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Certificate of Chancellor.

IN CHANCERY OF NEW JERSEY.

STATE OF NEW JERSEY, Defendant in Error, vs. FRANK SAGE, Plaintiff in Error.	*Sur* Indictment for Murder. Certificate of Chancellor.

This is to certify that application has been made to me for the allowance of a writ of error to be issued out of the New Jersey Supreme Court for review of the judgment of the Hudson County Court of Oyer and Terminer in this State, convicting the said Frank Sage of the crime of murder in the first degree, without exhibiting to me the record of the proceedings in the cause or any part thereof, and without alleging any error in those proceedings, and that I have refused to order a writ of error for the review of said judgment, solely because no cause, arguable or otherwise, is shown for the granting of such writ of error to the Supreme Court.

Dated June 18th, 1923.

E. R. WALKER,
Chancellor.

Writ of Error.

THE STATE OF NEW JERSEY,

(Seal)

To the HONORABLE HYMAN LAZARUS, Judge of the Court of Oyer and Terminer of the County of Hudson, GREETING:

Because in the judgment of the Court of Oyer and Terminer of the County of Hudson, upon a certain indictment against Frank Sage, late of the City of Jersey City, in said County, that he did wilfully, maliciously and with malice aforethought kill and murder one John J. Black, pro ut the said indictment and the several counts therein, whereof before you he hath been indicted and is thereof convicted by a certain jury of the County taken between the State of New Jersey and the said Frank Sage, as is said, manifest error hath intervened to the great damage of the said Frank Sage, as from his complaint we have received information; we, being willing in this behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Frank Sage, command you that if judgment be thereon given, then that you distinctly and openly send under your seal, the record and proceedings aforesaid, with all things touching and concerning the same to our Court of Errors and Appeals, in the last resort in all causes at law to be held at Trenton, New Jersey, on the 7th day of July, 1923, and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon, what of right and according to the laws and customs of New Jersey ought to be done.

WITNESS, EDWIN ROBERT WALKER,

our Chancellor at Trenton, this 18th day of June, 1923.

Return.

THOMAS F. MARTIN,

Clerk.

RICHARD DOHERTY,

Attorney of Plaintiff in Error.

The answer of Hyman Lazarus, Esquire, Judge of the Court of Oyer and Terminer, holding in and for the County of Hudson, and within named, the record and proceedings of the plaint whereof mentioned is within made that all things touching the same, I send to the justices of the Court of Errors and Appeals of the last resort in all causes at Trenton, New Jersey, at the day and year within contained in a certain writ to this appeal annexed as within I am commanded.

HYMAN LAZARUS,

Judge.

STATE OF NEW JERSEY, HUDSON COUNTY,

To wit: Be it remembered that at a Court of Oyer and Terminer at Jersey City, in and for said County of Hudson, on the Third day of May, in the year of our Lord One Thousand Nine Hundred and twenty-three before Honorable Francis J. Swayze, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Honorable Hyman Lazarus and Honorable, Judges of the Court of Common Pleas in and for said County of Hudson, according to the form of the Statute in such case made and provided by the oaths of

1. Dr. D. J. Donohue, Foreman, and 2, Michael Holmes; 3, David I Cohen; 4, Louis R. Perraud; 5, William E. Ward, Jr.; 6, Frank H. Eckert; 7, Fred Ketterer; 8, Peter A. Fanning; 9, Richard Butler; 10, Samuel Blauvelt; 11, Aaron Birnbaum; 12, Matthew R. Boylan; 13, Charles A. Reubens; 14, Charles N. O'Connor; 15, James Thomson; 16, George Wittmer; 17, R. H. Debacher; 18, Thomas F. Walsh; 19, Charles L. Munch; 20, Dr. Louis Franklin; 21, James Graham; 22, Frank J. Crawford; 23, William Higgins,

good and lawful men of said County, duly empanelled, sworn and charged to inquire for the State in and for the body of the said County of Hudson, it is presented in manner and form following, that is to say, that the Bills following are true Bills.

DANIEL J. DONOHUE,
Foreman.

And the foregoing being presented to the said Court on the Twenty-second day of May, in the year of our Lord One Thousand Nine Hundred

and Twenty-three, with bills of Indictment Nos. 145 to 155 inclusive, it is ordered by said Court that the said bill of Indictment so as aforesaid included as Bill number 146 for Murder, as charged upon Frank Sage, alias Frank Miller, alias Frank J. Eigan, and May Miller, remain in this Court of Oyer and Terminer for trial and disposal according to law, and said Bill is in words as follows:

HUDSON OYER AND TERMINER

April Term, A. D., 1923:

HUDSON COUNTY, To wit:—

The Grand Inquest of the State of New Jersey, in and for the body of the County of Hudson, upon their respective oath PRESENT, that Frank Sage, alias Frank Miller, alias Frank J. Eigan, and May Miller, late of the City of Jersey City, in the said County of Hudson, on the twenty-second day of May in the year of our Lord One Thousand Nine Hundred and Twenty-three, with force and arms, at the City of Jersey City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, one John J. Black in the peace of God of this State, then and there being did wilfully, feloniously and of his malice aforethought, kill and murder, 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.

And the Grand Inquest aforesaid, upon their oath aforesaid, do further PRESENT, That the said Frank Sage, alias Frank Miller, alias Frank J. Eigan, and May Miller, on the twenty-

second day of May in the year of our Lord one thousand nine hundred and twenty-three, at the City of Jersey City aforesaid, in the County of Hudson, aforesaid, and within the jurisdiction of this Court, did feloniously kill and slay one John J. Black, 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.

And the Grand Inquest aforesaid, upon their oath aforesaid, do further PRESENT, That the said Frank Sage, alias Frank Miller, alias Frank J. Eigan, and May Miller, on the twenty-second day of May in the year of our Lord, one thousand nine hundred and twenty-three, at the City of Jersey City, aforesaid, in the County of Hudson, aforesaid, and within the jurisdiction of this Court, in and upon one John J. Black, in the peace of God and of this State, then and there being an assault did make, and him, the said John J. Black, then and there did beat, wound and illtreat and other wrongs, to the said John J. Black then and there did, to the great damage of the said John J. Black 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.

JOHN MILTON,
Prosecutor of the Pleas.

Endorsed Bill No. 146 Hudson Oyer and Terminer, Term of April, 1923, The State vs. Frank Sage, alias Frank Miller, alias Frank J. Eigan, and May Miller, for Murder.

JOHN MILTON,
Prosecutor of the Pleas.

Record.

A TRUE BILL

DANIEL J. DONOHUE, Foreman.

Presented May 22, 1923, and it is thereupon ordered that this bill of Indictment remain in this Court of Oyer and Terminer for trial and disposal according to law.

JOHN J. McGOVERN, Clerk.

And afterwards to wit: To wit, on the twenty-third day of May, in the year of our Lord one thousand nine hundred and twenty-three, at a session of the Court of Oyer and Terminer of the County of Hudson, aforesaid being now of the Term of April one thousand nine hundred and twenty-three, in the said year Before the Honorable Hyman Lazarus, Judge of the Court of Oyer and Terminer, in and for the said County of Hudson, who doth constitute and hold the Court of Oyer and Terminer, in and for the County of Hudson, here cometh the said Frank Sage, alias Frank Miller, alias Frank J. Eigan, and May Miller, who being brought herein in their proper person and having heard the indictment read and forthwith being demanded of and concerning the premises in the said indictment above specified and charged upon them how they will acquit themselves thereof, they say they are not guilty thereof, and therefore for good and evil they put themselves upon the country, and John Milton, Esq., Prosecutor of the Pleas of said County who prosecutes for the State of New Jersey, in this behalf, doth the like.

Therefore, let the said indictment be continued until June 11th, 1923, and let a jury come before the Honorable Hyman Lazarus, Judge of the Court

of Oyer and Terminer in the County of Hudson, constituting and holding the Court of Oyer and Terminer, for said County, being now of the Term of April (1923) One Thousand Nine Hundred and Twenty-three, of twelve good and lawful men of this State and residents in the County of Hudson, over the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known, and who are not of kin to said defendants to recognize on their oath whether the said Frank Sage, alias Frank Miller, alias Frank J. Eigan, and May Miller be guilty of murder as in the indictment aforesaid is charged against them, or not guilty thereof, because as well as the said John Milton, Prosecutor of the Pleas of the County of Hudson, aforesaid, who prosecutes for the State of New Jersey in this behalf, as the said defendants in the said indictment have put themselves upon the same jury and the same day is given to the parties aforesaid at the same time and place.

At which time that is to say on the 11th day of June, in the year of our Lord, One Thousand Nine hundred and twenty-three, at Jersey City, aforesaid in the County of Hudson, aforesaid, before the Honorable Hyman Lazarus, Judge as aforesaid constituting and holding the Court of Oyer and Terminer as aforesaid, here comes as well the said John Milton, Prosecutor of the Pleas aforesaid, who prosecutes as aforesaid as well the said defendants, and who being brought to the bar in their proper persons, and the jurors of the jury by the Sheriff of the County of Hudson, aforesaid, for the purpose, chosen, empanelled and returned to-wit: Mark Drucker, Frank S, Turbett, Edward M. Paterson, John Theaken, Frank T. Shardlow, George Vietmeyer, Otto Rowan, Clifford F. Deck-

er, Oscar Wietzdorff, Louis Zeik, Elmer Lewis, Louis Hey, being called, come, who being chosen, tried and sworn to speak the truth concerning the premises, and thereupon the trial of the said issue commenced before the Court and Jury, and at which days the evidence of the parties is submitted and the attorneys were heard thereupon, and the said issue after a Charge from the Court was submitted to the said Jury in charge of the said Officers of the Court, being duly sworn for that purpose, were taken to a private room to consider of their verdict, and afterwards to wit, on June 13th, 1923, the last aforesaid at the City of Jersey City aforesaid, the said jury returned to the Court in charge of said officers, sworn as aforesaid to keep them in charge and then and there in the presence of the said John Milton, Esquire, Prosecutor of the Pleas as aforesaid, and of the said defendants do say that the said defendant, Frank Sage, alias Frank Miller, Alias Frank J. Eigan, is guilty of Murder in the First Degree, as in the aforesaid indictment is charged against him, and the jury at the time of rendering said verdict did not recommend imprisonment at hard labor for life, and they did further say that the said defendant, May Miller, is not guilty, as charged upon her. Therefore, let the said indictment be continued until June 15, 1923, Whereupon all and singular the premises being seen and by the Court here fully understood the sentence of the law is as follows:

The sentence of the law is, and it is by the Court here considered and adjudged that the said Frank Sage, alias Frank Miller, alias Frank J. Eigan, be taken by the Sheriff of the County of Hudson hence from the Bar of this Court, and by the said Sheriff delivered to the Principal Keeper of the State Prison, at Trenton, there to be kept in close cus-

tody and confinement until some day during the week beginning the sixteenth day of July, in the year Nineteen Hundred and Twenty-three, and that the said Frank Sage, alias Frank Miller, alias Frank J. Eigan, shall suffer the punishment and judgment of death, at the time, in the place, and in the manner provided by law for the same.

Judgment entered and signed this 15th day of June, One Thousand Nine Hundred and Twenty-three.

HYMAN LAZARUS,

Judge of the Court of Oyer and Terminer, in and for the County of Hudson, State of New Jersey.

Attest:

JOHN J. McGOVERN,

Clerk.

STATE OF NEW JERSEY

HUDSON COUNTY, ss:

I, JOHN J. McGOVERN, Clerk of the County of Hudson, aforesaid, and also Clerk of the Oyer and Terminer Circuit Court and Court of Common Pleas, holden therein,

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of Pleadings, proceedings, conviction, and sentence, in the case of the State of New Jersey vs. Frank Sage, alias Frank Miller,

alias Frank J. Eigan, on Sur Indictment No. 146 Term of April A. D., 1923, for Murder with all things touching the same, as the same is taken, from and compared with the original as presented, filed and recorded in my office. This certificate is issued so that the said cause may be removed to the Court of Errors and Appeals the last resort of all causes at Trenton, N. J., for adjudicature according to law.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Courts and County, at Jersey City, this twenty-eighth day of June, 1923.

JOHN J. McGOVERN,
(Seal) Clerk.

New Jersey State Library

HUDSON COUNTY COURT OF OYER AND TERMINER.

STATE vs. FRANK SAGE, alias FRANK MILLER, alias FRANK J. EIGAN and MAE MILLER.	Indictment 146 Murder. Before: Hyman Lazarus, Justice, and a Jury.

June 11th and 14th, 1923.

APPEARANCES:

John Milton, Esq., and Aloysius McMahon, Esq., for the State, George T. Vickers, Special Counsel.

James McCarthy, Esq., and John Drewen, Esq., for Defendants.

Mr. McCarthy: Before the Jury is called we would like to have the pleading of Mae Miller on this indictment withdrawn for the purpose of making a motion.

Mr. Vickers: No objection on the State's part.

Mr. McCarthy: Now, if your Honor please, on behalf of the defendant Mae Miller we move to quash the first count in the indictment so far as the same relates to or affects her on the ground that the first count charges an unin-

dictable offense so far as she is concerned, the indictment being fatally defective in that it charges that the defendant Frank Sage and the defendant Mae Miller did kill and murder John J. Black of his—that is, of the man defendant's — malicious aforethought. Although the fault pointed out may be one in grammar, still we believe it is one that affects the meaning of the count seeking to charge the defendant with a capital offense and it is thereby rendered fatally defective in so far as the defendant Mae Miller is concerned.

The Court: That motion will be denied.

Mr. McCarthy: Then the defendant Mae Miller, may be re-arraigned?

The Court: Yes, and plead, and her plea may be entered as not guilty.

Mr. McCarthy: Of course we are not entitled to an exception to your Honor's ruling but the record will show the situation.

The Court: Very well, call the Jury.

ADAM KAERTH, sworn.

DIRECT EXAMINATION by Mr. McMahon:

Q. Where do you live. A. 19 Manhattan Avenue.
Q. With whom do you live? A. My wife.
Q. What kind of a house is 19 Manhattan Avenue. A. Seven room house and bath.
Q. And how many rooms on the first floor? A.

Four.

Q. What are they? A. Front room, dining room, kitchen and pantry.

Q. And what is on the second floor? A. Two bedrooms, kitchen and a bath.

Q. I show you two photographs, do they represent the house in which you live, 19 Manhattan Avenue? A. Yes, sir.

Mr. McMahon: I will ask that these be marked for identification.

(Marked Exhibit S-1 and S-2, for identification.)

Mr. McCarthy: We have no objection to their going in now.

(Marked Exhibit S-1 and S-2, in evidence.)

The Court: What are the other two?.

Mr. McMahon: These show the yard and the rear of the house. I offer these.

(Marked Exhibit S-3 and S-4, in evidence.)

Q. Who occupied the second floor of your apartment? A. We occupied the front room, which we used as a bedroom.

Q. Who do you mean by we? A. Myself and wife.

Q. Anybody else in your famliy but yourself and wife? A. Not in the house, no, sir.

Q. Anybody live in the house but you and your wife? A. No, sir.

Q. Who else lived in the house on the 22nd day of May, 1923? A. Frank Miller and his wife.

Q. And where did they live? A. They had the three—the two rooms and bath on the second floor rear.

Q. What part, the back part of the house? A. The back part.

Q. Do you remember the morning of the 22nd of May, 1923? A. I do.

Q. About half past five in the morning? A. Yes, sir.

Q. What happened? A. The bell rang. I put on my trousers and went down and answered the door bell. There were three plain clothes men and one man in uniform at the door.

Q. What did they say to you? A. They asked me where is the man owns the car that is in front of the house.

Q. Who asked you that? A. One of these plain clothes men.

Q. What did you reply? A. I said he has rooms upstairs and he asked me was he home. I said he might be but I am not sure, I do not think he is because I didn't hear him come in.

Q. What else did they say to you? A. Then they showed me a picture and asked me was that the man lives upstairs and I said yes.

Q. I show you a picture and ask you if that is the picture I showed you to look at? A. Similar to that.

Q. Similar to that? A. Yes, I don't know if it is the same picture or not, but similar.

Q. A similar picture? A. Yes.

Q. Did you see the back of it? A. No, sir.

Q. After showing you this picture what did they ask you? A. They didn't ask me no more, they just went upstairs.

Q. What did you do then? A. I opened the apartment downstairs and went out into the kitch-

en for a drink of water.

Q. And after you had the drink of water, what did you do? A. I came back and stood at the foot of the stairs for about a half minute.

Q. Did you hear any conversation? A. I heard the woman upstairs talking, saying, "Wait until I get some clothes on."

Q. That is all you heard? A. Yes, then I went upstairs and I told him I had to get dressed, I have got to go to work, and I went in my room and locked the door.

Q. When you went upstairs did you have to pass two policemen? A. I passed two plain clothes men and the uniformed man on the stairway.

Q. How wide is this stairs leading up to the second floor? A. About thirty inches, I never measured it.

Q. Does it run straight up to the apartment? A. No, sir, there is a turn—there are eleven steps and four on the turn.

Q. And where is the entrance to your apartment compared with the entrance to Millers' apartment? A. Upstairs?

Q. Yes. A. Directly across.

Q. Directly across the hallway? A. Yes, sir.

Q. And how wide is that hallway? A. About as wide as the stairs.

Q. About 30 inches? A. Yes, sir.

Q. After you got into the apartment what did you hear? A. I didn't hear anything.

Q. Didn't hear anything at all? A. Nothing at all, no talking or anything.

Q. What part of the stairs were these officers on when you passed them to go up to your room? A. Two plain clothes men were on the landing and the uniformed man was on the top step like.

Q. What do you mean by the landing? A. Well, at the top of the steps, the entrance to the rooms.

Q. The entrance to the doorway into the Miller apartment? A. And my apartment.

Q. A uniformed policeman? A. He was standing on the top step.

Q. Was he behind the other two or in front? A. Behind, about the fourteenth step.

Q. That is, counting from the bottom up? A. Yes, sir.

Q. Did you see Otis there—do you know patrolman Otis? A. I do not know any of these officers by name.

Q. When you got in your room you say you heard nothing at all? A. No.

Q. Didnt hear any noise of any kind? A., No, sir.

Q. How long did you stay in your rooms? A. I was finishing dressing.

Q. What happened after that? A. Why, I was in the room a couple of minutes when I heard shooting.

Q. Oh, you heard shooting? A. Yes, sir

Q. How many shots did you hear fired? A. I could not tell.

Q. And how long a time elapsed between the time you went into your room and when you heard the shooting? A. Well, about a minute or so.

Q. Did you hear any other noise? A. Like tumbling, that is about all I heard. I didn't open the door.

Q. Who was in the room with you? A. my wife.

Q. And where was she? A. Getting dressed.

Q. Was she dressed at the time the shooting was going on? A. She was pretty nearly all dressed at the time.

Q. After the noises stopped did anybody come in your room? A. Only—knocked on the door.

Q. How did they knock on the door? A. Well, tapped—I don't know—I could not see what he done it with, whether it was his hand—

Q. As a result of the tapping what did you do? A. I opened the door.

Q. And who was there? A. Miller.

Q. What did he have with him? A. He had two guns in his hand.

Q. Well, what did he do or say to you? A. He said, "Open the door I want to see is any more in there."

Q. Any more what? A. I could not say. I was not sure whether he said cops or not.

Q. Where did he put his guns with relation to you? A. Where he put them?

Q. Where did he hold them? A. He had them in his hands.

Q. Was he pointing them toward you? A. Oh, he had their points towards me.

Q. Where? A. Towards my stomach.

Q. Did he go in your room? A. No.

Q. Did he go in your room? A. No, sir, he only looked in.

Q. And what happened then? A. He went in his room.

Q. When Miller was pointing the guns at your stomach was there any policemen in the hall at the time, or plain clothes men? A. Well, I was not in the hall.

Q. Wasn't the door open between your apartment and the hall? A. I opened it.

Q. Did you look out? A. About a foot—he was standing in the doorway, I could not see the hallway, I was inside the room about two feet from the door.

Q. Who opened the door, you or he? A. I did, it was locked.

Q. And when you opened it you stepped back? A. Yes.

Q. You did not stay in the hall? A. No.

Q. What did you do after that? A. He said he would not harm us so I went down, I told the wife to follow me down.

Q. And when you got down did you meet any policemen in the hallway? A. No, there was nobody in the house at the time, they were covering the house from the outside.

Q. When you went downstairs where did you go? A. As soon as I got down they followed me in.

Q. Who did? A. The police.

Q. When you got downstairs where did you go —in your apartment downstairs? A. In the front room.

Q. What did you find in there? A. Patrolman Black lying dead.

Q. How was he lying, do you know? A. Face down.

Q. Where was his feet? A. Towards the door, the gun was at his feet.

Q. His gun was at his feet? A. Yes, sir.

Q. And where was his head? A. Toward the piano.

Q. I show you a photograph and ask you if that represents the position in which you found Black at the time you came down? A. Yes, sir. His head was at this couch.

Mr. McMahon: I offer this photograph in evidence.

The Court: Any objection?

Mr. McCarthy: No objection.

(Marked Exhibit S-5.)

Q. Did you go further in the room? A. I walked in the dining room.

Q. What did you find? A. I found a uniformed man lying in blood, face down.

Q. I show you a photograph and ask you if that represents the position in which you found Weir? A. Yes, face down when I came down. Another officer turned him over.

Q. Did you see him turn him over? A. Yes, sir.

Q. Did you see Weir lying in this position in your apartment? A. No, sir, he was face down with his hand towards his back pocket.

The Court: Now, the question is did you see the officer turn him around as you say he was turned around?

The Witness: He was on his face when I came down.

The Court: Did you see the officer turn him around?

The Witness: Yes, sir.

The Court: And that photograph being shown to you, is that a photograph of that man as he was lying after he had been turned around?

The Witness: Yes, sir, that is the way he was lying after he had been turned around.

Mr. McMahon: I offer the photograph in evidence.

(Marked Exhibit S-6.)

Q. I show you a photograph and ask you if that is a photograph taken from another position, of Officer Weir? A. That is taken from the back of the room towards the window, yes sir.

Q. And does that represent the position in which he was when you came down, from upstairs? A. After they turned him.

Mr. McCarthy: I object to that photograph because it appears that this does not represent the position in which this witness found him.

Q. Did you see this officer turn him? A. yes, sir.

Mr. McMahon: I offer it for identification.

(Marked Exhibit S-7, for identification.)

The Witness: I was feeling his back and another officer came and turned him over.

Q. Is that the officer turned him over (indicating)? A. I could not say if he is the officer turned him over, I didnt get a good look at him.

Q. Did you see anybody else downstairs when you came there? A. No, sir.

Q. Did you see Otis? A. No, sir. The front door was open when I came down, which was closed when I went upstairs.

Q. What did you do then, after you viewed these two bodies? A. I went to the back window and

to let some air in the house and one of the officers had me covered and I said to him, I am not the man you are looking for, I am opening up the place. He said, "Come out to the back and open the back doors" so I went to the back and opened the doors and they would not let me in the house any more.

Q. Would not let you in the house? A. No, sir.

Q. Did you go back to the house after that at all? A. Yes, after they brought him down.

Q. Did you hear any other noises in the house after the shooting? A. Well, not—I didn't get a chance to hear very much because I was going through the rooms.

Q. Did you hear any shooting downstairs? A. No, sir.

Q. Did you hear any noises as if furniture was being moved at any time? A. Oh, while they were downstairs, while the other officers were there.

Q. What did you hear? A. I heard something like climbing or something moving.

Q. And what was that? A. While they were downstairs before—while we were in the dining room.

Q. How long after you came downstairs? A. Well, it could not have been a half minute.

Q. Not more than half a minute? A. No, sir.

Q. After you came back to the house, after opening it up, did you stay in the apartment downstairs? A. No, sir, I was outside, standing at the gate.

Q. And? A. They told me not to go in there, there would be more shooting.

Q. And how long did you stay outside at the gate? A. I would say about ten minutes.

Q. Then did you come back into the house. A. Yes, sir.

Q. And what did you find in the house then? A. The same as before.

Q. Do you see in the court room two people who occupied the apartment in the house on the second floor? A. Yes, sir.

Q. Where are they? A. One over there and one on this side.

Q. The man and the woman defendant? A. Yes, sir.

Q. Was there anybody else in the house at half past five in the morning outside of yourself and your wife and these two defendants? A. No, sir.

Q. Do you recall an architect coming up to your house? A. My wife was home when he came up.

Q. Does this correctly represent the second floor?

Mr. Drewin: We may agree to this plan after we look it over.

The Court: Do you admit that as evidence of the plan of that building?

Mr. Drewin: A diagram of the premises.

Mr. McMahon: A diagram of the first and second floor, 19 Manhattan Avenue, drawn to the scale of one half inch to the foot.

The Court: It may be admitted.

(Marked Exhibit S-8.)

Q. Can you indicate on this plan which is the room you and your wife occupied as a bedroom on the second floor and which were the rooms occupied by this man and woman? A This is my bed-

room and my wife.

Mr. McMahon: For the purpose of the record pointing to the room marked front of house and to that part of the diagram which is marked second floor.

The Witness: This is the bedroom occupied by Miller and his wife.

Q. Did they also occupy the room called the kitchen, bedroom? A. Kitchen and bedroom, yes, sir.

Q. Now, what is this part of the premises, is that the stairway leading up to your apartment? A. Yes, sir.

Q. That stairway turns so that it goes to the center of the building? A. Yes, sir.

Q. And that open space here is the hallway between your apartment and the other apartment? A. Yes, sir.

Q. How does the doorway open in both of these apartments?

Mr. Drewin: It is admitted that they open as shown on this diagram, D-M.

The Witness. Yes, sir.

Q. Was there a window in this bedroom looking into the back yard of these premises? A. Yes, sir.

Q. Can you point it out on the diagram? About here.

Mr. McMahon: Pointing to what appears to

be drawn as a window on the diagram.

Q. I show you Exhibit S-4. Can you point out on that picture the same window you have just pointed out on the plan. A. Right here.

Mr. McMahon: Indicating a window marked ed X-A.

Cross Examine.

CROSS EXAMINATION by Mr. McCarthy:

Q. What time was this on the morning of the 22nd you heard your door bell ring? A. About half past five or twenty minutes to six, I am not quite certain.

Q. How do you fix the time? A. By the alarm clock in the room.

Q. Well, how do you fix it by the alarm clock, had the alarm clock gone off before the doorbell rang? A. Yes, sir.

Q. How long before it rang? A. About five minutes.

Q. And what time is that alarm set for? A. Twenty-five after five.

Q. Did you look at the clock when it went off? A. Well, the wife generally sets it off.

Q. Did you look at it that morning? A. No, sir.

Q. Then you are not sure of it being twenty-five minutes after five? A. No, sir.

Q. How long after the alarm clock went off did the door bell ring? A. About ten minutes.

Q. What did you do? A. I put on my trousers and went down and answered the door bell.

Q. What do you mean by answering the door bell; what did you do? A. I went downstairs to

see who was there.

Q. Did you open the door? A. Yes.

Q. The door was locked, was it? A. Yes, sir.

Q. When you opened the door what happened? A. There was three plain clothes men and one uniformed man at the door with pistols drawn.

Q. What? A. With their pistols drawn.

Q. With pistols drawn and each one had a pistol? A. No, sir, the man that stood there second had his pistol.

Q. Which one was that? A. I could not say which one it was.

Q. Do you know Mr. Otis, Officer Otis? A. I might know him if I see him.

Mr. McCarthy: Officer Otis, stand up, please.

Q. Is that the one that had the pistol? A. I am not sure.

Q. Well, are you sure how many had pistols? A. No, I didn't look for pistols.

Q. What? A. I didn't look for how many had pistols, it was enough to see one.

Q. Well, did more than one have pistols? A. I could not say.

Q. Well, what was done with the pistol by the one that had it? A. Well, it was pointed at the door when I opened it.

Q. Well, when you opened the door was it pointed at you? A. Yes, sir.

Q. Whereabouts, what part of your body? A. Well, towards the stomach.

Q. And what was said by the person who pointed the pistol at your stomach? A. Asked me where the man was that owned the car in front of the house.

Q. And what did you say? A. I said he had three rooms upstairs, he lived upstairs.

Q. Well, go ahead, what else happened there? A. And they showed me a picture and asked me was that the man that lives up there and I said yes, sir.

Q. And you said what? A. Yes.

Q. And what did the officers do? A. They didn't say no more but walked past me and upstairs. I told them the rear door. They asked me was he home. I said I didn't know whether he was home or not, I didn't hear him come in.

Q. What is that? A. I told him I didn't hear him come in.

Q. Did you see any other officers there besides these three? A. There were four at the door.

Q. Three went upstairs? A. Two plain clothes men and one uniformed man went upstairs and one stayed downstairs.

Q. Who went upstairs first, the uniformed man or the ununiformed man? A. I think it was the man with the checked—the plain clothes man.

Q. Who followed him up? A. Another plain clothes man.

Q. And one in uniform was last? A. Yes.

Q. What became of the other officer you saw at the door? A. I do not know.

Q. Did you close the door? A. Yes, I just closed the door.

Q. And was he on the outside? A. Yes, sir.

Q. And was the door locked? A. I didn't lock the door, I just left it on the catch.

Q. And you went in to have a drink of water? A. Yes, sir.

Q. Did you hear any knock on the upstairs door. A. I heard them knock.

Q. And did you hear anything said? A. I didn't hear anything said from anybody.

Q. Well, you heard the knock? A. I heard the

knock.

Q. And if anything had been said you were in a position where you could have heard it? A. I was down at the bottom of the stairs.

Q. And what did you hear, if anything, after the knocking? A. Well, I went for a drink of water and when I came out I heard the woman's voice say, "Wait until I get some clothes on."

Q. Yes. And then I went upstairs and went past the officers.

Q. You went upstairs and went past the officers? A. Told them I had to get to work.

Q. When you went upstairs and passed the officers—sit down here please, show us just what position these officers were in? A. There were two plain clothes men standing here.

Q. Indicating the outside of the door leading to Miller's apartment, is that right? A. Yes, sir.

Q. Where was the uniformed man? A. He was about on the step here.

Q. On the step. How far was he from the door leading to Miller's apartment? A. Well, none of the officers were more than six inches apart, there was no more room.

Q. He was not in line with the door, the uniformed officer? A. No.

Q. Well, how far was he away from the line of the door?

Mr. Vickers. That would depend upon what line of the door.

Q. Well, how far was he—he was on this step, the topstep—

Mr. Vickers: For the purpose of the record that is the last step up from the first floor.

Mr. McCarthy: Right.

Q. Was the uniformed man— A. There are four steps here.

Q. Where are the four? A. Supposed to be four—there is eleven and four.

Q. Isn't it eight and three? A. Eleven and four.

Q. Well, was the uniformed man—how far away from the door was the uniformed man standing? A. I should say about two feet.

Q. Two feet away? A. Yes, sir.

Q. When you passed these men where did you go? A. I went into my room and locked the door.

Q. Did they say anything to you when you passed them? A. No, sir.

Q. Didn't say anything? A. No, sir.

Q. Did you see anything in their hands. A. I didn't see.

Q. How was the light in the hallway? A. There is no light on the top of the stairs; there is light enough just about to find your way.

Q. And after you got in your room you closed the door? A. Yes, sir.

Q. Locked? A. Yes, sir.

Q. Was your wife in there? A. Yes, sir.

Q. What happened then? A. I finished dressing.

Q. Did you hear any shots? A. While I was dressing I heard like the door open and there was shooting.

Q. How long after you locked the door did you hear the shooting? A. About a minute.

Q. How many did you hear? A. I could not say.

Q. Did you hear more than one? A. Yes, sir, more than one.

Q. Did you hear more than two? A. There was more than two, I could not say just how many but there were quite a few shots.

Q. Were they in quick succession? A. Yes.

Q. What did you do after you heard the shots? A. The wife was running to the window and I was putting her in a safe place by the chimney.

Q. Then what happened? A. After the shooting there was a knock on the door.

Q. How long after the shooting was there a knock on your door? A. Well, not a minute, not quite a minute, half a minute or so.

Q. And what did you do? They asked me to open the door, he wanted to see if there was any more in.

Q. What was said after the knock on the door by the person outside? A. He said, "Open your door, I want to see is any more in there."

Q. Wanted to see if there is any more in there? A. Yes.

Q. That is what was said, was it? A. Yes.

Q. And what did you do? A. I opened the door.

Q. And who was there? A. Miller.

Q. What did he have in his hand? A. Two guns.

Q. Two guns? A. Yes, sir.

Q. Which hand? A. One in each hand.

Q. One in each hand? A. Yes.

Q. You testified on your direct examination that he had two guns in his hand, did you mean that? A. Well, I meant in his hands if I said that.

Q. One in each hand? A. Yes, sir.

Q. What did he do with them, if anything? A. Why, he had them on me.

Q. What did he say? A. He didn't say no more, just looked around the room and said he

would not harm us, and went back in his apartment.

Q. And went back in his apartment? A. Yes.

Q. Did you see the defendant Mae Miller on these premises up to that time? A. I didn't see her all the way through.

Q. Did you see her there at any time? A. No, sir.

Q. That is, from the time that the—I withdraw that. From the time that the door bell rang as you went downstairs and admitted the officers until after the shooting was all over you did not see Mae Miller? A. No, sir.

Q. Did you know these men at the door, after the bell was rung and you opened the door, did you know they were police officers? A. I knew one was a police officer, he was in uniform.

Q. And you knew that by the fact that he was in uniform? A. Yes, sir.

Mr. McCarthy: That is all.

RE-DIRECT EXAMINATION by Mr. McMahon:

Q. Did you see Miller from the time you opened the door and after the shooting until the time he appeared at your door and knocked on it? A. No, sir.

Q. Where was your wife when Miller came into your room? A. In the room.

Q. What part of the room? A. By the bed, getting dressed.

Q. You said something on cross examination that she was by the chimney? A. After the shooting, yes, I put her behind it.

Q. After the shooting? A. When Miller came into the room?

Q. Yes. A. She was in a corner where I put her

Q. Can you indicate on the plan where your wife was? A. (Indicating over here).

Mr. Vickers: Indicating a point behind what is marked dresser, in the front room on the second floor, witness putting a lead pencil cross there.

The Court: I want to ask you a question. You said in answer to a question that the three rooms in the back part of the second floor in your house were occupied by Frank Miller and his wife?

The Witness: Yes.

The Court: That is your way of saying it was Frank Miller and his wife lived there?

The Witness: Yes, sir.

The Court: Who is Frank Miller?

The Witness: He is over here.

(Indicating).

The Court: Where?

The Witness: By the two officers.

The Court: Sitting on the bench?

The Witness: Yes.

The Court: And who do you mean by his wife?

The Witness: The woman sitting on this side between the woman and the officer.

The Court: Would you point her out?

The Witness: Right here.
The Court: Go down and put your hand on her.

(Witness puts hand on defendant Mae Miller.)

Mr. Drewin: We will admit the identity.

(Witness excused.)

LILLIAN KAERTH, sworn:

DIRECT EXAMINATION by Mr. McMahon:

Q. You are the wife of the last witness? A. Yes, sir.
Q. And live with him at 19 Manhattan Avenue? A. I do.
Q. You lived there the 22nd of May, 1923? A. Yes, sir.
Q. And were there any tenants in your house at the time? A. Only Miller and his wife.
Q. Do you remember the 22nd day of May, 1923? A. I do.
Q. About half past five in the morning where were you? A. In bed.
Q. How were you awakened? A. By my alarm clock.

Q. What time did that clock go off? A. 25 minutes after.

Q. Did you see the alarm clock? A. I turned it off.

Q. And after the alarm clock went off did anything occur after that? A. The door bell rang.

Q. About how soon after the alarm clock went off? A. About five or seven minutes, something like that.

Q. After the door bell rang what happened? A. my husband went downstairs, he got his trousers on and went downstairs and opened the door.

Q. Where did you stay? A. Up in my room.

Q. And do you know anything about the people who were at the door? A. I didn't see anybody.

Q. Did you hear any noise in the hall? A. No noise at all.

Q. Did your husband come back to your room? A. He came up in my room again and I asked him what was the matter and he said there is somebody after Miller.

Mr. McCarthy: Objected to and ask that it be struck out.

The Court: It may be stricken out.

Q. Don't say what your husband said. When your husband came in the room did you hear any noise in the hall? A. No.

Q. Did you hear any noise in any part of the house? A. Not until we were getting dressed and we heard the shooting.

Q. When did you hear that? A. A few minutes after my husband came in the room.

Q. And how many shots did you hear fired? A. I could not say.

Q. Did you hear any noise but the shooting noise? A. None at all.

Q. Did you hear any voices in the hallway before your husband came in the room? A. I didn't hear anybody.

Q. Did you hear any men come up to your doorway, opposite your room? A. I didn't hear anybody until my husband came up.

Q. After you heard these shots what did you do? A. I was going to the window, I didn't know what was happening, and my husband took me and sat me down in the corner near the chimney.

Q. Where is the chimney in your room? A. Just to the left of the door as you go in.

Q. By the dresser? A. Yes, sir.

Q. Well, after the shooting was over and you heard no more noise did you hear a knock on your door? A. No, I didn't hear the knock, all I heard after the shooting was my husband told me to come downstairs.

Q. Were you in the room when your husband opened— A. I was down in the corner.

Q. Down in the corner? A. Sitting where he put me.

Q. Did anybody come to your door and knock? A. I didn't hear anything.

Q. Did you hear anybody come into your room? A. No.

Q. Well, what was the next thing you remember? A. He brought me downstairs and I saw the man, the plain clothes man in my front room on his face, then I walked into the dining room and saw the policeman in uniform in the dining room.

Q. Where was he in the dining room? A. Right by the door.

Q. Dead? A. I guess he was dead, yes.

Q. Was he in a pool of blood? A. He was cov-

ered with blood.

Q. And what else did you do? A. I didn't do anything more, I went right in the kitchen and stayed there until they brought me out and told me to go in next door, they were going to use a tear bomb.

Q. Who told you that?

Mr. Drewin: Objected to.

The Witness: One of the officers.

Mr. Drewin: I ask that the answer be stricken out.

The Court: It may be struck out.

Q. Did you see Mae Miller there? A. I saw nobody at all.

Q. Didn't see Mr. Miller? A. No, sir.

Mr. McMahon: Cross examine.

CROSS EXAMINATION BY MR. DREWIN:

Q. You say that this alarm clock went off at what time? A. Twenty-five minutes after five.

Q. And how long after that was it that your husband went downstairs in response to the door bell? A. About five or seven minutes.

Q. And how long was she down there before returning to you in your room, the front room? A. Well, it didn't seem above five minutes.

Q. Was it as long as five minutes? A. I could not say exactly.

Q. And at that time, of course, you were not wide awake in your room, were you? A. I was dressing.

Q. Did you hear anybody come upstairs before your husband came up? A. No, sir, I didn't.

Q. You did not? A. No, sir.

Q. Did you hear any voices outside on the landing? A. I didn't hear anything, I was waiting for him to come up.

Q. Did you hear the defendant Mae Miller, did you hear her say anything about waiting until she got some clothing on? A. I heard her asking, "Wait until I get some clothes on."

Q. Did you hear anything else? A. Not a word.

Q. All you heard was her voice saying, "Wait until I get some clothes on?" A. That is all.

Q. How long after that was it that you heard the shot fired? A. Well, it didn't seem but a few minutes to me.

Q. And you cannot tell us how many were fired? A. I have not the slightest idea.

Q. Did you hear anything that immediately followed the shots, anybody going downstairs? A. No, I didn't hear it.

Q. Did you hear a knock at your door after the shots were fired? A. I didn't hear it, I was sitting there and I didn't hear it.

Q. You went downstairs after the shots were fired, didn't you? A. My husband told me to come on downstairs.

Q. How long was that after the shooting? A. Well, it all seemed so quick that I could not tell you.

Q. It happened so rapidly, did it? A. Yes, sir.

Q. You went downstairs and you went into the dining room? A. The parlor first.

Q. The parlor first? A. Yes.

Q. And went into the parlor and into the dining room? A. Yes, sir.

Q. Which is in the rear of the parlor? A. Yes.

Q. On the first floor of the house? A. Yes, sir.

Q. Your husband was there with you? A. He was with me.

Q. Now, I understood you to have said on your direct examination you did not see Mae Miller that morning? A. No, I didn't see her.

Q. Isn't it a fact that after you went downstairs and went into the rear room that she came downstairs and stood at the entrance to the parlor and called out your name? A. I never saw her.

Q. Just a minute, and asked if she could come into the dining room where you were and you said to her, "Isn't it terrible? I never thought anything like this would happen in my house?" You said that, didn't you? A. If I did—I didn't know anything I said.

Q. Do you remember having said this? A. I don't remember it. I don't remember even seeing Mrs. Miller.

Q. You don't remember telling Judge McCarthy and me that you said when your husband brought you downstairs and saw these men lying there, you never thought anything like that would happen in your house? A. When I saw the men to my husband I said that.

Q. Said what? A. I said, I never thought anything like that would happen in my house.

Q. Isn't it a fact that Mae Miller was present when you said that downstairs and she said to you, "Yes, and I never thought anything like this would happen in my life?" A. Why, no, sir.

Mr. McMahon: Objected to on the ground it is improper cross examination.

The Court: It has been answered. She has denied it by saying no.

(Witness excused.)

WILLIAM SCHERMER, sworn:

DIRECT EXAMINATION by Mr. McMahon:

Q. What is your position? A. Clerk, City Clerk's Office.

The Court: What city?

The Witness: Jersey City.

Q. What book is that you have with you? A. Official Oath Book.

Q. Can you turn to the official oath taken by Patrolman Black?

Mr. Drewin: I object to this, there is no testimony as to the official custody—

Q. Where did you get this book? A. The City Clerk's Office Vault.

Mr. McCarthy: We don't want to quibble on this—

The Witness: This is the oath of John J. Black.

Mr. McCarthy: Is this the police officer who was killed?

The witness: To my understanding, yes.

Mr. McCarthy: He does not know.

Mr. McMahon: I don't want to show it for that reason.

Mr. McCarthy: If you can assure that that is the record and he was a police officer of Jersey City, we will not quibble. We will admit it.

The Court: It is admitted that the book produced by this witness is the record of the Police Department of the City of Jersey City—

Mr. McCarthy: It is the official oath book of the City Clerk.

The Court: And contains the oath of—

Mr. McCarthy: John J. Black.

Mr. Vickers: Of the Police Department, page 21, of the oath book. And that we have the witnesses here who if sworn would testify that they have the department records and that Black, in 1916 was appointed a police officer and continued to act as a police officer up to and including the 22nd of May, 1923.

Mr. McCarthy: We will admit that if they were produced, they would have so testified.

(Witness excused.)

HARRY OTIS, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. What is your occupation? A. Lieutenant

of Detectives.

Q. What City? A. West New York.

Q. And on the 22nd of May of this year were you on duty in the neighborhood of 19 Manhattan Avenue, in Jersey City? A. Yes, sir.

Q. Now, then, at that day and at that place, were you injured? A. Yes, sir.

Q. And since that time where have you been? A. Jersey City Hospital.

Q. Up to today? A. Up to today.

Q. Now then, with whom were you on duty at this house 19 Manhattan Avenue, Jersey City on the 22nd of May? A. Sergeant Black, Detective Canallo, Detective Walton, Patrolman Weir and another patrolman, I do not know his name.

Q. Were you with all among the officers who rang the bell on 19 Manhattan Avenue and caused this witness Kaerth who has been a witness here today to come to open the door? A. Yes.

Q. And who was there among you who had the picture that has been spoken of? A. It was I.

Q. I show you a postal card or card containing a picture and ask you if that is the picture you had? A. It has a tear in it and a number on the other side in ink.

Q. Then, identifying it as you do, would you say this is the picture you had? A. Positively.

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

(Marked Exhibit S-9 for identification.)

Q. By the way, you have referred to a number on the other side of this card, E. 5443, what does that stand for in the course of business and experience? A. That is the New York Check Number.

Q. New York Check Number? A. Yes.

Q. From where did you obtain this card on or before the morning of May 22nd?

Mr. McCarthy: Objected to.

The Witness: My captain gave it to me.

Mr. McCarthy: Don't answer. I object to it as incompetent, irrelevant and immaterial.

Mr. Vickers. I withdraw it.

Q. Well, are you the police officer who has been referred to by the witness Kaerth as having made some inquiry concerning the man represented by this picture on this morning of May 22nd? A. Yes, sir.

Q. Being admitted to the house at 19 Manhattan Avenue together with one or more of your brother officers what happened? First of all, what did you do, stay downstairs or go upstairs? A. Well, we rang the bell.

Q. I mean after you were admitted, after you told this man your business and he let you in, did you stay downstairs on the first floor or what did you do, stay downstairs or go upstairs? A. We went upstairs.

Q. Well, will you describe how you posted yourselves when you went upstairs with respect to the number which has been spoken of here as the entrance to the Miller apartment? A. Well, Black went up first and I was second and Weir was third. He was behind. And we had our guns out going upstairs and Black said to me "Better put our guns away as if he sees a gun he will shoot probably" so—

Q. Did you personally, as a matter of fact, put your gun away? A. Yes.

Q. Do you know whether Black and Weir put their guns away? A. Yes.

Q. Following this remark made by Black? A. Yes. I seen Black put his in his overcoat pocket and I put mine in my holster and I don't know what Weir done with his.

Q. When you got upstairs on to the landing there with respect to this door where did you post yourselves? A. Well, when Black asked—when Black knocked at the door—

Q. Wait a minute, before you get to that. I want to know what position you posted yourselves in when you got upstairs, never mind about what Black did now. Were you to the left or to the right of this door as you faced it, and in the direction in which it opens? A. I was on the top landing.

Q. That is the hall upstairs, is it? A. Yes, sir.

Q. And were you to the right or were you to the left of the door? A. I was to the right where the knob is.

Q. Where the knob of the door is? A. Yes.

Q. Would that bring you with your back against the wall and facing the direction of— A. My back against the wall and facing downstairs.

Q. With the door knob of the Miller apartment towards your right hand, is that right. A. Yes.

Q. Now, then, being in that position, where with respect to you was Black? A. Black was on the left side of the door, one foot on the top landing and the other foot about two steps below, close up to the wall.

Q. And at that time what did Black or you or anybody else there do? A. Black knocked at the

door.

Q. What happened? A. And someone said, "Who is there?"

Q. Some one said— A. Some woman said, a woman's voice.

Q. Said, "Who is there?" A. And he said, "Is Mr. Miller in?" And she says, "No." He said, "We are police officers from Police Headquarters, and you will do."

Q. Wait a minute. Said, "Police Officers from Police Headquarters?" A. Yes, sir.

Q. You will do?" A. Yes, so she said, "Wait a minute."

Q. And what response did she make? A. "Wait a minute and I will get some clothes on."

Q. How long after that did you wait before anything happened? A. Well, it seemed to me about three minutes anyway.

Q. Now, then, what was the next thing that happened? A. Well, she opened the door.

Q. She, meaning who? A. Miss Miller, Mrs. Miller.

Q. Meaning this woman? A. Here, yes, sir.

Q. This woman defendant, is that right? A. Yes, sir.

Q. And when she opened the door what happened then? A. Well, I looked towards Black to see what he was going to say, and no more than I looked at Black two shots were fired, bang, bang, like that.

Q. And who, if you know, fired those two shots? A. Eigan, as I know him, by Eigan.

Q. By the way, when you speak of this man as Eigan, where did you get your knowledge of his name, if you have any knowledge? A. Well, I got it first through Lieutenant—

Q. You mean you got it through police sources?

A. Yes, sir.

Q. And is this card which you have shown, which is marked Exhibit S-9 for identification, is that one of the sources of your information for calling this man defendant by the name of Eigan? A. Yes, that is one.

Q. What other information have you, if anything, from police sources for calling this man by the name of Eigan? A. Well, I got my information from certain persons and they know him by the name of Eigan.

Q. By the way, have you seen this man whom you call Eigan and whom you say is this defendant at the Bar here, have you seen him before this day, the 22nd of May? A. Yes, sir.

Q. Where? A. I seen him on Hudson Avenue and 14th Street and I seen him once—

Q. And at that time had you— I withdraw that. When was it you saw him? A. I don't know just the day, we were looking for him then.

Q. About how long before this, for the purpose of fixing the time? A. Well, say three weeks.

Q. By the way, when you say that we were looking for him, who do you mean? A. Well, Captain Kerth.

Q. Who is Captain Kerth? A. Captain of the West New York Police Department.

Q. And when you say we were looking for him, were you acting under instructions from Captain Kerth? A. Yes, sir.

Q. Describe how you saw this defendant Eigan or Miller at the time, so that you now say you can identify him as having seen him on the 22nd of May? A. Well, at the time I didn't see his picture, I had a description—

Q. Listen to me. On the 22nd, this day of the shooting, that date ought to be fixed in your mind,

as well as on your body, on this 22nd of May, you say you saw this man Defendant Miller, tell us under what circumstances, how you saw him, what part of him you saw? A. I saw him when he done the shooting.

Q. How? A. When he fired the two shots I saw his face. I just seen a profile of his face when he peered out.

Q. From where? A. From behind the door-jamb.

Q. In other words, by reference to this diagram, there is a place marked here scuttle, this attic space and a door leading off opening from right to left into the bedroom of Miller. Now, can you come down here, Otis, and show where it was where you were standing with regard to that door which has been identified as the bedroom of Miller? A. Standing here (indicating).

Q. That would be in a position here at the end of the word scuttle? A. Yes.

Q. And was it to this wall your back was turned? A. Yes, sir.

Q. And when you say he looked out or peered out, you mean out of this room? A. Yes, he was right here.

Q. Indicating a space between the open door and the wall? A. Yes. (Witness returns to stand.)

Q. Either before or at the time of the firing of the two shots did you see this woman defendant there? A. I seen her when she opened the door.

Q. And after the two shots were fired? A. She came—

Q. Where did you see her again? A. I seen her again, I seen just about half of her come to the door to look down, and she fired a shot down the stairs.

Q. You say she fired a shot down the stairs? A. Yes, sir.

Q. At that time did you hear this woman say anything? A. Well, as she fired the shot I had my gun pointing waiting for him to come out and she seen me and she jumped back and she said "There is another one right here, get him."

Q. Was that before she fired the shot or after she had fired the shot? A. After she fired.

Q. After she fired a shot, she said, "There is another one out there," and she said, "get him?" A. Yes.

Q. And do you know where she went, what part of the room she went to after that? A. She went across to where Sage was, across the room that way.

Q. Can you say whether or not that is in the direction of the place marked wardrobe and dresser here. A. Yes, right across there. I could not see where she went because the door was open there.

Q. Did you see her go in that direction? A. In that direction.

Q. When this woman having fired, as you say, went across the room, did they expose your position more to her than you had been before, or less? A. Oh, yes, sure, that is why I jumped down.

Q. Did it expose it more? A. Yes.

Q. And you being then exposed, what did you do? A. I jumped to the next landing.

Q. Jumped to the next landing? A. Yes.

Q. Meaning from the position here across this hall down these steps, is that right? A. Yes.

Q. And what happened to you then? A. I had the gun in my hand and I wanted to turn, and I don't know what happened, I was hit, but I seen Sage half way out the door with a gun in his hand,

and that was the last.

Q. When you say you were hit, did you at the time know you were shot? A. No, I didn't know I was shot.

Q. And what was the next thing that you are conscious of having happened? A. Well, I was on my hands and knees.

Q. Where? A. Down at the bottom of the stairs.

Q. First floor? A. The first floor.

Q. And in what part of the first floor with regard to the door entering into the front parlor or living room? A. My head was towards Blackie's feet.

Q. We have not come to Blackie yet. Can you say with regard to the parlor door where was your head? A. Towards the front room.

Q. The door of the front room, right? A. Yes.

Q. You say you were on your hands and knees? A. Yes, sir.

Q. Did you then know you were shot? A. I didn't know. I started to crawl, and I kind of—

Q. Did you know you were shot? A. Yes, I know I was shot, yes.

Q. You know you were shot but did you know you were shot at the time? A. Yes, I knew I was shot.

Q. Were you bleeding? A. Well, I could not say whether I was bleeding at the time.

Q. Well, could you feel whether you were bleeding or not? A. No.

Q. Then, you crawled, you say, on your hands and knees into this room, did you? A. Yes.

Q. Into the front parlor? A. Yes.

Q. And of entering that front parlor, what did you find? A. I seen Sergeant Black lying on his face, a pool of blood around him.

Harry Otis—Direct.

Q. I show you picture marked Exhibit S-5, and ask you, can you tell us whether or not that was the position in which Black's body lay at the time you crawled in there on your hands and knees? A. That is exactly the way he was lying.

Q. And this part here which is marked like a stain, do you recognize that as being blood as it was there when you were there? A. I seen a big spot of blood coming out alongside his body.

Q. Was there any sign of life about him at the time? A. All I could hear was his breathing.

Q. How was he breathing? A. I could hear the breath going like this (indicating).

Q. Like a snore? A. Yes, like a snore.

Q. What is the next thing you did? A. Well, I felt him, shook him and I seen he was—he looked pretty well hit, and I crossed to a table and I heard a noise—

Q. When you say a table, you mean a table in this room? A. Well, a table or a chair, I do not just remember.

Q. Something in this room, some piece of furniture? A. Yes.

Q. What did you do? A. Then I heard a noise in the rear, I heard a groaning, a hollering, and talking, and I got up on my feet.

Q. Wait a minute, Officer Otis, when you say in the rear do you mean in the next adjoining room? A. The next room.

Q. The next room, and what did you do? A. I got up and hobbled over there as best I could.

Q. Into the next room? A. Yes.

Q. What did you see there? A. Weir was there rolling over and over on the floor, kept moaning and he—

The Court: You mean Officer Weir?

The Witness: Yes, sir.

The Court: The police officer who had gone upstairs with you?

The Witness: Yes, sir, the uniformed man.

Q. I show you pictures Exhibits S-6 and 7, being for identification, and ask you whether you can tell us whether those pictures indicate approximately the position in which you found Weir rolling as you say you did at the time? A. Well, I never seen him still, I mean when I seen him he was rolling.

Q. All right, does that indicate approximately the position, that is to say was it about there that Weir was? Can you identify it by the furniture or any surroundings there that that was about the place where you saw him? A. He was in line—

Q. If you cannot do it just say so? A. No, sir, I cannot because the door—

Q. All right, that is all there is to it. Do you know whether Weir was dead or alive as you entered the room?

Mr. McCarthy: Objected to.

The Witness: He was alive, he was talking to me.

Mr. McCarthy: It calls for a conclusion.

The Court: He is asking him if he knew.

Mr. McCarthy: But he is asking if he was dead or alive.

Mr. Vickers: I assume that while this man was rolling he was alive. Now, then, after that I want to know whether he remained in there when he died. I withdraw the question.

Q. Did you speak to Weir, or did Weir speak to you at the time? A. Yes, sir.

Q. What did he say to you or you to him?

Mr. McCarthy: Objected to on the ground it is irrelevant, incompetent and immaterial, anything said by a third person not in the presence of the defendant.

Mr. Vickers: We think it is a material part of the res geste. It is at the scene, at the time of the crime.

The Court: I would say it is part of the res geste I will allow it.

Mr. Drewin: Exception.

Hyman Lazarus, J. (L.S.)

(Repeated by Stenographer) What did he say to you or you to him?

A. When I went in the room and I seen him rolling, I started to talk to him and I said, "What is the matter here, were you hit?" He said, "She got me, I am a goner, good bye Otie."

Mr. Drewin: Just a moment, at this time I want to ask that the statement made by the witness as having been made by Weir, and so far as it concerns the defendant, Mae Miller, be stricken from the record.

The Court: That is denied.

Mr. Drewin: Exception to your Honor's ruling.

Hyman Lazarus, J. (L.S.)

The Court: At this point I am going to declare a recess.

(Recess until 2:00 P. M.)

TRIAL RESUMED.

Q. After you had spoken to Weir, what happened? A. When I was talking to Weir, I heard footsteps on the stairs.

Q. Were they light footsteps or heavy footsteps? A. I could not just say. I heard the stairs creaking as though somebody was coming down.

Q. Did you learn who it was that then came down the stairs? A. Well, I got up then, I was kneeling beside Weir.

Q. And kneeling beside Weir in the back room? A. Yes, sir.

Q. And you got up? A. Got up on my feet.

Q. And what happened? A. I got behind the doorjamb, I had my gun in my hand.

Q. When you say behind the doorjamb, do you recall the door in this room marked, dining room? A. It was the room back of the parlor.

Q. This room up here, marked dining room? A. Yes, sir.

Q. Where Weir's body was? A. Yes, where Weir's body was.

Q. What next? A. Then I backed out and I seen Mrs. Miller come down.

Q. This woman defendant? A. Yes, sir.

Q. What did you do? A. Then I heard somebody upstairs say, "Is there any more of them

downstairs?"

Q. And? A. And she said—

Q. Wait a minute, what was that, a male or a female voice? A. A male voice, the same voice that hollered before that.

Q. What? Take your time now, let's get it straight, the same voice as what? A. Well, when he fired two shots he hollered, get back there, you cocksuckers, he said.

Q. Using that language? A. Yes, sir.

Q. And you say the same voice that said that at the time the first two shots were fired, was the voice you now heard as you saw the woman in the room downstairs? A. Yes, sir.

Q. And what was said at that time? A. He said, "Any more of them down there?"

Q. What if anything, did this woman say? A. She said, "My God, they are lying dead all over the place."

Q. My God, they are laying dead all over the place? A. Yes, sir.

Q. Then, did you say anything to this woman? A. Well, then I seen she didn't have any gun or anything—

Q. What did you do? A. She didn't have anything in her hand and I hollered at her, I said, "Get upstairs or I will blow your head off," and she let out a scream and went upstairs.

Q. What did you do at the time or just after she left the room? A. I had the gun in my right hand but I could not use it, because I was kind of numb, so I put it in my left hand and fired two shots through the door.

Q. What kind of a gun did you have? A. A Colt Automatic.

Q. I show you an automatic and ask you if that is the gun you had at the time? A. That is my

gun, I know it by the handle here.

Q. You recognize that as your gun? A. Yes, sir.

Q. And with that gun then what did you do? A. I fired two shots through the door to scare them, to let them know I was there.

Q. Now, the door to which you refer, is that this door? entering the living room from the hallway on the first floor? A. Yes, sir.

Q. And you say through this door you fired two shots? A. Yes, sir.

Q. Holding this gun in your left hand? A. Yes, sir.

Q. What calibre is this gun? A. .32.

Q. Did the person who spoke upstairs, or on the stairs just before you fired the shots and just before the woman left the room, did that person come downstairs? A. About half way down, I think he met her on the first landing going up.

Q. Then, did you hear that person go upstairs again? A. Yes, I heard them both going upstairs.

Q. By that you mean the woman and the male person who made the remark or asked the question whether there was anybody more downstairs? A. Yes, sir.

Q. You did not go back upstairs then, did you? A. No, sir, I stood by that door there.

Q. The door in the parlor or the living room, downstairs? A. Yes, sir.

Q. And up to what time did you remain there? A. Then I heard, — Weir was calling me —

Q. Who? A. Weir, and I went back to where he was groaning and I could not understand what he was saying.

Q. Then, did you remain downstairs until other policemen came from outside? A. Then I heard

footsteps again on the stairs the second time, and it was the landlady.

Q. This Mrs. Kaerth? A. Yes, sir.

Q. Who has been on the witness stand? A. Yes, sir, she was at the door.

Q. Then, did the police reserves come? A. When she was at the door the police were knocking at the door and trying to get in, I didn't know who it was and I hollered I would shoot and then she said she was the landlady, and she opened the door for the police.

Q. Then the police reserves came in? A. Yes, sir.

Q. And where were you taken then? A. Then I think the sergeant got my gun off me.

Q. Who was the sergeant? A. Well, I could identify him, he had a little bit of a scar on his face, a sergeant or a lieutenant, I am not sure.

Q. Is that the man? Come over a little more. Yes, that is the man. No, it is another man, there was another sergeant with you?

Q. All right, never mind, you cannot identify this man? A. No, not this man.

Mr. Vickers: Cross Examine:

CROSS EXAMINATION by Mr. Drewen:

Q. What time in the morning would you say it was that you went to this house at 19 Manhattan Avenue? A. What time in the morning?

Q. Yes. A. I could not exactly say.

Q. Well, what is your estimate? A. Well, it was between five and six, I would say.

Q. About half past five or twenty minutes to six? A. Yes, half past five or twenty minutes to six.

Q. And who rang the bell at the entrance to Mr. Kaerth's house? A. Sergeant Black.

Q. And all that was said to him, as I understand it, was that he was asked who owned the car that was standing outside, is that right? A. Yes, sir.

Q. And he was shown the picture, and asked if that man was the man that lived upstairs? A. yes, sir.

The Court: Don't nod your head, please, reply because we cannot get a nod on the record.

Q. Then you officers proceeded upstairs? A. Yes, sir.

Q. Now, those stairs are quite narrow it has been testified they are about two feet wide or two and one-half feet wide? A. I know they are very narrow.

Q. And you go up one flight of stairs consisting of about eleven steps, that is true, is it? A. About that.

Q. Then there is a landing at the top of those eleven steps, a very small landing, is that right? A. Yes, sir.

Q. Then you proceed to the right on another small flight of steps consisting of about four steps, that is right? A. Four or five steps.

Q. There and then, at the end of thes four or five steps constituting the second flight there is another small landing? A. Yes.

Q. And this small landing at the top of the four steps is the landing upon which you stood? A. Yes, sir.

Q. Now, that top landing makes a very cramped inclosure, doesn't it? A. Yes, it is a small place.

Q. So that this top landing is boxed off by three sides, one side being the wall, the other side the door of the Kaerth room, the other side the door of Sage's room? A. Yes, sir.

Q. And as I understand it, you stood with your back to the wall, that is right? A. Yes, sir.

Q. Near the knob of Sage's door? A. Yes, sir.

Q. So that this, being the wall, this table being the wall, you stood about here, Sage's door knob being about where my hand is? A. That is about right.

Q. Right here to the left of you was Kaerth's door? A. Yes, sir.

Q. That is right, is it? A. Yes, that is right.

Q. Now then, I represent you, Officer, standing there; where was Black standing? A. Black was standing on the other side, that is, the left hand side of the door, the knob is on the right hand side when I am facing the door.

Q. Black had one foot on the landing and the other foot about the second step down? A. One step on the landing, or the second step, I am not sure, I would not be sure of that, but he was up close to the wall.

Q. You were up close to the wall, as I understand, here?

Col. Vickers: Black.

Q. Was Black close to the wall, or you? A. You asked me where Black was standing.

Q. Yes, where Black was standing, but first let's get where you were if there is any mistake about it; go slower, there is no need of hurrying. You were standing here with your back against the wall, with the knob of Sage's door right about here where my hand is? A. Yes, sir.

Q. And Black stood about like this, is that right? A. Well, he stood—he was off me—

Q. Toward this direction? A. No, he was over close to the door.

Q. He was over close to the door? A. Yes, sir.

Q. To the left of the door, you being to the right of the door as you faced it from the landing? A. Yes, sir.

Q. And you say, as I understand it that Black had one foot on the landing and one foot on the first or second step? A. That is about right.

Q. That is right, isn't it? A. Yes.

Q. Now, you were not in uniform, were you? A. No, sir.

Q. And Black was not in uniform? A. No, sir.

Q. Officer Weir was the only man in uniform, was he? A. Yes, sir.

Q. How far below Black, the man who stood with one foot on the first or the second step was Weir standing? A. Well, he stood about behind him, but he was over this way on the stairs.

Q. Well, how far behind him or below him on the stairs? A. Right close up to him.

Q. On the next step below him? A. The third or fourth step.

Q. The third or the fourth step down? A. He was about three steps—he had one foot on the third step and one foot, I guess, on the next step, kind of leaning over, watching what was going on.

Q. We are speaking of Weir now? A. Yes, sir.

Q. Now, being in that position, who knocked on the door? A. Black knocked on the door; he reached over and knocked on the door.

Q. He reached over and knocked on the door? A. Yes, sir.

Harry Otis—Cross.

Q. And there was a response, as I understand, a woman's voice? A. Yes sir.

Q. And this voice asked who was there? A. Yes, sir.

Q. Now, what else happened? A. Well, Black said, "Is Mr. Miller in," and she said, "No." He said, "We are from Police Headquarters, police officers," and he said, "You will do."

Q. "You will do?" A. She said—Mr. Black said, "You will do" to her.

Q. You will do, to her? A. And she said, "Wait a minute until I get dressed."

Q. Then you heard nothing after that, did you? A. What is that?

Q. Nothing from within the room after she said I will get dressed? A. No.

Q. How long after that was it that the door opened? A. I said about three minutes.

Q. Three minutes. You men waited there in perfect silence all that time? A. Yes, sir.

Q. Who was the door opened by? A. By Mrs. Miller; she opened the door.

Q. How wide was the door open? A. Well, I should say about three feet.

Q. Three feet? A. Maybe four feet.

Q. Who appeared in the doorway? A. Mrs. Miller stood in the doorway and I looked toward Black, waiting for him to say something, and two shots were fired.

Q. How long did you wait for Black to say something? A. Just looking for him, I turned my head and two shots were fired.

Q. In the space of a second? A. Yes, sir.

Q. A very brief space of time? A. Yes, sir.

Q. And you say two shots were fired? A. Two shots, positively.

Q. Both those shots took effect, didn't they?

A. I don't know if they took effect, I could not say that.

Q. Isn't it a fact that—immediately after the firing of the two shots—I withdraw that. What space of time elapsed between the first and the second shots? A. Bang, bang.

Q. Instantaneously, wasn't it? A. Yes, sir.

Q. What was the first thing that happened after this bang, bang, that you have spoken of? A. Mrs. Miller stepped to the door, but she was not in full view, just had a profile of her and I seen a flash of a gun go down the hallway and I looked down and I seen Weir going down with his back towards me.

Q. Well, after the bang, bang was fired, what did Black do? A. Black turned and went down.

Q. Black turned and went down? A. Yes, sir.

Q. How long after the first two shots were fired did Black turn and go down? A. Right away.

Q. Instantly? A. Yes, sir.

Q. And after Black went downstairs did you see what Weir did? A. No, I did not, because I pulled for my gun then, to get my gun out.

Q. And where was Weir when Black turned to go downstairs? A. I didn't notice.

Q. When did you next see Weir after Black turned to go downstairs? A. After I seen her fire I seen his back.

Q. You saw Weir's back? A. I seen him going down.

Q. Did you see Weir going down? A. Yes, sir.

Q. How long was this third shot fired after the first two were fired? A. Just a few seconds.

Q. A very brief space of time? A. Yes, sir.

Q. How long after Black turned to go down the stairs did you see Weir walking down? A. It is seconds not minutes.

Harry Otis—Cross.

Q. Weir was walking down with his back towards you, no question about that? A. All I seen was his back.

Q. And you saw him in the act of proceeding downstairs? A. He must have been because his back was towards me.

Q. Had he turned the first landing? A. I could not say that.

Q. Where was Black when Weir was going downstairs? A. I don't know.

Q. Out of sight? A. Yes.

Q. Out of sight entirely? A. Yes, sir.

Q. All this time you were standing with your back to the wall and the knob of the door, if the door were closed, to Sage's room close to you? A. Yes, sir.

Q. How wide was Sage's door open while these three shots were being fired? A. Well, three feet, maybe four.

Q. You mean the door was open; was it ever closed again while you were there? A. No.

Q. And how long after the three shots were fired, was it that you proceeded to go downstairs? A. Just seconds.

Q. A few seconds. How far down had you gotten— A. I jumped to the next landing because she ran across the floor and the door hid her. I don't know where she went to, the end of the door hid her from me.

Q. You jumped down to the first landing? A. I jumped because I thought she was going to take a shot at me, I was in full view of her.

Q. You thought she was going to take a shot at you? A. I figured I was standing in full view, that is why I jumped down to the next landing.

Q. Did she have a gun in her hand? A. Yes, sir.

Q. At the time? A. Yes, sir.

Q. There was a gun in his hand at the time? A. Whose hand?

Q. Sage's hand? A. I didn't see him then.

Q. Where was he at the time? A. Must have been behind the doorjam.

Q. Let's get this clear. The first two shots were fired by Sage? A. Yes, positively.

Q. The third shot was fired by the woman? A. Yes, sir.

Q. The fourth shot fired by who? A. Sage.

Q. The fourth shot is the shot that hit you? A. Yes, sir.

Q. How do you know Sage fired the fourth shot? A. Because when I hit the landing my head was turned and as he shot at me I seen him pulling back in the doorway, but I didn't know I was hit.

Q. Where was the woman at the time? A. I could not see her, she must have been on the other side of the room.

Q. Could you see her before you jumped to the first landing? A. Yes, I seen her run across, that is why I jumped.

Q. Ran across where? A. Across the room.

Q. Where was—I withdraw that. I represent you standing here at this open doorway. I am looking into the room at my right. Now tell us just how you saw this woman move in the room? A. I was watching, I had my gun in my right hand at the time and I could not very well get around—

Q. You had your gun in your right hand? A. Yes, sir.

Q. While you were standing here at the top landing? A. I had the gun, just got it out when she came to the door and shot, and I pulled the gun up and she hollered, 'There is another one, get

him." She pulled alongside of him and suddenly she ran across the room back of the door.

Q. And she had a gun in her hand at the time? A. I didn't see a gun in her hand when she ran across the room, I could not say that.

Q. So that in your presence, Mr. Otis, two shots had been fired that caused your brother officers to turn and go downstairs?

Mr. Vickers: Objected to, calling for a conclusion. This witness cannot say what caused these men to go downstairs.

Mr. Drewen: I withdraw the question.

Q. While you were standing there, two shots had been fired from that room you say by Sage? A. Yes, sir.

Q. And immediately after the firing of those two shots by Sage two of the men with you there turned and went downstairs? A. No, I didn't say that.

Q. You did not say that? A. No, sir.

Q. Well, what did you say with regard to them? A. I said, I seen Black turn when she came to the door, I didn't see Weir at all, but when she came to the door I seen a gun flash—

Q. Never mind about that, what I am trying to find out Mr. Otis, I don't want to be hard on you, I am just trying to get the truth out of this thing—what I want to find out Mr. Otis is this: You stood there in the position that I have represented to you as being in your position when two shots were fired and these two officers disappeared from their places in your presence on those stairs? A. I seen Black go; I only seen Black go.

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Mr. Vickers: Objected to on the ground that it contains an unwarranted assumption of fact because after the two shots another shot was fired he has said, which shot was fired by the woman at the second officer; that is what his testimony is.

The Court: Suppose you ask him the question without characterizing his testimony, Mr. Drewen.

Mr. Drewen: I am trying to avoid characterizing his testimony, if I have done so I have not intended to do it.

Q. Will you explain to us why it was you did not fire a shot as you stood there with the door open? A. Well, what would I fire at? I didn't see anything to fire at.

Q. Wasn't there anything there for you to fire at? A. No, sir.

Q. Hadn't you seen the defendant Sage in the doorway? A. I didn't have my gun in my hand at the time.

Q. Didn't you see the woman in the doorway? A. Yes, but she got out of the way before I could shoot at her.

Q. Well, as a matter of fact, she got out of the way before you had your gun out of your holster? A. I had my gun out, I was pulling it out when she seen me after she shot. She got back and said, "There is another fellow there, get him."

Q. As I understand it, it was the fourth shot that took effect in you, that is right, is it? A. Yes, sir.

Q. How long did it take to fire the first three shots? A. Well, it was inside of a minute—sec-

onds. It was less than a second, the first two shots were fired bang,bang.

Q. Yes? A. Then it was about two seconds when the next one was fired.

Q. From the time you began to take your gun out of your pocket until when? A. When the first two shots were fired then I started for my holster.

Q. Get it out? A. Yes, sir.

Q. And after you got it out you jumped to the first landing? A. I jumped when she went across because I was standing there waiting for him to come out.

Q. Why didn't you shoot while she was going across? A. Well, I could not see. I was watching for him to come out. I was not watching for her to go across there.

Q. It was because you were watching for him to come out, that is your explanation why you did not shoot at her when you saw her going across, that is right, is it? A. What is that?

(Question repeated by the Stenographer as follows).

"Q. It was because you were watching for him to come out, that is your explanation why you did not shoot at her when you saw her going across, that is right, is it?" A. Yes, sir.

Q. You say you told these people who were in the room, or that Black did, that you were from Police Headquarters? A. Yes, sir.

Q. Well, who was it suggested — I withdraw that. At one time, when going upstairs you did not intend to do that, did you? A. Intend to do what?

Mr. Vickers: Objected to as immaterial.

The Court: Intend to do what?

Q. Tell them you were from Police Headquarters? A. Oh, yes, only intended—

Q. Didn't you have a plan Mr. Otis, or a scheme to say that there was something the matter with his car? A. Yes, sir.

Q. And to come down and fix it? A. Yes, sir.

Q. Why did you plan to tell him there was something the matter with his car, to come down and fix it? A. Well, we didn't want to get him excited and have him shoot at us, we thought the easiest way was the best way.

Q. And you thought the easiest way was to tell this man that there was something the matter with his car? A. Yes, that was after we told him we came from Police Headquarters.

Q. What is that? A. We already told him we came from Police Headquarters before we thought of telling this story.

Q. I didn't get that. A. When she asked who it was, we already said, "We come from Police Headquarters."

Q. Yes? A. Then afterwards we were going to tell that story.

Q. Did you tell it or were you going to tell it? A. Going to tell him what?

Q. About the automobile down in the street? A. Yes, if he talked to us, but he did not talk to us, he shot us before we had a chance to say—

Q. That is, you intended to tell him when he opened the door? A. Yes, sir.

Q. Who made this plan with regard to telling him there was something the matter with his car? A. We all talked it over, I don't know who made the plan.

Q. When did you talk it over? A. Downstairs in the street.

Q. Before you got into the house? A. Yes,

sir.

Q. You are sure about that, aren't you? A. Yes, sir, I am sure of it.

Q. You won't say whether the plans were made with respect to how you would get this man to come out of his room were made at a conference you policemen had down in the street before you went into the house? A. Positively.

Q. That is true? A. Yes, sir.

Q. What was the plan you made before you went upstairs into the house? A. Well, Black had a plan in his mind, I could not just say what it was.

Q. Tell me if you can what plan you men had agreed upon? A. Well, he didn't explain the whole thing to me, I left everything to him.

Q. What was it he determined to do? A. I don't know just what he said, I could not tell you because it has gone out of my mind, I don't remember just now.

Q. I understand you to have said that you made this plan to tell Sage that there was something the matter with his car? A. No, there was an accident happened. I think he said something about an accident happening somewhere and the first three numbers of his car corresponded with the numbers that somebody else got and turned into Police Headquarters.

Q. Well, there was something with regard to his car, wasn't there, that you had planned? A. The first three numbers of his car corresponded to a car we were after.

Q. And that is what you were going to tell him? A. Yes, sir.

Q. And whatever plan you made in that connection you say you made down on the street, before you went up into the house, did you not? A.

There was one made down in the street, and made inside.

Q. Well, where was it made? A. Well, I don't know just where it was made. We talked it over in the street and talked about it up in Police Headquarters.

Q. When did you reach a decision as to the plan? A. Black was the one reached the decision, Sergeant Black.

Q. When did he reach it? A. I cannot say.

Mr. Vickers: Objected to on the ground that it calls for a conclusion. How can this witness say when Black reached his decision?

Q. Well, when did he express his decision or his determination as to how you should get this man out? A. In the hallway. He said, "Leave it to me, I will do the talking."

Q. Well, that was down in the street? A. No, in the hallway he said that.

Q. After you got in? A. Yes, sir.

Q. How long did you stop downstairs in the hallway after you were admitted to the house? A. We stood there a little while, just to talk things over, talking.

Q. What were you talking about? A. I could not say, I do not remember.

Q. Do you remember what you were talking about? A. No, sir.

Q. Was it about arresting this man? A. Yes, about arresting this man.

Q. What did you say about arresting him? what was said? A. I do not just remember.

Q. Did you make the plan down there after you got into the hallway? A. We were talking as to what we ought to do.

Q. What was said as to what you ought to do? A. I know we got our guns out then Black changed his mind and said, "You had better put them back because he is liable to shoot if he sees a gun."

Q. When did Black say that? A. Going up the stairs.

Q. While you were going up the stairs? A. Yes, sir.

Q. And Black said, "You better put your gun back because he will shoot if he sees a gun?" A. Yes, sir.

Q. But you had made this plan to tell him something about this car? A. Well, we talked outside and we talked inside.

Q. But before you came into the house, downstairs, you had reached the plan, all of you men, that it would not be good to have this man see a gun? A. Yes, sir.

Q. And why did you take your guns out when you got into the hall, the entrance downstairs. A. well, for protection.

Q. But, when you had determined that was no way to protect yourself? A. We changed our mind after that.

Q. When did you change your mind? A. The Sergeant told us it was a good idea—it was not me changed my mind, but the Sergeant thought it was a good idea to put the guns back in our pockets.

Q. Then you changed your mind sometime after this conference in the street and before you got admission by Mr. Kaerth, didn't you? A. Changed our mind going up the stairs.

Q. Outside on the stoop, or inside? A. Inside the house.

Q. But as I understood you, you say you

changed your mind before you got up the stoop, because you had your guns out when Kaerth opened the door? A. I didn't have my gun out when Kaerth opened the door.

Q. You didn't have your gun out? A. No, sir.

Q. Haven't you testified a minute ago you had your gun out? A. Not on the street.

Q. Up on the stoop? A. In the hallway. When we got in the hallway we pulled our guns out.

Q. When Kaerth opened the door? A. When Kaerth opened the door, pulled our guns out but in the hallway.

Q. When you were downstairs, as I understand it, you were on the left of the hall as you go out— A. When I was shot?

Q. Yes. A. I do not remember going down, I went down—I do not remember—I was on my hands and knees on the floor.

Q. You were shot in the back, weren't you? A. Yes, sir.

Q. And what was the first thing you did when you went into the dining room? A. I was on my hands and knees.

Q. What caused you to go into the dining room? A. I seen Black and I do not know what caused me to go in, but I was on my hands and knees and I started to go over to Mr. Black. I seen his feet.

Q. Well, how did you come to go into the rear room, the dining room? The parlor is the first room, now, I mean the back room, the dining room in the rear of the parlor? A. I heard a noise, groaning and talking.

Q. And you went back there? A. Yes, sir.

Q. How long after that was it that the woman came downstairs? A. Well—

Mr. Vickers: The woman defendant?

A. About three or four minutes, I suppose.

Harry Otis—Cross.

Q. And when she came downstairs you were on your feet, you were trying to get up as she came downstairs? A. When I heard a noise on the steps, I was leaning by the wall, then I got up as soon as I heard the noise and got my gun ready, but I could not lift it with this hand very good, so I—

Q. You were standing where? A. Over Black.

Q. Where? A. Over Sergeant Black.

The Court: What woman are you referring to?

Mr. Drewen: The woman defendant.

The Court: Is that the woman you are talking about?

The Witness: Yes, sir.

Q. And that was very near the entrance to the door from the hall to the front room, wasn't it? A. Yes, sir.

Q. Do you know whether or not she saw you before you saw her? A. No, she didn't see me because I heard the voice saying, "Is there any more of them there," and she said, "They are dead all over the place." She must have seen Weir because I was standing back of the doorjamb.

Q. Then you took out your gun? A. I pulled out my gun and I hollered at her to get upstairs and stay up there.

Q. What did she say to you. A. She said, "Oh, my God," she said and she started to run.

Q. Isn't it a fact that when you drew your gun and pointed it at her she remained standing there and said to you, "Won't you please give me a chance?" Isn't that right? A. I don't remember

that.

Q. You wouldn't say it did not occur, will you, Officer? A. She said something, "Oh, my God," and she ran, and I fired two shots through the door.

Q. Did she remain standing there while you had your gun drawn and pointed at her? A. She was not facing me, she had her back toward me when I hollered.

Q. Didn't she turn and look at you? A. She turned and looked at me but she kept going past the door.

Q. When she had her back turned to you and you called to her, she turned around and looked at you? A. Yes, sir.

Q. And when she turned you had your gun drawn and pointed at her? A. I didn't have it pointed at her, I had it in this hand but I could not do anything with this hand and I put the gun in my left hand.

Q. You tried to do something with your right hand? A. Yes, tried to lift it up and instead I exchanged it to this hand.

Q. And while you were exchanging it to the left hand this woman was standing out in the front room? A. No, sir, she went outside right away and when she went through the door she was out of sight.

Q. Isn't it a fact you had your gun drawn and pointed at her with whatever hand you could use, and she said to you while you were in that position, "Please give me a chance, where is Mrs. Kaerth?" A. I don't remember that.

Q. Was she still in your sight when you fired at her? A. She was out of my sight, I didn't want to shoot her.

Q. Isn't it a fact, Officer that you had the gun

drawn and that she remained there until you actually fired the two shots? A. No, sir.

Q. And that after firing two shots she left and went upstairs again? A. No, sir. I fired the shots when she was in the hall.

Q. Why did you fire the two shots? A. To let them know I was there and to scare him so that he would stay up there.

Q. They knew you were there? A. I wanted to let them know I had a gun there too, that is the reason I fired, to let them know I could shoot.

Q. Why didn't you want to shoot her? A. Well I am not crazy about shooting woman; I am not crazy about shooting a woman.

Q. But you saw this woman, you say, shoot Weir? A. Well, she didn't have any gun in her hand when I seen her.

Q. And you had been back there, you say, and saw Weir die? A. What is that?

Q. You had been back in the rear room and saw Weir die? A. No, he was alive when I was there.

Q. But he was in distress, wasn't he? A. Yes.

Q. Yet you say you didn't want to shoot her? A. I didn't want to shoot her, no.

Q. Now, when you faced this woman from the rear dining room you say you were standing beside the jamb of the door, is that right? A. Yes, sir.

Q. Was that the jamb on the left hand side as you looked out into the front room or the right hand side? A. The right hand side.

Q. As you looked out? A. Yes, sir.

Q. Now, Mr. Otis, while you were in the City Hospital you made a statement to a representative of the press, didn't you, as to how this occurred? A. No.

Q. You did not? A. No, sir.

Q. At no time? A. No, sir.

Mr. Drewen: Mr. Mills stand up.

Q. Did you see this gentleman here while you were at the hospital? A. Come over closer. Yes, I guess he was there.

Q. And you made a statement to him, didn't you, as a representative of the press. A. No, sir.

Q. What was this gentleman doing at the hospital?

Mr. Vickers: Objected to as incompetent, irrelevant and immaterial.

Mr. Drewen: We have a right on cross examination—

The Court: I sustain the objection.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

Q. You say you did see this gentleman in the hospital. A. Yes, sir.

Mr. Vickers: Objected to as incompetent, irrelevant and immaterial, improper cross examination.

Mr. Drewen: I am laying a foundation for a contradiction of this witness and ask an exception to the Courts' ruling.

Q. There is no question you saw this man in the hospital is there?

Mr. Vickers: He has said so. I want to

object to it. The witness has said he saw him.

Q. And you spoke to this man? A. He asked me questions. I didn't tell him anything.

Q. You did not tell him anything, is that right? A. That is in respect to this shooting. I know there were two reporters at the City Hospital from the Jersey City Journal and The Despatch. Where is he from?

Q. Did you speak to a representative of the Jersey City Journal? A. There were two of them up there, but I didn't want to talk to the reporters, I didn't want any reporters up there to talk to me.

Q. Didn't you say to the gentleman you just say you saw over there, didn't you say to him, "Now, about the shooting, here is the way we were standing."

Mr. Vickers: Objected to. Counsel is reading from a press report which the witness has denied having made, it being on collateral matter, it seems to me at this time the defense is bound by it, being improper cross examination, collateral matter, whether or not he made a statement to the press. His attention has not been drawn to a contradictory fact and he, having denied any interview, it seems to me that the contradiction is that there was an interview. That is all there is to it.

The Court: He has already denied having talked with this gentleman, now counsel directs his attention to a definite query. I think I will allow that.

(Question repeated by the Stenographer as follows:)

"Q. Didn't you say to the gentleman you just say you saw over there, didn't you say to him, 'Now, about the shooting, here is the way we were standing' "? A. No, sir.

"Q. And the stairs goes straight up until near the top where they turn to the right and there is a landing on the turn. There are three or four steps to the right after the first landing and at the top, on the left, toward the back of the house is Sage's bedroom door," Did you say that to this man? A. No, sir.

"Q. To the right is a narrow hallway and then the bedroom door of the landlord, that is the front room of the house on that floor?"

Mr. Vickers: One moment, that is objected to. Manifestly counsel cannot be intending to use this as a basis for contradiction. Those are elements that have been established, admitted by the proof in this case.

Mr. Drewen: That is true, but—

Mr. Vickers: Then, I don't think counsel has any right to read from an interview which this witness says does not belong to him, matters that are not the basis of a contradiction.

The Court: It was because counsel declared that he was about to lay a foundation for contradiction that the Court permitted him—

Mr. Drewen: I propose to do it and I still propose to do it.

The Court: If you propose to do it and you are not doing it, then you are not—

Mr. Drewen: I cannot read this lengthy statement at once.

The Court: The Court will order all of that stricken out.

Q. Didn't you say to this man, "Black rapped on the door and when a womans voice answered Black asked for Miller, if he was in that house, and told her there were some men from Police Headquarters outside. The woman asked for a few minutes to get dressed and we waited—"

Mr. Vickers: Objected to on the same ground.

The Court: Objection sustained.

Mr. Drewen: I would like to be heard on that.

The Court: I don't see how you can base a contradiction on that question. That already is his testimony.

Mr. Drewen: It is not his testimony, if your Honor please. What he has testified to is that the man said, "Is Miller here?" and they said no. That is not in this statement.

The Court: Well, it is not a contradiction. It may not have embodied all his testimony in that interview.

Q. Did you say this to this man: "Suddenly the door was pulled open partway, and I saw Sage stick his head and shoulders out partway and there

was Black on my left right in front of him, in line with the open door and then bang went Sage's gun and Black was shot. I saw Black turn and start down the stairs as if he was hit"—

Mr. Vickers: Same objection.

The Court: Same ruling.

Mr. Drewen: This witness has said he did not know what effect the first shot took. This is most important and vital in this case.

The Court: I don't think it is a contradiction.

Mr. Drewen: I am laying a foundation for it.

The Court: I will deny it.

Mr. Drewen: Exception to your Honor's ruling.

Hyman Lazarus, J. (L.S.)

I understand your Honor forbids me to ask this question.

The Court: I have already ruled.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

Q. Did you say this to the reporter: "As Sage fired, I saw the woman in the doorway as if she

had been pushed out by Sage and then I saw her shoot Weir who was coming up from the first landing?"

Mr. Vickers: Objected to on the same ground and on a further ground that the question contains an unwarranted assumption of fact, that the man referred to was a reporter.

Mr. Drewen: The man identified here in court a moment ago. Now, I want to urge this upon the Court in response to my opponent's objection, that this contradicts the testimony of this witness because the statement I have just read indicates it was the second shot fired by the woman and not the third, to which he has already testified.

(Question repeated by the Stenographer as follows):

"Q. Did you say this to the reporter: "As Sage fired, I saw the woman in the doorway as if she had been pushed out by Sage and then I saw her shoot Weir who was coming up from the first landing."

The Court: I cannot conceive of that being a contradiction or laying a foundation for contradiction.

Mr. Drewen: It clearly indicates it was the firing of the second shot, from what I have just read.

Mr. Vickers: It is argumentative.

Mr. Drewen: But am I not entitled to have the benefit of it on the record for argument?

Mr. Vickers: In order to be competent it must certainly be—assuming everything else competent to contradict him—on some relevant and material matter.

Mr. Drewen: It is relevant and material.

The Court: A moment ago counsel declared that it was contradictory because he had already testified it was the third shot that hit Weir.

Mr. Vickers: But he did not say—

The Court: He did not say that in that question you have asked him. If you can read that as a contradiction to that testimony, I will permit it.

(Question repeated by the Stenographer as follows:)

"Q. Did you say this to the reporter: 'As Sage fired, I saw the woman in the doorway as if she had been pushed out by Sage and then I saw her shoot Weir who was coming up from the first landing."

Mr. Drewen: Just be patient for a moment. I have already read to this witness a statement which is said to have been given to representatives of the press in which he described the first shot fired. He said it was fired by Sage. He describes it as "bang, and Black was hit."

Now, I ask him this, "As Sage fired I saw a woman in the doorway as if she had been pushed out by Sage and then I saw her shoot Weir who was coming up from the first landing." I respectfully submit to your Honor that second excerpt is a clear indication of what he said to the man whom he spoke to, that the shot that hit Weir was the second shot and not the third.

Mr. Vickers: Counsel cannot be serious that the statement says when Sage fired he means he fired only one shot. That is consistent with his testimony. After Sage had fired whether one or two is not contradicted by this, then the woman fired. That is the essence of that statement.

Mr. Drewen: He described Sage's shooting as "bang."

The Court: I do not see that that is a contradiction.

Q. Did you tell the reporter, the man whom you have identified that it was the second shot fired that killed Weir? A. No, sir.

Q. Did you say to the reporter, the man whom you have identified, that it was the second shot that was fired by the woman? A. No, sir, I didn't tell him anything, I don't see where he gets that stuff.

Q. You did not tell him anything? A. No, sir.

Q. Officer, while you were downstairs, or while you were going downstairs, it occurred to you that you could go downstairs and hold them upstairs, keep them from getting out, didn't it? A. When

I was downstairs, yes.

Q. Well, why didn't you take your position in the front of the house then, if you wanted to keep them from getting out? A. What is that outside in front of the house?

Q. No, downstairs in front of the house. Why did you go in the rear dining room? A. On account of Weir was talking, groaning.

Q. You did not know where this woman went before you shot at her, did you? A. Yes, I know, I heard her going upstairs.

Q. You did not know she was going to go upstairs before you shot at her; you did not know where she was going? You told her to get the hell out of here, didn't you? A. I did.

Q. Did you know? A. What?

Q. Where she was going to go when you told her to get the hell out of here? A. I expected she would, if I had a gun in my hand she would not stand there.

Q. You expected she would go after telling her to get the hell out of here or I will blow your head off?

Mr. Vickers: Objected to.

A. I told her to go upstairs and stay there.

Q. How did you know she would go upstairs?

Mr. Vickers. Objected to.

A. I didn't know, but she went upstairs.

Q. But she might have gone out of the front door for all you knew?

Mr. Vickers: Objected to as argumentative.

Harry Otis—Cross.

A. She might have, but she would have got shot.

The Court: The last objection is sustained.

Mr. Drewen: Exception.

. Hyman Lazarus, J. (L.S)

Q. How many shots did you hear, Officer, after you were hit, if any.

Mr. Vickers: That includes the two he fired?

Q. Aside from those you fired? A. I heard one shot.

Q. Now, I don't want to ask you to walk unnecessarily, but let this represent the doorway (indicating railing) while you stood against this wall this is the doorway of Sages' room. Now, will you please indicate, sitting where you are, or stand, if you must, just how Sage put his head and shoulders through the door, as you stood where I am standing?

Mr. Vickers: Objected to because if that is the door it is closed and this witness cannot open it.

Q. Let this be the doorway then (indicating) this is the doorway of Sage's room, this opening here. I am you standing just outside the doorway. This is about where you stood as I am standing with relation to this open door? A. A little bit further.

Q. Now, all that separated you from this open-doorway was a casement about as deep as the back

of your hand, is that right? A. Yes, sir.

Q. About how deep is that? A. I was further away than you are over there further.

Q. But this whole opening here is only about two and a half feet? A. About three feet.

Q. So that you stood like this. Now, how far out of this doorway did Sage put his head and shoulder when he fired the first shot? A. He just had his profile out, just about up to here (indicating).

Q. Did he get his head and shoulders out or only put his profile out? A. He had his face—I could see his face, I didn't see no shoulders or anything.

Q. You have testified already that Sage put his head and shoulders through the doorway? A. I don't think I have.

Q. How far did the woman put her head or shoulders out—through the doorway when she fired the shot. A. I seen her whole profile half way from her feet up to her head.

Q. And you were standing right where I am standing? A. Yes, sir.

Q. With nothing separating you from the doorway except this jamb about the width of the palm of your hand? A. That is right.

Q. You say the door was open about three or four feet. A. Yes, sir.

Mr. Drewen: That is all.

RE-DIRECT EXAMINATION by Mr. Vickers:

Q. Officer Black was leading this expedition, was he? A. Yes, sir.

Q. Was that according to police regulations where an arrest is to be made in a municipality,

to take the police officer of the municipality in charge? A. That is courtesy.

Mr. Drewen: Objected to as immaterial.

Mr. Vickers: That is to explain why this thing happened that way. Counsel at length cross examined on it, on their methods and so on, and I am just trying—

Mr. Drewen: I will withdraw the objection.

Q. You are a West New York police officer? A. Yes, sir.

Q. In regard to the plans made by this officer, you were the one had the picture, is that right? A Yes, sir.

Q. Was it or was it not the purpose arranged between you officers that this defendant if identified should be arrested? A. Yes, sir.

Q. Can you say whether or not he was wanted by the Police Department of your town for anything other than the offense charged on the card that you had, this police card?

Mr. Drewen: I object to any reference to a charge stated on the police card.

A. Yes, sir.

Mr. McCarthy: I ask that the answer be stricken out. The objection was that it is immaterial. This reference to the charge on the police card which is not in evidence.

The Court: The question was, "other than the offense charged on the card."

Mr. McCarthy: The objection is to any reference to the police card which is not in evidence.

Mr. Vickers: The State will connect it up.

Mr. McCarthy: It is objected to on the ground that it is immaterial, incompetent and irrelevant.

The Court: As I understand it, the objection is technical due to the fact that this card is not now in evidence.

Mr. Vickers: It has been offered for identification.

Mr. McCarthy: Reference to any other charge than contained on this police card.

Mr. Vickers: I withdraw the question.

Q. From your experience as a police officer tell us what that card is that has been marked Exhibit S 9, for identification? A. That is a Rogues Gallery picture.

Q. And the printed matter that is on the card?

Mr. McCarthy: Objected to.

The Witness: 25 reward.

Mr. McCarthy: Objected to, immaterial, not binding on this defendant or either of them.

The Court: Up to now it is not binding.

What is the printed matter on the back of that card?

Mr. McCarthy: I object to any reference to the printed matter.

Mr. Vickers: What I mean is what does the printed matter—to what category does this card with the picture and printed matter, as a matter of police experience bring the card. I am not asking him to read it or anything of the kind.

The Court: I will allow it.

Mr. McCarthy: Objected to. Is the objection overruled?

The Court: Overruled.

Mr. McCarthy: Exception to the Court's ruling.

Hyman Lazarus, J. (L.S.)

Q. Don't read the card. A. This card means he is wanted for breaking jail, a fugitive from justice.
Q. It is what is known as a fugitive card? A. A. That is what we—

Mr. McCarthy: Just a moment, we object to it and ask that the answer be stricken out on the ground it is highly prejudicial to this defendant. The witness says it shows he was wanted for breaking jail; it is highly prejudicial to the defendant, incompetent, immaterial and irrelevant.

Mr. Vickers: I submit he has a right to testify to that. If he says that he identified this defendant as the man represented on this card and as a matter of police experience he has a right to say what this thing was with which he then was armed.

The Court: I will allow it.

Mr. McCarthy: Exception.

Hyman Lazarus, J. (L.S.)

Q. (Repeated by the Stenographer). It is known as a fugitive card? A. Yes, sir.

Q. Now, then, in addition to that, had you any knowledge of any offense or alleged offense for which this defendant was wanted in any municipality? A. West New York, yes, sir.

Q. And what was the knowledge that you had at the time you went to this house as to any offense alleged against this defendant?

Mr. McCarthy: One moment, objected to on the ground that reference to any other offense makes the question immaterial, incompetent and irrelevant.

The Court: I will allow the question.

Mr. McCarthy: Exception.

Hyman Lazarus, J. (L.S.)

A. My captain informed me that—

The Court: Without telling us—

The Witness: That he was wanted for that stick-up of the Public Service payroll.

Q. In your municipality? A. In West New York.

Q. Did you or did you not know at that time whether or not a warrant was in existence for the arrest of this defendant for a high misdemeanor or felony committed in your jurisdiction?

Mr. Drewen: Objected to on the ground that it is incompetent, irrelevant and immaterial and calls for a conclusion unless this witness knows what a felony or high misdemeanor is.

The Court: I cannot tell until he answers whether he does.

Mr. Drewen: I would like to cross examine him.

Mr. Vickers: I don't think it is proper to interrupt the State's examination at this time for the purpose of cross examination.

Q. (Question repeated by the Stenographer). A. Yes, sir.

Q. Have you seen the warrant? A. Yes, sir.

Q. I show you a paper writing purporting to be a warrant and ask you whether that is the paper to which you refer, of which you have knowledge, and which you had seen before you went to this house on that day? A. That is it.

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

(Marked Exhibit S-10, for identification.)

Q. Otis, you have described the position of Weir on your cross examination as being some steps in the rear of Black. Can you tell us whether or not any light coming from the front door of this building on the first floor reflected or shown on the landing near which Weir was at that time? A. Yes, it did light it up.

Q. And Weir then was in police uniform, was he? A. Yes, sir.

Q. Do you remember whether or not the front door of this house was glass or partly glass? A. It was partly glass I think.

Mr. Vickers: That is all.

(Witness excused.)

DANIEL G. WINTERS, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. You are a physician and surgeon licensed to practice in the State of New Jersey? A. I am.

Q. And from what institution of learning are you a graduate? A. University of Vermont.

Q. How long have you been a practicing physician? A. Since 1909.

Q. And are you connected with any hospital or institution in Jersey City? A. Jersey City Hospital, Bergen Sanitorium.

Q. Were you connected with the Jersey City Hospital on the 22nd day of May of this year? A. I was.

Q. Did you attend to this last witness who was on the witness stand? A. I did.

Q. What was the character of your attendance on him? A. I treated him for a bullet wound of the right side.

Mr. Vickers: Come up here a minute, Otis.

Q. Can you indicate doctor on this man, where the wound was or is? A. Right in about here (indicating.)

Q. Where did it come out? A. I located it in front.

Q. Was there what appeared to be a wound of exit at the time you first examined him? A. There was not.

Mr. Vickers: All right, Otis, step down.

Q. Doctor, I show you a bullet purporting to have been removed from this patient and ask you whether it was that or such a bullet which you removed from the body of this man? A. It was a bullet about like this, yes.

Q. To whom did you turn it over? A. The nurse, his private nurse, his own private nurse.

Q. Do you know the nurse's name? A. I do not know the name.

Mr. Vickers: That is all.

Mr. Drewen: No questions.

(Witness excused.)

GEORGE BARBER, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. You are a member of the Jersey City Police Department? A. Yes, sir.

Q. And were you in attendance at the hospital in Jersey City at the time that Police Officer Otis was there and was operated upon? A. Yes, sir.

Q. Did you at that time receive a bullet? A. Yes, sir.

Q. A leaden bullet? A. Yes, sir.

Q. I show you a bullet and ask you whether you marked this and whether that is the bullet you received at the Jersey City Hospital? A. Yes, sir.

Mr. Drewen: From whom?

Q. From whom did you get it? A. Mrs. Lemkin, the nurse.

Q. Where it appears to have been marked with a knife here? A. I scratched it with a knife right here.

Mr. Vickers: I ask that it be marked for identification at this time.

(Marked for identification, Exhibit S-11, for identification.)

Mr. Vickers: That is all.

Mr. Drewen: No questions.

(Witness excused.)

ARTHUR V. HASKING, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. You are a physician and surgeon licensed to practice in the State of New Jersey?

Mr. McCarthy: We will admit the doctor's qualifications.

The Court: The qualifications of the doctor are admitted, you may proceed.

Q. Sometime after the 22nd day of May of this year, did you perform an autopsy on the body of the person represented by the photograph which I show you? A. The autopsy was performed on the morning of the 22nd of May last.

Q. Where? A. At Prior's Morgue, Jersey City.

Q. Will you tell the character of the Post Mortem, the examination which you made and what conclusion if any, as a result of your experience on the post mortem you performed, you arrived at as to the cause of death of the person represented by this photograph? A. The body was that of a man measuring about five feet ten inches in height, approximately about thirty years of age, well built and muscular. I found situated in the middle of the chest about four inches below the so-called sternum notch, that is, the depression at the top of the breast bone, the middle line and four inches below that, a circular shaped wound of the skin measuring about one-third inch in diameter and having the appearance of a pistol shot wound of entrance. Over the left cheek bone was a slight black and blue discoloration of the skin. There were no other marks of recent violence on external examination of the body. There was a considerable quantity of clotted blood about the face and in the mouth.

On opening the chest I found that the breast bone or the sternum had been perforated at about its middle portion at a point corresponding to the

external wound previously mentioned and about on a level with the third rib. On opening the chest I found that the front portion of the left lung had been perforated, the pericardial sac, which is a sac that surrounds the heart had been perforated. On opening that I found a considerable quantity of semi-fluid and clotted blood had distended that sac. The heart was perforated in front and the upper portion of the right ventricle, the heart being divided into two portions, right and left chamber—the posterior or rear portion of the heart, the left oricle was torn. The oricle is the cavity of the upper portion of the heart. The pericardial sac was then perforated in the back and through the root of the lung. The bronchus or portion of the wind pipe going to the left side of the left lung had been perforated as also were the blood vesels going through the root of the lung. The posterior or back portion of the lung was similarly perforated. I found that the posterior or rear portion of the chest had been perforated between the eighth and ninth ribs and about two and three-quarters inches to the left,—about two and one-half inches to the left of the middle line or backbone. I found situated about two and three-quarters inches to the left of the middle line, to the left of the backbone and lying underneath the skin at this point, which was a point corresponding to the wound of penetration in the chest wall, between the eighth and ninth rib which I have described, a leaden pistol bullet with a nickle jacketed tip apparently calibre .38. There was a considerable quantity of semifluid and clotted blood in the left cavity of the chest. The organs of the body were pale and bloodless, as in a case of severe hemorrhage.

The other organs of the body were normal and in such condition as to be consistent with the con-

tinuance of life and health, therefore from all the facts observed I infer that death resulted from a bullet wound of the chest involving the heart and lung.

Q. Doctor, have you got the bullet? A. I have.

Q. Produce it.

(Witness produces bullet.)

Mr. Vickers: I offer this bullet for identification, and the photograph likewise. I offer the photograph first and then the bullet.

(Marked Exhibit S-12, photograph, Exhibit S-13, bullet, for identification.)

Q. Doctor, showing you the bullet which was shown to the previous witness, and which is marked Exhibit S-11 for identification, I ask you whether from your experience and knowledge of bullets you can say whether this is apparently of the same character as the bullet which you just have produced and of the same calibre? A. It is.

Mr. Drewen: Is that the bullet shown to Dr. Winters.

Mr. Vickers: Yes.

Q. Before performing this autopsy and on the same day, Doctor, did you go to these premises, which have been described as 19 Manhattan Avenue? A. I did.

Q. And in the course of your duties as assist- to the County Physician and to determine whether or not an autopsy should be performed, did you

there make an investigation of the premises at 19 Manhattan Avenue? A. I did.

Q. Can you give us the time of the day when you went there? A. I should say that I arrived there approximately quarter to nine on nine o'clock.

Q. And when you arrived there were the police in charge of the premises? A. They were.

Q. That is, in the morning? A. Yes, sir.

Q. Describe what you found there in the course of your investigation? A. Why, I went into the hallway, and in the door immediately to the right and lying with feet nearest to the door was Detective Black, lying partially on the left side. The left arm was back of the body. The right arm forward and lying two-thirds on his face. A large quantity of blood was around the face on the carpet in the immediate vicinity. He was dead. I saw Patrolman Weir—

Q. Let me interrupt you just a minute. The person you have now described is the same man upon whom you performed the autopsy to which you have just testified? A. It is. Going to the rear room or the room to the rear of this room, lying slightly at an angle on his back was Officer Weir. There was a considerable quantity of blood about the body on the floor particularly to the left side extending several feet away from him. Then I examined the door which was partly open and which I found had been penetrated by two bullet penetrations through the door and also a picture.

Q. Will you step down here and examine this door and see if this is the door to which you have reference and the penetrations of which you speak? A. This a bullet penetration here and a bullet penetration here, one there and one here. Then opposite the door there was a window—at least a picture, the frame of which was penetrated and the

wall, and the plaster wall back of the frame, that was on about on a line with these two bullets.

Q. I show you a picture and ask you whether that is it? A. Yes, and there is the perforation, and the plaster was perforated back of this picture, the lower one about on the level so that the plaster was perforated. The outside of the frame building showed no evidence of penetration. The carpenter removed the outer boards of the building and they were split open and from them we removed two bullets.

Q. Doctor, on this plan of the first floor, will you indicate where at that time the door introduced in court here was, and in what position? A. There was a rug with rather a thick margin which held the door open, then the door was slightly beyond, a right angle opening from the front—

Mr. Vickers: For the purpose of the record, the witness draws a line from the left hand doorjamb on the living room door on the floor plan of the first floor of 19 Manhattan Avenue and indicates with a lead pencil a line where the rug was that held this door ajar, door leading from the hall into the living room, the hall being the hall almost opposite the foot of these stairs.

The Witness: This picture was approximately here.

Mr. Vickers: The witness now having drawn at a point on the front wall of this living room with a lead pencil the position of the picture which has been shown him of which the frame was perforated by a bullet hole.

Q. Doctor, by your direction or by you or in your presence was a search made for the course of these perforations through the door, through the picture and into this plaster of the wall? A. The department carpenter came there took the—there being no evidence of any penetration of the outer boards of the building, the boards were removed and they were found penetrated on one side and not penetrated on the other, and they were split open and the bullet removed. They were found embedded in the outer planks.

Q. What became of the bullets? A. I have them.

Q. Will you produce them?

(Witness produces bullets.)

Q. And in producing them tell us what character of bullets they are? A. I refer to them and they are marked as upper and lower bullets, having reference to their position in the door; 32 automatic nickle jacketed bullet.

Q. Calibre 32 automatic nickle jacketed bullet? A. Yes, sir.

Q. Which is the first one, the upper one? A. This.

Mr. Vickers: These bullets—the witness producing two bullets described by him—they are offered for identification at this time.

(Marked Exhibit S-14 for identification)

Q. This? A. This is the lower.

Q. I show you an automatic pistol heretofore identified by Officer Otis and ask you if the bullets which you have spoken of and which you have dug

out, as you have described, are the kind of bullets and apparently of the calibre used in this kind of a gun? A. They are.

Q. I show you five loaded shells and ask you whether those contain the same character of bullets which you have produced and which were taken out of these boards? A. They are.

Q. I show you an exploded cartridge and ask you whether that is the same character of cartridge as the five which you have just identified loaded? A. It is.

(Marked Exhibit S-15 for identification.)

Q. Now, then, I show you State Exhibit 5, and ask you whether that correctly represents the situation which you found on entering the living room or front room on the first floor of this house on the morning of the 22nd of May? A. This picture was taken under my direction and in my presence.

Q. I show you Exhibit S-6 and 7, and ask you whether those pictures correctly represent the situation in the rear room on that first floor at the time? A. The same reply as to the previous question.

Mr. McCarthy: I object to the answer as not responsive.

The Court: Does it correctly represent the condition as you found it?

The Witness: It does.

Q. And the persons indicated there are respectively Officers Black upon whom you performed this

post mortem and the officer whom you have referred to as Officer Weir, does it? A. It does.

Q. I show you a revolver and ask you whether you can tell us whether the bullet that you removed from the body of Black is of the calibre of the revolver which you have before you? A. It is.

Mr. Vickers: For the purpose of the record, it is marked 8020 and is United States Army model 1903. It has a further number 208020 on the butt.

Q. At this same time or shortly thereafter on the 22nd of May did you perform an autopsy on the body of Patrolman Weir? A. I did.

Q. And from that body did you extract any bullet or bullets? A. There was a bullet found; the officer was fully dressed in uniform, and in removing his clothing, between his shirt and undershirt was a fullet found, a leaden bullet with nickle jacket apparently calibre .38.

Q. The same kind of a bullet as that extracted from Black by you? A. It was.

Q. And have you that bullet? A. I have.

Q. Produce it.

(Witness produces bullet.)

Mr. Vickers: I offer this bullet for identification.

(Marked Exhibit S-16, for identification.)

Mr. Vickers: For the purpose of the record I desire to have it appear that the two empty cartridges have been taken from this revolver to determine that they were empty

and for safety sake and by me marked with a pen knife, marked with two X's.

Q. Doctor, what else if anything did you find in the course of your examination and investigation in this house? A. I found situated to the left, approximately about eight or ten inches to the left of Officer Weir's foot an empty .32 automatic shell.

Q. Of the same character as the one produced to you a moment ago by me? A. It is.

Q. Have you that? A. I have.

Mr. Drewen: .32 calibre, I understand?

Mr. Vickers: 32. I offer it for identification.

(Marked Exhibit 17 for identification.)

Q. Did you determine whether or not Weir died as a result of a bullet shot wound. A. He did.

Q. And was there more than one wound on his body? A. One.

Q. One wound of entrance? A. One wound of entrance and a wound of exit.

Q. And on what part of his body was the wound of entrance? A. In the neck slightly above the number, his police number on his collar.

Q. On the left hand side? A. On the left side and the wound of exit, which was rather large and torn was just above the collar bone, the middle line of the neck, just above the collar bone and at the point of the padding of his collar of his blouse and the shoulders, on the right side.

Q. By the way, in the course of your investigation did you make any investigation surrounding

this house or as a result of anything you found at any other place in the house, did you make any investigation? A. I did.

Q. What? A. In conjunction with others we found a perforation of the screen.

Q. Where was that? A. In the window of the room, the living room, the first room off the landing.

Q. And when you refer to a window, I show you Exhibit S-4 at the place marked with a lead pencil cross and an A under it, and ask you if that is the window you refer to? A. It is.

Q. As to the perforation which you say you found in the screen, I produce the screen and ask you whether that is the screen to which you refer, and the perforation? A. It appears to be it. There were a number present at the time. In the adjoining building or the second to the rear and to the eastward, a bullet was removed from that building.

Q. In your presence? A. Well, I was 50 or 75 feet away, but I later saw it. I was on the other side of the fence.

Q. I show you a picture, Exhibit S-3 and ask you whether on that picture, you can show the point where this bullet was removed? A. Why, it is rather difficult here but as I recall it, it was about in here, approximately in this location. I measured it but I cannot see it very well on this picture.

Mr. Vickers: For the purpose of the record it is at a point on the side of the house between the tree and the porch of the house shown in the picture and marked with an X.

Q. Is that point which you have indicated on this picture, Exhibit S-3, visible and in line with

the window in which this screen was in the room on the second floor? A. It is.

Q. And, Doctor, when you refer to the screen in the room, do you refer to what is known as the bedroom where these two defendants lived? A. I do.

Q. There is only one window there? A. Yes, sir.

Q. That window is this window? A. Right opposite the door.

(Recess for ten minutes, 4:00 P. M.)

EXAMINATION RESUMED by Mr. Vickers:

Q. I show you two photographs, and ask you whether they represent the person spoken of here as Police Officer Weir and whether they show the wounds you have referred to as the wound of entrance and exit caused by the bullets you have produced here? A. They do.

Q. On one of these is the wound of entrance? A. This.

Mr. Vickers: I offer this picture for identification.

(Marked Exhibit S-18, for identification.)

Q. Will you mark the point you say indicates the point of entrance?

(Witness marks picture.)

Q. Referring to the other picture, does that show the wound of exit you refer to? A. It does.

Q. Will you mark that with a lead pencil?

(Witness marks picture.)

Mr. Vickers: I offer that for identification.

(Marked Exhibit S-19 for identification.)

Mr. Vickers: Exhibit S-18 for identification shows the wound of entrance and Exhibit S-19 shows the wound of exit?

The Witness: Yes, sir.

Mr. Vickers: Cross examine.

CROSS EXAMINATION by Mr. Drewen:

Q. Doctor Hasking, the two bullet holes in the door you have indicated at this point, as the door through which those bullet holes were made? A. Yes.

Q. Now, the picture was situated behind the door in the direct course of the bullet passing through those two holes? A. Yes, sir.

Q. And behind the picture there were two holes in the front wall of the house. A. There was only one hole in the picture.

Q. One hole in the picture? A. Yes. There was a hole in the plaster below it.

Q. And two holes in the wall behind the picture—I do not mean to say in that portion of the wall directly behind the picture but in the wall on which the picture hung? A. In the plaster of the wall on which the picture was hanging.

Q. And they, you say, are both .32 calibre? A. Yes, sir.

Q. Did you look for or examine in the upper hall for bullet holes? A. I did.

Q. Outside of the doorway of Kaerth and Sage? A. I did.

Q. Did you find any? A. I did not.

Q How extensive an examination did you make in the hallways. A. I spent a few moments going up and down there with a light.

Q. Up and down the steps? A. Up and down the steps, and the plaster.

Q. And did you look extensively around by the door, the door of Sage and the door of Kaerth? A. I took a general look in the hallway and on the wall and woodwork.

Q. And you found no bullet marks? A. None that I saw; there were others looking there but I didn't see any.

Q. At the time if this examination, Doctor of the wall and of the hallway and of the upper stairs you were looking for bullet holes? A. I was.

Q. And you found none? A. No.

Mr. Drewen: That is all.

RE-DIRECT EXAMINATION by Mr. Vickers:

Q. One question I overlooked. I show you Exhibit S-2, and ask you whether on the house in the center of the picture, the place where the bullets were removed is evidenced by any marks? A. There is a mark on the board but I am inclined to think there were two boards replaced.

Q. Where they were taken out? A. The boards were split by the carpenter taking the bullets out and whether they were put back again after being put together or new boards, I do not know, but that is it approximately.

Q. Well, these two boards generally indicate the position? A. Yes, of the boards taken out.

Mr. Vickers: For the purpose of the record those are two boards appearing on the house exactly on the right hand of the porch post.

Mr. Vickers: That is all.

Mr. Drewen: No further questions.

(Witness excused.)

CHARLES H. WASH, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. Where do you reside? A. 2001 Palmetto Street, Brooklyn, New York.

Q. Are you a member of the New York Police Department? A. I am.

Q. What position do you hold? A. I am known as Fire Arm Instructor or Pistol Instructor, Police Department, City of New York.

Q. On the 22nd of May of this year, were you at a place known as 19 Manhattan Avenue, in Jersey City and in that vicinity? A. I was, sir.

Q. And did you make an examination on the premises in the rear and to one side of this house No. 19? A. I did.

Q. And was that at the same time that Dr. Hasking, the previous witness was there. A. Yes, sir.

Q. I show you photograph S-3, and ask you whether you recognize the premises shown on that picture, as the premises which you examined? A. Yes, sir.

Q. At that time by you or in your presence by someone else from the house which is shown, the view of the house which is shown in that pic-

ture, was there a bullet extracted? A. Yes, sir.

Mr. Drewen: May we have who extracted it?

Q. Who extracted the bullet? A. I did, myself.

Q. I show you a bullet and ask you whether that is the bullet you refer to? A. This is.

Q. That bullet has some substance on the steel —nickle jacketed point; can you tell whether that is wood or not? A. Yes, sir, that is where it entered in the wet pine or decayed pine.

Q. On the side of the house? A. Yes, sir.

Q. Have you experience in the matter of determining the character and calibre of pistol bullets or ammunition in general? A. Yes, sir.

Q. And can you tell the Court and jury what character of bullet this bullet is and what calibre? A. This is a .38 Special Colt Revolver.

Q. Is it the kind of a bullet fired from such a gun as I show you which has been heretofore marked for identification? A. Yes, sir.

Mr. Vickers: I ask that this bullet be marked for identification.

(Marked Exhibit S-20, for identification.)

Q. I show you Exhibit S-16, for identification, being a bullet, and I ask you whether that is the same character of bullet as the last one that you have just identified. A. Yes, sir.

Q. I show you bullet marked Exhibit S-13, for identification, and ask you whether that is the same character of bullet as the other two you have identified? A. The same calibre.

Q. Same calibre and character? A. Yes, sir.
Q. You call this a Special? A. .38 Special.

Mr. Drewen: Do I understand you are now showing the witness four bullets?

The Witness: Three.

Mr. Vickers: For the purpose of the record, the last bullet shown this witness being the bullet taken by Dr. Hasking from Black.

Q. I show you bullet marked S-11, for identification, and ask you whether that is the same character of bullet as the other three? A. Yes, I think it is.

Mr. Vickers: For the purpose of the rceord the last being the bullet taken from Otis.

Q. I show you a bullet marked Exhibit S-14, for identification, and ask you whether you can tell the calibre and character of that bullet?

Mr. Drewen: Which one is that?

Mr. Vickers: Out of the wood work of the house.

Mr. Drewen: On the lower floor?

Mr. Vickers: Yes.

The Witness: That is a 32 Automatic.

Q. I show you bullet marked Exhibit S-15, for identification, and ask you what character and cal-

ibre of bullet that is? A. 32 Automatic.

Q. The same as the last one? A. Yes.

Q. I show you an automatic pistol and five loaded shells, for the purpose of the record that being the same heretofore shown to Otis, and ask you whether that is the kind of pistol that you have described and whether those bullets are the same kind of bullets that are in the last two exhibits which you have identified? A. They are.

Q. And is this what is known as a 32 automatic pistol? A. 32 automatic Colt.

Q. By the way, this building No. 19, did you go over the walls of the building for the purpose of finding whether there were any evidences of bullet holes or shots other than these two which you have described on the lower floor? A. Yes, sir.

Q. Did you find any? A. We found one in the wall in the house back to the right.

Q. Downstairs? A. Yes, but he examined the stairways and ceiling and could find no bullets.

Q. Now, then, did you go to the room where this screen which I show you was on the second floor of this building, 19 Manhattan Avenue, where this screen was in the window? A. Yes, sir.

Q. I show you Exhibit S-4, and indicate to you a window marked with a cross and the letter A under it and ask you whether that is the window in which that screen was? A. Yes, sir.

Q. Did you make any examination or investigation to see whether the bullet which was extracted from the wet soggy pine board as you have described was in line or range from any point in that room with the hole in the screen? A. When I got there they showed me the screen in which the bullet had punctured a hole and by putting a pencil through the hole in the screen you could see it was

in line with the next house.

Q. You lined it up? A. Yes, sir.

Q. Was that before the bullet was found? That was before the bullet was found.

Q. And as a result of that, did you then make an examination of the house? A. Yes, sir.

Q. And thereafter this bullet was extracted that you have identified here? A. Yes, sir.

Q. And where you lined up with this lead pencil as you have indicated through this screen was the point where the bullet was found at or approximately at the point on which you sighted? A. We could sight over the lead pencil directly and it was only a matter of a couple of seconds until we found the bullet hole in the next building, after lining the point of the pencil with the top of an officer's head standing there.

Q. Was there any indication from your examination of this perforation in the screen that would indicate whether or not the shot which made the hole was directed from within the room or from without the room? A. The bullet was shot from a gun within the room.

Mr. Vickers: Cross examine.

CROSS EXAMINATION by Mr. Drewen:

Q. Where was the screen when you first saw it? A. The screen was placed in the window.

Q. Who placed it there? A. I don't know.

Q. Well, you do not mean to say it was placed in your presence? A. No, it was not.

Q. It was in the window when you first saw it? A. Yes, sir.

Q. In the window which you have indicated on the photograph shown you? A. I beg your par-

don?

Q. In the window which you have indicated on the photograph shown you? A. Yes.

Q. Now, as I understand you, Officer, you examined the premises at 19 Manhattan Avenue for bullet holes in the house, in the interior wall, is that right? A. Yes, sir.

Q. Did you examine extensively in the lower floor of the house? A. Yes, sir.

Q. And you found two bullet holes in the outer wall or rather the inner wall of the front room? A. Yes, sir.

Q. To make it clear to you, the two bullet holes in the wall behind or in course with the two holes pointed out in the door here that has been offered in evidence—that is right, is it? A. Yes.

Q. And you also found a bullet in the house in the rear of the house of 19 Manhattan Avenue? A. Yes, sir.

Q. That is three bullets altogether? A. Yes, sir.

Q. Were you present when the two bullets were extracted from the front wall of the house on the lower floor? A. No I was not.

Q. You did not see those bullets, did you? A. Not until I came here now.

Q. And I understand that you yourself extracted the bullets from the house, in the rear of the house 19 Manhattan Avenue? A. Yes, sir.

Q. Were there any other bullets found by you either in or about this house at 19 Manhattan Avenue? A. No, sir; one bullet was found by me.

Q. And you looked all through the interior of the house at 19 Manhattan Avenue, didn't you? A. Yes, sir.

Q. You looked along the walls in each of the rooms of the house? A. No, sir.

Q. Just—how extensively did you look, that is what I want to find out? A. The bullet was located in the house opposite, in the rear.

Q. I understand that, that is perfectly clear, but what I want to find out from you is how extensively you searched inside the house, No. 19 for bullet holes in the walls or elsewhere in that house? A. I searched I think approximately every square inch of the staircase from the landing that was shown me in between the two rooms.

Q. Yes. A. To the foot of the stairs, with a searchlight.

Q. And you found nothing? A. I found no bullet holes.

Q. That is to say you searched extensively from the entrance to Sage's room, that is to say the upper landing, the uppermost landing of this flight of stairs, from that point down to the foot of the stairs? A. Yes, sir.

Q. And you found no bullet holes? A. I found no bullet holes.

Q. Did you examine the walls along the lower hall landing from the street entrance to the rear door on the first floor? A. I do not understand your question.

Q. Maybe I can explain it. Step down here officer. This is the first floor; there is the porch, there is the first floor. This is a hall leading from the entrance door, from the porch, from the first floor alongside the staircase to the rear rooms; did you look along that hallway? A. The hall and the landing upstairs.

Q. And you found no bullets? A. No.

Mr. Drewen: That is all.

(Witness excused.)

Mr. Vickers: It is admitted by the State, that the State does not contend that there were more than—that it can prove that there were more than six shots fired—and we have produced all of the bullets here.

Mr. McCarthy: That is, three from the door of Sage's room and one through the screen and two downstairs in the parlor.

The Court: Do the six shots include the two fired by Otis?

Mr. Vickers: Four of 38 calibre.

Mr. McCarthy: Two of 32 calibre.

CHARLES SCHMIDT, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. Where do you reside? A. Trenton, New Jersey.

Q. What is your occupation? A. Officer, States Prison.

Q. In Trenton, New Jersey? A. Yes, sir.

Q. New Jersey State Prison at Trenton? A. Yes, sir.

Q. Do you know the defendant Miller here? A. No, sir. Eigan is the name he went under, Frank Eigan.

Q. You mean you do not know him by the name Frank Miller but by the name of Frank Eigan? A. Frank Eigan.

Q. And when did you know him and under what circumstances by the name of Eigan or Egan or Eigan? A. Egan.

Mr. McCarthy: Objected to on the ground it is immaterial, incompetent and irrelevant, highly prejudicial to the defendant.
The Court: I will allow it.

Mr. McCarthy: Exception to your Honor's ruling.

Hyman Lazarus, J. (L.S.)

A. Why, I am the truck driver there and the prisoners I had—I had him out with me helping, and he escaped.

Q. As a prisoner of State's Prison? A. Yes, sir.

Q. You had him with you on your truck, is that what you say? A. Helping.

Q. And? A. And he escaped from me.

Mr. McCarthy: I ask that the answer to the last question be stricken out on the ground that it is incompetent, irrelevant and immaterial and highly prejudicial to the defendant, showing the commission of another crime other than that charged in the indictment.

The Court: I do not understand that to be the purpose.

Mr. Vickers: We are just showing the facts.

Q. Can you fix the date when you say you had this man as a—

Mr. McCarthy: May I get the Court's ruling on that objection?

The Court: I allow the question.

Mr. McCarthy: Exception.

The Court: You may have it.

Hyman Lazarus, J. (L.S.)

Q. Can you fix the date when you say that this man escaped from you through your having him as a State's prisoner in your custody?

Mr. McCarthy: Same objection as the one last made.

The Court: Same ruling.

Mr. McCarthy: Exception.

Hyman Lazarus, J. (L.S.)

The Witness: That man that is with me over here has it on his card.

Q. The date? A. Yes.

Mr. McCarthy: I ask that the answer be stricken out on the ground that it is not responsive.

The Court: The answer may be stricken out.

Q. When you refer to a card, do you mean what is known as a fugitive card? A. I beg pardon?

Q. When you refer to a card do you mean what is known as a fugitive card? A. We have a card when they escape they send out with the picture.

Q. You mean some other man has the record, is that what you mean? A. Yes.

Q. Now, approximately can you fix the time, do you know whether it was in this present year or last year or when? A. Last year, in July.

Q. In July last year? A. Yes, sir.

Q. And the only thing you do not know is the exact date? A. The exact date.

Q. Since that time, so far as your knowledge goes has he been received back in State's Prison? A. No, sir.

Mr. McCarthy: Objected to—I was timely with my objection, and I ask that the answer be stricken out—on the ground it is immaterial, irrelevant and incompetent.

The Court: He has already answered it notwithstanding your statement that it was timely.

Mr. McCarthy: He was more timely than I was. I ask exception to the Court's ruling.

Hyman Lazarus, J. (L.S).

Mr. Vickers: Cross examine.

Mr. Drewen: No questions.

JAMES M. MURPHY, sworn:

DIRECT EXAMINATION by Mr. McMahon:

Q. You are a physician and surgeon? A. Yes, sir.

Q. A graduate of what college? A. Queens

University, Kingston, Ontario.

Mr. McCarthy: We will admit the doctor's qualifications.

Q. When? A. 1921.

Q. Do you recall the morning of the 22nd of May, 1923? A. I do.

Q. Were you connected with any institution at that time? A. Jersey City Hospital.

Q. Did you receive a call to go to the Sixth Precinct Police Station? A. I did.

Q. When you got there what time was it? A. I would say it was about quarter to six in the morning.

Q. And what did you go there for? A. Well, the call was there was a man shot at the 6th Precinct, so when we got there why, Detective Walton was shot, he had a scalp wound.

Q. Did you dress his wound? A. Temporarily, he didn't want to have it done, but he wanted us to go down and see the other fellows that were shot.

Q. Did you go from the 6th Precinct to the house at 19 Manhattan Avenue? A. I did.

Q. Do you remember what time it was about when you got there? A. I would say about five minutes to six.

Q. And when you went in what did you find? A. Why, I found a man in plain clothes lying face downwards, face toward the door. a pool of blood about his head.

Q. I show you photograph, Exhibit S-5, and ask you if you found that man in this condition? A. Yes, sir.

Q. Was that the man you are testifying to now, you found? A. Yes, sir.

Q. What room was he in? A. He was in the

parlor.

Q. Did you examine him? A. Yes, sir.

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

Q. And then where did you go? A. I went into the dining room, found a man in a policeman's uniform also dead, feet towards the stairs.

Q. I show you Exhibit S-7, for identification, and ask you if that is the man you found in the dining room? A. Yes, sir.

Q. Did you examine him? A. Yes, sir.

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

Q. Did you see Otis there? A. No, sir, I did not.

Mr. McMahon: That is all.

Mr. Drewen: No questions.

(Witness excused.)

JAMES WALTON, sworn:

DIRECT EXAMINATION by Mr. McMahon:

Q. You are a member of the Jersey City Police Department? A. Yes, sir.

Q. And you were connected with it on the 22nd day of May, 1923? A. Yes, sir.

Q. On the morning of that day did you receive a call to go to the house at 19 Manhattan Avenue? A. Yes, sir.

Q. How did you happen to go there? A. I met Sergeant Black at about half past four; he told me not to go home, he wanted to use me to go around to 19 Manhattan Avenue; he had telephoned to Lieutenant Otis of West New York to come down, that he had a man by the name of Mil-

ler—

Mr. McCarthy: Objected to what he said on the telephone.

The Court: Objection sustained.

Q. Tell us how you came to the house at 19 Manhattan Avenue? A. I drove five men and we went there.

Q. Who are the men you drove? A. Sergeant Black, Lieutenant Otis, Detective Connalin, Patrolman Weir and Patrolman Dondon.

Q. When you got to the house in 19 Manhattan Avenue, what did you do? A. They all got out;; I stopped the car and we shut the door and Sergeant Black told me to cover the back of the house.

Q. Do you know what the other men did? A. No.

Q. I show you Exhibit S-4, can you tell from that picture where you were standing, how you were covering the rear of the house? A. Right here.

Mr. Drewen: By the clothes pole?

The Witness: No, there is this railing here, I do not know what you would call it.

Mr. Drewen: That looks like a grape arbor.

The Witness: Yes, over here against this fence, this runs all the way over, over here near the fence, then stops.

Q. About in this position where I have the pencil? A. Yes.

Q. Well, I have made an X mark on Exhibit

S-4, that is where you were standing, put a "W" where you were standing? A. Yes.

Q. And how long did you stay there? A. About three or four minutes.

Q. Did you hear any noise or anything? A. I heard two shots.

Q. What did you do then? A. I walked from the end of the street out over to the other end, that would be the eastnorth corner at No. 17, and I hollered out to Patrolman Connalin that I thought they were shooting up Sergeant Black.

Mr. McCarthy: I object.

Mr. McMahon: We will consent that it be stricken out.

Q. What did you do after that? A. He told me, he said—

Mr. McCarthy: We object to what he said.

Q. What happened? A. He told me to stay in the back; he said he might get out the back, and I said all right, and I walked towards the rear or the front part of 15 Just as I turned around I got shot.

Q. Where were you shot? A. At the top of the head.

Q. Is that the wound that you have just pointed to? A. Yes, sir.

Q. What did you do after that? A. Why I didn't know where I was shot from, I thought it was on the other side of the fence, and I jumped over the fence. I didn't see anybody and I let two shots go in the house where I thought the man was.

Q. And then did you stay in the back part? A.

No, sir, I was all covered with blood, I could not see any more.

Q. Where did you go? A. Why, walked towards the gate and Patrolman Connalin came in and helped me out.

Q. Did you go to your automobile? A. No, he stopped another automobile and asked him if he would take me to a doctor and the man said yes, so just then there was somebody running out of a house and Connalin said, "There he goes." I didn't go in the other automobile, I went in my own car and went after him to Central Avenue.

Q. Capture him? A. Yes.

Q. Was he the defendant? A. No, he was some man that was running for help, for the policeman.

Mr. McMahon: Is Mr. Hughes in court?

(A voice: Yes.)

Q. Is that the gentleman you refer to was running? A. I would not know him now.

Q. So whether the bullet that struck you went into your head or bounced off your head—A. I got hit so fast I didn't know what hit me.

Q. It was not taken out, was it? A. No.

Mr. McMahon: That is all.

CROSS EXAMINATION by Mr. McCarthy:

Q. Were you there, Detective Walton, when the bullet was extracted from the house in the rear? A. No, I was in the hospital.

Q. Just tell us, by reference to this picture Exhibit S-4, where you were standing when you were

struck? A. I do not see the house there.

Q. Is this the house here? A. No, sir.

Q. That is not? A. No, sir, that is No. 19.

Q. This is No. 19? A. This is 17, and the next one is 15, the rear house.

Q. Were you standing near the fence of the house in the rear of 19, that is, off to the left, looking out from the back of 19? A. No, I was facing forward right up at the window.

Q. Facing up at the window of 19? A. Yes.

Q. But how far were you from the fence, the rear fence of No. 19? A. The rear fence.

Q. Yes. A. Why that would only give me 25 feet across?

Q. Twenty-five feet across? A. Yes, as far as the rear end of the fence of 19.

Q. Yes. A. I was up in the front of the fence before that, right up at the back of the house.

Q. You know where the house is in the rear, looking out from the back of No. 19, you know where the house is in the rear? A. Yes, sir, 15.

Q. 15 or 17? A. 15.

Q. In reference to that house where were you standing? A. Just about, well, maybe one foot from the fence.

Q. One foot from the fence? A. Yes, sir.

Q. And is that where you were when you were struck by this bullet? A. Yes, sir.

Q. When you heard these two shots, heard these two shots fired together, that is the way it sounded, fired together? A. Yes.

Q. Upstairs in what house? A. 19.

Q. When you were dressed that day, did you have an overcoat on? A. Yes, sir.

Q. Did you have the coat collar up or down. A. Down.

Q. Did you have your gun with you? A. Yes.

Q. Did you have the gun out at that time? A. Yes, sir.

Q. When did you first take your gun out? A. When I got in the back yard, when I heard the shots.

Q. After you heard the shots? A. Yes, sir.

Q. Did you hear the two shots in quick succession or was there an interval of time between the first and second? A. Well, it seems to me they went bang, bang.

Q. Bang, bang? A. Yes.

Q. And did you then take out your gun. A. Yes.

Q. And what did you do? A. I walked over and I shouted out to Connalin I thought Sergeant Black was getting shot up. He said, 'Well, you stick to the back, he might get out.

Q. And how soon after was it that you got hit on the top of the head? A. I would judge about—while I had walked 75 feet, I judge two or three minutes.

Q. Did you see the flash of that shot? A. No, sir.

Q. Did you hear any talk between these men, Black, Otis, Connalin or Weir on your way to this house as to how they were going to get this man out of the place? A. No, sir, I was driving the car, I didn't pay no attention to them.

Q. Did you hear any talk when you got to the house? A. No, Sergeant black ordered me in the back right away

Q. Did you see those men go up the stoop of the house? A. No, sir.

Q. You had gone away then to the back? A. I was in the back.

Mr. McCarthy: That is all.

RE-DIRECT EXAMINATION by Mr. McMahon:

Q. In reference to this window shown on the second floor of the plan, can you tell us in what direction from that window you were standing when you were shot? A. This is the window of the bedroom of the Miller's, the second floor window. I stood here.

Q. You were in that direction? A. Yes, sir.

Mr. McMahon: On the side indicated by the arrow on the plan. That is all.

(Witness excused.)

WILLIAM HOGUE, sworn:

DIRECT EXAMINATION by Mr. McMahon:

Q. You are connected with the Jersey City Police Department? A. Yes, sir.

Q. As Captain of Police? A. Yes, sir.

Q. In charge of what precinct? A. 6th.

Q. And were you in charge of that precinct on the 22nd day of May, 1923? A. Yes, sir.

Q. Did you go to the house on 19 Manhattan Avenue, on that day? A. Yes, sir, later in the day.

Mr. Vickers: At this point may we have the permission of withdrawing this witness and putting on Mr. Mahaney, he is here now from Trenton?

The Court: You may do so.

(Witness withdrawn.)

THOMAS A. MAHANEY, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. Where do you live? A. 37 Hart Avenue, Trenton, New Jersey.

Q. And what is your position? A. Identification Officer, State Prison.

Q. At Trenton? A. Yes, sir.

Q. And for how long have you been an official connected with that institution? A. Twenty years and a half.

Q. Do you know this male defendant here? A. Yes, sir.

Q. And have you any records with you of his imprisonment in State's Prison and his manner of release or relief from that institution? A. Yes, sir.

Mr. Drewen: Objected to on the ground it is incompetent, irrelevant and immaterial, prejudicial to the defendant and having no bearing on the present issue. I understand he has answered and I ask that the answer be stricken out.

The Court: I understand that it is not the purpose of the State's question. I will allow it.

Mr. Drewen: What is the purpose?

Mr. Vickers: The purpose is, if counsel does not know it, and it does not seem possible that he does not—to show that these police officers were within their rights as police officers with their information in pursuing an escaped felon; that is the purpose of it.

Mr. Drewen: So far as that is concerned, escape is at best a misdemeanor and it does not appear that those officers had a warrant, and not having a warrant they had no right to arrest him for a misdemeanor.

Mr. Vickers: I think perhaps we had better leave that question to be argued before the Court at some other time unless the Court wants to rule on it. The State's contention is—

The Court: I will rule on it now. I will allow it.

Mr. Drewen: Exception.

The Court: You may have your exception.

Hyman Lazarus, J. (L.S).

Q. Produce what records you say you have?

(Witness produces records.)

Q. You produce now a paper saying that this is the commitment which was delivered at the State's Prison with this defendant together with the bill of costs attached thereto, is that right? A. Yes, sir.

Mr. Drewen: Object to the question on the same ground as the last objection, and ask that the answer of the witness be stricken from the record.

The Court: I will allow it.

Mr. Drewen: I would like to have it appear that I made my objection promptly.

Mr. Vickers: We will admit it.

Mr. Drewen: And I except to the Court's ruling.

Hyman Lazarus, J. (L.S).

Mr. Vickers: The State now offers the commitment under the seal of Passaic County, New Jersey, purporting to be signed by the Clerk of the Court and by the President Judge of the Court and also the bill of costs under the seal of the County of Passaic, and we offer them in evidence.

Mr. Drewen: Objected to on the ground it is incompetent, irrelevant and immaterial, prejudical to the defendant and having no bearing on the present issues, and further that they are not shown—

The Court: Do I understand this has been offered for another purpose? That is, that a policeman has a right to arrest without a warrant when he knows that there has been a crime committed? I understand that that is the purpose of this entire examination. It is because of that that I allowed it.

Mr. Drewen: I object to that offer on the ground that the papers are not shown to be the official records that the State describes them as being.

The Court: I will allow them.
Mr. Drewen: Exception to the Court's ruling.

Hyman Lazarus, J. (L.S.)

Q. Have you any record made by you as to the identification of the person received together with this commitment paper which has been produced?

Mr. Drewen: Objected to on the ground it is incompetent, irrelevant and immaterial.

The Court: I will allow it.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

A. Yes, sir, I have.

Q. To what do you refer? A. I have a negative here made of him when he came in.

Q. Taken by whom? A. By me.

Q. Produce it? A. Right here.

Mr. Vickers: Witness produces a negative.

Q. I show you Exhibit S-9 for identification, and ask you whether you can say whether that was made of the negative which you have produced? A. Yes, sir.

Mr. Vickers: I now offer the negative in evidence also Exhibit S-9.

Mr. Drewen: Object to the offer on the ground that each article offered is incompetent, irrelevant and immaterial, highly prejudicial to the defendant, having no bearing on the present issue. Do I understand the two are made as one offer?

Mr. Vickers: Exhibit S-9 is now offered in evidence and so is the negative.

Mr. Drewen: I make the objection I have heretofore stated to each.

The Court: I will allow it.

Mr. Drewen: I make the further objection to the offer of S-9 on the ground that it contains printed matter on the back of the photograph, which printed matter is highly prejudicial to the defendant Frank Sage. What is the Court's ruling?

The Court: I do not know what is on the back of that.

(Exhibit S-9 handed to the Court.)

Mr. Vickers: I will withdraw my offer on that. I had not offered it for the printed matter. I will examine the witness further on that.

Q. With respect to certain printed matter which is on the back of Exhibit S-9, this card which has been shown to you, by whom was that made, collected and placed on the card?

Mr. Drewen: Objected to as—

The Witness: By me.

Mr. Drewen: —incompetent, irrelevant and immaterial.

The Court: I will allow it.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

Q. The answer is by me? A. By me.

Q. From what source did you get the descriptive matter contained on the back of that card?

Mr. Drewen: Same objection as that last stated.

The Court: Same ruling.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

A. I made that of him when he came in, that is, within the course of a week after.

Q. Does that come from your records, that is what I want to know? A. That comes from our records, and I put that on the fingerprint.

Q. You have the records, have you? A. Yes, sir.

Q. And so far as that portion of the printed matter on this card is concerned as pertains to an offered reward—

Mr. Drewen: Objected to, pardon me —

Q. (Continuing) By whose authority, if by anyone's, was that printed there?

Mr. Drewen: Objected to on the same ground, that it is incompetent, irrelevant and

immaterial and highly prejudicial to the defendant.

Mr. Vickers: I withdraw it. I now offer the card in evidence.

The Court: I will allow it.

Mr. Drewen: I object to the offer on the ground urged and stated by me when the offer of the photograph with the printed matter on the back of it was first made a few moments ago, that is, on the ground that the printed matter is incompetent, irrelevant and immaterial and highly prejudicial to the defendant.

The Court: And for the same reason that the Court has ruled before, it will allow it.

Mr. Drewen: Exception to your Honor's ruling.

The Court: You may have your exception.

Hyman Lazarus, J. (L.S.)

Q. Have you any record as to the date this defendant, the male defendant escaped from State's Prison? A. Yes.

Mr. Drewen: I object to that on the ground it is incompetent, irrelevant and immaterial, prejudicial to the defendant and having no bearing on this issue.

The Court: Objection overruled.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

Q. Give it. A. 11 A. M., the morning of July 7th, 1922.

Q. If since the 7th of July, 1922, this man had returned or been returned to your institution would he have through your bureau, passed through your hands as a matter of official routine of the prison? A. Yes, sir.

Mr. Drewen: Objected to on the same ground last urged as the basis of the last preceding objection.

The Court: He has already answered it, I will allow the answer and grant you an exception.

Hyman Lazarus, J. (L.S.)

Q. Since 11 A. M., the 7th of July, 1922, has this defendant returned or been returned to the States' Prison in Trenton?

Mr. Drewen: I make the same objection as that last stated.

The Court: Same ruling.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

The Court: What is your answer?

A. No, sir.

Q. Is it any part of your duties to investigate escapes and to make a search for escaped prisoners? A. Yes, sir.

Q. Did you personally at any time since the 7th of July, 1922, go to the Police Department in West New York or to any other place in this county for the purpose of finding this defendant?

Mr. Drewen: Same objection as last made.

The Court: Same ruling.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

A. Well, we notify them with our photograph—

Q. You mean these cards? A. Yes, sir.

Q. They are sent out broadcast? A. Sent out broadcast all over the States, in different cities and there was a detective came down from the West New York Department.

Q. Never mind about that. Have you with you the original information respecting the description, name, marks, fingerprint record and so forth of this defendant and which is contained on this card, Exhibit S-9?

Mr. Drewen: Objected to on the ground it is incompetent, irrelevant and immaterial, prejudicial to the defendant and having no bearing on this issue.

The Court: I will allow it.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

Mr. Vickers: Yes or no.

A. Yes, sir.

Q. And does it correspond with the information contained on the card? A. Yes, sir.

Mr. Vickers: Cross examine.

Mr. Drewen: No questions.

(Witness excused.)

CAPTAIN WILLIAM HOGUE, recalled:

DIRECT EXAMINATION (Resumed) by Mr. McMahon:

Q. Do I understand you went to the house at 19 Manhattan Avenue, on the morning of the 22nd of May, 1923? A. No, sir, I didn't go in the morning, I didn't go until afternoon; Deputy Chief Wolff was in charge.

Q. I have a number of envelopes here marked, "Captain Hogue," will you tell us who collected this evidence? Yes, sir.

Q. Who? A. I collected all that evidence, the gun of Officer Weir, and placed it in the envelopes.

Q. You collected it? A. Yes, sir.

Mr. Drewen: I ask that the statement of the witness, the gun of Officer Weir, be struck from the record.

Q. You collected the evidence contained in these three envelopes? A. Yes, sir.

Q. Where did you collect this evidence, Captain? A. I remained in the station and collected the evidence brought in by the officers.

Q. And did you mark the envelopes as you got them from the officers and put the evidence in? A. Yes, sir.

Q. And this envelope which I have, dated May 22nd, 1923, what does that contain? A. It contains an Iver Johnson Revolver, the property of Detective James Walton .

Mr. Drewen: I would ask, in this connection, if the Court please, that the witness just describe the objects without saying whose property they are.

Mr. Vickers: Just describe the property without attempting to say whose it is.

Q. I show you another envelope dated May 22nd, describe the property contained in that envelope? A. A revolver and five loaded shells.

Q. And in the envelope marked No. 5? A. One .32 calibre revolver, five loaded shells and a .22 calibre loaded revolver.

Q. And the envelope marked May 22nd, 1923? A. A .32 calibre revolver, Smith & Wesson, and five loaded shells.

Q. The envelope marked in red ink No. 4? A. Two empty shells marked X, found on the room off the stairs on the second floor.

Mr. Drewen: I object to that and ask that this witness refer to what is contained, and ask that the answer be struck from the record.

The Court: That may be done.

Q. And the envelope No. 6? A. Property taken from the defendant.

Q. What does this contain? A. Papers, a knife, a blackjack, a bit, keys, a Yale key and a Russwin key.

Q. You say taken from the defendant? A. Yes, sir.

Q. Where? A. The male defendant.

Q. Where? A. At the station.

Mr. Drewen: By you?

The Witness: By the officer, one of the arresting officers.

Mr. Drewen: In your presence?

The witness: Yes, sir.

Mr. McMahon: That is all.

Mr. Drewen: No cross examination.

(Witness excused.)

LOUIS KIDNEY, sworn:

DIRECT EXAMINATION by Mr. McMahon:

Q. Are you connected with the 6th Precinct? A. Yes, sir.

Q. And you were on May 22nd, 1923? A. Yes, sir.

Q. I show you two guns and ask you if you have ever seen these before? A. Yes, sir.

Q. Did you see this one, too? A. Yes.

Mr. Vickers: The last gun, for the purpose of the record, being the one already identified as No. 208020.

The Witness. Yes, sir.

Q. Where did you see these guns? A. Up in the attic.

Q. Attic where? A. Up over the stairs.

Q. In the house at 19 Manhattan Avenue. A. Yes, sir.

Q. Were they loaded? A. Yes, sir.

Q. Fully loaded? A. One had two shells.

Q. Which one is that? A. This one, this one marked 208020.

Q. It had two loaded shells? A. Two empty and four full ones.

Q. And how was this revolver? A. Fully loaded.

Mr. Drewen: "This revolver" of course, is indefinite.

Mr. Vickers: I offer six loaded shells handed to the witness for this gun, which is a Webley, .45 calibre.

Q. I show you two shells which Col. Vickers just extracted from this gun and marked by him: Are those the empty shells that were in the gun when you found it? A. They look like the same shells.

Mr. Drewen: Which gun?

Mr. Vickers: May it appear on the record—

The Witness: There were four others—

Mr. Vickers: May it appear on the record that the two empty shells that the witness has in his hand are the shells which at the request of defendant's counsel I extracted and marked in the presence of the court and jury.

Mr. Drewen: Extracted from 208020?

Mr. Vickers: Yes.

Q. The four shells which I show you now were they contained in the gun 208020? A. Yes, sir.

Q. And where were the other shells which I have in my hand? A. There were eight other shells lying on a board, on top.

Q. On top of what? A. On top of a board in the attic, about a foot from the opening, and this gun was lying on this side and the other gun was lying on this side of the board, lying like that (indicating).

Q. That is, they were all resting on a board in the attic? A. Yes, sir.

Q. Step down to this plan, Officer. Can you show on the second floor plan where the opening to the attic was? A. The second floor, right about here.

Q. This square marked scuttle to attic? A. Yes that is it.

Q. That is where you went up? A. Yes, and that is where the gun was, further inside.

Q. This side of the opening? A. Yes, sir.

Q. North of the opening? A. Yes, sir.

Q. About how far from the opening? A. About a foot or a foot and a half.

Q. Which way were they pointing? A. To-

ward the opening.

Mr. McMahon: That is all.

CROSS EXAMINATION by Mr. Drewen:

Q. These two guns which have been shown to you, one being a Colt, number 208020 and the other a Webley .45, they are the two guns you say you found in the attic? A. Yes.

Q. You say you found them about a foot from the trap leading up from the hole into the garret? A. About a foot or a foot and a half.

Q. And there were these bullets before you lying between the two guns? A. Yes, there is a jamb across there and they were lying on the board, the two guns and these bullets were lying there, about that far from the hole.

Q. Was the Webley 45. fully loaded? A. Yes.

Mr. Drewen: That's all.

(Witness excused.)

EDWARD COYNE, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. You are a member of the Jersey City Police Department? A. Yes, sir.

Q. And have been for how long? A. Since 1914.

Q. And what is your rank? A. Round Sergeant.

Q. On the 22nd day of May of this year, were you at 19 Manhattan Avenue? A. Yes, sir.

Q. Were you there at the same time that Officer

Kidney, the last witness who was on the stand was there? A. Yes, the same time Officer Kidney was there.

Q. Did you make any search of the premises at that time with Officer Kidney? A. We searched the premises, yes, sir.

Q. At that time did you find any blackjack there? A. A blackjack like that.

Q. Where? A. In the bedroom.

Q. On the second floor? A. Yes, sir, on the second floor.

Q. The bedroom towards the front or the bedroom towards the rear? A. The bedroom towards the rear.

Q. And did you there find this paper and the contents at that time? A. It was wrapped in a newspaper, which I opened.

Q. This paper and some contents? A. Yes, sir.

Q. What was in it? A. A long package and it was marked DuPont Dynamite and the other stuff in it was wires.

Q. I show you what you call wires and ask you if that is what you mean? A. That is what I mean.

Q. Do you know what they are? A. No, sir, I am not familiar with them.

Q. And to whom was the paper that I show you and that which was contained in it turned over, do you know? A. It was placed in the bag and taken to the 6th Precinct with the other stuff found there.

Mr. Vickers: Cross examine.

Mr. Drewen: No cross examination.

(Witness excused.)

THOMAS WOLFE, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. Chief, were you at 19 Manhattan Avenue on the 22nd of May? A. Yes, sir.

Q. And were you there at the time this male defendant was arrested? A. Yes, sir.

Q. Where was the defendant at the time you got there? A. At the time I got there, when I arrived there Sergeant Coyne was standing on the front stoop and several officers. Sergeant Coyne said to me—

Mr. McCarthy: I object to what Sergeant Coyne said.

Q. Don't tell us what he said. Did you direct the manner of his capture? A. Yes, sir.

Q. What was done? A. Well, I took Sergeant Coyne and about six or seven patrolmen that were standing there and I said, "Well, we got to go to this, we got to go in—

Q. What was done, never mind what was said? A. I proceeded upstairs—but I am going ahead of my story. When the man came to me—

Q. Don't tell us what was said, please A. Well, I had telephoned—

Q. What means were used to arrest this defendant, never mind about the conversation, we are getting into action now. A. I had telephoned for the gas bombs.

Mr. Drewen: Objected to.

New Jersey State Library

Q. Did you get them? A. Well, I—no. Then I met Sergeant Coyne.

The Court: After you had a conversation with him, what did you do?

Q. Let the gas off? A. Proceeded upstairs.

Q. Well proceed. A. And I told the men draw your revolvers, and we drew our revolvers and we went in and searched the bedroom and the bathroom and kitchen, so we didn't find him there. One of the officers passed a remark, he said, "Chief, he might be in the attic."

Mr. McCarthy: Never mind what the officer said.

Mr. Drewen: Don't tell us what the officers said.

The Court: That is objectionable Officer; you must not tell what conversations occurred between you and the officers, but tell us what you did and what you observed.

Q. Did you throw tear bombs up there and bring this man out? A. We came out into the small hall first.

Q. Did you throw them up Chief? A. Yes, sir.

Q. That is what brought him down? A. Yes, sir.

Q. And you put him under arrest? A. Yes, well—

Q. Now, when he came down did he have any weapons on his person? A. Well now, I will have to go into detail on that, Prosecutor.

Q. Just detail it enough to say yes or no? A.

I pulled him down—

Q. All right, after you pulled him down, did he have any weapons on him? A. No, he had no weapons.

Q. Were you there when Officer Kidney went up into the scuttle hole and found these weapons which he produced and says he found there? A. No, I sent Kidney when I was downstairs, when he had the defendant under arrest I sent him up.

Mr. Vickers: Cross examine.

CROSS EXAMINATION by Mr. Drewen:

Q. Deputy Chief Wolfe, when you went up, how many officers were with you? A. I should judge six or seven.

Q. Actually went upstairs with you? A. Went upstairs with me.

Q. Weren't there two other officers besides you went up the stairs with you? A. No, there was more than that, I believe.

Q. How long after the shooting do you know was it that you went upstairs with your men? A. Well, I guess it was before six o'clock I arrived there.

Q. In the morning? A. Yes.

Q. Did you see the girl, the defendant, Mae Miller? A. No, sir.

Q. She was not there at all when you got there? A. No, sir.

Q. Do you know whether or not she had been taken into custody by that time? A. Why, somebody informed me that she was already under arrest.

Q. But she was not there? A. No, sir.

Q. You did not see her when you got there?

A. No, sir.

Mr. Drewen: That is all.

(Witness excused.)

EDWARD F. MURPHY, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. You are a member of the Jersey City Police Department? A. Yes, sir.

Q. Were you at this house 19 Manhattan Avenue, on the morning of the 22nd of May, of this year? A. Yes, sir.

Q. Did you go up stairs? A. Yes, sir.

Q. At the time you went upstairs, did you know where the prisoner was, this male defendant here? A. I did not then.

Q. Had you any information indicating where he was? A. In the attic, sir.

Q. Up through the scuttle hole? A. Yes, sir.

Q. Was the scuttle hole open? A. No, sir.

Q. A lid on it? A. I took my night stick and threw it open?

Q. And what did you do? A. Threw the gas bombs in.

Q. Then he came down? A. About a minute or a minute and a half after.

Q. Did you help him down? A. His foot protruded down through the hole and I told him to come down and the Deputy Chief grabbed his leg and another patrolman—

Q. When he came down did he have any weapons on him? A. No, sir.

Q. At the time that you refer to, was Officer Kidney in the house? A. I did not see him, sir.

Mr. Vickers: Cross examine.

Mr. Drewen: No questions.

CHARLES H. WASH, Recalled:

RE-DIRECT EXAMINATION by Mr. Vickers:

Q. I call your attention to this Webley gun which has been produced here and also to 12 cartridges apparently of one make and also your attention to the gun which you have previously seen and identified, and ask you to which of those two guns the different cartridges that are now before you belong or fit? A. These cartridges, all 12 of them belong to this gun and could not be used in this other one.

Mr. Drewen: Which one?

The Witness: The .38 Special Colt.

Q. Now, I show you six loaded cartridges and ask you whether they belong to the Webley which is before you? A. Yes, sir.

Mr. Vickers: That is all.

(Witness excused.)

At 5:40 P. M., the Court declared a recess until 10:00 A. M., warning the Jury not to discuss the case.

HARRY KAERTH, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. You are a member of the Police Department in this county? A. Yes, sir.

Q. In what Municipality? A. West New York.

Q. How long have you been a member of the police force? A. About eight years.

Q. I show you a book and ask you whether you have produced this here today and what it is, whether it is connected with the Police Department? A. It is a record of warrants and summons issued by the recorder.

Q. Turned over to the police? A. Yes.

Q. And is there any record there made by you regarding a warrant or alleged warrant against this male defendant here on trial? A. Yes, sir. On April 24th, there is a warrant issued for the arrest of Frank Egan.

Q. April 24th, 1923? A. Yes, sir.

Q. And is that in your handwriting? A. Yes, sir.

Q. I show you a warrant heretofor marked Exhibit S-10, for identification, and ask you if that is the warrant which you referred to in this memorandum and whether it came to your hands and has been in your hands until turned over to the office of the Prosecutor of the Pleas, for the purpose of this trial? A. Yes, sir.

Mr. Drewen: I object as leading.

Mr. Vickers: Get it over with.

Mr. Drewen: I withdraw the objection.

Q. Do you know Mr. Otis, the police officer? A. Yes, sir.

Q. Is he a member of your department? A. Yes, sir.

Q. Is he the Otis who was a witness on the stand here and the same Otis who was shot in the course of this difficulty at 19 Manhattan Avenue on the 22nd of May? A. Yes, sir.

Q. How long have you known him? A. Oh, about 15 or 18 years.

Q. Are you familiar with his handwriting? A. yes, sir.

Q. Is it a part of police routine of your department, for persons other than yourself to make entries in this police record? A. Yes, sir.

Q. With respect to the entry on page 142 to which you have called attention, I call your attention to an entry just above that, using the same order, and just below that entry, and just after that entry on the next page under the same date, and ask you whether you know in whose handwriting those two entries are? A. Lieutenant Otis.

Q. So that with your entry of this warrant being out against Egan, the next entry above that is Otis's and the next entry after that is Otis's likewise, is that right? A. Yes, sir.

Q. And is it part of the duty of your department, for police officers, including Otis to familiarize themselves with the matters that come up and which are recorded in this police record?

Mr. Vickers: Cross examine.

CROSS EXAMINATION by Mr. Drewen:

Q. Captain, do you know this defendant who is named in that warrant? A. Do I know him?

Q. Yes. A. No, not so well.

Q. What was your answer?

The Court: Not so well.

Q. Well, you do know him then, do you? A. I

have seen him.

Q. You saw him three or four — had you finished your answer? A. I said I have seen him.

Q. When had you seen him? A. I seen him getting into his car one day when I was about a block away from him.

Q. And you saw him on other occasions? A. The only time I remember seeing him after that is about a couple of minutes after when I ran through a certain street to head him off and he passed me in his car.

Q. You knew where he lived when he lived in West New York, didn't you? A. I didn't know whether he lived—

Mr. Vickers: Objected to, not proper cross examination.

Mr. Drewen: It is proper cross examination, I submit in this situation. I have a right to test the good faith of this witness. He gives testimony here that April 27th there was a warrant in existence. I want to show that he saw this man after April 27th and before May 22nd, and didn't arrest him. I have a right to examine him as to that, certainly, so as to test the fact as to whether or not this warrant was actually in existence when he says it was.

The Court: I will allow it.

(Question repeated by the Stenographer.) "You knew where he lived when he lived in West New York, didn't you"? A. I didn't know where he lived. I thought he lived at 572 Hudson Avenue.

Q. Where? A. West New York.

Q. Did you ever go to 572 Hudson Avenue to look for him? A. I was there on the street.

Q. What is that? A. I was on the street a number of times waiting for him.

Q. Whereabouts on Hudson Avenue waiting for him? A. Sometimes I waited on the street nearby.

Q. In the drugstore? A. Yes, I have been in the drugstore?

Q. Now, Captain Kaerth, about three days before the shooting in Jersey City, did you see him outside the drugstore that you have just referred to and weren't you within about ten feet of the man? A. No, sir, never seen him there.

Q. 14th Street and Hudson Avenue? A. No, sir.

Q. Did you ever go to the premises 572 Hudson Avenue to ascertain this man's presence there? A. No, sir.

Mr. Drewen. That is all.

RE-DIRECT EXAMINATION by Mr. Vickers:

Q. By the way, I show you Exhibit S-9, and ask you whether you are familiar with that picture as a part of police business of your department in West New York? A. It was given to me by Lieutenant Delman of Union Hill.

The Court: What is your answer to the question, are you familiar with that?

The Witness: Yes, sir.

Q. And to whom did you turn it over, if you know? A. Why, Lieutenant Otis had it.

The Court: What is your answer to the question, are you familiar with that?

The Witness: Yes, sir.

Q. And to whom did you turn it over, if you know? A. Why, Lieutenant Otis had it.

Mr. Vickers: The State offers now in evidence the warrant and the Police blotter so far as the police blotter describes the entry of this warrant on the 24th day of April, 1923, and the two entries made by Otis just before and just after this entry on the same day.

The Court: Any objection to the offer of the warrant and the record?

Mr. Drewen: Yes, we object to the warrant and the record on the ground, it is incompetent, irrelevant and immaterial.

Mr. Vickers: I withdraw the offer.

CROSS EXAMINATION by Mr. Drewen:

Q. Now, Officer, with regard to your seeing this defendant Sage about a week before this shooting in Jersey City, isn't it a fact that you in the company with a man named Hangley and Detective Otis saw Sage near the drugstore at 14th Street and Hudson Avenue at night time? A. No, sir.

Q. You were about ten feet from him? A. Never seen him, or I would have taken him, or tried.

Mr. Drewen: That is all.

RE-DIRECT EXAMINATION by Mr. Vickers:

Q. You do not say, do you, that if the defendant alleges that he was in the position described by Mr. Drewen or where Mr. Drewen says he was, that he was not there; do you say that? A. No, sir.

Q. You say you did not see him, is that right? A. Yes, sir.

Q. And in the course of your police business were you on the lookout for him for the purpose of arresting him? A. Yes, sir.

Q. And were those your instructions to your subordinates? A. Yes, sir.

Mr. Vickers: That is all.

(Witness excused.)

GEORGE GERHART, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. Where do you reside? A. 73 Garrison Avenue, Jersey City.

Q. And how long have you lived in Jersey City? A Well, I have been out of the city for two or three years but previous to that all my life.

Q. What is your business? A. Manufacturer of fireworks, expert in handling explosives.

Q. And by whom were you employed? A. At the present time by the DuPont Powder Company.

Q. Are you familiar with the manufacture of goods of that company? A. Yes, sir.

Q. And since the 22nd of May of this year, have you received from Mr. Charlock of the Prosecutor's

office this paper with the contents at that time and likewise this paper or such a paper containing material such as now is in the paper, and if so, what if anything can you say, if you can say, was contained in this paper wrapper and what did you do, if anything, to determine what it was?

Mr. Drewen: Objected to as incompetent, irrelevant and immaterial.

The Court: It will be allowed.

A. I received from Detective Charlock a sealed package which I opened and it contained this stick of—

Mr. Drewen: He said, "I received from Detective Charlock a sealed package which I opened." The Colonel's question is directed to these specified records before him.

The Court: Proceed.

The Witness: And the package contained this stick of DuPont 60 per cent. dynamite as well as these number six blasting caps.

Q. What do you call them, number six blasting caps? A. Yes, number six blasting caps.

Q. And what did you do with the dynamite or part of it, and the caps in order to make a test or determination? A. I opened—

Mr. Drewen: Just a moment, that is objected to, incompetent, irrelevant and immaterial, not binding on this defendant, highly prejudicial to the defendant and has no bearing on

the issue being tried under the indictment.

Mr. Vickers: The State is endeavoring to show what this substance was that was found in the defendant's room.

The Court: I will allow it.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

A. I opened the stick and made the usual test which we make without putting the material under analysis, that is, the feel of it and the taste of it, and I would say that the stick contained 60 per cent dynamite, that is, 60 per cent nitroglycerine contents. The result after tasting real dynamite, in all instances is a severe headache, which I immediately got.

Q. That is one of the symptoms of handling dynamite? A. That is one of the symptoms of handling dynamite.

Q. Even for an experienced man? A. Yes, sir.

Q. And is this wrapper which is now in your hands the usual wrapper for the product that you have referred to as 60 per cent dynamite? A. Absolutely.

Mr. Drewen: Just a moment, I want to have it shown on the record that my objection was made promptly.

Mr. Vickers: Not prompt enough.

Mr. Drewen: I think so, I was speaking while the witness was speaking and when I

make an objection—

Mr. Vickers: Do you object to the question? I will withdraw it.

Q. And these things which I show you, being apparently black wires with red metal caps on them are explosives or percussion caps?

Mr. Drewen: Just a moment, I object to that on the ground that it is incompetent, irrelevant and immaterial, not binding upon this defendant, highly prejudicial to the defendant and has no bearing on the issue being tried under the indictment.

The Court: I will allow it.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

A. They are very high explosives fulminate of mercury caps.

Mr. Vickers: Cross examine.

Mr. Drewen: No cross examination.

(Witness excused.)

WILLIAM J. CHARLOCK, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. You are a member of the Prosecutor's Detective Staff?

Mr. Drewen: We will admit Mr. Charlock's qualifications.

Mr. McCarthy: Yes, as a detective or anything else.

Q. Mr. Charlock, do you know the last witness who was on the stand? A. Yes, sir.

Q. And did you from among the exhibits or material gathered by the officers of the Prosecutor of the Pleas from the Police of this city, take to this witness some substance contained in this wrapper which I show you? A. Yes, sir.

Mr. Drewen: Just a moment –

Q. (Continuing) And likewise the fulminating caps which I show you in this other package? A. Yes, sir.

Q. And having exhibited to him, having received his report, what if anything did you do with the contents of this paper which has been described as dynamite by the previous witness?

Mr. Drewen: Just a moment, objected to on the ground it is incompetent, irrelevant and immaterial, not binding upon the defendant, highly prejudicial to the defendant and has no bearing on the issue being tried under this indictment.

The Court: I will allow it.

A. I took it down to the Palisades—to the Passaic Trunk Sewer down at Curry's Woods where they were exploding down there, and I had one-third of the dynamite exploded.

Q. Were you present while that was done? A. Yes, sir.

Q. And can you say whether or not one of the caps then contained in this parcel was used for that purpose? A. Yes, sir.

Mr. Drewen: Just a moment, please, the same objection as that last stated.

The Court: I will not allow it, your objection was tardy.

Q. As a result of that experiment, I show you some pieces of iron rail and ask you whether by this explosion caused as you have described, this iron rail was broken—

The Court: Please do not answer until counsel has a chance to object.

Q. (Continuing) In the manner in which it now appears before you?

Mr. Drewen: Objected to as incompetent, irrelevant and immaterial and the answer elicited is incompetent, irrelevant and immaterial, and it is highly prejudicial to the defendant, not binding upon him and has no bearing on the issue being tried under this indictment.

The Court: I will allow it.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

A. This is all I could find of the pieces.

Q. That is all was left of the pieces? A. That is all I could find was left.

Q. And the destruction of such material contained in this paper wrapper, was that disposed of by you in the manner described, under the direction of the Prosecutor for safety sake?

Mr. Drewen: One moment please—

A. Yes, sir.

Mr. Drewen: Was that a tardy objection?

The Court: No.

Mr. Drewen: Same objection as last stated, and on the ground as last stated.

Mr. Vickers: The purpose of it being to explain the absence.

The Court: I don't think I will permit that, whatever his reasons were.

Mr. Vickers: What his reasons were—as an officer of this Court, for the protection of those here in this building, in order that the dangerous substance or materials may not be retained, and yet its absence be explained, this officer acts in a certain manner. If unexplained this Court and jury might well say, "Well, what business has he got to go down there and blow this thing up and then ask us to say it was dynamite?" That is my purpose, to explain the absence of this highly dangerous material. I think the State's obligation is—still, whether or not the Prosecutor's reason is good

or bad I suppose makes no difference. I made the offer, I cannot omit it.

Mr. Drewen: Has the Court ruled?
Mr. Vickers: The Court has overruled it. Cross examine.

Mr. Drewen: No questions.

Mr. Vickers: I now offer the remaining fulminating caps together with the wrapper of the dynamite in evidence.

Mr. Drewen: I object to the offer on the ground that it is incompetent, irrelevant and immaterial, highly prejudicial to the defendant, not binding on him, and having no bearing on the issue being tried under this indictment.

The Court: I will permit them to be admitted in evidence.

Mr. Drewen: Exception to the Court's ruling.

Hyman Lazarus, J. (L.S.)

(Witness excused.)

WILLIAM HOGUE, recalled:

RE-DIRECT EXAMINATION by Mr. Vickers:

Q. At the time of the arrest of this defendant and his search at Headquarters or at the police station or wherever it was. A. Yes, sir.

Q. And did you then receive and see taken from his person the property which is here now?

Mr. Drewen: Objected to as leading.

The Court: Well, do you insist?

Mr. Drewen: I withdraw the objection.

A. Yes, sir.

Q. Were you present, I mean, at the time? A. Yes, sir.

Q. And is this property which I now produce to you, taken out from the police envelope, the property that at the time of his arrest was taken from the defendant? A. Yes, sir.

Q. This is an extension bit, is it? A. Yes, sir.

Q. And this is what is known as a blackjack? A. Yes, sir.

Mr. Vickers: I offer this in evidence as an entire exhibit.

Mr. Drewen: I object to it on the ground it is incompetent, irrelevant and immaterial, and highly prejudicial to the defendant, having no bearing upon the issue pleaded and being tried under the indictment.

The Court: It may be admitted.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

(Marked Exhibit S-21.)

Louis Kidney, Recalled—Re-Direct.

(Witness excused.)

LOUIS KIDNEY, recalled:

DIRECT EXAMINATION by Mr. Vickers:

Q. At the time of your investigation of the premises 19 Manhattan Avenue, did you make a search of the room or rooms on the second floor said to have been occupied by these two defendants? A. Yes, sir.

Q. And I show you what appears to be a .32 calibre revolver and ask you whether you found that there at the time and if so where? A. Yes, sir.

Q. Where? A. In his valise.

Q. In this black valise that has been produced here yesterday? A. Yes, sir.

Q. Were you present when this 22 revolver was found, if it was found there? A. Yes, sir.

Q. Who found it? A. I could not exactly say.

Q. Was Officer Murphy third—was that officer there? A. Yes, sir.

Q. Do you know whether or not the .32 at the time you found it, the revolver which is before you was loaded or not? A. Fully loaded.

Q. I show you five loaded shells of apparently calibre .32 and ask you if those were the shells that were in that revolver at the time? A. Yes, sir, they are marked.

Q. You marked them? A. Yes, sir.

Q. And you identify them now by the mark which you put upon them? A. Yes, sir.

Q. At the time you found the revolver did you unload it? A. Yes, sir.

Mr. Vickers: I offer the revolver and the

five cartridges in evidence.

Mr. McCarthy: Objected to on the ground it is incompetent, irrelevant and immaterial.

The Court: I will allow it.

(Marked Exhibit S-22.)

Mr. McCarthy: Exception.

Hyman Lazarus, J. (L.S.)

Q. I think you have already testified with regard to the dynamite and the fulminating caps? A. I didn't say anything about it.

Q. Do you know anything about the finding of the dynamite and the fulminating caps? A. Yes, sir.

Q. Where were they found? A. in the same valise.

Q. In this black bag? A. Yes, sir.

Q. And in this paper wrapper? A. It was in a paper that was around it.

Q. This, wrapped around the stick? A. Yes.

Q. And when you say fulminating caps, do you refer to these or such caps as these? A. Yes, sir, three of them.

Q. By the way, Officer, did you have some conversation at this time and before the arrest of the defendant with this woman defendant? A. Yes, sir.

Q. Supposing you just tell the Court and jury what that conversation was? A. When I was going up the stairs I met this lady coming out of the room on the top of the stairs. She got down about four or five steps and I said to her, "Where is this fellow,"

she said, "He is in that room there."

Q. Pointing where? A. To the bathroom.

Q. To the bathroom? A. Yes, sir.

Q. Or the bedroom? A. Bedroom.

Q. And when you say there and pointing to the bedroom, do you mean pointing to a room to the right or to the left of the head of the stairs? A. Right at the top of the stairs.

Q. To the left? A. Yes, sir.

Q. To the left hand? A. Yes, sir.

Q. "He is right in there? " A. Yes, sir.

Q. Go ahead with the conversation. A. And "If you are not a lot of damn cowards go on and get him, there is 100 of you to one of him, and you are afraid to take a chance."

Q. That is what she said? A. Yes, sir.

Mr. Vickers: Cross examine.

CROSS EXAMINATION by Mr. Drewen:

Q. Do you recall clearly the circumstances of seeing this woman on the stairs? A. Yes, sir.

Q. There were two other officers with you at the time up there? A. Two sergeants.

Q. And isn't it the fact that you saw this woman going upstairs when you saw her on the stairs about to go into the room? A. Coming down out of the room.

Q. And she turned around and saw you coming up and you and the other two sergeants who were with you had your guns drawn, didn't you? A. No, sir.

Q. Didn't have your guns drawn? A. No, sir, not down on the stairs, we didn't.

Q. What were you going up there for? A. I don't know whether they had, I didn't have mine;

I didn't watch them.

Q. Now, Officer Kidney, what were you going upstairs for? A. To look for the man.

Q. This man who had shot two policemen? A. Yes, sir.

Q. You knew he had shot two policemen? A. Yes, sir.

Q. And you did not have your gun drawn? A. I did not, no.

Q. Did the other two men have their guns drawn? A. I didn't watch them.

Q. Where were they with reference to you? A. They were right ahead of me.

Q. They were right ahead of you? A. Yes, sir.

Q. Did you see what they did when they got to the top of the stairs, where their guns were? A. They didn't go right to the top, they went to the little landing where they met the girl.

Q. The first landing? A. Yes.

Q. Where the girl was? A. Yes.

Q. Then you did not see her coming out of the room, did you? A. Why sure, she came right out of that room, left the door open.

Q. And walked downstairs? A. Yes, sir.

Q. And isn't it a fact that you three men drew your guns and put them to her and said, 'Where is he?" A. No, sir.

Q. You did not ask her where he was? A. I asked her where he was, yes.

Q. And isn't it a fact she answered and said, "I don't know where he is, maybe he is in the bathroom?" A. No, sir.

Q. Isn't that what she said? A. No, sir.

Q. And isn't it a fact Officer, that she did not say to you what you have testified to with reference to your being damn cowards? A. That is what she said to me, yes.

Q. And didn't she, after you drove her in the room with your guns, having your guns pointed at her, didn't she say to you, "Gentlemen, don't shoot me?" A. No, sir.

Q. And then didn't she ask you, "Will you let me go downstairs?" A. No, sir.

Q. And you said or your companions said, in your hearing, go downstairs and we will put a bullet in you, too? A. No, sir.

Q. And she went downstairs? A. No, sir, no words like that used.

Mr. Drewen: That is all.

RE-DIRECT EXAMINATION by Mr. Vickers:

Q. Who was with you in your immediate presence at the time this woman spoke as you have testified here? A. There was Sergeant Balbian and Sergeant Kern.

Mr. Vickers: That is all.

(Witness excused.)

SERGEANT GUSTAV BALBIAN, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. Are you a member of the Jersey City Police Department? A. Yes, sir.

Q. And you have been for how long? A. 19 years.

Q. On this 22nd day of May of this year, were you in company with Officer Kidney and the others at 19 Manhattan Avenue in the morning, the early morning of that day? A. Yes, sir.

Q. Did you arrive there together with Officer Kidney, or were you there first or was he there first? A. Well, I could not say about that, I guess Officer Kidney was there first because his post is close to it.

Q. Was there a circumstance during which you and Kidney were on or near the first landing of the stairway leading from the first floor to the second floor of 19 Manhattan Avenue? A. Yes, sir.

Q. At that time did you see or hear this woman defendant—was she there? A. Yes.

Q. Will you relate to the Court and jury, what if anything, was said to her by you or by Officer Kidney or by any other officer there and what if anything was said by her to you or Officer Kidney or to any other officer there? A. We got up the stairs, she was coming out of the room to the left. We asked her where this man was and she said she did not know, he might be in the bathroom so we passed her on—she passed by going down the stairs, and on the stairs she—before she came down, started down, she made the remark about you cowards, 100 of you to one.

Q. What else did she say? A. That is all I recollect; she passed down then.

Mr. Vickers: Cross examine.

CROSS EXAMINATION by Mr. Drewen:

Q. Did you have your gun drawn officer? A. Yes, going up the stairs.

Q. And this Sergeant, who was with you had a gun drawn? A. I don't know, he was behind me.

Q. Could you see whether he had it or not? A. No, sir.

Q. Did you point your gun at this woman? A.

I held my gun in front of me going up.

Q. And you asked her where he was? A. Yes, sir.

Q. And she said "I don't know; maybe he is in the bathroom? " A. Yes, sir.

Q. Did she ask you if she might go downstairs? A. No.

Q. Didn't she ask you not to shoot her, please, let me go downstairs and finally one of the officers said, "Yes, go down?" A. I didn't hear.

Mr. Drewen: That is all.

RE-DIRECT EXAMINATION by Mr. Vickers:

Q. Let me ask you just one question that I overlooked. At the time, this time that you officers were on these stairs, do you know anything about a police officer being on the roof immediately above you? A. The police officer was on the roof over the kitchen.

Q. That was on the roof immediately above you, I mean on that roof of the house? A. I don't know whether the roof was right immediately over where I was or not.

Q. I do not mean over you directly, but was someone on that roof of that house, that is what I want to find out? A. Yes, sir.

Q. And who was it officer? A. I don't know who it was, I believe it was Officer Kidney and Officer Hamilton, I believe I heard their voices.

Q. Hamilton. Could you say at any time while you were there then officer, whose voices you heard on that roof? A. Not until after we opened the skylight.

Q. The skylight, by that do you mean the scuttle? A. No, sir, the skylight leading to the roof.

Q. Well, you did not open that did you, while this defendant was up to the scuttle hole holding his fort—wait a minute—perhaps I do not know enough about this roof. Are there two skylights or are you talking about a skylight that is above the scuttle hole on the head of these stairs, or is there only one? A. There is another one in the next room.

Mr. Vickers: That is all.

RE-CROSS EXAMINATION by Mr. Drewen:

Q. Officer, when was it that you heard these men on the roof? A. Well, just as soon as they got a ladder from the firehouse.

Q. Well, how long was that from the time that you and Kidney and the Sergeant went unstairs? A. I judge about 15 minutes maybe, the length of time to get the ladder from the firehouse two blocks away and have the firemen bring it there.

Q. About 15 minutes. You and Kidney and the third officer went up and met the woman defendant and you say you saw these men on the roof, or rather heard them on the roof? A. Yes.

Q. About a quarter of an hour after you had the conversation with the girl? A. About that, yes.

Mr. Drewen: That is all.

(Witness excused.)

Mr. Vickers: I offer in evidence the two guns, the .22 calibre and the .32 calibre and the cartridges which have been identified by these two witnesses.

Mr. McCarthy: We make the objection that they are incompetent, irrelevant and immaterial.

The Court: I will admit it.

Mr. McCarthy: Exception.

Hyman Lazarus, J. (L.S.)

(Marked Exhibit S-23.)

FREDERICK A. CLARK, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. Mr. Clark, what is your occupation? A. Custodian and Court Attendant, Passaic County Court.

Q. And how long have you been connected with the Passaic County Court? A. Ten years.

Q. Do you know this man defendant here? A. Yes, sir.

Q. Have you ever had him in your custody?

Mr. Drewen: Just a moment.

Q. As Court officer of Passaic County and if so when and where if any place did you deliver him?

Mr. Drewen: Just a moment, objected to on the ground that it is incompetent, irrelevant and immaterial and prejudicial to the defendant and has no bearing on the issue being tried in this indictment.

The Court: I will allow it.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

A. The 23rd day of November, 1921.

Q. And where did you take him from where to where? A. 9:55 from Passaic County Jail to Trenton, New Jersey, States Prison.

Q. I show you a commitment being under the seal of Passaic County and signed, purporting to be signed by William Watson President Judge, together with tax bill of costs.

Mr. Drewen: Don't answer that.

Q. (Continuing.) And ask you whether that is the commitment and tax bill of costs taken at the time by you from Passaic County together with this prisoner and delivered together with the prisoner to the principal keeper of State's Prison, Trenton, New Jersey?

Mr. Drewen: Same objection as last made.

The Court: Same ruling.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

A. Yes, sir.

Q. Do you know whether or not this defendant, Frank Egan or Eigan at that time was—I withdraw that. Cross examine.

Mr. Drewen: No cross examination.

(Witness excused.)

Exhibits.

Mr. Vickers: The State now offers if it has not been offered, the commitment of this defendant to the State's Prison and also the record of conviction from the County of Passaic, exemplified for which he was committed.

Mr. Drewen: Object to the offer on the ground it is incompetent, irrelevant and immaterial, it is not binding upon this defendant, prejudicial to the defendant and has no bearing on the issues being tried under the indictment, and on the further ground that the document offered and each of them are not authenticated as required by law.

The Court: They will be allowed.

((Marked in evidence.)

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

(Marked in Evidence, Exhibits S-24 and S-25.)

Mr. Vickers: Subject to the objection already made by the defendant's counsel the State offers those exhibits which have been marked for identification in case any of them have not been formerly offered, we offer them now.

Mr. McCarthy: Subject to our objection.

Mr. Vickers: Subject to any objection you have made.

The Court: You are now offering all the varieties of things, papers, that have been marked for identification including the photographs, I assume?

Mr. Drewen: The difficulty about that is—

Mr. Vickers: We offer the photograph Exhibit S-7 for identification in evidence.

(Marked in evidence.)

Mr. Drewen: No objection.

Mr. Vickers: Likewise Exhibit S-19 for identification, now offered in evidence.

Mr. Drewen: S-19 is a photograph of the body of policeman Weir. We object to the offer on the ground it is incompetent, irrelevant and immaterial and has no bearing on the issue being tried, and on the further ground, we admit the identity of policeman Weir, the policeman shot, as to the character of wound he received and the position of the body of policeman Weir, therefore we contend that the offer of the photograph can only prejudice the defendant and we object to it on that ground.

The Court: I will allow it.

(Marked in evidence.)

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

Mr. Vickers: Exhibit S-18, for identification, we offer in evidence.

Mr. Drewen: That is similar to the one last offered and we object on the same ground, it being a photograph of the body of Policeman Weir.

10

The Court: Same ruling.

(Marked in evidence.)

Mr. Vickers: Exhibit S-12 for identification.

Mr. Drewen: Exhibit S-12 for identification is a photograph of the body of Policeman

20 Black. The defense admits the identity of the person shown in the picture to be Black, the person named in the indictment, admits it shows the wounds on his body from which he died and objects on the further ground that it is incompetent, irrelevant and immaterial, and can only be prejudicial to the defendant.

The Court: It may be allowed.

30

(Marked in evidence.)

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

Mr. Vickers: Exhibit S-16 for identification, being one of the bullets of the four shots and referred to and testified to by the doctor,

40 Hasking, also by the police Sergeant Wash of

New York.

Mr. Drewen: No objection to that.

(Marked in evidence.)

Mr. Vickers: When I offer these I do not offer it with any of the writing on the envelope and I am willing to transfer them to an envelope where there is nothing prejudicial on the outside of the envelope. Exhibit S-20 for identification I offer in evidence, being the bullet that was dug out of the house and which struck Officer Walton.

Mr. Drewen: No objection.

(Marked in evidence.)

Mr. Vickers: Exhibit 15 for identification, the lower bullet as has been testified to, removed from the building below the picture in the front room on the first floor of 19 Manhattan Avenue, offered in evidence.

Mr. Drewen: No objection.

(Marked in evidence.)

Mr. Vickers: Exhibit S-14, is the upper bullet testified to, found in the same room.

Mr. Drewen: No objection.

(Marked in evidence.)

Mr. Vickers: Exhibit S-17, for identifica-

New Jersey State Library

tion is an empty shell of a .32 calibre found in the room and near the body of Weir and near the position described by the witness Otis standing and firing the two shots. I will put it in the other envelope with Exhibit S-17, they belong together.

Mr. Drewen: No objection.

(Marked in evidence.)

Mr. Vickers: Exhibit S-11 for identification being the .38 calibre bullet taken from the body of Otis.

Mr. Drewen: No objection.

(Marked in evidence.)

Mr. Vickers: Exhibit S-9, for identification has not been offered, that is the police picture, the fugitive picture. It is now offered. I am under the impression that it has already been offered and passed on, allowed by the Court.

Mr. Drewen: We object to the offer.

The Court: If you have not already objected, your objection may be entered on the record.

Mr. Drewen: I want to state the grounds in my objection. My objection to the offer last made is on the ground that it is incompetent, irrelevant and immaterial, prejudicial to the defendant, has no binding on the defendant, on the ground that on the back of the photograph

which is offered there is printed matter highly prejudicial to the defendant, incompetent, irrelevant and immaterial, not binding and having no bearing on the cause here being tried.

The Court: It will be allowed.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

Mr. Vickers: Exhibit S-13, for identification, being the .38 calibre bullet said to have caused the death of Sergeant Black.

Mr. Drewen: No objection.

(Marked in evidence.)

Mr. Vickers: I offer the Webley revolver together with the six loaded cartridges said to have been found as described in the testimony, just beyond the scuttle hole in the attic.

(Marked Exhibit S-25 in evidence.)

Mr. Vickers: I offer the black bag found in the premises of the defendant.

Mr. Drewen: I object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: It may be allowed.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

(Marked Exhibit S-26 in evidence.)

Mr. Vickers: I offer the original negative produced by the identification clerk from State Prison in evidence.

Mr. Drewen: Objected to on the same ground as stated in connection with the objection to the photograph of the defendant Sage offered in evidence except that there is no printed matter contained on the negative now offered.

The Court: It may be admitted.

Mr. Drewen: And I ask an exception.

Hyman Lazarus, J. (L.S.)

(Marked Exhibit S-27, in evidence.)

Mr. Vickers: I think it has been conceded that this man was a police officer. If not, I offer the record, evidence of his oath and appointment which was here in court produced by the authorities and I think it was consented to or not controverted.

Mr. McCarthy: Yes.

Mr. Vickers: I offer in evidence the automatic Colt pistol identified by Otis as his gun and the gun from which he fired the two shots described, and the bullets and shells, in evidence.

(Marked Exhibit S-28, in evidence.)

Mr. McMahon: The State rests.

FRANK SAGE, one of the defendants herein called and sworn as a witness in his own behalf, testified as follows:

DIRECT EXAMINATION by Mr. Drewen:

Q. Your name is Frank Sage? A. Yes, sir.

Q. How old are you? A. 32.

Q. You are the defendant in this action, indicted under the name of Frank Sage? (No answer.)

Q. You are the defendant in this action, indicted by the name of Frank Sage? A. Yes, sir.

Q. Frank Sage is your true name, is it? A. Yes, sir.

Q. Sage, where were you born? A. In Ireland.

Q. How old were you when you came to this country? A. Between the age of two and three, to the best I can remember.

Q. Where did you first go to live when you came to this country? A. Bushnell, Ill.

Q. With whom did you come to America? A. Why, my father and mother, as far as I know.

Q. Well, were you at any time in your life an orphan? A. Yes.

Q. At what age did you become an orphan? A. Between the age of three and four, as far as I can remember.

Q. Where were you living at that time? A. In Mattun, Ill.

Q. Where were you living in Mattun, Ill.? A. As far as I have known from my people, our prop-

erty was on 3016 Prairie Avenue.

Q. In that town? A. Yes.

Q. After you left Mattun, where did you go to live? A. The orphan asylum.

Q. Where? A. Shelvyville, Ill.

Q. And how old were you when you first went to the orphan asylum in Shelvyville? A. I could not say my exact age.

Q. About how old? A. Between the age of three and four.

Q. And how long did you continue to live in the orphan asylum at Shelvyville? A. I could not say the exact time.

Q. About how long, can you tell? A. I imagine three months; maybe four months.

Q. Did you go to another orphan asylum or a similar institution after you left the one in Shelvyville? A. Yes, sir.

Q. Where? A. Chicago, Ill.

Q. And how long did you altogether spend in orphan asylums or similar institutions? A. I was in orphan asylums until I became the age of around fifteen years old.

Q. And where were you living when you attained the age of fifteen years? A. In Genesee, Ill.

Q. And after you had left the orphan asylum in Genesee, where did you go to live? A. Why, I went to St. Louis, Mo.

Q. Work there? A. Yes, sir.

Q. What kind of work did you do? A. I sold newspapers and worked in a livery stable.

Q. And how long did you remain in St. Louis? A. Until I became the age of sixteen years old.

Q. Then where did you go? A. Then I enlisted in the Navy.

Q. Where? A. In St. Louis, Mo.

Q. The United States Navy? A. Yes, sir.

Q. How long did you serve in the United States Navy? A. Three years, six months and some days.

Q. That makes you about eighteen and one-half years of age? A. Well, I enlisted as a minor and a minor's age is—I had to serve until I was 21 years of age.

Q. Did you serve until you were 21? A. Yes, sir.

Q. So that you spent your life in the United States Navy from the time you were fifteen until you were twenty-one years of age?

The Court: I think he said sixteen.

Mr. McCarthy: Three years and six months.

Q. You entered the Navy when you were fifteen years? A. I do not recollect my exact age when I enlisted in the Navy. I gave them my age as a minor, after I enlisted as a minor, doing minor's cruise until I was twenty-one years of age.

Q. Well, Sage, how old were you when you came out of the Navy? A. Out of the Navy?

Q. Yes? A. Well, I could not say myself my exact age; I do not know now my exact age.

Q. After you left the service of the Navy, where did you go? A. After I left the Navy—in New Orleans.

Q. Go to work there? A. No, I went to work in Pittsburgh, Pa.

Q. How long after you left the Navy or after you were discharged from the Navy, you went to work at Pittsburgh? A. Why, three days.

Q. You mean to say you were discharged in New Orleans? A. I was discharged at Algiers,

that is the Naval Training Station.

Q. Where is Algiers? A. Across the river from New Orleans.

Q. And three days after you had been discharged from the Navy you say you went to Pittsburgh? A. Yes.

Q. And did you go to work at Pittsburgh? A. Yes, sir.

Q. Well, what work did you do there? A. Machinist.

Q. How long did you remain in Pittsburgh working at that trade? A. I remained there until 1913 or '14, to the best I can remember.

Q. 1913 or '14? A. Yes, sir.

Q. How old were you at the time you left Pittsburgh, about? A. Well, my age, coming from the Navy, twenty-one years old, I should judge then I would be twent-three years old.

Q. Well, after you left Pittsburgh, where did you go? A. Why, I was convicted then of larceny and sent to the Huntington Reformatory, Huntington, Pa.

Q. You were convicted in Pittsburgh? A. Yes.

Q. And how old were you when you got out of the Reformatory in Huntington? A. Twenty-four or twenty-five, I should say.

Q. Are you sure as to your age now? A. No, sir, I am not.

Q. When you say you are thirty-two, that is your best estimate of your present age? A. That is the best estimate I can give.

Q. When you left Huntington, the Reformatory at Huntington, where did you go? A. I went to work in a foundry.

Q. Where? A. Urban, Pa.

Q. How long did you work in the foundry? A. I worked there for three months until I enlisted

in the National Guard, Pennsylvania.

Q. You worked there three months and enlisted in the National Guard of Pennsylvania? A. Yes, sir. I worked there from January until the troops were called, and they asked for reserves to go to Mexico Border, and I volunteered and enlisted in the 18th Regiment of Pennsylvania, of Pittsburgh.

Q. Did you go to the border? A. Yes, sir.

Q. And when you returned from the border, where did you go? A. I went to work making shells.

Q. Where? A. In McKee's Rock, Pa.

Q. And how much time did you spend at the border? A. I stayed there until they called them from the border, that was in— I do not just remember what month it was, but we stayed there until the following year when the troops were called back.

Q. How long did you continue to work at McKee's Rock making shells? A. I worked there until I got in some trouble.

Q. What trouble did you get into? A. Why I married a woman and lived with her, and she left me and went to Wheeling, W. Va., to a house of ill-fame and I called her and asked her to come back.

Q. Well? A. I asked her to come back and to do what was right, that I did not have no hard feeling and would try to forget it. I furnished her a home, went to work as a guard in the Carnegie Steel Foundry, and on my return home I found that she had left. I took a little girl, her little sister with her to keep her company, at least to keep her from going back to the life and the old associates, but when I returned home one night she had left and I found out from a lady by the name of Lawlor that she had left for Wheeling, W. Va.,

Q. Can you give us the date when you were released from Atlanta? A. January the 9th or 10th, 1920.

Q. Nineteen what? A. 1920.

Q. Are you sure 1920, the year? A. No, 1921.

Q. 1920 or 1921; was it two years ago last January? A. (No answer.)

Q. Well, maybe we can straighten that out if you are not certain. When you left Atlanta, where did you go? A. To Pittsburgh, Pa.

Q. What did you do at Pittsburgh? A. I went to the United States Marshal, Mr. Bogan, and I asked him in regard to my case and all, and if it would be advisable for me to go back to work in with another man that had a house on Monroe Street at Wheeling, W. Va., so I called there and I asked her to return, and it was a matter of three or four days before she came back, and I was arrested then, and she said that I asked her to go to Wheeling, W. Va., and live the life.

Q. Did you ask her to go to Wheeling, W. Va., and live an immoral life? A. No, sir, and she came and sent me a letter, she said that she was very sorry she had done what she had did, it was through jealousy.

Q. How were you convicted then of that offense of what she charged you? A. I was transferred from Pittsburgh, Pa., to Phillippe, W. Va., and was convicted there.

Q. Did you serve any time as a result of that conviction at Phillippe? A. Did I serve time?

Q. Yes. A. Yes, I served my time at Atlanta, Ga.

Q. In the Federal Prison at Atlanta? A. Yes, sir.

Q. How long were you in the Federal Prison at Atlanta? A. Thirty-seven months.

Pittsburgh.

Q. Did you go back to work in Pittsburgh? A. I went to work in Pittsburgh at McKee's Rock again.

Q. What doing? A. Working in a foundry there.

Q. How long did you continue to work at McKee's Rock in a foundry? A. I worked there until two months.

Q. Where did you go then? A. Well, I was compelled to leave by people bothering me.

Q. Leave McKee's Rock? A. Yes, and I was having a conviction over me, it seemed as though—

Q. Well, you left McKee's Rock, did you? A. Yes.

Q. Where did you go? A. I came to Jersey City.

Q. You came to Jersey City? A. Yes, sir.

Q. Now, can you fix the time when you came to Jersey City? A. I should judge it was in May.

Q. What year? A. 1921.

Q. 1921. Well, you spent some part of your life in the City of Paterson, didn't you? A. Why, yes, I was tried at Paterson.

Q. Tried at Paterson for what? A. For entering and larceny.

Q. When was that? A. That was in November, 1921.

Q. And is that the same year you were released from Atlanta? A. Yes.

Q. So that you were released from Atlanta in 1921. A. Yes, sir.

Q. And you say it was in the month of November you were convicted in Paterson? A. Yes, convicted.

Q. November of 1921? A. Yes.

Q. And you were sent to State's Prison at Tren-

ton? A. Yes.

Q. Did you escape from State's Prison at Trenton. A. Yes, sir.

Q. When was that? A. The 7th of July, 1922.

Q. You were doing outside work at State's Prison? A. Yes.

Q. What was that work? A. I was working on a truck with a guard and three other men.

Q. Where, in the prison or outside the prison? A. Outside the prison.

Q. Outside from the Prison, how far? A. About three or four miles.

Q. And while thus working outside the prison on a truck you made your escape? A. I just walked away.

Q. Where did you go? A. Why I went to a store and got myself clothes and went up to the city and got on the street car and came to New Brunswick, from New Brunswick to Newark, and Newark to Hoboken.

Q. And that was in the summer of last year? The summer of 1922? A. Yes, sir.

Q. About the month of July? A. Yes, sir.

Q. How long did you remain in Hoboken, if you did remain there? A. About two or three months.

Q. What were you doing while in Hoboken, working? A. I never went on the street, sir.

Q. Never went on the street? A. No, sir.

Q. What did you do, stay in the house? A. I don't want to reveal.

Q. Well, what did you do, how did you earn your living, how did you provide for your support? A. Well, the people let me live there.

Q. What is that? A. The people let me live, and I had some money.

Q. You had some money? A. Yes, sir.

Q. Where did you go to live after you left Hoboken, you say you stayed in Hoboken three months? A. Yes, sir.

Q. Where did you go after—at the end of those three months, that would bring you down to about October or November, 1922? A. I went to Jersey City Heights.

Q. Jersey City Heights? A. Yes, sir.

Q. And you lived where, what street in Jersey City Heights? A. Newark Avenue.

Q. And that was about the time you met this woman who is on trial with you? A. That is where I met her.

Q. Where did you meet her? A. In the Oyster and Chop House on Central Avenue.

Q. And she was a waitress there? A. Yes, sir.

Q. You went there for your meals? A. Yes, sir.

Q. You met her in November, 1922? A . November, 1922.

Q. And how long after you met this girl did you go to live with her? A. I should judge about a month.

Q. And did you at any time, Sage, ever tell this girl you had been convicted of crime? A. I never did, sir.

Q. Did you ever tell this girl anything about your previous criminal life? A. I never did, sir.

Q. Did you ever tell this girl that you had escaped from State's Prison? A. No, sir, I did not.

Q. At the time of your arrest in this case, Sage, what was your business? A. Bootlegging.

Q. How long had you been engaged in that business? A. Practically a year—well, not a year. From the time that I had left Hoboken until my arrest.

Q. At the time this girl went to live with you,

did she know you were engaged in that business? A. In what.

Q. Bootlegging? A. She did not know what business I was in.

Q. You told her, did you not, that you were working as a freight handler in the chicken yard in Jersey City? A. Yes, sir.

Q. That is what she thought you were doing when she went to live with you? A. Yes.

Q. When did she first know you were engaged in unlawful business—how long after you went to live with her? A. I don't know that she ever knew I was engaged in an unlawful business.

Q. Well, Sage, isn't it a fact that this girl did find it out and she pleaded with you not to continue—

Mr. Vickers: Objected to on the ground that it is leading.

Mr. Drewen: I withdraw the question.

Q. Do you remember the morning of the 22nd of May, 1923? A. Yes, sir.

Q. Do you remember the night of the 21st of May, 1923, the night preceding? A. Yes, sir.

Q. Where were you that night? A. Why, I was downstairs most of the evening.

Q. With whom? A. With myself.

Q. Downstairs alone? A. Well, I was in Mr. Kaerth's apartment.

Q. Was Mae Miller the woman with you there? A. No, sir.

Q. Where was she? A. Upstairs, to the best of my knowledge.

Q. And what time did you go to bed that night, about? A. Between the hour, I should judge,

around midnight, eleven to twelve, I should say.

Q. And you went to bed, you retired in your own room upstairs? A. Yes.

Q. Was Mae in bed when you went to bed? A. She was laying reading.

Q. Did you have anything to drink before retiring that night? A. I did, to the best of my knowledge, I had three or four bottles of beer and I had a quart of wine that was on the ice box in the toilet. I drank, I should say, half of it.

Q. What kind of beer was it you drank? A. Home brew.

Q. And what effect did the drink have on you that night, before you went to bed? A. Well, if I ever drink wine or beer, it always gets me drowsy; it takes very little alcohol to make me full.

Q. Was your condition one of drowsiness when you retired that night? A. Yes, sir.

Q. Now, when you went upstairs to your room and went to bed, did you speak to the other defendant? A. No, sir.

Q. Did she speak to you? A. No, sir.

Q. Had you been speaking that day? A. I had not been speaking to the girl that day.

Q. How long was it you had not been speaking to her or she to you? A. I had not spoken to the girl from that Monday, that is the morning, until I was called to counsel in the county jail.

Q. Now, when you went to bed, you slept, did you? A. Yes, sir.

Q. About what time in the morning did you get up? A. Well, I looked at the clock, I should judge it was after five o'clock.

Q. And where was Mae, the girl, when you got up? A. When I woke up I turned over to the side of the bed and I noticed that she was hooking her dress or something, and not being on speaking

terms with her I never questioned her as to why she got up. I got up, walked across from the bed—

Q. Just a moment. At any time before you got out of bed that morning did you hear a knock on the door? A. No, sir.

Q. At any time that morning did you hear a knock at the door? A. No, sir, I never heard no noise whatever.

Q. Did you hear Mae, the woman, say anything with regard to her putting clothes on? A. I never heard nobody say one word in the house.

Q. Did you hear anybody say from the outside of the door of your room, 'Does Miller live here? " A. No, sir.

Q. Did you hear anybody from the outside of the door of your room say anything? A. No, sir.

Q. When you got up you say you saw this woman hooking her dress? A. Yes, fastening her dress or putting it on.

Q. Where did you go after you got up from the bed? A. Why, I walked across the room toward the dresser.

Q. The dresser was on the same side of the room that the door is on, is that right? A. Yes, sir.

Q. And when Mae—what was the next thing you saw Mae doing after you saw her hooking her dress? A. She stepped to the door.

Q. And what did she do after she stepped to the door? A. Why, she unlocked the door.

Q. And what happened after she unlocked the door? A. The door flew open and she flew back, and her hand went up like this.

Q. Well now, at the moment that the door flew open, where were you standing? A. by the dresser.

Q. The dresser is how far from that door—it

is a small room, is it not? A. A very small room, sir.

Q. And the dresser is in a direct line with that door, is that right? A. Not in a direct line, no, sir. It sits back—it is on a direct line but stands back slightly from—

Q. And you say you were standing at that dresser when the door flew open? A. Yes, sir.

Q. How far were you from the upper right-hand door of that dresser at that time? A. Why, as close as I am to this.

Q. Were there any guns in the upper right--hand drawer of the dresser? A. Yes, sir.

Q. The two large guns that have been offered in evidence by the State, were they in that drawer. A. No, sir, this one and—

Q. This one? A. Yes.

Q. The gun No. 208020, United States Army Colt, was in the upper right-hand drawer of the dresser? A. Yes, sir.

Q. Was the dresser open? A. The dresser drawer was open.

Q. Who opened it? A. Why, I could not say who opened it, it had been open all night, to the best of my knowledge.

Q. As this door swung open and Mae was pushed back, as you say, against the wardrobe, what did you do, standing where you were at the upper right-hand drawer of the dresser, and what did you say—I withdraw that question.

Q. At the time the door flew open, pushing the woman back against the wardrobe, and when you were standing at the upper right-hand drawer of the dresser, what did you see at the doorway, if anything? A. As the door flew open, I seen a form there, a man's arm come up with the revolver.

Q. When you saw that arm come up with a re-

volver, did you do anything? A. I bent over and reached for the drawer for my gun.

Q. That is, this gun here to which I have just referred? A. Yes, sir.

Q. What did you do? A. I pulled it out quick as the form seemed to move, another form—and I fired one shot.

Q. Then what did you do? A. As I fired the one shot, I advanced toward the bed, I should judge, about two or three foot, and as I did I fired two more shots.

Q. Then at the time you fired these shots, you were pretty close to the woman, weren't you? A. No, sir.

Q. Close behind her? A. No, sir.

Q. It is a very small room, isn't it? A. Well, I was about the length of the room from her, that is the best of my knowledge. I could not see just where she was at the time. I lost sight of her after I fired the two shots.

Q. After you fired the two shots you lost sight of her? A. Yes, sir.

Q. You do not know where she was after you fired the second shot? A. I do not know where she was.

Q. You are speaking of the last two shots now? A. Yes.

Q. Making the three shots in all that you had fired? A. Yes.

Q. Then after you had fired three shots out of that room, you say you do not know what became of Mae? A. No, sir.

Q. After you had fired three shots, what did you do? A. After I fired three shots, I looked out in the hallway, that is, standing inside the room about at the foot of the bed, and I could see from the angle of the top landing, where it goes down,

the top landing of the stairs that comes straight up, I see one man going down backward and one man facing him, going down together.

Q. You saw two men? A. Two men.

Q. Up to that time had you seen any uniform? A. No, sir.

Q. At the time had you seen any evidence that the men who were outside the door were policemen? A. No, sir, I did not.

Q. As you went to the side of the room near the bed and looked down and saw two men—were they in citizen's clothes? A. Yes.

Q. After you saw two men in plain clothes, what did you do? A. I stepped from the bed, after they moved down the stairs, I stepped over toward the chair where my pants were laying, and after I went to reach for my pants I seen a man in the yard, and I fired a shot.

Q. The yard of the house in which you live? A. No, sir.

Q. What yard? A. In the yard next door.

Q. In the yard next door? A. Yes, sir.

Q. All right. A. I fired a shot.

Q. Why did you fire a shot at this man in the yard? A. I hollered at him.

Q. What did you holler? A. I hollered "Hey."

Q. What was this man doing when you fired the shot at him? A. He had a gun like this in his hand, he fired two shots right after.

Q. He fired two shots? A. Yes, sir.

Q. And how was he dressed, the man in the yard that fired these two shots? A. He had a grey overcoat on, and to the best of my recollection a grey cap pulled down over his eyes.

Q. Did he bear any evidence of being a police officer that you could see? A. No, sir, none whatever.

Q. You had your trousers on, did you? A. No, sir. I put my trousers on after I laid the gun down on the dresser and put on my trousers.

Q. Where did this man go after the shot was fired from the window? A. He ran as fast as he could, that is, after he fired the shots.

Q. Then where did you go and what did you do then? A. I put on my pants, I laid the gun down and put on my pants.

Q. Yes? A. And after I put on my pants I stepped down to the front door and stepped onto the porch, and I turned around and I came back upstairs again and put on my coat.

Q. Yes? A. When I put on my coat—

Q. Just before you come to that, when you went downstairs and stepped on the front porch, did you see anybody? A. No, sir.

Q. Did you see Mae? A. Nobody.

Q. At any time that morning did you go in the room or knock on the door of Mr. Kaerth? A. Yes, sir.

Q. Well, was that before or after you went downstairs, as you say? A. That was after I went downstairs.

Q. After you went downstairs— A. Yes, sir.

Q. When you came up again did you go to Kaerth's door? A. I went in my bedroom first.

Q. What did you do there? A. I put on my coat.

Q. You put on your coat? A. Yes, sir.

Q. What else? A. And I got another gun that was—

Q. Got the other gun? A. Yes, sir.

Q. That is the gun offered in evidence? A. Yes.

Q. I show you gun marked in evidence Exhibit S-25, and ask you if that is the second gun you

took? A. Yes, sir.

Q. Where did you get that gun?

Mr. Vickers: At that time?

Q. Yes, where did you take that from that morning? A. I took it out of the bottom dresser drawer.

Q. That was in the bottom dresser drawer? A. Yes, sir.

Q. And having gotten this gun to which I have just referred, what did you do with it? A. Why, I held it in my hand.

Q. Did you have the other gun with it? A. Yes.

Q. The Colt? A. Yes.

Q. And, having those two guns in your hands, where did you go? A. I stepped to Mr. Kaerth's door, which was slightly open, about, I should judge, a half a foot, and I asked if Mr. Kaerth was in there, and he said "Yes." Mrs. Kaerth says, "Why don't you go out?", and I said, "I am not going to shoot anybody,"—not that, I mean I said, "I am not going to shoot any more, don't worry," and Mr. Kaerth said, "You cannot go outside, the place is surrounded.'

Q. And did you hear anything, any noise coming from the outside of the house at the time? A. I heard police whistles.

Q. Is that the first indication you had that it was the police came into the house? A. That is the first thought that I had of them being police officers whatever at all.

Q. When you heard the whistles? A. Yes, sir.

Q. Now, what was the manner of your holding these two guns at the time that you went to Mr. Kaerth's door? A. I had the two guns by the end of the barrel.

Q. In which hand? A. In my right hand.

Q. Like this (indicating)? A. Yes, sir.

Q. Carrying them like this (indicating)? A. Yes, sir.

Q. Did you hold them in this manner when you went to Mr. Kaerth's door? A. Yes, sir.

Q. After Mr. Kaerth told you that the house was surrounded, and you heard the police whistles, what did you do? A. I looked up and I seen a trap door.

Q. This trap door which is in the ceiling just above the small landing that ran between your door and Kaerth's door? A. Yes, where I was standing.

Q. You looked up and you saw the trap door, then what? A. Well, I didn't know what to do; it come to my mind that the police whistle is blowing and all, and I realized then that I had made a mistake and I didn't know what to do, so I reached up with the end of the one gun and knocked the bottom open, and threw the two guns up in there.

Q. Then, what did you do yourself? A. Then I reached up and I grabbed ahold with my two hands and pulled myself up in there.

Q. At any time after you fired the first three shots from that room, did you see Mae? A. No, sir.

Q. Do you know where she went to? A. I do not.

Q. At any time that morning did she have a gun in her hand? A. No, sir.

Q. Did you give her a gun? A. No, sir.

Q. Did Mae know that you owned these two big guns that I have just called your attention to? A. She did not.

Q. Where did you keep these guns, Sage? A. I always had them.

Q. Where? A. I always kept them in paper when I fetched them upstairs.

Q. When you fetched them upstairs from where? A. By the machine.

Q. From the machine? A. Yes, sir.

Q. In other words, you carried these two guns in your machine? A. In the side pocket, locked up.

Q. Were they wrapped in paper when you carried them in the side pocket? A. Sir?

Q. Were they wrapped in paper when you carried them in the side pocket? A. Yes, sir.

Q. When you brought them upstairs in the house, the night—I withdraw that.

Q. Was it at night when you brought these guns in the house? A. Always.

Q. Were they wrapped? A. Always wrapped in paper; I never carried them up that she could get a sight of them.

Q. Why didn't you want her to see that you had these guns? A. Well, I didn't want her to see the sight of them, that she would be frightened or anything like that because she knew that I was in the bootlegging, and I had trouble and all, and before she had asked me to please go away and settle down and not lead that life, that I would get hurt from them, and I promised her to leave on this coming Wednesday, that was the day after the trouble; I had promised to go away, go out to my people and settle down.

Q. You had promised her, you say, to go away to your people and settle down? A. Wednesday I was leaving.

Q. Did this girl know you ever did anything wrong except this bootlegging business? A. No, sir, she never did.

Q. And when you say trouble—what trouble

did this girl know you had been in? A. She didn't know I had been in any trouble, none whatever, outside of having a dispute with my friends, that is all.

Q. She didn't know you ever had any trouble with the law, did she? A. No, sir.

Q. Didn't know you ever had any trouble with the Government, you say? A. No, sir, she could not think anything like that because I mingled with the police officers and detectives I should say two days out of a week.

Q. Where did you mingle with these police officers and detectives? A. In Jersey City Heights and West New York and West Hoboken and in Union Hill.

Q. Do you know Capt. Kaerth of the West New York Police Department? A. Yes, sir.

Q. The man who testified in the State's case this morning? A. Yes, sir.

Q. How long have you known him? A. Since the early part of the year.

Q. Did you know Officer Hengley of the West New York Police Department? A. Yes, sir.

Q. What is Hengley's rank? A. Why, Captain, I think; he is Captain of the police or detectives, I could not say; he was standing talking to two other detectives one time that I know of, whether that was Mr. Otis or Mr. Kaerth and Mr. Hengley—and that time they said—I knew Mr. Kaerth and Otis before that, but Mr. Hengley this night was standing there and I was talking to a man at 14th Street and Hudson Avenue in a machine, and I was standing with my back facing the saloon on the corner, and looking over at Otis and Mr. Kaerth; Otis and Hengley.

Q. The three of them were standing there? A. Yes, sir.

Q. How long was that before the 22nd of May? A. Well, I should judge about six days or a week before that.

Q. How far were you standing from Kaerth and Hengley and Otis when you were looking in their direction, as you say? A. From here to that table.

Q. Was the machine between you and them? A. Yes, sir.

Q. The machine was between you and them? A. Yes, sir.

Q. How long were you standing there talking while these three police officers were in this group nearby? A. Between fifteen and twenty minutes.

Q. Do you know Lieutenant Otis? A. Yes, sir.

Q. Detective Otis? A. Yes, sir, he came up to me one time and put his hand on my shoulder.

Q. Where? A. 14th Street and Hudson Avenue.

Q. When? A. That is the day they took a fellow that had stolen a machine, and they took him in the same apartment house I was living in; and I came around the corner where the Palisade Street car line was, and I had two children, and I picked up one child and he kind of touched my arm and looked at me, and I walked up and into my apartment.

Q. Whose children were they? A. They belonged to a man by the name of Brokie. After I came down Mr. Kaerth and Otis were there. I put the children in the machine and took a ride with the children.

Q. When was that? A. At that time the girl's baby had the measles and she had to stay with her child, and I went down to see how the child was, and got a doctor for the child.

Q. That is, Mae' child? A. Yes, sir.

Q. When was it that you say Otis came up to you and touched you on the arm in the street? A. I could not say exactly the date.

Q. How long before the 22nd of May, 1923? A. I should judge that was maybe three weeks.

Q. Did you have any conversation with him? A. I never said anything to him and he never said anything to me.

Q. At that time were you pursued by Captain Kaerth through the streets of West New York or elsewhere? A. No, sir.

Mr. Vickers: Objected to as leading; never mind, the answer is "No."

Q. Why did you shoot that gun at all that morning, Sage? A. When I see the men come up with a gun like that, why I thought it was somebody that I had trouble with.

Q. What were you in fear of when you saw the gun lifting, as you say? A. Why, I had been told—

Q. Never mind what you had been told, what were you in fear of? A. I was in fear of somebody shooting me.

Q. Did you know at the time that these men were police officers? A. I did not, sir.

Q. If you had known they were police officers, would you have shot? A. If I had known they were police officers, I would not have reached for no gun.

Q. Did you have any reason to believe that the police of Jersey City or West New York were looking for you? A. No, sir, I had not.

Q. Why was your mind free from any such belief? A. Because I had been around them where they could see me on the street, never trying to get

away from them, and I figured that they knew nothing about me, that I had done no wrong, and that they were giving me a chance to go straight.

Q. Are you sure, Sage, that when the door opened and you were at the dresser drawer, you saw one of these forms, as you say, raise a gun? A. Yes, sir.

Q. Are you sure that a shot was fired from that gun?

Mr. Vickers: Objected to on the ground that it is leading.

Mr. Drewen: I withdraw the question.

Q. Was there a shot fired into your room from the outside?

Mr. Vickers: Objected to on the same ground.

The Court: What is the ground?

Mr. Vickers: Leading. This witness has told us a story and has entirely omitted any reference to this part. It is manifestly to create an effort to lead him to a part of the story which is—

Mr. Drewen: It is no effort whatever.

Mr. Vickers: Well, I withdraw the "effort" then, I will correct it. Without any effort whatever counsel for the defense is leading him.

Mr. McCarthy: Of course, it is within the

discretion of the Court.

The Court: Will the stenographer repeat the question?

(Question repeated by Stenographer.)

The Court: I think you ought to reframe the question, Mr. Drewen.

Q. What else happened besides the holding of the gun at the doorway at the time the door was open? A. The gun was lifted up and I reached for my gun, there was a report of a gun went off.

Q. A report of a gun went off? A. Yes, sir.

Q. And do you know what gun went off? A. No, sir.

Q. You could not tell? A. No, sir.

Q. Where is your wife now, Sage. A. I do not know, sir.

Q. Were you ever divorced from her? A. No, sir.

Q. Did you tell this girl Mae you were married? A. That I was married and divorced.

Q. You told her you were married and divorced? A. Yes, sir.

Q. You say, Sage, that after the three shots were fired in the room you did not see the girl after that? A. No, sir, I did not.

Q. Did you hear her voice after you fired the three shots? A. I heard her voice say, "Oh, my God!", and other words, I do not know what she said.

Q. Where did that voice come from? I. I could not say; it came from out of our apartment.

Q. Where were you then? A. I was in my bedroom.

Q. Well, was she there? A. No, sir.

Q. Well, what do you mean by saying it came out of your apartment? A. I say it came from without my apartment.

Mr. Drewen: Cross examine.

CROSS EXAMINATION by Mr. Vickers:

Q. Sage, when you enlisted in the United States Navy you gave your age and place of birth and the information which is required by the Navy authorities, didn't you? A. Yes, sir.

Q. Give it correctly or otherwise? A. I could not say whether it was correct or not, as I did not know.

Q. Did you intend to give it correctly? A. I intended to.

Q. Did you say when you enlisted in the Navy that you were born July 16, 1899, in Bushnell, Ill.? A. I could not say that, sir.

Q. What was the month of your birth? A. That is something I do not know, sir.

Q. On what date of the month were you born? A. I do not know, sir.

Q. How did you determine at what time, if you did determine, that you would be 21 years of age and entitled to your discharge from the Navy under the minor enlistment? A. I was informed in League Island, Philadelphia, that my time expired in July and I would be transferred to the U. S. Monitor to go to New Orleans. When I got to New Orleans they told me my time of enlistment had expired.

Q. Isn't it a fact that you gave your history as having been born July 18, 1899, Bushnell, Ill., and that in fact your time was up on July 15, 1910, and that you were transferred to New Orleans and actually discharged on the 21st of July, 1910? A. That is true. I was discharged the 26th of July,

to the best of my knowledge, 1910.

Q. Have you got your discharge? A. No, sir, I have not.

Q. What did you do with it? A. I have my discharge, yes.

Q. Where is it? A. I had my discharge in the trunk.

Q. Where? A. I do not know where the trunk is now.

Q. Have you sent for it or made any effort to have it here? A. No, sir.

Q. Do you remember the date of your enlistmen in the 18th Pennsylvania National Guard? A. The date of my enlistment?

Q. Yes? A. No, sir, I do not.

Q. Was it the 27th day of June, 1916, and were you mustered out as private, Machine Gun Company, 18th Infantry, April 12, 1917? A. Mustered out? No, sir, I was not.

Q. Well, were you mustered out? A. I received my discharge the 25th of August, 1918, I think.

Q. You do not remember the date of your discharge, but you remember the date of your enlistment, is that right? A. I received my discharge while I was awaiting trial.

Q. When you say you received your discharge, while you were awaiting trial, do you mean the trial for which you were convicted and sentenced to four years in the United States Penitentiary at Atlanta? A. Yes, sir.

Q. Now, you have described the circumstances of that conviction and the fact is, is it not, that you were convicted, tried and convicted as a white slaver? A. Well, of aiding and—my indictment read, "Aiding and persuading."

Q. Aiding and abetting white slavery? A. No,

sir, I think not, "persuading."

Q. White slaving? A. No, sir.

Q. Aiding and persuading what?

Mr. Drewen: I do not understand—the Colonel asks whether the indictment contained the words "white slavery."

The Witness: I think "aiding and persuading a certain young lady that was my wife to leave the state to go to another for immoral purposes.

Q. When were you married? A. I could not say the date, sir; I was maried, I was working, and I was taken to the police station in front of a police judge, and the judge asked me if I thought enough of the woman to marry her and give her a good home, and I said "Yes."

Mr. Vickers: I move that the answer be stricken out as not responsive. I asked him when he was married and not under what circumstances.

Q. When? A. I could not say.

Q. You do not know. Can you give the year? A. 1918.

Q. You do not mean that; you were convicted in 1917, weren't you? A. I was married the year I was convicted.

Q. How long before your conviction? A. About three or four months, to the best of my knowledge.

Q. Your enlistment in the Navy was at St. Louis, was it not? A. Yes, sir.

Q. Can you fix the month or the year when you enlisted in St. Louis? A. No, sir. I could not.

In 1917, weren't you? A. I was convicted the year

Q. Nor the year? A. No, sir.

Q. By the way, when your record was taken at the State Prison, on your admission following the conviction in New Jersey, did you there give your history? A. I gave my history, yes, sir.

Q. Did you there say that you were 30 years of age, that you were born in Bushill, Ill., and that your residence was 331 West 19th Street, New York City, and that you had no occupation? A. I do not know what record I gave down there, I could not say.

Q. You do not know? A. No, sir.

Q. But you say you do not know that at the time you enlisted in the Navy you did not give the same place that I have asked you about now as your birth place, in Bushill, Ill.? A. I did not. I said I didn't know what I gave.

Q. Isn't the name of that place Bushnell or Bushill? A. I could not say.

Q. You do not know that either. Now, you say you were tried at Paterson, that is true, is it, you pleaded, didn't you; you were not tried at Paterson, were you? A. I was tried in front of a judge, Judge Watson.

Q. The fact is you retracted your plea of not guilty and entered a plea of non vult, to the charges of entering, grand larceny and receiving stolen goods; isn't that true? A. Yes, sir.

Q. And Judge Watson, Judge William Watson is the man before whom you entered your plea and who sentenced you, is that right? A. Yes, sir.

Q. Now, you have said that you had no reason to believe that the police were looking for you, you thought they were giving you a chance to go straight? Is that right? A. Yes, sir.

Q. Knowing that you were married and not di-

vorced from your wife and living in a meritricious relation with this woman defendant, and being engaged in the bootlegging business, did you consider that going straight, which would induce the police to give you a chance—is that what you meant? A. I do not understand what you mean.

Q. Well, I will withdraw the question. You said you thought the police were giving you a chance to go straight, is that right? A. Yes, sir.

Q. Do you mean that? A. Yes, sir.

Q. Thinking that, you were nevertheless living with this woman in a state of adultery, is that right? A. Yes, sir.

Q. You were in the bootlegging business? A. Yes, sir.

Q. And you were carrying these two young cannon around with you wherever you went, and whenever you went out in your car, is that right? A. Not at all times, sir.

Q. But many times? A. Yes.

Q. And by the way, how about the blackjack that has been produced here, is that yours? A. No, sir.

Q. That is not yours? A. No, sir.

Q. Was it found on you by the police? A. No, sir.

Q. You say that was not a part of your personal property found on you at the time of your arrest, is that true? A. No, sir.

Q. What about the dynamite and the fulminating cap; whose property was that? A. I know nothing—

Mr. Drewen: I object on the ground it is incompetent, irrelevant and immaterial.

The Court: I will permit it.

Mr. Drewen: Exception.

Q. How about it? A. I know nothing whatever about it.

Q. Know nothing about it? A. No, sir.

Q. Whose black satchel is this? A. Whose bag is it?

Q. Yes? A. It belongs to me.

Q. And if in this bag immediately following your arrest there was found a stick of dynamite and several of these fulminating caps and wires, you say you have no knowledge as to how they got there, is that right? A. No, sir.

Q. No knowledge at all? A. No, sir.

Q. What about this 32-calibre revolver that has been testified to as having been found in that bedroom of yours, was that yours or not? A. That gun was taken apart and was in the drawer the last I seen of it.

Q. Is it yours? A. Yes, sir.

Q. How about the 22 revolver, is that yours? A. Is it mine? Yes, sir.

Q. When you last saw this gun, was it or was it not loaded with shells and bullets? A. When I last saw it, the chamber was out, but it had—it was fully loaded.

Q. The chamber was out and fully loaded? A. Yes, sir.

Q. Did you load it? A. Sir?

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

Q. What for? A. Why, I do not know, I just—

Q. By the way, you say that this man that you saw in the back yard had on a grey overcoat. I show you an overcoat and ask whether that looks like the overcoat the man had on at whom you took a shot through the screen? A. I could not say. I thought at the time he had a grey overcoat on, I

could not say if that is it or not.

Q. Did it look like this? A. I could not say.

Q. You say whatever overcoat this man had on, at whom you took a shot, that the collar was turned up, is that right? A. Yes, sir.

Q. Was it pulled up well around the neck? A. The collar laid like this (indicating).

Q. In such a manner as to arouse your suspicion? Is that right? A. I do not know what I did think.

Q. Did this man that you saw out there in the back yard have this kind of a cap on? A. Something similar to that.

Q. You took a pretty good look at this fellow before you shot, didn't you? A. Sir?

Q. You took a pretty good look at him? A. No, sir.

Q. Well, why did you shoot at him? A. I could not say why.

Q. You could not say why? A. No, sir.

Q. By the way, while you were in the service, both in the Army and the Navy, what was your record at pistol practice? A. Well, I could not say just what was the record.

Q. What do you mean you could not say. You know that is a part of the requirements and that in the Navy and in the Army both, that you are required to practice with the revolver, and the men are required to make themselves familiar with scores and their rating, don't you? A. You have to get out and shoot, at your places.

Q. Well, let's see, did you ever have any pistol practice? A. Did I ever have any?

Q. Yes? A. Yes.

Q. Do you know what kind of a marksman you were when you were having pistol practice? A. Well, nothing extra.

Q. Nothing extra. What do you call "extra?" A. Well, I could not say; I do not really know what is the score you got to make, to make a good shot.

Q. Assuming that you had 100 per cent. out of four shots, four hits out of four shots, would you say that was extra or not? A. I do not know, sir.

Q. You do not know? A. No.

Q. Did you ever have any pistol practice at a silhouette target of a man? A. No, sir.

Q. You never did? A. No, sir.

Q. Never aimed a gun at a man before this day when you saw this man in the back yard out of your window, did you? A. No, sir.

Q. But at that man you aimed, didn't you? A. No, sir.

Q. If you hit him, then you hit him by chance? A. Yes, sir.

Q. You did not aim at these men who were in the doorway, did you? A. Did I aim?

Q. Yes. A. (No answer.)

Q. Yes or no, did you? A. Please ask me that question again.

Q. You repeated it; did you aim, I asked you? A. Well, I pointed the gun like this.

Q. Did you aim; you know what I mean? A. Nothing, not particular.

Q. Did nothing in particular? A. Not at a form in particular, no, sir.

Q. Not at one form in particular? A. No, sir.

Q. When you pointed the gun as you have indicated you did not intend to hit either of these forms, did you? A. Well, I do not know whether I did or not.

Q. Did you? A. No, sir. Because I suppose—

Q. Then you cannot tell this Court and jury what your intention was or what your state of

mind was. You drew this gun out of the bureau drawer, having seen two forms in the door, one of them pointing a gun at you; you cannot tell this jury what your frame of mind or your intention was, can you? A. Why, I took the gun out—I was in fear that somebody was going to shoot me and I didn't know what to make out of it at that hour of the morning.

Q. Well, seeing that you were in fear and you saw a man with a gun pointed into that room and in your direction, I now ask you whether you pointed your gun you intended to shoot him? A. I didn't intend that I—no, I don't know whether I intended to shoot him or what I intended to do.

Q. You do not know whether you intended to shoot him. By the way, when you fired those two shots did either or both of the forms that you saw in the door disappear? A. After I fired the shots I seen the two forms disappearing downstairs.

Q. After you fired the two shots is what I am asking you? A. That is what I said.

Q. Two shots? A. After I fired first, after I fired the other two I seen the two forms disappear down the steps.

Q. After you fired the first one did either of the forms move that you had seen in the doorway? A. One form.

Q. One form moved? A. Yes, sir.

Q. And the other remained there? A. Well, as far as I could see.

Q. Did the form as you say had a pistol in its hand move? A. Yes, sir.

Q. That form moved? A. Yes, sir.

Q. And having fired at one, which caused that one form having the pistol to move, you next fired two shots at the other forms, is that right? A. I fired in the doorway at the entrance in the door.

Q. Right at the opening, right in the frame? A. Fired right through the opening of the door.

Q. Now, at that time, Sage, you were back in your bedroom and in what position with respect to the door leading into the kitchen from your bedroom? A. The door leading—

Q. Could you on this plan point out where you were. This is supposed to be your bedroom; this is the bed, the dresser and the wardrobe, chair, cabinet. Can you point out where you stood at the time you fired first and the succeeding two shots? A. Here is where I stood here, when I fired the first shot.

Mr. Vickers: For the purpose of the record indicating by a pencil mark a point on the print between the object marked Ch, for chair and the object marked dresser.

Q. Go ahead. A. This chair was not here.

Q. This chair was not there at the time? A. No.

Q. And this is the dresser here where you have made the pencil mark, from which you say you got this gun, is that right? A. Yes, sir.

Q. Now, do you say, Sage, that at the time this form with the gun stood here in the doorway? A. The only two forms I seen was the form here and the man was standing this way, gun out in his right hand, and the form was standing here.

Mr. Vickers: Indicating a point on the map just outside of the line of the door, if the door were closed.

The Court: We will recess at this point until 2:15 P. M.

2:15 P. M.—EXAMINATION RESUMED.

CROSS EXAMINATION (Continued) by Mr. Vickers:

Q. You have given some testimony as to your marksmanship; did you have a conversation regarding your marksmanship with Captain Hogue after your arrest? A. No, sir.

Q. Did you say to Captain Hogue that you could hit a half a dollar twice in the air before it hit the ground? A. No, sir.

Q. By the way, after firing these shots in your room, did you re-load the gun? A. No, sir.

Q. Sure of that? A. Yes, sir.

Q. The shots that were fired, were fired out of the same revolver? A. Yes, sir.

Q. And that was this .38 Army Colt? A. Yes, sir.

Q. Where did you get that gun? A. (No answer.)

Q. Where did you get it, how did it come into your possession? A. I bought it off a man.

Q. Where? A. Off a man that worked on the docks.

Q. Where? A. In Hoboken.

Q. When? A. Well, I could not just say when.

Q. How long before your arrest? A. I should judge about a month.

Q. Might it have been two weeks? A. No, sir.

Q. Did you tell the police at the time of your arrest that you won this gun from a fellow in a crap game—bought it a couple of weeks ago from a fellow in the crap game in the rear of the Lipton Tea Company Building, 14th Street, Hoboken. A. No, sir, not that.

Q. You did not say that? A. No, sir.

Q. Is that the truth, that that is how you got the gun? A. No, sir.

Q. Is that the truth as to the place in Hoboken where you got the gun? A. Yes, sir.

Q. But you did not tell the police that that was the manner in which you acquired it? A. No, sir.

Q. By the way, you did make a statement to the police, didn't you Sage? A. No, sir.

Q. Didn't make any statement? A. No, sir.

Q. Didn't sign any? A. I signed, yes.

Q. You signed a paper but you did not make the statement alleged to be contained thereon, is that what you mean? A. No, sir.

Q. Didn't make it? A. No, sir.

Q. How often did you sign it? A. I could not say, sir.

Q. More than once? A. More than once, yes, sir.

Q. I show you a paper writing, containing ten sheets of paper and ask you whether appended to the bottom of each sheet of paper is your signature? Take the papers and examine them? A. Yes, sir.

Q. And you say that those papers were signed by you but what purports to be the contents of a statement made thereon, the questions asked by the police is not in fact true as to anything alleged to have been said by you? A. I don't know what is in the statement whatever.

Q. But whatever is in there, you did not say? A. No, sir, not to my knowledge, the only thing I done was signed.

Q. And you gave no information to the police which they wrote down, or purported to write down on any of these sheets of papers, is that right? A. I don't know what is in them papers, I could not say, but one thing I did say is in respect to the girl not being my wife, and another time they quieted

down with me in the room that I was in and told me pay strict attention—that was I think a man by the name of Mr. Wolfe. He said, "Pay strict attention" to a certain thing.

Q. What was it? A. And that was the counting of some bullets.

Q. Were the bullets there in your presence being counted? A. He counted the bullets in my presence.

Q. What bullets were they? A. That was, if I remember right, twelve .38 calibre bullets.

Q. Such bullets as were used by you in this .38 Army Colt? A. I could not say sir. I seen them count them, that is all.

Q. Did the police say to you where these bullets had been obtained? A. No, sir.

Q. They did not? A. No, sir.

Q. Do you know where they had been obtained by the police? A. I do not know, sir.

Q. Do you know where you last had left them, if you had left them any place. A. No. sir.

Q. Did you have any other bullets for that Army Colt .38 than those which were in the gun? A. Yes, sir.

Q. Where? A. The 12 that they counted.

Q. They were yours? A. Yes, sir.

Q. Where had you last seen those 12? A. To the best of my knowledge they were wrapped in a piece of paper.

Q. Where? A. I could not say just where they were.

Q. Well, to the best of your knowledge, you say they were wrapped in a piece of paper, but you do not know where the paper was? A. I do not know where I laid them.

Q. Did you have them or any part of them up under the loft near the scuttle hole? A. No, sir.

Q. Did you take any ammunition up there with you? A. No, sir, outside of what was in the gun, that was all.

Q. Well, you had two guns up there? A. Yes, sir.

Q. What was in them? A. Why, just the way I fired the gun, that is the way I put it up there.

Q. You mean with four bullets exploded you put it up there, is that right? A. Yes, sir.

Q. If at the time the gun was recovered by the police, that gun contained only two empty shells, you do not know how the other two empties got out of the gun, do you? A. No, sir.

Q. The woman did not re-load it for you, did she? A. No, sir, she never had any gun in her hand.

Q. You did not re-load it? A. No, sir.

Q. And if there were two empties and the balance of the revolving chamber being filled with loaded cartridges, you have no way of explaining how those additional cartridges got into that revolver, have you? A. No, sir.

Q. Did you tell Lieutenant Fullam of the Prosecutor's Office, that you re-loaded that gun? A. No, sir.

Q. You did not tell that to Lieutenant Fullam, this gentleman here? A. I do not remember ever seeing him.

Q. Did you tell anybody you had re-loaded that gun? A. No, sir.

Q. By the way Sage, what was your purpose in getting this second gun, this Webley? A. No purpose, only to put it up in the attic.

Q. To put it up in the attic? A. Yes, sir.

Q. Then, before you started for the attic, didn't you secure this gun? A. Yes, sir, I took it as I—

Q. After securing it, didn't you go downstairs?

A. No, sir.

Q. You did not? A. No, sir.

Q. When you went downstairs did you have any gun? A. That I cannot remember.

Q. You cannot remember? A. No, sir.

Q. Then you mean to say you went downstairs, went out of the front door of that house and onto the stoop and you now do not know whether at that time you had a gun with you, is that what you say? A. Yes, sir.

Q. And you do say it is a fact that you did go out of the front door onto the stoop of the house, did you? A. Yes, sir.

Q. Did you see anybody out there? A. No, sir.

Q. No police there? A. No, sir.

Q. No one there? A. No, sir.

Q. No persons on the street? A. No, sir.

Q. Or in the vicinity of that house that you could see? A. I see no one.

Q. And that was after you had fired four shots, after the police officer in the back yard had fired two shots and also after the police officer downstairs had fired two shots, is that right? A. Well, I do not know. The two shots that I heard downstairs, I was upstairs.

Q. Yes, but you, going downstairs and out onto the stoop after these eight shots that you had described had been fired, is that right? A. No, sir, I said I went downstairs, I never heard no shots downstairs until after I returned upstairs.

Q. Oh, all right. So that you say you went downstairs before the two shots were fired downstairs, is that right? A. Yes, sir.

Q. Were those shots downstairs fired before or after you went out onto the stoop, as you say? A. They were fired when I went upstairs, when I was upstairs in my bedroom.

Q. Were they fired before or after you went out onto the front stoop, that is what I ask you? A. After I went out on the front stoop.

Q. After you went out on the stoop? A. Yes, sir.

Q. At the time when you went downstairs, was the woman downstairs? A. I never seen her, sir.

Q. You did not see her? A. No, sir.

Q. Didn't hear her? A. No, sir.

Q. Did you say at that time to this woman, "Get the hell out of here, get upstairs or I will blow your brains out," or words to that effect? A. No, sir.

Q. Did you say anything to her? A. No, sir.

Q. Did you hear anybody else say anything to her? A. No, sir.

Q. Did you hear this man Otis say anything to her at the time you were either going downstairs or going out onto the stoop, or coming back upstairs? A. No, sir.

Q. By the way, when you went downstairs and out onto the stoop, as you have described, did you see this dead or dying police officer lying there with his feet sticking out of the room from the front parlor into the hall? A. All I heard was somebody sort of moan, like.

Q. Moan? A. Yes.

Q. Well, I didn't ask you what you heard; did you see him I asked you? A. Yes, sir, sitting by the door.

Q. You saw him? A. Yes, sir, sitting by the door.

Q. Sitting? A. Yes, sir.

Q. You mean this man was sitting up? A. He was sitting in a position like this.

Q. Illustrate again the position in which you say this man was sitting? A. Just inside the door

by the doorway, he was like this, that is, I cannot exactly—

Q. I show you picture, State's Exhibit 12; is that the man you saw sitting by the door? A. I could not say.

Q. Can you recognize him? A. No, sir.

Q. You saw his face? A. No, sir.

Q. Didn't see his face? A. No, sir.

Q. I show you photograph, Exhibit S-5, and ask you if you recognize that as the downstairs front room of that house? A. Yes, sir.

Q. Then you passed in the hall and in a direction from right to left as shown in this photograph, is that right? A. Right straight through, sir.

Q. Then, if this man was at this door there was no difficulty in your seeing him, was there? A. I could see him as I went straight out, sitting in a sitting position. I could not explain just how, but I went out on the porch and turned right around and went right back upstairs again.

Q. And did you go to the room of Mr. Kaerth on the same floor as your rooms were before going downstairs or after coming back again? A. After, sir.

Q. Afterwards? A. Yes, sir.

Q. Then when you went for this second gun you had seen this man who is now described as Officer Black and who is now described as being dead and having been killed, at the time you have seen him in this sitting position downstairs, is that right? A. Yes, sir.

Q. What did you get the second gun for? A. To put it up in the attic.

Q. To put it up in the attic? A. Yes, sir.

Q. For what purpose? A. Why, I put them both there.

Q. For what purpose did you put them both there? A. I could not say.

Q. What do you mean you could not say? A. I didn't know what to do.

Q. Do you mean you now do not know what was then in your mind? A. No, sir.

Q. You mean you do not know what was in your mind? A. No, sir, I didn't know.

Q. You do not know what was then in your mind? A. I did not realize, no, sir, until I had went into the attic, I could not—

Q. What was your purpose in going into the attic, did you go there to escape arrest? A. No, sir, not to escape arrest.

Q. Didn't you then realize you had shot this man who was sitting down there in the doorway? A. I realized it then, yes, sir.

Q. You realized it then? A. Yes.

Q. And it was after you realized that that you went and got this second gun, is that right? A. Yes, sir.

Q. What for? A. I do not know, sir.

Q. You do not know what for? A. No, sir, only to put it in the attic.

Q. Well, at that time Sage, were you still under the belief that whoever these men were, represented by the figures in that door, they were intruding into your home for the purpose of doing you grievious bodily harm? A. It was when I returned upstairs after being down that I heard the police whistles that is when I first realized I had committed the offense on the police officers and knew my mistake.

Q. You realize exactly what you have said then, do you? A. I said I realized that I had made a mistake and that by hearing the police whistle that I possibly injured one of the police officers.

Q. What was there between the time that you fired the last shot which you fired at the man in the overcoat and your going downstairs and seeing this man sitting up, which indicated to your mind that you had committed an assault upon a police officer? A. By hearing the police whistles, sir.

Q. And that is all that then indicated to your mind, that you had committed an assault on a police officer, is that right? A. Yes, sir.

Q. By hearing the police whistle, is that right? A. Yes, sir, and Mr. Kaerth saying the place was surrounded.

Q. But when you came upstairs, you had not yet gone to Kaerth's room, had you? A. You asked me why I got the other gun and put it up there, and why I went into the attic.

Q. But when you got the other gun you had not yet gone into Kaerth's room, isn't that so, Sage?. A. Sir?

Q. You had not yet gone to Kaerth's room, when you got that second gun? A. No, sir.

Q. And I ask you again why did you go for the other gun? A. I do not know, sir.

Q. When you went for it, did you know it was fully loaded? A. No, sir, I did not.

Q. Did you, when you put it away the last time leave it loaded? A. I never knew whether it was loaded or not.

Q. When you got it, did you examine it to see if it was loaded? A. No, sir.

Q. Didn't examine it? A. No, sir.

Q. But not knowing whether it was loaded and knowing you had fired four shots out of the other gun, you say you threw those two guns into the attic, is that right? A. Yes, sir.

Q. When you went to Kaerth's room, what did you go there for? A. I went to Mr. Kaerth's room

and I said, "Is Mr. Kaerth in there."

Q. What did you go there for, I asked you, Sage? A. Well, I do not know what I went there for, I could not say.

Q. You do not know? A. No, sir.

Q. Your memory is perfectly clear as to what happened when you got the second gun and when you went to Kaerth's room? A. Yes, but I have no knowledge of what prompted me to go to his room.

Q. You have no knowledge? A. No.

Q. You know before you went there, you got this second gun, don't you? A. Yes, sir.

Q. And you have testified that you took those two guns and you carried them in your right hand in the manner I indicate, both guns by the barrel, and with the two guns in that position you went to Mr. Kaerth's room, is that right? A. Yes, sir.

Q. You did not take these two guns one in each hand and go to Kaerth's room and stick them up against his belly, did you? A. No, sir.

Q. You are sure of that? A. Yes, sir.

Q. When you went to Kaerth's room, you are sure the door was open, are you? A. About that much (indicating).

Q. You are sure you did not ask him to open the door? A. No, sir, I did not.

Q. Did Kaerth show any evidence of fear that you saw? A. Sir?

Q. Did Kaerth show any evidence of fear when you came to the door with these two guns? A. No, sir.

Q. Showed no evidence of fear? A. No, sir.

Q. How did you hold those guns at the time, holding them in your right hand as you have described, how did you hold them with regard to the position of Kaerth? A. I held them in my hand

like this.

Q. Push them in? A. No, sir.

Q. Your body did not get entirely into the room, did it? A. No, sir, I didn't go inside.

Q. You did not push the guns into the room, did you? A. No, sir.

Q. What caused you to say to Kaerth that you were going—"I am not going to shoot any more, don't worry." What caused you to say that to Kaerth? A. Mrs. Kaerth seemed to be frightened.

Q. Where was she? A. I could not see her, sir.

Q. Then, how could you say she seemed to be frightened? A. The way she talked.

Q. Did she talk? A. Sure.

Q. What did she say? A. She said, "Why don't you get out?"

Q. She said? A. Yes, sir.

Q. "Why don't you go out?" A. Yes, sir.

Q. Speaking to you? A. Yes, sir.

Q. "Why don't you go out?" A. Yes, sir.

Q. Was there anything in that, that indicated to your mind that she was frightened? A. And the way she said it, "My God," or something, "Why don't you go out," or something I could not say just exactly, but I know she said something similar to that. "Why don't you go out," or something.

Q. By the way, at that time when you heard this other defendant or somebody say, "My God, they are lying dead all over the place here," or words to that effect— A. All I heard her say was, "My God," and the other words I did not hear.

Q. Where was this woman at the time you heard her say that? A. I could not say.

Q. Don't you know whether she was downstairs or in your apartment or where? A. No, sir, I am sure she was not in my apartment.

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Q. Where was this woman the last time you saw her before you came down out of the attic? A. I do not understand you.

Q. Where was Mae, the last time you saw her before you came down out of the attic—where was she? A. She was between the door and the wardrobe.

Q. Between the door and the wardrobe? A. Yes, sir.

Q. That is to say in this bedroom of yours, she was to one side of you but between you and the door, is that right? A. Yes, sir.

Q. And that is when you were in the position from which you fired the three shots, is that right? A. Yes, sir.

Q. And you are sure you fired those shots from a position on the right side of that room and at an angle across the room, and fired through the door and toward the door of Kaerth? A. I fired the first shot from where I was standing.

Q. After you fired the first shot did you move from that position? A. Yes, sir.

Q. To where? A. Toward the bed, sir.

Q. Did you move past the woman? A. No, sir.

Q. Had she moved from there after you fired the first shot? A. No, sir, not that I know of, I didn't know it.

Q. Then when you fired the second shot she was still in that position near the dresser? A. As far as I know.

Q. That would be toward the right hand side as you were moving toward the bed, is that right? A. Yes, sir.

Q. And when you got toward the bed, then you were at an angle which permitted you to shoot toward and downstairs, is that right? A. Yes, sir.

Q. And from that position you did shoot down and toward the stairs? A. No, sir.

Q. Where were you when you fired the second shot? A. I fired the first shot, advanced two or three steps toward the bed and as I did I fired the second shot.

Q. And as you fired that were you firing straight out through the door? A. Yes, sir.

Q. That would be exactly in the direction of Kaerth's door, wouldn't it? A. Well, it would be like the first shot, and the next I would think on an angle, I was moving, and it would go on the angle out through the door; it would not fire straight through the door.

Q. Between the interval of the second and third shot were you still moving towards the bed? A. Yes, sir.

Q. Were you aiming this gun at anything the time you fired the second shot? A. I was aiming at the form in the door?

Q. What were you aiming at at the time you fired the third shot? A. I thought that was what you just asked me.

Q. I asked you what you were aiming at, at the time you fired the second shot and you said you were aiming at the form in the door. Now, I ask you what you were aiming at at the time you fired the third shot? A. At the forms.

Q. The same form? A. I could not say.

Q. You could not say. A. No, sir.

Q. By the way, the window in that room, and the only light in that room is exactly opposite this door to which and out of which you were firing, is that so? A. Yes, sir.

Q. Wasn't there sufficient light there at that time so that you could distinguish these forms? A. No, sir.

Q. Could you tell whether they were male or female forms? A. I could not tell.

Q. The only thing you distinguished was a revolver, is that right and a form? A. No, sir, I distinguished a man's form.

Q. And a revolver? A. And a revolver.

Q. There was light enough for you to see a revolver? A. With his arm through the door, yes, sir.

Q. Now, when you had fired the third shot was Mae still there in a position near the dresser? A. I could not say, sir.

Q. Between the time you fired the first shot and the time you had fired the third shot, do you know whether Mae moved out of the way? A. I could not say, sir.

Q. When was it with respect to these three shots that you heard a report of a gun other than your gun? A. (No answer.)

Q. Do you understand that question? A. No, sir.

Mr. Vickers: I withdraw it.

Q. You have testified that you heard the report of a gun, is that right, do you remember that? A. Yes, sir.

Q. You remember testifying so? A. Yes, sir.

Q. And do you remember testifying you did not know whose gun it was that made that report? A. I do not know what time you mean.

Q. Do you remember testifying this morning in answer to a question that you heard the report of a gun, but you did not know from whose gun the report came, or words to that effect? A. Yes, sir.

Q. And there is not any doubt in your mind

about that now is there, that that is the truth? A. I do not understand you, sir.

Q. All right. You say you do remember so testifying, do you? A. Yes, sir.

Q. When you so testified, was that the truth? A. Yes, sir.

Q. Do you want to change that story now? A. No, sir.

Q. How do you know Mae did not fire that gun? A. I had the gun in my hand.

Q. Well, but you know it was not your gun that was then reporting. How do you know that Mae did not fire that shot, the report of which you heard? Can you answer that? A. I do not see how she could when she didn't have no gun.

Q. How do you know she didn't have no gun? A. I seen her when she went to the door and she didn't have a gun in her hand.

Q. How do you know she didn't have one after she left your side and left the dresser? A. How could she get it?

Q. Do you know whether there were other guns in that dresser? A. Yes, sir, but I got it out of that dresser.

Q. Wasn't the .32 there? A. As far as I know, I don't know.

Q. Well, you do know, as a matter of fact, don't you, you said it was your gun and that the last you saw of it, it was with the chamber fully loaded, the revolving barrel fully loaded and taken apart, isn't that so? A. Yes, sir.

Q. It was in the dresser, wasn't it? A. I could not say where I put it, I never bothered with it.

Q. Now, Sage, you have been asked what you have been doing in the two or three months that you lived in Hoboken and you said you were never

on the street, and what you were doing to make a living and you answered that you did not want to reveal that. What is your reason for declining to reveal that?

Mr. Drewen: I do not understand the witness said that. I understand he said he didn't want to reveal himself.

The Court: I think he said "I do not want to reveal." I understood him to say he did not want to reveal the place.

Mr. Vickers: It was in answer to a question of Mr. Drewen, "How did you support yourself, what did you do for a living," that he gave that answer. However, I will not press it.

Q. Sage, you have testified that you were an orphan and spent a great many years of your life in Orphan Asylums, that you went to St. Louis, lived and worked there and there enlisted. Had you any folks in St. Louis? A. No, sir.

Q. Where did you have any folks? A. I had folks in Chicago.

Q. You had folks in Chicago? A. Yes, sir.

Q. Who? My aunt and uncle.

Q. Did you ever live with them? A. No, sir.

Q. Wasn't your mother alive? A. No, sir.

Q. Did you ever have any other folks you ever had lived with in recent years? A. Not that I ever lived with, no sir.

Q. You never had anybody you lived with, excepting this woman whom you say charged you with that act that I called white slavery, is that right? A. That I lived with?

Q. The woman you say you called your wife and

that out of revenge or jealousy— A. No, sir.

Q. Is that the only person you lived with as a member of your family until you lived with this defendant Mae? A. I never was asked that question before.

The Court: You are now being asked this question.

(Question repeated by the Stenographer as follows: "Q. Is that the only person you lived with as a member of your family until you lived with this defendant Mae?" A. No, sir.

The Court: You mean you did or did not live with them or anybody else besides them.

The Witness. No relation. I lived with another woman that married me in the County Jail in Paterson.

The Court: That was another woman?
The Witness: Yes.

The Court: Some woman married you in the County Jail in Paterson?

The Witness: He asked me if I ever told this girl I was divorced and I answered to the effect I told her I was divorced.

Q. That is not this woman defendant, Mae? A. No, sir.

Q. And that is not the woman you referred to that caused your conviction in Pennsylvania? A. No, sir.

Q. And you do not know where that woman is

you say you married in Paterson, do you? A. No, sir.

Q. You have not any apprehension of being arrested by any police officials of the State of New Jersey, for the crime of bigamy admitted in Paterson, did you? A. Bigamy?

Q. Yes, marrying a woman when you had another wife living? A. I never said I had divorced her.

Q. You say you are in effect divorced from this woman in Pennsylvania, is that right? A. Yes, sir.

Q. But at that time you were going with Mae, you were not divorced from the woman you married in Paterson, were you? A. No, sir.

Q. By the way, did you ever make any inquiry of Mae whether she was married or unmarried? A. I never questioned her.

Q. But you were withholding from her the fact of your criminal career and the fact that you were married because you didn't want her to know that your intentions were otherwise than honorable, is that right? A. Yes, sir.

Q. That is right is it? A. Yes, sir.

Q. You knew that Mae had a daughter, didn't you? A. Yes, sir.

Q. Well, what do you mean by saying you did not know whether she was married or not; did you think it was a bastard? A. I never thought anything like that, no sir.

Q. Never took the trouble to inquire as to whether or not this child that had the measles or something else was a bastard child or a legitimate child did you? A. She could have a child and her husband be dead or divorced or left her.

Q. Did you ever make any inquiry, that is my question. A. No, sir.

Q. Isn't it a fact that you told the police that this woman's name was Muhr and that her husband had left her and that her home was in Pinebush, New York. A. I never said—I said the woman was not my wife, I told the police.

Q. Did you tell the police you thought her maiden name was Benjamin? A. No, sir. I never said where she lived or her people.

Q. By the way, do you remember Officer Edward Murphy who had you in custody when you came down the stairs out of this house at 19 Manhattan Avenue? A. I could not recognize anybody, sir.

Q. Well, do you remember a policeman had you under arrest, one or more policemen, don't you? A. I should judge—

Q. After they put a tear bomb up there and you came down you know some policemen had you in custody, don't you? A. About 15 of them.

Q. Did you talk to any of them? A. No, sir.

Q. Didn't say anything? A. No, sir.

Q. Was anything said at the time by you or by any of these officers with regard to the man now identified as Black and who was dead downstairs? A. One of them I think said, "See what you done, you bastard," that is all I remember.

Q. And didn't he tell you the name of the man that you had killed? A. No, sir.

Q. Didn't he tell you it was Black and didn't you then say something to him regarding that? A. No, sir.

Q. Didn't you say, "Is that Black? I didn't know that was Black, I though it was Bernard McFeeley?" A. No, sir.

Q. You did not? A. No, sir.

Q. You are sure of that? A. Yes, sir.

Mr. Vickers: Officer Murphy, stand up.

Q. To this officer, did you say that or words to that effect? A. No, sir, I did not.

Q. Do you know a man named Bernard McFeeley? A. No, sir.

Q. Did you know that Bernard McFeeley or Barney McFeeley was a member of the Police Force of Hoboken? A. No, sir.

Q. You did not know that? A. No, sir.

Q. Never heard of it or knew it before? A. I have heard McFeeley, but not Barney or Bernard.

Q. Well, Barney or Bernard, whatever you say? A. I have heard McFeeley.

Q. A police officer of Hoboken? A. No, sir.

Q. Don't know anything about him? A. No, sir, I don't remember him.

Q. Well, whether it be Bernard or Barney, did you say you thought this man was Bernard or Barney McFeeley or words to that effect? A. No, sir.

Q. While you were living in Jersey City, did you become acquainted with the neighborhood in which you lived? A. No, sir.

Q. Did you become acquainted with any persons? A. People that I knew?

Q. Living in Jersey City? A. Yes, sir.

Q. Know a good many people in Jersey City? A. Not so many, no, sir.

Q. Know any member of this jury? A. No, sir.

Q. Ever converse with any member of this jury? A. No, sir.

Q. Know where any of the members lived? A. No, sir.

Q. Were you ever a taxi driver in the taxi business? A. No, sir.

Q. Were you a licensed chaffeur? A. Yes, sir.

Q. Is that your pen knife? A. Yes, sir.

Q. Did you have it on you at the time you were arrested? A. No, sir.

Q. You did not? A. Not that I know of.
Q. Where was it? A. On the dresser, I guess.
Q. On the dresser? A. Yes, sir.
Q. Is this your billfolder? A. Yes, sir.
Q. Was it on you at the time you were arrested? A. No, sir.
Q. Where was it? A. On the dresser.
Q. Is this your picture, this picture, the baby picture? A. Yes, sir.
Q. Whose baby is it? A. I could not say, sir.
Q. Have it with you at the time you were arrested? A. I don't think so.
Q. Don't you know? A. I don't know, sir.
Q. Is it your baby? A. No, sir.
Q. Is it Mae's baby? A. I could not say, sir.
Q. Where did you get the picture? A. I don't know where the picture came from, sir.
Q. But it is not you, is it? A. I do not know whether it is mine or not; it was the girl's.
Q. Haven't you said it was your picture when I showed it to you, didn't you say it was your picture? A. No, sir, I don't think so.
Q. I show you what purports to be the conditional bill of sale for a motor vehicle, is that your property? A. That was what I had, it don't belong to me.
Q. Did you have it with you at the time you were arrested? A. No, sir.
Q. Where was it? A. In the wallet.
Q. In what wallet? A. No, it was lying on the bureau.
Q. What wallet do you refer to when you said first it was in the wallet? A. This bill wallet you showed me.
Q. This little billfolder? A. Yes.
Q. You said it was in the billfolder? A. It was lying on the bureau back of a dish, I think.

Q. Didn't have it with you? A. No, sir.

Q. I show you a letter addressed to "Friend Frank" is that your property? A. Yes, sir.

Q. Did you have it with you at the time you were arrested? A. No, sir.

Q. Where was it? A. On the dresser in the drawer, I could not say.

Q. I show you a New Jersey Motor Vehicle Driver's License card number 257790, and ask you whether that is your property? A. No, sir.

Q. Did you have it? A. Not on me, sir.

Q. Where was it? A. Up in the bureau.

Q. It was your property, wasn't it? A. Why, I had it there but it don't belong to me.

Q. I show you two cards stamped and signed but not filled out, department of motor vehicles of New Jersey, and ask you whether they were your property? A. Yes, sir.

Q. Where did you get them? A. That was given to me, sir.

Q. By whom? A. The man I care not to reveal.

Q. Some one you don't care to reveal? A. Yes, sir.

Q. What was your purpose in having them? A. I was asked to get them.

Q. You were asked to get them? A. Yes, sir.

The Court: What are they, driver's licenses?

Mr. Vickers: They are blank cards with the seal of the State of New Jersey and the signature of the Commissioner of Motor Vehicles.

The Court: In blank?

Mr. Vickers: In blank.

The Court: They are cards of this year and they both expire December 31st, 1923.

Q. By the way, it appears that the license number on one of these cards is completely erased or obliterated; was that so when you got the card, or did you erase it? A. That is the way it was when I received it, sir.

The Court: These are Owners Licenses, are they?

Mr. Vickers: Yes, your Honor.

The Court: And not Drivers Licenses?

Mr. Vickers: Motor Vehicles, Owners Licenses.

Q. By the way, I show you another paper purporting to be a bill of sale for a motor vehicle, for a Studebaker touring car; is that your property? A. Yes, sir.

Q. Where was that? A. That was in a wallet.

Q. And when you say a wallet, do you refer to this black wallet I have in my hand? A. Yes, sir.

Q. And where was the black wallet? A. I think it was laying on the bureau.

Q. This wallet was in your possession at the time you were arrested, was it? A. No, sir, I don't think so.

Q. I show you a Deputy Marshall's badge of the State of New Jersey, number 26, and ask you whether that is your property or claimed by you to be your property? A. Yes, sir.

Q. Where was that? A. It was in the wallet.

Q. Where did you get that? A. Off of a man.

Q. Off of a man? A. Yes, sir.

Q. When you say you got it off of a man, do you mean you stuck him up and got it off him? A. No, sir, he gave it to me.

Q. How did you get it off him? A. He gave it to me.

Q. Somebody gave it to you, a Deputy Marshall's badge, bearing the Coat of Arms of the State of New Jersey and number 26, is that right? A. Yes, sir.

Q. For what purpose did you have it? A. To help me out on the road transporting booze.

Q. From whom did you get it? A. Sir.

Q. From whom did you get it? A. I don't care to answer that question.

Q. On what ground? A. I don't care to reveal the man's name.

Q. You do not refuse to answer it on the ground that it will incriminate you, do you? A. No, sir.

Q. I show you a card headed State Secret Service, incorporated, with the Coat of Arms of the State of New Jersey and the name John Miller, address 179 Hudson Avenue, West New York, is that your property or claimed by you to be your property? A. Yes, sir.

Q. Where did you get that? A. Off the same man.

Q. The man whose name you do not care to reveal, is that right? A. Yes, sir.

Q. I show you a motor vehicle license and in the name of John Miller, and ask you whether it is your license? A. Yes, sir.

The Court: Is it John Miller?

The Witness: Yes, sir.

Q. Your right name is Frank? A. Yes, sir.

Q. Why did you get the license in the name of John? A. They are John F. Miller.

Q. Well, is your name John F.? A. Yes, sir.

Q. That is your name, is it? A. Yes, sir.

Q. Your middle name is Frank or Franklin? A. Franklin

Q. Isn't it a fact, your name is Franklin James Sage? A. No, sir, my name was changed.

Q. Didn't you enlist in the United States Navy under the name of Franklin James Sage? A. Yes, sir.

Q. But you say that that is not your right name although that is your enlistment name and the name under which you claim to have an honorable discharge from the United States Navy, is that right? A. Franklin James Sage, yes, sir.

Q. Then what name were you convicted under in the State of New Jersey? A. Frank Sage, I think.

Q. Frank Sage? A. Yes, sir.

Q. Don't you know? A. Frank Sage, that is what it was.

Q. By the way, where is your brother Percy Sage? A. I do not know, sir.

Q. You do not know? A. No.

Q. Never had one? A. Never had one what?

Q. Did you have a brother Percy? A. No, sir.

Q. Never did? A. No, sir. I have a brother Danny and Roy.

Q. Where are they? A. I don't know where they are at.

Q. By the way, when you enlisted in the Navy, did you give your home address as Matun, Illinois? A. I could not say, sir.

Q. Well, where was your home address at the time? A. I had no home, I was staying—

Q. Had none? A. I had none.

Q. Did you claim any home? A. Only the Newsboys Home.

Q. Well, was that 2909 Locust Avenue, St. Louis? A. Yes, sir.

Q. You remember that number and that street although you enlisted when you were a minor at the age of 16 years, is that right? A. Yes, sir.

Q. You remember the street number and the street? A. I remember the street because I sold newspapers on it.

Q. That is the reason you remember that? A. Yes, sir.

Q. Don't you remember whether or not at the time of your enlistment in the Navy, you gave that as your home address? A. I do not know, sir.

Q. Don't you know it is necessary to give your home address at the time of your enlistment? A. Well, I do not remember what they asked me for.

Q. Well, do you remember whether they asked and whether you gave your mother's name? A. I do not remember it.

Q. At that time did you give your mother's name as Mrs. Susie Matthews, 2008 Weston Avenue, Matun, Illinois? A. No, sir.

Q. Was your mother's name Susie? A. Yes, sir.

Q. And what was her last name? A. Sage.

Q. Wasn't it Matthews? A. No, sir.

Q. Was her maiden name Matthews? A. No, sir.

Q. Did she or you ever live at 2008 Weston Avenue, Matun, Illinois? A. No, sir.

Q. Did you give the Navy the information that you had a brother Percy Sage at Matun, Illinois? A. No, sir.

Q. Did you give the Navy the information that

you had a sister by the name of Gladys at Matun, Illinois? A. I have a sister Gladys.

Q. Where did she live at the time? A. She was in an Orphan Asylum.

Q. Where? A. Chicago or Indianapolis, I don't know.

Q. You mean to say you do not know whether she resided in the State of Illinois, or the State of Indiana, but you know she lived in an Orphan Asylum? A. Positively. The whole family of us were sent to Orphan Asylums; two were here and two were another place; I don't know where they went, we never heard of each other after.

Q. Now, Sage, you have said that you, responding to the entreaties of this other defendant Mae, had arranged that on Wednesday, the 23rd of May of this year you were going to quit where you were living in Manhattan Avenue and you were going away to your family or folks and live a new life, is that the truth? A. Yes, sir.

Q. And that was because this woman prevailed upon you to give up this life of crime and danger you were leading and turn over a new leaf and reform, is that right, that is the reason why you had made up your mind, is that right? A. She asked me, she never knew—the only thing she knew was my being in trouble with men I was handling booze with, nothing outside of that. She asked me to go away and I had promised to do it.

Q. And to reform, is that right? A. Yes.

Q. That is then, this woman had prevailed upon you to abandon the life of crime you and she were leading at 19 Manhattan Avenue and to go away and turn over a new leaf? A. Yes.

Q. And become a good man, is that right? A. Yes, sir.

Q. And that was to take place on the 23rd of

May? A. I expected to go Wednseday if I possibly could.

Q. Wednesday, that is the day after this fatal shooting, isn't it? A. I intended to go Wednesday before that, but I could not get away.

Q. On your direct examination, you have testified it was arranged that you intended to go away on the Wednesday following this day when the shooting occurred and you were going to go away to your folks and lead a new life; was that the truth when you so testified? A. Yes, sir.

Q. And that was because you and this woman had resolved that together, is that true? A. And she asked me to do it.

Q. And you responded to her wishes, didn't you? A. Yes, sir.

Q. And yet you say you were on bad terms, not on speaking terms with her, is that the truth? A. Well, that was not on the Monday.

Q. That was not on the Monday? A. No, sir.

Q. Had you changed your mind on Monday? A. Why, because I was mad at her on Monday, I would not stay mad at her all the time.

Q. But if your story is true you were going to leave this woman the next day following this Tuesday, is that true? A. I was going to leave her?

Q. Yes, you were going to leave her and go to your folks and turn over a new leaf, is that true? A. I was going away.

Q. And going to leave her weren't you? A. No, sir.

Q. Yes or no? A. No, sir.

Q. Were you going to take her with you? A. Not at the present time, I would not have taken her.

Q. Then you were going to leave her, weren't you? A. And she was going to come after, yes.

Q. And you were going to leave her with her consent, is that so? A. Yes, sir.

Q. For the purpose of giving up the life of crime, is that right? A. Yes, sir.

Q. Still you say on this Tuesday before this was to happen you were on bad terms and not speaking to her, is that true? A. On the Monday, yes, sir.

Q. Well, you were still on bad terms with her when you got out of bed on this Tuesday morning, weren't you. A. Yes, sir.

Q. And the reason you would not speak to her or pay any attention to her was because you were on bad terms with her, is that true? A. Yes, sir.

Q. And then you still had in your mind that you were going to go away according to this agreement between you and her the following day, is that right? A. Yes.

Q. When had you last talked over with her this matter of your going away and leaving her and reforming? A. The week before.

Q. The week before? A. Yes, sir.

Q. You did not have any quarrel with her about going away and leaving her, did you? A. No, sir.

Q. Were you asked by the police after the arrest, this question: "You knew the crime for which those policemen were looking for you," and did you answer "No, sir?" A. I don't know.

Q. You don't remember that? A. No, sir.

Q. You do not remember whether you were asked that or not? A. No, sir.

Q. Were you asked this question, "Who were these policemen talking to in your apartment," and did you answer, "Through the door they were talking to us, they asked her if I was home and she said, "Wait a minute," she got dressed, I put on my pants, I picked up the gun from the table in

dining room, they opened up the door and I started shooting." Were you so asked and did you so answer?

Mr. Drewen: Objected to on the ground it is incompetent, irrelevant and immaterial, not binding upon the defendant Mae Miller, any statement made by this witness.

Mr. Vickers: Well, it is not introduced for the purpose of being binding on her.

The Court: It would not be binding upon Mae Miller but it is for the purpose of basing, I assume, a contradiction, and for that purpose I will allow it.

Mr. Drewen: May I ask your Honor to charge this jury at this time that that statement, as far as the defendant Mae Miller is concerned, may not be considered by them against her.

The Court: They have heard you say that and I acquiesce in what you say, that so far as it mentions Mae Miller, it does not affect or bind Mae Miller, but only affects himself. When he makes a statement he cannot affect somebody else.

(Question repeated by the Stenographer as follows:)

"Q. Were you asked this question, "Who were these policemen talking to in your apartment," and did you answer, 'Through the door they were talking to us, they asked her if I was home' and she

said, 'Wait a minute,' she got dressed, I put on my pants, I picked up the gun from the table in dining room, they opened up the door and I started shooting.' Were you so asked and did you so answer?" A. No, sir.

Q. Do you now say you were neither asked the question nor did you give that answer? A. I do not understand you, sir.

Mr. Vickers: I withdraw the question.

Q. Did the police ask you that question? A. No, sir.

Q. They did not? A. No, sir.

Q. Did you in answer to any question by the police answer as I have read to you this purported answer or any words to that effect? A. No, sir.

Q. Did you say anything to the police that persons outside of the door at this time were talking to us, meaning you and Mae, or any words to that effect? A. No, sir.

Q. Did you say to the police that at that morning the persons outside of the door asked her, meaning Mae, if I was at home, or words to that effect? A. No, sir.

Mr. Drewen: The same objection as I have made to the previous question.

The Court: With the qualifications, I believe the question itself is not objectionable.

Mr. Drewen: Will your Honor make it clear to the jury now that anything appearing in this statement alleged to have been made by this witness cannot be considered as binding against the defendant, Mae Miller.

Mr. Vickers: I object to the interruption of this examination by asking the Court to instruct the jury with respect to these rulings of the Court at this time. The Jury has been cautioned with respect to this line of examination and at the proper time I assume your Honor will charge the jury as to the probative force of this evidence. I do not think the State ought to be interrupted in its cross examination.

The Court: It will be so understood during the continuance of the examination of this document regarding questions answered and answers made that anything affecting Mae Miller is not to be considered by the jury.

Q. And did you say to the police that "she, meaning Mae Miller, got dressed, I put on my pants," or words to that effect? A. No, sir.

Q. Did you say to the police, "I picked up gun from table in dining room," or words to that effect? A. No, sir.

Q. Did you say they, meaning the persons outside the door, opened up the door, then I started shooting, or words to that effect? A. No, sir.

Q. Did you ever say to the police that the persons outside of this door opened the door and forced their way in? A. No, sir.

Mr. Vickers? That is all.

(Witness Excused.)

MAE MILLER, sworn:

DIRECT EXAMINATION by Mr. Drewen:

Q. What is your correct name? A. Martha Meuer.

Q. And how old are you? A. 28.

The Court: You will have to arrange to talk louder.

Q. Are you married? A. Yes, sir.

Q. What is your husband's name? A. Robert Meuer.

Q. Have you any children? A. Yes.

Q. How many? A. One little girl.

Q. Any children that are dead? A. Yes.

Q. Where were you married to Robert Meuer? A. Newburgh, New York.

Q. When? A. It is 11 years ago, the 26th of July.

Q. So that you were married when you were about 17 years of age? A. 18.

Q. Where were you born? A. I am not sure, but I know it was up around Highlands, New York.

Q. How long did you live in Highlands after—how old were you when you left Highlands? A. I do not know, I was just a little girl. My mother moved to Poughkeepsie, New York.

Q. And you say you were married at Newburgh? A. Yes, sir.

Q. Where did you go to live with your husband after you were married? A. With my mother.

Q. With what? A. With my mother.

Q. You and your husband went to live with your mother? A. Yes, sir.

Q. At Newburgh? A. Newburgh, New York.

Q. And how long did you live with your mother? A. I think about three months.

Q. And then where did you go? A. We went

housekeeping in his mother's house.

Q. Where? A. Newburgh, New York.

Q. How long did you live at his mother's house? A. About a year.

Q. And how long altogether did you and your husband live at Newburgh, after you were married? A. Well, we were separated twice while we were in Newburgh.

Q. While you were in Newburgh? A. Yes, sir.

Q. Did you ever live anywhere with your husband outside of the city of Newburgh? A. Yes, Pinebush, New York.

Q. And when did you go to live with your husband at Pinebush? A. I should judge it was about a year before I left Pinebush, that is, about three years ago; I was in Pinebush about a year before I left there.

Q. Well, you are 28 years of age now, and how old were you when you went to live at Pinebush with your husband? A. Must have been going on 26.

Q. How long did you live in Pinebush with your husband? A. About a year.

Q. How old were you when you left Pinebush, can you tell us, in your best judgment? A. Going on 27.

Q. 27 years of age? A. I was 26, going on 27.

Q. And how long had you been living in Pinebush with your husband? A. About a year.

Q. So that you were married when you were 17? A. 18, I was married.

Q. And you left Pinebush when you were about 26, you say? A. Yes, sir.

Q. Now, where had you been living in the intervening time between your eighteenth year and your twenty-sixth year, those eight years? A. Well, I lived with mother I should judge about three

months after I was married, then we went housekeeping at his mother's house, we had an apartment there furnished by ourselves.

Q. Yes. A. We lived there I should judge about a year.

Q. Yes? A. Then after the first baby was born I went back to my mother's again alone.

Q. Yes? A. And I stayed there until my baby died.

Q. Your baby died at your mother's home at Newburgh? A. Yes.

Q. Now, when did you meet this defendant, Frank Sage? A. In November.

Q. In November of what year? A. 1922.

Q. 1922, and where were you living at the time you met Sage? A. With my mother in Hoboken.

Q. How long had you been living in Hoboken when you met him? A. I think about a year and a half.

Q. And during that year and a half had you been with your husband? A. No.

Q. Where did you and your husband separate? A. In Pinebush, New York.

Q. And you had separated from your husband about a year and a half before you met the other defendant in Jersey City, is that right? A. Yes, sir.

Q. At the time you separated from your husband you had one baby living? A. Yes, sir.

Q. Did you take the baby with you when you and your husband separated? A. Yes, sir.

Q. Where is the child now? A. With my mother and sister in Hoboken.

Q. How did you come to meet—I withdraw that. How did you come to be separated from your husband?

Mr. Vickers: Objected to as incompetent, irrelevant and immaterial.

A. He didn't treat me fair.

The Court: How is it material?

Mr. Drewen: I want to show what influence that would be, his treatment of her, what life they lived together.

The Court: How will it help?

Mr. Drewen: It will help to show the motive by which this woman had acted; does your honor rule it out?

The Court: Yes.

Q. How did you come to meet the defendant Frank Sage? A. I was a waitress in a restaurant.
Q. Where? A. Central Avenue.
Q. Jersey City? A. Jersey City.

The Court: Are you men on the jury hearing all that this witness is testifying to or do you find it difficult?

Juror No. 6: Kind of hard.

The Court: You must talk out louder, I find it a little difficult to hear you.

Q. You say you were working in a restaurant in Jersey City when you met the defendant, Sage? A. Yes, sir.
Q. As a waitress? A. Yes, sir.

Q. That restaurant was located where? A. Central Avenue, I think it was—

Q. And you met him in November, 1922? A. Yes, sir.

Q. What kind of work were you doing in this restaurant? A. Waitress.

Q. Did he come there for his meals? A. Yes, sir.

Q. You waited on him? A. I did.

Q. And how long—what part of the month of November was it that you became acquainted with him? A. I think it was the middle of November, I am not sure.

Q. And when did you go to live with this defendant? A. Sometime in December.

Q. Following? A. The following December.

Q. What part of December, can you tell? A. No, I don't remember what date it was.

Q. And how did you come to go to live with him? A. Because I liked him, because I loved him.

Q. Didn't you know he was a married man? A. No, at that time, no, sir.

Q. Didn't he tell you he had had a wife before? A. No, not at that time.

Q. And when did he tell you he had a wife before? A. I think about two weeks, probably a week or two weeks after I was with him he told me.

Q. Two weeks after you went to live with him? A. Yes.

Q. And what else did he tell you besides the fact that he had had a wife? A. That he was divorced.

Q. Now, did you tell this man that you had a husband living? A. I don't remember whether I told him that or not.

Q. Did you tell him at any time subsequent that you had a husband living? A. I don't remember whether I ever told him my husband was liv-

ing or dead, I don't remember that.

Q. Did you tell him you had been married? A. Yes, sir.

Q. He knew that? A. Yes.

Q. Where did you first go to live with him? A. On Webster avenue.

Q. Jersey City? A. Yes, sir.

Q. And that you say was sometime about the middle of December? A. Yes.

Q. How long did you live there with him? A. I cannot say for sure, I think it was three or four weeks.

Q. Then where did you go to live? A. To 572, I think, Hudson Avenue, West New York.

Q. And how long did you live there? A. I think it was around three months, I am not sure.

Q. Then where did you go to live? A. Then, the next place we lived is on Manhattan Avenue.

Q. 19 Manhattan Avenue? A. Yes, sir.

Q. At the time you went to live with this man, at any time before, did he tell you he had ever been in any kind of trouble with the law? A. No.

Q. Did he ever tell you he had been convicted of crime? A. No.

Q. Did you know at the time you went to live with him that he was a fugitive from justice? A. No.

Q. Did he ever tell you he was escaped from State's Prison. A. No.

Q. What did the defendant tell you he was working at when you firse became acquainted with him? A. I think he was working in a chicken coop, or something.

Q. A chicken yard? A. Something like that, yes, I am not sure.

Q. And when you went to live with him, what did he tell you his business was? A. I didn't ask

him what his business was when I went to live with him.

Q. When you first—did you know after you went to live with this man that he was engaged in bootlegging? A. After I was living with him I found it out, yes.

Q. How long had you been living with him, when you found it out? A. Probably two or three weeks.

Q. And how did you find it out? A. Why, fellows came to the house and talked with him, and I asked him and he told me.

Q. Asked what? A. If he was in the bootlegging business and he told me yes.

Q. And when he told you yes, what did you do about it? A. I asked him to give it up.

Q. And how many times did you ask him to give it up, how often? A. Why, I don't know, we planned almost from the start that he was going to give it up and we were going away.

Q. And after the time that you knew that he was in the bootlegging business, how often did you speak to him about it, asking him to give it up, as you say? A. We spoke of it real often, I do not know just how many times.

Q. Now, did you know at any time that you lived with this defendant, that the police were looking for him for any purpose? A. No, I had no idea the police were looking for him.

Q. Do you know whether or not he associated friendly with the policemen? A. I know that we were on the street very often, and very often policemen passed us, but I do not know any of them knew. We had been to theatres and policemen sat alongside of us in the theatre, and they have never let on in any way that they were after him.

Q. Do you remember the night or morning of

the 22nd of May, 1923? A. Yes.

Q. Do you remember the morning of May 22nd, the morning of the shooting? A. Yes, sir.

Q. Now, on the night before, at what time did you retire? A. Why, I think it was between nine and nine-thirty.

Q. You went to bed at that time. A. Yes, sir.

Q. And did you go to sleep right away? A. No, I was reading a book.

Q. And was the other defendant in the room at the time you went to bed? A. No, sir, he was downstairs on the porch.

Q. Do you know what he was doing down there?

Mr. Vickers: What has that to do with it?

Mr. Drewen: I withdraw it.

Q. How long after you went to bed did he come upstairs to retire? A. I don't know just how long it was, probably an hour or two hours.

Q. And what happened after he came upstairs? A. He came upstairs and I think he undressed himself and went to bed right away, I am not sure because I didn't stop reading until I saw that he was ready to get into bed.

Q. And when he was ready to get into bed, did he get into bed? A. Yes.

Q. And what did you do? A. He pulled the light out, then he got into bed, and I layed my book aside, turned around and went to sleep.

Q. Did you have any conversation with him at all before he retired? A. No, I did not.

Q. Did he say anything to you? A. No, he said nothing to me.

Q. Or did you say anything to him? A. No, sir.

Q. And what time were you awakened in the morning? A. I have no idea what time it was when I was awakened in the morning.

Q. Now, prior to the night of May 21st, when you say you read the book, as you have described, had you been speaking to him or were you then speaking to him? A. No.

Q. How long was it that you had not been on speaking terms with him? A. I do not know, I think it was about two o'clock in the afternoon we had a little argument.

Q. On the same day or the day before? A. On Monday, the 21st.

Q. Two o'clock of Monday? A. Yes, sir.

Q. What was the nature of this little argument? A. Over the book that I was reading.

Q. How did that come about? A. During the morning I asked him to take me to the store to buy these books and first he didn't want to take me, and then he decided he would take me.

Q. Yes? A. He was expecting to meet some one at the house, I don't know who it was.

Q. Yes? A. And he wanted his auto there to meet this party, that is why he didn't want to take me. We went there and he was in a hurry to get back, and I got angry because I thought he didn't give me enough time to pick out the book that I wanted, and coming out of the store, as I had the book coming out of the store, got into the car, he started away and looking over the books I found that they were books that were sequels to other books and I threw the two books out of the car, and he got a little angry at me for doing that. He said something about I should not have done it, or something like that, I do not know just what he said, and that is what the argument came over.

Q. And you did not speak to him after that? A. No, I did not talk to him because I was angry at him.

Q. What was the cost of these books that you

bought? A. I think 45 cents for the three books.

Q. And where was it you bought these books? A. I think it was up at the Summit Transfer Station or the Summit Tube or something like that, I know it is on Summit Avenue anyway.

Q. In what town? A. I think it is Jersey City, I am not sure.

Q. And what kind of a store was it? A. Why, they have candy, cigars and such stuff.

Q. Now, on the morning of the 22nd of May, you say you cannot tell what time it was you were awakened? A. No, sir.

Q. What awakened you? A. A knock at the door.

Q. And you heard the knock, then what did you say or do? A. When I heard the knock on the door I asked who was there.

Q. Yes? A. Some man's voice on the outside asked if Mr. Miller was in.

Q. Yes? A. I answered that we were sleeping.

Q. Yes? A. And then the voice answered back that it wanted to either see or talk to Mr. Miller and I told him to wait until I got some clothes on.

Q. Yes? A. And there was no more said after that until I got dressed.

Q. Well, after you told this party outside that he should wait until you got clothes on, what did you do? A. I got up, started to dress myself.

Q. Got out of bed? A. Got out of bed and dressed myself.

Q. Yes. A. And then I went to the door, pushed back the bolt from the door and turned the key. As I put my hand on the door, to open it, the door was pushed open quickly and a shot was fired immediately, which powder went into my eyes, across my eyes, and hurt my eyes. and I put my hand to my eyes and in the meantime there were

three more shots fired and then everything was quiet.

Q. Well, now, do you know where those shots came from that struck across your eyes? A. No, sir, I do not know where any of the shots came from, I only heard them, I didn't see them.

Q. What were you doing while the shots were sounding in the room? A. I was standing by the door, between the door and the wardrobe. After the first shot was fired I had my hands over my eyes until after, until the last of the shots were fired, and when I took my hands away I saw two men, one man was walking downstairs, the other man was backing downstairs.

Q. Yes? A. And after that I cannot remember anything.

Q. What did you next do? A. I do not remember anything after that until I remember going downstairs and I saw the men lying there on the floor, and I stepped inside the door.

Q. Go ahead? A. And as I was going in I saw a man standing in the dining room I could just see his head and shoulder and he told me—I don't know if I asked him could I please come in, I said something to him, but I just don't remember what it was, and then he told me I should get back upstairs, and I still asked him could I come in or something like that and he told me I should go back upstairs.

Q. Just a moment; you say you do not remember anything from the time you heard these shots ring out until you went downstairs in this position you have just described, is that right? A. Yes, sir, that is right.

Q. Now, was it in the entrance from the hall to the parlor downstairs that you found the man lying, the first man you saw lying there? A. I

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think he was lying just inside the parlor door.

Q. The parlor door, the entrance from the hall? A. Yes, sir.

Q. What did you say or do when you saw this body lying there. A. I don't know, I think I said, "Oh, my God," I am not sure.

Q. What did you do? A. I think I said, "Oh, my God," I am not sure what I said.

Q. And where is the dining room to which you have referred, that is in the rear of the parlor so-called, in which you saw the body of the first man lying? A. Yes, sir.

Q. And where was it in this dining room that you saw this man standing or saw him sitting whatever it was, who spoke to you about getting upstairs? A. Why, as you come down the stairs there is a hall leading into the dining room and you walk through this, there is the door; he was standing behind that door in the dining room.

Q. So that just as if I was entering from the hall into the parlor, so-called, the parlor door, the dining room door would be situated about here, this door? A. Yes.

Q. And you say you saw a man standing where with relation to that doorway? A. He was standing—there is two doors, there is a door leading from the dining room to the hallway, a door leading from the dining room into the parlor.

Q. And he was there? A. He was.

Q. At which doorway, the doorway leading from the dining room to the parlor—or— A. He was standing by the door of the hallway looking through the doorway into the parlor.

Q. What I want to get clear is, was he standing in the parlor or in the dining room? A. In the dining room.

Q. All this time he was standing in the dining

room doorway that leads from the parlor to the dining room? A. Yes, he was looking downwards, I could just see his head and shoulders.

Q. When you first saw this man did he have anything in his hands? A. I don't know, I didn't notice whether he had a gun or not.

Q. What did he say to you? A. The only thing I remember saying, of him saying, is that I should get back upstairs.

Q. And what did you say to him? A. I think I said please let me come in, I am not sure.

Q. What happened then after you said that? A. Well, then, I went back upstairs again.

Q. Well, did anything else happen; did you see a gun at any time? A. I didn't see a gun but I heard two shots.

Q. You heard two shots? A. Yes, sir.

Q. Where did those shots come from? A. From the dining room.

Q. From the doorway in which this man was standing? A. Yes, sir.

Q. And after the two shots were fired, what did you do? A. I went back upstairs.

Q. When you went upstairs what happened? A. when I got back upstairs on the top landing I heard someone coming upstairs and I turned around and there was three policemen coming upstairs with guns in their hands, and when they got to the first landing I believe they pointed—the guns were pointed at me and they said, "Where is he," and I said, "I no not know," and they said, "Tell us where he is or we will blow your head off," or something like that, and I said, "I do not know, maybe he is in the bathroom," then I asked them please not to shoot to let me go downstairs.

Q. What? A. Not to shoot me to let me go downstairs, and one of the officers said, "Yes, get

downstairs."

Q. Where did you go then? A. Then I went downstairs to the door and called for Mrs. Kaerth.

Q. To what door? A. To the parlor door.

Q. To the downstairs parlor door? A. Yes, sir.

Q. And you called for Mrs. Kaerth? A. Yes, sir.

Q. Did you get any aswer? A. I don't remember.

Q. Well, what did you do then? A. I asked—yes, I must have gotten an answer because I asked could I come in and some woman's voice answered yes, so it must have been her.

Q. Where did you go then? A. I went into the parlor and from the parlor into the dining room.

Q. Whom did you see in the dining room? A. I saw Mr. and Mrs. Kaerth in the dining room.

Q. And what were they doing? A. Mrs. Kaerth was crying.

Q. Yes? A. And Mr. Kaerth, I don't know, he was just standing there, I think trying to help Mrs. Kaerth.

Q. What did you say after you got into the dining room, if anything? A. Mrs. Kaerth said to me something about, "My God, I never thought anything like this would happen in my house," something like that.

Q. Yes? A. And I answered her — I don't know what I answered her.

Q. You do not know what you answered her? A. No.

Q. Well, how long were you with Mrs. Kaerth, if you can tell? A. Why, it was just a few seconds.

Q. Then where did you go? A. I walked back into the parlor then a man came up into the hall,

with another man, and told them to take me away.

Q. Where did they take you? A. They took me to the Central Avenue Police Station.

Q. Let me ask you again, did you have any conversation, did you say any words to Sage or Sage any words to you that morning in your apartment before you opened the door? A. No, there was no words spoken between us.

Q. Had you on any prior occasion opened in the morning for people who knocked? A. Yes, sir.

Q. People who asked for Miller? A. Yes, sir.

Q. Did you at any time that morning have a gun in your hand? A. No.

Q. Did you know that Sage, the other defendant, was going to shoot? A. No.

Q. Did you know that these men were police officers? A. No.

Q. Did you see a uniform on any of these men? A. No, not until the three men were coming upstairs and I asked them could I go down.

Q. Well, that was after the shooting, was it? A. Yes, sir, after the shooting.

Q. When you went downstairs the second time, went through into the dining room and saw Mrs. Kaerth there, did you see anybody in that room? A. Yes.

Q. The body of a policeman? A. Yes, sir.

Q. That policeman had a uniform, didn't he?

Mr. Vickers: Objected to.

The Witness: I am not sure.

Mr. Drewen: I withdraw it.

Q. How was that man dressed, or how was the

body attired that you saw lying in the dining room to the rear of the parlor?

Mr. Vickers: She has not said she saw a body lying in the dining room; she saw a man standing there — all right, go, ahead.

(Question repeated by the Stenographer.)

A. I didn't notice his clothes, all I noticed he was lying on his face in a pool of blood.

Q. I show you two guns in evidence, one referred to as the United States Army Colt, No. 208020, and the other referred to Webley gun and ask you if you ever saw those guns in your home?

A. In my home, I never saw those guns.

Q. When was the first time you saw those guns?

A. In the Central Avenue Police Station when the officers showed them to me.

Q. I hand you the gun testified to, the United States Army Colt 208020, a .38, and ask you to try to pull that trigger. Stand up please, and point the gun down.

The Court: What do you want to demonstrate by this?

Mr. Drewen: That she cannot pull the trigger.

Mr. Vickers: How is the jury going to tell?

The Court: Is this gun in the same condition it was on the 22nd of May?

Mr. Drewen: I do not know, I am doing the best I can with what is here available at the

time. There is no proof that the gun is not in the same condition.

Mr. Vickers: For the sake of the experiment the State will admit that it is.

(At this point witness stands holding gun in right hand, hammer down, attempting to squeeze trigger.)

The Witness: I cannot do it.

(Hands gun to Mr. Drewen, and Mr. Drewen demonstrates action of gun, pulling trigger several times.)

Mr. Vickers: For the purpose of the record, Mr. Drewen has illustrated the action of the gun, and he is not a Goliath.

Mr. Drewen: I ask that that comment be stricken from the record.

Mr. Vickers: What object have you in demonstrating it?

Mr. Drewen: For the jurors to see that it can be operated.

Mr. Vickers: That does not excuse counsel for making demonstration.

The Court: I do not know what is going on, gentlemen. (Addressing witness) Did you hurt your hand trying to pull that?

The Witness: My finger, that is all.

Mae Miller—Cross.

Mr. Drewen: Cross examine.

CROSS EXAMINATION by Mr. Vickers:

Q. Can you pull the trigger now (handing witness revolver with hammer cocked)? A. Yes. (Pulls trigger, hammer snaps down.)

Q. By the way, can you pull the hammer back as I have indicated to you? A. Yes (witness cocks hammer.)

Q. Now, can you pull the trigger? A. Yes. (Witness pulls trigger.)

Q. How many times were you in the dining room downstairs after the shots were fired and before you saw the three officers in uniform in the hallway going upstairs? A. I was not in the dining room at all before I saw the three officers going upstairs.

Q. You were not? A. No, sir.

Q. Sure of that? A. Positively sure.

Mr. Drewen: That is, in the dining room?

The Witness: The dining room.

Q. Do you recognize Lieutenant Otis, the man who testified here as the person you saw standing in the dining room at the time that you entered the parlor? A. No.

Q. You do not recognize him as the man? A. Not as the man I saw in the dining room because I didn't think about looking at him, I just seen a man's form there.

Q. Well, you said you saw a man standing there —I withdraw that.

Q. That man whose form you saw there, was he the only person you saw standing either in the par-

lor or in the dining room at the time you were downstairs? A. Yes.

Q. And did that man say anything to you? A He just told me to get upstairs.

Q. Didn't he say, if you did not get up he would blow your head off or words to that effect? A. Yes, I believe he did say something like that.

Q. Did he or did he not point a gun at you? A. I saw no gun.

Q. And you never said to him, "Please give me a chance," or words to that effect at a time when he was pointing a gun at you, did you? A. I saw no gun and I don't remember what I said to him when I went downstairs.

Q. You do not recall saying any such words as that, do you? A. I do not remember what I said, I said something.

Q. Do you recall saying any such words as that? A. No, I do not.

Q. All right, that is all. You have not told anybody, have you, that you did say such words to this man, who was downstairs standing up at the time you were down there, did you? A. No, I told no one anything I said.

Q. All right, that answers the question. When had you last seen Sage before going down into that parlor, when and where? A. When I opened the door that morning, I have a faint recollection of seeing him standing between the bed and the dresser with his bathrobe in his hand, but I cannot say for sure.

Q. With a bathrobe in his hand? A. Yes, with a bathrobe in his hand.

Q. That is the last recollection of Sage, is that right? A. Yes, that was before I opened the door.

Q. And you have said, and do you now say that you do not know by whom any shots were fired that

were fired upstairs that day? A. No, I don't know who fired the shots upstairs.

Q. And you do not know from what direction any of the shots were fired, do you? A. No.

Q. Was it light or dark in that hallway up at the top landing outside of your door? A. Well, I don't remember whether it was light or dark; it was light enough to see two men going downstairs.

Q. Well, when the door was opened, you say pushed open— A. Yes.

Q. Was there light enough in the room or on the landing for you to see that these were men? A. I didn't get time to see anything, it happened so quickly.

Q. Well, but did a man or men enter the room as that door was pushed open? A. When the door was pushed open the shot was fired so quickly that the powder or whatever it was went by my eyes and it blinded me for the minute, I put my hand up and I did not see anything else until I saw the two men going downstairs.

Q. Well, now, when you say the powder went by your eyes you mean from in front of you or from the side of you? A. I don't know.

Q. You do not know? A. I do not know.

Q. You do not know where it came from? A. I do not know.

Q. You cannot now tell the jury whether this flash of a gun was in front of you so close that the powder splashed in your eyes or whether that shot came from back of you, is that what you mean? A. I cannot say because I do not know.

Q. You saw no flash, did you? A. It seems to me I saw a flash but I—

Q. From where? A. From the front.

Q. From in front of you? A. Yes, but I cannot say.

Q. Then why did you say it? A. Well, I am just telling you it seems—you asked me if I saw a flash and I am telling you it seems as though I saw one, but I am not sure.

Q. Well, you have said you did not know where the shots came from and you did not see—you did not know whether the powder that went into your eyes came from the front or behind you; now do you say that it seems as though there was a flash from in front of you? A. I do not know, I am just telling you as I saw it. When the door was pushed open the shots came so quick that it blinded me and it seemed to me as though it came from in front, but I saw no guns .

Q. By the way, Mrs. Meuer, when you were arrested you made a statement to the police, did you not? A. Yes, I answered some questions.

Q. You, at the time of your arrest were not under the belief that you had committed any crime, were you? A. No.

Q. There was no reason, was there why you should not tell the police anything that happened on that morning, at 19 Manhattan Avenue, was there? A. Outside of the reason that I knew I was not living right; I had no other reason.

Q. Whatever you did say to the police, did you say it of your own free will? A. No, I did not say anything of my own free will in the police station.

Q. Why not? A. Because they didn't treat—they wouldn't let me say this right; they were knocking me around—not exactly knocking me, but coming so close to it that my heart was—well I don't know that I can explain it to you.

Q. Let's see: These police officers that had you under arrest and at the police station were knocking you—not knocking you but coming so near that your heart was all up-set, is that right? A. Yes.

Q. And that did not cause you to tell them anything which you now know to be untrue, did it? A. No.

Q. Whatever you did say at that time, did you tell the truth? A. Whatever I said at that time.

Q. Whatever you then said to the police, was that the truth. A. What I said to the police was the truth, yes.

Q. Were you aware of the fact that what you were saying to the police and what they were saying to you was apparently being taken down in writing? A. Yes.

Q. And were there certain things that you declined to answer, refused to answer? A. Yes.

Q. And after this paper was written, was it read over to you, did you sign it? A. I don't remember whether they read the paper over or not, but I signed papers.

Q. You signed some papers? A. Yes.

Q. And where you refused to answer certain questions do you know that the police put it down on the paper that you refused to answer them? A. I don't know.

Q. At that time, did you in answer to this question, 'What have you to say to the charge, that is to say, that you did assist your husband, meaning this defendant, in killing John Black, Detective Sergeant and Patrolman Clarence Weir, sometime between five and six this A. M., what have you to say to the charge, did you make this answer: "Some time this morning someone knocked at the door. I got up to open the door and I asked who was there? " A. No, I did not say I got up and opened the door, because I didn't.

Q. And didn't you, when you heard this knock, didn't you get up to open the door? A. No, I asked who was there; I was still in bed.

Q. Didn't you get up to open the door? A. After they told me they wanted to see me, yes.

Q. Then you say you did not answer as I have read to you? A. I was in bed when I answered.

Q. Then you say you did not answer as I have read to you? A. I told the police the same thing I am telling you now.

Q. Will you please answer the question: Did you answer to the police as I have just read, that which purports to be your answer; did you so answer? A. Well, read it again, please.

Q. "Some time this morning someone knocked at the door, I got up to open the door and I asked who was there? " A. No, I did not.

Q. Did you answer, "And they asked me was Mr. Miller home," did you so answer? A. I am not sure about that.

Q. What part of that answer is it which you are not sure of? A. I think I said someone from the outside answered and asked me was Mr. Miller in.

Q. You think instead of aswering, "And they asked me was Mr. Miller in," you think your answer was, "Someone from the outside asked me, was Mr. Miller in," is that right? A. Yes.

Q. What is there in that that caused you to remember the difference between— A. Because there was only one man that spoke.

Q. Only one man that spoke, is that right? A. Yes.

Q. And you had no information before this door was open, that there was more than one man there, is that what you say? A. No, I had no information.

Q. The reason you now say you did not say to the police, "They asked me was Mr. Miller home," is because you now say that no one outside of this door said, "These are police officers from Police

Headquarters," or words to that effect, is that right? A. There was no one said anything about police officers.

Q. Did you answer the police in your statement as follows: "I said, you will have to wait until I get dressed." Did you tell the police that? A. Yes.

Q. Is that the truth as to what happened? A. I answered that they would have to wait, I don't know if I said until I get dressed or until I get some clothes on.

Q. Is that the truth of what happened, that after this inquiry was made you said, "You will have to wait until I get dressed or wait until I get some clothes on," Is that the truth of what happened? A. Yes, sir.

Q. Did you say to the police, following what I have just read to you, I got dressed and I opened the door," did you say that? A. Yes, I told them that I opened the door.

Q. And did you then answer to the police, "Then the fireworks started? " A. No, I did not.

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

CROSS EXAMINATION (Resumed) by Mr. Vickers:

Q. On this morning after this knock came on the door, did you go into any other room in your apartment? A. No.

Q. You were not in the room called the kitchen or the dining room were you; you were not in the room called the bathroom? A. No, sir.

Q. And except this room which is called the bedroom, those were the only two rooms in your apart-

ment, is that right? A. Yes.

Q. There were three rooms, bedroom, kitchen or dining room and the bathroom? A. Yes.

Q. So that until after all these shots were fired excepting the two shots that were fired downstairs you were in that bedroom only? A. Yes.

Q. Did you see Miller fire a shot through the screen? A. No, I did not see him.

Q. Where were you, if you know, when that shot was fired? A. I do not know.

Q. But you did not go, you did not start downstairs until after all of the shots were fired upstairs, did you? A. I don't know; I went downstairs shortly after the two policemen were going downstairs.

Q. You did not pass Otis on your way going downstairs, did you? A. I passed no one going down.

Q. And when you got downstairs— I withdraw that. And leaving your bedroom you went directly downstairs and into the parlor, did you? A. Yes, sir.

Q. And entering the parlor door you saw this figure of a man standing up in the dining room downstairs, is that right? A. Yes.

Q. While you were downstairs did you hear any shot or shots other than the two shots which were fired by the man downstairs? A. No.

Q. I show you a .22 calibre revolver and ask you whether you had ever seen that before? A. Yes.

Q. Whose is it? A. Mine.

Q. Where did you keep it? A. I think it was kept in the top drawer of the dresser.

Q. Don't you know where it was kept? A. It was where it was when I saw it last, the top drawer of the dresser.

Q. How long before the 22nd day of May did you see it last? A. I don't know how long it was.

Q. I show you a .32 calibre revolver and ask you whether you had ever seen that before? A. Yes.

Q. Whose was it? A. Why, I don't know whose it was.

Q. Where did you see it before? A. In the dresser.

Q. Seeing it there did you make any inquiry as to whose it was? A. No.

Q. In what condition did you see it in the dresser, wrapped up or ohterwise? A. I don't remember how it was there. All I know it was there.

Q. But you recognize it now as having seen it? A. Yes. Did you have any ammunition of your own? A. No.

Q. Did you know of any ammunition of Sage's around that apartment? A. No, I did not.

Q. On this 22nd day of May, did you know whether any ammunition was stored, concealed or kept in any of your belongings? A. No, I never saw any in the house outside of those two—or I never saw Frank with any.

Q. I show you a powder box and ask you if that is yours? A. That was on the dresser, but it is not mine.

Q. Is it yours? A. No, sir.

Q. Whose is it? A. It belongs to the apartment.

Q. It belongs to the apartment? A. Yes, sir.

Q. You recognize it, do you? A. Well, I do not know if it is the same one or not, but there was one similar to that on the dresser.

Q. Do you know what it was used there for? A. It was not used for anything that I know of.

Q. Do you know whether or not on the 22nd day of May, of this year it was filled with these

cartridges with which you now see it filled? A. No, I do not know, I never saw them before.

Q. Never have seen them before? A. No.

Q. Know nothing about there being there on that dresser, or any place in that apartment in this powder box if that is what it is? A. No, I never saw them before.

Q. When you left this house on the morning of the 22nd, did you have in your possession any cartridges? A. No, I did not.

Q. Did you have in your possession when you got by or near a fence on your way passing the house, any cartridges? A. No, I did not.

Q. In whose custody were you when you passed out of the house? A. I do not know.

Q. Is this the officer that had you in charge? A. I do not know.

Q. Which way did you pass along out of the house with the officer, whoever it was, that had you in charge? A. Why, I think we went up Manhattan Avenue to Central Avenue, up straight to Central.

Q Up Manhattan to Central? A. Yes.

Q. Went on foot, did you? A. Yes.

Q. Did you have any altercation or conversation with this officer, whoever he was, who was conducting you away from the house? A. I don't remember.

Q. Wait a minute, please, regarding a desire on your part to go back to the house and put on some more clothing, or something, is that so? A. It seems to me I asked him would he please get me a wrap of some kind, but I made no request to go back upstairs.

Q. What is that? A. I asked him—it seems I asked him to get me a wrap of some kind, but I didn't make no request to go back upstairs.

Q. Well, where were you when you asked that? A. In the hallway of 19 Manhattan Avenue.

Q. Well, after you left the house and were out on the street, didn't you take hold of a fence and ask the officer to take you back or let you go back and get some more clothing? A. No, I did not.

Q. Under the pretext of such a conversation at that place, didn't you drop some shells? A. No, I did not.

Q. Sure of that? A. Positively, sure.

Q. Do you remember the officer who was then conducting you under arrest take hold of your hand and calling attention to some marks that were on your fingers? A. Yes, I remember them calling my attention to the marks on my fingers.

Q. You say at the time was there more than one? A. Oh, yes, more than one man, you mean?

Q. Yes? A. Yes, there were a few of them there.

Q. Do you remember what man it was that called your attention to these marks? A. No, I do not.

Q. What was done at that time with regard to that subject matter? A. I do not understand your question.

Q. I withdraw it. At that time did the officer pick up your hand, take hold of your hand and inspect these marks on your hand, and did he then smell of them and make a remark or say that these were powder marks or words to that effect? A. Why, he took my hand and looked at it and said something to that effect, but I do not remember just what it was.

Q. You mean to say that you do not remember whether the police officer who had you in charge after the shooting remarked, anything about powder marks or that these marks smelled like pow-

der; you say you do not remember that? A. They said something to that effect, but I do not remember just what they said.

Q. And where on your hand were these marks to which the officer directed your attention? A. on the left hand between the two middle fingers.

Q. And at that time did you say anything to this police officer or any of these police officers that you had been burned, or that there was powder flash or something like that that came from behind you and flashed in your eye or burned your eye? A. No, I did not say a shot came from behind me that burned my eye; I didn't say where it came from.

Q. But you did at that time when the police officer was examining these fingers and talking about the marks on the fingers, you did say something about a powder flash on your eye or face, is that right? A. Yes, I told them that the powder flash went in my eyes, yes.

Q. At that time that you made your statement after your arrest at Police Headquarters or at the police station, were you asked this question: "Q. When you opened the door, who did you see in the hallway?" A. I don't remember.

Q. You mean you do not remember if you were asked that question, you do not remember? A. I do not remember.

Q. Did you answer, "I saw two policemen?" A. No, I did not answer.

Q. You remember that talk? A. I remember that I did not answer anything about policemen because I knew nothing about policemen until I saw the three policemen coming upstairs and I went down.

Q. Were you asked any question about your knowledge of any policemen being there? A. I cannot remember.

Q. You cannot remember that? A. No.

Q. Were you asked this question: "Q. How did you know they were policemen?" and did you answer, "because they had uniforms on? A. No, I did not answer that question.

Q. You say you cannot remember you were asked the question, but you say you did not give that answer, is that what you say? A. I made no answer to those questions.

Q. Made no answer? A. No.

Q. When you say you made no answer to those questions, do you mean that the questions were not asked you or that you do not remember they were asked you? A. I mean I do not remember that they were asked me.

Q. Were you asked this question: "What occurred then," and did you answer, "Then the shooting started?" A. I think I answered something similar to that, I do not know if that is just what I said or not.

Q. Do you remember being asked this question? A. Which?

Q. Do you remember being asked that question? A. Yes.

Q. And do you remember being asked this question, "Who did the shooting," and did you give this answer, "I don't know?" A. Yes.

Q. You remember both the questions and the answers, do you? A. Yes.

Q. Do you remember this question being asked, "Where were you standing when the shooting took place," and did you answer, "I was standing at the door?" A. I don't know.

Q. Is it the truth you were standing at the door or is it not? A. I was standing by the door all the time until I went downstairs.

Q. By the door, were you? A. Yes, between

the door and the wardrobe after the door was open.

Q. Were you asked this question: "When you opened the door, did you see any revolver in the policeman's hands" and did you say, "No, I did not?" A. They asked me the question—

Q. What was your answer? A. The answer was that I saw no revolver at all. I heard the shooting but I saw no guns.

Q. Did you say that you had never seen these two revolvers, the large revolvers which had been shown you? A. I never saw those revolvers until I saw them up at the police station.

Q. Do you remember at the police station being asked with regard to the revolver being in the house? A. Yes, I remember them bringing them to me and showing them to me and asking me if I recognized them.

Q. Do you remember being asked this question: "Have you ever seen your husband with a revolver in the house," and did you give this answer, "I do not want to answer that question?" A. No, I did not say that.

Q. You did not say that? A. No.

Q. Do you remember being asked the question? A. Yes, I remember.

Q. What was your answer? A. That I had never saw him at any time in the house or out of the house with any revolver.

Q You remember that distinctly as being your answer, is that right? A. Something to that effect, yes.

Q. But you do say distinctly that you did not answer in response to that question, "I don't want to answer that question?" A. No, I did not say that.

Q. Do you remember being asked this question: "How long have you lived with Frank Miller as his

wife?" A. I am not sure if they asked me that question or not.

Q. Do you remember answering that question, "I am not going to answer that question? " A. Yes, I think I did say that.

Q. Having heard your supposed answer you now remember that you said that in response to the question, don't you? A. Yes, I think I did.

Q. Were you asked this question: "When you opened the door and you saw the policemen, was there any shots fired before then," and did you say No? A. I just don't understand that last question.

Q. (Question repeated by the Stenographer)? A. Before the door was open, there was no shots fired.

Q. But when the door was opened and you saw the policemen, the question is , whether or not there was any shots fired before then, and to that did you say no? A. I cannot remember that question or that answer.

Q. Do you remember being asked such a question? A. I am not sure.

Q. Do you remember being asked this question, "How long was it after you opened that the shots were fired," and did you answer, "Right away?" A. Yes, I think I did answer that question.

Q. Were you asked this question: "Where was your husband Frank Miller standing when the shots were fired," and did you say, "I don't know?" A. Yes, I think I answered that question, too.

Q. Did you say that when you came downstairs into the dining room that you saw this man lying face down on the floor? A. When I came downstairs? When I came into the parlor I saw a man lying face down on the floor, yes.

Q. And do you say you do not know whether

that was a policeman or not? A. I do not know if that is a policeman or what, I did not see his clothes, all I saw was his face and the blood.

Q. His face? A. The side of his face, yes.

Q. The side of his face? A. Yes.

Q. And could you tell whether he wore a policeman's uniform of not? A. No, I did not look.

Q. Didn't look? A. To see what clothes he had on.

Q. Didn't look to see what clothes he had on? A. No.

Q. You are not now referring to the man that was in the parlor, are you, are you referring to the man in the dining room? A. The parlor I am talking about.

Q. All right, was the man in the parlor lying face down? A. I am not sure in the parlor he was —in the dining room I am not sure.

Q. Haven't you already testified that the man in the dining room was lying face down? A. In the parlor I testified that the man was lying face down.

Q. And when you went into the dining room—get this straight—how was the man lying that you saw then? A. I don't know.

Q. Did you notice whether that man in the dining room had on a policeman's uniform or not? A. I know the only thing I saw was the blood in both places.

Q. A great pool of blood was running out down the room, is that right? A. Yes.

Q. Had you any idea where Frank Miller was at the time you were downstairs? A. No, I had no idea where he was.

Q. At any time did you see a man standing in the doorjamb to the right of the door knob in the hallway? A. I do not understand just what you mean.

The Court: Are you referring to upstairs?

Q. Upstairs, I had better withdraw the question.

Q. At any time when the door was open upstairs in your room, did you see a man standing in the hall near the doorknob and at or near this jamb in the hall, which is back against the wall in the hall? A. No, when I saw anybody, there were two men going downstairs; when the door was pushed open, and the shot was fired, I saw nothing.

Q. Did not see these forms, did you? A. I saw nothing.

Q. No forms when the door was pushed open? A. No, I saw nothing.

Q. And you were at the door, is that right? A. The door was pushed open.

Q. Pushed against you? A. Yes.

Q. Were you knocked against the dresser? A. The dresser, no; the wardrobe, yes.

Q. Well, what else is there in that room outside of the wardrobe and the bed? A. There is a dresser and a chair and another stand at the foot of the bed.

Q. Was it light in the room? A. I don't remember.

Q. You don't remember whether it was daylight or not, do you? A. I do not.

Q. There is a window in that room near the place toward which you say you were pushed, is that right? A. No, the window—I was pushed back, the window is facing the door.

Q. Facing the door? A. Yes.

Q. And in the light from that window did you, when the door was opened and before any shots were fired, see any forms? A. I saw nothing only heard the shot when the door was pushed open.

Q. Before the shot was fired did you— A I had time to see nothing because it was fired instantly.

Q. As quick as the door was opened the first shot was fired, is that right? A. Yes.

Q. Now, then, when you went downstairs after this shooting why didn't you go out the front door when you saw this man lying in the door of the parlor? A. I don't know.

Q. You don't know. At any time after this shooting while you were still in that house, did Sage speak to you? A. No.

Q. Had you any reason for saying to the policemen who were coming upstairs that maybe Sage was in the bathroom? A. No, it was the first thing I thought of and it is the first thing I said.

Q. Had no other reason for it whatever? A. I had no reason to think he was any place because I didn't know.

Q. You did not know, did you, that Sage had gone through the scuttle? A. No, I did not.

Q. You did not know that if these men passed upstairs that Sage was in a position where he might take a shot at them, did you? A. No, I did not.

Q. Did you at any time say to Sage, "There is another one outside, get him," or words to that effect? A. No, I did not.

Q. Did you at any time see Sage leaning out or partially leaning out of this door to your bedroom and shooting in the direction down the stairs? A. no.

Q. Did you at any time lean out or partially lean out of that door? A. No.

Q. Do you recall in your cross-examination at any time saying that you did not know whether you said to them, "Wait until I get dressed, or wait until I get some clothes on?" A. I think I said,

"Wait until I get some clothes on," but I am not sure.

Q. I want you to get my whole question: Do you recall saying "I do not recall whether I said to *them.* that is the emphasis, to *them* wait until I get dressed, or wait until I get some clothes on," do you remember so testifying here on your cross-examination today? A. I think you read that out of the statement, didn't you?

Q. No, without it being read out of the statement or anything else, do you remember so testifying? A. No, I don't remember.

Mr. Vickers: I will ask the Court's permission to have the Stenographer turn back to the answer of the witness.

(Stenographer reading Page 338 as follows) "A. I answered that they would have to wait, I don't know if I said until I get dressed or until I get some clothes on."

Q. Do you remember testifying as the Stenographer has read to you? A. Yes.

Q. Was that a slip of the tongue when you said they instead of him? A. No, it was no slip of the tongue.

The Court: She has answered no, it was not a slip of the tongue.

Q. You mean you intended to say they would have to wait, is that right? A. I didn't realize I was saying that.

Q. Didn't realize you were saying that, then you do realize it was a slip of the tongue, is that what you mean, Mrs. Meuer? A. I don't know, I do not understand what you mean.

The Court: You are getting an opportunity now to correct something that you yourself said when you characterized the people standing outside as "they" instead of one individual. You used the word, "they," which conveys that there were two or more.

Mr. Vickers: That you knew about.

A. No, I only heard one man talk in the hall.

Q. But didn't that man in the hall say to you, "We are police officers from Headquarters," there was nothing said of that kind, there was no one said anything about police officers.

Q. Do you want to correct your testimony which has just been read to you now to read, "He must wait until I get dressed or get some clothes on," do you want to change it, is that what you meant to say or should have said? A. I should have said someone from the outside answered me.

Q. That is not the question. The question is your answer to somebody outside; what do you now want to say was your answer to the person or persons outside?

The Court: I don't think it makes any difference as to how she will characterize that situation.

Mr. Vickers: Excepting as to her bona fides.

The Court: She has already told whatever there is to be told on that point of it. She heard one voice but she characterized it as they. That will be argumentative later on I assume by you, but as to whether she wants to change

that or not—

Mr. Vickers: Your Honor, I know that it will be argumentative but I want to give this witness an opportunity to explain if she can, because it is important in the case. But if your Honor says no, I will be satisfied.

The Court: You have given her an opportunity, she does not evidently care to explain it. Let it stand as it is.

Mr. Vickers: That is all.

Mr. Drewen: That is all.

(At this time the Court declared a recess until ten o'clock, June 13th, repeating to the jury the admonition not to talk about the case.)

June 13th, 10:00 A. M.

Mr. Drewen: The Defense rests.

STATE'S REBUTTAL.

JAMES WALTON, recalled:

DIRECT EXAMINATION by Mr. Vickers:

Q. On this 22nd day of May, when you were in the rear yard as described by you, did you have on the overcoat which I produce and show to you?
A. Yes, sir.
Q. Is this the cap that you wore at the time?
A. Yes.

James Walton, Recalled—Direct.

Q. At that time or any time while you were in the vicinity or at that house, 19 Manhattan Avenue or in the back yard, did you wear that overcoat with the collar turned up? A. No, sir.

Q. I call your attention to certain markings or stains on the coat and near the collar and ask you what those markings are? A. That is the blood.

Q. I call your attention to the cap and to the two perforations in this cap and ask you whether those perforations were there before this shot was fired by this defendant? A. No, sir.

Q. I call your attention to the inside of this cap and to the stains and markings in that and ask you what those stains are? A. That is the blood.

Q. So that after you were shot this cap remained on your head, did it? A. Yes, sir.

Q. And the blood, do you know that the blood trickled from your wound down onto your coat? A. It was all over the coat.

Q. But at that point particularly where I have described it? A. Yes.

Mr. Vickers: The State offers in evidence this coat and cap and desires the jury to inspect it with a view to determining whether or not at the time of this incident this coat was worn with the collar turned down or the collar turned up?

Mr. McCarthy: No objection.

(Marked Exhibit S-29.)

The Court: You may do that later, gentlemen of the jury, when it is in the jury room.

James Walton, Recalled—Direct.

Q. Walton, when you left the rear of this house or the house next door, wherever the position was at which you were shot and came forward on to Manhattan Avenue, did you there find any police officer or police officers on duty? A. Detective Connallon.

Q. And did you at that time also see this Detective? A. Patrolman Dundon.

Q. Both there at that time? A. Yes.

Q. And where were they with respect to No. 19, how close to No. 19; were they directly in front of No. 19? A. Dundon was running up the street blowing his whistle.

Q. Blowing his whistle, is that right? A. Yes.

Q. And where was Connallon? A. Connallon was helping me into a car when he said, "There he goes."

Q. As you were coming out and before this Officer Connallon got in company with you where did you see him first with respect to the front of No. 19 Manhattan Avenue? A. In front of No. 17.

Q. I show you Exhibit S-1 ,and ask you whether you recognize the house that you describe as No. 17 on that picture? A. This one here.

Q. Being the house, for the purpose of the record, in front of which is the large tree and the police officer standing at the house? A. Yes.

Q. And can you point out on this picture where it was that you came out onto Manhattan Avenue after being shot? A. Between those buildings in here.

Q. Just to the left of this police officer that stands on that picture? A. There is a sidewalk runs into 15.

Q. There is a sidewalk runs into 15? A. Yes, sir.

Mr. Vickers: Cross examine.

Mr. Drewen: No questions.

Mr. Vickers: We offer the map in evidence.

Mr. Drewen: I think it is in, we have no objection.

(Marked in evidence.)

WILLIAM HOGUE, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. Captain Hogue, when this prisoner was at the police station, this defendant Sage, did you have any conversation with him regarding his marksmanship? A. Yes, sir.

Q. What if anything did he say to you regarding his ability to hit a silver dollar? A. He told me he was an expert shot, that if a half dollar was thrown in the air he could hit it twice before it hit the ground.

Q. And with regard to his expertness at any period of his services, either in the Army or in the Navy, did he say anything to you regarding that? A. He said among 1900 men at the border he received first prize for marksmanship, he was the best marksman among them.

Mr. Vickers: Cross examine.

Mr. McCarthy: No cross examination.

WALTER P. CIECIUCH, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. You are a member of the Police Department of Jersey City? A. Yes, sir.

Q. On this 22nd day of May of this year were you at the premises 19 Manhattan Avenue? A. Yes, sir.

Q. On that day and on these premises did you find and take into your possession this celluloid powder box, or whatever it is? A. That was found in my presence by Sergeant Davis.

Q. On the dresser in the room on the second floor, to the left of the stairs? A. Yes.

Q. The room that has here been designated as the bedroom occupied by these defendants? A. Yes, sir.

Q. And at that time— I withdraw that.

Q. By the way did you mark it and does it now bear the markings you made at the time? A. Yes, sir.

Q. At the time it was found and taken into possession by Davis and you, did it have in it these cartridges that now appear in it? A. Yes, sir 26 of them.

Q. 26 of them? A. Yes.

Q. Have you, as a police officer, any knowledge of the character and calibre of cartridges? A. Yes, sir.

Q. Do you know what those are? A. .38 calibre.

Q. Shots? A. Leaden bullets.

Q. Capable of being fired in a Colt automatic .38? A. They are.

Q. Colt Army Service, as well? A. Yes, sir.

Q. At this same time what else was— I withdraw that. I show you an envelope containing three loaded .38 calibre and two empties, and for

the purpose of the record the envelope has at this time been unsealed by me, it having been fastened with cord and sealing wax, — can you tell whether or not at this time you and Sergeant Davis, or either of you found these articles, and if so where? A. The two exploded shells were found in the bedroom, between the dresser and the bed, on the floor.

Q. And is that the same bedroom you are talking about, where this powder box with shells was found? A. Yes, sir; the bullets were found in the front of 21 Manhattan Avenue in the gutter, right in front—

Q. And is 21 Manhattan Avenue represented on this picture, Exhibit S-1? A. Yes, sir, the center house here.

Q. From No. 19 where this shooting took place is No. 21 and the place where these shells were found in the direction on Manhattan Avenue towards Central? A. Yes, sir.

Mr. Drewen: Might I have the benefit of an objection to that question?

The Court: What is your objection?

Mr. Drewen: The objection is, if your Honor please, proof of the finding of the cartridges in the gutter outside of the house No. 21 is incompetent, irrelevant and immaterial, it is not binding on either of these defendants, especially not binding on the defendant Mae Miller.

The Court: I do not know the significance of it at this time, I will allow it, however.

Mr. Drewen: Exception to your Honor's ruling.

Hyman Lazarus, J. (L.S.)

Q. What time of day on the 22nd was it, that you and Davis made the search of the premises you have described and found these things both on the premises and the cartridges as you have described in front of No. 21? A. About 7.30 A. M.

Q. And when you refer to the 22nd day of May, do you refer as a matter of fact and knowledge to the day on which the shooting occurred? A. Yes, sir.

Mr. Vickers: Cross examine.

Mr. Drewen: I move now, if you Honor please, to strike out the testimony of this witness as to the finding of the cartridges in the gutter on the ground it is incompetent, irrelevant and immaterial, not binding upon either of these defendants and has no bearing on the issue being tried under this indictment. Your Honor indicated a moment ago it did not appear what the significance was; we respectfully contend there is no significance to the finding of these objects and therefore we ask that the testimony of the witness be stricken out.

The Court: Without discussing the evidence heretofore produced by the State as to where this woman stood when she talked about wanting to go back for her clothes, I do not know whether that is the same spot or not; if that is so it is significant.

Mr. Vickers: I will say that is the purpose of offering the evidence, if your Honor please; they do not grow in the gutter, these cartridges.

Mr. Drewen: Of course, they do not.

The Court: I think I will allow it.

Mr. Drewen: Exception to your Honor's ruling.

Hyman Lazarus, J. (L.S.)

(Witness excused.)

EDWARD F. DAVIS, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. Are you a member of the Jersey City Police Department? A. Yes, sir.

Q. And you are the Sergeant Davis that has been referred to in the previous witness's testimony regarding the finding of this celluloid powder box or whatever it is in the room at 19 Manhattan Avenue? A. Yes.

Q. Was this box found by you? A. Yes, sir.

Q. Did you mark it at the time and does it now bear the markings made by you then? A. Yes, my initials are on it.

Q. At the time you found it what were its contents? A. 26 bullets.

Q. And when you say you found it, will you tell on what portion of the premises it was found, if you can describe it? A. On the second floor of 19 Manhattan Avenue in a room occupied as a bedroom on a dresser to the left of the stairway.

Q. In that room on the left of the stairway and entering it, what was immediately on the right hand side as you enter the room? A. The bed.

Q. And where with respect to that bed as you

enter the room in that manner was the dresser on which this box of cartridges was found? A. On the opposite side of the room.

Q. On the opposite side of the room? A. Right near the window.

Q. Suppose you come down to the map a minute officer. In order to locate this piece of furniture I call your attention to this plan and ask you if this is the bedroom to which you refer? A. Yes, sir.

Q. And now with regard to the other articles marked on that plan in that room, where is the dresser that you refer to? A. Right there.

Q. Being the object marked "dresser" on this plan? A. Yes, sir.

(Witness returns to witness stand.)

Q. So that there was not an article of furniture marked "wardrobe" here but the article marked "dresser?" A. The dresser at the window.

Q. Now, then were you present at the time of the finding of these two empties in that room as testified to by Cieciuch? A. Yes, sir.

Q. And what if anything do you know with respect to the finding of any cartridges outside of the house on this day in question, at the time of your search and examination? A. Those were found in front of 21 Manhattan Avenue, in the gutter.

Q. Were you present with Cieciuch at the time they were found? A. Yes, he and I were together.

Mr. Vickers: I offer in evidence these two empty cartridges and also the three loaded ones.

Mr. Drewen: With respect to the offer of

the three loaded cartridges, the defense objects to the offer on the ground it is incompetent, irrelevant and immaterial, not binding on either of the defendants, having no bearing on the issue being tried and highly prejudicial to both defendants.

The Court: They may be admitted.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

Mr. Vickers: The State offers in evidence the celluloid powder box or whatever the article is, together with the 26, if that is the correct number of loaded .38 cartridges therein.

The Court: They may be admitted in evidence.

(Marked Exhibit S-30 in evidence.)

(Witness excused.

ADAM KAERTH, recalled:

DIRECT EXAMINATION by Mr. Vickers.

Mr. Vickers: I am calling this witness with reference to this matter I am uncertain about; bear with me—as to whether he has testified or not on the subject.

Q. Mr. Kaerth, after the shooting and before you saw this defendant, had you closed or locked the door of your room? A. I locked it before there

was any shooting.

Q. Before there was any shooting? A. Yes, sir.

Q. After the police officers came? A. Yes, sir. I passed them on the stairs.

Q. Did that remain locked until this defendant Sage was admitted into the room? A. He only—

Q. Did you get my question: Did that remain locked until this defendant Sage was admitted into the room? A. He didn't come into the room, he only looked in.

Q. He only looked in, all right. Between the time you locked it as you have described that you locked it until this man looked in, did that door remain locked until you unlocked it then? A. Yes, sir.

Mr. Vickers: Cross examine.

Mr. Drewen: No cross examination.

ABRAHAM SCHULMAN, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. You are a member of the staff of the office of the Prosecutor of the Pleas? A. Yes, sir.

Q. On or since the 22nd day of May of this year, have you had a conversation with this defendant Sage? A. On the 22nd of May.

Q. And at the time of the conversation to which you are referring and before you said anything to him or he said anything to you, did you make known to him or anyone make known to him your office? A. Yes, sir.

Q. With respect to gun or guns had or used by him during this shooting, did he say anything to

you at the time that you now refer to? A. He did.

Q. What did he say? He said he done the shooting with one gun, a .38. I asked him how many loaded shells was in that gun. He said, he knows—

Mr. Drewen: Just a moment, please, I assume this witness is called to contradict a definite statement of the defendant Sage on the stand.

Mr. Vickers: I will consent that the testimony be discontinued at this time.

Q. Did this defendant then say to you that he had re-loaded this gun? A. Yes, sir.

Mr. Vickers: Cross examine.

Mr. Drewen: No cross examination.
(Witness excused.)

EDWARD MURPHY, recalled:

DIRECT EXAMINATION by Mr. Vickers.

Q. On the 22nd of May, at 19 Manhattan Avenue, were you and this defendant Sage together coming down the stairs from the second floor of that building? A. I was a little ahead of him, sir, having him by—

Q. On the stairs at the same time? A. Yes, sir.

Q. I do not mean in the same spot? A. Yes.

Q. And at that time did he say to you he did not know it was Black, "I thought it was Barney McFeeley?" A. Yes, sir.

Q. Where was Black at the time that he said this to you? A. He was in the front room on the bottom floor, lying face downward with his feet—

Q. Dead? A. Appeared to be dead.

Mr. Vickers: Cross examine.

Mr. Drewen: No cross examination.

(Witness excused.)

Mr. Vickers: I do not know whether the contents of the envelope which has been testified to and referred to as having been taken from the person of the defendant at the time of his arrest and search has been offered in evidence.

Mr. Drewen: It is in.

JOHN CONNALLON, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. You are a member of the Jersey City Police Department? A. Yes, sir.

Q. And have been for how long? A. Going on seven years.

Q. On the 22nd day of May of this year, were you among the arresting officers at 19 Manhattan Avenue? A. Yes.

Q. And at that time there did you have in your custody this defendant Mae? A. Yes, sir.

Q. Leaving the house 19, in which direction did you proceed with her? A. West on Manhattan Avenue.

Q. Would that be in the direction of Central

Avenue? A. Yes, sir.

Q. And did you proceed on the same side and street on which No. 19 is located or on the other side of the street? A. On the south side of the street, yes, sir.

Q. The same side? A. Yes, sir.

Q. And what if anything happened regarding this woman defendant after she in your company left No. 19? A. Well, when we got outside she said, "I want to go in and put more clothes on." I said, "If you go in there again it will be over my dead body." She went to get hold of a fence and as she did I jerked her toward the gutter about three or four feet from the gutter, then she tried to get me across the street; I pulled her back. I said, "I am running this situation, you are going the way I want you to go."

Q. I show you a picture Exhibit S-1, and ask you if you can indicate on that picture the place and the fence where this occurred? A. Well, to the best of my knowledge where she went to get hold of the fence, you mean?

Q. Yes? A. Right about here, sir.

Q. Is that on the picture just beyond the end of the house No. 19 is that right? A. Right in the center here; I swung her this way.

Q. Swung her this way, indicating on the picture toward the extreme right and toward the gutter is that right? A. Yes, sir.

Q. This, so far as it is shown on this picture is the house next the one which you have indicated, No. 21, that has been referred to on the right, the high gabled peak house to the right of No. 19? A. Yes, sir.

Q. And did this take place so far as you know while the man defendant was still in the house? A. Yes, sir.

Q. He was still in the house? A. Yes, sir.
Q. Up in the attic? A. Yes, sir.

Mr. Vickers: Cross examine.

CROSS EXAMINATION by Mr. Drewen:

Q. She asked you if she could go upstairs to get a wrap, didn't she? A. Yes, sir.

Mr. Drewen: That is all.

(Witness excused.)

JOHN A. MURPHY, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. You are a member of the Jersey City Police Department? A. Yes, sir.
Q. On the 22nd day of May of this year or since then, if that is not the correct date, were you present at Police Headquarters during the taking of a statement of and by this defendant Miller? A. Yes, sir.
Q. And was that statement taken down in writing? A. Yes, sir.
Q. Written by whom? A. Written by me.

Mr. Drewen: The defendant Mae Miller.

Mr. Vickers: Sage.

Q. Before taking it down in writing and before directing to him any question, what if anything was done by you or anybody in your presence and his presence respecting a warning or caution to him or

informing him of any right in the premises that he had? A. Well, I announced myself and told him —I gave him my name—

Q. Supposing you just say, just tell us what you said? A. I said, "I am John A. Murphy, I am a member of the Jersey City Police Department. You Frank Miller, have been accused of committing a crime; you are about to be questioned concerning this crime but you may answer the question if you will, or you may not answer them if you choose, but anything you say must be said voluntarily" and thereafter Chief Wolfe started to question him.

Q. In your presence? A. Yes, sir.

Q. And you did the writing, did you? A. I did the writing and as soon as I would write out a question and finished it I would read it off to the defendant.

Q. The question and answer is that right? A. Questions and answers.

Q. As soon as you finished writing the question and answer you say you read it over to him? A. Over to the defendant, yes, sir.

The Court: He does not say that as soon as he finished writing a question he read the question to the defendant, is that right?

The Witness: Yes, sir.

The Court: Then what happened?

The Witness: Then I would take his answer down in writing, and when I completed his answer Iwould read the answer over to him.

Q. And does that apply, this method of taking down by you writing and reading to the defendant apply to every question and every answer that was recorded by you on these papers? A. Yes.

Q. Which are before you? A. Yes, sir.

Q. These papers appear to bear, and the defendant has said that they do bear his signature.

Can you tell the Court and jury when these signatures were appended to each sheet respectively? A. After I completed, after I had read the questions and answers over to the defendant. I passed it to him and asked him to read them. He read it over and after he finished them, he signed them.

Q. So that what you then wrote and what now appears on these sheets of paper correctly record in the identical language the questions directed to this witness and the responses to such questions made by him? A. Yes, sir.

Mr. Vickers: The State offers in evidence the paper.

Mr. Drewen: May I cross examine?

Mr. Vickers: Yes.

CROSS EXAMINATION by Mr. Drewen:

Q. What time in the morning was this statement which you say taken from the defendant Sage? A. Oh, I judge about 20 minutes past six or half past six.

Q. And where do you say it was taken? A. In the station house, Central Avenue.

Q. Who was present besides you and Deputy Chief Wolfe? A. Officer Hamilton.

Q. Who else? A. Well, I saw Officer Hamilton and there were a few other officers, but Officer Hamilton was right at the desk.

Q. How long had the defendant Sage been in your presence either there or elsewhere before you began taking this statement? A. Oh, about 20 minutes.

Q. What was occurring during those 20 min-

utes while Sage was present and before you began taking the statements? A. Just sitting there, he was smoking.

Q. Who was sitting there? A. The defendant.

Q. Who else? A. And the Deputy Chief and Officer Hamilton.

Q. Who else, yourself? A. Myself, yes, sir.

Q. Who else? A. Well, there was one or two others there.

Q. What are their names? A. Why, one was Officer Lane.

Q. What is the other man's name? A. Officer Dennison.

Q. Who else? A. That is all.

Q. Are you sure there were not more than one or two others there at the time? A. That is all I seen there.

Q. Were there any there you could not see?

Mr. Vickers: How can he answer that?

Q. Do you know whether there were any other officers there whom you did not happen to see but whom you heard at the time? A. No, sir.

Q. Now, tell us please, what you and your five or six brother officers were doing those 20 minutes while the defendant was there? A. Well, I was sitting at the desk.

Q. Yes? A. And the Deputy Chief was beside me.

Q. What doing; I didn't ask for your positions, I want to know what you were doing? A. Waiting for him.

Mr. Vickers: He said they were sitting there.

The Witness: We were sitting there waiting to take this defendant's statement.

Q. What were you waiting for? A. Well, he wanted to calm himself a bit.

Q. Wanted to calm himself? A. Yes.

Q. Do you know whether or not it was necessary for him to calm himself? A. Know what?

Q. Do you know whether or not it was necessary for him to calm himself? A. I don't know whether it was or not.

Q. How did he make known to you he wanted to calm himself? A. He seemed to be nervous.

Q. What did he say? A. He asked for a few minutes?

Q. What else did he say? A. He said, "I would like to have a smoke."

Q. What else? A. That is all.

Q. How long was this after this defendant was pulled out of the trap at 19 Manhattan Avenue, if you know? A. Oh, a half an hour, I believe.

Q. Were you there when he was arrested at 19 Manhattan Avenue? A. Yes.

Q. Were you there and pulled him out of the trap? A. No, sir.

Q. Were you there when he was pulled out of the trap? A. No, sir.

Q. Were you present when he was placed in the patrol wagon? A. Yes, sir.

Q. Were you in the patrol wagon? A. No, sir.

Q. What was this man's condition during the 20 minutes when you were waiting to take this statement ,when you say he asked for a chance to calm himself?

Mr. Vickers: Objected to on the ground that the witness is not qualified to testify to his condition.

Mr. Drewen: I will withdraw the question.

John A. Murphy—Cross.

Q. Isn't it a fact that this man's both eyes were blackened? A. No, sir.

Q. That he bore bruises on the head? A. No, sir.

Q. On the body? A. No, sir.

Q. That he was bleeding? A. No, sir.

Q. You are sure there was a period of 20 minutes you waited before you proceeded to take this statement? A. Yes, sir.

Q. And that nothing was being done by the officers except they sat there and waited for this man to calm himself? A. That is all.

Q. You are sure about that? A. Yes, sir.

Q. Did the officers carry on any conversation among themselves while those 20 minutes were passing? A. No, sir.

Q. Perfect silence reigned among the policemen? A. Yes, sir.

Q. You are sure about that, are you? A. Yes.

Q. Any remarks being made by the policemen to this defendant Sage during those 20 minutes? A. Not that I heard.

Q. You were there? A. I was there, I didn't hear anything.

Q. You heard none? A. No, sir.

Q. During the 20 minutes did this defendant, Sage ask for permission to go to the toilet? A. No, sir.

Q. Isn't it a fact he did ask for that permission and he went to the toilet and he was followed by two policemen? A. No, sir.

Q. What room in the station house was it that Sage was present, the room to which you refer? A. In the Captain's office.

Q. That is on Central Avenue? A. Yes, sir.

Q. Were you there when Sage was brought to the station house? A. No, sir.

Q Where were you if you can tell? A. I was around at 19 Manhattan Avenue.

Q. How long after Sage arrived at the station house, did you arrive there? A. Ten minutes.

Q. You have cells in the Central Avenue station house? A. Yes, sir.

Q. This defendant was placed in one of those cells, wasn't he? A. He may have been placed in a cell before I got there.

Q. That would be during the ten minutes that he preceded you to the station house? A. Yes, sir.

Q. Do you know whether or not Deputy Chief Wolfe was there before you got to the station house? A. Deputy Chief Wolfe came with me.

Q. Can you give us the name of any officer who was at the station house before you got there or who appeared to be there when you arrived?

Mr. Vickers: When the officer got to the station house with this defendant?

Mr. Drewen: No, when this witness arrived there.

Mr. Vickers: Someone who had already been there with Sage?

Mr. Drewen: Yes.

Q. Do you understand my question? A. I understand, I am just trying to think.

Q. Well, was Lane there with Sage when you arrived? A. Yes, I seen Lane there.

Q. Was Hamilton there with Sage when you arrived? A. Yes, I seen Hamilton there, yes.

Q. Was Deputy Chief Wolfe there when you

arrived? A. Deputy Chief Wolfe came with me.

Q. Can you give me the name of any other officer or officers who were at the station house with Sage when you arrived there? A. That is all I can remember now.

Q. Lane and Hamilton? A. Lane and Hamilton.

Mr. Drewen: That is all.

RE-DIRECT EXAMINATION by Mr. Vickers:

Q. At the time Sage was brought down out of the trap, as Mr. Drewen called it, and taken to the patrol wagon, did he or did he not have shoes on? A. He had a pair of house slippers on.

Q. House slippers? A. Yes, sir.

Q. Did he or did he not have his— I withdraw that. Were you present at the place where he came down out of the trap? A.No, sir, I just saw him coming out of the house.

Mr. Vickers: That is all.

The Court: The statement will be admitted in evidence.

Mr. Drewen: I want to object to it on the ground it is incompetent, irrelevant. and immaterial, that the offer of the statement is not proper rebuttal. Does the Court overrule that?

The Court: It is overruled.

Hyman Lazarus, J. (L.S.)

Mr. Drewen: Exception. I also want to

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object to the statement, as to anything it contains in reference to the defendant, Mae Miller.

The Court: That may be eliminated by the jury with the Court's instruction already in their mind, that any statement contained in that paper that affects Mae Miller not to be used against Mae Miller.

(Witness excused.)

Mr. Vickers: The State offers so much of this statement now to be read into the record as the statement contains in the form of direct questions addressed to the defendant Sage on cross examination and by him denied.

The Court: That is, you merely wish to use that as rebuttal only as to the questions asked him which he denied?

Mr. Vickers: On the objection of counsel that it is not competent rebuttal, the State now makes this offer of the use of the paper and so much thereof as the State thinks is competent as rebuttal to now be read into the record, with an opportunity for the defense to make an objection to each separate question.

Mr. Drewen: We respectfully submit that the State cannot rebut with a paper. It cannot rebut with a paper writing purporting to be a statement. It can only rebut with a statement of a police officer that he said thus and so. Having asked the defendant Sage on the stand, or having in fact laid a foundation with Sage for certain contradictions as to whether or

not he said certain things to the police officer, the State is bound by the statement of that police officer and has no right to offer the statement in if it is for that purpose.

Mr. Vickers: That is exactly the objection I am asking to meet by this present offer, not the paper itself but that there be now read into the record the specific question directed to the witness and the answer by him denied.

Mr. Drewen: We submit, if your Honor please, that the proper way to have done this was to ask each repudiating witness or each contradicting witness the specific question that was asked Sage. Before the State begins to read may I have the Court's ruling on our motion?

The Court: I think that is so.

Mr. Vickers: The Court overrules the State's present offer to read specifically from this statement into the record and the questions asked of the defendant and the answers denied by him to have been made?

The Court: No, I do not overrule that.

Mr. Vickers: I understand that is what counsel is asking for. That is what the State is now offering.

The Court: I think counsel is right as to the general offer.

Mr. Vickers: I am meeting it, your Honor.

The Court: You are meeting his objection?

Mr. Vickers: By this, exactly. If he says I have no right to put a whole statement in because it is not proper rebuttal, I am now offering to take only so much of this proof admitted—

The Court: Just a moment, then as I understand it you are withdrawing the offer of the paper itself?

Mr. Vickers: I have not yet done so, your Honor, I am bound by what your Honor's ruling is on this point. I am not going to burn my bridges behind me.

The Court: You have a right to rebut; I cannot anticipate you until you ask a question and unless it is objected to I won't rule. you may proceed.

Mr. Drewen: What is the Court's ruling?

The Court: What ruling is that?

Mr. Drewen: That the State may proceed to read from the statement?

The Court: All right, put the witness back.

Mr. Vickers: I cannot proceed any different than I have proceeded. I have said to this witness and it has not been controverted in any form, "Do these papers now before you contain in the identical words each and every question asked of this defendant and in the same words the answers given by him" that ap-

plies to the entire statement. I offer the entire statement in order not to be met by the objection that I could not offer a part of it. Counsel objected to the entire statement. I now offer as proper rebuttal, having laid the foundation to read the questions previously read to the defendant Sage in *havic verba*. Now, I do not see how there can be logical objections to it. What more can a witness say; he has already sworn to it.

The Court: You may proceed.

Mr. Drewen: Objection to the Court's ruling.

The Court: You may have it.

Hyman Lazarus, J. (L.S.)

Mr. Vickers: The State reads from this statement on page three the following: "Q. You know the crime for which those policemen were looking for you? A. No, sir.

"Q. Who were these policemen talking to in your apartment? A. (On the next page following) Through the door they were talking to us. They asked her if I was home and she said wait a minute. She got dressed, I put on my pants, I picked up gun from table in dining room. They opened up the door then I started shooting.

Mr. Drewen: Just a moment, the defense objects to that as far as it affects the defendant Mae Miller.

The Court: That objection is sustained as to that feature.

Mr. Drewen: And I ask the jury to be instructed to disregard the statement as read.

The Court: I have already in effect instructed them on that point and I think they understand that.

Mr. Vickers: "What was your wife's maiden name?"

A. (So much of it as the State alleges was read to the defendant Sage) Her husband left her and her home is in Pinebush, New York. I think her single name is Benjamin.

"Q. How long did you own this revolver? A. I bought it a couple of weeks ago from a fellow in a crap game in the rear of Lipton Tea Company Building at 14th Street, Hoboken, New Jersey."

For the purpose of identifying the question and answer the question and answer refers to the .38 Colt revolver.

The State now withdraws its offer of the statement complete on the objection of the Defense to its offer at this time as being improper rebuttal.

(Witness excused.)

FRANK J. HUGHES, sworn:

DIRECT EXAMINATION by Mr. Vickers:

Q. You are a member of the Jersey City Police Department? A. Yes, sir.

Q. And have been for how long? A. For 13 years.

Q. On the 22nd day of May of this year at Jersey City, did you participate in the taking of a statement from this defendant Mae Miller? A. I did.

Q. I show you a paper writing consisting of five sheets and ask you in whose handwriting those sheets are? A. My handwriting.

Q. And there appeared to be attached to these sheets, each of them, a name, Mae Miller. I ask you whether you saw those words Mae Miller written and if so by whom written? A. By Mae Miller.

Q. This defendant? A. Yes, sir.

Q. Before taking any statement of Mae Miller what if anything did you say to her advising her of her rights? A. I said I was Frank J. Hughes, Detective of the Jersey City Police Department, I was going to ask her some questions on the crime for which she was arrested, she may answer them or not just as she sees fit, but what she did say must be of her own free will, a voluntary statement which would be taken down in writing and used at her trial.

Q. Having said this to her did she proceed to give the answers as they now appear recorded in your handwriting upon these papers? A. Yes, sir.

Q. And the questions which appear recorded on these papers, were they at that time directed to her either by you or someone in your presence? A. They were directed by me.

Q. By you? A. Yes, sir.

Q. And after that they were recorded in your handwriting? A. Yes, sir.

Q. And when I speak of questions directed to her and which were written, I refer to those on

the paper appearing in print? A. Yes, sir.

Q. So, for instance, "What is your name, where do you live, how old are you, and what is your occupation," and so forth, those which are in print on the paper, and the answers thereto appearing in hand writing, those questions were directed to her and the answers recorded, they were given by her, is that so? A. Yes, sir.

Mr. Vickers: You may cross examine on this statement. The State expects to offer a part of it, read a part of it at this time into the record.

Mr. Drewen: No cross examination at this time.

Mr. Vickers: I read to you from this paper this question: "Q. You are charged with murder in as much as you did assist your husband in killing John Black, Detective Sergeant and Patrolman Clarence Weir, same time between five and six this A. M. What have you to say to the charge?

The Court: Some time instead of same time.

Mr. Vickers: Same time, right. I ask you whether that question was directed to this woman, Mae Miller at that time?

A. Yes, sir.

Q. And I read to you this answer: "Some time this morning some one knocked at the door. I got up to open the door and I asked who was there and they asked me was Mr. Miller home. I said, you will have to wait until I get dressed. I got dressed

and I opened the door, then the fireworks started." Was that answer as I have read it and as it appears recorded on this paper at that time given to you by this defendant Mae Miller? A. It was.

Q. "Q. When you opened the door who did you see in the hallway? A. I saw two policemen." Was that question asked of this defendant Mae Miller, and did she give that answer? A. She did.

Q. "Q. How did you know they were policemen? A. Because they had uniforms on." Did you ask her that question, and did she give that answer? A. She did.

Q. Did you ask her this question: "Q. What occurred at the time? A. Then the shooting started."

"Q. Who did the shooting? A. I don't know." Were those questions asked of her and did she give those answers? A. She did.

"Q. When you opened the door, did you see any revolver in the policeman's hands? A. No, I did not." Was that question asked her and did she give that answer? A. It was and she did.

"Q Have you ever seen your husband with a revolver in the house? A. I don't want to answer that question." Was that question asked her and did she give that answer? A. She did.

"Q. When you opened the door and you saw the policemen were there any shots fired before that? A. No." Was she asked that question and did she give that answer? A. She did.

"Q. How long was it after you opened the door, the (then there is a word left out) that the shots were fired? A. Right away." Was that question asked her, and did she give that answer? A. Yes, sir.

"Q. Where was your husband Frank Miller

standing when the shots were fired? A. I don't know." Was she asked that question and did she give that answer? A. It was and she did.

"Q. You say you were facing the uniformed policemen when the shooting began? A. I did not see any shooting at all." Was she asked that question and did she give that answer? A. She did.

Mr. Vickers: That is all.

Mr. Drewen: No cross examination.

(Witness excused.)

Mr. McMahon: The State rests.

Mr. Drewen: The Defense rests.

(Recess taken for five minutes.)

Mr. Drewen: The Defense on behalf of the defendant Mae Miller challenges the sufficiency of the State's evidence to sustain a verdict of murder in the first degree against the defendant Mae Miller. The Defense on behalf of the Defendant Mae Miller separately challenges the sufficiency of the State's evidence to sustain any verdict against the defendant Mae Miller.

(After discussion off the record).

The Court: As I understand it, Col. Vickers, by agreement you will not open for the State, but both counsel for the defendants may be permitted to address the jury on behalf of each individual defendant, Judge McCarthy talking for Sage, the defendant, and Mr. Drewen talking for the defendant Mae Miller.

Mr. Vickers: Yes.

The Court: You may proceed.

Mr. Vickers: Before the summing up begins there is no mark on this plan. It is, of

course, a part of this case and if it is marked—

Mr. Drewen: The Defense will admit that the map referred to by Col. Vickers is in evidence.

(Marked Exhibit S-8, in evidence.)

Mr. Vickers: With your Honor's permission, before the Court proceeds to charge the jury, the State overlooked at the closing of the entire case an argument of the State's position with respect to this indictment and the counts thereof, and I desire at this time to have it appear on the record that the State abandons the counts in the indictment for manslaughter and assault and battery respectively.

Mr. Drewen: The defense objects to the abandonment by the State of the counts in the indictment for manslaughter and assault and battery.

Mr. Vickers: Does the defense object that it is done at this time, or does the objection go as though the State had made its abandonment at the time of the closing of the case?

Mr. Drewen: The objection goes to the legal merit of the abandonment, not to the question of time of its being made. Does your Honor overrule the objection?

The Court: Yes.

Mr. Drewen: Exception.

Hyman Lazarus, J. (L.S.)

DEFENDANTS' REQUEST TO CHARGE.

1. Each one of the defendants at the bar is presumed by the law to be innocent.

The burden of proof is cast by the law upon the State to prove each and all of the essential elements of the offense charged by evidence which clearly establishes guilt beyond a reasonable doubt.

This burden rests upon the State throughout the trial and is never shifted.

Reasonable doubt is not a mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

If, therefore, after you have carefully and entirely compared and considered all the evidence in the case, your mind is left in that condition that you cannot say that you feel an abiding conviction to a moral certainty of the truth of the charge, then you have what the law calls a reasonable doubt and it is your duty to give the benefit of such reasonable doubt to the defendant in whose favor it arises, and acquit such defendant.

2. The defendant Frank Sage has set up in justification of this killing, what is known in the law as the plea of self-defense. The statute of this State says: "That any person who shall kill another in his or her own defence shall be guiltless and totally acquitted and discharged."

Therefor I charge you that if these police officers, or any one of them, did not announce at the door of the defendant Sage's bedroom, their official character, or did not make known to him the fact that they were officers of the law, but instead either pushed in the door themselves, or when the door

was opened discharged or pointed a revolver or revolvers in the direction of the defendant Sage, he not knowing or having means of knowing who they were and whether they were policemen, but believing they were intruders and that there was reasonable apprehension of peril on his part of sustaining serious bodily injury or losing his own life, then he would have the right, in order to preserve his own life, or to save himself from serious bodily injury, to repel such assault on the part of the supposed intruders, even to the extent of taking their lives.

The justification of taking life in such a case is based upon the situation existing at the time the fatal wound is given by him who pleads justification, and it is further based, not upon whether there was actual peril, but whether there was reasonable apprehension of such peril.

3. If this defendant Sage did not know the men at the door were police officers, but reasonably believed them to be intruders, menacing him with a deadly weapon so that he reasonably apprehended destruction of his own life or serious bodily injury, then he was not bound to retreat before inflicting the fatal wound, unless he could safely do so, and provided there was a safe way of retreat open to him.

If he could not have retreated with reasonable safety to himself in such a situation, and inflicted the fatal wound because it reasonably appeared to him to be necessary to do so in order to preserve his own life, or save himself from serious bodily injury, then the killing was excusable and the defendants are entitled to be acquitted.

4. Evidence has been offered by the State, through the cross-examination of the defendant Sage,that he has been previously convicted of crime.

These convictions were not allowed to be put in evidence in order to have you thereby determine that because of these convictions of crime, the defendant Sage would be more likely to commit the crime with which he is charged in this indictment. Such convictions of crime are in evidence solely to affect his credibility as a witness in this case and must not be considered by you for any other purpose.

And it is for you to say whether these prior convictions of crime do affect his credibility as a witness, in order that you gentlemen may determine whether such convictions detract from his truthfulness as a witness in this case. For that purpose, and that purpose only, may you consider these convictions.

5. You may convict both of these defendants or you may find both of them not guilty, or you may convict one and find the other not guilty, according as you may feel warranted in so doing by the evidence in the case and the instructions in the law given to you thereon.

6. If the defendant Mae Miller did not know that the persons at the door were police officers, but reasonably thought them to be intruders, and the shot or shots inflicting the mortal wound fired by the defendant Sage were fired and inflicted by him under reasonable apprehension on his part of losing his life, or sustaining serious bodily injury, and in that situation and under those conditions the defendant Mae Miller aided, abetted, assisted, counselled or procured him in repelling such attack or apprehended attack, then the defendant Mae Miller cannot be found guilty undre this indictment and should be acquitted.

7. Even though the defendant Sage knew, or had reason to know, that the persons at the door

were police officers, and with such knowledge fired at them and killed Black, yet if the defendant Mae Miller did not know, and had no reason to know, that the men were police officers, but reasonably thought them intruders, and reasonably apprehended the destruction of her life, or that of Sage, or serious bodily injury to herself or him, and if in that situation she aided, abetted, assisted, counselled or procured Sage in his firing at the officers, then you cannot find the defendant Mae Miller guilty, but must acquit her.

8. Even though the defendant Sage knew, or had reason to know, that the persons at the door were police officers, and with such knowledge fired at them and killed Black, yet if the defendant Mae Miller did not know, and had no reason to know, that the men were police officers, but reasonably thought them intruders and reasonably apprehended the destruction of her life and that of Sage, or reasonably apprehended serious bodily injury to herself, and in that situation aided, abetted, assisted, counselled or procured Sage in his firing at the officers, then you cannot find the defendant Mae Miller guilty, but must acquit her.

9. Even if the defendant Sage knew, or had reason to know, that the men at the door were police officers and though there was no display of any deadly weapon, or menace of death or serious bodily injury on their part, and the defendant Sage fired at them killing Black, and did so intending to kill, but without wilfulness, premeditation and deliberation, then the defendant Sage can only be guilty of murder in the second degree. And if in that situation the defendant Mae Miller actually aided, assisted, abetted, counselled or procured the defendant Sage in the firing at the officers and killing Black, the defendant Mae Miller can be con-

victed only of murder in the second degree.

10. In order to convict the defendant Sage of murder in the first degree in this case, you must find that he fired the shot at the officers, killing Black, not only with an intent to kill, but also with wilfulness, premeditation and deliberation, and this is so, even though the defendant Sage knew or had reason to know that the men at whom he fired were police officers. In other words, regardless of the knowledge of the defendant Sage as to the character of the men at whom he fired as police officers, you cannot convict of murder in the first degree in this case unless you find that Sage acted not only with intent to kill but wilfully, and with premeditation and deliberation.

11. Even though you find beyond a reasonable doubt that the defendant Mae Miller knew, or had reason to know that the men at the door were police officers, and even though you find it so proved that she knew that the defendant Sage was about to shoot, still she is not guilty of any crime under this indictment unless in that situation and with that knowledge on her part she actually aided, counselled, assisted, abetted or procured the defendant Sage in his assault upon the officers at the door, resulting in the killing of Black.

12. The police officers, even though they had a written warrant for the arrest of the defendant Sage, and even though they had a lawful right to arrest him without a warrant as a suspected felon, still the officers, or either of them, had no lawful right to push open the door of defendants' room or to stand at the door after it was opened and display a deadly weapon without announcing the fact that they were police officers, or by making it known to the defendant by other evidence that they were such officers. And if they did thus push open

the door or display a deadly weapon in the open doorway, whether or not they fired any shot or shots, the defendant Sage, in that situation and under those conditions, not knowing them to be police officers, but reasonably believing them to be intruders, and having a reasonable apprehension of peril to himself, inflicted the mortal wound in an effort to preserve his own life, or save himself from serious bodily injury, then both of these defendants should be acquitted.

13. Whether the defendant Sage knew, or had reason to know that the men at whom he fired were police officers, I charge you that you cannot convict him of murder in the first degree unless he fired at them, killing Black, and in doing so not only intended to kill, but fired wilfully and with premeditation and deliberation, and this it is the burden of the State to prove to you beyond a reasonable doubt. The three mental elements of wilfulness, deliberateness and premeditation must all have existed in the mind of the defendant Sage, and must have entered into his killing of Black before you can convict him of murder in the first degree.

14. If you find that at the time the officers came to Sage's door he was roused from sleep and that at the time of the shooting of Black, Sage was in such state of mental confusion or drowsiness that he did not know the visitors were officers, and his confusion resulted in intent to kill upon sudden and heedless impulse, and recklessly, your verdict cannot be for murder in the first degree against him, but for murder in the second degree only.

15. Even should you find that the State has proved to you beyond a reasonable doubt that the defendant Sage in shooting and killing Black intended to kill, and did so wilfully and with pre-

meditation and deliberation, and that he is therefore guilty of murder in the first degree, it will not necessarily follow that because he is thus guilty, the other defendant, Mae Miller, is likewise guilty. Having found that the defendant Sage is guilty either of murder in the first degree or of murder in the second degree, if you do so find, you cannot upon that fact alone convict the defendant Mae Miller. In order to convict her you must find that it has been proved to you by the State, beyond a reasonable doubt, that in the commission of his crime she was not only present, but was present, aiding, assisting, counselling, abetting or procuring him in that crime, and if you do not so find against her, you must acquit her, even though you may find the defendant Sage guilty.

16. Even should you find that it has been proved by the State beyond a reasonable doubt that the defendant Mae Miller knew that the defendant Sage was about to commit a crime in discharging his gun at the officers, and that she did nothing to prevent that, you cannot, from her mere failure to intervene or attempt to dissuade Sage, find her guilty of any offense. If all that you find against the defendant Mae Miller in this case is that she failed to attempt to prevent the commission of a crime by Sage, either by intervention or by dissuading him, then you cannot find her guilty, but must acquit her.

17. There has been evidence in this case that at the time of the shooting, and for some months prior thereto, the defendant Mae Miller was living in a state of illicit relationship with the defendant Sage. I charge you that you cannot consider the fact against her in dealing with the question of her guilt or innocence under this indictment. And the same is true as to your consideration of the guilt

or innocence of the other defendant, Sage.

18. The defendant Mae Miller is charged in this indictment jointly with the defendant Frank Sage as a principal. She is charged on the theory that she was present with him and aided, assisted, counselled, abetted or procured him in the commission of the offense charged, the law being that all those who are present on the scene, and who aid, assist, counsel, abet or procure another in the commission of such an offense as here charged are principals.

I charge you, however, that her mere presence upon the scene with the defendant Sage does not make her guilty of any offense. In order that you may find her guilty of any crime, the State must satisfy you by proof beyond a reasonable doubt not only that she was present with Sage, but that being present she actually did something to aid, assist, counsel, abet or procure Sage in the commission by him of such crime.

19. As the jury in this case you are rightly concerned with the provisions of the statute of this State which provides that every person convicted of murder in the first degree shall suffer death, unless the jury by their verdict, and as part thereof, upon and after consideration of all the evidence, shall recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed. Therefore, should you determine, under the rule I have laid down, that defendant Sage is guilty of murder in the first degree, it is your right and power in accordance with the provisions of the statute I have stated to you, to fix the penalty by recommending as part of your verdict that defendant be imprisoned at hard labor for life. If you return a verdict of first degree murder, without recommendation of imprisonment

at hard labor for life, the penalty imposed must be death.

21. I charge you that nothing contained in the paper writing, purporting to contain a statement made by the defendant Sage to the police can be used or considered by you against the defendant Mae Miller.

22. There has been some testimony on the part of the State to the affect that after the shooting, the defendant Sage, asked the witness Kaerth, while Sage held deadly weapons in his hands, "Are there any more in there?" (meaning in Kaerth's rooms.) There is no evidence that the defendant Mae Miller was present at that time. I therefore charge you that you cannot use or consider against the defendant Mae Miller any such statement made by the defendant Sage.

23. The mere fact that the person killed in the present case was an officer of the law, and even though you find as an additional fact that as such officer he was, at the time he sustained the wound from which he died, arresting or about to arrest the defendant Sage in the actual and legal performance of his duty, those facts alone are not sufficient to raise the killing to murder in the first degree. In order to find either defendant guilty of murder in the first degree, the State must establish by proof beyond a reasonable doubt, not only that the defendant Sage intended to kill the officer, but that he also premeditated that killing and deliberated upon the thought of carrying out his intent to kill.

24. Even if you do find that it has been proved beyond a reasonable doubt that the defendant Sage at the time of the shooting of the officer actually had a specific intention to take the officer's life, but did not premeditate the killing of the officer, and

did not deliberate upon the intent to kill him, then you cannot find defendant Sage guilty of murder in the first degree, but of murder in the second degree only.

25. To constitute murder in the first degree, the design to kill must be deliberately formed. The conception of such a design and its deliberate execution necessarily takes some appreciable time. An intent to kill carried out does not constitute murder in the first degree unless coupled with the deliberation and premeditation prescribed by the statute, and which required time—not a long time —not necessarily an hour or a minute, but still an appreciable time, and not until after such premeditation and deliberation have taken place does the act become "wilful" in the sense intended by the statute, so as to be murder in the first degree.

26. If you find that the execution of a preconceived design to kill followed that design so instantly as to preclude the idea of deliberation, you cannot find the defendant Sage guilty of murder in the first degree, but of murder in the second degree only.

27. A reading of our statute relative to murder shows that the legislature when it used the words "deliberate" and "premeditated" meant that something more than the bare intent to kill should exist in order to constitute murder in the first degree; for it first specifies two cases of homicide in which both deliberation and premeditation are present to a marked degree, viz: by the administration of poison, and by lying in wait, and then declares that murder perpetrated by any other kind of wilful, deliberate and premeditated killing shall be murder of the first degree.

28. Even should it be established that the killing in the present case amounts to murder, the pre-

sumption of the law is that all murders are of the second degree only. The burden is upon the State to raise it to murder in the first degree and the State does not discharge that burden until it proves to you beyond a reasonable doubt that the killing was wilful, deliberate and premeditated.

29. There are three mental states essential to murder in the first degree. Not only must the killing be wilful but also deliberate and premeditated. These mental states normally succeed each other in the inverse order, premeditation necessarily preceding that weighing of the mental content that is implied in the term "deliberate." And both this premeditation and this deliberation must precede the adoption by the will of the intent to kill.

30. The wilful intent to take life does not necessarily include the other elements of premeditation and deliberation. And before you can find the defendant Sage guilty of murder in the first degree, the State must establish beyond a reasonable doubt the presence in the mind of the defendant Sage of all of these three mental elements, that is, wilfulness, deliberation and premeditation.

31. Even should you find that at the time of the shooting the defendant Sage was resisting or preventing his lawful arrest and trying to make good his escape, but that the full extent of his intent was to do bodily harm,—or even grievous bodily harm—to the officer in order to get away from him, your verdict can be one of murder in the second degree only.

32. If it should be established in your mind beyond a reasonable doubt that the defendant Sage was guilty of the offense of murder, and you should be in that state of doubt as to whether it is murder of the first or of the second degree, you would, under the law, be bound to convict of murder in the

second degree only.

34. There has been admitted in evidence against this defendant a paper writing alleged by the State to be a written confession of guilt made by the defendant. The jury alone is to determine the weight and truth to be attached to the statements contained in that paper writing. The defendant denies that the so-called confession is a true statement. It is for you to determine the extent to which it is true or false. And in that respect you are to take into consideration the evidence in the case bearing on the physical and mental condition of the defendant at the time the confession was made.

35. There is testimony in the case from which you may infer that the police officers went to the defendant's home for the purpose of arresting Sage for an escape from State Prison at Trenton. For such an arrest they had no warrant in their possession. I charge you that such escape is in our law not a felony, but a misdemeanor only; and that being a misdemeanor the officers had no right to arrest Sage for that offense without having a warrant for that arrest in their possession at the time.

36. If you find that the police officers went to Sage's home to arrest him for an escape from State Prison, I charge you in that event that the officers had no right to make such an arrest. An escape under our law being not a felony but a misdemeanor only, the officers had no right to make such arrest without having in their possession at the time a warrant for such arrest. There is no evidence that such warrant was in their possession at the time of the attempted arrest of Sage.

37. There is testimony that at the time of the attempted arrest of Sage there was in existence a warrant against him charging felony. There is

no evidence that at the time of the attempted arrest by the officers such warrant was in their possession. I charge you that though such warrant may have been in existence the officers had no authority to make an arrest in the execution of that warrant, unless at the time of making the arrest the warrant was in the actual possession of the officer or officers making the arrest.

38. If you find from the evidence, considered in connection with the instructions I have given you relative to the law of arrest, that under the circumstances in this case the officers had no right to arrest Sage at the time of their visit to his home, then I charge you that if when they appeared at the doorway to Sage's room they displayed a deadly weapon or weapons in such a way as to give Sage a reasonable apprehension of the destruction of his own life, or serious bodily injury to himself, then Sage had the right to resist the officers, even to the extent of killing, and even though he knew they were officers, if he had reasonable grounds at the time of believing such resistance to be necessary to save his own life or to prevent serious bodily injury to himself.

39. There is some evidence in the case that after firing three shots at the officers who stood in the doorway, the defendant Sage went to a window of his room and fired a shot through the screen in that window, wounding Detective Walton in the head. I charge you that the act of Sage in firing the shot out of the window cannot be considered by you in any way against the defendant Mae Miller.

40. There was some testimony given by the witness Otis, called by the State, to the effect that one of the shots which he said were fired at the officers from the doorway of Sage's room, was fired by the defendant Mae Miller. The substance of Otis' tes-

timony in this regard was that Sage fired two shots, wounding Black; that then the woman fired one shot, wounding Weir; and that Sage then fired the fourth shot, wounding Otis. In addition to this Otis stated that after these four shots were fired he fired two shots himself downstairs at the woman defendant. He says, also, that while downstairs he heard another shot fired. He thus accounted for seven shots in all. After this witness Otis had testified, and later in the case, the State agreed with the defendants that it, the State contends that there were only six shots fired in all; three fired through the doorway on the upper floor, two fired by Otis at the woman defendant downstairs, and one shot fired through the screen on the upper floor, striking Walton. In that posture of the evidence on this point, and by reason of all the testimony in the case, I charge you that there is no evidence from which you can find that the defendant Mae Miller fired any shot whatever.

41. There is no evidence in the case from which you can find that any shot was fired by the defendant Mae Miller.

COURT'S CHARGE.

The Court: Gentlemen of the Jury: The defendants on trial in this case are Frank Miller, described in the indictment by other names, and Mae Miller the woman defendant, and they stand before you charged by the State of New Jersey with the crime of murder. That charge is presented against them in the form of what is known as an indictment. An indictment is the official presentation in and by which the grand inquest of the State of New Jersey in and for this county has made this charge of crime against them. In other words, un-

der the law they are, in this case, charged with the crime of murder as I have already indicated to you. In the interest of clearness and so that I may be as specific as possible, I take occasion now to read to you this indictment, — Hudson Oyer and Terminer, April Term, A. D. 1923, Hudson County, to wit; the Grand Inquest of the State of New Jersey in and for the body of Hudson County, on their respective oath present, that Frank Sage, alias Frank Miller, alias Frank J. Egan, and Mae Miller, late of the City of Jersey City in said County of Hudson, on the twenty-second day of May in the year 1923, with force and arms at the City of Jersey City aforesaid, in the County aforesaid, and within the jurisdiction of this court, one John J. Black, in the peace of God and of this State then and there being, did wilfully, feloniously, and of his malice aforethought, kill and murder 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.

Stated in simple terms, these defendants are charged with having at the City of Jersey City, in this county, on the 22nd day of May, 1923, wilfully, deliberately and premeditatedly killed one John J. Black. By reference to the indictment you will note that there are three counts in this indictment as originally presented to this court by the Grand Jury. The State has abandoned two of these counts, that is to say, the count in the indictment which charges the crime of manslaughter and also the count in the indictment which charges the crime of assault and battery, therefore, gentlemen, of the jury, I charge you that you are not to concern yourselves with the last two counts in this indictment, as the indictment will be taken by you from the court to the jury room for your consideration of

this case, but you will concern yourselves specifically with the first count in the indictment which charges the crime of murder, with respect to which I will charge you more specifically.

At this time, gentlemen of the jury, I will read to you certain requests to charge which counsel for the defense have requested me to charge, as follows—and I so charge you:

The defendant Frank Sage has set up in justification of this killing, what is known in the law as the plea of self defense. The statute of this State says, — That any person who shall kill another in his or her own defense shall be guiltless and totally acquitted and discharged. Therefore I charge you that if these police officers or any one of them did not announce at the door of the defendant Sage's bedroom their official character, or did not make known to him the fact that they were officers of the law, but instead either pushed in the door themselves, or when the door was opened discharged or pointed a revolver or revolvers in the direction of the defendant Sage, he not knowing or having means of knowing who they were and whether they were policemen, but believing they were intruders and that there was reasonable apprehension of peril on his part of sustaining serious bodily injury or losing his own life, then he would have the right, in order to preserve his own life or to save himself from serious bodily injury, to repel such assault on the part of the supposed intruders, even to the extent of taking their lives.

The justification of taking life in such a case is based upon the situation existing at the time the fatal wound is given by him who pleads justification, and it is further based, not upon whether there was actual peril but whether there was reasonable apprehension of such peril.

Another request to charge, and I so charge you: If this defendant Sage did not know the men at the door were police officers, but reasonably believed them to be intruders, menacing him with a deadly weapon so that he reasonably apprehended destruction of his own life or serious bodily injury, then he was not bound to retreat before inflicting the fatal wound, unless he could safely do so, and provided there was a safe way of retreat open to him. If he could not have retreated with reasonable safety to himself in such a situation, and inflicted the fatal wound because it reasonably appeared to him to be necessary to do so in order to preserve his own life or save himself from serious bodily injury, then the killing was excusable and the defendants are entitled to be acquitted.

Another request to charge, and I so charge you: You may convict both of these defendants or you may find both of them not guilty, or you may convict one and find the other not guilty, according as you may feel warranted in so doing by the evidence in the case and the instructions in the law given to you thereon.

Another request to charge, and I do so charge you: If the defendant May Miller did not know that the persons at the door were police officers, but reasonably thought them to be intruders, and the shot or shots inflicting the mortal wound fired by defendant Sage were fired and inflicted by him under reasonable apprehension on his part of losing his life or sustaining serious bodily injury, and in that situation and under those conditions the defendant Mae Miller aided, abetted, assisted, counselled or procured him in repelling such attack or apprehended attack, then the defendant Mae Miller cannot be found guilty under this indictment and should be acquitted.

Another request to charge, and I do so charge you: Even though the defendant Sage knew, or had reason to know, that the persons at the door were police officers, and with such knowledge fired at them and killed Black, yet if the defendant Mae Miller did not know and had no reason to know, that the men were police officers, but reasonably thought them intruders, and reasonably apprehended the destruction of her life, or that of Sage, or serious bodily injury to herself or him, and if in that situation she aided, abetted, assisted, counselled or procured Sage in his firing at the officers, then you cannot find the defendant Mae Miller guilty, but must acquit her.

Another request to charge, and I do so charge you: Even if the defendant Sage knew, or had reason to know that the men at the door were police officers and though there was no display of any deadly weapon or menace of death or serious bodily injury on their part, and the defendant Sage fired at them, killing Black, and did so intending to kill, but without wilfulness, premeditation and deliberation, then the defendant Sage can only be guilty of murder in the second degree. And if in that situation the defendant Mae Miller actually aided, assisted, abetted, counselled or procured the defendant Sage in the firing at the officers and killing Black, the defendant Mae Miller can be convicted only of murder in the second degree.

Another request to charge, and I do so charge you: In order to convict the defendant Sage of murder in the first degree in this case, you must find that he fired the shot at the officers killing Black, not only with an intent to kill, but also with wilfulness, premeditation and deliberation, and that is so, even though the defendant Sage knew or had reason to know

that the men at whom he fired were police officers. In other words, regardless of the knowledge of the defendant Sage as to the character of the men at whom he fired as police officers, you cannot convict of murder in the first degree in this case unless you find that Sage acted not only with intent to kill, but wilfully, and with premeditation and deliberation.

Another request to charge, and I do so charge you: Even though you find beyond a reasonable doubt that the defendant Mae Miller knew, or had reason to know that the men at the door were police officers, and even though you find it so proved that she knew that the defendant Sage was about to shoot, still she is not guilty of any crime under this indictment unless in that situation and with that knowledge on her part she actually aided, counselled, assisted, abetted or procured the defendant Sage in his assault upon the officers at the door, resulting in the killing of Black.

Another request to charge, and I do so charge you: Even should you find that the State has proved to you beyond a reasonable doubt that the defendant Sage in shooting and killing Black intended to kill, and did so wilfully and with premeditation and deliberation, and that he is therefore guilty of murder in the first degree, it will not necessarily follow that because he is thus guilty, the other defendant, Mae Miller, is likewise guilty. Having found that the defendant Sage is guilty either of murder in the first degree or of murder in the second degree, if you do so find, you cannot upon that fact alone convict the defendant Mae Miller. In order to convict her you must find that it has been proved to you by the State, beyond a reasonable doubt, that in the commission of his crime she was not only present, but was present,

aiding, assisting, counselling, abetting or procuring him in that crime, and if you do not so find against her, you must acquit her, even though you may find the defendant Sage guilty.

Another request to charge, and I do so charge you: Even should you find that it has been proved by the State beyond a reasonable doubt that the defendant Mae Miller knew that the defendant Sage was about to commit a crime in discharging his gun at the officers, and that she did nothing to prevent that, you cannot, from her mere failure to intervene or attempt to dissuade Sage, find her guilty of any offense. If all that you find against the defendant Mae Miller in this case is that she failed to attempt to prevent the commission of a crime by Sage, either by intervention or by dissuading him, then you cannot find her guilty, but must acquit her.

Another request to charge, and I do so charge you: The defendant Mae Miller is charged in this indictment jointly with the defendant Frank Sage as a principal. She is charged on the theory that she was present with him and aided, assisted, counselled, abetted or procured him in the commission of the offense charged, the law being that all those who are present on the scene, and who aid, assist, counsel, abet or procure another in the commission of such an offense as here charged are principals. I charge you, however, that her mere presence upon the scene with the defendant Sage does not make her guilty of any offense. In order that you may find her guilty of any crime, the State must satisy you by proof beyond a reasonable doubt not only that she was present with Sage but that being present she actually did something to aid, assist, counsel, abet or procure Sage in the commission by him of such a crime.

Another request to charge, and I so charge you: As the jury in this case you are rightly concerned with the provisions of the statute of this State which provides that every person convicted of murder in the first degree shall suffer death, unless the jury by their verdict, and as a part thereof, upon and after consideration of all the evidence, shall recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed. Therefore, should you determine under the rule I have laid down, that defendant Sage is guilty of murder in the first degree, it is your right and power, in accordance with the provisions of the statute I have stated to you, to fix the penalty by recommending as part of your verdict that defendant be imprisoned at hard labor for life. If you return a verdict of first degree murder, without recommendation of imprisonment at hard labor for life, the penalty imposed must be death. I so charge you, and at the same time I charge you in addition thereto that the same rule and principal of law is applicable to the defendant Mae Miller and must govern you in the consideration of the charge against her.

Another request to charge, and I so charge you: I charge you that nothing contained in the paper writing, purporting to contain a statement made by the defendant Sage to the police can be used or considered by you against the defendant Mae Miller.

I decline to charge the twenty-second request submitted to me by counsel for the defendants, and in lieu thereof I now charge you, gentlemen of the jury, that as against the defendant Mae Miller, you cannot consider any statement made by the defendant Sage at the time he spoke to the witness Kaerth while he, Sage, held deadly weapons in his

hands, there being no evidence in this case that the defendant Mae Miller was present at that time.

Another request to charge, and I so charge you: There are three mental states essential to murder in the first degree. Not only must the killing be wilful, but also deliberate and premeditated. These mental states normally succeed each other in the inverse order, premeditation necessarily preceding that weighing of the mental content that is implied in the term "deliberate," and both this premeditation and this deliberation must precede the adoption by the will of the intent to kill.

Another request to charge, and I so charge you: The wilful intent to take life does not necessarily include the other elements of premeditation and deliberation, and before you can find the defendant Sage guilty of murder in the first degree the State must establish beyond a reasonable doubt the presence in the mind of the defendant Sage of all of these three mental elements, that is, wilfulness, deliberation and premeditation.

Another request to charge, and I so charge you: Even should you find that at the time of the shooting the defendant Sage was resisting or preventing his lawful arrest and trying to make good his escape, but that the full extent of his intent was to do bodily harm—or even grievous bodily harm—to the officer in order to get away from him, your verdict can be one of murder in the second degree only.

Another request to charge, and I so charge you: If it should be established in your minds beyond a reasonable doubt that the defendant Sage was guilty of the offense of murder, and you should be in that state of doubt as to whether it is murder of the first or of the second degree, you would under the law, be bound to convict of murder in the second degree only.

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Another request to charge, and I so charge you: There has been admitted in evidence against this defendant—(I do not know which you refer to) a paper writing alleged by the State to be a written confession of guilt made by the defendant. The jury alone is to determine the weight and truth to be attached to the statements contained in that paper writing. The defendant denies that the so-called confession is a true statement. It is for you to determine the extent to which it is true or false. And in that respect you are to take into consideration the evidence in the case bearing on the physical and mental condition of the defendant at the time the confession was made.

Of the requests to charge made by counsel for the defendants, I refuse to charge except as I have so charged them and as I shall hereafter charge you concerning them.

Gentlemen of the Jury, the crime of murder in this state is defined by statute, that is to say, the legislature or the law making body of the State of New Jersey has written in the law what act or acts shall constitute the crime of murder. This law as it is applicable to the facts in issue in this case is as follows: Any person who in committing or attempting to commit any unlawful act against the peace of the state of which the probable consequence may be bloodshed, shall kill another, shall be guilty of murder; or if the death of anyone shall ensue from the committing or attempting to commit any such crime or act as aforesaid, or if any person or persons shall kill any constable or other officer of justice either civil or criminal of this State, in the execution of his office or duties, or shall kill any of his assistants, whether specifically called to his aid or not, endeavoring to preserve the peace or to apprehend a criminal, knowing the au-

thority of such assistants, or shall kill a private person endeavoring to suppress an affray or to apprehend a criminal, knowing the intention with which such private person interposes, then such person or persons so killing as aforesaid shall be guilty of murder.

Murder in this state is divided into two degrees, murder in the first degree and murder in the second degree. Murder in the first degree is the more grievous form of murder; that in the second degree is the less grievous form of murder. As I shall point out to you, murder in the first degree is that which is perpetrated by means of poison or by lying in wait or by any other kind of wilful, deliberate and premeditated killing, and all other kinds of murder are declared to be murder in the second degree. So that it is for you, gentlemen of the jury, at all times, to bear in mind the elements which constitute the two degrees of murder as I have defined them to you and to bear in mind the distinction between these two degrees. It will be your duty in this case, should you find the defendants or either of them guilty of murder to indicate by your verdict whether you find that they or either of them are or is guilty of murder in the first degree or murder in the second degree.

Now, as to the two degrees of murder, you will bear in mind that in the definition of murder in the first degree the law of our State prescribes as the necessary elements to that degree of murder the wilfulness, the deliberateness, and the premeditation of the killing. In other words, as you will recall, the law says that 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 shall be murder in the first degree and that murder committed without the elements which I have indicated to you, that is to say, with-

out deliberation, without wilfulness and without premeditation falls into the lesser degree of murder, that is, into the class of murder known as murder in the second degree.

Now, it is necessary that I lay down to you as clearly as I possibly can, just what the law means when it speaks of murder as being wilful, deliberate and premeditated. It is said, in one of the decisions of our highest court, in dealing with this subject, that an unlawful killing does not amount to murder in the first degree unless it should be found by the jury that the accused contemplated the killing, that is, premeditated it, then determined upon the killing, that is intended it, then weighed such intent before carrying it into effect, that is, deliberated upon it. But, while I have dealt with these terms, wilful, deliberate, and premeditated, in such a way as to indicate to you that they signify, as they do, three separate and distinct functions or operations of the human mind engaged in the premeditation of a killing, I do also charge you that the taking place of these functions of the human mind does not require necessarily any prescribed period of time, but that the mental acts to which I have referred are capable of being performed with that degree of speed with which the human mind is proverbially capable of acting. In other words premeditation and intent to kill need not be for a day or an hour or even a minute, for if you, gentlemen of the jury believe there was a design and a determination to kill distinctly formed in the minds of these defendants or either of them at any moment before or at the time the shots were fired, which design was deliberately and with premeditation carried out, it was a wilful, deliberate and premeditated killing, and therefore murder in the first degree.

Now, as to murder in the second degree, I have already charged you that the law is that any person who in committing any unlawful act against the peace of the State of which the probable consequence may be bloodshed, shall kill another, shall be guilty of murder, and I charge you now that the shooting of a revolver by these defendants or either of them at the body of the dead man, Black, was an unlawful act against the peace of this State, likely to be attended by the consequence of bloodshed, so that such killing is presumed to be malicious and is therefore murder unless and until the defendants produce facts and circumstances from which justification, excuse or extenuation may arise, unless such facts or circumstances of excuse or extenuation appear from the evidence introduced against them.

Now, if all that you find in this case is that the defendants are guilty of murder only because the killing was the result of the unlawful acts of these defendants which I have just indicated to you, and because you find no evidence in the case to justify, excuse or extenuate that killing, you can only find the degree of that murder is the second degree. The burden is upon the State to raise the degree from the second to the first degree by proving to you that the killing was not only the result of the intentional doing of the unlawful act of shooting the revolver at Black, but in addition that the killing of Black was wilful, deliberate and premeditated, and these terms I have already explained to you. So far, gentlemen, I have attempted to define and explain to you the nature of the accusation against these defendants. I have laid down and explained the various and separate elements which are required to constitute murder in the first degree, then the elements which constitute murder in the sec-

ond degree. In dealing with the elements which I have indicated to you, constituting either one of the degrees of murder respectively, the State must prove to you beyond a reasonable doubt these elements and each of them before you can find the defendants or either of them guilty of either one of the degrees charged.

Now, how and to what extent must this proof be made to you? These defendants have denied entirely the truth of the indictment presented against them. They have pleaded not guilty. How and by what proof is that denial to be overcome, if it is to be overcome at all in this case? This is the rule and the rule which I am about to lay down to you shall guide and govern you throughout all your deliberations in this case, and you shall apply it and the test or standard of proof which it prescribes through all the testimony in this case which has been brought against the defendants or either of them, and you shall apply it to each and every element of the crime charged as I have outlined these elements to you.

The defendants in this case, as such defendants, have certain rights with which the law of our land invests them. The one to which I would particularly call your attention now is this: they are at all times presumed to be innocent. The burden of proving their innocence is not upon them. They are not required to show that they are innocent. The burden of proof rests upon the state and it never shifts. It remains upon the state always until you, gentlemen, by your verdict, conclude this trial. What is the nature of this burden that rests upon the state? It is this: to prove the defendants guilty beyond a reasonable doubt; in other words, if the state fails to satisfy your minds beyond a reasonable doubt that the defendants or

either of them are guilty of the crime charged against them, then you are bound under your oath to acquit them. But on the other hand, if you find that the state has discharged its burden of proof, that is to say, that it has satisfied your mind beyond a reasonable doubt that the defendants or either of them did commit one of the degrees of crime charged in this count of the indictment against them, then it will be equally your duty to return a verdict of guilty against them or either of them as to the degree of crime of which they or either of them has thus been proved to be guilty.

I have used the term reasonable doubt. I have said that the state's burden is to prove the defendants or either of them guilty beyond such a doubt. Reasonable doubt does not mean any mere possible or capricious or fanciful doubt. You are not to give the defendants or either of them the benefit of such a doubt as that. It means very much what the words themselves import, a reasonable doubt. The definition which the law lays down for that is as follows: a reasonable doubt is not a mere possible doubt; it is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge. In other words, if after you have made an entire comparison and consideration of all the evidence, you are in that state of mind that you cannot say you feel an abiding conviction to a moral certainty that the defendants or either of them are or is guilty of any one of the degrees of murder which I have described to you, you may then be said to have a reasonable doubt of the guilt of the defendants or either of them and they or either of them are or is entitled to the benefit of

your doubt and you will acquit them or either of them. On the other hand, if after you have made an entire comparison and consideration of all the evidence you are in that state of mind that you can say you feel an abiding conviction to a moral certainty that the defendants or either of them are guilty, then your minds may be said to be free from any reasonable doubt of the guilt of the defendants or either of them and it will be your duty in that event to return your verdict of guilty as to the crime which has thus been proved to you by the state beyond a reasonable doubt against the defendants or either of them.

If, at any time, in any instance, throughout your deliberations in this case you feel that you have a reasonable doubt as to any essential or material element of the case brought before you by the state, you will in that event, give to the defendants or either of them, the benefit of that doubt; and you shall, as I have said, follow that rule throughout all your deliberations and in your entire consideration of the case.

Now, gentlemen, having in mind that the burden of proof here is upon the state and that that burden is to prove the defendants or either of them guilty beyond a reasonable doubt I say to you that if the state has failed to prove beyond a reasonable doubt that the defendants or either of them are or is guilty of either murder in the first degree or murder in the second degree, then it will be your duty to return a general verdict of not guilty and acquit the defendants or either of them.

If, on the other hand, the state has proved to you beyond a reasonable doubt that the defendants or either of them did commit the crime of either murder in the first degree or murder in the second degree, then it will be your duty to find by your ver-

dict that the defendants or either of them are or is guilty of that crime such as either murder in the first degree or murder in the second degree which has thus been proved to you.

The evidence in this case shows that the deceased, John J. Black, came to his death on the 22nd day of May, 1923, at Jersey City, in this county, as a result of being wounded by a bullet fired from a room said to have been occupied by the defendants. If it shall have been proved to you beyond a reasonable doubt that the bullet which caused the death of John J. Black was unlawfully fired by these defendants or either of them, then I charge you that under the law of this state this was an act against the peace of the state, the probable consequence of which was bloodshed, so that such killing is presumed to be malicious and is therefore, murder, but murder in the second degree until the state, by its proof beyond a reasonable doubt, shall have raised the degree of murder from murder in the second degree to murder in the first degree by establishing beyond a reasonable doubt the elements of wilfulness, deliberation and premeditation on the part of the person or persons inflicting the mortal injury as I have heretofore defined those elements to you. Provided, however, that you will bear in mind what I have already charged you, that it is incumbent upon the defendants to adduce evidence of facts and circumstances from which justification, excuse or extenuation may arise, unless such facts or circumstances appear from the evidence introduced against them.

Proof has been adduced in this case that the deceased and those accompanying him to this house at 19 Manhattan Avenue were police officers and this fact is not controverted. Evidence has also

been introduced that these police officers were engaged in the performance of duties as such police officers, that some or either of them had information leading them or some of them to believe that the defendant Miller was an escaped convict, having on the 7th day of July, 1922, escaped from the State's Prison at Trenton in this State, where he was serving a sentence under a conviction for entering, larceny and receiving stolen goods, and that in addition thereto the officers or some of them had information that he was charged with the crime of robbery said to have been perpetrated in the town of West New York in this county and that there was a warrant against this defendant, Miller, in the hands of the police authorities of West New York commanding his apprehension and arrest upon this charge. As to the authority of these police officers to arrest the defendant Miller without having in their possession any warrant for such arrest, I charge you that these officers were within their legal right in arresting the defendant or attempting to arrest the defendant Miller if such officers or any of them who were attempting to arrest Miller had reasonable cause to suspect him of being guilty of a felony although it afterwards appear that no felony was committed, provided such officer or officers had reasonable cause to suspect that the person arrested or attempted to be arrested committed a felony. The distinction between felonies and misdemeanors is not observed in our criminal code. Statutory offenses, if designated at all, are called misdemeanors or high misdemeanors. The grade of the offense in our criminal code is determined by the character and degree of punishment prescribed, rather than upon the common law classification of felonies and misdemeanors, and I charge you that if Black was in the act of ar-

resting or attempting to arrest the defendant Miller and had reasonable cause to suspect that Miller had committed the crime of robbery, Black was justified in arresting or attempting to arrest Miller without a warrant, and for that purpose calling to his assistance such other officers as were necessary to accomplish that purpose.

I further charge you that if in this case it is established to your satisfaction beyond a reasonable doubt that this defendant Miller was a fugitive from justice, escaped from our state prison at Trenton, where he was under conviction serving a sentence for the crime of entering, larceny and receiving stolen goods, and that the larceny of which this defendant was convicted was what is known to the law as grand larceny, then these officers or such of them having reasonable cause to believe or suspect the truth of such facts, if they were facts, were justified in arresting this defendant without a warrant.

In this connection I charge you and caution you regarding the following: there has been admitted into this case evidence concerning the previous conviction of crime on the part of this defendant Sage and of his escape from a penal institution in this State. A part of this evidence is a certain picture card which in this case has been called a fugitive's card, containing what is alleged to be a picture of the defendant Sage and certain printed information on the reverse side of that card. Also, evidence concerning a warrant for the arrest of this defendant which, it is alleged, charged him with the commission of what has been called a felony or high crime committed in the town of West New York, in this county. For the admission of this evidence in this case, the Court has the responsibility, but I now charge you that you are not to consider this

evidence as proving or tending to prove the commission of any crime or crimes by this defendant Sage to influence you or prejudice you in arriving at your verdict, that because of this evidence there is established a propensity on the part of this defendant to commit this crime or any other crime or crimes, but on the contrary, the sole justification for the admission of this testimony was for the purpose of establishing, if it could be established, that at the time of this arrest or attempted arrest of this defendant Sage, the police officers who attempted to effectuate this arrest were possessed of the knowledge or had reasonable information to believe that this defendant had committed, was charged with committing, or by them suspected to have committed a crime which under the circumstances justified them in making or attempting to make the arrest of the defendant Sage without having in their possession at the time a warrant for his arrest.

I want to repeat to you, gentlemen of the jury, that none of this evidence introduced must be considered by you as proving or tending to prove a propensity or likelihood on the part of this defendant Sage, because of the commission or alleged commission of any other crime or crimes, to commit the crime with which he stands charged before you today.

I charge you that one of the elements of proof for your determination under the rules which I have given you is whether or not these defendants, either or both of them, were aware of the official character of the person or persons upon whom these assaults are alleged by the State to have been committed. In other words, if you are satisfied that these defendants, either or both of them, were informed or knew that the persons at the door

were police officers from headquarters, then you shall take such facts, if so established, in considering the subsequent conduct of these defendants, either or both of them, with regard to the persons assaulted by either or both of them.

The accused seek to justify the killing upon the ground that it was done in self defense. Ministers of justice while in the execution of their office are under the peculiar protection of the law. Their special protection is founded in great wisdom and in every principle of political justice, for without it public tranquility cannot possibly be maintained or private property secured. For these reasons the killing of officers so employed has been termed, at common law, murder of malice prepense, as being in defiance of the justice of the kingdom. To the same effect is the statute of this State. The statute of this State respecting a killing in self defense is as follows: Any person who shall kill another by misadventure or in his or her own defense, or in defense of his or her husband, wife, parent, child, brother, sister, master, mistress or servant, and who shall kill any person attempting to commit arson, burglary, murder, rape, robbery or sodomy, shall be guiltless and totally acquitted or discharged.

Taking life in the course of the necessary defense of one's person is a legal defense on an indictment of this kind, but the law, from the wise consideration of public policy, circumscribes the right of one person to take the life of another within narrow limits and allows it to be exercised only under extraordinary circumstances. The burden of proof of self-defense is upon the prisoner. He must show to the satisfaction of the jury, situation and circumstances under which that right may be lawfully exercised, and before his defense is com-

plete, those facts and circumstances must appear to bring the act done by the prisoner within the prescribed limits. The weapon that was used here was one capable of producing either death or grievous bodily harm. The shot was delivered on a vital part of the officer's body and resulted in immediate death. The question for the decision of the jury is, upon this matter, whether this act of the prisoner was an act in the lawful defense of his person. To make this defense available the justification must be coextensive with the act intended to be done and the character of weapon used, the place where the shot was delivered and the circumstances under which it was delivered are all to be borne in mind in passing judgment upon the defense of self-defense set up in this case. Did he kill either in self-defense of himself or to prevent his own life being taken or to prevent grievous bodily harm arising to him by reason of the conduct of the officer or officers making or attempting to make the arrest, or did he do grievous bodily injury with the intent of escaping arrest? To kill to escape arrest is not self-defense. The foundation of the right to take life by the way of self-defense is necessity. There must exist a necessity for resorting to violence for self-protection, and necessity for using the means that were used to secure the defense of his person. An accused is justified in using force to defend his person only when force is necessary to accomplish that end. If the injury apprehended could be otherwise avoided, the prisoner was bound to avoid the danger without resorting to violence, and even if the circumstances be such as to require the use of force to repel the assault, he will be inexcusable if he carried his defense beyond the bounds of necessity. The danger must be immediate and must be actual or else ap-

prehended upon reasonable grounds of which you, gentlemen of the jury, are the judges. The accused could not base his judgment of the necessity of slaying the deceased, in order to defend himself, a justification for his act. Whether the necessity for taking life existed must be determined from the situation of the accused at the time and it is the province and the duty of you, gentlemen of the jury, to determine that question.

Now, the facts of the shooting are to be taken by you. Was the officer here by any action of his own, making or attempting to make this arrest, putting the life of the prisoner in danger, or doing that which would cause him grievous bodily injury, or were any of his acts in making or attempting to make the arrest such as to warrant an apprehension in the prisoner's mind that his life was in danger or that grievous bodily harm would come to him unless he used the pistol on the officer, and which demanded of him the act of slaying the officer in order to protect his body from such danger?

These defendants, gentlemen of the jury, being jointly indicted by a grand jury of this county, charged with this crime, are now jointly on trial. Nevertheless, your consideration of the evidence in this case must necessarily be separate and individual as to each of these defendants. What I have said to you as to the burden of proof incumbent upon the State to bear and carry throughout the entire proceeding applies to each of those defendants and your verdict must be such a verdict as to each defendant arrived at by you after the consideration of all of the evidence as to each defendant under the rules of law as I have laid these down to you.

As requested by counsel for the defendants to charge, and as I have already charged you, I re-

peat that you may convict both of these defendants or you may find both of them not guilty, or you may convict one and find the other not guilty, according as you may feel warranted in so doing by the evidence in the case and the instruction in the law given to you thereon.

I have been requested by counsel for the defense to charge, and I have charged you, that in order to convict the defendant Mae Miller, you must find that it has been proved to you by the State beyond a reasonable doubt that the defendant Sage, in shooting and killing Black, intended to kill and did so wilfully and with premeditation and deliberation and that he is therefore guilty of murder in the first degree and that it does not necessarily follow that because he is thus guilty this other defendant Mae Miller is likewise guilty, but that in addition to your finding the defendant Sage thus guilty, in order to convict the defendant Mae Miller, you must also find that it has been proved to you by the State beyond a reasonable doubt that in the commission of his crime she was not only present but was also present aiding, assisting, counseling, abetting or procuring him in that crime; in addition to which I now charge you that if you do find that the defendant Mae Miller was present aiding, assisting, counseling, abetting or procuring the defendant Sage in the commission of such crime as you shall determine him to have been proved guilty of beyond a reasonable doubt, then the defendant Mae Miller may be found by you to be equally guilty with him of the degree of crime so proved to you.

During the course of the defense in this trial, it has been proved that the defendant Sage has heretofore been convicted of crime. Now, you gentlemen have no right in dealing with that evidence

to consider that because the defendant may have hitherto been guilty of the criminal offenses referred to, that therefore he is, or is more likely to be, guilty of the offense for which he is now being tried. This testimony of prior criminal offense can have no such significance. The law does not admit such testimony into evidence for that purpose. Proof of former convictions is admissible into evidence for one purpose and one purpose only; that is, to affect the credibility of the witness concerning whom the former conviction is proved. In other words, the only effect this testimony can have with you is on the credit or belief which you would ordinarily give to the witness. You may, in weighing the truth or credibility of the witness in question, take into consideration the former criminal offense; in so doing this testimony of former conviction may cause you to have less belief or credit in the story told by the witness, if in your best judgment and calm deliberation you find yourself so affected by it. But that is as far as this proof of former conviction can go with you.

In the event that your verdict shall be that the defendants or either of them are or is guilty of murder in the first degree it will be necessary for you to have in mind a statute of this state which I shall now read to you. This statute gives you, as the jury in this case, should you find the defendants or either of them guilty of murder in the first degree, the power to make a recommendation to the court relative to the punishment which shall be inflicted upon the defendants or either of them. The statute I refer to reads as follows: Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers shall suffer death unless the jury shall, by their verdict, and as a part thereof, upon and after consideration of all

the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed. So that, if upon your returning a verdict of murder in the first degree, you make no recommendation, the penalty meted out to these defendants or either of them shall be death; and if, in the event of your returning a verdict of murder in the first degree, you shall determine that the penalty to be imposed upon these defendants or either of them shall be imprisonment at hard labor for life, it will be necessary by your verdict and as a part thereof, for you to recommend imprisonment at hard labor for life, in which case that will be the punishment imposed. But in this connection I feel it incumbent upon me to inform you that the Court of Pardons in this State shall have the power to change, reduce, abolish or set aside whatever result you might arrive at in this regard, whether you fix the penalty as life imprisonment or not.

In the course of summing up by the respective counsel and also in my instructions to you, references have been made to the testimony. In your deliberations you shall deal with the testimony as you recall it, and not as I, or the respective counsel may have stated it to you, should those statements be in conflict with your recollection of what the testimony really is.

You have all the evidence and the testimony of all the witnesses, and this testimony is submitted to you by the respective sides as evidence of what the truth really is in this case. Out of all this evidence and out of all this testimony, it is your duty to find upon your solemn oath as jurors where the truth does lie in this issue. You are the sole judges of the facts. You have nothing to do with the law except to take the law and deal with it and apply

it to the facts as I have stated it to you. All the facts in this case are before you, and so far as you are concerned there are no facts in this case except those which have been brought in evidence here in this trial. Nothing else is to enter your mind in considering this case.

The solemn oath which you have taken as jurors obliges you to render a true verdict according to the evidence. I would stress to you the fact that your verdict must be true and that it cannot be true unless it is according to the evidence as you see it. You have seen and heard all the witnesses. How did they and each of them impress you? You have a right to ask yourselves that question. You have a right to consider the deportment of the witnesses on the stand, their manner of testifying. You have a right to consider the credence, the belief, which these persons have inspired or failed to inspire in you, as the case may be. You have the right also, to consider the interest or the motives by which the witnesses may have been moved in giving testimony. For example, in considering the testimony of the defendants themselves, you may weigh the circumstance that they are the most interested persons in all the world in the outcome of this trial. Has that interest been strong enough to induce them or either of them to depart from the truth, or to color his or her testimony? It is possible that it did so induce them or either of them; it is possible that it did not. It is the thing which you may consider.

Gentlemen, the case passes into your hands. You have all the facts. You and each of you, I trust, understand your duty and the solemn oath which binds you to it; your duty to this defendant, also your duty to the State of New Jersey, and your duty to the one is no less solemn or exacting than

to the other.

You may retire, gentlemen, and deliberate on your verdict.

(Jury retires.)

Mr. Drewen: I am speaking now for both defendants.

We take a general exception to your Honor's refusal to charge as requested.

Hyman Lazarus, J. (L.S.)

We except in each instance to the Court's refusal to charge the defendant's requests where the Court did so refuse.

Hyman Lazarus, J. (L.S.)

We take a general exception to the Court's charge.

Hyman Lazarus, J. (L.S.)

We take exception to the statement of the Court to the jury that you are not to concern yourselves with the last two counts in the indictment, that you will concern yourselves specifically with the first count in the indictment which charges the crime of murder in the first degree.

Hyman Lazarus, J. (L.S.)

Exception to that part of the Court's charge where he says that the evidence shows that the police were engaged in the performance

of their duties as police officers.

Hyman Lazarus, J. (L.S.)

We except to that part of the Court's charge in which he said, "in addition thereto it is shown in the evidence that the officers had information that he — meaning Sage — was charged with the crime of robbery."

Hyman Lazarus, J. (L.S.)

We except to that part of the Court's charge in which he says, "I further charge you that if Miller was a fugitive from justice, escaped from State's Prison at Trenton, and that the larceny for which this defendant was convicted was what is known as grand larceny and the officers had reasonable cause to suspect the truth of such crime, they were justified in arresting the defendant without a warrant.

Hyman Lazarus, J. (L.S.)

Exception to that part of the Court's charge where he says, "The accused seek to justify the killing upon the ground that it was done in self-defense."

Hyman Lazarus, J. (L.S.)

Exception to that part of the Court's charge where he referred to the gravity of the offense of the killing of police officers and officers of the law generally, in which the Court referred to such killing as being in defiance of the justice of the kingdom, and where the

Exception to Court's Charge.

Court further said, "To the same effect is the statute of this State," it being murder of malice prepense at common law and being the same under the statute of this State.

Hyman Lazarus, J. (L.S.)

Exception to that part of the Court's charge where he said, in referring to the law of self-defense, "The defendant Sage is permitted to use force only when force is necessary to accomplish his defense.'

Hyman Lazarus, J. (L.S.)

Jury returns to Court Room.

The Clerk: Have you agreed upon a verdict?

The Foreman: Yes.

The Clerk: How say you, Mr. Foreman, do you find the defendant Frank Sage, alias Frank Miller, alias Frank J. Egan, and Mae Miller, the prisoners at the bar, guilty or not guilty?

The Foreman: We find the defendant, Frank Sage, guilty of murder in the first degree, and Mae Miller not guilty.

The Clerk: You say you find the defendant, Frank Sage, guilty of murder in the first degree?

The Foreman: Yes sir.

The Clerk: And the defendant, Mae Miller, not guilty.

The Foreman: Yes:

The Clerk: And so say you all?

The Jury: Yes.

Mr. McCarthy: I ask that the jury be polled as to the defendant Frank Sage.

(Jury individually polled, each answer being "Guilty of murder in the first degree.")

"Ex. S-9. Ev.

Photograph on postcard size, frontal and profile views, number 6759.

Reverse side.

$25.00 REWARD $25.00

FRANK EIGAN, No. 6759

Escaped from Perrine Avenue Warehouse, Trenton, N. J., July 7, 1922.

DESCRIPTION

RIGHT NAME FRANK J. SAGE

Received from Passaic County, Nov. 23, 1921. Crime, Entering, Larceny and Receiving. Sentence, 1½ to 7 years. Residence, 201 Zabriskie Street,

Jersey City, N. J. Occupation, Longshoreman. Eyes, light blue. Hair, dark brown. Height 5 ft. 8½ in. Weight, 166 pounds. Age, 30.

MARKS AND SCARS

Right side: American coat of arms, woman's head and wings tatooed out forearm, heart pierced with dagger, forearm inside full form of woman nude on forearm.

Left side: American coat of arms and dagger forearm outside, cowboy initials H. F. P. forearm inside, Nude Ballet Dancer and woman's head on muscle.

FINGER PRINT

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Wire any information at my expense.
New Jersey State Prison,
Trenton, N. J. Phone 3543.

JOSEPH S. HOFF,

Principal Keeper.

Ex. S-24. Ev.

At a court of Quarter Sessions holden at Paterson, in the County of Passaic, of the Eighteenth day of November, A. D. nineteen hundred and twenty-one, being as yet of the September term for the said year of said Court the following proceedings were had; to wit:

THE STATE vs. FRANK EIGEN, indicted with others.	Sur indictment for entering, larceny and receiving. Pleaded Non Vult.

The defendant being placed at the bar for sentence, the court does order and adjudge that he be confined in the State Prison at hard labor for the maximum term of seven years and the minimum term of one year and six months.

(Endorsement.)

Passaic Quarter Sessions.
September Term, 1921.

STATE

vs.

FRANK EIGEN, indicted with others.

Sentence.

Approved,

WILLIAM W. WATSON,
President Judge.

STATE OF NEW JERSEY,

PASSAIC COUNTY.

ss:

JOHN McCUTCHEON, Clerk of said County and also Clerk of the County Courts thereof, do hereby certify that the foregoing is a true and correct copy of the sentence passed by the above named Court on the said defendant, upon the above stated indictment as the same remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at Paterson, this Eighteenth day of November, A. D. 1921.

(Seal)

JOHN McCUTCHEON, Clerk.

By Deputy.

Exhibits.

Ex. S-24. Ev.

Passaic Quarter Sessions.

September Term, 1921.

THE STATE vs. JOHN DORSEY, FRANK EIGEN, and PATRICK HALSEY, indicted with others.	Sur indictment for entering, larceny and receiving. Sentence as per commitment.

Entering and filing indictment and crier's fee, clerk, 20c; Justice's and Constable's fee on arrest, $3.10; Clerk Taxing Justice's and Constable's fees, Clerk, 50c; drawing and sealing subpoena for Grand jury, tickets and serving and rule for do., witnesses' fees before Grand Jury, days, foreign witness before Grand Jury, days and mileage, drawing and sealing process for defendant and rule for do., Clerk, 49c; Sheriff's fee for serving and returning process, Pros., etc., $5.12; order to surrender defendant and remanding to Sheriff, Clerk, 20c, Pros., etc., $1.50 order to call prisoner to bar for appearance and entering do., Clerk, 20c; rule to charge, entering and filing plea, Clerk, 18c; order to remand prisoner for trial and Sheriff's fee, Clerk, 10c, Pros., etc., 37c; order for process, Clerk, 10c; order to remand prisoner for sentence and Sheriff's fee, Clerk, 10c, Pros., etc., 37c; order to set

down trial for Sept. 27, Nov. 4, 1921, Clerk, 10c; order to set down sentence for November 18, 1921, Clerk, 10c; order to take recognizance of prisoner, 3 entering do., and Sheriff discharging, Clerk, 25c, Pros., etc., 12c; Sheriff letting to bail and discharging (62) Clerk, 75c, Pros., etc., 36c; 3 copies recog. for Hudson Co., order to take recognizance of witnesses and entering do., drawing and sealing subpoena, 9 tickets and serving, Clerk, $1.20; drawing and sealing foreign subpoena,, tickets and serving, order to bring up prisoner and that trial come on, and remanding to Sheriff, Clerk, 30c, Pros., etc., 37c; drawing and sealing venire, rule to return do., and Sheriff's fee, Clerk, 49c, Pros., etc., $1.12; calling and swearing Jury, Clerk swearing witnesses and crier's fee, witnesses. days, foreign witnesses days and mileage, Sheriffs mileage for serving subpoenas, miles, rule to retract plea of not guilty and entering retraxit, Clerk, 18c; entering and filing plea of guilty, non vult and order, Clerk, 18c; constable attending Jury and Clerk swearing and order for do., taking and entering verdict, rule to remand and Sheriff's fee, order to call prisoner to the bar for sentence and remanding to Sheriff, Clerk 29c, Pros., etc., 37c; taking and entering judgment signing and recording do., and order for do., Clerk, $1.18; order to place defendant in care of probation officer, Prosecutor's fee, Pros., etc., $12.00; drawing costs, copy, taxing and filing, Clerk, 90c; certified copy of costs for Sheriff, Clerk, 60c; certified copy of costs for Sheriff, Clerk, 60c; certified copy of costs for State Prison Keeper, Clerk, 60c; certified copy of costs for Keeper of Reformatory, Clerk, 28c; certified copy of sentence for Keeper of New Jersey Reformatory, Clerk, 28c; certified copy of sentence for Keeper of Reformatory, Clerk, 28c; drawing

discharge, 4, Clerk 15c, 45c. Total, Clerk, $12.68, Pros., etc., $15.10, Sheriff, 9.70. Grand total, $37.48.

Tax at thirty-seven Dollars and forty-eight cents, November 18, 1921.

JOHN McCUTCHEON, Clerk.

By Deputy Clerk.

STATE OF NEW JERSEY,

COUNTY OF PASSAIC.

ss:

I, JOHN McCUTCHEON, Clerk of the Court of Quarter Sessions in and for the said County, do hereby certify that the foregoing to be a true copy of the Bill of Costs taxed upon an indictment against John Dorsey, Frank Eigen and Patrick Halsey, indicted with others, as the same remains on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the (Seal) seal of the said Court and county, at Paterson, this 18th, day of November, 1921.

JOHN McCUTCHEON, Clerk.

By Deputy Clerk.

(Endorsement.)

"I 25 Ex. S-25 1391.

PASSAIC QUARTER SESSIONS.

September Term, 1921.

THE STATE vs. FRANK EIGEN, JOHN DORSEY, et al., indicted with others."	Costs.

"Ex. S-24.

PASSAIC OYER AND TERMINER AND GENERAL JAIL DELIVERY.

April Term, A. D. Nineteen Hundred and Twenty-one.

PASSAIC COUNTY, to wit:—The Jurors of the State of New Jersey, in and for the body of the County of Passaic, upon their oath PRESENT, that John Dorsey, Peter Doe, Frank Eigen, Michael Doe and Patrick Halsey, late of the City of Passaic, in the County of Passaic aforesaid, on the Fifteenth day of June, in the year of our Lord one thousand nine hundred and twenty-one, with force and arms, at the City aforesaid, in the county aforesaid and within the jurisdiction of this Court, the building of Max Blau there situate, wilfully and maliciously did enter without breaking the

same with intent, the goods and chattels of Max Blau in the said building then and there being found, unlawfully to steal, take and carry away, 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.

And the Jurors aforesaid, upon their oath aforesaid, do further present that the said John Dorsey, Peter Doe, Frank Eigen, Michael Doe and Patrick Halsey, on the Fifteenth day of June, in the year of our Lord one thousand, nine hundred and twenty-one, in the City of Passaic in the County aforesaid money to the amount of one hundred and twenty dollars and twenty cents unlawfully did steal, take and carry away, 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.

And the Jurors aforesaid, upon their oath aforesaid, do further present that the said John Dorsey, Peter Doe Frank Eigen, Michael Doe and Patrick Halsey on the Fifteenth day of June, in the year of our Lord, one thousand nine hundred and twenty-one in the City of Paterson, in the county aforesaid money to the amount of one hundred and twenty dollars and twenty cents, of the value of one hundred and twenty dollars and twenty cents, of the moneys, goods and chattels of Max Blau before then unlawfully stolen, taken and carried away unlawfully did receive and have, they the said John Dorsey, Peter Doe, Frank Eigen, Michael Doe and Patrick Halsey, then and there well knowing the goods and chattels aforesaid to have been unlawfully stolen, taken and carried away 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.

Witness:

BENJAMIN F. TURNER.

J. WILLARD DE YOE,

Prosecutor of the Pleas."

(Endorsement.)

"78626 No. 182.

PASSAIC OYER AND TERMINER.

April Term, A. D. 1921.

THE STATE

vs.

John Dorsey, Peter Doe, Frank Eigen, Michael Doe and Patrick Halsey.

INDICTMENT

ENTERING, LARCENY AND RECEIVING.

J. WILLARD DE YOE,

Prosecutor of the Pleas."

A TRUE BILL.

JOHN H. COOK,

Foreman.

Arraigned .....

Plea .....

Bail .....

Trial .....

Verdict .....

Sentence .....

Filed June 24, 1921,

JOHN J. SLATER, Clerk."

"At the Court of Quarter Sessions, holden at Paterson, in and for the County of Passaic, of the Term of September, A. D., Nineteen Hundred and Twenty-one, the following proceedings were had, to wit:

Thursday, November 3, 1921.

The Court Met,

Present,

HON. WILLIAM W. WATSON.

No. 182. THE STATE vs. FRANK EIGEN, indicted with others.	Sur, Indictment for Entering, Larceny and Receiving.

Exhibits.

The said defendant being arraigned and charged on this Indictment pleads thereto that he is not guilty in manner and form as he stands charged therein.

The trial of this Indictment is set down by the Court for the Fourth day of November, inst.

The said defendant is thereupon remanded to the custody of the Sheriff.

Friday, November 4, 1921.

The Court Met,

Present,

HON. WILLIAM W. WATSON.

No. 182. THE STATE vs. JOHN DORSEY, FRANK EIGEN and PATRICK HALSEY. — Sur, Indictment for Entering, Larceny and Receiving.

At this time the said defendants come into court and retract the pleas of not guilty hereto pleaded by them to said indictment and plead non vult contendere.

Friday, November 18, 1921.

The Court Met,

Present,

Exhibits.

HON. WILLIAM W. WATSON.

No. 182. THE STATE vs. JOHN DORSEY, FRANK EIGEN and PATRICK HALSEY.	Sur, Indictment for Entering, Larceny and Receiving.

The said defendant Frank Eigen, being placed at the Bar for sentence, the Court does order the Judge that said defendant do be confined at hard labor in the State Prison for the maximum term of seven years and the minimum term of one year and six months.'

"STATE OF NEW JERSEY

PASSAIC COUNTY.

I,JOHN McCUTCHEON, Clerk of said County and Clerk of the County Courts thereof, do hereby certify that the foregoing is a true copy of an Indictment for Entering, Larceny and Receiving in re: The State vs. Frank Eigen and others, and the Proceedings had thereon insofar as they relate to Frank Eigen, as the same is taken from and compared with the original Indictment filed June twenty-fourth, A. D. Nineteen Hundred and Twenty-one, and the record of proceedings in the minutes of the Court of Quarter sessions, in and for the County of Passaic, now remaining on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the

(Seal) seal of the said courts and county at Paterson, this Ninth day of June, A. D. 1923.

JOHN McCUTCHEON, Clerk,

By Deputy Clerk.

111053."

(Endorsement.)

"COUNTY CLERK'S OFFICE,

Paterson, Passaic County, New Jersey.

CERTIFIED COPY

of an indictment &c., in re:

THE STATE

vs.

FRANK EIGEN, indicted with others."

Request for Entire Record.

HUDSON COUNTY COURT OF OYER

AND TERMINER.

STATE OF NEW JERSEY vs. FRANK SAGE, Defendant,	On Indictment for Murder. Request for return of entire record.

To the HONORABLE HYMAN LAZARUS, Judge of the Hudson County Court of Oyer and Terminer:

The above named defendant having heretofore sued out and served a writ of error to review the judgment upon above mentioned indictment, hereby requests that the entire record of the proceedings had upon the trial of said indictment, be certified and returned with said writ of error.
Dated July 9th, 1923.

RICHARD DOHERTY,
Attorney of Defendant.

Certificate of Entire Record.

HUDSON COUNTY COURT OF OYER AND TERMINER.

STATE OF NEW JERSEY vs. FRANK SAGE, Defendant,	On Indictment for Murder. Certificate of entire record.

I, HYMAN LAZARUS, Judge of the Hudson County Court of the Oyer and Terminer, do hereby certify that the foregoing is the entire record of the proceedings had upon the trial of the above mentioned indictment and is returned with the bill of exceptions signed and sealed in the cause.
Dated July 18th, 1923.

HYMAN LAZARUS,
Judge. (L.S.)
Hudson County Oyer and Terminer.

NEW JERSEY COURT OF ERRORS

AND APPEALS.

STATE OF NEW JERSEY, Defendant in Error. vs. FRANK SAGE, Plaintiff in Error.	In Error. Assignments of Error.

The Plaintiff in error prays the reversal of the judgment of the Court below, and assigns error on the record therein as follows:

1. There is manifest error in this the Court over the objection of the defendant, permitted the witness, Harry Otis, to testify as follows:

Q. Did you speak to Weir or did Weir speak to you at the time? A. Yes, sir.

Q. What did he say to you or you to him? A. When I went into the room and I seen him rolling I started to talk to him and I said, "What is the matter here, were you hit?" He said, "she got me, I'm a goner, goodbye Otis."

2. There is manifest error in this, the Court on motion of the defendant below refused to strike out the said testimony last set forth.

3. There is manifest error in this, the Court below refused to permit the witness, Harry Otis to answer the question propounded by the defendant:

Q. What was this gentleman, (referring to

David Mills), doing at the hospital?

4. There is manifest error in this, the court below refused to permit the witness, Harry Otis, to answer the following question asked by the defendant:

Q. Did you say to this man, (referring to David Mills), "Suddenly the door was pulled open partway, and I saw Sage stick his head and shoulders out partway, and there was Black on my left right in front of me, in line with the open door and then bang, went Sage's gun and Black was shot. I saw Black turn and start down the stairs as if he was hit."

5. There is manifest error in this, the Court over the objection of the defendant, permitted the witness, Harry Otis, on re-direct examination to answer the following question:

Q. What I mean is, what does the printed matter, to what category does this card (referring to Exhibit S-9) with the picture and printed matter, as a matter of police experience, bring the card I am not asking him to read it or anything of the kind? A. This card is wanted for breaking jail, a fugitive from justice.

6. There is manifest error in this, the court below on motion of defendant, refused to strike out the testimony last referred to.

7. There is manifest error in this, the court over the objection of the defendant, permitted the witness, Chas. Schmidt, to answer the following question:

Q. And when did you know him and under what circumstances by the name of Eigan or Egan

or Eigan? A. Why I am a truck driver there (referring to New Jersey State Prison) and the prisoners I had—I had him out with me helping and he escaped.

Q. As a prisoner of the State Prison? A. Yes, sir.

Q. You had him with you on your truck, is that what you say? A. Helping.

Q. And? A. And he escaped from me.

8. There is manifest error in this, the court below on motion of the defendant refused to strike out the testimony last set forth.

9. The court over the objection of the defendant, permitted the witness, Charles Schmidt, to testify as follows:

Q. Since that time, so far as your knowledge goes, has he been received back in State's Prison? A. No, sir.

10. There is manifest error in this, the court on motion for the defendant, refused to strike out the testimony last referred to.

11. There is manifest error in this, the court below over the objection of the defendant, permitted the witness, Thomas A. Mahaney, to testify as follows:

Q. And have you any records with you of his, (the defendants,) imprisonment in State's Prison and the manner of release or relief from that institution? A. Yes, sir.

12. There is manifest error in this, the court allowed the witness, Thomas A. Mahaney, over the objection of the defendant, to testify as follows:

Q. You produce now a paper saying that this is the commitment which was delivered at the State's Prison with this defendant together with a bill of cost attached thereto, is that right? A. Yes, sir.

13. There is manifest error in this, the court received in evidence over the objection of the defendant, the paper last referred to being the commitment of the defendant, the State Prison by the Court of Quarter Sessions of the County of Passaic.

14. There is manifest error in this, the court permitted the witness, Thomas A. Mahaney, over the objection of the defendant, to testify as follows:

Q. Have you any record made by you as to the identification of the person received together with this commitment paper which has been produced? A. Yes, sir, I have.

Q. To what do you refer? A. I have a negative here made of him when he came in.

15. There is manifest error in this, the court permitted the witness, Thomas A. Mahaney, over the objection of the defendant, to testify as follows:

Q. With respect to certain printed matter which is on the back of Exhibit S-9, this card which has been shown to you by whom was that made, collected and placed on the card? A. By me.

16. There is manifest error in this, the court permitted the witness, Thomas A. Mahaney, over the objection of the defendant, to testify as follows:

Q. From what source did you get the descriptive matter contained on the back of that card? A. I made that of him when he came in, that is, within

the course of a week after.

17. There is manifest error in this, the court over the objection of the defendant, received in evidence Exhibit S-9 consisting of a prison photograph of the defendant with prejudicial matter printed on the back thereof.

18. There is manifest error in this, the court permitted the witness, Thomas A. Mahaney, over the objection of the defendant, to testify as follows:

Q. Have you any record as to the date this defendant, the male defendant, escaped from State Prison? A. Yes.

Q. Give it. A. 11 A. M., the morning of July 7th, 1922.

Q. If since the 7th of July, 1922, this man, (referring to defendant) had returned or been returned to your institution, would he have, through your bureau, passed through your hands as a matter of official routine of the Prison? A. Yes, sir.

Q. Since 11 A. M., the 7th of July, 1922 has this defendant returned or been returned to the said State's Prison of Trenton? A. No, sir.

Q. Did you personally at any time since the 7th of July, 1922, go to the Police Department in West New York or to any other place in this county for the purpose of finding this defendant? A. Well, we notified them with our photograph.

Q. You mean these cards? A. Yes, sir.

Q. They are sent out broadcast? A. Sent out broadcast all over the States, in different cities and there was a detective came down from the West New York Department.

Q. Have you with you the original information respecting the description, name, marks, finger prints, records, etc., of this defendant and which

is contained on this (Exhibit S-9?) A. Yes, sir.

Q. And does it correspond with the information contained on the card? A. Yes, sir.

19. There is a manifest error in this, the court permitted the witness, George Gerhart over the objection of the defendant, to testify as follows:

Q. And what did you do with the dynamite or part of it and the caps in order to make a test or determination? A. I opened the stick and made the usual test which we make without putting the material under analysis, that is, the feel of it and the taste of it and I would say that the stick contained 60% dynamite, that is, 60% nitro glycerine contents. The result after testing real dynamite is a severe headache which I immediately got.

20. There is manifest error, the court over the objection of the defendant, George Gerhart, witness, testified as follows:

Q. And these things which I show you, being apparently black wires with red metal caps on them are explosives or percussion-caps? A. They are very high explosives fulminate of mercury caps.

21. There is manifest error in this, the court over the objection of the defendant, permitted the witness, William J. Charlock, to testify as follows:

Q. And having exhibited to him (referring to witness, George Gerhart) having received his report, what, if anything, did you do with the contents of this paper which has been described as dynamite by the previous witness? A. I took it down to the Palisades—to the Passaic Trunk Sewer down at Curry's Woods where they were exploding down there and I had one-third of the dynamite

exploded.

Q. Were you present while that was done? A. Yes, sir.

Q. As a result of that experiment I show you some pieces of iron rail and ask you whether by this explosion caused as you have described, this iron rail was broken in the manner in which it now appears before you? A. This is all I could find of the pieces.

22. There is manifest error in this, the court received in evidence over objection of the defendant, the remaining fulminating caps together with the wrapper of the dynamite in evidence.

23. There is manifest error in this, the court received in evidence over the objection of the defendant, an extension bit and the blackjack alleged to have been found on the premises of this defendant after the commission of the offense charged.

24. There is manifest error in this, the Court admitted in evidence over the objection of the defendant, a revolver and five cartridges, alleged to have been found on the premises of the defendant after the time of the offense charged in the indictment.

25. There is manifest error in this, the court over the objection of the defendant, admitted in evidence, two guns, the .22 calibre and the .32 calibre and the cartridges identified by the witnesses, Kidney and Balbian.

26. There is manifest error in this, the court over the objection of the defendant, permitted the witness, Fred A. Clark, to testify as follows:

Q. Did you ever have this man in custody as Court officer of Passaic County and if so when and where, if any place, did you deliver him? A. 23rd of November, 1921.

Q. And where did you take him, from where to where? A. 9:55 from Passaic County Jail to Trenton, New Jersey, State Prison.

Q. I show you a commitment being under the seal of Passaic County, and signed, purporting to be signed by William Watson, President Judge, together with tax bill of costs and ask you whether that is the commitment and tax bill of cost taken at the time by you from Passaic County together with this prisoner and delivered together with the prisoner to the principal keeper of State's Prison, Trenton, New Jersey? A. Yes, sir.

27. There is manifest error in this, the court received in evidence over the objection of the defendant, the commitment last referred to, and the record of conviction from the County of Passaic for which he was convicted.

28. There is manifest error in this, the court admitted in evidence over the objection (Exhibit S-19) being a photograph of the dead body of Policeman Weir.

29. There is manifest error in this, the court admitted in evidence over the objection (Exhibit S-19) being a photograph of the dead body of John J. Black.

30. The court admitted in evidence over objection of defendant, the black bag (S-26) alleged to have been found on the premises of defendant, subsequent to his arrest.

31. There is manifest error in this that the court over the objection of the defendant, permitted the witness, Walter P. Cieciuch, to testify as follows:

Q. I show you an envelope containing three loaded .38 calibre and two empties and for the purpose of the record the envelope has at this time been unsealed by me, it having been fastened with cord and sealing wax—could you tell whether or not at this time you and Sergeant Davis found these articles and if so where? A. The two exploded shells were found in the bedroom described between the dresser and the bed on the floor.

Q. And is that the same bedroom you are talking about where this powder box with shells was found? A. Yes, sir, the bullets were found in front of No. 21 Manhattan Avenue in the gutter right in front.

Q. And is No. 21 Manhattan Avenue represented in this picture, Exhibit S-1? A. Yes, sir, the center house here.

Q. From No. 19 where this shooting took place is No. 21 and the place where these shells were found in the direction on Manhattan Avenue, towards Central? A. Yes, sir.

Q. What time of day on the 22nd was it that you and Davis made the search of the premises you have described and found these things both on the premises and the cartridges as you have described in front of No. 21? A. About 7:30 A. M.

32. There is manifest error in this, the court refused to grant a motion of the defendant to strike out the testimony last referred to.

33. There is manifest error in this, the court at the conclusion of the testimony permitted the State

over the objection of the defendant, to abandon the counts in the indictment for manslaughter and assault and battery.

34. There is manifest error in this, the court although duly requested by the defendant refused to charge the jury as follows:

12. "The police officers, even though they had a written warrant for the arrest of the defendant Sage, and even though they had a lawful right to arrest him without a warrant as a suspected felon, still the officers, or either of them, had no lawful right to push open the door of defendants' room or to stand at the door after it was opened and display a deadly weapon without announcing the fact that they were police officers, or by making it known to the defendant by other evidence that they were such officers. And if they did thus push open the door or display a deadly weapon in the open doorway, whether or not they fired any shot or shots, and the defendant, Sage, in that situation and under those conditions, not knowing them to be police officers, but reasonably believing them to be intruders, and having a reasonable apprehension of peril to himself, inflicted the mortal wound in an effort to preserve his own life, or save himself from serious bodily injury, then both of these defendants should be acquitted."

35. There is manifest error in this, the court although duly requested by the defendant, refused to charge the jury as follows:

13. "Whether the defendant Sage knew, or had reason to know that the men at whom he fired were police officers, I charge you that you cannot convict him of murder in the first degree unless he fired at them, killing Black, and in doing so not only in-

tended to kill, but fired wilfully and with premeditation and deliberation, and this it is the burden of the State to prove to you beyond a reasonable doubt. Three mental elements of wilfulness, deliberateness and premeditation must all have existed in the mind of the defendant, Sage, and must have entered into his killing of Black before you can convict him of murder in the first degree.

36. There is manifest error in this, the court although duly requested by the defendant, refused to charge the jury as follows:

14. "If you find that at the time the officers came to Sage's door he was aroused from sleep and that at the time of the shooting of Black, Sage was in such a state of mental confusion or drowsiness that he did not know the visitors were officers, and his confusion resulted in intent to kill upon sudden and heedless impulse, and recklessly, your verdict cannot be for murder in the first degree against him, but for murder in the second degree only."

36. There is manifest error in this, the court although duly requested by the defendant, refused to charge the jury as follows:

17. "There has been evidence in this case that at the time of the shooting, and for some months prior thereto the defendant, Mae Miller, was living in the state of illicit relationship with the defendant, Sage. I charge you that you cannot consider the fact against her in dealing with the question of her guilt or innocence under this indictment. And the same is true as to your consideration of the guilt or innocence of the other defendant, Sage."

37. There is manifest error in this, the court although duly requested by the defendant, refused

to charge the jury as follows:

23. "The mere fact that the person killed in the present case was an officer of the law, and even though you find as an additional fact that as such officer he was, at the time he sustained the wound from which he died, arresting or about to arrest the defendant, Sage, in the actual and legal performance of his duty, those facts alone are not sufficient to raise the killing to murder in the first degree. In order to find either defendant guilty of murder in the first degree, the State must establish by proof beyond a reasonable doubt, not only that the defendant, Sage, intended to kill the officer, but that he also premeditated that killing and deliberated upon the thought of carrying out his intent to kill.

38. There is manifest error in this, the court although duly requested by the defendant, refused to charge the jury as follows:

24. "Even if you do find that it has been proved beyond a reasonable doubt that the defendant, Sage, at the time of the shooting of the officer actually had a specific intention to take the officer's life, but did not premeditate the killing of the officer, and did not deliberate upon the intent to kill him, then you cannot find defendant, Sage, guilty of murder in the first degree, but of murder in the second degree only."

39. There is manifest error in this, the court although duly requested by the defendant, refused to charge the jury as follows:

25. "To constitute murder in the first degree, the design to kill must be deliberately formed. The conception of such a design and its deliberate execution necessarily take some appreciable time. An

intent to kill carried out does not constitute murder in the first degree unless coupled with the deliberation and premeditation prescribed by the statute, and which require time—not a long time—not necessarily an hour or a minute, but still an appreciable time and not until after such premeditation and deliberation have taken place does the act become "wilful" in the sense intended by the statute, so as to be murder in the first degree."

40. There is manifest error in this, the court, although duly requested by the defendant, refused to charge the jury as follows:

26. "If you find that the execution of the preconceived design to kill followed that design so instantly as to preclude the idea of deliberation, you cannot find the defendant Sage guilty of murder in the first degree, but murder in the second degree only."

41. There is manifest error in this, the court, although duly requested by the defendant, refused to charge the jury as follows:

35. "There is testimony in the case from which you may infer that the police officers went to the defendant's home for the purpose of arresting Sage for an escape from State Prison at Trenton. For such an arrest they had no warrant in their possession. I charge you that such escape is in our law not a felony but a misdemeanor only; and that being a misdemeanor the officers had no right to arrest Sage for that offense without having a warrant for that arrest in their possession at the time.'

42. There is manifest error in this, the court although duly requested by the defendant, refused

to charge the jury as follows:

36. "If you find that the police officers went to Sage's house to arrest him for an escape from State Prison, I charge you in that event that the officers had no right to make such an arrest. An escape under our law being not a felony but a misdemeanor only, the officers had no right to make such arrest without having in their possession at the time a warrant for such arrest. There is no evidence that such warrant was in their possession at the time of the attempted arrest of Sage."

43. There is manifest error in this, the court although duly requested by the defendant, refused to charge the jury as follows:

37. "There is testimony that at the time of the attempted arrest of Sage there was in existence a warrant against him charging felony. There is no evidence that at the time of the attempted arrest by the officers such warrant was in their possession. I charge you that though such warrant may have been in existence the officers had no authority to make an arrest in the execution of that warrant, unless at the time of making the arrest the warrant was in the actual possession of the officer or officers making the arrest."

44. There is manifest error in this, the court although duly requested by the defendant, refused to charge the jury as follows:

38. "If you find from the evidence, considered in connection with the instructions I have given you relative to the law of arrest, that under the circumstances in this case the officers had no right to arrest Sage at the time of their visit to his home, then I charge you that if when they appeared at the doorway to Sage's room they displayed the deadly

weapon or weapons in such a way as to give Sage a reasonable apprehension of his own life, or serious bodily injury to himself. Then Sage had the right to resist the officers, even to the extent of killing, and even though he knew they were officers, if he had reasonable grounds at the time of believing such resistance to be necessary to save his own life or to prevent serious bodily injury to himself."

45. There is manifest error in this, the court charged the jury as follows:

"By reference to the indictment you will notice that there are three counts in this indictment as originally presented to this court by the Grand Jury. The State has abandoned two of these counts, that is to say, the count in the indictment which charges the crime of manslaughter and also the count in the indictment which charges the crime of assault and battery, therefore, gentlemen of the jury, I charge you that you are not to concern yourselves with the last two counts in this indictment, as the indictment will be taken by you from the court to the jury room, for your consideration of this case, but you will concern yourselves with the first count in the indictment which charges the crime of murder, with respect to which will I charge you more specifically."

46. There is manifest error in this, the court charged the jury as follows:

"Premeditation and intent to kill need not be for a day or an hour or even a minute, for if you, gentlemen of the jury, believe there was a design and determination to kill distinctly formed in the minds of these defendants, or either of them at any moment before or at the time these shots

were fired, which design was deliberately and with premeditation carried out, it was a wilful, deliberate and premeditated killing, and therefore murder in the first degree."

47. There is manifest error in this, the court charged the jury as follows:

"I charge you now that the shooting of the revolvers by these defendants or either of them at the body of the dead man, Black, was an unlawful act against the peace of this State likely to be attended by the consequence of bloodshed, so that such killing is presumed to be malicious and is therefore murder unless and until the defendants produce facts and circumstances upon which justification, excuse or extenuation may arise, unless such facts or circumstances of excuse or extenuation appear from the evidence introduced against them.'

48. There is manifest error in this, the court charged the jury as follows:

"If it shall have been proved to you beyond a reasonable doubt that the bullet which caused the death of John H. Black, was unlawfully fired by these defendants or either of them, then I charge you that under the law of this State this was an act against the peace of the State, the probable consequence of which was bloodshed, so that such killing is presumed to be malicious and is therefore, murder, but murder in the second degree until the State, by its proof, beyond a reasonable doubt, shall have raised the degree of murder from murder in the second degree to murder in the first degree by establishing beyond a reasonable doubt the elements of wilfulness, deliberation, and premeditation on the part of the person or persons in-

flicting the mortal injury as I have heretofore defined those elements to you. Provided, however, that you will bear in mind what I have already charged you, that it is incumbent upon the defendants to adduce evidence of facts and circumstances from which justification, excuse or extenuation may arise, unless such facts or circumstances appear from the evidence introduced against them.

49. There is manifest error in this, the Court charged the jury as follows:

"Evidence has also been introduced that these police officers were engaged in the performance of duties as such police officers, that some or either of them had information leading them or some of them to believe that the defendant Miller was an escaped convict, having on the 7th day of July, 1922, escaped from the State's Prison at Trenton in this State, where he was serving a sentence under a conviction for entering, larceny and receiving stolen goods, and that in addition thereto the officers or some of them had information that he was charged with the crime of robbery said to have been perpetrated in the town of West New York in this county and that there was a warrant against this defendant, Miller, in the hands of the police authorities of West New York commanding his apprehension and arrest upon this charge. As to the authority of these police officers, to arrest the defendant, Miller, without having in their possession any warrant for such arrest, I charge you that these officers were within their legal right in arresting the defendant or attempting to arrest the defendant, Miller, if such officers or any of them who were attempting to arrest Miller had reasonable cause to suspect him of being guilty of a felony although it afterwards appear that no felony

was committed, provided such officer or officers, had reasonable cause to suspect that the person arrested or attempted to be arrested committed a felony. The distinction between felonies and misdemeanors is not observed in our criminal code. Statutory offenses, if designated at all, are called misdemeanors or high misdemeanors. The grade of the offense in our criminal code is determined by the character or degree of punishment prescribed, rather than upon common law classification of felonies and misdemeanors.

50. There is manifest error in this, the court charged the jury as follows:

"I charge you that if Black was in the act of arresting or attempting to arrest the defendant, Miller, and had reasonable cause to suspect that Miller had committed the crime of robbery, Black was justified in arresting or attempting to arrest Miller without a warrant and for that purpose calling to his assistance such other officers as were necessary to accomplish that purpose."

51. There is manifest error in this, the court charged the jury as follows:

"I further charge you that if in this case it is established to your satisfaction beyond a reasonable doubt that this defendant, Miller, was a fugitive from justice, escaped from our State Prison at Trenton, where he was under conviction serving a sentence for the crime of entering, larceny, and receiving stolen goods, and that the larceny of which this defendant was convicted was what is known to the law as grand larceny, then these officers or such of them having reasonable cause to believe or suspect the truth of such facts, if they were facts, were justified in arresting this defendant without a warrant."

52. There is manifest error in this, the court charged the jury as follows:

"There has been admitted into this case evidence concerning the previous conviction of crime on the part of this defendant, Sage, and of his escape from a penal institution of this state. A part of this evidence is a certain picture card which in this case has been called a fugitive's card, containing which is alleged to be a picture of the defendant, Sage, and certain printed information on the reverse side of that card. Also, evidence concerning a warrant for the arrest of this defendant, which, it is alleged, charged him with the commission of what has been called a felony or high crime committed in the town of West New York, in this county. For the admission of this evidence, in this case, the Court has the responsibility, but I now charge you that you are not to consider this evidence as proving or tending to prove the commission of any crime or crimes by this defendant, Sage, to influence you to prejudice you in arriving at your verdict, that because of this evidence there is established a propensity on the part of this defendant to commit this crime or any other crime or crimes, but on the contrary, the sole justification for the admission of this testimony was for the purpose of establishing, if it could be established, that at the time of this arrest or attempted arrest of this defendant, Sage, the police officers who attempted to effectuate this arrest were possessed of the knowledge or had reasonable information to believe that this defendant had committed, was charged with committing, or by them suspected to have committed a crime which under the circumstances justified them in making or attempting to make the arrest of the defendant Sage without having in their possession at the time a warrant for his arrest."

53. There is manifest error in this, the court charged the jury as follows:

"I charge you that one of the elements of proof for your determination under the rules which I have given you is whether or not these defendants, either or both of them were aware of the official character of the person or persons upon whom these assaults are alleged by the State to have been committed. In other words, if you are satisfied that these defendants, either or both of them, were informed or knew that the persons at the door were police officers from headquarters, then you shall take such facts, if so established, in considering the subsequent conduct of these defendants, either or both of them, with regard to the persons assaulted by either or both of them."

RICHARD DOHERTY,

Attorney of and of Counsel with Plaintiff in Error.

Specification of Causes.

COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY, Plaintiff in Error. vs. FRANK SAGE, Defendant in Error.	In Error. Specification of causes for Reversal.

The plaintiff in error complains that he has suffered manifest wrong and injury in the admission and rejection of testimony, in the charge of the court, and in the denial of matters by the court and specifies as causes for reversal of the judgment herein, the following:

1. The court at the conclusion of the testimony, permitted the State to "abandon" the counts in the indictment for manslaughter and assault and battery, and because of such "abandonment" omitted to charge the jury respecting defendant's guilt of manslaughter and directed the jury not to concern themselves with the defendant's guilt of manslaughter, notwithstanding the testimony adduced would have supported a verdict of guilty of the count charging that offense.

2. The court did not define manslaughter or malice nor point out to the jury the distinction between murder and manslaughter.

3. Notwithstanding there was no testimony whatever adduced as to any knowledge or information respecting the defendant possessed by the deceased, Black, the court permitted the jury to speculate whether the deceased had a reasonable ground for a suspicion that the defendant was guilty of a crime.

4. The court instructed the jury that suspicion concerning the defendant's criminal guilt, entertained by any member of a police party of six, justified the deceased, Black, in undertaking the arrest of defendant without a warrant, irrespective of whether the deceased shared such suspicion.

5. Notwithstanding no testimony whatever was adduced on the point of reasonable suspicion entertained by the deceased, or his companions, that defendant was guilty of a crime, the court falsely assumed and permitted the jury to so assume that such suspicion existed.

6. Notwithstanding the full weight of the evidence established merely that Otis, a companion of the deceased, had seen an advertisement announcing the defendant's departure from a warehouse in Trenton, while serving a sentence, and that Otis had also seen a warrant setting forth that the defendant was accused of robbery, and that there was an entire absence of proof that Otis or any one had communicated these matters to Black, the court permitted the jury to determine from this evidence whether Black had reasonable suspicion that the defendant had committed the offense of prison breach or robbery.

7. Notwithstanding an absence of proof as to

the purpose for which the deceased, Black, went to the defendant's house, the court permitted the jury to assume that it was to arrest the defendant, either for robbery or prison breach.

The court permitted the jury to consider that information as to an accusation merely such as Otis had received, might be the basis of reasonable suspicion by Black as to the defendant's actual guilt.

9. In the exposition of the law of arrest on reasonable suspicion, the court ignored the principle that such suspicion must be predicated upon facts and circumstances created by the defendant.

10. The court instructed the jury that there was evidence from which it might find that the defendant escaped from State Prison notwithstanding the undisputed and contrary proof that he had merely neglected to return voluntarily to the institution after having been liberated therefrom for the performance of some service four miles away.

11. The court by its charge, misled the jury into the belief that a mere departure from a prison, or failure to return voluntarily thereto, unaccompanied by prison breach constituted a crime for which arrest might lawfully be made.

12. While the court charged the jury in the the abstract that a killing is presumed to be malicious, where there are no circumstances of mitigation, extenuation or excuse, it misled the jury by its failure to instruct that such circumstances might exist in the situation of the deceased having attempted to force his way into the defendant's

bedroom at a very early hour of the morning to make an unlawful arrest, in the course thereof assaulting one of the inmates of the household and making a menacing display of firearms, as the evidence on the part of the defendant tended to establish.

13. The court instructed the jury, in effect, that the duty resting upon the defendant to adduce evidence of facts and circumstances from which justification, excuse or extenuation may arise, related not only to the elimination of the presumption of malice, but likewise to the reduction of the offense from murder in the first degree to murder in the second degree.

14. The court admitted in evidence proof of defendant's previous crime and conviction, unconnected with the offense charged, and the irrelevant to the issue of his guilt.

15. The court admitted in evidence proof of the finding of revolvers, cartridges, blackjack, extension bit, dynamite, percussion caps and satchel, in the home of the defendant, subsequent to his arrest, which articles were unconnected with the offense and irrelevant to the issue of his guilt and the only possible effect of which was to establish that the defendant possessed criminal propensities.

16. The charge of the court respecting wilfulness, premeditation, and deliberation was inconsistent, contradictory, and confusing.

17. The court omitted to define and distinguish "felony" and "misdemeanor" in their application

to the right to arrest on suspicion.

18. The verdict was against the weight of the evidence.

19. The evidence could not satisfy a considerate mind beyond a reasonable doubt that the accused is guilty of murder in the first degree.

20. The verdict was contrary to the evidence in view of the contradictions, improbabilities and insufficiencies in the testimony.

21. The verdict was the result of mistake, passion, prejudice, and partiality.

Respectfully submitted,

RICHARD DOHERTY,

Attorney of Plaintiff in Error.

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, Defendant-in-Error, vs. FRANK SAGE, alias Frank Miller, alias Frank J. Eigan, Plaintiff-in-Error.	Sur Indictment for Murder on Writ of Error.

BRIEF FOR THE STATE OF NEW JERSEY.

This case is before the Court on writ of error to the Hudson Oyer and Terminer, on conviction and sentence of death of Frank Sage, plaintiff-in-error, hereinafter called the defendant; and the entire record of the proceedings had upon the trial is certified by the trial Court. There are assignments of error as well as specifications of causes for reversal.

Facts.

The defendant, Frank Sage, having been indicted jointly with one May Miller, charged with the murder of John J. Black at Jersey City on May 22, 1923, was tried and by the jury found guilty of murder in the first degree. The verdict contained no recommendation as to punishment. The co-defendant, May Miller, tried at the same time,

was acquitted. Briefly, the situation out of which the killing resulted is as follows:

On May 22, 1923, the man and woman defendants, not being married to each other, were living together at No. 19 Manhattan Avenue in Jersey City, under the name of Miller. Frank Sage at this time was an escaped convict, having on July 7, 1922, escaped from State's Prison, to which institution he had been committed on a conviction in the Quarter Sessions of Passaic County on his plea of *non vult* to an indictment charging entering, larceny and receiving stolen goods, and having been sentenced to State's Prison at hard labor for a maximum term of seven years and a minimum term of one year and six months. After defendant escaped, the prison authorities, as is the custom, sent out to all Police Departments what is called a fugitive's card, showing the photograph of defendant, his description, the fact of his escape, crime for which committed, and notice that reward for his recapture is offered. Such a fugitive's card was in the possession of Police Lieutenant Otis, one of the arresting officers, at the time (Ex. S9, Ev.). On this May 22nd, there was also in existence an unexecuted warrant against this Frank Sage, charging him with highway robbery at the town of West New York, and this warrant was in the hands of the police authorities of West New York for execution, one of whom was Otis.

Black, a Lieutenant of Police from Jersey City, had apparently located the fugitive, Sage, as living at or frequenting No. 19 Manhattan Avenue, Jersey City. Black must have known that Sage was wanted in West New York, and Otis, not being a member of the Police Department of the latter city, assisted in the search and arrest. In the early morning of May 22nd, Lieutenant Otis, Sergeant John J. Black (the victim), Police Officer Wier

(then also shot and killed by Sage), Police Officer James J. Walton (also shot and seriously wounded by Sage), and other officers, went to No. 19 Manhattan Avenue, some entering and others surrounding the premises. Officers Black, Wier and Walton were members of the Jersey City Police Department, Wier being in uniform; the others, as well as Otis, were in citizen clothes. Then, upon inquiry, learning from the owner and occupant of the house that the man corresponding to the picture on the fugitive's card exhibited to him by Officer Otis, was occupying rooms on the second floor of the house, Otis, Black and Wier proceeded upstairs to the door of the apartment indicated by the owner. A knock on the door was answered by May Miller, and in response to the inquiry whether Sage was there, she denied his presence; thereupon it was announced by Black, "We are police officers from Headquarters, and you will do," to which May Miller responded, "Wait a minute and I will get some clothes on." After a short interval the door was opened and without any inquiry, explanation or warning, Sage opened fire, first shooting Officer Black, then Officer Wier, then Officer Otis, who were either on the landing near the apartment door or on the short flight of stairs leading to that landing. Then defendant Sage shot Officer Walton, who was on guard in the adjoining rear yard overlooked by a rear window in the apartment of Sage. There were but four shots fired by Sage, each of which took effect upon a different person, two mortally and two seriously wounding. Immediately after the last shot was fired by Sage, he proceeded to make search of other parts of the house, looking for other victims, and finding none upstairs, and Officer Otis downstairs, armed and shooting, Sage barricaded himself under the roof at the scuttle hole, until driven therefrom by tear gas and arrested.

New Jersey State Library

The outstanding facts in controversy in this case are encompassed within a narrow margin, and, briefly stated, they are as follows:

The State asserts that defendant must have known and did know that the persons at the door claimed to be police officers from Headquarters, and that he, knowing that he was wanted, planned deliberately and premeditatedly to resist arrest with a deadly weapon at any cost and carried this intent so formed into execution.

The defendant wholly denies this and says these persons, without any notice to him, suddenly pushed into the room and so menaced him with a revolver that he believed his life to be in danger, and he shot in self-defense.

On the part of the State the evidence is that on this morning of May 22nd, Black and the other police officers entered this house and stationed themselves near and to the right and left of the door leading into the Sage apartment. Thereupon Officer Black knocked at the door and the conversation above quoted took place. The door was opened by May Miller and then the shooting began, none of the officers entering or attempting to enter this room nor did they open or attempt to open or push in the door, neither did they or any of them at this time have in their hands or exhibit or fire any gun or guns.

On behalf of the defendants the testimony presents a situation where it is made to appear that the defendant Sage, who did the shooting, heard no knock on the door, heard no conversation between the woman defendant (although she was lying in the same bed with him) and anyone outside the door, and that the first intimation he had of impending trouble was when "The door flew open and she flew back and her hand went up like this" (page 188, line 35). "As the door flew open I seen a form there and a man's arm come up with

the revolver" (page 189, line 38). "I bent over and reached for the drawer for my gun" (page 190, line 3). "I pulled it out quick as the form seemed to move, another form—and I fired one shot" (page 190, line 7). "As I fired the one shot, I advanced toward the bed, I should judge about two or three foot, and as I did I fired two more shots" (page 190, line 11). "After I fired three shots, I looked out in the hallway, that is, standing inside the room about at the foot of the bed, and I could see from the angle of the top landing, where it goes down, the top landing of the stairs that come straight up, I see one man going down backwards and one man facing him, going down together" (page 190, line 34, *et seq.*). "I stepped from the bed, after they moved down the stairs, I stepped over toward the chair where my pants were laying, and after I went to reach for my pants, I seen a man in the yard, and I fired a shot" (page 191, line 16).

The assignments of error may be divided as follows:

Numbers 1 to 32 inclusive relate to the admission or rejection of evidence.

Assignment number 33 relates to the "abandonment" by the State of the counts in the indictment for manslaughter and assault and battery.

Numbers 34 to 44 inclusive relate to the refusal of the court to charge as requested; and numbers 45 to 53 inclusive deal with exceptions to portions of the Court's charge.

In the order as given, these assignments of error will be dealt with, first generally, and then with regard to the particular assignments.

POINT ONE.

The defendant suffered no manifest wrong or injury in the admission or rejection of evidence.

The first assignment relates to testimony given by the witness Otis concerning what was said by him to Wier and by Wier to the witness (page 51). This conversation was admitted by the Court on the theory that it was a part of the *res gestae,* and it is now urged that this ruling was correct.

Estell vs. State, 51 N. J. L., 182.

Estell vs. State is in point only so far as it illustrates the distinction between the then case and the case at bar. There the act had been completed, the defendant had passed on, time elapsed, the injured man was brought back to the toll house before the objectionable conversation occurred. In the case at bar the battle was still in progress.

In Castner vs. Sliker, 33 N. J. L., 95, the following appears:

> "It is too plain, I think, to admit of reasonable doubt, under the circumstances in which all the witnesses of the combat were placed, what any of them said or did, while it was in progress, was a part of the *res gestae,* and was calculated to throw light on, and aid the jury in forming a correct judgment of the facts of the case."

So in Hunter vs. State, 40 N. J. L., 415, at page 583, this Court holds that a declaration made by the victim to his son, out of the presence of the defendant Hunter, to the effect that he, the victim, intended going to Camden with Hunter was admissible as a part of the *res gestae.*

In the case at bar this conversation took place on the scene, at the time and while this murder orgy was still in progress.

Donnelly vs. State, 26 N. J. L., 601.

However, waiving aside the question of the legality of the admission of this evidence, it is inconceivable how it can be construed as prejudicial to this defendant; for the reason that it tended to exculpate him of the shooting and fasten upon the woman defendant the particular act.

As to exception number 2, it will be noted by reference to the printed book that the exception is without merit so far as this defendant is concerned, because the motion to strike out the testimony referred to was made only "so far as it concerns the defendant May Miller."

State vs. Newman, 95 N. J. L., 280.

Exceptions 3 and 4 relate to the refusal of the Court to permit Otis to be asked two questions regarding a newspaper reporter alleged to have interviewed the witness while in the hospital, and alleged statements by Otis to this reporter.

As to the first of these questions, "What was this gentleman (referring to David Mills) doing at the hospital?" This question was incompetent as well as immaterial. It called for a conclusion on the part of the witness as to what the reporter was doing there; in other words, what his purpose was in being there.

The second question found on page 77 was asked as a basis for contradiction of the witness's testimony on direct. The purpose of the question is indicated by the colloquy here in the printed case between the Court and counsel, and quite apparently has the sole purpose of showing that the wit-

ness knew the effect of the shot upon Black at that time, whereas the witness had previously testified that he did not know the effect. That there is no contradiction between this alleged statement and the testimony of Otis must be quite apparent, and the Court so indicated.

Exceptions 5 to 18 inclusive, as well as 26 and 27 deal with the evidence of and testimony relating to State's Exhibit "S9" in the record and here referred to as the fugitive's card. All of this testimony and the exhibit are introduced for the purpose of establishing the identity of the defendant, the fact that he was an escaped convict at the time of his arrest, the character of the crime for which he had been committed, and the reasonableness of the suspicion or pretended knowledge on the part of the arresting officer or officers who acted without a warrant in this attempted arrest of the defendant. How the defendant can be said to have been injured by the admission of this testimony and the card in evidence is hard to conceive in view of the indubitable fact that the defendant himself admitted everything contained in this testimony and also on the card with much in addition thereto concerning his conviction, incarceration and escape from the State Prison.

This evidence was competent to establish the fact that Sage was "Eigan" and was a criminal. State vs. Bertchy, 77 N. J. L., 640.

It is here further urged by defendant-in-error that the Court in dealing with the evidence (page 34, line 10 *et seq.*) did with meticulous nicety and great fairness so limit the effect of this evidence that its bearing upon the defendant's guilt or innocence of the crime for which he was on trial could not have been misunderstood by the jury;

leaving the weight and probative force of this evi dence in the hands of the jury.

Exceptions 19 to 25 inclusive and 30, 31 and 32 deal with the admission into evidence of certain fulminating caps, an extension bit, a black bag, two revolvers, some loaded and exploded cartridges and a black jack; and with the testimony relative thereto and testimony relative to the determination and destruction of some dynamite found with the fulminating caps, and which dynamite for obvious reasons of safety was not produced or demonstrated in Court.

Except for three revolver shells, all of this property was taken at the time immediately following the arrest of the defendant from the room occupied by the defendant, and at the scene of the crime or from his person at the time of his arrest immediately following the commission of the crime. The three revolver shells are alleged to have been dropped by the woman just outside of the house on her way to the station house.

The following New Jersey case cited as illustrating the legality of this evidence:

> "It therefore became competent to show, in this inquiry, conduct on the part of Parks which would indicate his position, or any circumstances strictly related to this offense which would reveal a criminal purpose of that kind. (Parks vs. State, 59 N. J. L., 573.)"

Referring to exceptions to the general rule that other crimes may not be shown, Mr. Justice Garrison, illustrating the reason for these exceptions "in which defendant's guilt of the extraneous crime tends to prove against him some particular element of the crime for which he is being tried", in Meyer

vs. State, 59 N. J. L., 310, says, "Scienter may be thus proved, so, in appropriate cases, may opportunity, motive, preparation, concealment or escape. Where, however, the proof can go no further than to show a propensity to commit the offense in question it is not relevant. The general presumption of innocence cannot be broken down by thus showing the likelihood of the defendant's guilt of the particular offense."

In Schlemmer vs. State, 51 N. J. L., 23, 28, other offenses such as previous threat to take the life of the victim, the carrying of concealed weapons, defendant's intended suicide were approved as competent evidence to prove "the conduct of the defendant as indicative of an existing intention to commit murder"; hence a part of the *res gestae*. In the same case Chief Justice Beasley, speaking for the Supreme Court, says: "The rule exemplified by the authorities is this: that whenever the existence of a purpose, or state of mind, is the subject of inquiry, explanatory conduct and accompanying expressions of the party himself, or of other persons to him or in his presence, may be shown by proof."

In Bodee vs. State, 57 N. J. L., 140, this Court approved the introduction in evidence of a complaint and arrest of a person previous to the commission of the crime, this person not being a defendant; on the ground that these facts, coupled with proof of knowledge thereof by one of the defendants, "was competent to disprove the existence of any belief on Fannie's (a defendant) part that the complainant had abandoned his coal."

In State vs. Bertchy, 77 N. J. L., 640, at page 642, this Court says, "In order to bring the defendant within the condemnation of this statute the state was required to prove three things: first, that the defendant was a criminal; second, that Janowski was endeavoring to apprehend him when

the defendant shot him, * * *" As to these two points the case then under consideration is identical with the case now before this Court. As in the Bertchy case, so in the present case, the state was obliged to prove Sage to be a criminal, and also that those present at the scene of the crime including the deceased, Black, were intending to apprehend him when the defendant shot Black.

In Dodge vs. State, 24 N. J. L., 455, at page 462, "The material inquiry on the trial upon which the defendant gave his evidence, was whether a certain horse was exposed to the weather in the month of February or March, 1851. He testifies that the horse was not exposed to the weather either in February, March or April. The truth is alleged to have been that he was exposed to the weather in March and April. To warrant a conviction, therefore, it was necessary to show that the defendant swore falsely in regard to the exposure of the horse in the month of March. But it was neither incompetent nor irrelevant to show that the horse was also exposed in the month of April, * * * Not to establish perjury in regard to any other time than the month of March, but to exclude the idea of error arising from mistake in point of time, and as tending to show that the evidence was not only false but knowingly and corruptly false."

This Court in State vs. Laster, 71 N. J. L., 586, at page 587, said, "The contention on the part of the plaintiff-in-error is that it was prejudicial to the prisoner to have articles introduced in evidence which had been found upon his person, but which did not have any direct relation to the crime with which he was charged. The revolver, they concede, was admissible because death resulted from a gunshot wound, alleged to have been the result of the discharge of a revolver in the hands of the prisoner." Further commenting, the Court says

that although the other articles might not have any materiality in the State's case, that their introduction was a frank presentation to the Court and jury of all the property given up by the prisoner in the same condition in which it had been received. The Court then concludes, "Such articles thus received are admissible in evidence. The prisoner cannot complain because the State put all the articles in evidence. A complaint that the State had put some of the articles found upon the prisoner in evidence would be much more forceful." Citing on this point Commonwealth vs. Williams, 2 Cush., 582, 585. If articles having no materiality in the State's case may be properly admitted in evidence, by what process of logic can it be maintained that articles in the possession of the defendant which throw light upon the question of intent or motive are less competent?

In State vs. Abbatto, 64 N. J. L., 658, the State contended that the motive for the murder was the desire of the defendant to obtain possession of the victim's wife; in support of which there was introduced into evidence the fact that the defendant together with the wife, subsequent to the killing, went to Philadelphia and to New York. This Court respecting that evidence, says, "that proof of such relations was competent for the purpose of showing motive is not, and cannot be successfully denied."

In Webb vs. State, 51 N. J. L., 189, the instructions to the jury by the trial Judge that the arrest was "unjustifiable and altogether illegal." Held by the Supreme Court "as entirely right".

Cases from other states in point on this evidence.

People vs. Wilson, 117 Cal., 688.

Defendant was indicted for assault with a deadly weapon with intent to murder one John M. McInnes.

Defendant was the keeper of a saloon in the City of San Diego. On the night of December 16, 1895, three policemen—Sergeant Cota and Officers Warner and McInnes—went to the defendant's saloon for the purpose of arresting him for shooting a soldier named Kelley, which had been reported to the police office by telephone. Sergeant Cota first sent Warner and McInnes to the saloon to watch the defendant while he went to the hospital for information as to the alleged shooting, and was there informed that Kelley had been shot by defendant in the saloon. The sergeant returned two or three minutes before midnight and told the defendant "to consider himself under arrest for shooting that soldier." Defendant asked if he had a warrant. The sergeant replied: "No, I don't need one now." Sergeant directed the officers to arrest him. Defendant then reached for his pistol, and, as he raised it, the sergeant shot at him. Several shots were fired, some by the defendant and some by the police, and one of the defendant's shots hit Officer McInnes, and it was for shooting McInnes that he was indicted and found guilty.

Upon the trial, Kelley and his companion, Carrington, were called as witnesses for the prosecution, and were permitted to testify, over the objection of the defendant, to the circumstances of an assault committed by him upon Carrington for "pulling a gun" on him and also to the shooting and wounding of Kelley, which occurrences took place in the same saloon between ten and eleven o'clock the same night, and grew out of a controversy between defendant and Kelley in shaking dice, Carrington being the stakeholder.

Appellant contended that the ruling of the Court was erroneous in that it permitted the prosecution

to prove the commission of a separate and distinct offense, and that he was prejudiced thereby.

Court: "It is undoubtedly the general rule that evidence of another offense than that under investigation is not admissible when not relative to the issue being tried. It is contended by respondent, however, that the evidence objected to is relative, as 'it shows defendant's motive, and tends to prove his intent in resisting arrest and assaulting Officer McInnes.' If such is the effect of the evidence, it must be admissible, because the motive and intent are within the issue being tried and the fact that the testimony also had a tendency to show that defendant had been guilty of another assault for the commission of which he was not being tried, would not be sufficient to exclude it, if it were otherwise competent."

(Moore vs. U. S., 150 U. S., 61.)

"It is true the officers were not being tried for making an unauthorized arrest, but nevertheless it was competent to show that the arrest was authorized, and that the defendant knew the fact which justified the arrest, because such knowledge negatived his right to resist arrest, and therefore tended to characterize the assault upon the officer for which he was being tried; and in this view of the evidence, it was admissible as affecting the intent with which the assault was made, and to negative any possible claim that he was resisting an unauthorized arrest.

If there had been no prior assault committed by the defendant upon Kelley or Carrington, the intent with which he fired upon McInnes would necessarily appear to be different from his intent in doing the same act with the personal knowledge that he had committed the prior offense * * * I think that it did have a tendency to show defendant's

intent, and, because it had such tendency, the evidence was properly admitted."

Hendrickson vs. People, 10 N. Y., 13, 31, it is said that "considerable latitude is allowed on the question of motive. Just in proportion to the depravity of the mind would a motive be trifling and insignificant which might prompt the commission of a great crime. We can never say the motive was adequate to the offense; for human minds would differ in the ideas of adequacy according to their own estimate of the enormity of the crime, and a virtuous mind would find no motive sufficient to justify the felonious taking of human life."

12 Cyc., 410.

Evidence to show the motive prompting the commission of the crime is relevant and admissible, notwithstanding it also shows the commission by the accused of another crime of a similar or dissimilar character.

People vs. Harris, 136 N. Y., 423.

Upon the trial of an indictment charging defendant with the murder of his wife by poison, the prosecution was allowed to prove illicit relations between him and a young unmarried woman, and that in a conversation with the latter he advised her to marry some old man with plenty of money, stating that they could put him out of the way by giving him a pill. Held, no error. The marriage between defendant and the deceased was a secret one. The prosecution was allowed to prove statements of the defendant as to illicit relations with other women and that to overcome the scruples of two of them, he had secretly married them. Held, no error at 449.

Court: "The testimony of the witness Oliver, disclosing a conversation with the defendant in

which, after boasting of his previous extensive intercourse with women and of his successful methods for violating their persons, he admitted having previously contracted two secret marriages, made necessary to overcome the scruples of the women, was clearly admissible on the question of motive. It threw light upon it. With a previous secret marriage, the publicity of his later marriage with the deceased would have stamped him as a bigamist and have ruined his reputation, if it would not have subjected him to criminal prosecution." Court goes on to say: "While evidence merely to show previous bad and vicious character is inadmissible against one on trial for the commission of a criminal offense, if the depraved acts, offered to be shown, evidence, or throw light upon motive, they become admissible."

Wharton, in his work on Criminal Evidence, says (section 51) that on a trial of a husband for the murder of his wife the State has a right to prove his adultery with another, as illustrating a desire to get rid of the marital relations; and he cites in support of rule Stout vs. People, 4 Parkers Crim. Rep. 71.

In Stout vs. People, the defendant was accused of the murder of Little and the prosecution offered evidence to show incestuous intercourse between defendant and Little's wife, who was defendant's sister. The evidence was held admissible to show motive and that is was no objection that it tended to prove a distinct felony, namely the incest.

Pontius vs. People, 28 Hun, 328, upon the trial of the plaintiff-in-error for an assault alleged to have been committed upon one John G. Hoster, with a deadly weapon, with an intent to kill him, the prosecution was allowed, against the objection and exception of the plaintiff-in-error, to show he had shortly before the alleged assault, forged the name of the said Hoster to two promissory notes,

which notes he had in his possession up to the time of committing the assault. Held, that evidence was properly received.

Court—"That the desire to conceal the crime of forgery, if the defendant had perpetrated it and to render the forged paper available, may have constituted a Motive for attempting to put out of the way the man whose name was forged, is so probable, that the evidence cannot be said to be foreign to the issue; and it is well settled, that upon a trial for a felony, evidence tending to prove a motive for its commission is not inadmissible because it may incidentally show the accused to have been guilty of another offense." (Citing People vs. Wood, 3 Park Crim., 681; Stout vs. People, *supra;* Pierson vs. People, 18 Hun, 239; Coleman vs. People, 58 N. Y., 555; affirmed 82 N. Y., 339.)

McConkey vs. Com., 101 Pa. St., 416—If a murder is committed in an attempt to conceal stolen goods, evidence may be introduced at the trial, tending to connect the murder with the robbery, in order to prove the motive and object of the crime, and as part of the history of the occurrence. The deceased with others had gone out in search of certain goods that had been stolen. He was engaged in this search at the time he was killed. The witness Snyder had heard the shots at a distance, and having started for the scene of the occurrence saw several men fleeing from the direction of the place. He discovered certain articles, knives, razors, pistols, and a pocketbook containing papers of deceased lying on ground at different places. One Calhoun was with Snyder at the time. It was to the latter's testimony that objection was made. Held evidence was competent.

Court—"The articles were connected directly with the deceased. * * * Without question it was entirely proper to prove the discovery of these articles shortly after the homicide in close proxim-

ity to the place where it occurred, and in the line of flight of certain persons who were seen running from the locality immediately after the offense was committed."

People vs. Pool, 27 Cal., 572, defendant indicted with others for the murder of Joseph M. Staples. It was proved that at about ten o'clock of the evening of the day previous, the defendant with thirteen persons stopped two stage coaches and by violence took from one of them a large amount of gold. Deceased who was a Deputy Sheriff became informed of the robbery. He and a constable started out in persuit of the robbers, and at about five o'clock the next morning came upon some of them at the Somerset House, where they were together in a room and finding a gun standing at the door of the room deceased took it into his possession, and then opening the door addressed the defendant and his companions, saying to them: "You are my prisoners—surrender," and at the same time pointing toward them the gun which he held in his hands while they, on their part, instead of surrendering drew their pistols and opened fire on the deceased causing his death. Defendant was found guilty and sentenced to death. Appeals—one ground being that Staples did not at the time he attempted to arrest the defendant and his companions, inform them in terms of his official character, nor the cause for the attempted arrest, and therefore argued on defendant's behalf that the homicide was justifiable.

Court—"A false or mischievous notion seems to have obtained to a considerable extent that a person may justify or excuse the slaying of his fellow being for causes which fall far short of any exigency from which it may lawfully be presumed the act of the slayer was necessary for the defense of his person, habitation, or property, or for the protection of those whom by the law of nature he is

bound to protect and defend. The right of defense in the cases indicated is founded on necessity, and when sought to be interposed in justification of the act, the first inquiry is as to the alleged necessity." Court then showed that under circumstances they were not justified in taking his life.

"The defendant objected to the evidence offered and given at the trial in relation to the robbery, and now insists that the Court erred in permitting any examination as to that offense and the defendant's connection with it. In our view of the matter it was material for more reasons than one:

"First.—To show that the defendant was engaged in the commission of the robbery, and that he and his confederates had a motive beyond their own protection, as men innocent of crime, in killing the deceased while in pursuit of them.

'Second.—

'Third.—To establish a condition of circumstances from which the robbers would be deemed to have sufficient notice that their pursuers were officers of the law, or citizens in pursuit of them as malefactors.' " Court says further—"the circumstances of having committed the crime of robbing the stage coach was sufficient to cause them to apprehend pursuit."

Pierson vs. People, 79 N. Y., 424. The defendant was charged with the murder of one W. The alleged motive was defendant's desire to possess the wife of the deceased. On the trial evidence was received to show that eleven days after the death of W the defendant and the wife of deceased appeared before a clergyman in Michigan to be married. Defendant there took an oath that there was no legal objection to the marriage. Although this evidence tended to prove the commission, by the defendant, of another crime than that for which he was on trial, the Court said, "this evidence tended to prove that the motive which operated

upon the prisoner was the desire to possess W's wife; that the passion for her was so absorbing that he was determined to overcome all obstacles standing in his way."

In Hawes vs. State, 88 Ala., 37, the defendant was on trial for the murder of one of his children. Two other indictments were then pending against him for the murder of his wife and another child. Evidence was received to support the theory that the motive for the killing of all was to open the way for a second marriage which is consummated a few days after the last death. This was held proper because the motive was the same in each case.

In People vs. Molineaux, 168 N. Y., at 293, Court says: "The exceptions to the general rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, (5) the identity of the person charged with the commission of the crime on trial. (Wharton on Crime Ev. (9th ed.), Sec. 48.)"

31 Texas Crim. Appeal, 312. Appellant was convicted of an assault with intent to murder one Walden. Had been convicted of a similar assault upon the same party once before. Over appellant's objection the prosecution was permitted to prove on the trial of this cause the prior assault and former conviction. In this case the State relied on circumstantial evidence. The evidence objected to was admitted to prove motive and ill will.

Court: "Where a crime has been committed, and the circumstances point to the party on trial, charged with such crime, any fact tending to show

him the perpetrator of the offense is admissible to prove motive, even tho such fact or circumstance be remote; and it is competent to prove acts of the accused occurring prior to the assault under investigation when the acts themselves, taken in connection with other facts or circumstances, prove or tend to show the animus of the accused towards the assaulted party. Clearly permissible for prosecution to prove the former assault, as well as indictment predicated thereon."

People vs. Keep, 123 Mich., 231 (1900). Upon a prosecution for robbery, evidence that the respondent escaped from jail while serving a sentence for a misdemeanor is competent, where it appears that he was at the time under arrest for the robbery, and knew that he would be put to trial for that offense.

Exceptions 28 and 29 deal with the admission into evidence of two photographs representing the dead bodies respectively of Black and Wier.

These photographs were relevant and material. So far as the one of Black is concerned it is sufficient to say that it was material to prove the identity of the victim and the character of the injury.

Both photographs were evidential of the deadly accuracy with which defendant shot, and also to show the positions of the wounds, so that the jury, having the conflicting testimony as to the position of Sage in the room during the firing, and having the floor plan of the house before it, could be aided in determining whether the first two shots were fired on a sudden appearance of two figures bursting into the door, or were in fact fired as Otis said while Sage was at the open door pointing at the two men in their described positions on the stairs.

POINT TWO.

The defendant suffered no injury by the abandonment by the State of the counts in the indictment charging manslaughter and assault and battery (Assignment 33).

To have justified a conviction of manslaughter in this case it was necessary for the jury to find that the defendant in a sudden transport of passion, upon reasonable provocation and without malice did this killing; or else that defendant was so grossly reckless and careless in the use of this firearm that he unintentionally killed Black. To have so found would have been a travesty on justice.

Why should the jury be permitted to reflect such a state of affairs in their verdict, which not even the defendant claims existed?

The defendant says he shot in self-defense, he does not even intimate that his acts *extenuate* the killing; he justifies the killing on the ground of necessity and asks an acquittal under the law.

At the conclusion of the testimony that was clearly the issue, guilty of murder, or not guilty; and the State accepted it by abandoning the counts for manslaughter and assault and battery.

The jury having convicted this defendant of the highest degree of crime possible under this indictment, to which they, by their verdict, attached the extreme penalty of the law; it is now contended by the defendant, that he suffered injury because the jury was not permitted to contemplate and throw into the discard more than one offense inferior to that of which they found him guilty.

All objections to the abandonment of the manslaughter count should certainly be disposed of by a determination of the question of there being sufficient evidence, or not, to justify the first degree verdict which was found.

POINT THREE.

The trial Court did not err in its charge, nor in refusal to charge as requested.

The exceptions to the Court's refusal to charge as requested are embraced in assignments 34 to 44 inclusive, and to the Court's charge in those numbered 45 to 53 inclusive.

Assignment 34—for refusal to charge:

> "The police officers, even though they had a written warrant for the arrest of the defendant Sage, and even though they had a lawful right to arrest him without a warrant as a suspected felon, still the officers, or either of them, had no lawful right to push open the door of defendants' room or to stand at the door after it was opened and display a deadly weapon without announcing the fact that they were police officers, or by making it known to the defendant by other evidence that they were such officers. And if they did thus push open the door or display a deadly weapon in the open doorway, whether or not they fired any shot or shots, and the defendant, Sage, in that situation and under those conditions, not knowing them to be police officers, but reasonably believing them to be intruders, and having a reasonable apprehension of peril to himself, inflicted the mortal wound in an effort to preserve his own life, or save himself from serious bodily injury, then both of these defendants should be acquitted."

The vice of this request to charge lies in the inclusion therein of argumentative matter not

within the case, i.e., "even though they had a written warrant for the arrest of the defendant Sage." There is no suggestion that there was a written warrant, and the Court was not obliged to enter the realm of speculation with counsel of defendants to propound a purely academic theory to the jury.

Assignment 35—refusal to charge:

> "Whether the defendant Sage knew, or had reason to know that the men at whom he fired were police officers, I charge you that you cannot convict him of murder in the first degree unless he fired at them, killing Black, and in doing so not only intended to kill, but fired wilfully and without premeditation and deliberation, and this it is the burden of the State to prove to you beyond a reasonable doubt. Three mental elements of wilfulness, deliberateness and premeditation must all have existed in the mind of the defendant, Sage, and must have entered into his killing of Black before you can convict him of murder in the first degree."

This request likewise is vicious for it asks the Court to propound to the jury an inaccurate statement of the law, namely that Sage must have "fired at *them,* killing Black." Sage could have been convicted of murder in the first degree if he had wilfully, and with premeditation and deliberation fired at any *one* of these officers, killing another. The request also could have been rejected by the Court as tending to confuse the jury as to the necessary elements of the crime of murder in the first degree, for it contains the proposition that not only must the killing be *intentional,* but in *addition* to *intention* there must be wilfulness, premeditation and deliberation. Unexplained, this creates four

instead of three separate mental functions, and the Court is not called upon to charge a request which needs explanation.

Assignment 36—refusal to charge:

> "If you find that at the time the officers came to Sage's door he was aroused from sleep and that at the time of the shooting of Black, Sage was in such a state of mental confusion or drowsiness that he did not know the visitors were officers, and his confusion resulted in intent to kill upon sudden heedless impulse, and recklessly, your verdict cannot be for murder in the first degree against him, but murder in the second degree only."

This request is open to the same objection suggested respecting number 34; it introduces speculation on a condition of drowsiness and confusion in the defendant entirely foreign to the evidence. The defendant says (page 187, line 35, *et seq.*), "Well, I looked at the clock, I should judge it was after five o'clock. When I woke up I turned over to the side of the bed and I noticed that she was hooking her dress or something, and not being on speaking terms with her I never questioned her as to why she got up. I got up, walked across from the bed—towards the dresser. She stepped to the door, * * * unlocked the door."

All this preceded the opening of the door.

Does this justify a request to charge embracing drowsiness and confusion?

Assignment 36 (2nd No. 36)—refusal to charge:

> "There has been evidence in this case that at the time of the shooting, and for some months prior thereto the defendant, Mae Miller, was living in the state of illicit relationship with the defendant, Sage. I charge you that you

cannot consider the fact against her in dealing with the question of her guilt or innocence under this indictment. And the same is true as to your consideration of the guilt or innocence of the other defendant, Sage."

The testimony to which this request relates was introduced by defendants' counsel from defendants. The jury is under the legal obligation of considering all of the evidence in determining the guilt or innocence of a defendant, and the defendant having produced the evidence, could not ask the Court to direct the jury not to consider the evidence against defendants. A request to limit its application would have been proper. Certainly the jury could not have been left to consider evidence of this illicit relationship *in favor of the defendants,* if it was instructed not to consider it *against them.*

Additionally it is urged that the evidence was relevant on the question of "motive" which the jury must consider. This is argued in the brief under another point.

Assignment 37—refusal to charge:

"The mere fact that the person killed in the present case was an officer of the law, and even though you find an additional fact that as such officer he was, at the time he sustained the wound from which he died, arresting or about to arrest the defendant, Sage, in the actual and legal performance of his duty, those facts alone are not sufficient to raise the killing to murder in the first degree. In order to find either defendant guilty of murder in the first degree, the State must establish by proof beyond a reasonable doubt, not only that the defendant, Sage, intended to kill the officer, but that he also premeditated that killing and deliberated

upon the thought of carrying out his intent to kill."

This request to charge is without any merit. It attempts to define the State's burden of proof in murder of the first degree, and omits any reference to the necessity of the intent to kill so premeditated and deliberated upon being carried into execution.

Assignment 38—refusal to charge:

"Even if you do find that it has been proved beyond a reasonable doubt that the defendant, Sage, at the time of the shooting of the officer, actually had a specific intention to take the officer's life, but did not premeditate the killing of the officer, and did not deliberate upon the intent to kill him, then you cannot find defendant, Sage, guilty of murder in the first degree, but of murder in the second degree only."

To have charged this request would have been prejudicial to the defendant, because it compels under limited given circumstances, a conviction of either degree of murder, making no allowance for a possible acquittal of the defendant in the event of his having shown justification.

Assignment 39—refusal to charge:

"To constitute murder in the first degree, the design to kill must be deliberately formed. The conception of such a design and its deliberate execution necessarily take some appreciable time. An intention to kill carried out does not constitute murder in the first degree unless coupled with the deliberation and premeditation prescribed by the statute, and which require time—not a long time—not

necessarily an hour or a minute, but still an appreciable time and not until after such premeditation and deliberation have taken place does the act become 'wilful' in the sense intended by the statute, so as to be murder in the first degree."

It is urged by defendant-in-error that the substantive law contained in this request was not only charged in the trial Court's own language but under other requests made by the defendant which were charged by the Court.

Assignment 40—refusal to charge:

"If you find that the execution of the preconceived design to kill followed that design so instantly as to preclude the idea of deliberation, you cannot find the defendant Sage guilty of murder in the first degree, but murder in the second degree only."

As to this request it is likewise urged the Court charged the law in the request referred to, and was not bound to accept the identical language.

Assignment 41—refusal to charge:

"There is testimony in the case from which you may infer that the police officers went to the defendant's home for the purpose of arresting Sage for an escape from State Prison at Trenton. For such an arrest they had no warrant in their possession. I charge you that such escape is in our law not a felony but a misdemeanor only; and that being a misdemeanor the officers had no right to arrest Sage for that offense without having a warrant for that arrest in their possession at the time."

To charge as requested would have been error and the language of the request is so couched as to

eliminate the other authorities, to wit: the known charge that the defendant was wanted on a warrant for the alleged commission of a felony in West New York. For these reasons the request was properly rejected.

Assignment 42—refusal to charge:

> "If you find that the police officers went to Sage's house to arrest him for an escape from State Prison, I charge you in that event that the officers had no right to make such an arrest. An escape under our law being not a felony but a misdemeanor only, the officers had no right to make such arrest without having in their possession at the time a warrant for such arrest. There is no evidence that such warrant was in their possession at the time of the attempted arrest of Sage."

To this request the same objection is made as to the last preceding one, with the additional reason urged that both of these requests use the term *felony* as distinguished from misdemeanor, without reference to the fact that until recently all crimes in New Jersey were designated, if designated at all, as misdemeanors, either "high misdemeanors" or "misdemeanors," and that the rule for guidance is the character of the offense, which may be judged by the character of the penalty attached thereto.

Assignment 43—refusal to charge:

> "There is testimony that at the time of the attempted arrest of Sage there was in existence a warrant against him charging felony. There is no evidence that at the time of the attempted arrest by the officers such warrant was in their possession. I charge you that though such warrant may have been in existence the officers had no authority to make an

arrest in the execution of that warrant, unless at the time of making the arrest the warrant was in the actual possession of the officer or officers making the arrest."

To have so charged would have been error; because knowledge of the existence of a lawful warrant for the arrest of the defendant for a crime here characterized as a felony, though not in the hands of the arresting officers, would have justified an arrest of a defendant so charged. Additionally, the language of the request, "the officers had no authority to make an arrest *in the execution of that warrant,*" had no bearing on this case because no contention was made that the warrant itself was being executed.

Assignment 44—refusal to charge:

> "If you find from the evidence, considered in connection with the instructions I have given you relative to the law of arrest, that under the circumstances in this case the officers had no right to arrest Sage at the time of their visit to his home, then I charge you that if when they appeared at the doorway to Sage's room they displayed the deadly weapons or weapons in such a way as to give Sage a reasonable apprehension of his own life, or serious bodily injury to himself, then Sage had the right to resist the officers, even to the extent of killing, and even though he knew they were officers, if he had reasonable grounds at the time of believing such resistance to be necessary to save his own life or to prevent serious bodily injury to himself."

As objection to this request it is urged that there are two erroneous proportions of law contained therein (a) the language "they displayed the

deadly weapon or weapons *in such a way* as to give Sage reasonable apprehension of his own life," etc., makes it dependent upon the way the officers displayed the deadly weapon and not whether in fact that way caused Sage to have a reasonable apprehension of his own life (b) the legality of Sage's conduct did not depend upon whether *the jury found* from the evidence "that under the circumstances in this case the officers had no right to arrest," *but whether Sage, not the jury,* knew or believed that the officers had no right to arrest. And it is urged as a further objection to this request that the language "if he had reasonable grounds at the time *of* believing such resistance to be necessary," etc., does not clearly state the law. It is not a determining factor that he did have reasonable grounds *of* believing, but whether, having reasonable grounds, he *did* believe.

Assignment 45—alleged error in the charge:

> "By reference to the indictment you will notice that there are three counts in this indictment as originally presented to this Court by the Grand Jury. The State has abandoned two of these counts, that is to say, the count in the indictment which charges the crime of manslaughter and also the count in the indictment which charges the crime of assault and battery, therefore, gentlemen of the jury, I charge you that you are not to concern yourselves with the last two counts in this indictment, as the indictment will be taken by you from the court to the jury room, for your consideration of this case, but you will concern yourselves with the first count in the indictment which charges the crime of murder, with respect to which I will charge you more specifically."

This assignment of error involves the same question raised by assignment 33, and in addition to what has already been contended for by defendant in error, it is urged that in effect when considered in connection with the entire charge the Court here instructed the jury that the defendant must either be convicted of murder or acquitted as was done in the Bullock case, respecting which this Court says, "the instruction of the trial Court in presenting the case, on the theory that the accused, if convicted, should be convicted of murder, was correct." Bullock vs. State, 65 N. J. L., 557 at page 573.

Assignment 46—alleged error in the charge:

> "Premeditation and intent to kill need not be for a day or an hour or even a minute, for if you, gentlemen of the jury, believe there was a design and determination to kill distinctly formed in the minds of these defendants, or either of them at any moment before or at the time these shots were fired, which design was deliberately and with premeditation carried out, it was wilful, deliberate and premeditated killing, and therefore murder in the first degree."

So far as this excerpt from the charge goes, it is a correct statement of the law, containing all that was said in Donnelly vs. State with the addition of the words, "which design was deliberately and with premeditation carried out." The addition certainly strenghtened rather than weakened the instruction, a part of which it was. Also is this portion of the charge in connection with the whole charge upon this subject, entirely harmonious with State vs. Clayton, 83 N. J. L., 673. What this Court has said respecting Donnelly vs. State on this point in later cases such as State vs. Bonofiglio, 67 N. J. L., 239, State vs. Clayton (*supra*), State vs. Deliso,

75 N. J. L., 808, 818, in no wise overrules what this Court declares as the "constructions which we have given to the statute," and which "will settle its meaning in New Jersey, and be useful in establishing a uniform rule of construction in all our criminal courts." Until this Court in words of equal certainty repudiates this as a guide for our criminal courts it cannot be construed as error that the trial Court declined to charge also some other definition of the crime likewise approved by this Court.

Assignment 47—alleged error in the charge:

> "I charge you now that the shooting of the revolvers by these defendants or either of them, at the body of the dead man, Black, was an unlawful act against the peace of this State likely to be attended by the consequence of bloodshed, so that such killing is presumed to be malicious and is therefore murder unless and until the defendants produce facts and circumstances upon which justification, excuse or extenuation may arise, unless such facts or circumstances of excuse or extenuation appear from the evidence introduced against them."

This excerpt, together with its context is a correct statement of the law.

Assignment 48—alleged error in the charge:

> "If it shall have been proved to you beyond a reasonable doubt that the bullet which caused the death of John H. Black, was unlawfully fired by these defendants or either of them, then I charge you that under the law of this State this was an act against the peace of the State, the probable consequence of which was bloodshed, so that such killing is presumed to be malicious and is therefore murder, but

murder in the second degree until the State, by its proof, beyond a reasonable doubt, shall have raised the degree of murder from murder in the second degree to murder in the first degree by establishing beyond a reasonable doubt the elements of wilfulness, deliberation and premeditation on the part of the person or persons inflicting the mortal injury as I have heretofore defined those elements to you. Provided, however, that you will bear in mind what I have already charged you, that it is incumbent upon the defendants to adduce evidence of facts and circumstances from which justification, excuse or extenuation may arise, unless such facts or circumstances appear from the evidence introduced against them."

Assignments 49-52 inclusive. Alleged errors in the charge:

These assignments deal with exceptions to that portion of the Court's charge relative to the admission into evidence of the fugitive's card, the warrant for the "stick up," the authority of the officers to arrest and the effect of the conviction in Passaic County.

Except for that portion in this excerpt from the charge wherein the trial Court refers to the authority of the police officers to arrest, this language is mere comment by the Court upon the evidence, which at the time and otherwise in the charge is in express terms left to the sole determination of the jury. This was not error. So far as the instruction relates to the authority of the officers to arrest, under given circumstances, to be determined by the jury the charge correctly states the law.

This portion of the charge is a correct statement of the law and the proviso added cannot be constructed to mean that the burden of proof is shifted

from the State to the defendant on the whole case; and as the Court in express terms refers back to what has already been charged, the jury could not have misunderstood this instruction as to the defendant's obligation to adduce evidence of facts and circumstances from which justification, excuse or extenuation may arise, and that it was applicable only to the presumption of murder in the second degree, where the unlawful killing resulted from an act against the peace of the State, of which the probable consequence may be bloodshed.

By defendant's counsel on cross-examination, it was developed that the police, Otis, Black and others, had a conversation at Police Headquarters, also on the street and again inside the house, concerning this proposed arrest. According to this evidence the plan made up by these officers was to effectuate the arrest by engaging the defendant in a conversation about his automobile (page 66-67) and that Black had made the final plan and took charge saying, "leave it to me, I will do the talking"; and that Black determined that they all put their guns away, saying "you had better put them (guns) back, because he (Sage) is liable to shoot if he sees a gun"; and Black, Weir and Otis did put their guns away (page 43). To shed further light upon the assistance under which the Police Officers were operated, the following testimony is quoted (page 85): "Q. In regard to the plans made by this Officer (Black) you (Otis) were the one who had the picture, 'Ex. S9,' is that right? A. Yes, sir. Q. Was it or was it not the purpose arranged between you officers that this defendant if identified should be arrested? A. Yes, sir."

Assignment 53—alleged error in the charge:

Here the trial Court instructs the jury to consider knowledge of the official character of the person alleged to have been arrested on the part of the

defendant, if the jury found that he had such knowledge, in connection with the conduct of defendant subsequently.

Specification of Cause for Reversal.

Except those specifications hereafter particularly referred to, it is deemed that the subject matter of the specifications has been covered by answers to exceptions dealing with the same objections.

> "3. Notwithstanding there was no testimony whatever adduced as to any knowledge or information respecting the defendant possessed by the deceased, Black, the Court permitted the jury to speculate whether the deceased had a reasonable ground for a suspicion that the defendant was guilty of a crime."

Testimony by James Walton (page 118, line 35):

> "Q. How did you happen to go there? A. I met Sergeant Black at about half past four; he told me not to go home, he wanted to use me to go around to 19 Manhattan Avenue; he had telephoned to Lieutenant Otis of West New York to come down, that he had a man by the name of Miller—"

The answer was interrupted by objection sustained, but no motion was made to strike out the evidence so far as it had gone.

This testimony, together with that above referred to on pages 43, 66, 67 and 85, does not justify the assertion that "there was no testimony whatever adduced as to any knowledge or information" etc., by Black.

This court in State vs. Bertschy (*supra*), from surrounding circumstances, justified the jury in

finding, as they must have, that Janowski, the slain citizen who attempted to arrest the fugitive Bertschy, heard what was said and was acting in aid of the pursuing officer.

> "4. The Court instructed the jury that suspicion concerning the defendant's criminal guilt, entertained by any member of a police party of six, justified the deceased, in undertaking the arrest of defendant without a warrant, irrespective of whether the deceased shared such suspicion."

This is a mistatement of what the Court did charge, for it said (page 342, lines 40 *et seq.*) :

> "I charge you that if Black was in the act of arresting or attempting to arrest the defendant Miller and had reasonable cause to suspect that Miller had committed the crime of robbery, Black was justified in arresting or attempting to arrest Miller without a warrant, and for that purpose calling to his assistance such other officers as were necessary to accomplish that purpose."

And in the charge immediately following above quoted the trial Judge said, having referred to the escape, etc.:

> "Then these officers or such of them, having reasonable cause to believe or suspect the truth of such facts, if they were facts, were justified in arresting this defendant without a warrant."
>
> "7. Notwithstanding an absence of proof as to the purpose for which the deceased, Black, went to the defendant's house, the Court permitted the jury to assume that it was to arrest

the defendant, either for robbery or prison breach."

The testimony is (page 85, line 20):

"Q. Was it or was it not the purpose arranged between you officers that this defendant, if identified, should be arrested? A. Yes, sir."

"10. The Court instructed the jury that there was evidence from which it might find that the defendant escaped from State Prison notwithstanding the undisputed and contrary proof that he had merely neglected to return voluntarily to the institution after having been liberated therefrom for the performance of some service four miles away."

Was there evidence that Sage escaped from State Prison? Sage says he did.

On direct examination (page 184, line 4):

"Q. Did you escape from State's Prison at Trenton? A. Yes, sir.

Q. When was that? A. The 7th of July, 1922."

"11. The Court, by its charge, misled the jury into the belief that a mere departure from a prison, or failure to return voluntarily thereto, unaccompanied by prison breach, constituted a crime for which arrest might lawfully be made."

The Court said nothing about the escape or "mere departure" being a *crime*. What the Court said was, that if the defendant escaped, having been committed for the perpetration of a felony, he was amenable to arrest without warrant by an officer having that knowledge or reasonable suspicion.

If it be contended that the defendant Sage, after his escape from the State Prison, was not the subject of legal arrest without warrant because the offense of escape under our law is a misdemeanor and was not at common law a felony; such reasoning would in the given case resolve itself into a strange situation. At the time Sage committed the offense in Passaic County, the crime they charged among others being that of grand larceny, he was the subject of lawful arrest without warrant by a police officer on reasonable suspicion of having committed a felony even though it afterwards was made to appear that no such felony had been committed by him. For the actual commission of this crime, he was convicted and committed to State Prison from where he escaped; and if he was then not the subject of a lawful arrest without warrant, it follows that the criminal acquired greater rights after conviction than he had when the presumption of his innocence still surrounded him.

THE DEFENDANT SUFFERED NO MANIFEST WRONG OR INJURY BY THE ADMISSION OR REJECTION OF EVIDENCE.

THE DEFENDANT WAS NOT INJURED BY THE ABANDONMENT OF THE COUNTS FOR MANSLAUGHTER AND ASSAULT AND BATTERY.

THE DEFENDANT SUFFERED NO INJURY BY THE COURT'S REFUSAL TO CHARGE AS REQUESTED.

THE DEFENDANT SUFFERED NO INJURY BY THE COURT'S INSTRUCTIONS TO THE JURY.

THE VERDICT IS NOT CONTRARY TO THE WEIGHT OF EVIDENCE.

For the above reasons it is urged that the judgment of the Hudson Oyer and Terminer, be affirmed.

Respectfully submitted,

JOHN MILTON,
Prosecutor of the Pleas,
Attorney of Defendant-in-Error.

GEORGE T. VICKERS,
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38436–

NEW JERSEY COURT OF ERRORS

AND APPEALS.

STATE OF NEW JERSEY, Defendant in Error, vs. FRANK SAGE, Defendant Below, Plaintiff in Error.	In Error.

BRIEF FOR PLAINTIFF IN ERROR.

Frank Sage, the plaintiff in error, (hereinafter called the defendant), was convicted of murder in the first degree in Hudson County Oyer and Terminer, and on June 15, 1923, was sentenced to death.

In outline the facts are as follows:

Defendant on November 18th, 1921, was sentenced by the Passaic County Quarter Sessions to be confined in the State Prison for a minimum term of one and one-half years on a plea of non vult to an indictment for entering and larceny and receiving, and was received in state prison November 23rd, 1921. (Exhibit S-24; pp. 357-366; p. 169, l. 5). On July 7th, 1922, he, with three other prisoners, was released from actual confinement in the prison and despatched to a point three or four miles away from the institution to help the prison truck driver in the performance of some duty. (pp. 114, 115, 116, 184). He eluded the latter while so engaged, (p. 184, L. 15) did not return to the prison but traveled to Hudson County where he contin-

uously remained until his arrest for the homicide under consideration. (P. 185). The homicidal act for which he stands convicted occurred at 5.30 A. M. (daylight saving), May 22nd, 1923. (P. 15, L. 10). The defendant with a paramour who was jointly indicted with him, was living at Jersey City, in the rear part of the top floor of a two story building, the front of which was occupied as a bedroom by the landlord and his wife. (P. 14, LL. 30-40) The doors opening to these respective apartments were directly opposite to each other and were located on either side of a platform or landing at the head of the stairway. The area of this landing is described as thirty inches square (p. 16, L. 32) and the stairway conducting to it is angulated by a turn to the right on the 11th step at which point there is a platform and from which is a further ascent of four steps to the top landing (p. 16, LL. 20-30) flanked, as described, by the two bedroom doors.

The deceased, John J. Black, was a Jersey City police sergeant, who before dawn on the day of the killing, organized a police expedition consisting of himself, four other Jersey City policemen of subordinate rank, and a police lieutenant named Otis of the town of West New York. (P. 118, LL. 20-40) This party foregathered and repaired in an automobile to the home of defendant at the hour named. On arriving Black, who was leading the expedition, (p. 84, L. 38) ordered three of his men to guard the front, back and side of the house (p. 119, L. 19), while Otis and a policeman named Weir, were directed to remain with, and accompany him, in the enterprise of entering the home of the defendant.

The case contains no hint of what was the purpose of Black in thus beleaguering and attacking the house of defendant beyond the following scraps

of testimony educed from Otis:

Q. When was it you saw him? A. I don't know just what day, we were looking for him then.

Q. About how long before this, for the purpose of fixing the time? A. Well, say three weeks.

Q. By the way, when you say that we were looking for him, who do you mean? A. Well, Captain Kaerth.

Q. Who is Captain Kaerth? A. Captain of the West New York Police Department.

Q. And when you say we were looking for him, were you acting under instructions from Captain Kaerth? A. Yes, sir.'

(P. 45, LL. 20-35).

Q. How long did you stop downstairs in the hallway after you were admitted to the house? A. We stood there a little while, just to talk things over, talking.

Q. What were you talking about? A. I could not say, I do not remember.

Q. Do you remember what you were talking about? A. No, sir.

Q. Was it about arresting this man? A. Yes, about arresting this man.

Q. What did you say about arresting him? what was said? A. I do not just remember.

(P. 68, LL. 25-40).

Q. Was it or was it not the purpose arranged between you officers that this defendant, if identified, should be arrested? A. Yes, sir.

(P. 85, L. 20).

New Jersey State Library

In its fullest extent the testimony established that Kaerth, Otis' captain in West New York had previously given him a copy of a circulated advertisement issued from the State Prison after defendant's departure, which Kaerth had received from a policeman of another municipality. (P. 42, L. 10; P. 149, LL. 25-40). This advertisement contained the defendants' picture and physical description, announced that he had "escaped from the Perrine Avenue Warehouse" and offered a reward of $25.00 for information to be wired to the principal keeper. (Exhibit S-9, P. 355). Otis further testified that his captain had told him that he was wanted for a "stick-up," (P. 88, LL. 25-40) and that he knew of, and had seen, a warrant requiring the defendant's apprehension for robbery. (P. 89). The police captain, although a witness to prove the existence of the warrant, did not corroborate the statement that he imparted such information to Otis, but testified that the warrant had been issued (P. 146, L. 15) and remained in his hands (P. 146, LL. 20-30); and that Otis, through his dealings with a police blotter might have gleaned some information concerning it from an entry in the book. (P. 147, L. 10-30). The warrant was exhibited at the trial and although identified by both Otis, (P. 89, L. 30), and the captain, (P. 146, L. 29), was not offered in evidence. (P. 150, L. 25). Its authenticity was not proved, no allusion whatever was made to any sworn complaint supporting it, and it was conceded that it was not in the possession of Otis or Black or any of the raiding party on its arrival at the defendant's home.

There was nothing more than the bare and haltingly given testimony that Otis and the others were present to *arrest* defendant, and no testimony that either Black or Otis in fact suspected, or had

ground to suspect, defendant of any criminal guilt.

Of the party of six men, but one (Weir) wore a police uniform. (P. 15, L. 15). After three of them, Conallon, Walton, and Dundon, had been posted about the outside of the building, Black, Otis and the uniformed man, Weir, ascended the stoop and Black rang the bell. (P. 56, L. 1). The landlord, Kaerth, who with his wife had just risen, came down and opened the door. The three policemen confronted him with drawn revolvers. (P. 26. LL. 1-15; P. 69, L. 1-15). Otis, who had in his possession the photograph on the State Prison advertisement, showed it to the landlord and learned from him that the defendant lived in the house. (P. 27, LL. 1-10; P. 42, L. 15). Without further parley the three proceeded past the landlord with guns still out and went up the stairs, Black first, Otis next and Weir last. (P. 42, LL. 30-40). On reaching the top landing, Otis stood with his back to the wall, facing the short flight of four steps in which the stairs terminated; Black stood in front of him with one foot on the landing and other two steps below, (P. 43, LL. 20-30), with Weir behind him, on either the landing or the first step below. (P. 58, LL. 30-35). The landlord after the policemen pushed past him at the front door, went to the kitchen on the first floor for a drink of water (P. 15, L. 40) and then going upstairs squeezed past the three men at the landing and returned to his bedroom, closing the door after him. (P. 16, LL. 1-10).

Black and Weir both lost their lives, and the State's testimony as to what transpired after the three men took their position in front of defendant's door, is furnished by Otis alone. His account is as follows:

Black standing on the short flight of stairs, so that he had to reach over for the purpose, knocked at the door (P. 43, L. 40; P. 58, L. 35). The woman defendant through the closed door asked who was there, Black asked for Miller and on hearing that he was not in, announced that they were officers from Police Headquarters and that they wanted to see the woman. She asked them to wait a minute while she dressed (P. 44, LL. 1-10). After a wait of three minutes the door was opened by the woman, about three or four feet, (P. 59, LL. 20-30). When the door was opened there was a pause during which Otis waited to hear what Black was going to say and two shots were fired by defendant from within the room very rapidly like "Bang," "Bang." (P. 44, L. 30). The defendant at the same time called out to them "get back there." (P. 53, L. 40). The first two shots were fired within less than a second and the next shot was fired in about two seconds. (P. 65, LL. 1-10). The third shot was fired down the stairs by the woman (P. 46, L. 35), who instantly afterwards observed Otis and said, "there's another one right here, get him." (P. 47, L. 5). After the firing of the first two shots, Black and Weir turned and went downstairs (P. 60, LL. 10-20), Otis remaining in his position on the top landing. A few seconds after the firing of the third shot, Otis jumped down to the next landing with his gun in hand and turning his head saw Sage shoot at him but did not know he was hit. (P. 62, LL. 15-20; P. 47, L. 45). He went downstairs, crawled into the front room, saw Black lying there in a pool of blood, (P. 48, L. 36), stood up, went in the rear room and saw Weir rolling in pain and heard him moaning, (P. 49, L. 35), knelt beside Weir, then got up, with his gun still drawn, stood behind the door jamb; the woman came downstairs

and as she entered the room Otis heard Sage upstairs inquire "is there any more of them down there?" (P. 52, LL. 20-40) seeing that the woman was unarmed he ordered her to go upstairs and when she started up he fired two shots after her through the door that was ajar as she passed out "to scare them and let them know he was there." (PP. 53 and 54). His summation of the shooting was that one of the first two shots fired by Sage struck Black, the third shot fired by the woman struck Weir and the fourth shot fired by Sage struck himself. (P. 62, LL. 10-20).

His version of the actual happening was discredited by the State, which on the strength of the testimony concerning the autopsy, (PP. 92 to 105), the character of the bullet extracted from Otis, (P. 95, L. 20), and an examination of the premises by an expert (PP. 106-107) conceded that he was ~~in~~ UN-reliable, and that but three instead of four shots were fired in the doorway and that all were fired from a .38 calibre gun such as Sage held and which was the only one of its kind on the premises.

The State's repudiation of Otis' story appears in a formal admission, (P. 113, LL. 1-10).

The contradictory account by the defendant is as follows:

He went to bed at midnight after drinking three or four bottles of home brew and a pint of wine (P. 187, LL. 1-10) woke up and arose while the woman was dressing; he had not heard the knock by Black or the alleged conversation between him and the woman that included an anouncement that they were policemen; had no conversation with her because he was then on bad terms with her; stood by the dresser, in the open top drawer of which lay the pistol with which the shooting was done; while he

was thus standing opposite the doorway the woman finished dressing, stepped to the door and unlocked it; it then flew open and as it did she was thrown back against a wardrobe; simultaneously he saw the form of a man and a man's arm come up with a revolver; at the same moment he heard a shot but did not know from whence it came; he reached in the drawer for the gun, pulled it out quickly as the form seemed to move, together with another form that he observed, and he fired one shot; he then moved two or three feet to the left towards the bed and fired two more shots; standing with his gun still in hand he looked out of the doorway and saw two men going downstairs, neither of these were in uniform and neither had the appearance of having been hurt; stepping over to the chair on which his trousers were he saw through the window another man in the adjoining yard with a gun in hand and called, "hey" to him, and fired a shot through the window at him and the latter after returning the fire with two shots, ran away, (PP. 187-192); shortly after he heard police whistles and his landlord told him that the house was surrounded; realizing that he had made a mistake he threw the gun that he had used and another that was in the drawer, up into a space between the ceiling of the roof and drawing himself up hid there until he was arrested. (P. 194).

The female defendant testified:

A knock at the door awakened her and she asked who was there. A man's voice outside asked if Miller was in. She answered that they were sleeping and the voice answered back that he wanted either to see or talk to Mr. Miller and she told them to wait until she got some clothes on; got out of bed and dressed, then went to the door, pushed the bolt

back and turned the key; as she put her hand on the door to open it, it was pushed open quickly and a shot was fired immediately, causing powder to go into her eyes and she put her hand up to her eyes and in the meantime there were three more shots fired, then everything was quiet. She did not know where any of the shots came from having only heard them, having her hands over her eyes when the first shot was fired and until the last; when she took her hands away she saw two men walking downstairs. (P. 252, LL. 15-40; 253, LL. 1-15. No one said anything about police officers (P. 266, L. 2); (P. 271, LL. 30-40).

The landlord of the house and his wife, witnesses on the part of the State, both testified that while they heard the woman through the closed door tell the callers to wait until she got dressed, they did not hear any announcement made that the men were policemen. (P. 16, LL. 5-15; P. 28, LL. 5-15; P. 37, LL. 1-20).

To establish that the defendant was guilty of an escape from State Prison there were produced the photographic advertisement, above referred to; the negative from which it was obtained; testimony as to how such advertisement was compiled and the sources of information contained on the back thereof; the extent to which it was disseminated and, the records of the State Prison relative thereto, as well as the testimony of the guard who had the defendant in charge at the time of his departure. (PP. 128-134).

The State also produced the certified record of the judgment of the Passaic County Quarter Sessions and the bill of costs delivered to the Principal Keeper of the State Prison, identified by an prison employee, (P. 126, LL. 20-30), and also by a Passaic County Court Officer. (P. 169, LL. 10-30). To

these two documents were annexed a copy of the Passaic County indictment and a transcript of the minutes of the Quarter Sessions, certified by the Passaic County Clerk two days before the trial and this entire batch was admitted in evidence as one exhibit, over the defendant's objection "that the papers are not shown to be the official records that the State describes them as being." (P. 127).

In contrast with this fulsome proof as to the supposed escape, there was offered on the subject of the robbery charge merely the evidence that a police captain had a warrant in his possession which he had exhibited to the witness, Otis, and concerning which there was a notation in a book kept at the Police Station. The State made no gesture to prove the actual commission of the offense, any circumstances implicating the defendant, the terms of the complaint, the identity of the complainant or the nature or source of any information received or possessed by Black, Otis or any other member of the arresting party that defendant might have been guilty of the robbery.

I.

THE TRIAL JUDGE REFUSED TO PERMIT THE LAYING OF A PROPER FOUNDATION FOR THE CONTRADICTION OF THE WITNESS, OTIS. (Assignments 3 and 4.)

Otis was the only surviving eye-witness to the shooting. He had testified that the woman defendant opened the door, (P. 44, L. 22), and stood in the doorway (P. 59, L. 29); that he waited some appreciable time for Black to say something (P. 59, L. 31); that Sage was then behind the doorjamb, between the open door and the wall. (P. 46, LL.

10-30). That two shots were first fired, "Bang," "Bang," the effect of which he could not say. (P. 59, LL. 30-40; P. 60, LL. 1-10).

The following question asked of this witness, was ruled out on the ground that "It is not a contradiction. It may not have embodied all his testimony in that interview." (P. 77, LL. 30-40).

> Q. Did you say to this man: "Suddenly the door was pulled open partway, and I saw Sage stick his head and shoulders out partway, and there was Black on my left, right in front of him, in line with the open door, and then "bang" went Sage's gun and Black was shot. I saw Black turn and start down the stairs as if he was hit."

The question was asked concerning an interview given by the witness to a newspaper reporter. Its aim was to show that on such occasion the witness had in substance stated (a) that Sage, and not the woman, had opened the door; (b) that Sage, and not the woman, stood in the doorway; (c) that Sage was not behind the doorjamb; (d) that there had been no pause between the opening of the door and the firing of the shot; (e) that a single shot instead of two had been first fired and (f) that this shot visably took effect on Black.

All these comcomitants of the question tended to impeach the credibility of the testimony that the witness had just given. The subject of the question had originated in his examination in chief. It touched the *res gestae,* was not collateral or irrelevant and the inconsistency of the previous statement should have been permitted to be shown.

State vs. Sprague, 64 N. J. L., 420.

A witness having previously rendered an account of an occurrence may be impeached, after the laying of a proper foundation, by proof not only of inconsistent or contradictory statements, but also by his failure to mention circumstances of a character that would ordinarily be recollected and detailed.

State vs. Rosa, 71 N. J. L., 316.

II.

THE TRIAL COURT ERRED IN RECEIVING EXHIBIT S-9 IN EVIDENCE; IN PERMITTING ITS TERMS TO BE INTERPRETED SO AS TO IMPORT THE COMMISSION OF A CRIME BY THE DEFENDANT; IN PERMITTING TESTIMONY TO BE INTRODUCED AS TO THE SOURCES OF THE INFORMATION ENDORSED THEREON. (Assignments 5, 6, 15, 16, 17).

Exhibit S-9 (Page 355) was a photograph of the defendant taken in State Prison and reproduced from a negative discussed and exhibited at the trial (P. 128, L. 20). When the defendant eluded the vigilance of his guard and failed to return to State Prison, copies of this photograph was sent broadcast. (P. 133, L. 20). On the back of the photograph was the offer of a reward for information to be wired to the Principal Keeper of the State Prison. It contained the further statements that the defendant "escaped from the Perrine Avenue Warehouse, Trenton, New Jersey, July 7th, 1922" and "Crime, entering, larceny and receiving."

The most intimate relation that this Exhibit bore to the alleged crime itself resulted from the exhibi-

tion of the photograph by Otis to the landlord when the latter answered the bell, out of the defendant's presence. (P. 27, L. 2; P. 41, L. 22). From this beginning it was elaborated by having the witness, Otis, state that from his police experience "it is a Rogue's Gallery picture," (P. 86, L. 26); "it means that he is wanted for breaking jail, a fugitive from justice." (P. 87, L. 28); "It is known as a fugitive card." (P. 88, L. 15).

Whatever, if anything, might be discovered in favor of the competency of this exhibit, with its prejudicial endorsement, it was in any case self-explanatory, and the interpretations of the witness that it imported the commision of the crime of prison breach was clearly a criminatory opinion on a point which later proved to be vital to the defendant's right to resist an unlawful interference with his liberty, and to act upon the provocation that an unlawful arrest constituted.

If the photograph possessed any relevancy (which it did not), the matter endorsed thereon was inadmissable as hearsay.

State vs. Rombolo, 89 N. J. L. 535.

The endorsement viewed as a possible basis for reasonable suspicion to justify arrest without warrant was, by its own tenor, inadmissable because, (a) it did not intimate that the defendant had committed the crime of prison breach, nor that he had even escaped from a prison. It asserted the contrary by mentioning that his escape was from a warehouse without anything to indicate that the latter constituted part of the prison institution. (b) It did not request the apprehension of the defendant as it would most likely do had the defendant violated any criminal law in the manner of

escape. It offered merely a reward for information.

Viewed as corroborating the expedient through which Otis learned from the landlord the whereabouts of the defendant, it was irrelevant as hearsay; as proof of the facts endorsed it was hearsay; the interpretation of its meaning by Otis was incompetent because of being a plainly baseless opinion.

In addition to the testimony of Otis respecting this Exhibit, the witness, Mahaney, a prison employee, was permitted to testify that he took the photograph (P. 128, L. 1-40) collected the information and placed the printed matter on the back thereof, (P. 129, L. 30-40), and that he got such information from prison records the contents of which he was permitted to state. (P. 130, L. 10-30.)

It is contended that the testimony as to the exhibition of the picture to the landlord was incompetent as a transaction out of the presence of the defendant, and which, if admitted without objection, did not justify the further opinionatory and hearsay evidence touching its meaning and preparation that was offered to the length set forth.

III.

THE COURT ERRED IN PERMITTING THE WITNESS, MAHANEY, TO TESTIFY THAT HIS RECORD SHOWED THAT THE DEFENDANT ESCAPED FROM STATE PRISON. (Assignment 18.)

The real facts as to the defendant's departure from State Prison were established on the part of the State by the witness, Schmidt: "I had him out with me helping on a truck and he escaped from

me." (P. 114, L. 1-10). The defendant's admission was more circumstantial and was unrebutted;

> "I was working on a truck with a guard and three other men, outside the prison, about three or four miles from it, and I just walked away." (P. 184, LL. 10-20.)

Duly regarding the proven and undisputed facts of the occurrence, it is apparent that the defendant was harmed by having it even imputed that he "escaped from the Perrine Avenue Warehouse." There was no basis for an assertion that he escaped from any building whatever, and Mahaney's imputation, mild though it was, had no justification by the facts in evidence. A fortiori, there could be nothing to justify Mahaney, who professed no personal knowledge of the facts, in reading from his record (P. 131, LL. 30-40; P. 132, LL. 1-10), the still more damaging canard that "defendant escaped from State Prison, 11 A. M. the morning of July 7th, 1922." That the defendant was prejudiced by the admission of this hearsay testimony clearly predicated upon information at variance with the proven facts of the case can be best realized when it is seen that the court in its charge instructed the jury: "There has been admitted in this case evidence concerning the previous conviction of crime on the part of the defendant, Sage, and of his escape from a penal institution in this State." (P. 343, L. 25); "evidence has been introduced that these police officers were engaged in the performance of duties as such police officers, that some or either of them had information leading them or some of them to believe that the defendant, Miller, was an escaped convict, having on the 7th of July, 1922, escaped from the State Prison at

Trenton." (P. 342, L. 10).

Proceeding on the premise that the incompetent evidence of Otis and Mahaney established the fact that the defendant had escaped from the prison, and creating the erroneous impression that such escape, if committed, would be criminal in its nature, the court made the suggestions of Otis and Mahaney the turning point of the case, through the following charge:

> "I therefore charge you that if in this case it is established to your satisfaction, beyond a reasonable doubt, that this defendant, Miller, was a fugitive from justice, escaped from our State Prison at Trenton, where he was under conviction, serving a sentence for the crime of entering, larceny, and receiving stolen goods, and that the larceny of which this defendant was convicted was what is known in the law as grand larceny, then these officers, or such of them having reasonable cause to believe or suspect the truth of such facts, if they were facts, were justified in arresting this defendant without a warrant."
> (P. 343, LL. 10-25).

IV.

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE THE ENTIRE RECORD OF THE DEFENDANT'S CONVICTION IN PASSAIC COUNTY, INCLUDING A COPY OF THE INDICTMENT. (Assignments 12, 13, 26 and 27). Specification (4).

Exhibit S-24 was a collection of records batched together and offered as one exhibit. They con-

sisted of a copy of the defendant's sentence by the Quarter Sessions of Passaic County, November 18, 1921, certified by the Clerk as of the same date, also the bill of costs likewise certified as of the same date, which the court may recognize as constituting the commitment warrant in a criminal case. This certified minute together with the bill of costs, was delivered to the keeper of the State Prison at the time of the defendant's reception in the institution. (P. 169, LL. 1-20). The balance of the exhibit was composed of a certified copy of the indictment upon which the defendant was accused in the Passaic Sessions and copies of the entire minutes showing his original plea of not guilty, his retraction and plea of non vult and of the judgment of imprisonment. These latter documents were certified as true copies by the clerk of Passaic County on June 9th, 1923, two days before, and obviously for use at the trial.

Although the witness, Mahaney, and the witness, Clark, were called upon to identify only the two documents, i. e. the certified judgment and the bill of costs delivered to the prison keeper, the indictment and other records certified by the County Clerk June 9th, 1923, which were attached to the identified papers were received and marked in evidence along with the prison copies, notwithstanding the apt objection of the defendant that they were not the papers the State described them as being. (P. 127, L. 30-35). That such course was not fortuitous is manifest from the court's charge heretofore quoted directing the jury to inquire into the characteristics of the Passaic County crime. The language specially pertinent is:

"If in this case it is established****that the

> larceny of which this defendant was convicted was what is known to the law as grand larceny, then these officers,****were justified in arresting this defendant without a warrant."

The only evidence in the case that could enable the jury to learn the extent of the larceny with which the defendant was charged was the copy of the indictment certified by the Passaic County Clerk. The second count of the indictment charged the defendant with the larceny of money to the amount of $120.20. The third count charged him with receiving the same amount of money having been heretofore stolen from another.

Where a defendant is charged with an escape, accompanying a prison breach under Crimes Act, Par. 12, Com. Stat. Page 1746, amended by Chapter 272, P. L. 1920, 493, it is not necessary to allege in the indictment anything more than that the defendant was imprisoned for a crime and that he broke prison. The crime for which he was imprisoned would be immaterial, and proof of the actual escape, surplusage. Upon showing of actual imprisonment the court would intend and assume such imprisonment to be lawful.

An indictment for an escape need not set out the offence with which the defendant was charged at the time of his alleged escape, nor the jurisdiction in which such offence was committed, nor need it charge that he was in lawful custody.

> Commonwealth vs. Ramsey, Brewster, (Pa. 1867), 422.

Nor need such indictment aver that the court under whose commitment the defendant was confined had jurisdiction to commit, as courts will

take judicial notice of the extent of that jurisdiction. The State may, however, prove the nature of the *commitment and the process* under which it took place to show that the defendant was in lawful custody.

State vs. Whalen, 98 (Mo.) 222, 11 S. W. 576.

It may well be doubted whether under the terms of our statute, which refer merely to one imprisoned for crime, lawful custody need be shown until the legality of the confinement is brought into question by the defendant. Argument does not appear to be necessary that the statute recognizes no distinction in respect of offences for which prisoners are incarcerated so as to impose upon the State the duty of proving the charge contained in original indictment. In the present instance, the indictment was introduced, and referred to, not to establish the fact of lawful custody, but, according to the court's exposition, to regulate the right of peace officers to arrest without a warrant, ~~to observe~~ in which connection to it called on the jury to a distinction between imprisonment for a grave offence, and for one less grave.

The researches of counsel have failed to discover any authority in support of the legal principle thus laid down, which ignores the plain purport of the New Jersey statute, and resurrects the abrogated policy of Statute de frangentibus prisonem.

V.

THE COURT ERRED IN (A) ADMITTING IN EVIDENCE ARTICLES ALLEGED TO

HAVE BEEN FOUND ON THE PREMISES OF THE DEFENDANT AFTER HIS ARREST CONSISTING OF PERCUSSION CAPS, BLACKJACK, EXTENSION BIT AND BLACK BAG; (B) IN ADMITTING TESTIMONY AS TO DYNAMITE LIKEWISE FOUND AND PROOF OF ITS POTENCY; (C) IN ADMITTING TESTIMONY AS TO THE TESTING AND DESTRUCTION OF THE DYNAMITE BY EXPLOSION; AND (D) IN ADMITTING TESTIMONY AS TO ITS DEVASTATING POWER AS ILLUSTRATED TO THE JURY THROUGH THE EXHIBITION OF FRAGMENTS OF IRON RAILS. (Assignments 19, 20, 21, 23 and 30; specification 5).

There was no dispute as to the killing having been by shooting. After the arrest of the defendant the police in large numbers took charge of the house, and six or seven policemen accompanying the Deputy Chief went to the second floor (P. 143, LL. 15-20) where the articles in question were found. The testimony of Hogue, a police captain, that he saw the blackjack and extension bit taken from the defendant at the station house is obviously mistaken, and his answers clearly referred only to the defendant's papers, knife, and keys, (P. 136). The testimony is explicit that Kidney and Coyne, policemen, found dynamite, caps, bag and blackjack on the premises after defendant's arrest, (P. 140-160) and that the witness, Hogue, received them from the police officers at the Station House (P. 135 L. 1-5).

There was no proof that at the time of the search, the premises were in the same condition as at the time of the shooting, or when they were occupied by the defendant.

The circumstances under which articles subsequently found on the scene of the crime become relevant is not opened to debate. They are relevant when they can be traced to the prisoner, and when they have been in any wise connected with the murder, or may in any wise show his state of mind or intent; articles, such as letters, which may show a motive for the crime, or repel a presumption arising from other circumstances, are also admissible; when the previous possession of special means, tools, apparatus and the like shows the doing of an act requiring such means; when under the circumstances and according to experience, as naturally interpreted and applied, possession would indicate a probable design, either to use the instruments or commit the crime; when their subsequent presence on the person or premises of the defendant are resulting circumstances supporting an inference that the defendant did an act with which these circumcumstances are associated; when they are marks of identity or traces of the crime.

State vs. Hill, 65 N. J. L. 626.
State vs. MacFarland, 83 N. J. L. 474.
Wigmore, §§. 88, 149, 238.

By these principles the articles in question were irrelevant because wholly unconnected with the offense charged. They were all articles recognizable by the jury as utilities for the commission of other crimes and deeds of violence,—the blackjack as the usual weapon of the highwayman; the extension bit as an implement in house breaking; the dynamite as an agency commonly resorted to in safe cracking; and the black bag as a useful convenience in carrying about these contraband articles. While they pos-

sessed no relevancy to the defendant's guilt of homicide, they had an unquestionable effectiveness in revealing the defendant's character and in creating a passionate prejudice against him, culminating in a verdict of first degree murder in a case utterly barren of a circumstance, hinting at homicidal premeditation. They were not, and could not, have been offered on any point but that of character and the inference of criminal propensity.

Evidence of general bad reputation in rebuttal is receivable after the defendant has placed reputation in issue, but it is forbidden on the main case, cross-examination or rebuttal to show specific criminal acts or even criminal proclivity. In the present case the State did not proffer proof of criminal acts or of criminal proclivity, but introduced evidence far more vicious, i. e. circumstances from which criminal proclivity might be argued and inferred.

Viewed either as proof of the conduct of the defendant in acquiring such articles, or as indices to his character in keeping them at hand, the evidence was incompetent and prejudicial; viewed as part of the res gestae it was irrelevant; viewed as a practical admission binding the defendant, it was incompetent because of the absence of proof establishing his knowledge, ownership or possession of the articles, or his presence on the premises when they were found, or at any time while they were there deposited.

The defendant denied all knowledge of the property except the bag, the ownership of which he admitted. The dynamite was not produced in court because it had been destroyed 'for safety sake" (P. 157); the experiments by the witnesses Gerhart and Charlock to ascertain its strength and destructiveness, culminating in the wrecking of iron rails ex-

hibited to the jury, (P. 151-157), were conducted in the absence of the defendant, superadding incompetency to their plain irrelevancy.

State vs. Raymond, 53 N. J. L. 330.

VI.

THE COURT ERRED IN PERMITTING THE STATE TO "ABANDON" THE COUNT FOR MANSLAUGHTER, AND IN FAILING TO CHARGE THE JURY RESPECTING MANSLAUGHTER. (Assignments 33, 45. Specifications 1, 2).

A fair examination of the entire case disclosed that the defendant, if guilty of any offence, committed manslaughter and none other. The elements of provocation, sudden resentment and the absence of malice stand out in the proof adduced by the State, and the evidence offered by the defendant in its worst aspect confirmed the indications that the killing was unmalicious, sudden and provoked.

At the conclusion of all the evidence and in the face of testimony offered by the defendant, and serviceable for the purpose of reducing the offense to manslaughter, the prosecutor stated "I desire at this time to have it appear on the record that the State abandons the counts in the indictment for manslaughter and assault and battery respectively." The proceeding was objected to and the defendant's objection overruled. (P. 311).

The effect of this proceeding on the outcome was stated in the Court's charge as follows:

"By reference to the indictment you will

note that there are three counts in this indictment as originally presented to this Court by the grand jury. The State has abandoned two of these counts, that is to say the count of manslaughter and also the count in the indictment which charges the crime of assault and battery, therefore, gentlemen of the jury, I charge you that you are not to concern yourself with the last two counts in this indictment as the indictment will be taken by you from the court to the jury room for your consideration of the case, but you will concern yourself specifically with the first count in the indictment which charges the crime of murder, with respect to which I will charge more specifically." (P. 326, L. 30-40).

Throughout the charge the court omitted further reference to manslaughter and offered no definition of malice. At one point, however, in defining murder in the second degree, a reference was made to "extenuation" of the crime along with its justification and excuse. The portion in point reads as follows:

"I charge you now that the shooting of a revolver by these defendants, or either of them, at the body of the dead man, Black, was an unlawful act againt the peace of this State, likely to be attended by the conseqence of bloodshed, so that such killing is presumed to be malicious and is therefore murder unless and until defendants produced facts and circumstances from which justification, excuse or *extenuation* may arise, unless such facts or circumstances of excuse or *extenuation* appear from the evidence introduced against them."

(P. 337, L. 8-20).

With the terms justification and excuse, thoroughly understood as eliminating criminality from the homicidal act and entitling the defendant to an acquital, the employment of the word *extenuation,* in view of the exclusion of manslaughter from the jury's consideration, was either meaningless, or else was in effect an instruction that this defendant was under the duty to extenuate to the point of entitling himself to an acquittal. Extenate, (extenuo, I thin out), is not the synonym of either justify or excuse, and when employed in connection with the principles of homicide, it means the reduction of the offence to a less blame-worthy grade of crime, namely, manslaughter, or assault and battery. The jury's powers having been paralyzed by the previous direction of the charge to ignore manslaughter, the instruction to them to notice the defendant's facts of extenuation was mere rhetoric, and so far as the defendant's fate was concerned, the court seemingly empowered the jury to favor him by doing the impossible, or, at least leaving it to its own caprice.

In a homicide case a charge in respect to manslaughter is dispensed with only when there is nothing in the case to warrant a verdict of manslaughter;

Genz vs. State, 58 N. J. L. 82.

when there is no testimony from which the jury might find that the defendant's criminality was manslaughter;

State vs. Hermann, 77 N. J. L. 533.

when the case is barren of proof tending to support such a finding;

State vs. Pulley, 82 N. J. L. 579.

when manslaughter cannot be deduced from any theory of the case inferable from the evidence.

State vs. Moynihan, 93 N. J. L. 253
State vs. Fiore, 94 N. J. L. 474.

The testimony of the case showed that the deceased, a policeman, invaded the defendant's home without a warrant. There was not the faintest intimation of the entertainment by him or any of his companions, of any suspicion, reasonable or otherwise, that the defendant was guilty of a crime which justified arrest without a warrant. This posture of the case left in issue as a fact to be determined by the jury whether the attempted arrest was lawful.

An unlawful arrest, either made or attempted, constitutes such provocation which, if suddenly acted upon, without malice, reduced the killing of the officer to manslaughter.

State vs. Brown, 62 N. J. L. 695.

In the latter case this court approved the submission of the question of manslaughter to the jury notwithstanding a state of facts far less favorable to the defendant than those of the present case. Brown was a recognizable criminal, carrying a kit of burglar's tools and in view of the deceased policeman entered a house with most suspicious conduct; was arrested on the spot and on the way to prison struggled to escape and fired three shots into the body of his captor, admittedly conscious of each taking mortal effect.

The contrasting circumstances of the present case showed in the way of provocation that the deceased had no warrant and might or might not have had suspicions, reasonable or rash; that he appeared in the doorway of defendant's bedroom along with two other men, all armed and one of whom, according to the defendant, made a display of a pistol without any announcement of his official character or the purpose of the visit; that the door of his bedroom was forced open in a manner as to constitute an assault upon an inmate; that a shot was heard by the defendant simultaneously with the forcing of the door and the appearance of two forms; no word of testimony indicates that the defendant had knowledge of the official character of his visitors. The testimony is that he was asleep on their arrival; that Black's conversation was with the woman; that if he announced his character it was to her only, and there was no evidence from which it might be legitimately inferred either that the defendant was then awake and conscious, or that between Black's alleged announcement and the actual shooting, the woman made any communication to him. Upon a contention that the circumstances constituted provocation, the facts and their adequacy should have been submitted to the jury.

On the point of sudden passion, the State's witness was unable to describe the suddenness with which defendant acted otherwise than by employing the expression, "Bang", "Bang", and stating that the first two shots were fired within one second after the door was opened and the next one within two seconds. In the light of this testimony, completely harmonizing with that of the defendant and the woman, there was no issue at all as to sudden passion, and manslaughter could well have been submitted to the jury with the instruction that

this element of the crime, at least, was satisfactorily established.

On the point of Absence of Malice in the sense of consisting of the conscious or wilful infliction of serious bodily harm, the State's testimony and that of the defendant is likewise in harmony. The proof showed the firing of a shot at deceased, the effect of which the witness, Otis, could not tell until he later discovered deceased lying on the floor downstairs; after the sound of the shot the deceased turned and went downstairs and passed out of the presence of the defendant seemingly unhurt; defendant permitted deceased to depart unmolested after deceased evinced a compliance with the order to "get back"; from no circumstance could it be inferred that the defendant knew, any more than Otis knew, that his shot had been effective, and this together with proof of his conduct in allowing deceased to leave his presence and disappear from view seemingly unhurt, and with his physical vigor seemingly unimpaired, were circumstances creating a valid issue as to malice, if not wholly dispositive of the question in the defendant's favor.

Sudden passion, therefore, being unquestionable, and the elements of provocation and malice being open for determination, it was glaring error to take manslaughter from the jury's consideration.

VII.

THE COURT'S INSTRUCTIONS AS TO THE REQUIRED DURATION OF WILFULNESS, DELIBERATION AND PREMEDITATION WERE CONFLICTING AND ERRONEOUS. (Assignments 46 and 48, Specification 13).

The Court charged the defendant's 10th, 29th,

and 30th requests, all relating to the definition of murder in the first degree. These requests in substance were (a) that not only was intent to kill required but also wilfulness, premeditation and deliberation; (b) that three mental states are essential to murder in the first degree, which normally succeed each other in the inverse order and that premeditation and deliberation must precede the adoption of the intent to kill; (c) that wilful intent to kill does not necessarily include premeditation and deliberation. (P. 329, LL. 32 to 40; 333, LL. 2-23).

After disposing of the defendant's requests on this topic the court proceeded to explain "just what the law means when it speaks of murder being wilful, deliberate and premeditated." (P. 336, L. 6-10).

Quoting the language of Justice Garrison in State vs. Clayton, 83 N. J. L. 665, the trial judge stated that an unlawful killing does not amount to murder in the first degree until it should be found that the accused contemplated, determined on, and intended the killing. His next statement was that the terms, wilful, deliberate and premeditated, signified three separate and distinct functions or operations of the human mind engaged in the *premeditation* of the killing and the sentence concluded "I do also charge you that the taking place of these functions of the human mind does not require necessarily any prescribed period of time, but that the mental acts to which I have referred, are capable of being performed with that degree of speed with which the human mind is proverbially capable of acting."

Thecharge thus far instructed the jury that when the human mind was engaged in the *premeditation* of the killing, it was simultaneously engaged in de-

liberation and wilfulness respecting the same, and that premeditation alone was comprehensive of the whole three mental operations which had just been described as separate and distinct. The instruction also suggested that all three mental acts were capable of performance with the speed with which the human mind can act in respect of any mental process, be it single, double or triple.

The latter part of the instruction was couched in phraseology somewhat similar to that employed in State vs. Clayton, but vastly different in sense and substance. The language of Justice Garrison will be found to refer to the import of the words wilful, deliberate and premeditated and not to engagement those mental functions; while saying that the words do not import any prescribable period of time and commenting that each mental act "to which they severally refer" may be performed with proverbial celerity, he refrains from any statement that would justify the theory of the charge in question that no prescribed period of time, appreciable or otherwise, was necessarily required for the performance of all three mental acts to which the words relate. All the cases referred to herein are emphatically contradictive of such theory, and it derives no encouragement from the Clayton case which discloses only an observation upon the impracticability of the legislature prescribing, in chronological or psychological terms, any time for the duration of the mental functions which the statute demanded.

All rulings on this branch commencing with State vs. Zdanowicz, lay down the rule that not only all, but each, of these mental processes requires some appreciable time. The other instructions on this phase being silent as to the duration of wilfulness, deliberation and premeditation, this erroneous

direction was the only guide that was furnished to the jury.

Their misdirection was confirmed by the sentence of the charge immediately following:

> "In other words, premeditation and intent need not be for a day, or an hour or even a minute, for if you, gentlemen of the jury, believe there was a design and determination to kill distinctly formed in the minds of these defendants or either of them at any moment before *or at* the time the shots were fired, which design was deliberately and with premeditation carried out, it was a wilful, deliberate and premeditated killing and therefore murder in the first degree." (P. 336, L. 30-40.)

This passage was a repetition of the charge of Chief Justice Hornblower in State vs. Spencer which was quoted by the Supreme Court in State vs. Donnelly, 26 N. J. L. 463, and by this Court in the same case, 26 N. J. L. 601. Both courts noted the charge without expression of approval, but with that practical repudiation discovered in the adoption of the widely variant principle—that "to constitute murder in the first degree under the statute in this state there must be an intention to take life; no particular time need intervene between the formation of the purpose to kill and its execution. It is enough if the design to kill be fully conceived and purposely executed."

The complaint against the charge in the Donnelly case was that the trial court had held that a design to kill formed at any moment before *and* at the time of the fatal act, constituted a wilful, deliberate and premeditated killing. This instruction, although incalculably more liberal to the de-

fendant than the holding of Chief Justice Hornblower, or the instruction in the present instance, was not regarded with approval by either the Supreme or this Court. It was dismissed with the observation that in view of the barbarity of the crime the defendant could not be prejudiced by any ruling as to the construction of the statute. (P. 617).

In State vs. Mangano, 77 N. J. L. 544, the doctrine of Chief Justice Hornblower was again considered and specifically disapproved. In the opinion by Justice Parker it was discerned as the equivalent of that portion of the opinion of Chief Justice Green in the Donnelly case from which the Court of Errors and Appeals, as was pointed out in State vs. Bonofiglio, 67 N. J. L. 239, withheld its approval.

State vs. Zdanowicz, 69 N. J. L. 619.
State vs. Deliso, 75 N. J. L. 808.
State vs. Clayton, 83 N. J. L. 673.

VIII.

THE COURT ERRED IN REFUSING THE DEFENDANT'S REQUEST TO CHARGE THE TRUE RULE AS TO THE DURATION OF WILFULNESS, DELIBERATION AND PREMEDITATION. (Assignments 35, 37, 38, 39 and 40).

4 ~~Five~~ requests offered by the defendant were refused,—13th, (P. 317), 24th, 25th, and 26th, (P. 320).

The 13th placed on the State the burden of showing not only intention to kill but wilfulness, deliberation and premeditation, and required that all three elements should exist in defendant's mind and have entered into the act of killing. The 24th

sought an instruction that specific intention to take life without premeditation or deliberation was second degree murder. The 25th requested an instruction (a) that the design to kill must be deliberately formed; (b) the conception of such design and its deliberate execution necessarily takes some appreciable time; (c) an intent to kill carried out does not constitute murder unless coupled with deliberation and premeditation requiring an appreciable time, and that not until after such premeditation and deliberation does the act become "wilful". The 26th was a request that the execution of a preconceived design to kill, following that design so instantly as to preclude deliberation, was second degree murder.

The 13th and 24th requests if charged, would have forefended the error discussed in the point immediately preceeding, because the necessity of all three mental elements existing in the mind and entering into the killing, are plainly provided by the statute.

The first sentence of the 25th request rested on the authority of the Donnelly case viz: that the design to kill be fully and clearly conceived in the mind. In State vs. Mangano, (P. 547), it was considered that deliberation as a statutory requirement, related to the homicidal design and not to its execution, and such was the notion of this request, as contra-distinguished from the court's actual charge that deliberation related to the carrying out of the design. (P. 336, LL. 35-40).

The second sentence of the request—both the conception of the design and its deliberate execution, necessarily takes some appreciable time—is a verbatim reproduction of the language of Chancellor Magie in State vs. Zdanowicz. The remainder of the request, concluding with the principle—that a

killing does not become "wilful" until after due premeditation and deliberation—is a verbatim excerpt from the opinion of Justice Parker in State vs. Mangano, Page 547.

The 26th request declaring that the instantaneous execution of a design to kill, precludes the idea of deliberation was appropriated from the syllabus in the case last cited.

The refusal of these requests carrying a true and accurate statement of the law, and the substitution of the portion of the charge heretofore criticised, constituted error.

IX.

THE COURT ERRED IN CHARGING THE JURY THAT IT WAS INCUMBENT UPON THE DEFENDANT TO ADDUCE EVIDENCE OF JUSTIFICATION, EXCUSE OR EXTENUATION, IN ORDER TO AVERT A FINDING OF FIRST DEGREE MURDER. (Assignment 48; Specification, 13).

As heretofore indicated, the court in defining murder generally charged that a killing resulting from an unlawful act against the peace of the State likely to be attended by the consequence of bloodshed, is presumed to be malicious and is murder until the defendant produces facts and circumstances from which justification, excuse or extenuation may arise, unless such facts or circumstances of excuse or extenuation apear from the evidence against him. (P. 337, LL. 10-20).

The court then proceeded to discuss the burden that rested upon the State to raise the degree from second to first, the presumption of innocence arising from the plea of not guilty, the burden of prov-

ing guilt beyond a reasonable doubt and the legal defination and application of the latter to the several degrees of murder and the general guilt of the defendant. (PP. 339-341).

Recurring to the facts of the case the court instructed the jury that proof of the unlawful firing of a bullet causing death, was presumptively malicious and murder in the second degree, omitting in this connection his former reference to circumstances of justification, excuse or extenuation. He then reiterated the obligation of the State to raise the offense to first degree murder by establishing wilfulness, deliberation and premeditation and concluded his instruction on this particular phase of the case as follows:

> "Provided, however, that you will bear in mind what I have already charged you, that it is incumbent upon the defendant to adduce evidence of facts and circumstances from which justification, excuse or extenuation may arise, unless such facts or circumstances appear from the evidence introduced against him." (P. 341, LL. 29-35).

The question of the propriety or error of this provision depends upon its relativity to the preceeding instructions. If, by fair import, it was repetitious of what had been charged in respect of second degree murder (P. 339) it would be negligible, but if its reasonable effect was to qualify the reference to first degree murder immediately preceeding, it was flagrantly erroneous.

In determining whether a provision is a proviso or an exception, the mere location of the clause and its proximity to, or remoteness from, the subject matter is not, of course controlling. The import-

ant element is the nature of the clause itself and its obvious sense as gleaned from the entire discourse.

> Western Assurance Co. vs. Mohlman Co., 83 Fed. 811, 40 L. R. A. 561.

Nothing could be more serious than the consideration of whether this instruction had the effect on the jury's verdict that is apprehended by this assignment. If it founded in the jury's mind an understanding that the defendant should have introduced evidence to justify, extenuate or excuse proof of premeditation, etc., the cognate instruction that the State should prove those elements beyond a reasonable doubt, was nullified by the contradiction that accompanied the declaration that the obligation was so placed.

While misguidance in a judicial charge may not be readily credited, a particular survey of the present instructions renders it not at all unreasonable that it had a confusing effect upon the jury. The latter might well have understood from the charge shown on page 337, that when the State proves an unlawful killing and rests, the defendant is obliged to efface the presumption of malice by excusing or extenuating facts; and from the charge shown on page 341, that when the State goes beyond proof of mere killing and proceeds to show in addition the elements of first degree murder, it is then required that the defendant address his proof of excuse or extenuation to the whole case as it then stands, and that such proof is then necessary to overcome first, the evidence of premeditation, etc., and next, the presumption of malice.

It is here repeated that the direction that the defendant might extenuate his offense was inane, in view of the court's instruction that manslaughter

and assault and battery was taken from their consideration. The extenuation in that case must either be by proof of absolute innocence, or the defendant's guilt of some extraneous offense, not constituting an ingredient of homicide.

As hereafter argued, there was not even color of proof of premeditation, deliberation or wilfulness.

X.

THE COURT ERRED IN REFUSING TO CHARGE THAT THE MERE FACT THAT A PERSON KILLED WAS AN OFFICER OF THE LAW ENGAGED IN THE ACTUAL AND LEGAL PERFORMANCE OF HIS DUTY DID NOT RAISE THE HOMICIDE TO MURDER IN THE FIRST DEGREE. (Assignment 37.)

The request refused reads as follows:

"23. The mere fact that the person killed in the present case was an officer of the law, and even though you find as an additional fact that as such officer he was, at the time he sustained the wound from which he died, arresting or about to arrest the defendant Sage in the actual and legal performance of his duty, those facts alone are not sufficient to raise the killing to murder in the first degree."

The court read to the jury the statutory definition of murder contained in Par. 106, Crimes Act, P. 1779, including the instances of a killing through the commission of an act against the peace of the State and the killing of an officer in the execution of his duty. (P. 334, L. 20-40). The court without immediate comment on this paragraph read the one next succeeding relating to murder in the first degree and undertook the explanation of what con-

stituted wilfulness, deliberation and premeditation. (P. 335 and 336.) Returning to the consideration of paragraph 106 the court instructed the jury that if the killing was through the commission of an unlawful act against the peace of the State it was but murder in the second degree. (P. 337). Nowhere did the court indicate that bare proof of the killing of a policeman in the performance of his duty also amounted to but murder in the second degree, in the absence of the necessary mental elements. This request was competent to elucidate that point to the jury, and was particularly vital to the defendant's interest in view of the court having stressed the fact that the killing by the commission of an unlawful act against the peace of the State, with nothing more shown, would have entitled the defendant to a second degree verdict.

XI.

THE COURT ERRED IN REFUSING TO CHARGE THAT DEFENDANT HAD THE RIGHT TO RESIST HIS OWN DESTRUCTION OR SERIOUS BODILY HARM EVEN THOUGH HE KNEW THE DECEASED WAS AN OFFICER, IF THE LATTER HAD NO RIGHT TO ARREST AND CREATED A REASONABLE APPREHENSION OF MORTAL OR SERIOUS INJURY TO THE DEFENDANT. (Assignment 44).

The request refused reads as follows:

"38. If you find from the evidence, considered in connection with the instructions I have given you relative to the law of arrest, that under the circumstances in this case the officers had no right

to arrest Sage at the time of their visit to his home, then I charge you that if when they appeared at the doorway to Sage's room they displayed a deadly weapon, or weapons, in such a way as to give Sage a reasonable apprehension of the destruction of his own life, or serious bodily injury to himself, then Sage had the right to resist the officers, even to the extent of killing, and even though he knew they were officers, if he had reasonable grounds at the time of believing such resistance to be necessary to save his own life or to prevent serious bodily injury to himself."

The principal of this request was one which the court countenanced in Brown vs. State, Page 703, in approving the charge of the trial judge touching the right of self defense in cases of arrest—

"His (the prisoner's) duty, the arrest being lawful, was to submit to arrest if made with the use of no unnecessary force and if his resistance caused force to be applied, he cannot complain that sufficient force was used to render the arrest effective." The court charged the defendant's second request, respecting the defendant's right of self defense, "he not knowing or having means of knowing who they were and whether they were policemen." (P. 327, LL. 11-35); the third request that defendant was not bound to retreat if he "did not know the men at the door were police officers" (P 328, LL. 10-20); his seventh request that defendant would be guilty of second degree murder only "if he knew or had reason to know that the men were police officers and that no menacing display was made but defendant acted without wilfulness, etc.". (P. 329, LL. 18-25). The charge elsewhere is silent on the point of the right to resist destruction or serious bodily harm, after acquiring knowledge of the official character of the assailant. The elaborate

quotation from State vs. Brown, respecting the right of self defense (P. 345, LL. 30-40, 346 & 347) is also silent on the point of whether that right is affected by the knowledge that the arresting afficer is engaged in the performance of a legal duty.

The refusal of this request deprived the jury of the guidance with which the defendant was entitled to have them furnished and warned.

XII.

THE COURT'S INSTRUCTION TO THE JURY THAT IT MIGHT FIND THAT THE DECEASED WAS ENGAGED IN MAKING A LAWFUL ARREST WAS ERRONEOUS, BECAUSE OF THE TOTAL ABSENCE OF EVIDENCE TO JUSTIFY SUCH A FINDING.

The instructions given to the jury on the right to arrest are found in the record on pages 341, 342, 343 and 344 and may be epitomized as follows:

That there was evidence that the police officers were engaged in the performance of duties as such; that some or either of them had information leading them or some of them to believe that the defendant was an escaped convict, having on the 2nd day of July, 1922, escaped from the State Prison at Trenton where he was serving a sentence for entering, larceny and receiving; and that in addition the officers or some of them had information that he was charged with robbery and that a warrant was in existence; that the officers had a legal right to arrest if they or any of them had reasonable cause to suspect him of being guilty of a felony; that Black was justified in arresting without warrant if he had reasonable cause to suspect that defendant had committed robbery and might call for neces-

sary assistance; that if Miller was a fugitive from Justice, escaped from State Prison where he was serving a sentence for entering, larceny and receiving, and the larceny was grand larceny, then the officers or such of them having cause to believe or suspect the truth of such facts, were justified in arresting without a warrant. That evidence had been admitted concerning the defendant's previous conviction and his escape from a penal institution. That the evidence of what was called a "fugitive's card" and of the warrant for the defendant's arrest in West New York was admitted to establish that at the time of the arrest the police officers were possessed of knowledge or had reasonable information to believe that the defendant had committed, was charged with committing, or by them suspected to have committed a crime, which justified them in making or attempting to make the arrest with a warrant (P. 343, LL. 30-40: 344, LL. 1-22).

It is contended that the faults of this charge are:

1. There was *no evidence* introduced that the officers were engaged in the performance of *any duty;*

2. There was *no evidence* that they or any of them had any information whatever that defendant *had escaped from State Prison;*

3. Such escape even if proved, *did not constitute a crime* justifying arrest with or without a warrant;

4. There was *no evidence* that they or any of them had information that defendant was *charged*

with the crime of robbery. The evidence being that Otis alone had *seen a warrant* requiring the defendant's arrest on a robbery charge, but that he knew nothing of the fact of the accusation. And that it would be irrelevant if he did unless his information came from sources that shown to the jury to be creditable;

5. There was *no evidence* justifying an inference that he *had communicated the fact* of having seen the warrant *to the deceased,* or that he, Otis, was engaged in attempting an arrest on account of having seen the warrant, or that he had called Black to his assistance, or that Black was engaged in attempting an arrest on the strength of the warrant's existence;

6. The fact that *one officer has reasonable suspicion* does not *justify another* in attempting an arrest on those suspicions;

7. The right to make an arrest without a warrant rests upon reasonable suspicion *entertained by the captor* and caused by facts and *circumstances created by the defendant* himself;

8. There was *no evidence* at all that the deceased, *Black,* was arresting or attempting to arrest the defendant *on any reasonable suspicion of his own* that defendant had committed the crime of robbery or any crime; and there was no evidence that he called for assistance to accomplish that purpose;

9. There was *no evidence* from which the jury could find as a *fact* that the defendant *had escaped from State Prison.* The proof in the case on that

point was hearsay and was incompetent.

10. There was *no evidence* that the *officers* or any of them might have had reasonable cause to believe or suspect the *truth* that the *former conviction involved the crime of grand larceny.*

11. The magnitude of the offense involved in the former conviction did not sanction an arrest without a warrant.

12. The evidence of defendant's previous conviction, the fugitive's card and the existence of the West New York warrant could not *be efficient to establish* that the police *officers were possessed of knowledge or had* reasonable *information to believe* or that they *suspected* that the *defendant had committed a felony,* and if it resulted in knowledge or belief, or suspicion that he was charged by another merely it would not have vested them with the right to make the arrest without warrant.

A charge is vitiated when it contains the statement that a fact of the utmost importance, clearly connected with the merits, is in evidence, when such fact has neither testimony nor the color or testimony to support it.

Smith vs. State, 41 N. J. L. 370
State vs. Diamond, 84 N. J. L. 17
State vs. Lovell, 88 N. J. L. 353

It is also error to permit the jury to regard hearsay evidence (such as the testimony of Otis and Mahaney, that defendant had escaped from State Prison) as proof of a controlling fact.

Kohl vs. State, 59 N. J. L. 445.

Departing from State Prison without jail breaking is not a crime. Crimes Act, Par. 12, Com. St. P. 1746, amended by P. L. 1920, Chap. 272, P. 493, Criminal Procedure Act Par. 156, Com. St. P. 1871.

The act formerly relative to escapes, unaccompanied by prison breach, and which provided for additional confinement on conviction, Gen. St. P. 1084, was expressly repealed by Chap. 236, P. L. 1898, P. 856.

An actual, as distinguished from a constructive, breaking, is necessary and there must be some violation of proper material safeguards interposed against escape.

Randell vs. State, 53 N. J. L. 488.

The latter was the controlling authority in the determination of an Iowa case in which the circumstances were in exact similitude to the present instance:—A prisoner working two miles from the institution concealed himself in a crevice in a stone quarry and eluded the guards who returned with out him. Held that no offense was committed.

State vs. King, 54 L. R. A. 853.

The right to arrest without a warrant depends upon suspicion that (a) is entertained by the person making the arrest; (2) engenders an honest belief that the prisoner is guilty; (3) arises from facts and circumstances created by the prisoner, and (4) is reasonable in view of those facts and circumstances.

Brown vs. State, supra.

The full force of the testimony in the present case respecting the right of Otis or Black to make an arrest was (a) Otis had seen an unauthenticated warrant requiring the defendant's apprehension; (b) Otis had in his possession the card stating that the defendant escaped from "Perrine Avenue Warehouse."

If a view of a warrant was sufficient to base a reasonable suspicion on the part of Otis, irrespective of whether there was an underlying sworn complaint, there was no ground for inference that Black was acting upon information as to the warrant received from Otis. The proof is to the contrary—Black summoned Otis by telephone to come to Jersey City to participate in an enterprise that Black himself was promoting, and Otis came bringing the so-called, "fugitive's card," that was used for identification purposes; the nature or purpose of Black's enterprise was not disclosed to the jury, and the charge permitting it (the jury) to find that Black was attempting to arrest for escape or robbery or felony, or had a suspicion of the defendant's guilt, was a clear license to it to indulge in surmise and speculation.

The burden of the State was to submit competent evidence from which the jury might legitimately infer, (1) that the deceased was making or attempting an arrest; (2) that such arrest was in the execution of his office or duty through being legally attempted and (3) that the defendant in resisting resorted to malicious, wanton or unreasonable violence.

State vs. Bullock, 65 N. J. L. 557.

(See dissenting opinion by Dixon, J. Brown vs. State supra).

There was *no evidence* as to either the fact of arrest attempted, or of its legality; neither was there evidence that deceased was the assistant of any other officer engaged in making a legal arrest; or if such were the secret fact, that the defendant knew of the deceased's authority.

XIII.

THE COURT'S INSTRUCTIONS THAT ARREST FOR FELONY MIGHT BE MADE ON REASONABLE SUSPICION WERE INSUFFICIENT AND CONTRADICTORY. (Assignment 49. Specification 17).

The language of the charge is as follows:

> "I charge you that these officers were within their legal right in arresting the defendant or attempting to arrest the defendant, Miller, if such officers or any of them who were attempting to arrest Miller had reasonable cause to suspect him of being guilty of a felony although it afterwards appear that no felony was committed, provided such officer or officers had reasonable cause to suspect that the person arrested or attempted to be arrested committed a felony. The distinction between felonies and misdemeanors is not observed in our criminal code."
>
> (P. 342, LL. 20-32).

If the only ground for arrest urged in the case was a suspicion that the defendant was guilty of robbery for which a warrant had been issued, the failure of the court to differentiate between a *felony* and a *misdemeanor* and the apparent coales-

escence of both in the statement that the distinction was abolished in our criminal code, would have been uncomplainable; because the charge proceeded to state that if Black had reasonable suspicion that defendant committed robbery, he might arrest without warrant. (P. 342, L. 40). The damage, however, was wrought through the fact that in other parts of the charge, the court referred to the escape from State Prison as constituting an offense for which arrest might be made, and had invited the attention of the jury to the consideration of this matter as well as the alleged robbery. Disregarding the distinction between an innocent escape and a criminal jail breaking it is notable that the statute declares the latter a misdemeanor only.

Therefore, when the court failed to point out the common law distinction between *felony* and *misdemeanor,* but told the jury on the other hand that the distinction was not observed in our criminal code and required the jury to consider the two offenses, one of which was felonious and the other not, it erred when it left the jury to understand, as it must have from the tenor of these instructions, that the right to arrest for jail breaking was in the same sort as that to arrest for robbery.

For the purpose of regulating the law of arrest the common law distinction between *felony* and *misdemeanor* still obtains in New Jersey and should have been pointed out.

McMichael vs. Culliton, 104 Atl. 433.

In the latter case Justice Kalisch declared "reported cases on the civil and criminal sides expository of this view are numerous in this State and must be familiar to the general practitioner." This sentiment would seem to negative an anticipation

THE COURT REFUSED DEFENDANT'S REQUEST DEFINING ESCAPE AS A MISDEMEANOR, REQUIRING THE POSSESSION OF A WARRANT, (Assignment 42), AND

that a lay jury should be able to discern and apply the distinction without technical instruction, and it was error to fail to point out the legal distinctions relating to arrest for such an offense as robbery and arrest for a misdemeanor such as jail breaking.

XIV

THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE. (Specifications, 18, 19, 20 and 21).

By the verdict, the jury registered its finding that the killing was wilful, deliberate and premeditated; the only evidence submitted to it was that upon the appearance of the deceased when the defendant's bedroom door was opened, the latter, while exclaiming "get back there," fired a shot that struck deceased who turned, went downstairs and out of the sight of the defendant, who could not have known that the shot was mortal, and who evinced no purpose to disable the deceased physically, so long as he complied with the command to "get back." The same self-restraint and non-homicidal purpose characterized the conducet of the defendant in respect of Weir, Otis and Walton, who were also injured by him—he drove them from his sight and did no more.

To determine that he premeditated, deliberated and willed the death of Black was to accredit him with such anatomical, surgical and ballistic proficiency as to know the spot where the bullet struck, the course of its progress and its surgical consequences so completely as to understand that as Black walked away out of his sight, the bullet had struck its vital mark, that his earthly doom was sealed and that further attack to accomplish his destruction was unnecessary.

The evidence showed that the shot was fired in-

stantly upon the opening of the door. The premeditation, deliberation and design, if they existed, must have been formed before the door was opened. As to the defendant's conduct before the opening of the door, there was no proof except the testimony of himself and the woman that he was asleep when the knock came; that he did not hear the conversation between the deceased and the woman through the door; did not know of the presence of the deceased; that no communication concerning it had been made to him by the woman; that he was unarmed when the door was opened, and was alarmed by the appearance of the deceased.

This evidence, constituting the only proof of the circumstances involved, was discarded by the jury, and out of the air they drew inferences that the defendant was aware of the presence and character of the deceased, either through having been awake at the time of the knock, or having received some communication from the woman; that before the opening of the door he formed a design to kill and armed himself for that purpose, and that the firing of a single shot, and refraining from firing another, was his method of carrying out a preconveived homicidal design.

It is insisted that these inferences were wholly baseless and that, after disregarding the testimony of the defendant, and having recourse to the evidence adduced by the State, the proof was entirely contrary to such a finding. The evidence was that Black spoke to the woman and not to the defendant; that nothing indicated that the defendant was conscious at the time and heard Black's announcement; that there was no evidence from which it could be inferred that the woman conversed with him previous to the opening of the door, or that he was armed before the door was opened.

There was no proof of preparation, threat, ill-will, fierceness of attack or intent to do mortal harm.

The necessity and nature of evidence of premeditation is thus laid down in 21 cyc. page 1103, with citations of authorities.

> "Deliberation and premeditation when essential elements of murder in the first degree must be established beyond a reasonable doubt, but direct evidence is not esential for such purpose. The character of the weapon employed, the force and numbers of blows inflicted, the location and severity of the wounds, the place of the crime, previous remarks and conduct indicating preparation, subsequent acts and statements, together with every other circumstance having a legitimate bearing upon the subject, may be considered by the jury. Deliberation and premeditation cannot be inferred from the mere fact of killing, or the use of a deadly weapon, in the absence of a showing of other facts. Premeditation may be inferred from express malice, in case the other ingredients of the crime are established. In determining the weight to be given threats, as establishing a predetermined intention to kill, all the circumstances under which they were made are to be considered. Where provocation intervenes between the threat and the killing, the threat is not conclusive of the fact that killing was done in pursuance thereof, and not upon the passion produced by the provocation."

The processes by which passion, partiality, prejudice and mistake of the jury were engendered, can be easily perceived in the record and categori-

cally are as follows:

1. Otis and Mahaney were permitted to picture the defendant as a desperado who had broken jail and escaped from State Prison.

2. Otis and Capt. Kaerth were allowed to identify him as the defendant named in the warrant for robbery.

3. The indictment in Passaic County advertised him as a burglar, thief and receiver of stolen goods.

4. The production of four guns and the blackjack alleged to have been in his possession painted him as an assassin.

5. The extension bit and black bag held him up as the transporter of burglar's tools.

6. The high powered dynamite and highly explosive percussion caps and the twisted iron rails showed him to be a criminal of extreme and violent methods.

7. The intimitation that the deceased was shown by the evidence to be a policeman engaged in the performance of his duty, roused a resentment against the taking off of a valiant public servant.

8. The withdrawal of the consideration of manslaughter conveyed to the juror's minds that the act of the defendant was specially nefarious.

Upon review under chap. 349 P. L. 1921, verdict must be set aside when so clearly unsupported by evidence as to the plainly result of mistake, pre-

judice, passion or partiality.

State vs. Karpowitz, 120 At. 40,

Or, when the controlling facts upon which said verdict rests are introduced through incompetent proof.

State vs. Kohl, supra.

Or, when the evidence does not satisfy a considerate mind beyond a reasonable doubt that the accused is guilty.

Or, when the evidence is contradictory and improbable.

State vs. Lanto, 121 Atl. 139.

It is submitted that the principle of the case last cited should have determining weight in the present instance, when it is considered that the circumstances of the shooting upon which the jury must, of necessity relied, was furnished by the witness, Otis. His account in respect of such crucial circumstances as the number of the shots fired, the defendant who fired them, and the object they struck, was so unbelievable that the State in a formal admission declared his unreliability and its discredence.

RICHARD DOHERTY,

Attorney of and Counsel
with the defendant.