides of the deceased's head, which the State contends it will prove were put there by the defendant. And they are not being offered for any purpose of inflaming the jury or prejudicing the defendant in this case, but they are an orderly part of the State's case and are necessary in the State's opinion to the proper presentation of this case. And on that ground we respectfully ask that they be marked in evidence.

Mr. Foley: May I say in reply to the Prosecutor's statement that while it is true Dr. Martland made marks upon these pictures, he did it at a time when the pictures had already been rejected upon the offer of the Prosecutor, although marked for identification. Furthermore, Dr. Martland made the same demonstration upon the coat of Captain Cocozza when the captain stood before the jury, and the doctor indicated the location of the marks of the wounds.

In so far as Dr. Stein is concerned, at the time he testified and counsel asked him to make certain marks upon the pictures, the pictures had been rejected either twice

or three times by your Honor, with leave, of course, to renew the offer at a subsequent time. And under those circumstances the Prosecutor was satisfied to have the doctor make marks upon pictures which had already been rejected, it seems to me, with that risk, and that was borne by him.

The Court: Had they been rejected, Mr. Foley?

Mr. Congleton: They weren't rejected.

Mr. Foley: They hadn't been received.

Mr. Congleton: I had offered them on previous occasions, and your Honor had reserved decision on my offer. I don't think you ever made any ruling on receiving them.

Mr. Foley: Perhaps I used the wrong word. When I say they were rejected, I will say they had not been admitted and that the question of their admission was still an open one.

The Court: Yes, that is right. They were reserved, as I recall.

Members of the jury, the Court will admit these pictures in evidence, but at the same time I wish to emphasize the fact that you are sitting professionally; you are sitting as judges, clothed with office, in an official capacity for today and for the trial, and I will ask you to see to it that you maintain that attitude and do not allow anything of this kind—these pictures or anything else—to play upon your emotions unduly, to excite your passions, or to make you feel prejudiced or in any way to affect your judicial status. And with that caution I will ask you to receive the pictures and

look at them in that manner; that is, as judges who look at things of that kind.

Mr. Foley: I pray an exception.

The Court: There has been an application made by Mr. Foley for a further view of this truck, and the Court is ready to grant that application. The gentlemen who represent the State on the one side and the defendant on the other wish to make a statement to the jury and request you to observe certain things when you go to make your view. So I will ask counsel for the respective sides to address the jury and tell them what they wish them to observe in particular when we get to the place where the truck is now located. And I suppose it will be in order for the Prosecutor to make his address first.

Mr. Congleton: All right, sir. May I interrupt just long enough to get these pictures physically marked, sir?

The Court: Yes.

(The pictures are received in evidence and marked Exhibits S-3, S-4, S-5 and S-6.)

The Court: We have a diagram, ladies and gentlemen of the jury, of this room, which we use from time to time. At the request of counsel that diagram has been shown to them, and according to the diagram the distance from a point in the center of that rail to the far door—the entrance door—is 45 feet, 8 inches. That is understood and agreed to by both sides?

Mr. Foley: The rail being that which is directly in front of the witness chair.

The Court: Yes, that is right.

Mr. Congleton: If the Court please, and Mr. Foley, I will try to describe the physical setup as we have set it up, and I hope you will interrupt me in any portion that is not correct.

Mr. Foley: I hope I don't have to do that.

Mr. Congleton: I hope you don't have to do it, too, but it is new to me.

We have gone over behind the Hall of Records here and marked a spot on a step with a piece of chalk, next to a post, where both the defense counsel and the State would like each juror in turn to stand when they make their observation. We have arranged for three different views of the truck, and I assume that if the jury wants any closeup or other views, or if they want to get into the truck you have no objection.

Mr. Foley: None whatsoever.

Mr. Congleton: We will ask you to make at least three observations individually from this point. When the truck is to your left and out from you approximately twelve feet and a distance from the point that the judge has just indicated on the witness stand to that door, the truck will be that distance away and you can see what it looks like. The truck will then be moved up, still in the same line of twelve feet, so that the door, with the right door open, the door will be approximately five feet to your left. The truck will then be moved up so that the door, with the right door open is directly in front of you.

The State asks you particularly to bear in mind when you make these observations that a witness' testimony as to specific dis-

tances, such as one witness testified to, to twelve feet or five feet are a man's best recollection of distances at a given time, that they cannot be accepted with mathematical certainty. We ask you to make all these observations, particularly the one five feet away and the one close up, bearing in mind that you can probably make certain observations through the window of the door as well as through the open door itself.

Mr. Foley: If your Honor please, Mr. Congleton has stated the demonstration correctly. I wish merely to tell you what I would like to have you look for.

First of all, I would like you to try the door and see how far back it can be opened. You will recall that one witness said, the witness Bomwell, that the door was opened up so that it was against the mudguard. I would like you to try the door and fix it in the position to which it can be opened the farthest. Then I would like you to look inside the truck and to picture, if you can, a place close to the floor on the righthand side of the truck, a distance of approximately a foot past the line of the driver's seat; in other words, if the driver's seat was on the righthand side instead of on the left; a foot behind that and down close to the floor. That, you will recall, is where the witness Bomwell said he saw the smoke inside the truck. We would like you to stand in the position which we have indicated and, of course, this is an approximation to a certain extent; but imagine that you are standing on the sidewalk, standing at the point on the sidewalk that Bomwell indi-

cated he was at, which was not right on the curb but somewhere near the edge of the sidewalk.

We will ask you, last of all, to bear in mind that when you are looking at the truck directly in front of you, as Mr. Congleton desires you to do, to have in mind that the truck was moving, and that the witness' opportunity to view must be considered in the light of the fact that the truck was in motion. Is there anything else, Mr. Hayden?

Mr. Hayden: No.

Mr. Foley: Thank you very much.

The Court: The Court will proceed now, members of the jury, to the point where the truck is parked, and you will be accompanied by the officers in the usual way.

(The following occurs at the demonstration referred to, in the automobile parking area in the rear of the Hall of Records:)

Mr. Congleton: It was thought, your Honor, that the jury would step up along this line so they could see the truck at the position it is in now.

The Court: You want the jury to observe it at that position?

Mr. Congleton: Yes.

Mr. Foley: The truck is now 45 feet, 6 inches away.

The Court: I understand that the truck is now, according to counsel by agreement, 45 feet away. So counsel ask you to observe the truck from this distance now. Step right up. This is the theoretical curb here.

Juror No. 9: May I ask a question? This curb, in relation to the curb on 13th

Avenue, what is the distance from here to the bed of the street. It might make a difference.

The Court: I will ask counsel.

Mr. Foley: We agreed that that is substantially the height of the curb, give or take an inch. We agreed to that because we do not think it would make much difference, because the jurors are of varying heights, so that that would be the same substantially.

Juror No. 6: Were the hinges on that door ever broken?

The Court: Oh, we had better not go into that part. This is a view, and that question can be asked when we get back into the courtroom.

Mr. Foley: Yes, and we can take care of it at that time.

(The truck is moved forward.)

The Court: Just circle around, please, so that each person can stand here on this spot in succession. Counsel want you to look at the truck from this point. What is the stipulated distance that the truck is from the point where the jury are standing?

Mr. Congleton: 12 feet from the curb to the side of the truck and 5 feet to the left.

Mr. Foley: 5 feet to the left to the door.

Mr. Congleton: To the front part of the door.

Mr. Foley: Right.

(The jury make the observation.)

(The truck is moved forward.)

Mr. Foley: We stipulate that the truck is drawn forward so that the door is approximately 12 feet forward of the place where the truck had been previously standing.

(The jury make the observation.)

Mr. Foley: Before the jury goes in I would like to have the jury look inside the truck to a point on the righthand side approximately 12 inches behind the line of the driver's seat.

Mr. Congleton: May I make a statement? Bearing in mind that smoke is not a fixed object.

Mr. Foley: Oh, certainly. Will the jury also try the door?

(The jurors make the observation.)

Juror No. 2: Is it possible to see the bracket that was broken? Can we see it while we are here?

The Court: Yes.

Mr. Congleton: Mr. Foley has no objection to my making this statement. The bracket is riveted fast on this side, the right side. It has been replaced at this point by a nut and bolt.

Mr. Foley: Indicating the bracket on the lefthand side of the door.

Mr. Congleton: Yes, and the pictures show that this was broken off.

The Court: If the jury want to look at any other part of the truck, go right ahead, as much as you want to and anything else you want to.

Juror No. 12: I would like to see the truck started up and travel at a speed of approximately five miles an hour.

Mr. Foley: I would like to see that, too.

Juror No. 12: To see what happens to that open door.

Mr. Foley: Yes. I would like to have the jury observe the back of the truck, too, with the door closed.

Mr. Congleton: I have no objection to the truck being driven forward, but there is no testimony in the case yet that the door was open when the truck was 50 feet away. The witness testified that he did not know when it opened and that he noticed it when it was 5 feet away.

The Court: Will the members of the jury please get back on that stand?

It has been requested that the truck be moved, so we are going to move it.

Do I understand you want the truck started up and moved as nearly as he can do it at five miles an hour?

Mr. Foley: From that point where he started in the first place.

The Court: Will you go back with the truck to that point and come up at five miles an hour as nearly as you can do it?

Mr. Foley: I think it should be noted on the record that the truck is being driven not by its regular chauffeur but by a detective from the Prosecutor's Office.

The Court: That is right.

Mr. Congleton: The record will show that the truck went up in first gear, not exceeding five miles an hour.

Mr. Foley: That is agreable to me.

It was in first gear and, certainly, it did not exceed five miles an hour.

The Court: Members of the jury, if you want to do anything else, you can do it, or if you want to see anything else, you can see it. If you don't, we will go back to the courtroom.

Juror No. 14: I guess that is all.

The Court: Then we will return to the courtroom.

(The following takes place in the courtroom:)

Mr. Foley: If your Honor please, during the course of the jury's view, one or more of the jurors asked some questions in connection with the truck. I think that those questions should now be placed on the record, and if possible we should undertake to answer them.

The Court: What the Court said to the jury in each instance was that if they wanted to ask any questions to defer them until we were in the courtroom.

Mr. Foley: That is correct.

The Court: So that I will renew that proposition. If any member of the jury wishes to ask any question, they are at liberty to do so right now.

Juror No. 6: If your Honor please, my question was whether or not the hinges on the truck door on the righthand side were ever broken so that the door may have been opened further than what we saw this morning.

Mr. Congleton: If the Court please, not that I know of at the present time, but I

will have witnesses within a few moments who arrived at this truck shortly after, the police officers, and I will have an employe of the bakery who went there to bring this truck back, and it was my intention at that time to have them describe the condition of the truck, and I think that the man who works for the bakery would be in the best position to answer that question at that time. I don't like to answer it myself because I don't think I am qualified.

The Court: Any answer to any question must be by testimony. Of course, neither the counsel nor the Court are at liberty to answer a question in that sense.

Mr. Foley: It could be by stipulation if the facts were agreed upon.

Mr. Congleton: Mr. Foley, I don't want to interrupt you but I am not in any position to stipulate those facts until these people get on the stand.

Mr. Foley: We are going to need someone familiar with that model of truck who will be able to testify as to whether or not the way the door operates is the standard operation.

Mr. Congleton: I don't think so at all. I expect to produce someone from the bakery who is familiar with that truck, who was in and out of it, and let him testify as to the condition of the door. I think that is the best evidence.

The Court: That is what the juror asked, the condition of that particular door, not the trucks in general of that make.

Mr. Foley: But, if your Honor please, if the operation of that door is the standard

operation, if there was no evidence that the door was ever broken, presumably that is the way the door operated on that day.

The Court: As I understand it, there are going to be witnesses here who know about that particular truck who can testify, and that is the best evidence.

Mr. Foley: We will have to see what they say. If I feel it is necessary, I shall introduce testimony from someone familiar with that type of truck.

The Court: You are at liberty to call any witness you want to call.

Mr. Congleton: Are there any further questions?

The Court: Does anybody else wish to ask a question? Very well, I didn't hear any, so that we will proceed.

Frances Bateman, sworn.

Direct examination by Mr. Congleton:

Q. Mrs. Bateman, where do you live? A. 2 Hillside Avenue, Newark.

Q. How long have you lived there? A. About twelve years.

Q. You are the widow of Mortimer Bateman? A. Yes.

Q. Mrs. Bateman, I show you S-26 for identification and ask you if you recognize that. A. Yes. I bought this coat for him at the store that I work in.

Mr. Congleton: I don't know whether the jury heard that. Would you read that answer?

The Witness: I bought this coat for my husband.

Mr. Foley: We do not deny that is Mr. Bateman's coat.

Q. When did you last see your husband, Mrs. Bateman? A. Monday, about 11 o'clock.

Q. In the morning? A. No, at night. He went to work at night. I was in the house.

Q. Did you see him when he went to work? A. Yes. In fact, I turned around, and the alarm clock rang, and I said, "What are you running for?"

Mr. Foley: Objected to.

Mr. Congleton: You can't tell us what was said.

Q. He stayed at work from that night on; he didn't come home all night? A. He didn't come home. He called me on the 'phone at the store.

Q. You can't tell us what he said on the 'phone, Mrs. Bateman. Did you see how he was dressed when he left that evening? A. Yes.

Q. How was he dressed, Mrs. Bateman? A. He had khaki pants on, high shoes, and that coat.

Mr. Congleton: That is all. Cross examine.

Mr. Foley: No questions.

Mr. Congleton: I offer the coat in evidence.

Mr. Foley: No objection.

(The coat is received in evidence and marked Exhibit S-26.)

Michael J. Tymczyn, for the State—Direct.

MICHAEL J. TYMCZYN, sworn.

Direct examination by Mr. Congleton:

Q. You are a member of what police department? A. The Union Police Department.

Q. Union Township? A. Yes.

Q. Is there a portion of Union Township that is commonly referred to as Vaux Hall? A. Yes, sir.

Q. What portion of the township is Vaux Hall in? A. What do you mean by that, sir?

Q. Is it northeast or south? A. That would be east—I mean west. West going down.

Q. What are some of the adjacent communities to the borderline of Vaux Hall? A. Well, there is Maplewood, Springfield, Millburn and Irvington.

Q. Directing your attention to December 17, 1946, on that day what was your duty? A. I was riding the radio car with my partner, William Whittaker. We received a call at 2:11 to go to Mr. Moore's.

Q. At 2:11 p.m.? A. Yes.

Q. Who was driving the radio car, you or your partner? A. Officer Whittaker was driving it.

Q. You received a call at 2:11 p.m. to go to Mr. Moore's? A. Yes.

Q. At that time where were you in the radio car? A. Half a block away.

Q. What did you do when you received the alarm? A. We proceeded to go down to Waldorf Street.

Q. When you arrived at Waldorf—is it street or place? A. Place.

Q. What did you see when you arrived there? A. We seen Mr. Bateman there.

Q. Whereabouts did you see him sir? A. I would say about the middle of the block.

Q. Directing your atttention, officer, to Exhibit S-15, do you recognize that picture, sir? A. Yes.

Q. What is it, sir? A. It is a picture of Waldorf Place.

Q. Would it be possible to indicate on there where Mr. Bateman was when you saw him? A. I would say just about in the middle of the street.

Q. Will you put an X there and your initials, please. (Witness complies.)

Mr. Congleton: The record will show that the witness marked an X and his initials "M. T." thereunder.

Q. Where was Mr. Bateman when you saw him there? Was he standing or sitting or lying down? A. He was standing.

Q. And in what position? A. Well, he was in agony.

Q. Was he standing up straight or bent over? A. Bent over.

Q. Where were his hands? A. He was holding them around his stomach.

Q. What was his general appearance? A. He was pretty well beaten up.

Q. Did you observe any blood? A. Yes, quite a bit.

Q. Where? A. His whole head was covered with blood and it seeped blood out through the shirt.

Q. What did you do? A. We immediately put him in the radio car and took him down to Dr. Biber.

Q. You saw Mr. Bateman, you observed his condition, and you did nothing further; you just put him in the radio car and drove him to Dr. Biber, is that correct? A. That is right.

Q. You went to Dr. Biber's? A. Yes.

Q. What happened when you got to Dr. Biber's? A. We took his coat off and the doctor injected a needle in his arm and gave me a prescription.

Q. Where was Mr. Bateman? A. In the back of the radio car.

Q. After that, where did you proceed? A. We went to the Elizabeth General Hospital.

Q. You delivered him to the accident ward? A. Yes.

Q. And that was your last connection with this affair? A. Yes, sir.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. The Elizabeth General Hospital is in the City of Elizabeth? A. That's right.

Q. And in the County of Union? A. That's right.

Mr. Foley: That is all.

Mr. Congleton: I neglected to ask the officer a question.

Direct examination (continued) by Mr. Congleton:

Q. Officer, have you any idea—and I haven't asked you to measure it, so you may not know the answer to this—of the approximate distance it is from the Courthouse here out to Vaux Hall—Waldorf Place?

Mr. Foley: I object, if your Honor please. It is not a matter of his having any idea; it is a matter of his being able to tell with some degree of certainty.

The Court: Yes.

Mr. Foley: Any idea would be obviously purely a guess.

Mr. Congleton: I appreciate that, and I will reframe the question.

Q. Do you have any knowledge of the distance from the Courthouse to Vaux Hall?

Mr. Foley: That is objected to unless—

Mr. Congleton: I am only asking for a yes or no answer.

Mr. Foley: Well, you see, that would depend upon the route that was taken.

The Court: Well, that is true.

Mr. Congleton: I will withdraw the question at this time. No further questions.

Mr. Foley: No questions, Officer.

WILLIAM E. WHITAKER, sworn.

Direct examination by Mr. Congleton:

Q. Officer, with what Police Department are you connected? A. Township of Union.

Q. You have been for how long? A. 17½ years.

Q. Directing your attention to December 17, 1946, were you on duty that day? A. I was.

Q. What was your type of duty that day, sir? A. I was in a radio car.

Q. Directing your attention to the afternoon of that date, did you receive a call as a result of which you proceeded to Waldorf Place? A. I did.

Q. About what time did you get that call, Officer? A. 2:11.

Q. How far away was your radio car at the time you got the call? A. Oh, about a half a block.

Q. How long would you say it took you after you got that call to get to Mr. Moore's house? A. About a minute.

Q. When you got there what did you observe, Officer? A. Well, I observed a man walking in the street. He was in a very bad condition. He was blood from head to foot, and he was walking along the street, hollering for help.

Q. Officer, directing your attention to Exhibit S-15, I ask you if you recognize that picture. A. That is Waldorf Place.

Q. Can you point out on there approximately where you think it was you saw the gentleman? A. Right about here.

Q. You are indicating where the "X" is that was put there by the other officer? A. Yes.

Q. Did you subsequently ascertain the name of the man you saw there? A. After we got him in the car.

Q. What was his name? A. Mortimer Bateman.

Q. As soon as you saw his condition what did you do? A. We stopped in the doctor's on the way down.

Q. We are back at Waldorf Place. You arrived there and as soon as you saw his condition what did you do with the man? A. We put him in the car.

Q. You didn't do anything further at the scene? A. No, sir.

Q. Then you took him to Dr. Biber's? A. That's right.

Q. Where he was given emergency treatment, and thereafter you proceeded to the hospital in Elizabeth, where you turned Mr. Bateman over to the accident ward? A. That's right.

William E. Whitaker, for the State—Cross.

Q. Is there anything further you had to do with the incident? A. No, only I brought his jacket back. That's all.

Q. You brought his jacket back to Police Headquarters? A. Yes.

Q. I show you S-26 and ask you if you recognize that. A. I do.

Q. What is that? A. That is Mr. Bateman's jacket.

Q. That is the jacket you took back to Union Police Headquarters? A. Yes.

By the Court:

Q. Where did you get the jacket from? A. I took it off him down at the hospital.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. Did either you or your partner go back to the bakery truck while you were there? A. I went back after we delivered Mr. Bateman to the hospital.

Q. Was anybody there at that time? A. Yes, sir.

Q. Were there any police officers there? A. There was.

Q. Were they police officers from Union or Newark? A. From Union.

Q. When you got there did you find or was there found in your presence a bullet on the runningboard of this truck? A. No.

Q. Were any bullets found by you or your fellow officers from the truck as far as you know? A. As far as I know, yes.

Q. Pardon me? A. As far as I know, yes.

Q. Yes? A. Yes.

Joseph A. Kinney, for the State—Direct.

Q. Do you know who found the bullets? A. Officer Spies and Officer Dehmar.

Mr. Congleton: I don't want to interrupt you, but those officers will be called to the stand.

JOSEPH A. KINNEY, sworn.

Direct examination by Mr. Congleton:

Q. Detective, you a member of the Newark Police Department, are you not? A. Yes, sir.

Q. You have been for how long? A. Six years.

Q. Directing your attention to 1946, sir, to what bureau of the Police Department were you assigned? A. Detective Division, Homicide Squad.

Q. As part of your duties as a member of the Homicide Squad you investigate homicides that occur in the City of Newark; is that correct, sir? A. Yes, sir.

Q. Directing your attention to December 17, 1946, did you receive any instructions as the result of which you went to a hospital in Elizabeth? A. Yes, sir.

Q. What hospital did you go to? A. St. Elizabeth, Elizabeth, New Jersey.

Q. About what time did you get there? A. About 3:40 p.m.

Q. After you got there what did you do? A. I went to the second floor of the hospital and talked with Dr. Stein.

Q. Dr. Stein was the doctor who was here yesterday? A. Yes, sir.

Q. Following your talk with Dr. Stein, what did you do? A. I went into a room in the hospital with his permission and spoke to Mortimer Bateman.

Q. After you talked to Mortimer Bateman what did you do? A. I called Newark Police Headquarters and had a conversation with Lieutenant Wangner, my immediate superior.

Q. Did you give any information to Lieutenant Wangner? A. Yes, sir.

Q. Did you suggest or order to Lieutenant Wangner that any alarm be sent out? A. I told him to——

Mr. Foley: I object to that.

A. —pick up Joseph Smart.

Mr. Foley: I object to that. The question can be answered yes or no. What he told to his superior is not binding on this defendant. If it is answered yes or no, I have no objection. I ask that everything else be stricken.

The Court: Yes, strike it out.

(The pending question is read by the court reporter.)

A. Yes, sir.

Q. Do you know what alarm went out, Officer?

Mr. Foley: Answer that yes or no.

A. Yes, sir.

Q. What was the alarm?

Mr. Foley: I object to that, if your Honor please.

The Court: Would you object if it was done in his presence?

Mr. Foley: Yes, I believe I would still object. I object, if your Honor please, because what was said by anybody out of the presence of this defendant cannot be binding upon him.

The Court: Well, the witness has already said that an alarm was sent out.

Mr. Foley: Yes.

The Court: Well, did that occur while you were present?

The Witness: No, sir, I was at the telephone at St. Elizabeth Hospital and I was speaking to my superior in Newark.

Mr. Congleton: Your Honor rules that he can't answer the question?

The Court: That is correct. This is a telephone conversation, talking to his superior.

Mr. Congleton: That is all.

Mr. Foley: No questions.

WILLIAM G. WANGNER, sworn.

Direct examination by Mr. Congleton:

Q. Lieutenant, you are a member of the Newark Police Department?

Mr. Foley: Mr. Congleton, may I ask Detective Kinney one question?

Mr. Congleton: You certainly may.

JOSEPH A. KINNEY, resumes the stand and testifies further, as follows:

By Mr. Foley:

Q. Detective Kinney, did you have any conversation with Brooks, the defendant, at any time? A. I saw him in Headquarters. I must have talked to him. I don't recall any specific thing I said. I remember when the statements were taken.

Q. I am not asking you about that. A. I am sorry. Okay.

Q. You say you did see him?

Mr. Congleton: Objected to as improper cross examination at this time.

The Court: I think it is.

Mr. Foley: Very well.

WILLIAM G. WANGNER, resumes the stand.

Direct examination by Mr. Congleton:

Q. Lieutenant Wangner, I don't know whether I asked you the usual question. You are a member of the Newark Police Department? A. I am.

Q. You have been for how long, sir? A. Thirty-one and a half years.

Q. In 1946 and up to the present time to what bureau are you assigned? A. Homicide Squad, Detective Bureau.

Q. You are in charge of the squad, are you not? A. I am, under the supervision of Deputy Chief O'Neill.

Q. Directing your attention to the afternoon of December 17, 1946, do you recall a telephone

conversation you had with Detective Kinney? A. I did.

Q. After that telephone conversation did you send out an alarm? A. There was no alarm sent out by me; there was one sent out by the Union Township police.

Q. You ascertained an alarm had already been sent out? A. That is right.

Q. You checked that from the information that Detective Kinney gave you? A. That's right, I did.

Q. Did you in Newark receive the alarm which Union sent out? A. We did.

Q. Do you have a copy of it? A. I have.

Q. What was the Union alarm?

Mr. Foley. Objected to, if your Honor please. Anything anybody said out of the presence of the defendant would not be binding upon him.

The Court: Yes.

Mr. Foley: An alarm is no different from any other statement or conversation.

The Court: Yes. So far I think your objection is well taken. Is there any reason to argue to the contrary, Mr. Prosecutor?

Mr. Congleton: Yes, I feel that evidence which shows the chronology and orderly processes of the police following the commission of an alleged crime of this nature, step by step, is admissible in evidence.

The Court: Well, conversations during that investigation?

Mr. Congleton: This is not a conversation; this is an official alarm that was sent out by the Union County police.

The Court: But it had to be done by word-of-mouth, I suppose, over some apparatus.

Mr. Congleton: No, I think they send it out on the teletype.

The Court: Well, by hand, but that is the equivalent of conveying words. I don't see any difference between that and a conversation. I will sustain the objection.

Mr. Congleton: I will withdraw the question.

The Court: He says he received the alarm from the Union County police.

Mr. Congleton: That is all for the time being. I will withdraw the witness.

Mr. Foley: No questions.

ALBERT G. DEHMAR, sworn.

Direct examination by Mr. Congleton:

Q. Officer, you are a member of the Union Township police? A. Yes, sir.

Q. You have been for how long? A. Since 1938—nine years.

Q. Directing your attention to the afternoon of December 17, 1946, what duty were you on that day? A. I am in the—I am a patrolman, but I do the maintenance work for the department.

Q. Will you keep your voice up just a little bit, because sometimes I can't hear you. A. Yes, sir.

Q. That afternoon what were you doing? A. Well, I was in Headquarters.

Q. What happened? A. The patrolman on desk duty received a telephone call.

Q. Following that telephone call you were sent somewhere? A. I was detailed to Waldorf Place.

Q. With whom? A. Myself.

Q. You went alone? A. Yes, sir.

Q. In a police car? A. Yes, sir.

Q. Then you proceeded to Waldorf Place? A. Yes, sir.

Q. Do you know approximately what time it was when you got there? A. Oh, approximately 2:15.

Q. What did you find when you got there? A. I saw a truck parked on Waldorf Place.

Q. Just a minute, officer. Directing your attention to Exhibit S-15, do you recognize that picture? A. Yes, sir.

Q. What is that a picture of? A. That is Waldorf Place, looking in a northerly direction.

Q. Can you indicate on there, if it would be shown on that picture, where that truck was? A. Yes, sir.

Q. Where was it? A. Approximately here.

Q. I wonder if you would put a mark on that picture. I know you can't show the exact size of the truck, but approximately. A. I will put a line here. Something like that.

Q. The truck is a lot bigger than that, isn't it? A. That is approximately where it was.

Q. All right. Could you say about how far away it was from that telegraph pole? A. Oh, about fifteen feet. That is the front of the truck.

Q. The front of the truck? A. Yes.

Q. Now, officer, I show you S-8 and ask you if you recognize that picture? A. Yes, sir, that is the truck that was standing on Waldorf Place.

Q. When you got there what did you do? A. I looked the truck over.

Q. What did you find, officer? A. I found that the keys had been taken out of the truck. I proceded to take the rotor from the distributor so that no one else could move the truck.

Q. Did you make an examination of the truck, of the interior as well as the exterior? A. Yes, sir.

Q. Did you see anything inside the truck? A. I found a pellet apparently from a .38 caliber revolver.

Mr. Foley: If your Honor please, I ask that the latter part be stricken, the "apparently from a .38 caliber revolver".

The Court: Very well. Strike it.

Mr. Congleton: If the Court please, I would like to be heard on that striking. This is a police officer who is giving his opinion as to the caliber.

The Court: He has not shown any qualifications, any more than any other police officer.

Q. You say you found a pellet there, is that correct? A. Yes.

Q. I show you an object and ask you if you recognize that? A. Yes, sir. That is the pellet I found.

Q. How do you distinguish that as being the pellet you found? A. I put the initial "A" right here.

Q. Whereabouts in the truck did you find it? A. Right near the driver's seat.

Q. Do you understand this drawing up here? A. Yes.

Q. Will you indicate on the upper lefthand drawing whereabouts you found that pellet? A. Yes. Here is the driver's seat. The pellet I found

was right about there, in with some gravel, like, that was down here.

Q. Will you put your initials there and also "pellet"? A. Yes. (The witness complies).

Mr. Congleton: I ask that it be marked in evidence.

Mr. Foley: No objection.

(The pellet is received in evidence and marked Exhibit S-30.)

Q. Did you look the truck over some more? A. No, I did not make a more thorough examination.

Q. Did you look in the interior; were there any bakery goods or anything in there? A. No, there wasn't. There was some paper in there.

Q. Any boxes? A. I didn't notice. I didn't notice the boxes. I noticed the paper.

Q. I show you S-10 for identification and ask you if you recognize that. A. That is the interior of the truck.

Q. Is that the appearance of the truck when you saw it?

Mr. Foley: I object to that, if your Honor please, as leading, and, secondly, I object because the witness has said that he did not make an examination of the inside of the truck. He noticed some paper and that's all. He said he did not notice any boxes. Unless the condition shown on that picture was that which was present at the time he saw it, and this witness knows beyond any question that that was the condition that was present, he should not be permitted to answer this question.

Mr. Congleton: That is the very thing I asked him.

Mr. Foley: You asked it in a very leading form.

(The pending question is read by the court reporter.)

Mr. Congleton: I don't see anything leading about that.

The Court: Mr. Foley has reference to the contents.

Mr. Foley: That is right.

By the Court:

Q. Without reference to the position of the movable objects, would you say that is the appearance of the truck? A. I noticed paper in this portion of the truck, but as to my recollection of the boxes being in the truck, I don't recollect that.

Mr. Congleton: All right, sir.

By Mr. Congleton:

Q. Did you notice anything on the truck broken? A. No, sir, I didn't.

Q. What did you do after you found this pellet? A. I searched the neighborhood looking for any suspects that might be in the vicinity.

Q. Did any other Union police officers arrive while you were there? A. Yes, sir.

Q. Who? A. Officer Spies.

Q. Did he stay there after you left or did he leave first? A. We were both there together.

Q. He went with you? A. Yes, he had another police car.

Q. Did he stay there when you left or not? A. We both left about the same time.

Q. Did he find something? A. Yes, sir.

Q. Did you see him find something? A. Yes, sir.

Q. What did you see him find? A. A pellet on the runningboard of the truck.

Q. Which running board? A. On the left running board, near the driver's seat.

Mr. Congleton: No further questions.

Cross examination by Mr. Foley:

Q. That is the running board on the driver's side? A. That's right.

Q. The doors of the truck were unlocked when you arrived? A. I opened this door on the left-hand side, by the driver's seat. That is the door I opened.

Q. The other door was unlocked too? A. That I can't say.

Q. You didn't open it at all? A. No, sir.

Q. The back doors, rear doors, were open, were they not? A. The back doors weren't, no.

Q. They were not? A. They were not open.

Q. They were not locked, were they? A. I can't say whether they were locked or not, but they were not open.

Q. You didn't try them? A. No, sir.

JOSEPH P. SPIES, sworn.

Direct examination by Mr. Congleton:

Q. Officer, you are a member of the Union Township Police Department? A. Yes, sir.

Q. And you have been for how long, sir? A. Five years.

Q. On the afternoon of December 17, 1946, to what duty were you assigned? A. I was reserve man in Headquarters.

Q. Did anything happen that afternoon as a result of which you went to Waldorf Place? A. Yes, sir. I received a telphone call from a Mr. Moore.

Q. About what time did you receive that call? A. 2:11.

Q. What did you do after you received that call? A. I dispatched the car on the upper end to the scene.

Q. Did you do anything yourself after you dispatched that car? A. After that I dispatched the other car to assist him up there.

Q. Did you go up there yourself? A. Yes, after they called back and told me the situation, I was sent up there in another car.

Q. About what time was it when you got up there? A. It was between I should say, about 2:17 or 2:18.

Q. When you got there what did you find? A. When I came upon Waldorf Place the only thing I saw was a truck.

Q. Showing you Exhibit S-15, do you recognize that? A. Yes, that is Waldorf Place.

Q. Can you point out where it was on that picture that you saw the truck? A. Right here where that mark is.

Q. In other words, you point to the mark that the previous police officer put on the picture? A. Yes, sir.

Q. That truck was headed in which direction —toward the telegraph pole? A. That's right, the front toward the telegraph pole.

Q. What geographical direction is that? A. I would say that is north.

Q. Did you examine the truck officer? A. Not very thoroughly. I looked it over. I assisted Officer Dehmar in taking a rotor out of the truck to

prevent anyone from moving it. In looking around on the left running board I found a pellet.

Q. I show you an object and ask you if you recognize that. A. Yes, that is the one I found.

Q. How do you recognize it? A. I put an "X" on top of it with a penknife.

Mr. Congleton: I offer that in evidence, sir.

Mr. Foley: No objection.

(The pellet is received in evidence and marked Exhibit S-31.)

Q. Do you understand this diagram? A. Yes, sir.

Q. Will you step down and indicate here where you found that pellet? A. I would say it was right about here.

Q. Will you write "Pellet" there and put your initials under it? A. Yes. (The witness complies.)

Q. How long did you stay there at the truck? A. Oh, a short while. I should say a few minutes.

Q. Were there any other police officers there besides you and Officer Dehmar? A. Yes. Officer Holzhauer was sent up there and Detective Hanoway.

Q. After you left there, where did you go? A. We searched the fields in the immediate vicinity of Waldorf Place.

Q. Now, while you were there, did you observe the interior of this truck? A. No, I did not.

Q. You did not? A. No, sir.

Q. You did not notice whether or not anything on the truck was broken or not? A. No, I did not.

Mr. Congleton: Cross examine.

Joseph P. Spies, for the State—Cross.
Adriana L. Smart, for the State—Direct.

Cross examination by Mr. Foley:

Q. Were the rear doors of the truck opened at any time while you were there? A. No, they were not.

Q. When you arrived there who was there? A. Officer Dehmar and myself.

Q. And then Officer Holzhauer came? A. Yes, and Detective Hanoway.

Q. And were you present during all the time that they were there? A. That's right.

Q. And during all of that time the doors were not opened? A. To my knowledge, no, they were not.

Q. The "X" which you marked for purposes of identification is marked right on the nose of this pellet? A. Yes.

Q. That is your mark, that "X" there? A. Yes.

Mr. Foley: That is all, Officer. Thank you.

ADRIANA L. SMART, sworn.

Direct examination by Mr. Congleton:

Q. Mrs. Smart, where do you live? A. 150 Atlanta Avenue, Vaux Hall.

Q. Do you think we could talk just a little bit louder between us, so my good ear works? How long have you lived there? A. About 6 years.

Q. To whom are you married, Mrs. Smart? A. Howard E. Smart.

Q. Did he have a brother, Joseph Smart? A. Yes, he did.

Q. You knew his brother, Joseph Smart? A. Yes.

Q. What street is it you said you live on? A. Atlanta Avenue.

Q. Do you know where Waldorf Place is? A. Yes.

Q. I show you Exhibit S-14 and ask you if you recognize that picture. A. Yes.

Q. What is that? A. Waldorf Place.

Q. How far away do you live from the view shown in this photograph? A. About two blocks.

Q. Were you home on the afternoon of December 17, 1946? A. Yes, I was.

Q. On that afternoon did anyone come to your home? A. Yes.

Q. Who? A. My brother-in-law, Joe Smart, and James Brooks.

Q. Do you know James Brooks? A. I had met him once before.

Q. What name did you know him by? A. Gill.

Mr. Foley: What was that?

Mr. Congleton: Gill—G-i-l-l.

Q. That was a nickname, wasn't it? A. Yes.

Q. Not a last name? A. No.

Q. You knew him as Gill Brooks, is that right? A. That's right.

Q. Do you see the gentleman you knew here in the courtroom? A. Yes, I do.

Q. Will you point him out, please. A. Sitting between the two officers.

Mr. Congleton: Indicating for the record the defendant Brooks?

Mr. Foley: Yes.

Q. About what time was it they came to your home? A. Between 2:30 and 3 o'clock.

Q. On December 17. Is that right? A. That's right.

Q. When did you first know they were there? A. They knocked at the door.

Q. Yes. A. I was laying down—myself and my two children—and the children jumped up and came into the dining room and said, "Mother, uncle Joe is here."

Q. Did you then get up? A. Yes.

Q. When you got up what did you do? A. I had to put on a dress.

Q. Yes. A. And I came out into the kitchen, and Joe was standing in the doorway between the kitchen and the dining room.

Q. He is the only one you saw at first? A. Yes.

Q. Then did you see anyone else? A. Gill had —not right away.

Q. Well, after that did you see someone else? A. Then I saw Gill.

Q. Where did he come from? A. Out of the bathroom.

Q. How far away was the bathroom from where you saw Joe? In other words, I think you said that Joe was standing in the doorway between the kitchen and the dining room. Is that right? A. That's right.

Q. Where is the toilet with reference to that? A. On the righthand side, right off the kitchen.

Q. How far away? A. It is just a doorway, like right here.

Mr. Foley: Indicating the bench directly next to the witness' seat.

Q. In other words, the door between the kitchen and the dining room is here, and against the other wall and close by is the door of the toilet in the kitchen. Is that correct? A. That's right.

Q. When you are in the toilet, with the door shut, can you hear people talking if they are

standing in the doorway between the kitchen and the dining room? A. No.

Q. When did you see Gill? A. When he came out of the bathroom.

Q. Did he say anything to you? A. He spoke to me.

Q. Yes. And did you observe him? Did you notice how he was dressed? A. He had on a dark suit.

Q. Did you notice whether he had an overcoat on? A. Yes, he had his overcoat on.

Q. Do you remember what kind of overcoat that was? A. It was dark.

Q. Did he have a hat? A. I didn't notice.

Q. Did you see anything in the house at that time besides these two men that ordinarily isn't there? A. Yes.

Q. What? A. On the chair in the dining room there was a large brown paper bag.

Q. Can you show us about how big that paper bag was, Mrs. Smart? A. About like that.

Mr. Congleton: Indicating what? 2 feet?
Mr. Foley: About.

Q. Then what happened? After Gill came out of the bathroom and Joe and you were there, what happened? A. Well, I went and sat down on the dining room chair by the window and Gill came out and we just were talking generally and Joe walked into the sun parlor and looked out the window. He came back to the front room and he called Gill and they stayed in the front room together in there talking.

Q. Then what happened after that? A. And then they came back out and Joe asked me what kind of fire did I have. I told him a furnace fire. He said——

Mr. Foley: I object to anything said by Smart unless it was in the presence of Brooks.

Mr. Congleton: I think the witness testified that both of them came from the front room into the dining room, and they were there when this conversation took place.

Mr. Foley: If that is so, I can have no objection.

By the Court:

Q. Were they both there? A. Yes.

Mr. Foley: Very well. I withdraw my objection.

Q. Did Joe ask the question or Gill? A. Joe.

By Mr. Congleton:

Q. Then what happened? A. Joe asked me can he burn some trash, paper, in the furnace. I told him I would rather he didn't because the fire had been rather low that day and I had just got it started. He said it was just a little. So I told him all right. So they both went into the bathroom. They they came out, picked up the paper bag and went down the cellar.

Q. Then what happened, Mrs. Smart? A. They went on down the cellar, and I smelled something burning and I got up from the chair in the dining room and went to the cellar door to ask Joe what was he burning. It didn't smell like paper. So I had two girls with me and I went down the cellar with the children and walked down the cellar stairs. You have to walk around like this to get to the furnace. When I got there—as I was coming there Joe and Gill were stand-

ing in front of the furnace, and by the time I walked part-way around there Joe slammed the cellar door and spoke very sharply to me and told me to go upstairs.

Q. When you say he slammed the cellar door, do you mean the cellar door? A. I mean the furnace door.

Q. You mean the furnace door. He told you what? A. To go back upstairs.

Q. Then what happened? A. So I took the children and came back upsairs.

Q. I neglected to ask you. Is this a one-family or a two-family house? A. A two family house.

Q. Are there one or two furnaces? A. Two furnaces.

Q. As you come downstairs and go into the part of the cellar where the furnaces are, are the two furnaces close to each other? A. Yes.

Q. As you approach them, whose is first, yours or the other people's? A. That's according to which way you go.

Q. Let us put it this way. Is your furnace nearer to the back of the house or the other people's? A. The other people's.

Q. Then you came back upstairs after Joe slammed the furnace door and told you to go upsairs? A. Yes.

Q. What happened after that? A. Joe and Gill came upsairs.

Q. When Joe and Gill came upstairs did they have anything with them? A. They had a brown paper bag.

Q. What did they do after they came upsairs? A. Set it on the chair. One of them asked me for the whisk broom.

Q Do you know which one asked it? A. No. I don't.

Q. You remember one of them asked you for a whisk broom? A. Yes.

Q. Did you get him the whisk broom? A. Yes.

Q. Then what happened? A. They went into the kitchen and brushed their selves off

Q. And did their clothes need brushing off? A. Gill's.

Q. Gill's clothes needed brushing? A. Yes.

Q. Did Smart's need brushing off?

Mr. Foley: I object to that. She can tell how the clothes appeared, but her conclusion as to whether or not they needed brushing or not is not material here.

Q. What was the appearance of Smart's clothes? Do you understand what I mean? A. Yes.

Q. Do you know what they looked like? A. No.

Q. Did you observe anything on them? A. No.

Q. Did you observe anything on Brooks' clothes? A. Nothing but just dust. They looked dusty.

Q. Did you notice what part of his clothes this dust was on? A. Mostly on his pants.

Q. You saw him brush himself off, is that correct? A. I didn't see him.

Q. You didn't see him. You saw him before he brushed himself off and you saw him afterwards, is that right? A. Yes.

Q. What did you see happen next? A. Then Joe said that Gill wanted to go and wanted a taxi. So I called the taxi.

Q. Well, what happened after that? By the way, did he say where he wanted to go? A. The lady at the taxi office asked me and I asked him and he told me he wanted to go to Westfield.

Q. That is what you told the lady in the taxi office? A. Yes.

Q. Then what happened after that, Mrs. Smart? A. Joe took off his trench coat.

Q. Joe was wearing a trench coat? A. Yes. Gill took off his overcoat and they changed coats.

Q. They changed coats? A. Yes.

Q. You saw Brooks put on Smart's coat, is that correct? A. Yes.

Q. Did you see him put anything else on? A. He put on a hat.

Q. Yes. A. And a pair of dark glasses.

Q. Did you see where he got the hat? A. No.

Q. You saw him put on Joe Smart's coat and a pair of dark glasses and a hat, is that correct? A. Yes.

Q. Then what happened after that, Mrs. Smart? A. The taxi came and Gill picked up the paper bag and went out the door.

Q. Did Smart stay? A. Yes, he did.

Q. How long did he stay? A. Several hours.

Q. Did he go out at all while he was there? A. Yes.

Q. Do you know how many times?

Mr. Foley: If your Honor please, I object to it. I do not believe that whatever Smart did subsequent to the happening would be binding in any way on Brooks.

The Court: It depends on whether it was in the course of an effort to either cover up the alleged crime or to effect an escape.

By the Court:

Q. Where was the taxi told to go? A. Westfield.

The Court: Do you contend that this has anything to do with an effort to escape or cover up the crime?

Mr. Congleton: Yes, sir, this was part of it. This was shortly after these two men left the truck and went into the woods, and they came to this house two blocks away. This is all part of the attempt to escape.

The Court: That is the whole point. Of course, according to the testimony, the robbery seems complete at the time that these men got out of the truck. If it is part of an attempt to escape, the Court will allow it upon the theory that the jury may consider it if they conclude that these men were acting in concert for the purpose of robbery and escape. You say there will be evidence to show that it was part of an escape, because a mere request to call a taxi to go to Westfield doesn't seem necessarily to indicate an escape.

Mr. Congleton: I am then going to show where Brooks went in that taxi. I am certainly going to show that. I was now attempting to show that Smart stayed at her home, I think she said for several hours. I have now asked her how many times he left the house during those several hours. That is the present pending situation.

Mr. Foley: My point is this: Whatever Smart did during the several hours after Brooks left could hardly be said to be evidence to indicate an attempt to escape on Brooks' part.

The Court: It might not be unless they were acting in concert to accomplish something. If you are simply going to show he

went in and out of the house, I don't see any connection.

Mr. Congleton: Very good, sir. I will pass it for the time being and bring it in another way later.

Q. Directing your attention, Mrs. Smart, to when Brooks left the house and went to get a taxi, did he have anything with him when he left the house? A. The paper bag.

Q. He took the paper bag with him; is that correct? A. Yes, he did.

Q. Did you see whether or not he gave anything from the paper bag back to Smart before he left? A. No.

Q. You testified previously that you smelled something burning and you left upstairs and went down to the cellar after you called. Is that correct? A. Yes.

Q. Smart had already told you that he was going downstairs to burn something? A. Paper.

Q. Why did you go downstairs when you already knew that he had gone down to burn paper?

Mr. Foley: That is objected to, if your Honor please.

The Court: Well, she said this much, Mr. Prosecutor: That she smelled something that did not smell like burning paper.

Mr. Congleton: I wasn't sure that she had said that, sir; I missed it. She did testify then that she smelled something that did not smell like burning paper?

The Witness: That's right.

Q. Do you know what it did smell like? Or what did the odor smell like to you?

Mr. Foley: Objected to, if your Honor please.

The Court: I will allow that.

Mr. Foley: I pray an exception.

A. I didn't—it didn't have any definite odor; it just wasn't paper. I knew.

Q. By the way, Mrs. Smart, when you 'phoned for a taxi, do you recall what taxi company you called? A. Spriggs' Taxi.

Q. Spriggs? A. I think that is the name.

Q. Whereabouts is that? A. In Millburn.

Mr. Congleton: Cross examine.

(A recess is taken until 2:15 p. m.)

AFTERNOON SESSION

ADRIANNA L. SMART, resumes the stand.

Cross examination by Mr. Foley:

Q. Mrs. Smart, Joe Smart was your husband's brother, is that correct? A. That's right.

Q. You knew him for quite a long while? A. Yes.

Q. For how long? A. 7 years.

Q. Did you see him often? A. Yes.

Q. Did he come to your house often? A. Any time.

Q. Pardon me? A. Any time.

Q. You were friendly with him? A. Yes.

Q. Your husband was friendly with him? A. Yes, sir.

Q. Never had any trouble with him of any kind, did you? A. No.

Q. Did you know Brooks for any length of time before that day? Gill. A. I had just met him once before.

Q. Where was that? A. At my mother-in-law's home.

Q. How long before? A. It was a year before that.

Q. A year? A. Yes.

Q. Did you know his wife? A. I had met her at the same time.

Mr. Foley: That is all. Thank you.

DANDRICH WOOD, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Wood, where do you live, sir? A. Vaux Hall, New Jersey, 333 Power Street.

Q. What is your business, sir? A. I am employed at Spriggs' Taxi Service.

Q. Do you drive a taxi, sir? A. Yes, sir.

Q. I show you a card here and ask you if you recognize that card? A. Yes, sir.

Q. What is that card? A. That is my card—my daily report for the 17th of December.

Mr. Congleton: These gentlemen can't hear you. Will you read that question and answer back, please, Mr. Stenographer.

(The last question and answer are read by the court reporter.)

Q. Mr. Wood, see these last gentlemen over here? They have to hear you, so please, even if I am standing here, will you keep your voice up? A. Yes, sir.

Q. As you make a trip with your taxi do you make an entry at the time on this card? A. Yes, sir.

Q. On the afternoon of December 17th did you receive a call, as the result of which you went to the home of Mrs. Smart in Vaux Hall? Yes, sir.

Q. About what time was it you went there, do you remember? A. It was between a quarter to three and five of three.

Q. You had been sent there from your taxi-stand? A. Yes, sir.

Q. Had you been told where you were to take this passenger? A. Yes, sir.

Q. Where? A. To Westfield.

Q. When you got to Mrs. Smart's home what happened? A. This gentleman came out to get in the taxi, and said his plans had been changed, and he wanted to go to East Orange.

Q. How was that gentleman dressed? A. He had on something like an Army jacket—a short Army jacket—brown——

Q. Go ahead, sir. A. Brown hat, dark eyeglasses.

Q. Do you know who that was that you met that day? Have you ever seen him since? A. Yes.

Q. Where? A. In the courtroom here.

Q. Could you point him out? A. Yes, sir.

Q. Will you point him out? A. There he is between them two officers there.

Q. Did he have anything with him that you noticed? A. It looked like he had something under his arm or something.

Mr. Congleton: May the record indicate that the witness pointed to the defendant before?

Mr. Foley: Correct.

Q. What did he say to you, if anything, when he came out and got in your cab? A. He said he wanted to go to East Orange. I turned around and came back to where I stayed on Tower Street to call up the office to let them know I was going to East Orange.

Q. Then you went to your cab? A. Yes, sir.

Q. Then what happened? A. When I got to the cab he wanted to know if I could get him to the Penn Station in Newark by 3:30. I told him yes, I could take him to Newark, and I turned around and went over to Vaux Hall Road and hit the highway and came into Penn Station, Newark.

Q. Did you leave him there? A. Yes, sir.

Q. Directing your attention to this card again, can you point out the entry of this trip? A. Yes, sir.

Q. You are pointing to the entry that says, "V. Hall"? A. "To Newark."

Q. "To Newark"? A. Yes, sir.

Q. What is the rate? A. Three dollars.

Mr. Congleton: I offer this card in evidence.

Mr. Foley: Objected to. The card can only be used for the purpose of refreshing his recollection. The witness testified, and I don't dispute his testimony, and I don't see any reason for admitting the card in evidence.

The Court: It is not disputed. I suppose your idea is corroboration?

Mr. Congleton: That is correct, that it was the record he kept and made that day as he ran that taxicab to these various spots.

Mr. Foley: Let me see it. There is a lot of writing on here.

Mr. Congleton: It is all trips, Mr. Foley. This is the one in question.

Mr. Foley: I will withdraw the objection. I don't think it means anything one way or the other.

(The card is received in evidence and marked Exhibit S-32.)

Q. The charge for that trip is three dollars? A. Yes, sir.

Q. How did he pay it? A. He paid me in one dollar bills.

Mr. Congleton: Cross examine.

Mr. Foley: No questions.

RAYMOND A. EDIGHOFFER, sworn.

Direct examination by Mr. Congleton:

Q. Sergeant Edighoffer, you are a member of what Police Department? A. The Township of Union Police Department.

Q. How long have you been a member of that department? A. Nine years.

Q. On December 17, 1946 were you on duty? A. I went to work that day at 3 o'clock in the afternoon.

Q. When you went to work that afternoon at 3 o'clock were you given any job to do? A. Yes, sir. I was told to go to Waldorf Place in the Vaux Hall section of Union Township and there I would——

Mr. Foley: I object to what someone told him.

The Court: Very well.

Mr. Foley: His instructions would be hearsay.

Q. You received instructions, as a result of which you went where? A. To Waldorf Place in the Vaux Hall section of Union Township.

Q. What did you do after you got there? A. When I arrived there on Waldorf Place I saw a green International bakery truck standing there and as the result of having received those instructions I parked my radio car behind it to safeguard it.

Q. Sergeant Edighoffer, showing you S-15, can you recognize that picture? A. That is a picture of Waldorf Place, Vaux Hall.

Q. Can you point out on that picture approximately where that truck was parked? A. Near where the box and the "X" is.

Q. You arrived about what time, Sergeant? A. About 3:05 p. m. in the afternoon.

Q. How long did you stay there? A. Until 5:53 p. m.

Q. Now Sergeant, while you were there did you stay in your radio car all the time or did you get out and look over the truck? A. When I first arrived I got out of the radio car and looked over the truck.

Q. Did you look inside the truck? A. Yes.

Q. Did you see anything inside the truck? A. Well, I saw the rotor to the distribtuor lying on top of the dashboard. I saw inside the truck, in the back, behind the driver's seat, several large size bags. I believe they are known as poultry bags.

Q. What are they made of? Paper? A. Paper, yes.

Q. What color? A. Brown. Sort of manila.

Q. Did you see anything else in the back of the truck? A. There were other pieces of paper there and on the floor there was dust and debris, and it looked to me to be——

Mr. Foley: No.

Q. Did you see any other object on the floor, Sergeant? A. Whole object?

Q. Yes. A. No.

Q. You observed a driver's seat in the truck? A. Yes.

Q. Did you observe anything else in the truck that you could sit on? A. No.

Q. Sergeant, you say you stayed there until 5:53. Did anyone come to that vicinity that did anything with that truck or to do anything with that truck while you were there? A. Lieutenant Flynn, of the Newark Police Department, came there with three other men, I believe. They looked at the truck and, after consulting among themselves, left.

Q. Thereafter did anyone else come and start to do anything to the truck while you were there? A. There was a man that came up with a kit and a portable light, and dusted the truck for fingerprints.

Q. Did anyone come from Newark to get that truck? A. Yes. sir, a bakery employee by the name of Herman Schuttert, and a colored man whom I understand is an employee of the bakery.

Q. Would you know the name if you heard it? A. I believe it was Matias.

Q. Matias? A. Matias.

Q. Sergeant, at or about 5:53 or just prior thereto did anything occur? A. Yes. Lieutenant Flynn had returned, looked at the truck, and departed again. And I was prepared to release the truck to the employees of the bakery. This Herman Schuttert and the Matias gentleman were trying to put the roter back into the distributor, when I noticed another colored man come up and talk to Mr. Matias. To me, having worked that section of town for years, I did not recognize him, from the way this man was dressed, as a person would be dressed up there at that time of the day. I walked up to him and questioned him.

Q. You are correct. You can't tell us what you questioned him about or what he said. As a result of the questions and the answers what did you do? A. I took the man into custody.

Q. Who was the man?

Mr. Foley: Objected to.

The Court: Why?

Mr. Foley: I object, if your Honor please, because the answer would obviously have to be based upon something that was told him—anything that was told him.

The Court: He has not asked him what was told him; he has just asked him what he did.

Mr. Foley; The present question is, "Who was the man?"

The Court: Yes, "Who was the man?"

Mr. Foley: His only knowledge of who the man was would come from what the man told him or what somebody else told him.

The Court: I beg your pardon. I didn't understand you. I thought the objection

was to his taking the man in custody, whoever he was.

Mr. Foley: Of course not.

The Court: I didn't understand you.

Mr. Foley: Your Honor sustains the objection?

The Court: Yes, I sustain the objection.

Q. You arrested that person, did you not? A. Yes, sir.

Q. Where did you take that person? A. To Police Headquarters, Union.

Q. Was he booked? A. Yes, sir.

Q. Under what name was he booked?

Mr. Foley: Objected to, if your Honor please.

The Court: Under what name he was booked? I don't think that is evidential. Maybe he gave his name to the officer. We don't know. All right, go ahead. What he was booked as doesn't make any difference.

Mr. Congleton: Your Honor ruled out the question as to what his name was that he gave them.

The Court: I said that he may have given his name, but that question is not yet before the Court.

Q. Did the man who was arrested give you a name?

Mr. Foley: Objected to as testimony based on hearsay.

The Court: Objection sustained.

Q. I show you a picture and ask you if you recognize anybody in that picture? A. The man on my right as I look at the picture, No. 42128.

Q. Is what? A. Joseph Smart.

Mr. Foley: I object to that and ask that it be stricken out.

Mr. Congleton: I didn't mean that.

Q. You mean he was the man who was arrested? A. Yes, sir.

Mr. Congleton: That is the answer I expected.

The Court: Strike out, "Joseph Smart."

Mr. Congleton: I ask that it be marked for identification.

(The photograph is marked Exhibit S-33 for identification.)

Q. After you got to Union Police Headquarters did you turn him over to somebody else or did you stay there for a while? A. I stayed there.

Q. Whom did you subsequently turn him over to? A. I don't remember.

Q. If you don't remember their names, can you tell us approximately who they were? A. I don't know. I imagine they were from Newark Police Headquarters.

Q. They were police from Newark Police Headquarters that you turned him over to? A. Yes, sir.

Q. As I understand it, it was about 5:53 that afternoon when you, with this person you had arrested, left the truck to go to Police Headquarters; is that correct? A. That's correct.

Mr. Foley: I have no objection to your putting that picture in evidence. I have just consulted with my client and he says it is Smart. I will stipulate to that.

Mr. Congleton: Then there is no necessity of the picture going in, if it is conceded it is Joseph Smart he arrested.

Mr. Foley: That is conceded.

Mr. Congleton: The record shows that the man who was arrested was Joseph Smart; is that correct, Mr. Foley?

Mr. Foley: That is correct.

Mr. Congleton: Cross examine.

Mr. Foley: No questions.

THOMAS O'BIERNE, sworn.

Direct examination by Mr. Congleton:

Q. Detective, you are a member of the Newark Police Department? A. Yes, sir.

Q. How long have you been, sir? A. Five years.

Q. To what bureau were you attached in December, 1946? A. Detective Bureau, Bandit Squad.

Q. In the afternoon of December 17, 1946, did you have occasion to go to Union Township? A. Yes, sir, I did.

Q. With whom? A. I went to Union Township with Sergeant Flynn and Detective Smith and Detective Cook and Detective Geiger.

Q. Where did you go when you got there? A. Waldorf Place.

Q. What did you find when you got there? A. There was a Wigler Bakery truck there.

Q. Did you examine the truck? A. I didn't. Lieutenant Flynn did.

Q. How long did you stay there, sir? A. I would say we were there fifteen or twenty minutes.

Q. Then where did you go from there? A. From there we went to several—to two houses in Springfield.

Q. With whom did you go to these two houses in Springfield? A. Lieutenant Flynn, Detective Cook and Detective Geiger and Smith and Thomas Matias.

Q. Who was Thomas Matias? A. He told us he was a cousin of Joseph Smart.

Q. He was the man that was there to get the truck? A. Yes.

Q. One of the men that came to get the truck? A. Yes.

Q. Do you know whose home you went to in Springfield? A. I believe they were relatives of Joseph Smart.

Q. Why did you go to those homes?

Mr. Foley: I object to that.

I withdraw my objection.

A. We went there because Thomas Matias told us that Smart might be there.

Q. You were looking for Smart? A. Yes.

Q. Now, after you had gone to these places, where did you go? A. From there we went back to Waldorf Place and we took Identification Clerk Hickey with us and Thomas Matias and another employe of the Wigler Bakery, a white fellow. We left there and we went to 48 Avon Avenue, where Smart had lived. We searched the house looking for him.

Q. Then where did you go? A. Well, while we were there Lieutenant Flynn received a call from Police Headquarters that Smart had been apprehended by the Union police.

Q. So where did you go? A. From there we went up to Union. That was Detective Cook, Geiger and myself.

Q. Where did you go in Union? A. We went to Union Police Headuarters.

Q. What did you do when you got to Union Police Headuarters? A. Smart was in another room. We went up to the bench, the officer at the desk, and Sergeant Bond told us——

Mr. Foley: I object to that.

Mr. Congleton: You can't tell us what he told you.

Q. You had a conversation with him? A. Yes, sir.

Q. Thereafter, what happened? A. Smart was turned over to us by Sergeant Bond; also a khaki fleece-lined coat and two pellets.

Q. I show you Exhibit S-26 and ask you if this is the khaki jacket that was turned over to you by the Union police? A. Yes, sir.

Mr. Foley: We will admit that it was, Mr. Congleton, if you say it was.

Mr. Congleton: I wasn't there.

Q. What else did you say was turned over to you? A. Two lead pellets.

Q. What did you do with the two lead bullets that were turned over to you? A. We signed a receipt for the coat and pellets and took Smart, the coat, and the pellets back to Police Headquarters.

Q. Did you examine the bullets to see how they were marked? A. I looked at them; yes, sir.

Q. I show you S-31 and ask you if you can tell whether that is one of the bullets? A. Yes, sir.

Q. How do you tell? A. Because it is marked with an "X" on the head of it.

Q. I show you S-30 and ask you if that is the other pellet. A. Yes, sir. That is marked with an "A".

Q. I don't think they could hear you. A. That is marked with an "A".

Mr. Foley: Where is that marked, Mr. Congleton? On the head also?

Mr. Congleton: No, because the head is flattened out. I guess you would call it a flange.

Q. When you left Union Headquarters with Smart, the jacket, and the bullets, where did you go? A. We went back to Waldorf Place. Detective Kinney had met us at the Union Police Headquarters, and we went up to Waldorf Place. Detectives Kinney and Cook went through the neighborhood there to see if they could find any information as to the truck.

Q. Thereafter where did you go, detective? A. And from there we went back to Newark Police Headquarters.

Q. You handed Smart over to someone else? A. Yes, we turned Smart over to Lieutenant Wangner, of the Homicide Squad.

Q. Directing your attention to December 18, 1946, do you recall to what you were assigned that day? A. Yes, sir; I do.

Q. What was it, sir? A. Lieutenant Flynn ordered me to accompany him, Lieutenant Wangner, and Detectives Smith, Cook, and Geiger to 17 Lillie Street.

Q. Did you go to 17 Lillie Street? A. Yes, sir; we did.

Q. About what time did you get there? A. I would say we arrived there about 2:30 p.m.

Q. Did you all stay there, or only some of you? A. No, sir; we were ordered, that is, Detective Geiger and myself, were ordered to stay in the kitchen of this home by Lieutenant Flynn.

Q. What happened thereafter? A. We were there about an hour when the defendant, James Brooks, came in. We placed him under arrest.

Q. Did you ascertain whose home that was in which you were? A. That was his home.

Q. You and Detective Geiger placed him under arrest? A. Yes.

Q. Did you search him at that time? A. Yes, I did.

Q. What did you find on him? A. In his right overcoat pocket there were a roll of coins stamped in ink, "Wigler's Bakery".

Q. I show you S-25 for identification and ask you if you recognize that roll of coins. A. I marked it with an "X", yes, sir.

Q. You do? A. I didn't see it at first. There is an "X" in here.

Q. There is an "X" in there in pencil? A. Yes, sir.

Q. You found those where? A. They were in his right overcoat pocket.

Q. The defendant's righthand overcoat pocket? A. That's right.

Q. How was the defendant dressed at that time? A. He was wearing a gray overcoat and gray hat, as I remember.

Q. Did you find anything else on his person? A. Yes, he had a wallet, and in the wallet was $95 in bills, and loose change, a little less than a dollar, and he had a sales slip for a watch, a ring, an overcoat, suit, and I believe two hats, and he also had a conditional bill of sale for a Cadillac, 1942 Cadillac car. The name was Graham he bought it from.

Mr. Congleton: I offer S-25 in evidence
Mr. Foley: No objection.

(The roll of coin, previously marked Exhibit S-25 for identification, is received in evidence and marked Exhibit S-25.)

Q. You took Brooks out of the house? A. Yes, sir.

Q. Did you notice anything when you took Brooks out of the house? A. No, I did not.

Q. Did you notice a car or anything? A. No.

Mr. Foley: Objected to as not being material.

Q. Where did you take Brooks? A. We took him down the street, and there was an auto repair shop about five doors away from his house, and we told the man there to call the Fourth Precinct and tell him to send the patrol wagon up, and the patrol wagon came up and Detective Geiger and myself took him to Police Headquarters.

Q. Thereafter did you do anything further in connection with this case? A. Yes, sir. When we got to Police Headquarters Lieutenant Strong came up and Deputy Chief O'Neill. I turned that roll of coin over to the Deputy Chief and told him I found it in his pocket. At that time we had Brooks in the small room. When we took him in the bandit squad room I started to undress him to see if there was anything on his person, and Lieutenant Strong said to me, "Take him in the small room in case anyone comes in while he was undressed", and I took him in the small room and the Deputy Chief came in, and I handed him the roll of coin, and the Deputy Chief put it down on the table and asked him about it, and I don't remember the exact words he used, but he said

that he was in on a holdup of the bakery man, and I went outside to send a call out to Lieutenant Flynn and Lieutenant Wangner, out in the radio car, the squad car equipped with a radio, and when I came back the Deputy Chief said to me——

Mr. Foley: Objected to.

Q. Was Brooks present when the Deputy Chief gave you instructions? A. Yes, sir.

Q. Will you tell us what he said?

Mr. Foley: I object as to what the Deputy Chief said. Even though it was said in his presence it would not be binding on Brooks.

The Court: It depends on what it was and what Brooks did. I don't know what the statement was yet.

Mr. Foley: I wish to have my objection made timely. I appreciate if I don't object now and wait for the answer to come in, I might be precluded from striking the answer as I was the day before yesterday when the Prosecutor called your Honor's attention to the fact that the answer was in before I objected.

Mr. Congleton: I would be very happy to step over to side bar and disclose to your Honor and Mr. Foley what I anticipate the answer is going to be, and I don't think Mr. Foley will object.

Mr. Foley: Since I don't know and you do know——

Mr. Congleton: I am offering to tell you.

Mr. Foley: I will be very glad to hear about it.

(The Court and counsel confer at side bar.)

Mr. Foley: I don't have any objection to that. If it develops that the answer is not what is anticipated, I want to reserve my right to strike it.

The Court: Certainly.

Mr. Congleton: May we have the question read?

(The pending question is read by the court reporter.)

Q. Strike that out. Will you tell us what the instructions were? A. The instructions were for Detective Geiger and myself to go to 17 Lillie Street, on the 4th floor, which was Brooks' home, and to search there for the money and the gun.

Q. Thereafter did you and Detective Geiger go to Brooks' home in Lillie Street? A. Yes, sir.

Q. What did you do when you got there? A. Well, Brooks had told us where we would find the gun and the money.

Q. He told you that? A. Yes, sir, both I and Detective Geiger in the presence of Deputy Chief O'Neill.

Q. Where did he tell you the gun and the money would be found? A. He told us that we would find the gun in the bottom drawer of a clothes closet and the money would be in the third drawer in a dresser in his bedroom, in the third drawer from the top.

Q. You looked in those places in the apartment? A. Yes.

Q. What did you find? A. Detective Geiger was searching the drawer in the clothes closet and he brought out the gun.

Q. I show you a gun and ask you if you can identify it.

Mr. Foley: You are also showing him a holster.

Mr. Congleton: Yes.

The Witness: It was in the holster.

Q. Yes, I am showing you the gun and the holster. A. Yes, that is the gun and that is the holster.

Q. How do you tell that it is the gun? A. When the gun was brought back it was marked with an "X". I remember it was a chromium gun with a pearl handle, a .38 calibre, Smith & Wesson.

Mr. Congleton: I ask that these be marked for identification.

(The gun is marked S-34 for identification.)

(The holster is marked S-35 for identification.)

Q. Thereafter did you look further for anything else? A. Yes, sir. I was searching for the money in the dresser. James Brooks had told us that the money would be in a black bag, a woman's purse. The purse was there but the money was not there. As we were searching, Lieutenant Wangner came in.

Q. That is Lieutenant Wangner of the Homicide Squad? A. Yes, sir. I told him we couldn't find the money. Lieutenant Wangner called Brooks' wife, Gwendolyn.

Q. You can't tell us what was said, but thereafter what did Lieutenant Wangner do? A. Lieutenant Wangner located the money in the baby carriage which was in the kitchen of Brooks' home.

Q. Did you see him find it? A. Yes, sir.

Q. Whereabouts in the baby carriage was it? A. I am not sure. I know it was under the pillow and the covering that was in there.

Q. Then what happened thereafter, Detective? A. Lieutenant Wangner asked Mrs. Brooks to accompany us to Headquarters. There was another girl there. I believe her name to be Lucille Rawls. She went along with her.

Q. You all returned to Headquarters? A. Yes, sir.

Q. To whom did you turn the gun, the holster, and the money over?

Mr. Congleton: Strike that out.

Q. You didn't have the money, did you? A. No, sir.

Q. To whom did you turn the gun and holster over? A. Detective Geiger had that. He turned that over to Lieutenant Wangner.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. What time of day did you go to Brooks' home the first time? A. About 2:30 p. m.

Q. There were five of you who went. Is that correct? A. Lieutenant Flynn, Detectives Cook, Smith, Geiger, and myself; yes, sir.

Q. You say you and one of the other detectives were in the kitchen? A. Yes, sir; Detective Geiger.

Q. Where were the other three? A. The other three went out in an effort to apprehend James Brooks in that particular section—the Third Ward.

Q. So that when Brooks arrived you and Detective Geiger— A. Yes, sir.

Q. —were in the house? A. That's right.

Q. Who else was there? A. There was Mrs. Williams, James Brooks' mother-in-law, his wife, Gwendolyn, and Lucille Rawls. I am quite sure that is her name.

Q. And the baby? A. And the baby.

Q. Was the baby in the carriage? A. No, they were holding the baby. Lucille Rawls was holding the baby.

Q. That is, Brooks' baby? A. Brooks' baby; yes, sir.

Q. When you speak of Mrs. Brooks, you are referring to the young lady——

Mr. Foley: Stand up, Mrs. Brooks.

(A woman stands in the courtroom.)

Q. Is this Mrs. Brooks? A. Yes, that's right.

Q. How long were you there before Brooks arrived? A. Approximately an hour.

Q. When Brooks came in, you told him that you were looking for him on a check charge, didn't you? A. No, sir. When Brooks came in we told him to put his hands up, which he did. I started to search him. I did search him. Brooks started to struggle, and we took him outside, and he struggled all the way—that was on the fourth floor—all the way down. He kept on fighting, and he wanted to know what did we have him for. And we told him, "Forgery."

Q. Forgery? A. Yes, sir.

Q. When he came in—walked into the apartment—he had a folding baby carriage in his hands, didn't he? A. Yes, sir; he did.

Q. His mother-in-law, Mrs. Williams— A. Yes, sir.

Q. —called out. "Don't start a fight; remember the baby," or something of that sort? A. She may have.

Q. Or "Don't hurt the baby." A. I don't recall that.

Q. The baby was a very young baby, wasn't it? A. Yes, sir; it was an infant.

Q. A matter of a few months? A. I wouldn't know how old. It was an infant.

Q. A babe-in-arms? A. Yes, sir.

Q. You say a struggle started in the apartment and continued all the way downstairs? A. It really wasn't much of a struggle. He kept on saying, "What do you want me for? What have you got me for?" The reason we told him it was forgery——

Q. Never mind the reason for the moment. You spoke of a struggle. A. Yes, sir.

Q. Will you tell us what the struggle was? A. It wasn't really much of a struggle, because Detective Geiger had him by the left arm and I had him by the right arm. The stairway was narrow going down.

Q. You both had drawn guns? A. No, sir; we did not.

Q. You did not? A. No, sir.

Q. Do you mean to say that you were apprehending this man for murder and— A. At the time when he came into the room we told him, "Put up your hands." Detective Geiger at that time was behind him. When I searched him, I put the gun in my overcoat pocket, and neither I or Detective Geiger had a gun out as we took him downstairs, because he didn't give us too much trouble. We were able to handle him.

Q. He was giving you enough trouble that you described before the trouble you had with him as a struggle? A. He was struggling.

Q. Notwithstanding that, neither of you covered him with a gun? A. No, sir; it wasn't necessary.

Mr. Foley: I ask that the last part of the answer be stricken—"It wasn't necessary".

The Court: Very well.

Q. You did not cover him with a gun? A. No, sir.

Mr. Congleton: I object to the striking out of it. I think it was perfectly responsive.

The Court: No, it was not.

Mr. Foley: I object to striking it out.

The Court: The ruling stands.

Mr. Foley: What was the ruling?

The Court: You moved to strike it out, and I did.

Mr. Foley: I beg your pardon: I didn't understand your Honor.

By the Court:

Q. What date was this, please, Officer? A. December 17, your Honor.

By Mr. Foley:

Q. Did you make any search in the house during the hour you were there awaiting Brooks' arrival? A. Yes, sir.

Q. Did you look in the bureau that he mentioned? A. Detective Geiger and myself, Lieutenant Flynn and Detectives Smith and Cook were also there. We searched Mrs. Williams' room.

Q. Why did you search no other room besides that? A. That was the only room we searched—Detective Geiger and myself.

Q. How many other rooms were there—bedrooms? A. There were two bedrooms, kitchen, living room.

Q. Well, it didn't take you a whole hour to search the one room, did it? A. No, sir; we searched through it thoroughly. Then we sat in the kitchen. I sat on one side of the door, and Detective Geiger sat on the other.

Q. After you had searched the one room and found nothing, why didn't you search the other bedroom? A. I thought the other rooms were searched.

Q. By whom? A. By Lieutenant Flynn, Detectives Smith and Cook.

Q. I thought you said they had left to attempt to apprehend Mr. Brooks. A. Excuse me. I didn't understand that. In the hour that we were there?

Q. Yes, sir. A. No, sir; we didn't go into any other rooms, because we were looking for a man we considered would be dangerous. We didn't want to be in another room when he walked in; we wanted to be there when the man walked in.

Q. Which was it? That you didn't want to go into another room because you knew the man might be dangerous, or you didn't go into the other room because you thought it had already been searched? You have given us two answers. A. I misunderstood you. At first I thought you meant when we first came in, when the squad came in.

Q. What question did you think I had asked you when you said you did not search the other room because you thought it had been searched by the other detectives? What was the question that you thought I asked you? A. When we first entered the apartment?

Q. Just state for me, if you will, what was it that you thought I asked you in answer to which you gave me that answer.

Mr. Congleton: I object to that line of examination.

The Court: He is asking him to recall the record. The question, evidently, did not make any impression on him.

Mr. Foley: I asked the witness why he did not search another room.

The Court: And he told you two reasons.

Mr. Foley: And he gave me two reasons, and in giving me the second reason he said he misunderstood my question. I asked him what was the question that I asked him that led him to give me that answer.

The Court: Go ahead, if you can answer it.

A. I was of the opinion that the counsellor meant when we first came into the apartment. That is the reason I said we searched the mother-in-law's bedroom.

Q. You said you did not search the other room because you thought the other detectives had searched it. A. At that time, yes, sir.

Q. What was the question which you thought I asked you that led you to give that answer?

Mr. Congleton: If your Honor please, the testimony of this witness is that when they first went there there were other police officers with them and they left thereafter and they left these two men alone, and he is referring to two different times during the period that he was present in the apartment.

The Court: The witness has given you his reasons. He has given you what he thought. Do you want him to continue with it?

Mr. Foley: I have not yet had an answer to the question which is now pending. I am not asking what he had in mind as to my question beyond stating what he thought the question was.

The Court: Can you tell us what you thought the question was?

The Witness: That's what I thought the question was, as to when we first went into the apartment.

Q. When you first went into the apartment what?

The Court: He thought at that time the room had been searched.

The Witness: That's right; yes, sir.

Q. How long were the other detectives there? A. Oh, I would say no more than fifteen to maybe twenty minutes.

Q. Were they out of your sight during the fifteen or twenty minutes? A. Yes, sir, they were.

Q. What were you doing at that time? A. In Mrs. Williams' bedroom, searching the bedroom.

Q. Was anybody in the kitchen? A. I wouldn't know. I was in the bedroom.

Q. Well, your impression is that you were in Mrs. Williams' bedroom and the other detectives were searching the other rooms? A. That's right.

Q. If that is the fact, then nobody was in the kitchen?

Mr. Congleton: I object to that as argumentative.

The Court: Well, he said he was not there and he does not know who was in the kitchen.

Q. I thought you said it was important that you be in the kitchen at all times to apprehend this dangerous character. A. I did so think, yes, sir, when we were planted there. When we were ordered by Lieutenant Flynn to stay there, the most advantageous point for us to be in was at the door.

Mr. Foley: That is all.

Re-direct examination by Mr. Congleton:

Q. When you were waiting to apprehend this man you knew you wanted the man for murder, didn't you? A. Yes, sir, we did.

Paul J. Geiger, sworn.

Direct examination by Mr. Congleton:

Q. Detective, you are a member of the Newark Police Department? A. I am.

Q. And you have been for how long? A. Sixteen years.

Q. In December 1946, to what division of the Department were you assigned? A. Detective Bureau, Bandit Squad.

Q. Directing your attention to the afternoon of December 17, 1946, did you have occasion to go to Vaux Hall, New Jersey? A. I did.

Q. With whom did you go? A. With Lieutenant Flynn, Detective O'Bierne, Detective Smith and Cook.

Q. At about what time did you go there, sir? A. It must have been around 4:30, 5 o'clock, I guess.

Q. Where did you go when you got to Vaux Hall? A. Waldorf Place.

Q. What did you see when you got there? A. We found a Wigler's Bakery truck parked there.

Q. Did you examine that truck? A. I didn't examine it. Lieutenant Flynn examined it.

Q. How long did you stay there by that truck? A. About ten or fifteen minutes, I guess.

Q. Where did you go after you left the truck? A. We then went with a colored fellow that was there by the Wigler truck, and he took us to Springfield and we stopped in a couple of houses there.

Q. Do you know whose houses they were? A. They were relations of Joseph Smart.

Q. Did you return to the truck? A. We then returned to the truck; yes, sir.

Q. Do you know what time it was when you got back there? A. About an hour later or so, I guess.

Q. Where did you go when you left the truck? A. When we left the truck we went to Union Police Headquarters, I think, and then returned to Newark.

Q. After you got back to Newark did you have occasion to return to Vaux Hall that evening? A. We were over at Smart's apartment at 84 Avon Avenue when we got a call to return to Union Police Headquarters.

Q. You returned to Union Police Headquarters, and about what time was it when you got there, do you remember? A. Between 8 and 9 o'clock, I guess.

Q. Who returned there with you? A. Detective O'Bierne and Detective Cook, I think it was.

Q. When you got there whom did you see? A. We saw the desk sergeant there, and he had Joseph Smart in custody there.

Q. Was he turned over to your squad? A. He was turned over to us with a jacket and a couple of pellets, lead pellets.

Q. You have seen the jacket here shown before in the courtroom. Was that the jacket, S-26? A. That is the sheep-lined jacket.

Q. That was turned over to you? A. That's right.

Q. Did you look at the two bullets turned over to you? A. No, I didn't look at them. Detective O'Bierne looked them over and put them in his pocket.

Q. But you did see they were two bullets? A. I saw the two lead pellets.

Q. When you left Union Police Headquarters what did you do? A. We took Joseph Smart and brought him back to Police Headquarters where he was slated.

Q. Thereafter, directing your attention to December 18, the next day, did you accompany Detective O'Bierne that afternoon? A. I did.

Q. Where did you go? A. Detective O'Bierne, Lieutenant Flynn, Detective Cook and Lieutenant Wangner and Detective Smith, we went to 17 Lillie Street.

Q. Do you remember about what time it was when you got there? A. About 2:30.

Q. What did you do after you got there? A. We went up to the fourth floor, an apartment on the fourth floor, righthand side.

Q. Whose apartment was that? Did you find out? A. James Brooks. When we entered the place he wasn't home. We were ordered then, Detective O'Bierne and myself, were ordered to stay there until he returned.

Q. Did you do anything with Detective O'Bierne before you were ordered to say there

and the others left? A. While Lieutenant Flynn was there and Cook and Smith, Detective O'Bierne and I went through the bedroom, off the kitchen, and looked it over.

Q. How long would you say the others stayed? A. About ten to fifteen minutes.

Q. Then when they left where did you and Detective O'Bierne go? A. We sat in the kitchen inside the door.

Q. Were both of you right together? A. I was on one side of the door and he was on the other.

Q. How long did you stay there? A. About an hour.

Q. Then what happened? A. James Brooks came walking in carrying a baby carriage.

Q. What did you do? A. When he set it down Detective O'Bierne pointed his gun at him and told him to put his hands up in the air, and we frisked him and placed him under arrest and took him downstairs.

Q. Did you see Detective O'Bierne find something in his pocket? A. Yes, he found a roll of coins.

Q. I show you S-25 and ask you if you recognize that. A. Yes, that is the roll of coins.

Q. Where did you see Detective O'Bierne get that from? A. From his overcoat pocket.

Q. Did you see anything else that was taken off his person? A. He had a duplicate bill of sale and registration dated that date for a car.

Q. Do you remember what name that was in? A. No, I don't. It wasn't in his name, though, and then he had slips in his pocket for clothes and some jewelry.

Q. Then what happened after you had told him to put his hands up and had frisked him? A. Then we placed him under arrest and told him

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we wanted to question him down at Headquarters. Then we took him out.

Q. What happened as you started to take him out? A. He tussled going downstairs and he wanted to get away, and so forth, but I had hold of him, and we took him downstairs and called for the wagon and took him down to Headquarters.

Q. Thereafter were you present when the Deputy Chief was talking to Brooks? A. Yes. Deputy Chief O'Neill questioned him down at Headquarters, and when he saw the roll of coins he admitted that he had taken part in a holdup, and told Deputy Chief O'Neill that he had put the gun under some old clothes in the closet up in his home, and he put the money in the third dresser drawer in his room. So Deputy Chief O'Neill ordered us to return to his apartment to see if we could find the gun and money.

Q. Who returned to the apartment? A. Detective O'Bierne and myself.

Q. You then, following the instructions of the Deputy Chief, went to the apartment? A. Yes.

Q. What did you do when you got there? A. I went to his room and, now, we went to the closet and I pulled some old clothes out and under the clothing in the corner the gun and holster was laying on the floor.

Q. I show you S-34 for identification and ask you if that is the gun that you found there? A. That is the gun.

Q. And how do you recognize it? A. That is my cross on that. I scratched it on with a penknife.

Q. I show you S-35 for identification and ask you if that is the holster? A. That is the holster. I scratched an "X" on there with a penknife.

Mr. Congleton: I offer S-34 in evidence.
Mr. Foley: No objection.

(The gun is received in evidence and marked Exhibit S-34.)

Mr. Congleton: I offer S-35 in evidence.
Mr. Foley: No objection.

(The holster is received in evidence and marked Exhibit S-35.)

Q. After you found the gun and the holster, did you look further for anything? A. Detective O'Bierne was looking through the dresser and he was looking for the money, and I assisted him, and we looked through the room and we couldn't find it. Then, now, Lieutenant Wangner and Detective Cook, I think, came in, and they also assisted in looking for it. Finally they spoke to Brooks' wife and, now, she claimed that it was—

Q. You can't tell us that, but as a result of talking or claiming what did Lieutenant Wangner do? A. Lieutenant Wangner found the money in the bottom of the baby carriage.

Q. Did you see him find the money? A. I was out calling Police Headquarters to speak to Brooks again.

Mr. Foley: Is he going to be here, the man that found the money?

Mr. Congleton: He was on the stand once today and he is still here. Lieutenant Wangner.

Q. Thereafter what did you do? A. We then returned to Headquarters with the gun and money and I marked the gun and turned it over to Lieutenant Wangner.

Mr. Congleton: Cross examine.
Mr. Foley: No questions.

(A short recess is taken.)

WILLIAM M. FLYNN, sworn.

Direct examination by Mr. Congleton:

Q. Lieutenant, you are a member of the Newark Police Department? A. Yes, sir.

Q. You have been for how long? A. 35 years and about 10 months.

Q. In December 1946 to what bureau of the Department were you assigned? A. Detective Bureau, Bandit Squad.

Q. You are in charge of the Bandit Squad? A. Under the commandership of Deputy Chief Frank A. O'Neill.

Q. There has been some testimony by a previous police officer about taking someone into the bandit squad room. Where is the bandit squad room located in Police Headquarters? A. 4th floor.

Q. Who occupies that room? A. It is occupied by the bandit squad and the homicide squad jointly.

Q. In connection with that room is there an adjoining room? A. Yes, there is an interrogating room.

Q. Lieutenant, directing your attention to December 17, 1946, did you have occasion to go to Vaux Hall that afternoon? A. I did; yes, sir.

Q. With whom did you go, sir? A. Detectives Smith, Cook, O'Bierne, Geiger, and Identification Officer Hickey.

Q. Where did you go in Vaux Hall? A. Waldorf Place.

Q. When you got to Waldorf Place what did you find? A. I found a number of police officers and a sergeant from the Vaux Hall Police Department, and the Wigler Bakery Company truck.

Q. When you say an Identification Clerk, was it Hickey? A. Hickey, yes, sir.

Q. For what purpose did he go along? A. We brought him up there to dust the truck for the hope of getting fingerprints, should there have been any on the wheel or on the windshield or whatever place it would be possible.

Q. When you got there did he do that? A. Well, I left him there to do it. I instructed him to do it and left him with a large flashlight so that he could carry on his dusting and we left there.

Q. Did you examine the truck at all? A. Well, superficially.

Q. Lieutenant, you say you left. Where did you leave to go? A. We left Vaux Hall. We also had a colored boy with us from Wigler's Bakery, Mathis, who was a cousin of Smart's, and who was to identify Smart in the event we ran across him and to assist us in any way possible, which he volunteered to do.

Q. Where did you go with Mathis? A. We went from there to Springfield Police Department. I acquainted the Chief with our purpose and I asked him——

Q. You can't tell us what you asked him. As a result of talking to the Chief, did he assign an officer to you? A. He himself together with another officer accompanied us to the home of Joe Smart's mother, and the Chief apparently knew Mrs. Smart, and he told her what his purpose was there and we searched the house.

Q. You didn't find anything? A. No.

Q. Where else did you go? A. We went from there back to Vaux Hall and from Waldorf Place we then went to Smart's cousin, the same officers and accompanied by an officer from Union, and we went through that house in Vaux Hall. We were about to go back to the sister's—to the other sister's house, but we didn't go there.

Q. Where did you go from there? Back to the truck again? A. We went back—we went from there—we picked up another one of Wigler's workers. I just don't recall his name. From there we went to 48—to 84 Avon Avenue.

Q. Avon Avenue where? A. Newark. Smart had a furnished room there. So we entered the house and we identified ourselves and we told her that we wanted to know where Smart's room was and we went into Smart's room and we searched it, figuring that he might possibly be there.

Q. You found no one there? A. We found no one there. The bed had not been used.

Q. Then where did you go? A. From there we went back to Police Headquarters.

Q. Did you have anything further to do with that case on the 17th? A. Yes. After Smart was brought back to Headquarters, I interrogated him from possibly 10 o'clock at night or around that time until 3 o'clock in the morning.

Q. Thereafter on the next day, December 18th, in company with a group of officers did you go to Lillie Street? A. Yes, we did in the afternoon, after we received certain information. We first spoke to Smart the next morning, and from information that I obtained from Smart——

Mr. Foley: Objected to.

The Court: Strike it out.

Q. You talked to Smart the next morning? A. Yes, sir.

Q. Later that day did you go to 17 Lillie Street? A. Yes, sir.

Q. Who went to 17 Lillie Street? A. Detectives Smith, Cook, O'Bierne, Geiger, Lieutenant Wangner and myself.

Q. What did you do when you got to 17 Lillie Street? A. Lieutenant Wangner, in company with Detective Cook, covered the back of the building, and Detectives Geiger, O'Bierne, Smith and myself proceeded to the fourth floor, the home of Mrs. Williams, wherein Gill Brooks lived. We went in there and identified ourselves as police officers and asked for Brooks, and he wasn't there, and we searched the house in its entirety for Brooks.

Q. Just a minute. When you say you searched the house in its entirety for Brooks, what kind of a search did you make? A. We went through every room and under the beds and in the closet, wherever it was possible for a person to be hidden.

Q. In other words, you were searching for a person? A. That's right.

Q. You were not searching for anything else? A. That's right.

Q. How long did you stay there? A. Well, we did search for other things, too.

Q. You did? A. Yes. We made a careful search; that is, I, at the time, thought it was a careful search. It proved otherwise afterwards. O'Bierne and Geiger searched one room, and Phil Smith searched another room. And I stood in the doorway of the dining room to watch the kitchen door.

Q. How long did you stay there? A. Well, Cook—or, rather, Smith and I stood there probably ten to fifteen minutes. And then I directed Detectives O'Bierne and Geiger to remain there until such time as Brooks appeared, and to let no one come in and to let no one out, regardless of who they were.

Q. You left no other police officers there except O'Bierne and Geiger. Is that correct? A. That's right, sir.

Q. And you left? A. That's right.

Q. You went back to Headquarters? A. No. We scoured all of the places where we thought it would be possible to find Brooks—various places.

Q. Then later you learned that Geiger and O'Bierne had apprehended Brooks? A. Well, we left there, and we found that out. I went back to Vaux Hall, and from Vaux Hall we went to Union. And in Union Police Headquarters it came over the air that Brooks was apprehended.

Q. Then you came back? A. Then we came back to Newark.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. How many of you went into the house, Lieutenant Flynn? A. Detectives Smith, O'Bierne, Geiger, and myself.

Q. I thought you said two stayed outside. A. That's right—Lieutenant Wangner and Cook remained in the rear in the event——

Q. There were seven of you altogether? A. There was six, I believe.

Q. That is right. A. Six—that's right.

Q. Four were inside, and two stayed outside? A. Two stayed outside.

Q. Did you look in the drawer where this gun was subsequently found? A. No, I did not.

Q. Who made the search of the room where that gun was later found? A. Well, as I say, Detective Smith looked in some of the drawers there. Apparently he didn't look in them all.

Mr. Foley: That is all.

Mr. Congleton: Mr. Foley, it has been called to my attention that I left another day or so out of this. So if I may reopen my direct, I would appreciate it.

Mr. Foley: It is agreeable to me.

Direct examination (cont'd) by Mr. Congleton:

Q. Now, Lieutenant, directing your attention to December 19, 1946, did you have occasion to go back to Lillie Street? A. Yes, I did.

Q. Who went with you? A. Detective Smith.

Q. About what time of day did you go? A. I imagine it was around noontime.

Q. Did you go there more than once? A. Well, we went several times.

Q. What did you do on these occasions when you went to the house? A. There was a discrepancy between the amount of money we recovered and the amount of money that was reported stolen, and we went back to that house with the hope of recovering the amount of money that was supposedly missing. We went back and we told Mrs. Brooks——

Mr. Foley: I object to that.

The Court: Sustained.

Q. You can't tell us what you told Mrs. Brooks. Did you search the house some more? A. Yes, we searched the house some more, and I had a

conversation with Mrs. Brooks, and we left. As a result of that conversation——

Mr. Foley: I object to that.

Q. Thereafter, what happened? A. We returned and upon returning we got a paper bag with two hundred and seventy some-odd lollars more in it.

Q. Where did you get it from? A. It was on the bed. When I went in Mrs. Brooks said, "The money is in on the bed."

Q. You say it was a paper bag? A. Yes.

Mr. Foley: I ask to have stricken what Mrs. Brooks said.

The Court: All right.

Q. Mrs. Brooks told you something and you went to a bed? A. Yes, that's right.

By the Court:

Q. Did you say lying on the bed? A. Yes, sir, lying on the bed.

Q. In a bag? A. In a paper bag. There was a lot of silver and a lot of coins in it, and I got that cloth bag and I put it in the cloth bag so we wouldn't lose the change.

By Mr. Congleton:

Q. How much money did you find on your visit? A. I believe it was two hundred and seventy dollars. I got a note on it here.

Q. Will you look at it? A. $270 or something. I just forget the exact amount. (Witness refers to a paper.) $237.40.

Q. Was any of that money that you found in any kind of wrappers? A. No, sir.

Q. It was in what form? A. It was all bundled together in the bag.

Q. What did you do with the money that you got? A. We counted it and put it in the bag and brought it back and turned it over to Lieutenant Wangner.

Q. Do you remember what kind of bag you put it in? A. Yes, that cloth bag there. I got that bag off Cantor, the plumber, and I put it in the cloth bag.

Q. You put the $237.40 in there, is that right? A. Yes, sir.

Q. Do you happen to know whose writing this is on this card? A. That is Lieutenant Wangner's writing.

Mr. Foley: Do you want to put it in evidence? I have no objection.

Mr. Cogleton: I offer the bag containing this loose change and bills, in evidence.

(The bag is received in evidence and marked Exhibit S-36.)

Q. Thereafter did you have any other occasion to go back there? A. I made several visits there after that.

Q. On any of those visits did you ever find anything else?

Mr. Foley: If your Honor please, it seems to me we are getting very far beyond the time when the alleged crime was completed. This is all subsequent to the apprehension of Brooks, and, according to their testimony, also to his admission that he participated in a robbery, and I don't believe that subsequent investigation, if that is what you might call it, could be material.

The Court: I think it depends entirely upon what was found.

Q. Did you find anything else on any subsequent visit? A. We went up there and searched again and there were a lot of shoes there and we found $45 in $1-bills in the toe of his shoes.

Q. What did you do with the $1-bills amounting to $45? A. I turned them over to Lieutenant Wangner.

Q. Were they in anything when you turned them over? A. No.

Q. You turned them over loose? A. Yes.

By the Court:

Q. On what date did you find that money? A. That was on the 23rd.

By Mr. Congleton:

Q. Of December? A. December; yes, sir.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. This last money you referred to was not money that was in a wrapper? A. No, just 45 single-dollar bills.

Q. You don't know to whom that money belonged? A. No, I don't. I presumed but I don't know.

Q. I notice you said you interrogated Smart. A. Yes, sir; I did.

Q. Did you participate in the interrogation of Brooks? A. I did, yes sir.

Q. When was that?

Mr. Congleton: Objected to at this time, if the Court please, as not proper cross ex-

amination. This witness has not testified at all to interrogating Brooks.

The Court: No, he hasn't testified to any interrogation of Brooks, as far as I remember.

Mr. Foley: If the Prosecutor takes that position, I certainly cannot proceed with the examination. There is no question about it.

Mr. Congleton: So that there will be no misunderstanding, we expect to go fully into the interrogation of the defendant Brooks, but I think it would be in the interests of a more orderly trial if we confined the testimony to one time.

The Court: To another time.

Mr. Foley: I will withdraw the question. No further questions.

Mr. Congleton: No further questions.

THOMAS MATHIS, sworn.

Mr. Foley: If your Honor please, the defendant just gave me some information and has requested that I ask the last officer a question which did not occur to me. And with your permission I would like to have him recalled.

The Court: Very well.

(The witness is withdrawn.)

William M. Flynn, for the State—Cross —Re-direct.

WILLIAM M. FLYNN, recalled, testifies further, as follows:

Cross examination (Continued) by Mr. Foley:

Q. Lieutenant Flynn, is it not a fact that Brooks told either you or one of the other officers where this money was—the money in the bag marked Exhibit S-36 and also the money in the envelope marked Exhibit S-37 for identification? A. Well, Brooks told us that there would be some money found in a certain place in the kitchen, under the floor. But there was no money found there. We searched it very thoroughly. And as a result, as I say, of conversation with Mrs. Brooks, we left. And when we came back the money was on the bed.

Q. But it was Brooks himself who told you that there was additional money to be found in the house? A. Oh, yes, positively.

Q. He told you that? A. Yes. He said, "There has got to be more money there."

Q. Did he also tell you that there was some money in the house which belonged to him? A. No. He told me that there was some money in the pocketbook—that $95; that some of that money belonged to him.

Mr. Foley: That is all.

Re-direct examination by Mr. Congleton:

Q. When you refer to money in the pocketbook, what do you mean by, "money in the pocketbook"? A. In the wallet, rather. I should have said wallet. There was $95 or $96 of it there.

Q. And that was the wallet that was taken from his person when he was arrested? A. That's right; yes, sir.

Mr. Congleton: That is all.

THOMAS MATHIS, resumes the stand.

Direct examination by Mr. Congleton:

Q. Mr. Mathis, where do you live? A. 73 Monmouth Street.

Q. How long have you lived there? A. For the past six years or more.

Q. By whom are you employed, sir? A. Wigler's Bakery.

Q. How long have you been employed by Wigler's Bakery? A. 12 years.

Q. What do you do for Wigler's Bakery? What is your job? A. Driver—truck driver.

Q. You are a truck driver? A. That's right.

Q. Did you know Mortimer Bateman? A. I did.

Q. Did you know a Joseph Smart? A. Yes, I did.

Q. Was he any relative of yours? A. Yes, he was my cousin.

Q. When was the last time you saw Mortimer Bateman? A. On Tuesday, December 17th.

Q. About what time of day? A. It was about 12:30 or a quarter of 1.

Q. Where was he when you saw him? A. He was at the bakery.

Q. Did you see his truck that day? A. I did.

Q. Did you have occasion to put anything in his truck that day? A. No, I did not.

Q. You didn't notice anything unusual about his truck? A. No.

Q. Did you see his truck standing at the curb with the back doors open? A. The truck was parked at the curb. The doors are closed when they are unloading.

Q. I show you S-9 for identification and ask you if you recognize what that picture portrays? A. That is Wigler's Bakery and a truck backed into the curb.

Q. Although that is not alleged to be the truck that Bateman drove— A. That is not his truck.

Q. Does that represent the manner in which you saw Bateman's truck parked on December 17?

Mr. Foley: I object to that. He has not said that he saw the truck parked.

Mr. Congleton: Then I misunderstood him entirely, sir. He said he saw Bateman and he saw the truck and I asked him if he saw anything unusual about the truck and he said he didn't.

The Court: He said he didn't put anything in it.

Mr. Congleton: Yes, but I understood him to say that he saw the truck parked there.

The Court: Why not ask him? Let's see.

Q. Did you see Bateman's truck there that day? A. Yes, I saw it.

Q. How was it parked there? A. That is not Bateman's truck, but that is the way it was parked.

Q. That is the way it was parked? A. Yes.

Q. In other words, with the rear into the curb? A. Yes.

Mr. Congleton: I offer the picture in evidence.

(The photograph is received in evidence and marked Exhibit S-9.)

Q. Calling your attention to December 17th again, that afternoon, did you go with some police officers somewhere? A. That was that evening. I went with police officers to Joe Smart's house up in Vaux Hall. That was later in the evening.

Q. Were you asked by Mr. Wigler to go to Vaux Hall in the evening? A. Yes.

Q. Who went with you? A. A cake baker, Herman Schuttert.

Q. How did you go to Vaux Hall? A. We went straight up Springfield Avenue.

Q. In another truck? A. In another truck.

Q. You went in another truck? A. Yes.

Q. You were going—one of you was going to drive that truck up there and then one of you would bring the other truck back? A. Yes.

Q. About what time did you get to Vaux Hall? A. About 5:30. Something like that.

Q. Was it light or dark? A. It was getting just dark.

Q. When you got there what did you see? A. Well, when we got there we found—they directed us to Mortimer's truck in Waldorf Place.

Q. Did you have occasion to go in that truck that day? A. No, I didn't. I didn't go into the truck.

Q. Did you have occasion to see the right front door? A. No, I didn't, because it was guarded.

Q. It was guarded? A. Yes.

Q. What did you do with that truck, if anything? A. After it was O. K. to take it away I was going to put the rotor in, which the police

had removed, and I was going to take the truck back. They had removed the rotor so no one could move the truck.

Q. This is not important, but to clear up my unmechanical mind, there has been some talk about a rotor. Is that a little part that goes in the distributor? A. That is right.

Q. While you were there did some police officers from Newark arrive? A. Yes, sir.

Q. Did you go some place with them? A. Yes, I did.

Q. Where did you go with them? A. I went to Smart's mother's house in Springfield.

Q. Did you go in the house? A. Yes, I went in the house.

Q. You didn't see Joe Smart there? A. No.

Q. Did you go any other place with the police officers? A. Yes, we went to a family by the name of Worlds, a friend of his and ours.

Q. Did you go in there? A. We went in there.

Q. You didn't find Smart? A. We didn't find Smart.

Q. Where did you go after that? A. We went back to Vaux Hall, back to the truck.

Q. By that time were you able— A. By that time they had said we could take the truck away.

Q. Who drove that truck away? A. The helper was with me.

Q. You are the one who put the rotor on? A. I am the one that put the rotor on.

Q. But you didn't have any occasion to get into the truck? A. I didn't have occasion to get in the truck.

Q. Did you follow that truck back to Newark? A. Yes, I did, I came down.

Q. Do you know where in Newark that truck was taken to? A. To the Avon Public Garage on Avon Avenue, Newark.

Q. Who instructed you to take the truck there? A. That is where we keep our trucks.

Q. While you were putting this rotor on, on this distributor, did anybody arrive there? A. Yes, they did. Smart walked up.

Q. Who? A. Smart. Joe Smart.

Q. Thereafter did you have a conversation with him? A. Yes. He spoke.

Mr. Foley: Objected to.

Q. All you can say is that he spoke to you. You can't tell us what he said. A. Yes.

By the Court:

Q. That is the place where you keep your trucks; is that right? A. Yes.

Mr. Congleton: If the Court please, from your questioning of the witness, I am not sure that I haven't confused you by jumping from one place to another. When Smart walked up it was at Vaux Hall.

The Court: I asked him if that was the place where he keeps the trucks and he said yes.

Mr. Congleton: No.

The Court: I am talking about where Smart walked up.

The Witness: That was in Vaux Hall.

By Mr. Congleton:

Q. Before the truck was moved to Newark, when you were putting the rotor on the distributor, that is when Joe Smart walked up? A. Yes.

Q. The truck up to that time had not been moved? A. Had not been touched by us.

Q. Were there any police officers there? A. Yes, there was one police officer when he walked up.

Q. Did the police officer then come over? A. Yes, he was there with me holding a light while I was trying to put the rotor on.

Q. Then the police officer and Joe Smart left; is that correct? A. That is correct.

Mr. Congleton: Cross examine.

Mr. Foley: Mr. Congleton, do you intend to develop the operation of this door through this witness? Was he the man you mentioned this morning?

Mr. Congleton: He is the man I mentioned this morning, but subsequent inquiry discloses he is not the man. I intend to have another man here who is the one that got in and out of this truck. I will ask this witness some further questions if you want me.

Mr. Foley: Maybe he doesn't know.

By Mr. Congleton:

Q. Did you have occasion the next day to go to Bateman's truck? A. The next day? No, the truck was taken out of the garage during the night to Headquarters. I didn't——

Q. It was taken out of the garage during the night to Headquarters? A. Yes, by someone else.

Q. When your truck was released to you by the police, or when it came back to Wigler's Bakery, did you see the truck then? A. I saw the truck.

Q. Did you have occasion to use the truck then? A. I didn't use it. I wasn't using it.

Thomas Mathis, for the State—Cross.

Q. To your knowledge were any repairs made to that truck after it got back? A. That I don't know.

Q. Did you ever hear of anything being done to the right front door, as shown in S-17? A. That I don't recall. No, I don't know.

Mr. Congleton: I have no further questions.

Cross examination by Mr. Foley:

Q. Have you ever driven this truck? A. Yes, sir; I have driven the truck.

Q. Not since that time, I take it. A. Since that time I have driven the truck—since that time.

Q. Does the right hand door of the truck operate the same way now as it did before that time—before the time of this event? A. To me it seems to operate the same.

Q. The way it opens now is the way it always opened? A. That is the way it seemed to me.

Q. I show you Exhibit S-18 and I call your attention to the door. Is that as far as that door will open, as far as you know? A. Well, as far as I know.

Q. The door does not swing back further against the mudguard, does it? A. I haven't noticed. I don't know that.

Mr. Congleton: Will you keep your voice up, even though you are talking to Mr. Foley right there? There are some customers down here that can't hear you.

The Witness: That I don't know, sir.

Q. But you have driven this truck since December 17th? A. That, I have.

Q. And you drove it before December 17th, and the door operates— A. To my knowledge, yes.

Q. —the same way now as it did before? A. To my knowledge, yes.

Mr. Foley: That is all.

The Court: Have you finished this cross, Mr. Foley?

Mr. Foley: Yes, I have.

(Adjourned to Saturday, March 22, 1947, at 10 a. m.)

SIXTH DAY.

March 22, 1947.

HERMAN J. SCHUTTERT, sworn.

Mr. Congleton: This witness spoke to me last night, your Honor. This is his busiest day of work, and I took the liberty of asking him to come here right from work so that he could leave right away, and that is why he is not dressed in his street clothes as he would like to have been. He is embarrassed by it, and he did not want it to be considered disrespectful to the Court.

Direct examination by Mr. Congleton:

Q. Mr. Schuttert, where do you live? A. 58 Pierce Street.

Q. By whom are you employed? A. Wigler's Bakery.

Q. How long have you been employed by them? A. Eight years, with time off for the Service.

Q. Mr. Schuttert, directing your attention to December 17, 1946, did you have occasion to go to Vaux Hall that day? A. Yes, sir.

Q. About what time did you go there? A. Approximately 5 o'clock or 5:30.

Q. Who went with you? A. Thomas Mathis.

Q. How did you go there? A. In another truck.

Q. Do you remember where it was in Vaux Hall that you went to? A. Waldorf Place, I believe the name of the street is.

Q. When you got to Waldorf Place what did you find? A. Another of the Wigler Bakery trucks guarded by Union policemen.

Q. Were you allowed to enter the truck? A. No, sir.

Q. Thereafter were you allowed to go into the truck? A. Yes, sir.

Q. And when you went into the truck what did you do? A. I got it started and drove it away.

Q. That was after Mr. Mathis put the rotor on? A. Yes.

Q. When you drove that truck away where did you drive it to? A. The Avon Public Garage.

Q. When did you see that truck again? A. I can't recall. I imagine a few days later.

Q. Now, Mr. Schuttert, it was practically dark when you got into the truck, wasn't it? A. Yes, sir.

Q. You were familiar with that truck prior to the time of this occurrence on December 17, were you not? A. Yes, sir.

Q. You have driven the truck since December 17, have you not, on occasion? A. I believe so, sir.

Q. You have seen the truck? A. Yes, sir.

Q. To your knowledge does the right door work any differently now than it did before December 17, 1946? A. No, sir.

Q. To your knowledge were there any repairs or changes made to that door? A. No, sir.

Q. You don't know what happened to that truck after it got into the Avon Garage, do you? A. No, sir.

Mr. Congleton: Cross examine.

Mr. Foley: No questions.

Mr. Congleton: Mr. Foley, may I ask at this time whether that proof satisfies you? Or would you like me to try to produce still further proof?

Mr. Foley: I would like to answer your question in this way: One of the jurors asked a question which required this proof,

and I should like to know if the juror is satisfied. I am satisfied myself.

Mr. Congleton: I am now in a position to represent to the Court, which I was not yesterday when the question was asked, that to my knowledge, gained through the witnesses who have testified and my talks with the people, that there were no changes made to that door, and that the door works the same now as it did prior to December 17.

Mr. Foley: And on December 17?

Mr. Congleton: Yes.

The Court: Very well.

Mr. Foley: Would your Honor be good enough to ask that juror who inquired whether or not that is an answer to his question?

The Court: Well, at the defendant's request I will.

Juror No. 6: I am entirely satisfied, your Honor. Thank you.

JOHN J. HICKEY, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Hickey, by whom are you employed? A. City of Newark, Police division.

Q. In what capacity? A. Identification officer.

Q. How long have you been so employed? A. Ten years.

Q. Your duties as an identification officer consist of what? A. Classifying fingerprints, going out on jobs to attempt to get fingerprints.

Q. You received training to do that type of work? A. Yes, sir.

Q. Mr. Hickey, directing your attention to December 17, 1946, did you have occasion to go to Vaux Hall that day? A. Yes, sir.

Q. In whose company did you go? A. Lieutenant Flynn.

Q. And some of the other men of the squad? A. Yes, they followed in another car.

Q. When you got to Vaux Hall what did you find? A. We found a Wigler Bakery truck. If I may be permitted, I have a note here. It was an International truck, license number XK8451 New Jersey.

Q. XK8451 New Jersey? A. That's right.

Q. I show you Exhibit S-11 and ask you if you recognize that picture? A. No, not from the rear.

Q. You see a license plate? A. Yes.

Q. What is the license plate shown in that picture? A. XK8451 New Jersey.

Mr. Congleton: We were referring at the time to Exhibit S-11.

Q. What did you do when you arrived there, Mr. Hickey? A. I proceeded to dust the truck in an attempt to get fingerprints. It was quite dark.

Q. Some of us may not understand what you mean by dusting the truck. Some of us think of dusting as dusting something off. A. Do you want me to explain?

Q. Please. A. When you have a surface, in order to get a fingerprint, we use contrasting powder. We use white for a dark surface and black for a light surface. We go over lightly with a camel's hair brush in an effort to bring out

any fingerprints on there. If the surface is dusty that destroys the opportunity of getting prints, and of course atmospheric conditions have a good deal of bearing on whether you can get fingerprints or not.

Q. When you use the term *dusting* you mean to dust on something? A. That's right.

Q. Will you proceed? I think you started to tell us you dusted the truck. A. That's right.

Q. What parts of the truck did you dust? A. I dusted the rear view mirror, the windows of the door—that's the front door—inside and outside.

Q. Of both doors? A. On the front, the cab; the doors themselves, that is, the middle part; the interior and exterior; the steering wheel, the gear shift lever, the windshield, the dashboard, the emergency brake, the panel—that's above the windshield—and I found no prints.

Q. You found no prints in any of those places? A. That's right.

Q. Was it light or dark when you arrived? A Well, I left the office at 4:15 and I must have gotten there in the neighborhood of a quarter to five. I had to use a light.

Q. Did you go into the rear of that truck at all? A. No, sir, I did not.

Q. Did you look into the rear? A. I did. I flashed my light in there.

Q. Did you flash it from the cab of the truck? A. Yes.

Q. What did you see when you flashed your light in there? A. There was a low shelf and a couple of cardboard cartons in the interior.

Q. I show you S-10 for identification and ask you if you recognize that picture at all? A. The cardboard cartons like this. This was not in there.

Q. Did you go to the rear of the truck? A. I did not see this box. The only thing I saw was——

Mr. Congleton: The witness is indicating what he didn't see. He is indicating that he did not see the wooden box in the right foreground of the picture.

Q. But you did see paper cartons such as that? A. Yes.

Q. This observation was made from the cab of the truck? A. That's right.

Q. With a light flashed into the back, is that correct? A. Yes.

Mr. Congleton: I offer the picture in evidence.

Mr. Foley: I object, for two reasons. First of all, he says there is something in this picture which was not present at the time he made his observation. Secondly, there is no proof that the conditions shown in the picture were present immediately after this occurrence. There is a space of something like an hour or two hours to two hours and a half——

The Witness: From the time I left?

Mr. Foley: No, I am not asking you. There is a space of considerable time, perhaps two hours and a half, between the time this truck arrived at the place where it was found by these officers and the time he got there. Many people were there; many things could have happened. There is nothing to indicate that it was in the same condition when he arrived there with respect to movable objects within the truck as it was when that truck first came to that scene.

Mr. Congleton: If the Court please, there has been testimony that the police

guarded the truck until the time that this gentleman arrived there, so that no one could go in and out. I didn't understand the witness to say that the wooden box was not in the truck; I understood him to say he didn't see it.

The Court: That is right.

Mr. Congleton: And the State's contention is that from looking at the cab of the truck, which would be the reverse of this picture, and throwing a light to the rear, with those cartons in front, he could not have seen the object.

Mr. Foley: That may all be true, but that does not give the State the right to introduce a picture which contains an object which no witness has identified as being an object that was within the truck at any time.

The Court: So far, I don't recall anything about the cartons.

Mr. Congleton: About the cartons?

The Court: About the cartons. I mean except this witness.

Mr. Congleton: That is correct, sir, but the police officers have testified that the truck was guarded from the time that they got there, so that no one went in there, and the people that got there were not allowed to go in until this man came to fingerprint.

The Court: Are you sure he gave that testimony?

Mr. Congleton: It is my understanding of the testimony.

Mr. Foley: I don't believe that it could be said one officer or any group of officers expressly said that no one went inside the

truck. It is true that they were there for the purpose of guarding the truck.

The Court: Yes.

Mr. Foley: But it would only be by inference gathered that no one did actually enter the truck. There is no affirmative proof to that effect to the best of my recollection.

Mr. Congleton: Well, my recollection was to the contrary. I will withhold it and prove it later, sir.

The Court: That is my recollection—corresponding with Mr. Foley's—that there was no proof—no positive proof on the part of any officer that no one was allowed to go in. Of course, they may have been there for that purpose—to guard it—but there is no affirmative evidence as far as I can recall that they saw to it no one entered that truck.

Mr. Congleton: No further questions.

Mr. Foley: No questions.

JOSEPH COCOZZA, sworn.

Direct examination by Mr. Congleton:

Q. Captain, you are a member of the staff of the Prosecutor of the Pleas of Essex County? A. I am.

Q. You have been for how long, sir? A. 24 years.

Q. In what capacity are you presently serving in the Prosecutor's Office? A. I am a Captain of County detectives, in charge of the Homicide Bureau.

Q. You have been such for how long? A. Since 1937.

Q. Prior to coming to the Prosecutor's Office—I think you said it was 24 years ago—what was the nature of your work? A. I was a finger-print——

Mr. Foley: Is this for the purpose of qualifying the Captain?

Mr. Congleton: Yes.

Mr. Foley: As what?

Mr. Congleton: As a firearms expert.

Mr. Foley: I will admit the Captain's qualifications. I think there is no one more qualified than he.

Mr. Congleton: I appreciate that, Mr. Foley, but so that the jury may have a little idea of the type of studies he made for this work, I would like them to have just a little of it.

Mr. Foley: I will withdraw my offer under those circumstances.

Mr. Congleton: All right, sir.

Q. Prior to your coming to the Prosecutor's Office, Captain, what work were you engaged in? A. I was engaged in identification work in the Newark Police Department.

Q. For how long were you so engaged? A. Six years.

Q. Have you made any study of firearms? A. I did.

Q. Will you tell us briefly, not in too much detail, what that study consisted of? A. The study consisted of the manufacture of all firearms and of the various types of ammunition, and in studying that course I visited all the firearms and ammunition factories in this country and Canada. I

also visited the DuPont Powder Company in Wilmington, Delaware, and the Hercules Powder Plant at Kenvil, New Jersey, and I visited the Northwestern University where I took a short course in firearms under Colonel Goddard, and I visited a number of the police departments in this country in an effort to learn their methods of firearms identification.

Q. About when was the first time that you qualified as an expert witness on firearms? A. 1937.

Q. Since that time you have testified in a number of cases, have you not, sir? A. I have.

Q. Now Captain, I show you Exhibit S-34 and ask you if you made an examination of that firearm? A. I did.

Q. Will you tell us what kind of firearm that is? A. This is a Smith & Wesson, .38 calibre, break-open revolver.

Q. The barrel will hold how many cartridges? A. The cylinder has five chambers, which will hold five cartridges.

Q. Will you explain briefly to the Court and jury the mechanism of firing that gun? A. In order to load the gun you must break open the frame and insert the cartridges in the chambers of the cylinder. When they are all loaded with the full load, the frame is closed and it is ready for action. In order to fire this firearm you must pull the trigger in that fashion to fire the gun. (Demonstrating.) This is a single action. When you pull the trigger back and you pull the trigger it will also fire.

By the Court:

Q. You mean pull the hammer back? A. Pull the trigger back, which releases the hammer.

By Mr. Congleton:

Q. I think what the Court means is this: First you have to pull the hammer back? A. First you have to pull the hammer back. Then you pull the trigger in that fashion and it will go off. (Demonstrating.)

By the Court:

Q. In other words, it operates automatically or by hand, as anybody may prefer? A. Yes.

Q. They may cock it by hand or fire it by pulling the trigger? A. That's right. They can fire it in a single action by pulling the trigger in that fashion (demonstrating), or by double action in that fashion (demonstrating).

By Mr. Congleton:

Q. Have you fired that gun since it has been in your possession? A. I did.

Q. About when did you receive possession of the gun? A. I received possession of the gun on December 26, 1946. I fired test shots on January 18, 1947 and March 15, 1947.

Q. When you speak of firing test shots, will you tell the jury how you fired test shots? A. After loading the firearm I fired shots into a box of cotton, which is about five feet in length and 8 inches square. This box has a steel plate at the end of it and an opening of 8 inches in the front. It is packed with cotton. I fire a bullet into the cotton and then recover the fired bullet.

Q. The bullet then receives no damage when it goes into the cotton; is that so? A. That's right.

Q. I show you Exhibit S-30 and ask you if that bullet was turned over to you by the police. A. This bullet was turned over to me by Detective Geiger on the night of December 17, 1946.

Q. Where? A. At Police Headquarters in Newark.

Q. Did you examine that? A. I did.

Q. Can you tell us what the result of your examination was as to what your opinion is as to the type of bullet that is? A. That is a .38 calibre lead bullet. It is very badly damaged. The nose is flattened, and after firing the shot from S-34 I recovered the bullet and I then made a comparison with this bullet in the comparison microscope.

Q. Now, Captain, so that I may better understand this, when you fire a test bullet and compare it with another bullet, what do you look for? A. We look for the fine lines which are made on the lead bullet as it passes through the barrel of the firearm, a group of fine lines which are called striations. It is those lines which must be compared, and if we find a comparison we do know that the bullet is fired from a certain firearm.

Q. Now, Captain, what conclusion or what opinion did you form after you made the examination of the exhibit that you now have? A. I made an examination of this bullet and compared it with the bullet fired from the firearm marked S-34 and my conclusion was that Exhibit S-30 was fired from the firearm marked Exhibit S-34.

Q. I show you Exhibit S-31. Did you receive that bullet from some police officer? A. I did.

Q. From whom? A. I received it from Detective Geiger at Police Headquarters in Newark on December 17th.

Q. Did you make an examination of that bullet? A. I did. This is a .38 calibre lead bullet, and after firing test shots from Exhibit S-34 and comparing them with the bullet marked S-31 I found that the bullet marked S-31 was fired from the firearm marked Exhibit S-34.

Q. Now, Captain, were you able to determine from your examination of either Exhibit S-31 or Exhibit S-30 what type of powder was used in the cartridges? A. I was.

Q. What type of powder was it? A. Black powder.

Q. Are there any characteristics of black powder that are important? A. Yes.

Q. What are they? A. Black powder causes black smudges on the bullet and around the cylinder of the firearm. It shows black smudges, which indicates that black powder had been used.

Q. Did Exhibit S-34 that you now hold in your hand also exhibit the fact that black powder had been used? A. Yes.

Q. Now, Captain, I show you Exhibit S-1 and ask you if that was turned over to you? A. It was.

Q. From whom did you receive that? A. I received Exhibit S-1 from Dr. Martland at the City Hospital on December 18, 1946.

Q. Did you examine that bullet? A. I did.

Q. Did you make a comparison of that with test shots? A. I did.

Q. What opinion did you form after making that comparison as to what gun that bullet was fired from? A I found that the Exhibit marked S-1 was fired from the exhibit marked S-34.

Q. In what condition did you find that bullet, sir? A. This condition is very—this bullet marked S-1 is very badly scarred on the sides. There are some markings on this bullet which were compared with the bullet marked Exhibit 34. This is a copper-coated bullet, and it is a .38 caliber lead bullet.

Q. When you say it is a copper-coated bullet, what do you mean by that, sir? A. It is a lead

bullet with a copper—a very thin copper coating on it.

Q. Does that differ from the other two exhibits that you have already examined? A. It is the same bullet except the copper coating which is on this bullet and not on the other.

Q. Now. I show you S-2, captain, and ask you if you received that bullet. A. I did.

Q. From whom did you receive that? A. I received this bullet from Dr. Martland at the City Hospital on December 18, 1946.

Q. Did you make a comparison of that with test shots? A. I did.

Q. What opinion did you form as a result of your examination as to what gun that bullet was fired from? A. After making a comparison I find that S-2 was fired from the firearm marked S-34.

Q. What was the condition of that bullet, captain? A. There was a scar on the nose of this bullet which was caused by striking some object. and the base of the bullet is a bit flattened on one side.

Q. In those envelopes that you have there, captain, are those the test bullets you fired? A. Yes. sir.

Q. And the envelopes in which they are contained have your notation as to when they were fired? A. They have.

Mr. Congleton: I ask that these be marked for identification.

(The envelopes referred to are marked S-39 through S-42 for identification).

Q. Now captain, since you received in your possession exhibits S-30, 31, 1, and 2, and the Ex-

hibit S-34 which is lying there before you—the gun—have you kept those in your possession? Have they been in your possession until you produced them here in court, sir? A. That is right.

Q. Now, captain, in your study of firearms did you also make a study from which you are able to determine the distance that a gun is held from a point of contact? A. I did.

Q. You made that study at the same time you made the other studies. Is that right, sir? A. Yes.

The Court: Excuse me.

By the Court:

Q. Your conclusion, as I understand it, captain, was that all of these bullets were fired from the same gun. A. Yes, sir.

Q. To wit, the gun that is before you? A. That is right, sir.

By Mr. Congleton:

Q. Now, captain, I show you Exhibit S-26 and ask you when that came into your possession, if it did. A. This came into my possession on December 26, 1946.

Q. From whom did you receive it? A. I received that from Lieutenant Wangner, of the Homicide Squad, Newark Police Department.

Q. Did you make an examination of that coat? A. I did.

Q. What did you discover on your examination? A. I discovered numerous bloodstains with some foreign substance attached to the coat. I also discovered two bullet holes—one in the back and one in the front.

Q. At this point, if I may direct your attention specifically to the bullet hole in the front, will you indicate to the jury the position of what you call the bullet hole? A. There is a bullet hole located about three and a half inches from the zipper. The bullet hole is surrounded by black smudges, or there is a black smudge here, to indicate that is a bullet hole. That hole is about eight inches from the bottom of the jacket and between two buttons.

Q. Did you determine whether or not that hole goes completely through the coat? A. It does.

Q. Can you indicate in what direction it went through the coat? A. It goes through at a slight angle from the zipper toward the back of the coat, at an angle of about in that position, in that angle.

Mr. Foley: Do you want to hold that a second?

Mr. Congleton: Let us put a pencil through it.

Mr. Foley: I thought we might describe the angle for the record if we could. 22½ degrees? That's one-half of 45 degrees.

Mr. Congleton: It is half of 90, isn't it?

Mr. Foley: It's about half of the quarter.

The Witness: Just about half of the quarter.

Mr. Congleton: Half of the quarter would be what?

Mr. Foley: When I say a quarter I mean———

Mr. Congleton: That's 90 degrees, isn't it?

Mr. Foley: I don't know.

Mr. Congleton: Well, there are 360 degrees in a circle, a quarter would be 90, and a half of 90 would be 45.

The Witness: About a 45 degree angle.

Q. Directing your testimony at this time to that particular hole, did you make any test as a result of which you formed an opinion as to how far away the gun that made that bullet hole was at the time it was fired? A. I did.

Q. What do those tests consist of? A. Those tests consist of firing bullets from Exhibit S-34 into the same box of cotton that I used to fire the test shots. In fact, they were made simultaneously. By determining the distance the blotter is placed in front of the hole in the box and by getting a pattern on the blotter as you fire the bullet through, I determine the distance that the firearm was held away from the coat when this bullet hole was made.

Q. I don't think I quite understood that. You fixed the blotter to the front of the test box? A. I do.

Q. And you hold the gun at various distances from the blotter? A. That's right.

Q. The blotter always stays next to the box in these various tests, and you don't move the blotter in your tests? A. No.

Q. Did you make tests with various blotters from this gun? A. I did.

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

Q. Will you produce them, please.

(The witness produces blotters.)

Q. You go ahead and explain it.

Mr. Foley: If your Honor please, before the captain explains, it seems to me some-

thing is missing in the manner of making these tests. Perhaps while I was reading this paper I failed to hear the captain mention it. I don't recall that the captain testified that the test shots he made were with bullets that used the same kind of powder.

Mr. Congleton: That is correct, he did not, because I neglected to ask him the question. I thank you for calling it to my attention.

Q. When you made these test shots, what type of bullets did you use? A. I used .38 caliber lead bullets with black powder.

Q. Will you go ahead and explain these blotters. A. My first shot was a near contact shot.

Q. When you say near contact shot, what do you mean by that? A. That the muzzle of the firearm was not held against the blotter. There is no indication on this bullet hole that the muzzle was held against the blotter in that fashion.

Q. How far away was the gun held on the first test? A. This first test was fired, as I say, near contact, which would be about an inch away from the target. I got that pattern from holding the muzzle of the firearm an inch away from the blotter.

Mr. Congleton: I ask that that be marked for identification, sir. This has written on it, "Near contact, Test 1." I will have the record show it is in two pieces.

Mr. Foley: It is.

(The blotter, in two pieces, is marked Exhibit S-43 for identification.)

Q. What did your second test shot consist of? A. Having received a pattern as contained in

S-43 for identification and knowing that was too close, I fired a shot four inches away from the blotter, and in the second test shot I got this pattern which was held four inches away from the blotter.

Mr. Congleton: I ask that that be marked for identification. Again this is in two pieces. It is marked, "Test 2, four inches" on both pieces.

(The blotter, in two pieces, is marked Exhibit S-44 for identification.)

Q. Did you make a further test? A. I did. My third test shot, having received a large pattern on S-44 for identification, I wanted to get a smaller pattern, so I fired a test shot at eight inches away from the target, and this is the pattern that I got at eight inches.

Mr. Congleton: I ask that that be marked for identification. This is in one piece.

(The blotter is marked Exhibit S-45 for identification.)

Mr. Congleton: That has written on it, "Test 3, eight inches."

Q. So that there will be no misunderstanding in anybody's mind on these various exhibits that have just been marked S-45, S-44 and S-43, there are holes at the top and at the bottom, and those holes are where the thumbtacks fastened it to the box, isn't that right? A. That is right.

Q. There is no connection between them and the bullet? A. No.

Q. As a result of these tests and as a result of your examination of S-26 in evidence, did you

form an opinion as to how far away the gun was held that caused the bullet hole that appears in the front of S-26 about 3 inches to the left of the zipper? A. I did.

Q. What was your conclusion or opinion? A. After firing Exhibit S-44 for identification and S-43 for identification, I found that the pattern on S-44 for identification was too large for the pattern made on S 26, and I found that the pattern on S-8 was not enough to make a comparison on S-26, so I determined that the distance fired was about 6 inches from the exhibit maked S-26 when the firearm was fired.

Q. In other words, your opinion is that the gun that fired the bullet that created the hole in the front of that jacket was held not more than 6 inches away? A. That's right.

Q. Now, Captain, I call your attention to a hole that appears in the rear portion of this jacket, about 4 inches to the right of the left back seam. Did you find that hole there when you made your examination? A. I did.

Q. Did you determine what course the bullet passed through that portion of the jacket when it made that hole in the rear? A. I did.

Q. Can you tell us what the course was, in your opinion? A. The course was directly through the coat and the lining in a straight course in that angle.

Mr. Congleton: Indicating——

Mr. Foley: I am not going to try that again, Mr. Congleton.

Mr. Congleton: I thought we taught you that was 90 degrees.

Mr. Foley: All right.

Q. Captain, thereafter did you use the same test blotters that you had previously described to form an opinion as to what distance it was that the gun was held that caused the bullet hole that you have just described in the rear of this jacket? A. I did.

Q. What opinion did you form? A. My opinion is that the firearm was held 4 inches away from Exhibit S-26 when the bullet was fired.

Q. Captain, since that coat was turned over to you, you kept it in your possession, did you not, except for sending it away for one test? A. I did.

Q. To whom did you send it for that test? A. To Dr. John Brady, of the Edel Laboratories, on Hill Street, Newark.

Q. And that was for the purpose of having a chemical analysis made to determine what the stains were on the back of the coat. Is that correct? A. Yes, sir.

Q. Then the coat was returned to your possession and custody? A. Yes.

Q. How did you send that coat to Dr. Edel? By one of your men? A. I sent the coat down by Mr. Kosloski, of our office.

Mr. Congleton: I said, "Dr. Edel." I would like to change that to Dr. Brady.

Mr. Foley: It is Dr. Brady.

Mr. Congleton: That is a matter of habit. Cross examine.

Cross examination by Mr. Foley:

Q. Captain Cocozza, when you sent the coat to Dr. Brady did you request that he give you an analysis of the marks which you have described as powder burns? A. No, sir.

Q. Did you determine that they were powder burns by any test of any kind or purely by observation? A. Purely by observation. They are not powder burns; they are powder smudges. Burns are different.

Q. They are powder smudges? A. Yes, sir.

Q. Did you determine that they were powder smudges by any test other than your visual examination of them? A. No, sir. From my experience in gunshot wounds I can tell you whether they are powder smudges or powder burns, whichever appear on the clothes or skin.

Q. Of course, that second smudge is a foreign substance laid over the material, isn't it? A. That's right.

Q. It would be entirely possible for a man such as Dr. Brady or Dr. Edel, when he was here, to take a specimen from the entire smudge, from various parts of the smudge, and to determine beyond any question that the smudge was a powder smudge and not some other kind of smudge? A. He could have made that test.

Q. You sent the coat out to him for examination of the other substances which appeared on the coat—those other than what you call powder smudges, but made no request for an analysis of those smudge marks? A. That is right.

Q. I understood you to say, speaking now of the bullet hole on the front of the coat, that you made first a near contact test, then one from 4 inches away, and then one from 8 inches away. A. Yes, sir.

Q. And as a result of your examination of that one which was 4 inches away and that one which was 8 inches away you concluded that the gun was fired from a point 6 inches away. A. That is right, sir.

Q. Did you then make a test shot against a blotter, with the muzzle 6 inches away, to see how that smudge would compare with the smudge on the coat? A. No, sir.

Q. By so doing you would have been able to establish with extreme accuracy that the gun was either 6 inches away or not 6 inches away, depending on how large the smudge mark was on the blotter and comparing that with the coat, wouldn't you? A. Yes.

Q. You kept the pellets, Captain, that you used in the test shots? A. I did.

Mr. Congleton: I have them here if you want them, sir.

Mr. Foley: I may want them.

Mr. Congleton: I marked them for identification.

Mr. Foley: They are marked for identification?

Mr. Congleton: That is right.

Q. I don't know very much about bullets, Captain. I will ask you this: Do bullets manufactured by different people vary in size and shape and the like, even though used in the same gun? A. There are some variations in the specifications in each —from each manufacturing concern.

Q. By examining the bullets which are marked in evidence could you tell who manufactured them? A. If I traced them down, yes, I could tell you.

Q. In making these test shots did you attempt to trace down the manufacturer of the bullets which are marked in evidence, so that you would use exactly the same kind of bullets for your test shots? A. I did not trace them down, but I did use the same type of bullet. It may not have been

the same company, because cartridges are very hard to get today, and you have to use as close as you possibly can to the real bullet.

Q. Are there variations in the powder as well as in the size of the bullet? A. There are no variations in the powder. Powder is made by one or two concerns, and black powder is black powder. It doesn't make any difference which bullet it is loaded with. The same with smokeless powder.

Q. Do some bullets contain more powder than others? A. Yes.

Q. And have you any way of knowing whether the bullets that you used for your test shots contained exactly the same amount of powder as the bullets that are marked in evidence? A. No, I have no way of telling that. When I said that there is more powder in some bullets than in others I meant that a .45 caliber bullet would contain more powder than would a .22 caliber bullet.

Q. That is not what I meant. So that we may be perfectly clear, I meant only .38 caliber bullets. Do they contain the same amount of powder? A. Approximately.

Q. Is there any variation? A. Very, very slight variation. One company may put in a few more grains than another company.

Q. Now, it is a fact, is it not, captain, that the black powder makes a larger smudge than the other powder? A. Definitely, yes, sir.

Q. And a bullet fired by black powder will make a smudge against the object which it strikes at a distance greater from the object than a bullet containing another type of powder? A. I don't understand that.

Q. Where the bullet has black powder it will make a smudge against the object it strikes when

the muzzle of the gun is held further away from the object that it strikes than would be the case if the bullet did not contain black powder? A. It would make a smudge up to a certain distance. Beyond a certain distance you find no evidence in black powder or smokeless powder of a smudge or burn, whichever the case may be.

Q. But if within the distance where a smudge might be made, a gun were held at a certain distance and a bullet had black powder, the smudge would be larger than if a bullet was fired from a gun held the same distance which bullet had smokeless powder? A. That's right.

Q. What color smoke attends the firing of a shot such as was fired in this manner? A. That all depends on the atmospheric conditions. You may get a black smoke or you may get a gray smoke. It is according to how much air mixes in with the smoke.

Q. How does the atmospheric conditions affect it? What kind of atmospheric conditions do what? A. Air and moisture. If you fire black powder in a room where there isn't too much moisture or too much fresh air, you will get black smoke. If you fire it outdoors, where you have fresh air and moisture, you will get gray smoke. It is a mixture of air and moisture which will cause you to get a somewhat grayish color.

Q. I understand then that the greater the confinement wth respect to fresh air the blacker the smoke? A. That's right.

Q. Where did you make your test shots? A. In my room downstairs.

Q. Did you get smoke when you fired the gun? A. I did. In fact, the first test I got smoke and fire.

Q. Smoke and fire? A. Yes, sir.

Q. Would you ordinarily expect to get fire along with smoke? A. At that distance I would. Contact or within an inch or probably an inch and a half you would get fire with it.

Q. Beyond an inch and a half you would probably not get a flash; is that correct? A. You would get a flash but not fire. When I say fire my cotton in the box burns.

Q. I see what you mean. And there was smoke, of course, when you fired the gun? A. Yes, sir.

Q. Would you be able to demonstrate to the jury the test shots in order that the jury might see how much smoke came from the gun? A. Yes, sir.

Q. Do you consider that the firing of the gun against the blotter and the firing of the gun against materials such as this—I am indicating now the jacket, S-26—are comparable in every way with respect to showing the amount of smudge? A. Yes, with respect to the amount of smudge, it is. The only difference is that the blotter is white and the jacket is tan, and it is more prominent on the white blotter than on the tan coat, but as far as the pattern is concerned, there is no difference.

Mr. Foley: That is all captain.

Re-direct examination by Mr. Congleton:

Q. Captain, you spoke of near contact shots creating fire. Is that the reason why in S-43 for identification the bullet made such a big hole? A. That shows evidence on the back of the blotter more than it does on the front, but the reason for the large hole is the blast of the powder. It just blew that hole right through there, but there is evidence that that blotter did start to burn.

Q. Now, capain, you have been asked about black powder and other types of powder. I would like to ask you this: Where a cartridge containing black powder is fired, putting in motion a bullet when the gun is fired and that bullet enters human flesh, would or would not a bullet that had been fired with black powder tend to leave a mark at the point of entrance? A. It would.

Q. What kind of mark would it tend to leave? A. A small black ring immediately surrounding the wound of entrance. In fact, you get that from both, whether it is black or smokeless powder, but the black is more prominent.

Mr. Foley: If your Honor please, I would like at this time to request that at some time during the course of this trial the captain give a demonstration to the jury of the firing of two test shots, when the jury may see the nature and extent of the smoke that comes from the shots.

The Court: You mean here in the courtroom?

Mr. Foley: I thought in the captain's office downstairs. Apparently he is equipped to do that kind of thing. I gathered so from his testimony.

The Court: Well, you mean to have the jury go down into the captain's office for these shots to be fired?

Mr. Foley: Yes. I approach it in the same manner that we approached the matter of having the jury view the truck. It is a matter of demonstration. I think it would be very interesting for the jury to see how much smoke comes from the firing of these shots. There is testimony on that from two

witnesses, who are rather important witnesses in this case.

The Court: The difficulty would be in reproducing the conditions that existed to coincide with the testimony as to the circumstances under which the shots were fired. There are so many conditions, I have a feeling that it would be impossible to reproduce them in the captain's office. In the captain's office we have a still atmosphere. In the outdoors we have an entirely different atmosphere. In the captain's office there is no wind blowing, any stirring; in the out-of-doors there would be. I doubt whether we would gain anything or that the comparison would be of such a character as to be of assistance. That is the reason I doubt the wisdom of it or the practicability of it or that it accomplishes anything.

Mr. Foley: The quantity of the smoke, as I understand it, would not vary.

The Court: The quantity of the smoke which was emitted from the muzzle of the gun, I should judge from the testimony, would be substantially the same no matter where the gun was fired, but it is not a question of the quantity of the smoke. It is a question of observation. Now, if you fire a gun, as a matter of common sense, it would seem, right out in the open where there was a high wind and no surrounding confinement why, you would certainly see less smoke than if you fired it in a still atmosphere where there is considerable confinement.

Mr. Foley: I agree with your Honor on that.

The Court: The difficulty is in the reproduction of the conditions in such a way as to be of practical value.

Mr. Foley: I agree with your Honor when you say that the smoke would be less visible where the air was in circulation or where the wind was blowing than it would be indoors. Of course, I would want the jury to take into consideration that this all happened in the out-of-doors with the truck in motion and with the door open, but that here indoors we could see what the quantity of the smoke was and if the quantity were not much then the jury would be able to understand how difficult it would be for anybody to see that quantity of smoke, particularly in the out-of-doors and particularly where the truck was in motion. That is the point of my request.

The Court: That, of course, is a matter that would have to be addressed to the judgment of the jury. There is another thing that I should like to know about, and that is a matter that I would like to ask of the captain if there is no objection. How about the noise, Captain, in firing shots right in a room like we have?

Captain Cocozza: Well, there is a great amount of noise when the cartridge explodes.

The Court: There must be.

Captain Cocozza: You have to plug your ears up, unless you want something to happen to your eardrums, in some instances.

Of course, other eardrums are stronger than weak ones.

The Court: I don't know. I really don't think it would be a practicable thing so far. But I am not precluding you; I am not coming to a final conclusion. But my impression is that we would not gain anything of a practical nature, because of the difficulty of reproducing conditions that would be sufficiently alike—the conditions testified to—to be of practical use. So far, Mr. Foley, I am not inclined in your favor.

Mr. Foley: Very well. Your Honor will reserve decision?

The Court: I beg your pardon?

Mr. Foley: Your Honor will reserve decision upon my application?

The Court: Yes, I will.

Mr. Foley: May I off the record ask the Captain a question?

(Mr. Foley speaks to Captain Cocozza, not within the hearing of the jury.)

Mr. Foley: Very well. I may renew my application later, then, if your Honor please?

The Court: If you like.

Mr. Congleton: If the Court please, at this time I would like to offer S-43 for identification in evidence, S-44 for identification in evidence, and S-45 for identification in evidence. Those are the three test blotters, sir. I think it would probably be well, Mr. Foley, if I slid them into an envelope.

Mr. Foley: That is agreeable to me.

(The blotters referred to are received in evidence and marked Exhibits S-43, S-44, and S-45.)

Mr. Congleton: At this time, if the Court please, I offer S-39 for identification in evidence, which contains a test bullet and the cartridge from which that bullet was fired —the empty cartridge from which it was fired.

Mr. Foley: No objection.

(The articles referred to are received in evidence and marked Exhibit S-39.)

Mr. Congleton: I offer in evidence S-40 for identification, which contains another test bullet and the cartridge from which it was fired.

Mr. Foley: No objection.

(The articles referred to are received in evidence and marked Exhibit S-40.)

Mr. Congleton: I offer next in evidence Exhibit S-41 for identification, which contains a test bullet and the cartridge from which it was fired.

Mr. Foley: No objection.

(The articles referred to are received in evidence and marked Exhibit S-41.)

Mr. Congleton: And S-42 for identification, which contains a test bullet and the cartridge from which it was fired.

Mr. Foley: No objection.

(The articles referred to are received in evidence and marked Exhibit S-42.)

(At this point a brief recess is taken.)

William G. Wangner, Recalled, for the State —Direct.

WILLIAM G. WANGNER, recalled.

Direct examination by Mr. Congleton:

Q. Lieutenant, you were on the stand yesterday and testified that you were the head of the Homicide Squad? A. I did.

Q. Now on December 18, 1946 did you have occasion to go to 17 Lillie Street? A. I did.

Q. Whom did you go there with? A. Lieutenand Flynn, Detective Smith, O'Beirne, Geiger and Cook.

Q. At about what time was it that day, do you recall? A. About 2:30.

Q. That was when you got there or when you left Headquarters? A. When we arrived there.

Q. What did you do after you got there? A. Detective Cook and I covered the rear.

Q. When you say covered the rear, by that you mean stayed out in the back yard? A. In the rear yard.

Q. I suppose so that if somebody came out of the house, you were there? A. That's right.

Q. How long did you stay there? A. I should judge about 15 or 20 minutes.

Q. Then did you leave? A. Then we left.

Q. Thereafter did you return there that day? A. We did.

Q. When you say "we" whom do you mean by that? A. All of the officers I mentioned.

Q. When was that? A. That was around, I should judge, 4:30.

Q. What did you do when you got there that time? A. I went to the fourth floor, front right apartment of the Brookes. I met Detective Geiger and O'Beirn there, and Detective Cook was with me.

William G. Wangner, Recalled, for the State —Direct.

Q. There were the four of you present, is that right? A. That's right.

Q. What did you proceed to do? A. Detective Geiger and O'Beirne were searching for the Wigler Bakery Company deposit.

Q. What did you do? A. I assisted in the search.

Q. During the course of that search did you have a conversation with Mrs. Brooks?

Mr. Foley: Answer yes or no, please.

A. Yes, I had.

Q. After that conversation did you find anything? A. Mrs. Brooks pointed to the baby carriage in the kitchen——

Mr. Foley: I object to that, if your Court please.

The Court: Strike it out.

Q. What did you do? A. I went to the baby carriage, lifted the pillow in the bottom of the baby carriage, and I saw bills and change.

Q. How much money did you find under the pillow? A. When I return to Headquarters and I finally counted the money myself, I found $1,387.61.

Q. What form was it in? A. In bills, ten dollars' worth of quarters, and there was an envelope with 61 cents in it.

Q. I show you now S-23. Is that the envelope you are referring to? A. That is the envelope; that is the money.

Q. These bills that you found, did you notice whether any of them were wrapped? A. There was eight wrapped in fifties; there was one

wrapped in five hundred; one was wrapped in two huundred and fifty; the rest were loose bills.

Q. I show you S-22 for identification and ask you if you will tell us how many fifties and things there are here. A. There is eight here.

By Mr. Foley:

Q. Eight fifties? A. Eight fifties.

By the Court:

Q. Eight packages of fifty? A. Eight packages of fifty, and they are stamped, "Wigler Bakery."

By Mr. Congleton:

Q. And there is a package of— A. There is a package of 250.

Q. Made up of— A. Fives, and there is a package of five hundred made up of tens, stamped, "Wigler Bakery," and then the loose bills. Where are they?

Q. You say you found some loose bills there? A. I did.

Q. Do you remember the amount? A. I sorted them in hundreds. There was two one hundred dollar packages and twenty-seven, so that there was $227 in ones and twos and so forth.

Q. You kept those moneys in your custody for how long? A. And of course there was ten dollars in quarters. Until December 23rd and I turned them over to Captain Cocozza.

Q. Thereafter were other moneys turned over to you by other members of the police? A. Yes, sir.

William G. Wangner, Recalled, for the State —Direct.

Q. Who turned moneys over to you? And in what amounts. A. Lieutenant Flynn turned over to me $237.45 in a linen bag.

Q. I show you S-36 in evidence and ask you if that is the linen bag? A. That is the linen bag, and that is my——

Q. We took the tag off. A. I had a tag on there.

Q. We took it off yesterday and substituted this one. How much was in there? A. $237.45.

Q. Did anybody else turn in any money? A. He turned over $45 to me.

Q. In what form? A. That was in bills. That was turned over December 20th and this was turned over to me December 23rd.

Q. Now you are handling S-37 for identification? A. That's right.

Q. Is that your typing on that envelope? A. That is mine, and I put that in the envelope myself.

Mr. Congleton: I offer that in evidence.

Mr. Foley: No objection.

(The envelope and contents are received in evidence and marked Exhibit S-37.)

Mr. Congleton: Mr. Foley, I can recall Captain Cocozza when this witness is finished to prove that these monies that he has testified to were turned over to him by the witness, before I offer them in evidence, or I can offer them now.

Mr. Foley: I will not require that proof. You can offer them now.

Mr. Congleton: All right, sir. I offer S-22 for identification in evidence.

Mr. Foley: No objection.

(The money referred to is received in evidence and marked Exhibit S-22.)

Mr. Congleton: I offer S-24 for identification in evidence.

Mr. Foley: No objection.

(The money referred to is received in evidence and marked Exhibit S-24.)

Mr. Congleton: And I now offer this loose bunch of bills, which has no marking on it at all.

Q. That is the balance of the money you took in your possession that did not have wrappers and wasn't in change? A. That's right.

Q. How much did you say was there when you turned it over? A. Two hundred and twenty seven dollars.

Mr. Foley: Mr. Congleton, there are no markings on any of these packages—pencil markings—other than those that have been testified to—initialing and the like of that? I will look myself.

Mr. Congleton: I don't know what you mean, Mr. Foley.

Mr. Foley: I mean there are no pencil notations which are extraneous to the exhibit.

Mr. Congleton: I see some "O.K.'s" on there. I recognize the initials, "J.C." which indicates that Captain Cocozza counted the money when it was turned over to him. And I see "L.E.F.", with an

"okay" which is a secretary in his office, who evidently counted some of them.

Mr. Foley: That is all right.

(The money referred to is received in evidence and marked Exhibit S-46.)

The Court: While you are doing that, let me look at the gun.

Q. Now, were any other moneys turned over to you in connection with this case, Lieutenant Wangner? A. There was.

Q. I show you an envelope, and please don't testify as to what it says on the envelope, but how much money did you receive in that envelope? A. Seven hundred dollars.

Q. Whom did you receive it from? A. Mr. Abraham Fisher.

Mr. Congleton: I ask that that be marked for identification.

(The envelope is marked Exhibit S-47 for identification.)

Q. I show you another envelope, and again I ask you not to testify to what is on the envelope, but did you receive some other moneys and when? A. I received on December 19th from Harry Schwartz, a clothier on Branford place, $160.

Mr. Congleton: I ask that that be marked for identification.

(The envelope is marked Exhibit S-48 for identification.)

Q. I show you another envelope and ask you not to testify what is on the envelope, but did

you receive further moneys, and how much were they?

A. On December 19th I received from the Branford Jewelers, $124.50 for a gold watch and ring.

Q. From whom? A. The Branford Jewelers.

Q. I show you another envelope and ask you if you received any further moneys? A. On December 20th, $13.95, from the Harvard Hat Store, 46 Market Street, for two hats.

Mr. Congleton: I ask that the envelope from the Branford Jewelers be marked for identification.

(The envelope is marked Exhibit S-49 for identification.)

Mr. Congleton: I ask that the envelope containing the $13.95 be marked for identification.

(The envelope is marked Exhibit S-50 for identification.)

Q. After you received these moneys did you also turn them over to Captain Cocozza? A. I did, the same day.

Q. Have you totaled the amount of moneys from all sources that you received in connection with this case that were turned over to Captain Cocozza? A. Outside of what you showed to me, yes.

Q. I don't understand you. Excluding the money in these four envelopes? A. There is nine dollars that I received from Detective O'Beirne that he got from Brooks' pocket.

Q. You mean the exhibit that was testified to yesterday of a package of quarters that were found in Brooks' pocket? A. That's correct.

William G. Wangner, Recalled, for the State —Direct.

Q. There it is. I show you Exhibit S-25 for identification and ask you if that is the one? A. That is the package. And also I received from Detective O'Beirne seventy-six dollars, seventy-five dollars in bills and a silver dollar, that was taken from Brooks' pocket.

Mr. Foley: I assume that the witness to whom he just referred is going to be called to testify, because he says it was taken from Brooks' pocket.

Mr. Congleton: I think that was already testified as the money in the wallet.

Mr. Foley: I move to have that stricken from the answer as a conclusion that it was from a person's pocket.

Mr. Congleton: Brooks' person.

Mr. Foley: That is not what he said.

Mr. Congleton: All right. I have no objection to striking that. Detective O'Beirne testified that there was a wallet on the man and there was some money in it.

(The package is received in evidence and marked Exhibit S-25)

Q. Can you tell us what these moneys totaled that you turned over? A. $2,763.51.

Q. $2,763.51? A. Yes.

By the Court:

Q. What time did you first go to Brooks' house? A. 2:30.

By Mr. Congleton:

Q. Does that include the money in this brown envelope? A. That includes the entire cash that I received and turned over to Captain Cocozza.

William G. Wangner, Recalled, for the State —Cross.

Q. Does it also include the money that was in the wallet? A. Yes.

Q. Now, you say you found these moneys in the baby carriage when you went there the second time? A. Yes.

Q. Where was that located? A. In the kitchen.

Q. What type of baby carriage was it? A. To my recollection it was a dark colored paneled baby carriage.

Q. After you found the moneys where did you go? A. We left Brooks' house with Mrs. Brooks and the detectives and went to Police Headquarters.

Cross examination by Mr. Foley:

Q. Did you recover the watch and the ring? A. Recover the watch and ring? That is the receipt we received from the watch and the ring.

Q. In other words, you recovered the watch and the ring and returned it to the jeweler and received the money? A. Received the cash; that's right.

Q. Lieutenant, did you assist in the search that was made I think it was in the bureau or dresser where Brooks said you would find the money? A. They already had searched that when I got there.

Q. When you found the money in the baby carriage did you learn that Mrs. Brooks had removed the money from the dresser and placed it in the baby carriage? A. She told me that, yes, in Headquarters.

Q. She told you that? A. Yes, she told me that.

Q. So that as far as you know, when Brooks told the police where the money was, he told them the truth as to where it was at that time? A. That's right.

William G. Wangner, Recalled, for the State —Re-direct.

Philip J. Smith, for the State—Direct.

Q. Did she tell you that she had done that on an impulse?

Mr. Congleton: Objected to, if the Court please.

The Court: Sustained.

Mr. Foley: I pray an exception.

Re-direct examination by Mr. Congleton:

Q. You were asked by Mr. Foley if you recovered a watch and ring, and that these moneys were then returned for the watch and ring. Did you also recover some other things which you turned in and got money back for? A. An automobile.

Q. What else? A. Hats, clothing.

Q. Where did you get the watch and ring from or didn't you get it? A. I personally didn't get the watch.

Mr. Congleton: That is all. No further questions.

Mr. Foley: No questions.

PHILIP J. SMITH, sworn.

Direct examination by Mr. Congleton:

Q. Detective, you are a member of the Newark Police Department? A. Yes, sir.

Q. You have been for how long, sir? A. 21 years and 8 months.

Q. In 1946 to what bureua were you assigned? A. The Detective Bureau, Newark Police Headquarters, bandit squad.

Q. Directing you attention to the afternoon of December 17, 1946——

Mr. Congleton: And I am going to lead, Mr. Foley. If you wish to object to it at any time, you are free to do so, because this is cumulative.

Q. —you were with Lieutenant Flynn when he went to Vaux Hall? A. I was—no, I wasn't. I followed him in the squad car.

Q. You joined him there? A. Yes, sir.

Q. You were with him when he went with Mathis to a house in Springfield? A. To Joe Smart's mother's house.

Q. Were you also with him when they went to another place? A. That's right.

Q. Thereafter you returned to Newark. Is that correct? A. After that.

Q. To Avon Avenue? A. No, after that we returned back to Waldorf Place in Vaux Hall.

Q. After that you returned to Newark? A. That's right.

Q. You went up in Avon Place? A. 48 Avon Avenue, to Joe Smart's furnished room.

Q. Then you went to Headquarters, I believe? A. After we came out of there, why, Lieutenant Flynn and I went to Police Headquarters.

Q. Directing your attention to December 18, on the afternoon of December 18 did you have occasion to go to 17 Lillie Street? A. I did.

Q. Did you go there with Lieutenant Flynn and Lieutenant Wangner and the other officers that have testified? A. I did.

Q. Did you stay out and cover the rear with Lieutenant Wangner when you got there? A. No, sir.

Q. Where did you go? A. Up into the house.

Q. What did you do when you got in the house? A. I searched the front bedroom, which was supposed to be occupied by Brooks and his wife.

Q. How long did you stay there? A. I figure I may have been in there about 10 or 15 minutes.

Q. Then did you leave? A. That's right.

Q. Where did you go then? A. We searched quite a few spots in the Third Ward, looking for Brooks.

Q. Later that day did you return to Brooks' apartment? A. We came back with some—shortly after searching these places in the Third Ward, we returned back to Brooks' house.

Q. Who was there when you got there? A. Detectives Geiger and O'Bierne. And there was Brooks' mother, or Brooks' mother-in-law, Mrs. Williams, Brooks' wife, and some old Italian man.

Q. Was that before or after Brooks was apprehended? A. That is before.

Q. How long did you stay that time? A. A few minutes.

Q. Then you left? A. That's right.

Q. Then later that day did you go back there again? I did.

Q. On that occasion who went with you? A. Lieutenant Flynn.

Q. Who was there when you got there? A. Detectives O'Beirne and Geiger. Lieutenant Wangner was with us, too, when I went back.

Q. Was a search conducted? A. Not by me.

Q. But there were some others searching there? A. Yes, apparently.

Q. Were you present when Lieutenant Wangner found the money in the baby carriage? A. No.

Q. How long did you stay there that time? A. Just a few minutes.

Q. Then where did you go? A. Newark Police Headquarters.

Mr. Congleton: Cross examine.

Mr. Foley: No questions.

JAMES B. GRAHAM, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Graham, where do you live? A. 168 Belmont Avenue.

Q. How long have you lived there? A. About 18 months.

Q. In December 1946 were you working? A. Yes, sir.

Q. Where were you working? A. 1199 Springfield Avenue.

Q. What was your business? A. Presser.

Q. For whom did you work? A. Mrs. Zonner.

Q. It is the Target Cleaners, isn't it? That is the name of the place, isn't it? A. That's right.

Q. Mr. Zonner is your boss? A. That's right.

Q. That is an establishment where you clean and press clothes? A. That's right.

Q. Now, do you know the defendant, James Brooks? A. I only met Brooks three times.

Q. Do you know who he is? A. Yes.

Q. Do you see him here? A. Yes.

Mr. Congleton: Mr. Foley, indicating the defendant?

Mr. Foley: Yes.

Q. I call your attention to the evening of December 17, 1946. Did you see him that night? A. Yes, sir.

Q. Where did you see him? A. I went by Brooks' house about a quarter past eight.

Q. Who was there? A. Brooks and his wife and Brooks' wife's sister.

Q. Whom did you go there to see? A. Brooks' wife's sister.

Q. What were you doing there? A. I told her that Sunday night—that Saturday night that we was out together I told her that I would be around that Tuesday night.

Q. What did you do after you got there?

Mr. Foley: Objected to.

The Court: Sustained. Too broad.

Q. What did you do after you got there? A. When I first came up there was a fifth of whiskey on the table.

Q. What did you do with that? A. I came in the kitchen and I sat down on the chair.

Q. And you had a drink?

Mr. Foley: I object to that. That is not material.

The Court: Well, it doesn't make any difference whether he had a drink or not.

Mr. Foley: Well, if it is not material, it is not material, and I object to it.

Q. Was the defendant, Brooks, drinking?

Mr. Foley: I object to that as not being material.

The Court: Of what consequence is that?

Mr. Congleton: As part of the period between the time this alleged robbery and murder took place and the time that he was arrested. It is his course of conduct.

The Court: Well, any conduct that is material to the issue, undoubtedly, but whether he had a drink there is of no consequence, is it?

Mr. Congleton: Except that we are going to prove the purchase of that liquor earlier that day after this alleged robbery and murder took place.

The Court: You can prove that.

Q. How long did you stay there that night? A. I stayed there until about quarter past 11.

Q. Did you have a conversation with Brooks there that night about some clothes of his? A. Well, Brooks—Brooks said, "Jimmy, you're working up to the cleaners, aren't you?

I said, "Yes."

He said he had a suit for me to take, and I said, "All right, I'll take it when I get ready to go."

Q. When you got ready to go, did you get the suit from him? A. When I got ready to go I told him, "I am ready to go, Brooks." He went and got the suit and he brought the suit with the coat tied around the pants. So I throw the coat on my arm and he said, "I want to see you before you go."

Q. All right, what did he say? A. He called me up in the front. He told me, he said, he wanted to buy a car but he couldn't get any car in his name, and he asked me would I have it on my credit.

I said, "My credit is o.k., and I can get almost anything I want."

Q. What else was said? A. He said, "How about staying off the next day and helping him look for a car." I said I had to go to work. He told me to stay off, and he said, "I will pay you for the day."

I told him no, I still had to go to work, but then I told him that I was on Springfield Avenue and I have an hour for lunch, and he told me, "Suppose I come tomorrow and you can help me look for a car," and I told him I have an hour for lunch.

Q. Then you left? A. Then I left.

Q. I show you this blue suit and ask you if you recognize that. A. That is the suit.

Q. That is the suit? A. That is the suit.

Q. You took that suit where? A. To the Target Cleaners.

Q. You took it there the next morning when you went to work? A. Yes.

Q. What did you do after you got it there? A. When I got it to the shop I opened it up, and the first thing I seen was some blood on the lapel of the coat.

Q. You saw some dirt on the lapel of the coat? A. Some blood. Then I looked at the pants and I said to the girl, I said, "I wonder what happened to this."

Mr. Foley: Objected to, and I ask that it be stricken out.

Q. You can't tell us what you said. You saw something on the pants? A. Yes.

Q. What did you do thereafter? A. I showed it to the girl in the cleaner's.

Q. And you gave it to the cleaner? A. I gave it to the spotter.

Q. The spotter is the man who cleans spots; is that it? A. Yes, sir.

Q. That is the last you saw of the suit? A. That is the last I saw of the suit before the detective come down there.

Q. Were you there when the detective came? A. Yes, sir.

Q. Do you remember which detective it was? A. It was Joe Kinney over there.

Q. Joe Kinney? A. Yes, sir.

Mr. Congleton: Stand up, Detective Kinney.

(A man stands up in the courtroom.)

Q. Indicating Detective Kinney; is that correct? A. Yes, sir.

Q. That suit was given to Detective Kinney? A. Yes.

Q. Do you remember when it was he got the suit? The day after or— A. I think it was that Thursday.

Mr. Congleton: I offer the suit in evidence.

Mr. Foley: No objection. Of course there is no objection to the suit, but I have an objection to the tag.

Mr. Congleton: I appreciate that. I will not give the suit to the jury at the present time, but I would just like the tag to remain until Dr. Brady gets here so that he can tell that this is the suit that he made a chemical analysis of.

Mr. Foley: That is agreeable to me.

(The suit is received in evidence and marked Exhibit S-51.)

Q. Did you see Brooks the next day on December 18? A. Yes, sir.

Q. When? A. 12 o'clock I went out for lunch, and I got back about quarter past 12, and when

I come back the girl in the place said, "Somebody in the front wants to see you."

Q. You went up to the front and who was there? A. Brooks.

Q. What did he say to you? A. He said, "Are you going out to help me look for the car?"

I said, "I ain't got but 45 minutes left."

It was about quarter past when I got back. We come down to the corner and he got a cab, a White and Black cab, and went down above Irvington Center.

Q. Where did you go when you got to Irvington Center? A. When we got to Irvington Center first we looked at a LaSalle.

Q. What else? A. The LaSalle wasn't so good, and we went down further and looked at a Cadillac.

Q. You went further down the street to look at a Cadillac? Yes.

A. And you looked for a car there? A. Yes.

Q. How did you make out down there? A. That car we looked at cost $2,500. I said, "Brooks, that's too much to pay for a car. Why don't you get a smaller car?"

By the Court:

Q. What was the price? A. The Cadillac was $2,500.

By Mr. Congleton:

Q. You didn't buy that Cadillac car? You suggested he should not pay that much for a car?

Mr. Foley: I object to that. He has said that, but, while I can understand that this testimony is admissible upon the theory that it might be said to be part of the es-

cape, conversations respecting the value of the automobile and the like of that, are not of any materiality.

The Court: He has already said it cost $2,500 but the Prosecutor is repeating it. It was already testified.

Q. What happened after that? A. Well, we was standing there, and this fellow Cash came up—the car salesman.

Q. You say, "This fellow Cash came up." Is Cash here? A. Yes, sir.

Mr. Congleton: Will you stand up, Mr. Cash?

(A man stands in the courtroom.)

Q. Is that the man you mean? A. Yes, sir.

Q. What happened? A. So Cash said he had a car down in Newark a little cheaper. Then I said, "Well, I don't have time to go down there."

Mr. Foley: I object to that.

Mr. Congleton: All right.

Q. So what did you do? Did you go to Newark? A. Yes. He took us down in his car.

Q. Cash took you and Brooks down. Is that right? A. Yes.

Q. Was there anybody else with you and Brooks? A. There was another fellow—a boy that worked with me.

Q. A boy that worked with Brooks? A. That worked with me.

Q. You went to Newark. What happened when you got to Newark? A. He showed us this Cadillac for $2,200.

Q. What did you do about it? A. Then Cash said to him, or I said, "How much do you have to put on this car?"

Cash said, "As much as you can."

Then I told Brooks—I said, "Brooks, I don't have any money to pay on that car."

Brooks said, "Tell him we will pay $700 on the car."

Q. Yes? A. Then Brooks—I said, "Brooks, where is the money?"

He said, "Wait a minute. I will come back."

Brooks went in the bathroom. He stayed there so long, I went to see what happened to Brooks. When I got to the bathroom door, Brooks was coming out. He handed me the money.

Q. He handed you what? A. He handed me $700.

Q. In what form, do you remember? A. $5-bills, $10-bills, and $1-bills.

Q. You then came out and went back to Cash? A. Yes.

Q. Did you make arrangements then to buy the car? A. Well, we went to pay Cash with the money. Cash said, "You can't pay it here; we have to go back just where we came from."

Q. So you then went back where you came from? A. That's right.

Q. And up there you paid the money? A. That's right.

Q. And signed the papers? A. That's right.

Q. In whose name was the car purchased? A. In my name.

Q. The credit was taken in your name, too? A. That is right.

Q. How much were the weekly payments going to amount to?

Mr. Foley: Oh, I object to that, if your Honor please. I don't think that the nature of the transaction is of any materiality at all.

As I say, I can understand that the prosecution can establish that a car was purchased, but the details concerning the transaction I cannot see is material. Perhaps the Prosecutor can indicate in what manner they think it becomes material, but I can't see it at this time.

Mr. Congleton: The State's purpose in trying to show the size of the weekly payments is to show that it was impossible for this defendant to have carried out the payments, and consequently allows the inference to be drawn that he intended to flee with this car.

Mr. Foley: I don't see that the one thing follows the other, and the vice of it is that by inference at least Mr. Congleton is suggesting that at that time he intended to commit some other offense for which he is not presently on trial.

The Court: No, flight is a part of it. Mr. Congleton's argument is that he wants to show that the payments were so large as to indicate that Brooks was not really acting in good faith. That is his argument. I do not say whether it is good, bad or indifferent.

Mr. Foley: I feel that upon Mr. Congleton's representation of what he says he wants to prove, that that is not proved by this question, and I therefore object.

The Court: You do not have the contract, do you?

Mr. Congleton: We have a copy of it.

The Court: A copy won't do.

Mr. Congleton: We do not have the original, because that car was returned and the contract had to be surrendered in order to get the money back.

The Court: Well, I think the contract would be admissible as corroborative.

Mr. Congleton: Well, we will make efforts to locate it. We do not have it presently in our possession. Your Honor rules that the witness should not answer the question?

The Court: Yes. The best evidence must be produced anyway.

Q. Now, after you paid this money and signed the papers did you go back to work? A. Yes, he took me back to work.

Q. Did Brooks stay with Cash, do you know?

Mr. Foley: I object to that.

Q. The last time you saw Brooks, where was he? A. With Mr. Cash.

Q. When they left you at your place of business? A. Yes.

Q. Did you ever see the automobile after that that you purchased? A. No.

Q. Did you do anything about getting license plates for that car? A. No, sir.

Mr. Congleton: That is all. Cross examine.

Cross examination by Mr. Foley:

Q. Did you have a ride in that car back to your place of business? A. No, sir.

Q. What did you do? Did you leave Brooks and Cash at the place where the transaction was made? A. Yes, sir.

Mr. Foley: That is all.

WILLIAM CASH, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Cash, where do you live? A. 28 Barclay Street, Newark.

Q. How long have you lived there? A. Eighteen years.

Q. In December 1946, what was your business? A. I had an appointment at 864 Springfield Avenue.

Q. You had what? A. An appointment.

Q. With whom? A. I had it with another customer——

Q. Maybe you didn't understand my question, Mr. Cash. What was your business? What kind of work did you do? A. Automobile salesman.

Q. For whom, sir? A. I am a broker and sell for all the various dealers.

Q. On the afternoon of December 18th do you remember seeing the defendant, James Brooks? A. Yes, at 864, around 12:30, just as I drove up to the lot, I saw three gentlemen in the lot. I walked up to them and I shook hands with them and asked them what could I do for them. I think one of the gentlemen—I don't remember which of the gentlemen it was—he says that he is in the market for a car. I asked him what type of car he was interested in and they said something in the line of a Cadillac. So I showed them a car that we had on the lot and he said that that was

too much money. As a matter of fact, they wanted a different style.

Mr. Foley: If your Honor please, again I must object to these matters which are not material to the issue of flight. How they felt about the price of the car or what kind of car they wanted, that is of no materiality here.

The Court: They are details that probably do not help us.

Q. You had some conversation with them about some kind of car, and as a result of that conversation where did you take them? A. I showed them another job, but they said they didn't like that style.

Q. They didn't buy any car on that lot? A. No.

Q. Where did you go? A. To 49 Rankin Street. I told them I had a couple of cars there. So we went there and I had this particular '41 Cadillac, and they looked at that and said that they liked that particular model. So I asked them how much money they could put on the car and someone said $600. So I said that wouldn't be enough. I said couldn't they squeeze out another hundred dollars, and they said possibly they could. So we got another hundred dollars.

Q. Whose car was that? A. Mr. Fischer's.

Q. Do you know what his full name is? A. Abe.

Q. What did you do after they decided they wanted that car? A. Well, we went back to 864 Springfield Avenue.

Q. Was that Mr. Fischer's place, too? A. Yes, that is where he is located at.

Q. And there the arrangements were made to purchase it, is that correct? A. Yes.

Q. What was the final price agreed upon?

Mr. Foley: Objected to as immaterial.

The Court: Hasn't that been testified to?

Mr. Foley: I guess so. I will withdraw my objection. I am trying to point out that there are——

The Court: I agree with you on that.

Mr. Foley: There are so many details, and they are simply encumbering the record and will lead us to no useful purpose.

Mr. Congleton: Oh, now, if the Court please——

The Court: All right. Now, please let us get ahead. We have the evidence in.

Q. Were you paid some money, or was Mr. Fischer? A. Yes, the money was counted out on the desk.

Q. How much was counted out? A. Seven hundred dollars.

Q. In what form? A. Most of the money was in one dollar bills.

Q. Cash? A. Yes.

Q. How long did Brooks stay there? A. Well, Brooks stayed with me until around—until I delivered the car to him.

Q. He stayed there until you delivered the car to him? A. Yes.

Q. You delivered that Cadillac car that was purchased in Mr. Graham's name to Mr. Brooks? A. Yes.

Q. Who drove away in it? Did he drive away in it? A. Yes. I delivered the car to Mr. Brooks.

Q. What was done about getting license plates? A. I had Mr. Graham to sign the bill of sales and the——

Q. And the application? A. Yes.

Q. And you got the plates and Mr. Brooks drove it away? A. Yes.

Mr. Congleton: That is all.

Cross examination by Mr. Foley:

Q. Did you get the plates for the car? A. Yes, we got the plates for that car.

Q. Is Cash your real name? A. Yes, Cash is my real name.

Q. Or just your car salesman's name? A. Cash is my real name.

Mr. Foley: That is all.

Abe Fischer, sworn.

Direct examination by Mr. Congleton:

Q. Where do you live, Mr. Fischer? A. I live at Attorney Street in New York City.

Q. What is your business, Mr. Fischer? A. In the automobile used car business.

Q. Do you have a place of business in New Jersey? A. Yes, sir.

Q. Where is it? A. 864 Springfield Avenue, Irvington.

Q. Directing your attention to the afternoon of December 18, 1946, do you recall a transaction in reference to a Cadillac automobile? A. I certainly do.

Q. Did Mr. Cash bring some colored gentlemen to you to purchase a Cadillac automobile? A. Well, it didn't happen that way. Three people came on the lot, and they were looking around.

I had a '42 Cadillac standing in front of the lot—one of the cars—and Mr. Cash drove up.

Q. I don't want to interrupt you, sir, but in line with the Judge's thought before and Mr. Foley's, I am trying to skip the first part of this and go to the point where they have already decided on the Cadillac automobile they wanted. A. Yes, sir.

Q. After they had gone to Newark they came back to Irvington. Is that so? A. That's right, back to my place of business.

Q. Then the arrangements were made with you to purchase that. Is that correct? A. Yes, sir.

Q. Do you remember the payment of some money? A. Yes, sir.

Q. How much? A. Seven hundred dollars.

Q. In cash? A. Yes, sir; mostly in singles.

Q. Now, Mr. Fischer, do you remember the name of the man that purchased that car? A. I don't remember his name, but I just seen him.

Q. You mean the gentleman that was on the stand? A. On the stand; yes, sir.

Q. Mr. Graham? A. Graham.

Q. Do you see one of the other men here that was with him that day? A. The man over there.

Q. Indicating the defendant, Brooks. Is that right? A. That's right.

Q. Did you see Brooks take the car away? Or did Cash take care of that transaction? A. Cash took care of it.

Q. The next day did you see Brooks' picture in the newspaper?

Mr. Foley: Objected to as not being material.

Mr. Congleton: It is purely preliminary.

The Court: Why not let's see what he did the next day.

Mr. Congleton: All right.

Q. The next day what did you do? A. A fellow brought a newspaper into my place of business.

Mr. Foley: Now, if your Honor please, I object.

The Court: Sustained.

Mr. Foley: I don't think this is proper.

The Court: I will strike that out.

By the Court:

Q. After that what did you do? A. Well, after that I got a call from the Newark Police Department.

Q. You went down to Police Headquarters? A. I went down to Police Headquarters.

Q. You identified your Cadillac automobile for them? A. Yes, sir.

Q. You gave them back the $700? A. Yes, sir.

Q. And the papers were— A. The Finance Company who financed the car——

Mr. Foley: I object to that. This is after Brooks had been apprehended, as I understand it.

The Court: Yes.

Mr. Foley: What possible purpose could it serve?

The Court: I think the Prosecutor merely wanted to show where the money came from. That's all.

Mr. Foley: He has said he gave back the $700.

The Court: He returned the $700 and got the car back.

Mr. Foley: What else happened is not of any consequence.

Q. Do you recall the name of the Finance Company involved?

Mr. Foley: I object to that as being immaterial.

Mr. Congleton: I want to know that for the purpose of getting this contract in.

The Court: All right. What is the name of the Finance Company?

A. Franklin Discount, 1025 Broad Street, Newark.

Q. You didn't give back to the police the same bills that you got the day before from this customer? A. No, sir.

Q. You just gave $700 back? A. $700; yes, sir.

Mr. Congleton: That is all. Cross examine.

Mr. Foley: No questions.

(At 12:45 a recess is taken until 2 p. m.)

AFTERNOON SESSION.

JOHN P. BRADY, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Brady, what is your profession? A. I am a chemist.

Q. And do you specialize in any particular type of chemistry?

Mr. Foley: I will admit Mr. Brady's qualifications as a chemist.

Mr. Congleton: Thank you, sir.

Q. Mr. Brady, did you receive from the Prosecutor's Office a blue suit now known here as Exhibit S-51, for analysis? A. Yes, I did.

Q. Did you make an examination of that suit? A. I did.

Q. What did you find on that suit, sir? A. At the bottom of the lapel on the righthand side of the coat I found a reddish stain about an inch and a half long, and on the bottom of the coat on the right side a stain approximately three-quarters of an inch long. On the trousers, both legs, in the front, had many reddish stains. They also showed the effect of being very dirty and dusty.

Q. Did you make an analysis of those stains? A. Yes, I examined the stains on the coat and on the trousers for human blood, and I found them to be positive, and I also typed the blood and found it to belong to Group 8, international nomenclature.

Q. Referring to Exhibit S-51, did you put any marks on the suit? I call your attention to a red crayon mark on the lapel. A. I did. Wherever I took samples I made red marks on it.

Q. You took a sample from the part now torn out? A. I did.

Q. That is what you made a sample of? A. Yes, sir.

Q. Did you do the same thing with the pants? A. I did. Wherever you see red crayon markings, the circles are for the stains and the X's are for the dust.

Q. Did you make any analysis of the dust? A. I did.

Q. What did that disclose? A. The dust gave positive reactions for fine starch grains such as wheat starch.

Q. Is that the kind of starch you find in flour? A. You usually do; yes, sir.

Q. I show you a blue overcoat. Did you make an examination of that blue overcoat? A. I did.

Mr. Congleton: I ask that it be marked for identification.

(The overcoat is marked Exhibit S-52 for identification.)

Q. What did your examination of that overcoat disclose, sir? A. Well, it disclosed many stains that were negative for blood, and it disclosed a dust that was similar to the dust on the blue suit.

Q. In other words,— A. That it was starch or flour.

Q. At the same time you were given those other two exhibits to analyze were you given S-26? A. Yes, I was.

Q. Did you make an examination of that? A. I did.

Q. What did you find? A. I found on the fur-lined jacket, which was heavily stained on the back and the front and beneath the left sleeve on the back and about 11 inches above the hem, in this position, a hole about a half inch in diameter, surrounded by scorch and powder stains. On the back and on the front there were multiple stains, which I analyzed for blood and found them to be positive for blood, Type B, international nomenclature. And among the blood stains I also analyzed for dust, which was similar to the starch grains on the trousers and on the overcoat.

Q. Mr. Brady, on the suit and on that jacket, your tests were positive and showed that there was human blood, Type B nomenclature, present on those articles. Is that correct? A. That's right.

Q. You found no blood on the overcoat—the blue overcoat. Is that correct? A. No blood on the coat.

John P. Brady, for the State—Cross.

Q. On all of the apparel you found the same dust which you described as a starch-like dust? A. That's right.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. Were you given any sample of blood for the purpose of comparing it with the stains that you found on the articles of clothing you described? A. I was not.

Q. So you don't know whose blood that was? A. No, I have no idea.

Mr. Foley: That is all.

Mr. Foley: Now, I don't know how important this is to you, but in view of the fact that reference has been made to dust on his clothing, I say that these articles of clothing are now on the floor and subject to being rubbed by my feet and the feet of everybody else, and I am wondering if it is wise to leave them there.

Mr. Congleton: Well, we can hang them over the railing.

Mr. Foley: Anywhere you say.

Mr. Congleton: I assume there are no starch-like grains around here.

Mr. Foley: Well, I don't suppose the jury would be able to distinguish one kind of dust from another just by an examination.

Joseph Cocozza, Recalled, for the State—Direct.

JOSEPH COCOZZA, recalled.

Direct examination by Mr. Congleton:

Q. Captain Cocozza, you have already testified this morning that you are attached to the Prosecutor's Office of Essex County. In the course of your official duties did you have occasion on December 18, 1946, to go to Newark Police Headquarters? A. I did.

Q. While you were there did you see James Junior Brooks? A. Yes.

Q. Do you recall what time you saw him? A. It was around 7:30 or 7:40.

Q. Where did you see him?

Mr. Foley: Day or night?

The Witness: In the evening.

Q. Where did you see him? A. I saw him on the fourth floor in the Homicide Room of Police Headquarters.

Q. You say the Homicide Room, that is the room, the same room that has been previously described as the Bandit Squad and Homicide Squad Room? A. Yes.

Q. What did you proceed to do, captain? A. I proceeded to talk to Brooks and then take a statement from him.

Q. Whereabouts were you when you took a statement from him? A. I was in a small room to the rear of the Bandit Squad and Homicide Squad Room on the fourth floor of Police Headquarters, Newark.

Q. I show you some papers I have in my hand and ask you what they are. A. This is a statement; the writing in these sheets is as the result of a statement taken from James Brooks at Police Headquarters on December 18, 1946.

Joseph Cocozza, Recalled, for the State—Direct.

Q. Will you tell us how many sheets there are? A. There are sixteen sheets.

Mr. Congleton: I ask that the statement be marked for identification.

(The statement is marked Exhibit S-53 for identification.)

Q. You say you took Brooks into the smaller room at the rear. Who was with you at the time? A. Deputy Chief Frank O'Neill, Detective Kosloski from the Prosecutor's Office.

Q. Did you proceed to do something after you got in that room? A. Yes.

Q. What did you proceed to do? A. I proceeded to take this written statement.

Q. In what way did you take it? A. I asked Brooks his name and address and occupation and age, and then I asked him to relate to me just what happened on the afternoon of the shooting at Wickliffe Street. I then asked him where he lived and where he was born, what schools he went to, and I wrote the information down as he gave it to me. Then he started to tell me about what happened at Wickliffe Street.

Mr. Foley: If your Honor please, at this time I must object. It is the contention of the defendant that while he voluntarily stated certain things to Captain Cocozza—I say voluntarily and I mean he did it without there being any threat or violence practiced upon him by Captain Cocozza or Detective Kosloski or Chief O'Neill—but it is the contention of the defendant that statement was not voluntary in this sense, that prior to the time that the——

Mr. Congleton: If the Court please, I don't like to interrupt Mr. Foley in his argument, but I think the objection comes as a very untimely part of the examination. I think the Captain has a right to testify what he did in connection with the taking of the statement. In the ordinary course of proof, as I understand the procedure, when it comes to the time that the State offers the statement, the defendant then has a right to ask for a hearing on the question of whether or not the statement was voluntary or involuntary, but I don't think any attack at this time is proper or any statement about it is proper.

Mr. Foley: I would agree with Mr. Congleton were it not for the fact that the Captain is already commencing to tell us about the contents of the statement.

The Court: Yes.

Mr. Foley: He started to give an answer to the last question. I simply want it brought to your Honor's attention that we do question the statement; we do question the circumstances leading up to its taking; we do maintain that it was not a voluntary statement in the sense that threats and violence were practiced upon the defendant; and we do want a hearing on it.

Now, if your Honor feels that this is not the proper time, that is all right. But I shall object to the captain's testifying indirectly, if you please, as to the contents in the statement, even though he does not quote exactly what the man said, and that

seems to me to be the force of his last answer—the one which I interrupted.

The Court: Well, as I get it, the defendant's contention is that there were no promises made to him or hopes held out or violence used at the time the captain refers to, but he claims that he was under the influence of duress previously exercised.

Mr. Foley: And that that influence continued up to and included the time he was giving the statement to Captain Cocozza. It was not influence or duress practiced upon him by the person who took the statement, but by others with whom he had been in contact before.

I could readily explain to your Honor at side bar just exactly what the circumstances are, and I think perhaps it might be better, so that there may be no suggestion that I am attempting to make a speech before this jury. And I could do it very quickly, and I know your Honor would instantly understand what I have in mind.

The Court: Yes. I will be very glad to hear you.

Mr. Congleton: I think I can shorten it up by saying that I don't think Captain Cocozza had testified as to anything this defendant told him other than his name and address. The question was directed to the method and the procedure followed in taking this statement, and I don't think the captain said anything about the contents of the same. And it is my purpose at this time to conduct my examination in such a way that we show the method and procedure under which this statement was taken,

and the method and circumstances surrounding the signing of it.

The Court: Well, then, as I understand it, you do not intend to go into, at the present moment, the substance of the statement?

Mr. Congleton: No, sir.

The Court: Only the method of taking it?

Mr. Congleton: Yes.

Mr. Foley: Well, it isn't so much a matter of what the Prosecutor intends to do. What I am concerned with is the effect of his questions and the effect of the answers. And if we may turn back in the record to the point where I made my objection, and if your Honor will hear the beginning of that answer, you will see, or I think you will see, the answer in effect was to relate a part of what transpired on December 17th.

The Court: All right, let the stenographer read it.

(The last answer is read by the court reporter).

Mr. Foley: That is the point. At that point I made my objection.

The Court: Well, "he started to tell me what happened at Wickliffe Street." I suppose if you stop with the word *happened*, it will be satisfactory. "He started to tell me what happened."

Mr. Foley: Yes.

The Court: We will strike out "at Wickliffe Street". All right. Then you can go ahead, Mr. Prosecutor.

Joseph Cocozza, Recalled, for the State—Direct.

Q. Captain, you proceeded to ask the defendant questions. Is that correct? A. Well, I didn't ask him the questions after he started to tell me what happened. He just started his story, and I wrote it down just as he told it. And at different intervals I would say, "What happened next?" and then he would proceed, and I would write down just what he told me.

Q. You took this statement in a narrative form, is that correct? A. Yes.

Q. You did not proceed and write down the question and then write down the answer? A. No.

Q. Did I understand you to say that this statement is word for word what the defendant said? A. Yes, sir.

Q. About what time did you start taking the statement? A. 7:40 p. m.

Q. What time did you finish? A. At 1 a.m. in the morning, December 19th.

Q. Now, directing your attention to the fact that the last page on here is dated a different date — A. That is right. It is dated December 19th.

Q. Is that a subsequent statement that you took? A. Yes, sir.

Q. I direct your attention to the next to the last page of this group of papers. I show you a signature "James J. Brooks". Did the defendant make that signature in your presence? A. He did.

Q. And is that your signature there? A. Yes, sir.

Q. Did Deputy Chief O'Neill and Detective Kosloski witness it in your presence? A. They did.

Q. What was done before this defendant was asked to sign that statement? A. When I fin-

ished writing that statement I gave it to the defendant and asked him to read it aloud and he did, and as he was reading it he made some corrections on pages 3, 6, 7, 13 and 15, and after he made these corrections and finished reading his statement I asked him to sign it and he did.

Q. Did you ask him if it was the truth? A. Yes, sir. I took an affidavit from him.

Q. And under what authority do you take an affidavit, Captain? A. Under Chapter 216 of the Laws of 1939.

Q. Before the defendant signed that statement was there any promise of reward made to him? A. No.

Q. Were there any threats made to him? A. No.

Q. Any violence? A. No.

Q. Directing your attention to the last page, did you return to Headquarters on December 19? A. I did.

Q. Did you take a further statement? A. I did.

Q. It was taken in the same manner as the statement that had been taken the evening before? A. Yes, sir.

Q. When you had finished taking the statement what did you do? A. I asked him to read the statement and he did. I showed him a brown hat and asked him whose hat that was and he said it was his hat.

Mr. Foley: I object to that.

The Court: Strike it out. You seem to be surprised, Mr. Prosecutor.

Mr. Congleton: I am, sir.

The Court: That is exactly in accordance with the previous statement.

Mr. Congleton: This is in addition to what is in the statement.

The Court: Isn't that in the statement?

Mr. Congleton: That is in the statement, too.

The Court: Well, it is a part of the statement. It is a part of the oral statement. He said, "This is my hat," and Mr. Foley's objection, in which I thought you concurred, was that you were not going to adduce anything that was part of the statement. It is certainly part of his statement that this was his hat, and that is the part that is objected to and is stricken.

Q. What else was done, Captain? A. I gave him the hat and he marked his initials on the hat.

Mr. Foley: Objected to. I withdraw my objection.

Q. Thereafter was the statement read by the defendant? A. It was.

Q. Did he sign that statement on the last page? A. He did.

Q. Were there any threats or promises made to him at the time that was signed? A. No.

Q. Before he signed this statement what did the defendant do with the whole statement, referring to the previous pages? A. He read the statement aloud.

Q. Who was present when he read it aloud? A. Lieutenant Wangner, and Detectives Kinney and Norris were in the large room. I don't know whether they heard it or not, but Lieutenant Wangner and I were in the room when the defendant Brooks read this statement aloud, and Joseph Smart was also present at the table where Brooks was reading the statement.

Q. After Brooks had read the entire statement —I am not only referring to the one dated December 19th, but the one taken on December 18th —had read the entire statement out loud, did Brooks then sign the one of the 19th? A. Yes.

Q. Thereafter who else signed this statement? A. Joseph Smart signed the statement, and Lieutenant Wangner and Detectives Kinney and I signed it.

Q. Did you have the defendant Brooks swear to that? A. I did.

Q. Captain, in the course of your official duties, did you have occasion to go to Newark Police Headquarters on the morning of December 19? A. I did.

Q. Whom did you see there on the morning of December 19? A. I saw Lieutenant Wangner and Joseph Smart.

Q. What did you do, sir? A. I took a statement from Joseph Smart.

Q. Is this the statement you took from Joseph Smart?

Mr. Foley: I object, if your Honor please. It isn't material whether it was or not. Smart's statement in no event could be evidential in this case.

The Court: A little while ago the Captain said that Brooks was present when this statement was taken.

Mr. Congleton: That is correct. When Brooks was questioned on the 19th of December, Brooks and Smart were together, and Brooks read his statement out loud to Smart and Smart read his statement out loud to Brooks.

The Court: I haven't heard any testimony of that last yet.

Mr. Congleton: That is what I am coming to.

The Court: That is what you intend to show?

Mr. Congleton: That is what I have to show, that this statement was taken first, sir.

The Court: All right, go right ahead.

Mr. Foley: I of course ask for an exception.

(The pending question is read by the court reporter.)

A. It is.

Mr. Congleton: I ask that it be marked for identification.

(The statement is marked Exhibit S-54 for identification.)

Q. You took this statement, I suppose, in the same way in which you took Brooks' statement, in narrative form; is that correct? A. I did.

Q. How many pages does this statement consist of?

Mr. Foley: I object, if your Honor please. I take the position that the statement of Smart at no time can be material to this case. Therefore his question is immaterial.

The Court: Not if the Prosecutor makes good on what he said he expects to show, to-wit, that the statement that the witness now holds was read to Brooks in Smart's presence, and I understood him to say that it was.

Mr. Foley: I pray an exception.

Q. How many pages? A. This statement consists of ten pages.

Q. Did Smart sign it in your presence?

Mr. Foley: Objected to as not being material.

The Court: I will allow that.

Mr. Foley: I pray an exception.

A. He did.

Q. Were there any threats or promises made to him? A. No.

Mr. Foley: Objected to as not being material.

The Court: What has that to do with it?

Mr. Congleton: I will withdraw it.

Q. Who was present when Smart signed it?

Mr. Foley: Objected to as not being material or relevant to this issue.

The Court: It may not be. The relevancy of this statement, at least what would make it relevant, if competent, would be the acquiescence of the defendant in the presence of Smart and in the presence of the witness, and what preceded that would form no basis for its admission.

Mr. Congleton: All right, sir. I was just showing that it was Smart's statement.

Q. What time did you complete taking that statement?

Mr. Foley: Objected to, as not being relevant. You are referring to the statement of Smart?

Mr. Congleton: That is correct.

The Court: Sustained. Then the other statement of the witness as to the taking of the Smart statement is stricken under Mr. Foley's objection.

Q. On the afternoon of December 19 at about 4:45 p. m. were you in Police Headquarters? A. I was.

Q. You have already testified that at that time and on that occasion the defendant, Brooks, read his statement out loud in the presence of Joseph Smart. Is that correct? A. That is correct.

Q. What else happened there that afternoon? A. Then I asked Joseph Smart to read his statement aloud in the presence of James Brooks.

Q. And did he? A. He did.

Mr. Foley: Objected to as not being relevant.

The Court: Overruled.

Mr. Foley: I pray an exception.

Q. And did he? A. He did.

Mr. Foley: Please, Mr. Congleton, when I make my objection and I get an exception, if you repeat the question I don't have any record of it.

Mr. Congleton: You object so fast that the jury can't hear the witness' answers, and I think they are entitled to hear the witness' answers.

Mr. Foley: I think that the witness should wait a moment. He well understands that I am objecting to these questions.

May it be noted, if your Honor please, that Mr. Congleton repeated a question to which I objected?

The Court: Yes.

Mr. Foley: And to which I was allowed an exception? And my exception will be allowed to that answer?

The Court: Certainly.

Mr. Foley: The subsequent answer—the repetition of the same question and the same answer.

The Court: Not on the ground of repetition, but in substance it is not admissible. That is the ground of the objection—not that it is repetitious.

Mr. Foley: Oh, no, indeed.

The Court: No. All right. Go ahead.

Q. After Joseph Smart read his statement out loud in the presence of the defendant, Brooks, did the defendant, Brooks, sign the statement of Joseph Smart?

Mr. Foley: Objected to as not being material.

The Court: Overruled on that ground.

Mr. Foley: Objected to as not being relevant.

The Court: Overruled on that ground.

A. He did.

The Court: Wait a minute. I thought maybe you might have another ground.

Mr. Foley: Well, I have recited two proper grounds. However, I will object upon the ground it is not competent.

The Court: Isn't it leading?

Mr. Foley: Well, it is leading, of course, if your Honor please.

The Court: I will sustain it on that ground.

Joseph Cocozza, Recalled, for the State—Cross.

Q. What happened after Joseph Smart read his statement out loud in the presence of James Brooks?

Mr. Foley: I object upon the ground it is not relevant.

The Court: Overruled.

Mr. Foley: I pray an exception.

A. I gave the statement to James Brooks, and he signed his name to it as having heard Joseph Smart read the statement aloud.

Q. Did he say anything else?

Mr. Foley: Objected to as not being relevant.

The Court: I will allow that.

Mr. Foley: I pray an exception.

A. No, I don't remember him saying anything else.

Q. Who was present at the time that Joseph Smart read his statement out loud in the presence of James Brooks, and James Brooks signed the statement?

Mr. Foley: Objected to as not being material.

The Court: Overruled.

Mr. Foley: I pray an exception.

A. Lieutenant Wangner and Detective Joseph Kinney, of the Newark Police Homicide Squad.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. Captain, what time did you say you arrived at Police Headquarters and commenced taking the

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first statement from Brooks? A. I arrived at Police Headquarters about 7:30 P. M., and I started to take the statement at 7:40.

Q. You completed that statement at what hour? A. At 1 o'clock in the morning.

Q. I understand you to say that the statement is word for word what Brooks told you. A. Yes, sir.

Q. In other words, there has been no substitution of words. A. No, sir.

Q. Is everything that Brooks told you in the statement? A. Yes, sir.

Q. I understand that you asked no questions of Brooks other than those which would direct him to continue his narrative, such as, "Well, what happened then?" A. That's right.

Q. You did not question him as to what he meant about any particular thing he said; you simply took it down as he gave it to you? A. That's right.

Q. There was no time during the time when you were taking the statement that you had to pause to discuss any particular part of what he said to you because you just took it down and put it down verbatim? A. That's right, there was no pause.

Q. Did it take Brooks five and a half hours to give you that eighteen-page statement? A. It did.

By the Court:

Q. You don't mean that during the time from 7:30 to 1 o'clock you never opened your mouth, do you? A. I did say, "What happened next?" or things like that.

Joseph Cocozza, Recalled, for the State—Cross.

By Mr. Congleton:

Q. What other things did you say? A. Or "Go on," or "What happened next?" or "What happened?"

Q. That is the extent of what you said? A. Yes. Of course, he would pause during the taking of the statement, too, to determine what he was going to tell me.

Q. And that was the extent of what you said? A. Yes.

Q. And at no time during the entire course of the statement did the occasion arise for you to discuss with him any particular part of what he said in order that you might fully understand what he meant? A. As far as what happened is concerned I said nothing, but I did say something during the statement when I showed him the exhibits and asked him what they were and he told me.

Q. I see. A. But as far as what happened is concerned, I did not ask him.

Q. You just took it down as he gave it to you? A. Yes.

Q. And that consumed five and ahalf hours? A. Yes.

Q. Have you since read the statement, captain? A. I have. I have had it in my possession.

Q. And that consumed five and a half hours? A. Well, about twenty minutes.

Mr. Congleton: May I ask whether Mr. Foley's question is directed to reading it silently or reading it out loud?

Q. Did you read it silently? A. Yes.

Q. Did you read it out loud? A. No.

Q. So the only time you read it was silently? A. Correct.

Q. It took you about twenty minutes? A. Yes.

Q. But it took Brooks five and a half hours to give it to you? A. It took him that five and a half hours to give it to me and then I had to write what he gave me.

Q. You would write a sentence at a time as he would give you a sentence? A. That is right.

Q. When did you go back to take the second statement?

Mr. Congleton: What do you mean by the second statement?

Mr. Foley: The one that you referred to as the second statement.

Mr. Congleton: I don't know which you mean.

Mr. Foley: The one about the hat.

A. On December 19th, the following afternoon.

Q. What time did you get there? A. I got there about 3:30 in the afternoon.

Q. How long did it take you to take that statement? A. Around five or six minutes. It is just a paragraph.

Q. Now, at the time you took the long statement, the one of December 18th, did you have before you certain writings that had been given to you by members of the Newark police force and purported to be statements made by Brooks to members of the Newark police force? A. No, sir.

Q. There was nothing of that kind there? A. No, sir.

Q. Did you ever see any such writings? A. No, sir.

Q. Did you ever inquire of the Newark police as to whether they had any such writing in their possession? A. No, sir.

Joseph Cocozza, Recalled, for the State —Re-direct.

Q. That was not discussed between you and any members of the Newark police force when you arrived? A. No.

Mr. Foley: That is all. Thank you.

Re-direct examination by Mr. Congleton:

Q. Captain, when you went there you had been informed, had you not, that Brooks had been taken into custody?

Mr. Foley: I object to that, as your Honor put it before, as being leading. That is a leading question and I object.

Mr. Congleton: All right, sir. It was merely preliminary.

Q. When you got to Police Headquarters, did you know whether or not Brooks was there? A. I did.

Q. You went to Police Headquarters on December 18th for what purpose? A. To take statements.

Mr. Foley: May I see the paper that was marked for identification?

Mr. Congleton: The statement?

Mr. Foley: Yes.

Mr. Congleton: You want to examine the statement?

Mr. Foley: I want to see what was marked for identification. There was testimony by the captain that there were certain marks, certain corrections made on this statement which is marked for identification and I wish to examine it to see whether or not that part of his testimony is accurate.

The Court: We are not concerned now with the substance of the statement. We are only concerned with the preliminary question, the manner in which it was taken and whether it was voluntary or not.

Mr. Foley: But in the direct testimony of Captain Cocozza, when counsel was eliciting from him the manner in which the statement was taken, he asked what Brooks did with reference to the statement. I do not say that he asked that question in that particular manner, but in answer to a question to that effect the captain said that Brooks signed the statement, that he read the statement and that he had made corrections on six different pages.

The Court: Yes.

Mr. Foley: That exhibit was marked for identification. The exhibit should establish the fact of the truthfulness of that. I do not mean to imply that the captain is untruthful, but rather the fact of his statement.

The Court: The inquiry that you are making is whether such things are on the statement?

Mr. Foley: As he testified to.

The Court: So many corrections?

Mr. Foley: Yes.

The Court: You may look at it for that purpose, but, mind you, it is for that purpose.

Mr. Foley: Certainly, I will look at it for that purpose. If you Honor please, in the brief time that I have to look at the six pages of this statement I am not going to

have much opportunity to read any other part of the statement, if that is what your Honor has in mind.

The Court: Well, I am not saying what I have in mind. All I am saying is that it will take a very short time to look at those sheets and see whether that number of corrections have been made.

Mr. Congleton: May I suggest that the proper procedure would be to hand the statement to the witness and have him point out these corrections?

The Court: That would be all right, too.

Mr. Foley: I will certainly have to look at the record with him to know if they are or not.

Mr. Congleton: Certainly. We can shorten it up by having him point them out.

Mr. Foley: Page 3 is the first one. Yes.

The Court: That is one. Will you count them, captain, as you go along?

The Witness: Two on page 3.

Mr. Foley: Don't go so fast, captain. Where is the next one?

The Witness: One on page 6. One on page 7. One on page 13. Three on page 15.

Mr. Foley: That is all.

Mr. Congleton: I would like to call a witness out of turn, if I may, because he is going to prove an official record, and it will take about two minutes.

CHARLES J. KILCULLEN, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Kilcullen, are you employed by the Newark City Clerk? A. I am.

Q. And you have been for how long, sir? A. Twenty years.

Q. And you have with you the original death records of the City Clerk's Office for the period of December 1946? A. We have our original records, yes, sir.

Q. That is correct. Directing your attention to December 20th or 21st, whichever it is, have you there the death record of Joseph Smart? A. Yes, sir.

Q. And what does that record disclose?

Mr. Foley: Objected to, if your Honor please. The record would speak for itself.

Mr. Congleton: I agree with the legal point of Mr. Foley's, but this is the original record of the City Clerk's office of the City of Newark, and I would be glad to have Mr. Foley examine it.

Mr. Foley: Have you a certified copy of the certificate there?

Mr. Congleton: I have a certified copy.

Mr. Foley: Put it in.

Mr. Congleton: You have no objection to the certified copy?

Mr. Foley: As long as I have an opportunity to compare it with the original.

Mr. Congleton: I offer the certified copy.

Mr. Foley: If you will wait just a moment I will tell you whether I will agree to it or not.

By Mr. Foley:

Q. I notice that you did not fill in the information under the word duration. On the original record it reads, "Dead on arrival at City Hospital." A. That's right.

Q. That does not appear on your certified copy. A. Um, um.

Q. So that the certified copy should be corrected to that end, shouldn't it? A. All right, I will put that in.

Mr. Foley: Very well.

(Mr. Congleton hands document to Mr. Foley.)

Mr. Foley: No objection.

Mr. Congleton: I offer it in evidence.

(The document referred to is received in evidence and marked Exhibit S-55.)

Mr. Congleton: That is all, sir.

You don't have any cross?

Mr. Foley: None.

FRANK A. O'NEILL, sworn.

Direct examination by Mr. Congleton:

Q. Chief, you are a member of the Newark Police Department? A. I am.

Q. And you have been for how long, sir? A. 36 years, sir.

Q. Your present title is Deputy Chief? A. That's right, sir.

Q. What are your present duties? A. I am in the command of the Detective Division, Police Headquarters.

Q. You have been for how long, sir? A. Six years.

Q. Were you present in Police Headquarters on the evening of December 18, 1946? A. I was.

Q. Directing your attention to S-53 for identification, is that your signature appearing on the first page? A. That is.

Q. Did you see the defendant, James J. Brooks, put his signature on the first page? A. I did.

Q. Did you see Captain Cocozza and Kosloski sign? A. I did.

Q. And those same signatures appear on each of the pages, do they not? A. That's right, sir.

Q. And you were present? A. Correct.

Q. Directing your attention to what is next to the last page of this group of papers, did you see the defendant, James J. Brooks, sign on that last page? A. I did.

Mr. Foley: What page is that? Is it numbered?

Mr. Congleton: 15.

Q. Is that your signature, Chief? A. It is.

Q. Did you see Detective Kosloski put his signature there? A. I did.

Q. Do you know what was done before Brooks signed that statement? A. It was read to Brooks, and he read it himself.

Q. Did you make any promises to him? A. None whatever.

Q. Did you hear anyone else make any promises to him? A. None at all, sir.

Q. Did you hear any threats? A. No, sir.

Q. Did you make any threats? A. No, sir.

Q. Did you hear any promises of reward? A. No, sir.

Q. Did you hear anyone else offer him any promises of reward? A. Absolutely not.

Q. Was Brooks asked whether or not that statement was the truth? A. He was.

Q. What did he say? A. He said, "That is the truth."

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. Were you there while the statement was being read by Captain Cocozza? A. I was, sir.

Q. During the entire time? A. Not all the time, sir.

Q. Were you there when Captain Cocozza commenced writing the statement? A. That's right, sir.

Q. What time was that? A. 7:40.

Q. Did you make a note of that time? A. No, not particularly.

Q. Why do you say now it was 7:40? A. Because I refreshed my memory by looking the statement over, and I had been down at Headquarters all afternoon, as a matter of fact, and because of the importance of the arrest I saw fit to stay there until Captain Cocozza arrived.

Q. So there is something in the statement then which informs you that the statement was started at 7:40? A. Oh, yes, positive.

Q. It is because of that notation that your memory is refreshed, and you are now able to say it was 7:40 that Captain Cocozza started writing. Is that it? A. Correct, sir.

Q. But for that you would not be able to testify accurately to the time, would you? A. Considering the time that has elapsed since the 18th until now I wouldn't be exact or accurate in saying 7:40. I might give you an approximate time.

By the Court:

Q. How close can you approximate it? A. I might say 7:30 or 7:15, something like that, your Honor.

By Mr. Foley:

Q. You would make it earlier, not later, than 7:40 if you were being asked to give your independent recollection of the time? A. I think I would.

Q. You say you were not there all of the time? A. Mostly all of the time, but it was necessary at times for me to step out of the office where Captain Cocozza was taking the statement in the outer room for periods of two or three minutes and then back again.

Q. So that for an approximate 5½ hours, let alone an occasional interval of two or three minutes, you were there with Captain Cocozza? A. That's right.

Q. Did you ask Brooks any questions during that time? A. I can't recall that I did, no, during that time.

Q. Did you ask Captain Cocozza any questions? A. No, none at all.

Q. Did you ask Detective Kosloski any questions? A. None at all.

Q. Was anybody else present? A. Not that I can remember in that room.

Q. So that I take it, then, for a period of five and a half hours, barring a minute or two interval now and again, you sat perfectly quiet and said nothing to anybody? A. As I recall it now——

Q. Is that correct or isn't it? A. No, I wouldn't say, sir, that is correct. I might have made re-

marks as to, "What was that?" and so forth and so on, and not absolutely silent during that time.

Q. We are not interested in what you might have done. Do you recall any remark that you made during the 5½ hours you sat there? A. Not pertaining to his statement, no, sir, I can't recall any.

Q. Was any other subject discussed by you or Detective Kosloski and Captain Cocozza except the important matter of this statement that night? A. No.

Q. So that if you did not make any remark pertaining to the statement there was no other remark that you could have made, was there? A. Oh, yes, sir.

Mr. Congleton: That is objected to as argumentative.

The Court: He said there were or possibly could be.

Q. But you can't recall any remark concerning any subject that you made during that time? A. No, sir, I can't recall any remarks that I made, sir, except sit there and listened to the statement given by Brooks to Captain Cocozza and Captain Cocozza writing the statement and concentrating on his writing what Brooks was saying to him, and that necessitated perfect silence in the room.

Q. Did anybody else come in the room during that time? A. Yes, I can remember an impartial witness sitting in there. I cannot recall his name. A colored gentleman. He was sitting there. And the physician who examined Brooks was also there. Not during the entire statement.

Q. I notice you said an impartial witness. A. Yes.

Q. Do you mean by that that any other witnesses may have been partial witness? A. Oh——

Mr. Congleton: I object to that, if the Court please.

The Court: Why not let the Captain answer?

A. I mean to say, Counselor, along these lines that because for many reasons we law-enforcement agents have felt it imperative to bring in an impartial witness so that he will hear and see and question everything that goes on, that's all.

Q. What time did he arrive? A. I can't say exactly, sir.

Q. Well, about? A. 8 o'clock or something around that time. Not at the very start of the statement. It was rather difficult to get him.

Q. Some time after you had commenced taking the statement? A. Yes.

Q. Even though you felt, as you say, it is imperative to have somebody like that, you began to take the statement from this man before this impartial witness had arrived? A. Oh, we knew he would be there.

Q. Will you answer that question yes or no? A. I would like to elaborate a little bit on that, Counselor.

Mr. Foley: That question calls for a yes or no answer, and I ask your Honor to direct him to answer that question yes or no.

(The pending question is read by the court reporter.)

The Court: I will allow that question to be answered yes or no if you will eliminate the first part.

Mr. Foley: I will reframe it.

Q. It is the fact that the taking of this statement was commenced before the impartial witness arrived? A. That's right, sir.

Q. What time did the doctor arrive? A. Well, I am not certain of that.

Q. About what time? A. Oh, I would say after 8 o'clock. Between 8 and 8:30, if I can recall that correctly.

Q. How long did he stay there? A. Oh, I guess he was there for a couple of hours.

Q. He left some hours before the statement was finished, then? A. No, he did not. He remained there and also heard the statement read and heard Brooks say that it's the truth and then he stripped Brooks and examined him.

Q. Didn't you say he arrived there shortly after 8 o'clock and stayed for a couple of hours? A. I am not sure, Counselor, whether he arrived between 8 and 8:30. It was after 8 o'clock that he arrived.

Q. He stayed from that time until the statement was completed? A. That's right.

Q. What time was that? A Early in the morning.

Q. What time? A. Oh, 1 o'clock or a quarter to one; something like that.

Q. Did anybody else come in the room besides those two persons? A. Detective Kosloski was there.

Q. I understand he was there. A. None other that I can remember.

Q. Captain Cocozza, yourself, Detective Kosloski, the witness and the doctor. A. That's right.

Q. And nobody else came in that room during the entire time the statement was being taken, is

that correct. A. That is correct. As far as I can remember.

Q. That is your best recollection? A. Yes, sir.

Q. Did the impartial witness sign this statement in your presence? A. Yes, he did, sir.

Q. Did the doctor sign it? A. No, the doctor did not.

Q. And the impartial witness signed this statement— A. I believe he did, sir.

Q. —at about a quarter of one in the morning? A. I might correct myself there. I am not positive that I saw him sign that statement, but I believe he did, as they do in all cases of that kind.

Q. Was he there when it was signed by Brooks upon the completion of it? A. Yes, he was, sir.

Q. And your best recollection is he signed it? A. Yes, sir.

Mr. Foley: That is all.

Re-direct examination by Mr. Congleton:

Q. Chief, I direct your attention to S-53 for identification and ask you if you will look at that and see whether or not that would refresh your recollection as to whether the impartial witness signed that or not.

Mr. Foley: May I look with him? I mean, he is going to testify to something that is on there, and I should like to see what it is.

The Court: Certainly, look.

Mr. Congleton: It is going to be negative.

A. No, sir; I don't see his name, sir.

Q. Does that refresh your recollection now as to whether or not the impartial witness did or did not sign that statement? A. It does refresh my memory.

Q. Did he? A. He did not.

Mr. Congleton: That is all.

Re-cross examination by Mr. Foley:

Q. Was he there? A. He was, sir.

Mr. Foley: That is all.

Mr. Congleton: Is Mr. Robinson here?

(There is no response.)

Mr. Congleton: All right, sir. He is not here. I was going to have you identify him. That is all, sir.

(A short recess is taken.)

Michael J. Kosloski, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Kosloski, you are an investigator in the Office of the Prosecutor of the Pleas in Essex County? A. I am.

Q. You are assigned to the Homicide Squad of that office? A. Yes, sir.

Q. In the course of your official duties did you have occasion to go to Police Headquarters on December 18, 1946? A. I did.

Q. Showing you S-53 for identification and directing your attention to the first page, where it says, "James J. Brooks," did you see the defendant, Brooks, sign his name there? A. I did.

Q. Is that your signature there? A. Yes.

Q. Did you see Captain Cocozza and Deputy Chief O'Neill sign it? A. I did.

Q. Those are your signatures on each of the succeeding pages? A. Yes, they are.

Q. You saw the people whose names are mentioned there sign it? A. Yes.

Q. Directing your attention specifically to page 15 of S-53 for identification, did you see the defendant, James Brooks, sign his name there? A. I did.

Q. Is that your signature? A. It is.

Q. Did you see Captain Cocozza sign it? A. I did.

Q. Did you see Deputy Chief O'Neill sign it? A. I did.

Q. Were you present when this statement was read to the defendant? A. Yes, I was.

Q. Were you present when the defendant read the statement? A. I was.

Q. Was he asked if it was the truth? A. Yes, he was.

Q. What did he answer? A. That it was the truth.

Q. Did you make any promise of reward? A. I did not.

Q. Did you make any threat against him? A. I did not.

Q. Did you hear anyone else promise anything or make any threats against him? A. No, sir.

Q. Detective Kosloski, a Mr. Robinson has been mentioned as an impartial witness. A. Yes, he has.

Q. Can you point him out, please. A. Mr. Robinson is in the second row of the first seat.

Mr. Congleton: Will you stand up, please, Mr. Robinson?

(A man stands in the courtroom.)

Q. That is the impartial witness who was there that evening? A. That's right; yes, sir.

Q. Now, while this statement was being taken from Brooks, were you present in the room all the time? A. I was with the exception of a short time when I went to get Mr. Robinson.

Q. You went to get him with your car at his home? A. That is right.

Q. And about how long were you gone? A. I imagine about twenty minutes or twenty-five minutes or so.

Mr. Congleton: That is all. Cross examine.

Cross examination by Mr. Foley:

Q. What time did you go for Mr. Robinson? A. I think it as about 10 o'clock, I would say.

Q. It wasn't around 8 o'clock, was it? A. I know it was later in the evening. I don't know the exact time.

Q. Your best judgment is it was around 10 o'clock? A. Later in the evening; yes, sir.

Q. Will you answer my question, please? Is it your best judgment that the time you left to pick up Mr. Robinson was about 10 o'clock? A. About there.

Q. It was about 10:30 when you returned? A. 10:20, 10:25.

Q. Then Mr. Robinson remained there until the statement was completed? A. Yes, sir.

Q. Did you happen to notice how many pages of the statement had been written at the time you returned with Mr. Robinson? A. No, sir; I did not.

Q. You went there with Captain Cocozza, did you? A. No, sir; I did not.

Q. Did you meet him there? A. I met Captain Cocozza there, yes.

Q. Were you there at the time he commenced taking the statement or did you come after? A. Yes, sir; I was there.

Q. When did Chief O'Neill arrive? A. Chief O'Neill was there at the time when I was there.

By the Court:

Q. You mean he was there when you arrived or during the time you were there or all of the time you were there? A. During the time I was there, long before even Captain Cocozza came.

Q. Before Captain Cocozza came? A. Yes.

Mr. Foley: That is all. Thank you.

Mr. Congleton: If the Court please, at this time the State offers S-53 for identification in evidence.

Mr. Foley: Objected to, if the Court please, and we request a hearing as to whether or not the statement was voluntarily given.

We take the position that it was not; that the defendant executed it by reason of threats that had been made upon him by members of the police force; that he executed it in fear; and that he did not execute it voluntarily.

The Court: Now, as far as the hearing is concerned, I understood that we have been having that hearing for some little time; that the testimony that has been offered by the Prosecutor, I am taking it, is offered in connection with the very hearing you speak of, and the questions which the Prosecutor asked saved the Court the

trouble of asking them. So they were asked in behalf of the Court, as I understood it. So the situation now is that we are in the progress of that very hearing.

Mr. Foley: If your Honor please, I did not so understand it, for this reason: The Prosecutor says that the purpose of these witnesses was to establish the framework of the taking of this statement. I did not go into any cross-examination of the witnesses as to what was said and what Brooks said to Captain Cocozza and what Captain Cocozza said to him, because it was my understanding counsel had represented that he was merely establishing the manner in which this statement was taken.

The Court: Well, that is whether it was voluntary or not. I understood the questions that the Prosecutor propounded were definitely to that effect. Were any promises made, any threats made, or any hopes of reward held out? Each one of those is the very inquiry upon which we are now engaged. Didn't you understand that was a part of the hearing?

Mr. Foley: I did not, sir.

The Court: Very well. If you misunderstood it and you would have asked some more questions on cross examination, I think you are at liberty to do it.

Mr. Foley: The point is this, if your Honor please: There would be some questions I would ask of Captain Cocozza.

The Court: Yes.

Mr. Foley: But in the main I should like to interrogate those witnesses who put

Brooks in fear and put him in the position where for fear of what they would do to him he gave the statement.

The Court: Well, I am here to conduct this investigation. Now, I have heard certain witnesses and, as I understand it, you claim that your cross examination was not complete because you misunderstood what was actually going on in the court. And I am saying to you now that those witnesses can be recalled for further cross examination—any one or all—right now.

Mr. Foley: I have only a few questions to ask of Captain Cocozza. It might well be that after I have asked those the Prosecutor would like to put back the other witnesses. I don't know.

Mr. Congleton: If the Court please, may I be heard on the procedure as I understand it?

The Court: Yes.

Mr. Congleton: As I understand the procedure and the proof of a confession, it is that the State in its orderly course of its proof prove the signing of the statement and the taking of the statement and the fact that it was voluntarily made and that there were no promises or threats made. I must produce all the witnesses whose names appear on the statement. When that point is reached the State then offers the statement in evidence. At that point, if the defendant desires to offer any testimony as to the involuntariness of the statement, that is its prerogative.

The Court: Well, Mr. Prosecutor, that is not before the Court at all. The situation

is this. The State has offered testimony, and counsel for the defendant says he was under a misapprehension, and for that reason did not ask questions on cross examination which otherwise he would have asked. The Court says to him now, "Go ahead. Ask those questions. Your opportunity is before you."

Mr. Foley: May Captain Cocozza be recalled for a few questions?

The Court: Recalled for further cross examination.

JOSEPH COCOZZA, recalled.

Cross examination (Continued) by Mr. Foley:

Q. Captain Cocozza, is it not a fact that Brooks told you while the statement was being taken that he had not fired any shot which had killed Bateman but that you called to his attention certain written memoranda prepared by somebody and which you said had been prepared by the Police of the City of Newark, in which there was contained a statement similar to that which you eventually incorporated in your statement, and that Brooks then told you that he had not told that to the Newark Police Department, and that you then said to him that it would be better if he incorporated that since that was the record which the police had?

Mr. Congleton: I object to that question. I object to it on the ground that it incorporates a statement of what may or may not be contained in this statement that the

State could not go into on direct examination. The Captain has been asked a question previously by me as to whether there were any promises or threats or anything of that nature, and I think the cross examination should be limited to that.

The Court: I agree with you in general, Mr. Prosecutor, but this question is whether or not, as the statement was taken, the defendant was not told that it would be better for him if he said thus and so. I will allow it.

A. I did not tell that to the defendant.

Q. Did any incident occur in the course of your interrogation of him such as I have described to you? A. No, sir.

Mr. Foley: That is all.

The Court: Are there any other witnesses you wish to call?

Mr. Foley: No, your Honor.

Mr. Congleton: I renew my offer, sir, of S-53 in evidence.

The Court: The Court will inform counsel for the defendant that if he has any testimony or evidence to sustain his proposition that these statements were not voluntary, now is the time to produce that evidence.

JAMES J. BROOKS, the defendant, sworn.

Direct examination by Mr. Foley:

Q. Brooks, you are the defendant in this case? A. Yes, sir.

Q. When you were taken to Police Headquarters in whose custody were you placed at Police Headquarters? Do you know their names? A. Yes. The fellow between Detective Smith and the tall one there.

Mr. Foley: Will you stand up, Detective Smith?

(A man stands up in the courtroom.)

A Voice: I believe he means me.

Mr. Congleton: The record will indicate Detective O'Beirne.

Q. He is the one that took you to Headquarters or the one you met after you got there? A. He took me to Headquarters.

Q. After you got there whom were you taken to? A. The fellow on the end.

(A man stands up in the courtroom.)

Mr. Congleton: Is that the gentleman?

The Witness: Yes, sir.

Mr. Foley: Chief O'Neill.

The Witness: Yes, sir.

Q. What other officers were there? A. The one next to him.

Mr. Foley: His name, please.

(A man stands up in the courtroom.)

Mr. Congleton: Lieutenant Flynn.

Mr. Foley: That is Lieutenant Flynn.

Q. Anybody else there? A. Smith.

Mr. Foley: Will Smith stand up, please?

(A man stands up in the courtroom.)

Q. You mean that man? A. Yes, sir.

Q. Anybody else who is in this courtroom? A. The officer with the gray hair.

(A man stands up in the courtroom.)

Mr. Congleton: Detective Geiger.

The Witness: Detective Geiger.

Q. Anybody else? A. No, I don't recall.

The Court: As I understand it Mr. Foley, you are not now speaking of the time that Chaptain Cocozza mentioned?

Mr. Foley: No, sir.

The Court: This is prior to that?

Mr. Foley: Prior. I shall fix the time as nearly as my client can remember the time. I will come to that in just a moment, if your Honor please.

Mr. Foley: Is Officer Cook here? He was in the courtroom. I think he stepped out.

(A man stands up in the courtroom.)

Mr. Congleton: Will the record show that Cook was sitting there the whole time that the defendant was pointing out officers who he said were present.

Q. Do you recognize that man? A. He wasn't there at the time but he came in afterwards.

Q. You have told us about all of them who were there at the time you arrived? A. Yes, sir.

Q. While you were there did some other men come? A. No.

Q. During the time you were there? A. No. Later on in the evening.

Q. But sometime during the evening did someone come? A. Yes.

Q. Who came? A. Detective Cook came in.

Q. Anybody else? A. I don't recall anyone else there at the time.

Q. At about what time did you reach Police Headquarters? A. I will say about 4 o'clock.

Q. And how long after you got there did you come in contact with Smith and Geiger and Lieutenant Flynn and Chief O'Neill? A. A few minutes after I was in the room.

Q. Did all of them remain with you for some time? A. Yes.

Q. Will you tell us what happened, what any of them said or did to you, and what you said to them as near as you can recall.

The Court: Let me see. Wait a minute.

By the Court:

Q. Were they all in there with you at the same time? A. No, not all of them. There was four in there at the time.

Q. Who was in there first? These four that you are now speaking of? A. Yes.

Q. What you are going to tell us is what happened when these four were in there. Is that right? A. Yes, sir.

Q. Will you please just name those four? A. There was Detective Smith and the fellow—the detective with the gray hair. I can't recall his name.

By Mr. Foley:

Q. Geiger? A. Geiger. And the second officer on the end there.

Q. Flynn? A. And the one completely on the end.

Q. The Chief? Chief O'Neill? A. Yes.

Q. Will you tell us in your own words everything that happened from that point on. A. The exact words?

Q. No, no, in your own words. Describe to the jury what happened. Just tell them what happened to you. A. Well, as I was picked up and brought to Headquarters, I was picked up on a forgery, and after being taken into custody I was placed in a small room, in which I was searched. And I was told I was involved in a murder. And they asked me for my statement, and I told them, yes, I admitted being involved in a murder. And they said did I do any shooting. I told them yes, I fired one shot that forced upon me, and which at the time——

The Court: Excuse me. Now, what I am inquiring into is this: Whether there were any threats or violence used which would induce a person to make a false statement.

Mr. Foley: If your Honor please, I am quite sure that unless the witness tells what he told them, we will not be able to fix the occasion—the time—when the violence was used. In other words, he will come to a point where——

The Court: We can't measure time by the number of words of it.

Mr. Foley: Well, it would seem to me that the mere description of what they did without the conversation that went on be-

tween them would lead to no clear picture of what happened.

The Court: No. We will have to take his estimate of the time that elapsed, rather than estimate ourselves from the number of words said. Will you please speak louder? One of the gentlemen on the jury says he can't hear you so well.

Mr. Foley: Your Honor therefore directs that the witness stop his recital at this point?

The Court: I direct that the inquiry be confined to the subject; to-wit, were there any threats or promises, and so forth, made to this defendant to induce him to make this statement otherwise than a voluntary one.

Mr. Foley: If your Honor wishes it that way, I will ask him the question directly.

The Court: Please.

Q. Were you threatened by any of these police officers? Was any violence practiced upon you by any of these police officers at any time while you were in the Headquarters?

Mr. Congleton: If the Court please, the State objects to the dual question. There are two questions contained in one.

The Court: Provided he won't make an answer in the form of a conclusion. Of course if he said either yes or no, that wouldn't get us anywhere. But what we want to find out is what happened, what was said to him in the nature of a threat, as he claims, if so; what was said to him in the nature of a promise, if any such statement was made, and what was done

to him by way of violence, if any such thing occurred.

Mr. Foley: You have yourself asked several questions. I can only ask one at a time. I asked one question which is a preliminary one. If he says, "Yes," then I would ask him what threats and what violence.

The Court: That is all right.

Mr. Foley: I can understand, your Honor, that you may think that I might obtain an answer and rest. I do not intend to do that.

The Court: All I want is to get at the testimony in the form of allegations or statements of what occurred, rather than conclusions in the form that some threat was used.

Mr. Foley: May I have that preliminary question answered so that I may have some background from which to start?

The Court: Well, go ahead.

Mr. Foley: Speak up so that we can all hear you.

(The pending question is read by the court reporter.)

A. Yes.

Q. Will you tell us what violence was done you by any of the officers, naming the officer and stating how many times it was done and what was done. A. Well, I was told by Detective Smith that if I did not admit shooting Mr. Bateman that he was going to give me a good going over with some of his friends, the other detectives. I told him that I did not shoot Mr. Bateman. He gave me a hit on the side of the head which knocked me on the floor.

Q. Which side of the head? A. The right. After being knocked on the floor I received several kicks in the ribs, in the stomach, and in the back, and he then let me get up, and on my trying to get up I was hit and knocked down again.

By the Court:

Q. By whom? A. By Detective Smith.

Q. By Detective Smith? A. Yes. After getting up he asked me was I going to give a statement that I shot Mr. Bateman, and I told him no, that I was not going to give him a statement that I shot him; that the first shot was fired accidently which missed Mr. Bateman. He told me, well, did I know that it was a white fellow which was killed. I told him yes, I realized that.

They also made threats that if I didn't admit shooting Mr. Bateman that either they was going to shoot me, hang me or make me jump out of a window.

Mr. Foley: Now, if your Honor please, I don't think it is proper for these police officers to undertake any demonstration. One of them just laughed out loud. I do not think it is fair or proper, and they ought to know better. They have been through this before and they know better.

Mr. Congleton: I don't know that any police officer laughed out loud, sir.

Mr. Foley: Well, I heard him and I saw him laughing when I turned around.

The Court: Anyhow, I am sure that everybody in the room will understand, including the police officers, that they are not to demonstrate approval or disapproval of anything that may be said and that they

will conduct themselves in a quiet and orderly manner, if you please. I do not wish anyone to understand in the room that I myself saw anything. My attention is concentrated here on the witness. Go ahead.

By the Court:

Q. Will you tell me this: You have not said definitely who said this. There is quite a little that you say they said. A. That was the detective who walked out of the door.

Q. That was Detective Smith? A. Yes.

Q. He said all of it or part of it? A. He said that he was going either to shoot me or hang me or make me jump out the window. He said, "Now are you willing to sign the confession that you did the shooting that killed Mr. Bateman?"

I told him no. So he had a small pistol on the side here and so he drew it and put it on the side of my head, and I pushed it aside right away. I said, "You might get a stroke like that and that go off and hit me."

He said, "Don't worry, you are either going to get hit before you leave here or you are going to go out the window."

So I said, "Well, being as that I am about in that place, I will go and sign a confession that I fired the shots."

I said, "But I only fired one shot and that did not hit Mr. Bateman."

And so then they started taking more confessions and at about 7:30 Detective Cook came in.

By Mr. Foley:

Q. Will you stop there for just a minute. You say they started to take more confessions? A. Yes.

Q. What detective was it? A. That was the second detective sitting on the end there.

Q. Was doing what? A. He was writing down. They were taking part of the statements.

Q. Taking down things you said? A. Yes.

By the Court:

Q. This was before Captain Cocozza was there? A. Yes, because I was informed by them that I'd better have my statement straight before Captain Cocozza came in, because they didn't want to give him any headaches, and they wanted to get this statement made right away, and that after Detective Cocozza came in if I changed my statement that they were going to take care of me after Detective Cocozza left.

By Mr. Foley:

Q. Will you just stop there for a minute? The Judge asked you a question and I asked you a question; just before that you started to say something about Detective Cook coming in at 7:30. A. That's right.

Q. We never got beyond that. What happened when Detective Cook came in? A. Detective Cook came in and asked me wasn't that the fellow that was mixed up in the holdup and the murder, and I told him yes. I said yes, that was one of the fellows, and he said, he asked Detective Smith did I make my statement yet, and Detective Smith, he did a few swearings.

Q. Tell us what he said. A. The exact words?

Q. Yes, go ahead and tell the exact words, if you can remember them.

The Court: This was who?

Mr. Foley: Detective Smith.

Q. As well as you can remember them. Did he call you names? A. Yes, he did.

Q. What did he call you? I am speaking now of Detective Smith.

(There is no response.)

The Court: Go right ahead and don't be embarrassed by it.

A. Well, Detective Smith——

The Court, Remember, we are sitting here professionally. I told the jury about that before. We are sitting here professionally, and to the lady I will say the same thing, and we will treat it professionally. Go right ahead and tell us what was said.

The Witness: Judge, I don't like to keep swearing.

The Court: Go right ahead. The jury has to hear you.

The Witness: Detective Smith told me——

The Court: Remember that those fourteen people over there are judges just as much as I am, and they are just as profesional as I am. They are sitting here today in a professional capacity, and they are judges of the fact, the sole judges of the fact, in the main.

The Witness: Detective Smith told me that—in fact he said—he said, "You are——"

Mr. Foley: All right, Brooks, we will pass it.

Mr. Giuliano: Let's have it.

Mr. Foley: I would prefer you to tell us.

Mr. Giuliano: Don't let him get away with that.

Mr. Foley: If your Honor please, now I hear a remark from Mr. Giuliano, "Don't let him get away with that," and it was said loud enough for me to hear, and I don't think we should have from the Prosecutor or anybody else anything like that. This is the first witness I have produced. Throughout their whole case, and they have had some thirty-odd witnesses here, they have heard nothing from me but polite treatment, and I expect to have the same treatment accorded to my witness.

The Court: I suppose the reason the Assistant Prosecutor said that was to tell Mr. Congleton not to let that pass without notice.

Mr. Giuliano: Exactly, your Honor.

The Court: Perhaps the language could have been more gentle, but the meaning is the same, really.

Mr. Congleton: If the Court please, on behalf of the State, I think the witness should be required to answer the question asked by his counsel.

The Court: I think he will unless his counsel withdraws the question.

Mr. Foley: I will repeat the question.

Q. What did Smith call you or say to you? A. Well, he called me a black son-of-a-bitch.

Q. What did Cook do or say? A. He also called me the same thing.

Q. While you were there were you questioned about a man named Harris? Just answer yes or no. A. No.

Q. Was Harris' name mentioned to you by these police? A. No, Clarence Wright.

Q. Wright? A. A man named Wright? A. That's right.

Q. At the time they were talking to you about Wright did they make any suggestion to you as to where they were going to take you and what they were going to do to you? A. They did.

Q. Tell us about that. A. Detective Cook said that him and some more detectives was going to pretend they were going to take me out to identify Clarence Wright, because I had killed a white man, and that after taking me out that night they were going to pretend that I tried to make an escape and was going to shoot me on sight. And I told them I wasn't going to be, or I wasn't going to get out of the car. And then he said, "Well, do you remember what we did to the other colored fellow?"

I says, "I can't recall what other colored fellow you are talking about."

He says, "You know that one we made jump out of the window," he says, "and the same thing is going to happen to you if you don't make a confession that you shot Mr. Bateman." And I told him that I didn't shoot Mr. Bateman, and then again I received some more kickings and being hit over the head with the hoses which they had put up on the table in a box, and more threats.

Q. Now, have you told us as near as you can recall about all of the threats and all of the violence that was practiced upon you? A. No.

Q. Tell us the rest of it then. A. Well, they told me that—Detective Smith and Detective Cook was the ones that was making all the threats, and they told me that if I didn't sign my statement the way Smart had given it that they would make

sure that I didn't have a chance to say anything in court, and which I told them before if I had the opportunity that if I did reach court I wasn't going to go by their statement in doing the shooting. I says that, "My statement I want to give you is voluntarily, but the one which you are forcing upon me, I will not give it in court."

Q. With respect to what? Having to do with what? A. With the murder.

Q. With who fired the shots? A. Smart.

Q. Did you tell them that you did not fire the shots that struck Bateman? A. I did.

Q. Did they tell you or did they mention to you that a statement was going to be taken by Captain Cocozza? A. They did.

Q. Did they tell you anything about what they expected you to say to Captain Cocozza and what they would do if you did not say it? A. They did.

Q. Tell us about that. A. They told me that Smart's statement said that I did all the shooting and that I had the gun at all times, and that when Lieutenant Cocozza came in that they wanted me to say exactly I did all the firing; that I had the gun at all times; and that when we went out to meet Mr. Bateman it was in my mind to shoot him after we had got the money; and if I didn't, after Cocozza had made—had taken my statement they was either going to make me jump out of the window or either hang me or shoot me, and they said if I didn't do as they said that they would throw me out the window if I didn't jump.

Q. At the time you signed your statement for Captain Cocozza were you or were you not in fear of Detective Smith and Detective Cook? A. I was.

Mr. Foley: Cross examine.

Cross examination by Mr. Congleton:

Q. Were Cook and Smith present when you signed your statement? A. No.

Q. When is the last time that day you saw Cook and Smith? A. I saw them that night.

Q. What time? A. About 7:30 or 8 o'clock, before Lieutenant Cocozza came in.

Q. Did you see Detective Kosloski there earlier that evening? A. I don't know who Detective Kosloski is.

Mr. Congleton: Stand up, Detective.

(Detective Kosloski stands in the courtroom.)

The Witness: He was in there when I first came in.

Q. When you first came in he was in there? A. Yes.

Q. Was he present when these threats were being made that you testified about? A. No, he was not.

Q. Where was the Deputy Chief when these threats were going on?

Mr. Foley: Objected to. Just a minute. He can ask him whether or not he was present, but he can't ask him where he was. He might have been anywhere.

The Court: Well, very well.

Q. Was the Deputy Chief present when these threats were being made? A. Who is the Deputy Chief?

Mr. Congleton: Stand up, will you, Chief O'Neill, please?

(Deputy Chief O'Neill stands in the courtroom.)

The Witness: He was outside. He walked out.

Q. He walked out when? A. Out of the room when Detective Smith came in.

Q. What time of the evening was this? A. It was about 5:30.

Q. What time was it when you say Cook and Smith came back in? A. Well, Detective Cook came in about maybe 20 minutes after I was there. I couldn't recall the time, because I didn't have a watch on.

Q. I think you testified on direct examination that it was about 7:30 p. m. when Cook and Smith came in and had a conversation with you. A. I said Detective Cook came in last. Detective Smith was in there before Detective Cook was.

Q. Didn't you say Cook came in at 7:30? A. No, Detective Smith came in together.

Q. They came in together? A. Yes.

Q. Didn't you tell us that it was at 7:30 that Detective Cook came in? A. That they both came in the room together.

Q. At 7:30? A. Yes.

Q. How long did they stay there? A. I couldn't recall the time.

Q. Was it a minute or five minutes or ten minutes or a half hour or an hour? A. I don't know.

Q. You haven't any idea how long they were there? A. No, because I was always under threats and I couldn't remember or recall the time.

Q. You were so afraid of what Detective Cook and Detective Smith were going to do to you that you signed a confession for Captain Cocozza that you shot and killed Bateman? A. I didn't tell

them that I shot or killed Mr. Bateman. When I was making that statement I stopped, and then I remembered exactly what they told me.

Q. Yes. A. And I said, "Yes, I did the firing."

Q. You said that in your statement? A. Yes.

Q. You did that because you were afraid? A. That is correct.

Q. You said in this statement you fired all the shots. Is that right? A. I didn't tell them I fired all the shots, no.

Q. What did you tell them in your statement? A. I told them that I fired one of the shots, and he said, "Well, there was more shots fired."

Q. Who said that? A. Lieutenant—Detective Cocozza.

Q. Yes. A. And then I told him—I says that I had fired one shot again, and he says—he asked me didn't I get a going-over here before.

Q. Who asked you that? A. Captain Cocozza.

Q. While he was taking the statement? A. Yes.

Q. Who was present then? A. Well, the detective at the end.

Q. The Chief was present? A. Yes.

Q. Was Detective Kosloski there? A. I didn't see him there.

Q. You didn't see him there at all that night? A. Yes, that night, but he wasn't in the room then.

Q. Didn't I understand you to say, Brooks, that you were so afraid because Smith and Cook told you if you did not sign the statement for Captain Cocozza that you shot and murdered Bateman that they would do certain things to you? A. Yes.

Q. Did you sign a statement for Captain Cocozza saying that you did shoot and murder Bateman? A. Yes, I signed the statement afterward.

Q. That you did shoot and murder Bateman? A. Yes.

By the Court:

Q. When Captain Cocozza asked you if you did not get a going over in advance, what did you think he meant by that? A. Didn't I get a beating.

Q. In advance. And what did you answer him? A. I told him yes.

Q. You told Cocozza that you had gotten a beating in advance? A. Yes.

Q. Didn't you say anything to him to the effect that you were making that statement a false statement because of this beating? A. No, sir, because I was afraid that the detectives were going to do what they had said before.

Q. But you did tell him that you had had a beating in advance? A. Yes.

Q. Did you tell him who beat you? A. No. He didn't ask me.

Q. He didn't ask you? A. No.

Q. Who was present when you said you had a beating in advance or a going over, as you put it? A. The detective on the end was there.

The Court: Will you kindly stand up.

Mr. Congleton: Deputy Chief O'Neill.

Q. Deputy Chief O'Neill was there and heard that? A. Yes.

Q. Captain Cocozza was right there in the room? A. Yes.

Mr. Foley: I don't like to take exception to your Honor's questioning, but I notice that you say Deputy Chief O'Neill was there and heard that. I don't know that he can say that he heard it. He san say he was there.

The Court: Yes, all right.

Mr. Foley: I would like to have deleted from your Honor's question——

The Court: I will pursue that further. Realize, if you will, please, that this investigation is being conducted by the Court.

Mr. Foley: Yes, sir.

By the Court:

Q. When you said a minute ago that Captain O'Neill was there and heard that, did you mean that or not? A. He was sitting there. I don't know whether he heard it.

Q. How close was he to you? A. He was at the end of the table. I was sitting at one end of the table and he was sitting at the other end.

Q. How big a table is it? A. About that big.

The Court: Indicating the table where the Prosecutor is sitting.

Mr. Congleton: Can we agree that it is six feet long?

Mr. Foley: I would say so.

Q. How big was this room that you were in? A. It was not a very large room.

Q. What say? A. It was not a very large room.

Q. That does not get us very far. What do you mean by that?

Mr. Foley: Perhaps the witness could square off a place in this room.

Q. Take that table that counsel have agreed upon. How many of those tables could be put abreast or end to end? A. I would say two or two and a half.

Q. Two and a half. All right. Thank you.

By Mr. Congleton:

Q. That is the length of the room? A. Yes.

Q. What is the width of the room? A. I would say maybe a table and a half or two could get in.

Q. The width or length of the table? A. The width.

Q. So that there will be no misunderstanding, Brooks you were so afraid of what Detectives Cook and Smith told you they were going to do to you that you signed a statement for Captain Cocozza admitting that you shot and murdered Bateman, is that correct? A. Yes that's correct.

Q. I show you S-53 for identification and ask you to point out any place in this statement where you said you admitted that you shot and killed Mortimer Bateman. A. I don't know whether he put it in there or not.

Q. Didn't you read the statement before you signed it? A. At the end, yes.

Q. You read the whole thing, didn't you? A. Yes.

Q. All right. Look at the end of this statement. That is your signature, isn't it? A. Yes.

Q. There is a page added, isn't there? A. There is.

Q. And that is your signature on that page, isn't it? A. That is.

Q. All right. That is where you signed it after you read the statement, isn't it, indicating page 15? A. Yes, that's right.

Q. So you read it before you signed it, didn't you? A. Yes.

Q. All right. Now, you point out to me in there where there is anything in which you said you shot and murdered Mortimer Batement.

Mr. Foley: I certainly could have no objection to that question, but this statement is a lengthy one. It took Captain Cocozza twenty minutes to read it.

I want Mr. Brooks to read the whole of the statement, so I think he should be given ample opportunity.

The Court: Mr. Prosecutor, doesn't the statement speak for itself?

Mr. Congleton: If the Court please, it does, but I can't get it in at this point.

The Court: I get your point, but what I was thinking of was that nobody can tell what is in that statement without consuming quite some time.

Mr. Foley: And I want him to read it very carefully. I think he should know that he has the opportunity to read the paper all the way through.

Mr. Congleton: May I suggest that I pass that question for the time being? I have a couple more questions to ask him before we adjourn. Then I would like to ask the Sheriff to arrange to have the defendant upstairs early on Monday morning and we will have that statement up there and he will have an opportunity to read it.

Mr. Foley: I think anything that is done should be done in the courtroom, if your Honor please.

The Court: All right, if you want to do it in the courtroom. I think one witness testified it took him 20 minutes to read the statement.

Mr. Foley: I have no intention or desire to delay this, but I don't believe it is a wise

thing to have exhibits taken to a place outside of the courtroom and examined by witnesses.

The Court: Certainly.

Mr. Foley: And testimony given. I don't think it is the right thing to do.

The Court: We will give him all the time that is reasonable.

Mr. Congleton: Shall I pass that for the moment?

The Court: No, you had better go ahead and get through with this. Let him read the statement. I think it is better just to wait.

Mr. Foley: There is just this that I might say to your Honor. You can readily see that on re-direct examination I will have to read the statement, too, in order to make certain that my client has not failed to notice something in the statement or perhaps that he has failed to properly interpret something in the statement.

The Court: That may be.

Mr. Foley: So that that would also take a considerable time.

The Court: We will cross the bridge after we get through with one thing.

A. I don't see it here, no.

The Court: The witness says he doesn't see it in there.

Q. You don't find it at all, do you? A. No.

The Court: This would be a good time to adjourn, I think. The jury may retire.

Mr. Foley: If your Honor please, I assume now that the witness has been given the statement to examine, I will be permitted to examine it for the purpose of redirect examination. If I am correct in that assumption, I might suggest to your Honor that I will be glad to look that over before we open court on Monday morning so as to save the time of the Court on Monday. Do you have any objection to that?

The Court: I think the examination should be concluded the first thing; that is, that Mr. Congleton should conclude his examination. Then he can turn the statement over to you.

Mr. Foley: All right, sir.

(A recess is taken until Monday, March 24, 1947, at 10 a.m.)

SEVENTH DAY.

March 24, 1947.

JAMES J. BROOKS, resumes the stand.

Cross examination (continued) by Mr. Congleton:

Q. Brooks, what time in the afternoon of December 18th were you arrested? A. I don't know exactly the time. About 3:30.

Mr. Foley: A little louder, please.

The Witness: About 3:30.

Q. You were arrested by Detectives O'Beirne and Geiger, were you not? A. Yes.

Q. They took you out of your home and down and into a patrol wagon and then took you to Headquarters, is that correct? A. Yes.

Q. When you got to Headquarters, whereabouts in Headquarters were you taken? A. I was taken on the fourth floor. From there I was taken to the small room.

Q. Who was in the small room when you got there? A. There was no one in the small room when I got there.

Q. Who took you into the small room? A. I don't know exactly who took me into the small room because I was told to go in.

Q. Who went in with you? A. It was Detective Geiger, he went in, and——

Q. Was it the other officer who arrested you? A. I don't know whether he went in or not.

Q. Did someone else besides him go in? A. Yes, sir.

Q. Did Deputy Chief O'Neill go in? A. I don't see the officer that was here that went in.

Q. Was it the gentleman that was here the other day and testified? A. Yes.

Q. The man that said he was present when you signed your statement, Deputy Chief O'Neill? A. Yes.

Q. So that there was O'Beirne, Geiger and Deputy Chief O'Neill that were in the room with you, is that right? A. And Detective Smith was there, too.

Q. Detective Smith was there when you arrived at Headquarters? A. Not when I arrived; after I arrived.

Q. Well, now, directing your attention to the time when you went into this small room, which you say you did after you arrived at the fourth floor at Headquarters, who went in there with

you? A. Well, there was Detective Geiger and the other detective that was here.

Q. You mean Chief O'Neill? A. Yes.

Q. And the Chief stayed in there with you, didn't he? A. For a while, yes.

Q. For quite a while, didn't he? A. Yes.

Q. He asked you about some money and a gun, didn't he? A. He did.

Q. Shortly after you went into the little room? A. Yes.

Q. Up to that time Smith wasn't there, was he? A. No, he was not.

Q. You told Deputy Chief O'Neill and Geiger and O'Beirne where the money and the gun were, didn't you? A. Yes.

Q. Nobody had made any threat or promise to you then, had they? A. No, they didn't make it then, but they did after.

Q. So that at that time nobody had said anything to you that was out of the way? A. No.

Q. Do you know what time that was when you told them where the money was? A. No, I don't.

Q. Then Geiger and O'Beirne left after you told them where the money and the gun were, didn't they? A. They just left out of the room.

Q. And the Deputy Chief stayed there, didn't he? A. He was there, yes.

Q. Did anyone else come into the room? A. Well, Detective Smith came in.

Q. Are you sure of that now? A. Yes.

Q. Do you know about what time it was when he came into the room? A. No, I don't.

Q. Was it before or after you ate? A. It was before I ate.

Q. Before you ate? A. Yes.

Q. By the way, they fed you pretty well that night, didn't they? A. Not until after 12 o'clock.

Q. Not till after 12 o'clock? A. That's right.

Q. Somewhere early in the evening didn't you have two pork chops and French fried potatoes? A. No, sir.

Q. You are sure of that? A. Yes, sir.

Q. Smith came in when? A. I don't know the exact time he came in, but I know he came in sometime during that afternoon and evening.

Q. Do you remember a man coming in and telling you he was Chief Sebold, Chief of Police of the City of Newark? A. No, I don't remember.

Q. By the way, Chief O'Neill just came in the door. Is that the man who was in the room with you when you first got there? A. Yes.

Q. Do you remember Lieutenant Strong coming in? A. I don't remember the names. In fact, I don't remember all of them that came in because they were coming in and out.

Q. Then I think you said on Saturday that Flynn and Smith came in; is that right? A. That's right.

Q. Do you know when that was? A. No, I dont' know the exact time.

Q. Didn't you testify Saturday it was around 4:30? A. I said I didn't know the exact time. I said about 4:30, but I didn't know the exact time.

Q. What happened when Flynn and Smith came in the room? A. They were asking me whether I was involved in the murder.

Q. What did you tell them? A. I told them yes, I was involved in the murder, and they asked me didn't I shoot him, and I said no, I didn't do any shooting.

Q. Who was it that asked you this? A. Detective Smith.

Q. Was Deputy Chief O'Neill still present? A. Yes, he was.

Q. And Smith and Flynn proceeded to—or Smith asked you questions while the Deputy Chief was there? A. Yes.

Q. What else did he ask you? A. Then he asked me did I do any of the shooting, and I told him yes, I fired one shot that was forced upon me.

Q. What do you mean, forced upon you? A. When I drew the gun——

Q. You are the one that had the gun——

Mr. Foley: Just a minute, I object. The Prosecutor asked the witness a question and the witness started to answer it, and the Prosecutor asked him another question. I ask that he be permitted to finish the answer.

The Court: Mr. Prosecutor, please remember there is only one issue before the Court, and that is as to whether or not this statement was voluntary.

Mr. Congleton: I appreciate that. In order for the State to properly meet the issue raised, we must show the circumstances that surrounded the questioning of this man in Headquarters that evening and afternoon.

The Court: It might be, but it seems to me you are getting pretty close to a general cross examination.

Mr. Congleton: I will try to avoid a general cross examination.

Mr. Foley: I would like to have the question answered which he started to answer.

The Court: Certainly.

(The previous question and answer are read by the court reporter.)

Mr. Foley: Answer it.

A. This fellow, Bateman, grabbed the gun, grabbed my hand and the gun.

Q. And you pulled the trigger? A. No, I didn't pull the trigger.

Q. You didn't pull the trigger? A. No.

Q. Was the gun cocked? A. It was on the side.

Q. And had you cocked it? A. No, I didn't.

Q. You know what I mean by cocking? A. I know what you mean.

Q. You had not cocked it? A. No.

Q. When he grabbed your hand it went off? A. That's right.

Q. But you did not pull the trigger? A. No.

Q. Did he pull it? A. He grabbed my finger and pressed it.

Q. At this time Lieutenant Flynn, Smith and Deputy Chief O'Neill were there, is that right? A. That's right.

Q. How long did Smith stay there? A. Perhaps fifteen or twenty minutes. Maybe more.

Q. Did you testify Saturday that he threatened you then? A. Yes.

Q. What did he say? A. Well, at first he was talking about that I had killed this fellow, Bateman, and that I had did the shooting and I said no, I didn't do the shooting. Then he asked me did I want a going over, and that's when he placed the box upon the table.

Q. What kind of box? A. A small box, about like that.

Q. A wooden or cardboard box? A. I wouldn't know whether it was wooden or cardboard. It was brown.

Q. Did you look in the box? A. Yes.

Q. What was in it? A. There was several hoses in the box.

Q. Anything else? A. I didn't see anything else.

Q. The Deputy Chief was there during all this? A. He happened to walk out.

Q. He happened to walk out when? A. When Detective Smith was in there and the other detectives were there also. In fact, there were two or three more in there.

Q. There were two or three more in there at the time? A. Yes.

Q. Who were they? A. I can't recall.

Q. Can you pick any of them out? A. No, I can't pick them out.

Q. You couldn't pick them out? A. No.

Q. This was, you think, around 4:30 or a little after? A. I wouldn't say exactly what time it was. It was after I was brought down to Headquarters.

Q. Was it after they came back with the money? A. No, it was before they came back with the money.

By the Court:

Q. What did you say was in the box? A. There was several rubber hoses—about two or three rubber hoses.

By Mr. Congleton:

Q. Did Smith or anyone else do anything to you at that time? A. Yes. When I went to look in the box, Detective Smith hit me on the side of the face and knocked me out of the chair where I was sitting.

Q. You were sitting down? A. Yes.

Q. Was your back toward the door as you come into that room or were you sitting at an end of the table? A. I was sitting—the door was here,

and I was sitting sideways from the door, on an angle.

Q. Was the door to your left or to your right? A. To my left.

Q. Was the table on your right? A. No, the table was—as you walk inside, the table is facing the wall.

Q. As you walk in there the table is right ahead of you, isn't it? A. That's right.

Q. Were you sitting at the end of the table or were you sitting along the table? A. Right near the end of the table.

Q. Right near the end of the table? A. Yes.

Q. About like my chair is placed here? A. That's right.

Q. The table was on your right? A. Yes.

Q. And the door was on your left? A. Yes.

Q. What kind of chair were you sitting in? A. It was a brown chair. I don't know exactly what kind.

Q. Did it have arms? A. No, it wasn't like that.

Q. Did it have any arms? A. It was like the other chairs over there on the side.

Q. Show me what chair. I mean they all look alike to me. You mean like that? A. Yes, something like that. It wasn't exactly, though.

Mr. Foley: Indicating a folding chair without arms.

The Witness: No, it wasn't a folding chair, but it was something of that make.

Q. Well, what happened when you started to look in the box? A. That is when I was hit on the right side of the face.

Q. You were hit on the right side of the face by whom? A. Detective Smith.

Q. Where was he standing when he hit you on the right side of the face? A. He was standing on my right side.

Q. The table was on your right, wasn't it? A. The table isn't all the way against the wall on both sides; just the front is against the wall.

Q. So he was alongside the end of the table? A. That's right.

Q. Did you see him swing? A. No, I didn't see him swing.

Q. How do you know he hit you? A. I know he hit me; he was standing right next to me.

Q. He was standing right next to you? A. And there was no one else on the right side of me but him.

Q. What is the next thing you know? A. What is the next thing I know?

Q. Yes. Did you see him swing? A. No, I didn't see him swing.

Q. Did you see his fist coming? A. Sure, I seen his fist coming after he had hit me.

Q. After he had hit you? A. Sure.

Q. I thought you said when he hit you, you fell to the floor. A. That's right, but I know exactly when I fell I looked up, and I could see who it was.

Q. How hard did he hit you? A. Hard enough to knock me off the chair and daze me.

Q. With his open hand or fist? A. Fist.

Q. Was there any mark left on your face? A. No.

Q. Any cut on the inside of your mouth? A. No.

Q. You fell to the floor? A. That's right.

Q. What happened then? A. Then he started —I got—first I was kicked in the stomach.

Q. By whom? A. By Detective Smith.

Q. Yes. A. And the back and the side.

Q. Whereabouts in the back? A. Right in the middle of my back. I was lying on my side.

Q. Then whereabouts on your side? A. Right up here, on the ribs.

Q. What? A. Under my right arm.

Q. Then what happened. A. Then he told me to get up.

Q. Yes. A. And as I was getting up I was hit again.

Q. By whom? A. By Detective Smith.

Q. Who was present at this time? A. (There was no response.)

Mr. Congleton: Will all the members of the Newark Police Department who are present please rise?

(A number of men stand in the courtroom.)

The Witness: Well, I don't see the fellow that was in here, but, anyway, there was a detective sitting outside that came in and said, "That is no way of getting a confession out of a fellow by beating him."

Q. Who was that? A. He isn't in here. He was sitting at the desk, with the blue uniform on.

Mr. Congleton: May we note for the record that 11 detectives stood up?

Q. You can't pick out anybody there who was in the room? A. No.

Mr. Foley: If your Honor please, he has already identified Detective Smith.

Mr. Congleton: I said besides Detective Smith.

Q. You can't pick out anybody else? A. No.

Mr. Congleton: So that there will be no misunderstanding, stand up, Detective Kosloski.

(Detective Kosloski stands.)

Q. Was he in there? A. No, he wasn't in the room. He wasn't in the room I was in, but he was outside.

Mr. Congleton: Mr. Queenan, will you stand up?

(A man stands in the courtroom.)

Q. Was he in the room? A. He was not in the room. He was outside.

Q. And the only one that you can remember that was in the room at the time Smith was supposed to have hit you was Smith himself, is that right? A. Yes.

Q. How many more do you say were there? A. About two.

Q. About two? A. Yes.

Q. It couldn't be more than two? A. I don't know exactly how many were there. In fact, I wasn't watching the others. I was watching the one that was doing the damage to me.

Q. As a matter of fact, Detective Smith was never in the room that afternoon, was he? A. He was there.

Mr. Foley: I object to that. That is not a proper question. The witness has said repeatedly that he was there.

The Court: Yes, that is repetition.

Q. Now, Brooks, what happened after you picked yourself up? A. I was knocked down again.

Q. By whom? A. Detective Smith.

Q. Where did he hit you this time? A. In the stomach.

Q. With what? A. With his fist.

Q. Did you go to the floor again? A. No.

Q. Then what happened? A. Then he told me to sit down again.

Q. Then what happened? A. Then he was asking me some more questions, and I told him that —in fact, I answered him. He said that I was the one that did the shooting and I told him I didn't do any shooting that killed Mr. Bateman. So he told me that Detective—Lieutenant Cocozza would be in later on that night and I had better have my confession straight.

Q. What else did he tell you? A. If I didn't, he was going to either shoot me or hang me or make me jump out the window.

Q. Were you afraid then? A. Of course.

Q. Were you afraid when the police arrested you that afternoon? A. No, I wasn't afraid.

Q. You knew what they were arresting you for, didn't you? A. No.

Q. You knew you had been involved in a murder and robbery, didn't you?

Mr. Foley: I object to it. This has no bearing upon the issue that your Honor is presently hearing. We contend that this man was put in fear by Detective Smith. We do not contend that the arresting officers did anything to put him in fear; nor that the Prosecutor's men did anything to put him in fear. So it seems to me that as long as that is not so, no issue is raised

as to how he felt and what his state of mind was at the time of his arrest.

Mr. Congleton: If the Court please, as I understand it, it is true that we are inquiring as to whether or not the statement was voluntary. That involved the man's state of mind. It is alleged that on certain occasions somebody struck him and thus put him in fear, and I have a right to inquire as to what his state of mind was prior thereto.

The Court: He said he first told them he had been involved in the robbery before he was struck, before he was put in fear, as I understand it, and also that he had only fired one shot, as he put it, that was forced upon him.

Mr. Foley: And that it was not a shot that struck Mr. Bateman. He has also testified to that.

The Court: I didn't get that part.

Mr. Foley: He has so testified, if your Honor please.

The Court: All right, it wasn't that shot that struck Mr. Bateman.

Mr. Foley: That is correct.

The Court: But the real question we must come to is whether or not he was under fear.

Mr. Foley: If your Honor please, the jury say they cannot hear you your Honor.

The Court: The real question we must meet is whether or not, under fear, he made this statement.

Mr. Congleton: I think I have a right to probe to see whether or not that fear is not

of the consequences of the act he admitted doing rather than something else.

The Court: By putting in fear he means fear of physical violence at the time or to follow.

Mr. Congleton: I appreciate that.

The Court: Not fear of the consequences of some alleged crime or something of that kind. That is the issue. We want to narrow the issue and not go into a general cross examination. That is what I am asking the Prosecutor to do.

Mr. Congleton: Yes, sir. I am trying now to develop what was the witness' state of mind prior to the time he alleges he was struck by Smith.

The Court: He says at that time he was not in fear, and that he told them, to begin with, that he was involved in the robbery, and told them where the gun was and where the money was, he says, and that at that time he was not in fear; it was only after he was struck.

Mr. Congleton: Very well, sir.

The Court: That is what I understood him to say.

Q. Now, Brooks, how long was Smith present on this occasion that you say he struck you, kicked you? A. I will say about fifteen or twenty minutes, maybe more.

Q. Then did he leave? A. Yes, he did.

Q. During any of that time was Deputy Chief O'Neill present? A. Yes, he was.

Q. Was the Chief present while he was kicking you? A. No, I told you before he went out.

Q. When did the Chief come back? A. He came back—in fact, he came in and told me that the money wasn't in the closet drawer where I said it was. He said he had a 'phone call and for me to tell him where the money was, and I said I told him where the money was.

Q. At the time that the Chief came back had Smith already struck you or kicked you? A. Before he came in, yes.

Q. Did you tell the Chief that Smith had hit you? A. No, I didn't tell the Chief.

Q. Did you ever tell anybody that Smith hit you? A. No, I did not.

Q. You didn't tell anyone in the Police Department? A. No one but my counsel.

Q. You didn't tell anyone in the Prosecutor's Office? A. No, I didn't.

Q. Did you tell the doctor? A. No, I didn't tell the doctor.

Q. Smith left? A. Yes.

Q. Did anyone else strike you or say anything to you out of the way again that day? A. No, not that day.

Q. Who talked to you then? A. I stayed in there and then the detective was in there talking to me.

Q. Which detective do you mean—Kosloski? A. Yes. The rest of the detectives came back in with the money and they put it on the table and also the gun, and they asked me was that the money and the wrapper, and was that the gun, and I said yes. One of the detectives said, "Is this the gun you did the killing with?" and I said, "No, I didn't do the killing, but that was the gun that was in my possession when I first went there."

Q. Which detective asked you that? A. I don't remember.

By the Court:

Q. But it was the one that brought the gun in, the one you told that to? A. The ones that were up in the house came back in with the money and the gun.

Q. That is the detective who said that to you? A. Yes. Lieutenant Cocozza came in and he asked me about the money and the gun, and they had already started to count the money, and so he asked me to put a marking on the gun so that I remembered it for identification.

By Mr. Congleton:

Q. You say Lieutenant Cocozza. Do you mean this gentleman here? A. Yes.

Mr. Congleton: For the record, Captain Cocozza.

Q. He came in and asked you about marking the gun? A. Yes.

Q. During all this period nothing else happened to you? A. That night just before Captain Cocozza came——

Q. Will you answer my question?

Mr. Foley: If your Honor please, he is answering the question.

Mr. Congleton: I asked him a question and I would like a responsive answer.

Mr. Foley: May I have the question read and have your Honor hear the answer?

The Court: Certainly.

(The pending question and answer are read by the court reporter.)

Mr. Congleton: I think I am entitled to an answer to my question as to whether during this period he has described anything else happened to him.

Mr. Foley: When a question is put in the negative, "Nothing else happened, did it?" a man is entitled to tell what did happen to him if something did.

The Court: Not necessarily. The question could be answered by "yes". I assume that he claims something did happen.

Mr. Foley: If your Honor please, I don't know what the meaning of that answer would be. Mr. Congleton said, "Nothing happened to you?" and the witness would say "yes", that would mean yes what—yes, nothing happened to him, or no, something did happen to him? It seems to me it is a question which enables the witness to say whether or not something did happen to him and what it was.

The Court: I don't think the question calls for a recital of everything that happened. The Prosecutor merely wants to know whether he claims something else did happen.

Mr. Foley: May I suggest, if counsel wants a yes or no answer, that he put the question in a different way—"Did anything else happen to you?" and then it could be answered yes or no.

Mr. Congleton: I think the question I asked is perfectly proper, and that I have a right to put my questions, as long as they are in proper form, in any manner I see fit.

Mr. Foley: That question cannot be adequately answered yes or no.

The Court: I think, Mr. Prosecutor, we would make more time if you would put your question in a little different form.

Mr. Congleton: This is cross examination.

The Court: I understand it is cross examination. Do you refuse to change your question?

Mr. Congleton: I would like that question answered.

The Court: The objection is sustained.

Mr. Congleton: Very well, sir.

Q. You stated a few minutes ago that somewhere around 4:30 or thereabouts Smith was there for about fifteen or twenty minutes and did something to you; is that correct? A. Yes.

Q. Then you testified that later Lieutenant Cocozza, as you called him, came in and the gun was marked; is that correct? A. Yes.

Q. Between those two incidents did anyone strike you or make any threats or anything of that nature? A. Before Captain Cocozza came in?

Q. Yes. A. Yes.

Q. What happened? A. That is when Detective Cook came in that night. He also——

Q. Do you know Detective Cook? A. Yes.

Q. Can you point him out? A. Yes.

Q. Will you point him out? A. The fifth gentleman sitting in the front row there.

Mr. Congleton: Stand up.

(A man stands in the courtroom.)

Q. Is that Detective Cook? A. Yes.

Mr. Foley: Is that Detective Cook, for the purpose of the record?

Mr. Congleton: It is.

Q. But you didn't pick him out on Saturday when he was sitting over there, did you? A. He wasn't in the room at that time.

Mr. Foley: There is nothing to indicate that he was sitting there on Saturday.

Mr. Congleton: I submit the record indicates that after he picked out the detectives——

The Court: The witness answered the question. He said he wasn't in the room at that time.

Mr. Congleton: I beg your pardon?

The Court: The witness has answered the question. He said he wasn't in the room at that time.

Mr. Congleton: Very good, sir.

Q. Detective Cook came in. Is that correct? A. Yes.

Q. And what happened? A. He came in. He asked, "Was this the fellow that was involved in the murder?" And so he came in the room, and I was expecting him to ask me something about the murder. He was asking me something about a fellow named Clarence Wright.

Q. Are you sure it was Clarence Wright he was asking you about? A. Yes, I am sure it was Clarence Wright he was asking me about.

Q. Are you sure it wasn't another man by the name of Wright? A. No, it was Clarence Wright.

Q. Are you sure it wasn't Leonard Wright? A. It was Clarence Wright.

Q. Do you know a Leonard Wright?

Mr. Foley: Objected to. Now, if your Honor please, I don't see how this can be

a part of the present issue—whether or not he knows a man named Leonard Wright.

The Court: Well, I think so. He has said that it was a different Wright, so he is entitled to ask him does he know the other man.

Mr. Foley: I pray an exception.

The Court: You may have an exception.

Q. Do you know a Leonard Wright? A. No, not by that name—not Leonard Wright.

Q. What happened after Detective Cook came into the room? A. Well, he asked me did I know this fellow Clarence Wright; that they was looking for him. And I told him, yes. I said, "I know Clarence Wright". I says, "In fact, I was down to his house several days ago, looking for him". And then he was asking me——

The Court: Wait a minute. Now, what has this to do with the issue?

Mr. Congleton: Well, the witness testified Saturday that on the occasion that Cook asked him about Wright, Cook told him that he was going to take him out to identify Wright, and at that time they were going to make him escape and shoot him, and say he escaped.

The Court: That is right. But whether he knows Wright or not is going a long way, because it is the knowledge of the detectives. Then you would have to show they knew that he knew Wright, and we will keep on going indefinitely.

Mr. Congleton: May I have the stenographer read my question back? I don't think my question was directed to whether he knew Wright or not.

(The last question is read by the court reporter.)

The Court: Well, that is not the question.

Mr. Foley: The previous question was, "Do you know a Leonard Wright?"

The Court: Yes.

Mr. Foley: That was the question to which I objected.

The Court: That is a different thing. If you want to show what happened after somebody came into the room, that is all right. I have no objection to that.

Mr. Congleton: Well, that is the pending question, sir.

The Court: Yes. All right. Then he may answer that.

Mr. Foley: Will you read it so the witness may understand just what question is being put to him?

(The pending question is read by the court reporter.)

The Witness: That is when he asked me about this fellow Clarence Wright.

Q. Detective Cook was there. Who else was there? A. Well, Detective Cook and some other detectives came in with him.

Q. Do you know who the other detective was? A. No, I can't recall him.

Q. You don't see him? A. I can't recall if he was sitting there.

Q. Well, Detective Cook was there. Did he hit you? A. Yes, he did and made threats by saying they would take me out and say I was looking for Clarence Wright and that they was going to

let me get out of the car and then shoot me and say I tried to escape.

Q. You say Cook hit you? A. Yes, I said he did.

Q. What time of the night was it that Cook got there? A. I don't know the time. It was later on in the evening.

Q. How much later in the evening? A. I should say maybe about a quarter to seven. Maybe seven o'clock.

Q. And another detective was with him, is that right? A. That's right.

Q. How did Cook hit you? A. He slapped me across the mouth.

Q. With what? A. With his open hand.

Q. Where were you at that time? Sitting or standing up? A. I was still sitting in the chair.

Q. You didn't say anything the other day about Cook slapping you in the mouth? A. No.

Q. Why not? A. Because I remembered he did.

Q. When did you remember that Cook slapped you in the mouth? A. When I remembered yesterday.

Q. You remembered yesterday. Did anyone else hit you? A. No.

Q. Then or at any later time? A. No.

Q. When Captain Cocozza got there were you still afraid? A. Sure.

Q. You were not afraid of Captain Cocozza, were you? A. No, because he said there wasn't going to be—they said there wasn't going to be any hitting or anything like that. He said he wanted the confession at that time and then asked me did I have a going over.

Q. Captain Cocozza said that to you when he first got there? A. Yes, he asked me if I got a going over.

Q. Who was present when Captain Cocozza asked you that? A. The detective sitting on the end.

Q. Deputy Chief O'Neill? A. Yes.

Q. Who else? A. That's all I can recall at that time.

Q. Was there anyone else? A. I don't recall anyone else sitting in the room at the time he came in.

Q. When Captain Cocozza came in, didn't Detective Kosloski come in with him? A. No, he did not come in exactly when he did.

Q. After Captain Cocozza got there he immediately started taking the statement? A. No; he didn't start taking the statement then. They were counting the money before they started taking the statement.

Q. Captain Cocozza was counting the money? A. Yes.

Q. In the room with you? A. Yes.

Q. Did anyone else strike you or hit you after Cook struck you across the mouth? A. No.

Q. So the only two detectives that you allege you were struck by was by Smith in the afternoon and by Cook in the evening, is that correct? A. Yes.

Q. No one else touched you? A. No.

Q. Captain Cocozza was then with you for some number of hours, was he not? A. Yes.

Q. And he wrote out your confession, is that correct? A. Yes.

Q. During that time did you tell him you had been struck? A. No, I didn't tell him I had been struck.

Q. Did you tell Detective Kosloski you had been struck? A. No, sir.

Q. Did you tell Deputy Chief O'Neill you had been struck? A. I didn't tell anyone.

Q. Why didn't you? A. Because I was afraid to.

Q. What were you afraid of? A. Because they had told me that if I would tell anyone or even the doctor or the other fellow that was coming to identify me, exactly what they were going to do afterwards.

Q. When did they tell you about anybody identifying you and that they were going to do something to you? A. They told me that there was going to be a colored fellow coming in there and also a doctor.

Q. Who told you a colored fellow was coming in and also a doctor? A. Captain Cocozza.

Q. That was the first time you knew that a doctor and a colored fellow was coming in. How could Cook and Smith tell you that something was going to happen to you?

Mr. Foley: He said "they". He didn't say Cook or Smith.

Q. Who told you? A. Captain Cocozza.

Q. Now you say it was Captain Cocozza that told you that if you told this doctor or this colored man that was coming in that you had been struck, what would happen to you? A. That wasn't it.

Q. You tell me what happened. A. They said—

Q. Who is they? A. Detective Smith and Detective Cook.

Q. Right. They told you what? A. That if anyone should come in to identify me, as the doctor or some other fellow, that I had better not mention about being hit.

Q. You said something before about a colored fellow. A. That's right.

Q. Did they say that some colored fellow would come in to identify you, or a doctor? A. No. I seen the colored fellow myself. So I thought perhaps that was the fellow they was talking about.

Q. But they told you about some fellow that was coming there? A. Yes.

Q. That was around 7 o'clock? A. Yes.

Q. Did they tell you who was coming in? A. They didn't say. Just a doctor and another fellow.

Q. Did they tell you it was another colored fellow? A. No, they didn't say a colored fellow.

Q. You said that before. A. Because I seen the colored fellow afterwards.

Q. You remember a colored fellow coming in afterwards? A. Yes.

Q. Would you know him if you saw him? A. Sure.

Q. Is he here now? A. Yes, he is here.

Q. Will you stand up, Mr. Robinson?

(A man stands up in the courtroom.)

Q. Do you remember his coming there? A. Yes.

Q. When did you first see him that afternoon? A. He didn't come that evening.

Q. When did he come? A. If I am not mistaken, I think it was on Friday.

Q. About Friday? A. Yes.

Q. You say Mr. Robinson was not there on the evening that you gave this confession, is that right? A. That's right.

Q. You did not see him there at all that night? A. I wouldn't say exactly that night, no.

Q. You did not see him early in the morning of the next day? A. No.

Q. Don't you remember Mr. Robinson that night at the time you were going to sign that confession asking you this question: "How were you treated by these men since your arrest?" Didn't you answer him: "Fine. They treated me swell"? A. Yes.

Q. That was the night you signed this confession, wasn't it? A. That was the night we are reading the confessions to each other.

Q. You are sure of that now? A. Yes.

Q. You wouldn't be confused with another man? A. No.

Q. Why didn't you tell Mr. Robinson about this —that the statement wasn't true? A. Because I had remembered the threats.

Q. On the night you signed the confession we are talking about, S-53 for identification, didn't he ask you this question: "Have you made this statement?" And you answered, "Yes." Didn't you say that to him? A. Yes.

Q. But you say it wasn't the night you signed it. Is that right? A. I didn't say exactly. I wouldn't know whether it was the night or not. I wouldn't say it was that night or not, no.

Q. A little while ago you said it was Friday. A. I says about Friday, yes.

Q. Well, you signed this and you gave this on a Tuesday night, and you signed it in the early morning of Wednesday morning. A. No, I didn't give it Tuesday night or Wednesday morning.

Q. You gave it on Wednesday, didn't you? A. Wednesday night.

Q. You gave it Wednesday night, and you signed it early Thursday morning. Is that right? A. About that; yes, sir.

Q. What is that? A. Yes.

Q. Wasn't that when Mr. Robinson was there? A. I don't know.

Q. Did he ask you this question: "Is this statement the truth?" And you answered him, "Yes"? A. That is correct.

Q. Then didn't he ask you this question: "Were there any threats or promises made to you to get you to make this statement?" And your answer was, "No threats whatsoever", wasn't it? A. That is correct.

Q. Before Mr. Robinson asked you this question weren't you told that he had nothing to do with the Police Department or the Prosecutor's Office; that he was just a citizen in the County of Essex? A. Yes, I was.

Q. And that if you wanted to tell him anything, you could. A. Yes.

Q. Why didn't you tell him? A. Because I was told if I didn't what was going to happen to me after he had left.

Q. You were told that if you told anything different something was going to happen to you after he left? A. To anyone that came in there to identify me, yes.

Q. When you were going over this statement before you signed it, you pointed out some things that were wrong in it, didn't you? A. That wasn't the statement I was talking about that said I did the shooting; I was telling you about the statement that Smart made proving or saying that I did the shooting, and I told you, no.

Q. Well, now, just a minute. This whole line of questioning has been directed to the statement that you gave the police. That is the only statement we have been talking to you about.

Mr. Foley: Is that a question or a statement?

Mr. Congleton: That is a statement.

Q. Didn't you understand that?

Mr. Foley: If it is a statement, I move that it be stricken.

Mr. Congleton: I think it is a preliminary statement to asking a question. That is the only way I can really do it.

Mr. Foley: We are interested in questions—not statements.

The Court: It is not a question, but I think it is to call the witness' attention to the subject he is going to talk about.

(The pending question is read by the court reporter.)

Mr. Foley: I move that that statement be stricken.

The Court: Well, what is the last part of it?

(The court reporter reads the last part of the pending question, as follows: "Didn't you understand that?")

The Court: "Didn't you understand that?" I will allow the question.

Mr. Foley: I pray an exception.

A. No, I didn't understand that.

Q. Well, let me ask you this question again: Directing your attention to S-53 for identification, which is the one I called your attention to Saturday, do you remember that? Do you remember when I called your attention on Saturday to the 15th page and asked you if you did not sign your name there? A. Yes, sir.

Q. All my questions are directed to this statement. Were you in fear of anyone when you signed this statement? A. Yes, I was.

Q. Wasn't this the statement that Mr. Robinson came there and asked you about? A. I guess it was.

Q. You guess or you know? A. I wouldn't know, no, because I have signed several statements before or after that.

Q. Wasn't this statement concerning which Mr. Robinson asked you the question, "Were there any threats or promises made to you to get you to make this statement?" And you answered, "No threats whatsoever"? A. He asked me that, yes.

Q. When he asked you it, he was referring to this statement that I have just shown you, wasn't he? A. Yes.

Q. You didn't tell him about anything? A. No, I did not.

Q. You say you did not. Why? A. Because I had remembered what was told to me before.

Q. By whom? A. By Detective Smith and Detective Cook.

Mr. Congleton: Will you stand there a minute, please, Chief?

(Chief Sebold stands in the courtroom.)

Q. Do you remember this gentleman? A. Yes.

Mr. Congleton: Indicating for the record Chief Sebold.

Q. When did you see him? A. Well, he is the gentleman that said, "There is no use of trying to beat a statement in the fellow."

Q. To whom did he say that? A. Well, he said that when these detectives was inside, and he came in afterwards.

Q. Did he see them beating you? A. I don't know whether he seen them beating me or not.

Q. Was he there when you were hit? A. No, he wasn't there when I was hit.

Q. Was this in the afternoon or was this in the evening? ? A. It was in the evening.

Q. Was this when Smith and Cook were there together? A. No, it was when Detective Smith was in there.

Q. That was earlier in the afternoon, wasn't it? Around 4:30 you said. A. Something like that.

Q. That is the incident you are referring to? A. Yes.

Q. That is when this gentleman said to the police, "There is no use beating him; that isn't the way to get a confession"? A. "No use to beat him or threatening him."

Q. Then you weren't afraid after that, were you? A. Of course, I was afraid.

Q. Did you tell him that anyone had struck or beaten you? A. No.

By the Court:

Q. Who did you understand this man was who said that and that you have identified as Sebold? Who did you understand he was? A. I didn't exactly understand who he was.

Q. Did you think he was a detective, did you think he was a citizen? Which did you think he was? A. It was stated he was a detective down there.

Q. You thought he was a detective? A. Yes.

Q. Did you understand that he was the Chief? A. Yes, I understood he was the Chief.

Mr. Congleton: I don't know whether the jury could hear that, so I would like to ask the question over again.

By Mr. Congleton:

Q. Did you understand or were you told that Mr. Sebold was the then Chief of Police of the City of Newark? A. Yes.

Q. In the evening or early morning when you signed this statement that I have just shown you didn't Mr. Robinson also ask you the question, "Are you willing to sign this statement?" And you answered, "Yes, I am."? A. Yes, I answered him that after thinking for a while.

Q. After thinking? A. Yes.

Q. Thinking about what? A. About what was said to me, and then the question he asked me—was I willing to sign it on my own will.

Q. Now, I show you S-53 for identification and ask you if you will point out in there to me anything that you said involuntarily.

Mr. Foley: I object, if your Honor please, upon the ground that the statement, not yet being in evidence, cannot at this time be used for that purpose. It has only been marked for identification, and for a Prosecutor to obtain an answer which indicates that a certain thing is a part of the statement is in effect reading into evidence a part of the statement before the statement itself has been put into evidence.

The Court: Well, what the witness says is that he was under fear all the time. He claims that what he was afraid of was that he was going to be beaten thereafter. That is what he says—or taken out for a ride or something of that sort. So I think your point is well made.

Mr. Congleton: Your Honor sustains the objection?

The Court: Yes, I do. I think that is a general cross examination, Mr. Prosecutor.

Mr. Congleton: If the Court please——

The Court: I want to confine myself, if possible, to this issue: Was it a voluntary statement made or was it not, or at least was it a statement made of such a character that in the judgment of the Court it is competent.

Mr. Congleton: That is it.

The Court: That is what I want to know.

Mr. Congleton: The reason, if I may state the reason I asked the question on direct examination, is that this witness said that he told the police he wanted to make a voluntary statement; he wanted to tell them voluntarily his part in it, but it was because of these threats that he put some other things in there. Now, I am asking this question if he will point out to me what parts of the statement he claims are involuntary.

The Court: Well, I understand he claims it all was involuntary.

Mr. Foley: He says that during the entire time the statement was taken, up to and including the time that he affixed his name to it, that he was under fear of threats that had been made to him by Detective Cook and Detective Smith.

The Court: That is the way I understand his testimony.

Mr. Congleton: Very well, sir.

Q. Now, Brooks, have you ever been convicted of a crime? A. Yes.

Q. How many times? A. Say about three.

Q. When was the first time?

Mr. Foley: If your Honor please, I know that this question is not objectionable, but I should like to have it understood that the sole purpose is to affect the credibility of the witness.

The Court: Well, the Court will instruct the jury on that score at the proper time.

Mr. Foley: Very well, as long as your Honor does.

Q. Let me put it this way: Weren't you in February 1942 convicted of robbery? A. I was.

Q. And sentenced to Annandale by Judge Van Riper? A. I was.

Q. In May 1944 weren't you convicted of larceny and receiving and your sentence suspended and you were put on probation by Judge Naughright?

Mr. Foley: I object, if your Honor please. The conviction can be proved, but the sentence is not material.

The Court: Well, I think anything that the record will disclose may be proven, and certainly the record would discclose the sentence.

Mr. Foley: I pray an exception.

A. May I have that read over again?

(The pending question is read by the court reporter.)

The Witness: Put on probation? No.

Q. Were you convicted of larceny and receiving in May 1944 before Judge Naughright? A. Perhaps it is true.

Q. Well, don't you remember? A. I wouldn't doubt it, no; I wouldn't doubt it. But I don't recall about anything of larceny or receiving.

Q. Well, do you remember being convicted in front of Judge Naughright and being sentenced by him? A. Yes.

Q. What for? A. I was—if I am not mistaken, that was forgery.

Q. That was in 1945, though, wasn't it? A. Well, that is what I am talking about.

Q. But back in 1944 you pleaded guilty. did you not, to two charges of larceny and receiving before Judge Naughright? A. I don't remember.

Q. Would you say you did not?

The Court: Oh, pardon me. He says he doesn't remember.

Q. In 1945, in October, you were convicted on six different offenses before Judge Naughright, weren't you?

Mr. Foley: If your Honor please, I object to that. I think the witness is entitled to have stated what the offenses were. In other words, he is entitled to be questioned upon a definite record of conviction. I have no objection to the record of conviction going in, but I think the witness is entitled to know what were the six crimes.

The Court: His general credit is in issue. Now, his recollection in regard to these convictions, that does not go to his credit?

Mr. Foley: Well, I wonder. I can well understand that his recollection of being convicted would go to his credit, but as to what the different crimes were, it might not at all.

The Court: The question of accuracy of recollection about the number of convic-

tions which he may have had against him, if he says he does not remember them, that affects his credit.

Mr. Foley: He may never have seen the indictments.

The Court: I don't know, but it seems to me on the face of it it does.

(The pending question is read by the court reporter.)

A. Yes.

Q. Two of them were for breaking, entering, larceny and receiving, is that so? A. Yes.

The Court: Will you give me that again?

Mr. Congleton: He pleaded guilty on October 15, 1945, and was sentenced on October 31, 1945, to two charges of breaking, entering, larceny and receiving.

Q. And at the same time you were convicted of another charge of breaking, entering, larceny and receiving, were you not? There were three of them? A. Yes.

Q. One of them was under the alias of John Henry Ashford, was it not? A. Yes.

Q. And at the same time you were convicted here on three indictments or three allegations for uttering bad checks; isn't that correct? A. Yes.

Q. Under the name and using the alias of John Henry Ashford? A. Yes.

Q. You were sentenced to the reformatory at Annandale? A. Yes.

Q. When did you get out of the reformatory?

Mr. Foley: I object, if your Honor please, as not material.

The Court: That would not appear on the record, I don't think, and I think the proof must be confined to whatever the record would show.

Mr. Congleton: All right, sir.

Q. What other names are you known as besides James Brooks, John Henry Ashford, and Gill?

Mr. Foley: I object to that, if your Honor please, upon the ground that it is not proper cross examination, and it goes beyond the subject matter to which he testified. We are concerned here with a hearing on the question of whether or not he made this statement under fear. It is, of course, proper for counsel to show on cross examination convictions of other crimes.

The Court: Yes.

Mr. Foley: But this is still another question which could not be shown by any record, and the proof of which could not be offered in evidence.

The Court: The general question is—it is quite general—whether at other times he was known by aliases, and I don't think that is material to the present issue.

Mr. Congleton: Very well. I will save it for the main case. No further questions.

Re-direct examination by Mr. Foley:

Q. Brooks, in the course of Mr. Congleton's questioning of you, he brought out that you testified to one thing today that you didn't testify to on Saturday. Have you discussed this matter with me or with Mr. Hayden, or have you even seen us between the time you left here on Saturday afternoon and the time you returned this morning? A. No.

Mr. Foley: That is all.

Mr. Congleton: The State did not mean to infer in its questioning that anything this witness testified to here was suggested by Mr. Foley or by Mr. Hayden.

Mr. Foley: It would not be intentional, but it might occur to the jury that perhaps that was done, and that was the reason that Mr. Haydon and I purposely refrained from discussing anything with him over the weekend. That is the evidence we are offering on the question of the admissibility of the confession.

The Court: That concludes the evidence in behalf of the defendant on the issue as to whether or not the statement is voluntary?

Mr. Foley: Exactly.

The Court: Very well. Has the State anything further on that issue?

Mr. Congleton: Yes, sir.

FRANK A. O'NEILL, recalled.

Direct examination by Mr. Congleton:

Q. Chief, directing your attention to the afternoon of December 18, 1946, and the evening of the same day, were you present on that occasion in what is known as the Bandit-Homicide Squad Room and the small room? A. I was.

Q. Do you recall the defendant, Brooks, being brought into Headquarters after he was apprehended? A. I do.

Q. Were you there at the time he was brought in? A. I was downstairs when he was brought in.

Frank A. O'Neill, Recalled, for the State—Cross.

Q. And you were notified? A. I was.

Q. What did you do after you were notified? A. I came upstairs immediately to the fourth floor.

Q. Did you then proceed to interview the defendant, Brooks? A. I did.

Q. Where? A. In the outer room off the Bandit Squad Room, the small room.

Q. How long did you stay with the defendant, Brooks? A. I stayed with the defendant, Brooks, from approximately 3:30 in the afternoon of the 18th until 1 a.m. on the morning of the 19th.

Q. You were not, however, in the small room all the time, were you? A. Not all the time, no.

Q. But you were in either the small room or the big room; is that right? A. Yes.

Q. While you were there did you see Detective Smith go into the small room? A. At no time did he enter that small room.

Q. Did you see Detective Cook go into the small room? A. I did not, sir.

Q. In your presence did you see Detective Cook or Detective Smith or anyone else strike this defendant? A. I did not, sir.

Q. Or threaten him? A. No, sir.

Mr. Congleton: That is all.
Cross examine.

Cross examination by Mr. Foley:

Q. Chief, do I understand you to say that you were with this defendant at all times from 3:30 in the afternoon until about 1 o'clock when he signed this statement? A. Correct, sir.

Q. He was never out of your sight for one minute? A. No, sir, I believe not.

Frank A. O'Neill, Recalled, for the State—Cross.

By the Court:

Q. Didn't you say you were in and out of the room? A. Yes, your Honor. The room is about 11 by 15, the smaller room, and the larger room with the doors open is—he was within my sight at all times. I stepped out two or three times to telephone or interrogate somebody outside.

By Mr. Foley:

Q. There were times when you left the room for two or three minutes at a time? A. That's right, sir.

Q. Your recollection that you were there at all times is a very clear one? A. Yes, sir.

Q. Your recollection when you testified on Saturday day with respect to the impartial witness having signed the statement proved to be faulty, didn't it?

Mr. Congleton: I object to that, if the Court please.

The Court: Sustained.

Mr. Foley: If your Honor please——

The Court: That simply calls upon him to characterize his testimony.

Mr. Foley: I pray an exception.

Q. On Saturday you testified that it was your recollection that the impartial witness had signed the statement which Brooks signed, did you not?

Mr. Congleton: That is objected to. It is not proper cross examination within the scope of the direct examination. It is improper and irrelevant.

Mr. Foley: I am testing the recollection of the witness for the purpose of affecting his credibility.

The Court: I will allow it.

A. I was under the impression, sir, that he did sign it.

Q. And before you left the stand you testified that he did not sign it? A. After perusing the statement I learned that I was under the wrong impression.

Q. So your recollection wasn't correct?

Mr. Congleton: I object to that.

The Court: He does not have to draw that inference.

Mr. Foley: Your Honor sustains the objection?

The Court: Yes.

Mr. Foley: I pray an exception.

Q. You also testified that the impartial witness arrived at Headquarters between 8 and 8:30 p. m., did you not? A. I did. I said after 8 o'clock. Then I again said between 8 and 8:30. I was under the impression that it was that time.

Q. As a matter of fact, he did not arrive until sometime around 10:30?

Mr. Congleton: I object to that as immaterial and not within the scope of the direct examination.

Mr. Foley: I ask that for the purpose of affecting his credibility.

The Court: I will allow it.

A. That is right, sir.

Q. Now, Chief O'Neill, the first time you saw Brooks that afternoon was about half past three, did you say? A. Correct.

Q. With whom was he when you first saw him? A. Detectives O'Beirne and Geiger.

Q. They were the arresting detectives, were they not? A. Correct.

Q. And how long did they remain with Brooks in your presence? A. I would say about forty minutes, sir.

Q. While they were there were there any other detectives present? A. Lieutenant Strong.

Q. Anybody else? A. In the outerroom, sir, I should think—I am sure that—no, I can't recall any of the others being there.

Q. Would you say there were no others there? A. No.

Q. There in the small room, not the large room. A. I would say not in the small room, but in the outer room, the larger room, there probably was Detective Queenan, who does the office work there.

Q. Now, you say O'Beirne and Geiger stayed there for about forty minutes, which would bring us up to about ten after four or a quarter after four; is that correct? A. Correct.

Q. How long did Lieutenant Strong stay there? A. About a half hour.

Q. He left about 4 o'clock? A. About that time.

Q. Then when O'Beirne and Geiger left you were alone with the defendant, were you not? A. That's right, sir.

Q. For how long did you remain alone with the defendant? A. About approximately fifteen minutes.

Q. That would bring us to about 4:30? A. Yes.

Q. Who came then? A. Detective Daley was sent up from the reserve of the Detective Bureau by Lieutenant Strong when he left. He had gone

downstairs and he sent Daley up to be in the room with me and the defendant.

Q. Do you see Daley here today? A. I don't see him, sir.

Q. Is Strong here today? A. No, sir.

Q. How long did Daley stay there? A. I think he remained until, I think, a quarter to five or five o'clock.

Q. Just the two of you? A. I can't recall just how long, sir, he stayed there, but it was not very long.

Q. But in that brief period just you and Daley were there? A. That's right, sir.

Q. And after Daley left, you and the defendant were then alone again? A. No. When Daley left Lieutenant Flynn and Detectives Cook and Smith came in the outer room.

Q. What time was that? A. Five o'clock or shortly thereafter.

Q. And did they come in? Were they with you and the defendant at that time? A. Lieutenant Flynn came in the smaller room. Detectives Smith and Cook—the door was open between the smaller room and the larger room, and they stayed in the doorway.

Q. How large is this small room? A. About 11 feet wide and 19 feet long.

Q. What furnishings are in it? What furniture is in it? I should put it that way. A. Three chairs and a table.

Q. How large is the table? A. I would say 7 by 4 or something like that.

Q. Was the table in the center of the room or against the one wall? A. In the center of the room.

Q. And the chairs are around the table? A. That's correct.

Q. How near would the nearest chair be from that doorway? A. Three feet.

Q. Is that the chair in which the defendant sat? A. Correct.

Q. And you occupied one of the other chairs, did you? A. Correct.

Q. To the right or to the left of the defendant? A. To the left.

Q. How long did Cook and Smith remain standing in the doorway? A. Accurately I couldn't tell you, sir. I was busy with the defendant.

Q. Approximately how long? A matter of an hour or two? A. I would say it might be that long.

Q. As I understand it, they just stood there in the doorway. They didn't come in the room. A. They were walking around the large room and standing in the doorway.

Q. They, of course, had no business with the defendant? You and Flynn were discussing the matter with him, is that correct? A. Flynn was not discussing the matter.

Q. You were? A. I was, sir. And I might say that I can recall now that Chief Sebold was there at that time, also.

Q. In the room with you? A. That's right.

Q. For how long? A. The Chief stayed there with me continually then until late in the evening.

Q. When did he arrive?

By the Court:

Q. Excuse me. What room do you mean? A. The smaller room.

Frank A. O'Neill, Recalled, for the State—Cross.

By Mr. Foley:

Q. When did Chief Sebold arrive? A. Shortly after 4 o'clock. He was in his office downstairs and I informed him that the prisoner was upstairs and he came up.

Q. Came up shortly after 4? A. That's right, sir.

Q. Was Strong there then? A. I thing he was, sir.

Q. He was there while Daley was there? A. No. Daley was not there then.

Q. Daley came in after? A. After Strong had left.

Q. Was the Chief there while Daley was there? A. I don't think so. I think he came in—I mean, he was there only a short time, Daley.

Q. I thought you said the Chief stayed there with you at all times? A. I did say that.

Q. Since Daley came after Strong, if the Chief was there while Strong was there, he must have been there while Daley was there.

Mr. Congleton: I object to that. It is purely argumentative.

The Court: I think the Chief can answer it.

Mr. Foley: I pray an exception.

The Court: I am going to allow him to answer it.

Mr. Foley: I beg your pardon. I thought you said no.

The Court: That is all right. Go ahead.

A. I made no notes with regard to definite time in and out. I can only say that, as I explained it there, after Lieutenant Strong left, he sent Daley from reserve upstairs to me. Whether the Chief

came in at that time or whether he was there when Strong was there, I can't recall that.

Q. Since you made no notes, we are interested in the accuracy of your recollection. Didn't you say before that when Strong was there you and Strong were the only two in the room?

Mr. Congleton: If the Court please, I object to the statement contained in the question about being interested in the accuracy of the Chief's recollection and so forth. I don't think that is a question or should be any part of the question, and I ask that it be stricken out.

The Court: Perhaps it is a statement.

Mr. Foley: I will consent to have it stricken.

Q. Didn't you testify that while Strong was there only you and Strong were in the room? A. That's right, sir.

Q. And now you say you think Sebold may have been? A. I can't recall whether he was there with Lieutenant Strong or not. I cannot say definitely.

Q. Didn't you say before when Strong left you were the only one in the room with the defendant? A. Yes, I did say that, sir.

Q. Is that still your recollection? A. When Strong left for about a minute or two minutes, from the time he left the fourth floor to go down to the second floor to send Daley up, as far as I remember, I was alone with him.

Q. Up to that time Sebold had not arrived, had he? A. That may be so. I can't recall.

Q. That is so, isn't it? A. I can't recall it, sir.

Frank A. O'Neill, Recalled, for the State—Cross.

Q. Didn't you say before that while Daley was there only you and Daley were in the room? A. That's right.

Q. Is that your best recollection? A. Yes, sir.

Q. If that is your best recollection then Sebold hadn't arrived until Daley left, had he?

Mr. Congleton: Objected to as argumentative.

The Court: No, I will allow that.

A. He may have arrived shortly after Daley or just as he was about to go downstairs for him, because it was near 5 o'clock at the time.

Q. Near 5 o'clock? A. That's right.

Q. Haven't you testified that Sebold arrived at about 4 o'clock? Isn't that the testimony you gave a little while ago? A. I am trying to recall how long I was with the defendant before the Chief came up.

Mr. Foley: I move to have the answer stricken out as not being responsive and ask to have the question read, if your Honor please.

The Court: The witness says he is trying to recall. What you are asking the Chief about now is the precise hour he came in?

Mr. Foley: No, sir; I am not.

The Court: Whether somebody was there or nobody was there at some particular time.

Mr. Foley: That, of course, is quite important but this particular question, if your Honor please, is directed to something that the Chief has already testified to. I will repeat the question, if your Honor please. It is this:

Frank A. O'Neill, Recalled, for the State—Cross.

Q. Haven't you already testified that Sebold arrived at 4 o'clock or thereabouts? A. That is my impression, sir.

Q. Is it your impression that he arrived at 4 o'clock or is it your impression he arrived at 5 o'clock? A. He arrived before 5 o'clock. I am sure of that.

Q. Haven't you said that Daley left at 5 o'clock, and you don't know whether the Chief was there before Daley left or not? A. I am not sure whether Daley was there or not when the Chief came in or whether the Chief was in the room when Daley came in.

Q. If he did not arrive until after Daley left, he did not arrive until after 5 o'clock?

The Court: I think that is argumentative. The Chief does not purport to testify from notes. He is merely telling from recollection as to particular parts of the hour.

Mr. Foley: If your Honor please, it must be remembered that the tenor of the Chief's testimony is that Detectives Smith and Cook did not enter this room at any time, and so it is important to the defendant to ascertain who was there with some reasonable degree of accuracy. The State has offered the Chief as a witness. Having offered him, presumably he is in a position to testify with some reasonable degree of accuracy as to the subjects he has already testified to.

The Court: When he says a certain person was not there during the period he is there, that is quite definite, but when you get down to the particular minutes, what occurred this minute and what occurred

in another fifteen minutes, you must remember that we are trying an issue before the Court. So I wish you to remember that. That is all I can say.

Mr. Foley: I have it in mind at all times. I can assure your Honor of that.

The Court: When the Chief says a person was not there at a particular time, that is quite definite, but when he undertakes from recollection to fix the hours that people came in and out within fifteen minutes at a time we are referring to back in December 1946——

Mr. Foley: Which isn't very long ago, if your Honor please.

The Court: It is long for some people, especially if you have a great deal to do; it is not long for others, perhaps; but you can proceed.

Mr. Foley: I will try to develop it without reference to immaterial matters, but of course we are concerned with a period of time, and necessarily we have to find out what took place at different times. I think I may point out to your Honor that in the cross examination of the defendant frequent reference was made to this hour and that hour and the other hour.

The Court: That is true enough, but it is an entirely different thing, it seems to me, because this was one event in the mind of the defendant, whereas there are many cases before the Chief of Police, and so I am just suggesting to you that the effect may not be as strong perhaps as you may feel it is.

Mr. Foley: All of us lawyers I think are prone to overestimate the importance of our own ideas. I will agree with your Honor on it, and I will be very happy to follow your Honor's suggestion.

The Court: Do not misunderstand me, because I must put myself in the same category with other lawyers.

Mr. Congleton: I think that, if the Court please, if I might be allowed to point out, in the light of all the statements Mr. Foley has made in his discussion of it, that part of the present difficulty is due to the fact that the defendant himself could not remember who the other detectives were that were present.

The Court: Well, gentlemen, we are arguing. Mr. Foley, will you go on as you see fit and finish?

Mr. Foley: I will follow your Honor's suggestion.

The Court: You follow your own ideas, and do not disturb yourself on my account by what I think.

Q. Deputy Chief, what is your best recollection of when Smith and Cook arrived, fixing it, if you will, not from the standpoint of an hour, but as to who was present when they arrived, if that would make it simpler for you? A. Answering your question as to the approximate time, they arrived after 5 o'clock, and I was in the room with the defendant.

Q. And who else? A. Deputy Chief Sebold, or Chief Sebold. Excuse me for underrating our good Chief.

Q. Now, at that time was anybody there besides you and Chief Sebold? A. Not that I can recall.

Q. Who was the next person who arrived and came in the small room? A. Lieutenant Flynn came in the small room. In the doorway and also in the outer room were Detectives Smith and Cook. I believe that is all.

Q. What were Detectives Smith and Cook doing at that time? A. Nothing particular. They walked up to the door, they looked in, stood there in the doorway. They heard me interrogating the prisoner, and they were walking back and forth and in the doorway of the outer room and the doorway of the smaller room.

Q. When did you conclude your interrogation of the prisoner? A. About 6:30 approximately. You mean entirely conclude it or off and on?

Q. Well, you mentioned 6:30. What does that hour mean to you with respect to concluding your examination? A. That he had completed the story of the robbery and murder.

Q. Did you write it down? A. I did not, sir.

Q. Did anybody write it down? A. Yes, sir.

Q. Who? A. Captain Cocozza.

Q. Captain Cocozza did not come there until 7:30, did he? A. That is right, sir—7:40.

Q. Who wrote down what you and Brooks were talking about between the hours of 3:30 and 6:30? A. Nobody, sir.

Q. No record was made of that? A. That's right, sir.

Q. You were interrogating a man who was charged with murder? A. That's right, sir.

Q. During that time the Chief of Police of the City of Newark was there? A. That's right.

Q. The Deputy Chief of Police of the City of Newark was there, detectives were there, and nobody wrote down one word of what Brooks said? A. I was interrogating the defendant.

The Court: Pardon me. He says that, Mr. Foley.

Q. That is true? A. That is true. I might add to that, if I may——

Q. Never mind adding anything to it. What were Smith and Cook doing all this while?

Mr. Congleton: Objected to, if the Court please. He has already been asked the question and he has already answered it.

Mr. Foley: Well, I asked him what Smith and Cook were doing at a certain time. That is not the time covered by this question.

The Court: What time is covered by this question?

Mr. Foley: All the while that they were there.

The Court: All the while that they were there—Smith and Cook?

Mr. Foley: Yes.

A. I didn't pay much attention to them, your Honor. They were walking around the outer room and standing in the doorway. I asked them no questions; they asked me no questions. They didn't ask the defendant any questions. And I particularly paid very little attention to those officers.

Q. And they never once, either of them, moved beyond the doorway into the room in which you were sitting? A. That is correct, sir.

Q. The closest either of them ever got to Brooks was 3 feet away? A. Approximately.

Q. How many times during the period between 3:30 and 6:30 did you leave the room for two-or-three-minute intervals? A. While I was interro-

gating the prisoner and while he was giving the story to me I did not leave that room; I stayed there and listened to him. But after 6:30, on the arrival of Captain Cocozza and the men from the Prosecutor's Office, I stepped out and in the outer room occasionally.

Q. You fix the time of the arrival of Captain Cocozza and the men from the Prosecutor's Office at 6:30? A. About that time or shortly thereafter.

Q. How long did they wait before commencing to take a statement from Brooks? A. It may have been 40 minutes, 50 minutes—something like that—getting arrangements made for the statement—statement sheets and so forth.

Q. They brought the statements sheets with them, didn't they? A. I can't recall—yes, they must have brought them with them because they brought the Prosecutor's stationery for that.

Q. Did you see the stationery? A. I saw the statement paper, yes, sir.

Q. Was it on the Prosecutor's stationery or on the stationery of the Department of Police of the City of Newark?

Mr. Congleton: I object to this. We are going outside the scope of whether or not this statement taken from the defendant was voluntary or involuntary.

Mr. Foley: This has to do with this man's recollection.

The Court: That is so minute, and we have the statement here in court, and it is going into such minute details, Mr. Foley, that I am afraid we will never get through.

Mr. Foley: I don't intend to go into any more detail than I have to, but you can

readily understand that it is only in the smaller details that I can hope to affect this man's credibility. In the larger things I would only be asking him to repeat what he said on direct. Sometimes one's recollection can best be judged by his recollection of apparently smaller matters.

The Court: We spent so much time on it. Whether the Chief noticed the kind of paper that was being used, will that get us very far? Does it matter whether it was the Prosecutor's paper or the Department's paper?

Mr. Foley: That standing alone, your Honor, would be insignificant, but if his recollection on a number of small matters is found to be incorrect, surely the jury would have the right to infer that the man's recollection generally is subject to scrutiny.

The Court: Well, if you can tell us, will you tell us what kind of paper it was?

The Witness: I recall now, your Honor, that it was our Detective Bureau statement paper because I looked it over here on the witness-stand and also looked it over that night, but I didn't remember. Now I can recall that it was the Detective statement blanks.

Q. You say that it took Captain Cocozza and his men about 40 minutes to get ready to take this statement, to get the statement paper and everything. What else did they have to get besides the statement paper?

Mr. Congleton: I object to that, for this reason. We are now getting into what the

mental processes are of men from the Prosecutor's Office; why they didn't bring other things down and why they didn't put everything else aside and go in there and take the statement. They may have a lot of reasons.

Mr. Foley: I withdraw the question.

Q. What was done by you during the 40 minutes which elapsed from the time the Prosecutor's men got down there until the time they took the statement? A. Oh, I may have remarked to Captain Cocozza——

Q. Not what was said. What was done by you? A. I am trying to explain it.

Mr. Congleton: If he had a conversation, can't he tell it?

The Court: He was not asked to recite a conversation.

Mr. Foley: I said what was done by him.

A. Nothing was done by me, sir.

Q. Did you have a conversation with Captain Cocozza or anyone else from the Prosecutor's Office? A. I did.

Q. Did you tell them in advance of their taking the statement of Brooks what Brooks had told you?

Mr. Congleton: Objected to as improper at this time. It has nothing to do with the voluntariness or involuntariness of the statement.

Mr. Foley: The question is asked for the purpose of affecting his credibility.

Mr. Congleton: I don't see how it affects anything the witness has testified to.

Mr. Foley: It does not have to.

The Court: Suppose he said yes. You don't expect him to go into the details of what he said, do you?

Mr. Foley: No.

The Court: You want to know in general.

Mr. Foley: Yes.

The Court: If you put it in general, I will allow it.

By the Court:

Q. Did you state in general to Captain Cocozza what you had been told? A. I told Captain Cocozza——

Mr. Foley: Yes or no.

Mr. Congleton: It may be that he can't answer that yes or no.

The Court: The question may not be acceptable.

Mr. Foley: May I have my question put as I originally put it?

The Court: All right. I withdraw my question.

By Mr. Foley:

Q. Did you tell Captain Cocozza all or any part of what Brooks had told you?

Mr. Congleton: I object to that. There are two questions in it. He says "all or any part".

The Court: Go ahead.

A. I told Captain Cocozza——

Mr. Foley: I request that the witness be directed to answer that question yes or no.

Frank A. O'Neill, Recalled, for the State—Cross.

It calls for a yes or no answer. The question is clear on its face and I ask your Honor to direct the witness to answer yes or no.

(The pending question is read by the court reporter.)

A. I contend that is a very difficult question to answer.

Mr. Foley: If the witness feels that it is a difficult question to answer, I won't press it.

A. I would like to just say this——

Mr. Foley: I am asking for a yes or no answer. If he says he can't answer it, I don't want any answer, and I ask your Honor to instruct him to answer it yes or no if he is going to answer it at all.

A. I will answer "Yes".

The Court: Now, I was holding up on taking our recess, expecting you to get through with this witness, but we take so much time. We will take our customary ventilation recess.

(A short recess is taken.)

Q. Chief, I just have one more question. Have you told us the names of every detective of the Newark Police Force who was present in the small room with you at any time while you were questioning Brooks? A. I believe I did.

Frank A. O'Neill, Recalled, for the State —Re-direct.

Q. So that would be Chief Sebold, Lieutenant— A. Strong. John Strong.

Q. Detective Daley? A. That's correct, and the two arresting officers, of course.

Q. O'Beirne and Geiger? A. And Geiger.

Q. Who left shortly after? A. And Lieutenant Flynn.

Q. And Lieutenant Flynn. And none of those persons you have mentioned were there during the entire time you were questioning the prisoner; is that correct? A. That's correct.

Mr. Foley: That is all.

Re-direct examination by Mr. Congleton:

Q. Didn't Lieutenant Wangner also come in?

Mr. Foley: Objected to as being leading.

The Court: Oh, no. That can be asked.

Mr. Foley: Certainly, if your Honor please, it suggests the answer.

The Court: The weight of it is for the jury, is for the Court.

Mr. Foley: I object to it upon the ground it is a leading question.

The Court: Yes. I will allow the question.

Mr. Foley: I pray an exception.

A. I can recall that Lieutenant Wangner also was there.

Mr. Congleton: That is all.

PHILIP SEBOLD, sworn.

Direct examination by Mr. Congleton:

Q. Chief, you were a member of the Newark Police Department for how long? A. 41 years.

Q. When did you retire? A. March 8.

Q. This year? A. This year.

Q. In December 1946 you were actively on duty as Chief of Police of the City of Newark, is that correct, sir? A. Yes.

Q. Directing your attention to the afternoon of December 18, 1946, did you see the defendant, Brooks, in Headquarters? A. I did.

Q. About what time was it when you first saw him? A. Somewhere between 4:30 and 5.

Q. Where was he when you first saw him? A. On the 4th floor in the little room off the bandit room.

Q. Prior to your going to the small room where had you been? A. My office.

Q. Is that on the same floor? A. That's on the second floor.

Q. You came upstairs and went into the small room? A. I did.

Q. When you went into the small room whom did you see there? A. I saw Inspector O'Neill. At that time he was Inspector. He was promoted since to Deputy Chief. I saw Inspector O'Neill, and I also recall seeing O'Beirne and Geiger in and out of there.

Mr. Foley: What was the latter part of that answer?

(The last answer is read by the court reporter.)

A. (Continuing) And then Lieutenant Flynn came in at one time there; Lieutenant Wangner, and Detective Kosloski of the Prosecutor's Office came in shortly.

Q. When you came in, to get into that small room, you had to pass through the large room? A. Yes.

Q. When you passed through the large room did you observe either Detective Smith or Cook there? A. No, they were not there.

Q. Now, how long did you stay up there in the bandit or homicide squad room that afternoon? A. Well, I stayed with Brooks until something like 6:30 o'clock or 7 o'clock, and then from then I went with Inspector O'Neill to the photographer's room where we took out Smart from the cell.

Q. All right, you can't tell us about that part of it. But you sayed in the bandit squad and homicide squad room and the small room from the time you got there until somewhere around 6:30 or 7? A. 7 o'clock I would say, yes.

Q. During the course of the time you were there did you know who was with the defendant? A. Who was with him in the room?

Q. Yes. A. Yes.

Q. At any time while you were there was Detective Smith in the little room with the defendant? A. He got as far as the door. He opened the door and came in, and I objected to him—anyone interrupting the procedure—the questioning there. That is an unwritten law in the Police Department. We do not permit ourselves to be interrupted. And I ordered Smith out of the room. The closest he got was about 4 feet from Brooks.

Q. Did you see Detective Cook at any time in the small room? A. No, he never got in the small room.

Q. While you were there, Chief, did you see anyone strike the defendant? A. No, sir.

Q. Did you strike the defendant? A. No, sir.

Q. Did you hear——

Mr. Foley: It is not claimed that Chief Sebold did, lest there be any misunderstanding about that.

Q. Did you hear anyone make any threats to the defendant? A. No.

Q. Of any nature whatsoever? A. No.

Q. While you and the Deputy Chief and the defendant were there, I suppose you had a conversation with the defendant, did you not? A. I did.

Q. During the course of that conversation will you tell us who else came into the room? A. Lieutenant Wangner came in with the money that he had found where Brooks had directed him to look for it.

Q. What did you do when Lieutenant Wangner came in with the money?

Mr. Foley: Objected to, if your Honor please. We are only dealing with the question of the threats, and we do not suggest or intimate in any way that Chief Sebold was guilty of any threats. So that anything he did would have no bearing whatsoever upon whether or not Brooks was threatened by Cook and Smith.

The Court: Is the question what the Chief did?

Mr. Foley: What did the Chief do?

Mr. Congleton: What was done is what I meant.

Mr. Foley: Will you have it read, please?

(The pending question is read by the court reporter.)

Mr. Congleton: Strike that out.

Q. What was done when Lieutenant Wangner came in with the money?

The Court: Pardon me just a minute. Will you give me the time you were there in that little room?

The Witness: I would say sometime from between 4:30 and 5 to close to 7 o'clock.

The Court: Then you stayed until about 7?

The Witness: About 7 o'clock in that particular room.

The Court: These are just approximate times?

The Witness: Yes. I was in the immediate presence all the while after 7 o'clock until somewhere around 1 o'clock in the morning on the same floor, that is, I was within a radius of 25 or 50 feet at all times.

The Court: Until when?

The Witness: About 1 o'clock in the morning.

Mr. Foley: Now may we have Mr. Congleton's question read?

(The pending question is read by the court reporter.)

Mr. Foley: That is objected to because it is not relevant to the inquiry in which the Court is presently engaged. It might

be proper as general examination on the general issue of the robbery but not on this particular issue.

The Court: Of course, I don't know what is going to be said.

Mr. Congleton: I can only tell you what I believe is going to be said, if Mr. Foley wants me to state it.

Mr. Foley: No, I don't think counsel should make any statement, but it seems to me that the question should be directed to what, if anything, was done by the two persons named by the defendant as the ones who had threatened him. What anybody else did would have no bearing upon that issue, since, as I understand it, he does not charge any of the other officers with having threatened him.

The Court: That might not follow.

Mr. Foley: Certainly the question should be amended to the end that we know what was done and by whom. In other words, what was done is so broad a question that it might embrace many, many things which would have no materiality to the issue. The question should by its terms indicate to the Court that the answer will in all reasonable probability have a bearing upon the issue.

The Court: The question is as to what was said by the witness. Isn't that the question?

Mr. Congleton: No, sir. The question originally was: What did Chief Sebold do when the money came? That was objected to and I changed it to: What was done when the money came? That is the pending question.

Mr. Foley: I suggest that the question should contain some suggestion of "done by whom". In that way we will know whether or not it is material or relevant.

The Court: Does that cover the situation—done by whom?

Mr. Congleton: No, sir.

The Court: "And by whom?"

Mr. Congleton: Yes. "And by whom?" I have no objection to adding that to the question.

A. We counted the money and placed it in bags. Some of it was found in various places in the house, in the baby carriage, some here and some there, the exact point where the money was found, and we placed it in bags and so marked it and counted the money, and we placed it in paper bags and marked it.

Mr. Foley: Just a minute. I move to strike the answer on the ground that it has no relevancy to this issue.

Mr. Congleton: It is preliminary now to the next question and if the next question does not bring out what I contend, I will consent that it be stricken.

Q. During the time that you were counting the money, what was the defendant doing? A. He was sitting right at the table. He was eating some pork chops and potatoes and one thing or another. The hot meal we had sent for.

Q. Who sent for that hot meal? A. Well, I don't know. It was myself—I ordered it and O'Neill agreed that we should get him a meal.

Q. This was during this period while you and Deputy Chief O'Neill and Lieutenant Wangner

and the prisoner were in this small room? A. And Lieutenant Flynn was also in the room.

Q. And Lieutenant Flynn also? A. Yes, and Kosloski at that time.

Q. And Kosloski? A. Yes.

Q. During the entire time that you were there, Chief, did you see either Detective Smith or Detective Cook strike the defendant or threaten him?

Mr. Foley: That is objected to, if your Honor please. He has already testified that he did not see Cook at all, that Smith never entered the room, that the nearest he got was to the open door and he was directed to leave. Obviously, this question has already been answered.

The Court: It may have been by inference, but I will let it be answered directly.

(The pending question is read by the court reporter.)

A. No, sir.

Q. Now, Chief directing your attention to the physical layout of this small room; there are two windows there, are there not? A. Yes, sir.

Q. And is there anything over those windows? A. Well, there is a grill over the windows to prevent anybody from jumping out.

Q. Is that plainly visible there to anybody in the room? A. Oh, yes.

Cross examination by Mr. Foley:

Q. Can the grill be removed in order to enable you to clean the window? A. Well, I don't know. On the others we have a lock on it and it must be unlocked. I don't know whether the same thing exists on that window. It is not left there for any-

one to open it. There is some trick about opening it.

Q. Whether by unlocking the lock or otherwise, the grille can be removed? A. It can be opened. I think it opens on a swing or hinge.

Q. Chief, I understand that you say that in addition to those detectives named by Chief O'Neill as having been present, there was also present Detective Kosloski? A. Yes, sir; of the Prosecutor's Office.

Mr. Congleton: If your Honor please, I object to that question even though it is asked, because when Mr. Foley asked Deputy Chief O'Neill who was present, he specifically limited it to members of the Newark Police Department, and Detective Kosloski is not a member of the Newark Police Department.

Mr. Foley: You are right, and I will withdraw the question. You are entirely correct. I remember that I did so limit it.

Q. Chief, after you entered the room, I take it that you closed the door from the little room to the big room? A. Yes, sir.

Q. Did that door remain closed at all times except when somebody entered or left the room? A. That is correct.

Q. You say that you did not see Detective Cook at all? A. No, sir.

Q. When, prior to the time that you entered the room had you last seen Detective Cook? A. I don't recall seeing Cook at all that day between 4 o'clock—or I might have seen him during the day around the lunch period or something. But from 4 o'clock on I don't recall ever seeing Cook at all.

Q. When thereafter did you next see Cook? The next day? A. To the best of my recollection, I wouldn't even say I saw him the next day. I don't know when I saw him after that.

Q. I understand you to say that when Smith entered the room he did so first by opening the door. A. That is right.

Q. You then directed him to leave the room? A. I did.

Q. Is it not a fact that sometime during the time that you and Chief O'Neill were together, Cook and Smith stood in the open doorway? A. It could have happened before I got up to that room. I don't know what happened after I got there.

Q. Was the door open or closed when you arrived? A. It was closed, and I knocked on the door and somebody inside said come in.

Q. You got there between 4:30 and 5? A. That's right.

Q. From the time you arrived until 6:30 or 7 you say that neither Cook nor Smith stood in the open doorway and that, in fact, there was no open doorway? A. That is the best of my recollection. That door was closed.

Q. Well, if it were closed, of course, they couldn't stand in the open doorway. A. That's right.

Q. Where were you sitting, Chief, with respect to the prisoner? A. The prisoner sat right alongside me. I was facing the wall, with my back to the door, and Brooks sat on my right. On the other end of the table, on my left, sat Inspector O'Neill. And on the other side of Brooks sat Lieutenant Flynn. And at the door, facing the table, was Detective Kosloski, of the Prosecutor's Office.

Q. You say your back was to the door? A. My back was to the door.

Q. Did you leave at any time? A. No. I did after 7 o'clock.

Q. I mean during that time commencing 4:30 to 5 and ending 6:30 to 7. A. No, not during that time.

Q. During all that time your back was to the door? A. Well, I wouldn't say all the time. I might have turned and faced the door. I faced the door when Smith came in. I wouldn't say my back was constantly to the door, but that would be—that was the normal position I was in, and most of the time my back was to the door.

Q. When did you see Smith after the time when you directed him to leave the room? A. Well, I think I saw Smith later on that night as I went in to talk to Smart, and I think Smith was out in the big room.

Q. Would you fix the time? A. I would say that was between 7 o'clock and 1 o'clock in the morning.

Q. Where was he then? A. He was out in the big room.

Q. Was Cook out there? A. I didn't see Cook.

Mr. Foley: That is all.

Re-direct examination by Mr. Congleton:

Q. I neglected to ask you a question, Chief. This big room you speak about, which we refer to as the Bandit and Homicide room: There are desks in there, are there not? A. Yes, there are desks.

Q. Lieutenant Flynn has a desk there? A. That's right.

Q. Cook and the others have their desks there? A. That's right.

Q. Smith, too? A. Yes.

Mr. Congleton: That is all.

Marcus H. Greifinger, sworn.

Direct examination by Mr. Congleton:

Q. Dr. Greifinger, you are a duly licensed physician and surgeon of the State of New Jersey? A. Yes, sir.

Q. You have been for how long, sir? A. I was licensed in 1925.

Q. What positions do you hold, doctor? A. In the various hospitals, you mean?

Q. Yes. A. I am——

Mr. Foley: I raise no question about the doctor's qualifications.

Q. Do you hold any other positions aside from your association with the hospitals? A. Yes, sir.

Q. What are they? A. I am the Assistant Police Surgeon of the City of Newark.

Q. Do you belong to any medical societies? A. I am the secretary of the Essex County Medical Society.

Q. Now, doctor, in the course of your duties as Assistant Police Surgeon, did you have occasion on December 19, 1946, to examine the defendant, James Brooks? A. Yes, sir.

Mr. Foley: May it be noted that the doctor is referring to a memorandum and testifying, please?

The Court: Very well, yes.

Q. Doctor, where did that examiantion take place? A. At Police Headquarters.

Q. Do you remember about what time you got to Police Headquarters to make that examination? A. I got there about 2 a. m., and started my examination at 2:10 a. m.

Q. And that was in the early morning of December 19? A. Yes.

Q. Who was present when you made that examination? A. Detective Kosloski, Deputy Chief O'Neill, Captain Cocozza, and a Mr. Robinson.

Q. And the examination took place in the small room that we heard about? A. Yes, sir.

Q. What did your examiantion consist of? A. Having the man strip and speaking with him and examining his body.

Q. Did you find any evidence of any trauma in or about his body or head? A. I did not.

Q. Any bruises or anything of any nature? A. I found no evidence of any trauma.

Q. Did you ask the defendant whether or not he had any complaints to make? A. Yes, sir.

Q. What was his reply? A. That he was not injured, that he made a voluntary statement in which he admitted to the truth.

Q. During the course of that examination did you ask him what he had to eat? A. Yes, sir.

Q. And what did he tell you? A. For breakfast he told me he had some spam and eggs and a chocolate milk drink. He also had later on two drinks of Schenley and a glass of ale. For lunch, which he said he had in Irvington, he had a cup of coffee and a hamburger, and I noted that he was smoking cigarets and I asked him if he had cigarets and he said he did. He was smoking Lucky Strikes. For supper, which he told me was provided by the police, he said he had two pork chops, French fried potatoes, cole slaw, coffee, bread and butter and pie, and he was given some cigarets by the police.

Marcus H. Greifinger, for the State—Cross.

By the Court:

Q. He was smoking at the time of the examination? A. I noted that he was smoking, yes.

Q. Or had been smoking? A. Or had been smoking.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. Doctor, you went there for the purpose of examining this man to see whether or not there were any bruises or marks on his body, is that correct? A. I went there to note that and to see whether the man was rational and calm or clear or not.

Q. No part of your duties as a police surgeon involve ascertaining whether or not a man's statement is voluntary or involuntary, is that correct? A. I asked him that.

Q. You asked him that although that was not necessary? You——

Mr. Congleton: That is objected to.

Mr. Foley: I have not asked the question.

Q. In other words, whether or not he had given a voluntary statement played no part in your determining whether or not there were any bruises on his body, is that correct?

Mr. Congleton: I object to that question.

Mr. Foley: I asked that question for the purpose of indicating——

The Court: That is a conclusion which is obvious, that it does not indicate whether he had bruises or not.

Mr. Foley: I do not quite follow your Honor.

The Court: You say whether he said the statement was made voluntarily or not does not show whether he had bruises or not?

Mr. Foley: Exactly, yes. I wish to establish, in order to show the interest in this case of this witness, who is an assistant police surgeon, that his investigation of this matter went beyond that which would be expected of a doctor.

The Court: Very well.

Mr. Foley: That is the purpose of my question.

Mr. Congleton: I object to that statement, if your Honor please, that he went beyond what is expected of a doctor.

The Court: I think counsel wants to show that the question was asked not in pursuance of his duty as a doctor.

Mr. Foley: Exactly, yes.

Mr. Congleton: The question was in his official duties as police surgeon. That doesn't follow.

The Court: As a medical man. I don't understand necessarily as police surgeon. You are asking it as a police surgeon or as a medical examiner?

Mr. Foley: Are you asking me, your Honor?

The Court: Yes. Is your question directed to his duty as police surgeon or medical examiner?

Mr. Foley: I submit that the question standing alone is a perfectly proper question, if your Honor will have it reread.

The Court: Will you read it, please?

(The pending question is read by the court reporter.)

Mr. Foley: It contains two questions, and so let me reframe it.

Q. Doctor, whether or not Brooks gave a voluntary statement played no part in your determining whether or not there were bruises on his body; isn't that correct? A. No.

Q. I notice that you have referred to a memorandum, presumably for the purpose of refreshing your recollection. A. Yes, sir.

Q. May I then see it? A. Yes, sir. (The Witness hands a card to Mr. Foley.)

Q. Your testimony is that you found no evidence of trauma; is that correct? A. Recent trauma.

Q. When you were asked the question by Mr. Congleton did you qualify it by saying recent trauma or did you not say that there was no evidence of trauma? A. I did not qualify it. I assumed he meant recent trauma.

Q. Was there any evidence of any trauma which in your judgment was not recent? A. Yes.

Q. What was that? A. Certain scars that he had on his body which he sustained at different times during his life.

By the Court:

Q. You refer to healed scars? A. Healed scars.

By Mr. Foley:

Q. How did you learn he had suffered these scars at different times in his life? From him? A. From him.

By the Court:

Q. Did you see the scars? A. Yes, but I asked him how he got them, and he answered and told me how he got each scar I pointed out.

By Mr. Foley:

Q. And those you would call traumatic, resulting from injury? A. Yes, old healed scars.

Q. Let me call your attention to the last line on the back of your card, on which you have noted, "Said he was never injured except he fell on head when a kid age six." Did you make that notation? A. Yes.

Q. Did he tell you he was never injured except when he fell on his head as a child age six? A. That was the last question I asked him when I explained——

Mr. Foley: If your Honor please, I move to have the answer stricken out as not responsive. I am entitled to a yes or no answer.

Mr. Congleton: I submit the witness was answering the question and was interrupted before it was completed.

The Court: That part which says, "That was the last question——"

Mr. Foley: Read the pending question.

(The pending question is read by the court reporter.)

Mr. Foley: That question can be answered yes or no, and I submit I am entitled to a yes or no answer.

The Witness: I don't think it can.

The Court: I will strike the answer.

The Witness: I must qualify the answer.

The Court: He asked you what was a leading question. He said, "Did he say he was never injured except for something which occurred when he was six years of age?"

The Witness: He did not say that.

Q. But you have noted on your card, and presumably this is in your own handwriting— A. Yes, sir.

Q. I am reading it correctly, am I not, when I read as follows: "Said he was never injured except he fell on head when a kid age six"?

Mr. Congleton: Why don't you read the whole card?

A. If you will let me explain it I can explain it.

Mr. Foley: If your Honor please, if Mr. Congleton has any objection to make to that question, may I suggest that he direct his objection to you?

Mr. Congleton: Yes, I will address it to the Court. I object on the ground that Mr. Foley has the doctor's notes in his hand which contain other injuries, notes of other injuries, and I submit it is a very unfair and improper question.

The Court: You may re-examine the doctor.

Mr. Foley: May I have the question read?

The Court: He has answered something, hasn't he?

Mr. Foley: No, he hasn't answered anything, if your Honor please. May I reframe the question?

Q. Do I read the card correctly when I read as follows: "Said he was never injured except he fell on head when a kid age six." A. You are reading it correctly.

Q. Doctor, there is some confusion in our minds as to what time you arrived there. A. About 2

a.m., on 12/19/46, and I began my examination at 2:10 a.m.

Q. Who was present at that time? A. Detective Kosloski, Deputy Chief O'Neill, Captain Cocozza and Mr. M. Robinson.

Q. Your examination took how long? A. About a half hour.

Re-direct examination by Mr. Congleton:

Q. Now, Doctor, let's look at these notations on the card that Mr. Foley did not call your attention to—

Mr. Foley: Just a minute.

Q. —and I ask you——

Mr. Foley: Just a minute.

Mr. Congleton: May I finish my question if you have an objection to make?

Mr. Foley: That is not a question.

Mr. Congleton: You can object when I finish.

Mr. Foley: I object to the statement which prefaces this question. Will you read it, please?

(The pending question is read by the court reporter.)

Mr. Foley: I move that statement be stricken, your Honor.

Mr. Congleton: It is a fact that you did not call his attention to all these notations.

The Court: I want to get what the real objection is. Is it to the form of the question?

Mr. Foley: It is to the form of the question—"Now, let's look at"——

The Court: If he said, "Will you please look at", would you be satisfied?

Mr. Foley: I would object to the question, because the card is self-serving. It can only be used for the purpose of refreshing his recollection. I did not question the doctor as to the contents of the card, beyond that part in which he said that this man told him something, and I questioned him about nothing else on that card. And if there is any effort or any attempt made to put in the contents of the card, I should object to it, and I feel your Honor should sustain my objection.

The Court: Will you let me see the rest of it, so I can understand what it is all about?

(The witness hands card to the Court.)

The Court: Well, may I speak to counsel? I am afraid I am not clear.

(Court and counsel confer at the side bar.)

The Court: I will allow that.

Mr. Foley: Is there a question pending now, so that I may know what it is?

The Court: You may show any other references on that card to any other injuries.

Mr. Foley: I pray an exception to your Honor's ruling generally on that subject, and then I will make my objections to the individual questions as they are asked.

Mr. Congleton: Did you hear his Honor's question to you?

Mr. Foley: I don't think his Honor put a question. He said you may show other matters on the card.

The Court: Any other notations on that card showing injuries.

Q. During the course of your examination of Brooks, you testified on cross examination that you found evidences of scars, of old trauma, is that correct? A. Yes.

Q. Do you have notations of that on your card?

Mr. Foley: That is objected to on the ground it is irrelevant; also upon the ground that it is immaterial. The card can only be used for the purpose of refreshing his recollection, and the testimony of what is on the card, on the direct testimony, is no more evidential than if the card itself were offered in evidence, which of course would not be evidential.

The Court: That might be, but what we are really trying to do is get the doctor's statement explained as to what was said about injuries.

Q. Doctor, you testified on cross examination in response to a question of Mr. Foley where he pointed out to you on the card, that he said he was never injured except by falling on his head when a kid, age 6, that that appeared there? A. Yes, that appears there.

Q. Do you have any further references on that card to injuries?

Mr. Foley: That is objected to. Answer it yes or no.

The Court: Excuse me. I will ask him myself.

By the Court:

Q. Did he say anything else about any other injuries? A. No.

Mr. Foley: That is objected to.

The Court: And Mr. Foley objects.

Mr. Foley: I desire to make my objection to your Honor's question for the reasons stated previously. I pray an exception.

The Court: Yes, you may have an exception.

Q. What else did he say about injuries?

Mr. Foley: I assume that my same objection and exception will lie.

The Court: Yes.

A. I noted that he had several scars and I questioned him as to how he sustained them.

Q. Yes. A. I have notations as to his answers, and after I was all through I asked him if he had any other injuries and he said no, except that he fell on his head when he was a kid age 6.

Mr. Foley: I move to strike out the answer upon the ground that in effect it is testimony concerning the contents of the card, and it is not evidential on the direct or re-direct examination. The card can only be used for the purpose of refreshing recollection.

The Court: Yes. The testimony is directed to the doctor's accuracy and credibility, and that is the purpose of the examination. The Court allows him to state this additional testimony. Otherwise his testimony might be misunderstood.

Mr. Foley: So that your Honor overrules my motion to strike?

The Court: The Court overrules your motion to strike and you may have an exception.

By Mr. Congleton:

Q. What were the scars that you found and what did he tell you caused them?

Mr. Foley: I object to that. He has already testified on direct testimony and now on your Honor's questioning.

The Court: Go ahead, please.

Mr. Foley: I pray an exception.

A. I found that he had two old scars on his face. He said he got them in a football game. I found two old scars on his neck. He said he was injured with an icepick when he was about age 18. I found an old scar on the parietal scalp and two old scars on both legs and left buttock. He said he got those playing football.

Mr. Congleton: That is all. Thank you, Doctor.

The Court: I understand this is not admitted for the purpose of laying a foundation to contradict someone.

Mr. Congleton: Not at all.

The Court: This is merely to explain and make clear the doctor's testimony so that there may be no misunderstanding as to what he undertook to testify the man told him and what he undertook to testify as to what he noted on the card.

Mr. Congleton: That is correct, sir.

(A recess is taken to 2 p.m.)

AFTERNOON SESSION.

MARVIN A. ROBINSON, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Robinson, where do you live? A. 124 Barclay Street, Newark, New Jersey.

Q. What is your business, Mr. Robinson? A. I am an engineer employed by the Prudential Insurance Company.

Q. What is the nature of your employment? A. I am assistant manager at a housing project.

Q. Do you have any connection directly or indirectly with any law enforcing agency in Essex County? A. No.

Q. And that of course includes the Prosecutor's Office, and the City of Newark police? A. That is true.

Q. Did you, on December 18, 1946, at the request of a representative of the Prosecutor's Office go to Newark Police Headquarters? A. I did.

Q. And about what time that night did you get there? A. About 10:30.

Q. Did you see the defendant, James Brooks, that evening? A. Yes, I did.

Q. When was the first time you saw him, Mr. Robinson? A. When I entered the room at Headquarters about 10:30.

Q. Where was he at that time? A. He was seated at a table in that room.

Q. Do you recall who else was there at the time? A. In the room?

Q. Yes. A. In the small room?

Q. Yes. Keep your voice up, please. A. Inspector O'Neill. I was accompanied by, I think you call him, Special Investigator Kosloski and Lieutenant Wangner.

Q. Did you see Captain Cocozza there? A. He was taking the statement, Captain Cocozza was.

Q. How long did you remain at Headquarters? A. I remained there from approximately 10:30 until about a quarter of three, I would say. It was after 2:30 the next morning.

Q. Did you have an opportunity during that period to observe the defendant? A. Yes, I did.

Q. Toward the end of your stay were you present when he read his statement? A. Yes, I was.

Q. Were you present when it was read to him? A. Yes, I was.

Q. At that time did you ask this question of the defendant: "How were you treated by these men since your arrest?"

Mr. Foley: Objected to as being leading. I think the Prosecutor should ask the witness what he did rather than suggest that he did anything.

Mr. Congleton: This is rebuttal, and I specifically laid the foundation by asking the defendant whether or not he was asked these questions and wheher he made these answers.

The Court: All right, go ahead.

Mr. Foley: I pray an exception.

(The pending question is read by the court reporter.)

A. I did ask him that question.

Q. What was his answer? A. As near as I can recall, "Fine".

Q. I show you a letter dated December 20 and ask you if that will refresh your recollection as to what questions you asked him and what answers he gave. A. Yes. He said, "Fine".

Q. Did he say anything else? A. To that question?

Q. Yes. A. "They treated me swell".

Q. What other questions did you ask him? A. I asked him all the questions listed here.

Q. Will you tell us what they are? A. "Have you made this statement?" His answer was "Yes".

"Is this statement the truth?" He answered "Yes".

"Were there any threats or promises made to you to get you to make this statement?" His answer was "No threats whatsoever".

I then asked him, "Have you read this statement and has it been read to you?" He answered "Yes".

I asked him, "Are there any corrections you want to make in this statement?" His answer was "None other than I have already made".

Another question, "Are you willing to sign this statement?" His answer was "Yes, I am".

Q. Were you present, Mr. Robinson, when Dr. Greifinger made his examination? A. Yes, I was.

Q. And you had an opportunity then to observe the defendant? A. I did.

Q. Did you observe any marks or bruises on him that appeared of recent origin? A. No, sir.

Q. During the entire time you were with the defendant did he complain to you at any time of having been struck by any policeman?

Mr. Foley: I object to it as not being proper rebuttal. If your Honor please, the defendant himself said that he made no complaints to Mr. Robinson when asked. There is nothing contradictory before the Court. In other words, if the defendant

had in answer to Mr. Congleton's questions said that he made a complaint, then it would be perfectly proper, but since he said that no complaint was made, there is no occasion to ask the question.

The Court: As I remember, he himself said there was no complaint made.

Mr. Foley: There is no occasion for the question; it is not claimed that it was done.

Mr. Congleton: Cross examine.

The Court: Will you please mark that memorandum for identification?

(The paper is marked Exhibit S-56 for identification.)

Cross examination by Mr. Foley:

Q. Mr. Robinson, these questions which are contained on S-56 for identification: did you prepare those questions yourself or were they given to you by someone else? A. I prepared the ones that you have there, yes.

Q. In other words, were these of your own origination or were you asked to ask these particular questions? A. Some of them.

Q. Will you tell us which questions you were asked to put to the defendant? A. May I ask this question?

Q. Yes. A. I don't quite understand.

Q. What I am trying to get at is this, if I may explain it to you: what I am trying to find out is whether you yourself thought of these questions and asked them or whether someone who was there from the Prosecutor's Office or from the Police Department said to you, "We would like you to ask these questions". Do you remember which it was? A. I was asked if I would like to ask the questions.

Q. Then did you ask him questions that came to your own mind or were you given a list of questions? A. No, I had a list of questions.

Q. Who gave you the list of questions? A. I think Captain Cocozza.

Q. Did you ask any questions other than those that were on that list? A. I can't recall, sir.

Q. If you did, you made no record of the answers? A. No, I did not.

Q. Did Brooks say anything to you, either in answer to a question or otherwise, other than what is on this paper? A. No, I don't recall. We were introduced and he acknowledged the introduction, and that's about all.

Q. Did he have any discussion with you of any kind? A. No.

Q. Then you prepared this and later sent it in? A. The following day.

Q. Was this done by you, or presented to you for signature? A. No, I did that in my own office.

Q. Did you sign that statement, too, Mr. Robinson? A. No. You mean—pardon me. The statement that——

Q. The statement that Brooks signed. A. No, I did not.

Q. Did you sign it at any time? A. No.

Q. Did you ever sign any statement which Brooks signed? A. I don't recall, no.

Mr. Foley: That is all. Thank you very much.

New Jersey State Library

Philip J. Smith, Recalled, for the State—Direct.

PHILIP J. SMITH, recalled.

Direct examination by Mr. Congleton:

Q. Detective Smith, I believe you testified yesterday afternoon when you were on the stand or perhaps it was Friday or Saturday, that after you left 17 Lillie Street you went to Vaux Hall, was it, in the afternoon of December 18? A. I went to the Union County Police Headquarters.

Q. The Union Township Police Headquarters? A. The Union Township Police Headquarters, yes.

Q. I believe you also testified that while you were there the alarm came over that Brooks had been apprehended and you and Lieutenant Flynn and someone else returned to Newark Police Headquarters? A. Lieutenant Wangner and Detective Cook.

The Court: Excuse me. Will you confine yourself to the issue, to whether or not the statement was voluntary.

Mr. Congleton: Yes, sir.

The Court: And rebuttal.

Mr. Congleton: Yes.

Q. Now, on December 18 when you were in Police Headquarters did you at any time strike the defendant, Brooks? A. No, sir.

Q. Did you at any time kick the defendant, Brooks? A. No, sir.

Q. Did you at any time call the defendant, Brooks, a black son-of-a-bitch? A. No, sir.

Q. Were you at any time in the small room that afternoon and evening? A. As far as the doorway.

Q. What happened when you got as far as the doorway? A. The Chief ordered me out.

Philip J. Smith, Recalled, for the State—Cross.

Q. Do you remember about what time that was? A. I am not positive of the time. It could be, maybe, around 5:30.

Mr. Congleton: That is all.

Cross examination by Mr. Foley:

Q. Detective Smith, you were a friend of Mr. Bateman, who was killed, were you not? A. I was not a friend of him. I knew him well.

Q. You had known him over what period of years?

Mr. Congleton: Objected to as immaterial.

Mr. Foley: I desire to show interest and this man's frame of mind.

The Court: You are referring to Bateman?

Mr. Foley: I am, sir.

The Court: Go ahead.

By the Court:

Q. Just how long have you known him and what was your association with him? A. I knew Mr. Bateman to see and to speak to in my course of police work in that neighborhood I would say about 16 years.

By Mr. Foley:

Q. That is, your police work took you into the section in which Mr. Bateman worked? A. Yes, sir; I was assigned up there for years.

Q. You are still up there, are you not? A. No, sir; I am in Police Headquarters now, assigned all over the city.

Q. For how many years were you in that section where Bateman worked? A. Off and on about 16 years.

Q. After Brooks was returned or taken to Headquarters were you with him at any time? A. What day?

Q. On the 18th of December. A. No, sir.

Q. Were you with him before that time? A. No, sir. After the 18th I was with Mr. Brooks.

Q. Where were you with him after the 18th? A. In the bandit squad room in Police Headquarters on the 19th.

Q. Who was with you?

Mr. Congleton: Objected to as immaterial as to what occurred on December 19th.

The Court: Sustained.

Mr. Foley: It may be, if your Honor please, that the incident that we have in mind is the same one, even though the detective fixes a different day.

Mr. Congleton: That would follow after the signing of this confession.

The Court: We can't assume that.

Mr. Foley: I would say, if your Honor please, I should be entitled to examine into every contact that the defendant had with Detective Smith in view of the testimony of the defendant.

The Court: No, not after the statement was taken.

Mr. Foley: We have only the detective's own recollection as to the date.

The Court: That's right. You want me to assume the contrary, but I am going to assume what he says, that he did not see the defendant until the 19th. We have only

the testimony of the defendant, and his testimony is in conflict in that regard.

Mr. Foley: Your Honor sustains the objection?

The Court: I do.

Mr. Foley: I pray an exception.

Q. On the 18th what was the closest you ever got to the defendant? A. At the door.

Q. Were you standing in the doorway while he was discussing this matter—Chief O'Neill? A. No, sir; not standing in the doorway.

Q. How long were you in the doorway? A. I couldn't tell you—looking in.

Q. For how long? A. I don't know how long.

Q. Can you tell us whether it was for a minute or ten minutes or half hour or an hour, or how long? A. Just a casual look now and then.

Q. The door was open then, was it not? A. When I first arrived there; yes, sir.

Q. For how long after you arrived there was the door standing open? A. I didn't make any mental note of that.

Q. Well, over what period of time, giving us your best estimate? I am not attempting to pin you down to minutes. But was it a matter of five minutes or a half an hour or an hour or an hour and a half that you would occasionally walk up to the doorway and look in? A. Well, I don't know just—what period of time it was, it happened so long ago. I have done so many things since that time that I just wouldn't be able to say how long it was.

Q. You could not give us any idea whether it was five minutes or two hours? A. I will say it was not two hours.

Q. Would you say it was more than five minutes? A. I took a casual look now and then.

Q. That is the best you can do toward enlightening us over what period of time you occasionally looked in? A. Yes sir; a casual look now and then.

Q. Was that before or after Chief Sebold arrived? A. I don't know when Chief Sebold arrived.

Q. How long after you first arrived and occasionally looked in was it that you were ordered out of the room by Chief Sebold? A. I figure Chief Sebold about 5:30. I am not sure of that time, now, but I am trying to give you an honest and truthful picture.

Q. All right. That is all we want you to do. A. I would say it was about 5:30 when I became inquisitive and opened the door to look in, and the Chief gave me the order to stay outside.

Q. Was it before or after that you occasionally looked in the room, as you have stated? A. I didn't look in after that any more.

Q. Had you looked in the room before that? A. Yes, sir.

Q. About how many times? A. I don't know how many times—casually.

Q. So that after Chief Sebold arrived you never went back to the doorway again? A. After I was ordered out, I knew better than to go back.

Q. But before Chief Sebold arrived you had looked in the room several times? A. Casually.

Q. Well, we will accept that — casually. A. That's right.

Q. Now, you have emphasized the word casually. Will you tell us what you mean by that? A. Now and then I looked in the room.

Philip J. Smith, Recalled, for the State—Cross.

Q. For what purpose? A. Oh, just inquisitive. I am a police officer, I got a right to do that if I want to.

Q. You just looked in before you were inquisitive? A. That's right. I wanted to see who Mr. Brooks was.

Q. You wanted to see who he was? A. Yes.

Q. You didn't have to take more than one look at him to see who he was, did you? A. I didn't think there was any restriction on how many looks I wanted to take.

Q. I don't want to argue with you. A. And I don't want to argue with you.

Mr. Foley: Just a minute. I ask that that answer be stricken. The answer is not responsive. May I have the question read?

(The pending question is read by the court reporter.)

Mr. Foley: I ask your Honor to instruct the witness to answer responsively.

The Court: I will instruct him this way. Don't argue with counsel unless counsel argues with you. I am afraid one is equally as argumentative as the other.

Mr. Foley: Your Honor declines to strike the answer?

The Court: Yes.

Mr. Foley: I pray an exception.

Q. Did you have to look at Brooks more than once to see who he was?

Mr. Congleton: Object to that as immaterial.

The Court: Sustained.

Mr. Foley: I pray an exception.

Philip J. Smith, Recalled, for the State—Cross.

Q. Now, Detective Smith, do you have any feeling of prejudice towards Brooks?

Mr. Congleton: That is objected to.

The Court: Well. You mean against—prejudiced in what sort of way? I am not clear. I do not quite understand you.

Mr. Foley: If your Honor please——

The Court: Has he had any previous connection with him that would beget a prejudice or simply that he does not like what he thinks are criminals.

Mr. Foley: Those things, and that may be his answer, but I submit the question is complete in itself. This witness, if your Honor please, is the one that Brooks said threatened him. I should certainly be permitted to show whether or not this man had any feeling of animosity towards Brooks or any feeling of bitterness toward him or was subject to any other emotion which might lead to the thing which Brooks said was actually done.

The Court: How far are we going to pursue this, I wonder.

Mr. Foley: I am sure I don't know, your Honor. It would depend largely on what his answer was.

Mr. Congleton: If your Honor please, to ask the witness, particularly this law-enforcement officer, that question, it seems to me that prejudice covers a wide field, as to what is meant by prejudice, and I think we would go far out afield by getting into that sort of thing and would bring us into things that have no part in this hearing.

The Court: Do you mean by that an unfair disposition to him?

Mr. Foley: Yes, sir.

The Court: Is that addressed to the present time, or some other time?

Mr. Foley: It is addressed to the present time, if your Honor please.

The Court: All right. Well, I will allow it with that qualification as qualified by the Court.

(The last part of the foregoing discussion is read by the court reporter.)

The Court: Assume that counsel means by that an unfair disposition toward him at the present time.

The Witness: Relative to what, your Honor?

The Court: Relative to him.

The Witness: I mean pertaining to what?

The Court: You would have to ask counsel if he wants to qualify that.

The Witness: Pertaining to what?

Q. Pertaining to him, that you feel toward Brooks. A. I have no feeling toward Brooks.

Q. None at all? A. No, sir.

Q. Have you had any feeling of animosity toward Brooks since you have been in this courtroom since the beginning of this rial? A. No, sir.

Mr. Congleton: Objected to as immaterial.

The Court: If he has any animosity I think counsel is entitled to show it.

A. I have not.

Q. You have not? A. No, sir.

Philip J. Smith, Recalled, for the State—Cross.

Q. On Wednesday and Thursday of last week, Detective Smith, you sat in this courtroom where this young lady is sitting at the present time, did you not? A. That's right. I sat on the end.

Q. You sat on the end? A. That's right.

Q. And you sat on the second seat, too? A. That's right, at one time.

Q. On Thursday afternoon you were requested to remove yourself to another place in the courtroom, were you not?

Mr. Congleton: I object to that, if the Court please. I would like to state my reasons at side bar.

The Court: I don't think that has anything to do with it, what someone else did. Someone else may have made a request, but that does not show Detective Smith's animosity.

Mr. Foley: I will show the reason why he moved.

The Court: That is all right. You can ask him why he moved, if he did move, but what someone else said is a different thing.

Mr. Congleton: I would like to explain the situation to you at side bar, because I think we are going to get into a great hiatus here on this.

The Court: All right, I will be glad to hear it.

(The Court and Counsel confer at side bar.)

Mr. Foley: I will reframe my question.

Q. At the commencement of our afternoon session on Thursday you removed yourself from that seat and sat over in the next row or the row following that, did you not?

Mr. Congleton: Objected to as immaterial.

The Court: Well, apparently it is so far. I thought you were going to reframe the question.

Mr. Foley: I am, if your Honor please, but I can't prove everything in one question.

The Court: I realize that.

Mr. Foley: It is a chain of events. I want to show why he removed himself.

The Court: Why not ask him. Let's get down to the question.

Mr. Foley: Let me first, if your Honor please, establish that he did move.

The Court: Well, if he did move, that is the first thing.

Mr. Foley: All right. That is the quesion. Will you repeat it, please?

(The last question is read by the court reporter.)

A. That's right.

Q. During the morning session of Thursday is it not a fact that you addressed remarks to Brooks to the effect that——

Mr. Foley: Strike that.

Q. Is it not a fact that you remarked or questioned—asked a question of Brooks on two or three occasions, in which you asked Brooks in other words other than I am using, to the effect, wouldn't he like to leave where he was sitting and have sexual relations with his wife, who was in the courtroom?

Mr. Congleton: I object to that——

A. That is not true.

Mr. Congleton: If the Court please——
The Court: He said he did not.
The Witness: That is not true.

Q. Did you say anything to Brooks that morning? A. I bid him the time of the day.

Q. Anything else? A. And one time I said to him, "Jimmy", I said, "you look like you got fat". He said he lost eight pounds.

Q. Did you say anything else to him? A. That's all.

Q. Didn't you come up to me at the end of the court day at 4 o'clock and say, "What's the matter? Do you object to me talking to my boy friend?" Didn't you say that to me? A. I may have said something to you, Counselor, but I don't know just what the words are. It was something pertaining to Mr. Brooks, yes. I said, "'Why did you object to me speaking to Jimmy Brooks?" I think that is what I said to you.

Q. Didn't you say, "What's the matter? Do you object to me talking to my boy friend?" Didn't you say that? A. Well, I don't think I used that term.

Q. Would you deny that you used that term? A. Well, I will deny, yes, I used that term.

Q. You say you did not say that to me? A. Well, I will say I did not say that to you.

Mr. Foley: That is all.

Clarence J. Cook, sworn.

Direct examination by Mr. Congleton:

Q. Detective, you are a member of the Newark Police Department? A. Yes, sir.

Q. You have been for how long? A. 22 years.

Q. In December 1946 to what bureau of the Department were you attached? A. Detective Bureau, bandit squad.

Q. On the afternoon and evening of December 18, 1946 were you in Police Headquarters at any time? A. No—the latter part of the evening.

Q. The latter part of the evening? A. Yes, sir.

Q. About what time? A. I came in about 5:15, around there.

Q. How long did you stay? A. Oh, approximately maybe 20 minutes.

Q. Did you see the defendant, James Brooks, that day in Police Headquarters? A. No.

Q. Your answer is "No"? A. "No".

Q. At any time did you strike the defendant, James Brooks? A. No, sir.

Q. Did you tell him that if he didn't tell Captain Cocozza that he shot and murdered Mortimer Bateman that you would see he either jumped out of the window, hung himself or got shot? A. No, sir.

Q. Did you kick him at any time? A. No, sir.

Q. Did you see anybody else kick him or hit him at any time? A. No, sir.

Q. Did you hear anyone else make any threats to him? A. No, sir.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. Did you at any time enter the room where Brooks was being questioned from the time he arrived at Headquarters until Captain Cocozza arrived? A. I wasn't there.

Q. Sir? A. I wasn't there.

Q. You were not at Headquarters? A. No. I told you I came in, I stated I came in the latter part of the evening.

Q. What time? A. 5:15, about 5:15, and I stayed about 20 minutes and I went out to supper.

Q. During those 20 minutes were you in the room where the questions were being asked? A. No. I had his wife and some girl friend I was watching that I brought back from 17 Lillie Street.

Q. Where were they? A. In the room.

Q. What room? A. In the big room.

Q. You say you were there for about 20 minutes, and then what happened? A. I went out to supper.

Q. When did you come back? A. I don't know. I guess about an hour later.

Q. Where did you go then? A. I requested whether there was any further need for me, and I didn't know how long to stay there after that. Lieutenant Flynn said, "You'd better go home, because I believe some of the men will be here very late, and I want somebody here tomorrow morning, so if there are any cases that come in then somebody would be here to take charge."

Q. Did you at any time stand in the doorway of the room in which the questions were being asked? A. No, sir.

Q. Did you hear Deputy Chief O'Neill testify here today? A. I seen Lieutenant Wangner when he went in the little room and I observed the rear of the Chief of Police, Chief Sebold's back, and Deputy Chief O'Neill, but as far as conversation, I heard none.

Q. Did you hear Deputy Chief O'Neill testify that you had stood in the doorway?

Mr. Congleton: Objected to as immaterial.

The Court: Sustained.

Q. You did not stand in the doorway at any time? A. No, sir.

Mr. Foley: That is all.

WILLIAM G. WANGNER, recalled.

Direct examination by Mr. Congleton:

Q. Lieutenant, directing yourself to the afternoon and evening of December 18, 1946, did you see the defendant, James Brooks, in Headquarters? A. I did.

Q. Were you in the little room with the defendant? A. He was there when I walked in with the money.

Q. About what time was that, do you know? A. I should say about between 5 and 5:15.

Q. Where did you go with the money? A. Into the room and put it on the table in front of Chief Sebold and Deputy Chief O'Neill.

Q. Do you know who else was there? A. I think Kosloski was there and Lieutenant Flynn and the defendant.

Q. How long did you stay in there? A. I should judge I was there about ten or fifteen minutes.

Q. Then you came out into the big room? A. I came into the big room with the money.

Q. You stayed in the big room a considerable length of time? A. I did.

Q. At any time that afternoon or evening when you were in the little room or the big room did you see anyone kick or hit the defendant, James Brooks? A. I did not.

William G. Wangner, Recalled, for the State —Cross.

Q. Did you hear anyone make any threats to him of any nature? A. I did not.

Q. From 5:15 on did you see either Detective Smith or Detective Cook go into the little room? A. I did not.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. Did you see either Detective Smith or Detective Cook in the big room? A. Yes.

Q. Did you see them stand in the doorway at any time? A. No, I didn't see either one of them in the doorway.

Q. Was the door open or closed? A. It was closed when I got there and went in with the money.

Q. And what time did you get there? A. About between 5 and 5:15.

Q. From the time you got there and went into the room did you see Smith again until after you had completed your business there? A. I might have seen him in the big room. I know Cook was there because he brought the defendant's wife in with Detective O'Beirne.

Q. You didn't see him in the small room at any time? A. No.

Q. You didn't see him to try to come in at any time? A. No, not while I was there.

Q. Isn't it a fact that during that period, sometime after 5:15, Smith attempted to come in the small room and he was ordered out by Sebold? A. I didn't see that or hear that.

Mr. Foley: That is all.

John Strong, for the State—Direct.

JOHN STRONG, sworn.

Direct examination by Mr. Congleton:

Q. Detective Strong, you are a member of the Newark Police Department? A. I am.

Q. And you have been for how long? A. Thirty years.

Q. In December 1946 to what bureau were you assigned? A. Detective Bureau.

Q. Did you have occasion on the afternoon or evening of December 18, 1946, to go to the Bandit Squad or Homicide Squad room and there see the defendant, James Brooks? A. I did.

Q. About what time did you go there, do you know? A. I figure about 3:45.

Q. When you got up there at 3:45 where was the defendant, James Brooks? A. He was sitting on a bench in the desk room of the Bandit-Homicide Squad.

Q. When you say, "desk room" do you mean the large room? A. The large room which contains the desks of the various detectives.

Q. How long did you stay there? A. I stayed with Brooks, I should judge, about fifteen or twenty minutes at the most.

Q. Did you go in the small room at any time with him? A. I did.

Q. Who was in the small room when you were in there? A. Detectives O'Beirne and Geiger and myself first. Later on Deputy Chief O'Neill came in.

Q. While you were there did you see anyone strike or kick the defendant, James Brooks? A. I did not.

Q. Did you hear anyone make any threats to the defendant, James Brooks? A. I did not.

Q. When you left did you send Officer Daley up? A. Yes, I assigned Detective Daley to stay at the door of the big room, as they term it, into the little room, as Deputy Chief O'Neill at that time was in alone with Brooks.

Mr. Congleton: Cross examine.

Cross examination by Mr. Foley:

Q. What time did you leave? A. I should judge about 4 o'clock.

Q. When did you return? A. I didn't return.

Mr. Foley: That is all.

George P. C. Daly, sworn.

Direct examination by Mr. Congleton:

Q. You are a member of the Newark Police Department, sir? A. Yes, sir.

Q. You have been for how long? A. Going on seventeen years.

Q. In December 1946, to what bureau were you assigned? A. The Detective Bureau.

Q. Directing your attention to the afternoon of December 18, 1946, and the early evening, did you have occasion to go to the Homicide-Bandit Squad room? A. I did.

Q. While you were there did you see the defendant, James Brooks? A. Not when I first went up to the room. I did after I went into the little room.

Q. About what time did you first go up to the room? A. Well, I go around pretty near every day around 4 o'clock—between 4 and five after 4

—with what we call our squeals—our complaints. And it was then, I would say, five after 4.

Q. And it was while you were delivering those that Lieutenant Strong grabbed hold of you? A. That's right. He told me to go in with the Inspector, or Deputy Chief, rather.

Q. Did you then go into the little room? A. I did.

Q. Who was in the little room when you went in? A. Chief O'Neill and James Brooks.

Q. How long did you stay? A. Oh, I would say about three quarters of an hour.

Q. While you were there, who else entered that room? A. Well, after I was there a few minutes Detective Zager came up. He stayed a few minutes.

By Mr. Foley:

Q. What was that name, please? A. Zager.

Q. How do you spell that? A. Z-a-g-e-r.

By Mr. Congleton:

Q. Who else? A. Well, Zager, as I say, only stayed there a little while and then went out. Then Chief Sebold came in, and I had been sitting down at that time, and I gave the Chief my seat. And it was only a short time after that that the Prosecutor's detective——

Q. Kosloski. A. —Kosloski—he came in.

Q. While you were there did you see either Cook or Smith enter the room? A. No, sir.

Q. At any time while you were there did you see anyone kick or hit the defendant, James Brooks? A. No, sir.

Q. Did you hear anyone make any threats against him? A. No, sir.

Mr. Congleton: Cross examine.

George P. C. Daly, for the State—Cross.
William M. Flynn, Recalled, for the State—Direct.

Cross examination by Mr. Foley:

Q. Was Detective Zager there while Chief O'Neill was there? A. Yes.

Mr. Foley: That is all

Mr. Congleton: Is Detective Zager here?

(No response.)

WILLIAM M. FLYNN, recalled.

Direct examination by Mr. Congleton:

Q. Lieutenant Flynn, on the afternoon of December 18 were you in the Bandit Squad and Homicide Squad room at any time? A. I was; yes, sir.

Q. Did you see the defendant, James Brooks, there? A. Yes, sir.

Q. What time did you see him? A. Oh, I believe it was around 5 o'clock.

Q. Where was he when you saw him? A. Sitting in the interrogating room.

Q. Where were you? A. I had went in there.

Q. Who was in there? A. Chief Philip Sebold and Inspector, then, Frank A. O'Neill—now Deputy Chief.

Q. How long did you stay? A. Oh, I stayed possibly a half hour—forty minutes—something like that.

Q. While you were there who else came into the room? A. Well, when I came in, I left the door open, and shortly after I came in Smith stepped into the room, and when he did the Chief turned to him and said, "Outside."

Q. What other officers came into the room? A. Later on Lieutenant Wangner came into the room

with the money that they had brought down from Brooks' house.

Q. Did you see any Prosecutor's detectives there? A. Yes, Kosloski was there.

Q. You stayed there about a half hour? A. A half hour or forty minutes. Around that time.

Q. Then you left? A. I went out into the other room. I had other work. I directed the men to do this or to do that. I had other work to do.

Q. At any time did you go back into the little room? A. Not that day, no, sir.

Q. How long did you stay at that time in the big room? A. Oh, for a considerable time.

Q. While you were there in the little room did you see anyone kick or hit the defendant, James Brooks? A. Emphatically and positively no.

Q. Did you hear anyone make any threats against him? A. Absolutely no.

Q. While you were in the big room did you see Detectives Smith or Cook go into the small room? A. They never entered the room.

Cross examination by Mr. Foley:

Q. If you had seen anyone beat this defendant or kick him or threaten him would you now say that you had seen it? A. I wouldn't let anybody beat or kick anybody. That's my responsibility as a superior officer.

Q. If you had seen it would you have stopped it? A. I positively would. I would not permit it.

Q. Have you ever had occasion to stop it?

Mr. Congleton: I object to that as immaterial.

The Court: Sustained.

Mr. Foley: That is all.

Mr. Congleton: That is all.

Thomas A. Queenan, for the State—Direct.

THOMAS A. QUEENAN, sworn.

Direct examination by Mr. Congleton:

Q. Mr. Queenan, are you a member of the Newark Police Department? A. I am, sir.

Q. In what capacity were you assigned to the Department in December 1946? A. Identification officer assigned to the Bandit Squad to do their clerical work.

Q. As such you have a desk there in the Bandit Squad room? A. Yes.

Q. That is the big room, is it not? A. Yes.

Q. Your desk is located where in reference to the door that enters the small room? A. To the left of it facing the wall.

Q. The door that enters the small room swings which way? A. Towards my desk.

Q. On the afternoon of December 18, 1946, were you present in Headquarters? A. I was, sir.

Q. In the Bandit Squad room? A. Yes, sir.

Q. Did you see the defendant, James Brooks? A. I did, sir.

Q. When did you first see him? A. When Detectives O'Beirne and Geiger first brought him in.

Q. That was in the big room? A. Yes, sir.

Q. Thereafter did you see him taken into the small room? A. I did, shortly thereafter.

Q. Did you at any time enter the small room? A. I think I was in and out a couple of times with a message.

Q. With a message for someone? A. Yes.

Q. How long did you stay that day? A. I stayed until late in the evening.

Q. While you were there did you see anyone kick or hit the defendant, James Brooks?

Mr. Foley: I object, if your Honor please. I thought this door was supposed

to have been closed. If the door was closed obviously he couldn't see.

Mr. Congleton: I am calling everyone that the State knows was in this vicinity. There has been some testimony that the door was open, and there has been some testimony that the door was closed. This man said he was in the room a couple of times.

The Court: I will allow that question.

By the Court:

Q. Did you see anyone hit or kick the defendant? A. No, sir; I did not.

By Mr. Congleton:

Q. Did you hear anyone threaten the defendant? A. No, sir.

Q. Did you see Detective Smith that afternoon or evening? A. I saw him that evening.

Q. What time did you see him? A. About five o'clock, I think it was, he came in with Lieutenant Flynn.

Q. At any time did you see him in the small room? A. No, sir.

Q. Did you see Detective Cook that evening? A. Yes, sir.

Q. At any time did you see him in the small room? A. No, sir.

Q. Do you remember what time Cook got there? A. He came in with Lieutenant Wangner, Detective Geiger and Detective O'Beirne. They had money, a gun, and two witnesses with them.

Mr. Congleton: That is all. Cross examine.

Cross examination by Mr. Foley:

Q. Was the door open or closed? A. Intermittently open.

Q. Standing open? A. Not for any lengthy period, sir.

Q. When you say not for any lengthy period, what do you mean? Just long enough for someone to go in and out? A. It was normally closed, and then it would be opened for someone to go in and out. There were periods when it might be left open.

Q. We are not talking about what might have been. Were there times that afternoon when the door was standing open? A. Do you mean if I could see in the room? I could. The door was open at times and I could see in there.

Q. And there were times that the door stood open for a matter of minutes? A. Oh, five minutes, I should say.

Q. Did you see Cook and Smith stand in the doorway? A. No; I did not.

Q. Did you hear Deputy Chief O'Neill testify? A. I did, sir.

Mr. Foley: That is all.

JOSEPH COCOZZA, recalled.

Direct examination by Mr. Congleton:

Q. Captain, on the evening of December 18, 1946, when you were taking this statement from the defendant, James Brooks, did you at any time ask him if he had had a going over? A. No.

Joseph Cocozza, Recalled, for the State—Cross.

Q. At any time during the time you were with James Brooks on the evening of December 18 or early morning of December 19 did he ever complain to you about having been hit or kicked by anyone? A. No.

Q. Did he ever say anything to you about having been threatened?

Mr. Foley: I object, if your Honor please. If you will recall the testimony of the defendant, it was that he did not complain to anybody, including Captain Cocozza, because he was afraid to. The only purpose of this testimony is to contradict him, and it contradicts nothing.

Mr. Congleton: I think that is a well taken objection, but the defendant testified he told Captain Cocozza or Captain Cocozza asked him if he had a going over.

Mr. Foley: I didn't object to that question.

Mr. Congleton: All right. Cross examine.

Mr. Foley: That is all. I don't know whether this question would be proper cross examination—it may go to the testimony that the captain gave before—but perhaps you will have no objection to it.

Cross examination by Mr. Foley:

Q. Is there anything on the statement to indicate the time at which you commenced taking it? A. Yes, sir.

Mr. Foley: That is all.

Michael Kosloski, Recalled, for the State—Direct.

MICHAEL KOSLOSKI, recalled.

Direct examination by Mr. Congleton:

Q. Detective, in the afternoon of December 18, 1946, did you see the defendant, James Brooks, in Police Headquarters? A. I did.

Q. At what time? A. Sometime after 4:30.

Q. Where was he when you saw him? A. He was in a little room in back of the Homicide and Bandit Squad room.

Q. Did you go in the little room? A. Yes, I did.

Q. Did you stay in the little room? A. I did.

Q. Who was in there? A. When I entered the room, Chief Sebold was sitting there, and Deputy Chief O'Neill and Detective Daly was there.

Q. How long did you stay in the room? A. I stayed there until about 6:30; a quarter to seven, about 6:30, a quarter to seven.

Q. While you were in the little room did you ever see Detective Smith come into the room? A. I didn't see him because my back was to the door. The door—the entrance to the room was here, and I was sitting here, because Brooks was sitting here. And I was sitting next to the Chief here. But I know the door opened at one time, and the Chief said, "Outside."

Q. Did you ever see Detective Cook in the room? A. No, I did not.

Q. While you were present in that room did you see anybody kick or hit the defendant, James Brooks? A. No, sir.

Q. Did you hear anyone make any threats to him? A. No, sir.

Mr. Congleton: Cross examine.

Michael Kosloski, Recalled, for the State—Cross.
Thomas O'Beirne, Recalled, for the State—Direct.

Cross examination by Mr. Foley:

Q. Did you turn around and look out the door at any time? A. I kind of turned this way, but I was more interested in listening to what Brooks was saying, and I didn't see who was there.

Q. You wouldn't be sure whether the door was standing open or was closed, would you? A. I think I heard it open. I think it was closed.

Q. You don't know of any reason for your having looked at it? A. It was closed when I came there and when I entered the room I closed it myself.

Q. You don't know whether thereafter it was opened from time to time for a period of three or four minutes? A. It might have been, but I think Officer Queenan came in with a message.

Mr. Foley: That is all, Detective.

Thomas O'Beirne, recalled.

Direct examination by Mr. Congleton:

Q. Detective, you arrested Brooks on the afternoon of December 18th? A. Yes, sir.

Q. With Geiger? A. Yes.

Q. You have already testified that you had him in the little room and then you left and then you came back, is that correct? A. That is right.

Q. Do you remember what time it was when you came back? A. I would say it was about 10 minutes to 4.

Q. Where was the defendant then? A. The defendant was still in the small room.

Q. Who was in there with him? A. I don't know.

Q. You did not go in? A. No.

Q. Did you enter that small room at all that afternoon? A. No.

Q. Or evening? A. No, I did not.

Q. So in your presence you never saw anyone kick or hit the defendant?

Mr. Foley: I object to that.

The Court: Sustained.

Mr. Foley: That is not contradictory of Brooks' testimony, because Brooks said Detective O'Beirne had gone before this happened.

The Court: Sustained.

Mr. Congleton: If the Court please, the defendant Brooks testified that when Smith hit him there were four or five detectives present who were there.

Mr. Foley: He specifically excluded O'Beirne.

Mr. Congleton: All right. That is all.

Mr. Foley: No questions.

Mr. Congleton: Do we specifically exclude Geiger?

Mr. Foley: Yes, he did. He said O'Beirne and Geiger left.

Mr. Congleton: All right. Detective Zager. I understand that the detective is on his way up here, but I did not know about him until the last minute. The State has sent for Detective Zager. I don't know whether your Honor wants to hold up my offer of this for his testimony or not.

Mr. Foley: I have not heard Detective Zager's name mentioned by my client, and

I am certain he does not make any claim against Detective Zager. I think it is pretty clear what his claim is, but if you have concluded your testimony on that point I desire to recall Brooks to rebut a statement made by Smith on his cross examination.

The Court: Very well. You can call Brooks. If this detective comes in——

Mr. Foley: I will have no objection to his going on.

JAMES J. BROOKS, recalled.

Direct examination by Mr. Foley:

Q. Brooks, on Wednesday and Thursday of last week was Detective Smith sitting directly behind you? A. Yes, he was.

Q. Is it or is it not a fact that on Thursday morning on two or three occasions Detective Smith called to you and asked you a question which in effect—I am not attempting to use the exact words—which in effect was, "Wouldn't you like to have relations with your wife?"

Mr. Congleton: Objected to.

The Court: Why?

Mr. Congleton: I do not see that that is at all material.

Mr. Foley: It is material.

The Court: Didn't he testify to that?

Mr. Congleton: My recollection is your Honor sustained my objection.

Mr. Foley: He answered the question.

Mr. Congleton: Did he?

The Court: Yes.

Mr. Congleton: Then I withdraw my objection. I thought you sustained my objection.

A. Yes.

Mr. Foley: Cross examine.

Mr. Congleton: No questions.

Detective Zager.

(There is no response.)

Mr. Foley: Well, in order to save time, I am perfectly willing to stipulate that there will be no comment whatsoever about the absence of Detective Zager—no mention of him in any connection.

Mr. Congleton: Very well, sir.

Mr. Foley: Is that agreeable?

Mr. Congleton: Yes, sir.

At this time then, if the Court please, the State renews its offer of S-53 for identification in evidence.

Mr. Foley: I object to the offer and now, if the Court please, I would like the opportunity of examining this lengthy exhibit in order to amplify the reasons for my objection.

The Court: Weren't there two statements, Mr. Prosecutor? Wasn't there the statement of the other man, Mr. Prosecutor?

Mr. Congleton: I did not continue my proof on that Saturday, sir; I have proved only this one.

The Court: I thought someone testified that statement was read as well.

Mr. Congleton: It was, sir. Captain Cocozza testified to that, but I did not ask

the succeeding witness about the other statement; I limited my examination after Captain Cocozza to just this statement, and offered this one. It was the only one I offered Saturday.

The Court: Then that is the offer. And Mr. Foley, you want——

Mr. Foley: I object to it but, of course, would like to examine it in order that I may with some degree of intelligence, if it is possible, state the reasons for my objection—additional reasons.

The Court: Very well. Then you may examine it, and inasmuch as the statement of your reasons will be an argument, why, I can excuse the jury from being present at that argument, and I think I will hear the argument in my chambers.

(Addressing the jury): Counsel wish to argue the question of the admissibility of this statement, and inasmuch as that is a question for the Court to decide, whether to admit it or not, I think I will hear the argument in chambers, and perhaps you, lady and gentlemen, would be more comfortable if you sat in your own room while I hear it.

Mr. Foley: If your Honor please, I have not looked at the statement. I understood it took Captain Cocozza 20 minutes to read it. I will have to read it very carefully. It would seem to me that the length of time that it takes to read the statement, plus the time of my argument, will use up between now and 4 o'clock.

The Court: Possibly it will.

Mr. Foley: I said that to your Honor only because your Honor did not happen

to think of that—having the jury here, perhaps.

The Court: You mean your idea is that it might be just as well if I excused the jury until tomorrow morning?

Mr. Foley: I think we will use up the remainder of the day on this subject.

The Court: I don't know about that.

Mr. Foley: Well, maybe not.

The Court: It is getting rather late, anyway, so I will see how it goes along—how long it takes to read the statement, and so forth. I will let you know, lady and gentlemen, whether you are excused until tomorrow morning or not.

(At this point a brief recess is taken.)

WILLIAM WANGNER, recalled.

Direct examination by Mr. Congleton:

Q. Lieutenant Wangner, directing your attention to the afternoon of December 19, 1946, were you present in Police Headquarters with the defendant Brooks? A. I was.

Q. Was also a Mr. Smart there? A. There was.

Q. Showing you S-53 for identification I ask you if you saw James Brooks sign his name? A. I did.

Mr. Foley: I object to that upon the ground that it is not relevant and not material.

Mr. Congleton: This is the last page of Mr. Brooks' statement.

William Wangner, Recalled, for the State —Direct.

Mr. Foley: Excuse me. I withdraw the objection.

Q. Did you see James Brooks sign that statement? A. I did.

Q. At that time what did Brooks do with his statement? Did he read it? A. He read the statement out loud.

Q. Who was present when he read it out loud? A. Joseph Smart, Detective Kinney, Captain Cocozza and myself.

Q. Thereafter did Smart read his statement? A. Smart read his statement first, before Brooks.

Q. He read his statement first? A. Yes.

Q. After he read his statement, did you see James J. Brooks put his signature on the last page of S-54 for identification?

Mr. Foley: I object to that, if your Honor please, upon the ground that it is not material whether Brooks placed his name on Smart's statement or not.

The Court: Overruled.

Mr. Foley: In the absence of other proof it would signify nothing.

The Court: The proof is whether it was read in his presence and then signed his name on it.

Mr. Foley: There is also before your Honor that another statement was read which was made by him, and under the circumstances any discrepancies between the two statements would amount to a denial by Brooks of what Smart had said by reason of the discrepancy, so that his signature to the statement would be of no significance.

The Court: That is argumentative and that is a subsequent question. The question now is whether it is material or relevant to have testimony to the effect that Brooks put his name on that statement in the presence of Smart after both statements had been read in the presence of both of them. So I will allow that to be proved, that he annexed his signature.

Mr. Foley: I pray an exception.

The Witness: What was the question?

Mr. Congleton: I have forgotten it, too, myself.

(The last question is read by the court reporter.)

The Witness: I did.

Q. Did you sign your name? A. I did.

Q. Did you see Captain Cocozza sign his name? A. I did.

Q. Did you see Detective Kinney sign his name? A. I did.

Q. Did Brooks say anything after Smart read his statement out loud? A. He did not.

Mr. Congleton: Cross examine.

Mr. Foley: No questions.

JOSEPH A. KINNEY, recalled, testifies further, as follows:

The Court: As I understand it, Smart read his statement out loud. Do I understand that properly?

Mr. Congleton: Smart read his statement out loud and, thereafter, Brooks read his statement out loud.

Joseph A. Kinney, Recalled, for the State—Direct.

Mr. Foley: Is this testimony to be cumulative with Lieutenant Wangner's?

Mr. Congleton: It is to prove Kinney's signature on here and cumulative of Lieutenant Wangner.

Mr. Foley: I am perfectly willing to stipulate that this witness would testify to the same effect as Lieutenant Wangner, permitting me, of course, my objection and exception to those questions put to Wangner.

The Court: That is up to the Prosecutor to accept it or not if he sees fit.

Mr. Congleton: It will be very short. We might as well do it, and there won't be any question about it.

Mr. Foley: Very well.

Direct examination by Mr. Congleton:

Q. Detective Kinney, were you present at Police Headquarters on the afternoon of December 19, 1946? A. I was.

Q. Directing your attention to Exhibit S-54 for identification, were you present when Joseph Smart read his statement out loud in the presence of the defendant, Brooks? A. I was.

Q. Thereafter were you present when James Brooks signed his name? A. I was.

Q. Is that your signature? A. Yes, sir.

Q. Were you present when Lieutenant Wangner and Captain Cocozza signed their signatures? A. Yes, sir.

Q. Directing your attention to S-53 for identification, with particular reference to the last page——

Mr. Foley: Which is which, Mr. Congleton?

Mr. Congleton: S-53 is Brooks' statement; S-54 is Smart's statement.

Mr. Foley: I am sorry, if your Honor please. I must be getting a little bit tired this afternoon. I thought he was referring to Brooks' statement. I find now he was referring to Smart's statement. Had I not been misinformed, or had I not misunderstood, I would have objected to that question which he asked if he saw Brooks.

The Court: You may make your objection now as timely.

Mr. Foley: I object to the question which was directed to the witness, in which he was asked whether he saw Brooks sign, upon the ground it is not material or relevant, and for the reasons I assigned in objecting to a similar question put to Lieutenant Wangner.

The Court: I think the same issue is involved, is it not, Mr. Foley?

Mr. Foley: I think it is the same question.

The Court: The Court will overrule the objection.

Mr. Foley: I pray an exception.

The Court: You may have an exception.

Q. Directing your attention to Exhibit S-53 for identification, with particular reference to the last page, did you see James Brooks sign his name after he read the statement out loud to Smart? A. Yes, sir.

Q. Is that your signature appearing thereon? A. Yes, sir.

Q. Were you present when Lieutenant Wangner and Captain Cocozza signed? A. Yes, sir.

Joseph A. Kinney, Recalled, for the State—Cross.

Q. Did the defendant, James Brooks, say anything after he signed that? A. No, sir.

Mr. Congleton: Cross examine.

Mr. Foley: No questions.

The Court: Excuse me, but this is only asking what is on the paper, and I would like to get myself clear.

Did Brooks sign his own statement for the second time on that occasion?

Mr. Congleton: Yes, sir.

The Court: Also, according to this witness, signed Smart's statement?

Mr. Congleton: That is correct.

The Court: At that same interview?

Mr. Congleton: That is correct.

Cross examination by Mr. Foley:

Q. And nothing was said by Brooks at that time? A. No, sir.

Mr. Congleton: I offer Exhibit S-54 for identification in evidence.

Mr. Foley: I object to that offer, too; that will be upon a different ground.

The Court: That is the matter that Mr. Foley wanted to argue, and you want to have an opportunity, I assume, to look at both statements?

Mr. Foley: To look at both of them now.

The Court: Before he makes his argument. So that, members of the jury, we are back just where we were before, as far as adjournment is concerned, and that being the case, now being somewhat later, we might just as well excuse you until tomorrow morning at 10 o'clock.

(An adjournment is taken until Tuesday, March 25, 1947, at 10 a.m.)

EIGHTH DAY.

March 25, 1947.

(The following takes place in the Court's chambers.)

The Court: As I understand it, gentlemen, the situation is this. The evidence as to the admissibility of these two statements is closed; that is, the inquiry as to whether or not they are competent, is closed, and the testimony adduced is satisfactory to both sides; that is to say, both sides rest upon the testimony as it stands. Is that correct?

Mr. Congleton: That is correct.

Mr. Foley: I have no more evidence to offer.

The Court: You have no more evidence to offer; but is there any other evidence you desire to be offered or introduced?

Mr. Foley: No, your Honor; I can think of none. I think that subject has been thoroughly——

The Court: Explored?

Mr. Foley: Explored.

The Court: All right. That being the case, I think the next thing in order is to argue the proposition advanced by the State, that these statements are competent.

Mr. Congleton: That is what it comes to.

Mr. Foley: May we argue these one at a time, your Honor? My argument probably would not be the same as to both.

The Court: Yes. Let us take up the statement of Brooks.

Mr. Congleton: S-53 for identification, which is Brooks' statement. That state-

ment has been proved by the State to have been a voluntary statement, on which no threat or promise of any reward were made to the defendant Brooks. Brooks states that, if I recall his testimony, he was struck and kicked by Detective Smith and was struck on one occasion by Detective Cook, and that both Cook and Smith made threats to him. The State has offered proof which we feel has more than sustained the burden, namely, that these threats could not have taken place; that Cook and Smith were never with this defendant during the course of this questioning alone and that all the police officers and detectives from the Prosecutor's Office who were present in Police Headquarters that evening, together later on with the disinterested citizen of the community, together with the testimony of the doctor who examined this man and found no visible signs of injury and when this man made no complaint; therefore the State submits that it has sustained the burden that those are voluntary statements, although the State does not concede that the burden is upon them in this hearing to so maintain, because I think the burden is upon the defendant to prove that they are involuntary, but I believe that by the great preponderance of the evidence the State has proved that they are voluntary statements.

Mr. Foley: Are you referring now to the statement of Brooks?

Mr. Congleton: That is all, Mr. Foley.

The Court: That is the first one.

Colloquy.

Mr. Foley: If your Honor please, I can briefly state my objection as to that statement.

We maintain that the statement was not a voluntary statement; that the evidence is not such as to establish that the statement was voluntarily made and that it was not the result of threats. We feel we have established that the contrary was true, and we take that position.

The Court: Have we the testimony of Brooks here?

Mr. Congleton: It started on Saturday, if the Court please.

The Court: What I wanted to ask you is this: Is anyone sufficiently familiar with it to point to that portion preliminarily to that where Brooks maintained that he was told that if he did not say he shot and killed Mortimer Bateman he would be thrown out the window, taken for a ride, and things of that kind?

Mr. Foley: That was yesterday, and it may have been said both days.

The Court: Exactly. Then he was asked the question, "Did you tell Captain Cocozza that you had shot and killed Bateman?" and he said, "I did not."

Mr. Congleton: Sir, I will find the testimony. Your recollection is a little incorrect in my opinion.

The Court: All right.

Mr. Congleton: I asked him if he did tell Captain Cocozza that he shot and murdered Bateman; that is Brooks, because of these threats, and he said yes, he did. Then

I handed him the statement. I said, "Point it out to me in the statement."

He went through the statement; we sat there, and he said, "I can't find it."

The Court: Oh, yes, I think you are right. I stand corrected. In other words, what I meant to say was he did not put it in the statement.

Mr. Congleton: That is right.

The Court: It was not put in the statement.

Mr. Congleton: This is at page 611, after he has read the statement he says, "I don't see it here, no." This was a long argument after I asked him, "Now, you point out to me in there where there is anything in which you said you shot and murdered Mortimer Bateman."

Mr. Hayden: What page are you referring to, Mr. Congleton?

Mr. Congleton: I am referring to page 608.

The Court: That was substantially the situation. Brooks maintained he was told that he had to say that he had shot and killed Mortimer Bateman or else, and so forth. Then it did not appear in the statement that way. Yet he said he told Captain Cocozza in compliance with the threat; is that right?

Mr. Congleton: That is my understanding of the testimony.

The Court: He told Captain Cocozza in compliance with the threat what was demanded of him by the police, that he had shot and killed Mortimer Bateman, and yet it does not so appear in the statement.

What could induce Captain Cocozza to leave that out if he was not telling the truth and the defendant was? That is the key to the case, so to speak.

Mr. Foley: No, if your Honor please. I think that is only one of a number of things.

The Court: Precisely. I agree with you.

Mr. Foley: This man says he was in a state of fear. If he was in a state of fear, then whatever he said, whether it be what is in the statement or whether it be something which is not in the statement, would not be admissible against him, because he was in a state of fear, and the statement was not made voluntarily.

The Court: Well, that is the issue that is before the Court, as to whether or not it was voluntary. I am bound to weigh the testimony of Brooks in that connection. And another thing is: Is this statement a confession according to the demand of the police, and is it a full confession at all? Isn't it a partial confession in which he undertakes to shift the burden very largely to his associate, Mr. Smart? That is another thing that impressed me in the case. Those two things impressed me. That is the reason why I am mentioning them.

Mr. Foley: I cannot see how your Honor could come to any conclusion other than that it is a confession, because we have to consider the nature of the crime charged. The crime is murder in the course of a robbery. Under the law, the extent of his participation is not important, except as it might bear upon the degree of punishment to be inflicted.

The Court: That is right.

Mr. Foley: But we are speaking of the crime itself, and this statement is no doubt a confession of the crime.

The Court: Yes.

Mr. Foley: For whether he fired the shots or whether he didn't, he admitted in the statement that he participated in a robbery, and it is clear that as a result of that robbery Bateman was killed. Therefore he has confessed to the crime which is charged.

The Court: True, in a sense it is a confession and an avoidance—a confession of a crime technically but an avoidance of the chair. So that I think it may be that Brooks calculated to some extent in making this statement, and he didn't comply, as he himself says, with the demands of the police in order to avoid being thrown out of the window and taken for a ride and shot on a pretext that he was trying to escape, but he made a statement which was a confession of a crime technically but at the same time laid skilfully the groundwork for an avoidance of the chair.

Mr. Foley: If your Honor please, I think we must consider the holdings of the case in which it is said that the recommendation of life imprisonment is not a part of the verdict. The judgment of the jury is either guilty or not guilty.

The Court: I agree with that.

Mr. Foley: The recommendation is something which is attached to the verdict.

The Court: Yes.

Mr. Foley: And from which certain obligations develop upon the Court. But essentially the verdict is guilty or not guilty of the indictment before the jury.

The Court: Yes.

Mr. Foley: The facts contained in his statement are his confession of the guilt of the crime charged.

The Court: Yes.

Mr. Foley: So much of it as might enable the jury to extend clemency to him, has nothing whatsoever to do with his guilt or innocence of the crime, and so is an admission he participated in the robbery, plus the undisputed proof that Bateman died as a result of gunshot wounds, and his admission that a gun was fired by whoever it was, whichever it was, is of itself a confession of murder in the first degree.

If your Honor please, if you had the power to try the case without a jury and the man so testified, you would have no alternative but to find him guilty of the crime.

The Court: Yes.

Mr. Foley: There would be no justification for finding him not guilty.

The Court: I will agree to that so far.

Mr. Foley: I might say, if your Honor please, that in making that statement to you I want it to be understood for the record that I am not conceding his guilt, because I have a motion which has nothing whatsoever to do with the statement, which I will make at the conclusion of the State's case, in which I will argue that the State has failed to establish his guilt in accordance with the law.

The Court: That is all right. You certainly have that right.

Mr. Foley: But in so far as the confession is concerned, I say it is a confession, it is a complete admission of his guilt of the charge.

The Court: What I am pointing out is that it does not indicate, the statement as it is presented, that is, does not indicate a complete compliance with the alleged threats; it does not indicate a man who completely submits himself and surrenders himself to a fear of police and does what they tell him. It pictures a man who has in mind all the time what a man is almost sure to keep before him when he is in danger of it, and that is the electric chair, and this statement reflects, to my mind, a calculation, a calculating statement on the part of this man which, while admitting technically his guilt of the crime charged, skilfully opens the way to avoid the electric chair, which must have been the thing that was in this man's head, for this man is not new at criminal experiences. So I think, on the whole, gentlemen, without prolonging the thing any longer, that I am perfectly satisfied that statement No. 1, to-wit, the statement of Brooks, is competent and the objection to its admission in evidence will be overruled and the defendant granted an exception.

Now we come to the second statement, which is the statement of Smart.

Mr. Foley: Perhaps, if your Honor please, since I have not outlined to your Honor the ground of my objection——

The Court: And let me add further that I do not confine myself to what I have said;

I pointed those out only as things that have impressed me during the trial as quite salient, and I wanted to mention them to you. Of course, there is no use to extend the argument or extend the reasons that the Court has for ruling as it does. But I do not wish it understood that this is all I would really have to say if I were exploring the subject further.

Mr. Foley: I understand the rule to be that anything in the record which would support your Honor's finding would be before the Court if that question were reviewed.

The Court: Undoubtedly.

Mr. Foley: I wish to say that I think it might be better if I stated my opposition to the Smart statement, S-54 for identification, so that we can lay the course of the argument and raise the issue.

The Court: All right.

Mr. Foley: The objection to the Smart statement, S-54 for identification, is based upon an entirely different ground from that expressed by me in opposition to S-53 for identification. We are not in a position to offer any evidence with respect to the voluntary nature of the Smart statement; Smart is dead; and so we cannot challenge the admissibility of that statement from the standpoint of its being voluntary, although I would like it clearly understood that if it were admitted the question of its being voluntary and the weight to be attached to the statement would still be for the jury, and I feel would be subject to argument. However, that is apart from the ground urged.

Colloquy.

As we understand it, the only ground upon which this statement may be admitted in evidence is that the circumstances were such with reference to the reading of it and the affixing of his signature by Brooks to the statement as to constitute an admission against interest. The statement, in the first place, prima facie is hearsay. It could become under some circumstances an admission against interest.

Under *Donnelly* v. *State,* 26 N. J. L. 601, at page 613, the Court fixed the rule when it said, "When a matter is stated in the hearing of one, which injuriously affects his rights, and he understands it, and assents to it, wholly or in part, by a reply, both are admissible in evidence; the answer, because it is the act of the party, who is presumed to have acted under the force of truth, and the statement as giving point and meaning to the action. So, also, silence, unless it be accounted for by some of the circumstances which have been specified, or by other sufficient reasons, may be taken as a tacit admission of the fact stated; because a person knowing the truth or falsity of a statement affecting his rights, made by another in his presence, under circumstances calling for a reply, will naturally deny it, if he be at liberty so to do, if he does not intend to admit it."

The Court: Have you got the original statements?

Mr. Congleton: Yes, sir. That is Brooks', and this is Smart's.

Mr. Foley: So, as I understand the law, the burden rests upon the State, since it is the State which urges that this is an excep-

tion to the hearsay rule, to establish facts from which the Court may gather that the statement was such as to call for a reply, the circumstances were such as to require a reply, and then either that a reply was made or that by silence there was a tacit admission of what was a reply. We maintain, if your Honor please, that none of these requirements is met in this case, and in order to explain what I mean by that, I must briefly review the circumstances under which Smart's statement was read to Brooks.

The Court: Well, let me ask this. These subsequent writings, as they might be called, the first is a statement signed by Brooks.

Mr. Foley: Are you referring to S-53?

The Court: S-53. That is Brooks' statement. Then it is signed by him, and that was discussed quite fully on the first motion.

Then we have some other writing which follows and that says, "A brown felt hat was shown to me at Police Headquarters," and so forth, and then goes on and says, "I heard James Brooks read his statement aloud and in my presence at Police Headquarters. Smart." That handwriting appears to be in the same handwriting as the main body of the statement, and I assume there is no doubt and no misunderstanding that it was Captain Cocozza's handwriting.

Mr. Congleton: That is right.

The Court: And the same thing over in the other statement; it says, "I have read this statement aloud in the presence of James Brooks." That is signed by Smart.

Underneath that is Brooks' statement that he heard Joseph Smart read his statement, and so forth. Those all appear to be in the same handwriting, which I understand is Captain Cocozza's handwriting.

Mr. Congleton: That is correct, sir.

Mr. Foley: You are now referring to S-54 for identification?

The Court: Yes. I understand these additional statements, phrases or paragraphs were added by Captain Cocozza not at the same time the original statement of Brooks was taken but at a subsequent time? Much later?

Mr. Congleton: That is correct, sir. S-53, the statement of Brooks, was signed, I think it shows, around 1 or 1:30 in the early morning of the 19th, and the reading of the statement took place around 4 or 4:45 in the afternoon of December 19th.

The Court: That is what I understand. All right.

Mr. Foley: Now, the circumstances surrounding the giving of these statements and the reading of these statements in the presence of the respective persons who made the statements, namely, Smart and Brooks were these. We do not know whether Smart's statement was given first.

Mr. Congleton: Yes, we do.

Mr. Foley: In the first instance.

Mr. Congleton: Lieutenant Wangner testified that Smart's statement was read to Brooks first.

Mr. Foley: I am not talking about the time read: I am talking about the time it was originally taken.

Mr. Congleton: Smart's statement shows that it was taken on the 19th.

Mr. Hayden: Subsequent to Brooks' statement.

Mr. Congleton: Yes.

Mr. Foley: Subsequent to Brooks. Then I can say for the record that, first, Brooks gave the statement which is marked S-53 for identification and sometime thereafter Smart gave a statement. At the time he gave a statement the other was not present. Subsequently the men were brought together and the statement which Brooks previously gave was read in Smart's presence, and the statement that Smart previously made was read in Brooks' presence.

Two questions arise now. Having heard Smart's statement, was Brooks obliged to make a denial of any of the facts in Smart's statement if he desired to deny them, and did he by making those statements admit the truth of Smart's statements? And that is number one.

Secondly, the question arises, Does the fact that Brooks placed his name at the end of Smart's statement, indicate that he approved the contents of it, adopted Smart's statement as his own, and, in effect, not only did not deny the statement but admit the truth of its contents by reason of his having attached his name?

The Court: As I understand it, these two statements do not coincide.

Mr. Foley: That is the point. That is the point that is the whole basis of my argument, and I am coming to that in just a moment. I think at this point it should be

noted that the evidence is clear from the officers who testified that no word was spoken to Brooks at the time he signed his name on Smart's statement, that he said nothing. He wasn't asked, "Is this true?" He wasn't asked, "Do you agree with this?" He had read the statement, presumably, only a few minutes before, certainly within a relatively short period.

The Court: According to the testimony, everybody became dumb.

Mr. Foley: Completely.

The Court: And possibly deaf; I don't know.

Mr. Foley: Completely wordless.

The Court: They seemed to lapse into a condition of, I might say, innocuous desetude, as Mr. Cleveland used to say, but at least dumb. I mean deaf and dumb, in that sense. Nobody said anything. That is the way this is presented.

Mr. Foley: That is the record, and I think perhaps I shall have something to say about that at another time.

The Court: Whether that picture is a credible one is another proposition.

Mr. Foley: That, too, is for your Honor to consider, because you have the primary consideration as to whether or not the circumstances were such as to indicate to your Honor's mind that Brooks was called upon under those circumstances to do something other than stand mute and was called upon to say, "No, I will not put my name on that statement."

I will say in view of this rather peculiar complete silence that that of itself should

appeal to your Honor as being most unusual and quite out of keeping with things that happen in the ordinary course of events.

The Court: I wish you would let me correct that. When I said, "dumb" I meant in the sense of mute. Your use of the word "mute" showed me that that is the word I should have used.

Mr. Foley: I thought that was the word your Honor meant. I know there was no reflection meant upon the mentality of anyone who was there.

The Court: No, I didn't intend that at all.

Mr. Foley: However that may be, the fact remains that your Honor can examine both of these statements and find in Brooks' statement substantial denials, substantial contradictions, let's say, of the contents of Smart's statement. And so I respectfully submit to your Honor that the reading of his statement, even though it preceded the reading of Smart's statement, was of itself in Brooks' mind a denial of what was said by Smart, and for him to be called upon to reiterate his denial after Smart's statement was read would be to call upon him to do a useless thing, a meaningless thing, and the law does not recognize the obligation upon anyone to do a meaningless thing. The theory of calling upon a man to make a denial is that he has said nothing substantially to deny what is charged against him. Brooks, in a ten-page statement, has given a complete account of his activities in this affair, and in many respects it is contradictory of Smart's state-

ment, and so in every respect that it is contradictory it is a denial of Smart's statement.

I would like to call to your Honor's attention the case of State *vs.* Sorge, 123 N. J. L. 532, opinion by Chief Justice Brogan. That was a rape case. The defendant was brought to a police station, and there he was confronted by the complaining witness. Apparently the complaining witness said, "He is the man who assaulted me." There is evidence of two things. There is evidence from some witnesses that the defendant hung his head and made no answer. There is evidence from another witness that the defendant admitted having had the intercourse with the complaining witness but said she was willing. In those circumstances the Supreme Court said that the admission of that statement was a violation of the hearsay rule, and that in those circumstances the Court should have found that the conduct of the defendant was such as to amount to an admission of the accusation. It is a lengthy opinion. I do not know whether your Honor has recently read it or not. If not, rather than have me read it at length, I should like to have your Honor examine it.

The Court: I have some knowledge of it.

Mr. Foley: But the important part is this, aside from the factual situation, and I might point out there is an analogy between the two cases, even from the standpoint of fact, because in the Sorge case the defendant admitted, let us say, one element of the crime and he has denied another element.

In other words, the crime of rape is concerned with two elements essentially—intercourse and against the will of the person who was assaulted. He admitted the intercourse; he said she was willing, which by inference is a denial. There was also present, however, evidence the he said nothing when she charged him with it; that he hung his head in shame.

Now, in our case Brooks admits his participation in the robbery and he admits his participation in the killing in his own statement, and so, having conceded that as far as the crime itself is concerned, he had already contradicted, had already made a denial of anything that Smart might say, or, perhaps, an admission of what Smart had said by his own statement, if he had admitted it prior to the reading of Smart's statement, then there would be no purpose in having him admit it.

Referring now to the Sorge case, the Court said, "Hearsay evidence, i.e., that which does not derive its value from the credit to be given the witness himself, but necessarily rests on the veracity and competency of some other person is not tolerated in our system of jurisprudence unless it be within one of the well known and strictly defined exceptions. Under the facts in this case its only justification would have to rest upon the exception which is known as an 'admission against interest', and unless it be that, the reading of the statement was clearly erroneous. It should be noted, of course, that the witness, Pirola, might with legal propriety have testified to what

had happened on the occasion in question and to what he had seen and heard from Miss McClaren when confronted by Sorge, and in turn what the defendant said upon being confronted by Miss McClaren. If it appeared that he was confronted by this outraged girl, who accused him, especially as here, in the presence of witnesses, under circumstances where he had the opportunity to speak and did not, then the testimony as to what occurred would be competent and it would be for the jury to infer that which reasonably might have been deduced from his silence. The defendant here was not surrounded by circumstances that in any way excused him from making what comment or answer he desired to make."

The Court: That next to the last expression is rather confusing.

Mr. Foley: It is. "The important element in the charge of rape is whether or not the unlawful act was done with or without the consent of the woman who makes complaint. In this case the intercourse was admitted and the defendant in the Police Headquarters when he was confronted with Miss McClaren and before trial of the cause answered that she consented to his act. Therefore, he did make denial of that which went to the essence of the crime charged. Since this case will have to be tried anew we have thought it wise to point out the vice in the proceeding, i.e., allowing the statement of Miss McClaren who could not, and we assume cannot at the next trial, appear to testify; that the statement made by her and read by the State's witnesses

does violence to the rule against hearsay. This we think was a violation of a substantial right."

The Court: The girl went crazy?

Mr. Foley: Yes, that is it.

I have read the Supreme Court opinion, and the Court of Errors and Appeals' opinion in affirming the Supreme Court refers to the Supreme Court's opinion and says in effect that it admirably states the rule.

Now then, coming back to our case:

Was Brooks' conduct at the time Smart's statement was read an admission against interest? That is the only question here. How can it be an admission against interest if in the very transaction he read his version of it and in many respects denied what Smart had said? In those respects in which he admitted what Smart said his own statement will prove that, and in those respects in which he denied Smart's statement there was a denial, which I submit is a complete denial, and did not call upon him to make any further statement, particularly in view of the fact that he was not apprised by the police that by putting his name on the paper he was adopting Smart's statement. He was not asked by the Police if he had anything to say. And what would any reasonable person think if he were in the room other than what Brooks undoubtedly thought: "There is nothing for me to say as far as Smart's statement is concerned because I already read my own and in those respects in which I differ from Smart I have already in-

formed the Police, and I have already committed myself to a statement." So I think, if your Honor please, that to admit Smart's statement would do violence to the hearsay rule, and I do not think, if your Honor has read the statement, that I need to urge you that a substantial right of Brooks will be impaired by the admission of the statement, because Smart's statement contains matters, details of Brooks' part in this affair, which are quite different from Brooks' version, and in those very details, even though Brooks' guilt or innocence of the charge of first degree murder is not in any way changed, upon the issue of whether or not the jury will recommend life imprisonment, which issue is determined after an examination of all the evidence under the law, I cannot help but feel that there are matters in Smart's statement which, if it becomes a part of the evidence, would eliminate any possibility that Brooks would be extended any clemency. Therefore I object to its admission.

The Court: Well, the whole thing before the Court is the evidence which would be proper to prove guilt or innocence. I have no right to introduce any other evidence. I have no right to allow evidence exclusively on the subject of mercy or recommendation. The trial, as I understand the law, is confined to evidence which is competent to prove the guilt or innocence of the defendant. Does anybody differ with that?

Mr. Foley: I do not differ with your Honor's statement. I might say that I think you have drawn an inference from what I

have said which I did not intend you should draw. In speaking of it violating a substantial right, I had in mind that evidence erroneously admitted may be harmless. I am simply pointing out to your Honor that this statement of Smart could not under any circumstances be said to be harmless if it were erroneously admitted, because it does violate a substantial right of the defendant in the respect that it adds to the record evidence which the jury might consider adversely to Brooks upon the issue of whether or not life imprisonment should be granted.

The Court: It might be, but that is not the controlling feature.

Mr. Foley: It is not, but I would, if your Honor please, be in the position, if I were arguing this case before your Honor as an Appellate Judge, of having to show to your Honor—and assuming that your Honor agreed with me that a statement had been erroneously admitted in the first place, if your Honor please—what harm was done by its admission. So I thought I should have in the record at this time a statement which would apprise your Honor of one of the reasons why I think this statement would be harmful if erroneously admitted. That is my only point.

The Court: You mean it would be prejudicial error?

Mr. Foley: That is right. But that is apart from the fundamental issue. The fundamental issue is, can that statement be admitted as an admission against interest? If it cannot be, it has no place in the record. Upon no other theory is it admissible.

Colloquy.

The Court: I see it, as far as that goes, very much as you state, but, as I see it, it is this. Where an accusation or statement is made in the presence of a person, a defendant, accusing him of something, there are conditions under which they are expected to say something, and if they do not say something it is taken as an admission; their silence, in other words, is an admission. But the circumstances must be such as to call upon them to say something. That is what we are considering here. Are the circumstances such as to call upon him to say something and, if so, what did he say? That is what I want to explore.

Mr. Foley: That, your Honor, I submit, is completely answered by the defendant. He had just previously read his entire version of the thing and in every respect that it was contradictory of Smart's statement he denied Smart's statement by reading it.

The Court: But here is what he said, apparently: "I heard Joseph Smart read his statement out loud in my presence at Police Headquarters."

Mr. Foley: You see, if your Honor please, if we were dealing here with two defendants on trial each of these statements would be admissible against the man who made it. There would be no problem then. But here one man is gone. The defense has no opportunity to cross examine Smart and find out whether or not what he said is true, and the only way the defendant can be charged with this statement of Smart is for your Honor to find that the

circumstances were such that he made no denial. I say, first of all, he did make a denial when he read his own statement, for in every respect that it is contradictory to Smart's statement it was a denial of Smart's statement.

The Court: Well, at the same time he did this, and this all occurred at the same interview; at the same time Brooks said this, or at least he signed this: "I have read my statement aloud in the presence of Joseph Smart and the detectives at Police Headquarters."

Mr. Foley: So that, first of all, he said his statement is true, as will appear in the statement. I think you will find at the conclusion of the statement he said that his statement is true and then he says in addition, "I have read my statement aloud in Smart's presence." From that, can anything else be gathered than that he intended that that should be his answer to anything that Smart might say? Because he has given a complete, detailed version of just what happened.

The Court: Would you mind showing me in what some material respect these two statements differ?

Mr. Foley: Yes, I will, sir. Just so the record may be clear, your Honor has asked me to point out some. So I take it that you do not want me to point them all out.

The Court: No, just something.

Mr. Foley: Because I would not want it to appear that I did not raise something that I might feel to be of consequence.

The Court: No, just something that seems to be of consequence.

Brooks says, "About two days after I came out of Annandale, two months ago, Joe came up to my house to see me. Joe and me was in the front room, and my wife, mother-in-law, and sister-in-law, were in the kitchen. Joe said to me, 'Do you want to make some easy money?' I said 'No, Joe, I don't want to do that any more; I have been in too much trouble; I just came out.'

"Joe said, 'Well, whenever you do, let me know.' Joe stayed there about a half an hour longer, then left. About two weeks later I met Joe in Mike's Tavern, 13 Lillie Street. Joe said to me, 'Do you want to make that easy money?'

"I said, 'No, Joe, I don't want to get in no more trouble'."

That is in S-53 for identification.

Now, referring to Smart's statement——

The Court: Well, in short, that would say in effect that Smart instituted the whole thing.

Mr. Foley: That is right. Smart's statement is this: " 'Do you want to know how to make some easy money?' He said, 'Sure, what's the score?'

"I said, 'Hooks, the truckdriver where I work at Wigler's carries a lot of money to the bank. It isn't just a few hundred dollars.' Jimmy said, 'I will think it over.' Then we quieted down for about a week."

Now, that would be important in the jury's consideration, when it examines all of the evidence in the case. There would then be evidence which would or could miti-

gate Brooks' chances of obtaining a recommendation of life imprisonment. But there is a more important thing than that. You must remember, if your Honor please, that this indictment is drawn in the statutory form, and under this indictment this case must be submitted to the jury, if the proof warrants it, on either or both of two theories: It can be submitted to the jury upon the theory that this was a murder commenced in the course of a robbery—a felony murder, so-called—and that if the jury so finds, the question of deliberation and premeditation is not to concern the jury.

In Smart's statement there is a part which I will refer to in just a moment, from which it could be inferred that Brooks' state of mind and his intention, for that matter, were such as to afford the jury the opportunity of finding that this was a willful, deliberate, premeditated murder, quite apart from the theory of a felony murder.

In Smart's statement he says——

The Court: Excuse me. In Brooks' statement he says there that the thing was initiated by Smart.

Mr. Foley: That is right.

The Court: Now, what does Smart say? I don't quite get that.

Mr. Foley: Smart said, "I said to Jimmy, 'Do you want to know how to make some easy money?' and he said, 'Sure, what's the score'?"

Brooks said, "No." In his statement Brooks said, "No, I don't want to make

any easy money, I am through with that kind of thing.''

The Court: Brooks protested, but he finally acquiesced according to his own statement.

Mr. Foley: That is right. Smart said he did not protest.

The Court: That is a different thing. Nevertheless, they both went in.

Mr. Foley: That is right. And on this matter which I just recently mentioned, according to Smart——

The Court: I think it is very important in this argument that the differences between the two statements should be pointed out, because the more I think of it the more I am satisfied that that is a very important element.

Mr. Foley: Very well. Then I had better start at the beginning and go through it. But before doing so, in order that my argument may have some continuity, let me pick out this one thing.

The Court: Well, excuse me, now. What you said before can be summarized in a very few words. In other words, in one instance Brooks said that Smart was the iniating force and that Brooks was reluctant. In the other instance, the other statement said that Brooks was not reluctant but was willing. But in the final analysis they all went in together in the end.

Mr. Foley: That is the first thing I said. Then after that I said to your Honor that I could point out in the statement that Smart said——

The Court: Now, let me ask you this: Do you remember that the police, according to Brooks, said that they demanded that he say he shot and killed Mortimer Bateman, and his statement does not contain that? Now, is there anything in Smart's statement which would show that Brooks did the shooting?

Mr. Foley: Yes, sir.

The Court: Well, that is an important thing.

Mr. Foley: I will point that out. "Jimmy Brooks had the gun in his right hand and pointed it at Hooks and me and said, 'Pick them up, Hooks.'

"I said to Gill, 'Cut out the jive and put that thing away.' Hooks stopped the truck at Thirteenth Avenue, near the battery store. Hooks then jumped up and grabbed Gill and they started tussling. During the tussle Gill fired two shots at Hooks. Then Gill and Hooks fell in the truck. Then I stepped between Hooks and Gill and got behind the wheel. Gill said, 'Get going Joe.' Gill fired two more shots while he was tussling with Hooks."

If your Honor please, the testimony in the case is that there were only four shots fired.

The Court: Yes.

Mr. Foley: Three of them entered Bateman's body. So when Smart said that Brooks fired four shots, he says that Brooks shot all of the shots that were fired into Bateman's body. Do you see what I mean?

The Court: Yes. Now, wait a minute. These nicknames kind of get me a bit.

Mr. Foley: Gill is Jimmy Brooks, and Joe is Joe Smart.

Mr. Congleton. Hooks is Bateman.

Mr. Foley: And Hooks is Bateman.

Now, Smart says in this statement——

The Court: Let me see what Smart says.

Mr. Foley: I will read it again. "Hooks then jumped up and grabs Gill, and they started tussling. During the tussle Gill fired two shots at Hooks. Then I stepped between Hooks and Gill and got behind the wheel. Gill says, 'Get going, Joe.' Gill (Brooks) fired two more shots while he was tussling with Hooks." That is all—four shots.

The Court: Yes. In other words, according to Smart, Brooks fired all of the shots. Now, let's see what Brooks says, or Gill.

Mr. Foley: "I had my right index finger on the trigger." This is before any shots were fired. "The gun was not cocked. As Hooks grabbed my hand the gun went off. Before the gun went off Hooks grabbed my hand, stopped the truck and turned off the ignition?

The Court: In other words, he said the same as he did on the stand, as I recall it.

Mr. Congleton: There is more to it.

Mr. Foley: There is more to it. I am eliminating things which do not bear on this direct question. "Hooks was holding my hand and the gun went off toward the front of the truck. Hooks grabbed the barrel of the gun and pressed on it. The The gun went off again toward the rear of the truck, and Joe slowed down and came pretty close to a stop. He turned around

and said, 'Give me the gun. I will shoot him.' Joe took the gun out of my hand.

When he did this Joe shot Hooks twice."

The Court: That is very material.

Mr. Foley: There are many more things, but there is one thing in particular which I think is most important, if your Honor please.

The Court: Definitely that is a variance, a substantial one.

Mr. Foley: No question about it.

The Court: In other words, Brooks said that he saw him fire two shots.

Mr. Foley: And Smart said he fired none.

The Court: And Brooks says that the whole thing was accidental and was due to the action of Bateman, whereas Smart says Brooks fired all four shots. That establishes, I think, fairly clearly, that the statements do not coincide, which was the original proposition.

Mr. Foley: Right. But there is something more, if I can point it out. I am having trouble locating it. Here is something I think is quite important: Smart says that Brooks said on Sunday, December 15 —mind you, that is two days before—"He (referring to Brooks) then asked me if I was still for getting the money from Hooks."

"I said, 'Well, I guess I am.' Jimmy said, 'Which you know I will kill the son-of-a-bitch.' "

Now, that, if believed by the jury, would establish not merely a felony murder but

a wilful, deliberate and premeditated murder.

Mr. Congleton: I don't want to break in on your argument, but I think you should call the Judge's attention to what Brooks said in his own statement.

Mr. Foley: I am coming to it. I am commenting first on what this man said.

Mr. Congleton: I am sorry.

Mr. Foley: I don't mind your interrupting me, if you wish to, but I intended to come to that. That, you will note, refers to an incident which occurred on December 15.

The Court: Yes.

Mr. Foley: Brooks said on December 17—Tuesday, the 17th—as follows: "I found Joe at home." He went to Joe's home. "Joe said, 'After I get in you get in,' speaking of getting in the truck.

"I said, 'Yeah, you get in the truck and I'll get in behind you.' Joe then said, 'You pretend you are holding us both up because I don't want the folks to know I was in on the holdup.' I said, 'Suppose he don't give the money up, then what?' Joe didn't say anything. I said, 'Twenty-two thousand dollars is a lot of money if that is what you say it is. Suppose he makes a break and grabs for me, I'll shoot to scare him.' Joe said, "Yeh, that's a lot of money, we got to get him one way or the other.' I said, 'We are not going to kill him, are we?' Joe said, 'Yeah, if we have to because we got to get that money.' I said, 'O.K.' Joe said, 'Because if we don't do it that way, Hooks will go back and tell

that I stopped him.' I started kidding with Joe and said, 'We will shoot him and dump him in the river with the truck.' I said, 'That's about the only way we will get away with it.' Joe said, 'Yeah, that's right 'cause Hooks will go back and tell and that will make it hard on me.' So I said, 'What shall we do, shoot him?' Joe said, 'Sure.'

This was the end of the conversation. That, it seems to me, is substantially different from what Smart says because Smart says, he quotes Brooks in this way: "Which you know I'll kill the son-of-a-bitch," whereas he asserts that he was kidding with Joe, and that language certainly is not the language of anyone who is kidding.

The Court: Well, I think it seems to me it is plain enough that the statements do not coincide.

Mr. Foley: I can point out other things to your Honor if you wish.

The Court: Does not everybody agree with that?

Mr. Congleton: Yes.

Mr. Foley: Very well. If they do not coincide, then, and if it is agreed by everybody, as your Honor seems to say it is——

The Court: If anybody takes the contrary view, now is the time to say something.

Mr. Foley: I understood the Prosecutor to assent to that.

The Court: Yes.

Mr. Congleton: I did.

Mr. Foley: Therefore we come back to the question: Was there an admission against interest by silence?

The Court: Doesn't that boil right down to that?

Mr. Foley: It does boil down to that, and I say that since he had just a few minutes before—Brooks, that is—had read a statement which was contradictory over and over again with Smart's statement, that that was his denial of what Smart had said, and there was no need for him to say anything more. There was no occasion for him to say anything more and it cannot be implied that he intended to admit Smart's statement, concede the truth of it, when just a moment before he had denied it in so many particulars.

Mr. Congleton: May I interrupt, to keep the record straight, even though it might strengthen Mr. Foley's argument? The only testimony we have is that Smart's statement was read to Brooks first and at the conclusion of that Brooks read his statement to Smart.

Mr. Foley: I thought it was the reverse. I do not think it makes any esential difference, but it does strengthen my argument, because if he then read his statement that was the denial, and if there is a denial the statement cannot be admitted.

Mr. Hayden called my attention to some very strong language in State *vs.* Sorge, a Court of Errors and Appeals case, 125 Law, 447. Speaking of the Court's part in the admission of the statement on the preliminary question of whether or not it is

admissible—not speaking of the weight to be given to it if it were admitted, but on the offer—the Court said: "It is requisite that the conduct of the accused reasonably justify the conclusion of assent, express or implied, to the truth of its contents."

The Court: Would you mind reading that once more?

Mr. Foley: "It is requisite that the conduct of the accused reasonably justify the conclusion of assent, express or implied, to the truth of its contents."

Now I say that if it is requisite, then the fact that Brooks, after listening to Smart's statement, read a statement which denied Smart's statement in many, many respects — full contradictions, I think we have agreed—that was a denial; and that since there was a denial the Court cannot say that there was any assent, either express or implied, to the truth of Smart's statement.

The Court: We probably all agree on the law in general, to-wit, that where a statement is made in the presence of a defendant, where the circumstances are such that it calls upon him to say something, that silence is taken as an admission against interest, and the whole picture must be considered. Now, here is a case where apparently according to the testimony Brooks never opened his mouth.

Mr. Foley: Oh, no, if your Honor please. Smart's statement was read.

The Court: Yes.

Mr. Foley: And after it was read Brooks read his statement.

The Court: Yes.

Colloquy.

Mr. Foley: Which contradicted Smart's statement.

The Court: I don't mean that, as far as reading his statement is concerned. According to the evidence as we have it before us, there was silence that prevailed there.

Mr. Foley: Only at the time that he placed his name on Brooks' statement.

The Court: Yes, but there was a lot of preliminary. Of course reading the statement by Brooks, according to the testimony, must have covered a long time, but outside of that apparently never a word was said. By some process Brooks starts in and says, "I have read my statement aloud in the presence of Joseph Smart and the detectives at Police Headquarters." Apparently that is all that happened.

Mr. Foley: I can't agree that that is all that happened, because I think when your Honor says that you are thinking that that is all that happened at the time he put his name on it.

The Court: Yes, and read the statement previously.

Mr. Foley: And having heard Smart's statement read out loud. Suppose Brooks did not have any statement at all. Suppose after Smart had read his statement Brooks said, "No, that is not what happened. Here is what happened," and then, without reference to any statement recited the entire contents of this statement. Wouldn't that be a denial of Smart's statement?

The Court: Reading it out loud might be considered as practically saying it without a statement.

Mr. Foley: I don't see how it could be otherwise.

The Court: But that may be or may not be. I think I would like to hear what the Prosecutor has to say.

Mr. Congleton: The State's position in this matter is just this, if the Court please. Under Donnelly *vs.* State, 26 Law 601, which has already been cited, the Court says, at page 613: "When a matter is stated in the hearing of one which injuriously affects his rights and he understands it and assents to it, wholly or in part, by a reply, both are admissible in evidence."

Now, the State contends that the statement of Smart is admissible on two grounds:

First, after it was read to Brooks, he stood silent, which we can contend is an admission. But if it is to be considered that Brooks' reading his own statement then to Smart was a reply, and Smart having read his statement to him, Brooks, then it is true that in part Brooks denied some things that Smart says in his statement; but basically and much more important is that by Brooks' own statement read to Smart he admits at least in part the statements made by Smart in Smart's statement.

Mr. Congleton: And under the Donnelly case that I have just cited——

The Court: Would you argue he admitted it in part so far as it coincided with Brooks' statement?

Mr. Congleton: Correct, sir, and also to matters that are mentioned in Smart's statement that do not appear in Brooks' statement at all and are not denied.

Secondly, I wish to point out that the denials we have agreed to exist in these very denials of incidents occurring during the course of the perpetration of the crime for which this man is on trial. There is no denial in Brooks' statement anywhere of his guilt of the charge made against him; namely, that he was a participant in a homicide arising out of a robbery.

The Court: Well, he does not deny it.

Mr. Congleton: That is correct.

Mr. Foley: He has already testified under oath to that.

The Court: Yes, he does not deny it.

Mr. Foley: That is not in issue now.

Mr. Congleton: The reason it becomes important is this, sir: That as I understood the case of *State* v. *Sorge,* the trouble in that case was that the statement of the complainant, about which the case arose, was the only proof of one element of the crime; namely, the fact that she did not consent to the intercourse with the defendant. The situation at bar is not analogous, in my opinion, because we do not have any denials here of the essential allegations or elements of the crime with which the defendant is charged.

Now, the State's position can be summed up very briefly to the effect that it is true, if you want to consider—and I think perhaps your Honor should consider—that it is not enough in this case that Brooks said nothing when he put his name there, because immediately thereafter—and that is the testimony—Brooks read his statement aloud to Smart, and by so doing, and under

the very words of his own statement, he admitted in part the declarations of Smart in Smart's statement.

Mr. Foley: Well, if your Honor please, in answer to that, even if it can be said that you could go through the statements and pick out some things upon which they agree, and it would be a very difficult thing to do that, no matter how you approached it, then only those things to which he agreed, expressed his assent, would be admissible, and those things which he denied would be inadmissible. And to put in evidence a harmful statement containing matters which were expressly denied would be to circumvent the hearsay rule and bring about a result that was not intended, and it would be extremely harmful to the defendant.

The Court: Of course, in the Sorge case you have there, what the defendant said was a complete defense. He said, "Why, she consented."

Mr. Foley: At one point, and at another point—I will read this to your Honor: "The main assignment of error concerns the testimony of Charles Pirola, a sergeant of police. He testified that he brought Sorge to Paterson from Bloomfield Police Headquarters where he had been in custody and conducted Sorge into the presence of Miss McClaren and some witnesses. Immediately upon his entering the room she cried, 'That is the fellow that assaulted me,' and we asked him if that was right—was that the truth and the defendant lowered his head and he said nothing."

"A little further on in the testimony of the sergeant he indicated that before any written statement was taken either from the defendant or from Miss McClaren the defendant did make reply to the effect that what he did on the night of May 8 or the morning of May 9 was with her consent."

The Court: Yes. Don't you see? The lowering of the head wasn't the end of the incident. He followed that by saying, "Why, she consented." And that is a complete defense in one word.

Mr. Foley: But it is for that very reason that I think my argument is extremely sound. Transposing your Honor's words to this case, although Brooks may have said nothing when Smart's statement was read, although he placed his name on the paper, in the same instant he denied essential parts of Smart's statement by the reading of his own statement.

The Court: Well, I want to ask Prosecutor this: If the action of Brooks is to be regarded as an admission by silence, which statement does Brooks say is right?

Mr. Congleton: That is why, if the Court please, I do not go along with that point by itself. I am willing to concede for the purpose of this argument that Brooks' reply was the reading of his statement.

The Court: Yes.

Mr. Congleton: Maybe I do not make myself clear on that.

The Court: All right. I see. Then Brooks' reading of the statement is to be regarded as his reply to Smart's reading of Smart's statement?

Mr. Congleton: Yes. The State does not contend under the situation as outlined by the witnesses that the mere fact that Brooks said nothing at that particular time and then proceeded to read his statement can be separated; that it was all one continuing transaction.

The Court: When Smart got up, we will say, and read this statement, and Brooks got up in reply, you say, and read his statement, doesn't he contradict Smart?

Mr. Congleton: In some parts.

The Court: But is he regarded as accepting it in all the parts that are not mentioned in his statement?

Mr. Congleton: The majority of the parts that are mentioned in his statement are admitted.

The Court: In other words, is the reading of his statement to be regarded as an affirmation—"My statement is true"?

Mr. Congleton: That is right.

The Court: If it is a reply?

Mr. Congleton: All right, sir. But it is not a denial of the parts of Smart's statement except the specific parts that are different.

The Court: Well, that might be so, but those parts that are not different—what purpose does the Smart statement serve?

Mr. Congleton: Because there are things in Smart's statement that do not appear in Brooks' statement.

The Court: That do not appear in either statement?

Mr. Foley: Such as what? Point them out.

Mr. Congleton: Can I go through them?

Mr. Foley: Yes, indeed.

The Court: The things that you are talking about are things that do appear in Smart's statement but do not appear in Brooks' statement?

Mr. Congleton: That is correct, sir.

The Court: Therefore, you contend that whatever appears in Smart's statement and which is not denied in Brooks' statement he is to be regarded as remaining silent with respect to.

Mr. Congleton: That is right.

The Court: That is it, stated in a few words. Now I think we have gotten to the meat of the proposition.

Mr. Foley: I would like to say to your Honor that I don't know at this moment what things Mr. Congleton is referring to, but in thinking about that your Honor must approach this from the standpoint of what were the circumstances? What was intended by the parties? What was their state of mind?

The Court: That might be so, but we are going through a sort of mechanical proposition.

Mr. Foley: I say it cannot be reduced to a matter of mechanics.

The Court: You don't get what I mean.

Mr. Foley: I know what your Honor means.

The Court: It is in the nature of a mechanical process. We are trying to find out now in what respects Smart's statement alleges something which Brooks does not meet in his statement, but the next step I am not prepared to say.

Mr. Congleton: I cannot put my finger on it now, but somewhere here in Smart's statement he says this day he stopped down town on his way up town and bought a brand new pair of leather gloves. You have seen that in here, haven't you?

Mr. Foley: Yes, I have.

Mr. Congleton: Brooks in his statement at one point says——

Mr. Foley: Did you say Smart said he bought the gloves?

Mr. Congleton: Yes.

Mr. Foley: I think Brooks said he bought the gloves.

Mr. Congleton: Did he?

Mr. Foley: Yes.

Mr. Congleton: I am sorry. Now you have me confused. You are correct.

Mr. Foley: Am I right?

Mr. Congleton: You are correct. Smart says in his statement: "About two weeks ago in the middle of the week I met Jimmy in a tavern on Lillie Street next his house. We stayed in the tavern a few minutes then Jimmy asked me to go to his parole officer to help him get his driver's license. I went with him. We were in the office about fifteen minutes then we left."

What Brooks says about this in his statement is: "I saw Joe again on a Wednesday night two weeks ago tonight in Mike's Tavern. We stayed in the tavern about five minutes then left. I went down to see my parole officer, Mr. Wright, on Court Street. We were in Mr. Wright's office about 15 or 20 minutes then we left."

There is nothing there about trying to obtain the driver's license.

Mr. Foley: How is that important?

Mr. Congleton: Because under the State's contention, this man Brooks planned from the outset to hold up this place, get a driver's license, buy a car and flee.

Mr. Foley: It seems to me if that is their contention, there is reference to the same incident and Brooks' version of it.

The Court: I am wondering what kind of mentality a man like Brooks would have to have, or anybody would have to have, to follow Smart's statement and pick out what he had omitted to mention in his own statement. That is what that would come to.

Mr. Congleton: Yes, it would, and, secondly, it would come to a question of the affirmance of the things in the statement that are not denied.

The Court: True. I am talking about those things. Those things mentioned in Smart's statement which affect Brooks, he read his statement in reply, which denied many of them, but some of them he omitted to deny, and I say if you are going to make a complete job of it, Brooks would have had to have an unusually good memory to keep in mind the points in Smart's statement which he didn't agree to and mention them specifically.

Mr. Foley: Line by line.

The Court: Isn't that an unreasonable burden to put upon him under those conditions?

Mr. Congleton: That I cannot answer.

The Court: I am disposed to think that is the answer.

Mr. Congleton: But the important part is, as I see it in line with the case, when a matter is stated in the hearing of one which unjustly affects his rights, and he understands it and assents to it——

The Court: But does he assent to it?

Mr. Congleton: He assents to most of it.

The Court: Does he?

Mr. Congleton: Because the statements agree in most parts.

The Court: But the rule of reason has to be injected into every rule of law. To hold that a man of Brook's mentality, to the capacity at least to Smart's statement, to designate those things which are not covered by his statement and specifically mentioned in it, after reading his own statement in opposition to Smart's statement, certainly that calls upon him for an unreasonable amount of intelligence that he obviously does not possess.

Mr. Foley: I doubt that there are very many people in the world that can do it.

The Court: I don't know how many men in this room can do that, at least to the extent of Smart's statement, and then say after reading this one, "There are certain things in this statement that do not coincide with the other statement."

Mr. Foley: Mr. Congleton and I both read these statements two or three times—Mr. Congleton even more than I—and we can't even find some of the things without looking for them and without searching for them with a fine-tooth comb.

Mr. Congleton: That is because we were not there that day, Mr. Foley.

Mr. Foley: I don't know. I don't think that quite follows.

The Court: As I understand the situation, it is this: Brooks concedes he was a participant in this robbery and this man was shot in the course of it.

Mr. Foley: He has so testified.

The Court: That is a concession of guilt of murder in the first degree, isn't it?

Mr. Foley: It seems so to me under the rule.

Mr. Congleton: We so argue it anyway.

The Court: There is only one thing left, and that is the question of mercy. On that proposition I have no right to admit any evidence applicable to that, with reference to that. All I can do is admit evidence applicable to guilt or innocence. The jury must decide upon that. That is where the jury are at a tremendous disadvantage by reason of this new law. I call it new. It might not be new to some of you gentlemen but it is new to some others. There is where the power to sentence is transferred to the jury. Before the Court had the same opportunity and the same latitude it has now and can possibly do the right thing, or try to at any rate, but under this new law the jury are confined to what they hear on the issue of guilt or innocence and can go no further, and they must decide right there on that what the sentence is to be. To my mind, I don't know, I wouldn't characterize that law, and maybe I should stop talking right here.

So, gentlemen, I think on the whole, I must deny your application to admit

Smart's statement and grant your application to admit Brooks' statement.

Mr. Foley: I pray an exception to your Honor's ruling as to Brook's statement.

The Court: I had better make that announcement outside.

Mr. Congleton: Yes, and I had better renew my offer outside.

(The following takes place in the courtroom:)

Mr. Congleton: At this time, if the Court please, the State renews its offer of S-53 for identification, the statement of James J. Brooks.

Mr. Foley: My objection will be noted for the reasons outlined at length in your Honor's chambers.

The Court: Very well. The objection is overruled.

Mr. Foley: I pray an exception.

(The statement is received in evidence and marked Exhibit S-53.)

Mr. Congleton: At this time the State renews its offer of S-54 for identification, the statement of Joseph Smart.

Mr. Foley: That is objected to for the reasons outlined at length in your Honor's chambers.

The Court: Very well. The objection is sustained.

Mr. Congleton: The State asks permission to read to the jury the statement of James J. Brooks.

The Court: Very well.

(Mr. Congleton reads Exhibit S-53 to the jury.)

Joseph Cocozza, Recalled, for the State—Direct.

JOSEPH COCOZZA, recalled.

Direct examination by Mr. Congleton:

Q. Captain Cocozza, I show you S-27 for identification and ask if you recognize that? A. I do.

Q. Did you show that hat to James Brooks in Police Headquarters on December 19, 1946? A. I did.

Q. What did he say? A. He said that was his hat and that was the hat he wore on the day of the stickup of Wigler's Bakery truck on December 17th in Wickliffe Street.

Mr. Congleton: I offer the hat in evidence.

Mr. Foley: No objection.

(The hat is received in evidence and marked Exhibit S-27.)

Mr. Congleton: That is all. Cross examine.

Mr. Foley: No questions.

Mr. Congleton: I beg your pardon. I forgot something.

By Mr. Congleton:

Q. I show you S-52 for identification and ask you if you recognize that? A. I do.

Q. What is it? A. It is a blue overcoat.

Q. Did you show that blue overcoat to James Brooks in Headquarters on December 18? A. I did.

Q. What did he say? A. He said it was his overcoat and that is the overcoat he wore on the day of the stickup.

Mr. Congleton: I offer it in evidence.

Mr. Foley: No objection.

(The overcoat is received in evidence and marked Exhibit S-52.)

Mr. Congleton: To speed up this thing, with Mr. Foley's permission, I would like to ask the captain a question which is not on the record.

(Mr. Congleton, Mr. Foley, and the witness confer, not within the hearing of the jury.)

By Mr. Congleton:

Q. Captain, I show you S-47 for identification, S-48 for identification, S-49 for identification, and S-50 for identification and ask you if those were turned over to you by Lieutenant Wangner. A. They were.

Q. Have you had them in your possession since? A. I have.

Mr. Congleton: I offer them in evidence.
Mr. Foley: No objection.

(The envelopes are received in evidence and marked Exhibits S-47 through S-50.)

Mr. Congleton: That is all.
Mr. Foley: No questions, captain.

ANGELO G. CICCONE, sworn.

Direct examination by Mr. Congleton:

Q. Where do you live, sir? A. 713 North Sixth Street, Newark.

Q. What is your business? A. I work for the Bureau of Sewers, City of Newark.

Q. On December 19, 1946, did you take a crew of your men to the sewer at West Kinney and Sayre Streets? A. Yes, sir.

Q. Did you empty out that sewer? A. We recovered the keys right on top of a bank of dirt. We removed the grate first and there was the keys. We removed a little paper, and the keys were on top of a bank of dirt. I took them and gave them to Officers Burns and Kossupp, from the emergency crew, who were standing by.

Q. Do you recognize these keys as the keys you recovered in the sewer? A. Yes, sir, that is the set of keys.

Mr. Congleton: I ask that they be marked for identification.

Mr. Foley: No objection.

(The keys are marked S-57 for identification.)

Thomas J. Burns, sworn.

Direct examination by Mr. Congleton:

Q. Officer, you are a member of the Newark Police Department? A. Yes, sir.

Q. And have been for how long, sir? A. Since 1926.

Q. In December 1946, to what bureau of the Department were you assigned? A. Newark Police Emergency Squad.

Q. On December 19, 1946, did you accompany Mr. Ciccone to a sewer at Sayre Street and West Kinney Street? A. I met him there.

Q. You met him there? A. Yes.

Q. Were you present when he recovered a set of keys? A. Yes, sir.

Q. I show you these keys, now marked S-57 for identification, and ask you if you recognize them? A. I do.

Q. What happened to them after Mr. Ciccone got them? Did he give them to you? A. He gave them to me.

Q. Whom did you give them to? A. I brought them back to the Emergency quarters, and from there I brought them to Lieutenant Wangner.

Q. Of the Homicide Bureau? A. Yes, and marked them for identification.

Mr. Congleton: That is all.

Mr. Foley: No questions.

Mr. Congleton: I have the other two officers who were with this officer when the keys were turned over, but that is merely cumulative.

Mr. Foley: Put that in evidence as far as I am concerned.

Mr. Congleton: Mr. Wigler.

Mr. Foley: Put them in without calling Mr. Wigler.

Mr. Congleton: I want an explanation of them.

Mr. Foley: All right.

PHINEAS L. WIGLER, recalled.

Direct examination by Mr. Congleton:

Q. Mr. Wigler, I show you S-57 for identification and ask you if you recognize those keys and that ring. A. Yes, sir; I do.

Phineas L. Wigler, Recalled, for the State —Direct.

Q. What are they? A. There is a key here that fits the ignition of the International truck that was used by Mortimer Bateman. There are also several keys that were for stores where Mortimer Bateman made early morning deliveries, and the storekeepers gave the keys to Wigler's Bakery for him to open the stores. Instead of leaving the bread and rolls on the street they were delivered into the stores.

Mr. Congleton: Cross examine.

Mr. Foley: No questions, Mr. Wigler.

Mr. Congleton: I offer the keys in evidence.

Mr. Foley: No objection.

(The keys are received in evidence and marked Exhibit S-57.)

Mr. Congleton: At this time I renew my offer of S-10 for identification, which shows the interior of the truck, on the basis of the statement of the defendant that there was a box in the truck on the day that this holdup took place.

Mr. Foley: I object to it, if your Honor please, because the interior of the truck shows not only a box but a number of other things, and there has been no testimony that they were present. I myself cannot anticipate what argument would be made from this picture. I don't know whether the Prosecution thinks that these articles here are of some significance. If the Prosecution does, then it should be proved, and there is no proof.

Mr. Congleton: May I correct you?

Mr. Foley: May I just finish? There is no proof that there was anything other than a box, and I think one witness said some paper bags. If your Honor will examine the picture, you will notice other articles in the picture.

Mr. Congleton: May I call your attention to the fact that Identification Officer Hickey testified when he got there that after he brushed the truck he threw his light to the rear and saw paper cartons.

Mr. Foley: I don't know whether he said cartons or bags.

Mr. Congleton: Yes, he said cartons.

Mr. Foley: There are still other articles there besides cartons. I don't know what the purpose is.

Mr. Congleton: I will be perfectly frank in stating what my purpose is. So that we have a picture showing the interior of this truck with the shelf present.

Mr. Foley: Even as to the boxes, there is nothing in the proof which would establish that the boxes were in the same position at the time of the robbery as they were at the time the picture was taken. They are movable objects and I can readily see that it might be argued to the jury that if these boxes were in the same position at the time of the robbery or at the time of the shooting as they appear to be in the picture, then this or that or the other that the defendant said could not be true. I don't know whether that argument would be made. So the location of these movable objects at the time of the crime is an important thing.

The Court: As I understand the Prosecution, the Prosecution does not offer this picture for the purpose of showing the location of the boxes at the time of the alleged commission of the crime.

Mr. Congleton: That is correct.

Mr. Foley: If it is merely to show the interior of the truck, the jury has had ample opportunity to examine the inside of the truck, and there are other pictures showing the physical layout. So it seems to me the purpose must be to suggest at least that those conditions which appear to prevail in the picture were the same conditions which prevailed at the time of the robbery, and I do not believe the picture would be evidential unless that were established by proof

The Court: I think that perhaps it would be necessary to prove that the interior of the truck was in the condition as it appears in this picture imediately after the robbery was completed.

Mr. Foley: Your Honor sustains my objection?

The Court: Yes, until that proof is supplied.

Mr. Congleton: Very good, sir. I will withdraw that offer and offer then, in the light of that, S-16 for identification, which shows everything removed but the box.

Mr. Foley: I have no objection to that one. That is a picture of the interior of the truck.

(The photograph is received in evidence and marked Exhibit S-16.)

Mr. Congleton: If the Court please, I notice it has come to our usual hour of adjournment. I will state quite frankly that the State intends to rest, but I would like to reserve the right to use the noon recess to check the voluminous exhibits, to make sure I have not overlooked something I should have put in.

The Court: Very well. We will take a recess now.

(A recess is taken to 2 p. m.)

AFTERNOON SESSION.

Mr. Congleton: So that there will be no misunderstanding, the State formally rests.

The Court: Very well. The State rests.

Mr. Foley: If the Court please, the defendant rests.

The Court: The defendant rests.

Mr. Foley: At this time, if your Honor please, I desire to present a motion to the Court.

The Court: Yes. Do you want to argue it, Mr. Foley?

Mr. Foley: Yes, I will have argument of some length on it.

The Court: Well, lady and gentlemen, I think we have to pursue the same course as usual. There is no use in my keeping you sitting around while we argue a question of law. So I think you will be more comfortable if I excuse you, and you can sit in your jury room, and as soon as I get through with my question of law which I

have to take over, why, I will let you know and we will take our next step.

(The jury retires.)

(The following takes place in the Court's chambers.)

Mr. Foley: If the Court please, on behalf of the defendant I move for a directed verdict of acquittal. The indictment in this case reads as follows: "The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that James Brooks on the 17th day of December in the year of Our Lord 1946, at the City of Newark, in the County of Essex his malice aforethought kill and murder Mortimer Bateman, 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."

The words in the indictment with which my argument will be concerned are these, that the defendant "did kill and murder Mortimer Bateman at the City of Newark." We respectfully submit to your Honor that the State has not established that to be the fact by evidence beyond a reasonable doubt. As far as we see it, there is insufficient evidence even to conclude that that might have happened without regard to whether it was proved beyond a reasonable doubt or not.

Originally, if your Honor please, at the common law no provision was made for the bringing to book of a man who shot a man in one County where the man died in another County, and it was realized that

that was a deficiency in the law. That deficiency was cured by statute, and our State adopted a statute similar to the statute which was adopted in England, to correct that deficiency. Our statute reads as follows. It is R. S. 1:84-2. "Whenever any person shall be feloniously stricken or poisoned in one county and shall die by reason thereof in another county, an indictment thereof found in either county shall be as good and effectual as if the stroke or poisoning and the death had occurred in the county where the indictment shall be found; and the Judges of Oyer and Terminer in the county where the indictment shall be found and the Justices of the Supreme Court where the indictment shall be taken or removed before them shall and may proceed thereon as they might do in case the felonious stroke or poisoning and the death thereby ensuing had occurred all in one and the same county."

So it is quite clear that if there be proof that a man received a fatal wound in one county and died in another, he may be tried in either. In this case there is no question as to where Bateman died. He died in the County of Union, and the State takes the position that the fatal stroke was delivered in the County of Essex in the City of Newark, specifically in the City of Newark. That must be proved; that is an essential element of the charge and it must be proved.

The Court: Let me see if I follow you. Your idea is that assuming that the fatal shot was fired in Union County and assum-

ing the death occurred in Union County, this Court would have no jurisdiction.

Mr. Foley: Exactly so. That is the point of my argument. So the inquiry necessarily must turn to the evidence in support of the allegation that the fatal shot was fired in Newark. That in turn involves two considerations.

The Court: Well, let us see. Does it say "fatally stricken" or "feloniously stricken" or just "stricken"?

Mr. Congleton: Feloniously stricken.

The Court: Does "stricken" mean necessarily fatally injured, or does it mean feloniously injured?

Mr. Foley: I take the position, your Honor, and I believe that we could lay our hands on a case, which I am sure I read in the course of my preparation for this case, that the view that is taken is that the felonious striking is the stroke which produces the death.

In other words, if a man were, let's say, held up in Newark and punched in the face, he would be feloniously struck. There could be no doubt of that.

The Court: Yes.

Mr. Foley: What if it were clear that thereafter he was taken to Union County and there shot through the heart and killed, and that the fatal striking occurred in Union County, then I would take the position, and I think properly so, that this Court would be without jurisdiction. In other words, the felonious striking that the Legislature must have had in mind is that which produces the death; otherwise, there would be no need for this statute.

The Court: In other words, felonious striking is to be regarded the same as fatal felonious striking?

Mr. Foley: I take that view. That is my argument.

Now, as I said, if your Honor please, in considering the matter, there are two inquiries into the facts which must be undertaken. First of all, the inquiry of whether or not there is evidence to show which was the fatal shot; secondly, there must be evidence to show that the fatal shot was fired in the City of Newark. As to the first proposition, in the State's case there is a disparity, if I might call it that, of opinion. Dr. Martland, who performed the autopsy, testified with respect to which wound caused the death. This question was put to him: "In your opinion, Doctor, either wound number one or wound number two would have caused death? Answer: 'My opinion is that wound number one caused the death in this case. Wound number two might aggravate it somewhat by the hemorrhage, and if he had lived wound number two might have become infected, and there might have been a hemorrhage from the left kidney from the wound which might have caused death; but actually death is due in this case to wound number one, perforating the intestines and bladder, and producing peritonitis, hemorrhage and shock.' "

The doctor's testimony on cross examination, that being the direct, is substantially the same.

The Court: You might give me the pages, if you don't mind; it would help me.

Mr. Foley: I will, yes. I have just read the last third of page 60 and the first three lines of page 61.

Then when we come to the cross examination, page 70, last line, we find this: "Doctor, you have a fixed conclusion in your own mind that there was one fatal wound and that was the wound which you have described as wound No. 1? Answer: 'Yes, that is right'."

Thereafter, Dr. Stein was called by the State, and in the course of my cross examination—in fact, at the very commencement of it, page 217, this question was put to the doctor: "Doctor, for the purpose of identification will you assume that the bullet wound in the abdomen was wound number one—we are not speaking now of the order in which the wounds were inflicted—merely to identify them—that the wound in the back was wound number two; and that the wound in the leg was wound number three? Which of these wounds in your opinion was the fatal wound? Answer: 'Which was the fatal wound? Most likely the one that came in anteriorly.'

"Question: 'Anteriorly doesn't help us.'

"Answer: 'In the front of the abdomen —in the right upper abdomen.'

"Question: 'You believe that was the fatal wound and the other two wounds were not fatal?'

"Answer: 'Yes, because I don't know how many shots were fired. But I do know the man had perforations indicating that. Whether the bullet went in or out, I don't know. But in my opinion the wound that

went into the anterior abdomen was the wound that produced the most of the damage. And then, of course, there was the wound that came through the leg. That wound—it is hard to say—the bladder injury—from what bullet that came. All we know is that he had all these things.'

"Question: 'In other words, it would be difficult to determine whether the bladder injury was the result of the bullet by which wound number one was inflicted or that by which number two was inflicted or that by which number three was inflicted.'

"Answer: 'I would say that wound number three in the back would have nothing to do with it.'

"Question: 'Two is the back, sir.'

"Answer: 'Well, then, two is the back. That, I would say, had nothing to do with the urinary bladder, but the wound in number one and number three had something to do with it.'

"By the Court: Question: 'You mean the wound in the leg?'

"Answer: 'It might have even gone through'."

Here is the point:

"Question: 'Do you feel that the bladder injury was the primary cause of his death?'

"Answer: 'Oh, no, no, no. Multiple. There are so many injuries, all the intestinal injuries. I may say that I had had a report on the autopsy, and I missed some of the perforations. I couldn't go ahead.'

"Question: 'Even the wound that entered the back caused some of the injury within the abdomen?'

"Answer: 'True. I think they all contributed to the death. It wasn't one specially that was the cause of death. Every one of them contributed to the death and the amount of shock.'

"Question: 'You would not wish to say that any one in particular produced the death?'

"Answer: 'No, I think all taken together produced the death'."

So in the first place we have a dispute in the State's case as to which of the bullets was the fatal bullet, and we take the position that since the proof of the fatal stroke is a necessary element in the charge laid in the indictment, and the State's proof is deficient with respect to that, for that reason alone the Court should direct an acquittal.

Secondly, leaving behind us for the moment the question of which wound produced his death, which striking, which bullet, we have the question of where these various bullets were fired. Now, it must be remembered that the proof establishes——

The Court: Before we go one step further, see if I get this correctly: Let us assume, as you argue, and as the doctor seems to think, Dr. Stein, that all of these wounds combined produced the death—no one individually did it—your idea would be that inasmuch as they all contributed to produce the death, you couldn't say that he had been stricken in Essex County?

Mr. Foley: That is correct.

The Court: Well, under that argument would he be stricken in any county at all?

Mr. Foley: It might well be that in a given case you couldn't establish where a man was stricken. After all, we don't make the law. The law is before us as it is made by the Legislature.

Mr. Congleton: You say the law is before us, but I would like to read this statute, R. S. 2:184-2.1: "Whenever any murder or other offense shall be committed in one county of this State, and any person or persons shall be accessory in any manner to any such murder or other offense in any other county of this State, such offense of accessoryship shall be inquired of and tried by a jury in either of said counties; and any indictment found against such accessory or accessories and all proceedings had thereon, shall be as good and effectual as if such offense of accessoryship had been committed or perpetrated within the body of the county wherein the principal offense was committed."

Mr. Foley: If your Honor please, I would say that that statute would have absolutely no application to this indictment, because this man is not indicted as an accessory; he is indicted as a principal.

Mr. Congleton: He would not be indicted as an accessory.

The Court: It wouldn't make any difference how he is indicted. But isn't the theory here that he fired the shot?

Mr. Foley: That is the State's theory.

The Court: Or, if he didn't, that they were not accessories; they were all principals acting in concert?

Mr. Foley: That is the State's theory, and the record will show that at least twice in the course of this trial, upon the offer of either testimony or exhibits—I don't now recall which—Mr. Congleton said to your Honor that the State took the position that these men were acting in concert. If they were acting in concert, then one was not the accessory of the other. Both had to be principals.

The Court: Of course, the law is that an accessory may be indicted as a principal, in the form of a principal; but, really, what we are concerned with more is what the proof shows, rather than what the theory of the State is, and if the proof shows anything here, wouldn't it show that these men were acting in concert to rob this man and that they killed him while acting in concert, either according to your view, in one county or the other, but, apparently in any view of the evidence, the robbery certainly started in this county and may have been completed in another. I guess it was, because they did not get the money until they got into the other county. But, nevertheless, your proposition, I think, is a great deal to be solved by whether the word "stricken" in one county means fatally stricken. If it does not mean fatally stricken, why, what would be left in your argument?

Mr. Foley: I still have another ground.

The Court: I mean in that argument.

Mr. Foley: In that argument, I wouldn't want to answer that question without giv- it some thought, if your Honor please.

The Court: This is a remedial statute, as I see it, is it not?

Mr. Congleton: Yes, sir.

Mr. Foley: Remedial? I would assume that it was.

The Court: It requires liberal construc-
10 struction.

Mr. Foley: Yes, sir, but while the statute may be liberally construed, there cannot be read into it something which is not there.

The second part of my argument is that there is an absence of proof that any fatal shot was fired in the City of Newark, my first point being that there is an absence of proof beyond a reasonable doubt that any one certain bullet produced the death,
20 by reason of the dispute between the testimony of Drs. Martland and Stein.

The Court: In other words, assuming that there was no particular shot that was fatal or by which this man was fatally stricken, then, inasmuch as it was scattered, I suppose the theory would be that it is so much scattered that it isn't anywhere; hence, there can be no conviction. Well, I think that would be all right, but
30 you know there is such a thing as arguments being scattered so thin that they carry no weight, as well as shots being scattered so thin. So, possibly, it might be that we might get into that trouble.

Mr. Foley: Possibly so.

As the second ground of my motion, your Honor, I urge that if it be assumed from the proof that the fatal shot was fired in the City of Newark, there is no proof
40 that the shot was fired in the course of a

robbery. It may be that if that happened, if the proof does establish the fatal shot was fired in Newark, there would be no proof that it was fired in the course of an attempted robbery. The theory of the State is that there was a robbery and that this happened in the course of robbery. I submit that there is no proof of any robbery in the City of Newark. The robbery had to take place at the time the money was taken from the truck. At that time, it was undisputed, the truck was in Union County.

"Whenever any person shall be feloniously stricken and shall die by reason thereof in another county."

So that as soon as you say "by reason thereof" you must necessarily conclude that the felonious striking, by the very words of the statute, is the fatal striking.

The Court: Those words "by reason thereof" add substance to your argument, and weight.

Mr. Foley: That probably outlines the argument I wish to make on the question of where the shots were fired. There is quite something to be said. To start off, the State has offered in evidence the statement of Brooks. It is the State's exhibit. That statement says that there were five bullets in the gun and all five bullets were fired. The State is bound by that statement, having offered it as its exhibit. Now, where can the five bullets be accounted for? You have a statement of one witness, Bomwell, who says that he heard a noise like a backfire. Thereafter he says——

The Court: Whose statement is this?

Mr. Foley: The witness Bomwell, the battery station man.

The Court: He testified, and you are referring now to a written statement.

Mr. Foley: I am going to refer to both. I am referring to his statement. He testified as follows.

The Court: I couldn't go along with you on that proposition, that the State is bound by his testimony. If you mean that they must accept it in toto, that is true.

Mr. Foley: I was referring to the statement of Brooks, which was offered in evidence. It was Brooks who said that there were five bullets in the gun and all five were shot. If the State offers no evidence that there were less than five shots fired then that evidence which they have offered to establish that five shots were fired, being uncontradicted, I believe does bind the State to prove the five shots. That is as to Brooks' statement.

Now, to account for those five shots, you have to look at the testimony of the other witnesses. We must take, first, Bomwell. He said he was standing outside the door and he heard a noise like a backfire. He looked up. He saw the truck standing in the street. Shortly thereafter the truck came slowly down the street toward him. As it came down the street he heard two shots. He was asked how he knew they were shots. He said he saw smoke, two puffs of smoke. He said that at one point in his testimony. At another point, the first time he was asked by the Prosecutor, when he was asked how many shots, he said

one or two and that he saw smoke. Now, let us see. We can infer from that that two shots were fired. There were two other witnesses who were called, neither of whom described the noises which they heard as shots. They spoke of the noises as reports. One of them was standing in the front room of his home, looked out and heard a report and saw smoke, and saw the truck move and then heard another report, and then, I believe, he said after the truck had passed the place where Bomwell was and had crossed the street or started to cross the street, he heard a third report.

And there was another witness—a woman who lived near the corner—who said that she heard, I think, three reports. So even if it be assumed that that which Bomwell called a backfire was in fact a gunshot and that there were two other shots, as he says, that would account for only three shots. From that point on there is nothing to show where the remaining two shots were fired. You can read Brooks' statement. He says five shots were fired. But there is nothing to indicate when or where. And so I say that the State, having five shots to account for and having established that only three at most were fired in the City of Newark, having failed to establish where the other two were fired, is in the position where it has not established that the fatal stroke was delivered in Newark; first, because there is a dispute as to what the fatal stroke was; and, secondly, there is no evidence to show where it was inflicted.

For these reasons I respectfully move for a directed verdict of acquittal.

The Court: While we are waiting, Mr. Martin obtained this definition of *stricken* from Funk & Wagnalls, which I will give you gentlemen just as a matter of interest if you have no other concern about it: "1. Wounded by a weapon, especially by a missile; as a stricken deer; 2. struck down, as by calamity, smitten, afflicted."

Mr. Foley: Well, I think that that might be of interest if it were not for the wording in the statute which I called to your Honor's attention—"and shall die by reason thereof".

The Court: As I said, I think that adds force to your argument.

All right, Mr. Prosecutor.

Mr. Congleton: If the Court please, as I understand the law, at this juncture of the case the State may argue any logical inferences arising from the testimony, and is not bound by the statement that it has offered in evidence, in its entirety. It can be contradicted in any point whatsoever.

Calling your Honor's attention to the testimony of the three witnesses who were produced from Wickliffe Street—first, Mr. Bomwell, then Mr. Tutler, and then Mrs. Newby, the evidence seems clear that at one stage of the robbery the Wigler Bakery truck was stationary in the street and not moving.

Mr. Tutler in his testimony testified that he heard two reports while the truck was standing still. The other witnesses' testimony was something like this, as I recall it: Bomwell testified that he heard one

shot while the truck was standing still and two while it was moving. Mrs. Newby testified that she heard one report before she looked out the window and saw the truck and when it was going by, and after she saw the truck going by or as it was going by she heard two more shots. Taking the inferences from that testimony, the State can argue that there were two shots fired while the truck was standing still and two shots fired while the truck was moving, which makes a total of four shots in the vicinity of Wickliffe Street and Thirteenth Avenue.

Taking Brooks' statement, although it is true that because of the position of Brooks in the truck he was not in a position to state where the truck was at any particular time, but taking the sequence of events as he recites them in his statement, the State again maintains that it may be inferred that all these shots were fired, even under Brooks' theory of the case, three by him and two by Smart, within a comparatively short period of time. I think that the inference can well be drawn that the five shots were fired in the vicinity of Wickliffe Street and Thirteenth Avenue in the City of Newark.

Brooks in his statement said: "As Hooks grabbed my hand the gun went off. Before the gun went off when Hooks grabbed my hand he stopped the truck and turned off the ignition. The truck had just about reached the battery place on the corner of Thirteenth Avenue. Hooks and me were still struggling when the door opened and I lost my hat. Joe grabbed

Hooks from the back and was trying to pull Hooks away from me. When he pulled Hooks, Hooks pulled me and we both fell in the back on the floor of the truck. Joe then sat in the driver's seat and started the truck in motion. He was wearing my gloves. I don't know which way the truck was going because I was still struggling with Hooks on the floor of the truck. Joe was driving very fast. During the struggle Joe said, 'Hurry up and shoot him. Ain't you shot him yet?' Hooks was holding my hand and the gun went off toward the front of the truck. Hooks then grabbed the barrel of the gun and presed on it."

There are two more shots, and by this evidence the State maintains that those two shots referred to were fired before the truck crossed Thirteenth Avenue and Wickliffe Street.

The Statement continues: "Hooks began to holler, 'Take the money, take the money, but don't try to hurt me.' I finally got my hand loose and I started hitting Hooks on the side of the face two or three times with the butt of the gun. I also punched him once in the face. Joe slowed down and came pretty close to a stop. He turned around and said, 'Give me the gun. I'll shoot him.' Joe took the gun out of my hand. I put my hand over Hooks' mouth to try to keep him from hollering. When I did this Joe shot Hooks twice."

There were five shots fired in the light of Brooks' statement, all within a comparatively short time. And, at least three, probably four of those shots, according to

the State's contention, were fired at Wickliffe Street and Thirteenth Avenue in the heart of the City of Newark.

Mr. Foley: If your Honor please, while it is entirely true that the proponent of any case, whether criminal or civil, is entitled upon a motion for direction to have all reasonable inferences drawn in favor of his position, that refers to inferences and cannot be mere speculation, and while Mr. Congleton seems to indicate that because Brooks' recital of these things was a recital of what happened within a very short space of time, the fact remains that you only have to read a few more lines and you will find that these men were in Vaux Hall, and so it is not a fair inference or a reasonable inference, it is mere speculation, when you say that all this happened in the vicinity of Wickliffe Street.

Mr. Congleton: I certainly disagree with Mr. Foley's statement that if you read a few lines further you will find yourself in Vaux Hall.

Mr. Foley: It doesn't take you long to get there.

Mr. Congleton: It took me about twenty minutes this morning. After I stopped reading a few minutes ago, then the statement continues: "Hooks then released his hold on me and rolled over on his back. The first shot Joe fired was in Hooks' back. The second shot was fired as Hooks was rolling over on his back. Joe then gave me back the gun and said, 'Keep the gun on him if he moves or hollers shoot him.' I got the gun and told Hooks to lay on the floor and

keep quiet. Hooks asked me if I would let him sit up and get some air. I said, 'Sit up and keep quiet.' Hooks was hollering about his stomach and his leg. I said, 'If you can't keep quiet, lay down.' Joe was still driving. When Hooks laid back Joe said to me, 'Throw the gun on me too and make it look like you are holding us both up.' I said to Joe, 'You keep driving and don't try any funny stuff.' I said this out loud so Hooks could hear it. Joe said, 'O. K., Mister, I'm not going to start no funny stuff.' Hooks said, 'Don't leave me here to die, fellows,' and to me he said, 'Mister, don't leave me here to die.' I said, 'Well, keep quiet and I won't leave you here to die. I am going to let you go.' Hooks said, 'I got a wife and children. Go ahead and take the money, he won't say nothing.' I said, 'We are going to let you go.' Then I caught myself when I said 'we' so I said, 'I am going to let you go but I am going to take him with me.' I then said to Hooks, 'Do you know him,' nodding toward Joe, and Hooks said, 'Yes, his name is Joe.' Then I asked Joe if he knows him, nodding toward Hooks, and Joe said, 'Yes, his name is Hooks.' Then I said, 'I have been watching you for the last six months.' This was our plan to throw suspicion off Joe and myself. Then again Hooks said, 'Please, Mister, don't leave me here to die. Take me to a hospital.' Then I said. 'I know where you live. If I let you go and you say anything, I will go and get your wife and kids.' Hooks said, 'No, I won't say anything, just take me to a hospital.'

I am now sitting up beside Joe with the gun on Hooks and once in a while I would throw the gun on Joe to make it look like he wasn't in it. When I said something about a hospital, Joe said in a whispering voice, 'No, no, shoot him. Have you got any more bullets in the gun?' I opened the gun and the shells fell on the floor. I told Joe there were no more bullets in the gun. I then closed the gun and the truck then came to a stop."

The State respectfully submits that it can well be inferred from the testimony that these five shots all took place within a comparatively short space of distance and time, in the vicinity of Wickliffe Street and Thirteenth Avenue, in the City of Newark.

Mr. Foley: I have in mind what your Honor said to me when an objection was made to a question that I asked of a witness during this trial. You said, "Time cannot be measured in words that a man says." I thought that was a very sage observation. It applies to this. There is nothing here to show that all of these shots were fired in Newark, and there is nothing to show that any one shot fired in Newark was the fatal shot.

The Court: All right, gentlemen. I think I can dispose of the matter. The question now is what we are going to do about the jury. This will be off the record.

(There is a discussion off the record.)

(The following takes place in the court-room):

The Court: The motion will be denied, and an exception allowed.

Members of the jury, I am afraid that it has been necessary to try your patience. I am aware of the fact that you are being delayed here and seemingly hearing nothing, and almost all day seemingly doing nothing, but I am sorry; I could not help it.

Remember that we are a number of judges here—yourselves and myself as well—and our tasks are divided. You are judges of the facts while I am the judge of the law. Now, it has been my turn to labor with the questions of law which astute counsel have presented to me, and your turn will come later as judges of the facts.

So you have to realize that the Court was working, because we all constitute the Court, and while it seemed that there was idleness, that is not the fact. You are the ones that I might say without any doubt of contradiction had the best end of it, because you were at leisure and relaxed while the Judge of the law had to be considering the problems which were being presented to him. Those problems were presented in my chambers because they were purely matters of law and could be heard there as well as anywhere else, but at the same time relieved you of the necessity of sitting in this room, which is rather close. And I thought you would be more comfortable in your own jury room. So with that I hope you will understand why you were probably seemingly left without anything to do.

Now, having disposed of these motions the next thing in order will be the summations of counsel. The case is concluded except in two respects: the summations of counsel and the charge of the Court—of the Judge on the bench, in other words.

It is obviously impossible to conclude this case today. Counsel have advised me that they would each like to have a considerable length of time to present their views, and in the matter where the issues are such as they are here, why, under our system we cannot unduly restrict the time. So that it is obvious we can't conclude the case today, it now being a quarter to four. And wishing to have counsel have the opportunity to each be heard one after the other without any intervening time, I have decided to take an adjournment until tomorrow morning, and we will meet again at 10 o'clock, and then we will try to sit continuously until this case is submitted to you, when my work will be over, and then I will cast the burden upon your shoulders. And then the matter will be reversed: instead of my being active while you are idle and resting, we will reverse the process, and you may take the burden into your room with you and dispose of it while I wait at leisure in my chambers. So, you see, turnabout is fairplay.

That being the case, lady and gentlemen, we will take a recess until tomorrow morning, and the jury may be excused.

(An adjournment is taken until Wednesday, March 26, 1947, at 10 a. m.)

Colloquy.

(Transcript of colloquy between Mr. Foley and the defendant on the prison floor of the Court House at 2:20 p.m., Tuesday, March 25, 1947:)

Mr. Foley: Brooks, this is the court stenographer, and you have seen him taking the notes in the courtroom.

The Defendant: Yes.

Mr. Foley: Because of the nature of the case, we feel that it would be advisable to have a record made to establish that you are satisfied not to take the witness stand again. Do you understand me?

The Defendant: Yes, sir.

Mr. Foley: It is now twenty after two. Before lunch, before one o'clock, Mr. Hayden and I were up here with you?

The Defendant: Yes, sir.

Mr. Foley: And we went over the whole thing, didn't we?

The Defendant: That's right.

Mr. Foley: And we gave you our views of the matter, but told you that the final decision as to whether you would take the witness stand or not would be left to you.

The Defendant: That's right.

Mr. Foley: And after discussing it you said that you agreed you should not take the witness stand; is that correct?

The Defendant: That is correct.

Mr. Foley: And you still feel that way?

The Defendant: Yes.

Mr. Foley: Is there anything else you would like to say?

The Defendant: No, nothing at all.

Court's Charge to the Jury.

AFTERNOON SESSION.

(The Court charges the jury as follows:)

The Court: Members of the jury: I have received in behalf of the defendant a number of requests to charge.

First. The burden of proof is upon the State to prove every element of the crime charged beyond a reasonable doubt. I so charge you.

Another request. The indictment alleges that Brooks committed the murder of Bateman in the City of Newark and this is an essential element of the charge. I so charge you.

Another request. The obligation rests upon the State to prove beyond a reasonable doubt that the stroke which caused the death of Bateman was delivered in the City of Newark. I so charge you.

A further request. If, after a consideration of the evidence, there remains in your minds a reasonable doubt that the fatal shot or shots were fired in the City of Newark, I charge you that your verdict must be "not guilty." I so charge you.

A further request. In considering the question of where the fatal stroke was delivered, you may take into consideration that a pellet from the gun was found upon the running board of the truck in Vaux Hall in the County of Union. That in consideration with all the other evidence in the case. I so charge you, modifying it to that extent.

A further request. If you find the defendant guilty you are then entitled to consider the question of whether or not you will recommend life imprisonment as his punishment. I so charge you.

A further request. If you conclude to make such recommendation it must be attached to your verdict. I so charge you.

A further request. The recommendation if made must be clearly stated in words to this effect: "we recommend life imprisonment at hard labor." I so charge you.

A further request. A mere recommendation of mercy or leniency will not serve to withhold punishment by death. A verdict in that language will not be received by the Court. I so charge you, the latter part having been added by the Court.

Another request. The Court is without authority to withhold the death penalty after a conviction of murder in the first degree unless the jury expressly recommends "life imprisonment at hard labor" or words to that effect. I so charge you.

Another request. The words "life imprisonment" must be included in the recommendation if the defendant upon conviction is not to be sentenced to death. I so charge you.

Another request. Neither upon the question of guilt nor if you be satisfied of that beyond a reasonable doubt upon the question of the recommendation of life imprisonment can your determination be arrived at by accepting the vote of a majority and adopting the same as the verdict of all if you do not agree with such vote. Each of you is charged with deciding the issues submitted to you and you must not return any verdict unless it is the unanimous verdict of the jury. A unanimous verdict is one which reflects the individual view of each member of the jury. I so charge you, having consolidated three requests in one.

A further request. Before a verdict of murder in the first degree can be returned each and everyone of you must be satisfied that the State has proved every element of the crime beyond a reasonable doubt. I so charge you.

I have received since the conclusion of the Prosecutor's address these requests in behalf of the defendant.

The verdict of the jury of guilty or not guilty must not be based upon any consideration of the effect it may have on the community. I so charge you.

The issues before you on the question of guilt are those raised by the indictment and do not include any considerations of the effect of the verdict upon the community. I so charge you.

Your verdict of guilty or not guilty should not be arrived at by any consideration of what might or might not be good policy. I so charge you.

By this I mean that you do not fix or establish the policy for the guidance of future juries or prospective offenders of the law. Your verdict of guilty or not guilty must be based upon the evidence in the case regardless of its future effect. I so charge you.

These requests to charge, the ones I have received since the conclusion of the Prosecutor's address, I am informed in my chambers by defendant's counsel, are not intended to have any reference to the matter of the recommendation, but to the matter of the verdict itself of guilty or not guilty, and I charge them with that understanding and proviso.

I come now to my paramount instructions. They are these. The Court is the sole judge of the law and has the right to express to the jury his comments and opinions on the facts in their

relation to the guilt or innocence of the defendant, but such opinions on the facts do not bind the jury, who are the sole judges of the facts. The jury must at all times rely upon and follow their own recollection as to what the evidence is or is not, even if it fails to coincide with the recollection of the Court, upon which recollection the jury are informed the Court draws in referring to the facts, unless expressly otherwise stated at the time by the Court, and the jury must decide the case not only on such evidence as may be referred to by the judge but on all the evidence in the case.

The defendant is presumed to be innocent, and unless the crime charged or the degree of crime being considered and each of its elements is proven against him beyond a reasonable doubt, he is entitled to an acquittal. The burden of so proving the defendant guilty rests upon the State and never shifts.

The foregoing are paramount instructions, and all that precedes or follows is subordinate to them. And this is the end of the paramount instructions which I said I would deliver to you a few moments ago.

Now, this defendant comes before us here for the reason that there has been laid against him a charge. That charge is preferred by an official body of our county, to wit, the Grand Jury, called at times the Grand Inquest. That charge is contained in a document and the document is denominated an indictment. An indictment, of course, *per se,* has no evidential value to prove the guilt of the defendant. It is what it purports to be, to wit, a charge, and a charge only. It may be used to establish its own existence and to show the nature and scope of the crime which it

charges, and for that purpose only. It has, as I said, no evidential value to prove the guilt of the defendant, who is, as I have told you before, presumed to be innocent unless proven guilty beyond a reasonable doubt. But an indictment has this effect. It has the effect of a charge officially laid. Being so laid, it becomes the duty of the Prosecutor of the Pleas as an official to bring the charge to trial before a court composed, as this court is, of twelve judges of the fact, sitting in the box, as we call it, and one judge of the law, sitting on the bench, as we call it.

The indictment having been found, the defendant, of course, is entitled to be represented and to present his version and his views and to have the aid of counsel. In furtherance of that provision of our law, which is fundamental in our democratic procedure, the Court assigned counsel to him to represent him on this trial, assigned two officers of the Court, he representing to the Court that he did not have the funds to employ counsel himself; and so he comes before you, under our form of government, represented by counsel. So counsel on both sides, both being able and competent in every way, have presented the views and contentions of the State, on the one hand, and of the defendant, on the other. Now we are about shortly to submit the questions of fact to the jury, the judge on the bench being in the process of discharging his duty to instruct the jury what is the law applicable under the circumstances, which instruction as to the law it is the duty of the jury to follow.

Now, you will recall that there has been testimony to the effect that the defendant has been previously convicted of crime. A prior conviction of crime has no evidential value to prove the guilt

of the present crime charged. Perhaps inquiry may arise in your mind as to why the evidence should be given or allowed that he has been guilty of crime heretofore. That is allowed in order that the jury may consider it in weighing his credibility. We know by common experience in our everyday lives that as a rule people do not give the same credence to one who has a criminal record as they do to one who has an unblemished record. So for that reason alone, or, rather, for the reason alone that his credibility may be affected in the mind of the juy, the law permits it to be developed that he has been previously convicted of crime, provided he puts his credibility in issue by taking the stand. If he does not put his credibility in issue by taking the stand, then it may not be shown that he has been previously convicted of crime. It must be a conviction.

You will recall that we spent a substantial amount of time in hearing evidence on a preliminary issue. That issue was as to the competency of a statement alleged to have been made by the defendant. The Court admitted that statement after hearing all the evidence on the subject. It is true that a statement which is produced or induced by violence, threats, promises or fear or hope of reward has no evidential value against the defendant; and in the event that you find that this statement was obtained in that way, you will realize that it is to have no weight, no evidential weight. Its competency has been passed upon by the Court. Its evidential weight is for the jury.

Now, you will recall that this defendant took the stand on that preliminary issue, and you will recall that the Court endeavored to restrict the testimony to that preliminary issue of the com-

petency of the statement. But the defendant did not take the stand upon the general issue. Why not? He did not take the stand and submit himself to general cross examination on the general issue. Why not? There he is. He could take that stand if he wanted to, but he can't be compelled to. I can't call him here on that general issue. Neither can the Prosecutor. He elected not to do it. Why? And what is the consequence of his failure in that regard? I will answer that question. A defendant in a criminal proceeding is at liberty to take the stand and testify in his own behalf in regard to the general issue if he so desires, but he cannot be compelled to be a witness in that regard, or against himself. His failure to take the stand, of course, would not of itself justify an inference of guilt of the crime charged in the indictment. But if he fails to take the stand, as he did, and where evidence brought against the defendant tends to establish facts which, if true, would justify or tend to justify a conviction, and the defendant is in court and in a position to deny such evidence of his own knowledge and he fails to take the stand on his own behalf, then from his failure to take the stand, his silence under those circumstances, the jury may be justified in drawing against him unfavorably conclusions.

The issue has been raised here as to where the fatal shot was fired or occurred. It is contended that it has not been proven to have occurred in the City of Newark. Now, we have testimony here of a man who says that he heard shots right up here near this courthouse in this truck and that he saw smoke; that he heard a number of shots fired right then and there. I think another witness testified to hearing them. Now, the defend-

ant knows of his own knowledge whether there were shots fired right up here near this courthouse in this vicinity in the course of this occurrence. Why doesn't he take the stand and say that no such shots were fired at that place? The inference from his failure to do so is for you to draw, not for me. But his failure to do so may be taken by you as indicating a good reason not to do so and as operating against his case.

Oft times in criminal trials physical objects may be of moment. Physical objects cannot be changed by mere words, testimony. Now, we have here a physical object in the shape of a gun. According to the defendant's argument this gun was discharged three times during this entire episode without his volition, as far as he was concerned, accidentally. His credibility is at issue here. You have a right to examine this material object. The gun, he said, was not cocked. It was not cocked. So it went off, without being cocked, three times without his volition. Now, it may be operated without being cocked, but you can judge for yourself how it operates and you can decide whether its method of operation is such as to bear upon the credibility of his contention that this gun was discharged three times without his volition, without being cocked.

Now, the contention of the State is that this killing occurred in a robbery. If the death of anyone shall ensue during and from the committing of a robbery, each and everyone of the persons then present and participating in the commission of the robbery is guilty of murder in the first degree, whether he or some other such participant fired the shot that accomplished the killing and whether the fatal shot was fired accidentally or purposely. That is the law. I will read you an

extract from the opinion of our highest court, delivered unanimously in an opinion by the Chancellor of our court, the highest judicial officer that we have in this state. The Court says this: "The Crimes Act makes murder which shall be committed in perpetrating or attempting to perpetrate any robbery, murder in the first degree, and this provision is repeated"—referring to another provision of the law. "These provisions of our criminal law are so inexorable that if two persons agree to rob another and one strikes a blow that results in the death of the victim, both are guilty." Persons who embark upon a combine to commit in concert a robbery are responsible for the acts of each other to the extent that if one of them kills a human being during and from the commission of a robbery all of these persons present and participating are guilty of murder in the first degree, notwithstanding the fatal shot may have been fired unintentionally, accidentally and contrary to the very agreement under which the participants are acting. Persons who participate in executing a common purpose of robbery take their chances of such things happening in the course thereof. People under the law are not to combine to commit robbery. If they do, they do it at their peril. They cannot relieve themselves by showing that no killing was intended or that it was agreed that no killing or shooting should be done. Their responsibility is fixed by the law in such case and they are guilty of murder in the first degree.

Do not understand by what I have said that I undertake to determine the facts. I am reading you the law and stating it to you. What the facts are, whether they apply to that law, is not for me to say, because I am not a judge of the facts at the present time.

Now, if we assume for the moment that the jury are satisfied beyond a reasonable doubt that the fatal shot or fatal shots were fired in the City of Newark, then let us see how we stand. According to the contention of the State, the defendant, with Smart, was at the time engaged in robbery. If so, if those things are true, the defendant is guilty of murder in the first degree. According to the contention of the defendant, laying aside the question of where the shots were fired, for the moment, and assuming they were fired in Newark, then according to the contention of the defendant they were engaged in robbery. And if you believe it, he is guilty of murder in the first degree.

So, lady and gentlemen, it seems to me that you have heard enough of comment in regard to the question of guilt or innocence of the defendant. I do not mean to express any opinion on that subject, although I have a right to, but I am not intending to convey the impression that I am expressing any opinion on this occasion. So I will refrain from any further comments on the evidence in this case. We come to a further duty which devolves upon the Court or the judge, and that is to advise you as follows. The statute of our state requires that the jury, if it finds a conviction of murder, shall designate whether they find murder in the first degree or murder in the second degree. So you will please remember that if you should find the defendant guilty of murder you are to specify in what degree is your verdict. In case your verdict should be murder in the first degree, you will also please remember that the law now provides that every person convicted of murder in the first degree shall suffer death unless the jury shall in their discretion and by their verdict and as part thereof, upon and after a con-

sideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment will be imposed.

Now, lady and gentlemen, upon the question of your recommendation, I have no power to comment on that subject. Whether, in the event you find the defendant guilty of murder in the first degree, you shall accompany it with the recommendation that I have indicated, is something upon which I have no right to comment under our law. Therefore, please understand that anything I may have said is not to be construed as comment upon that subject. That subject remains with you as judges. Twelve of you who sit in that box will be the judges of the facts, and that will be ascertained in a few moments.

So I have concluded all that I intend to say at the present time. I will ask you to take the case upon all of the evidence. If you find that the State has sustained the burden of proof beyond a reasonable doubt you will bring in a verdict of guilty, as the proof may call for it; if not, if otherwise, you will bring in a verdict of not guilty.

I have not defined reasonable doubt. Reasonable doubt is not a mere possible doubt. It is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors where they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. On the other hand, to state that in a positive way, if after an entire comparison and consideration of all the evidence, the jurors find that they can say that they feel an abiding conviction to a moral certainty of the truth of the charge, then they are convinced beyond a reasonable doubt within the meaning of those words as they are used in our system of law.

Now, then, that being the case, we will proceed to select the jury. The jury, of course, will be selected by lot from the members who now sit in the box.

(Mr. Foley confers with the Court at side bar.)

The Court: Mr. Foley seems to think that I meant to eliminate the question of recommendation, but I hardly think that could be understood, because that was made plain to you quite clearly, not only in his request to charge but in the main part of my own charge, of which his request really constituted a part.

So, Mr. Clerk, will you proceed? You realize you have one extra person in the box, and under the law a jury must consist of twelve people. So one of you must be eliminated. Who that one will be nobody knows at the present time, but we will know in a little while.

The Clerk of the Court: Daniel J. Dougherty. William F. Bird. John Duerr. Irving M. Baker. Joseph W. Courter. John M. Everett. Arthur L. Brown. Bernard A. Decker. Frank Cronshey. James A. Brower. Bernice F. Dreyfus. George W. Cameron.

The Court: Now, the gentleman who was not drawn, would you mind, after I leave the bench, coming into my chambers, please?

Under the law, the first name drawn is the foreman.

(The jury retires.)

Mr. Foley: First, with respect to conclusion of the Court's charge in which your Honor said in effect that the jury would return either a verdict of guilty or not guilty, I feel that the jury might

be under some misapprehension as to whether or not that foreclosed it from bringing in a third verdict, of guilty with a recommendation of life imprisonment. So at this time I request the Court to charge that there are three possible verdicts, a verdict of guilty, a verdict of not guilty, a verdict of guilty with a recommendation of life imprisonment at hard labor.

This is in the form of a request to charge, and that is why I stopped at this point. Shall I continue?

The Court: Yes, because if the Court is going to take any action the Court would like to cover any other omissions or mistakes that may have been made.

Mr. Foley: First, I might say that I take a general exception to the charge.

Then I take an exception to the part of your Honor's charge in which your honor said three times, "The defendant did not take the stand. Why not? The defendant did not take the stand on the general issue. Why not?" Then, "He cannot be compelled to take the stand." That I agree with, but then your Honor said, "He elected not to do so. Why?" My exception is based upon the contention that this exceeds the bounds of proper comment, since by the repeated statement that he did not take the stand, followed by the question "Why?" greater emphasis is placed on his failure to do so than is proper, and the repeated references could not help but convey the impression to the jury that the Court considered it to be of extreme significance that he did not take the stand.

The Court: I thought I followed it very shortly with a statement of what the consequences were.

Mr. Foley: I think you did, sir. Then I take exception to that part of the Court's charge in which your Honor said that it was the contention of the defendant, or words to this effect, that the State had not proved beyond a reasonable doubt that the fatal shot or shots were fired in Newark, following which your Honor said, "The defendant knows whether or not the shots were fired." At that point your Honor was discussing the three shots which were fired on Thirteenth Avenue, and the failure of the defendant to testify with respect to those three shots, in my view, had no bearing upon the obligation of the State to prove that the fatal shot was fired in Newark.

Secondly, that is the burden of the State; it is its burden to establish where they were fired, and the inference to be drawn from the charge is that there was an obligation upon the defendant to explain where the five shots were fired, which I do not admit to be the law.

The Court: Well, the charge, of course, stands upon its own language, but the impression of the Court is that the Court conveyed the idea that the defendant knew where all the shots were fired, or was supposed to, as he was supposed to be present, and he could state that if he wished to, and the consequence of his failure to do so, the Court told the jury, might be held against him.

Mr. Foley: In that connection I would like to make note in the record that this occurred in a closed truck, and at best there would have to be first the preliminary question for the jury of whether or not, considering where these events took place, the defendant would be able to know whether they were in Newark or elsewhere.

I also take exception to that part of the Court's charge in which your Honor said in effect, "Why

doesn't the defendant take the stand and say that no shots were fired?" My objection to that, if your Honor please, is that the defendant has not at any time taken the position, either while he was on the stand or through me as his attorney, that there were no shots fired at Thirteenth Avenue and Wickliffe Street.

The Court: Perhaps that is not clear in this respect: in the City of Newark.

Mr. Foley: Immediately following the part of the charge to which I have just objected, your Honor said, "His failure to do so may be taken as indicating a good reason and as operating against his case." It is the latter part of the sentence, that part of it continuing the words "as operating against his case" that I object to particularly, because of the indefinite nature of it, because from that it might be inferred by the jury that there was a burden upon him to go forward, which I take it is not the law. That completes my exceptions.

The Court: I might say, if you have any particular thought in mind under your general exception, the Court would ask you to mention it.

Mr. Foley: I suppose, if your Honor please, I might put in this way. The general exception in the main goes to the comprehending of these individual exceptions, in this respect. There are several places where your Honor emphasized particularly that the man had not taken the stand and raised the question, and so in that respect, because of that emphasis, I think the charge as a whole may be said to be prejudicial.

The Court: Very well. In the first place, Mr. Prosecutor, have you any suggestion or remarks to make in connection with these exceptions?

Mr. Congleton: No, I have not, sir. I listened to them but I do not feel that they are well taken.

The Court: Well, one exception I would like to get cleared up. You say that the Court said something in reference to no shots fired in the City of Newark.

Mr. Foley: I will bring it to your Honor's attention. While your Honor was talking about the shots that were fired on Thirteenth Avenue, or about the evidence that those shots were fired, you said in effect, "Why doesn't the defendant take the stand and say that no shots were fired?" I think what your Honor had in mind was that the defendant might be called upon to take the stand and say that no shots were fired in Newark.

The Court: In the City of Newark.

Mr. Foley: But from that it seems to me that it might be inferred that it was your Honor's view, and that you were so instructing the jury, that the defendant took the position that no shots were fired at Thirteenth Avenue and Wickliffe Street, which of course is not the contention of the defendant.

The Court: Really, it is "no effective shot." Your idea is that the Court should have said to the jury that no effective shots were fired in the City of Newark, rather than no shots were fired in the City of Newark?

Mr. Foley: No, I would not feel that that was a proper charge, because the other objection to it is that we take the position that there is no proof that the fatal shot was fired in the City of Newark, and we do not believe that any obligation rests upon the defendant to establish that. We think that is an affirmative matter and is a part of the State's burden, and so if your Honor did recall the jury and simply added the words

"the City of Newark" or that the effective shots were fired in the City of Newark, I would still feel I should take the same exception.

The Court: It did not cover the objection, then?

Mr. Foley: That is right.

The Court: The reason I ask you these questions is obvious. If the Court has prejudiced the defendant by its charge in any respect the Court desires to correct it and desires to correct it now, and that is the reason the Court is listening carefully to your views, and also asked the Prosecutor his views.

So, gentlemen, it seems to me that there is nothing more to be done except to await the views of the jury. That being so, we being about to close this case, I wish to speak to counsel who were assigned to defend this case. Mr. Foley, as senior counsel, and Mr. Hayden, as junior counsel, I wish to say that it gives the Court pleasure to compliment you gentlemen upon the manner in which you have discharged your duty as officers of the Court, and to thank you for your services.

Mr. Foley: We thank you, your Honor.

Mr. Hayden: Thank you.

(The jury returns to the courtroom.)

The Clerk of the Court: Members of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk of the Court: Mr. Foreman, how do you find?

The Foreman: Guilty of murder in the first degree.

The Clerk of the Court: Members of the jury, just listen to your verdict as the Court will have it recorded. You say you have agreed upon a verdict and by your foreman say that you find

the defendant, James Brooks, guilty of murder in the first degree, and so you say all?

The Foreman: Yes.

Mr. Foley: May I have the jury polled, if your Honor please?

The Court: Certainly.

The Clerk of the Court: Members of the jury, at the request of counsel for the defendant the jury is to be polled. Your verdict as announced by your foreman is that you find the defendant guilty of murder in the first degree. Each of you will state how you find the defendant as your name is called.

John M. Everett.

Mr. Everett: Guilty of murder in the first degree.

The Clerk of the Court: Daniel J. Dougherty.

Mr. Dougherty: Guilty of murder in the first degree.

The Clerk of the Court: William F. Bird.

Mr. Bird: Murder— Guilty of first degree murder.

The Clerk of the Court: John Duerr.

Mr. Duerr: Guilty of murder in the first degree.

The Clerk of the Court: Irving M. Baker.

Mr. Baker: Guilty of murder in the first degree.

The Clerk of the Court: Joseph M. Courter.

Mr. Courter: Guilty of murder in the first degree.

The Clerk of the Court: Arthur L. Brown.

Mr. Brown: Guilty of murder in the first degree.

The Clerk of the Court: Bernard A. Decker.

Mr. Decker: Guilty of the murder in the first degree.

The Clerk of the Court: Frank Cronshey.

Mr. Cronshey: Guilty of murder in the first degree.

The Clerk of the Court: James A. Brower.

Mr. Brower: Guilty of murder in the first degree.

The Clerk of the Court: Bernice F. Dreyfus.

Miss Dreyfus: Guilty of murder in the first degree.

The Clerk of the Court: George W. Cameron.

Mr. Cameron: Guilty of murder in the first degree.

The Court: Very well, members of the jury, the Court will discharge you from further consideration of this matter, and I will ask you if you will kindly go into your juryroom and just wait there for a few minutes. May I see counsel in my chambers for a moment?

(A short recess is taken.)

SENTENCE.

The Court: Brooks, have you anything to say why sentence should not be pronounced upon you?

The Defendant. Nothing at all.

The Court: The judgment and sentence of the 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, the twentieth day of April, 1947. And may God have mercy upon your soul.

* * * * * *

The Court: Brooks, the Court has sent for you to correct a direction inadvertently given at the time of your sentence yesterday afternoon. So that the statement of the Court in sentencing you shall read as follows: The judgment and sentence of the Court is that you suffer the punishment of death at the place and in the manner provided by law on a day within the week beginning Sunday, the fourth day of May 1947. And may God have mercy on your soul.

DEFENDANT'S REQUESTS TO CHARGE.

The defendant requests this Court to charge:

1. The burden of proof is upon the State to prove every element of the crime charged beyond a reasonable doubt.

2. The indictment alleges that Brooks committed the murder of Bateman in the City of Newark and this is an essential element of the charge.

3. The State in establishing that the crime was committed in the City of Newark must prove beyond a reasonable doubt which shot or shots was or were fatal.

4. The obligation rests upon the State to prove beyond a reasonable doubt that the stroke which caused the death of Bateman was delivered in the City of Newark.

5. If, after a consideration of the evidence there remains in your minds a reasonable doubt that the fatal shot or shots were fired in the City of Newark, I charge you that your verdict must be "not guilty".

6. In considering the question of where the fatal stroke was delivered, you may take into consideration that a pellet from the gun was found upon the running board of the truck in Vaux Hall in the County of Union.

7. The indictment charges that the murder was done wilfully and with malice aforethought and these elements are essential and must be proved beyond a reasonable doubt.

8. If you find the defendant guilty you are then entitled to consider the question of whether or not you will recommend life imprisonment as his punishment.

9. If you conclude to make such recommendation it must be attached to your verdict.

10. The recommendation if made must be clearly stated in words to this effect:

> "We recommend life imprisonment at hard labor."

11. A mere recommendation of mercy or leniency will not serve to withhold punishment by death.

12. The court is without authority to withhold the death penalty after a conviction of murder in the first degree unless the jury expressly recommends "life imprisonment at hard labor" or words to that effect.

13. The words "life imprisonment" must be included in the recommendation if the defendant upon conviction is not to be sentenced to death.

14. The right given by statute to a jury to recommend life imprisonment upon a conviction of murder in the first degree is subject to no restrictions.

(*State* v. *Martin,* 92 N. J. L. 436).

15. The recommendation of life imprisonment need not rest upon any testimony and is within the unlimited discretion of the jury.

(*State* v. *Martin,* 92 N. J. L. 436).

16. The recommendation of life imprisonment is within the unlimited discretion of the jury.

(*State* v. *Martin id.*)

Defendant's Requests to Charge.

17. Even if you find no palliating or mitigating circumstances in this case, you may still recommend life imprisonment if upon a view of the whole evidence you are of the opinion that it would be unjust or unwise not to do so.

(*State* v. *Martin id.*)

18. Your discretion in the matter of recommending life imprisonment is unlimited and by this is meant that you may do whatever your conscience dictates.

(*State* v. *Martin id.*)

19. Neither upon the question of guilt nor if you be satisfied of that beyond a reasonable doubt upon the question of the recommendation of life imprisonment can your determination be arrived at by accepting the vote of a majority and adopting the same as the verdict of all if you do not agree with such vote.

20. Each of you is charged with deciding the issues submitted to you and you must not return any verdict unless it is the unanimous verdict of the jury.

21. A unanimous verdict is one which reflects the individual view of each member of the jury.

22. Before a verdict of murder in the first degree can be returned each and everyone of you must be satisfied that the State has proved every element of the crime beyond a reasonable doubt.

23. Before a verdict of murder in the first degree without recommendation of life imprisonment may be returned each and every one of you must be satisfied that he has determined not to exercise his unlimited discretion to recommend life imprisonment at hard labor.

Certificate of Stenographic Reporters.

We, Charles J. Drescher, Simon J. Flynn and Charles E. Abbey, members of the staff of official stenographic reporters of the County of Essex, State of New Jersey, do certify that we did well and truly record stenographically the proceedings had at the trial of the above-entitled cause, and that the foregoing is a true transcript of our stenographic notes of such proceedings.

Witness our hands this day of April 1947.

Charles J. Drescher.
Simon J. Flynn.
Charles E. Abbey.

Certificate of Presiding Judge.

I, Dallas Flannagan, Presiding Judge, of the Essex County Court of Oyer and Terminer, and the Judge who presided over the aforesaid cause, certify that the above printed book contains the entire record of the proceedings had upon the trial of said cause, and that the same is returned by the plaintiff in error therein with the writ of error bringing up the bill of exceptions signed and sealed in this cause.

Dallas Flannagan,
Judge.

April 1947.

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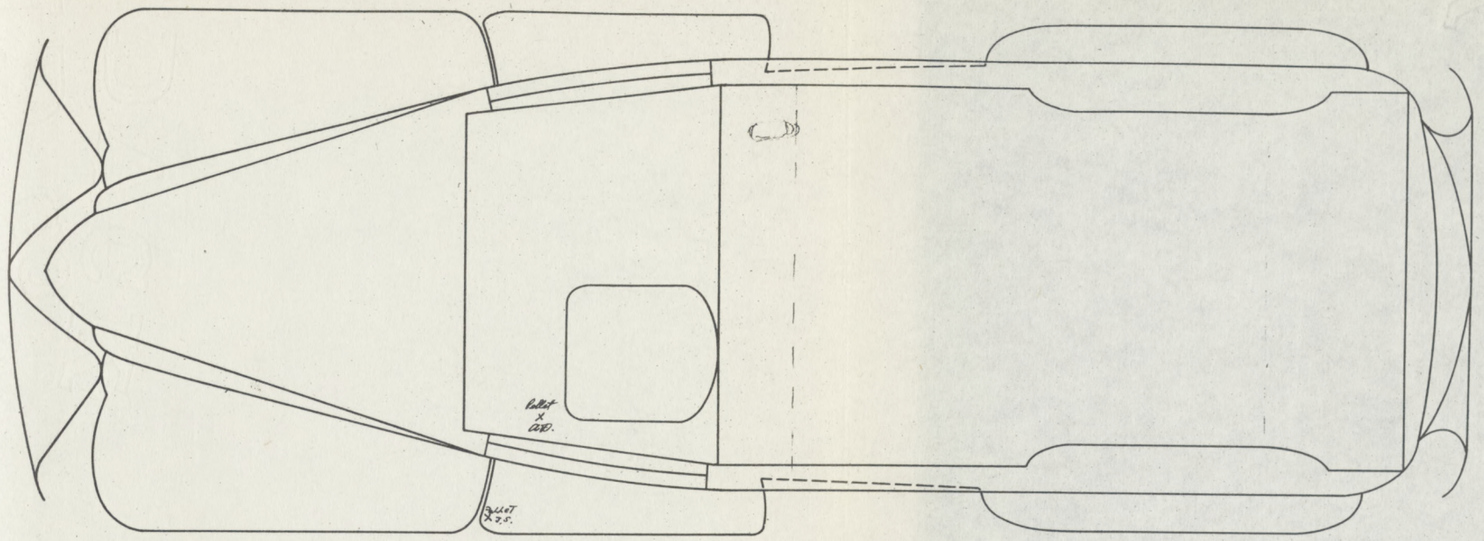

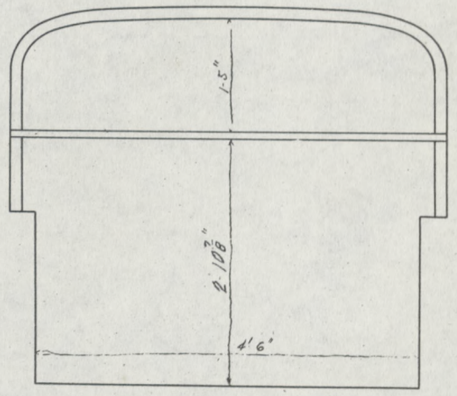

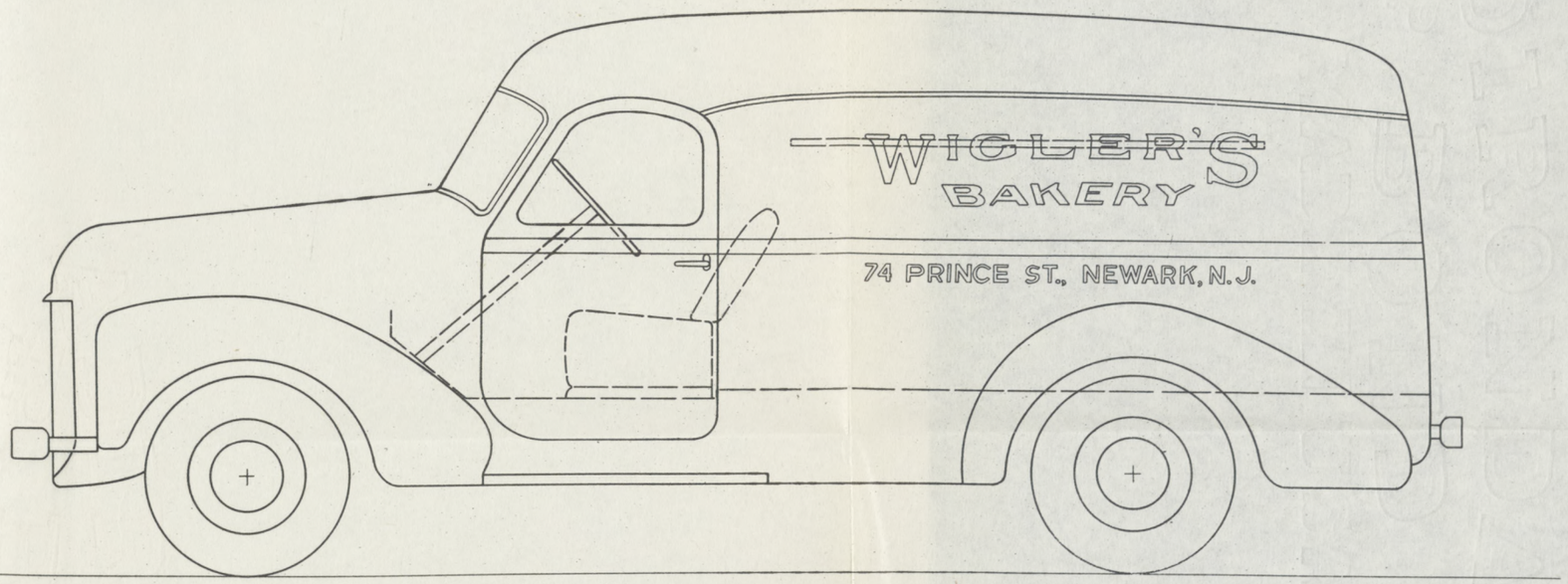

EXHIBIT
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D. J. D.

ESSEX COUNTY
ENGINEERING DEPARTMENT

STATE of N.J. vs JAMES BROOKS

SCALE: 1½ IN. = 1 FT. DATE: DEC. 27, 1946
SURVEY BY HRH DRAWING BY HCR
APPROVED _____
COUNTY ENGINEER

Exhibit S-7.

Exhibit S-8.

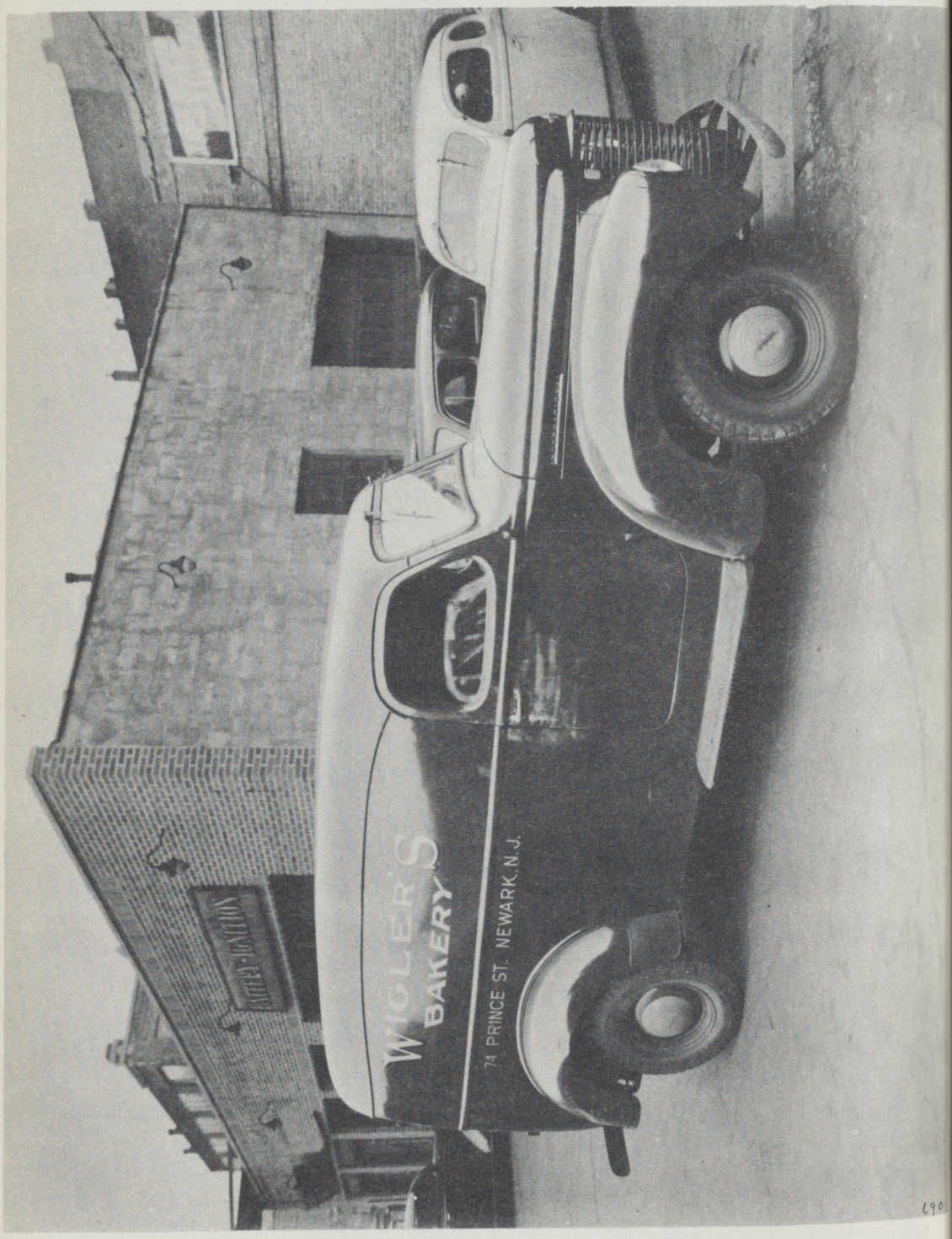
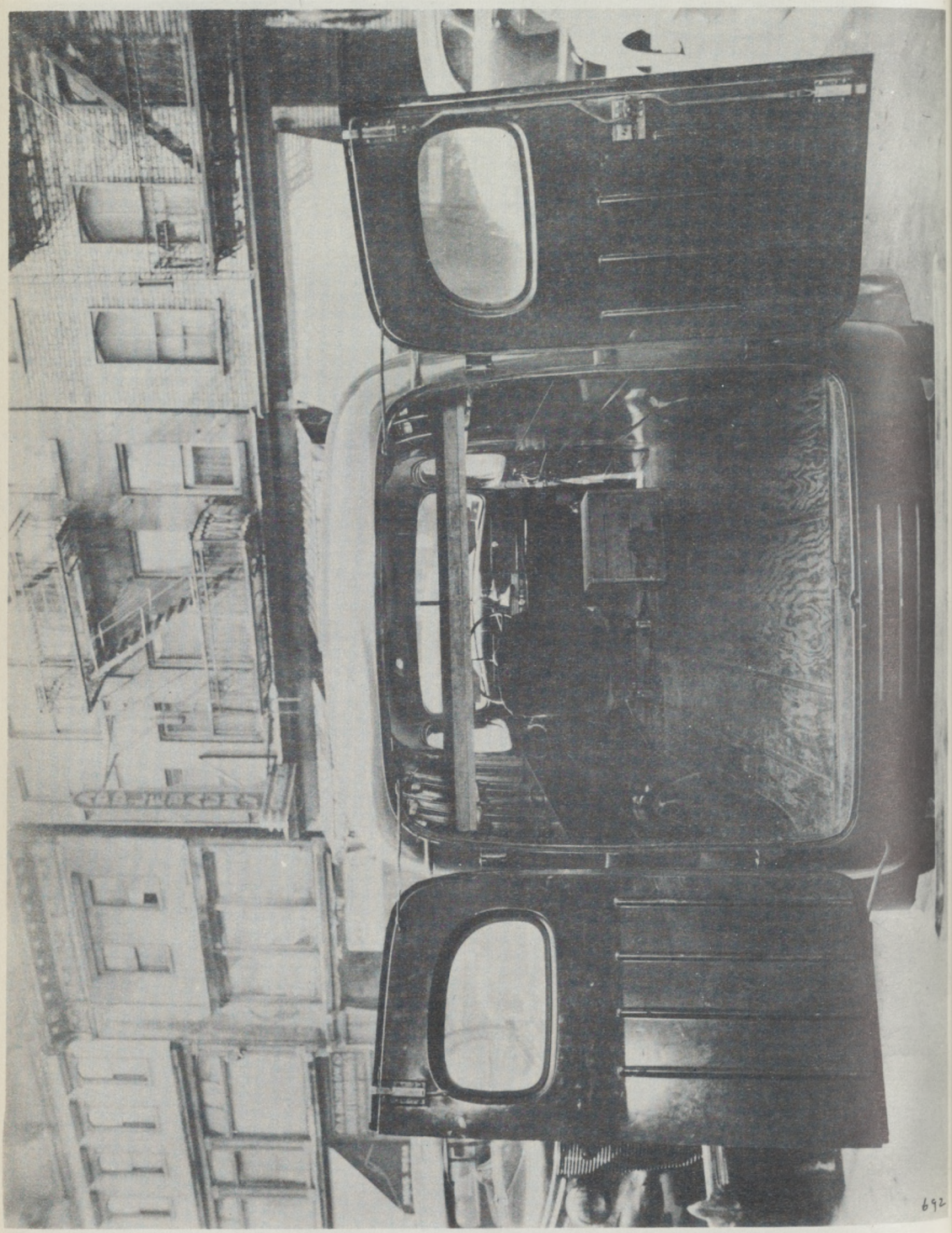


Exhibit S-9.


WIGLER'S
GROCERIES - MEATS - FRUITS
CUT UP POULTRY
WIGLER'S BAKERY
691

Exhibit S-16.



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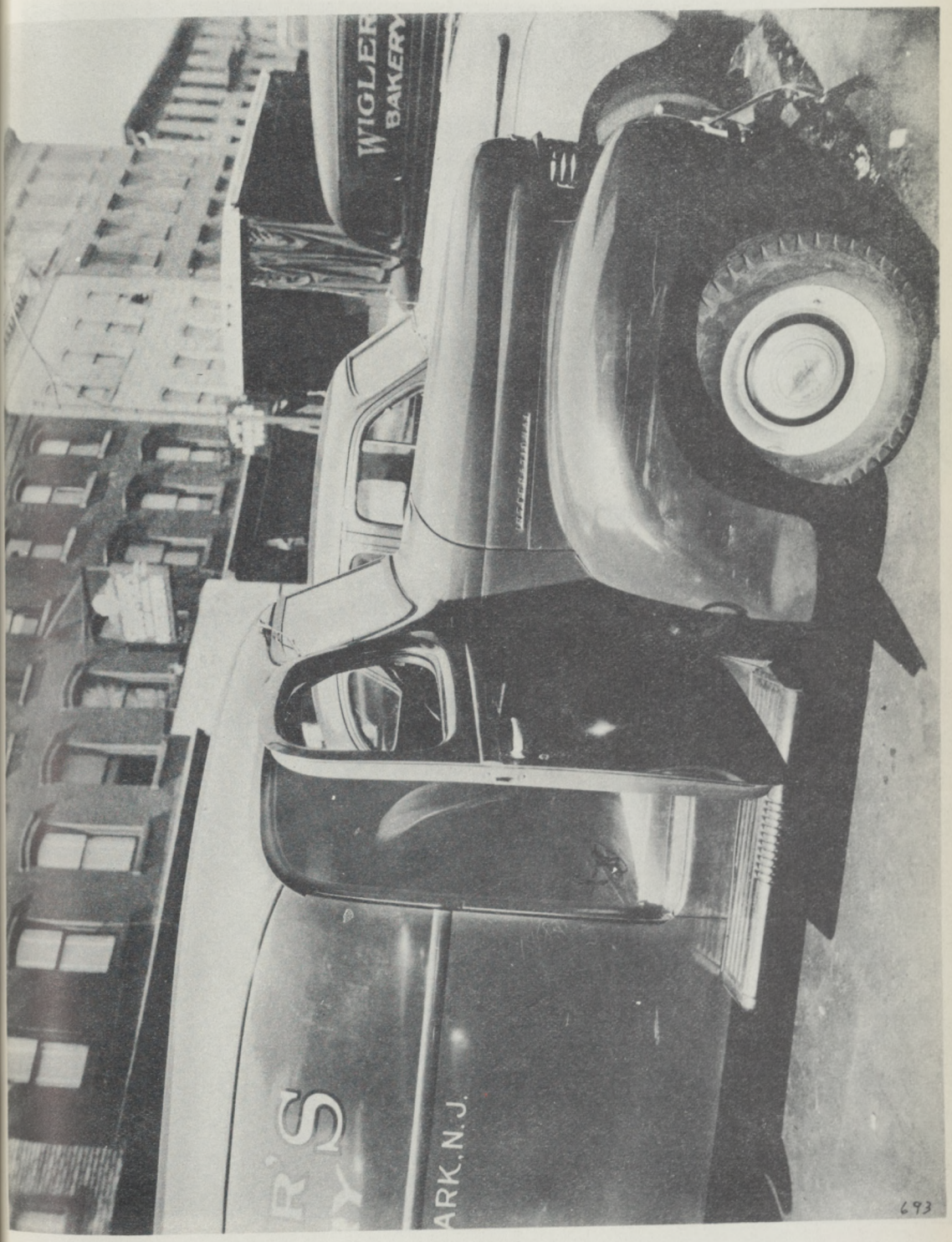

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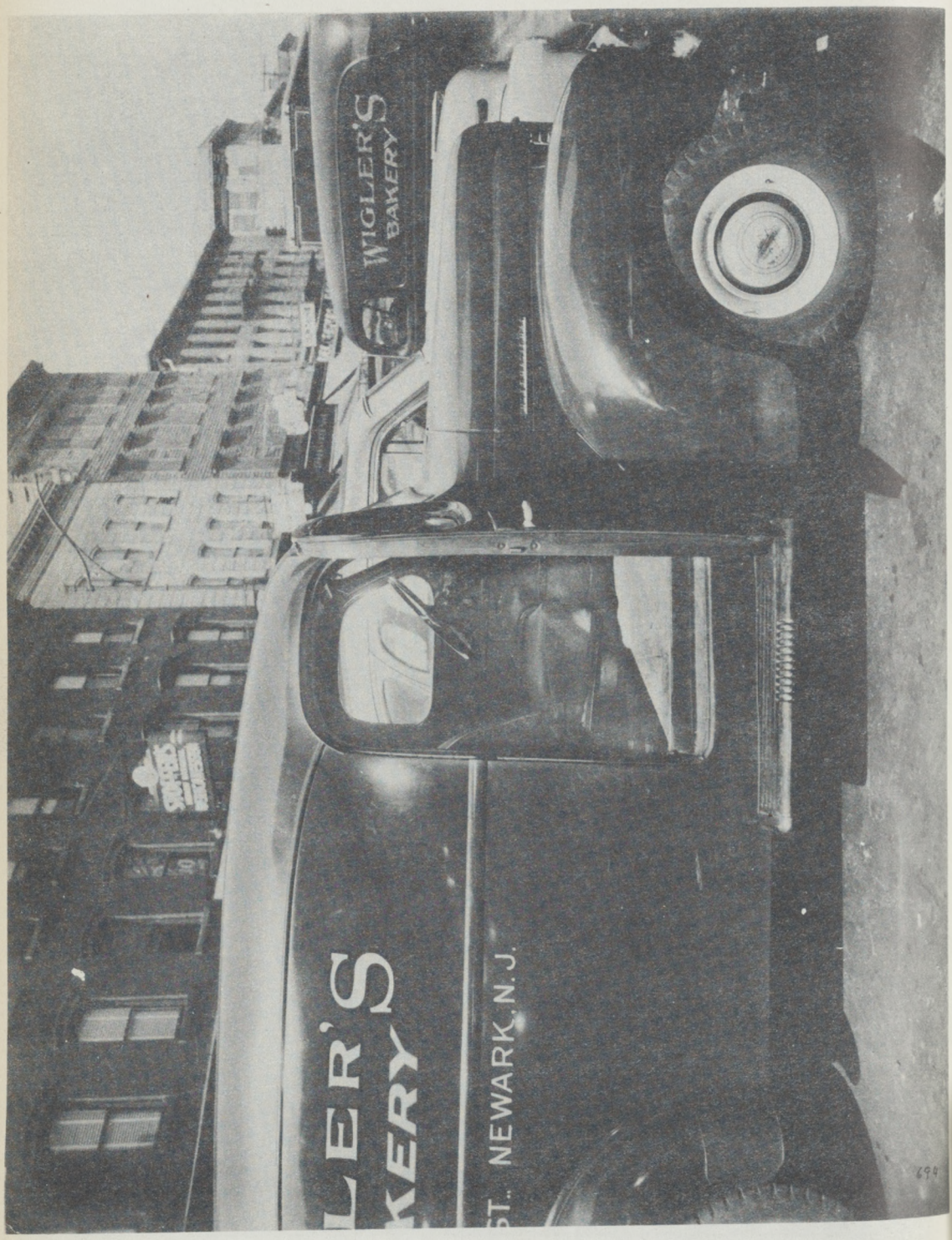

Exhibit S-32.

Phone MIllburn 6-1800-1801

WILLIAM SPRIGGS

— TAXI SERVICE

11 Holmes Street, Millburn, N. J.

Dec 17 Dandrich wood

CAR No. _____ CHAUFFEUR'S DAILY REPORT

EXHIBIT S 32 D C. J. D.

IN					
OUT					
Totals					

TRIP NO.	FROM	TIME	TO	TIME	AMOUNT	
1	Sh		Center	41	35	
2	Kenswick		train		—	35
3	train		Sh		35	
4	train		Sh		35	
5	Lupine way		train		35	
6	train		Slop Dr		35	
7	Sh		Center		35	
8	Office		Sh		70	
9	Knolwood Rd		Vhall		—	15
10	Vhall		Knolwood Rd		—	75
11	Office		wood crest		35	
12	Eden St		Center		35	
13	Bus noon	kids home			—	200
14	Center		Mt Vue Rd		35	
15	Bus		Sh		—	50
16	Sh		Center		35	
17	Vhall		Newark		300	
18	Sh		Center		35	
19	Sh		train		35	
20	Sh		Vhall		1 50	
21	Sh		Center		35	
22	trip	for tom			85	
23	Sh		train		35	
24	train		Mr Bilding		—	35

NAME OF CHAUFFEUR Dandrich wood

DATE Dec 17, 1946

TOTAL 1095

EXPENSE

NET TOTAL

IMPORTANT In case of all accidents always get names and addresses of as many witnesses as possible. If it is a collision with another vehicle, be sure to get the names and addresses of any persons riding in the vehicle, if any, and the name and address of the owner.

If you run down a pedestrian, be sure and get his name and address, and the name of the doctor in attendance.

REMARKS Charges 4.70

695

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Exhibit S-28.

DEPARTMENT OF PUBLIC SAFETY.
POLICE DIVISION

11:00 A. M.

Newark, 2, N. J., Dec. 26th, 1946

Voluntary Statement of: Max Bomwell,
Residence: 185 Kimberley Rd., Union, N. J.
Occupation Battery Service Station.
Age 46 years.

Statement Made to: Lieutenant Wangner and Det. Norris, at 92 - 13th Ave..

I am married and I live at the above address for the past ten months with my wife and family.

I am in the Battery Service at 92-13th Ave. and have been for the past 23 years.

On Dec. 17th, 1946, I was standing on the sidewalk in front of my store sometime after 1:30 P. M. when I heard a noise like an auto backfiring. I looked south on Wickliff Street and I saw a Wigler Bakery truck parked in the street in front of 116 Wickliffe St. There was no driver in the seat. Then I heard a scuffle come from the truck.

Then I saw an unknown colored man get into the driver's seat, he came from inside the truck. This colored man then started the truck and as the truck was coming towards 13th Ave. and Wickliffe St., I heard two shots coming from inside the truck. I saw smoke inside the truck. As the truck was passing me, I could see a man's foot on the floor of the truck as the side door of the truck was open. The truck continued going north on Wickliffe St. I went to my phone and called the Police.

Shortly after I called the Police a gent's brown soft hat was brought to me and the colored man

who gave me the hat told me the hat fell out of the Wigler Truck. I have marked this hat with my initials M. B. on the inside for identification.

MAX BOMWELL.

Witnesses:
WM. L. WANGNER
CARLTON B. NORRIS

Exhibit S-29.

DEPARTMENT OF PUBLIC SAFETY
POLICE DIVISION
Newark, N. J.

Date Dec. 17, 1946.

To: John J. Sweeny
Captain: Fourth Prec.

Sir:

I hereby report at this 145 P. M. sent to 92 - 13th Ave. to see complainant.

Max Bomwell, 92 - 13th Ave., who runs a battery store at above address, claims about 1:40 P. M. he saw 2 colored men driving a Wiglers Bakery truck north on Wickliff St. and when the truck went by him he heard 2 shots and as the truck went by him he saw a man lying on the floor of the truck and a hat fell from the truck.

We tagged the brown hat 6⅞, Del Park custom made at the 4th Prec.

We contacted Wiglers and they claim they had sent a driver to the Federal Trust on Commerce St. with the day's receipts.

We searched the neighborhood but could not locate the truck.

Respectfully submitted,

Radio 41 Ptlm. NYGARD & GINDELE.
Signature: VINCENT E. NYGARD,
Rank: Patrolman 770

Exhibit S-53.

DEPARTMENT OF PUBLIC SAFETY.
POLICE DIVISION.

7:40 P. M.

Newark 2, N. J., Dec. 18, 1946.

Voluntary Statement of: James Junior Brooks
Residence: 17 Lillie St., Newark, N. J.
Occupation Laborer
Age 23.

Statement Made to: Deputy Chief Frank O'Neill, Capt. Joseph Cocozza and Det. Michael Kosloski.

I was born in Miami, Florida, April 3, 1923. I don't remember my mother at all. I do remember my father who used to live at 159 Belmont Ave., Newark.

When I was about three or four years old I left Miami with my Aunt and Uncle and went to live at 222 Prince St., Newark. I lived in Newark ever since I arrived here. I went to Belmont Ave. School and from there to Charlton St., then to Morton. Later I went to Monmouth St. School and then to Woodrow Wilson School. All of these schools are in Newark. I reached the seventh grade, then I got into trouble and was sent to the Parental School then to the City Home. From the City Home I was sent to Jamesburg and it was while I was in Jamesburg that I reached the seventh grade in school.

When I left Jamesburg I was about sixteen years old. I then went to work for the Newark Plaster Co., on Bridge St., Newark.

I have worked in several places after this and in 1941 I got into trouble and was sent to Annandale. I got out in 1943. I was out a couple of

New Jersey State Library

years and in 1945 I got into trouble again and was sent back to Annandale. I got out about two months ago on parole.

I have known Joe Smart all my life. He is my fourth or fifth cousin on my Aunt's side. Before Joe went into service I used to see him regularly. Me and my Mother, Grandmother and my Aunt used to go to his house.

About two days after I came out of Annandale two months ago Joe came up to my house to

James J. Brooks

Witnesses:

Capt. Jos. Cocozza
D. C. F. A. O'Neill
M. J. Kosloski

2.

see me. Joe and me was in the front room and my wife, mother-in-law and sister-in-law were in the kitchen.

Joe said to me, "Do you want to make some easy money"? I said "No, Joe. I don't want to do that any more, I have been in too much trouble. I just came out." Joe said, "Well whenever you do, let me know." Joe stayed about a half hour longer then left.

About a week later I met Joe in Mike's Tavern, 13 Lillie St. Joe said to me, "Do you want to make that easy money?" I said, "No, Joe, I don't want to get in no more trouble."

Joe then told me he chauffers for Mr. Wiglers. I knew that Wigler's was a baker shop on Prince St., Newark. Joe told me that he drove Mr. Wigler down to the bakery every morning. Joe also told me that Mr. Wigler and his daughter counts

the money every Monday morning and after counting the money they put it in a bag like bread. Joe also told me that after the money is put in a bag, the driver named Hooks throws the bag in the truck and drives over Prince St., toward So. Orange Ave. Joe said "There will be a couple of thousand dollars or more on this job."

Joe asked me to do the job alone and I told him "No." Joe then said, "It's an easy job, all you got to do is hail him down by making motions and call him "Hooks", then he will probably stop, lower the window and open the door. Then you jump in and say 'This is a stick up.'" After talking a while longer I told Joe that I would think it over. Joe said "All right." We both left the tavern and I went home. I saw Joe several times after that but we did not discuss the job.

James J. Brooks

Witnesses:

Capt. Jos. Cocozza
D. C. F. A. O'Neill
M. J. Kosloski

3.

J.B. on a J.B. two

I saw Joe again Wednesday night, weeks ago to -night, in Mikes tavern. We stayed in the tavern about five minutes then left. We went down to see my parole officer Mr. Wright, on Court St. We were at Mr. Wright's office about fifteen or twenty minutes then we left.

Joe and me started to walk up Court St., to Springfield Ave. While walking along I was on the inside and Joe was on the outside. Joe said

Exhibit S-53.

"Are you for doing the job"? I knew he meant the Wigler job. I said "How much money did you say was in it?". Joe said "There's about ten or twelve thousaid dollars in it now." So I said "Dag, is there that much money."? And I said "OK., but I got no gun", Joe said "Just pretend you got a gun by keeping your hand in your pocket," I told Joe "OK", and I also said "I'll pretend I am going to work Monday and go to my job then come back and see you at your house," Joe said "OK, Be there between eight and nine," I said "should I wait for you or will you be there," Joe said "I'll be there I'll wait." Then we parted.

On Monday, December 9—1946—I went to work and I told my foreman, Charles Bergens, that I had some business to attend to and that I would not be able to stay. Charlie said "OK, I'll tell the boss." This place is the Asbestos Products, 300-306 Thomas St., Newark. I then went to the movies intending to get out at one o'clock. I got out of the movies at twelve thirty. I was supposed to meet up with Hooks on Prince St., between one and two o'clock to stick him up and take the money. I had a toy gun with me. I went home first to get the toy gun and on my way home I met Joe. He gave me a ride

James J. Brooks

Witnesses:

Capt. Jos. Cocozza
D. C. F. A. O'Neill
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4.

home in Wigler's green Studebaker. On the way home Joe gave me the description of Hooks again and also the location. I told Joe I understood everything. I then reached my house and Joe left saying he had to pick up the boss and take him back home. I then went in and got a toy gun from under the bed, placed it in my left pants pocket and went down to Prince St., across from Wigler's bakery and waited for Hooks to come out with the money. From the description Joe gave me I knew Hooks as soon as he came out. I waited about an hour until two oclock when I saw Hooks come out of the bakery and threw a paper bag in the truck which was standing in the street. Hooks then got in the truck and drove over Prince St., to So. Orange Ave.

I was supposed to get in the truck as soon as Hooks threw the money in but I missed him. I ran over Prince St., after the truck but I could not catch up. Before I got to So. Orange Ave., I saw Joe in the Studebaker coming in my direction over Prince. Joe blew the horn and I stopped. Joe said "I see you missed him," I said "yes;" Joe then said "Get in." I got in the car and Joe said "Where you going?" I said "Home I missed him," Joe said "Well now you know who Hooks is, did you see the money bag?" I said "Yes it was a big bag." Joe said "Now you know what to do next Monday." I said "Yeah." Then Joe said "I'll show you just which a way Hooks go, in fact we may catch him now." Joe then turned around and drove over Belmont Ave., down So. Orange

James J. Brooks

Witnesses:

Capt. Jos. Cocozza
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M. J. Kosloski

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5.

Ave., to Wickliffe St., to West Market St., cut off on some street to the Boulevard and down to the bank near the Boulevard. Joe drove pretty fast through these streets. When we reached the bank Joe said "There's the truck, Hooks done already took the money inside." Joe then drove me home.

The next time I saw Joe was Sunday, December 15—1946, when he came to my house. Joe's girl friend Mary was at my house, another girl named Lizzie Williams was also there with her boy friend named Buddy, whose last name I do not know. My wife, mother-in-law and my wife's Aunt Clara Ray and my sister-in-law Lucille were also there. This was on Sunday evening.

Joe and I went into my room where we began to talk about the Wigler job. Joe said "Are you still for the job?" I said "Yeah, I got a gun now". I went to my dresser and took out a gun from the drawer next to the bottom one and I showed it to Joe. The gun was fully loaded with five bullets. Joe looked at the gun and said "That's just what we need". I put the gun back in the drawer. Then Joe said "See me tomorrow morning, I'm not going to work". I said "O.K. Joe". We both went back and joined the party. Nothing else was said this Sunday night.

On Monday morning, December 16th, 1946, I went to Mary's house, I think it is 25 Lillie St., Newark. Joe was not home but he came up about three minutes. We both went into his house. Joe and I made plans on how to get the money from Hooks on the same day. Joe said "I am going to call up my boss and tell him my mother is sick

and that I am not going in to work. That way I will know

James J. Brooks

Witnesses:

Capt. Jos. Cocozza
D. C. F. A. O'Neill
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6.

whether the boss is in or not". I said "We can go to a movie first". We went down to the Newark Paramount to an early show. We came out of the show at one o'clock and we went to a store on Market St., where I bought a pair of leather gloves for $2.95. We then took a #25 bus and got off at Howard and Springfield Ave. The arrangement that we made to rob Hooks was for Joe to go up to Prince St., first and I would follow him. So when we got off the bus we split. I walked down Prince St., toward So. Orange Ave., and Joe stayed at Prince and Springfield Ave., on the opposite side of Wigler's Bakery.

Joe walked back and forth watching for Hooks for about two hours. I was on Prince standing in a hallway waiting for a signal from Joe.

After waiting a long time Hooks did not come out with the money and Joe disappeared. I waited around for about five minutes and then realizing there was nothing doing I went home.

That night I seen Joe at my house. Joe said "I went down to the bakery to tell the boss he had to pay some bills and I asked the boss if he wanted me to run some errands as I was not feeling so well". Joe also said "I told the boss I would not be in tomorrow". Joe then told me to come to his house tomorrow morning.

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On Tuesday, December 17, 1946, I got up at eight o'clock. I ate breakfast prepared by my wife and then sat around the house about a half hour. I then dressed and before leaving the house I went to my room and took the gun from the dresser drawer and put it in my belt on the right side. There were five bullets in the gun.

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7.

I then went to Joe's house. I told my wife Gwen that I was going out.

I found Joe at home. He told me his stomach wasn't feeling so good. Joe was home alone. Joe said "We got to get that money today." I said, "You're right, because I need a lot of stuff for Christman. I need a lot of clothes for my wife, the baby and myself. I want to have a good time for Christmas and New Years. I hope everything work out allright." Joe said, "Yeah, me too. Mary and I need a lot of money too. We are going to do this job just like you said before. I'll call for him to stop just like I was doing down town." Joe said "After I get in, you get in." I said "Yeah, you get in the truck and I'll get in behind you." Joe then said "You pretend you are holding us both up because I don't want the folks to know I was in on the holdup." I said "Suppose he don't give the money up, then what?" Joe didn't say anything. I said "Twenty Two thousand dollars is a lot of money if that is what you say it is. Suppose he makes a break and

Exhibit S-53.

grabs for me, I'll shoot to scare him." Joe said "Yeah, that's a lot of money, we got to get him one way or the other." I said "We are not going to kill him are we?" Joe said, "Yeah, if we have to because we got to get that money." I said "O.K." Joe said "Because if we don't do it that way, Hooks will go back and tell that I stopped him." I started to kidding with Joe and said "We will shoot him and dump him in the river with the truck." I said "That's about the only way we will get away with it." Joe said, "Yeah, that's right cause Hooks will go back and tell and that will make it hard on me." So I said "What shall we do shoot him." Joe said, "Sure."

J. B.

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8.

This was the end of the conversation. Joe said, "After we get the truck with Hooks and the money, we will go out to Vaux Hall, I'll drive." Joe asked me for my gloves and I gave them to him.

We left Joe's house about ten thirty and went for a green cab on Montgomery St. On the way down Joe said "If they didn't take the money yesterday they will go about eleven o'clock today." We got a green cab with a young colored girl as driver. Joe ordered to drive down Prince St. toward Springfield Ave., to South Orange Ave. When we passed Wigler's bakery Joe said "The Venetian blinds are down and the shades are

down in the back, they must be counting the money now. Do you see the car." I said "No." Joe said "Well they are in there counting the money at least I think they are in there so we will wait just the same." We got out of the cab at So. Orange Ave., and Prince St. Joe paid the girl. When we passed the bakery both trucks were in front of the place.

When Joe and I got out of the green taxi we waited on the corner near the fish market. From here we went down to a tavern where we had a glass of beer. We then returned to the corner of Prince St., where we could see the bakery and the trucks. We stayed on this corner from about one o'clock until the time Hooks came out which was about one thirty or two o'clock. Joe saw the truck coming over Prince St., and he said, "Here he comes, come on." Joe crossed the street and I followed him. We walked down So. Orange Ave., about fifteen yards. When the truck pulled around the corner Joe hailed Hooks and motioned toward downtown.

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9.

Hooks opened the truck door and said to Joe "What are you doing around here." Joe said, "I am on my way downtown, are you going down?" Hooks said "Yeah, I am going down that way, hop in." Joe motioned to me to come on and he got in the truck. I also got in the truck and Hooks looked at me kinda funny. Joe got in the truck

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and stooped down between me and Hooks. I sat on a box. Hooks started the truck down So. Orange Ave. Hooks said something to Joe but I did not hear it so good.

While riding along Wickliffe St. near 13th Ave. Joe nudged me and I pulled the gun out of my belt and pointed it toward Hooks and I said "This is a stickup." Joe said "What's this here," as though he wasn't in on the deal. Then Hooks smiled. Then I said "I'm not kidding, this is a holdup." Hooks stopped smiling right away and he made a dash for the gun. I had my right index finger on the trigger. The gun was not cocked. As Hooks grabbed my hand the gun went off. Before the gun went off when Hooks grabbed my hand he stopped the truck and turned off the ignition. The truck had just about reached the battery place on the corner of 13th Ave. Hooks and me were still struggling when the door opened and I lost my hat. Joe grabbed Hooks from the back and was trying to pull Hooks away from me. When he pulled Hooks, Hooks pulled me and we both fell in the back on the floor of the truck. Joe then sat in the driver's seat and started the truck in motion. He was wearing my gloves.

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10.

I don't know which way the truck was going because I was still struggling with Hooks on the floor of the truck. Joe was driving very fast.

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During the struggle Joe said "Hurry up and shoot him, ain't you shot him yet?" Hooks was holding my hand and the gun went off toward the front of the truck. Hooks then grabbed the barrell of the gun and pressed on it. The gun went off again toward the rear of the truck. Hooks began to holler "Take the money, take the money but don't try to hurt me". I finally got my hand loose and I started hitting Hooks on the side of the face two or three time with the butt of the gun. I also punched him once in the face. Joe slowed down and came pretty close to a stop. He turned around and said "Give me the gun, I'll shoot him". Joe took the gun out of my hand. I put my hand over Hooks' mouth to try to keep him from hollering. When I did this Joe shot Hooks twice. Hooks then released his hold on me and rolled over on his back. The first shot Joe fired was in Hooks' back. The second shot was fired as Hooks was rolling over on his back. Joe then gave me back the gun and said "Keep the gun on him if he moves or hollers shoot him". I got the gun and told Hooks to lay on the floor and keep quiet. Hooks asked me if I would let him sit up and get some air. I said "sit up and keep quiet". Hooks was hollering about his stomach and his leg. I said "If you can't keep quiet, lay down". Joe was still driving. When Hooks layed back Joe said to me "Throw the gun on me too and make it look like you are holding us both up".

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11.

I said to Joe "You keep driving and don't try any funny stuff", I said this out loud so Hooks could hear it. Joe said "OK, Mister, I'm not going to start no funny stuff". Hooks said "Don't leave me here to die fellows", and to me he said "Mister, don't leave me here to die". I said "Well keep quiet and I won't leave you here to die, I am going to let you go". Hooks said "I got a wife and children, go ahead and take the money, he won't say nothing". I said, "We are going to let you go" then I caught myself when I said "We" so I said, "I am going to let you go but I am going to take him with me". I then said to Hooks "Do you know him", nodding toward Joe and Hooks said "Yes, his name is Joe." Then I asked Joe if he knows him, nodding toward Hooks and Joe said "Yes, his name is Hooks". Then I said "I have been watching you for the last six months". This was our plan to throw suspicion off Joe and myself. Then again Hooks said "Please Mister don't leave me here to die, take me to a hospital". Then I said "I know where you live, if I let you go and you say anything, I will go and get your wife and kids". Hooks said "No, I won't say anything, just take me to a hospital". I am now sitting up beside Joe with the gun on Hooks and once in a whole would throw the gun on Joe to make it look like he wasn't in it. When I said something about a hospital Joe said in a whispering voice "No, no, shoot him. Have you got any more bullets in the gun".

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12.

I opened the gun and the shells fell on the floor. I told Joe there were no more bullets in the gun. I then closed the gun and the truck then came to a stop.

I said to Joe "How far do you have to go?" and Joe said "Just around the corner". Hooks said "Don't leave me here to die fellows". Joe then said "Haven't you got any more bullets in your pocket, I don't want him to identify me because he knows me." When I got ready to get out I took a cloth bag out of a box in the truck. Joe said "That's the money". Joe got out of the truck on the driver's side and I got out on the right side. I put the bag with the money in it in my bosom and I put the gun back in the holster which was on my belt. I walked around to where Joe was standing and he said "Don't take the bag like that someone may see it, let's get a paper bag and make it look like a package". Joe went to the truck for a paper bag and he also picked up the shells that fell out of the gun when I opened it. I then went back to lock the door of the truck but I just shut them instead of locking them. Joe then took me to his sister-in-laws house in Vaux Hall. When we got in Joe said "H'ya kid". She said "Hello Joe, What brings you here? " Joe said "You know who this is" and his sister-in-law said "Yes, he is Gill". That's what they call me. I then went to the bath room and Joe followed me in. He wrapped the shells in paper and tryed to flush them in the toilet but they would not flush so he put them in his coat pocket.

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13.

Joe and I then went down to the basement and bag. J. B. went through the money back. There were some checks in the bag which we burned together with one of the cloth bags and a cap belonging to Hooks was also burned in the furnace. Joe and I went back up stairs with the money. Before coming back up stairs Joe's sister-in-law hollered down and said "Joe, what are you burning in the furnace?" Joe said, "Nothing, I am just putting some coal on." She came down and Joe started putting coal on the fire to cover up what he was burning. Joe then told her to call a cab. Joe then went down in the basement with the money. I went down a few minutes later and I saw Joe putting a package of money in his back right hand pants pocket. Joe said "I am going to take some here and you take the rest. Take it to my attic." Instead I took the money to my house. A cab came to the house. Before the cab came I went to the bathroom. My clothes were bloodstained so I switched overcoats with Joe. Joe also gave me back my gloves. While waiting Joe asked me for ten dollars as he didn't want to break the package of bills which he put in his pocket. I gave Joe the ten dollars. He said he was going to his mother's house in Springfield and he could say that he was there all the while.

When the cab came I asked the driver to take me to the Pennsylvania station. When I got to the station I took a green cab and went home. The keys to the truck I threw then in a sewer at Sayre St. and West Kinney St. The shells I flushed down my toilet.

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Witnesses:

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14.

The money which was in a paper bag I put in a dresser drawer in my room. I got home about four thirty p. m.

I dressed and changed my clothes. I then took about four or five hundred dollars out of the bag and went downtown where I bought a man's ring in a jewelry store on Broad St. I paid $47.00 for the ring. I also bought a suit for $65.00 in Jack Schwartz' on Branford Pl. I also bought an overcoat in the same place. I bought another suit at Deed's on Washington St. for $60.00. I also bought a watch in the jewelry store on Broad St. for $70.00. This was a ladies watch. I also bought a couple of hats at Horowitz', on Market St. I also bought a fifth of Schenley whiskey and some beer then I went home. I also bought an overcoat for $90.00 at Jack Schwartz'.

Last night a fellow named James Graham came to my house and I asked him to buy a car in his name because I could not get one in my name as I am on parole. He agreed to get me a car and today I met him and he bought me a 1941 Cadillac for which I paid $800 down. The car cost $2,200. Later on I went to a dealer on Beacon St., where I picked up the Cadillac. I drove the car to my house and I went up stairs. When I got in my house the detectives were waiting for me. I was placed under arrest and taken to police headquarters where I was questioned by the detectives.

When I got home from the Pennsylvania railroad station I put the gun in a closet in my bedroom. I told the detectives where they could find the gun and also the money which was in the third drawer of my dresser.

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15.

a brown leather holster and a 38 Cal. Smith and Wesson nickel plated revolver with pearl handles J.B. #169309 is one that I borrowed from a fellow named Slim who I met in the Dug Out on Belmont Ave. Newark, last Thursday night. This is the J.B. when J.B. gun I used Hooks was shot in his truck during the stickup and it is the same gun which Joe Smart used when he shot Hooks in the truck on Tuesday, Dec. 17—1946. I have placed my mark on both of these articles.

A gold watch (ladies) shown to me is the watch I bought on Broad St.

I have been shown some packages of money with wrappers marked Wiglers Bakery—also two packages of quarters—This is some of the money which was in the bag that I took out of Wiglers truck after Joe and I held up and shot the driver I call Hooks. A silver dollar shown to me is not part of the change which was in the money bag.

A blue overcoat shown to me is mine. This is the coat I wore on the day of the stick up and the one which I switched with Joe Smart when he gave me his coat.

I never smoked marihuana cigarettes or used narcotics of any kind. I drink occasionally but I was not drinking on the day of the stickup.

I have read this statement out loud and it is the truth to the best of my knowledge.

James J. Brooks 1 00 A.M.

D C F J O'Neill
M. J. Kosloski

Sworn and Subscribed to before me
this 19th day of Dec. 1946

Capt. Joseph Cocozza

This Affidavit is taken pursuant to
Chapter 276 of the Laws 1939.

Exhibit S-53.

December 19, 1946

Voluntary Statement of: James Junior Brooks.

A brown felt hat shown to me at police headquarters is mine. I lost this hat at Wickliffe St., and 13th Ave. during the stickup and robbery of Hooks, in a bakery truck, between 1 30 pm and 2 oclock Tuesday, afternoon, December 17—1946.

I have read my statement aloud in the presence of Joseph Smart and the detectives at police headquarters. James J Brooks

I heard James Brooks read his statement aloud in my presence at police headquarters.

Joseph Smart.

Witness:

Capt Jos Cocozza
Wm. G. Wangner
Joseph A. Kinney

Sworn and Subscribed to before me
this 19th day of Dec. 1946

Capt. Joseph Cocozza

This Affidavit is taken pursuant to
Chapter 276 of the Laws 1939.

Notice and Grounds of Appeal.

ESSEX COUNTY COURT OF OYER AND TERMINER.

THE STATE OF NEW JERSEY, *vs.* JAMES BROOKS.	On Indictment No. 329 December Term, 1946. Notice and Grounds of Appeal.

To Honorable Duane E. Minard, Jr., Prosecutor of the Pleas of Essex County, New Jersey:

TAKE NOTICE that James Brooks, the defendant in the above entitled matter, appeals to the Court of Errors and Appeals of the State of New Jersey from his conviction on an indictment for murder, tried before the Honorable Dallas Flannagan and a jury in the Court of Oyer and Terminer in and for the County of Essex; the said defendant having been found guilty of murder in the first degree without a recommendation for life imprisonment by the jury, and, on the 26th day of March, 1947, sentenced to suffer the punishment of death in the manner prescribed by law on some day during the week commencing May 4, 1947.

The said defendant is now confined in the New Jersey State Prison in the custody of the Principal Keeper.

Grounds of Appeal.

1. The Trial Court erred in refusing to charge the third written request for instructions submitted to the Trial Court by the attorneys for the defendant at the conclusion of the entire case and

before arguments to the jury were commenced by either side, such request being as follows:

> "3. The State in establishing that the crime was committed in the City of Newark must prove beyond a reasonable doubt which shot or shots was or were fatal."

to which refusal to charge the attorneys for the defendant promptly excepted.

2. The Trial Court erred in refusing to charge the sixth written request for instructions submitted to the Trial Court by the attorneys for the defendant at the conclusion of the entire case and before arguments to the jury were commenced by either side, such request being as follows:

> "6. In considering the question of where the fatal stroke was delivered, you may take into consideration that a pellet from the gun was found upon the running board of the truck in Vaux Hall in the County of Union."

to which refusal to charge the attorneys for the defendant promptly excepted.

3. The Trial Court erred in modifying the sixth written request for instructions as follows:,

> "6. In considering the question of where the fatal stroke was delivered, you may take into consideration that a pellet from the gun was found upon the running board of the truck in Vaux Hall in the County of Union. That in consideration with all the other evidence in the case."

4. The Trial Court erred in refusing to charge the seventh written request for instructions sub-

mitted to the Trial Court by the attorneys for the defendant at the conclusion of the entire case and before arguments to the jury were commenced by either side, such request being as follows:

> "7. The indictment charges that the murder was done wilfully and with malice aforethought and these elements are essential and must be proved beyond a reasonable doubt."

to which refusal to charge the attorneys for the defendant promptly excepted.

5. The Trial Court erred in refusing to charge the twenty-third written request for instructions submitted to the Trial Court by the attorneys for the defendant at the conclusion of the entire case and before arguments to the jury were commenced by either side, such request being as follows:

> "23. Before a verdict of murder in the first degree without recommendation of life imprisonment may be returned each and every one of you must be satisfied that he has determined not to exercise his unlimited discretion to recommend life imprisonment at hard labor."

to which refusal to charge the attorneys for the defendant promptly excepted.

6. The Trial Court erred in refusing to charge a request for instructions submitted to the Trial Court by the attorneys for the defendant at the conclusion of the Court's general charge to the jury, such request being as follows:

> "I request the Court to charge that there are three possible verdicts, a verdict of guilty,

a verdict of not guilty, a verdict of guilty with a recommendation of life imprisonment at hard labor."

to which refusal to charge the attorneys for the defendant promptly excepted.

7. The Trial Court erred to the injury of the defendant in charging the jury as follows:

"But the defendant did not take the stand upon the general issue. Why not? He did not take the stand and submit himself to general cross examination on the general issue. Why not? There he is. He could take that stand if he wanted to, but he can't be compelled to. I can't call him here on that general issue. Neither can the Prosecutor. He elected not to do it. Why? And what is the consequence of his failure in that regard? I will answer that question. A defendant in a criminal proceeding is at liberty to take the stand and testify in his own behalf in regard to the general issue if he so desires, but he cannot be compelled to be a witness in that regard, or against himself. His failure to take the stand, of course, would not of itself justify an inference of guilt of the crime charged in the indictment. But if he fails to take the stand, as he did, and where evidence brought against the defendant tends to establish facts which, if true, would justify or tend to justify a conviction, and the defendant is in court and in a position to deny such evidence of his own knowledge and he fails to take the stand, in his own behalf, then from his failure to take the stand his silence under those circumstances, the jury may be justified

in drawing against him unfavorable conclusions.

The issue has been raised here as to where the fatal shot was fired or occurred. It is contended that it has not been proven to have occurred in the City of Newark. Now, we have testimony here of a man who says that he heard shots right up here near this courthouse in this truck and that he saw smoke; that he heard a number of shots fired right then and there. I think another witness testified to hearing them. Now, the defendant knows of his own knowledge whether there were shots fired right up here near this courthouse in this vicinity in the course of this occurrence. Why doesn't he take the stand and say that no such shots were fired at that place? The inference from his failure to do so is for you to draw, not for me. But his failure to do so may be taken by you as indicating a good reason not to do so and as operating against his case."

to which charge by the Trial Court the attorneys for defendant promptly excepted.

8. The Trial Court erred to the injury of the defendant in charging the jury as follows:

"If you find that the State has sustained the burden of proof beyond a reasonable doubt you will bring in a verdict of guilty, as the proof may call for it; if not, if otherwise, you will bring in a verdict of not guilty."

to which charge by the Trial Court the attorneys for defendant promptly excepted.

9. The trial Court erred to the injury of the defendant in charging the jury as follows:

> "Now, the defendant knows of his own knowledge whether there were shots fired right up here near this courthouse in this vicinity in the course of this occurrence. Why doesn't he take the stand and say that no such shots were fired at that place?"

to which charge by the Trial Court the attorneys for defendant promptly excepted.

10. The trial Court erred to the injury of the defendant in charging the jury as follows:

> "Why doesn't he take the stand and say that no such shots were fired at that place?"

to which charge by the Trial Court the attorneys for defendant promptly excepted.

11. The Trial Court erred to the injury of the defendant in charging the jury as follows:

> "But his failure to do so may be taken by you as indicating a good reason not to do so and as operating against his case."

to which charge by the Trial Court the attorneys for defendant promptly excepted.

12. The Trial Court erred to the prejudice and injury of the defendant in placing greater emphasis on the failure of the defendant to testify in his own behalf than is proper and in so doing exceeded the bounds of proper comment.

13. The Trial Court erred in denying the motion made on behalf of the defendant at the con-

clusion of the State's case for a directed verdict of acquittal, to which an exception was taken.

14. The verdict of the jury was contrary to the weight of the evidence.

15. The weight of the evidence did not establish beyond reasonable doubt that the fatal shot or shots which killed Mortimer Bateman was or were fired "at the City of Newark" as charged in the indictment.

16. The weight of the evidence did not establish beyond reasonable doubt that the defendant, as charged in the indictment, "did kill and murder Mortimer Bateman at the City of Newark."

17. The Trial Court erred to the injury of the defendant in receiving into evidence, over the objection of the defendant, exhibit S-28.

18. The Trial Court erred to the injury of the defendant in receiving into evidence, over the objection of the defendant, exhibit S-53.

GERALD T. FOLEY,
JOSEPH A. HAYDEN,
Attorneys for Defendant.

Service of the within Notice and Grounds of Appeal is hereby acknowledged this 30th day of April, 1947.

DUANE E. MINARD, JR.,
Prosecutor of Essex County.

Assignments of Error and Specifications of Causes for Reversal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, Defendant-in-Error, *vs.* JAMES BROOKS, Plaintiff-in-Error.	On Error. Assignments of Error and Specifications for Reversal.

Afterwards, to wit, and within thirty days after the return of the writ of error issued in this cause, comes James Brooks, the plaintiff-in-error, by Gerald T. Foley and Joseph A. Hayden, his attorneys, before the Judges of the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey, and say that in the record and proceedings aforesaid, and also in the matters recited and contained in the bill of exceptions, and further, in the rendition and giving of judgment aforesaid, there is manifest error, in this respect, to wit:

1. The Trial Court erred in refusing to charge the third written request for instructions submitted to the Trial Court by the attorneys for the defendant at the conclusion of the entire case and before arguments to the jury were commenced by either side, such request being as follows:

> "3. The State in establishing that the crime was committed in the City of Newark must prove beyond a reasonable doubt which shot or shots was or were fatal."

to which refusal to charge the attorneys for the defendant promptly excepted.

2. The Trial Court erred in refusing to charge the sixth written request for instructions submitted to the Trial Court by the attorneys for the defendant at the conclusion of the entire case and before arguments to the jury were commenced by either side, such request being as follows:

> "6. In considering the question of where the fatal stroke was delivered, you may take into consideration that a pellet from the gun was found upon the running board of the truck in Vaux Hall in the County of Union."

to which refusal to charge the attorneys for the defendant promptly excepted.

3. The Trial Court erred in modifying the sixth written request for instructions as follows:

> "6. In considering the question of where the fatal stroke was delivered, you may take into consideration that a pellet from the gun was found upon the running board of the truck in Vaux Hall in the County of Union. That in consideration with all the other evidence in the case."

4. The Trial Court erred in refusing to charge the seventh written request for instructions submitted to the Trial Court by the attorneys for the defendant at the conclusion of the entire case and before arguments to the jury were commenced by either side, such request being as follows:

> "7. The indictment charges that the murder was done wilfully and with malice afore-

thought and these elements are essential and must be proved beyond a reasonable doubt."

to which refusal to charge the attorneys for the defendant promptly excepted.

5. The Trial Court erred in refusing to charge the twenty-third written request for instructions submitted to the Trial Court by the attorneys for the defendant at the conclusion of the entire case and before arguments to the jury were commenced by either side, such request being as follows:

"23. Before a verdict of murder in the first degree without a recommendation of life imprisonment may be returned each and every one of you must be satisfied that he has determined not to exercise his unlimited discretion to recommend life imprisonment at hard labor."

to which refusal to charge the attorneys for the defendant promptly excepted.

6. The Trial Court erred in refusing to charge a request for instructions submitted to the Trial Court by the attorneys for the defendant at the conclusion of the Court's general charge to the jury, such request being as follows:

"I request the Court to charge that there are three possible verdicts, a verdict of guilty, a verdict of not guilty, a verdict of guilty with a recommendation of life imprisonment at hard labor."

to which refusal to charge the attorneys for the defendant promptly excepted.

Assignments of Error and Specifications of Causes for Reversal.

7. The Trial Court erred to the injury of the defendant in charging the jury as follows:

"But the defendant did not take the stand upon the general issue. Why not? He did not take the stand and submit himself to general cross examination on the general issue. Why not? There he is. He could take that stand if he wanted to, but he can't be compelled to. I can't call him here on that general issue. Neither can the Prosecutor. He elected not to do it. Why? And what is the consequence of his failure in that regard? I will answer that question. A defendant in a criminal proceeding is at liberty to take the stand and testify in his own behalf in regard to the general issue if he so desires, but he cannot be compelled to be a witness in that regard, or against himself. His failure to take the stand, of course, would not of itself justify an inference of guilt of the crime charged in the indictment. But if he fails to take the stand, as he did, and where evidence brought against the defendant tends to establish facts which, if true, would justify or tend to justify a conviction, and the defendant is in court and in a position to deny such evidence of his own knowledge and he fails to take the stand, in his own behalf, then from his failure to take the stand, his silence under those circumstances, the jury may be justified in drawing against him unfavorable conclusions.

The issue has been raised here as to where the fatal shot was fired or occurred. It is contended that it has not been proven to have occurred in the City of Newark. Now, we have testimony here of a man who says that

he heard shots right up here near this court house in this truck and that he saw smoke; that he heard a number of shots fired right then and there. I think another witness testified to hearing them. Now, the defendant knows of his own knowledge whether there were shots fired right up here near this court house in this vicinity in the course of this occurrence. Why doesn't he take the stand and say that no such shots were fired at that place? The inference from his failure to do so is for you to draw, not for me. But his failure to do so may be taken by you as indicating a good reason not to do so and as operating against his case."

to which charge by the Trial Court the attorneys for defendant promptly excepted.

8. The Trial Court erred to the injury of the defendant in charging the jury as follows:

"If you find that the State has sustained the burden of proof beyond a reasonable doubt you will bring in a verdict of guilty, as the proof may call for it; if not, if otherwise, you will bring in a verdict of not guilty."

to which charge by the Trial Court the attorneys for defendant promptly excepted.

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"Now, the defendant knows of his own knowledge whether there were shots fired right up here near this courthouse in this vicinity in the course of this occurrence. Why

doesn't he take the stand and say that no such shots were fired at that place?''

to which charge by the Trial Court the attorneys for defendant promptly excepted.

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14. The verdict of the jury was contrary to the weight of the evidence.

Assignments of Error and Specifications of Causes for Reversal.

15. The weight of the evidence did not establish beyond reasonable doubt that the fatal shot or shots which killed Mortimer Bateman was or were fired "at the City of Newark." as charged in the indictment.

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17. The Trial Court erred to the injury of the defendant in receiving into evidence, over the objection of the defendant Exhibit S-28.

18. The Trial Court erred to the injury of the defendant in receiving into evidence, over the objection of the defendant Exhibit S-53.

GERALD T. FOLEY,
of Counsel,

JOSEPH A. HAYDEN,
Attorneys for Plaintiff-in-Error.

Service of the within Assignments of Error and Specifications for Reversal is hereby acknowledged this 30th day of April, 1947.

DUANE E. MINARD, JR.,
Prosecutor of Essex County.

Stipulation.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

STATE OF NEW JERSEY, Defendant-in-Error, *vs.* JAMES BROOKS, Plaintiff-in-Error and Appellant.	Sur Indictment for Murder. On Error to and Appeal from the Essex County Court of Oyer and Terminer. Stipulation.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the word "question" be substituted for the word "objection" appearing on line 5 of page 164 of the State of Case; and that the words "Group B" be substituted for the words "Group 8" appearing on line 18 of page 405 of the State of Case.

DUANE E. MINARD, JR.,
Prosecutor of the Pleas.

cwc

GERALD T. FOLEY,
Attorney of Plaintiff-in-Error
and Appellant.

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, Defendant-in-Error, *v.* JAMES BROOKS, Plaintiff-in-Error and Appellant.	Sur Indictment for Murder. On Error to and Appeal from the Essex County Court of Oyer & Terminer.

BRIEF FOR PLAINTIFF-IN-ERROR AND APPELLANT, JAMES BROOKS.

Statement.

The defendant appeals from his conviction in the Essex County Court of Oyer and Terminer on the trial of an indictment for murder. The indictment was presented on January 3, 1947 and the trial thereof was terminated on March 26, 1947 with a verdict of guilty of murder in the first degree without recommendation. On the following day the defendant was sentenced to death. This appeal is under R. S. 2:195A-1 and a notice of appeal containing a statement of the grounds of appeal has been duly served upon the Prosecutor, but a writ of error was also issued to obviate any question as to defendant's right to a stay of execution. This appeal seeks a review of the entire record as well as of the numerous errors specified. The grounds of appeal and the assignments of error and specification of causes for reversal are identical and in this brief reference will be made only to the grounds of appeal.

The crime of which the defendant was convicted was an abhorrent one. We desire to make it plain

at the very outset that no proof was offered below that the defendant did not participate in an armed robbery in the course of which a man was shot and killed. The Court as a body of human beings may well be inclined to close its mind to the legal argument which will be presented herein, so revolting are the facts surrounding the commission of the crime. But if it does, it will fall far short of performing its duty. The difficulties attendant to the administering of even-handed justice to an offender no doubt are in direct proportion with the degree of his guilt. That is to say, the more clearly guilt appears and the less excuse to be found for the guilty act, the more difficult it is to turn ones mind from the clear picture of inexcusable crime and to direct it to a consideration of the Constitutional rights of the guilty one. Yet, the proper administration of justice as we know it, requires our courts to be overly cautious in determining whether or not a person who is plainly guilty has had a fair trial because such a person is less likely to receive a fair trial than one whose guilt is less apparent. This thought was admirably expressed in the case of *State* v. *Metalski,* 116 N. J. L. 543 by Justice Heher:

> "Basic safeguards devised by the law to protect against unjust and unfounded accusations *are not alone for the just and 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 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."

Since the record is extensive and a proper understanding of the various points on appeal will require a setting forth of considerable factual matter from the record, the present statement of facts is not complete in and of itself. A more detailed consideration of the facts pertinent to this appeal will be found under the various points thereof.

The indictment, in statutory form, charged that the defendant " * * * at the City of Newark in the County of Essex aforesaid, did wilfully, feloniously and of his malice aforethought kill and murder Mortimer Bateman * * *."

It was undisputed by the defendant that he and one Joseph Smart, dead by his own hand shortly after his arrest in this case, together engaged in the robbery of a bakery truck operated by deceased on December 17, 1946 and it was undisputed that the robbery began in the City of Newark at about 1:30 P. M. At about 2:15 or 2:30 that same afternoon Smart and the defendant left Bateman and his truck in Vaux Hall, in Union Township, Union County. Likewise it was conceded that during the course of the robbery shots were fired and that Bateman died in Elizabeth, New Jersey, at about seven o'clock that evening as a result of wounds by gunshot.

The defendant having taken the stand only upon the issue of the competency of his confession, it may be assumed that the facts herein outlined (aside from those dealing with the circumstances surrounding the taking of the confession) were in their entirety a part of the State's case.

The confession (S. C. 699-716) narrates the events leading up to the day of the robbery.

From this it appears that the defendant, a negro aged 23, was released from Annandale Reformatory some two months before December 17, 1946, and returned to the home of his wife and child in

Newark. A few days later Joseph Smart, since a suicide as we have said, approached the defendant on the subject of making some "easy money". A week later Smart again approached him on this subject. On both of these occasions Brooks disclaimed interest. Smart then told Brooks that he was employed by one Wigler, a bakery owner on Prince Street, Newark; that on certain days the receipts of this bakery were customarily delivered to a downtown bank by means of a truck driven by Bateman and that a hold-up of the truck would be an "easy job". This time Brooks agreed to undertake the job. As Smart was, of course, known to Bateman as a fellow employee and would be readily identified, it was planned that Brooks would pretend to commit the robbery alone. With this scheme of operation in mind Brooks set out on December 9th to accomplish the hold-up, but on that occasion Bateman drove away before Brooks could intercept him. Smart drove by just as the truck was being driven away from the bakery. He picked up Brooks and the pair attempted unsuccessfully to overtake Bateman. A similar attempt on December 16th chanced to fail through postponement of delivery of funds to the bank.

Thus we come to December 17, 1946. Previously Brooks had been carrying a toy gun, but on this day he had a loaded revolver, one that held five shots (S. C. 354, l. 23). The two met sometime that morning and decided after discussion that Smart would hail the truck as it came along and if, as expected, Bateman permitted them to board it, Brooks would jump in after Smart and would hold up Bateman, all the while pretending according to plan that he was holding up Smart too. Though there is some discrepancy on the point (S. C. 708, 113, 193), it would nonetheless appear that it was about 1:30 in the afternoon when they

saw the truck leave the bakery and come toward them. At that time the pair were at the intersection of Prince Street and South Orange Avenue. The truck proceeded north on Prince Street and as it turned east on South Orange Avenue, Smart hailed the driver Bateman and asked for a ride to downtown Newark. Bateman, often referred to in the testimony as "Hooks", said, "Hop in." Followed by Brooks, Smart did so. The truck—enclosed at the sides and rear (S. C. 692)—had no seat other than the driver's. Between that and the right hand door was an open space, in which there was a wooden box. Brooks sat on this box and Smart squatted down between him and Bateman.

They drove east to Wickliffe Street, where they turned north. Approaching Thirteenth Avenue on this course, Brooks pulled his gun, pointed it towards Bateman and said, "This is a stick-up." Smart, acting his role, asked what was going on. Bateman smiled, apparently not taking Brooks seriously. Then Brooks said, "I'm not kidding, this is a hold-up." Bateman "stopped smiling right away and he made a dash for the gun." In so doing he grabbed Brooks' hand and the gun went off. Just previous to this Bateman had stopped the truck, so that at the time of this first shot the truck was standing still at Thirteenth Avenue and Wickliffe Street, Newark (S. C., pp. 709, l. 20, 115, l. 23), opposite the place of business of the witness subsequently identified as Max Bomwell.

It is at this point that clarity of detail comes to an end and obscurity begins.

As already stated, the gun held five shots and there is no testimony in the case nor was the claim ever made that it was reloaded at any time before the truck came to its final stopping place in Union County. There is nothing whatsoever

to show that the weapon was fired more than five times or that either Smart or Brooks had extra ammunition. At most, five shots were fired in some three quarters of an hour elapsing between the time the witnesses Bomwell, Tuttler and Newby first saw the truck in Newark and its stopping in Union County. It must be always borne in mind that no witness was produced who *actually saw* either Smart or Brooks shoot the driver. The three witnesses last named—all of whom testified as to certain occurrences on Wickliffe Street, Newark speak only of *hearing* shots or reports like backfire or of *seeing* puffs of smoke swirling about the truck. Max Bomwell stated on cross examination that at most he heard three reports or shots (S. C. 139, l. 23). His statement to the police, Exhibit S-28 (S. C. 697), placed in evidence over objection and exception, mentions no more. The witness Thomas Tuttler spoke of hearing three reports like backfire (S. C. 193, l. 17; 199, ll. 28-32) and of seeing "a little fog of smoke, like the backfire of a car" (S. C. 203, l. 13). The next witness, Erlie Newby, at first testified to hearing four reports (S. C. 211, l. 10) but on cross examination she reduced this number by one (S. C. 212, l. 37). It should be understood that these witnesses refer to the same three shots or reports only. The testimony of these persons will be again referred to in this brief. Their testimony, assuming for the moment that hearing reports or noises like those of shots is the same as hearing shots, at most shows that three shots were fired in Newark. The alleged confession made by Brooks speaks of five shots being fired (S. C. 709 *et seq.*), but it fails to show where *each* of them was fired. Beyond the evidence or testimony just recited there exists not one iota of proof to show that *all five* shots were fired in Newark or elsewhere in Essex County and, at

best, the proofs show *three* shots—*and no more*—fired in Newark or that county.

The importance of the foregoing lies in this:

Dr. Martland, the medical examiner of Essex County and concededly a physician of international reputation, testified that he performed the autopsy and found three wounds. For the purpose of identification and not with any idea of indicating the order in which the wounds were inflicted, he referred to them in his testimony as wounds numbers 1, 2 and 3. Wound number one was in the abdomen and in the opinion of Dr. Martland *it* was the cause of death (S. C. 59, ll. 23 *et seq.*). Wound number two was in the back and in the opinion of Dr. Martland may or may not have had the effect of aggravating the condition produced by wound number one which would have been mortal even had not wound number two been inflicted. Wound number three was found just above the right knee and was insignificant in the chain of causation between injury and death. Thus it is clear that in all *probability* a single shot caused Bateman's death and that *possibly* the effects of two shots were combined to that end. There was medical testimony by Dr. Stein who operated upon Bateman but who was not present at the autopsy. In the main he substantiated the testimony of Dr. Martland (S. C. 176) although there is some indication that he felt that all three wounds contributed to the death. The wound to the leg, in its very nature, was not likely to be a mortal wound and the autopsy proved it not to have been, regardless of what Dr. Stein may have thought at the time he performed the operation. We believe that the State will concede for the purposes of this argument that in the event that there might appear to be any variance between the testimony of Dr. Martland

and that of any other doctor, the testimony of Dr. Martland should be accepted as accurately stating the fact and we for the defendant make the same concession.

It may fairly be said, therefore, that with this medical evidence as the basis of its case, the State was obliged to offer proof that the abdominal wound was inflicted in the City of Newark or at least in the County of Essex.

Following the occurrence on Wickliffe Street, the next thing that appears is that some three-quarters of an hour after the commencement of the hold-up, that is, at about 2:15 P. M., the truck was seen stopped in the Vaux Hall section of Union Township in Union County. Smart and the defendant are conceded to have left it there and to have taken themselves to the nearby residence of a relative of Smart's. They were then carrying the loot with them in a paper bag. Bateman was found wounded but still alive; was taken by the local police to a doctor for emergency treatment; and was then rushed to a hospital in Elizabeth, where Doctor Stein operated. There Bateman died at about seven o'clock that evening.

Shortly, Smart was apprehended by the Union police and he committed suicide while under arrest. On December 18, 1946 the defendant Brooks was arrested ostensibly on a charge of forgery and taken to Newark Police Headquarters. He arrived there at about 3:30 P. M. and was immediately placed under interrogation. By one o'clock in the morning of December 19th, he had signed the alleged confession introduced in evidence as Exhibit S-53.

During the course of the trial, but before testifying the witness Bomwell used a statement he had given to the police for the purpose of refreshing his recollection. The Prosecutor declined to pro-

duce this statement on the oral request of the defendant's counsel except on the condition that it should go in evidence (S. C. 151, ll. 33-38). The latter then requested the Court to order the State to permit him to examine the memorandum. The Court ruled that, should its order for the production of the document be invoked, the jury could see it in its entirety (S. C. 153, 154). After discussion on this point the defense made a motion that the Prosecutor be directed to produce the statement (S. C. 155), the latter having refused to do so except on order. This motion was granted and the statement (marked Exhibit S-28) was produced and handed to counsel, who proceeded to cross examine the witness at length with regard to it. During the course of this examination the Prosecutor offered the statement in evidence over objection that it was self-serving (S. C. 161); it was received over exception (*id.* 163). Later (*id.* 170) the Court "restored" the exhibit to a point that it was "marked for identification only". However, the State again offered Exhibit S-28 in evidence; it was received over the repeated objection that it was self-serving and hearsay and exception to its reception in evidence was taken (S. C. 183). It was thereafter read to the jury (*id.* 185).

At the close of the case (S. C. 638, l. 24), the defense moved for a directed verdict on grounds that will be considered at length under Point I of this brief. This motion was denied and an exception granted (S. C. 658, l. 5).

There was much testimony concerning the "voluntariness" of the defendant's alleged confession, he testifying that it was not voluntary as that expression is understood in the law because of threats made to him and the State introducing evidence to show its voluntary nature. The Court and also the jury heard the testimony offered on

this issue and at its conclusion the Court admitted the confession in evidence. The Court's ruling thereon is not now argued as erroneous, but the evidence as to "voluntariness" will be considered in connection with Point IV.

Following summations the Court delivered its charge to the jury (S. C. 661 *et seq.*). Various portions of this charge were excepted to both generally (S. C. 673, ll. 19-20) and specifically (*id.* l. 21 *et seq.* to p. 677). The part of the charge now urged as erroneous will be set forth verbatim under Point II.

Since two of the points hereinafter argued directly involve the application of a statute to the proof and since the same statute is incidentally involved in the remaining two points of the brief, we print the statute herewith italicizing the crucial words:

> "Whenever any person shall be *feloniously stricken* or poisoned *in one county and shall die by reason thereof* in another county, an indictment thereof, found in either county, shall be as good and effectual as if the stroke or poisoning and the death had occurred in the county where the indictment shall be found; and the judges of the court of oyer and terminer in the county where the indictment shall be found, . . . shall and may proceed thereon as they might or could do in case the *felonious stroke* or poisoning and *the death thereby ensuing* had occurred all in one and the same county" (Italics ours.) R. S. 2:184-2.

We will argue the following points:

I. There being no evidence that the fatal shot was fired in the City of Newark, the Court erred in failing to direct a verdict in favor of the defendant.

II. The Court erred in charging the jury that guilt may be inferred from the failure of the

defendant to testify as to where the fatal shot was fired.

III. The Court erred in admitting in evidence Exhibit S-28.

IV. The verdict was contrary to the weight of the evidence with respect to two essential parts of the State's case (a) the State failed to prove beyond a reasonable doubt the voluntary nature of the defendant's confession and (b) the State failed to prove beyond a reasonable doubt that the fatal shot was fired in the City of Newark.

POINT I.

There being no evidence that the fatal shot was fired in the City of Newark, the Court erred in failing to direct a verdict in favor of the defendant.

The State's evidence to prove commission of the crime charged in the indictment—a murder in Newark in Essex County—consisted solely of the testimony of these witnesses: Max Bomwell, Thomas Tuttler and Erlie Newby and of such facts as may be gleaned from the confession. We feel it necessary to make a detailed analysis of this evidence in order to support our argument under the present point. The following analysis will also be referred to but not repeated in detail in support of our contentions under Point IV.

Erlie Newby (S. C. 209-213) stated on direct examination that she lived near Thirteenth Avenue and Wickliffe Street and that on the afternoon of the day in question her attention was attracted by some noise like the backfire of a truck or car. On hearing this she looked out of her window and saw a bakery truck passing in the middle of Wickliffe Street. She then heard three more "reports"

and also saw an unknown man pick up a hat that fell from the moving truck and take it over to Bomwell's place. It is admitted that this hat belonged to defendant. On cross examination she stated that she heard one report before glancing out of the window and only two afterwards as the truck went by. This witness does not say that these reports were *shots* or that they came from the truck or anything whatsoever to negative the possibility that they were due to backfire from some other vehicle.

Thomas Tuttler (S. C. 190-209), who also lived on Wickliffe Street, stated on direct examination that he first saw the truck standing in that street and that his attention was drawn by what he thought was backfire. He looked down on the truck then heard in all, four reports (S. C. 192). To him it seemed like "backfire of a truck" and he did not "pay any attention to it." Then as the truck began to move, he heard "report fire again," and adds, "I don't know what happened." However, this witness did see smoke. But in response to a question by the Court he answered that he heard three noises like backfire. On cross examination he said that he was looking out of the window when he heard the report and otherwise exhibited considerable uncertainty as to his testimony on direct. At one place (S. C. 194, ll. 20-23) he said that he heard "reports of the gun or a truck that was backfiring, while I was looking down on the truck." It should be noted that this witness is silent as to how he concluded that the reports came from a gun. He goes on to state (S. C. 200) that the back doors of the truck were closed and that while the truck was standing still he saw smoke come out of the rear of the truck * * * "like smoke fogging around, like a backfire generally do" (S. C. 200, ll. 36-37), "* * * like smoke when a car backfires" (*id.*, ll.

39-40). Tuttler stated that there was not much smoke; "just a little fog of smoke, like a backfire of a car" (S. C. 203, ll. 12-13). The State admitted that Tuttler's testimony was only to the effect that he heard "reports" (S. C. 206, ll. 13-16). This witness, like Erlie Newby, said nothing to the effect that the reports came from the truck.

Since neither of these witnesses testified as to any shots, and neither connected Smart or Brooks with what they saw or heard, their testimony could have no incriminating effect upon the defendant unless it should appear to have some connection with or corroborate some other portion of the State's case. So far as concerns the present point—which is whether there was any evidence of a felonious striking in Newark or Essex County resulting in death, in other words, whether the fatal shot was fired there—the links so far missing can be found, if found at all, only in the confession or in the testimony given by Max Bomwell. On direct examination it appeared that his attention was attracted by a sound "like backfire" and a scuffle taking place in the back of the truck (S. C. 113, ll. 17-21). He did not see the scuffle. At this time the truck was parked in the middle of Wickliffe Street without a driver. The scuffle sounded to him like men fighting inside of a truck, etc. (S. C. 114). When he first looked he saw no one in the truck (*id.* 115, l. 38). Thereafter he saw a man come from the inside of the truck and get into the driver's seat, start it and drive past him. *The witness could not tell who that man was* (S. C. 116, l. 15). He did state that this man was a negro and that he was wearing gloves. Next Bomwell stated: "One or two shots were fired and while I couldn't see who was doing the shooting, I could see a puff of smoke as each bullet went off" (S. C. 117). He also saw part of a

man's foot sticking upwards from the floor of the truck. These two shots were fired after the man got into the driver's seat and after the truck began moving towards this witness. Because of its importance a part of the testimony near the conclusion of the direct examination is set forth:

> "Q. Was it before or after or at the time that you heard these shots that you observed this man with his hands on the wheel? A. The hands were on the wheel driving while these shots were taking place.
>
> Q. After the truck passed did you hear any further shots? A. I did not, no sir" (S. C. 120, ll. 30-35).

The substance of Bomwell's whole testimony is in short this: He heard one report like backfire while the truck was standing still and a scuffle like men fighting, saw one man take the wheel and start driving, saw another man's foot sticking upwards in the front of the truck, heard two shots and observed puffs of smoke therefrom as the truck proceeded past him. He did not identify the driver of the truck, who, of course, was either Smart or Brooks. We do not urge that it is of any legal significance so far as the present point is concerned, whether Smart or Brooks fired these shots, for there is nothing in the record to show that they were fatal. But we do want to emphasize the lack of any evidence to show that these shots hit Bateman at all or inflicted a wound resulting in death; in other words, to emphasize the lack of proof of a fatal shot or felonious striking resulting in death in the City of Newark or the County of Essex. If we turn to the confession itself we find nothing therein that aids the State in supplying this element of proof. The portion thereof relating to the discharge of the gun is set forth at S. C. 709-10. The first shot there referred to is stated to have occurred when the gun went off.

This was near Bomwell's establishment. A fair reading of these pages indicates, we believe, that "Hooks" was not injured by this discharge. "Hooks" and the defendant were engaged in a struggle, and Smart started the truck and soon got it going very fast, as might well be expected under the circumstances. During the course of the struggle the gun went off once again. It does not appear whether Bateman was wounded by the second discharge. The next discharge occurred during this same struggle, but the confession says not one word as to its effect on Bateman. Thus we come to shots four and five mentioned in the confession. We quote part of it: "When I did this Joe shot Hooks twice. Hooks then released his hold on me and rolled over on his back. The first shot Joe fired was in Hook's back. The second shot was fired as Hooks was rolling over on his back."

The confession is utterly silent as to where the truck was when any but the first shot was fired. For aught that appears therefrom all of the other shots could have been fired in Union County. And, we urge, for all that appears from this document and the testimony of the witnesses, Bowman, Tuttler and Newby as well, the last two shots, which, according to the confession are the only ones that took effect, could have been fired in that county. However, it is conceded that Bateman sustained three wounds. If all the testimony of the above witnesses as to "reports" should be interpreted as referring to shots, it would follow of course that at least one wound was sustained in Essex County, but then it must be asked, which wound? The one above the knee? The one in the back? Or the *fatal* wound? The State failed to furnish any evidence that would enable one to answer these questions. And answered they must be, for where, as in this case, a conviction is sought under R. S.

2:184-2 the State must prove a felonious striking in a certain county and a resultant death. In the absence of proof that could answer these questions, the vital finding that the fatal striking took place in Essex County must be taken to have been predicated upon pure conjecture.

As we pointed out heretofore, the statute provides that wherever a person shall be *feloniously stricken * * * and shall die by reason thereof* in another county, an indictment may be found in either county.

Clearly, this statute requires proof of two things, (1) a felonious striking and (2) death resulting therefrom. The deficiencies in the common law that led to the passing of such statutes are mentioned by Chief Justice Beasley in the case of *State* v. *Wyckoff,* 31 N. J. L. at p. 69, and need not be expatiated here. Such statutes changing the common law are admitted to be remedial and entitled to liberality of construction, which, we maintain, does not in the least mean that the State is relieved of proving all elements of its case. *Venue* is such an element, and it must be proved that the act (in this case a *fatal* blow) of which a conviction is sought occurred within the venue laid, in other words, occurred within the jurisdiction of the court. See *State* v. *Mac Rorie,* 86 N. J. L. 401. In that case the indictment charged rape on a certain day. The trial court charged that time was not of the essence in the offense and that "'* * * if you believe that the testimony shows that the defendant committed the crime charged * * * on some other day, then you will be justified in finding the defendant guilty.'" The venue laid was in Union County. There was proof before the jury that before the date named in the indictment the defendant had had sexual relations with the girl—but outside of Union County. On appeal the Supreme Court said:

> "Under this state of the proofs it was just as likely that these sexual indulgences occurred outside of the limits of Union County. It was error, therefore, to permit the jury to convict the defendant for sexual acts other than that alleged in the indictment in the absence of proof that those other acts occurred within the jurisdiction of the court."

Is not the application of this to the present case most plain? Must not the State prove that the felonious striking that caused death occurred within Essex County?

In *State* v. *Frazer,* 108 N. J. L. 504, this Court passed on a case involving a blow in New York and a consequent death in Union County. The defendant urged that there was no proof of death in Union. This Court held that there was such proof. The opinion cites the following from 16 Corp. Jr. 529:

> "The prosecution has the burden of proving that a crime has been committed *before* the jury can proceed to inquire as to who committed it." (Italics ours.)

In other words, this Court held that the fact of death had to be proved as an essential element in the case. By parity of reasoning the place of the felonious striking, whether in New York, as in that case, or in Essex County, as the State alleges in the present one, would as well have to be *proved.*

At page 884 of 22 *C. J. S.* we find this statement: "In general, the burden is on the prosecution to prove that the crime was committed in the county * * * in which the prosecution was instituted." Cited in support of this proposition is *State* v. *Steinfeld,* 6 N. J. Misc. 1087, wherein there was a conviction for receiving stolen bonds in Bergen County. There the Supreme Court said:

> "We have examined the evidence with care and find it entirely barren of any testimony

> that defendant received the bonds in Bergen County. This was essential to a conviction under the third count. *State* v. *Wyckoff,* 31 N. J. L. 65, 67."

It is certainly a fundamental rule of our jurisprudence that the State must prove *every* element of the offense charged. In 20 *Am. Jr.* at p. 137 the matter is put thus:

> "In criminal cases * * * the burden of proof is upon the prosecution to establish, beyond all reasonable doubt, every element of the offense charged in the indictment."

Our courts have of course applied this rule on numerous occasions and in a wide variety of case. For instance, the Supreme Court in *State* v. *Fay,* 127 N. J. L. at p. 84 stated that the trial court "* * * had correctly charged that the state was obliged to prove, beyond a reasonable doubt, all of the component elements of the offense as charged and tried." In *State* v. *Hoffman,* 9 N. J. Misc. 271, the same court said: "* * * in our opinion, the existence of an *essential fact,* upon which the guilt of the defendant is predicated, must be proved beyond a reasonable doubt."

The soundness of the foregoing pronouncements is amply confirmed by numerous text writers. For instance in Wharton, *Criminal Evidence,* 10th ed., the author speaks of venue as an essential element of proof and of whether it must be proved beyond a reasonable doubt. There are, as Wharton states, cases holding it need not be so proved, but that erudite commentator criticizes such holdings with some rigor. The decisions of our own state do not, we believe lend support to any such holding. In section 107a of this work the author lays it down as his understanding that:

> "* * * Venue, then, is one of the essential averments to be established by the state in

all prosecutions for criminal offenses. Where there is no locus for the crime and no jurisdiction for the court, the prosecution is a nullity.

"The degree of proof as applied to the evidence in all criminal prosecutions is that all essential elements must be proved beyond a reasonable doubt. Hence, in such prosecutions, venue, being an essential element, must be proved beyond a reasonable doubt. * * * No principle is more firmly settled than that *venue must not be left to inference.* Hence, as an averment essential to a valid indictment, the weight of authority is that venue must be proved beyond a reasonable doubt."

In the eleventh edition of this work the matter is put very briefly (Wharton, *Criminal Evidence,* 11th ed., vol. 1, sec. 205):

> "The burden rests upon the prosecution to prove venue beyond a reasonable doubt, by direct or circumstantial evidence, and if it does not sustain this burden the defendant is entitled to an acquittal, and a conviction must be reversed."

Another writer of equal eminence has this to say:

> "The evidence, equally with the allegation, must show the county of the offense. And this is as well the doctrine in misdemeanors as in felonies." (Bishop *New Criminal Procedure,* 2d ed., Vol. 1, sec. 384)

In the second volume of the same work (sec. 1052) the author has this to say:

> "1. The Doctrine—is, in substance to repeat, that the proof against one defending on the general issue, should cover every particular, whether of act or intent or of the place or time essential in a *prima facie* case."

If, the State of New Jersey has failed to prove the "particular" of place of the felonious striking (the fatal shot in other words), how can it be said to have made out a *prima facie* case?

In the same work, Mr. Bishop writes (sec. 1076):

> "2. Every Essential Fact—in other words, every individual circumstance necessarily entering into the proofs—must be fully established; that is beyond a reasonable doubt. Such is the rule for purely circumstantial evidence. Where the direct evidence mingles with the circumstantial, the considerations for the jury are proportionately modified."

There exists no direct evidence as to the whereabouts of the fatal shot. It cannot be successfully maintained that because, as Bomwell testified, a man's foot was seen sticking upwards from the floor of the truck the deceased had received a fatal blow or shot in Newark. He might have been thrown into that position during the struggle mentioned in the confession or knocked down as Brooks struck him, or wounded by either or both of the shots which admittedly were not fatal.

Messrs. O'Regan and Schlosser, in their *New Jersey Criminal Practice and Procedure* (p. 103) have this to say:

> "When the venue cannot be fixed there can be no prosecution. A total lack of direct or circumstantial evidence tending to show in what county the offense had been committed is fatal to indictment or conviction."

Another authority puts the matter thus:

> "It has been held, however, that a conviction cannot be sustained on proof of homicide in a county other than that alleged in the indictment, and that the place of the mortal stroke alleged must be proved, although death occurred in another county, in which

> the prosecution is brought * * *'' (40 *C. J. S.* art. ''Homicide'' par. 178.

This article cites the Florida case of *Smith* v. *Smith,* 27 So. 868. Here a murder indictment alleged a mortal stroke in the county of prosecution. The state failed to prove that the mortal stroke was inflicted in that county. On appeal the state Supreme Court said:

> ''But the court did err in refusing the motion for a new trial, because the state failed to prove that the mortal wound was inflicted in Leon County, as alleged in the indictment. While it is unnecessary to allege the place of death of the party slain, under our statutes * * *, where the indictment is found in the county where the mortal stroke was inflicted, it is necessary to allege *and prove the place of the stroke,* even though the prosecution be commenced in the county of death; * * *.'' (Our italics.)

In *Spencer* v. *Commonwealth* (Ky.), 240 S. W. 750, the mortal blow occurred in P. county, the death and indictment in C. county. The prosecution was under a statute similar to our R. S. 2-184:2. The indictment merely charged an offense in C., the proofs showed that the shot was inflicted in P. The court held the indictment proper and the variance not fatal; but it does go on to say:

> ''Such was the instant case and *the necessary of proving the acts of violence* in Powell county to make up the complete offense did not amount to a fatal variance * * * but the fact that the entire crime was alleged to have been committed in Clark County and the evidence proved a part of the essentials as having occurred in Powell * * * was not a fatal or prejudicial variance.'' (Our italics.)

From *Coleman* v. *Mississippi,* 83 Miss. 290, we quote a portion of the court's language:

> "Here the act was committed in one county and the effect produced in another. The crime was wholly completed in neither county. The mere striking of the blow is not murder. Its fatal effect must follow to make the completed crime. To constitute murder several essential facts must exist—among them the criminal act and its fatal effect. * * *"

State v. *Pauley* (Wis.) 12 Wis. 599. The facts were about the same as in the *Spencer* case. The case was considered largely on constitutional grounds not being raised by the present defendant. Referring to different counties, the court has this to say:

> "The offense was committed partly in each—wholly in neither; and in whichever it is tried a most essential element of it must be shown to have occurred in the other. The reasoning of Chief Justice Parker to that effect in the case of Commonwealth *v.* Parker, 2 Pick. 558 seems to be unanswerable."

The *Parker* case involved a blow in one county and death in the venue. The Chief Justice of Massachusetts commented on the necessity of proving all facts in cases of the type being discussed.

The foregoing authorities amply demonstrate the absolute necessity of the State's proving the *locus in quo* beyond a reasonable doubt; such proof is a most essential element of its case; and in the absence of such proof in the present case no jury question was presented. The prosecution will undoubtedly argue as it did below that the case of *State* v. *Hauptmann,* 115 N. J. L. 412, controls the question of venue herein to the disadvantage of the defendant. In that case the corpse of the dece-

dent was found in a county other than that of the venue and the defendant contended that there was no proof of fatal striking in the venue. This court held however, that from the circumstances, a fatal striking in the venue was inferable. Among the circumstances was that of the removal of the decedent from premises located in the venue, but most important was the condition of the body. Clearly, it appeared that a battery had been perpetrated on the decedent and equally clearly did it appear that this battery resulted in instantaneous death. The difference between that case and the present case is obvious. It lies in the fact that Bateman was found alive in a county other than that of the venue and did not die for several hours thereafter. Since in the *Hauptmann* case the inference was premised upon the fact that *death* occurred in the venue, that case can have no application to the present case. We think it hardly necessary to suggest that it could not have been the intention of this court to have relaxed the universal rule that venue being an essential element of a cause of action it must be substantiated by proof beyond reasonable doubt. This clearly appears to have been in the mind of Mr. Justice Trenchard whose charge to the jury in the *Hauptmann* case was approved in all particularrs. O'Regan and Schlosser, *N. J. Criminal Practice and Procedure* p. 257, quote the following instructions of Mr. Justice Trenchard (S. C. 4512-13):

> "The evidence produced by the State is largely circumstantial in character. In order to justify a conviction of the defendant on circumstantial evidence, it is necessary not only that all of the circumstances concur to show that he committed the crime charged but that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proved coincide with, account for and therefore render probable the hypo-

> thesis that is sought to be established by the prosecution. They must exclude to a moral certainty every other hypothesis but the single one of guilt and if they do not do this, the jury should find the defendant not guilty. And where the case against the defendant is made up wholly of a chain of circumstances and there is reasonable doubt as to any fact, the existence of which is essential to establish guilt, the defendant should be acquitted."

In concluding this point, we respectfully urge that by the indictment of Brooks in the County of Essex rather than in the County of Union where this question could not have arisen, the State took upon itself the burden of establishing beyond a reasonable doubt that the blow or blows which proved *fatal* to Bateman were struck in the County of Essex and that despite the plenitude of proof of other matters, the State failed to establish this essential element of the crime charged in the indictment.

POINT II.

The Court erred in charging the jury that guilt could be inferred from the failure of the defendant to testify as to where the fatal shot was fired.

Specific exceptions were taken to the charge and a general exception was also taken. We print the objectionable portions herewith as a whole rather than in separate sentences so that the complained of error will more clearly appear when the challenged parts are laid against the context.

The portion of the charge excepted to is as follows:

> "But the defendant did not take the stand upon the general issue. Why not? He did

not take the stand and submit himself to general cross examination on the general issue. Why not? There he is. He could take that stand if he wanted to, but he can't be compelled to. I can't call him here on that general issue. Neither can the Prosecutor. He elected not to do it. Why? And what is the consequence of his failure in that regard? I will answer that question. A defendant in a criminal proceeding is at liberty to take the stand and testify in his own behalf in regard to the general issue if he so desires, but he cannot be compelled to be a witness in that regard, or against himself. His failure to take the stand, of course, would not of itself justify an inference of guilt of the crime charged in the indictment. But if he fails to take the stand, as he did, and where evidence brought against the defendant tends to establish facts which, if true, would justify or tend to justify a conviction, and the defendant is in court and in a position to deny such evidence of his own knowledge and he fails to take the stand, in his own behalf, then from his failure to take the stand his silence under those circumstances, the jury may be justified in drawing against him unfavorable conclusions.

"The issue has been raised here as to where the fatal shot was fired or occurred. It is contended that it has not been proven to have occurred in the City of Newark. Now, we have testimony here of a man who says that he heard shots right up here near this courthouse in this truck and that he saw smoke; that he heard a number of shots fired right then and there. I think another witness testified to hearing them. *Now, the defendant knows of his own knowledge whether there were shots fired right up here near this courthouse in this vicinity in the course of this occurrence.* Why doesn't he take the stand and *say that no such shots were fired at that place?* The inference from his failure to do so is for you to draw, not for me. But this failure to do so may be taken by you as indi-

cating a good reason not to do so and as operating against his case'' (S. C. 667-668).

We concede, of course, that as a general rule of criminal procedure a trial judge has a right to comment on the failure of the defendant to take the stand. Such was held in *Parker* v. *State,* 61 N. J. L. 308. But we maintain, nonetheless, that there was error and prejudice in this part of the charge. One of the reasons we set forth the evidence under Point I at some length was to make it absolutely clear that there was no testimony that more than three shots were fired in the county of the robbery. The Court having already instructed the jury that the failure to testify might be considered as ''operating'' against the defendant's case these instructions became highly prejudicial. In effect they assumed that the defendant *could* testify as to whether or not the *fatal* shot was fired in Newark and the burden of establishing that the venue was improperly laid was shifted to him. Supposing that Brooks had taken the stand, what could he have said about those shots? He could only admit them or deny them. But what possible effect could his admitting them have had? How, in view of the medical evidence and the ''two-county'' aspect of this case, could he—a negro whose elementary education was barely completed—say which of the three was the fatal shot?

Nor can it be concluded that he would know where they were fired, for he was inside of a closed and speeding truck that ended its journey in Union County. He was, be it borne in mind, engaged in a struggle with Bateman and both he and Smart were doubtless intent on flight. How in such circumstances could Brooks be expected to know where he was when each shot was fired? It is to be remembered, as we more than once said under the first point, no one knows when

or where the *fatal* shot was fired. In view of the fact that an expert medical examiner like Dr. Martland had to make an autopsy to determine which *wound* was fatal, this uneducated defendant could not possibly have known which of the five was the fatal shot or when it was fired.

Yet, by not testifying to something which he could not have known he was placed by the court in the position of admitting to be a fact something the State never proved—namely the locus of the fatal shot.

To return to *Parker* v. *State, supra.* After laying down the general rule relative to comment on defendant's failure to take the stand the court goes on to say:

> "There may be cases in which the evidence against the accused does not directly affect him and a reply from him could not necessarily be expected. His failure to offer himself as a witness when his testimony *could not meet or disprove* any particular fact or circumstance and could consist only of a general denial of guilt, probably *ought not* to affect him, and if so his silence should not be commented on or considered." (Our italics.)

The general rule of *Parker* v. *State* does not apply with the same force where there is no direct evidence, see *State* v. *Wines,* 65 N. J. L. 31. There error was assigned because the trial court charged that defendant's failure to testify created an irresistible inference of guilt. On appeal the Supreme Court said:

> "In the present case there was no direct evidence to convict the accused with the crime charged. It was circumstantial evidence to be submitted properly to the jury. We think the learned judge was not, under this evidence, justified in the manner in which the failure of the accused to testify or call wit-

> nesses to establish an alibi was urged upon the jury, or in applying the comments of the Chief Justice in Parker *v.* State to the condition of the evidence in hand."

There being no direct evidence as to the place where the fatal shot was fired, it seems to us that the comments made by the trial judge were too strong by far in view of the above quotation from the *Wines* case.

Furthermore, we claim that in the present case it was error for the judge to make any comment at all on defendant's failure to take the stand on the general issue, for the reason that the *facts* to be denied must be such as defendant *can* deny before there may be adverse comment on his failure to testify. This was recognized by this court in *State* v. *Howard,* 83 N. J. L. 636, where a reversal was refused only because of the state of the record and this was said:

> "It is only where the defendant has direct knowledge of the facts charged to make out his guilt and can specifically deny them, as distinguished from a general denial, that he will be criticisable for not making such denial."

At the risk of laboring the point, we ask again—what could Brooks say about *fatal* shots?

State v. *Callahan,* also in this court, 71 N. J. L. 685, is not, we believe, to be considered as altering or limiting this rule, for there the defendant could easily have denied his knowledge of certain acts. The *Callahan* case and the present subject received considerable discussion by the Supreme Court in *State* v. *Freedman,* 135 N. J. L. 413, but nothing said in that decision questions the remarks quoted from *State* v. *Howard, supra.*

Put another way, the excepted portion of the charge has the effect of "importing" into what

Brooks might have said if he had taken the stand a fact that he never could have testified to anyway. See *Wilcox & Christian* v. *Missionary Alliance,* 124 N. J. L. 527, where in discussing the case of *Smith & Bennett* v. *State,* 41 N. J. L. 370, this court remarks as follows:

> "That authority bears no analogy to the issue here. In that case this court reversed a conviction in a homicide case because the trial court stated that a certain important incident was part of defendant's 'story', when as a matter of fact it was not; the incident there in question was vital and unsupported by testimony or color of testimony."

Thus, we contend that the instructions constituted prejudicial error for the following reasons:

(a) There was no proof in the State's case of where the fatal shot was fired and therefore there was nothing with respect to that feature of the case which the defendant was called upon to meet.

(b) The charge strongly implied that the burden was on the defendant to testify as to what shots were fired and where they were fired and in this respect it shifted the burden of proof to him.

(c) The charge strongly implied that the burden was upon the defendant to testify as to where the fatal shot was fired and thus the burden of proof of establishing the propriety of the venue was shifted to him.

(d) The tenor of the charge respecting the obligation of the defendant to testify was such as to inflame the jury and to create the impression that upon the failure so to do alone a finding of guilt could be predicated.

POINT III.

The Court erred in admitting in evidence Exhibit S-28.

In dealing with this point it might be well to recall to the court that the testimony of Bomwell, was in a large sense the cornerstone upon which the State's case was built. Although Tuttler and Newby testified to hearing "reports and sounds like "backfire" it was this witness and only this witness who testified concerning the *shots* which were said to have been fired on Wickliffe Street near Thirteenth Avenue. Therefore, anything which would serve to habilitate him in the minds of the jury was necessarily damaging to the defendant. Exhibit S-28 was a statement given to the police by him and it recites certain facts he testified to at the trial. It is designated a "voluntary" statement (S. C. 697) and bears the signature of a police lieutenant who also testified. This statement in the main was a reiteration of the testimony given by Bomwell and in practical effect *its presence in the jury room corresponded to the presence there of a stenographic transcript of his testimony.*

On cross examination of the witness it was established that he had used this statement to refresh his recollection before testifying and the defendant then called upon the State to produce the statement in order that the defendant might have an opportunity of ascertaining whether or not it contained information which would have served to refresh his recollection. The Prosecutor at that time refused to produce the statement except upon a stipulation that defendant would consent that it go in evidence. This defendant was unwilling to do. After considerable discussion the statement

was received in evidence over objection that it was self-serving and exception taken (S. C. 183, ll. 20-22).

At the outset of this discussion it should be noted that the production of Exhibit S-28 was not requested by subpoena or notice to produce. It is undisputed that in such cases inspection of the document so demanded *ipso facto* results in its going into evidence. *Decker* v. *Smith,* 88 N. J. L. 630 and similar cases, which concern *that* subject, therefore cannot be urged by the State in support of the trial court's action. The theory on which Bomwell's statement was admitted is found at S. C. 151, ll. 8-14. We quote the Court:

> "But if a litigant comes to the Court and invokes the process of the Court, and the statement is produced because of the pressure of authority or under the direction of the Court, then I understand the rule to be that it must all be put in evidence."

The action of the trial judge, we urge, was violative of the general rule of law that a writing used solely to refresh recollection is not admissible except on the offer of the adverse party. 32 *C. J. S.* 696.

That the statement now being considered is self-serving is self evident. Furthermore, it bears an official heading—is marked "Voluntary Statement"—and was witnessed by a police officer who testified at the trial. Could it be otherwise than that a jury would in such circumstances be influenced by such a writing? The result of the admission of this exhibit is much the same as if Bomwell had been allowed to testify twice, once by oral testimony and once again by a written statement. Such over-emphasis of his testimony could not fail to unduly impress his testimony on the minds of the jury to the prejudice of the defendant.

In *Springer* v. *Labow,* 108 N. J. L. 68, the defendant denied making certain statements. A witness was called who swore that he did make them and that he had made a memorandum thereof. The witness used this writing on the stand and it was admitted in evidence. The remarks of the Supreme Court on appeal are much to the present point:

> "A thing in writing carries, particularly with the layman, a weight of its own. When the jury withdrew they took with them their recollection of Jacobson's testimony and, in addition, this exhibit, which was not only a thing in writing but because of that fact was a present and constant reminder to the jury of its contents. It may have been the fulcrum on which the verdict turned."

The opinion continues with a general discussion of the admissability of a refuting record.

> "The ancient view was that it was not the memorandum that is the evidence, but the recollection of the witness. *Henry* v. *Lee,* 2 Chit. 124. Analogous opinions of our own courts, though not directly in point are *North Hudson County Railway Co.* v. *May,* 48 N. J. Eq. 401; *D. & L. Oil Station Co.* v. *Foltzer,* 105 Id. 391, and *Lindenthal* v. *Hatch,* 61 Id. 29. * * *
>
> "The text book writers rather generally support the doctrine that where a witness, upon reference to the memorandum, is enabled to testify from recollection, the paper itself is inadmissable at the instance of the party using it. *Wigmore,* sec. 793; *Jones,* p. 883, *Ruling Case Law,* 185, is to the same effect. Of like import is *Russell* v. *Hudson River Railroad Co.,* 17 N. J. 134."

Springer v. *Labow* cites the case of *Palmer* v. *Hartford Dredging Co.,* 47 A. 125, 127. There the Connecticut tribunal had this to say:

> "Assuming that it contained statements previously made by the witness consistent with his oral evidence, the general rule is that a party cannot strengthen the testimony of his witness by showing that he has made previous statements to the same effect as his testimony. * * *"

If this be the rule in civil causes, it should certainly be such in criminal cases, wherein the law is ever more zealous in affording protection to the accused and in insuring that its rules be not misapplied to his prejudice.

It may be that the facts in *Springer* v. *Labow* differ from those pertinent to the present point, but, we respectfully urge, the philosophy expressed there is highly applicable. To paraphrase the essence of that philosophy, we may say that the law fears that a writing has a magic effect, as it were, upon the layman far beyond the effect generally produced by oral testimony. We contend that this is especially so where, as here, we have a document that purports to be "official".

Dean Wigmore has this to say of the subject:

> "It follows from the value of the purpose for which the paper is used (ante sec. 758) that it is in no sense *testimony.* In this respect it differs from a record of past recollection. * * * Nevertheless, though the witness' party may not present it as evidence, the same reason for precaution which allows the *opponent* to examine it (ante sec. 762) allows the opponent to *call the jury's attention* to its features, and also allows the jurymen, if they please to examine it for the same end. In short, the *opponent,* but not the offering party, has a right to have the jury see it.
>
> "That the *offering party* has not the right to treat it as evidence by reading it or showing it or handing it to the jury is well established. That the opponent may do this, or that the jury may of its own motion demand it is equally conceded."

Wigmore on Evidence, 3rd ed., sec. 762:

> "On a general principle (past sec. 1861), that has in view the risk of imposition and false aids against which the opponent is entitled to the means of protection, the writing must be *shown to him on request.* Furthermore, as by this opportunity of inspection the opponent is guarded against imposition clearly apparent, so by *cross-examination* based on the paper he may further detect circumstances not appearing on the surface, and may expose all that detracts from the weight of testimony."

In the present case, the writing could have had, for the reasons above stated, a very great effect indeed. Though the Supreme Court in *Chimel* v. *Yatsko,* 124 N. J. L. 508, made a statement that seems to approve the admission of memoranda refreshing recollections, this court in the case of *Crothers* v. *Caroselli,* 126 N. J. L. 590, specifically approved the remarks made in *Spinger* v. *Labow,* as to their incompetency. After the writing had refreshed the recollection, "The use of the 'refreshing' statement was at an end and not admissible in evidence" declared this court in the *Crothers* case.

The Labow decision cites the Massachusetts case of *Capodilupo* v. *F. W. Stock & Sons,* 130 N. E. 65, which involved a party's demand for inspection of a refreshing statement used by an adverse witness. The court held that such inspection did not make the writing evidential and pointed out that the doctrine relating to inspection after production on notice did not apply.

We have been unable to find a case dealing precisely with the effect of an oral request for inspection first made at the trial and enforced by order of the court, but we nevertheless believe that the foregoing authorities suffice to show that the trial

court's ruling and the admission of Exhibit S-28 thereunder was erroneous and, as we have pointed out, prejudicial.

POINT IV.

The verdict was contrary to the weight of the evidence with respect to two essential parts of the State's case (a) the State failed to prove beyond a reasonable doubt the voluntary nature of the defendant's ~~conviction~~ CONFESSION and (b) the State failed to prove beyond a reasonable doubt that the fatal shot was fired in the City of Newark.

(a) As we have already stated, the case of the State rests essentially on the testimony of the witnesses, Bomwell, Tutler and Newby plus the alleged confession. It should be understood that the purpose of the following discussion is not to question the admission of this document into evidence by the court. As opposed to that, we are trying to show that if, as must have been the case, the jury believed the testimony of the police officials who sought to deny defendant's claim of "involuntariness" by reason of threats and violence, then, that jury, overlooking a fact of the utmost significance, could have reached its verdict only on the basis of a mistake. We should here state that, as we understand the cases, the jury possesses the right to consider the weight of the evidence adduced on the preliminary issue of the competency of a confession as part of its function in reaching a verdict. *State* v. *Locicero,* 12 N. J. M. 837. Certainly, if the jury arrived at its verdict by losing sight of a most important fact, as we claim must have happened in the instant case, how can it be otherwise than that its verdict is contrary to the weight of the evidence?

The testimony relating to the circumstances surrounding the confession runs to considerable length and we shall attempt to abstract most of it (S. C. 408 to 585). It is admitted that the actual writing of it commenced at 7:40 P. M. on the day of Brooks' arrest, which occurred at about 3:30 in the afternoon, and continued until about 1 A. M. of the next day. This all took place at Newark Police headquarters in a small room adjoining a large office used by various members of the detective squad. The confession was witnessed by Captain Cocozza and Detective Kosliski, both of the Prosecutor's office and by Chief O'Neill. No claim is made that any of these particular officials threatened or beat the defendant, and it is admitted that the defendant, when asked by the police surgeon, said that he had no complaints as to how he had been treated and also that he told the "impartial" witness Robinson that he had been treated "fine" and had not been threatened or hit. Likewise, it is not disputed that the defendant read and signed the confession but what is claimed is this:

> *Detectives Cook and Smith by threats and violence so worked upon him and put him in fear that he agreed to sign the confession and to remain silent as to this treatment.*

It is true that the State's rebuttal evidence as to this claim is plenary. Some is of passing plausibility and some otherwise. But the essence of that testimony is substantially to the effect that Detectives Smith and Cook did not, with possibly a few inconsequential exceptions, enter the small room wherein defendant says they threatened and abused him. Indeed, Chief O'Neill specifically says that Cook and Smith just stayed in the doorway of that room for some time (S. C. 507, l. 27). Former Chief Sebold states that Smith just came to the door and that he ordered him out of the

room so that he never got closer than four feet from Brooks (*id.*, 524, ll. 33-40). He further states that Cook never entered the room at all (*id.*, 525, l. 2.) As may be expected, both Cook and Smith deny the acts and threats attributed to them by defendant, and the rest of the police officials testified either that there were no threats, etc., or, which is at most a negative rebuttal, that they heard no threats. That the officers should so testify is rather to be expected, for when the day comes when police officials admit in the least to using either physical or psychological third degree methods, we may assume that the millennium has also arrived. But be that as it may, this question cannot be escaped:

Why, when the police officers testified that neither Cook or Smith spent more than a moment in the interrogation room, should Brooks pick on *those two men* as those who beat and threatened him?

Certainly a person not *non compos mentis*—and while Brooks is uneducated, there is nothing to show that he is unintelligent—would not pick the two individuals who, say the police, were not there at all. More naturally, he would pick on some of those who admittedly were there. The conclusion that something improper, some violence or putting in fear took place is in view of that circumstance inescapable and ineluctable and it is this conclusion that the jury lost sight of in weighing the evidence. Thus, we respectfully submit, their verdict is based on error and mistake.

We urge another ground on which the verdict should be regarded against the weight of the evidence. As we attempted to demonstrate under Point II, the charge of the trial judge called upon Brooks to deny something he could not possibly know as an inexpert layman—the locale of the fatal shot. And yet the charge carried with it the

unwarranted implication he could do so. Presumably the jury took the charge as its guide. If so, it too made the mistake of assuming that Brooks could deny a certain thing when in truth he could not.

Once again we urge another ground for holding the verdict contrary to the weight of the evidence. Even if it can—somehow—be made to appear from the evidence that there is some ground for inferring that the fatal shot was discharged in the venue—we urge, that inference can be discovered only by ratiocination carried to a superfine degree, and at best any such inference is nebulous indeed. And is any such single, sole and solitary inference—nebulous and substantial at best—to be made the basis of sending a man to the electric chair?

We do not admit that any inference whatsoever can be drawn that the fatal shot occurred in the venue, but we say that a verdict so founded could only be contrary to the evidence and against its weight.

(b) Under Points I and II we have argued that as a matter of law the State failed to establish that the shot which proved fatal to Bateman was fired in the City of Newark. This necessarily implies that it is our contention that there was neither direct evidence of this nor was there proof from which an inference could be drawn that such was the fact. We maintained that position and we reiterate it here. We say again that the record is barren of this element of proof and that no reasonable inference may be drawn to support this conclusion. Therefore, if any such inference was drawn a verdict based upon it must be said to be contrary to the weight of the evidence.

Conclusion.

We respectfully urge that for the reasons set forth in the various points of this brief, it is apparent defendant suffered prejudice and that the judgment and conviction should be set aside and reversed.

GERALD T. FOLEY and
JOSEPH A. HAYDEN,
Of Counsel with and attorneys for
James Brooks, Plaintiff-in-Error
and Appellant.

GERALD T. FOLEY
On the Brief and Oral Argument.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, Defendant-in-Error, *vs.* JAMES BROOKS, Plaintiff-in-Error.	On Indictment for Murder. On Writ of Error to the Essex County Court of Oyer and Terminer.

BRIEF FOR THE STATE.

Statement.

The plaintiff-in-error, James Brooks, hereinafter referred to as the defendant, was tried on March 17, 1947 before Hon. Dallas Flannagan and a jury in the Essex County Court of Oyer and Terminer upon an indictment charging that on December 17, 1946, at Newark, he did wilfully, feloniously and of his malice aforethought kill and murder Mortimer Bateman.

The trial consumed nine full days.

On March 26, 1947, the defendant was found guilty of murder in the first degree, without recommendation; and he was thereupon sentenced to death.

This writ of error was taken on bill of exceptions and on assignments and specifications of causes for reversal; so that it brings before this Court the entire record of the case for review.

Eighteen alleged errors have been assigned; and identical causes for reversal have been specified. The same number of identical Grounds of

Appeal have been submitted, in accordance with Chapter 187 of the Laws of 1946, *R. S. 2:195A,* (effective February 1, 1947), all of which concern the Court's charge as given, the refusal to charge certain requests, the refusal to direct an acquittal, the reception of certain evidence, and the contention that the verdict was contrary to the weight of the evidence.

Facts.

The State contends that the killing of Bateman was committed during the perpetration of a robbery.

The deceased Bateman was about 46 years of age, white, 5 feet 4 inches tall, and weighing about 165 pounds. He is sometimes referred to as "Hooks," and he had been employed by Wigler's Bakery, at 74 Prince Street, Newark, for about 27 years. His duties were varied; among which were the making of collections from customers, going to the bank to make deposits, and picking up the payroll for his employers. The deposits he usually made on Monday, or Tuesday and Thursday; and the payroll he usually picked up at the bank on Friday of each week.

Bateman was robbed and killed on Tuesday, December 17th, while on his way to the bank to make a deposit which included some $3,200 in cash.

One Joseph Smart (sometimes referred to as "Joe"), colored, was employed as a private chauffeur for the owner of the bakery, Phineas L. Wigler. He had been employed as such for about 4 or 5 months.

Smart was a participant with defendant in the actual robbery and killing of Bateman. He was

apprehended by the police shortly after the crime, on the same day. While he was in custody in Newark Police Headquarters, on December 20th (three days after the crime), Smart committed suicide in his cell by hanging himself with the belt of his trench coat. His absence at the trial was explained, and a certificate of his death was received in evidence, without objection.

The details of how the deposit had been prepared was testified to by Mr. Wigler, the owner, and his bookkeeper, Adele Engel. Bills of various denominations were placed in separate packages and labeled "Wigler's Bakery" for the "Federal Trust Company," the depository, which together with the coins and checks were placed in a large canvas bag, and the bag and contents were placed in the office safe. This took place on the day before the crime, December 16th.

On the afternoon of Tuesday, December 17th, at about 1:45 P. M., the bookkeeper, Miss Engel, gave the bag and contents to Bateman for delivery to the bank. She saw him get into the company truck in front of the bakery and drive off.

The truck was an "International," the usual baker's delivery kind, and almost new. A sketch and photographs of the truck were received in evidence. The interior was 4½ feet wide, with doors on both sides of the driver's compartment, and two doors at the rear that opened outwardly. There was a single driver's seat directly behind the steering wheel, a left-hand drive. Inside of the truck there was a shelf running the full length of the main body of the truck, commencing behind the driver's seat. This left a space between the ceiling and the shelf of 1 foot, 5 inches, and a space from the bottom of the shelf to the floor of 2 feet, 10 and ⅞ inches.

The truck went a very short distance northerly on Prince Street, and turned east on South Orange Avenue, where it was intercepted by the defendant and Smart.

What transpired from that point is gleaned from the testimony of several witnesses for the State (Bomwell, Tutler, Mrs. Newby, ballistics tests) and the facts given by the defendant in his written confession received in evidence as Exhibit S-53 (C., pp. 699-716).

The confession reveals the plans and details entered into by the defendant and Smart in preparation for the robbery.

According to defendant, it was Smart who first suggested the holdup to defendant, asking him if he wanted to make some "easy money;" that there was a "couple of thousand dollars or more on this job;" and that it was "an easy job" (C., pp. 700-701); and that after some hesitation at first the defendant finally agreed. Upon learning that "There's about ten or twelve thousand dollars in it now," the defendant said to Smart, "Dag, is there that much money?" and replied, "O. K." (C., p. 702, l. 5).

The defendant and Smart had prepared to carry out their plan the week before, on Monday, December 9th; but on that occasion, Bateman had taken his truck to the bank before anything happened, the defendant saying, "I missed him" (C., p. 703, l. 22).

Originally it was planned that defendant should undertake the holdup alone, but after the defendant's failure it was decided that Smart would participate, Smart telling the defendant, "You pretend you are holding us both up because I don't want the folks to know that I was in on the holdup" (C., p. 706, l. 35).

The defendant and Smart tried again on Monday, the 16th, the day before the crime, after the defendant had shown Smart a "gun fully loaded with bullets" (C., p. 704, l. 25), which defendant kept in his dresser drawer, and Smart said, "That's just what we need" (C., p. 704, l. 26). On Monday, the 16th, they actually waited for Bateman to come out of the bakery, but again they missed him. That night Smart went to defendant's home where they planned to commit the holdup the next day.

On the morning of Tuesday, December 17th, the defendant went to Smart's home where they made final arrangements for doing the job that day. When Smart expressed fear that Bateman would recognize him, the defendant said, "We will shoot him and dump him in the river with the truck," and further, "That's about the only way we will get away with it" (C., p. 707, l. 12).

The defendant gave Smart a pair of white gloves that he recently bought. They took a taxi to South Orange Avenue and Prince Street, within sight of the bakery, where they got out and took up positions watching and waiting for Bateman to come out and get into the truck. Bateman came out, got into the truck and started off for the bank with the deposit. When the truck pulled around the corner into South Orange Avenue, Smart hailed Bateman, making a motion as though he were bound for downtown. Bateman opened the door and invited Smart to enter the truck, which Smart did, the defendant following him into the truck. The defendant sat on a box alongside the driver in the driver's compartment, with Smart stooped down between them. They only rode a very short distance, the truck turning northerly into Wickliffe Street. On Wickliffe Street, as the truck was approaching 13th Ave-

nue, the defendant pulled his gun and pointing it at Bateman said, "This is a stickup" (C., p. 709, l. 9). He had the gun in his right hand, with his "right index finger on the trigger". Smart said, "What's this here", pretending that "he wasn't in on the deal", and at the same time Bateman smiled. The defendant said, "I'm not kidding, this is a holdup". Bateman stopped smiling, and, according to the defendant, "he made a dash for the gun", meanwhile turning off the ignition and stopping the truck. Defendant said, "As Hooks grabbed my hand the gun went off" (C., p. 709, l. 17). A struggle ensued in which the defendant and Bateman fell backward onto the floor of the truck. Smart then took the driver's seat and started the truck in motion. The defendant said, "Hooks was holding my hand and the gun went off toward the front of the truck. Hooks then grabbed the barrel of the gun and pressed on it. The gun went off again toward the rear of the truck" (C., p. 710, l. 5). This would seem to indicate that three shots were fired while the gun was in defendant's hand, from the time Bateman first made a dash for it and during the struggle immediately following. The defendant said that he later struck Bateman with the butt end of the gun and punched him in the face; that Smart "slowed down and came pretty close to a stop", when Smart took the gun from the defendant, and while he kept his hand over Bateman's mouth to keep him from hollering, "Joe shot Hooks twice", the first time in Bateman's back, and the second time as Bateman was rolling over on his back. Smart then returned the gun to defendant as he resumed driving, while defendant kept the gun on Bateman who was writhing around on the floor of the truck.

The confession would seem to indicate that when Smart resumed his driving, all five shots in

the gun had been fired. Considerable time elapsed while Bateman was lying on the floor "hollering about his stomach and leg" (C., p. 710, l. 29), pleading for his life and begging to be taken to a hospital, while defendant was pretending, within Bateman's hearing, that Smart was likewise a victim of the robbery. The defendant said, "I am now sitting up beside Joe with the gun on Hooks and *once in a while* would throw the gun on Joe to make it look like he wasn't in it". The truck was still being driven by Smart after all five shots in the gun had been fired. Smart asked the defendant if "you got any more bullets in the gun", and defendant opened the gun and the shells fell on the floor. He told Smart there were no more bullets left (C., p. 711, l. 35 to p. 712, l. 7), after which the defendant "closed the gun and the truck then came to a stop" (C., p. 712, l. 8).

The truck came to a stop in the Vaux Hall sectoin of Union Township, Union County.

The Vaux Hall section of Union Township is bounded in part by Maplewood, Millburn and Irvington (C., p. 265, l. 19), the latter municipalities all being in Essex County. Wickliffe Street and 13th Avenue is in the center of Newark, just two blocks from the Court House.

The chain of events from this point on were partly admitted by the defendant in his confession, and also testified to by State witnesses.

The truck was abandoned and Bateman left dying. The defendant and Smart, taking the loot with them, went to the home of Mrs. Adriana L. Smart, a sister-in-law of Smart's, residing at 150 Atlanta Avenue, Vaux Hall. They both entered her home between 2:30 and 3:00 P. M. She had known the defendant as "Gill." She saw a "large brown paper bag" on the chair of her dining room.

With her permission they went to the cellar to "burn some trash, paper, in the furnace." She smelled something burning "not like paper," so she went down. Smart slammed the furnace door, and spoke to her "sharply," telling her to go back upstairs. She did, and they followed her upstairs. Defendant's clothes, "mostly his pants," looked dusty. She gave them a whiskbroom, and they brushed themselves in the kitchen. At their request she called a taxi for the defendant. The defendant and Smart exchanged coats. The defendant put on a hat and a pair of dark glasses. The taxi arrived and defendant left in it, leaving Smart behind, and Smart remained at his sister-in-law's for several hours.

Mrs. Clowtell Thomas, of 151 Waldorf Place, Vaux Hall, looking out of her window, saw the truck "approach from the woods, from the north end of Waldorf Place," and saw it come to a stop. She saw two colored men get out of the truck, one from the driver's side, and the other from the rear. The one coming out of the rear was carrying a large brown paper bag in his hand, and he walked "toward the woods." She saw Bateman in the street bleeding from his head and stomach; he was "bent over," holding his stomach and "hollering for help."

Her mother, Mrs. Emma Coleman, of the same address, saw Bateman in front of her home "hollering," and "dragging and hanging on the post, crying for help." She called a Thomas Moore across the street to go to Bateman's assistance.

Thomas Moore, of 168 Waldorf Place, saw Bateman, saw his condition, and he summoned the local police.

Upon arrival of the local police, Bateman was taken to Dr. Bieber's in Union, where the doctor gave Bateman a hypodermic injection of morphine

while he was in the police car, and sent him on post haste to the Elizabeth General Hospital in Elizabeth. At the Elizabeth General, Bateman was given emergency surgical operations by Dr. Emil Stein, and blood transfusions, and he died there within a few hours.

The following day, December 18th, Dr. Harrison S. Martland, Essex County Chief Medical Examiner, performed an autopsy. He found Bateman had three bullet wounds, and he traced the course of each bullet which caused the wounds, designating the wounds by numbers in point of severity.

Wound No. 1 was in front of the abdomen, about 2½ inches to the right of, and 3½ inches above, the navel. The bullet causing this wound took a downward course and slightly beckward, going through the small intestine several times and through the large intestine and wall of the bladder. He extracted the bullet, .38 caliber, from the area behind the pelvic bone.

Wound No. 2 was in the back, posterior to the left chest, about 6½ inches to the left of the spine, and between the 10th and 11th ribs. This bullet entered the left pleural cavity and passed forward and downward, slightly to the right, and over the left kidney. He extracted the bullet causing this wound, also of .38 caliber, from the psoas muscle on the left side.

Wound No. 3 was just above the right knee. The bullet came out on the back of the thigh, and passed completely out of the body.

Dr. Martland gave it as his opinion that it was wound No. 1 that was the fatal wound, causing death.

While the truck was being surveyed at Vaux Hall by the police, and preparatory to its being

removed by other employees of the bakery, Smart returned to the truck and was taken into custody by Union Township police, and later turned over to the Newark police authorities at Newark Headquarters, where he committed suicide three days later in police headquarters.

As to this defendant's movements after he left Smart's sister-in-law's place in the taxi, according to his confession, he was taken to the Pennsylvania Railroad Station in Newark, where he took another taxi to his home in Newark. He had taken the keys to the truck, and he threw these in a sewer at Sayre and West Kinney Streets, Newark, and the empty shells from the gun he flushed down the toilet in his home. He hid the paper bag with the loot in a dresser drawer in his room. He changed his clothes, and took several hundred dollars in cash with him to do some shopping in downtown Newark. He bought some jewelry and clothes, some whiskey and beer and returned home. The same evening, in his home, he arranged with a friend named Graham to buy an automobile the next day. He wanted Graham to take the car in his name, the defendant explaining, "I could not get one in my name as I am on parole." The next day he paid a deposit of $700 on a 1941 Cadillac car costing $2,200. in Irvington. He drove the newly purchased car to his home, where detectives were waiting for him. He was placed under arrest and taken to Newark Police Headquarters.

The gun used in the crime was a .38 caliber Smith and Wesson revolver, claimed by the defendant to have been loaned to him by a friend named "Slim" in a Newark tavern a few nights before the crime.

As to the shooting of Bateman in the truck on Wickliffe Street, Newark, the State produced three witnesses.

Max Bomwell was the owner of an auto service station at the southeast corner of Wickliffe Street and 13th Ave. On the afternoon of December 17th, at about 1:30 P. M., while standing by a gas pump outside his station, he saw the Wigler bakery truck at a standstill and without a driver, almost in the center of the street about 50 feet to the south of his station and facing in his direction (C., p. 115). His attention was attracted by a sound "that sounded like the backfire of an automobile" (C., p. 113, l. 17), followed by noises that "sounded like men fighting inside of a truck, the moving of feet, the throwing of bodies against part of the inside of that truck" (C., p. 114, l. 9). Then he saw "a man that came out of the truck and got into the driver's seat" (C., p. 116, l. 5). It was a colored man wearing "light gloves," and he "started to start that truck up and drive past me where I was standing" (C., p. 116, l. 12). As the truck approached him, "there were two shots —one or two shots fired, and while I couldn't see who was doing the shooting I could see a puff of smoke as each bullet went off" (C., p. 117, l. 4). He said he could see inside of the driver's compartment because the right-hand door was open (C., p. 117, l. 13). He said he heard the second two shots after the man had gotten behind the wheel. This was his testimony (C., p. 117, l. 20):

"By the Court:

Q. You first spoke of a noise which you said sounded to you like the backfire of an automobile. A. That is correct.

Q. You later said that you heard two shots. A. That's correct.

Q. Did you hear those two shots before this man took his seat in the driver's seat or after? A. After.

Q. After? A. After he was in the driver's seat, yes, sir."

And on page 117, l. 39:

> "Q. Was it after the truck was moving that you heard these other two shots? A. Yes. Q. And saw the puffs of smoke? A. Yes."

Bomwell further testified that the truck was "Just crawling along in first gear" (C., p. 118, l. 40); and that when it was about 12 feet away he saw the foot of a man "that appeared to be stretched out lying on the floor of the truck;" that it was not the foot of the driver; that the toes of the foot were pointed upward; and that he could see about 12 inches of the leg itself (C., p. 118).

After the truck made the crossing at 13th Avenue he called the police on the phone. Before they arrived, a man brought him a hat picked up in the street which he turned over to the police. The defendant identified the hat as his own (C., p. 716).

Thomas Tutler lived on the second floor of premises 119 Wickliffe Street, a few doors south of 13th Avenue. Looking out of the window he saw the truck directly in front of him, standing still behind two cars, waiting for the change of traffic signal at the corner. He first heard a sound "what I thought was a backfire." Then he looked down on the truck and "I heard a report fire twice" (C., p. 192, l. 15). As the truck was moving toward 13th Avenue he "heard a report fire again" (C., p. 192, l. 22). He "saw like smoke, just like it was flying around the truck, like back in the truck" (C., p. 192, l. 38), saying it was "like a little fog of smoke was around it" (C., p. 193, l. 6). He said the rear doors of the truck were closed, and that the smoke "was just fogging around the truck" (C., p. 201, l. 6).

In his cross examination, he stated he heard two "reports" while the truck was standing still; and that after the truck started to cross 13th Avenue he heard one more report (C., p. 199, l. 28). During this time the truck was moving at an ordinary, moderate rate of speed (C., p. 204, l. 28).

Mrs. Erlie Newby lived at 115 Wickliffe Street on the first floor, and two doors from Tutler. She was walking from the kitchen to the front part when her attention was attracted by "some noise like the backfire of a truck, a car" (C., p. 210, l. 25). She looked out of the window and saw the truck passing in the centre of the street. She then heard "three reports" (C., p. 211, l. 23). She saw a man pick up a hat "lying near the curb, close to the battery station," and saw the man lay it on a box at the station. In cross examination, she said she heard one "report" before looking out of the window, and two more as the truck was passing (C., p. 213).

At the trial the State offered testimony of Detective Captain Cocozza, an admittedly qualified firearms expert, that the .38 calibre bullet taken by Doctor Martland from the area behind the pelvic bone, which had entered in wound number one (C., p. 50, ll. 4 and 5) had been fired from the gun belonging to the defendant and which was found in the defendant's home after his arrest (C., p. 357, ll. 30 and 31). Captain Cocozza further testified that he had examined the coat worn by the decedent and that he found a "bullet hole located about three and a half inches from the zipper. The bullet hole is surrounded by black smudges, or there is a black smudge here to indicate that is a bullet hole. That hole is about eight inches from the bottom of the jacket and between two buttons" (C., p. 360, ll. 7 to 13), and thereafter Captain Cocozza testified that the hole went

completely through the coat at an angle of about forty-five degrees (C., pp. 360 and 361). Thereafter Captain Cocozza testified concerning tests he made to determine how far away the gun had been held at the time of the firing of the bullet which caused wound number one, and the Captain determined "that the distance fired was about six inches from the exhibit marked S-26 (the coat) when the firearm was fired" (C., p. 364, ll. 14 to 16).

Captain Cocozza further testified that the bullet which was taken from the body of the decedent which caused wound number two was fired from the gun owned by the defendant and which had been found in his home after his arrest (C., p. 350, ll. 19 to 21). The captain further testified that the gun which caused the bullet hole in the rear of the jacket inflicting wound number two was held four inches away from the jacket when the bullet was fired (C., p. 365, ll. 10 to 12).

At the trial, the State offered testimony of John P. Brady, an admittedly qualified expert in Chemistry, that he examined the clothes that were admittedly worn by defendant on the day of the crime, and that on the trousers

> "both legs, and the front, had many reddish stains. They also showed the effect of being very dirty and dusty.
>
> Q. Did you make an analysis of the stains? A. Yes, I examined the stains on the coat and on the trousers for human blood and I found them to be positive and I also typed the blood and found it to belong to Group B, international nomenclature." (C., p. 405, ll. 10 to 19).

Mr. Brady further testified he made an analysis of the dust and found that it gave positive reactions for fine starch grains such as wheat starch, the kind you find in flour (C., p. 405, ll. 32 to 38).

POINT I.

There was sufficient evidence from which the jury could reasonably infer that the fatal wound was inflicted in Essex County and the Court's refusal to direct an acquittal was not error.

It is undisputed that all five shots in the gun were fired in the truck during its trip from Wickliffe Street, Newark, to the point where it was brought to a stop in Vaux Hall, Union County, and within a period of some three-quarters of an hour, from about 1:30 to about 2:15 P. M.

A glance at a map of Essex County will indicate that the distance from Wickliffe Street and 13th Avenue, Newark, to the boundary line between Essex and Union counties at a point nearest to the spot where the truck was brought to a stop on Waldorf Place, Vaux Hall, when measured in a straight line with a rule, is slightly over five and one-half miles.

It is undisputed that Bateman sustained three bullet wounds, which Dr. Martland, from his autopsy, described, in point of severity, as Wounds No. 1, 2 and 3.

Dr. Martland stated that Wound No. 1 was the fatal wound. He described the wound as having been inflicted in the front left abdomen, about 2½ inches to the right of, and 3½ inches above, the navel. He described the course of the bullet as being "downward" and "slightly backward"; and that it went through the small and large intestines and wall of the bladder. He extracted a .38 calibre bullet that caused this wound from in front of the bladder (Exhibit S-1, C., p. 50, l. 13).

Wound No. 2 was in the back, in the rear of the left chest, between the 10th and 11th ribs. The bullet entered the left pleural cavity, and passed forward and downward, slightly to the right and over the left kidney. He extracted a .38 calibre bullet causing this wound from the psoas muscle on the left side (Exhibit S-2, C., p. 52, l. 22).

Dr. Martland stated that while this wound was not fatal, it "might aggravate it somewhat by the hemorrhage", and if he had lived it might have become infected, and there might have been a hemorrhage from the left kidney which would have caused death".

Wound No. 3 was just above the right knee, the bullet coming out of the back thigh. It passed out of the body, and it was not considered fatal.

With respect to the first shot, the defendant's version as to how it was fired was this. He said that "While riding along Wickliffe Street near 13th Avenue, I pulled the gun and pointed it toward Hooks", at the same time saying, "This is a stickup" (C., p. 709, l. 8). Smart said, "What's this here", making it appear that "he wasn't in on the deal". At first Bateman merely smiled, but when defendant said, "I'm not kidding, this is a holdup", Bateman stopped smiling, and "he stopped the truck and turned off the ignition" (C., p. 709, l. 19). Bateman's hands presumably were no longer on the wheel, because Bateman, according to the defendant, then "made a dash for the gun" (C., p. 709, l. 15). Defendant had his "right index finger on the trigger", and "As Hooks grabbed my hand the gun went off" (C., p. 709, l. 16). When this took place, according to the defendant's confession, "The truck had just about reached the battery place on the corner of 13th Ave." The defendant went

on to say that a struggle between himself and Bateman then ensued in which they both fell back onto the floor of the truck; and that in the course of the struggle "Hooks was holding my hand and the gun went off toward the front of the truck" (C., p. 710, l. 5), which accounts for the second shot. Thereafter, according to defendant's version, "Hooks then grabbed the barrel of the gun and pressed on it. The gun went off again toward the rear of the truck (C., p. 710, l. 7), which accounted for the third shot, all within the space of a few seconds, and while the truck was on Wickliffe Street at or near the intersection of 13th Avenue.

The time of the firing of these three shots, as admitted by the defendant, fits in with the testimony of State witnesses.

Max Bomwell, the gas station man at the corner of Wickliffe Street and 13th Avenue, said that his attention had been attracted by what "sounded like the backfire of an automobile", followed by the sound of scuffling inside the truck (C., p. 113, l. 17). At that moment the truck was "approximately fifty feet from the store", and "approximately in the center of the street", at which time the truck was "parked without a driver" (C., p. 115, l. 23). He went on to say that he saw a colored man emerge from the interior of the truck and take the driver's seat; that the man had light gloves on; and that it was after the man started up the truck and while it was in motion, that he heard two more shots and puffs of smoke after each shot (C., p. 120, l. 30).

Thomas Tutler testified that he heard three shots which he described as "reports"; that first he heard "a report fire twice" (C., p. 192, l. 15), and as the truck was moving toward 13th Avenue he heard "a report fire again" (C., p. 192,

l. 22). He also saw smoke "like fogging around the truck" (C., p. 201, l. 6).

Mrs. Newby said she heard "three reports" (C., p. 211, l. 23).

It was Captain Cocozza's testimony, an admitted firearms expert, that the bullet causing wound No. 1 had been fired at distance of about six inches; and that the bullet causing wound No. 2 had been fired at a distance of about four inches, from the point of entry.

In addition to these first three shots, which defendant admits were fired while he had the gun, there were two more shots fired within the truck, which defendant claims had been fired by Smart.

We submit that this evidence was more than sufficient to justify the jury in finding that the "felonious striking" had taken place in Essex County, bringing the case well within the ruling of *State* v. *Hauptmann,* 115 N. J. L. 412.

There the Lindbergh baby had been kidnapped from its nursery at East Amwell, Hunterdon County, on the evening of March 1, 1932, and its mutilated and decomposed body was found on May 12 several miles away in Mercer County. The venue was laid in Hunterdon County, and the State proceeded with the trial upon the theory that both the infliction of the felonious stroke and death had occurred in that county. From a reading of the opinion, the only evidence submitted by the State to establish those facts beyond a reasonable doubt was the autopsy showing that the baby had suffered three violent skull fractures claimed by the doctor to have caused instantaneous death, the finding of the mutilated and decomposed corpse in the adjoining county of Mercer, and a broken ladder presumably used by the kidnapper to force entry into the nursery through a second story window.

With respect to the fact of death occurring in Hunterdon, this Court held the evidence to be sufficient to justify such an inference, and upheld the trial Court's charge to the jury wherein it said that the presumption of death in Mercer arising from the finding of the corpse in Mercer "may be rebutted and overcome by circumstantial evidence".

And with respect to the fact of the felonious stroke being inflicted in Hunterdon, this Court also held that the evidence was sufficient to form a basis for a legitimate inference that such was the fact, when it said, page 423 of opinion (bottom):

> "* * * Clearly the jury were entitled in view of the evidence to find that some sort of battery was committed in Hunterdon when the child was taken from its bed; and from that evidence might also find that the blows on the head, causing death, were inflicted in Hunterdon. It was not necessary to show death in Hunterdon; proof of a felonious striking in that county, causing death wherever that occurred, was sufficient; and we consider that of such striking there was sufficient proof, *even though of a circumstantial character.*" (Italics ours.)

The gist of defendant's argument under this point seems to be that, where the venue is laid in the county where the felonious striking is alleged to have taken place, under authority of the statute (R. S. 2:184-2) permitting indictment and trial in either the county of felonious striking or the county where the death occurs, proof of the felonious striking must be established beyond a reasonable doubt by evidence that is direct and not circumstantial, and that in the case at bar there was a lack of direct evidence that the mortal wound had been inflicted in Essex County.

It is the State's contention that the felonious striking may be shown to have taken place beyond a reasonable doubt by means of circumstantial, as well as direct, evidence; and that in the instant case there was abundant evidence from which the jury could draw a legitimate inference that the mortal wound had been inflicted in Essex County.

Applying the rule in the *Hauptmann* case to the case at bar; we have the following situation.

The defendant admitted that the first three shots were fired from the gun while he had the gun in his hand.

He said that the first shot was fired as he pointed the gun at Bateman, and Bateman brought the truck to a stop and "made a dash for the gun." This admittedly took place when "The truck had just about reached the battery place on the corner of 13th Ave." (C., p. 709, l. 20). Thereafter a struggle between the two ensued, during which two more shots were fired, one "toward the front" and the other "toward the rear" of the truck (C., p. 710, ll. 5-10).

There was evidence of three State witnesses (Bomwell, Tutler and Mrs. Newby) to the effect that three "reports" were heard coming from the truck, two of the witnesses (Bomwell and Tutler) also seeing smoke, or puffs of smoke, coming from within the truck, from which the jury was entitled to infer that they were the three shots referred to by defendant.

There was evidence of Bomwell who saw "a foot of a man that appeared to be stretched out lying on the floor of the truck" (C., p. 118, l. 26), which he saw while the truck was passing him with the front door open so that he looked into the driver's compartment; and he could see "about twelve inches of the leg itself," and the

toes of the foot "were pointed upward" (C., p. 118, ll. 32-36).

These first three shots were fired while the truck was on Wickliffe Street, at or near 13th Avenue, Newark, which was only a matter of a few minutes after, and within a very short distance from, the bakery from which the truck had started.

It is undisputed that Bateman was wounded three times, the same number of times that the gun was fired by the defendant Brooks. It is also undisputed that wound No. 1, (as designated by Dr. Martland), was the mortal wound.

There was the evidence of the firearms expert, Captain Cocozza, to the effect that from his tests he determined that the bullet causing the mortal wound, No. 1, was fired from a distance of six inches, and that wound No. 2 was caused by a bullet fired at a distance of four inches.

We submit that from these facts and circumstances it was well within the function of the jury to legitimately infer that the mortal wound was inflicted by any one of these three shots fired by defendant.

The defendant stated in his confession that it was Smart who fired the last two shots in the gun, the first being fired in Bateman's back, and the second as "he rolled over" on his back (C., p. 710, l. 19). True, there is no direct proof that these two shots were fired while the truck was still in Essex County, but there is ample evidence from which it may be inferred that all the shots were fired in Essex County.

Apparently the jury gave very little, if any credence, to the defendant's version as to how those last two shots came to be fired by Smart,

and as to the events in the truck before they were fired.

Defendant stated that after he had fired the first three shots, and while his struggle with Bateman apparently was still in progress, "I finally got my hand loose and I started hitting Hooks on the side of the face two or three times with the butt of the gun. I also punched him once in the face" (C., p. 710, l. 11); that Smart slowed the truck down "close to a stop," and upon Smart's urging he turned the gun over to Smart; and that while the defendant held his hand over Bateman's mouth to keep him from hollering, Smart fired the last two shots into Bateman.

As to the plausibility of this portion of the defendant's story, undoubtedly the jury asked themselves: Would a man with a gun in his hand in the act of overpowering a victim of a robbery, and engaged in a desperate struggle with him, and knowing there are more bullets in his gun, resort to striking his victim with the butt of the gun and turn his gun over to his confederate to apply the coup de grace, while he merely put his hand over the victim's mouth in an attempt to keep him from making an outcry? Would he have handed the gun to his confederate who was admittedly engaged in operating the truck, and who would have had to fire by holding his arm between the back of the seat and the shelf in the truck? Or would it be more likely that he would use the gun himself under such conditions?

We submit that the jury were entitled to infer that the struggle between Bateman and defendand was such as to require immediate and decisive action in silencing Bateman; that the last two shots, regardless of who fired them, were fired in almost quick succession after the first three shots had been fired in the vicinity of Wickliffe

Street and 13th Avenue; and this particularly in view of what defendant had to say with respect to the events in the truck after all five shots admittedly had been fired.

Defendant said that after Smart fired the last two shots he took back the gun and admonished Bateman to "lay on the floor and be quiet" (C., p. 710, l. 26); that during this time "*Joe was still driving*" (C., p. 710, l. 31); there was much conversation in the truck between all three, which must have consumed time. Bateman was mercifully pleading for his life, he begged to be taken to a hospital on his promise not to divulge the perpetrators of the crime, and he was "hollering about *his stomach*" and leg.

The defendant said, "*I am now sitting up beside Joe,*" with the empty gun pointed at Bateman threatening him to keep quiet, and "*once in a while*" he said he would "throw the gun on Joe to make it look like he wasn't in it" (C., p. 711, l. 30).

But why go through this pretense if Smart already had fired the two shots heretofore discussed, while Brooks held his hand over the victim's mouth?

What took place inside the truck after the gun had been emptied of its five shots, and presumably while the truck was still in motion, takes up a considerable portion of the defendant's confession, from page 710, line 24 to page 712, line 8.

We submit that under these facts and circumstances it was well within the function of the jury to reasonably infer that all of the five shots, including the one causing the mortal wound, had been fired within a comparatively short time and distance and that the felonious stroke had been

inflicted well within the confines of the City of Newark and Essex County.

There is still another inference which the jury could reasonably draw from the facts and circumstances of the case;—that it was the very first shot fired from the gun immediately after the holdup which inflicted the mortal wound.

It is necessary to consider the occurrences described by the defendant in his confession together with the nature of the mortal wound as described by Dr. Martland, the position of the men in the driver's compartment of the truck at the time, and the testimony of the firearms expert.

The defendant followed Smart into the truck, Smart taking a position next to the driver and the defendant seating himself on a box to the right. Smart "stooped down between me and Hooks, and I sat on a box" (C., p. 709, l. 4). When the truck turned into Wickliffe Street, the defendant pulled his gun and pointed it toward Bateman saying, "This is a stickup." The defendant held the gun in his right hand, having his "right index finger on the trigger" (C., p. 709, l. 15). Bateman "stopped the truck and turned off the ignition" (C., p. 709, l. 19). Bateman "made a dash for the gun," from which the jury could reasonably infer that in doing so Bateman reached toward the defendant with his hands with his body turned and facing in the direction of the defendant who was seated on the box on the extreme right. It was reasonable to infer, too, that in reaching toward the defendant, Bateman's body assumed a forward-bending position, and it was while Bateman's body was in that position that the first shot was fired, with the gun only six inches away, causing the bullet to enter the left abdomen and take the "downward" and "slightly backward" course, as described by Dr. Martland.

The defendant admitted that when this took place "The truck had just about reached the corner of 13th Ave." (C., p. 709, l. 20).

By statute, *R. S. 2:184-2,* it is provided, briefly, that whenever a person shall be feloniously stricken in one county and he shall die by reason thereof in another county, an indictment may be found in either county.

In this case, the indictment was found in Essex County and tried there upon the theory that Bateman had been feloniously stricken in Essex, and that as the result thereof he died in Union County.

Under this point, defendant cites and quotes from a number of cases and authorities in support of the proposition that where, as here, the venue is laid in the county of the felonious stroke the venue must be established by proof beyond a reasonable doubt.

We have no quarrel with the rule, nor with the cases and authorities cited in support thereof; except that the State takes the position that the venue may be proven by circumstantial, as well as, direct evidence, and that in the instant case there was abundant proof of facts and circumstances sufficient to justify the jury, entering the realm of reasonable inference as was done in the *Hauptmann* case, to conclude that the felonious stroke was inflicted in Essex County.

On the subject of venue, and the character of proof required to prove it, the defendant (B., p. 10) quotes from Wharton's Criminal Evidence, 11th Ed. Vol 1, sec. 205, to the effect that while the State has the burden of proving venue beyond a reasonable doubt, it may be done "by direct *or circumstantial* evidence."

The same author, in the same text, Vol. 2, sec. 1054, page 1854, has this to say about proving venue by means of circumstantial evidence:

> "Proof by circumstantial evidence. To prove venue, it is not necessary that the witness should testify in terms that the offense was committed in the place charged. As in all other essential matters, the proof is not required to be direct, nor in express terms, but all reasonable inferences of which the testimony will admit may be drawn by the jury, under the instructions of the court, as to where the crime charged occurred * * *."

We have examined all of the cases and text authorities cited and quoted from by defendant in his brief; and while they substantially deal with the general subject of venue as an essential element of proof they do not support defendant's argument that the character and manner of proof must be by direct evidence.

It is the State's contention that it has been well established in our State, particularly in view of *State* v. *Hauptmann, supra,* that the venue laid in the indictment in the county wherein the felonious stroke is alleged to have been inflicted may properly be established beyond a reasonable doubt by proof of facts and circumstances sufficient to justify the jury in concluding such fact by way of inference.

As hereinbefore pointed out, there was abundant evidence in the case from which the jury could draw the legitimate inference that the felonious stroke, the mortal wound, had been inflicted upon Bateman in Essex County, and that the circumstantial evidence was so strong as to leave no room for reasonable doubt.

POINT II.

The Court's charge upon defendant's failure to testify in his own behalf was not error.

The defendant complains of the following portions of the Court's charge, and particularly the portions therein italicized in defendant's Brief (C., p. 667, l. 4 to p. 668, l. 12):

> "* * * But the defendant did not take the stand upon the general issue. Why not? He did not take the stand and submit himself to general cross examination on the general issue. Why not? There he is. He could take that stand if he wanted to, but he can't be compelled to. I can't call him here on that general issue. Neither can the Prosecutor. He elected not to do it. Why? And what is the consequence of his failure in that regard? I will answer that question. A defendant in a criminal proceeding is at liberty to take the stand and testify in his own behalf in regard to the general issue if he so desires, but he cannot be compelled to be a witness in that regard, or against himself. His failure to take the stand, of course, would not of itself justify an inference of guilt of the crime charged in the indictment. But if he fails to take the stand, as he did, and where evidence brought against the defendant tends to establish facts which, if true, would justify or tend to justify a conviction, and the defendant is in court and in a position to deny such evidence of his own knowledge and he fails to take the stand, in his own behalf, then from his failure to take the stand his silence under those circumstances, the jury may be justified in drawing against him unfavorable conclusions.
>
> "The issue has been raised here as to where the fatal shot was fired or occurred. It is contended that it has not been proven to have occurred in the City of Newark.

> Now, we have the testimony here of a man who says that he heard shots right up here near this courthouse in this truck and that he saw smoke; that he heard a number of shots fired right then and there. I think another witness testified to hearing them. *Now, the defendant knows of his own knowledge whether there were shots fired right up here near this courthouse in this vicinity in the course of this occurrence.* Why doesn't he take the stand and *say that no such shots were fired at that place?* The inference from his failure to do so is for you to draw, not for me. But this failure to do so may be taken by you as indicating a good reason not to do so and as operating against his case."

The defendant had taken the witness stand only upon the preliminary issue on the voluntariness of his confession, and not upon the general issue.

We cannot agree with defendant's assertion in the caption to this point that the charge permitted the jury to infer guilt from defendant's failure to testify as to "where the *fatal* shot was fired," nor with his argument that it placed the defendant in the "position of admitting to be a fact something the State never proved—namely the *locus* of the *fatal* shot" (B., p. 27).

As to the first paragraph of the quoted charge, the Court properly submitted the general rule in accordance with the well established principle laid down in the leading case of *Parker* v. *State,* 61 N. J. L. 308.

The Court began the second paragraph thus:

> "The issue has been raised here as to where the fatal shot was fired or occurred. It is contended that it has not been proven to have occurred in the City of Newark."

With respect to this portion of the charge, what the Court was alluding to was the issue and con-

tention that had been raised by the defendant throughout the trial, namely, that the felonious stroke had not been proven to have been inflicted in the venue laid in the indictment.

Throughout the trial it was the theory of the State that the fatal stroke had been inflicted in Essex County, while it was contended by the defense that such had not been established by the proofs.

The Court merely pointed out to the jury the defendant's contention that the State had failed to prove that the fatal shot had been fired in Essex County.

It is well established that it is always within the province of the Court, in its charge, to outline what a party's contention is.

State v. *Danser,* 116 N. J. L. 487, 494.

That is what the Court did in the first two sentences of the second paragraph of the charge here under discussion.

Then the Court proceeded to comment upon the testimony in the case with respect to the firing of shots in the truck at Wickliffe Street and 13th Avenue "right up here near this courthouse," saying "Now, the defendant knows of his own knowledge *whether there were shots fired*" at that particular locality.

The Court said nothing about the defendant knowing where the fatal shot was fired. The "knowledge" imputed to the defendant in the portion complained of did not refer to defendant's being able to tell where the fatal shot had been fired, but it was limited to his knowledge with respect to the fact that "shots had been fired," at a time and place when the defendant was admit-

tedly within the truck engaged in a robbery and struggle with the victim.

There was the testimony of Bomwell, the gas station man, that he heard the first shot while the truck was driverless and at a standstill; and that after the truck was started up by a colored man who came from within the truck he heard two more shots with puffs of smoke from each.

There was the testimony of Tutler who heard three shots and smoke "fogging around" the truck.

And there was the testimony of Mrs. Newby who heard three "reports."

There was the additional testimony of Bomwell that he saw the foot of a man with the toes pointed upwards, as though a man were lying on the floor of the truck.

And there was the testimony of the firearms expert that wound No. 1 had been caused by a shot fired from a distance of six inches, and wound No. 2 from a shot fired from a distance of four inches.

There was the admission of the defendant in his confession, offered by the State as part of its case, that the first shot was fired when Bateman made a "dash for the gun," which was followed by a struggle during which two more shots were fired, one toward the "front" and the other toward the "rear" of the truck, the defendant admitting that when the first shot was fired the truck was just about at the service station at the corner of Wickliffe Street and 13th Avenue.

We submit this was evidence which logically called for some explanation on the part of the defendant, as to whether or not any shots were fired at all at that particular place; and if so, how

many, and where the truck was when the firing was done.

As we attempted to point out under Point I, in view of the evidence of Dr. Martland that Bateman had been wounded three times, one of which was mortal, together with all the other evidence tending to show that three shots had been fired in the vicinity of Wickliffe Street and 13th Avenue, the jury could draw the legitimate inference that the mortal wound was fired among those three.

The defendant was in the best position to deny or explain whether or not any shots were fired at that particular place and thereby attempt to diminish or destroy such an inference.

But the defendant chose not to do so. His failure to do so, we submit, justified the Court in making the statement that it might be taken as "operating against his case."

The situation here does not fall within the exception referred to in the excerpt from the opinion in the *Parker* case, *supra,* (quoted in defendant's Brief, p. 27), to the effect that there may be cases where the evidence "does not directly affect" the accused and a reply is not to be expected. As for example, in *State* v. *Wines,* 65 N. J. L. 31 (B., p. 27), where the evidence failed to connect up the defendant at all, and where it was held that the language used by the trial judge in applying the rule was too strong and entirely unwarranted under the evidence of the case.

Neither *Wilcox & Christian* v. *Missionary Alliance,* 124 N. J. L. 527, nor *Smith & Bennett* v. *State,* 41 N. J. L. 370, cited and quoted from (B., p. 29), have any application here. In the *Smith & Bennett* case, discussed in the *Wilcox* case, what led to a reversal, was the Court's charge, wherein

the trial judge stated that it was part of defendant's "story" that the murderer had gained entrance into the premises where the alleged killing took place through an opening in the floor of a closet, when as a matter of fact the defendant had never made any such statement.

That is not the situation here. Here the Court was referring to evidence produced by the State to the effect that shots were fired at a particular place, and not to any fact or "story" of the defendant.

In the instant case there was definite proof of shots being fired inside the truck when the truck was at the particular place described by State witnesses. This was evidence that was within the defendant's own knowledge, because he was admittedly in that truck at that time and place. He admitted in his confession that at least one shot was fired, and two more in the ensuing struggle, during which he admitted losing his hat, at that particular place.

There was evidence establishing the fact that shots were fired while the truck was at Wickliffe Street and 13th Avenue, which the defendant had it in his knowledge to deny or explain; and it was that fact alone which the Court was referring to when it said that "the defendant knows of his own knowledge whether there were shots fired right up here near this courthouse," and asked why he did not see fit to "say that no such shots were fired at that place."

We submit that the charge as given was proper, and no merit is shown under this point.

POINT III.

Exhibit S-28 was properly admitted in evidence by the Court.

Exhibit S-28 is a statement made to the Newark Police on December 26, 1946, nine days after the commission of the offense, by Max Bomwell, one of the witnesses called by the State. Max Bomwell operated a battery service station at the southeast corner of Wickliffe Street and 13th Avenue, in the City of Newark, two blocks distant from the Court House. He was standing in front of his store, on the Wickliffe Street side, at about 1:30 p. m. on December 17, 1946, when the noise of a report attracted his attention to a truck standing in the center of the street, fifty feet to the south on Wickliffe Street.

Bomwell testified to hearing one report while the truck was standing still and to hearing a scuffling in the truck like men fighting and then seeing an unknown colored man come from inside the truck and take his place behind the wheel. He then observed the truck start up and proceed toward him, "Just crawling along in first gear" (C., p. 118, l. 40). He first observed that the right door of the truck was open when the truck was approximately five feet to the left of him (C., p. 142, ll. 13-16), and he then heard two reports and on each occasion saw smoke which he said came from the inside of the truck. He saw the foot of a man, "That appeared to be stretched out lying on the floor of the truck," with the toes of the foot pointed upward (C., p. 118). He noticed the driver of the truck was a colored man and when he heard the two shots as the truck approached him he noticed that the driver's hands were on the wheel and that he was wearing light new gloves (C., p. 120, ll. 24-25).

Bomwell testified further that upon hearing the shots and seeing the puffs of smoke, a foot pointed upwards on the floor of the truck and the name "Wigler's Bakery" on the side of the truck, he immediately went to the phone and called the Newark Police. A few minutes thereafter the radio police arrived at his store and he gave them the information of what he had seen, which resulted in a phone call by the police to their headquarters. Later that day the two radio officers submitted a report to their superior officer, the Captain of the Fourth Precinct, which report went in evidence with the full acquiescence of the defendant (C., p. 221, ll. 30-38) as Exhibit S-29.

The testimony of Bomwell as to the three reports was corroborated by the witnesses Tutler and Newby and was further substantiated by the defendant's confession, Exhibit S-53 (C., pp. 699-716).

On cross examination of the witness, Bomwell, he was asked by the defense attorney if he had given any statements to the police. Bomwell testified that he had given two, one to the radio police and one to the Prosecutor's Office, but it later developed that there was none given to the Prosecutor's Office, but rather that the statement to which he referred had been given to the Newark Police, Exhibit S-28. It also appeared that he had given no written statement to the radio police, but had merely told them briefly what he had seen and they had endeavored to cause the apprehension of the truck which Bomwell had seen passing. Defense counsel then asked Bomwell if he had used his statement to refresh his recollection and Bomwell said he had, but only to refresh his recollection as to the date of the occurrence. This was his testimony on that point (C., p. 162, ll. 1-20):

"The Court: In order that there will be no confusion, I believe, Mr. Witness, you said that you used the statement to refresh your recollection.

The Witness: Of the date, your Honor.

The Court: But will you answer that question yes or no?

The Witness: I did use that statement to refresh my recollection.

The Court: Was that in any particular or in general?

The Witness: Just in particular; the date in particular. That was all I was interested in.

The Court: I want to get that straight.

The Witness: That was all I was interested in."

Defense counsel then called upon the State to produce the statement and the State refused to produce it unless counsel would stipulate that it would go in evidence. When defense counsel so refused to stipulate, the State declined to produce the statement and at the request of defense counsel was then ordered by the Court to hand the statement to counsel. At one stage of the trial, the statement was offered in evidence by the State and received over the defendant's objection. Defense counsel then withdrew a question that was pending and asked no further questions of the witness in reference to this statement. Some time later in the trial the Court reversed itself and refused to allow the statement to go in evidence and left it marked for identification only. Up to this time neither the State nor defense had used the statement in examining the witness, nor had the contents thereof been referred to by either before the jury.

Thereafter Bomwell was recalled to the stand for further cross examination, and defense counsel then proceeded to use the statement in an at-

tempt to contradict the testimony given on direct examination by the witness and brought out under questioning that there had been facts testified to by the witness on direct examination which were not contained in Exhibit S-28, his statement to the police. At no time during this cross examination did defense counsel ever examine the witness as to the date of the occurrence, which was the only part of the statement the witness had testified he used to refresh his recollection.

The statement was properly admitted in evidence for the following reasons:

1. Under the rule as laid down in *Decker* vs. *Smith,* 88 N. J. L. 630, and similar cases, the law is well settled that if a paper is produced on notice and submitted to the inspection of the other side, it becomes by reason of such production and inspection evidence for both parties.

Justice Trenchard, speaking for the Court of Errors and Appeals in *Decker* vs. *Smith, supra,* said, at page 635:

> "The defendant also contends that it was erroneous to admit in evidence a letter written to the plaintiff's assignor by one alleged to be its agent. Not so. Where, as in the present case, a paper is produced on notice and submitted to the inspection of the other side, it becomes, by reason of such production and inspection, evidence for both parties, on the ground that to allow a party, after requiring his adversary to produce the paper, and after inspecting it, to insist on excluding it, would give him an unfair advantage. *Ellison* v. *Cruser,* 40 N. J. L. 444."

In the present situation, the State refused to produce the statement until specifically ordered by the Court to turn it over to defense counsel

for examination. Certainly a verbal order of the Court made during the course of a trial is fully as effective and binding as would be a notice to produce or a subpoena.

2. Exhibit S-28 was properly admitted in evidence because the statement was not used by defense counsel to ascertain that there were facts in it sufficient to have refreshed the witness' recollection, but was used in an attempt to contradict the testimony given by the witness on direct examination. The witness had testified that the statement was used by him only to refresh his recollection as to the date, and on cross examination none of the questions were directed to that point, but the contents of the statement were fully inquired into (C., pp. 181-183), and it was only after this cross examination that the statement was offered and received in evidence as Exhibit S-28 (C., p. 183, ll. 15-21).

The defendant quotes from Sections 762 and 763 of the Third Edition of *Wigmore on Evidence* (B., pp. 33-34), but fails to quote Section 764, which reads as follows:

> "§ 764. *Cross-examiner's Use of Writing to Revive Recollection.* Where the effort to refresh the witness' memory comes originally from the *cross-examining party,* several distinct questions may arise.
>
> "(1) *Must* the witness accede to the request and see if his memory is refreshed by the paper handed him? It seems entirely proper to require him, in the trial judge's discretion, to do this.
>
> "(2) When this is done, the paper so used must in fairness be *read aloud* or shown to the jury.
>
> "(3) A paper thus desired to be used will usually be one containing a prior *inconsistent statement* of the witness; in this case, the

rules will apply that the inconsistent statement is not equivalent to independent testimony (*post,* § 1018), and that the paper containing it must (in the jurisdictions following The Queen's Case) first be shown to the witness before asking him upon its contents (*post,* § 1259).

"(4) The propriety of thus refreshing a hostile witness' recollection by his *deposition* or former testimony, not being a contemporaneous paper, has already been noticed (*ante,* § 761).

It is interesting to note that in Section 765, immediately thereafter Dean Wigmore said:

"§ 765. *Judicial Discretion in applying the Foregoing Rules.* The foregoing rules should not be treated as dogmas of inherent efficiency. They are merely crude rules-of-thumb, worthy of adoption for the general purpose. What is said in § 755, *ante,* as to over strict enforcement of the other rules, applies equally to these. The trial Court's discretion should control."

There was no error in admitting the statement in evidence as it was used by the cross examiner to show prior inconsistent statements by the witness.

3. After the statement of Bomwell, Exhibit S-28, had been admitted in evidence, the report of the radio police to their superior was also put in evidence with the acquiescence of the defendant as Exhibit S-29. Exhibit S-29 contains fewer facts of what Bomwell had seen than those contained in Exhibit S-28 and was used by the defense to attack the credibility of the witness. If there was any question as to the propriety of the admission in evidence of Exhibit S-28 theretofore, at this point it certainly became admissible, under the rule of law as stated in *State* v. *Neiman,* 123 N. J. L. 341, 344:

"It is well established that previous statements of a witness are ordinarily not admissible to strengthen and corroborate his testimony, but the general rule is that when a witness has been impeached by an attack upon his credibility, tending to show that his testimony is a fabrication of recent date or is colored, distorted, and falsified through the influence of some strong personal motive, his statements, made on occasions so near to the event involved, and so long anterior to the litigation that the effect of his speech could not have been foreseen, are admissible. 'And it is also usually conceded that if a witness testifying to a material fact associated with a transaction in dispute is shown to have omitted to mention it when giving, at a previous time, an account of such transaction, it may be proved in reply that about the same time he did speak of such fact.' 41 L. R. A. (N. S.) 958.

"*In Commonwealth* v. *Retkovitz,* 110 N. E. Rep. 293, it was said: 'But there is an exception where the contention is made that the testimony of a witness is given under a bias or undue influence, arising from some late occurrence subsequent to the main event, is a recent contrivance, or that the facts described in testimony previously have been concealed under conditions which warrant the belief that, if they were true, the witness would have been likely to have revealed them. In such a situation, evidence that the witness at earlier times before the intervention of these pernicious impulses had made statements like those given in court has a legitimate tendency to impugn the existence of these factors as operating causes to produce the testimony and thus to fortify his testimony, and therefore should be admitted.' See, also *Commonwealth* v. *Tucker,* 76 N. E. Rep. 127."

The defendant in his brief quotes at length from *Springer* v. *Labow,* 108 N. J. L. 68 (B., p. 32), a case in which the facts are not at all similar to

the case at bar. In the *Springer* case the writing which was used to refresh the witness' recollection was in the witness' possession and was not produced upon order of the Court and was not used by the defense attorney to show prior inconsistent statements of the witness. As the Supreme Court pointed out in that case, page 70:

> "A thing in writing carries, particularly with the layman, a weight of its own. When the jury withdrew they took with them their recollection of the defendant's testimony and their recollection of Jacobson's testimony and, in addition, this exhibit, which not only was a thing in writing but because of that fact was a present and constant reminder to the jury of its contents. It may have been the fulcrum upon which the verdict turned."

In the present case the writing did not contain a number of facts testified to by the witness under direct examination, particularly the fact that the witness saw the man with both hands on the wheel, wearing new light gloves.

Defendant in his brief says, "The testimony of Bomwell was in a large sense the cornerstone on which the State's case was built." (B., p. 30).

This is far from the fact. The defendant's confession shows that three shots were fired at or near the intersection of Wickliffe Street and 13th Avenue in the City of Newark and that at the time the three shots were fired, the defendant's confederate, Smart, was the driver of the truck and not the defendant. It further shows that a struggle took place, in which the defendant was on the floor during which time his leg would have been visible with the door open. It also shows that the door of the truck opened during the struggle and that a hat fell out which the defendant identified as his. The testimony of the wit-

nesses Tutler and Newby also establishes that three shots were fired at or near the intersection of Wickliffe Street and 13th Avenue. The State's case could have been presented in all its aspects without the testimony of Bomwell.

There was no error by the Court in admitting in evidence Exhibit S-28.

POINT IV.

The verdict was not against the weight of the evidence either as to (a)—the voluntariness of defendant's confession, or (b)—that the fatal shot was fired in the venue laid.

A.

As to the voluntariness of the confession.

Under this subdivision, the defendant makes the statement (B., p. 35), that the purpose of the discussion "is not to question the admission * * * into evidence by the court," of defendant's confession, Ex. S-53, and that "No claim is made that any of these particular officials" (naming Captain Cocozza and Detective Kosloski of the Prosecutor's Office, and Chief O'Neill of Newark Police Headquarters), who witnessed the taking of the confession, had "threatened or beat the defendant" (B., p. 36); and he concedes that in response to the inquiry made of the defendant by the citizen witness Robinson as to how he had been treated by the police the defendant said he had been treated "fine" and that "he had not been threatened or hit." But defendant makes the claim, contained in the four italicized lines on page 36 of his Brief, that the defendant had been so "worked upon" and put in fear by Newark

Detectives Cook and Smith that he agreed to sign the confession and to remain silent as to his treatment; that as a consequence the jury, in weighing all the evidence pro and con on the alleged beatings, "lost sight of" the "conclusion" that the defendant, admittedly not unintelligent although uneducated, would not pick on two detectives who were not present rather than on others who were admittedly present during his questioning in Police Headquarters, with the result, says the defendant, that the guilty verdict "is based on error and mistake."

Frankly, we cannot follow this reasoning.

It is the accepted rule that when a confession has been admitted, the jury may weigh it and reject it, if they choose.

> *State* v. *Jefferson,* 131 N. J. L. 70;
> *State* v. *Compo,* 108 N. J. L. 499.

The State produced Captain Cocozza who took defendant's confession in Police Headquarters from 7:40 P. M. of December 18 to 1:00 A. M. of the 19th (C., p. 413); and he testified that it was voluntarily made, without promise of reward or threats of violence (C., p. 414, l. 15); and that he took a supplemental statement from the defendant the following day in which he admitted ownership of the hat he wore at the time of the crime which fell out of the truck, this statement likewise being voluntarily given without any promises or threats (C., p. 415).

Deputy Chief O'Neill testified to the taking of the confession by Captain Cocozza and that it was voluntarily given (C., p. 430, l. 29).

Prosecutor's Investigator Kosloski gave corroborative testimony as to the voluntariness of the confession (C., p. 438).

The defendant took the stand and testified to certain acts of violence and threats allegedly committed upon him by Newark Detectives Smith and Cook in Newark Headquarters prior to the giving of his confession.

Thereafter, before the case was finally submitted to the jury, the State produced all of the witnesses who were present at the time of the questioning of the defendant, at the time of the signing of the confession, and all persons who had any interviews with him. The State produced not only Smith and Cook who denied each and every allegation of the defendant in regard to mistreatment but also the then Chief of Police Sebold, Lieutenant Wangner of the Homicide Squad, Lieutenant Flynn of the Bandit Squad and Detectives Strong, Daly and Queenan, besides recalling Captain Cocozza and Detective Kosloski of the Prosecutor's Office and Deputy Chief O'Neill of the Newark Police. They all made specific denial of any acts of violence or threats claimed by the defendant. Chief Sebold stated that neither Smith nor Cook were present when the defendant was under questioning; that Smith had been ordered out of the room as he was about to enter, and that Cook had never entered the room where the defendant was being interviewed (C., pp. 524-525).

Dr. Greifinger, Newark Assistant Police Surgeon, examined the defendant for about a half-hour early the morning of December 19, and when he asked the defendant if he had any complaints, the defendant replied he had not been injured, and that "he made a voluntary statement in which he admitted the truth" (C., p. 534, l. 24).

Marvin A. Robinson, an engineer with the Prudential Insurance Company and assistant-manager of a housing project, was the impartial citizen-witness who testified that he questioned the

defendant at 2:30 A. M. of the 19th as to how he had been treated, and defendant said "Fine," and that "they treated me swell" (C., pp. 546-547).

Doubtless the jury, in weighing the evidence on both sides with respect to the alleged mistreatment, must have considered the defendant's story as deserving of no weight or credit at all.

The confession contains details which none of the officers, nor anyone connected with the case, other than the defendant himself, could have known and disclosed, and for that reason, to use the words of this Court in *State* v. *Morehous,* 97 N. J. L. 285, page 292 of opinion, (bottom), "the defendant's version of the obtaining of the confession is discredited by the confession itself."

B.

As to the firing of the fatal shot in the City of Newark.

With respect to the argument under this subdivision, wherein it is urged that the State failed to show beyond a reasonable doubt that the fatal wound had been inflicted in Newark, we deem the subject has been fully discussed under Point II, and repetition would serve no useful purpose.

As we hereinbefore attempted to point out, there was ample evidence that at least three shots had been fired in the vicinity of Wickliffe Street and 13th Avenue, which together with all the other proofs in the case, afforded a reasonable basis for the jury in drawing a legitimate inference that the felonious stroke had been inflicted in the county of the venue laid in the indictment.

We submit that the guilty verdict was not so contrary to the weight of the evidence on either of the subject-matters herein particularly dis-

cussed as to give rise to the inference that it was the product of mistake, or for that matter, of passion, prejudice or partiality.

It is respectfully submitted that no errors have been shown, and that the judgment of conviction should be affirmed.

Respectfully submitted,

DUANE E. MINARD, JR.,
Prosecutor of the Pleas.

RICHARD J. CONGLETON,
First Assistant Prosecutor.

C. WILLIAM CARUSO,
Legal Assistant Prosecutor.